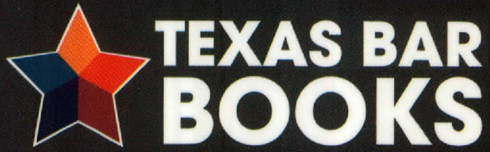

TEXAS COLLECTIONS MANUAL

volume one

2020

Texas Collections Manual
2020 Edition

Volume 1

TEXAS COLLECTIONS MANUAL

2020 Edition

Volume 1

Austin 2020

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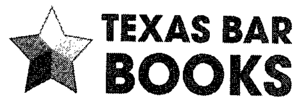

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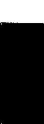

Preface

Throughout the years, the *Texas Collections Manual* has been the product of selfless volunteers—highly experienced attorneys with busy practices who have given much of their time, talent, thought, and energy to improving the quality and practice of law in Texas. The 2020 edition is no exception.

Attorneys will find the extensive revisions and new material in this new edition of great help in many different areas of Texas law practice. The value of this manual goes far beyond a collections practice. It is just as importantly an invaluable primer on Texas litigation and rules of procedure, in particular, the chapters on Causes of Action, Jurisdiction and Venue, Service of Process, Discovery, and Trial Procedure.

We are also excited to announce that *The Texas Collections Manual* now resides online as well as in print and downloadable form. The many advantages of an online subscription include search functions, hyperlinks to statutes, cases, and other online resources, and downloadable forms. Importantly, practitioners wishing to propose changes or edits to the manual will be able to contact the editorial committee at **books@texasbar.com** for quick review and ongoing edits.

As before, this edition of the manual would not have been possible without the deeply appreciated work of its contributing authors. Michael Bernstein, Mark Blenden, M. H. "Butch" Cersonsky, David Fritsche, Matthew Fronda, Stephanie Kaiser, John Mayer, Jacquelyn McAnelly, Ian McCarthy, Stephen Meador, Hon. David Patronella, Peter Ruggero, Michael Scott, Richard Simmons, Allison Snyder, and Mark Stout each enhanced the manual in ways that will be highly useful to any collections practice. And we are always grateful to Judge Bill Parker for allowing us to include the invaluable and updated practice guide used in the U.S. Bankruptcy Court for the Eastern District of Texas.

Finally, the Committee would like to express its gratitude to Sharon Sandle, Jim Norman, and the Texas Bar Books Department of the State Bar of Texas for their support and dedication in producing this publication.

—Stuart R. Schwartz, *Chair*

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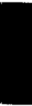

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A detailed chapter table of contents immediately precedes each chapter.

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Overview of how to use the manual and features available in the online and downloadable digital versions of the manual

1 Debt Collection Law Practice

Discussion of law office management and client relations for debt collection practice

2 Laws Affecting Debt Collection

Comprehensive treatment of state and federal debt collection laws with practice notes concerning interest, time-price differential, usury, acceleration, and holder in due course

3 Finding Debtor and Debtor's Assets

Practice notes and forms for use in locating the debtor and the debtor's assets

4 Communicating with Debtor

Practice notes and forms relating to demand and negotiation and payment agreements with the debtor

5 Repossession

Practice notes and forms detailing the mechanics of self-help repossession, including discussions of security interests, breach of peace, notice, and sale

6 Presuit Considerations

Practice notes concerning civil and criminal remedies and discussing an individual's liability for the debts of a business entity

7 Creation and Enforcement of Liens

Practice notes and forms concerning mechanic's and other liens

8 Prejudgment Remedies

Practice notes and forms concerning the prejudgment remedies of garnishment, sequestration, attachment, and injunction

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[chapters 9–13 reserved]

14 Petitions and Causes of Action

Practice notes and forms concerning basic requirements for petitions and a variety of causes of action on different types of obligations, with sample party designations

15 Jurisdiction and Venue

Discussion of jurisdictional and venue issues, including jurisdictional limits, amounts in controversy, mandatory and permissive venue, and transfer of venue

16 Service of Process

Practice notes and forms concerning service of process on both individuals and business entities

17 Defenses and Counterclaims

Practice notes concerning various defenses and counterclaims, with a discussion of statutes of limitations

18 Discovery

Practice notes and forms concerning pretrial discovery tools, including depositions, requests for admissions, interrogatories, requests for disclosure, and requests for production, with a discussion of sanctions for discovery abuses

19 Trial Procedure

Overview of trial matters with emphasis on pretrial procedure, law of other jurisdictions, and motions for summary judgment

20 Judgment

Practice notes and forms concerning the essential elements and procedural steps for obtaining judgment and keeping the judgment alive

[chapters 21–25 reserved]

26 Postjudgment Discovery

Practice notes and forms concerning postjudgment discovery, including interrogatories in aid of judgment and enforcement by contempt

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27 Postjudgment Remedies

Practice notes and forms concerning judgment liens and abstracts of judgment, execution, garnishment, and turnover

28 Landlord-Tenant Law

Practice notes and forms concerning commercial and residential property leases, with discussion of tenants' defenses and landlords' remedies

29 Probate and Guardianship

Practice notes and forms concerning claims procedure in probate in both dependent and independent administrations, as well as claims in guardianship

30 Justice Courts

Practice notes concerning debt collection practice in justice courts

31 Attorney's Fees

Practice notes concerning steps necessary to prove attorney's fees in fee-shifting situations and other contexts

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35 Bankruptcy

Overview of bankruptcy issues, including Chapter 7 and Chapter 13 bankruptcies, automatic stay, claims, avoidance actions, executory contracts, and unexpired leases

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Introduction

The *Texas Collections Manual* is more than a form book. It is a practice guide for attorneys in Texas who handle collections matters. This 2020 edition of the manual reflects major changes in organization from the previous editions, with significant improvements for the user. The manual is organized by the logical sequence of events that would occur while following a collections matter from beginning to end. Each chapter contains a detailed table of contents; each contains practice notes concerning the topic of the chapter. The forms take up the greater part of most chapters. The uniform format of practice notes and forms, organized according to a simpler, more logical numbering scheme, is designed to enhance readability and ready reference and to accommodate easier word-processing use of the forms. The digital versions of the *Texas Collections Manual* are internally hyperlinked and fully searchable, allowing quick and easy launching of a desired form into word-processing software. See section 2.8 of this introduction for further information.

§ 1 Practice Notes

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

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

§ 2 Forms

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

1. Optional content

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

2. Typeface conventions

Two typefaces are used in the forms. Material in Times Roman (like most of this page) is appropriate for inclusion in a finished form. In

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

3. Bracketed material

Several types of bracketed material appear in the forms.

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

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

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

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

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

4. Blank lines

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

5. Language in boxes

Language in boxes is not to be typed in the finished document but constitutes instructions, usually either telling the user whether to use the form language following the box, describing what information should be included at that point in the finished document or attached to it, or providing cautionary reminders about use of the form language. *Caveat:* Instructional language is presented as hidden text and will be included in the finished form unless specifically deleted.

6. Form numbers

Forms are numbered in sequence within each chapter. All forms begin with the number of the chapter, which is followed by a hyphen and the number of the form within the chapter. Some forms consist only of clauses to be inserted in other forms. In these instances the clauses are numbered in sequence using the form number, followed by the number of the clause—for example, clause 14-15-1 in form 14-15. This system is used to permit future expansion of any chapter without requiring the rearrangement of the entire book.

7. Captions

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

8. Digital versions

The *Texas Collections Manual* is available in two digital versions: online and downloadable. The online version, available by subscription, is accessible on a variety of platforms including PC, mobile phones, and tablets. The complimentary downloadable version contains the entire text of the manual as a single Adobe Acrobat PDF file.

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Features of both versions include downloadable State Bar of Texas-copyrighted forms from the manual as editable Word files (and, in some cases, as PDF files) as well as printable or downloadable PDF files of forms available from various state and federal agencies. In both versions, applicable Texas and federal case and statute citations in the practice notes and forms instructions are linked to case reports and main code sections cited via Casemaker online. Both versions are searchable and hyperlinked to allow for easy, rapid navigation to topics of interest.

Caveat: Note that the Word files of forms included in the digital versions contain instructional language as hidden text. Be aware that this language will be included in your completed forms unless you specifically delete it.

For more information about the online version, visit **http://texasbarbooks.net/texasbarbooks-online/**. For more information about the digital download including usage notes, see the material at the end of this introduction titled "How to Download This Manual."

§ 3 Captions of Forms

1. Court designations for caption of petition

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

District Court

IN THE DISTRICT COURT
OF _________ COUNTY, TEXAS
_________ JUDICIAL DISTRICT

Constitutional County Court

IN THE COUNTY COURT
OF _________ COUNTY, TEXAS

Unnumbered County Court at Law

IN THE COUNTY COURT AT LAW
OF _________ COUNTY, TEXAS

Numbered County Court at Law

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

Justice Court

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

No. 00–12345

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

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2. Appearance of caption

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

3. Notice of Sensitive Data

If a document filed in a civil case is required to contain sensitive data, the filer must notify the clerk by (1) designating the document as containing sensitive data when it is electronically filed or (2), if the document is not electronically filed, including on the upper left-hand side of the first page, the phrase: "NOTICE: THIS DOCUMENT CONTAINS SENSITIVE DATA." Tex. R. Civ. P. 21c(d). See section 19.7 in chapter 19 of this manual for additional information concerning sensitive data.

§ 4 Corrections and Updates

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

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

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

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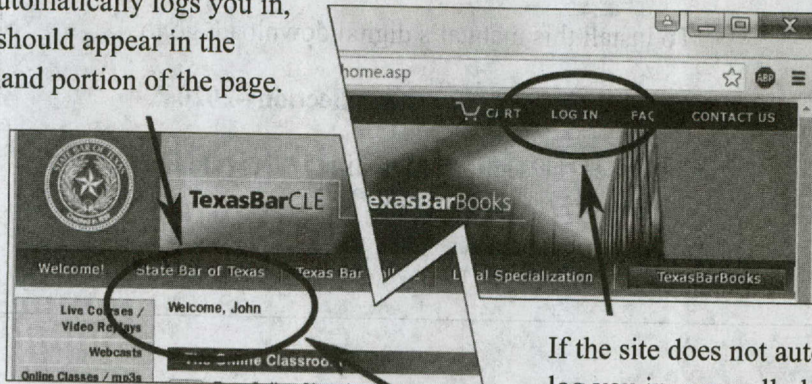

If the site does not automatically log you in, manually log in.

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Modify the selected text to make the URL **"www.texasbarcle.com/collections-2020"** and press your keyboard's "Enter" key.

The "http://" and "www" are optional for most browsers.

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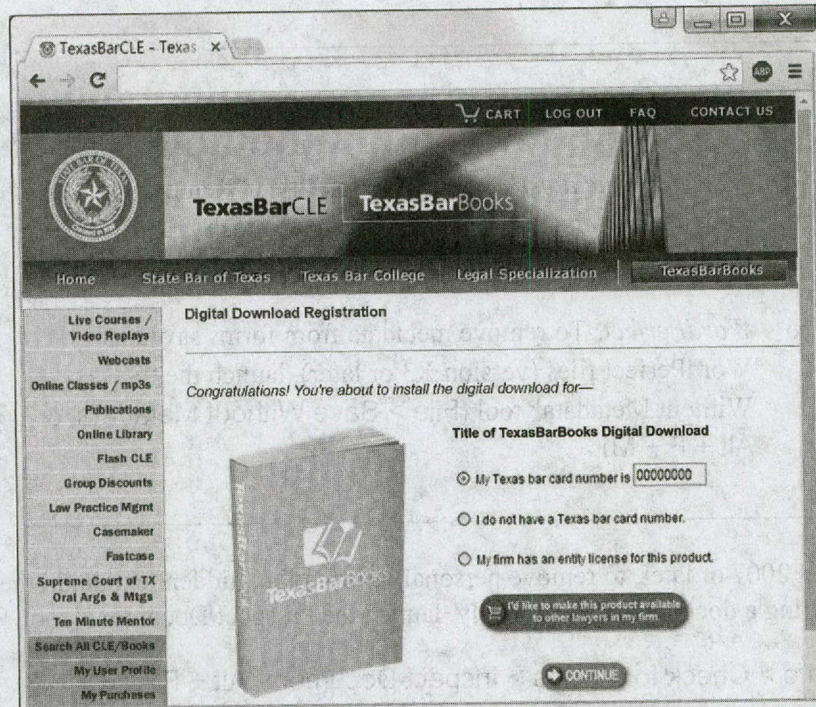

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- find and highlight the next variable, instruction, or optional text;
- browse, select, and copy clause text from forms that are collections of clauses;
- retain the embedded instructions for viewing while you work on your hard drive but prevent them from printing on your hard copies; and
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Notes for Other Software

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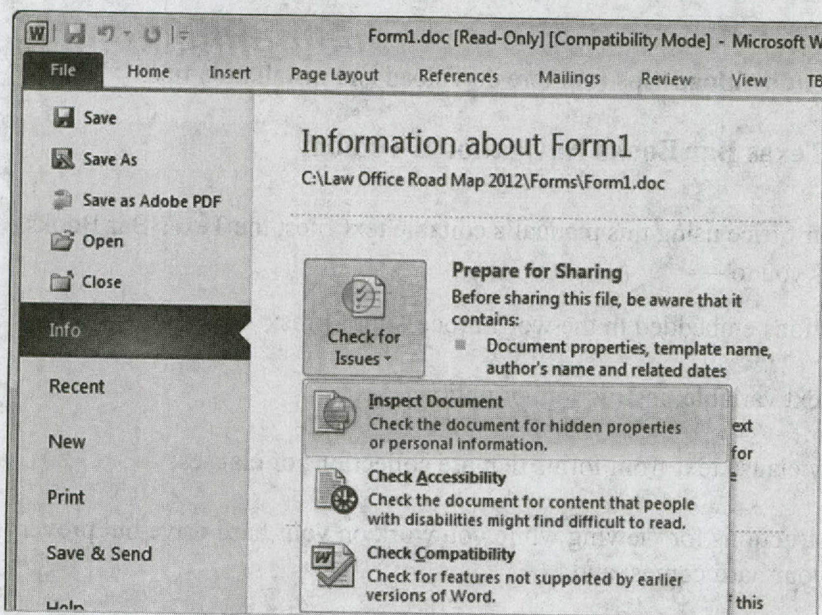
- *WordPerfect:* To remove metadata from forms saved as WordPerfect files (version X3 or later), launch the "Save Without Metadata" tool (File > Save Without Metadata, or Alt + F + M).

Using Word version 2007 or later, to remove personal information, hidden text, and other metadata before filing or sharing a document electronically, launch the "Inspect Document" tool.

1. Go to File > Info > Check for Issues > Inspect Document (Alt + F + I + I + I).



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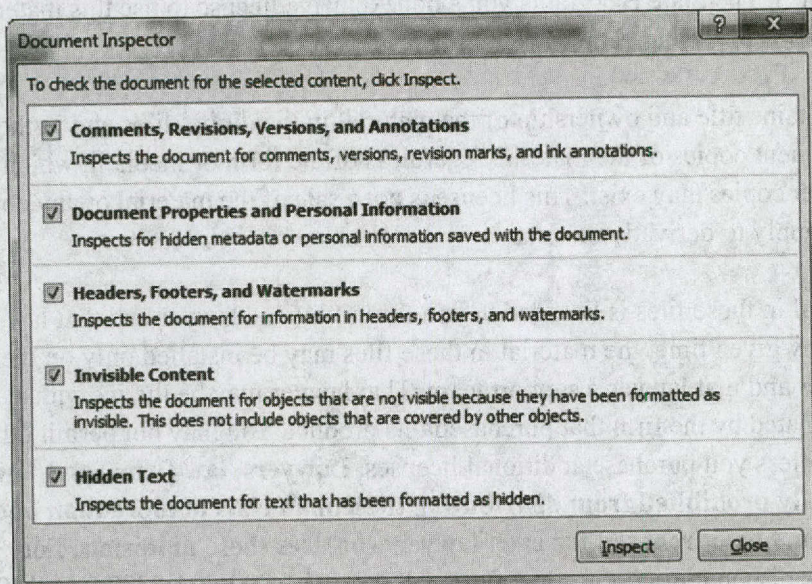
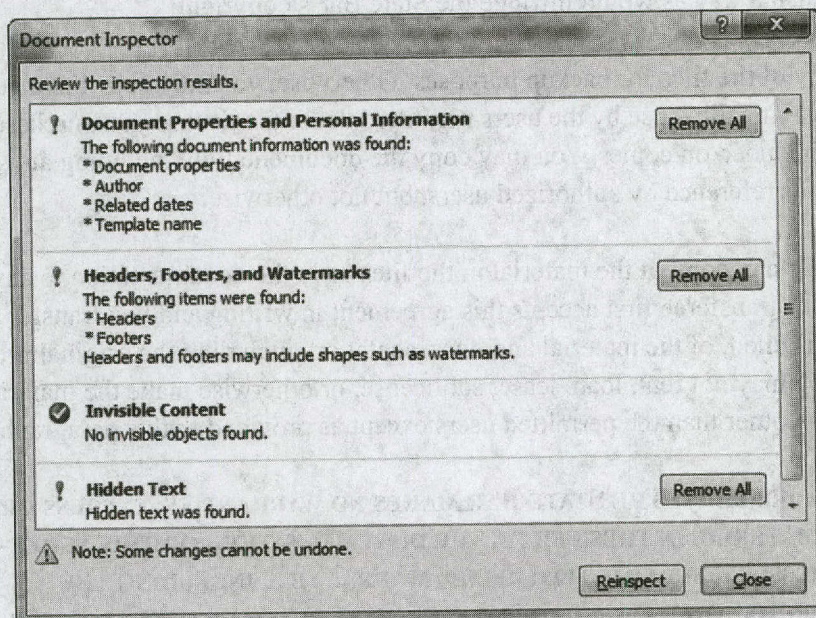
2. In the "Document Inspector" window that opens, select the categories desired by checking the appropriate boxes (be certain to check the "Hidden Text" box to ensure that any remaining red, hidden instructional text in the document will be also be detected) and click the "Inspect" button.



3. In the second "Document Inspector" window that opens, review and remove any metadata found as desired.



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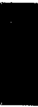

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Chapter 1

Debt Collection Law Practice

I. Managing the Law Office

§ 1.1 Client and Claim Information

When a new matter is received, the attorney should open a case file, assign a file number, and complete as much of the client information sheet as possible. The client information sheet, form 1-1 in this chapter, should be the top item in the case file or otherwise placed where it can be referred to easily. Client information may also be kept in a computer database or file management system, which may be particularly helpful if the client refers multiple matters to the attorney.

Form 1-1 has blanks for the most important or recurring information about the case. As the case progresses, more information, such as the date of judgment, may be entered.

§ 1.2 Professionalism

§ 1.2:1 Informing Client of Grievance Process

Attorneys practicing law in Texas must provide notice to clients of the existence of the grievance process by one of four means: making available at the attorney's place of business brochures printed by the State Bar of Texas describing the grievance process; posting a sign prominently in the attorney's place of business describing the grievance process; including the grievance process information in the written contract for services with the client; or providing the information with the bill for services. Tex. Gov't Code § 81.079(b). This information can be included in the contingent fee agreement at form 1-2 in this chapter.

§ 1.2:2 Texas Lawyer's Creed

The Supreme Court of Texas and the Texas Court of Criminal Appeals adopted "The Texas Lawyer's Creed—A Mandate for Professionalism" in 1989. The Texas Lawyer's Creed, along with additional information regarding its adoption, is available at **www.legalethicstexas.com**. For a provision of the Creed to be enforceable by the courts, the courts must act pursuant to their inherent powers or existing rules, because the Texas Lawyer's Creed is not binding law but a recommended code of conduct. The Creed does not create new duties and obligations enforceable by the courts beyond those existing as a result of (1) the courts' inherent powers and (2) the rules already in existence. *PNS Stores v. Rivera*, 379 S.W.3d 267, 276–77 (Tex. 2012).

§ 1.2:3 Texas Lawyer's Oath

The Texas Lawyer's Oath requires an attorney practicing law in Texas to—

1. support the U.S. and Texas constitutions;
2. "honestly demean oneself in the practice of law";
3. discharge the attorney's duty to the attorney's client; and

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4. "conduct oneself with integrity and civility in dealing and communicating with the court and all parties."

Tex. Gov't Code § 82.037(a).

The oath must be endorsed on the attorney's license, subscribed by the attorney, and attested by the officer administering the oath. Tex. Gov't Code § 82.037(b). Tex. Gov't Code §§ 602.002–.005 set out a list of persons who may administer the oath. A copy of the oath is available at **www.texasbar.com**.

§ 1.2:4 Duty to Report Ethical Violation; Peer Assistance Program Alternative

The Texas Lawyer's Creed states that a lawyer "must abide by the Texas Disciplinary Rules of Professional Conduct," and "professionalism requires more than merely avoiding the violation of laws and rules." The Texas Lawyer's Creed—A Mandate for Professionalism, *reprinted in Texas Rules of Court—State* 763 (West 2019).

Rule 8.03 of the Texas Disciplinary Rules of Professional Conduct requires attorneys to make a report when a substantial question arises about another lawyer's "honesty, trustworthiness or fitness":

> **8.03 Reporting Professional Misconduct**
>
> (a) Except as permitted in paragraphs (c) or (d), a lawyer having knowledge that another lawyer has committed a violation of applicable rules of professional conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate disciplinary authority.
>
> (b) Except as permitted in paragraphs (c) or (d), a lawyer having knowledge that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judges fitness for office shall inform the appropriate authority.
>
> (c) A lawyer having knowledge or suspecting that another lawyer or judge whose conduct the lawyer is required to report pursuant to paragraphs (a) or (b) of this Rule is impaired by *chemical dependency on alcohol or drugs or by mental illness may report that person to an approved peer assistance program rather than to an appropriate disciplinary authority.* If a lawyer elects that option, the lawyer's report to the approved peer assistance program shall disclose any disciplinary violations that the reporting lawyer would otherwise have to disclose to the authorities referred to in paragraphs (a) and (b).
>
> (d) This rule does not require disclosure of knowledge or information otherwise protected as confidential information:
>
> (1) by Rule 1.05 or
>
> (2) by any statutory or regulatory provisions applicable to the counseling activities of the approved peer assistance program.

Tex. Disciplinary Rules Prof'l Conduct R. 8.03, *reprinted in* Tex. Gov't Code Ann., tit. 2, subtit.

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G, app. A (Tex. State Bar R. art. X, § 9) (emphasis added). The rule and the alternative method of reporting under rule 8.03(c) reflect the values of the Texas Lawyer's Creed; rule 8.03(c) allows attorneys to help each other without involving the disciplinary process.

§ 1.2:5 Texas Lawyer's Assistance Program

The only approved peer assistance program to which lawyers may make reports under rule 8.03(c) is the Texas Lawyer's Assistance Program (TLAP). *See* Tex. Health & Safety Code § 467.001(1)(A); Board of Directors Meeting Minutes, Jan. 20–21, 1989, State Bar of Texas. TLAP is available to lawyers, judges, and law students twenty-four hours a day, seven days a week, at 1-800-343-TLAP (8527). Information about attorney wellness and other related information is also available on TLAP's website, **www.tlaphelps.org**. If a lawyer is required to report under rule 8.03(a), that is, if he has knowledge "or suspects" another lawyer is "impaired by chemical dependency on alcohol or drugs or by mental illness," the report may instead be made to TLAP and discharges the concerned lawyer's duty to report. *See* Tex. Health & Safety Code § 467.005(b); Tex. Disciplinary Rules Prof'l Conduct R. 8.03(c). "Mental illness" encompasses Alzheimer's disease, dementia, and other cognitive disorders. American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 591 (5th ed. 2013).

Calling TLAP about a fellow lawyer in need is a way to help an attorney with a problem without getting that attorney into disciplinary trouble. The confidentiality of TLAP participants' information is ensured under Tex. Health & Safety Code § 467.007 and by TLAP policy. All communications by any person with the program (including staff, committee members, and volunteers) and all records received or maintained by the program are strictly protected from disclosure. TLAP does not report lawyers to disciplinary authorities. While the majority of calls to TLAP are self-referrals, referrals may also come from partners, associates, office staff, judges, court personnel, clients, family members, and friends. TLAP is respectful and discreet in its efforts to help impaired lawyers who are referred, and TLAP never discloses the identity of a caller trying to get help for another attorney. Furthermore, the Health and Safety Code provides that any person who "in good faith reports information or takes action in connection with a peer assistance program is immune from civil liability for reporting the information or taking the action." Tex. Health & Safety Code § 467.008.

Approximately half of all assistance provided by TLAP is given to attorneys suffering from anxiety, depression, or burnout. Additionally, TLAP helps lawyers, law students, and judges suffering problems such as prescription and other drug use, eating disorders, gambling addictions, cognitive impairment, codependency, and many other serious issues.

Once a lawyer, law student, or judge is connected to TLAP, the resources that can be provided directly to that person include—

1. direct peer support from TLAP staff attorneys;
2. self-help information;
3. connection to a trained peer support attorney who has overcome the particular problem at hand and who has signed a confidentiality agreement;
4. information about attorney-only support groups such as Lawyers Concerned for Lawyers (weekly meetings for alcohol, drug, depression, and other issues) and monthly Wellness Groups (professional speakers on various wellness topics in a lecture for-

mat), which take place in major cities across the state;

5. referrals to lawyer-friendly and experienced therapists, medical professionals, and treatment centers; and

6. assistance with financial resources needed to get help, such as the Sheeran-Crowley Memorial Trust, which is available to help attorneys in financial need with the costs of mental-health or substance abuse care.

§ 1.3 Conflicts of Interest

§ 1.3:1 Conflicts Generally

A detailed discussion of conflicts of interest is beyond the scope of this manual. Attorneys should incorporate a conflicts check in the processing of matters they are engaged to handle. *See* Tex. Disciplinary Rules Prof'l Conduct R. 1.06, 1.09.

See section 1.14 below regarding representation of multiple clients with claims against the same debtor.

§ 1.3:2 Going into Business with Clients

See Tex. Disciplinary Rules Prof'l Conduct R. 1.08 regarding restrictions and disclosures that must be made before going into business with a client.

§ 1.4 Ticklers and Calendars

When a file is opened, the attorney should calendar the statute of limitations date to ensure that suits will be timely filed. A detailed discussion of statutes of limitations can be found in part III. in chapter 17 of this manual.

As the attorney works the file, a reminder or "tickler" should be made for its next retrieval date each time a case folder is returned to the filing system. Even if the next step will not occur until a response is received from the client, an entry should be made to ensure that the file will be reviewed regularly.

The attorney who does not use a tickler system or calendar important dates is inviting a malpractice claim. Many attorneys use computer programs as primary or backup tickler systems. Several dedicated programs have been created specifically for attorneys' docket control needs, and other calendar programs or personal information managers serve much the same purpose. Regardless of the system used, a backup system should be put in place to minimize the possibility of human or computer error.

§ 1.5 Handling Money

§ 1.5:1 Trust Accounts

An attorney must hold all funds and other property belonging to clients, such as retainers and funds for paying court costs, separate from the attorney's own property. These funds must be kept in a separate account designated as a "trust" or "escrow" account. The attorney must keep complete records of the account funds and preserve the records for five years after termination of the representation. Tex. Disciplinary Rules Prof'l Conduct R. 1.14(a). Practitioners must also comply with the applicable rules governing Interest on Lawyers Trust Accounts programs under article XI of the State Bar Rules.

The attorney must promptly notify the client of the receipt of any funds for the client, must promptly deliver to the client any funds to which the client is entitled, and must, on request by the client, promptly render a full accounting of the funds. Tex. Disciplinary Rules Prof'l Conduct R. 1.14(b).

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§ 1.5:2 Debtor's Payments on Account

An integral part of a collections practice is receiving and accounting for payments received from debtors. These funds must be placed in the attorney's trust account when received, the debtor's account must be promptly credited for the payment, and the funds must be disbursed (both to the attorney for fees earned and to the client) as soon as practicable after the funds clear. The engagement agreement may include the method and manner of disbursement and the attorney's authority to receive payments on the client's behalf. An authorization agreement is at form 1-3 in this chapter. A record of the debtor's payments is at form 1-4. See also chapter 4 in this manual.

§ 1.6 Taxation of Debt Collection Services

Legal services to collect debts are apparently exempt from sales tax unless the attorney is acting in a transaction as nothing more than a debt collector. Tex. Att'y Gen. Op. No. JM-823 (1987); *see also* Texas Comptroller of Public Accounts Private Letter Ruling 9301L1222F05. (See **https://comptroller.texas.gov/taxes/letters-rulings/** for information on the binding effect of Private Letter Rulings.)

However, other businesses engaged in a debt collection service (any activity to collect or adjust a delinquent debt, to collect or adjust a claim, or to repossess property subject to a claim) are subject to sales tax. Tex. Tax Code § 151.0036(a); *see also* 34 Tex. Admin. Code § 3.354. Tax is due on the total charge for debt collection activity when the last known address of the debtor in the creditor's records, at the time the account is placed for collection, is located in Texas; and the creditor for whom the debt is collected is located in Texas or is engaged in business in Texas, as provided in Tex. Tax Code § 151.107, at the time debt is referred for collection. 34 Tex. Admin. Code § 3.354(b)(1). The term *debt collection service* does not include the collection of court-ordered child support or medical child support or the collection of current credit and real estate accounts. Tex. Tax Code § 151.0036(b); *see also* 34 Tex. Admin. Code § 3.354(d). "A current credit or real estate transaction is one that has not exceeded the later of the due date of the payment or the date on which a penalty or other contractual sanction attaches." 34 Tex. Admin. Code § 3.354(b)(2). Fees for dishonored checks are taxable, while late charges are considered additional interest and not debt collection charges. 34 Tex. Admin. Code § 3.354(b)(2)–(3).

§ 1.7 Bonding of Attorneys and Nonattorney Employees

Debt collectors who collect consumer claims in Texas must be bonded. Attorneys are considered debt collectors for bonding purposes. Because the amount of bond is nominal and given the continued attempts by consumer advocates and attorneys to expand the reach of the federal Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692–1692p, and Texas Debt Collection Practices Act, Tex. Fin. Code §§ 391.001–.404, the attorney is encouraged to obtain and file a bond with the Texas secretary of state. See section 2.32:4 in this manual for more detailed discussion.

[Sections 1.8 through 1.10 are reserved for expansion.]

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II. Client Relations

§ 1.11 Keeping Client Informed

An attorney must keep the client reasonably informed of the status of a matter, promptly comply with reasonable requests for information, and explain matters to the extent reasonably necessary to permit the client to make informed decisions regarding representation. Tex. Disciplinary Rules Prof'l Conduct R. 1.03. Keeping the client informed typically consists of—

1. providing the client with copies of all pleadings, motions, and correspondence;
2. informing the client in writing of actions the attorney is taking; and
3. if the engagement agreement is for an hourly fee, providing regular invoices, itemized with the actions taken by the law firm.

§ 1.12 Forwarders

A forwarder is an agent for a creditor-client who refers claims to attorneys for collection. A forwarder may be another attorney, a collection agency, a credit bureau, a credit insurance company, or any other entity that acts on behalf of the creditor in the referral of claims for collection. The forwarding contract should specify, at least, the agreed fee to be paid as the attorney's compensation for effecting collection.

Every forwarder has very specific operating procedures. These procedures can range from one page to more than thirty pages. Most operating procedures discuss reporting, remittances, fees, and what happens when certain events occur such as bankruptcy, death, or a request to close the account. Before accepting files, the attorney should review these procedures and make sure he understands the agreement and can ethically agree to the requirements. Failure to object or advise that the attorney is unable or unwilling to abide by a term could be a breach of fiduciary duty and possibly subject the attorney to disciplinary action.

§ 1.13 Authority to Sue or Take Other Action

Unless the engagement agreement provides otherwise, mere employment of an attorney to collect a claim does not confer authority to sue, and mere forwarding of a claim for collection does not warrant commencement of a suit. An attorney should not file suit unless there is specific authority from the creditor or forwarder to do so. See form 1-5 in this chapter, which is a letter recommending suit but stating that no action will be taken without authorization.

§ 1.14 Multiple Clients with Claims against Same Debtor

Occasionally an attorney will receive claims against one debtor from more than one client. An attorney may represent multiple clients if the attorney reasonably believes the representation of each client will not be materially affected and if each affected or potentially affected client consents to the representation after full disclosure of the existence, nature, implications, and possible adverse consequences of the common representation and the advantages and disadvantages involved, if any. Tex. Disciplinary Rules Prof'l Conduct R. 1.06(c).

A lawyer owes a duty of loyalty to every client; therefore, a potential conflict generally arises when one law firm represents multiple parties in a single lawsuit, for example, a class of plaintiffs, or when one law firm represents two parties in a single action where the funds are insufficient to satisfy both parties. Tex. Disciplinary Rules Prof'l Conduct R. 1.06(b) & cmt.

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1. A potential conflict could arise in a debt collection scenario if the defendant were to attempt to settle multiple lawsuits with one settlement offer, thus forcing the firm's clients to vie for the funds. While the clients' interests in such a scenario are not directly adverse, the comments to rule 1.06 suggest that the lawyer analyze the situation from the client's point of view. *See, e.g.*, Tex. Disciplinary Rules Prof'l Conduct R. 1.06 cmt. 6. This requires a two-step analysis. First, the attorney should determine whether representation of multiple creditors against the single defendant will materially affect the firm's representation of any of the creditor-clients. If representation will materially affect the firm's representation, then the firm should decline representation. If the firm determines that representation will not materially affect the firm's representation of the creditors, then the firm should obtain client consent to representation. Tex. Comm. on Prof'l Ethics, Op. 641 (2014).

Practice Note: As a practical matter, many clients will consider multiple representation a benefit and an advantage, since the firm will have gained knowledge regarding the debtor through discovery in the other matters.

It is permissible for a creditor's attorney to represent several creditors against a single debtor in separate lawsuits as long as the clients are fully informed of the potential for a conflict to arise in the future, and the clients consent. Disclosure and consent are not formalities. The disclosure and consent need not necessarily be in writing, but it would be prudent for the attorney to provide potential dual clients with at least a written summary of the considerations disclosed. Tex. Disciplinary Rules Prof'l Conduct R. 1.06 cmt. 8. The more limited the debtor's resources become, the more likely that the representation will give rise to an actual conflict of interest if each creditor cannot be made whole. The attorney has the immediate duty, on receipt of a second or subsequent claim against the same debtor, to fully inform the creditor or forwarder of all facts or to return the second or subsequent claim with a full explanation.

§ 1.15 When to Recommend Not Filing Suit

The attorney may consider recommending not filing suit if—

1. the debtor cannot be located;
2. the debtor has not responded to demands for payment, and the amount involved is too small to justify filing suit;
3. the debtor's assets would not be sufficient to satisfy or substantially contribute toward satisfaction of a judgment; or
4. the debtor disputes the claim and alleges a plausible affirmative defense or counterclaim, and the time and expense involved in handling a contested suit on his claim cannot be justified.

Reassessment in the future of any of these considerations may be warranted as long as limitations are not imminent.

§ 1.16 Declining Representation

Attorneys decline to represent clients for a variety of reasons, including conflict with a current or former client, a claim that is barred or close to being barred by limitations, or failure to provide sufficient documentation to prosecute the claim. An attorney declining the matter must clearly state in writing that he is doing so and must take all reasonable steps to mitigate the consequences to the client. This typically takes the form of a letter to the client advising that the client may want to consult other attorneys and, if appropriate, that the failure to take action may result in the claim's being barred by limitations.

§ 1.17 Withdrawal from Representation

§ 1.17:1 When Withdrawal Is Necessary

An attorney will occasionally find it desirable or even mandatory to withdraw from representing a client. This occurs most frequently if the client will not cooperate with the attorney in furnishing information or responding to inquiries. Withdrawal from employment is permitted in several circumstances, including if a client insists on pursuing an objective that the attorney considers repugnant or imprudent or with which the attorney has fundamental disagreement, or if the client fails substantially to fulfill an obligation to the attorney regarding the attorney's services, including an obligation to pay the attorney's fee as agreed, and has been given reasonable warning that the attorney will withdraw unless the obligation is fulfilled. Tex. Disciplinary Rules Prof'l Conduct R. 1.15(b)(4), (b)(5).

§ 1.17:2 If Matter Is in Litigation

An attorney seeking to withdraw from pending litigation must file a written motion showing good cause for the withdrawal. If another attorney is to be substituted, the motion must state—

1. the name, address, telephone number, fax number (if any), and State Bar number of the substitute attorney if determined;
2. that the party approves the substitution; and
3. that the withdrawal is not sought for delay only.

If another attorney is not being substituted, the motion must state—

1. that a copy of the motion has been delivered to the party;
2. that the party has been notified in writing of his right to object to the motion;
3. whether the party consents to the motion;
4. the party's last known address and other contact information; and
5. all pending settings and deadlines.

If the motion is granted, the withdrawing attorney must immediately notify the party in writing of any additional settings or deadlines of which the attorney has knowledge at the time of withdrawal and of which he has not already notified the party. The court may impose further conditions. Notice to the party must be given either in person or by certified and regular mail sent to the party's last known address. Tex. R. Civ. P. 10.

§ 1.17:3 Ethical Requirements

An attorney who withdraws from employment should give reasonable notice to the client, allowing time for employment of other counsel; surrender papers and property to which the client is entitled; and refund any advance payment of a fee that has not been earned. The attorney may keep papers relating to the client to the extent permitted by law only if the client will not be prejudiced as a result. Tex. Disciplinary Rules Prof'l Conduct R. 1.15(d).

§ 1.17:4 Attorney's Fees after Wrongful Discharge

An attorney who is wrongfully discharged by the client should be able to recover a fee either under the client contract or under a quantum meruit theory. *See Mandell & Wright v. Thomas*, 441 S.W.2d 841, 847 (Tex. 1969); *Diaz v. Attorney General*, 827 S.W.2d 19, 22–23 (Tex. App.—Corpus Christi–Edinburg 1992, no writ). However, this rule "assumes an enforceable fee contract, and it is the plaintiff's burden to establish the existence of a valid contract." *Tillery &*

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Tillery v. Zurich Insurance Co., 54 S.W.3d 356, 360 (Tex. App.—Dallas 2001, pet. denied).

§ 1.18 Attorney's Engagement Agreements with Client

A comprehensive discussion of attorney's engagement agreements is beyond the scope of this manual. The attorney should have a written engagement agreement with the client, such as the one found at form 1-2 in this chapter. Also, an engagement agreement calling for a contingency fee must be in writing to be enforceable and must state the method by which the fee will be determined; the percentage or percentages that will accrue to the attorney if there is a differentiation in the percentages in the event of settlement, trial, or appeal; the litigation and other expenses that will be deducted from the recovery; and whether such expenses will be deducted before or after the contingency fee is calculated. Tex. Disciplinary Rules Prof'l Conduct R. 1.04(d). At the conclusion of the contingent fee matter, the attorney must provide the client with a written statement describing the outcome of the matter and showing the remittance to the client and the method of its determination if there is a recovery. Tex. Disciplinary Rules Prof'l Conduct R. 1.04(d).

If the attorney has not regularly represented the client, the basis or rate of the fee must be communicated to the client in writing. Tex. Disciplinary Rules Prof'l Conduct R. 1.04(c). A contingent fee agreement must be in writing, state the percentage fee, and be signed by the client. Tex. Disciplinary Rules Prof'l Conduct R. 1.04(d).

Additional terms that may be included in the contract include—

- a description of excluded services;
- whether costs are advanced or reimbursed by the client;
- if the matter is initially placed on a contingency basis, a statement that an hourly fee agreement will apply should the defendant file a counterclaim, request sanctions, appeal, or make some other claim for affirmative relief;
- a security interest in any recovery;
- an agreement by the client to furnish a witness to make affidavits, respond to discovery, give a deposition, attend a mediation, and attend and testify at trial;
- a notice to the client to preserve relevant e-mails and other records relevant to the case;
- an arbitration clause; and
- an explanation of the grievance process.

An agreement in an attorney engagement contract to submit disputes to arbitration is enforceable, including disputes over fees and attorney malpractice claims. *See Royston, Rayzor, Vickery & Williams, LLP v. Lopez*, 467 S.W.3d 494 (Tex. 2015) (enforcing agreement to arbitrate attorney malpractice claims); *Porter & Clements v. Stone*, 935 S.W.2d 217, 220–22 (Tex. App.—Houston [1st Dist.] 1996, no writ) (dispute over fees). The manual committee makes no recommendation about whether an arbitration clause should be included in the contract.

A form for a contingent fee contract for a collections matter is at form 1-2 in this chapter.

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Form 1-1

Client Information Sheet

File Information

Case file number: ______________________________

Responsible attorney: ______________________________

Forwarder Information (if applicable)

Name of forwarder: ______________________________

Mailing address: ______________________________

____

E-mail: ______________________________

Phone: ______________________________

Fax: ______________________________

Forwarder's file number: ______________________________

Creditor-Client Information

Name of creditor-client: ______________________________

Contact person: ______________________________

Mailing address: ______________________________

____

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E-mail: ______________________________

Phone: ______________________________

Fax: ______________________________

Client file number: ______________________________

Nature of Fee Arrangement: ______________________________

Debtor Information

Name of debtor: ______________________________

Nature of debtor (individual, corporation, etc.): ______________________________

Business address: ______________________________

____

E-mail: ______________________________

Phone: ______________________________

Fax: ______________________________

Residence address: ______________________________

____

Phone: ______________________________

Debtor's attorney: ______________________________

Mailing address: ______________________________

____

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E-mail: ______________________________

Phone: ______________________________

Fax: ______________________________

Remarks: ______________________________

____

Date Information Regarding Claim

Date claim received in law office: ______________________________

Date cause of action accrued (for limitations): ______________________________

Date limitations will run: ______________________________

Nature of Claim

Describe generally: ______________________________

Is claim secured? Yes/No

If so, describe collateral and nature of lien: ______________________________

____

Amount Owed

Original principal amount: $ ______________________________

Principal balance as of ____________: $ ______________________________

Interest or finance charge as of ____________: $ ______________________________

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Interest rate: ______________________________

Demand Letter

Date of demand letter: ______________________________

Date received by debtor: ______________________________

Suit Information

Date suit filed: ______________________________

Date citation served: ______________________________

Answer day: ______________________________

Style of case: ______________________________

Cause number: ______________________________

Court designation: ______________________________

Address of clerk: ______________________________

____

> If the case is transferred on change of venue, change information above as appropriate.

Judgment Information

Date judgment signed: ______________________________

Lien foreclosed? Yes/No

Type of judgment (default, summary, trial, etc.): ______________________________

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Principal amount of judgment: $ ______________________________

Costs: $ ______________________________

Attorney's fees: $ ______________________________

Prejudgment interest: $______________________________

Other: $______________________________

Total: $ ______________________________

Interest rate on judgment: ______________________________

Abstract and Execution

Date abstract filed: ______________________________

Date execution issued: ______________________________

Writ sent to: ______________________________

Remarks

____

____

____

____

____

____

____

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Form 1-2

This form may be used to establish a fee agreement with the client. The attorney must be careful to tailor the details of the agreement to the facts of the particular case. See section 1.18 in this chapter.

Date: [**Date**] ("Placement Date")

Contingent Fee Agreement

Select one of the following.

[**Name of client**] ("Client") hereby retains [**name of firm**] ("Firm") to represent Client in collecting from [**name of debtor**] ("Debtor") [**include if applicable:** under account number [**number**]] the debt ("Debt"), which includes [**include as applicable:** making demand/filing suit/moving for judgment/recording the judgment/instituting and maintaining postjudgment remedies] (the "Services").

The practitioner should decide how broad or narrow the representation should be when defining the terms "debt" and "services." Creditors occasionally discover additional accounts or invoices after referring the file or acquire an additional account or invoice as a result of a merger, acquisition, or extension of credit. If limiting representation and exposure is desired, consider describing the debt in sufficient detail (e.g., account number, invoice number, balance owed) and specifying what actions the firm agrees to take to collect the debt.

Select the following if collecting on a judgment.

[**Name of client**] ("Client") hereby retains [**name of firm**] ("Firm") to represent Client in collecting the judgment awarded in favor of [**name of creditor**] ("Creditor") and against [**name of debtor**] ("Debtor") under Cause No. [**number**] in the [**designation court**], [**county**] County, Texas, styled "[**style of case**]" (the "Services").

Select the following if domesticating a judgment.

Firm Client

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[Name of client] ("Client") hereby retains **[name of firm]** ("Firm") to represent Client in domesticating the judgment awarded in favor of **[name of creditor]** ("Creditor") and against **[name of debtor]** ("Debtor") under Cause No. **[number]** **[describe issuing forum and other identifying information]**, styled "**[style of case]**" (the "Services").

Fee Arrangement and Scope of Representation

Client assigns and sets over to Firm a **[percentage contingent fee, e.g.,** thirty-five percent] (**[percent]**%) contingent fee in any recovery ("Fee").

Select one of the following.

The parties agree that Debtor may file a bankruptcy, counterclaim, claim for affirmative relief, adverse action, motion for sanctions, bill of review, or appeal ("Event").

Include the following if collecting or domesticating a judgment.

The parties agree that Debtor may file a bankruptcy, claim for affirmative relief, adverse action, motion for sanctions, bill of review, or appeal ("Event").

Continue with the following.

This agreement does not include representation for any Event. In an Event, Client may employ Firm to represent Client on an hourly basis, at a rate to be agreed on at the time of the Event in addition to the agreed-on contingent fee. Should Client not retain Firm to represent Client with respect to the Event, Client understands and agrees that it should immediately retain other legal counsel and that Firm retains a **[percentage contingent fee, e.g.,** thirty-five percent] (**[percent]**%) contingent fee in any recovery.

____
Firm

____
Client

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This agreement does not include any services with respect to maintaining the enforceability of the judgment and judgment lien, including but not limited to calendaring deadlines, researching for assets, issuing and serving new writs of execution, or re-abstracting.

Additionally, Firm has not been retained to provide any tax information or advice. Client agrees to seek professional tax advice elsewhere.

If Client receives any payment from Debtor on or after the Placement Date, Client agrees to immediately pay Firm its Fee.

Client agrees that Firm is entitled to one-hundred percent (100%) of any attorney's fees awarded and recovered from Debtor or opposing counsel that result from sanctions or any motion to compel.

Client agrees it will pay all court costs, related fees, and expenses incurred in the collection efforts by Firm.

No Guarantee

Client understands there is no guarantee of success or recovery of any amount, including attorney's fees.

Termination of Agreement and Withdrawal from Case

Firm may terminate this agreement and withdraw from further representation by written notice to Client and with immediate effect for any of the following reasons:

1. Client's failure to cooperate and comply fully with any reasonable request;

____________________ ____________________

Firm Client

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2. Client's engaging in conduct or making statements that render it unreasonably difficult for Firm to carry out the purposes of its employment;

3. Client's insisting that Firm engage in conduct that is contrary to Firm's judgment and advice;

4. Client's failure to pay or approve court costs, related fees, or expenses within thirty (30) days from the time a request is made; or

5. for other good cause.

In the event of such termination, Client agrees to immediately pay Firm all court costs, related fees, and expenses incurred in any collection efforts undertaken by Firm prior to termination.

If Firm withdraws or Client terminates Firm's services for good cause, Firm, upon request of Client or on Firm's own initiative, shall elect to return all of Client's papers and file materials to Client in any one of the following ways:

1. electronically, such as by e-mail, Dropbox, or FTP, by including electronic copies of the papers and file materials; or

2. by mail through the U.S. Postal Service or any overnight delivery service, such as FedEx, by including copies or electronic copies of the papers and file materials.

However, Firm retains the right to destroy Client's file and all documents contained in Client's file after the passage of two (2) years from the date representation is terminated either by Client or Firm.

____
Firm

____
Client

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Entire Agreement of the Parties

This agreement embodies the entire agreement of the parties hereto with respect to the matters herein contained, and it is agreed that the terms, conditions, and stipulations hereof shall not be modified or revoked unless by written agreement signed by both parties and attached hereto and made a part hereof.

Client acknowledges that Client has received a copy of the agreement. CLIENT ACKNOWLEDGES THAT CLIENT HAS READ THIS ENTIRE AGREEMENT AND UNDERSTANDS AND CONSIDERS IT TO BE FAIR AND REASONABLE AND AGREES TO THE PROVISIONS HEREIN. CLIENT ACKNOWLEDGES THAT THE UNDERSIGNED ATTORNEY HAS ANSWERED ALL QUESTIONS CONCERNING THE AGREEMENT RAISED BY CLIENT.

This agreement is entered into and shall be performed in [**county**] County, Texas. Client agrees to keep Firm advised of any changes in residence address, work address, and all telephone numbers.

SIGNED [**date**].

____
[Name of client]

By ______________________________

Address: ______________________________

Telephone: ______________________________

E-mail: ______________________________

____
[Name of firm]

______________________ Firm

______________________ Client

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By ______________________________

Address: __________________________

Telephone: ________________________

E-mail: ___________________________

Notice to Clients

Texas law requires that all attorneys provide their clients with the following notice about the existence of the attorney grievance process: "The State Bar of Texas investigates and prosecutes professional misconduct committed by Texas attorneys. Although not every complaint against or dispute with a lawyer involves professional misconduct, the State Bar's Office of Chief Disciplinary Counsel will provide you with information about how to file a complaint. Please call 1-800-932-1900 toll-free for more information."

_____________________ _____________________
Firm Client

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Form 1-3

Client's Authorization for Attorney to Receive Payments

I, [**name of creditor**], appoint [**name of attorney**] as my agent to receive any money payable to me from [**name of debtor**], to endorse checks and other instruments, whether payable to me or to [**name of attorney**], and to disburse the money in accordance with other agreements previously or hereafter made between us regarding [**name of debtor**]. I make this appointment of agency in accordance with the powers and with respect to the matters set forth above, and I ratify all acts done according to this appointment. The agent's authority will begin on the date of execution of this instrument and end on completion of all matters set forth above, unless revoked sooner by my written statement. This authorization will not terminate on my disability.

SIGNED on ______________________________.

____
[**Name of creditor**]

SIGNED under oath before me on ______________________________.

____
Notary Public, State of Texas

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Form 1-4

Payment Record

Case File Number:

Debtor:

Attorney Responsible:

[Forwarder:]

Date File Opened:

Creditor:

Payment record						To attorney			To client	
Amount received	Date received	Check #	Add'l charges	Balance owed	Remarks	Fees	Costs	Other	Amount	Check #

Make a tickler for the next date when payment or receipt of other proceeds is expected.

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Form 1-5

This letter is furnished only as a basic example and should not be used as a standard form. The attorney must be careful to tailor the details of the letter to the facts of the particular case. This letter recommends suit, describes the investigation of the debtor that prompts the recommendation, and lists documents that will be required before suit is filed. See chapter 3 in this manual regarding investigation of the debtor and the debtor's financial situation. This form assumes that the claim can be handled by a sworn account procedure, and it should be modified as appropriate. The attorney should not state that the debtor "has" sufficient assets to satisfy a judgment or "at least" a certain portion of the claim. The creditor may allege in the future that the representation was a warranty that was untrue.

See section 1.15 regarding when filing suit may not be advisable. If one of those conditions applies, the client should be notified by letter. The attorney may wish to offer the client the option of filing suit anyway.

Letter to Client—Suit Recommended

[**Date**]

[**Name and address of creditor-client**]

Re: Debtor: [**name of debtor**]
Amount of claim: $[**amount**]

[**Salutation**]

Demand on the debtor has been fruitless.

I have investigated the debtor's circumstances, including [**describe attorney's investigation**]. I recommend filing suit.

Please provide [**list documents, e.g.,** copies of the latest statement of account and each invoice, showing the nature of each specific item, the date, the charge, and a systematic entry of credits and debits and resulting balances; a copy of the debtor's credit application; copies of all correspondence between you and the debtor; and a sworn account affidavit].

I will take no further action on this claim until I receive the documents listed above and your authorization to file suit. Thank you for sending the claim to me.

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Sincerely yours,

____

[Name of attorney]

Include a sworn account affidavit (form 14-2).

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Form 1-6

This form may be used to establish a settlement with a debtor. The attorney must be careful to tailor the details of the agreement to the facts of the particular case.

If there is a lawsuit and the debtor is paying over time, consider securing the payment arrangement with an agreed judgment. The agreed judgment may be held in trust or filed immediately in the event you are practicing in a court that will set the case for trial or place it on the dismissal docket before the debtor completes the payment terms. If unsure about the court's procedures, consider language that allows entering the agreed judgment immediately, such as the third optional paragraph 4 below.

Settlement Agreement Letter

[**Date**]

[**Name and address of debtor**]

Re: Balance Due of $[**amount**] owed to [**name of creditor**] (the "Creditor") by [**name of debtor**] (the ["Customer"/"Debtor"]) on the invoices described in Exhibit [**exhibit number/letter**], incorporated herein by reference (the "Debt") [**include if a lawsuit is pending:** and Cause No. [**number**] in the [**designation court**], [**county**] County, Texas, styled "[**style of case**]" (the "Lawsuit")]

[**Salutation**]

This letter memorializes the terms of the agreement (the "Agreement") between the Creditor and the [Customer/Debtor] with respect to the Debt [**include if applicable:** and Lawsuit].

Select one of the following.

1. The [Customer/Debtor] agrees to pay and the Creditor agrees to accept $[**amount of settlement**] in one lump sum on or before [**date**].

Or

1. The [Customer/Debtor] agrees to pay and the Creditor agrees to accept $[**amount of settlement**] as follows: payments of $[**amount of monthly payment**] or more per month

beginning on or before [**date**], and due on or before the [**day of month**] day of each successive month (the "Due Date").

2. **Payment should be made by CERTIFIED FUNDS payable to [name of payee] and forwarded to [payee's address]. [Include the following if allowing the debtor to pay with personal or business checks:** If payments are made by personal or business checks, the [Customer/Debtor] additionally agrees that, should a payment be returned for insufficient funds or dishonored for any reason, the Creditor may require future payments to be made by cashier's check or certified funds.]

3. Should a Due Date fall on a weekend or recognized holiday, the Due Date shall be extended to the next business day.

> If there is a pending lawsuit and the debtor has agreed to pay over time, consider securing the payment arrangement with an agreed judgment using one of the following paragraphs. See discussion about securing a payment plan with an agreed judgment in the headnote instructions to this form.

4. As security for such payments, the parties agree to sign the Agreed Judgment attached hereto as Exhibit [**exhibit number/letter**]. The parties agree that the Creditor will not file, abstract, or enforce the Agreed Judgment as long as the [Customer/Debtor] is not in default, as defined in this Agreement.

Or

4. As security for such payments, the parties agree to sign the Agreed Judgment attached hereto as Exhibit [**exhibit number/letter**]. The parties agree that the Creditor may submit the Agreed Judgment for the judge's signature and enter it of record but will not abstract or enforce the Agreed Judgment as long as the [Customer/Debtor] is not in default, as defined in this Agreement.

Or

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4. As security for such payments, the parties agree to sign the Agreed Judgment attached hereto as Exhibit [**exhibit number/letter**]. The parties agree that the Creditor may submit the Agreed Judgment for the judge's signature, enter it of record, and, in the Creditor's sole discretion, abstract the Agreed Judgment, whether or not the [Customer/Debtor] is in default.

Select one of the following.

5. Time is of the essence. If the [Customer/Debtor] becomes the subject of a bankruptcy, receivership, or any similar proceeding on or before the expiration of ninety-one (91) days following the date of the last payment required under paragraph 1, or if a payment is dishonored, returned for any reason, or not received by the Due Date, the [Customer/Debtor] will be in default without further notice of default, notice of intent to accelerate, or notice of acceleration, all of which the [Customer/Debtor] hereby waives.

Or

5. Time is of the essence. If the [Customer/Debtor] becomes the subject of a bankruptcy, receivership, or any similar proceeding on or before the expiration of ninety-one (91) days following the date of the last payment required under paragraph 1, or if a payment is dishonored, returned for any reason, or not received within seven (7) days of the Due Date, the [Customer/Debtor] will be in default without further notice of default, notice of intent to accelerate, or notice of acceleration, all of which the [Customer/Debtor] hereby waives.

Or

5. Time is of the essence. If the [Customer/Debtor] becomes the subject of a bankruptcy, receivership, or any similar proceeding on or before the expiration of ninety-one (91) days following the date of the last payment required under paragraph 1, or if a payment is dishonored, returned for any reason, or not received within seven (7) days of the Due Date, the [Customer/Debtor] will be in breach. In such event, the Creditor will send the [Customer/

Debtor] a notice of breach by [certified mail, returned receipt requested/e-mail] to [**address**]. If the Creditor receives all past-due payments by cashier's check, money order, wire, or certified funds from the [Customer/Debtor] within ten (10) days of the date listed on the notice of breach, the [Customer/Debtor] will have cured the breach. If the Creditor does not receive all past-due payments from the [Customer/Debtor] within ten (10) days of the date listed on the notice of breach, the [Customer/Debtor] will be in default. The [Customer/Debtor] agrees that the [Customer/Debtor] will have no more than two (2) opportunities to cure a breach per calendar year.

6. Unless otherwise stated herein, nothing in this Agreement requires the Creditor to accept late payments. The acceptance of any late payments by the Creditor will not cure or excuse the [Customer's/ Debtor's] default. The parties agree that, should the Creditor accept a payment after the [Customer/Debtor] is in default, the [Customer/Debtor] will remain in default regardless of the number of late payments accepted.

> If the parties are settling presuit and the debtor is paying over time, include the following acknowledgment of the debt.

7. If the [Customer/Debtor] is in default and regardless of whether the Creditor has accepted any late payments, the [Customer/Debtor] agrees that this Agreement remains entirely enforceable and that the full amount of $[**amount of original debt**] is immediately due and owing, in addition to prejudgment interest and attorney's fees, less any amounts paid under this Agreement.

> Include the following if the debtor is paying a lump sum or paying over time.

8. If the [Customer/Debtor] is not in default, upon full payment of the Debt, the Debt and all related fees and expenses will be considered settled.

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> Include the following if the debtor is paying a lump sum and there is a lawsuit. If concerned that the debtor may be subject to insolvency proceedings, modify to provide that the creditor will send the release ninety-one days after the final payment.

8. If the [Customer/Debtor] is not in default, upon full payment of the Debt, the Debt and all related fees and expenses will be considered settled, and after [the payment has cleared our bank/the expiration of ninety-one (91) days after the date of last payment], the Creditor or its attorney will file a notice of nonsuit with prejudice in the Lawsuit.

> Include the following if the debtor is paying over time and an agreed judgment was used and filed to secure the payment plan. If concerned that the debtor may be subject to insolvency proceedings, modify to provide that the creditor will send the release ninety-one days after final payment.

8. If the [Customer/Debtor] is not in default, upon full payment of the Debt, and after [the final payment has cleared our bank/the expiration of ninety-one (91) days after the date of last payment], the Creditor or its attorney will execute a release of judgment to the [Customer/Debtor] and forward it to the following address: [**address**]. The parties agree that it will be the sole responsibility of the Judgment Debtor to file the release of judgment in any county in which the Judgment was recorded. The parties further agree that the Debt and all related fees and expenses will be considered settled.

> Include the following if the release is limited solely to the debt.

9. The [Customer/Debtor] releases and forever discharges the Creditor, its affiliates, officers, directors, principals, shareholders, parents, subsidiaries, members, auditors, accountants, predecessors, successors, servants, employees, agents, counsel, partners, insurers, underwriters, administrators, executors, representatives, heirs, and assigns from any and all past, present, or future claims that have accrued, or may accrue later, or otherwise be acquired on account of, or in any way arise out of, the Debt and the goods and services made the sub-

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ject of the Debt, whether known or unknown, and whether based on a tort, contract, or other theory of recovery.

Include the following to incorporate a global release by the debtor.

9. The [Customer/Debtor] releases and forever discharges the Creditor, its affiliates, officers, directors, principals, shareholders, parents, subsidiaries, members, auditors, accountants, predecessors, successors, servants, employees, agents, counsel, attorneys, partners, insurers, underwriters, administrators, executors, representatives, heirs, assigns, and anyone else acting for the Creditor from any and all past, present, or future claims, whether known or unknown, and whether based on a tort, contract, or other theory of recovery.

Include the following to incorporate a mutual release as to the debt.

9. As long as the [Customer/Debtor] is not in default and the Debt is paid in accordance with the conditions described, the parties further release and forever discharge each other, their affiliates, officers, directors, principals, shareholders, parents, subsidiaries, members, auditors, accountants, predecessors, successors, servants, employees, agents, counsel, attorneys, partners, insurers, underwriters, administrators, executors, representatives, heirs, and assigns from any and all past, present, or future claims that have accrued, or may accrue later, or otherwise be acquired on account of, or in any way arise out of, the Debt and the goods and services made the subject of the Debt, whether known or unknown, and whether based on a tort, contract, or other theory of recovery.

10. No amendment or modification of this Agreement, and no waiver, discharge, or termination of any one or more of the provisions in this Agreement, shall be effective unless in writing and signed by all the parties.

11. By signing below, the [Customer/Debtor] acknowledges that this Agreement is made to satisfy a valid and existing claim as stated above. [**Include if the debt is disputed:** By

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signing below, the [Customer/Debtor] acknowledges that this Agreement is made to settle a disputed claim.]

If this correctly memorializes the terms of agreement between the [Customer/Debtor] and the Creditor, please indicate your approval of the terms stated in this letter by signing, dating, and returning a copy of this letter to me today.

THIS AGREEMENT IS NEITHER VALID NOR ENFORCEABLE UNTIL ALL PARTIES HAVE SIGNED.

By signing below, I am agreeing to the terms stated in this letter.

[Customer/Debtor]:

By:______________________________

____
Signature

____
Printed Name

____
Title

Date: _______________

Creditor:

By:______________________________

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____
Signature

____
Printed Name

____
Title

Date: ______________

Attach exhibit(s) as applicable.

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Form 1-7

This form may be used to establish an agreement with a debtor to forbear enforcing a judgment as long as the debtor fulfills its payment obligations. The attorney must be careful to tailor the details of the agreement to the facts of the particular case.

Forbearance Agreement Letter

[**Date**]

[**Name and address of debtor**]

Re: Judgment entered under Cause No. [**number**] in the [**designation court**], [**county**] County, Texas, styled "[**name of plaintiff**] ("Judgment Creditor") v. [**name of defendant**]" ("Judgment Debtor") (the "Judgment")

[**Salutation**]

This letter memorializes the terms of the agreement (the "Agreement") between the Judgment Creditor and the Judgment Debtor with respect to the Debt and Judgment.

Select one of the following.

1. The parties agree that the Judgment Creditor will forbear enforcing the Judgment on condition that the Judgment Debtor pays $[**amount of lump sum**] in one lump sum on or before [**date**].

Or

1. The parties agree that the Judgment Creditor will forbear enforcing the Judgment on condition that the Judgment Debtor pays $[**amount**] as follows: $[**amount of monthly payment**] or more per month beginning on or before [**date**], and due on or before the [**day of month**] day of each successive month.

2. **Payment should be made by CERTIFIED FUNDS payable to [names of payee and attorney] and forwarded to [payee's or attorney's address]. [Include the following if allowing the debtor to pay with personal or business checks:** If payment is made by personal or business checks, the Judgment Debtor additionally agrees that, should a payment be returned for insufficient funds or dishonored for any reason, future payments must be made by cashier's check or certified funds.]

Select one of the following.

3. Time is of the essence. If a payment is not received by its due date, the Judgment Debtor will be in default.

Or

3. Time is of the essence. If a payment is not received within seven (7) days of its due date, the Judgment Debtor will be in default.

Or

3. Time is of the essence. If a payment is not received within seven (7) days of its due date, the Judgment Debtor will be in breach.

4. If the Judgment Debtor is in breach, the Judgment Creditor will send the Judgment Debtor a notice of breach by [certified mail, returned receipt requested/e-mail] to [**address**]. If the Judgment Creditor receives all past-due payments from the Judgment Debtor within ten (10) days of the date listed on the notice of breach, the Judgment Debtor will have cured the breach. If the Judgment Creditor does not receive all past-due payments from the Judgment Debtor within ten (10) days of the date listed on the notice of breach, the Judgment Debtor will be in default. The Judgment Debtor agrees that the Judgment Debtor will have no more than two (2) opportunities to cure a breach per calendar year.

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5. Should a due date fall on a weekend or recognized holiday, the due date shall be extended to the next business day.

Continue with the following.

6. Unless otherwise stated herein, nothing in this Agreement requires the Judgment Creditor to accept late payments. The acceptance of any late payments by the Judgment Creditor will not cure or excuse the Judgment Debtor's default. The parties agree that, should the Judgment Creditor accept a late payment, the Judgment Debtor will remain in default regardless of the number of late payments accepted.

7. Nothing herein nulls, voids, compromises, satisfies, or settles the Judgment. The Judgment Debtor understands and agrees that should the Judgment Debtor fail to pay the amounts due in accordance with this Agreement, the Judgment Creditor may continue to enforce and collect the entire amount of the Judgment less credits for any payments made under this Agreement.

8. If the Judgment Debtor is not in default at the time the Judgment Debtor tenders final payment and after the Judgment Debtor's final payment has cleared the bank, the Judgment Creditor will execute a release of judgment and forward it to the Judgment Debtor at the following address: [**address**]. The parties agree that it will be the sole responsibility of the Judgment Debtor to file the release of judgment in any county in which the Judgment was recorded.

9. No amendment or modification of this Agreement, and no waiver, discharge, or termination of any one or more of the provisions in this Agreement, shall be effective unless in writing and signed by all the parties.

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If this correctly memorializes the terms of agreement between the Judgment Debtor and the Judgment Creditor, please indicate your approval of the terms stated in this letter by signing, dating, and returning a copy of this letter today.

THIS AGREEMENT IS NEITHER VALID NOR ENFORCEABLE UNTIL ALL PARTIES HAVE SIGNED.

By signing below, I am agreeing to the terms stated in this letter.

Judgment Debtor:

By:________________________________

____
Signature

____
Printed Name

____
Title

Date: ________________

Judgment Creditor:

By:________________________________

____
Signature

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____
Printed Name

____
Title

Date: ________________

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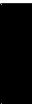

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Chapter 2

Laws Affecting Debt Collection

I. Overview of Debtor-Creditor Statutes

§ 2.1 Scope of Chapter

This chapter discusses some laws of which the debt collection attorney should be aware, including the Truth in Lending Act, the consumer credit sections of the Texas Finance Code, the Servicemembers Civil Relief Act, and the Military Lending Act. Such statutes or authorities ordinarily may not be considered debt collection laws but should be taken into account when evaluating a debt collection matter for possible defenses and counterclaims that may be asserted by the consumer.

Some of the laws were created or impacted by the Dodd-Frank Wall Street Reform Act of 2010 (the "Dodd-Frank Act"), including amendments to Regulation Z, which was promulgated in connection with the Truth in Lending Act. The Dodd-Frank Act also created the Consumer Finance Protective Bureau ("CFPB") and transferred authority for certain consumer protection laws to the CFPB, although certain lending institutions remain regulated by an agency or entity other than the CFPB. The CFPB republished certain regulations to reflect the transfer of authority to the CFPB and to include certain other changes to the regulations as a result of the Dodd-Frank Act. Regulation Z is one of the regulations that was moved from 12 C.F.R. pt. 226 to 12 C.F.R. pt. 1026.

§ 2.2 Consumer Debts

Many of the statutes discussed in this chapter primarily—if not exclusively—pertain to consumer debts. For example, the federal Fair Debt Collection Practices Act and Truth in Lending Act, the Texas Debt Collection Practices Act, and many of the former Consumer Credit Code provisions are now incorporated into the Texas Finance Code. Generally speaking, consumer debts are debts that are primarily incurred for personal, family, or household purposes. *See, e.g.*, 15 U.S.C. § 1692a(5); Tex. Fin. Code § 392.001. For a more detailed discussion of the definition of consumer debt, see section 2.12:2 below. Because consumer protection laws include hurdles and penalties not always found in other laws, attorneys should confirm whether the debts being collected have been properly classified as primarily consumer or nonconsumer debts and then confirm which laws apply to their collection efforts before proceeding further.

[Sections 2.3 through 2.10 are reserved for expansion.]

II. Federal Fair Debt Collection Practices Act

The abbreviation "FDCPA" is often used by judges, authors, and practitioners when writing about the Fair Debt Collection Practices Act and is so used in this chapter.

§ 2.11 Who Is a Debt Collector?

§ 2.11:1 Definition Generally

The activities of debt collectors are governed by the FDCPA. A debt collector is any person or organization who either—

1. uses any instrumentality of interstate commerce or the mails in any business whose principal purpose is the collection of any debts; or
2. regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due to another.

Under certain circumstances, the term *debt collector* may also apply to a business whose principal purpose is the enforcement of security interests. 15 U.S.C. § 1692a(6); *see also* 15 U.S.C. § 1602(d). See section 2.12:2 below regarding what constitutes a debt for FDCPA purposes.

§ 2.11:2 Original Creditor

Creditors who collect their own debts in their own names are generally exempt from the FDCPA. The legislative history indicates that "debt collector" does not include a consumer's creditors. *See* S. Rep. No. 95-382, at 3 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1695, 1698; *see also Wadlington v. Credit Acceptance Corp.*, 76 F.3d 103, 106 (6th Cir. 1996). A creditor conducting business under a registered assumed name is not violating the FDCPA. *Dickenson v. Townside T.V. & Appliance, Inc.*, 770 F. Supp. 1122, 1128–31 (S.D. W. Va. 1990).

§ 2.11:3 Original Creditor Representing Itself as Third-Party Debt Collector

A creditor who, in the process of collecting its own debts, uses any name other than its own that would indicate that a third party is collecting or attempting to collect its own debts is a debt collector. 15 U.S.C. § 1692a(6). An employee of a creditor who represents that he is working for a third-party debt collector not only becomes a debt collector himself but renders the creditor a debt collector as well. *See Kempf v. Famous Barr Co.*, 676 F. Supp. 937, 938 (E.D. Mo. 1988).

§ 2.11:4 Creditor-Assignee

Assignees of debts are exempt from the FDCPA unless the debt was in default when the debt was assigned. 15 U.S.C. § 1692a(4).

The majority of courts have held that a creditor who acquires a debt already in default is not a creditor but a debt collector. *Cirkot v. Diversified Financial Systems, Inc.*, 839 F. Supp. 941 (D. Conn. 1993); *Holmes v. Telecredit Service Corp.*, 736 F. Supp. 1289 (D. Del. 1990); *Kimber v. Federal Financial Corp.*, 668 F. Supp. 1480 (M.D. Ala. 1987); *Commercial Service of Perry v. Fitzgerald*, 856 P.2d 58 (Colo. App. 1993). However, the practitioner should exercise caution when pleading the elements of 15 U.S.C. § 1692a(6); *see Henson v. Santander Consumer USA, Inc.*, 817 F.3d 131 (4th Cir. 2016) (debtor's FDCPA suit failed because complaint did not allege facts demonstrating that defendant was acting as "debt collector").

§ 2.11:5 Statutory Exemptions

Those who are not debt collectors include—

1. any officer or employee of a creditor who, while in the name of the creditor, collects the creditor's debts (see section 2.11:6 below regarding attorneys as debt collectors);
2. any person or organization who acts as a debt collector for another, both of whom are related by common ownership or affiliated by corporate control,

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if the debt collector does so only for persons or organizations to whom it is so related or affiliated and if the principal business of each person or organization is not the collection of debts;

3. any officer or employee of the United States or any state to the extent that collecting or attempting to collect any debt is in the performance of his official duties;

4. any person while serving or attempting to serve legal process on any other person in connection with the judicial enforcement of any debt;

5. any nonprofit organization that, at the request of consumers, performs bona fide consumer credit counseling and assists consumers in the liquidation of their debts by receiving payments from those consumers and distributing those payments to creditors; and

6. any person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity—

   a. is incidental to a bona fide fiduciary obligation or escrow arrangement;

   b. concerns a debt originated by the person or organization;

   c. concerns a debt not in default when it was obtained by the person or organization; or

   d. concerns a debt obtained by the person or organization as a secured party in a commercial credit transaction involving the creditor.

15 U.S.C. § 1692a(6).

§ 2.11:6 Attorneys as Debt Collectors

Before 1986 attorneys were expressly excluded from the FDCPA, but the exemption was voided by statutory amendment. *See* Pub. L. No. 99-361, 100 Stat. 768 (July 9, 1986). An attorney is a debt collector if the attorney regularly tries to obtain payment of consumer debts due to another, even if the attorney's collection activities are limited solely to litigation. *Heintz v. Jenkins*, 514 U.S. 291 (1995).

An attorney who engages in collection activities "more than a handful of times per year" is a debt collector. *Crossley v. Lieberman*, 868 F.2d 566, 569 (3d Cir. 1989). It is the volume of the attorney's debt collection efforts that is dispositive, not the percentage of those efforts in the attorney's practice. *Garrett v. Derbes*, 110 F.3d 317, 318 (5th Cir. 1997); *Stojanovski v. Strobl & Manoogian, P.C.*, 783 F. Supp. 319, 322 (E.D. Mich. 1992); *Mertes v. Devitt*, 734 F. Supp. 872, 874 (W.D. Wis. 1990). See section 2.16:5 below regarding attorney liability for letting another debt collector use the attorney's name, letterhead, or signature.

In-house attorneys may lose the exemption of 15 U.S.C. § 1692a(6)(A) by sending correspondence leaving the impression that the attorney is acting as independent counsel. *See Dorsey v. Morgan*, 760 F. Supp. 509 (D. Md. 1991).

§ 2.12 Other Definitions

§ 2.12:1 Who Is a Consumer?

A consumer is any natural person obligated or allegedly obligated to pay a debt. 15 U.S.C. § 1692a(3). The nature of the debt determines the distinction between commercial and consumer debts; see section 2.12:2 below. A debt that was created as a consumer debt remains a consumer debt even if the collateral securing the debt is subsequently used for commercial purposes. *See, e.g., Miller v. McCalla, Raymer,*

Padrick, Cobb, Nichols & Clark, L.L.C., 214 F.3d 872 (7th Cir. 2000) (residential mortgage debt remains consumer obligation even if collateral subsequently turned into rental property).

§ 2.12:2 What Is a Debt?

For FDCPA purposes, a debt is any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services that are the subject of the transaction are primarily for personal, family, or household purposes. 15 U.S.C. § 1692a(5).

A dishonored check is generally considered a debt if it was given in a transaction governed by the FDCPA. *See, e.g., Snow v. Jesse L. Riddle, P.C.*, 143 F.3d 1350 (10th Cir. 1998); *Bass v. Stolper, Koritzinsky, Brewster & Neider*, 111 F.3d 1322 (7th Cir. 1997).

A party seeking restitution for another's criminal act is not trying to collect a debt under the FDCPA. *Zimmerman v. HBO Affiliate Group*, 834 F.2d 1163, 1169 (3d Cir. 1987) (theft of cable television signals); *Shorts v. Palmer*, 155 F.R.D. 172, 175–76 (S.D. Ohio 1994) (shoplifting). Also, tort claims damages and child support payments are debts not subject to FDCPA. *See Hawthorne v. Mac Adjustment, Inc.*, 140 F.3d 1367 (11th Cir. 1998) (tort claims damages); *Mabe v. G.C. Services Ltd. Partnership*, 32 F.3d 86 (4th Cir. 1994) (child support payments).

§ 2.13 Notice to Debtor and Request for Validation

§ 2.13:1 Contents of Notice

Within five days after the initial communication with a consumer in connection with the collection of a debt, the debt collector must (unless the following information is contained in the initial communication or the consumer has paid the debt) send the consumer a written notice containing—

1. the amount of the debt;
2. the name of the creditor to whom the debt is owed;
3. a statement that unless the consumer, within thirty days after receipt of the notice, disputes the validity of the debt, or any portion of it, the debt will be assumed to be valid by the debt collector;
4. a statement that if the consumer notifies the debt collector in writing within the thirty-day period that the debt, or any portion of it, is disputed, the debt collector will obtain verification of the debt or a copy of a judgment against the consumer and a copy of the verification or judgment will be mailed to the consumer by the debt collector; and
5. a statement that, on the consumer's written request within the thirty-day period, the debt collector will provide the consumer with the name and address of the original creditor, if different from the current creditor.

15 U.S.C. § 1692g(a). The complete "validation notice" must be given in such a way that "an unsophisticated consumer" would not fail to notice it. *Avila v. Rubin*, 84 F.3d 222, 225 (7th Cir. 1996). Printing the notice on the back of the letter is not sufficient notice. *Riveria v. MAB Collections, Inc.*, 682 F. Supp. 174, 177 (W.D.N.Y. 1988).

A "mini-Miranda" notice should be included with the validation notice; see section 2.14 below.

In *Miller v. McCalla, Raymer, Padrick, Cobb, Nichols & Clark, L.L.C.*, 214 F.3d 872 (7th Cir. 2000), the court held that the obligation to state

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the amount of the debt means that the attorney must state the full amount of the debt as of the date of the validation notice. If the debt, such as a mortgage debt, is subject to change, the attorney who sends a demand letter should state the full amount of the debt as of the date the letter is sent and should further notify the debtor that the payoff balance is subject to change and that the debtor should call or verify the correct payoff amount before sending payment. *See also Waterfield Mortgage Co., Inc. v. Rodriguez*, 929 S.W.2d 641 (Tex. App.—San Antonio 1996, no writ) (if payoff quote has limited duration, demand letter should contain deadline through which payoff amount will be accepted).

The attorney should be extremely careful to accurately state the amount of the debt. In *Duffy v. Landberg*, 215 F.3d 871 (8th Cir. 2000), an attorney was held to have violated the FDCPA by overstating the amount of the debt by sixty-five cents.

§ 2.13:2 Overshadowing, Contradictory, or Deceptive Notices

If a debt collector couples the required thirty-day validation period notice with a demand for action shorter than the thirty-day period, the validation notice is considered to be "overshadowed" by the other demand and is a violation of the FDCPA. *Russell v. Equifax A.R.S.*, 74 F.3d 30, 35 (2d Cir. 1996); *Miller v. Payco-General American Credits, Inc.*, 943 F.2d 482, 485 (4th Cir. 1991); *Swanson v. Southern Oregon Credit Service, Inc.*, 869 F.2d 1222, 1226 (9th Cir. 1988).

§ 2.13:3 Continuing Collection Efforts after Request for Verification Made

The debt collector does not need to suspend all collection efforts during the thirty-day period during which the consumer can request verification, but if the consumer does request verification, the debt collector must suspend collection until the verification is obtained and sent to the consumer. 15 U.S.C. § 1692g(b); *Trull v. GC Services Limited Partnership*, 961 F. Supp. 1199, 1205 (N.D. Ill. 1997).

§ 2.13:4 Responding to Request for Verification

If the customer makes a written request for verification, the verification itself must be provided in writing; oral verification is not enough. *Johnson v. Statewide Collections, Inc.*, 778 P.2d 93, 100 (Wyo. 1989). If the debtor requests verification after the thirty-day period after receipt of the validation notice, the debt collector is not obligated to provide it, but it may be more prudent to do so anyway, as it may aid in the collection effort. *See Mahon v. Credit Bureau of Placer County, Inc.*, 171 F.3d 1197, 1202–03 (9th Cir. 1999); *Robinson v. Transworld Systems, Inc.*, 876 F. Supp. 385, 391 (N.D.N.Y. 1995).

§ 2.14 "Mini-Miranda" Notice

The initial written communication to the consumer must state that the attorney is a debt collector and is attempting to collect a debt and that any information obtained will be used for that purpose. If the first communication is oral, the warning must be given in that first oral communication as well. In later communications with the consumer, the debt collector must state that he is a debt collector. In a formal legal pleading, however, the notice need not be given. 15 U.S.C. § 1692e(11). Unfortunately, the FDCPA does not define "formal pleading." In light of Fed. R. Civ. P. 7, the notice should probably be included in all motions and discovery documents. Note that the warning applies to communications with the consumer only, not communications with any other parties.

§ 2.15 Prohibited Practices: Contact with Consumers and Others

§ 2.15:1 Contacting Consumer Directly If Consumer Represented by Counsel

Unless the consumer gives prior consent or a court expressly permits it, a debt collector may not communicate directly with the consumer if the debt collector knows the consumer is represented by an attorney and either knows or can readily ascertain that attorney's name and address. If the consumer's purported attorney fails to respond to communications from the debt collector within a reasonable time or if the attorney consents to direct communication, the debt collector can then contact the consumer directly. 15 U.S.C. § 1692c(a)(2); *see also Graziano v. Harrison*, 950 F.2d 107 (3d Cir. 1991); Tex. Disciplinary Rules Prof'l Conduct R. 4.02, *reprinted in* Tex. Gov't Code Ann., tit. 2, subtit. G, app. A (West 2013) (Tex. State Bar R. art. X, § 9). For purposes of this rule, the term *consumer* includes the consumer's spouse, guardian, executor, administrator, or parent (if the consumer is a minor). 15 U.S.C. § 1692c(d).

The attorney should not send letters to the debtor's counsel addressed "[**name of debtor**] in care of [**name of attorney**]." The letter and the envelope should be addressed to the attorney. *Clark's Jewelers v. Humble*, 823 P.2d 818 (Kan. Ct. App. 1991).

§ 2.15:2 Inconvenient Time for Communication with Consumer

Unless the consumer gives prior consent or a court expressly permits it, a debt collector may not communicate with the consumer at any unusual time or place or at a time or place known or that should be known to be inconvenient to the consumer. Before 8:00 A.M. or after 9:00 P.M. local time (for the consumer) is presumed to be inconvenient unless contrary circumstances are known. 15 U.S.C. § 1692c(a)(1); *see also United States v. Central Adjustment Bureau, Inc.*, 667 F. Supp. 370 (N.D. Tex. 1986), *aff'd as modified on other grounds*, 823 F.2d 880 (5th Cir. 1987). For purposes of this rule, the term *consumer* includes the consumer's spouse, guardian, executor, administrator, or parent (if the consumer is a minor). 15 U.S.C. § 1692c(d).

§ 2.15:3 Communication with Consumer at Consumer's Place of Business

A debt collector who knows or has reason to know that a consumer's employer prohibits the consumer from receiving communications at work in connection with the collection of debt may not make such communications unless the consumer has given prior consent or a court expressly permits it. 15 U.S.C. § 1692c(a)(3). For purposes of this rule, the term *consumer* includes the consumer's spouse, guardian, executor, administrator, or parent (if the consumer is a minor). 15 U.S.C. § 1692c(d). Written notice is not required to trigger this provision.

§ 2.15:4 Telephone Conduct

Debt collectors may not—

1. cause the phone to ring or engage any person in a conversation repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number;
2. place phone calls without giving meaningful disclosure of the caller's identity, unless the call is to another person to acquire location information for the debtor; or
3. cause charges to be made to any person for communications (such as collect phone calls or telegrams) by

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concealing the true purpose of the communication.

15 U.S.C. §§ 1692d(5), (6), 1692f(5).

§ 2.15:5 Ceasing Communication

If a consumer notifies the debt collector in writing that the consumer refuses to pay the debt or wants the debt collector to cease further communication, the debt collector must cease the communications. The exceptions to the no-contact rule are—

1. to advise the consumer that the debt collector is ceasing its efforts;
2. to notify the consumer that the debt collector or creditor may invoke certain specified remedies that are ordinarily invoked by the debt collector or creditor; or
3. if applicable, to notify the consumer that the debt collector or creditor intends to invoke a specified remedy.

15 U.S.C. § 1692c(c).

For purposes of this rule, the term *consumer* includes the consumer's spouse, guardian, executor, administrator, or parent (if the consumer is a minor). 15 U.S.C. § 1692c(d). Section 1692c(c) will enable a consumer to shut down presuit collection efforts, but it cannot be used to stop an attorney from prosecuting a suit. *Heintz v. Jenkins*, 514 U.S. 291 (1995).

§ 2.15:6 Obscene or Profane Language

The debt collector may not use obscene or profane language, the natural consequence of which is to abuse the reader or hearer. 15 U.S.C. § 1692d(2).

§ 2.15:7 Language or Symbol on Envelope

Debt collectors may not use language or symbols on the envelope, other than the debt collector's address, when communicating with the consumer by mail or telegram, but the debt collector may use his own business name if the name does not indicate that he is in the debt collection business. 15 U.S.C. § 1692f(8); *see also Douglass v. Convergent Outsourcing*, 765 F.3d 299, 305–06 (3d Cir. 2014) (barcode and QR code containing consumer's account number and monetary amount of debtor's debt that was visible through window envelope was violation of statute); *Peter v. GC Services, L.P.*, 310 F.3d 344 (5th Cir. 2002) (collection agency violated FDCPA by sending collection letter in envelope that displayed name and address of U.S. Department of Education and "penalty for private use" message).

§ 2.15:8 Postcard

A debt collector may not communicate with a consumer by postcard. 15 U.S.C. § 1692f(7).

§ 2.15:9 Communication with Third Parties

Except for lawful communications with reporting credit agencies, the debt collector may not contact third parties for any reason other than ascertaining the consumer's location, unless the consumer gives prior consent or a court expressly authorizes the contact. 15 U.S.C. § 1692c(b); *see also Evankavitch v. Green Tree Servicing, LLC*, 793 F.3d 355, 360 (3d Cir. 2015) (violation for calling third parties more than once); *Masuda v. Thomas Richards & Co.*, 759 F. Supp. 1456 (C.D. Cal. 1991). When communicating with anyone other than the consumer to find out the consumer's whereabouts, the debt collector must identify himself, state that he is confirming or correcting location information concerning the consumer and, only

if expressly asked, identify his employer. He may not—

1. state that the consumer owes any debt;
2. communicate with that third person more than once, unless either—
   a. the person requests further contact; or
   b. the debt collector reasonably believes that the person's earlier response was erroneous or incomplete, and that the person now has correct or complete information regarding the consumer's whereabouts;
3. communicate by postcard;
4. use any language or symbol that indicates he is in the debt collection business or that the communication relates to collection of a debt; or
5. communicate with anyone other than the consumer's attorney after he knows the consumer is represented by an attorney.

15 U.S.C. § 1692b.

§ 2.16 Prohibited Practices: Misrepresentations

§ 2.16:1 Falsehoods and Deceptions Generally

The debt collector may not use a false representation or deceptive means to collect or attempt to collect a debt or obtain information concerning a consumer. 15 U.S.C. § 1692e(10); *see Peter v. GC Services, L.P.*, 310 F.3d 344 (5th Cir. 2002); *Bentley v. Great Lakes Collection Bureau*, 6 F.3d 60 (2d Cir. 1993).

The list of prohibited practices in 15 U.S.C. § 1692e(1)–(16) is not exclusive; any false, deceptive, or misleading act or practice of a debt collector is illegal. *Tsenes v. Trans-Continental Credit & Collection Corp.*, 892 F. Supp. 461 (E.D.N.Y. 1995).

§ 2.16:2 Nature, Character, or Amount of Debt

A debt collector may not misrepresent the amount, character, or legal status of the debt. 15 U.S.C. § 1692e(2)(A). Even if the debt collector unintentionally misstates the amount of the debt, the collector is liable unless he can prove bona fide error. *Smith v. Transworld Systems, Inc.*, 953 F.2d 1025 (6th Cir. 1992) (no liability); *cf. Duffy v. Landberg*, 215 F.3d 871 (8th Cir. 2000) (liability found); *Patzka v. Viterbo College*, 917 F. Supp. 654 (W.D. Wis. 1996) (liability found).

§ 2.16:3 Referral or Transfer of Debt

A debt collector may not falsely represent or imply that the sale, referral, or other transfer of the debt causes the consumer to lose any claim or defense to its payment of the debt or become subject to any practice prohibited by the FDCPA and may not falsely represent or imply that an account has been turned over to an innocent purchaser for value. 15 U.S.C. § 1692e(6), (12).

§ 2.16:4 Governmental Affiliation

A debt collector may not falsely represent or imply that he is vouched for by, bonded by, or affiliated with the United States or any state, such as by using a badge, uniform, or facsimile of either. 15 U.S.C. § 1692e(1).

§ 2.16:5 Attorney Participation

A debt collector may not falsely represent or imply that the collector is an attorney or that a communication is from an attorney. 15 U.S.C. § 1692e(3). Demand letters sent by a nonattorney debt collector using the attorney's letterhead and an image of the attorney's signature violates

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the FDCPA. The attorney as well as the debt collector is liable. *Taylor v. Perrin, Landry, DeLaunay & Durand*, 103 F.3d 1232 (5th Cir. 1997); *Clomon v. Jackson*, 988 F.2d 1314 (2d Cir. 1993). Liability also attaches if the attorney signs demand letters at the direction of a debt collection agency without independent knowledge of the cases. *Masuda v. Thomas Richards & Co.*, 759 F. Supp. 1456 (C.D. Cal. 1991).

§ 2.16:6 Threats of Action

The debt collector may not represent or imply that nonpayment will result in the arrest or imprisonment of any person or the seizure, garnishment, attachment, or sale of any property or wages, unless the action is lawful and the debt collector or creditor intends to take that action. 15 U.S.C. § 1692e(4). Also, a debt collector may not threaten to "take any action that cannot be legally taken or is not intended to be taken." 15 U.S.C. § 1692e(5); *see also United States v. National Financial Services, Inc.*, 98 F.3d 131 (4th Cir. 1996) (false statement of intent to sue); *Bentley v. Great Lakes Collection Bureau*, 6 F.3d 60, 63 (2d Cir. 1993).

§ 2.16:7 Criminal Conduct

A debt collector may not falsely represent or imply that the consumer committed a crime or other conduct in order to disgrace the consumer. 15 U.S.C. § 1692e(7).

§ 2.17 Prohibited Practices: Handling Funds

§ 2.17:1 Collection of More Than Amount Allowed

A debt collector may not collect any amount, including interest, fees, charges, or expenses incidental to the obligation, unless the amount is expressly authorized by the agreement or permitted by law. 15 U.S.C. § 1692f(1); *see also Sandlin v. Shapiro & Fishman*, 919 F. Supp. 1564 (M.D. Fla. 1996). Charges that are discretionary with a court should not be demanded as if they are automatically due. *Duffy v. Landberg*, 215 F.3d 871 (8th Cir. 2000).

§ 2.17:2 Postdated Checks

A debt collector may not accept a check postdated by more than five days unless the person giving the check is notified in writing of the debt collector's intent to deposit the check not more than ten or less than three business days before that deposit. 15 U.S.C. § 1692f(2). The debt collector may not deposit or threaten to deposit a postdated check before the date shown. 15 U.S.C. § 1692f(4).

§ 2.18 Bringing Collection Suit in Court of Improper Venue

Except when filing a suit to foreclose a real estate lien, a debt collector must bring its action against the consumer in the judicial district in which the consumer signed the contract sued on or in which the consumer resides at the commencement of the action. 15 U.S.C. § 1692i(a). This requirement preempts any contrary provision of state law. *Hageman v. Barton*, 817 F.3d 611, 618 (8th Cir. 2016); *see also Beeler-Lopez v. Dodeka, LLC*, 711 F. Supp. 2d 679, 681 (E.D. Tex. 2010) (stating that a law firm substituted after a violation of the venue provision of the FDCPA could not be held liable for the violation). See part II. in chapter 15 of this manual regarding venue generally.

§ 2.19 Bona Fide Error Defense

If the violation was not intentional and resulted from a bona fide error made despite the maintenance of procedures reasonably adapted to avoid any such error, the debt collector can avoid liability. 15 U.S.C. § 1692k(c); *see also Stojanovski v. Strobl & Manoogian, P.C.*, 783 F. Supp. 319 (E.D. Mich. 1992). *But see Jerman v.*

Carlisle, McNellie, Rini, Kramer & Ulrich LPA, 559 U.S. 573 (2010) (holding that bona fide error defense does not apply if violation resulted from incorrect interpretation of law).

§ 2.20 Remedies and Penalties

§ 2.20:1 Consumer Recovery

A debt collector who violates the FDCPA is liable for—

1. actual damages;
2. additional damages not to exceed $1,000 in the case of an action by an individual;
3. for a class action, the amount that could have been recovered by each individual in actual damages and additional recovery for all class members not to exceed the lesser of $500,000 or 1 percent of the debt collector's net worth; and
4. reasonable attorney's fees and court costs.

15 U.S.C. § 1692k(a).

The $1,000 statutory damages cap on an individual claim is per suit, not per violation. *Wright v. Finance Service of Norwalk*, 22 F.3d 647 (6th Cir. 1994); *Harper v. Better Business Services, Inc.*, 961 F.2d 1561 (11th Cir. 1992). Further, actual damages attributable to the consumer's conduct cannot be assessed, even if they occurred in conjunction with a possible FDCPA violation. *See Coursen v. Shapiro & Fishman, GP*, 558 Fed. App'x 882, 886 (11th Cir. 2014) (technical FDCPA violation during foreclosure proceeding did not result in consumer's loss of property; consumer's failure to pay was precipitating cause).

§ 2.20:2 Materiality

Certain case law supports the premise that materiality is necessarily a consideration when viewing an alleged violation of the FDCPA. Materiality is evaluated based on the perceived impact on the consumer's understanding and reaction to the alleged misstatement. *See Jensen v. Pressler & Pressler*, 791 F.3d 413, 420–22 (3d Cir. 2015) ("a statement in a communication is material if it is capable of influencing the decision of the least sophisticated debtor"); *Janson v. Katharyn B. Davis, LLC*, 806 F.3d 435 (8th Cir. 2015) (although collector's statement was false in technical sense, there is no violation of sections 1692e or 1692f if no one was misled); *Donohue v. Quick Collect, Inc.*, 592 F.3d 1027, 1034 (9th Cir. 2010) (mislabeling amounts owed did not undermine consumer's ability to choose her response to debt); *Hahn v. Triumph Partnerships LLC*, 557 F.3d 755, 757 (7th Cir. 2009) ("[m]ateriality is an ordinary element of any federal claim based on a false or misleading statement"); *Wahl v. Midland Credit Management, Inc.*, 556 F.3d 643, 645–46 (7th Cir. 2009) (it is not enough to show that statement is false; consumer must prove that false statement would mislead or deceive an unsophisticated consumer).

§ 2.20:3 Limitations

Claims for recovery under the FDCPA must be brought within one year. 15 U.S.C. § 1692k(d). The cause of action accrues when the plaintiff has a complete cause of action under the FDCPA and occurrence of the violation first becomes known to the consumer. *Benzemann v. Citibank N.A.*, 806 F.3d 98, 102–03 (2d Cir. 2015).

§ 2.20:4 Bad-Faith Suit by Consumer

If the court finds that a consumer's action was brought in bad faith or for purposes of harassment, the court may award the defendant attor-

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ney's fees reasonable in relation to the work expended and costs. 15 U.S.C. § 1692k(a)(3).

[Sections 2:21 through 2.30 are reserved for expansion.]

III. Texas Debt Collection Practices Act

The abbreviation "DCPA" is often used in Texas by judges, authors, and practitioners when writing about the Texas Debt Collection Practices Act and is so used in this part of the chapter.

§ 2.31 Scope

§ 2.31:1 Transactions Covered

The DCPA, Tex. Fin. Code §§ 392.001–.404, applies to anyone who attempts to collect a "consumer debt," which is an obligation or alleged obligation primarily for personal, family, or household purposes, arising from a transaction or alleged transaction. Tex. Fin. Code § 392.001(2). The DCPA does not apply to commercial transactions. *Ford v. City State Bank of Palacios*, 44 S.W.3d 121, 135–36 (Tex. App.—Corpus Christi–Edinburg 2001, no pet.).

§ 2.31:2 Parties Liable

Unlike the FDCPA, the DCPA applies not only to attorneys and collection agencies but also to creditors who are collecting their own debts from consumers. *See* Tex. Fin. Code § 392.001(3), (5), (6).

Although the DCPA generally covers anyone who attempts to collect a consumer debt, other requirements are placed on third-party debt collectors. These are debt collectors as defined by the FDCPA, but do not include an attorney collecting a debt as an attorney on behalf of and in the name of a client unless the attorney has nonattorney employees who either are regularly engaged to solicit debts for collection or regularly make contact with debtors to collect or adjust debts. Tex. Fin. Code § 392.001(7). See sections 2.32:3 and 2.32:4 below regarding laws particularly applicable to third-party debt collectors.

§ 2.31:3 Potential Parties

A DCPA violation must arise out of a debtor-creditor relationship, but the cause of action is not exclusive to the debtor. Any person against whom the prohibited acts are committed may sue. *Campbell v. Beneficial Finance Co.*, 616 S.W.2d 373, 374–75 (Tex. App.—Texarkana 1981, no writ).

§ 2.31:4 Restrictive Language of Debt Collection Practices Act

Unlike the FDCPA, which uses expansive language to describe a violation (see, for example, the first paragraph of 15 U.S.C. § 1692e), the DCPA is apparently violated only if a party commits one of the acts specified in Tex. Fin. Code §§ 392.301–.306.

§ 2.31:5 Use of Independent Debt Collector

A creditor violates the DCPA if it uses an independent debt collector after having actual knowledge that that debt collector repeatedly or continuously engages in acts or practices that violate the DCPA. Tex. Fin. Code § 392.306.

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§ 2.32 Required Conduct

§ 2.32:1 Providing Name of Assignee

Except for a person servicing or collecting real estate first-lien mortgage or credit card debts, a debt collector must clearly disclose in any communication with the debtor the name of the party to whom the debt has been assigned or is owed at the time of making any demand for money. Tex. Fin. Code § 392.304(a)(4), (b).

§ 2.32:2 Debt Collector Identification

In any written communication regarding an alleged debt, the debt collector must clearly disclose his name, address (either street or post office box), and telephone number. Tex. Fin. Code § 392.304(a)(6).

§ 2.32:3 Correction of Files of Third-Party Debt Collectors and Credit Bureaus

If an individual disputes the accuracy of an item in a third-party debt collector's or credit bureau's file and gives written notice of the dispute, a specific procedure must be followed for resolution of the dispute. See Tex. Fin. Code § 392.202 for details of the procedure.

Two federal courts in Texas have held that the Fair Credit Report Act, 15 U.S.C. § 1681 *et seq.* ("FCRA") preempts state statutory claims related to information furnishers to credit reporting bureaus. *See Shaunfield v. Experian Information Solutions, Inc.*, 991 F. Supp. 2d 786, 800 (N.D. Tex. 2014), and *Pachecano v. JPMorgan Chase Bank National Ass'n*, No. SA-11-CV-00805-DAE, 2013 U.S. Dist. WL 4520530 (W.D. Tex. Aug. 26, 2013).

§ 2.32:4 Surety Bond for Third-Party Debt Collector

Third-party debt collectors must obtain a $10,000 surety bond and file it with the secretary of state. This bond must be payable both to any person damaged by a violation of the DCPA and to the state in favor of any such person. Tex. Fin. Code § 392.101. Most bond issuers do not file the bonds, and third-party collectors who purchase bonds should take steps to ensure that their bonds are filed.

§ 2.33 Prohibited Practices

§ 2.33:1 Debtor Contact

Debt collectors may not oppress, harass, or abuse a person by—

1. using profane or obscene language or language intended to abuse the hearer or reader unreasonably;
2. placing phone calls without disclosing the name of the individual making the call and with the intent to annoy, harass, or threaten a person at the called number;
3. causing a person to incur collect phone call or telegram charges without first disclosing the name of the person making the communication; or
4. causing a phone to ring repeatedly or continuously or making repeated or continuous phone calls, with the intent to harass a person at the called number.

Tex. Fin. Code § 392.302.

§ 2.33:2 Misrepresentations

Tex. Fin. Code § 392.304(a) lists nineteen fraudulent, deceptive, or misleading representations

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that are illegal under the DCPA. Some of the commonly encountered violations include—

1. using a name other than the true business or professional name or the true legal or personal name of the debt collector while engaged in the debt collection;
2. falsely representing that the debt collector has information or something of value for the consumer in order to solicit or discover information about the consumer;
3. in the case of a third-party debt collector, failing to disclose clearly in the initial written or oral communication between the third-party debt collector and the debtor that the communication is an attempt to collect a debt and that any information obtained will be used for that purpose (does not apply to a formal pleading);
4. in the case of a third-party debt collector, failing to disclose in communications between the third-party debt collector and the debtor subsequent to the initial communication that the communication is from a debt collector (does not apply to a formal pleading);
5. using a written communication that fails to indicate clearly the name of the debt collector and the debt collector's address if the written notice refers to a delinquent consumer debt;
6. misrepresenting the character, extent, or amount of a consumer debt or misrepresenting the consumer debt's status in a judicial or governmental proceeding;
7. using a communication that purports to be from an attorney or law firm if it is not; and
8. representing that a consumer debt is being collected by an attorney or law firm if it is not.

Tex. Fin. Code § 392.304(a)(1), (a)(3), (a)(5)(A), (a)(5)(B), (a)(6), (a)(8), (a)(16), (a)(17).

§ 2.33:3 Threats or Coercion

Eight separate threats or coercive practices are proscribed at Tex. Fin. Code § 392.301. Commonly encountered violations are—

1. accusing falsely or threatening to accuse falsely a person of fraud or another crime;
2. threatening to file a charge, complaint, or criminal action against a debtor if the debtor has not violated a criminal law; and
3. threatening to take an action prohibited by law.

Tex. Fin. Code § 392.301(a)(2), (a)(6), (a)(8).

See also Dixon v. Brooks, 604 S.W.2d 330, 334 (Tex. App.—Houston [14th Dist.] 1980, writ ref'd n.r.e.). A debt collector may not threaten criminal prosecution to collect a consumer debt, even if the debtor's conduct may have been criminal. *Brown v. Oaklawn Bank*, 718 S.W.2d 678, 680 (Tex. 1986).

§ 2.33:4 Other Unfair or Unconscionable Means

Debt collectors may not use unfair or unconscionable means to seek or obtain a written statement or acknowledgment in any form specifying that the debt was incurred for necessaries if it was not or to collect or attempt to collect interest, a charge, a fee, or an expense incidental to the obligation unless it was expressly authorized by the agreement creating the obligation or legally chargeable to the consumer. Tex. Fin.

Code § 392.303. Further, the debt collector may not collect or attempt to collect an obligation under a check, draft, debit payment, or credit card payment if the check or draft was dishonored or the payment was refused because the check or draft was not drawn or the payment was not made by a person authorized to use the account; the debt collector has received written notice from a person authorized to use the account that the check, draft, or payment was unauthorized; and the authorized person has filed a report concerning the unauthorized check, draft, or payment with a law enforcement agency and has provided the debt collector a copy of the report. Tex. Fin. Code § 392.303(a)(3). A debt collector is not prohibited from collecting or attempting to collect such an obligation if the debt collector has credible evidence that the report filed with the law enforcement agency is fraudulent and that the check, draft, or payment was authorized. Tex. Fin. Code § 392.303(c).

§ 2.34 Requirement of Actual Damages

In addition to proving a violation of the DCPA, a consumer ordinarily must also prove actual damages to recover. *Elston v. Resolution Services, Inc.*, 950 S.W.2d 180, 183–84 (Tex. App.—Austin 1997, no writ). It is possible that recovery of an injunction under the Act is enough to allow an award of attorney's fees, but *Elston* did not reach that issue.

§ 2.35 Defense—Bona Fide Error

No liability accrues if the violation resulted from a bona fide error that occurred despite the use of reasonable procedures adopted to avoid the error. Tex. Fin. Code § 392.401.

§ 2.36 Remedies and Penalties

§ 2.36:1 Civil

Any person affected by a violation of the DCPA may maintain an action for injunctive relief and to recover actual damages. If the action is successful, the person may recover attorney's fees and court costs. Tex. Fin. Code § 392.403. Certain violations carry minimum damages of $100. Tex. Fin. Code § 392.403(e). *But see Elston v. Resolution Services, Inc.*, 950 S.W.2d 180 (Tex. App.—Austin 1997, no writ).

§ 2.36:2 Criminal

Any person who violates the Debt Collection Practices Act commits a misdemeanor punishable by a fine of between $100 and $500 per violation. Tex. Fin. Code § 392.402.

§ 2.36:3 Debt Collection Practices Act Violation Also DTPA Violation

A violation of the DCPA is a deceptive trade practice under the Texas Deceptive Trade Practices–Consumer Protection Act (DTPA). Tex. Fin. Code § 392.404(a). A consumer who sues under the DTPA as a result of a DCPA violation is not subject to the limitations on damages imposed by the 1995 amendments to the DTPA. Tex. Bus. & Com. Code § 17.50(h).

§ 2.36:4 Bad-Faith Suit by Debtor

If the court finds that a DCPA suit was brought in bad faith or for purposes of harassment, it must award the defendant attorney's fees reasonably related to the work performed and costs. Tex. Fin. Code § 392.403(c); *see also Sifuentes v. Carrillo*, 982 S.W.2d 500 (Tex. App.—San Antonio 1998, pet. denied).

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§ 2.36:5 Fair Consumer Debt Collection Act

Effective September 1, 2019, a debt buyer, as defined by the Texas Finance Code and as distinguished from the original consumer creditor, may not commence an action on an acknowledgement to revive a time-barred consumer debt. Acts 2019, 86th Leg., R.S., ch. 1055, §§ 2, 3 (H.B. 996) (codified at Tex. Fin. Code § 392.307 and known as the Fair Consumer Debt Collection Act). A debt buyer may not, directly or indirectly, commence an action against or initiate arbitration with a consumer to collect a consumer debt after the expiration of the applicable limitations period provided by section 16.004 of the Texas Civil Practice and Remedies Code or section 3.118 of the Texas Business and Commerce Code. If an action to collect a consumer debt is barred under subsection (c), the cause of action is not revived by a payment of the consumer debt, an oral or written reaffirmation of the consumer debt, or any other activity on the consumer debt. Tex. Fin. Code § 392.307(c), (d). The changes effective September 1, 2019, apply only to an action of a debt buyer to collect a consumer debt if the action occurs on or after that date. An action of a debt buyer to collect a consumer debt that occurs before September 1, 2019, is governed by the law in effect immediately before that date, and the former law is continued in effect for that purpose. *See* Acts 2019, 86th Leg., R.S., ch. 1055, § 4 (H.B. 996).

The debt buyer can still attempt to collect a time-barred consumer debt if the debt buyer provides the consumer in its initial written communication notice in twelve-point type that is boldfaced, capitalized, or underlined or otherwise conspicuously set out from surrounding material, among other language: "THE LAW LIMITS HOW LONG YOU CAN BE SUED ON A DEBT. BECAUSE OF THE AGE OF YOUR DEBT, WE WILL NOT SUE YOU FOR IT." Additional language is included in the notice depending on the status of the reporting of the debt to consumer reporting agencies. Tex. Fin. Code § 392.307(e).

[Sections 2.37 through 2.40 are reserved for expansion.]

IV. Interest and Time-Price Differential

§ 2.41 Interest Defined

§ 2.41:1 Interest Generally

Interest is the compensation allowed by law for the use, forbearance, or detention of money. Tex. Fin. Code § 301.002(a)(4). It does not include time-price differential, nor does it include compensation or other amounts that are determined or stated by the Finance Code or other applicable law not to constitute interest or that are permitted to be contracted for, charged, or received in addition to interest in connection with an extension of credit. Tex. Fin. Code § 301.002(a)(4). See section 2.46 below regarding time-price differential.

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

The "use" of money is that which is contracted for when a loan is made. Forbearance occurs if there is a debt due or to become due and parties agree to extend the time of its payment. Detention of money arises within the meaning of the usury statute if a debt has become due and the debtor has withheld payment without a new contract giving him the right to do so. *Parks v. Lubbock*, 51 S.W. 322, 323 (Tex. 1899); *Tygrett v.*

University Gardens Homeowners' Ass'n, 687 S.W.2d 481, 483 (Tex. App.—Dallas 1985, writ ref'd n.r.e.).

§ 2.42 Charges Other Than Contractual Interest

§ 2.42:1 Other Charges Generally

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

§ 2.42:2 "Front-End" Charges

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

§ 2.42:3 Commitment Fees

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

§ 2.42:4 Late Charges

If a borrower is charged for failing to make a required loan payment on time, the charge has been held to be a "charge for the detention of money" and therefore interest. *Butler v. Holt Machinery Co.*, 741 S.W.2d 169, 173–74 (Tex. App.—San Antonio 1987, writ denied), *disapproved as to other issue by George A. Fuller Co. of Texas v. Carpet Services, Inc.*, 823 S.W.2d 603 (Tex. 1992). If the transaction is not a credit or lending transaction, however, a late charge is not interest. *See, e.g., Bexar County Ice Cream Co. v. Swensen's Ice Cream Co.*, 859 S.W.2d 402, 406 (Tex. App.—San Antonio 1993, writ denied) (franchise agreement), *overruled on other grounds by Barraza v. Koliba*, 933 S.W.2d 164, 167–68 (Tex. App.—San Antonio, 1996, writ denied); *Potomac Leasing Co. v. Housing Authority of City of El Paso*, 743 S.W.2d 712, 713 (Tex. App.—El Paso 1987, writ denied) (lease).

If the debtor alleges usury because of late charges, the presence of a usury savings clause in the contract may negate the usury claim. *See Parhms v. B&B Ventures, Inc.*, 938 S.W.2d 199, 203–04 (Tex. App.—Houston [14th Dist.] 1997, writ denied); *see also Coxson v. Commonwealth Mortgage Co. of America, L.P.*, 43 F.3d 189, 191 (5th Cir. 1995) (quoting *Shropshire v. Commerce Farm Credit Co.*, 120 Tex. 400, 30 S.W.2d 282, 285–86 (Tex. 1930) ("[A] contract is usurious when there is any contingency by which the lender may get more than the lawful

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rate of interest"). See section 2.59 below regarding usury savings clauses.

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

§ 2.42:5 Prepayment Penalties or Charges

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

§ 2.42:6 Assumption of Third Party's Debt

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

§ 2.42:7 Pleadings

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

§ 2.43 Methods of Computing Interest

§ 2.43:1 United States Rule

Under the United States Rule, interest is computed on the principal for only that time during which the principal is unpaid. If a payment is insufficient to pay accumulated interest, the unpaid interest continues to accumulate and is paid from proceeds of subsequent payments without being added to the unpaid balance; that is, interest does not accrue on a deficiency in payment of interest. This method is sanctioned by Regulation Z (*see* 12 C.F.R. § 1026.22), as one way of computing the annual percentage rate for closed-end credit transactions. *See* 12 C.F.R. pt. 1026 app. J (2017).

§ 2.43:2 Actuarial Method

Under the actuarial method, at the end of each unit-period or fraction of a unit-period, the unpaid balance of the amount financed is increased by the finance charge earned during that period and is decreased by the total payment, if any, made at the end of that period. This method is generally considered the true rate of return on a creditor's investment and is one way of computing the annual percentage rate for closed-end transactions under Regulation Z. *See* 12 C.F.R. § 1026.22; 12 C.F.R. pt. 1026 app. J (2017). Each payment is allocated between interest and principal so that it is applied first to accumulated interest with the remainder subtracted from (or any deficiency added to) the unpaid balance.

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§ 2.43:3 Add-On Method

Under the add-on method, interest is computed, at the time the loan is made, on the full principal amount for the full term of the loan and is added to the amount the debtor is obligated to pay. That total is divided by the number of payments to be made, with the result being the same amount for each payment, even though the principal owed will decline with each payment. Add-on interest rates yield substantially higher monthly payments for the same stated interest rate than other interest rates. For example, a $10,000.00 loan, payable in monthly installments over one year with an add-on interest rate of 10 percent, yields monthly payments of $916.67. Under the United States Rule, such a monthly payment would be equivalent to an annual interest rate of 17.97 percent.

§ 2.43:4 Determining Which Method to Use

If the loan is of a type in which add-on interest is allowed or dictated by statute—for example, motor vehicle installment contracts—that method should be used unless the situation dictates otherwise. For an act committed or a transaction occurring before September 1, 1997, the United States Rule apparently is the correct method in Texas of computing earned interest absent an agreement otherwise. *See Community Savings & Loan Ass'n v. Fisher*, 409 S.W.2d 546, 550 (Tex. 1966). For acts committed or transactions occurring on or after September 1, 1997, the actuarial method should be used. *See* Tex. Fin. Code § 302.001(c).

§ 2.43:5 Calculating Interest Based on 360-Day Year

A creditor and an obligor may agree to calculate an annual interest rate on a commercial loan on a 365/360 basis or a 366/360 basis, as applicable, determined by applying the ratio of the percentage annual interest rate agreed to by the parties over a year of 360 days, multiplied by the outstanding principal balance, multiplied by the actual number of days the principal balance is outstanding.

The parties may also agree to compute the term and rate of a commercial loan on the basis of a 360-day year consisting of twelve thirty-day months. Tex. Fin. Code § 306.003(a).

The parties may agree that one or more payments of interest due with respect to a commercial loan may be paid on a periodic basis when due wholly or partly by adding to the principal balance of the loan the amount of unpaid interest due or scheduled to be due, regardless of whether the interest added to the principal balance is evidenced by an existing or a separate promissory note or other agreement. "On and after the date an amount of interest is added to the principal balance, that amount no longer constitutes interest, but instead [is] part of the principal for purposes of calculating the maximum lawful rate or amount of interest on the loan." Tex. Fin. Code § 306.003(b).

§ 2.44 Interest Rates

Determining the interest rate (including the maximum rate) applicable to a transaction under Texas law can vary, depending on whether the transaction is a commercial or consumer transaction, involves a revolving account, involves a default, or involves a judgment, among other things, and can be preempted by other authorities, including federal law. The discussions below should be viewed with these understandings in mind.

§ 2.44:1 Default Maximum Rate of 10 Percent

Unless a statute provides otherwise, the maximum interest rate in Texas is 10 percent per annum. Tex. Const. art. XVI, § 11; Tex. Fin. Code §§ 302.001(b), 342.004(a); *cf. Tully v.*

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Citibank (South Dakota), N.A., 173 S.W.3d 212, 218, n.6 (Tex. App.—Texarkana 2005, no pet.) (noting that Texas's usury laws may be preempted by federal law and that Texas law allows for interest up to 18 percent per annum for revolving charge accounts). Virtually all loans have a statutorily provided alternative maximum interest rate.

§ 2.44:2 If Rate Not Specified—6 Percent

If no specified interest rate is agreed on by the parties, 6 percent annual interest, starting thirty days after the amount is due and payable, may be charged. Tex. Const. art. XVI, § 11; Tex. Fin. Code § 302.002; *see Miner-Dederick Construction Corp. v. Mid-County Rental Service, Inc.*, 603 S.W.2d 193, 200 (Tex. 1980). This rate is referred to as "legal interest." *See* Tex. Fin. Code § 301.002(a)(8).

If the parties agree to the material terms of the loan, that is, the principal amount and the amount the obligor is to pay, and the interest rate can be calculated from the information stated, the failure to explicitly state the interest rate does not relegate the interest rate to 6 percent. *Community Savings & Loan Ass'n v. Fisher*, 409 S.W.2d 546, 550 (Tex. 1966).

The issue of an unspecified interest rate frequently arises if a seller wants to encourage prompt payment by charging interest on unpaid amounts, even though no interest rate was agreed on by the parties. *See Triton Oil & Gas Corp. v. Marine Contractors & Supply, Inc.*, 644 S.W.2d 443 (Tex. 1982); *Watson v. Cargill, Inc.*, 573 S.W.2d 35 (Tex. App.—Waco 1978, writ ref'd n.r.e.). If the seller's charges on invoices or statements consistently reflect the interest charge, the seller may be able to establish that the interest rate was agreed to by implied contract. *See Preston Farm & Ranch Supply, Inc. v. Bio-Zyme Enterprises*, 625 S.W.2d 295, 298 (Tex. 1981).

§ 2.45 Interest Rate Ceilings

§ 2.45:1 Ceilings Generally

Four interest rate ceilings may be used by parties to written contracts: weekly, monthly, quarterly, and yearly. Tex. Fin. Code §§ 303.002–.009. The weekly ceiling is determined by taking the "auction rate" (the auction average rate quoted on a bank discount basis for twenty-six-week treasury bills issued by the federal government, as published by the Federal Reserve Board, for the week preceding the week for which the weekly ceiling is to take effect), multiplying it by two, and rounding it to the nearest one-quarter of one percent. The weekly rate becomes effective on Monday of each week and continues until the following Sunday. Tex. Fin. Code § 303.003. The monthly ceiling is computed by the consumer credit commissioner on the first business day of the month for which the rate applies. It is computed by averaging the weekly ceilings computed during the preceding month. Tex. Fin. Code § 303.005. The quarterly and annualized ceilings are computed by the consumer credit commissioner on December 1, March 1, June 1, and September 1 of each year and become effective the following January 1, April 1, July 1, and October 1, respectively. Tex. Fin. Code § 303.008.

If the computation is less than 18 percent, the ceiling interest rate is 18 percent. Tex. Fin. Code § 303.009(a). If the computation is more than 24 percent, the ceiling interest rate is 24 percent. Tex. Fin. Code § 303.009(b).

If another applicable law provides for an alternative ceiling or maximum rate, that rate may be used instead of these ceilings. Tex. Fin. Code § 303.001(a).

§ 2.45:2 Variable Rate Ceilings

The parties to a contract may agree to a variable interest rate, but the rate as it varies must not

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exceed the ceiling applicable to the contract. Tex. Fin. Code §§ 303.015, 303.402. This sort of variable contract rate may not be used in a contract in which the interest or time-price differential is precomputed and added into the amount of the contract at the time the contract is made. Tex. Fin. Code § 303.015(b).

See section 2.101 below for other rules and requirements governing variable rate transactions.

§ 2.45:3 Maximum Interest Rates for Particular Types of Loans

The rules governing interest rates for particular types of transactions are set out at the following sections in this chapter:

- open-end accounts, section 2.83:2
- consumer loans, section 2.84:4
- revolving credit accounts, section 2.85:2
- variable rate transactions, section 2.101:2
- credit card transactions, section 2.102:2
- loans for business, commercial, or investment purposes, section 2.103
- loans to corporations, section 2.104
- commercial loans, section 2.105:2
- commercial loans of $3,000,000 or more, section 2.106:2
- negotiable instruments, section 2.107
- home solicitation transactions, section 2.108:2

§ 2.45:4 Where to Find Ceiling Rates

The consumer credit commissioner publishes ceiling interest rates in the Texas Register. Each such publication indicates both the type of ceiling (weekly, monthly, quarterly, or yearly) and the effective period of the ceiling.

§ 2.46 Time-Price Differential

§ 2.46:1 Time-Price Differential Generally

A time-price differential generally is the amount that is added to the cash price at which a seller offers to sell property or services and is payable for the privilege of paying after the time of sale. Tex. Fin. Code § 301.002(a)(16). Although time-price differential is not considered interest, the amount chargeable is limited by statute for particular types of loans, such as retail installment sales and motor vehicle installment sales.

§ 2.46:2 Retail Installment Sale or Retail Charge Agreement

For a retail installment sale governed by Texas Finance Code chapter 345, time-price differential is the amount paid or payable for paying for goods or services in installments. Tex. Fin. Code § 345.001(9). See section 2.86:2 below regarding rules governing time-price differential in retail installment sales and section 2.87:2 regarding rules governing time-price differential in retail charge agreements.

§ 2.46:3 Motor Vehicle Installment Sale

For a motor vehicle installment sale governed by Texas Finance Code chapter 348, time-price differential is the total amount added to the principal balance to determine the balance of the retail buyer's indebtedness. Tex. Fin. Code § 348.001(9). See section 2.88:2 below regarding rules governing time-price differential in motor vehicle installment sales.

[Sections 2.47 through 2.50 are reserved for expansion.]

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V. Usury

§ 2.51 Elements of Usury

"Usurious interest" is defined as interest that exceeds the applicable maximum amount allowed by law. Tex. Fin. Code § 301.002(a)(17).

Usury is committed by contracting for, charging, or receiving interest or time-price differential greater than the maximum allowable by law. Tex. Fin. Code § 302.001(b); *cf. Tully v. Citibank (South Dakota), N.A.*, 173 S.W.3d 212, 218 n.6 (Tex. App.—Texarkana 2005, no pet.) (noting that Texas's usury laws may be preempted by federal law and that Texas law allows for interest up to 18 percent per annum for revolving charge accounts).

A usurious transaction has three elements: a loan of money; an absolute obligation to repay the principal; and the exaction of a greater compensation than allowed by law for the use of the money by the borrower. *First Bank v. Tony's Tortilla Factory, Inc.*, 877 S.W.2d 285, 287 (Tex. 1994). The "exaction" of money can be by contracting for, charging, or receiving. Tex. Fin. Code § 305.001(a).

The civil penalties for excessive interest, time-price differential, and other charges are set out in Finance Code chapters 305 and 349 and discussed at sections 2.56:1 and 2.56:2 below.

§ 2.52 Actions Constituting Usury

§ 2.52:1 Contracting for Usurious Interest

If there is a question regarding the existence or terms of a contract, traditional rules of contract interpretation apply. *See Baker v. Howard*, 799 S.W.2d 450 (Tex. App.—Waco 1990, no writ). However, "when the contract by its terms, construed as a whole, is doubtful, or even susceptible of more than one reasonable construction, the court will adopt the construction which comports with legality." *Walker v. Temple Trust Co.*, 80 S.W.2d 935, 936 (Tex. 1935).

A contract issue arises more often if an acceleration clause is in the note or contract. An interest-bearing contract or note allowing acceleration of the unpaid balance of the contract or note can be usurious, because it calls for payment of interest not yet accrued. Acceleration of the debt, however, is not usurious, because future interest has not accrued. *Jim Walter Homes, Inc. v. Schuenemann*, 668 S.W.2d 324, 327–29 (Tex. 1984); *Coastal Cement Sand, Inc. v. First Interstate Credit Alliance, Inc.*, 956 S.W.2d 562, 568 (Tex. App.—Houston [14th Dist.] 1997, writ denied).

§ 2.52:2 Charging Usurious Interest

A usurious charge may be contained in an invoice, letter, ledger sheet, or other book or document. The basis of the action is a claim or demand for usury made by the creditor, and the vehicle for the claim or demand is immaterial except as an evidentiary fact. *Danziger v. San Jacinto Savings Ass'n*, 732 S.W.2d 300, 304 (Tex. 1987). A pleading is not a "charge." *George A. Fuller Co. of Texas v. Carpet Services, Inc.*, 823 S.W.2d 603, 605 (Tex. 1992). Demand letters, however, can be charges. *Woodcrest Associates, Ltd. v. Commonwealth Mortgage Corp.*, 775 S.W.2d 434, 437 (Tex. App.—Dallas 1989, writ denied). Invoices can contain a usurious charge; usury litigation often derives from a statement on an invoice adding interest to the amount due. *See William C. Dear & Associates v. Plastronics, Inc.*, 913 S.W.2d 251 (Tex. App.—Amarillo 1996, writ denied).

§ 2.53 Agent's Liability for Usury

A creditor's agent, such as a law firm or collection agency, may be liable if by its actions it

contracts for, charges, or receives usurious interest or time-price differential. *Lupo v. Equity Collection Service*, 808 S.W.2d 122, 124–25 (Tex. App.—Houston [1st Dist.] 1991, no writ).

§ 2.54 Guarantors and Usury

Guarantors are not obligors for purposes of the Texas Credit Title (Texas Finance Code tit. 4, subtit. A, Tex. Fin. Code §§ 301.001–339.005) and therefore cannot claim usury under that title. Tex. Fin. Code § 301.002(a)(13)(B). The Finance Code does not specifically address whether guarantors may claim usury, but it is doubtful that a guarantor could claim usury unless the guaranty contract itself was usurious. *See Houston Sash & Door Co. v. Heaner*, 577 S.W.2d 217, 222 (Tex. 1979).

§ 2.55 Discounted Debt

An "account purchase transaction" is one in which a person engaged in a commercial enterprise sells accounts, instruments, documents, or chattel paper at a discount, even if the person has a repurchase obligation related to the transaction. Tex. Fin. Code § 306.001(1). A discount in or charged under an account purchase transaction is not interest. The parties' characterization of an account purchase transaction as a purchase is conclusive that the transaction is not subject to a usury claim. Tex. Fin. Code § 306.103. *See also Ravkind v. Mortgage Funding Corp.*, 881 S.W.2d 203, 206 (Tex. App.—Houston [1st Dist.] 1994, no writ) (sale of note at discount does not constitute usury).

§ 2.56 Penalties

§ 2.56:1 Texas Finance Code Chapter 305

Liability for Usurious Interest: A person who contracts for, charges, or receives interest greater than the amount allowed in connection with a transaction for personal, family, or household use is liable to the obligor for an amount equal to the greater of (1) three times the amount computed by subtracting the amount of interest allowed from the total amount of interest contracted for, charged, or received or (2) $2,000 or 20 percent of the amount of the principal, whichever is less. Tex. Fin. Code § 305.001(a). A person who contracts for or receives interest that is greater than the amount allowed in connection with a commercial transaction is liable to the obligor for an amount that is equal to three times the amount computed by subtracting the amount of interest allowed from the total amount of interest contracted for or received. Tex. Fin. Code § 305.001(a–1). This liability applies only to a contract or transaction subject to tit. 4, subtit. A, Tex. Fin. Code §§ 301.001–339.005. Tex. Fin. Code § 305.001(b).

Additional Liability for More Than Twice Authorized Rate of Interest: A person who charges and receives interest greater than twice the amount allowed is liable to the obligor for (1) the principal amount on which the interest is charged and received and (2) the interest and all other amounts charged and received. Tex. Fin. Code § 305.002(a). This additional liability applies only to a contract or transaction for personal, family, or household use subject to Tex. Fin. Code §§ 301.001–339.005. Tex. Fin. Code § 305.002(b).

Liability for Usurious Legal Interest: A person who charges or receives legal interest greater than the amount allowed is liable to the obligor for an amount equal to the greater of (1) three times the amount computed by subtracting the amount of legal interest allowed from the total amount of interest charged or received or (2) $2,000 or 20 percent of the amount of the principal, whichever is less. Tex. Fin. Code § 305.003(a). This liability applies only to a transaction subject to Tex. Fin. Code §§ 301.001–339.005. Tex. Fin. Code § 305.003(b).

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Additional Liability for More Than Twice Authorized Rate of Legal Interest: A person who charges and receives legal interest greater than twice the amount allowed is liable to the obligor for (1) the principal amount on which the interest is charged and received and (2) the interest and all other amounts charged and received. Tex. Fin. Code § 305.004(a). This additional liability applies only to a contract or transaction subject to Tex. Fin. Code §§ 301.001–339.005. Tex. Fin. Code § 305.004(b).

Penalties Exclusive: The penalties provided by chapter 305 are the only penalties for violation of Tex. Fin. Code §§ 301.001–339.005 for contracting for, charging, or receiving interest in an amount greater than the amount allowed. Common-law penalties do not apply. Tex. Fin. Code § 305.007.

Criminal Penalty: A person commits a misdemeanor punishable by a fine not to exceed $1,000 if the person contracts for, charges, or receives interest on a transaction for personal, family, or household use that is greater than twice the amount allowed. Tex. Fin. Code § 305.008(a), (b). Each contract or transaction is a separate offense. Tex. Fin. Code § 305.008(c). Those provisions apply only to a contract or transaction subject to Tex. Fin. Code §§ 301.001–339.005. Tex. Fin. Code § 305.008(d).

§ 2.56:2 Texas Finance Code Chapter 349

Liability for Contracting for, Charging, or Receiving Excessive Interest: A person who contracts for, charges, or receives interest or time-price differential greater than the amount allowed under title 4, subtitle B, Tex. Fin. Code §§ 341.001–351.164, is liable to the obligor for an amount equal to twice the amount of the interest or time-price differential contracted for, charged, or received. Tex. Fin. Code § 349.001(a)(1). Also, a person who contracts for, charges, or receives a charge, other than interest or time-price differential, greater than the amount allowed is liable to the obligor for an amount equal to the greater of (1) three times the amount computed by subtracting the amount of the charge allowed from the amount of the charge contracted for, charged, or received or (2) $2,000 or 20 percent of the principal balance, whichever is less. Tex. Fin. Code § 349.001(b)(1).

Liability for Charges Exceeding Twice Amount Authorized: A person who contracts for, charges, or receives interest or time-price differential that in an aggregate amount exceeds twice the total amount of interest or time-price differential allowed under title 4, subtitle B, Tex. Fin. Code §§ 341.001–351.164, is liable to the obligor for (1) all principal or principal balance and (2) all interest or time-price differential. Tex. Fin. Code § 349.002(a).

Criminal Penalty: A person commits a misdemeanor punishable by a fine not to exceed $100 if the person contracts for, charges, or receives interest, time-price differential, and other charges that in an aggregate amount exceed twice the amount of interest, time-price differential, and other charges allowed. Tex. Fin. Code § 349.501(a), (b). Each contract or transaction is a separate offense. Tex. Fin. Code § 349.501(c).

§ 2.56:3 Attorney's Fees

In all usury cases the person committing the act of usury is also liable for the obligor's reasonable attorney's fees. Tex. Fin. Code §§ 305.005, 349.001(a)(2), (b)(2), 349.002(b).

§ 2.56:4 No Liability for Charging Interest Exceeding Contractual Amount

A person who charges or receives interest greater than the amount contracted for, but not greater than the maximum amount allowed, is not subject to penalties for usurious interest but may be liable for other remedies and relief as provided by law. Tex. Fin. Code § 305.001(c).

§ 2.56:5 No Liability for Charging Legal Interest during Thirty-Day Period

A person is not liable to an obligor solely because he charges or receives legal interest before the thirtieth day after the date on which the debt is due. Tex. Fin. Code § 305.102. See section 2.44:2 above regarding legal interest.

§ 2.57 Notice by Obligor

Before suing for a violation of the Texas Credit Title, claiming that the creditor has contracted for, charged, or received usurious interest, the obligor must give written notice advising the creditor in reasonable detail of the nature and amount of the violation at least sixty days before filing suit. Tex. Fin. Code § 305.006(b). The creditor may cure the violation within the sixty-day period and avoid liability. Tex. Fin. Code § 305.006(c). See section 2.60 below regarding curing usury.

An obligor who raises usury as a counterclaim to an original action by the creditor must provide notice complying with section 305.006(b) (described above) when the counterclaim is filed. The action may then be abated for sixty days, during which the creditor may cure the violation, pay the obligor's reasonable attorney's fees, and avoid liability. Tex. Fin. Code § 305.006(d). There is no corresponding requirement for notice for a claim of excessive charges under chapter 349 of the Finance Code.

§ 2.58 Spreading

Spreading is a method of allocating the total interest provided for in a loan over the full term of the loan. *See Groseclose v. Rum*, 860 S.W.2d 554, 558 (Tex. App.—Dallas 1993, no writ).

To determine whether a loan secured in any part by an interest in real property is usurious, the interest rate is computed by amortizing or "spreading" all interest contracted for, charged, or received, using the actuarial method, during the stated term of the loan. Tex. Fin. Code § 302.101(a). Realty-based loans are beyond the scope of this manual.

Spreading could be argued as being applicable to other cases, because it is well-recognized in the common law. *See, e.g., Nevels v. Harris*, 102 S.W.2d 1046, 1049 (Tex. 1937); *Mills v. Johnston*, 23 Tex. 308 (1859).

§ 2.59 Usury Savings Clause

A usury savings clause in a note or other loan document provides that, if the transaction is usurious, the interest rate will be lowered automatically to the maximum legal rate. *See First State Bank v. Dorst*, 843 S.W.2d 790 (Tex. App.—Austin 1992, writ denied). Most appellate cases discussing the effect of these clauses involve both a savings clause and the spreading doctrine. See section 2.58 above. A usury savings clause will not be given effect if a contract is usurious by its express terms but can purge a transaction of usury if the occurrence of a contingency causes the usury. *Parhms v. B&B Ventures, Inc.*, 938 S.W.2d 199, 203–04 (Tex. App.—Houston [14th Dist.] 1997, writ denied); *Dorst*, 843 S.W.2d at 793 (interest rate increased on transfer of mortgaged property).

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§ 2.60 Curing Usury

§ 2.60:1 Texas Credit Title

The creditor will not be liable for a usury violation under the Texas Credit Title if—

1. not later than sixty days after the date of actually discovering the violation, the creditor corrects the violation by taking any necessary action and making any necessary adjustment, including paying interest on a refund, if any, at the applicable rate provided for in the contract between the parties; and
2. the creditor gives written notice to the debtor of the violation before the debtor gives notice of the violation or files an action alleging the violation.

Tex. Fin. Code § 305.103(a). "Actually discovered" means just that—it does not mean when an ordinarily prudent person in the creditor's position would have discovered it. Tex. Fin. Code § 305.103(b). See Tex. Fin. Code § 305.103(c) regarding requirements of the notice to the debtor.

If more than one creditor may be liable for a particular violation, a correction by any of those creditors entitles all of them to protection from liability. Tex. Fin. Code § 305.104.

§ 2.60:2 Texas Finance Code Chapter 349

See section 2.90:3 below regarding curing excessive charge violations of Finance Code subtitle B.

§ 2.61 Defenses

§ 2.61:1 Bona Fide Error

A person is not subject to usury penalties for usurious interest or excessive charges resulting from accidental and bona fide error. Tex. Fin. Code §§ 305.101, 349.101(a)(1). The "bona fide error" defense is available if the evidence shows that usury resulted from ignorance of a material fact or from other unintentional mishaps in office practice or routine that may fairly be characterized as "clerical" errors. *Karg v. Strickland*, 919 S.W.2d 722, 725 (Tex. App.—Corpus Christi–Edinburg 1996, writ denied). Bona fide error is an affirmative defense, and the party asserting it has the burden of pleading and proving it. *Moore v. Sabine National Bank*, 527 S.W.2d 209, 213 (Tex. App.—Austin 1975, writ ref'd n.r.e.).

§ 2.61:2 Safe Harbors (Conformity with Other Law)

Texas Credit Title: A creditor does not commit usury if its action or omission conforms with an interpretation of the Credit Title in effect at the time of the act or omission that was made either by the consumer credit commissioner or a state or federal appellate court. Tex. Fin. Code § 303.401.

Texas Finance Code: A creditor does not violate the excessive charge rules of chapter 349 of the Finance Code if the violation was an act done or committed in good faith and in conformity with a rule adopted under an interpretation of title 4 of the Finance Code by a state agency, board, or commission; the federal Consumer Credit Protection Act, 15 U.S.C. §§ 1601–1693r; or a rule or regulation adopted under, or an interpretation of, the Consumer Credit Protection Act by an agency, board, or commission of the United States. Tex. Fin. Code § 349.101(a)(2).

§ 2.61:3 Time-Price Differential

If the transaction is not one in which a maximum time-price differential is set by law (for example, a motor vehicle installment transaction), proof that the transaction involved a time-

price differential and not interest is a defense to usury. The creditor must prove that—

1. the transaction was a bona fide sale and not a cash loan;
2. two prices were offered to the buyer;
3. the buyer was aware that two prices were being offered; and
4. the buyer knowingly chose the higher price for the privilege of paying after the time of sale.

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

§ 2.61:4 De Minimis Violation

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

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

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

§ 2.62 Statute of Limitation

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

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

§ 2.63 Common-Law Usury

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

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

[Sections 2.64 through 2.70 are reserved for expansion.]

VI. Federal Statutory Requirements

§ 2.71 Truth in Lending Act and Regulation Z

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

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

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

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

§ 2.71:2 Covered Transactions—Regulation Z

The Truth in Lending Act is implemented by Regulation Z of the Federal Reserve Board, 12 C.F.R. pt. 1026.

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

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

12 C.F.R. § 1026.1(c)(1).

"If a credit card is involved, . . . certain provisions [of Regulation Z] apply even if the credit is not subject to a finance charge or is not payable by a written agreement in more than four installments." 12 C.F.R. § 1026.1(c)(2).

§ 2.71:3 Required Disclosures—Open-End Transactions

12 C.F.R. § 1026.5 details the disclosures required for open-end credit transactions. Generally, they fall into three categories:

1. Initial disclosure statements that must be furnished to the consumer before the first transaction is made. 12 C.F.R. § 1026.5(b)(1) (with particular requirements set out at 12 C.F.R. § 1026.6).
2. Periodic statements. 12 C.F.R. § 1026.5(b)(2) (with particular requirements set out at 12 C.F.R. § 1026.7).
3. Subsequent disclosures required if prior disclosures have become inaccurate. 12 C.F.R. § 1026.5(e) (with particular requirements set out at 12 C.F.R. § 1026.9).

Under certain regulations, a written disclosure statement is also required to be provided to a potential cosigner on an open-end account, in substantially the wording set out in the regulation. *See, e.g.*, 16 C.F.R. § 444.3.

It should be noted that many credit practice rules (regulations) were repealed under the rulemaking authority of the Board of Governors of the Federal Reserve System, the Federal Home Loan Bank Board, and the National Credit Union Administration under the FTC Act, including 12 C.F.R. § 535.13(c). See section 1092(2) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act"), Pub. L. No. 111-203, 124 Stat. 1376 (2010), amending 15 U.S.C. § 57a(f); *cf.* Identification of Enforceable Rules and Orders, 76 Fed. Reg. 43,569 (July 21, 2011); 12 U.S.C. § 5581(b)(5)(B)(ii). Guidance suggests that the repealing of credit practices rules applicable to banks, savings associations, and federal credit unions should not be construed to permit the

actions that were previously prohibited. Instead, it has been cautioned that acts that previously were prohibited by the now-repealed regulations may violate other statutes or guidance, including sections 1031 and 1036 of the Dodd-Frank Act. *See* Board of Governors of the Federal Reserve System et al., "Interagency Guidance Regarding Unfair or Deceptive Credit Practices" (Aug. 22, 2014).

§ 2.71:4 Required Disclosures—Credit Card Transactions

Required disclosures in credit card transactions are governed by 15 U.S.C. § 1637(c) and 12 C.F.R. § 1026.60. Three notable disclosure categories are:

1. Annual percentage rates and fees. 15 U.S.C. § 1637(c)(1)(A)(i), (ii); 12 C.F.R. § 1026.60(b)(1).
2. Grace periods for avoiding finance charge, if such periods exist. 15 U.S.C. § 1637(c)(1)(A)(iii); 12 C.F.R. § 1026.60(b)(5).
3. How the balance is calculated. 15 U.S.C. § 1637(c)(1)(A)(iv); 12 C.F.R. § 1026.60(b)(6).

§ 2.71:5 Required Disclosures—Closed-End Transactions

The disclosure requirements for closed-end transactions are found at 12 C.F.R. §§ 1026.17–.20.

§ 2.72 Defenses to Liability

§ 2.72:1 Bona Fide Error

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

§ 2.72:2 Good-Faith Compliance

A creditor is exempt from liability if it acted in good faith and in conformity with any official rule, regulation, or interpretation of the Truth in Lending Act by the Federal Reserve Board "or in conformity with any interpretation or approval by an official or employee of the Federal Reserve System authorized by the Bureau [of Consumer Financial Protection] to issue such interpretations or approvals under such procedures as the Bureau may proscribe therefor, notwithstanding that after such act or omission has occurred, such rule, regulation, interpretation, or approval is amended, rescinded, or determined by judicial or other authority to be invalid for any reason." 15 U.S.C. § 1640(f).

§ 2.72:3 Correction of Error

A creditor can avoid liability with regard to certain provisions under the Truth in Lending Act if it takes certain actions within the proscribed periods of time and before receiving notice of the error from a consumer or before the consumer brings an action against the creditor. 15 U.S.C. § 1640(b). Specifically, section 1640(b) provides:

> A creditor or assignee has no liability under this section or section 1607 of this title or section 1611 of this title for any failure to comply with any requirement imposed under this part or part E, if within sixty days after discovering an error, whether pursuant to a final written examination report or notice issued under section 1607(e)(1) of this title or through the creditor's or assignee's own proce-

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> dures, and prior to the institution of an action under this section or the receipt of written notice of the error from the obligor, the creditor or assignee notifies the person concerned of the error and makes whatever adjustments in the appropriate account are necessary to assure that the person will not be required to pay an amount in excess of the charge actually disclosed, or the dollar equivalent of the annual percentage rate actually disclosed, whichever is lower.

15 U.S.C. § 1640(b). *See also* 12 C.F.R. § 1026.31(h).

§ 2.72:4 Use of Model Forms

A creditor is deemed to be in compliance with disclosure requirements with respect to nonnumerical disclosures if it either uses the model form or clause or uses the model but deletes information that is not required or rearranges the format, as long as the alterations do not affect the substance, clarity, or meaningful sequence of disclosure. 15 U.S.C. § 1604(b). Model forms are found at the appendices to Regulation Z. 12 C.F.R. pt. 1026 apps. G, H.

§ 2.73 Interaction of State and Federal Disclosure Laws

§ 2.73:1 Generally

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

§ 2.73:2 Retail Installment Sales

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

§ 2.73:3 Retail Charge Agreements

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

§ 2.73:4 Credit Card Transactions

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

§ 2.73:5 Availability of State and Federal Remedies

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

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

If a consumer gives proper written notice to the creditor of an alleged billing error, 15 U.S.C. § 1666; 12 C.F.R. § 1026.13 impose procedures the creditor must follow regarding resolution of

the error and limitations on the creditor's actions. In general, the consumer may withhold payment of the disputed amount until the billing error procedure has been completed, and the creditor is prohibited from making or threatening to make adverse credit reports because of the consumer's refusal to pay. 15 U.S.C. § 1666(c); 12 C.F.R. § 1026.13(d)(1), (2). See 12 C.F.R. § 1026.13(b) regarding what constitutes proper written notice from the consumer.

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

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

§ 2.75:1 Generally

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

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

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

§ 2.75:2 Limitation on Amount of Claim or Defense

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

§ 2.76 FTC Holder-in-Due-Course Rule

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

§ 2.77 Consumer Lease Disclosures

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

§ 2.77:1 Definition

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

1. a contractual lease or bailment;
2. made by a natural person;
3. for the use of personal property;
4. for longer than four months;
5. for a total not exceeding $50,000;

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6. primarily for personal, family, or household purposes;
7. regardless of whether the lessee has "the option to purchase or otherwise become the owner of the property at the expiration of the lease."

15 U.S.C. § 1667(1).

Consumer leases do not include—

1. leases for agricultural purposes;
2. leases for business or commercial purposes;
3. leases to governmental agencies or instrumentalities;
4. leases to organizations; or
5. sales for which the seller extends or arranges for credit, which includes "any contract in the form of a bailment or lease if the bailee or lessee contracts to pay as compensation for use a sum substantially equivalent to or in excess of the aggregate value of the property and services involved and it is agreed that the bailee or lessee will become, or for no other or a nominal consideration has the option to become, the owner of the property upon full compliance with his obligations under the contract."

15 U.S.C. §§ 1667(1), 1602(h).

§ 2.77:2 Required Disclosures

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

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

15. if the lease imposes liability on the lessee for the anticipated fair market value of the property at the end of the lease, a statement of the fair market value of the property at the lease's inception, the aggregate cost of the lease at its expiration, and the difference between the two figures;
16. a statement of the conditions under which either party can terminate the lease before the end of the term; and
17. the amount, or the method for determining the amount, of any penalty or other charge for delinquent payments, default, or early termination.

15 U.S.C. § 1667a. The action on a lease is discussed at section 14.26 in this manual.

§ 2.78 Servicemembers Civil Relief Act

Note: In this section, all persons covered as members of the armed forces on active duty are referred to as "servicemembers," and persons who were on active duty but have left active military service are referred to as "veterans." The terms are used for convenience only. The Servicemembers Civil Relief Act, 50 U.S.C. §§ 3901–4043, is referred to as the "SCRA."

Enforcement of certain civil liabilities and prosecution of certain legal proceedings against persons in military service is suspended to enable those persons to devote their entire energies to the defense needs of the nation. 50 U.S.C. § 3902.

§ 2.78:1 Persons Entitled to Claim Protection

Servicemember: The SCRA primarily protects persons in military service. "Military service" encompasses active-duty members of the United States Army, Navy, Air Force, Marines, or Coast Guard and officers of the Public Health Service or the National Oceanic and Atmospheric Administration while on active service. Members of the National Guard are included while under a call to active service for a period of more than thirty consecutive days. Although military service ends with the servicemember's termination of active service or death, many provisions of the SCRA allow for relief by a veteran after he leaves active service. Military service includes any period during which the servicemember is absent from duty due to sickness, wounds, leave, or other lawful cause. *See* 50 U.S.C. § 3911(1)–(3). The SCRA also covers U.S. citizens serving in the forces of a nation allied with the United States in a war or military action if that service is similar to military service. 50 U.S.C. § 3914.

Call-Up Period: A person who has been ordered for induction into the armed forces or a person in the armed forces reserve who has been called to active service is entitled to the protection of the SCRA from the date he receives the order until he reports for induction or service. 50 U.S.C. § 3917.

Protection of Parties Secondarily Liable: If a right against a servicemember or veteran is stayed, postponed, or suspended, the court taking that action may, in its discretion, also grant the same relief to sureties, guarantors, endorsers, accommodation makers, and others, whether primarily or secondarily liable. 50 U.S.C. § 3913(a). The same right accrues when a court vacates or sets aside a judgment or decree. 50 U.S.C. § 3913(b). See section 2.78:14 below regarding the ability of a secondarily liable party to waive the protection of the SCRA.

§ 2.78:2 Installment Contract for Purchase of Property

If a person enters into a contract to buy or lease property, pays a deposit or installment toward the purchase or lease, and then enters military service, the creditor or lessor may not exercise a

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right or option to terminate the contract or repossess the property for nonpayment of the contract or any other breach of its terms, except through court action. In a court action, the court may order the repayment of prior installments or deposits or any part of them as a condition of terminating the contract and resuming possession of the property, may order a stay of proceedings, or may make other disposition of the case as may be equitable to preserve the interests of all parties (as set out in sections 2.78:5 through 2.78:8 below). 50 U.S.C. § 3952. The servicemember's dependents may claim the protection of this provision unless in the court's opinion their ability to comply with the contract is not materially impaired by the servicemember's military service. 50 U.S.C. § 3959.

§ 2.78:3 Maximum Interest Rate for Preservice Obligation

If the servicemember incurred an obligation requiring him to pay interest greater than 6 percent per year before entering military service, his obligation is reduced to 6 percent annual interest during his period of military service and one year thereafter, in case of an obligation or liability consisting of a mortgage, trust deed, or other security in the nature of a mortgage or during his period of military service, in the case of any other obligation or liability. 50 U.S.C. § 3937(a). "Interest" includes service charges, renewal charges, fees, or any other charges except bona fide insurance in respect of the obligation. 50 U.S.C. § 3937(d). The creditor may apply to a court for an order authorizing payment of a greater interest rate on a showing that the ability of the servicemember to pay more than 6 percent annual interest is not materially affected by his military service. 50 U.S.C. § 3937(c).

§ 2.78:4 Judicial Foreclosure of Security Interest

If a servicemember is obligated under a security agreement and still owns the collateral when he enters military service, any action to enforce the security interest arising from the servicemember's alleged breach of the security agreement committed before or during his military service may be stayed as provided in sections 2.78:5 through 2.78:8 below, or the court may make another disposition of the case as may be equitable to preserve the interests of all parties. 50 U.S.C. § 3953(b). The servicemember's dependents may claim the protection of this provision unless in the court's opinion their ability to comply with the security agreement is not materially impaired by the servicemember's military service. 50 U.S.C. § 3959.

§ 2.78:5 Stay of Enforcement of Obligation

A servicemember may, at any time of his military service or within 180 days thereafter, apply for a stay of enforcement of any of his obligations incurred before his military service. 50 U.S.C. § 4021(a). The court may grant a stay of enforcement of the obligation during his service and after his service for a period of time equal to the period of his military service. 50 U.S.C. § 4021(b). The postservice stay is subject to the servicemember's paying the balance of principal and accumulated interest owed at the time of his separation from military service in equal periodic installments during the extended period, at the rate of interest prescribed for the obligation if paid when due and with other terms as may be just. 50 U.S.C. § 4021(b). The court may also find that the ability of the applicant to meet his obligation has not been materially affected by his military service and refuse to grant the stay. 50 U.S.C. § 4021(b). If the court grants such a stay, no fine or penalty may accrue during the postservice payment term because of the failure

of the veteran to meet his original contractual obligation. 50 U.S.C. § 4021(c).

§ 2.78:6 Stay of Fines and Penalties on Contracts

If an action for compliance with any term of a contract is stayed by other provisions of the SCRA, the servicemember will not be liable for any fine or penalty otherwise owed because of the servicemember's nonperformance of the obligation. 50 U.S.C. § 3933(a). Also, if a servicemember fails to perform any obligation and a fine or penalty is incurred as a result, a court may reduce or waive the fine or penalty if it appears that the servicemember was in military service when the fine or penalty was imposed and, because of his service, his ability to pay or perform was materially impaired. 50 U.S.C. § 3933(b).

§ 2.78:7 Stay of Nonjudicial Repossession of Security Interest

If a servicemember is obligated under a security agreement when he enters military service and still owns the collateral when he enters, the secured creditor may not seize, sell, or foreclose on the collateral during the period of his military service or for one year thereafter, except under an agreement between the servicemember and the creditor as described in section 2.78:14 below or on order previously granted by a court with a return of it made and approved by the court. 50 U.S.C. § 3953(c). The servicemember's dependents may claim the protection of this provision unless in the court's opinion their ability to comply with the security agreement is not materially impaired by the servicemember's military service. 50 U.S.C. § 3959.

§ 2.78:8 Stay of Judicial Proceedings

If a person is a plaintiff or defendant in a civil action or proceeding that he has received notice of and either is in military service or has separated from military service within ninety days, the court may, on its own motion, or shall, on the application of the servicemember, stay the proceeding for a period of at least ninety days. 50 U.S.C. § 3932(a), (b)(1). The application must contain—

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

50 U.S.C. § 3932(b)(2).

The application does not constitute an appearance for jurisdictional purposes or a waiver of any substantive or procedural defense. 50 U.S.C. § 3932(c). The servicemember may apply for an additional stay based on the continuing effect of military duty on his ability to appear. 50 U.S.C. § 3932(d). If the court refuses to grant an additional stay, the court must appoint counsel to represent the servicemember in the proceeding. 50 U.S.C. § 3932(d).

§ 2.78:9 Default Judgments

In all default judgments, if the defendant has not made an appearance, the prevailing plaintiff must file an affidavit setting forth facts showing that the defendant is not in military service. 50 U.S.C. § 3931(b)(1). If the plaintiff is unable to make such a showing, he must file an alternative affidavit, stating either that the defendant is in military service or the defendant's military service status cannot be determined. 50 U.S.C. § 3931(b)(1). A person who knowingly uses a false affidavit may be fined or imprisoned or

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both. 50 U.S.C. § 3931(c). See form 20-3 in this manual for a nonmilitary affidavit. If the defendant is in military service, the court may not enter a judgment until it has appointed an attorney to represent the defendant. 50 U.S.C. § 3931(b)(2). If appointed counsel cannot locate the servicemember, the attorney's actions in the case do not waive any of the servicemember's defenses or otherwise bind him. 50 U.S.C. § 3931(a), (b)(2). On counsel's application or on the court's own motion, the court shall also grant a stay of proceedings for at least ninety days if the court determines that there may be a defense to the action and it cannot be presented without the defendant's presence, or, after due diligence, counsel has not been able to determine if a meritorious defense exists. 50 U.S.C. § 3931(d).

If the court is unable to determine whether the defendant is in military service, the court may require the plaintiff to file a bond to indemnify the defendant against loss or damage suffered by reason of the judgment, should the judgment later be set aside. 50 U.S.C. § 3931(b)(3). If a default judgment is taken against a person in military service during the term of that person's service or within sixty days thereafter, the defendant may apply to the court rendering judgment to reopen the judgment for the purpose of allowing the servicemember to defend the action. 50 U.S.C. § 3931(g). The application must be made within ninety days of the defendant's release from military service, and the defendant will have to show a meritorious or legal defense against the plaintiff's claim and that the servicemember's ability to defend the action was materially affected by military service. 50 U.S.C. § 3931(g).

If the court vacates, sets aside, or reverses a default judgment under the SCRA, that action does not impair the title acquired by a bona fide purchaser for value under the judgment. 50 U.S.C. § 3931(h).

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

In an action or proceeding commenced in any court against a servicemember during the period of his service or within ninety days thereafter, the court may, on its own motion, or shall, on the application of the servicemember, stay the execution of a judgment, order, attachment, or garnishment issued against the servicemember, if in the opinion of the court the ability of the servicemember to comply is materially affected by his military service. 50 U.S.C. § 3934.

This stay may last for the length of the servicemember's military service and for ninety days thereafter. 50 U.S.C. § 3935(a). The stay may be subject to such terms as may be just, such as ordering payment of a debt in installments. If the servicemember is a codefendant with others, the plaintiff may proceed against the other defendants after obtaining leave of court. 50 U.S.C. § 3935(b).

§ 2.78:11 Settlement of Cases Involving Property

In an action to foreclose on or repossess property, the court may appoint three disinterested persons to appraise the collateral and use their appraisal to set an amount to be paid to the servicemember (or his dependent as appropriate) as a condition of foreclosure or repossession. 50 U.S.C. § 3954. If the court finds that this appraisal process would cause undue hardship to the dependents of the servicemember, it will not order the appraisal. 50 U.S.C. § 3954.

§ 2.78:12 Statutes of Limitation Affected by Military Service

Regardless of whether the plaintiff's cause of action accrued before or during the defendant's period of military service, the servicemember's period of military service is not included in

computing any limitations period or period for the redemption of real property, except limitations periods under the internal revenue laws. 50 U.S.C. § 3936.

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

If a servicemember applies for or receives any of the protections of the SCRA, that fact alone does not allow a lender or creditor to determine that the servicemember is unable to pay the obligation or liability, deny credit to the servicemember, change the terms of an existing credit agreement with the servicemember, refuse to grant credit to the servicemember in substantially the amount or on substantially the terms requested, or make an adverse report on the servicemember's creditworthiness, refuse to insure the servicemember, make an annotation in the servicemember's credit record to the effect that he is a member of the National Guard or reserves, or change the terms offered for insurance. 50 U.S.C. § 3919.

§ 2.78:14 Waiver

The protections of the SCRA can be waived by written agreement of the parties executed during or after the period of military service. 50 U.S.C. § 3918. Specific requirements apply to waivers for certain purposes.

A secondarily liable party may waive the protections set out above by written waiver executed as an instrument separate from the contract or instrument setting out the obligation or liability. 50 U.S.C. § 3913. No such waiver is valid if it is executed by an individual who later joins the military or if it is executed by a dependent of that individual, unless executed by the individual during the call-up period set out in section 2.78:1 above. 50 U.S.C. § 3913(d)(2).

§ 2.78:15 Real Estate–Related Provisions

The SCRA contains numerous provisions affecting mortgages or other liens or claims against servicemembers' real property. Those provisions often differ from those set out here and are beyond the scope of this manual. *See generally* State Bar of Tex., *Texas Real Estate Forms Manual* chs. 2, 11, 14, 25 (3d ed. 2017).

§ 2.78:16 Distinguishable from Military Lending Act

The SCRA is distinguishable from the Military Lending Act (the "MLA"), which is codified at 10 U.S.C. § 987, and the regulations promulgated in connection therewith, which are also defined as the MLA for purposes of this section. 32 C.F.R. § 232.1 *et seq.* The SCRA applies to servicemembers and their spouses and dependents with regard to preservice debts when they subsequently become active duty servicemembers. By contrast, the MLA applies to servicemembers and their spouses and dependents who are on active duty at the time they become obligated on the indebtedness at issue. *See* 10 U.S.C. § 987(a). Interest, including fees, is capped at 6 percent per annum under the SCRA, whereas interest, including fees, is capped at a 36 percent per annum Military Annual Percentage Rate (MAPR) as that term is defined under the MLA. *Compare* 50 U.S.C. § 3937(a) *and* 10 U.S.C. § 987(b). Under the SCRA, certain written disclosures are required after forty-five days of delinquency, whereas, under the MLA, written and oral disclosures are required at the time the credit account is established or when the borrower becomes obligated on the transaction under the new MLA rule. *See* 10 U.S.C. § 987(c). As with most laws, many of the key terms of the MLA are defined and must be carefully reviewed and considered. *See* 10 U.S.C. § 987(i). A failure to comply with the MLA can result in serious penalties, including a voiding of the note or credit as of inception and a require-

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ment that the creditor refund all fees and interest paid by the affected borrower. *See* 10 U.S.C. § 987(f). A violation of the MLA may also constitute a violation under Regulation Z and an unfair, deceptive, or abusive act or practice under the Dodd-Frank Act, which is set forth in 12 U.S.C. §§ 5531, 5536.

§ 2.79 Fair Credit Reporting Act

The Fair Credit Reporting Act, 15 U.S.C. §§ 1681–1681x, requires consumer reporting agencies to adopt reasonable procedures to meet the needs of commerce for consumer credit, insurance, and other information in a manner that is fair and equitable to the consumer with regard to the confidentiality, adversity, relevance, and proper use of that information. The Act applies not only to reporting agencies but also to providers of credit information. Although creditors or creditor-side entities may face litigation under the Fair Credit Reporting Act, it is not likely to give rise to a counterclaim to a collections suit.

[Section 2.80 is reserved for expansion.]

VII. Texas Consumer Credit Laws

§ 2.81 Consumer Credit Laws Generally

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

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

§ 2.82 Commonly Encountered Violations

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

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

7. taking a prohibited lien against real estate (*see, e.g.*, Tex. Fin. Code § 342.503(b)); and

8. imposing a surcharge for buying with a credit card, instead of cash, check, or other means of payment (Tex. Fin. Code § 339.001(a)).

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

§ 2.83 Open-End Accounts

§ 2.83:1 Definition

An open-end account is one in which—

1. an account under a written contract exists between creditor and obligor;

2. the creditor reasonably contemplates repeated transactions, and the obligor is authorized to make purchases or borrow money;

3. interest or time-price differential may be charged from time to time on an outstanding balance; and

4. the amount of credit that may be extended during the term of the account is generally made available to the extent that any outstanding balance is repaid.

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

§ 2.83:2 Rules Governing Interest

1. Ceilings generally. Tex. Fin. Code §§ 303.001–.017, 303.101.
2. Ceilings, variable rate account. Tex. Fin. Code §§ 303.015, 303.402.
3. Billing cycle interest limitation on open-end credit card account without merchant discount. Tex. Fin. Code § 339.002.
4. Ceiling on open-end account involving credit card transaction or merchant discount. Tex. Fin. Code § 303.006(c).
5. Ceiling on open-end account providing for credit card transaction in which merchant discount is not imposed or received (21 percent). Tex. Fin. Code § 303.009(d).
6. If creditor implements quarterly or annualized ceiling for majority of Texas obligors under a particular plan or arrangement, that ceiling is also the ceiling for all open-end accounts during period of plan or arrangement. Tex. Fin. Code § 303.106.

§ 2.83:3 Other Rules

1. Disclosures for variable rate accounts. Tex. Fin. Code § 303.105(b).
2. Disclosures for rate variations. Tex. Fin. Code § 303.105.
3. Notice of change of any agreement term. Tex. Fin. Code § 303.103(a)–(c).
4. Right of obligor to terminate open-end account on change in agreement term. Tex. Fin. Code § 303.103(d), (e).

Also, note the disclosure requirements for open-end transactions in the Truth in Lending Act and Regulation Z. 15 U.S.C. § 1637; 12 C.F.R. §§ 1026.5–.16. See section 2.71:3 above.

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§ 2.84 Consumer Loans (Texas Finance Code Chapter 342)

§ 2.84:1 Definitions

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

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

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

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

§ 2.84:3 Applicability of Chapter 342

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

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

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

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

1. Maximum cash advance as computed yearly by the consumer credit commissioner, indexing the amount to the percentage growth of the Consumer Price Index from December 1967 to the present year, using a base of $100 (or $200 for loans subject to Finance Code section 342.259). Tex. Fin. Code § 342.251.
2. Alternate charges instead of the charges allowed by Tex. Fin. Code § 342.201, including acquisition and investment account handling charges. Tex. Fin. Code § 342.252.
3. Maximum interest charge for loan with single repayment. Tex. Fin. Code § 342.253.

4. No other charges allowed, including insurance charges. Tex. Fin. Code § 342.254.
5. Maximum loan term. Tex. Fin. Code § 342.255.
6. Charges subject to refund. Tex. Fin. Code § 342.256.
7. Default charge, deferment of payment. Tex. Fin. Code § 342.257.
8. Schedules for weekly, biweekly, or semimonthly installments. Tex. Fin. Code § 342.258.

§ 2.84:6 Other Charges or Credits

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

§ 2.84:7 Form and Content of Loan Instruments

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

A lender may not take an instrument with blanks to be filled in after the loan is made. Tex. Fin. Code § 342.506. "A lender may not take an instrument in which a borrower waives any right accruing under [Code chapter 342]." Tex. Fin. Code § 342.507.

§ 2.84:8 Other Requirements

1. Generally, only licensed lenders can make consumer loans. Tex. Fin. Code § 342.051(a) (see Tex. Fin. Code § 342.051(c)–(e) for exceptions to the licensure requirement).
2. Must give receipt to borrower for cash payment. Tex. Fin. Code § 342.452.
3. Must accept full or partial prepayments. Tex. Fin. Code § 342.453.
4. Must return loan instruments to borrower on repayment. Tex. Fin. Code § 342.454.
5. May not take assignment of wages or lien against real property other than lien created by abstract of judgment. Tex. Fin. Code § 342.503 (commonly encountered violation).
6. May not take confession of judgment or power of attorney authorizing lender to enter confession of judgment. Tex. Fin. Code § 342.504.
7. May not take promise to pay or loan obligation that does not disclose amount financed and schedule of payments. Tex. Fin. Code § 342.505.
8. May not induce or permit person to be obligated for more than one loan if purpose is to obtain more than lawful interest. Tex. Fin. Code § 342.501.
9. Disclosures in advertising. Tex. Fin. Code § 341.301.
10. Discrimination on various grounds prohibited, Tex. Fin. Code § 341.401; penalties, Tex. Fin. Code § 341.402.

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11. False, misleading, or deceptive advertising prohibited. Tex. Fin. Code § 341.403.

12. Rules regarding agreement for more than one loan or cash advance. Tex. Fin. Code § 342.455.

13. Maximum loan terms. Thirty-seven calendar months for cash advance of $1,500 or less; forty-nine calendar months for advance of between $1,500 and $3,000; sixty calendar months for loans of more than $3,000. Tex. Fin. Code § 342.508.

14. Rules regarding insurance. Tex. Fin. Code §§ 342.401–.416. See section 2.84:9 below.

§ 2.84:9 Commonly Encountered Violations Regarding Insurance

1. Requiring credit life or credit health and accident insurance. If the loan is for $100 or more, the lender may request that the buyer provide the insurance. Tex. Fin. Code § 342.402.

2. Requiring insurance to be purchased from a particular agent or broker. Tex. Fin. Code § 342.405.

§ 2.85 Revolving Credit Accounts

§ 2.85:1 Definition

A revolving credit account is an account—

1. established by a creditor for a customer under a written agreement between the creditor and the customer;

2. accepted by the customer by using the account;

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

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

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

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

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

§ 2.85:2 Rules Governing Interest

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

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

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

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

§ 2.85:3 Other Charges

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

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

§ 2.85:4 Other Rules

1. Revolving credit accounts are subject to Tex. Fin. Code chs. 303 and 349 but are not subject to other chapters of title 4 unless specifically provided for

in chapter 346. Tex. Fin. Code § 346.005(a).

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

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

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

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

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

§ 2.86 Retail Installment Sales

§ 2.86:1 Definitions and General Rules

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

2. *Retail installment transaction.* One in which retail buyer purchases goods or services from retail seller under retail installment contract or retail charge agreement that provides for time-price differential and in which buyer agrees to pay unpaid balance and time-price differential in one or more installments. Tex. Fin. Code § 345.001(7).

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

4. *Goods.* Tex. Fin. Code § 345.002.

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

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

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

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

§ 2.86:2 Rules Governing Time-Price Differential

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

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

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

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

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

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

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

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

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

§ 2.86:3 Other Charges or Credits

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

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

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

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

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

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

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

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

§ 2.86:4 Form and Content of Contract

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

§ 2.86:5 Other Rules

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

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

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

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

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

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

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

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

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

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

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

12. May not promise to pay, pay, or otherwise tender cash to buyer as part of a retail installment transaction. Tex. Fin. Code § 345.352.

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

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

§ 2.87 Retail Charge Agreements

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

§ 2.87:1 Definition

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

§ 2.87:2 Rules Governing Time-Price Differential

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

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

§ 2.87:3 Other Charges

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

2. Reasonable processing fee of no more than $15 may be added for returned

check; fee may be added to unpaid balance. Tex. Fin. Code § 345.106.

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

§ 2.87:4 Other Rules

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

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

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

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

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

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

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

§ 2.88 Motor Vehicle Installment Sales

§ 2.88:1 Criteria and Relevant Definitions

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

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

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

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

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

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

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

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

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

Tex. Fin. Code § 348.003.

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

§ 2.88:2 Rules Governing Time-Price Differential

1. Cash price defined. Tex. Fin. Code § 348.004.
2. How principal balance computed. Tex. Fin. Code § 348.006(a), (b).
3. Maximum time-price differential, contract with equal monthly installments. Tex. Fin. Code § 348.104.
4. Time-price differential for other contracts. Tex. Fin. Code § 348.106.
5. Optional ceiling. Tex. Fin. Code § 348.105.
6. Rules governing acceleration. Tex. Fin. Code § 348.109.

§ 2.88:3 Other Charges or Credits

1. Itemized charge defined. Tex. Fin. Code § 348.005.
2. Documentary fee. Tex. Fin. Code § 348.006(c) (commonly encountered violation).
3. Cannot impose late charge until payment is at least fifteen days overdue, late charge cannot exceed 5 percent of amount of installment, and only one late charge per installment may be imposed. Tex. Fin. Code § 348.107 (commonly encountered violations).
4. Debt collection charges—reasonable attorney's fees, court costs, reasonable out-of-pocket expenses. Tex. Fin. Code § 348.108.
5. Charges involved when contract is amended. Tex. Fin. Code §§ 348.114–.115.
6. Buyer's refund credit on prepayment, monthly installment contract. Tex. Fin. Code § 348.120.
7. Buyer's refund credit on prepayment, other contracts. Tex. Fin. Code § 348.121.

§ 2.88:4 Form and Content of Contract

1. Must be a retail installment contract for each transaction. Tex. Fin. Code § 348.101(a).
2. Must be in writing. Tex. Fin. Code § 348.101(b)(1).
3. Must be dated. Tex. Fin. Code § 348.101(b)(2).
4. Must be signed by buyer and seller. Tex. Fin. Code § 348.101(b)(3).
5. Generally must be completed as to all essential provisions before signed by buyer. Tex. Fin. Code § 348.101(b)(4).
6. Printed part of contract must be in at least eight-point type unless a different size dictated by law. Tex. Fin. Code § 348.101(c).
7. Must contain names of buyer and seller. Tex. Fin. Code § 348.102(a)(1).
8. Must contain place of business or address of seller. Tex. Fin. Code § 348.102(a)(2).
9. Must contain residence or other address of buyer as specified by buyer. Tex. Fin. Code § 348.102(a)(3).
10. Must contain description of vehicle being sold. Tex. Fin. Code § 348.102(a)(4).

11. Must contain cash price of transaction. Tex. Fin. Code § 348.102(a)(5) (commonly encountered violation).

12. Must contain amount of down payment, specifying amount of money and valuation of trade-in. Tex. Fin. Code § 348.102(a)(6) (commonly encountered violation).

13. Must specify each itemized charge. Tex. Fin. Code § 348.102(a)(7) (commonly encountered violation).

14. Contract calling for variable contract rate must set out method of computation. Tex. Fin. Code § 348.102(c).

15. Must contain notice as specified in Tex. Fin. Code § 348.102(d) (commonly encountered violation).

16. May not contain confession of judgment. Tex. Fin. Code § 348.410(1) (commonly encountered violation).

17. May not contain assignment of wages. Tex. Fin. Code § 348.410(2) (commonly encountered violation).

18. May not authorize holder to enter buyer's premises in violation of chapter 9 of the Business and Commerce Code or breach the peace. Tex. Fin. Code § 348.411(1) (commonly encountered violation).

19. May not provide for power of attorney by buyer appointing holder or holder's agent as buyer's agent in repossession. Tex. Fin. Code § 348.411(2).

20. May not provide waiver of buyer's rights for collection or repossession disputes. Tex. Fin. Code § 348.412(a)(1) (commonly encountered violation).

21. May not provide covenant that buyer agrees not to assert claim or defense. Tex. Fin. Code § 348.412(a)(2).

22. Requirements regarding documentary fee, including that documentary fee notice must be in same language as that of oral sales presentation. Tex. Fin. Code § 348.006(c)–(i) (commonly encountered violation).

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

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

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

§ 2.88:5 Other Rules

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

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

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

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

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

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

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

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

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

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

§ 2.89:1 Liability Generally

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

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

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

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

§ 2.89:2 No License

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

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

§ 2.90:1 Bona Fide Error

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

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

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

1. a rule adopted under or an interpretation of title 4 (Tex. Fin. Code chs. 301–351) by a state agency, board, or commission;

2. the federal Consumer Credit Protection Act, 15 U.S.C. §§ 1601–1693r; or

3. a rule or regulation adopted under or an interpretation of the Consumer Credit Protection Act by a federal agency, board, or commission.

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

§ 2.90:3 Correcting Violation within Sixty Days

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

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

§ 2.90:4 Correcting Violation after Sixty-Day Period

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

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

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

§ 2.90:5 Only One Recovery

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

§ 2.90:6 Statute of Limitation

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

§ 2.90:7 Judgment under Federal Consumer Credit Protection Act

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

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[Sections 2.91 through 2.100 are reserved for expansion.]

VIII. Other Texas Statutes Affecting Debtor-Creditor Relations

§ 2.101 Variable Rate Transactions

§ 2.101:1 Definition

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

§ 2.101:2 Rules Governing Interest

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

§ 2.101:3 Other Rules

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

§ 2.102 Credit Card Transactions

§ 2.102:1 Definition

See Tex. Fin. Code § 301.002(a)(9) for a definition of a "lender credit card agreement," but note that this section refers to statutes applicable to all credit card transactions, not just the transactions described in that statute.

§ 2.102:2 Rules Governing Interest

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

§ 2.102:3 Other Charges

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

§ 2.102:4 Other Rules

1. Required disclosures. 15 U.S.C. § 1637; 12 C.F.R. §§ 1026.12, 1026.60.
2. Credit card issuer generally subject to all claims or defenses of cardholder. 15 U.S.C. § 1666i; 12 C.F.R. § 1026.12(c).
3. See 12 C.F.R. § 1026.12 for additional rules affecting credit cards.

§ 2.103 Loans for Business, Commercial, or Investment Purposes

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

§ 2.104 Loans to Corporation—Rules Governing Interest

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

§ 2.105 Commercial Loans

§ 2.105:1 Definition

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

§ 2.105:2 Rules Governing Interest

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

§ 2.105:3 Other Charges

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

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

§ 2.106:1 Definition

A “qualified commercial loan” is either—

1. a commercial loan with an aggregate value of—
    a. $3 million or more if secured by real property; or
    b. $250,000 or more if not secured by real property, and, if the aggregate value of the loan is less than $500,000, the loan documents contain a written certification from the borrower that the borrower was advised by the lender to seek the advice of an attorney or accountant and the

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borrower had the opportunity to do so; or

2. a renewal or extension of a commercial loan as described above, regardless of the principal amount of the loan at the time of renewal or extension.

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

§ 2.106:2 Rules Governing Interest

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

§ 2.106:3 Other Charges

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

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

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

§ 2.108 Home Solicitation Transactions

§ 2.108:1 Definition

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

§ 2.108:2 Rules Governing Interest

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

§ 2.108:3 Contents of Contract or Documentation

1. Notice form requirements. Tex. Bus. & Com. Code §§ 601.052–.055, 601.154; see section 2.108:5 below regarding particular violations commonly committed.

2. Contract or receipt cannot contain waiver of rights or confession of judgment. Tex. Bus. & Com. Code § 601.151.

§ 2.108:4 Rights Involving Cancellation

1. Qualifying transaction may be canceled by consumer not later than midnight of third business day after consumer signs agreement or offer to purchase. Tex. Bus. & Com. Code

§ 601.051. Merchant not entitled to compensation if consumer properly cancels. Tex. Bus. & Com. Code § 601.101.

2. May not transfer, negotiate, sell, or assign debt before midnight of fifth business day after contract signed or goods or services purchased. Tex. Bus. & Com. Code § 601.153 (commonly encountered violation).

3. May not fail to notify consumer before end of tenth business day after receiving notice of cancellation of merchant's intent to repossess or abandon shipped or delivered goods. Tex. Bus. & Com. Code § 601.154(1).

4. Rights and duties regarding goods possessed by consumer. Tex. Bus. & Com. Code §§ 601.102–.103.

5. May not refuse valid cancellation. Tex. Bus. & Com. Code § 601.154(2), (3) (commonly encountered violation).

6. Generally, must undo transaction. Tex. Bus. & Com. Code § 601.154(2), (3).

§ 2.108:5 Other Rules

All these rules are commonly violated.

1. Must inform consumer orally of right to cancel transaction. Tex. Bus. & Com. Code § 601.152(1).

2. May not misrepresent consumer's right to cancel. Tex. Bus. & Com. Code § 601.152(2).

3. Must provide consumer with the "notice of cancellation" set out in Tex. Bus. & Com. Code § 601.053(3), set in ten-point, bold-faced type, in the same language as that of the oral sales presentation.

4. Must provide consumer with a fully completed receipt or copy of the contract in the same language as that principally used in the oral sales presentation. Tex. Bus. & Com. Code § 601.052.

5. Must furnish notice of right to cancel in immediate proximity to the signature space on the contract in ten-point, bold-faced type. Tex. Bus. & Com. Code § 601.052(b)(4).

6. Must furnish consumer, at the time consumer signs contract or otherwise agrees to the purchase, with a completed notice of cancellation, in duplicate, attached to the contract or receipt and easily detachable. Tex. Bus. & Com. Code § 601.053.

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

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

§ 2.109 Business Opportunity Act

§ 2.109:1 Definition

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

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

2. the seller will either (a) provide or help the buyer find locations;
(b) provide a sales, production, or

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marketing program; or (c) buy back any of what is bought or produced by the purchaser.

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

§ 2.109:2 Requirements for Disclosure Form and Contract

1. Sellers must register and file a disclosure statement with the secretary of state. Tex. Bus. & Com. Code §§ 51.051–.054, 51.164 (commonly encountered violation).
2. Rules regarding disclosures to the buyer. Tex. Bus. & Com. Code §§ 51.151–.163.
3. Rules regarding the form and content of the contract. Tex. Bus. & Com. Code § 51.201 (commonly encountered violation: failure to put contract in writing).
4. Seller may not ask the buyer to waive provisions of this statute. Tex. Bus. & Com. Code § 51.006 (commonly encountered violation).

§ 2.109:3 Other Rules

1. May not employ representation, device, scheme, or artifice to deceive buyer. Tex. Bus. & Com. Code § 51.301(1).
2. May not make untrue statement or omission of material fact. Tex. Bus. & Com. Code § 51.301(2).
3. May not represent that business opportunity provides or will provide income or earning potential unless seller has documented data substantiating claim and discloses data to buyer when representation made. Tex. Bus. & Com. Code § 51.301(3).
4. May not make claim in promotional or advertising material or in oral sales presentation, solicitation, or discussion inconsistent with information required to be disclosed by Texas Business and Commerce Code chapter 51. Tex. Bus. & Com. Code § 51.301(4).
5. Copies of completed contract and any other documents seller requires buyer to sign must be given to buyer at time buyer signs contract. Tex. Bus. & Com. Code § 51.202 (commonly encountered violation).
6. Seller must keep complete set of books, records, and accounts of business opportunity sales for at least four years from date of contract. Tex. Bus. & Com. Code § 51.007 (commonly encountered violation).

[Section 2.110 is reserved for expansion.]

IX. Acceleration; Holder in Due Course

§ 2.111 Acceleration

§ 2.111:1 Acceleration Generally

Acceleration is defined as a change in the date of the maturity of an obligation from a future date to the present. *General Motors Acceptance Corp. v. Uresti*, 553 S.W.2d 660, 663 (Tex. App.—Tyler 1977, writ ref'd n.r.e.). Acceleration is the only practical solution to the problem of how to enforce a defaulted installment debt.

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Acceleration is particularly important if enforcing a security interest in personal property, because the foreclosure sale of the collateral discharges the security interest under which it is made. Tex. Bus. & Com. Code §§ 9.617(a), 9.601(a).

§ 2.111:2 Acceleration Clauses

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

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

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

§ 2.111:4 Acceleration for Insecurity

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

§ 2.111:5 Retail and Motor Vehicle Installment Sales

A retail installment sale for goods, services, or motor vehicles or a retail charge agreement may not authorize the holder of the debt to accelerate all or part of the debt unless either the retail buyer is in default of his obligations or the holder believes in good faith that the prospect of the buyer's payment or performance is impaired. Tex. Fin. Code §§ 345.062, 348.109.

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

Without a waiver, the holder of a note providing for acceleration of maturity at the option of the holder must demand payment of the delinquent installments before exercising the option to accelerate, and failure to give proper notice of intent to accelerate makes any attempted acceleration ineffective. *Williamson v. Dunlap*, 693 S.W.2d 373, 374 (Tex. 1985); *Ogden v. Gibraltar Savings Ass'n*, 640 S.W.2d 232, 233–34 (Tex. 1982); *Allen Sales & Servicenter v. Ryan*, 525 S.W.2d 863, 866 (Tex. 1975). See section 2.111:7 below regarding waivers. After notice of intent to accelerate has been given, an additional notice that the debt has been accelerated is also required. Notice of intent to accelerate is necessary to provide the debtor an opportunity to cure his default, and notice that the debt has been accelerated cuts off the debtor's right to cure the default and gives notice that the entire debt is due and payable. A notice that the debt has been

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accelerated is ineffective unless proper notice of intent to accelerate has been given. A letter to the debtor stating that failure to cure the default on or before a specified date "may" result in acceleration is not sufficient notice of intent to accelerate. *Ogden*, 640 S.W.2d at 234.

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

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

§ 2.111:7 Waiver of Notice

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

§ 2.112 Holder in Due Course

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

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

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

1. The instrument must be negotiable. *See* Tex. Bus. & Com. Code § 3.104.
2. The person claiming holder-in-due-course status must be a holder of the instrument. Tex. Bus. & Com. Code § 3.302(a); see Tex. Bus. & Com. Code § 1.201(b)(21) for the definition of "holder."
3. When issued or negotiated to the holder, the instrument must not bear such apparent evidence of forgery or alteration or be otherwise so irregular or incomplete as to call its authenticity into question. Tex. Bus. & Com. Code § 3.302(a)(1).
4. The holder must take for value. Tex. Bus. & Com. Code § 3.302(a)(2)(A).
5. The holder must take in good faith. Tex. Bus. & Com. Code § 3.302(a)(2)(B).
6. The holder must take without notice that—
    a. the instrument is overdue;
    b. the instrument has been dishonored; or
    c. there is an uncured default with respect to payment of another instrument issued as part of the same series. Tex. Bus. & Com. Code § 3.302(a)(2)(C).
7. The holder must take without notice that the instrument contains an unauthorized signature or has been altered. Tex. Bus. & Com. Code § 3.302(a)(2)(D).
8. The holder must take without notice of any claim of a property or possessory right in the instrument or its proceeds, including a claim to rescind a negotia-

tion and to recover the instrument or its proceeds. Tex. Bus. & Com. Code §§ 3.302(a)(2)(E), 3.306.

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

§ 2.112:3 Burden of Proof

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

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

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

1. infancy, to the extent it is a defense to a simple contract (see section 17.8:2 in this manual);
2. duress, lack of legal capacity, or illegality of the transaction that, under other law, nullifies the obligor's obligation (see sections 17.19, 17.8, and 17.24);
3. fraud that induced the obligor to sign the instrument with neither knowledge nor reasonable opportunity to learn of its character or essential terms (see section 17.16); or
4. discharge in insolvency proceedings.

Tex. Bus. & Com. Code § 3.305(a)(1).

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

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

NOTICE

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

16 C.F.R. § 433.2.

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

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

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

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

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

§ 2.112:7 General Prohibition against Waiver of Rights

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

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

[Sections 2.113 through 2.120 are reserved for expansion.]

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

§ 2.121 Chapter 9 Generally

Article 9 of the Uniform Commercial Code (Secured Transactions) was substantially rewritten in all fifty states effective July 1, 2001, except in Connecticut (effective October 1, 2001) and Alabama, Florida, and Mississippi (effective January 1, 2002). In Texas, this law is referred to as chapter 9 of the Texas Business and Commerce Code. The revisions to chapter 9 contain the first major changes to the law of secured transactions since 1972. There are significant changes in scope, substantive rules, and procedures intended to bring greater certainty to secured financing transactions by bringing more types of property and types of financing transactions within chapter 9 and by enforcement of security interests. However, many of the familiar procedures and principles of chapter 9 remain:

1. The filing of a financing statement (now called a UCC1) is still the primary method for perfecting a security interest.
2. "Floating" or "blanket" lien on after-acquired property remains a privileged arrangement.
3. The "first to file" rule remains the primary (although not the sole) priority principle.
4. Purchase-money security interests remain the primary exception to the "first to file" rule, although they have been changed slightly to make them easier to maintain.
5. The lender has a lien on the proceeds of the collateral if he has a perfected lien on the collateral, although the definition of proceeds has been sig-

nificantly enlarged and the lien on proceeds is now "automatic."

6. Attachment and perfection of security interest are retained concepts and still central issues for lenders.

7. A first security interest perfected under chapter 9 still takes priority over a lien creditor or trustee in bankruptcy whose lien arises later.

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

§ 2.121:1 Multistate Secured Lending Transactions

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

§ 2.121:2 Consumer-Goods Transactions

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

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

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

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

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

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

1. "Consumer debtor" means a debtor in a consumer transaction (Tex. Bus. & Com. Code § 9.102(a)(22)).
2. "Consumer goods" means goods that are used or bought for use primarily for personal, family, or household purposes (Tex. Bus. & Com. Code § 9.102(a)(23)).
3. "Consumer-goods transaction" means a consumer transaction in which (a) an individual incurs an obligation primarily for personal, family, or household purposes; and (b) a security interest in consumer goods secures the obligation (Tex. Bus. & Com. Code § 9.102(a)(24)).
4. "Consumer obligor" means an obligor who is an individual and who incurred the obligation as part of a transaction entered into primarily for personal, family, or household purposes (Tex. Bus. & Com. Code § 9.102(a)(25)).
5. "Consumer transaction" means a transaction in which (a) an individual incurs an obligation primarily for personal, family, or household purposes; (b) a security interest secures the obligation; and (c) the collateral is held or acquired primarily for personal, family, or household purposes. The term includes consumer-goods transactions (Tex. Bus. & Com. Code § 9.102(a)(26)).

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

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

1. The ten-day safe harbor for advance notification of disposition provided by Tex. Bus. & Com. Code § 9.612 does not apply in a consumer transaction.
2. Tex. Bus. & Com. Code § 9.613 (specifying the contents and form of notice of disposition) does not apply to a consumer-goods transaction.
3. Tex. Bus. & Com. Code § 9.620 prohibits partial strict foreclosure with respect to consumer-goods collateral and, unless the debtor agrees to waive the requirement in an authenticated record after default, in certain cases requires the secured party to dispose of consumer goods collateral that has been repossessed.
4. The "rebuttable presumption" rule does not apply to a consumer transaction. Tex. Bus. & Com. Code § 9.626. (See section 2.122:7 below for a discussion of the "rebuttable presumption rule.") Section 9.626 also provides that its limitation to transactions other than consumer transactions leaves to the courts the proper rules for consumer transactions and prohibits the courts from drawing inferences from that limitation. Tex. Bus. & Com. Code § 9.626(b).

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

§ 2.121:3 Information-Gathering Procedures under Chapter 9

Tex. Bus. & Com. Code § 9.210 allows a debtor to obtain information from a secured party about the secured obligation and the collateral in which the secured party may claim a security

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

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

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

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

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

§ 2.122 Subchapter F "Default"

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

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

1. the required notices;
2. the persons to whom notices must be sent;
3. required deadlines for notices;
4. the standard of conduct to which a secured party will be held;
5. how any proceeds of a disposition will be applied; and
6. the consequences for failure to observe the requirements of subchapter F.

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

§ 2.122:1 Debtor, Secondary Obligor, Waiver

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

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

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

3. a consignee.

Tex. Bus. & Com. Code § 9.102(a)(28).

An "obligor" is a person who—

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

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

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

§ 2.122:2 Rights of Collection and Enforcement of Collateral

Tex. Bus. & Com. Code § 9.607 explains in greater detail than former section 9.502 the rights of a secured party who seeks to collect or enforce nonpossessory collateral, such as accounts, chattel paper, and payment intangibles. It also sets forth the enforcement rights of a depositary bank holding a security interest in a deposit account maintained with the depositary bank. *See* Tex. Bus. & Com. Code § 9.607(a)(4), (a)(5). However, section 9.607 addresses only the rights of the secured party with respect to the debtor and not the rights or duties of third parties, such as account debtors on collateral, which are addressed elsewhere (*see, e.g.*, Tex. Bus. & Com. Code § 9.406). See Tex. Bus. & Com. Code § 9.608 concerning the manner in which proceeds of collection or enforcement are to be applied.

§ 2.122:3 Disposition of Collateral

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

Notification, Application of Proceeds, Surplus and Deficiency, Other Effects: A secured party is required to give notification of a disposition of collateral to other secured parties and lienholders who have filed financing statements against the debtor covering the collateral. Tex. Bus. & Com. Code § 9.611. However, the secured party is relieved of that duty when a timely search of the filing records is undertaken and the results are not received by the time of

notification. Tex. Bus. & Com. Code § 9.611(e). Section 9.613, which applies only to nonconsumer transactions, sets out the contents of a sufficient notice of disposition and provides that a notification sent ten days or more before the earliest time for disposition is deemed sent within a reasonable time. Tex. Bus. & Com. Code § 9.613. Section 9.615 addresses the application of proceeds of disposition, the entitlement of a debtor to any surplus, and the liability of an obligor for any deficiency. Tex. Bus. & Com. Code § 9.615. Section 9.619 clarifies the effect of a disposition by a secured party, including rights of transferees of the collateral. Tex. Bus. & Com. Code § 9.619.

§ 2.122:4 Rights and Duties of Secondary Obligor

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

§ 2.122:5 Transfer of Record or Legal Title

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

§ 2.122:6 Strict Foreclosure

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

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

The "rebuttable presumption" test applies to a determination of whether the secured party complied with certain provisions of subchapter F (the test does not necessarily apply in consumer transactions—see discussion at section 2.121:2 above). Tex. Bus. & Com. Code § 9.626. The deficiency claim of a noncomplying secured party is calculated by crediting the obligor with the greater of the actual net proceeds of a disposition or the amount of net proceeds that would have been realized if the disposition had been conducted in accordance with subchapter F (that is, in a commercially reasonable manner). Tex. Bus. & Com. Code § 9.626(a)(3). For nonconsumer transactions, this section rejects the "absolute bar" test that some courts have imposed, barring a noncomplying secured party from recovering any deficiency, regardless of the loss (if any) the debtor suffered as a consequence of the noncompliance. *See* Tex. Bus. & Com. Code § 9.626 cmt. 4.

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

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

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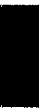

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Chapter 3

Finding Debtor and Debtor's Assets

I. Finding Debtor

§ 3.1 Why Finding Debtor Is Necessary

Finding the debtor is necessary because an amicable settlement of the claim is impossible otherwise. Although a judgment may be obtained against a missing defendant through service by publication (see section 16.16 in this manual), the process is expensive and involves extra costs of service and the appointment of an attorney ad litem. The judgment is subject to several forms of collateral attack (see section 16.16:3), and it is almost certainly uncollectible unless and until the debtor is found.

If the debtor cannot be found, it is better to advise the client of that fact and recommend closing the file. See section 17.63:2 regarding tolling of limitations when a defendant is absent from Texas.

One of the easiest and most effective strategies for locating a debtor is if the creditor-client obtains relevant location and identification information at the outset of the business relationship, for example, in a credit application or identification request. Such an application or request should ask the debtor to specifically provide the following information:

1. full name (d/b/a, a/k/a, or trade name, if any);
2. address (include e-mail address if available);
3. business status (corporation, LLC, sole proprietorship, or partnership, including state of registration);
4. business principals (owner, officers, directors, members, partners);
5. phone and fax numbers;
6. bank account and other relevant financial information;
7. description of any litigation or claims;
8. website information;
9. Social Security number or Employer Tax ID Number; and
10. references.

§ 3.2 Importance of Ascertaining Debtor's Form of Business

There are three primary reasons for ascertaining the form a business debtor takes. First, different entities are served with process in different ways. See sections 16.10 through 16.13 in this manual regarding service of process on different entities. Second, the nature of liability of the owners of the business varies with the type of entity. See sections 6.1 through 6.13 for a discussion of individual liability for debts of business entities. Third, the form of the debtor's business determines its location for UCC perfection and search purposes. See section 3.22 below.

§ 3.2:1 Comptroller

The Open Records Division of the Texas Comptroller of Public Accounts maintains records on taxable entities franchise tax and sales tax. Its search service is free. The comptroller's phone number is 800-252-1386, which directs the caller to the website **www.comptroller.texas.gov** to obtain the location and identification information discussed herein. The information may also be requested by fax at 512-475-1610 or by e-mail at **open.records@cpa.texas.gov**. And information may be obtained by using the comptroller's taxable entity search found at **https://mycpa.cpa.state.tx.us/coa/Index.html**. The information available from any of the listed searches includes the nature of the business—sole proprietorship, partnership, or corporation—as well as the names of corporate agents and officers, owners of sole proprietorships and partnerships, and corporate assumed names. The search will also tell whether the entity is in good standing. An entity is not in good standing when it forfeits its right to do business in Texas as a result of (1) failing to file the report required by chapter 171 of the Texas Tax Code, (2) failing to pay franchise taxes within forty-five days after a notice of forfeiture is mailed, or (3) refusing to permit the Texas comptroller to examine the filing entity's records pursuant to section 171.211 of the Texas Tax Code.

§ 3.2:2 Business Organization Records of Secretary of State

If provided with the business organization's name or a close approximation thereof, the secretary of state can provide such information as the business organization's registered agent and the names of its incorporators or whether the business is even a corporation chartered or authorized to do business in Texas. This information may be obtained at no charge by calling 512-475-2755 or by sending an e-mail to **corpinfo@sos.state.tx.us**. It also may be obtained by mail for a small charge per corporation name search or by searching the SOSDirect website at **www.sos.state.tx.us/corp/sosda/index.shtml**.

§ 3.2:3 Assumed Name Records

Searching the assumed name records is discussed at section 3.6 below. An assumed name record search will disclose not only the name but also the form of the debtor's business.

§ 3.3 Limitations on Debt Collectors' Activities in Finding People

The activities of debt collectors in trying to find consumer debtors are governed by the federal Fair Debt Collection Practices Act and the Texas Debt Collection Practices Act, which are discussed at length at sections 2.11 through 2.36 in this manual. The following sections apply particularly to debt collectors (as defined in the two acts) locating the debtor: 2.14 ("Mini-Miranda" notice), 2.15:9 (communication with third parties), 2.16 (misrepresentations), 2.32:2 (Texas law requiring debt collector identification), and 2.33 (Texas law concerning prohibited debt collection practices).

There are no statutory limitations concerning activities to locate nonconsumer debtors. The practitioner should be mindful of the common-law tort of unfair collections practices, which might create a counterclaim against the creditor or the creditor's attorney. *See also EMC Mortgage Corp. v. Jones*, 252 S.W.3d 857, 868 (Tex. App.—Dallas 2008, no pet.); *see also McDonald v. Bennett*, 674 F.2d 1080, 1089 n.8 (5th Cir. 1982) (noting that the tort of unreasonable collection efforts is intended to deter "outrageous collection techniques").

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§ 3.4 Post Office Resources

§ 3.4:1 Address Corrections

The simplest way to determine whether a debtor has moved from the last known address and discover the debtor's new location is to add the notation "Address Correction Requested—Do Not Forward" to the front of the envelope addressed to the last known address. If the post office has a forwarding address for the debtor, it will provide that address without charge when it returns the letter. Alternatively, the post office will deliver the letter to the debtor if it bears the notation "Forwarding and Address Correction Requested" and will return a card with a photocopy of the forwarded envelope showing the debtor's address along with a postage-due charge.

§ 3.4:2 Obtaining Debtor Information through Post Office

The creditor's attorney may request change of address or boxholder information from the U.S. Postal Service under the Freedom of Information Act, 5 U.S.C. § 552, for service of process. *See also* 39 C.F.R. § 265.3. A request must be submitted to the appropriate FOIA Requester Service Center ("RSC"). 39 C.F.R. § 265.3(a). For assistance in determining the appropriate FOIA RSC, requesters should review **http://about.usps.com/who/legal/foia/make-request-by-mail.htm**. Also listed on the website is a public liaison for each service center in the event additional assistance is needed.

A FOIA request can be used either to find a forwarding address for a defendant who has filed a change of address form or to obtain a name and street address for a business boxholder. 39 C.F.R. § 265.14(d)(4), (d)(5). This information will be provided only to an attorney, process server, or pro se party to aid that person in serving a defendant with process. The request can be made if the debtor is the subject of actual or prospective litigation. *See* 39 C.F.R. § 265.14(d)(5). Unless suit is actually planned against the debtor, however, the attorney should not consider the "prospective litigation" option to be a loophole to obtain information not otherwise available. *See* 15 U.S.C. § 1692.

The FOIA request must include—

1. a certification that the name or address is needed and will be used solely for service of legal process in connection with actual or prospective litigation;
2. a citation to the statute or regulation that empowers the requester to serve process, if the requester is other than the attorney for a party in whose behalf service will be made or a party who is acting pro se;
3. the names of all known parties to the litigation;
4. the court in which the case has been or will be commenced;
5. the docket or other identifying number, if one has been issued; and
6. the capacity in which the boxholder is to be served, e.g., defendant or witness.

39 C.F.R. § 265.14(d)(5)(ii)(A). By submitting such information and making the FOIA request, the requester certifies that the request is true and correct. The warning statement and certification must be included immediately before the signature block. If the FOIA request lacks any of the required information or a proper signature, the postmaster will return it to the requester specifying the deficiency. 39 C.F.R. § 265.14(d)(5)(ii)(B). See form 3-1 in this chapter.

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If the FOIA request is properly made, the post office will provide—

1. the new address of a specific customer who has filed a permanent or temporary change of address order;
2. the name and address of the holder of a bulk mail permit or other similar permit; or
3. the recorded name, address, and telephone number of the holder of a post office box.

39 C.F.R. § 265.14(d)(1), (d)(2), (d)(4), (d)(5).

§ 3.5 Driver's License Resources

On receipt of a written request and payment of a nominal fee, the Department of Public Safety may disclose information relating to an individual's most recent address as shown on its records. The requester must submit either the individual's driver's license number or full name and date of birth. The request should also include the individual's most current known address. Tex. Transp. Code §§ 521.045, 730.007(a)(2)(C)(ii). Although state and federal law has limited the availability of driver's license information, this information is still available for debt collection purposes. *See* 18 U.S.C. § 2721(b)(3); Tex. Transp. Code § 730.007(a)(2)(C)(ii). A DPS Application for Copy of Driver Record may be used to obtain this information and can be found at **www.txdps.state.tx.us/internetforms/Forms/DR-1.pdf**. See form 3-2 in this chapter. The information is not available online through the DPS website as of the publication date of the latest supplement of this manual; however, there are several fee-based commercial online services that will provide this information (for example, TLO, Accurint, LexisNexis). See also section 3.8:3.

§ 3.6 Assumed Name Records

§ 3.6:1 Who Must File Assumed Name Certificates

Assumed name certificates must be filed by—

1. any individual who does business under a name that does not include his own surname;
2. any partnership whose name does not include the surname or other legal name of each general partner or joint venturer;
3. any individual or partnership whose business name suggests the existence of other owners by the use of words such as "Company," "and Company," "and Sons," "Brothers," and so on;
4. any limited partnership, corporation, limited liability company, limited liability partnership, or foreign filing entity doing business under a name other than the one shown in its officially filed documents (for example, articles of incorporation); and
5. any other company conducting business under a name.

Tex. Bus. & Com. Code §§ 71.002(2), 71.051, 71.101.

§ 3.6:2 Where Certificates Must Be Filed

Corporations, limited partnerships, limited liability partnerships, limited liability companies, and foreign filing entities must file their assumed name certificates with the Texas secretary of state in Austin. A sole proprietor must file an assumed name certificate in every county in which the person conducts or renders professional services. Tex. Bus. & Com. Code § 71.054.

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§ 3.6:3 What to Look for in Assumed Name Certificates

An assumed name certificate provides the name and address of the owner of the business. The identity of any co-owners or others potentially liable for the debt may be discovered in this search. Also, a search of a reverse index of owners will show any other businesses a person or entity might own. In some urban counties, online searches of assumed name records are available and are usually free of charge.

§ 3.6:4 If Business Owner Fails to File Certificate

If a business owner–defendant fails to file a proper assumed name certificate, a plaintiff or other party bringing an action against the business may recover, if the court so determines, all expenses, including attorney's fees, incurred in locating and serving the owner. Tex. Bus. & Com. Code § 71.201.

§ 3.7 Searching by Telephone

§ 3.7:1 Telephone Searches Generally

Directory assistance does not give out addresses for number inquiries, but if voice contact with the debtor is sought, directory assistance may be helpful. Phone directories for many Texas towns and cities may be found in the public library or in a local phone company office. If debtors may be calling your office but refusing to give you contact information, caller ID and call return services can help, especially if the call return feature is used from a phone with an alphanumeric readout of the number dialed.

§ 3.7:2 Ethical and Legal Cautions

See section 2.15:4 in this manual regarding phone conduct generally and section 2.15:9 regarding communication with third parties.

The attorney should not use a gimmick such as claiming to have a package to deliver to the debtor and needing the debtor's address to deliver it. *See* Tex. Fin. Code § 392.304(a)(3). See section 2.33:2.

§ 3.7:3 Pretexting and Other False Pretenses

Pretexting occurs when someone tries to gain access to personal, nonpublic information without proper authority to do so by impersonating the account holder by phone, mail, e-mail, or by other means. *See* 15 U.S.C. §§ 6821–6827 (known as the Gramm-Leach-Bliley Act or the "GLBA"). The GLBA makes it illegal for financial institutions to collect data under false pretenses, that is, by pretext. 15 U.S.C. §§ 6821(a)–(b). While there is little case law on the subject, it seems clear that as an agent of financial institutions, a debt collector would be subject to the GLBA's prohibitions and resulting liability. In addition, pretextual collection activity may give rise to a "false pretenses" cause of action or defense by the debtor under common law. Practitioners should be aware that such conduct could also violate the Texas Disciplinary Rules of Professional Conduct. *See* Tex. Disciplinary R. Prof'l Conduct R. 3.01, 5.03, 8.04.

§ 3.8 Online Resources

§ 3.8:1 Finding Information on the Internet

Perhaps the most useful overall function of the Internet is its ability to search itself in a natural-language format. A few minutes' use of Google, Yahoo!, Bing, or other search sites can turn up all sorts of helpful information for location,

identification, and collection purposes. These search sites also offer free map applications, such as Google Maps, Apple Maps, and MapQuest, which allow the user to enter an address and immediately locate that address on the user's device, obtain directions, and view relatively recent pictures of the location entered.

Another source of information is social networking sites. Social networking sites such as Facebook, Twitter, Instagram, LinkedIn, Pinterest, Tumblr, Flickr, SnapChat, and similar sites should be scoured for useful location, identification, and asset information using each site's unique search functions.

§ 3.8:2 Commercial Online Services

There are many fee-based commercial online services available for locating debtor information. Services that provide information concerning debtors include **www.lexisnexis.com**, **https://westlaw.com**, **https://accurint.com**, **www.tlo.com**, **PeopleMap**, and **www.ussearch.com**.

§ 3.8:3 Credit Reporting Bureaus and Agencies

A simple credit report may tell you such things as the debtor's addresses for the last ten years, Social Security number, spouse's name, and employer. However, a credit report cannot be accessed without the consumer's permission. 15 U.S.C. § 1681b(a)(2).

Under the provisions of the Fair Credit Reporting Act (FCRA) you must—

1. obtain credit reports only for permissible purposes under the FCRA (15 U.S.C. § 1681b(a)(3));
2. notify the debtor when an adverse action is taken on the basis of such reports (15 U.S.C. § 1681b(b)(2)); and
3. identify the company that provided the report, so that the accuracy and completeness of the report may be verified or contested by the consumer (15 U.S.C. § 1681b(c))

Permissible purposes under the FCRA include—

1. use in a credit transaction involving the consumer on whom the information is to be furnished and involving the extension of credit to, or review or collection of an account of, the consumer (15 U.S.C. § 1681b(a)(3)(A));
2. employment qualification purposes (15 U.S.C. § 1681b(a)(3)(B));
3. underwriting insurance (15 U.S.C. § 1681b(a)(3)(C));
4. governmental issuance of a license or benefit (15 U.S.C. § 1681b(a)(3)(D));
5. use in assessment of personal credit risks as a potential investor or servicer, or current insurer (15 U.S.C. § 1681b(a)(3)(E));
6. a legitimate business need for the information—
   a. in connection with a business transaction that is initiated by the debtor; or
   b. to review an account to determine whether the debtor continues to meet the terms of the account (15 U.S.C. § 1681b(a)(3)(F)); and
7. as an executive department or an agency in connection with the issuance of government-sponsored individually billed travel charge card (15 U.S.C. § 1681b(a)(3)(G)).

The three major credit reporting agencies are Experian (**www.experian.com**), Equifax (**www.equifax.com**), and TransUnion

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(**www.transunion.com**). Each website has restricted access and is a subscription service. Attorneys typically do not subscribe to the services offered by credit reporting agencies, but often clients will have access to credit information.

§ 3.8:4 Asset Searches

There are also asset search applications on sites such as **www.lexisnexis.com** and **https://westlaw.com**. See also the sites listed in section 3.8:3 above. Each website has restricted access and is a subscription service. Services vary by website and subscription. You must have a legitimate reason to obtain this information in compliance with the Driver's Protection Policy Act (DPPA) and Gramm-Leach-Bliley Act (GLBA). Legitimate reasons include the following.

For the DPPA:

1. Litigation—in connection with any proceeding (including arbitration) in any court or government agency, or before any self-regulatory body, including investigation in anticipation of litigation, service of process, and execution of judgments. 18 U.S.C. § 2721(b)(4).
2. Debt recovery/fraud—to verify the accuracy of information about a person or obtain corrected information about a person who provided the information to you (or to your client) only if the information is used to recover on a debt against the person or to pursue legal remedies against the person for fraud. 18 U.S.C. § 2721(b)(3).
3. Business—in the normal course of business by a legitimate business or its agents, employees, or contractors to verify the accuracy of personal information submitted by the individual. 18 U.S.C. § 2721(b)(3).
4. Governmental use—by a government agency, including any court or law enforcement agency, in carrying out its functions. 18 U.S.C. § 2721(b)(1).
5. Insurers—by an insurer (or its agent) in connection with claims investigation activities, antifraud activities, rating, or underwriting. 18 U.S.C. § 2721(b)(6).

For the GLBA:

1. Fraud prevention or detection—"to protect against or prevent actual or potential fraud, unauthorized transactions, claims or other liability." 15 U.S.C. § 6802(e)(3)(B).
2. Legal compliance—to comply with federal, state, or local laws, rules, and other applicable legal requirements. 15 U.S.C. § 6802(e)(8).
3. Risk control—for required institutional risk control or for resolving customer disputes or inquiries. 15 U.S.C. § 6802(e)(3)(C).
4. Consumer authorization—with the consent and direction of a consumer or as necessary to effect or enforce a transaction requested or authorized by the consumer. 15 U.S.C. § 6802(e)(1), (e)(2).
5. Fiduciary capacity—by persons acting in a fiduciary capacity on behalf of the consumer. 15 U.S.C. § 6802(e)(3)(E).
6. Legal or beneficial interest—by persons holding a legal or beneficial interest relating to the consumer. 15 U.S.C. § 6802(e)(3)(D).

Dun & Bradstreet (**www.dandb.com**) is another subscription service available for searching business debtors. In general, it gives good loca-

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tion and financial information with respect to larger business. Typically, it is not very helpful for individuals or small businesses.

§ 3.9 Finding Debtor through Property Records

§ 3.9:1 Motor Vehicle Ownership

The Texas Department of Motor Vehicles will confirm the name of a vehicle's owner if provided with the vehicle identification number. The request must be made in person at any regional office of the DMV by filling out form VTR-275 (Request for Texas Motor Vehicle Information) and paying a nominal fee. See form 3-3 in this chapter. The DMV may be reached for assistance at 888-DMV-GOTX or 888-368-4689. More information on vehicle registration can be found on the DMV's website at **http://txdmv.gov/**.

§ 3.9:2 Boat Ownership and Liens

The Texas Parks and Wildlife Department will confirm the name of the owner of a boat if the boat registration number is provided. An online query for boat ownership may be made on the department's website at **https://apps.tpwd.state.tx.us/tora/home.faces**. Similarly, a printout of the ownership and lienholder information and a report of the boat's ownership history can be requested by submitting a request form to the department. The Ownership/Lien Holder Information Printout Or Ownership History Report (PWD 763) form can be downloaded from the department's site at **http://tpwd.texas.gov/publications/pwdforms/media/pwd_0763_a0900 _ownership_lien_holder_info_printout_history_rpt.pdf**. See form 3-4 in this chapter. Call the department at 512-389-4800 or toll-free at 800-792-1112 for more information.

§ 3.9:3 Aircraft

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

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

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

§ 3.10 Public Records

Although the county clerk's and tax assessor's records are more often searched to find the debtor's assets, they may contain address information as well. See sections 3.21:1 and 3.21:2 below regarding searching these records. When searching for an address in the county clerk's records, the attorney should examine all documents indexed in the debtor's name. All convey-

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ances executed after December 31, 1981, must have the grantee's address. Tex. Prop. Code § 11.003(a)(1). Also, county clerks typically require a document presented for recording to have a "return to" address at the end of the document. Finally, many document forms, such as the State Bar of Texas's conveyancing forms found in the *Texas Real Estate Forms Manual*, require the addresses of the parties to the transaction. The tax assessor's records will contain an address for the person paying taxes on particular property.

Location information may also be found in the federal district clerk's (including the bankruptcy court clerk) and county district clerk's records. Typically, because of jurisdictional and venue considerations, the information would be found where the debtor has its principal place of business or resides. Such information and records may be obtained on local county websites or through eFILETexas and its various providers. See **www.efiletexas.gov** for more information concerning its service providers and their respective services. Federal court records, including bankruptcy records, can be accessed through the federal PACER system at **www.pacer.gov**. Reviewing such information and records may also give the attorney a clearer picture of the collectability of the debt pursued.

§ 3.11 Professional or Occupational Licenses

If the debtor has a professional or occupational license, such as real estate broker–salesperson, insurance agent, auctioneer, physician, chiropractor, dentist, surveyor, nurse, accountant, or attorney, the relevant licensing authority should provide the debtor's address according to its records. If the debt or judgment pertains to the debtor's professional activity, there may be a recovery fund to pay unpaid judgments. *See, e.g.*, Tex. Occ. Code §§ 1101.601–.615 (Real Estate Recovery Fund to pay eligible judgments against licensees). A database of many Texas occupational licenses can be searched on the Texas Department of Licensing and Regulation's website, **www.tdlr.texas.gov/**. The practitioner should also visit the website of the agency regulating the occupation.

[Sections 3.12 through 3.20 are reserved for expansion.]

II. Finding Debtor's Assets

§ 3.21 Real Property Searches

§ 3.21:1 County Clerk

Every county clerk in the state must keep an index of grantors and grantees of documents recorded in the clerk's county. Many indexes are available online. If the county records are not online, a local title company may be of assistance; see section 3.21:3 below. Both the grantor and grantee indexes for tax liens and abstracts of judgment as well as conveyances should be searched in the county records.

§ 3.21:2 Tax Assessor-Collector

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

tax assessor does not maintain a name index, other taxing authorities in the county, such as school or water districts, may maintain such an index. Many counties now provide Internet access to their tax rolls.

§ 3.21:3 Title Company

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

§ 3.22 UCC Searches

With respect to liens encumbering personal property, the creditor will often record the lien in the public records of the secretary of state of the debtor's state of incorporation or organization pursuant to the provisions of the Uniform Commercial Code (the UCC). The system is similar to the recording system for real estate in county real property records. The purpose is to give potential buyers of personal property notice that the property is encumbered by a lien.

Under the UCC, a "debtor" is (1) "a person having an interest, other than a security interest or other lien, in the collateral, whether or not the person is an obligor"; (2) "a seller of accounts, chattel paper, payment intangibles, or promissory notes"; or (3) a cosignee. Tex. Bus. & Com. Code § 9.102(a)(28). An "obligor" is a person who, "with respect to an obligation secured by a security interest in or an agricultural lien on the collateral," (1) "owes payment or other performance of the obligation," (2) "has provided property other than the collateral to secure payment or other performance of the obligation," or (3) "is otherwise accountable in whole or in part for payment or other performance of the obligation." Issuers or nominated persons under a letter of credit are not obligors as defined by the UCC. Tex. Bus. & Com. Code § 9.102(a)(73). A "secured party" is (1) a person in whose favor a security interest is created or provided for under a security agreement, whether or not any obligation to be secured is outstanding; (2) a person holding an agricultural lien; (3) a consignor; (4) a person to which accounts, chattel paper, payment intangibles, or promissory notes have been sold; (5) a trustee, indenture trustee, agent, collateral agent, or other representative in whose favor a security interest or agricultural lien is created or provided for; or (6) a person that holds a security interest arising under section 2.401, 2.505, 2.711(c), 2A.508(e), 4.210, or 5.118 of the UCC. Tex. Bus. & Com. Code § 9.102(a)(73).

A secured party perfects its security interest by filing a financing statement, also called a UCC1. A UCC1 is a simple form that includes information such as the legal names and addresses of the debtor and creditor and a description of the collateral.

Because the UCC1 must describe the collateral securing a secured debt, a review of these documents will also give the attorney such information as the kind of assets the debtor may have and the identity of any party claiming a security interest in the assets as collateral for a debt. Tex. Bus. & Com. Code § 9.502.

To determine whether a particular UCC1 has actually been filed, the attorney can—

1. examine the particular UCC1 to see whether the upper right-hand corner has been stamped by the secretary of state or county clerk's office;
2. call the secretary of state's office at 512-463-5555, give the name of the debtor, and request the search;
3. perform an online financing statement search on the fSOSDirect website at **www.sos.state.tx.us/corp/sosda/index.shtml**; or

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4. submit a form UCC11 to the appropriate office. See form 3-5 in this chapter.

On receipt of a form UCC11, the filing officer must issue his certificate showing whether there is on file, on the date and hour stated therein, any presently effective financing statement naming a particular debtor and any statement of assignment and, if there is, giving the date and hour of filing of each such statement and the name and address of each secured party. On request, the filing officer must furnish a copy of any filed financing statement or statement of assignment. A financing statement for some kinds of personal property can be obtained by sending a form UCC11 to the Secretary of State, Uniform Commercial Code Section, P.O. Box 13193, Austin, TX 78711-3193. See form 3-5 in this chapter; form UCC11 is also available on the secretary of state's website at **www.sos.state.tx.us/ucc/forms/ucc11.pdf**. The form can be downloaded or filled out and then printed from the site. This information is also available through the Secretary of State Online Access system, called SOSDirect, which allows computer access to information maintained by the secretary of state. Information on subscribing to this system may be obtained by calling 512-475-2755 (corporations) or 512-475-2703 (UCC); e-mailing **corpinfo@sos.texas.gov**, **ucc_assist@sos.texas.gov**, or **sosdirect@sos.texas.gov**; or by accessing the secretary of state's website at **www.sos.state.tx.us**. See sections 5.11:4 through 5.11:6 in this manual for further discussion of financing statements.

§ 3.23 Debtor's Bank Account

An easy way to find out where the debtor banks is to write him a check on an unfamiliar account, which when cashed will show the depository bank and offer the account number itself. If the debtor is a business, something may be bought from the business with a check. This procedure should not be used in a consumer debt situation because such a procedure may violate consumer protection laws. See generally chapter 2.

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

§ 3.24 Vehicles, Boats, Aircraft

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

Form 3-1

This form is mandated by 39 C.F.R. § 265.14(d)(5). If submitted on the requester's letterhead, it must be used in its entirety or the postmaster will return it. Also, the warning statement and certification must appear immediately before the signature block. Note that the copy of a statute or regulation requested in item 2. below is not required if the requester is an attorney or a party acting pro se (a corporation acting pro se must include a copy of a statute or regulation, however).

Letter to Postal Service Requesting Information Concerning Address for Service of Process

[Letterhead Optional]

Postmaster Date ____________________

____
City, State, ZIP Code

Request for Change of Address or Boxholder

Information Needed for Service of Legal Process

Please furnish the new address or the name and street address (if a boxholder) for the following:

Name: ____

Last Known Address: ____

NOTE: Only one request may be made per completed form. The name and last known address are required for change of address information. The name, if known, and Post Office box address are required for boxholder information. **You must enclose a copy of the statute or regulation that empowers you to serve process.** (Not required for attorneys or individuals acting pro se.) If you are a corporation proceeding pro se in state court, you must enclose a copy of the state statute or regulation permitting corporations to proceed pro se.

The following information is provided in accordance with 39 C.F.R. § 265.14(d)(5). There is no fee for providing boxholder or change of address information.

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1. Capacity of requester (e.g., process server, attorney, party representing self): ________

   ____

2. The names of all known parties to the litigation: ______________________________

   ____

3. The court in which the case has been or will be heard: ________________________

   ____

4. The docket or other identifying number if one has been issued: ________________

5. The capacity in which this individual is to be served (e.g., defendant or witness): ____

   ____

WARNING: THE SUBMISSION OF FALSE INFORMATION TO OBTAIN AND USE CHANGE OF ADDRESS INFORMATION OR BOXHOLDER INFORMATION FOR ANY PURPOSE OTHER THAN THE SERVICE OF LEGAL PROCESS IN CONNECTION WITH ACTUAL OR PROSPECTIVE LITIGATION COULD RESULT IN CRIMINAL PENALTIES INCLUDING A FINE OF UP TO $10,000 OR IMPRISONMENT OF NOT MORE THAN 5 YEARS, OR BOTH (TITLE 18 U.S.C. SECTION 1001).

I certify that the above information is true and that the address information is needed and will be used solely for service of legal process in conjunction with actual or prospective litigation.

______________________________	______________________________
Signature	Address
______________________________	______________________________
Printed Name	City, State, ZIP Code

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____

FOR POST OFFICE USE ONLY

__ No change of address order on file.	NEW ADDRESS OR BOXHOLDER NAME POSTMARK AND STREET ADDRESS:
__ Moved and left no forwarding address	______________________________
__ No such address.	______________________________
	______________________________

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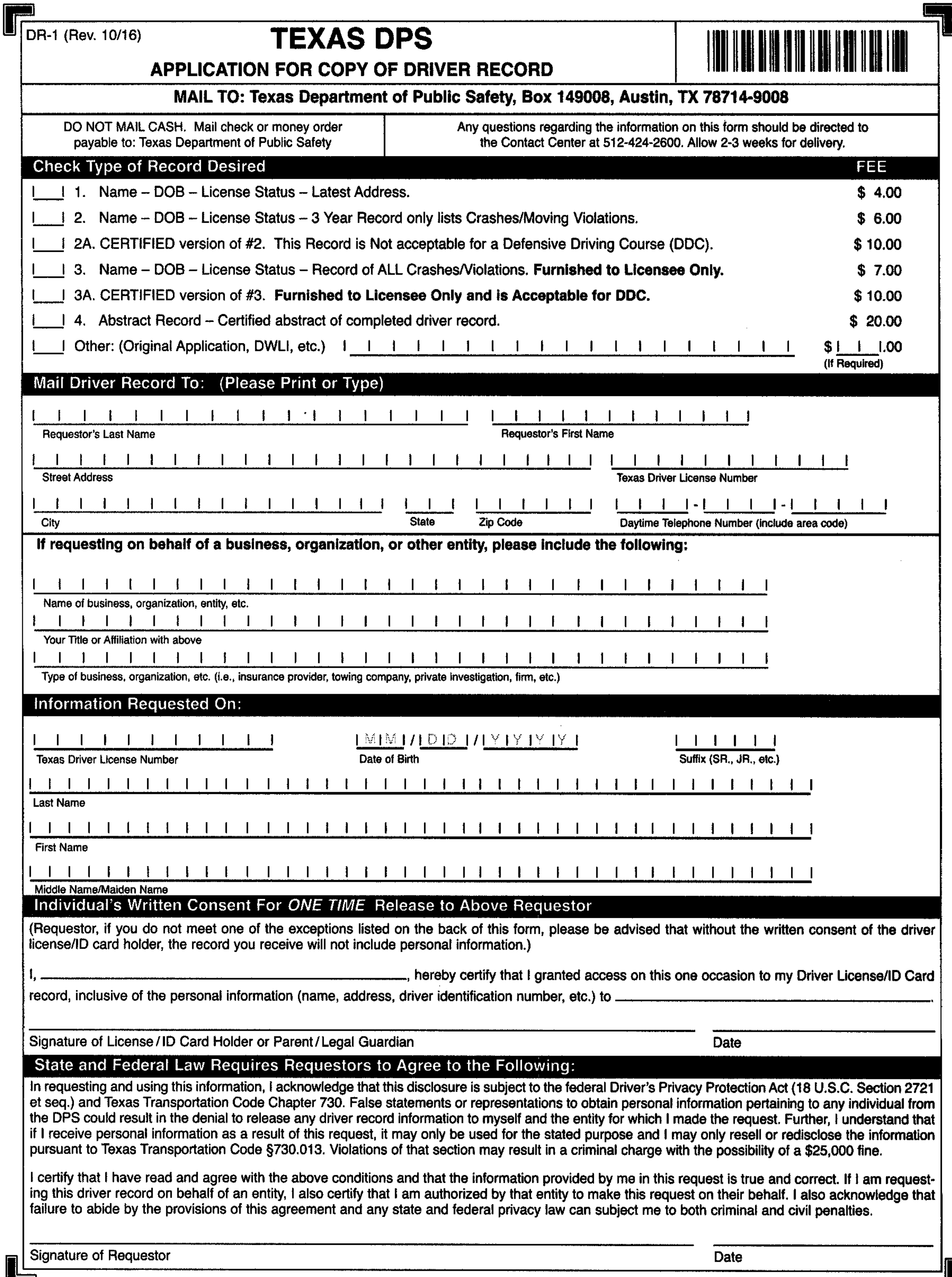
Form 3-2

Texas DPS Application for Copy of Driver Record



DR-1 (Rev. 10/16)

TEXAS DPS

APPLICATION FOR COPY OF DRIVER RECORD

MAIL TO: Texas Department of Public Safety, Box 149008, Austin, TX 78714-9008

DO NOT MAIL CASH. Mail check or money order payable to: Texas Department of Public Safety

Any questions regarding the information on this form should be directed to the Contact Center at 512-424-2600. Allow 2-3 weeks for delivery.

Check Type of Record Desired	FEE
___ 1. Name – DOB – License Status – Latest Address.	$ 4.00
___ 2. Name – DOB – License Status – 3 Year Record only lists Crashes/Moving Violations.	$ 6.00
___ 2A. CERTIFIED version of #2. This Record is Not acceptable for a Defensive Driving Course (DDC).	$ 10.00
___ 3. Name – DOB – License Status – Record of ALL Crashes/Violations. **Furnished to Licensee Only.**	$ 7.00
___ 3A. CERTIFIED version of #3. **Furnished to Licensee Only and is Acceptable for DDC.**	$ 10.00
___ 4. Abstract Record – Certified abstract of completed driver record.	$ 20.00
___ Other: (Original Application, DWLI, etc.) ______	$___.00 (If Required)

Mail Driver Record To: (Please Print or Type)

Requestor's Last Name ______ Requestor's First Name ______

Street Address ______ Texas Driver License Number ______

City ______ State ______ Zip Code ______ Daytime Telephone Number (include area code) ___-___-___

If requesting on behalf of a business, organization, or other entity, please include the following:

Name of business, organization, entity, etc. ______

Your Title or Affiliation with above ______

Type of business, organization, etc. (i.e., insurance provider, towing company, private investigation, firm, etc.) ______

Information Requested On:

Texas Driver License Number ______ Date of Birth MM/DD/YYYY Suffix (SR., JR., etc.) ______

Last Name ______

First Name ______

Middle Name/Maiden Name ______

Individual's Written Consent For *ONE TIME* Release to Above Requestor

(Requestor, if you do not meet one of the exceptions listed on the back of this form, please be advised that without the written consent of the driver license/ID card holder, the record you receive will not include personal information.)

I, ______, hereby certify that I granted access on this one occasion to my Driver License/ID Card record, inclusive of the personal information (name, address, driver identification number, etc.) to ______.

Signature of License / ID Card Holder or Parent / Legal Guardian ______ Date ______

State and Federal Law Requires Requestors to Agree to the Following:

In requesting and using this information, I acknowledge that this disclosure is subject to the federal Driver's Privacy Protection Act (18 U.S.C. Section 2721 et seq.) and Texas Transportation Code Chapter 730. False statements or representations to obtain personal information pertaining to any individual from the DPS could result in the denial to release any driver record information to myself and the entity for which I made the request. Further, I understand that if I receive personal information as a result of this request, it may only be used for the stated purpose and I may only resell or redisclose the information pursuant to Texas Transportation Code §730.013. Violations of that section may result in a criminal charge with the possibility of a $25,000 fine.

I certify that I have read and agree with the above conditions and that the information provided by me in this request is true and correct. If I am requesting this driver record on behalf of an entity, I also certify that I am authorized by that entity to make this request on their behalf. I also acknowledge that failure to abide by the provisions of this agreement and any state and federal privacy law can subject me to both criminal and civil penalties.

Signature of Requestor ______ Date ______

If you are not requesting a copy of your own record or do not have the written consent of DL/ID holder, you must provide the information requested on the reverse.

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Texas Department of Public Safety	Save Time – Request Your Driver Record Online www.texas.gov

Important Instructions – Read Carefully

The Texas Department of Public Safety may disclose personal information to a requestor without written consent of the DL/ID holder, on proof of their identity and a certification by the requestor that the use of the personal information is authorized under state and federal law and that the information will be used only for the purpose stated and in complete compliance with state and federal law.

You must meet one or more of the following exceptions if you do not have written consent of the DL/ID holder to be entitled to receive personal information on the above named individual. Please *initial* each category that applies to the requested driver record.

_________ 1. For use in connection with any matter of (a) motor vehicle or motor vehicle operator safety; (b) motor vehicle theft; (c) motor vehicle emissions; (d) motor vehicle product alterations, recalls, or advisories; (e) performance monitoring of motor vehicles or motor vehicle dealers by a motor vehicle manufacturer; or (f) removal of nonowner records from the original owner records of a motor vehicle manufacturer to carry out the purposes of the Automobile Information Disclosure Act, the Anti Car Theft Act of 1992, the Clean Air Act, and any other statute or regulation enacted or adopted under or in relation to a law included in the above.

_________ 2. *(Valid for Certified Abstract)* For use by a government agency in carrying out its functions or a private entity acting on behalf of a government agency in carrying out its functions.

_________ 3. For use in connection with a matter of (a) motor vehicle or motor vehicle operator safety; (b) motor vehicle theft; (c) motor vehicle product alterations, recalls, or advisories; (d) performance monitoring of motor vehicles, motor vehicle parts, or motor vehicle dealers; (e) motor vehicle market research activities, including survey research; or (f) removal of nonowner records from the original owner records of motor vehicle manufacturers.

_________ 4. For use in the normal course of business by a legitimate business or an authorized agent of the business, but only to verify the accuracy of personal information submitted by the individual to the business or the authorized agent of the business and to obtain correct information if the submitted information is incorrect to prevent fraud by pursuing a legal remedy against, or recovering on a debt or security interest against the individual.

_________ 5. *(Valid for Certified Abstract)* For use in conjunction with a civil, criminal, administrative, or arbitral proceeding in any court or government agency or before any self regulatory body, including service of process, investigation in anticipation of litigation, execution or enforcement of a judgement or order, or under an order of any court.

_________ 6. For use in research or in producing statistical reports, but only if the personal information is not published, redisclosed, or used to contact any individual.

_________ 7. For use by an insurer or insurance support organization, or by a self insured entity, or an authorized agent of the entity, in connection with claims investigation activities, antifraud activities, rating or underwriting.

_________ 8. For use in providing notice to an owner of a towed or impounded vehicle.

_________ 9. For use by a licensed private investigator agency or licensed security service for a purpose permitted as stated on this page.

_________ 10. *(Valid for Certified Abstract)* For use by an employer or an authorized agent or insurer of the employer to obtain or verify information relating to a holder of a commercial driver license that is required under 49 U.S.C. Chapter 313.

_________ 11. For use in connection with the operating of a private toll transportation facility.

_________ 12. For use by a consumer-reporting agency as defined by the Fair Credit Reporting Act (15 U.S.C. §1681 et seq.) for a purpose permitted under the Act.

_________ 13. For any other purpose specifically authorized by law that relates to the operation of a motor vehicle or to public safety.

Please state specific statutory authority _________________________

_________ 14. For use in the preventing, detecting, or protecting against identity theft or other acts of fraud. The Department prior to release of personal information may require additional information.

Below is an example of how numbers and letters should be written on front of this form:

1 2 3 4 5 6 7 8 9 0

A B C D E F G H I J K L M N O P Q R S T U V W X Y Z

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Form 3-3

Request for Texas Motor Vehicle Information

Request for Texas Motor Vehicle Information

Information and Instructions

The Driver Privacy Protection Act restricts access to personal information on vehicle title and registration records. Your signature and a copy of your current government issued photo ID are required with this application to certify the statements are true and correct for the described vehicle.

Submit completed and signed form with copy of your government issued photo ID, written authorization and required documentation, if applicable, to the following address or visit a Texas Department of Motor Vehicles (TxDMV) Regional Service Center for assistance.

Include payment in the form of a personal check, money order, or cashier's check made payable to TxDMV. **Do not mail cash**. Fees are not refundable.

Texas Department of Motor Vehicles
Vehicle Titles and Registration Division
Austin, TX 78779-0001

Applicant Information

First Name	Middle Name	Last Name	Suffix
Business Name (if applicable)			
Address	City	State	ZIP
Email		Phone Number	

Government Issued Photo Identification – Submit Photocopy

Entity Issuing ID and Type (e.g., TX Driver License, US Passport, etc.)	Government Photo ID Number	Expires

Search Information

Texas License Plate	Year	Make
Vehicle Identification Number	Title Document Number	

Records Request

If you are not the owner/lienholder, initial a **Permitted Use** on page 2 - unless you have written authorization. Select from the following:

- ☐ Title history $5.75
- ☐ Certified title history $6.75
- ☐ Title and registration verification of a vehicle record (current or expired) $2.30
- ☐ Certified title and registration verification of a vehicle record - for court use $3.30
- ☐ Duplicate registration receipt for current registration period $2.00
- ☐ Other - Please attach documentation explaining the request. You will be contacted with the fee total, which is based on the effort to fill the request.

Certification – State law makes falsifying information a third degree felony.

I certify that the statements on this application are true and correct and request the TxDMV provide me with the requested information contained in the motor vehicle record for the vehicle indicated. In making this request, I also certify that the:

- Information requested is for a lawful and legitimate purpose and will be used only in accordance with 18 U.S. Code §§2721-2725 and Texas Transportation Code, Chapter 730 (Driver Privacy Protection Acts);
- Personal information obtained pursuant to this request **will not** be used for marketing, solicitation or survey purposes; and
- I have not been convicted of a violation of either of the Driver Privacy Protection Acts, or violated a rule adopted by the department relating to the terms and conditions for release of personal information from vehicle records.

Name of Applicant ______________________ Date ______________

Signature of Applicant ______________________

Violators can be prosecuted under Texas Transportation Code, Section 730.013 and Penal Code, Section 37.10.

Form VTR-275 Rev. 8/2018 Form available online at www.TxDMV.gov Page 1 of 2

Request for Texas Motor Vehicle Information

Permitted Use – Sign or print your initials on the appropriate line for your use of the requested information.

Choose one of the following options.

1.☐ I am the current recorded owner or lienholder of the vehicle;

2.☐ Written authorization is attached from the person(s) listed as the recorded owner, lienholder or previous owner; or

3.☐ My authority to obtain vehicle information is for the permitted use noted below. I understand the use of the requested information is strictly limited to:

______ A governmental entity, including law enforcement (check applicable box):
- ☐ A government agency, including any court or law enforcement agency, in carrying out its functions.
- ☐ A private person or entity acting on behalf of a government agency in carrying out the functions of the agency.

______ Use in connection with one of the following (check applicable box):
- ☐ Motor vehicle safety or motor vehicle operator safety.
- ☐ Motor vehicle theft.
- ☐ Motor vehicle emissions.
- ☐ Motor vehicle product alterations, recalls or advisories.
- ☐ Performance monitoring of motor vehicles, motor vehicle parts, or motor vehicle dealers.
- ☐ Motor vehicle market research activities, including survey research.
- ☐ Removal of non-owner records from the original owner records of a motor vehicle manufacturer to carry out the purposes of the Automobile Information Disclosure Act, the Anti Car Theft Act of 1992, and the Clean Air Act.
- ☐ For child support enforcement.
- ☐ Enforcement by the Texas Workforce Commission.
- ☐ Voter registration or the administration of elections by the secretary of state.

______ Use in the normal course of business by a legitimate business or its authorized agent, but only to verify accuracy of personal information submitted by the individual; and, if the information is not correct, to obtain the correct information for the sole purpose of preventing fraud by, pursuing a legal remedy against or recovering on a debt or security interest against the individual. (Requestor must submit the information to be verified against the department's records.)

______ In conjunction with a civil, criminal, administrative or arbitral proceeding in any court or government agency or before any self-regulatory body, including service of process, investigation in anticipation of litigation, execution or enforcement of a judgment or order, or under an order of any court. (Requestor must submit proof of legal proceeding or proof of anticipated proceeding.)

______ Use in research or in producing statistical reports, but **only if the personal information is NOT published, redisclosed, or used to contact any individual.** (Requestor must submit proof of employment in a research occupation.)

______ Use by an insurer or insurance support organization, a self-insured entity or as an authorized agent of the entity in connection with claims investigation activities, antifraud activities, rating or underwriting. (Requestor must submit a license number provided by the Texas Department of Insurance or out-of-state equivalent, a license number the insurance support organization is working under, or proof of self-insurance. License Number: ______________________)

______ Use in providing notice to an owner of a towed or impounded vehicle. (Requestor must submit a license number provided by the Texas Department of Licensing and Regulation or out-of-state equivalent. License Number: ______________________)

______ Use by a licensed private investigation agency or licensed security service authorized to use the information for a permitted purpose. (Requestor must submit a license number provided by the Texas Department of Public Safety or out-of-state equivalent. License Number: ______________________)

______ Use in connection with the operation of a private toll transportation facility. (Requestor must submit documentation to relate the requested personal information with operation of a private toll transportation facility.)

______ Use by a consumer reporting agency, as defined by the Fair Credit Reporting Act, for a purpose permitted under that Act. (Requestor must submit documentation on official letterhead indicating a permitted use for personal information as defined by the Fair Credit Reporting Act.)

Resale and Redisclosure

Motor vehicle record information obtained by an authorized recipient for a permitted use may not be resold or redisclosed unless the information is provided to other authorized recipients and used only for the permitted use. Information obtained as a result of this request may not be resold or redisclosed in the same or substantially identical format as it is received from the TxDMV. Any original recipient is responsible for misuse of the motor vehicles records, regardless if they approved or were aware of subsequent transfers of the information.

An authorized recipient who resells or rediscloses motor vehicle records is required to maintain records of that transaction for a period of not less than five years. The department has the authority to request and review records kept by all authorized recipients. For further information regarding resale and redisclosure requirements, refer to the Texas Administrative Code, Rule §§217.127 and 217.128.

Form VTR-275 Rev. 8/2018 Form available online at www.TxDMV.gov Page 2 of 2

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Form 3-4

Ownership/Lien Holder Information Printout Or Ownership History Report (PWD 763)

Ownership/Lien Holder Information Printout Or Ownership History Report (PWD 763)

This form is used to:

- **Obtain a computer printout**, which provides the current owner/lien holder name, address, vessel/boat and/or outboard motor description. The form PWD 763 must be completed and submitted with appropriate fees to TPWD Headquarters in Austin, a TPWD local law enforcement office, or a participating County Tax Assessor-Collector office.
- **Obtain the History**, which provides a copy of all documents submitted for transactions on file for a vessel/boat and/or outboard motor. TPWD retains historical documentation for vessels and outboard motors for a period of 10 years. The form PWD 763 must be completed and submitted with appropriate fees to TPWD Headquarters in Austin.

Check if your request is for a vessel/boat, outboard motor or both. Complete multiple forms if you need information for more than one vessel/boat and one outboard motor.

☐ **Vessel/Boat Information:** Please complete each blank if possible.

TX #: ____________________ HIN/Serial#: ____________________

Make: ____________________ Year Built: ____________________

Owner of Record Name and Address: ____________________

☐ **Outboard Motor Information:** Please complete each blank if possible.

M# (if known): ____________________ MIN/Serial #: ____________________

Make: ____________________ Year Built: ____________________

Owner of Record Name and Address: ____________________

Select the type of information you are requesting on the vessel/boat and/or outboard motor.

☐ **Ownership/Lien Holder Information Printout – fee $0.00** each vessel/boat or outboard motor request
I, the undersigned, hereby request the name and address of the owner, name and address of the lien holder (if recorded), vessel/boat registration expiration date, and record status information on the vessel/boat and/or outboard motor described above.

☐ **Ownership History Report – (See Fee Chart)** each vessel/boat or outboard motor request
I, the undersigned, hereby request the historical transaction information recorded for the vessel/boat and/or outboard motor described above.
Check one: ☐ Normal History, or ☐ Certified History (letter is provided for court purposes)

Fees:

Number of Ownership/Lien Holder Reports Requested: __________ x $0 = $ __________

Number of Ownership History Reports Requested: __________ x (See Fee Chart) __________

Total Amount Enclosed: $ ____________________

I hereby certify that the TPWD vessel/boat and/or outboard motor record obtained will be used for lawful purposes.

WARNING: Falsifying information on documents is a punishable offense – Texas Penal Code Chapter 37, Section 37.10. Any person who knowingly makes a false entry in, or false alteration of a governmental record is guilty of a felony of the third degree, punishable by confinement in jail for any term of not more than 10 years or less than 2 years and punishable by a fine not to exceed $10,000. I hereby certify that all statements in this document are true and correct to the best of my knowledge and belief.

Signature of Applicant/Requestor: ____________________ Date: __________

Print Name: ____________________

Business Name (if applicable): ____________________

Mail to Address: ____________________

City: ____________________ State: _____ Zip: __________

Daytime Phone Number: ____________________

Texas Parks and Wildlife Department maintains the information collected through this form. With few exceptions, you are entitled to be informed about the information we collect. Under Sections 552.021 and 552.023 of the Texas Government Code, you are also entitled to receive and review the information. Under Section 559.004, you are also entitled to have this information corrected.

PWD 0763 – A0900 (08/09) Texas Parks and Wildlife Department • 4200 Smith School Road, Austin, TX 78744 • www.tpwd.state.tx.us

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Form 3-5

UCC11
Information Request

INFORMATION REQUEST
FOLLOW INSTRUCTIONS

A. NAME & PHONE OF CONTACT AT FILER (optional) | FILING OFFICE ACCT #

B. E-MAIL CONTACT AT FILER (optional)

C. RETURN TO: (Name and Address)

THE ABOVE SPACE IS FOR FILING OFFICE USE ONLY

1. DEBTOR'S NAME to be searched: Provide only one Debtor name (1a or 1b) (use exact full name; do not omit, modify or abbreviate any part of the Debtor's name)

1a. ORGANIZATION'S NAME			
OR 1b. INDIVIDUAL'S SURNAME	FIRST PERSONAL NAME	ADDITIONAL NAME(S)/INITIAL(S)	SUFFIX

2. INFORMATION OPTIONS relating to UCC filings and other notices on file in the filing office that include the Debtor name identified in item 1:

2a. ☐ LISTING RELATING TO DEBTOR AT SPECIFIED CITY AND STATE ONLY — Filing office requested to furnish a search report listing all financing statements, related records, and other notices on file in filing office that include the Debtor's name identified in item 1 and show that Debtor's address in the city, state, and country indicated here:

CITY	STATE	COUNTRY

2b. ☐ INFORMATION REQUEST RESPONSE WITH FULL COPIES (CERTIFIED) — Filing office requested to furnish a search report listing all financing statements, related records, and other notices, showing date and time of filing and name and address of each Secured Party named therein, and also furnish an exact CERTIFIED COPY of ALL reported records (including all attachments)

2c. ☐ INFORMATION REQUEST RESPONSE WITHOUT COPIES — Filing office requested to furnish a search report (as described in 2b) listing all reported records, but to furnish NO COPIES of reported records

2d. ☐ INFORMATION REQUEST RESPONSE WITH PARTIAL COPIES (CERTIFIED) — Filing office requested to furnish a search report (as described in 2b) and also to furnish an exact CERTIFIED COPY of the FIRST PAGE ONLY of all reported records

3. ☐ SPECIFIED COPIES ONLY — Filing office requested to furnish an exact copy of each page of the financing statements, related records, and other notices (including all attachments) that are identified below by record number. Certain filing offices require additional identifying information — please complete if required

☐ CERTIFIED COPY REQUEST — Filing office requested to furnish CERTIFIED copies per request indicated in this item 3

Record Number	Date Record Filed (if required)	Type of Record and Additional Identifying Information (if required)

4. ☐ LISTING RELATING TO SECURED PARTY — Filing office requested to furnish a search report listing all financing statements, related records, and other notices (regardless of Debtor name) on file in filing office that include the Secured Party's name identified in item 4a or 4b. If a specified city, state, and country are being requested (optional), show that Secured Party's address in item 4c

4a. ORGANIZATION'S NAME			
OR 4b. INDIVIDUAL'S SURNAME	FIRST PERSONAL NAME	ADDITIONAL NAME(S)/INITIAL(S)	SUFFIX
4c. CITY		STATE	COUNTRY

5. DELIVERY INSTRUCTIONS (request will be filled by mail sent to address shown in item C unless otherwise instructed here):

5a. ☐ FAX Delivery — Filing office requested to fax results of this Information Request to fax number indicated here: ( )

5b. ☐ Pick Up

5c. ☐ Other

Specify desired method here (if available from this office); provide delivery information (e.g., delivery service's name, addressee's account # with delivery service, addressee's phone #, etc.)

FILING OFFICE COPY (1) — INFORMATION REQUEST (Form UCC11) (Texas) (Rev. 07/19/12)

Office of the Secretary of State of Texas

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Instructions for Information Request (Form UCC11) (Texas)

Please type or laser-print this form. Be sure it is completely legible. Read and follow all Instructions, especially Instruction 1; use of the correct name for the Debtor is crucial.
Fill in form very carefully; mistakes may have important legal consequences. If you have questions, consult your attorney. The filing office cannot give legal advice.
Send completed form parts 1 and 2 (labeled Filing Office Copy (1) and (2)) to the filing office, with the required fee.

ITEM INSTRUCTIONS

A and B. To assist filing offices that might wish to communicate with filer, filer may provide information in item A and item B. These items are optional.
C. Provide name and address of requestor in item C. This item is NOT optional.

1. **Debtor's name.** Enter only one Debtor name in item 1 -- either an organization's name (1a) or an individual's name (1b). Enter Debtor's correct name. Do not abbreviate words that are not already abbreviated in the Debtor's name.

1a. Organization Debtor Name. "Organization Name" means the name of an entity that is not a natural person. A sole proprietorship is not an organization, even if the individual proprietor does business under a trade name. If Debtor is a registered organization (e.g., corporation, limited partnership, limited liability company), it is advisable to examine Debtor's current filed public organic records to determine Debtor's correct name. Trade name is insufficient. If a corporate ending (e.g., corporation, limited partnership, limited liability company) is part of the Debtor's name, it must be included. Do not use words that are not part of the Debtor's name.

1b. Individual Debtor Name. "Individual Name" means the name of a natural person; this includes the name of an individual doing business as a sole proprietorship, whether or not operating under a trade name. The term includes the name of a decedent where collateral is being administered by a personal representative of the decedent. The term does not include the name of an entity, even if it contains, as part of the entity's name, the name of an individual. Prefixes (e.g., Mr., Mrs., Ms.) and titles (e.g., M.D.) are generally not part of an individual name. Indications of lineage (e.g., Jr., Sr., III) generally are not part of the individual's name, but may be entered in the Suffix box. Enter individual Debtor's surname (family name) in Individual's Surname box, first personal name in First Personal Name box, and all additional names in Additional Name(s)/Initial(s) box.

If a Debtor's name consists of only a single word, enter that word in Individual's Surname box and leave other boxes blank.

For both organization and individual Debtors. Do not use Debtor's trade name, DBA, AKA, FKA, division name, etc. in place of or combined with Debtor's correct name; filer may add such other names as additional Debtors if desired (but this is neither required nor recommended).

2. **Information Options.**

2a. To request a "Listing Relating to Debtor at Specified City and State Only" check box 2a and enter the city, state, and country in item 2a. This type of request will introduce a search criterion that narrows the scope of the search, which may result in an incomplete search (that fails to list all filings against a named Debtor) and requestor may fail to learn information that might be of value.

2b-2d. Check appropriate box (2b, 2c, or 2d) to specify whether search response should include all copies, no copies or partial copies.

3. **Specified Copies Only.** To request specified copies only, check the "Specified Copies Only" box and provide the record number(s) as requested. To request certified copies for record number(s) identified in item 3, also check the "Certified Copy Request" box.

4. **Listing relating to Secured Party.** To request a listing for a named Secured Party, check this box. Enter only one Secured Party name in item 4 -- either an organization's name (4a) or an individual's name (4b). If a specified city, state, and country is being requested (optional), enter that Secured Party's address in item 4c.

5. **Delivery Instructions.** Unless otherwise instructed, filing office will mail information to the name and address in item C. Check appropriate box (5a, 5b, or 5c) if optional delivery method is being requested.

5a. To request information to be faxed to the requestor, check the "FAX Delivery" box and provide fax number in specified area.

5b. To request information to be picked up from the filing office, check the "Pick Up" box.

5c. For other than mail, pick up or FAX, check the "Other" box and specify the other delivery method that is being requested. If requesting delivery service, provide delivery service's name and requestor's account number to bill for delivery charge. Filing office will not deliver by delivery service unless prepaid waybill or account number for billing is provided.

If requesting information from a county clerk filing office, contact county clerk to determine what services are offered by that office.

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Chapter 4

Communicating with Debtor

I. Demand and Negotiation

§ 4.1 Why Make Demand?

§ 4.1:1 Confirm Debtor's Location

Mailing an envelope to the debtor at his last known address will either confirm that address as correct or provide information about a new forwarding address. If the notation "address correction requested" is included on the envelope, the post office will provide a forwarding address. See section 3.4 in this manual.

§ 4.1:2 Motivate Debtor to Pay

Letters from attorneys can be effective tools to motivate the debtor to pay. Every communication with the debtor or debtor's attorney should encourage payment. A firm but civil tone to the attorney's communications, combined with the message that *this* debt is one that must be dealt with, may encourage payment in situations in which a more strident tone might not.

A demand letter to the debtor should contain an assertion that the creditor has instructed the attorney to make only one demand for payment before filing suit. This assertion should be made only if true. Although there is apparently no liability for making such an untrue statement in connection with a commercial debt (as contrasted with a consumer debt, where such a false assertion violates the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692–1692p), the attorney sabotages his own authority and credibility by doing so. If the nature of the debt requires notice of intent to accelerate, that notice constitutes a second demand. See form 4-1 in this chapter for a commercial debt demand letter, form 4-2 for a consumer debt demand letter, and form 4-3 for a notice of intent to accelerate.

Demand letters should be sent both by certified mail, return receipt requested, and by regular first-class mail to take advantage of the mail presumption.

§ 4.1:3 Determine Debtor's Ability to Pay or Amenability to Suit

All communications to or with the debtor should be open-ended, encouraging the free flow of information from the debtor. If possible, the attorney should confirm the debtor's address by asking the debtor if he received the demand letter and follow up with a request to confirm the debtor's current mailing address. Dialogue with the debtor can tell the attorney about the debtor's financial and employment status and whether the debtor has foreclosures or judgments. Most importantly, listening for any complaints the debtor may have can help determine if the debtor may file a counterclaim. While not everything the debtor says may necessarily be true, it will help the attorney decide in recommending suit and in drafting a more thorough status update for the client.

The attorney should never stop attempting to collect the debt. If the debtor responds that he is unable to pay in full, the attorney should suggest that the debtor offer to set up a payment plan or be creative in trying to reach a compromise, such as allowing the debtor to make smaller

payments during off-peak times. See section 4.12 below.

§ 4.1:4 Predicate Liability for Attorney's Fees

In a variety of cases in which there is no express contractual liability for attorney's fees, demand for payment must be made before attorney's fees can be recovered. This topic is discussed at length in section 31.2:4 in this manual. *See also* Tex. Civ. Prac. & Rem. Code ch. 38.

§ 4.1:5 Accelerate Debt

If the debt is payable in installments, it must be accelerated before the creditor can either foreclose on any collateral or sue on the debt. In addition, unless there is a valid waiver in the loan document, the creditor must give notice of intent to accelerate before actually accelerating the debt. See form 4-3 in this chapter for a notice of intent to accelerate. Acceleration of a debt payable in installments is discussed at section 2.111 in this manual. The notice of intent to accelerate and notice of acceleration must be clear and unequivocal. *Ogden v. Gibraltar Savings Ass'n*, 640 S.W.2d 232 (Tex. 1982). The attorney should not demand any interest not yet accrued or expenses such as attorney's fees not yet incurred; such a demand may be usurious. *See Jim Walter Homes, Inc. v. Schuenemann*, 668 S.W.2d 324 (Tex. 1984).

§ 4.2 Actions Prohibited by Statute

See sections 2.11 through 2.36 in this manual for a discussion of the application of the federal Fair Debt Collection Practices Act and the Texas Debt Collection Practices Act to the collection of consumer debts. The fact that those statutory provisions are not repeated here does not lessen their importance in this area.

§ 4.2:1 Payoff Figures

Demanding or collecting more money from the debtor than is owed may violate usury laws. If the claim is a consumer claim, the excessive demand may also violate the Fair Debt Collection Practices Act and the Texas Debt Collection Practices Act. See sections 2.17:1, 2.33:2, and 2.52:2 in this manual. It is therefore vitally important that the debtor be given accurate payoff figures. *See Waterfield Mortgage Co., Inc. v. Rodriguez*, 929 S.W.2d 641 (Tex. App.—San Antonio 1996, no writ); *Seitz v. Lamar Savings Ass'n*, 618 S.W.2d 142 (Tex. Civ. App.—Austin 1981, no writ). The creditor may be able to claim bona fide clerical error as a defense to usury if an incorrect payoff figure is quoted. *See* Tex. Fin. Code § 305.101.

If an attorney gives an incorrect payoff amount or demands more money than is owed, the attorney violates the debt collection statutes unless he can show that it was a bona fide error that occurred despite the use of reasonable procedures designed to avoid the error. See sections 2.19, 2.35, and 2.61:1. It is better for the attorney to become familiar with how the creditor computes the amount owed so as not to inaccurately state the amount of the debt to the debtor. *See Duffy v. Landberg*, 215 F.3d 871 (8th Cir. 2000). If the debt bears interest, the attorney should try to ascertain a per diem charge based on the interest rate so as to more easily give a payoff quote for any particular day. See section 2.43 regarding how interest is calculated.

§ 4.2:2 If Debtor Is (or Claims to Be) Represented by Counsel

Both federal debt collection law and the Texas Disciplinary Rules of Professional Conduct require debt collection attorneys to communicate only with the debtor's attorney if one has been engaged. *See* 15 U.S.C. § 1692b(6); Tex. Disciplinary Rules Prof'l Conduct R. 4.02(a),

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reprinted in Tex. Gov't Code Ann., tit. 2, subtit. G, app. A (Tex. State Bar R. art. X, § 9).

If a claim of representation comes from the debtor instead of the debtor's attorney, the attorney should verify representation by telephone or written contact to the debtor's attorney. A letter to the debtor's alleged attorney may be advisable, asking for verification of representation within a period of time and stating that otherwise it will be assumed that there is no such representation. Written permission from the debtor's attorney is needed before the collection attorney may speak to the debtor, even if the debtor has initiated the contact.

§ 4.3 If Debtor Requests Verification of Debt

The validation notice required by the Fair Debt Collection Practices Act for consumer claims is governed by 15 U.S.C. § 1692g and is discussed more extensively at section 2.13 in this manual. If it is a commercial claim, verification is not required. But as a practical matter, it may help in furthering discussions and obtaining payment.

[Sections 4.4 through 4.10 are reserved for expansion.]

II. Payment Agreement with Debtor

§ 4.11 Encouraging Agreement

If the debtor knows that the debt is not going to be forgotten or forgiven and that all the creditor's remedies (such as repossession, foreclosure, execution, garnishment, or turnover) will cause a significant disruption in his life, the debtor may be motivated to work with the creditor's attorney. When encouraging the debtor in this manner, it is entirely proper for the attorney to point out the remedies available to the creditor—*if* the action is lawful and the creditor or debt collector intends to take that action. 15 U.S.C. § 1692e(4), (5); *see United States v. National Financial Services, Inc.*, 98 F.3d 131 (4th Cir. 1996); *Bentley v. Great Lakes Collection Bureau*, 6 F.3d 60 (2d Cir. 1993).

§ 4.12 Potential Settlement Means

Assuming that the debtor does not have sufficient liquid resources to pay the debt, several means exist for settlement. A nonexhaustive list includes obtaining the money from friends, family, or another lender; selling assets; paying the debt in installments; making a partial payment of the debt in installments, with a balloon payment afterward; and the creditor's accepting less than the full amount of the debt. Often, two or more of these options are used in the same settlement.

§ 4.13 Form and Content of Agreement

§ 4.13:1 Form Generally

Although an oral agreement to pay money is generally enforceable unless barred by the statute of frauds, an attorney should evidence the agreement in writing and memorialize its terms. This agreement can be any kind of memorandum, such as a letter agreement, or it can be a more formal promissory note.

The manual committee has not included a promissory note form in this manual, believing that the creditor's interests are usually sufficiently protected by the documentation from the original transaction combined with a letter agreement setting out the terms of the settlement.

§ 4.13:2 Contents of Agreement

The agreement should—

1. recite the amount owed including, as a sum total, principal, interest, and other charges;
2. contain a valid waiver of limitations;
3. state how the debt is to be paid—for example, in monthly installments of $247.50;
4. recite that the agreement is one to pay the debt or judgment already existing and does not create a new obligation (unless a new obligation is desired);
5. if payable in installments, contain an acceleration clause;
6. if a promissory note, waive presentment; and
7. in all cases, waive notice of default, notice of intent to accelerate, and notice of acceleration.

The attorney may also consider adding a mutual release to avoid future litigation regarding the services or goods provided that were discounted during the settlement process.

§ 4.14 Securing Obligation Created by Agreement

§ 4.14:1 Collateral Generally

Although it is generally preferable to have a secured debt rather than an unsecured one, several matters must be considered before agreeing to accept the debtor's property as collateral. First, does the debtor own the collateral? Second, what liens already exist against the collateral? Third, what price would the collateral bring at foreclosure sale? The decision to take collateral does not necessarily have to be only economic; the threat of losing property to repossession and foreclosure can motivate a debtor to comply with the agreement.

When drafting an agreement to accept any payment in the future, the attorney should consider collateralizing the agreement in some manner. Unless the loan is nonrecourse, the creditor will have at least a partial recovery, and the remainder may be sued for in a deficiency suit. See generally chapter 5 of this manual regarding nonjudicial repossession and section 14.29 regarding deficiency suits.

§ 4.14:2 Equity Lien against Debtor's Real Property

Traditionally, Texas creditors have shied away from securing any payment agreement with a consumer debtor that included a mortgage against the debtor's real property, because such a mortgage would be unenforceable against the debtor's homestead. Such loans are possible now, but the creditor and the attorney should know the numerous requirements involved with such a loan. From a debt collection view, the most important requirement is that a home equity loan must be nonrecourse, unless the owner or his spouse obtained the loan by actual fraud. Tex. Const. art. XVI, § 50(a)(6)(C). This nonrecourse provision will limit the creditor's ultimate recovery to the amount realized at foreclosure sale.

§ 4.15 Waiver of Limitations

See section 17.65 in this manual regarding waiver of limitations.

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Form 4-1

This letter does *not* contain language required by the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 *et seq.* If there is any chance that the debt could be considered a consumer debt, the attorney should send the letter at form 4-2 in this chapter.

Demand Letter—Commercial Debt

[**Date**]

[**Name and address of debtor**]

Re: [**name of creditor**], Creditor
[**include if applicable:** Account number [**number**]]
[**other information describing debt, if applicable**]
Our file number: [**law office file number**]

[**Salutation**]

I have been retained by [**name of creditor**] to collect the debt described above. As of [**date**], the amount owed is $[**amount**]. This total amount consists of $[**amount**], principal; $[**amount**], interest accrued through [**date**]; and [**itemize other charges**].

Demand is now made for payment of the debt. Because of the necessity of retaining this firm to collect this debt, payment in the additional amount of $[**amount**] as attorney's fees must also be tendered at this time. Direct your payments to this office.

> If a per diem interest charge can be calculated, provide it; otherwise, include the following paragraph.

Additional interest or other charges may accrue on this debt. To obtain a current payoff figure, call [**telephone number**] between [**time**] and [**time**], except for weekends or holidays.

> Continue with the following.

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I have been instructed to make only one demand for payment. If your payment is not forthcoming or if no arrangements are made to satisfy the debt, **[name of creditor]** will have no alternative but to pursue collection of this debt by all lawful means and through all remedies available at law. I trust, however, that this will not be necessary.

If you will forward to this office the amount of $**[amount]** within ten days from the date of this letter, we can all then put this matter to rest.

If you have any questions, please do not hesitate to call or write.

Sincerely yours,

____

[Name of attorney]

Certified Mail No. **[number]**
Return Receipt Requested

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Form 4-2

This letter contains both the validation notice and the "mini-Miranda" notice required by the Fair Debt Collection Practices Act, 15 U.S.C. § 1692. If there is any chance that the debt could be considered a consumer debt, the attorney should send this letter instead of the one at form 4-1 in this chapter. See sections 2.13 through 2.16 in this manual regarding communicating with consumers.

The attorney must be careful not to list an amount that is different than the full amount due as of the date of the letter (*see Miller v. McCalla, Raymer, Padrick, Cobb, Nichols & Clark, LLC*, 214 F.3d 872 (7th Cir. 2000)), and neither the letter nor any subsequent communications during the thirty-day validation period should overshadow or contradict the consumer's thirty-day validation rights (*see Avila v. Rubin*, 84 F.3d 222 (7th Cir. 1996); *Russell v. Equifax A.R.S.*, 74 F.3d 30 (2d Cir. 1996); *Graziano v. Harrison*, 950 F.2d 107 (3d Cir. 1991); *Miller v. Payco-General American Credits, Inc.*, 943 F.2d 482 (4th Cir. 1991); *Swanson v. Southern Oregon Credit Service, Inc.*, 869 F.2d 1222 (9th Cir. 1988)).

Making demand for attorney's fees in the initial Demand and Notice Letter is not recommended, especially if the contract does not provide for it.

Demand and Notice Letter—Consumer Debt

I AM ACTING AS A DEBT COLLECTOR IN THIS MATTER. I AM ATTEMPTING TO COLLECT A DEBT, AND ANY INFORMATION OBTAINED WILL BE USED FOR THAT PURPOSE.

[Date]

[Name and address of debtor]

Re: **[name of creditor]**, Creditor
[include if applicable: Original Creditor: **[name of creditor]**]
[include if applicable: Account number **[number]**]
[other information describing debt, if applicable]
Our file number: **[law office file number]**

[Salutation]

I have been retained by **[name of creditor]** to collect the debt described above. The amount owed is $**[amount]**. This total amount consists of $**[amount]**, principal; $**[amount]**, interest accrued through **[date]**; and **[itemize other charges]**. Please direct any payments to this office.

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Note: If a per diem interest charge is permitted and can be calculated, state the amount of the charge and that the charge is permitted. If a per diem interest charge is permitted but cannot be calculated, include the following sentence. Do not represent that interest may continue to accrue unless the contract supports such a claim.

Additional interest or other charges may accrue on this debt.

Continue with the following.

To obtain a current payoff figure, call [**telephone number**] between [**time**] and [**time**], except for weekends or holidays.

Unless, within thirty days after your receipt of this letter, you dispute the validity of the debt or any portion of it, I will assume the debt to be valid. If, within that same thirty-day period, you notify me in writing that the debt or any portion of it is disputed, I will obtain a verification of the debt or, if the debt is founded on a judgment, a copy of the judgment, and I will mail you a copy of the verification or judgment. If the original creditor is different from the creditor named above, then on your written request within the same thirty-day period I will provide you with the name and address of the original creditor.

If you have any questions, please do not hesitate to call or write.

Sincerely yours,

____

[**Name of attorney**]

Certified Mail No. [**number**]
Return Receipt Requested

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Form 4-3

This letter assumes that a clause allowing acceleration is in the loan document.

Notice of Intent to Accelerate

[**Date**]

[**Name and address of debtor**]

Re: [**name of creditor**], Creditor
[**include if applicable:** Account number [**number**]]
[**other information describing debt, if applicable**]
Our file number: [**law office file number**]

[**Salutation**]

I have been retained as attorney for [**name of creditor**].

The terms of your agreement with my client provide that in the event of your default in the agreement, the entire principal amount of the debt may, at the creditor's option, become immediately due and payable.

Despite demand made on [**date**] for payment of amounts overdue, you are still in default. This letter constitutes notice that, unless I receive a certified check, cashier's check, or money order for the full amount that is due and unpaid on or before [**number**] days after the date of this letter, I intend to take whatever steps are necessary to protect my client's interests, including seeking late charges, collection expenses, attorney's fees, interest, and acceleration of the remaining unpaid principal balance under the terms of the referenced note and agreement and the laws of this state.

Enclosed is an addressed, postage-paid envelope for your payment.

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Sincerely yours,

____

[Name of attorney]

Certified Mail No. **[number]**
Return Receipt Requested

Enc.

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Form 4-4

Notice of Acceleration

[**Date**]

[**Name and address of debtor**]

Re: [**name of creditor**], Creditor
[**include if applicable:** Account number [**number**]]
[**other information describing debt, if applicable**]
Our file number: [**law office file number**]

[**Salutation**]

The creditor has accelerated the debt referenced above in accordance with the terms of the agreement with you. Demand is now made for the total amount of $[**amount**]. This total amount consists of $[**amount**], principal; $[**amount**], interest accrued through [**date of acceleration**]; $[**amount**], attorney's fees; and [**itemize other charges**].

Sincerely yours,

____
[**Name of attorney**]

Certified Mail No. [**number**]
Return Receipt Requested

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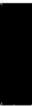

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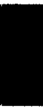

Chapter 5

Repossession

I. Overview

§ 5.1 Caveats Regarding Self-Help Repossession

This discussion and the forms in this chapter should be used only as a starting point for research on each transaction. Laws relating to contracts, waivers, default, acceleration, repossession, and related topics are scattered throughout overlapping state and federal statutes, rules of court, case law, and administrative opinions. The requirements for an action such as giving notice of default, for instance, may vary depending on the nature of the underlying transaction and the applicable law. The attorney should always research each case separately, keeping in mind that the law relating to debtors' and creditors' rights changes rapidly.

The applicable contract should be read carefully. Many rights and obligations in a secured transaction can be altered or waived by contract. Notice provisions after default or before disposition of collateral are particularly subject to amendment by contract, although revised chapter 9 of the Texas Business and Commerce Code places substantial limitations on waiver and variance of rights and duties. *See* Tex. Bus. & Com. Code §§ 9.602, 9.624. On the other hand, the parties may determine by agreement the standards measuring the fulfillment of the rights of a debtor or obligor and the duties of a secured party under any rule stated in section 9.602 if the standards are not "manifestly unreasonable." Tex. Bus. & Com. Code § 9.603(a). The parties may not agree to determine the standards concerning the duty to refrain from breaching the peace under Tex. Bus. & Com. Code § 9.609. Tex. Bus. & Com. Code § 9.603(b).

Attorneys may be debt collectors under both the federal Fair Debt Collection Practices Act and the Texas Debt Collection Practices Act and therefore should comply with the provisions of both. See sections 2.11 through 2.36 in this manual.

§ 5.2 Repossession Statutes

Most self-help repossessions are based on security agreements arising under Uniform Commercial Code article 9. The principal provision in chapter 9 governing repossession is Tex. Bus. & Com. Code § 9.609. Under this section, after default a secured party may take possession of the collateral and, without removal, may render equipment unusable and dispose of collateral on a debtor's premises under section 9.610. Tex. Bus. & Com. Code § 9.609(a). The secured party may repossess the collateral pursuant to judicial process or may do so without judicial process as long as he proceeds without breaching the peace. Tex. Bus. & Com. Code § 9.609(b). Finally, if so agreed, and in any event after default, a secured party may require the debtor to assemble the collateral and make it available to the secured party at a place to be designated by the secured party that is reasonably convenient to both parties. Tex. Bus. & Com. Code § 9.609(c).

The phrase *without breach of the peace* is not defined in chapter 9, and its interpretation is left to the courts. However, there is no reason to

think that the phrase means anything different under the revisions to chapter 9 than it did before July 1, 2001, and presumably prior judicial interpretations of the phrase are still good law.

It is clear from the official comments to the section that actions of third-party contractors, such as professional repossession firms, are subject to the same requirements concerning breach of the peace. Section 9.609 confirms and codifies the rule of such cases as *MBank El Paso, N.A. v. Sanchez*, 836 S.W.2d 151 (Tex. 1992). Also, the use of law-enforcement officers who are not acting under the judicial process to repossess property is not authorized by section 9.609 and may involve a breach of the peace, as some cases have held under prior law. For additional discussion of self-help repossession, see sections 5.21 through 5.23 below.

Section 9.609 permits the sale of the collateral on the debtor's premises, but, unlike prior Code section 9.503, section 9.609 expressly conditions this right on the debtor's (or obligor's) default. On the other hand, a debtor and secured party are free to agree that the secured party may require the debtor to assemble collateral and make it available from time to time at a place that the secured party designates, and such agreements are valid whether or not they are conditioned on the debtor's or obligor's default. Tex. Bus. & Com. Code § 9.609(c).

Unsecured parties may have rights of self-help repossession. They include—

1. sellers of goods sold to an insolvent buyer, including a buyer who fails to pay for the goods (see section 5.51 below);
2. lessors of goods leased to lessees who default on the lease (see section 5.52 below); and
3. repairers of motor vehicles, motorboats, vessels, or outboard motors (see section 7.2 in this manual).

§ 5.3 Constitutionality

The issue of due process has frequently been raised in self-help cases. The Fifth Circuit and other circuits have held that repossession under Uniform Commercial Code article 9 is free from federal due-process scrutiny in a civil rights action, for lack of requisite state action. *Calderon v. United Furniture Co.*, 505 F.2d 950 (5th Cir. 1974).

§ 5.4 Considerations in Choosing Self-Help Repossession or Judicial Foreclosure

Breach of Peace: Self-help repossession cannot be used if the repossession results in a breach of the peace. Tex. Bus. & Com. Code § 9.609(b). For a discussion of breach of the peace, see section 5.2 above and sections 5.21 and 5.23 below.

Perishable Collateral: If the collateral is rapidly deteriorating or its value is diminishing, it may be quicker or more effective to file suit, obtain a writ of sequestration, and then hold an emergency sale. Care must be taken in sequestering and disposing of collateral. For a discussion of sequestration, see sections 8.16 through 8.19 in this manual.

Disposition of Collateral and Deficiency: The secured creditor is put to an election regarding the repossessed collateral; he may sell it or retain it in complete satisfaction of the debt. Tex. Bus. & Com. Code §§ 9.610, 9.622; *Tanenbaum v. Economics Laboratory, Inc.*, 628 S.W.2d 769, 771 (Tex. 1982); *Knight v. General Motors Acceptance Corp.*, 728 S.W.2d 480, 483 (Tex. App.—Fort Worth 1987, no writ). See sections 5.32 through 5.38 below regarding sale or disposition of the collateral and section 5.39

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regarding retention of collateral in satisfaction of the debt.

Expense and Time: Self-help repossession is usually less expensive and faster than a judicial foreclosure proceeding.

[Sections 5.5 through 5.10 are reserved for expansion.]

II. Security Interest and Agreement

§ 5.11 Security Interest

§ 5.11:1 Attachment

Except as described in section 5.2 above, a creditor's right to repossess depends on whether his security interest has attached to the collateral. Attachment has three elements:

1. A valid security agreement must exist.
2. Value must be given by the creditor.
3. The debtor must have rights in the collateral.

The security agreement must be in writing, must be signed by the debtor, and must describe the collateral. Or, in lieu of a signed writing, the debtor must have "authenticated" the security agreement, a term that would include an electronic signature of an electronic document. Tex. Bus. & Com. Code §§ 9.102(a)(7), 9.203(b)(3)(A). See also section 14.28:1 in this manual.

§ 5.11:2 Perfection

Under the revised chapter 9, effective July 1, 2001, most security interests are perfected by filing a financing statement with (1) the secretary of state or (2) another designated central filing office of the state in which *the debtor* is located. Tex. Bus. & Com. Code § 9.301(1). See Tex. Bus. & Com. Code § 9.307 and the discussion in section 3.22 in this manual concerning how to determine the debtor's location for purposes of chapter 9.

Most security interests are perfected by filing a financing statement with the secretary of state of the state in which the collateral is located. Perfection establishes the priority of competing rights in the collateral. Perfection is not required to establish a valid security interest and is therefore not required to repossess. *Gulf Oil Co. v. First National Bank of Hereford*, 503 S.W.2d 300, 307 (Tex. Civ. App.—Amarillo 1973, no writ). Failure to perfect, however, may give away valuable rights to others claiming an interest in the collateral. A full discussion of the various means of perfection is beyond the scope of this manual, but note that taking possession or control, or the purchase of certain types of collateral (for example, instruments or investment property), may permit a later secured party or a purchaser to take priority over an earlier secured party who merely filed a financing statement. *See* Tex. Bus. & Com. Code §§ 9.312 cmt. 2, 9.328(1). Certain types of security interests are automatically perfected on attachment. *See* Tex. Bus. & Com. Code § 9.309.

§ 5.11:3 Priorities between Conflicting Claims in Collateral

Unperfected Creditor vs. Unperfected Creditor: If no secured creditor perfects, the first interest to attach has priority. Tex. Bus. & Com. Code § 9.322(a)(3). In this instance, the creditor should perfect immediately if possible; a junior lienholder can jump ahead by perfection.

Perfected Creditor vs. Unperfected Creditor: The perfected security interest has priority, even if that creditor has actual knowledge of a prior attaching security interest. Tex. Bus. & Com. Code § 9.322(a)(2).

Perfected Creditor vs. Perfected Creditor: Conflicting perfected security interests rank according to priority in time of filing or perfection. Priority dates from the earlier of the time a filing covering the collateral is first made or the security interest is first perfected, if there is no period thereafter during which there is neither filing nor perfection. Tex. Bus. & Com. Code § 9.322(a)(1). "Filing" refers to the filing of an effective financing statement. *See* Tex. Bus. & Com. Code § 9.310. "Perfection" refers to the acquisition of a perfected security interest, that is, one that has attached and as to which any required perfection step has been taken. *See* Tex. Bus. & Com. Code § 9.308. Certain security interests are automatically perfected on attachment. *See* Tex. Bus. & Com. Code §§ 9.308, 9.309.

Purchase-Money Security Interest: A purchase-money security interest (PMSI) in collateral other than inventory or livestock has priority over a competing interest in the same collateral or its proceeds if the creditor perfects at the time the debtor receives possession of the collateral or within twenty days thereafter. Tex. Bus. & Com. Code § 9.324(a). See also Tex. Bus. & Com. Code § 9.324(b) regarding inventory. The provisions of revised chapter 9 on purchase-money security interests have expanded the definition of a PMSI somewhat and made the preferred status of a PMSI, in transactions other than consumer transactions at least, easier to maintain than it was before. Tex. Bus. & Com. Code § 9.103. Note that in a transaction other than a consumer-goods transaction, a secured party claiming a PMSI has the burden of establishing the extent to which the security interest is a PMSI. Tex. Bus. & Com. Code § 9.103(g).

A detailed discussion of the new definitions and the new priority rules between competing PMSIs is beyond the scope of this manual; see, however, sections 9.103 and 9.324 and the official comments to the Texas Business and Commerce Code for the rules governing priority of a PMSI.

§ 5.11:4 Client's Financing Statement

To determine whether a financing statement has been filed with the Texas secretary of state, the attorney should call the secretary of state's office (512-475-2703), give the name of the debtor, and request a search or should inspect the client's financing statement and determine whether the secretary of state's filing stamp (indicating the date and place of filing) is shown in the upper right corner of the statement. Alternatively, UCC filings may be examined on the Texas secretary of state's website, SOS Direct, at **http://direct.sos.state.tx.us**.

For a form UCC1 financing statement, see form 5-1 in this chapter. See section 3.22 regarding description of the collateral and financing statement searches.

§ 5.11:5 Prior Financing Statement

When checking with the secretary of state's office to see if a client's financing statement has been filed, the attorney should also determine whether there is any other financing statement covering the same collateral on file under the debtor's name. Tex. Bus. & Com. Code §§ 9.308–.317, 9.320–.322, 9.324.

Note that if the debtor is a registered organization located outside Texas, a search may have to be done in both the debtor's domiciliary state and in Texas or possibly other jurisdictions because of the change in filing rules in chapter 9 after the revisions. See section 3.22 in this manual.

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§ 5.11:6 Filing Financing Statement

A financing statement (form 5-1 in this chapter) should be filed with the Texas secretary of state or the appropriate county clerk, depending on the nature of the collateral. Under the revisions to chapter 9 of the Texas Business and Commerce Code, local filings are required only for as-extracted collateral (such as oil, gas, or other minerals (defined by Tex. Bus. & Com. Code § 9.102(a)(6))), timber to be cut, or fixtures. Tex. Bus. & Com. Code § 9.501. The local filing office is the recording office for the related real property. Additional debtors' names and nonstandard forms require additional fees; the filing office should be contacted to ascertain current fees.

§ 5.12 Agreement Regarding Self-Help Repossession

On default, a secured party has the right to take possession of the collateral unless otherwise agreed. Tex. Bus. & Com. Code § 9.609. It is important, therefore, to determine whether there is any clause in the security agreement prohibiting self-help repossession by the creditor. Most agreements are creditor-oriented and do not contain this prohibition.

§ 5.13 Agreement Regarding Assembly of Collateral by Debtor

A security agreement may contain a provision requiring the debtor, on demand, to make the collateral available to the creditor at a place designated by the creditor that is reasonably convenient to both parties. In addition, the creditor may, without removal of equipment, render it unusable and may thereafter dispose of it on the debtor's premises. Tex. Bus. & Com. Code § 9.609(a)(2).

Rendering equipment unusable and disposing of it on the debtor's premises allows the creditor to avoid the expense of removal and storage pending resale. Tex. Bus. & Com. Code § 9.609. For a letter requiring the debtor to assemble the collateral for the creditor at a mutually convenient location, see form 5-2 in this chapter. If the debtor refuses to comply with the creditor's request, the creditor's remedies include self-help repossession or judicial action. Failure to deliver possession to the secured party may also constitute the criminal offense of hindering a secured creditor. See Tex. Penal Code § 32.33(c), discussed at section 6.27 in this manual. Although ethical considerations are beyond the scope of this manual, note that pursuing criminal activity may implicate serious ethical concerns pursuant to rule 4.04(b) of the Texas Rules of Disciplinary Conduct if not handled properly and kept separate from the civil proceeding.

[Sections 5.14 through 5.20 are reserved for expansion.]

III. Precautions

§ 5.21 Breach of Peace

§ 5.21:1 Requirement of No Breach of Peace

Unless otherwise agreed, a secured party may repossess collateral without judicial process if repossession can be achieved without a breach of the peace. Tex. Bus. & Com. Code § 9.609. The creditor's duty not to breach the peace is not delegable, even if the repossession is performed

by an independent contractor. *MBank El Paso, N.A. v. Sanchez*, 836 S.W.2d 151, 153 (Tex. 1992).

§ 5.21:2 Contractual Provisions

Texas courts generally uphold the legality of consumer contract clauses authorizing repossession of collateral wherever it may be found with free right of entry. *See, e.g., Woolard v. Texas Motors, Inc.*, 616 S.W.2d 706, 709 (Tex. Civ. App.—Fort Worth 1981, no writ). Most courts have construed this provision as one of limitation on the creditor that encourages peaceful repossession without trespass. The Supreme Court of Texas has not addressed this specific issue, but in dictum it repeated a remark in *Woolard* that such a provision would be unlawful if it read, "Seller shall have the right to repossess the property wherever the same may be found." *Gonzalez v. Gainan's Chevrolet City, Inc.*, 690 S.W.2d 885, 888 (Tex. 1985). A security agreement may not authorize a breach of the peace. Tex. Fin. Code § 348.411.

§ 5.21:3 Examples of Breach of Peace

The following acts have been held to be a breach of the peace:

1. Breaking into a garage to repossess an automobile. *A.B. Lewis Co. v. Robinson*, 339 S.W.2d 731, 735 (Tex. Civ. App.—Houston 1960, no writ).

2. Picking the lock of a building on business premises to obtain possession of equipment stored therein (the premises were owned by the creditor and leased to the debtor; the debtor was in default under the lease but had not been notified that the lease had been terminated). *Gulf Oil Corp. v. Smithey*, 426 S.W.2d 262 (Tex. Civ. App.—Dallas 1968, writ dism'd).

3. Gaining entry to a home peaceably and refusing to leave after being ordered to do so by the debtors and continuing to search for the collateral, provoking a fight, and causing an assault and a battery. *Godwin v. Stanley*, 331 S.W.2d 341 (Tex. Civ. App.—Amarillo 1959, writ ref'd n.r.e.).

4. Intimidating the debtor into giving the creditor the keys to the mortgaged automobile and then requiring the debtor to leave the automobile. *Watson v. Hernandez*, 374 S.W.2d 326, 328 (Tex. Civ. App.—Amarillo 1963, writ dism'd).

5. Towing an automobile at high speed with the owner inside, then parking the car in a padlocked storage yard where a Doberman pinscher guard dog was running loose. *MBank El Paso, N.A. v. Sanchez*, 836 S.W.2d 151, 152–54 (Tex. 1992).

6. Unreasonably damaging the collateral. *Giese v. NCNB Texas Forney Banking Center*, 881 S.W.2d 776, 783 (Tex. App.—Dallas 1994, no writ).

7. Damaging the garage in which the collateral was kept. *Meyers v. Ford Motor Credit Co.*, 619 S.W.2d 572, 574 (Tex. Civ. App.—Houston [14th Dist.] 1981, no writ).

§ 5.21:4 Examples of No Breach of Peace

The following acts have been held not to constitute a breach of the peace:

1. Repossessing a car from a public street or other property when the debtor was not present. *Ford Motor Credit Co. v. Cole*, 503 S.W.2d 853, 855 (Tex. Civ. App.—Fort Worth 1973, writ dism'd).

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2. Repossessing a car from a service station where the debtor had taken it for repairs, with the creditor allegedly lying by telling the service station employee he had the debtor's permission to take it. *Thompson v. Ford Motor Credit Co.*, 550 F.2d 256 (5th Cir. 1977).

§ 5.21:5 Permissible Actions

Courts routinely sanction self-help repossessions if the creditor has towed the debtor's mortgaged car off the public streets. If, however, the property is in the debtor's actual or constructive possession, as when it is inside his home or garage, the creditor should request the debtor to relinquish possession; if the debtor refuses, the creditor should resort to court action.

If the secured party anticipates difficulty or a breach of the peace, he may obtain judicial process to aid in obtaining possession. *Unicut, Inc. v. Texas Commerce Bank-Chemical*, 704 S.W.2d 442, 445 (Tex. App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.). Without removal, a secured party may render equipment unusable and may dispose of collateral located on the debtor's premises. Tex. Bus. & Com. Code § 9.609(a)(2). The secured party may take any permitted action or combination of actions. See section 5.21:6 below for caveats about prejudgment remedies. All actions in connection with disposition must be taken in a commercially reasonable manner. Tex. Bus. & Com. Code § 9.610(b). Commercial reasonableness is discussed at section 5.32 below.

§ 5.21:6 Using Prejudgment Judicial Remedies as Aid to Self-Help Repossession

The attorney should exercise caution in using prejudgment judicial remedies such as sequestration and attachment as aids to obtaining possession of the collateral. A creditor's actions in sequestering the collateral, obtaining possession through a plaintiff's replevy bond, voluntarily dismissing the lawsuit, and then foreclosing on the collateral through power of sale amounted to an abuse of process, leaving the creditor liable for damages for wrongful sequestration. *Burnett Trailers, Inc. v. Polson*, 387 S.W.2d 692, 694–95 (Tex. Civ. App.—San Antonio 1965, writ ref'd n.r.e.); *see also American Lease Plan v. Ben-Kro Corp.*, 508 S.W.2d 937, 943–44 (Tex. Civ. App.—Houston [1st Dist.] 1974, writ ref'd n.r.e.). Tex. R. Civ. P. 698 requires that a bond for a writ of sequestration must be conditioned on the applicant's prosecuting the suit to effect completion. Using a writ of sequestration to secure the property and then attempting to nonsuit would be grounds for forfeiture of the bond. See section 8.2 in this manual regarding garnishment, sequestration, attachment, and injunction.

§ 5.22 Conversion of Nonsecured Property

During repossession, a creditor may inadvertently take possession of personal property in which the creditor does not have a security interest. For example, he may unknowingly take possession of tools or other items in the trunk of a car being repossessed. In such a case, the creditor must notify the debtor, within fifteen days of discovering the property, of the debtor's rights to identify and claim the property at a reasonable time before the thirty-first day after the date notice is given. The notice must also tell the debtor where the property can be reclaimed. If the debtor fails to reclaim the property, the creditor may either keep it or dispose of it in a reasonable manner and distribute the proceeds according to applicable law. Tex. Fin. Code § 348.407.

The parties cannot contract to exempt the secured party from liability if the debtor's unsecured property is converted by the creditor after repossession. Such a contract is unenforceable as against public policy. *Ford Motor Credit Co.*

v. Cole, 503 S.W.2d 853, 856 (Tex. Civ. App.—Fort Worth 1973, writ dism'd).

§ 5.23 Practical Considerations in Self-Help Repossession

The secured party has a nondelegable duty to effect self-help repossession without a breach of the peace and may be held liable for the acts committed during self-help repossession by an independent contractor such as a towing company. *MBank El Paso, N.A. v. Sanchez*, 836 S.W.2d 151, 152–54 (Tex. 1992). The creditor and his attorney should exercise extreme caution in self-help repossession. A creditor may be held liable for his own or his attorney's conduct in repossessing property. Damages are potentially severe. *See Southwestern Bell Telephone Co. v. Wilson*, 768 S.W.2d 755, 758–59 (Tex. App.—Corpus Christi 1988, writ denied) (creditor liable for attorney's tortious conduct in executing on judgment).

The following is a nonexclusive list of "do's" and "don't's" for creditors attempting repossession.

DO

- make sure that there is a valid security interest in the collateral—in other words, that there is a right to repossess.
- make sure that there is no security interest that has priority over the one being enforced.
- review the contract provisions to make certain that they are in compliance with current statutes and case law. If necessary, send notice to correct a violation of the Texas Finance Code.
- ensure that the repossession procedure complies with any specific requirement of the security agreement—for example, a twenty-day notice before sale.
- make sure that the proper notices have been sent to the debtor and that the default permits repossession.
- make sure that no damage is done to other property in the debtor's possession when the collateral is removed.
- protect property belonging to third parties.
- be sure the correct property is repossessed.
- cease all repossession efforts at the first sign of resistance to the repossession; let the property be recovered through the courts.
- immediately notify the debtor of any items of personal property other than the repossessed collateral that were inadvertently taken during the repossession and return the property immediately on demand.

DON'T

- make any show of force or threat, or do anything that might be interpreted as a threat to the debtor. Even an implied threat can give rise to substantial liability in a suit by the debtor against the repossessor. This is true even if the debt is valid.
- use law enforcement officers, whether on or off duty or in or out of uniform, to assist in the repossession. Don't even bring them to the repossession.
- try to obtain the collateral if the debtor offers any resistance, including mere verbal resistance.
- enter a building or enclosed area through an entrance that is closed or locked unless the debtor or his authorized agent has granted permission.
- use more than one person in making the actual repossession, speak in a gruff voice, or use harsh language. Intimidating the debtor, even through implication, can incur liability.

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- do anything that can be considered a breach of the peace.
- threaten the debtor in any manner, such as telling him his credit rating will be ruined or he will be put in bankruptcy or in jail if he does not allow the repossession.

[Sections 5.24 through 5.30 are reserved for expansion.]

IV. Notice and Sale

§ 5.31 Notice

§ 5.31:1 Notice Requirement

Under most circumstances, reasonable notification of the sale must be given to—

1. the debtor;
2. any secondary obligor;
3. any other person from whom the secured party has received, before the notification date, an authenticated notification of a claim of an interest in the collateral; and,
4. if the collateral is anything other than consumer goods, any secured party that has perfected its security interest under the Texas Business and Commerce Code or under another statute, regulation, or treaty (as described in Code section 9.311).

Tex. Bus. & Com. Code § 9.611(b). Exceptions are set out in section 5.31:3 below. The careful secured party will avail himself of the safe harbor offered by Tex. Bus. & Com. Code § 9.611(e), by requesting in a commercially reasonable manner information concerning financing statements indexed under the debtor's name in the office indicated in Tex. Bus. & Com. Code § 9.611(c)(3)(B). This must be done not later than twenty days or earlier than thirty days before the notification date. The secured party should then send authenticated notifications of disposition to each secured party or other lienholder named in that response whose financing statement covers the collateral. Tex. Bus. & Com. Code § 9.611(b)–(c). The failure to order the search does not necessarily mean that the notification was not done in a commercially reasonable manner, but, considering the relative ease and low expense of doing so in most cases, there is usually no reason not to. Otherwise, the secured party takes the risk that his information about other claimants of an interest in the collateral may be inaccurate. Any secured party or lienholder of record who (1) is *not* notified of the disposition but whose name would have been found if the search had been ordered or (2) has sent a prior authenticated notification of a claim of an interest in the collateral and who does *not* receive an authenticated notification of disposition has the right to recover any loss resulting from the failure to receive notification. *See* Tex. Bus. & Com. Code § 9.625(b).

If the search is ordered, but the results are not received in time to be included in the notification, the secured party has discharged his duty under section 9.611(c) of the Texas Business and Commerce Code notwithstanding that he did not send a notice to a secured party of record whose name was on the search results when finally obtained. Tex. Bus. & Com. Code § 9.611(e)(2). Note that the failure to receive the search results before the notification date has no effect on the secured party's duty to notify a person from whom an authenticated notification of a claim of an interest in the collateral has been received

before the notification date. *See* Tex. Bus. & Com. Code § 9.611(c)(3).

Although earlier Texas cases held that oral notice was not necessarily unreasonable and that the medium of notice was only one factor in determining whether notice is reasonable, Tex. Bus. & Com. Code § 9.611(a)(1) requires that an "authenticated notice of disposition" be sent. This means that at the very least, an electronic notification complying with the definition of "authenticate" in Tex. Bus. & Com. Code § 9.102(a)(7) must be sent. *See* Tex. Bus. & Com. Code § 9.611 cmt. 5.

Note: The following cases permitting oral notice of disposition have been superseded by Tex. Bus. & Com. Code § 9.611(b): *Beltran v. Groos Bank, N.A.*, 755 S.W.2d 944, 945–47 (Tex. App.—San Antonio 1988, no writ), and *MBank Dallas N.A. v. Sunbelt Manufacturing, Inc.*, 710 S.W.2d 633, 635–36 (Tex. App.—Dallas 1986, writ ref'd n.r.e.).

It is important to understand that section 9.611 no longer allows the disposing secured party to remain passive, sending notice only to those parties that have contacted him. To ensure that notice is sent to all required parties, the foreclosing creditor not only must order a UCC search report listing financing statements filed against the debtor but also must be familiar with other means of perfection and order searches from appropriate recording officers. See Tex. Bus. & Com. Code §§ 9.701–.708 for the provisions governing the transition period that took place from July 1, 2001, until July 1, 2006.

§ 5.31:2 Consequences of Improper Notice

Proper notice is a prerequisite to any subsequent deficiency suit. *Tanenbaum v. Economics Laboratory, Inc.*, 628 S.W.2d 769, 772 (Tex. 1982); *see also Wright v. Interfirst Bank Tyler, N.A.*, 746 S.W.2d 874, 877–78 (Tex. App.—Tyler 1988, no writ); *Knight v. General Motors Acceptance Corp.*, 728 S.W.2d 480, 483 (Tex. App.—Fort Worth 1987, no writ); *Gentry v. Highlands State Bank*, 633 S.W.2d 590, 591 (Tex. App.—Houston [14th Dist.] 1982, writ ref'd). The *Tanenbaum* rule is one of election of remedies, not forfeiture, and has even been applied against the Federal Deposit Insurance Corporation and its successors. *See, e.g., FDIC v. Payne*, 973 F.2d 403, 410 (5th Cir. 1992); *In re Norriss Bros. Lumber Co.*, 133 B.R. 599 (N.D. Tex. 1991). Under Tex. Bus. & Com. Code § 9.625, the failure to give proper notice can also subject the secured party to injunctive relief, damages, and penalties. See section 17.50 in this manual. For a more complete discussion of deficiency suits, see section 14.29.

§ 5.31:3 When Notice Not Required

Notice is not required if the collateral is perishable or threatens to decline speedily in value or is of a type customarily sold in a recognized market. Tex. Bus. & Com. Code § 9.611(d). A "recognized market" might be a stock or commodity market, in which sales involve items so similar that differences between individual items are nonexistent or immaterial, competition between buyers is not a primary factor in determining sale price, and prices paid for actual sales of comparable items are currently available by quotation. *M.P. Crum Co. v. First Southwest Savings & Loan Ass'n*, 704 S.W.2d 925, 927 (Tex. App.—Tyler 1986, no writ). Cars and trucks are not generally considered collateral of a type sold on such a recognized market. *O'Neil v. Mack Trucks, Inc.*, 533 S.W.2d 832, 836 (Tex. App.—El Paso 1975), *rev'd on other grounds*, 542 S.W.2d 112 (Tex. 1976).

Notice is also not required if the creditor merely transfers his interest in the collateral and underlying loan and does not sell or dispose of the collateral itself. *Hairgrove v. Cramer Financial Group, Inc.*, 895 S.W.2d 874, 875 (Tex. App.—Fort Worth 1995, writ denied).

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In a case decided before the revisions to chapter 9 of the Texas Business and Commerce Code, if the debtor relinquishes the collateral to the creditor for an agreed-on sum to be credited against the debt, he is not entitled to notice of the sale or disposition of the collateral. *Acuff v. Lamesa National Bank*, 919 S.W.2d 154, 156–57 (Tex. App.—Eastland 1996, no writ). Several additional conditions have been imposed on the secured party's acceptance of collateral in full or partial satisfaction of the secured debt by the revised chapter 9. See section 5.38 below.

§ 5.31:4 Who Is Entitled to Notice

See Tex. Bus. & Com. Code § 9.611(b) and the discussion in section 5.31:1 above concerning notice. Much of the earlier case law on this subject is now codified in Code section 9.611.

§ 5.31:5 Contents of Notice—Nonconsumer Transactions

The contents of reasonable notice are prescribed with particularity by Tex. Bus. & Com. Code § 9.613 for all types of transactions other than consumer-goods transactions. Under section 9.613, a notice of disposition is sufficient if it—

1. describes the debtor and the secured party;
2. describes the collateral to be disposed of;
3. states the method of disposition (for example, sale, lease, license, and so forth);
4. states that the debtor is entitled to an accounting of the unpaid debt for a stated fee; and
5. states the time and place of any public sale of the collateral or the time after which the collateral will be disposed of by another manner.

Tex. Bus. & Com. Code § 9.613.

The statute offers a model form; see form 5-3 in this chapter. Note that this notice may be used for either a public or a private sale.

Practice Note: The safest course in describing the collateral is to reproduce exactly the description from the security agreement or financing statement. Incorporating descriptions by references to documents that may be misplaced or unavailable later is risky.

The right to an accounting may carry a fee with it. Section 9.613 does not expressly reference or incorporate section 9.210, which treats the subject of requests for accounting, lists of collateral, or statements of account generally and which provides that a debtor is entitled without charge to one response to a request during any six-month period and allows the secured party to require payment of a charge, not exceeding $25, for each additional response.

A notice that substantially complies with the five requirements of section 9.613 is sufficient. Tex. Bus. & Com. Code § 9.613(3). But a creditor that departs from, negligently completes, or supplements the model form invites challenges to the propriety of his notice. Whether a notice that lacks one or more of the five requirements is nonetheless sufficient is a question of fact. Tex. Bus. & Com. Code § 9.613(2).

Practice Note: When in doubt about whether a transaction is a consumer or nonconsumer transaction, use the consumer notice found in Tex. Bus. & Com. Code § 9.614. See section 5.31:6 below.

§ 5.31:6 Contents of Notice—Consumer-Goods Transactions

Unlike Tex. Bus. & Com. Code § 9.613, which provides that a notice is sufficient as long as the required information is provided and may be sufficient even if some information is missing,

Tex. Bus. & Com. Code § 9.614 requires that a notice in a consumer-goods transaction contain all of the following:

1. a description of the debtor, the secured party, and the collateral that is being disposed of;
2. a description of the method of disposition;
3. a statement that the debtor is entitled to an accounting of the unpaid debt and the charge, if any, for the accounting;
4. the time and place of public sale or the time after which any other disposition is to be made;
5. a description of the recipient's liability for any deficiency;
6. a telephone number from which the recipient can obtain the redemption price of the collateral; and
7. a telephone number or mailing ad dress from which the recipient can obtain additional information concerning the disposition and the obligation.

Section 9.614 also promulgates a model form; see form 5-4 in this chapter.

Practice Note: The model form found at Tex. Bus. & Com. Code § 9.614 must be strictly adhered to, more so than the notice in nonconsumer-goods transactions found at Tex. Bus. & Com. Code § 9.613. The absence of any required information from a notice under section 9.614 makes the notice insufficient as a matter of law. Tex. Bus. & Com. Code § 9.614 cmt. 2.

The Fort Worth court of appeals held in a case decided before July 1, 2001, that if the note, security agreement, or other contract calls for notice of the time and place of a *private* sale to be given, the creditor must give notice even though the statute does not require it. *Knight v. General Motors Acceptance Corp.*, 728 S.W.2d 480, 483 (Tex. App.—Fort Worth 1987, no writ). Presumably this case is still valid under the current law. The same is likely true of a holding that if the creditor notifies the debtor that a private sale will occur on or after a particular day but sells the collateral before the date stated, such notification is not reasonable. *All Valley Acceptance Co. v. Durfey*, 800 S.W.2d 672, 675–76 (Tex. App.—Austin 1990, writ denied).

§ 5.31:7 When Notice May Be Waived

The debtor or a secondary obligor may waive notice "only by an agreement to that effect entered into and authenticated after default." Tex. Bus. & Com. Code § 9.624(a). Previous Texas cases holding that oral waivers of notice and waivers by guarantors not in compliance with the statute were ineffective have been codified in the revised provisions. Standard or boilerplate clauses in which the debtor or a guarantor purports to waive notice of disposition of collateral, signed before default, have no validity in Texas. Tex. Bus. & Com. Code § 9.624(a).

§ 5.31:8 Acceleration Accompanying Notice

An installment debt in default must be accelerated before the creditor can collect the unpaid principal not yet due. Without acceleration, the creditor can collect only past-due installments plus accumulated interest. *Williamson v. Dunlap*, 693 S.W.2d 373 (Tex. 1985). A defaulted secured debt should be accelerated before or at the same time as giving the notice of sale. See section 2.111 in this manual for a general discussion of acceleration.

To avoid a contention that the overall standard of commercial reasonableness was not met, a notice of default should be sent even if the security agreement contains a waiver of notice. For a

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discussion of what constitutes default and the procedure afterward, see section 14.27. See form 5-5 in this chapter for a letter giving notice of default and intent to accelerate and form 5-6 for a letter giving notice of acceleration.

§ 5.32 Commercial Reasonableness of Sale

§ 5.32:1 Requirement of Commercial Reasonableness

The secured party may dispose of the collateral by either public or private sale. In both instances, the Business and Commerce Code requires that the sale be conducted in a "commercially reasonable" manner. Tex. Bus. & Com. Code § 9.610(b). "Commercially reasonable," however, is not defined, leaving the court and jury to judge all the circumstances of the sale after the fact. Whether the sale is conducted privately or publicly, the creditor should retain documentation of the details of the sale so that, if the debtor contests the sale's commercial reasonableness, the creditor can substantiate his efforts.

The commercial reasonableness requirement is an implied covenant in all contracts governed by article 9 of the Uniform Commercial Code. Under prior law, breach of this covenant was treated as a breach of contract, and no punitive damages were recoverable. *Texas National Bank v. Karnes*, 717 S.W.2d 901, 903 (Tex. 1986). The revised chapter 9 expressly provides for actual damages, liquidated damages, and penalties. Tex. Bus. & Com. Code § 9.625. See the discussion in section 17.50 in this manual.

§ 5.32:2 Choice of Kind of Sale

The creditor has broad choices regarding his handling of the collateral. He can dispose of it by public or private sale, in bulk or in lots, at any time or place and on any terms, as long as the sale is commercially reasonable. He may also elect to retain the collateral in satisfaction of the debt. *Tanenbaum v. Economics Laboratory, Inc.*, 628 S.W.2d 769, 771–72 (Tex. 1982).

It is recommended that all public sales to dispose of collateral be advertised at least three times in a newspaper of general circulation in the geographical area in which the sale is to be conducted. See form 5-7.

§ 5.32:3 Factors in Determining Commercial Reasonableness

The revised chapter 9 of the Texas Business and Commerce Code, like the prior version, does not define commercial reasonableness, although it does provide some safe harbors and some examples. Section 9.627 states that the fact that a greater amount could have been obtained by a collection, enforcement, disposition, or acceptance at a different time or by a different method from that selected by the secured party is not of itself sufficient to preclude the secured party from establishing that the collection, enforcement, disposition, or acceptance was made in a commercially reasonable manner. Tex. Bus. & Com. Code § 9.627(a). A disposition of collateral is made in a commercially reasonable manner if the disposition is made—

1. in the usual manner on any recognized market;
2. at the price current in any recognized market at the time of the disposition; or
3. otherwise in conformity with reasonable commercial practices among dealers in the type of property that was the subject of the disposition.

Tex. Bus. & Com. Code § 9.627(b). A collection, enforcement, disposition, or acceptance is commercially reasonable if it has been approved in a judicial proceeding, by a bona fide creditors' committee, by a representative of creditors, or by an assignee for the benefit of creditors.

Tex. Bus. & Com. Code § 9.627(c). These approvals are not mandatory, however, and the failure to obtain them does not mean that the collection, enforcement, disposition, or acceptance is not commercially reasonable. Tex. Bus. & Com. Code § 9.627(d).

Some factors the courts have considered in determining whether a sale was commercially reasonable are—

1. general market demand for the type of goods in question at the time of the sale;
2. whether the creditor tried to obtain the best price for the collateral;
3. what type and how many advertisements or solicitations for bids were used by the creditor to notify the general public of the sale;
4. adequacy of the time provided for responding to the notice or advertisement before the sale occurred;
5. opportunity to inspect the goods;
6. the sale location's accessibility to prospective purchasers and the demand for goods at that location;
7. the manner in which bids or purchase offers were made and accepted;
8. the cost of the sale;
9. the cost of reconditioning, rebuilding, or repairing the goods;
10. the price obtained at the sale and the later resale price (if resold); and
11. the fact that full market value is seldom obtained at forced sales.

Havins v. First National Bank of Paducah, 919 S.W.2d 177, 181 (Tex. App.—Amarillo 1996, no writ); *Pruske v. National Bank of Commerce*, 533 S.W.2d 931, 937 (Tex. Civ. App.—San Antonio 1976, no writ). The fact that the fair market value was not received at the sale or that a better price could have been obtained does not necessarily render the sale commercially unreasonable. Tex. Bus. & Com. Code § 9.627; *Siboney Corp. v. Chicago Pneumatic Tool Co.*, 572 S.W.2d 4, 8 (Tex. Civ. App.—Houston [1st Dist.] 1978, writ ref'd n.r.e.).

§ 5.33 Right to Redeem Collateral

At any time before the secured party has disposed of the collateral, entered into a contract for its disposition, or discharged the obligation by retaining the collateral in satisfaction of the debt, the debtor or any other secured party may redeem the collateral, unless otherwise agreed in writing after default. Redemption requires fulfilling all obligations secured by the collateral, paying the secured party's expenses in retaking, holding, and preparing the collateral for disposition and arranging for a sale, and paying reasonable attorney's fees and legal expenses to the extent provided in the contract and not prohibited by law. Tex. Bus. & Com. Code §§ 9.608(a)(1)(A), 9.615(a)(1), 9.623(b). It is clear that the right of redemption extends to nonpossessory collateral, such as accounts receivable, as well as possessory collateral, such as goods. Except in a consumer-goods transaction, a debtor or secondary obligor may waive the right to redeem collateral under section 9.623 only by an agreement to that effect entered into and authenticated after default. Tex. Bus. & Com. Code § 9.624(c). Otherwise, the right may not be waived at all. Tex. Bus. & Com. Code § 9.602(11).

§ 5.34 Application of Proceeds of Sale

The proceeds of the sale are to be applied in the following order to—

1. the reasonable expenses of retaking, holding, preparing for disposition, processing, and disposing, and, to the extent provided for in the agreement

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and not prohibited by law, the reasonable attorney's fees and legal expenses incurred by the secured party;

2. the satisfaction of obligations of indebtedness secured by the security interest under which the disposition is made;
3. the satisfaction of obligations secured by any subordinate security interest in or other subordinate lien on the collateral if—
   a. the secured party receives from the holder of a subordinate security interest or other lien an authenticated demand for proceeds before distribution of the proceeds is completed; and
   b. in a case in which a consignor has an interest in the collateral, the subordinate security interest or other lien is senior to the interest of the consignor; and
4. a secured party that is a consignor of the collateral if the secured party receives from the consignor an authenticated demand for proceeds before distribution of the proceeds is completed.

Tex. Bus. & Com. Code § 9.615(a).

If requested by a secured party, the holder of a subordinate security interest or other lien must seasonably furnish reasonable proof of his interest, and unless he does so, the secured party need not comply with his demand. Tex. Bus. & Com. Code § 9.615(b).

Practice Note: This hierarchy of application differs slightly from that prescribed in Tex. Bus. & Com. Code § 9.608, which applies to proceeds of collection (such as accounts receivable) or enforcement (such as a promissory note held as collateral), that is, proceeds of nonpossessory collateral.

If a surplus results from the sale of the collateral, the secured party must pay any surplus to the debtor. If the collateral sale leaves a deficiency, the obligor is liable for any deficiency. Tex. Bus. & Com. Code § 9.615(d). If the underlying transaction was a sale of accounts, chattel paper, payment intangibles or promissory notes, however, the debtor is not entitled to any surplus, and the obligor is not liable for any deficiency. Tex. Bus. & Com. Code §§ 9.608(b), 9.615(e). For discussion of the right to pursue a deficiency after applying the proceeds of a sale to the debt, see section 14.29 in this manual. See form 5-8 in this chapter for a letter giving notice of deficiency after sale.

§ 5.35 UCC Notice Requirements to Guarantors

The revisions to chapter 9 of the Texas Business and Commerce Code define "obligor" to mean a person who, with respect to an obligation secured by a security interest in or an agricultural lien on the collateral—

1. owes payment or other performance of the obligation;
2. has provided property other than the collateral to secure payment or other performance of the obligation; or
3. is otherwise accountable in whole or in part for payment or other performance of the obligation.

Tex. Bus. & Com. Code § 9.102(a)(60).

The term does not include issuers or nominated persons under a letter of credit. Tex. Bus. & Com. Code § 9.102(a)(60). The term "secondary obligor" is defined to mean an obligor to the extent that the obligor's obligation is secondary or the obligor has a right of recourse with respect to an obligation secured by collateral against the debtor, another obligor, or property of either. Tex. Bus. & Com. Code § 9.102(a)(72).

Section 9.611 imposes a duty on a secured party who wishes to dispose of collateral under section 9.610 to send a reasonable, authenticated notice of disposition not only to the debtor but also to any secondary obligor. There are exceptions for collateral that is perishable, threatens to decline speedily in value, or is of a type customarily sold on a recognized market. Tex. Bus. & Com. Code § 9.611. Accordingly, guarantors or sureties are entitled to receive notification of an intended disposition of collateral. If the surety or guarantor created the security interest, the surety or guarantor is treated as the debtor. If not, the surety or guarantor is treated as a secondary obligor. *See* Tex. Bus. & Com. Code § 9.102(a)(28). Note that a debtor or secondary obligor may waive the right to notification of disposition of collateral under section 9.611 only by an agreement to that effect entered into and authenticated *after default*. Tex. Bus. & Com. Code § 9.602(7); *see also* Tex. Bus. & Com. Code § 9.624(a).

The secondary obligor is also entitled to a notice of a proposal to accept collateral in partial satisfaction of the obligation it secures. Tex. Bus. & Com. Code § 9.621(b). A secured party need not send notification to a debtor or secondary obligor unknown to the secured party. Tex. Bus. & Com. Code § 9.605. Note also that under Tex. Bus. & Com. Code § 9.611(b), the borrower, who is implicitly under the definitions the principal obligor, is not always entitled to notification of disposition.

Finally, Tex. Bus. & Com. Code § 9.618 governs certain situations in which a secondary obligor, such as a guarantor or surety, acquires the rights and becomes obligated to perform the duties of the secured party in circumstances other than at a foreclosure sale. Although brief, the section is complex and beyond the scope of this manual. If representing a guarantor or surety that is considering a "take-out" of the secured party, the attorney must study this section and the official comment carefully and evaluate whether the client will become responsible for giving notices, for care and custody of the collateral, and the like.

§ 5.36 Notice to Taxing Authorities of Sale of Collateral

§ 5.36:1 Notice to Internal Revenue Service

If the Internal Revenue Service has properly filed a notice of federal tax lien with the Texas secretary of state or the county clerk against the debtor's property more than thirty days before sale of the collateral, notice of the sale must be sent to the IRS at least twenty-five days before the sale. 26 U.S.C. § 7425(c)(1). If notice is given, the IRS has a right to redeem the property for 120 days after sale, but after the redemption period the lien will no longer attach. 26 U.S.C. § 7425(d)(1). If no notice is given, the lien remains against the property, even though it may have been subordinate to the creditor's lien. 26 U.S.C. § 7425(b)(1). For a notice to the IRS, see form 5-9 in this chapter.

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

Any notices of possible federal tax liens filed against persons with the same or similar names as the debtor should be examined carefully. The notice will have either a taxpayer identification number or a Social Security number. The possibility that the defaulting taxpayer and defaulting debtor are different people or entities may be established based on information in the client's file such as a credit application or report. How-

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ever, if there is any possibility that the two are the same, the attorney should send the notice to the IRS. This action is cheap insurance against the possibility that the IRS could effectively overturn the foreclosure sale by retaining and enforcing its lien after the client's lien is extinguished by power of sale.

§ 5.36:2 Notice to Texas Comptroller

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

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

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

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

However, the practical reality, because of the transferee liability provisions described above and the ad valorem tax priority provisions such as Tex. Tax Code § 32.05, is that a search for state tax liens against the debtor's property is essential before conducting a foreclosure sale of the collateral. Even if no notice to the comptroller is required, any purchaser at the sale would not take free and clear of the state's liens, and the provisions of Tex. Bus. & Com. Code § 9.611 at best merely provide a defense to an action for wrongful foreclosure or conversion. *See Grand Prairie Independent School District v. Southern Parts Imports, Inc.*, 803 S.W.2d 762 (Tex. App.—Dallas), *rev'd on other grounds*, 813 S.W.2d 499 (Tex. 1991). In that case, the city of Grand Prairie alleged that the foreclosing secured party, Heller Financial, wrongfully foreclosed on the debtor's collateral. The debtor failed to pay personal property taxes on property

it used as collateral for a loan from Heller. Heller failed to give the city notice of its intended foreclosure sale under the predecessor to section 9.611(c)(3) (prior section 9.504(c)). The city's wrongful foreclosure suit was dismissed by summary judgment because Heller was not required to provide notice to the city. *Grand Prairie Independent School District*, 803 S.W.2d at 767. Heller was not aware of the city's security interest in the property because the city did not inform Heller of the existence of that interest. Furthermore, Heller was not obligated to provide the city with notice of the intended sale because the city never filed a financing statement to perfect its tax lien. Of course, the city was not required to file a financing statement to obtain an ad valorem tax lien on the personal property that was Heller Financial's collateral. Tex. Tax Code § 32.05.

§ 5.37 Purchase of Property by Creditor

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

§ 5.38 Disposition of Collateral by Methods Other Than Sale

§ 5.38:1 What Constitutes Disposition

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

§ 5.38:2 Destruction of Collateral

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

§ 5.38:3 Delivery to Third Party

Delivery of the collateral to a third party with the intention that that party will retain it for a period of time or permanently is a disposition requiring notice, even if no transfer of title is made. *See First City Bank v. Guex*, 677 S.W.2d 25, 28 (Tex. 1984).

§ 5.38:4 Voting of Stock Shares

Exercise of voting rights in stock without notice is not necessarily a retention of collateral, nor would the exercise of voting rights necessarily constitute a disposition of collateral. It is not necessary, however, that there be a transfer for value in order for there to be a disposition of collateral. *See Cohen v. Rains*, 769 S.W.2d 380 (Tex. App.—Fort Worth 1989, writ denied).

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§ 5.39 Retention of Collateral in Satisfaction of Debt

§ 5.39:1 When Collateral May Be Retained

The creditor may generally elect to retain the collateral in full or partial satisfaction of the secured obligation. Tex. Bus. & Com. Code § 9.620(a). In consumer transactions, no acceptance in partial satisfaction is permitted, and in certain cases involving consumer goods, no acceptance in full satisfaction is permitted as explained in section 5.39:2 below. Retaining the collateral instead of selling it is sometimes referred to as "strict foreclosure." Code section 9.620 describes the conditions under which strict foreclosure may or may not be done, section 9.621 describes the persons to whom notice of a proposal for strict foreclosure must be sent, and section 9.622 describes the effects of strict foreclosure.

§ 5.39:2 Conditions of Retention in Satisfaction

A creditor may accept collateral in full or partial satisfaction of the unpaid secured debt only if the following conditions are satisfied.

Consent of Debtor: The debtor must consent to the creditor's proposal. If the creditor proposes partial strict foreclosure, the debtor consents by agreeing to the proposal in a record authenticated after default. If the creditor proposes full strict foreclosure, one of two events must occur:

1. the debtor can expressly consent in a record authenticated after default; or
2. the debtor's consent will be inferred if—
    a. the creditor's proposal is unconditional (or subject only to the condition that collateral not in the creditor's possession be preserved and maintained);
    b. the creditor's proposal expresses an intent to accept collateral in full satisfaction of the unpaid secured debt;
    c. the creditor fails to receive, within twenty days after sending his proposal to the debtor, the debtor's notification of objection; and
    d. the creditor's proposal is made in good faith.

Tex. Bus. & Com. Code § 9.620(a)(1).

Absence of Objections from Notified Parties: After sending the notice of a proposal for strict foreclosure to the persons entitled to receive it under Tex. Bus. & Com. Code § 9.621, the secured party may retain the collateral only if he has not received a timely authenticated notice of objection from (1) a party to whom the secured party is required to send its proposal or (2) a lienholder or other secured party with a subordinate property interest in the collateral subject to the proposal. Tex. Bus. & Com. Code § 9.620(a). To be timely, an objection must be received by the secured party within twenty days after the date when the secured party sent his proposal. Tex. Bus. & Com. Code § 9.620(d).

Debtor Not in Possession (Applicable to Consumer-Goods Collateral): A strict foreclosure of consumer goods is not effective if the debtor possesses the consumer goods when he consents to the strict foreclosure. Tex. Bus. & Com. Code § 9.620(a)(3). Note that this condition applies only to consumer goods.

No More than 60 Percent of Principal Amount or Cash Price Paid (Applicable to Consumer-Goods Collateral): A creditor cannot exercise the remedy of strict foreclosure if it possesses consumer goods and at least 60

percent of the cash price of the goods has been paid (if the security interest is a purchase-money security interest (PMSI)), or at least 60 percent of the principal amount has been paid (in non-PMSI cases). Tex. Bus. & Com. Code § 9.620(e). Instead, the creditor must timely dispose of the collateral (in compliance with the requirements of Tex. Bus. & Com. Code § 9.610). A timely disposal in this context means selling it within ninety days of taking possession of it or within a longer period of time to which the debtor and all secondary obligors have agreed in an agreement entered into and authenticated after default. Tex. Bus. & Com. Code § 9.620(f). A debtor may waive the right to require disposition (rather than a proposed retention) of collateral under section 9.620(e), but only by an agreement entered into and authenticated after default. Tex. Bus. & Com. Code § 9.624(b). Note that section 9.620(e) applies only to consumer goods.

§ 5.39:3 Persons to Whom Notice of Proposal to Retain Must Be Sent

The creditor should send a notice of intent to retain the collateral in satisfaction of the debt to—

1. any secondary obligor (only if the proposal is to retain the collateral in partial satisfaction of the debt);
2. any person from whom the secured party has received, before the debtor consented to the acceptance, an authenticated notification of a claim of an interest in the collateral;
3. any other secured party or lienholder that, ten days before the debtor consented to the acceptance, held a security interest in or other lien on the collateral perfected by the filing of a financing statement that—
   a. identified the collateral;
   b. was indexed under the debtor's name as of that date; and
   c. was filed in the office or offices in which to file a financing statement against the debtor covering the collateral as of that date; and
4. any other secured party or lienholder that, ten days before the debtor consented to the acceptance, held a security interest in the collateral perfected by compliance with a statute, regulation, or treaty described in section 9.311(a).

Tex. Bus. & Com. Code § 9.621.

See form 5-10 in this chapter for a letter to the debtor giving notice of intent to retain collateral.

§ 5.40 Penalties for Failure to Comply with Chapter 9

If the creditor fails to comply with the provisions of chapter 9 of the Texas Business and Commerce Code, including those relating to collection, enforcement, disposition, and acceptance, certain aggrieved persons may be entitled to injunctive relief and to recover damages incurred as a result, including liquidated damages and statutory penalties. Tex. Bus. & Com. Code § 9.625.

[Sections 5.41 through 5.50 are reserved for expansion.]

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V. Other Repossession Statutes

§ 5.51 Reclamation (UCC Article 2)

§ 5.51:1 Credit Sale

If a credit seller discovers that his buyer has received goods on credit while insolvent, he may reclaim the goods on demand made within ten days after the receipt. If the buyer misrepresented his solvency to the seller within three months before delivery of the goods, the ten-day limitation does not apply. Tex. Bus. & Com. Code § 2.702(b). The seller has no other right to reclaim goods on the buyer's fraudulent or innocent misrepresentation of solvency or of intent to pay. The seller's right to reclaim is subject to the rights of a buyer in the ordinary course, another good-faith purchaser, or a lien creditor. Successful reclamation of goods excludes all other remedies with respect to those goods. Tex. Bus. & Com. Code § 2.702(c); *see also* Tex. Bus. & Com. Code § 2.403 (defines "power to transfer" and "good faith purchase").

§ 5.51:2 Cash Sale—Buyer Refuses to Pay for Goods Received or Issues Bad Check in Payment

Although no statute explicitly provides a cash seller with the right or power to recover goods already delivered to a buyer in breach, courts have recognized such a right of reclamation based on the language of section 2.507(b) and comment 3 to section 2.507(b) of the Texas Business and Commerce Code. The comment states:

> This subsection [section 2.507(b)] codifies the cash seller's right of reclamation which is in the nature of a lien. There is no specific time limit for a cash seller to exercise the right of reclamation. However, the right will be defeated by delay causing prejudice to the buyer, waiver, estoppel, or ratification of the buyer's right to retain possession. Common law rules and precedents governing such principles are applicable [section 1.103]. If third parties are involved, [section 2.403] protects good faith purchasers.

Tex. Bus. & Com. Code § 2.507(b) cmt. 3.

See Chapman Parts Warehouse v. Guderian, 609 S.W.2d 317, 319 (Tex. Civ. App.—Austin 1980, no writ); *Peerless Equipment Co. v. Azle State Bank*, 559 S.W.2d 114 (Tex. Civ. App.—Fort Worth 1977, no writ); *Ranchers & Farmers Livestock Auction Co. v. First State Bank*, 531 S.W.2d 167 (Tex. Civ. App.—Amarillo 1975, writ ref'd n.r.e.).

Acceptance of a check is considered a cash transaction, not a credit transaction. *Ranchers & Farmers Livestock Auction Co.*, 531 S.W.2d at 169.

§ 5.51:3 Limitations and Waiver

The seller's right of reclamation under either Tex. Bus. & Com. Code § 2.507 or § 2.702 is not a security interest within the scope of UCC Article 9 secured transactions. However, the seller may acquire a security interest by complying with the provisions of Chapter 9. *See* Tex. Bus. & Com. Code § 1.201(b)(35). The right to reclaim under Tex. Bus. & Com. Code § 2.702 is limited to a ten-day period from delivery of the goods, and, therefore, if the right is not exercised within that period, it is waived. If there has been a misrepresentation of solvency in writing by the buyer to the particular seller within the three-month period before delivery, the ten-day limitation does not apply. After this right is waived, the seller's remedies are then on the instrument and for breach of contract. *Ranchers & Farmers Livestock Auction Co. v. First State*

Bank, 531 S.W.2d 167, 169 (Tex. Civ. App.—Amarillo 1975, writ ref'd n.r.e.).

The seller may afford himself greater protection by having the debtor sign a security agreement describing the collateral, then taking the applicable steps required for perfection of a purchase-money security interest. *Peerless Equipment Co. v. Azle State Bank*, 559 S.W.2d 114, 115 (Tex. Civ. App.—Fort Worth 1977, no writ); *see also* Tex. Bus. & Com. Code § 1.201(b)(35).

§ 5.52 Leases

§ 5.52:1 Governing Law

Transactions involving the lease of goods are governed by chapter 2A of the Texas Business and Commerce Code chapter 2A. *See* Tex. Bus. & Com. Code §§ 2A.101–.532. Chapter 2A is an amalgam of chapters 2 and 9 of the Code, borrowing from each as the drafters deemed appropriate.

§ 5.52:2 Lessor's Right to Repossess

If the lessee defaults by failing to make a lease payment or by committing another default as defined in the lease contract, the lessor has a right—

1. to repossess the goods without judicial process;
2. to require the lessee to make the goods available to the lessor at a mutually convenient place designated by the lessor, if the lease contract so provides;
3. without removing goods employed in trade or business, to render them unusable if the lease contract so provides; or
4. to dispose of goods on the lessee's premises.

Tex. Bus. & Com. Code § 2A.525(b).

The lessor may employ any of these remedies without judicial process if that can be done without committing a breach of the peace. Tex. Bus. & Com. Code § 2A.525(c).

§ 5.52:3 Lessor's Right to Dispose of Goods

After default and repossession, the lessor has the right to dispose of the goods by lease, sale, or otherwise. Tex. Bus. & Com. Code § 2A.527(a).

§ 5.52:4 Deficiency Owed by Lessee after Disposition

Unless there is a liquidated damages clause in the lease agreement or damages are otherwise determined by agreement of the parties, if the lessor has re-leased the goods by a lease agreement substantially similar to the original agreement and has re-leased in good faith and in a commercially reasonable manner, he may recover the following damages from the lessee:

1. accrued and unpaid rent as of the date of the commencement of the new lease agreement;
2. the present value, as of the same date, of the total rent for the then-remaining term of the original lease agreement minus the present value, as of the same date, of the rent under the new lease agreement applicable to that period of the new lease term that is comparable to the then-remaining term of the original lease agreement; and
3. incidental damages allowed under section 2A.530 of the Business and Commerce Code.

Tex. Bus. & Com. Code § 2A.527(b).

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If the lessor disposes of the goods by a lease agreement not qualifying under section 2A.527(b) or disposes of the goods by sale or otherwise, the lessor may recover from the lessee as if the lessor had elected not to dispose of the goods. Tex. Bus. & Com. Code § 2A.527(c). See Tex. Bus. & Com. Code § 2A.528 regarding damages the lessor may recover.

For a thorough discussion of the various theories of the measure of damages for the breach of a lease and their application in the personal property leasing context, applying the Wyoming versions of 2A.527 and 2A.528, see *The Corner v. Pinnacle, Inc.*, 907 P.2d 1281 (Wyo. 1995).

§ 5.52:5 Criminal Penalties for Wrongfully Holding Rental Property

A person having control of personal property under a written rental agreement who intentionally holds the property beyond the expiration of the rental period may be charged with the offense of theft of service. Tex. Penal Code § 31.04(a)(3).

Form 5-1

UCC1
Financing Statement

UCC FINANCING STATEMENT

FOLLOW INSTRUCTIONS (front and back) CAREFULLY

A. NAME & PHONE OF CONTACT AT FILER [optional]

B. SEND ACKNOWLEDGMENT TO: (Name and Address)

THE ABOVE SPACE IS FOR FILING OFFICE USE ONLY

1. DEBTOR'S EXACT FULL LEGAL NAME insert only one debtor name (1a or 1b) - do not abbreviate or combine names

1a. ORGANIZATION'S NAME			
OR 1b. INDIVIDUAL'S LAST NAME	FIRST NAME	MIDDLE NAME	SUFFIX
1c. MAILING ADDRESS	CITY	STATE / POSTAL CODE	COUNTRY
1d. SEE INSTRUCTIONS / ADD'L INFO RE ORGANIZATION DEBTOR / 1e. TYPE OF ORGANIZATION	1f. JURISDICTION OF ORGANIZATION	1g. ORGANIZATIONAL ID #, if any	☐ NONE

2. ADDITIONAL DEBTOR'S EXACT FULL LEGAL NAME - insert only one debtor name (2a or 2b) do not abbreviate or combine names

2a. ORGANIZATION'S NAME			
OR 2b. INDIVIDUAL'S LAST NAME	FIRST NAME	MIDDLE NAME	SUFFIX
2c. MAILING ADDRESS	CITY	STATE / POSTAL CODE	COUNTRY
2d. SEE INSTRUCTIONS / ADD'L INFO RE ORGANIZATION DEBTOR / 2e. TYPE OF ORGANIZATION	2f. JURISDICTION OF ORGANIZATION	2g. ORGANIZATIONAL ID #, if any	☐ NONE

3. SECURED PARTY'S NAME (or NAME of TOTAL ASSIGNEE of ASSIGNOR S/P) insert only one secured party name (3a or 3b)

3a. ORGANIZATION'S NAME			
OR 3b. INDIVIDUAL'S LAST NAME	FIRST NAME	MIDDLE NAME	SUFFIX
3c. MAILING ADDRESS	CITY	STATE / POSTAL CODE	COUNTRY

4. This FINANCING STATEMENT covers the following collateral:

5. ALTERNATIVE DESIGNATION [if applicable]: ☐ LESSEE/LESSOR ☐ CONSIGNEE/CONSIGNOR ☐ BAILEE/BAILOR ☐ SELLER/BUYER ☐ AG. LIEN ☐ NON-UCC FILING

6. ☐ This FINANCING STATEMENT is to be filed [for record] (or recorded) in the REAL ESTATE RECORDS. Attach Addendum [if applicable]

7. Check to REQUEST SEARCH REPORT(S) on Debtor(s) [ADDITIONAL FEE] [optional] ☐ All Debtors ☐ Debtor 1 ☐ Debtor 2

8. OPTIONAL FILER REFERENCE DATA

FILING OFFICE COPY — UCC FINANCING STATEMENT (FORM UCC1) (REV. 05/22/02) International Association of Commercial Administrators (IACA)

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Instructions for UCC Financing Statement (Form UCC1)

Please type or laser-print this form. Be sure it is completely legible. Read all Instructions, especially Instruction 1; correct Debtor name is crucial. Follow Instructions completely.

Fill in form very carefully; mistakes may have important legal consequences. If you have questions, consult your attorney. Filing office cannot give legal advice.

Do not insert anything in the open space in the upper portion of this form; it is reserved for filing office use.

When properly completed, send Filing Office Copy, with required fee, to filing office. If you want an acknowledgment, complete item B and, if filing in a filing office that returns an acknowledgment copy furnished by filer, you may also send Acknowledgment Copy; otherwise detach. If you want to make a search request, complete item 7 (after reading Instruction 7 below) and send Search Report Copy, otherwise detach. Always detach Debtor and Secured Party Copies.

If you need to use attachments, you are encouraged to use either Addendum (Form UCC1Ad) or Additional Party (Form UCC1AP).

A. To assist filing offices that might wish to communicate with filer, filer may provide information in item A. This item is optional.

B. Complete item B if you want an acknowledgment sent to you. If filing in a filing office that returns an acknowledgment copy furnished by filer, present simultaneously with this form a carbon or other copy of this form for use as an acknowledgment copy.

1. **Debtor name**: Enter only one Debtor name in item 1, an organization's name (1a) or an individual's name (1b). Enter Debtor's exact full legal name. Don't abbreviate.

1a. Organization Debtor. "Organization" means an entity having a legal identity separate from its owner. A partnership is an organization; a sole proprietorship is not an organization, even if it does business under a trade name. If Debtor is a partnership, enter exact full legal name of partnership; you need not enter names of partners as additional Debtors. If Debtor is a registered organization (e.g., corporation, limited partnership, limited liability company), it is advisable to examine Debtor's current filed charter documents to determine Debtor's correct name, organization type, and jurisdiction of organization.

1b. Individual Debtor. "Individual" means a natural person; this includes a sole proprietorship, whether or not operating under a trade name. Don't use prefixes (Mr., Mrs., Ms.). Use suffix box only for titles of lineage (Jr., Sr., III) and not for other suffixes or titles (e.g., M.D.). Use married woman's personal name (Mary Smith, not Mrs. John Smith). Enter individual Debtor's family name (surname) in Last Name box, first given name in First Name box, and all additional given names in Middle Name box.
For both organization and individual Debtors: Don't use Debtor's trade name, DBA, AKA, FKA, Division name, etc. in place of or combined with Debtor's legal name; you may add such other names as additional Debtors if you wish (but this is neither required nor recommended).

1c. An address is always required for the Debtor named in 1a or 1b.

1d. Reserved for Financing Statements to be filed in North Dakota or South Dakota only. If this Financing Statement is to be filed in North Dakota or South Dakota, the Debtor's taxpayer identification number (tax ID#) — social security number or employer identification number must be placed in this box.

1e,f,g. "Additional information re organization Debtor" is always required. Type of organization and jurisdiction of organization as well as Debtor's exact legal name can be determined from Debtor's current filed charter document. Organizational ID #, if any, is assigned by the agency where the charter document was filed; this is different from tax ID #; this should be entered preceded by the 2-character U.S. Postal identification of state of organization if one of the United States (e.g., CA12345, for a California corporation whose organizational ID # is 12345); if agency does not assign organizational ID #, check box in item 1g indicating "none."

Note: If Debtor is a trust or a trustee acting with respect to property held in trust, enter Debtor's name in item 1 and attach Addendum (Form UCC1Ad) and check appropriate box in item 17. If Debtor is a decedent's estate, enter name of deceased individual in item 1b and attach Addendum (Form UCC1Ad) and check appropriate box in item 17. If Debtor is a transmitting utility or this Financing Statement is filed in connection with a Manufactured-Home Transaction or a Public-Finance Transaction as defined in applicable Commercial Code, attach Addendum (Form UCC1Ad) and check appropriate box in item 18.

2. If an additional Debtor is included, complete item 2, determined and formatted per Instruction 1. To include further additional Debtors, attach either Addendum (Form UCC1Ad) or Additional Party (Form UCC1AP) and follow Instruction 1 for determining and formatting additional names.

3. Enter information for Secured Party or Total Assignee, determined and formatted per Instruction 1. To include further additional Secured Parties, attach either Addendum (Form UCC1Ad) or Additional Party (Form UCC1AP) and follow Instruction 1 for determining and formatting additional names. If there has been a total assignment of the Secured Party's interest prior to filing this form, you may either (1) enter Assignor S/P's name and address in item 3 and file an Amendment (Form UCC3) [see item 5 of that form]; or (2) enter Total Assignee's name and address in item 3 and, if you wish, also attaching Addendum (Form UCC1Ad) giving Assignor S/P's name and address in item 12.

4. Use item 4 to indicate the collateral covered by this Financing Statement. If space in item 4 is insufficient, put the entire collateral description or continuation of the collateral description on either Addendum (Form UCC1Ad) or other attached additional page(s).

5. If filer desires (at filer's option) to use titles of lessee and lessor, or consignee and consignor, or seller and buyer (in the case of accounts or chattel paper), or bailee and bailor instead of Debtor and Secured Party, check the appropriate box in item 5. If this is an agricultural lien (as defined in applicable Commercial Code) filing or is otherwise not a UCC security interest filing (e.g., a tax lien, judgment lien, etc.), check the appropriate box in item 5, complete items 1-7 as applicable and attach any other items required under other law.

6. If this Financing Statement is filed as a fixture filing or if the collateral consists of timber to be cut or as-extracted collateral, complete items 1-5, check the box in item 6, and complete the required information (items 13, 14 and/or 15) on Addendum (Form UCC1Ad).

7. This item is optional. Check appropriate box in item 7 to request Search Report(s) on all or some of the Debtors named in this Financing Statement. The Report will list all Financing Statements on file against the designated Debtor on the date of the Report, including this Financing Statement. There is an additional fee for each Report. If you have checked a box in item 7, file Search Report Copy together with Filing Officer Copy (and Acknowledgment Copy). Note: Not all states do searches and not all states will honor a search request made via this form; some states require a separate request form.

8. This item is optional and is for filer's use only. For filer's convenience of reference, filer may enter in item 8 any identifying information (e.g., Secured Party's loan number, law firm file number, Debtor's name or other identification, state in which form is being filed, etc.) that filer may find useful.

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Form 5-2

Letter Requiring Debtor to Assemble Collateral at Convenient Location

[**Date**]

[**Name and address of debtor**]

Re: [**description of collateral, note, and security agreement**]

[**Salutation**]

I have been retained as attorney for [**name of creditor**].

Because of your default on the referenced note, my client demands that you assemble the referenced collateral and make it available to my client at [**address, city, state**] on or before [**date and time**]. You are required to do this on demand of the creditor by the referenced security agreement, a copy of which is enclosed.

Your failure to comply with the demands in this letter may force my client to take whatever legal action is necessary to protect my client's rights under the note and security agreement.

Under the security agreement, any sale of the collateral by my client will be credited against the amount of your deficiency under the note.

Sincerely yours,

____

[**Name of attorney**]

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Certified Mail No. [**number**]
Return Receipt Requested

Enc.

c: [**name of creditor**]

Attach copies of the note and security agreement.

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Form 5-3

This form may be used to notify the debtor, any secondary obligor, and other secured parties in any transaction other than a consumer-goods transaction. *See* Tex. Bus. & Com. Code § 9.613. The notice should be sent to each party by certified mail, return receipt requested. This form may be used in connection with either a public or a private sale. For a form to be used in consumer transactions, see form 5-4 in this chapter.

Notification of Disposition of Collateral

To: [**name and address of debtor, obligor, or other notice recipient**]

From: [**name, address, and telephone number of secured party**]

> Include the following in a notice to persons other than the debtor.

Name[s] of Debtor[s]: [**name[s] of debtor[s]**]

> Select the following for a public sale.

We will [sell/lease/license] the [**describe collateral**] [**include if applicable:** to the highest qualified bidder] in public as follows:

Date: [**date of sale**]

Time: [**time of sale**]

Place: [**physical address of sale**]

> Select the following for a private sale.

We will [sell/lease/license] the [**describe collateral**] privately sometime after [**day and date**]. A sale could include a lease or license.

> Continue with the following.

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You are entitled to an accounting of the unpaid indebtedness secured by the property that we intend to [sell/lease/license] [**include if applicable:** for a charge of $[**amount**]]. You may request an accounting by calling us at [**telephone number**].

____
[**Name of attorney**]

Certified Mail No. [**number**]
Return Receipt Requested

c: [**name of creditor**]

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Form 5-4

This form must be used to notify the debtor and any secondary obligor in a consumer-goods transaction. *See* Tex. Bus. & Com. Code § 9.614. Although the statute does not require a particular phrasing for the notification, using the form set out in section 9.614(3) provides a safe harbor that satisfies section 9.614(1). Tex. Bus. & Com. Code § 9.614 cmt. 3. The notice should be sent to each party by certified mail, return receipt requested. This notice may be used in connection with either a public or a private sale. For a form to be used in transactions other than consumer-goods transactions, see form 5-3 in this chapter.

[**Name and address of secured party**]

[**Date**]

Notice of Our Plan to Sell Property

To: [**name and address of any obligor who is also a debtor**]

Subject: [**identify secured transaction**]

We have your [**describe collateral**], because you broke promises in our agreement.

Select the following for a public sale.

We will sell [**describe collateral**] at public sale. A sale could include a lease or license. The sale will be held as follows:

Date: [**day and date of sale**]

Time: [**time of sale**]

Place: [**physical address of sale**]

You may attend the sale and bring bidders if you want.

Select the following for a private sale.

We will sell [**describe collateral**] at private sale sometime after [**date**]. A sale could include a lease or license.

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Continue with the following.

The money that we get from the sale (after paying our costs) will reduce the amount you owe. If we get less money than you owe, you [will/will not] still owe us the difference. If we get more money than you owe, you will get the extra money, unless we must pay it to someone else.

You can get the property back at any time before we sell it by paying us the full amount you owe (not just the past due-payments), including our expenses. To learn the exact amount you must pay, call us at [**telephone number**].

If you want us to explain to you in writing how we have figured the amount that you owe us, you may call us at [**telephone number**] or write us at [**address of secured party**] and request a written explanation. [**Include if applicable:** We will charge you $[**amount**] for the explanation if we sent you another written explanation of the amount you owe us within the last six months.]

If you need more information about the sale, call us at [**telephone number**] or write us at [**address of secured party**].

Include the following if applicable.

We are sending this notice to the following other people who have an interest in [**describe collateral**] or who owe money under your agreement:

[**Names of all other debtors and/or obligors**]

Continue with the following.

____

[**Name of attorney**]

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Certified Mail No. [**number**]
Return Receipt Requested

c: [**name of creditor**]

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Form 5-5

This form assumes that the default is the debtor's failure to pay an installment when due. Another event of default may exist. If so, it should be stated in the letter. See section 14.27 in this manual for discussion of default.

Letter to Debtor Giving Notice of Default and Intent to Accelerate

[**Date**]

[**Name and address of debtor**]

Re: [**description of collateral, note, and security agreement**]

[**Salutation**]

I have been retained as attorney for [**name of creditor**].

Your obligation to my client as set out in the referenced note and security agreement is in default because of your failure to make payment of $[**amount**] on [**due date**] as required by the note and security agreement, a copy of which is enclosed.

The total amount owed is $[**amount**]. This total amount consists of $[**amount**], principal; $[**amount**], interest accrued through [**date**]; and [**itemize other charges**].

Demand is now made for payment of the total amount owed. Direct your payments to this office.

> If a per diem interest charge can be calculated, provide it; otherwise, include the following paragraph.

Additional interest or other charges may accrue on this debt. To obtain a current payoff figure, call [**telephone number**] between [**time**] and [**time**], except for weekends or holidays.

> Continue with the following.

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Please forward payment of the full amount that is due and unpaid under the terms of the agreement to my office immediately. This letter constitutes notice that, unless I receive a certified check, cashier's check, or money order for the full amount that is due and unpaid on or before [**number**] days after the date of this letter, I intend to take whatever steps are necessary to protect my client's interests, including seeking late charges, collection expenses, attorney's fees, interest, and acceleration of the remaining unpaid principal balance under the terms of the referenced note and security agreement and the laws of this state.

Enclosed is an addressed, postage-paid envelope for your payment.

Sincerely yours,

____

[**Name of attorney**]

Certified Mail No. [**number**]
Return Receipt Requested

Enc.

c: [**name of creditor**]

Attach copies of the note and security agreement.

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Form 5-6

This form assumes that the default is the debtor's failure to pay an installment when due. Another ground for acceleration may exist. If so, it should be stated in the letter.

Letter to Debtor Giving Notice of Acceleration

[**Date**]

[**Name and address of debtor**]

Re: [**description of collateral, note, and security agreement**]

[**Salutation**]

I have been retained as attorney for [**name of creditor**].

Because of your default in making payment in accordance with the terms of the referenced note and security agreement, the entire unpaid principal balance under the agreement, together with accrued but unpaid interest charges, late charges, and collection expenses as provided for in the agreement, is hereby accelerated and declared immediately due and payable. A copy of the note and security agreement is enclosed.

Demand is hereby made for the total amount of $[**amount**], which consists of $[**amount**], principal; $[**amount**], interest accrued through [**date of acceleration**]; and [**itemize other charges**].

Please forward payment of the full amount, after acceleration, that is due and unpaid under the terms of the agreement to my office immediately. Please note that the agreement requires you to pay any accrued late charges, collection expenses, and attorney's fees. I have been instructed that unless I receive a certified check, cashier's check, or money order for the full amount, after acceleration, that is due and unpaid on or before [**number**] days after the

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date of this letter, I am to take all legal steps that may be necessary to protect my client's interests.

Enclosed is an addressed, postage-paid envelope for your payment.

Sincerely yours,

____

[**Name of attorney**]

Certified Mail No. [**number**]
Return Receipt Requested

Enc.

c: [**name of creditor**]

Attach copies of the note and security agreement.

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Form 5-7

It is recommended that all public sales to dispose of collateral be advertised at least three times in a newspaper of general circulation in the geographical area in which the sale is to be conducted. When this notice is sent to the newspaper, the attorney should request a bill for the advertisement and an affidavit that the notice was published on the requested dates. The terms of sale shown in the second paragraph are shown only as an example; they should be altered as necessary to make the sale commercially reasonable. See section 5.32 in this chapter.

Newspaper Notice of Public Sale

Because of a default by [**name of debtor**], Debtor, under the terms of a note and security agreement executed by Debtor on [**date of agreement**], the undersigned holder of the note and security agreement and the indebtedness represented thereby will sell at the premises of the undersigned, [**address, city, state**], on [**date and time of sale**], all right, title, and interest of the undersigned in the following property: [**describe property**].

The seller requires at the time of the auction a minimum down payment of 25 percent of the accepted bid in either cash, a certified check, or a cashier's check, with the balance due within twenty-four hours thereafter. The undersigned reserves the right to bid at the sale.

Date: [**date**].

____

[**Name of creditor**]

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Form 5-8

Letter to Debtor Giving Notice of Deficiency after Sale

[**Date**]

[**Name and address of debtor**]

Re: [**description of collateral, note, and security agreement**]

[**Salutation**]

I have been retained as attorney for [**name of creditor**].

On [**date of repossession**], under the terms of the referenced note and security agreement and because of your default under their terms, my client repossessed the referenced collateral.

After giving proper notice, my client sold this collateral for $[**amount**], incurred expenses of sale of $[**amount**], and realized a net amount of $[**amount**].

After you are given full credit for this net amount realized, there remains a deficiency under the terms and conditions of the note of $[**amount**].

Please forward payment of the full amount of the deficiency under the terms of the agreement to my office immediately. I have been instructed that, unless I receive a certified check, cashier's check, or money order for the full amount of the deficiency on or before [**number**] days after the date of this letter, I am to take whatever legal action is necessary to protect my client's interests.

Enclosed is an addressed, postage-paid envelope for your payment.

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Sincerely yours,

____

[Name of attorney]

Certified Mail No. **[number]**
Return Receipt Requested

Enc.

c: **[name of creditor]**

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Form 5-9

If the Internal Revenue Service has properly filed a notice of federal tax lien with the Texas secretary of state or the county clerk against the debtor's property more than thirty days before sale of the collateral, notice of the sale must be sent to the IRS at least twenty-five days before the sale. 26 U.S.C. § 7425(c)(1). See section 5.36:1.

Letter Notifying Internal Revenue Service of Intention to Sell Collateral

[Date]

Internal Revenue Service
Attention: Technical Services Advisory Group Manager
[Refer to relevant IRS publications for appropriate address.]

Re: Notice of nonjudicial sale of property

[Salutation]

This notice is submitted on behalf of **[name of creditor]**, whose address is **[address, city, state]**.

Enclosed is a copy of a notice of federal tax lien under the Internal Revenue Laws Form 668(Y), relating to taxpayer **[name of debtor]**, whose address is **[address, city, state]**. The notice was filed with the [Texas secretary of state/county clerk of **[county]** County, Texas,] on **[date]** and is recorded under file number **[number]**.

[Name of creditor], as secured party under a security agreement executed by **[name of debtor]** on **[date]**, intends to sell the following property at a public sale in accordance with the security agreement and under chapter 9 of the Texas Business and Commerce Code: **[describe items to be sold]**.

The sale will occur on **[date and time]** at **[address, city, state]**. Principal, interest, and other charges totaling approximately $**[amount]** are due and will be chargeable against the

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sale proceeds. [**Include if applicable:** In addition, legal fees, appraisal costs, lien search fees, filing fees, and selling costs will be chargeable against the sale proceeds.]

Sincerely yours,

____

[**Name of attorney**]
Attorney for [**name of creditor**]

Certified Mail No. [**number**]
Return Receipt Requested

Enc.

Enclose a copy of the federal tax lien and the notice of sale.

Form 5-10

Letter to Debtor Giving Notice of Intent to Retain Collateral in Satisfaction of Debt

[Date]

[Name and address of debtor]

[Include name[s] and address[es] of other secured parties if applicable]

Re: **[description of collateral, note, and security agreement]**

[Salutation]

You are hereby notified that my client, **[name of creditor]**, as secured party now in possession of the above-described collateral under the referenced note and security agreement now in default, proposes to retain the collateral in satisfaction of the obligation.

Sincerely yours,

____

[Name of attorney]

Certified Mail No. **[number]**
Return Receipt Requested

c: **[name of creditor]**

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Chapter 6

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Chapter 6

Presuit Considerations

I. Liability for Debts of Another

§ 6.1 Contractual Guaranties

The easiest and most often encountered method for imposing personal liability for the obligation of a corporation is a personal guaranty. Actions on personal guaranties are discussed at section 14.31 in this manual.

§ 6.2 Taxable Entity that Fails to Pay Franchise Tax

§ 6.2:1 Forfeiture of Right to Do Business

A corporation or other taxable entity that fails to pay its franchise tax or file a required report will forfeit its right to do business in Texas, thereby losing its right to sue or defend in any court in this state. *See* Tex. Tax Code §§ 171.251–.257. The forfeiture of the corporate privileges of a corporation is effected by the comptroller without a judicial proceeding. Tex. Tax Code § 171.257. "Taxable entity" means a partnership, limited liability partnership, corporation, banking corporation, savings and loan association, limited liability company, business trust, professional association, business association, joint venture, joint stock company, holding company, or other legal entity. Tex. Tax Code § 171.0002(a).

§ 6.2:2 Individual Liability of Directors, Officers, and Managers

If the corporate privileges of a corporation are forfeited for the failure to file a report or pay a tax or penalty, each director or officer of the corporation is liable for each debt of the corporation that is created or incurred in this state after the date on which the report, tax, or penalty is due and before the corporate privileges are revived. Tex. Tax Code § 171.255(a). The liability of partners is joint and several, so not all the officers and directors need be sued; the obligation can be enforced against individual officers or directors. *Sheffield v. Nobles*, 378 S.W.2d 391, 392 (Tex. Civ. App.—Austin 1964, writ ref'd) (judgment affirmed against defendant-president only; other officers not sued); *but see Williams v. Adams*, 74 S.W.3d 437, (Tex. App.—Corpus Christi 2002, pet. denied) (section 171.255 cannot be used to impute personal liability to an officer or director of a corporation for a corporate debt when the "debt" at issue is a tort judgment based on negligence liability). The creditor should serve each individual whose liability is sought.

Liability extends to officers and directors of forfeited limited liability companies. "The comptroller may, for the same reasons and using the same procedures the comptroller uses in relation to the forfeiture of the corporate privileges of a corporation, forfeit the right of a taxable entity to transact business in this state." Tex. Tax Code § 171.2515(a). "The provisions of this subchapter, including Section 171.255, that apply to the

forfeiture of corporate privileges apply to the forfeiture of a taxable entity's right to transact business in this state." Tex. Tax Code § 171.2515(b). *See also Bruce v. Freeman Decorating Services, Inc.*, No. 14-10-00611-CV, 2011 WL 3585619, at *6–7 (Tex. App.—Houston [14th Dist.] Aug. 16, 2011, pet. denied) (mem. op., not designated for publication) (affirming judgment against defendant-officer; Texas Franchise Tax Public Information Reports listed defendant as director of forfeited limited liability company; defendant failed to bring forth an exception to personal liability).

If a corporation's charter or certificate of authority and its corporate privileges are forfeited and revived, the liability under of a director or officer of the corporation is not affected by the revival of the charter or certificate and the corporate privileges. Tex. Tax Code § 171.255(d). Other means of imposing liability on officers, directors, and managers can be found at section 6.3 below.

§ 6.2:3 Relation-Back Doctrine

"When parties enter into a contract the law presumes they intend the consequences of its performance. It follows that performance or implementation of the contractual provisions relate back to and are authorized at the time of execution of the contract." *Curry Auto Leasing v. Byrd*, 683 S.W.2d 109 (Tex. App.—Dallas 1984, no pet.) (officers not liable on breach of lease agreement, which was signed before corporate forfeiture).

§ 6.2:4 Defenses

"A director or officer is not liable for a debt of the corporation if the director or officer shows that the debt was created or incurred: (1) over the director's objection; or (2) without the director's knowledge and that the exercise of reasonable diligence to become acquainted with the affairs of the corporation would not have revealed the intention to create the debt." Tex. Tax Code § 171.255(c).

§ 6.3 Personal Liability of Individual Signing in Representative Capacity

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

§ 6.4 Agency

One who contracts in his own name as an agent for an undisclosed principal is personally liable, even if he disclosed the fact of agency. *Carter v. Walton*, 469 S.W.2d 462, 471–72 (Tex. Civ. App.—Corpus Christi 1971, writ ref'd n.r.e.). An individual is personally liable on a contract he signed as a purported agent if no authority to do so existed. *Talmadge Tinsley Co. v. Kerr*, 541 S.W.2d 207, 209 (Tex. Civ. App.—Dallas 1976, writ ref'd n.r.e.). "It is the duty of the agent, if he would avoid personal liability on a contract entered into by him on behalf of the principal, to disclose not only the fact that he is acting in a

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representative capacity but also the identity of his principal, as the person dealt with is not bound to inquire whether or not the agent is acting as such for another." *Mahoney v. Pitman*, 43 S.W.2d 143, 146 (Tex. Civ. App.—Amarillo 1931, no writ). The fact that a person opened an account in the name of a business without use of the terms *incorporated, corporation*, or *company* in the business name is not enough to create a duty for a creditor to investigate to see if the business is in fact a corporation. *See Ferrant v. Graham Associates, Inc.*, No. 02-12-00190-CV (Tex. App.—Fort Worth, May 8, 2014, no pet.) (mem. op.) (CFO personally liable; "West Fort Worth" was insufficient disclosure of the true principal, West Fort Worth Day Care, LLC); *Avenell v. Chrisman Properties, LLC*, No. 14-08-01180-CV, (Tex. App.—Houston [14th Dist.] April 8, 2010, no pet.) (mem. op.) (manager personally liable on lease; "K&S Contracting" insufficient disclosure of K&S Contracting, Inc.). The test of disclosure is the creditor's actual knowledge that a business is a corporation or whether the creditor had reasonable grounds to know of the corporation's existence. *Wynne v. Adcock Pipe & Supply*, 761 S.W.2d 67, 69 (Tex. App.—San Antonio 1988, writ denied). Knowledge of the real position of affairs acquired after a cause of action accrued cannot affect the right to recover from the agent personally on a contract. *Burch v. Hancock*, 56 S.W.3d 257, 262 (Tex. App.—Tyler 2001, no pet.).

§ 6.5 Corporations

A shareholder may not be held liable to the corporation or its obligees with respect to any contractual obligation of the corporation or any matter relating to or arising from the obligation on the basis that the shareholder is or was the alter ego of the corporation or on the basis of actual or constructive fraud, a sham to perpetrate a fraud, or other similar theory. Tex. Bus. Orgs. Code § 21.223(a)(2). However, subsection (a)(2) does not prevent or limit the liability of a shareholder if the obligee demonstrates that the shareholder caused the corporation to be used for the purpose of perpetrating and did perpetrate an actual fraud on the obligee primarily for the direct personal benefit of the shareholder. Tex. Bus. Orgs. Code § 21.223(b).

Moreover, a shareholder may not be held liable for failure to observe corporate formalities, including the failure to comply with the certificate of formation or bylaws of the corporation. *See* Tex. Bus. Orgs. Code § 21.223(a)(3).

The same protections afforded corporate shareholders are available to members of a limited liability company. *See* Tex. Bus. Orgs. Code § 101.002.

§ 6.6 Piercing the Corporate Veil

Traditionally, Texas cases have attempted to treat contract claims and tort claims differently in determining whether to pierce the corporate veil. *Menetti v. Chavers*, 974 S.W.2d 168, 173 (Tex. App.—San Antonio 1998, no pet.). The theory behind disparate treatment is that plaintiff, in contract cases, had the opportunity to select the entity with which plaintiff deals, as opposed to tort cases in which no such choice exists.

In *Castleberry v. Branscum*, the Texas Supreme Court laid out six instances where the corporate veil could be pierced: (1) when the corporate fiction is used as a means of perpetrating fraud; (2) where a corporation is organized and operated as a mere tool or business conduit of another corporation; (3) where the corporate fiction is resorted to as a means of evading an existing legal obligation; (4) where the corporate fiction is employed to achieve or perpetrate monopoly; (5) where the corporate fiction is used to circumvent a statute; and (6) where the corporate fiction is relied upon as a protection of crime or to justify wrong. *See Castleberry v. Branscum*, 721 S.W.2d 270, 271 (Tex. 1986); *but see SSP Partners v. Gladstrong Investments*

(USA) Corp., 275 S.W.3d 444, 455 (Tex. 2008) (constructive fraud not grounds to pierce corporate veil).

It is extremely difficult to pierce the corporate veil on contract claims. Actual fraud must be proved, committed primarily for the direct personal benefit of a shareholder. *See* Tex. Bus. Orgs. Code § 21.223(b); *Willis v. Donnelly*, 199 S.W.3d 262 (Tex. 2006) (no liability for individual shareholders under implied ratification theory absent showing of actual fraud); *Menetti v. Chavers*, 974 S.W.2d 168 (Tex. App.—San Antonio 1998, no pet.) (judgment against individual shareholders reversed; claims arose from construction contract and no showing of actual fraud).

§ 6.6:1 Single Business Enterprise

The Texas Supreme Court rejected the single business enterprise theory, which advocates that corporations may be held liable for each other's obligations merely because of centralized control, mutual purposes, and shared finances. *See SSP Partners v. Gladstrong Investments (USA) Corp.*, 275 S.W.3d 444, 456 (Tex. 2008) (single business enterprise liability theory would not support imposition of one corporation's obligations on another without evidence of fraud to support disregard of corporate structure under Tex. Bus. Corp. Act Art. 2.21 (now Tex. Bus. Orgs. Code § 21.223)).

§ 6.6:2 Foreign Corporations

The statutory limitations on piercing the corporate veil may or may not apply to foreign corporations. *See* Tex. Bus. Orgs. Code § 1.002(14), which includes for-profit corporation, nonprofit corporation, and professional corporation in its definition of "corporation" but does not specify domestic or foreign. Also, Tex. Bus. Orgs. Code § 21.223 refers only to "corporations" and does not specify domestic or foreign. The manual committee is not aware of case law on this matter.

§ 6.7 Insolvency, Dissolution, and Forfeiture of Corporations

§ 6.7:1 Terminated Legal Entity

A terminated entity has a limited existence for three years after termination for the purposes of prosecuting or defending proceedings in its entity name by or against the terminated entity, permitting the survival of a claim by or against the terminated entity, holding title to and liquidating property for the purpose of distributing the property, and settling affairs not completed before termination. *See* Tex. Bus. Orgs. Code § 11.356. A "terminated entity" means a domestic entity the existence of which has been (1) terminated in a manner authorized or required by the Business Organizations Code or (2) forfeited pursuant to the Tax Code. *See* Tex. Bus. Orgs. Code § 11.001(4).

§ 6.7:2 "Trust Fund" Theory

Under the "trust fund" theory, when a corporation becomes insolvent and ceases doing business, the officers and directors hold corporate assets in trust for the benefit of creditors. *Hixson v. Pride of Texas Distributing Co.*, 683 S.W.2d 173, 176 (Tex. App.—Fort Worth 1985, no writ). The officers owe a fiduciary duty to administer the corporate assets for the benefit of the creditors, and breach of that duty gives rise to a cause of action against the officers and directors, which can be prosecuted directly by the creditors. *Hixon*, 683 S.W.2d at 176. *See also Fagan v. La Gloria Oil & Gas Co.*, 494 S.W.2d 624, 628 (Tex. Civ. App.—Houston [14th Dist.] 1973, no writ) (judgment affirmed against officer under trust fund theory; officer failed to hold corporate assets in trust for benefit of creditors once corporation became insolvent).

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

§ 6.7:3 "Denuding" of Corporate Assets

If one or more shareholders appropriate the corporation's assets, leaving it unable to satisfy corporate claims, the corporation's creditors may trace the assets and hold the shareholders responsible for the corporation's obligations, to the extent of the corporate assets received by the shareholder. *World Broadcasting System, Inc. v. Bass*, 328 S.W.2d 863, 865–66 (Tex. 1959); *Huff v. Harrell*, 941 S.W.2d 230, 236 (Tex. App.—Corpus Christi 1996, writ denied). A "denuding" claim is typically brought with one or more causes of action, such as fraudulent transfer. See section 14.30 in this manual for more discussion on fraudulent transfer.

§ 6.8 General Partnership

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

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

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

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

§ 6.9 Limited Partnership

A limited partner is not liable for the debts of the limited partnership unless he either is also a general partner or participates in the control of the business. If the limited partner participates in

control of the business, he is liable only to persons transacting business with the limited partnership who reasonably believe, based on the limited partner's conduct, that he is a general partner. Tex. Bus. Orgs. Code § 153.102.

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

§ 6.10 Limited Liability Partnership

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

Partners are not individually liable, directly or indirectly, by contribution, indemnity, or otherwise, for any obligation of the partnership incurred while the partnership is a registered limited liability partnership. Tex. Bus. Orgs. Code § 152.801(a).

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

§ 6.11 Limited Liability Company

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

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

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

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the approach suggested by the commentators mentioned above.

§ 6.12 Professional Corporation

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

§ 6.13 Association or Unincorporated Joint-Stock Company

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

[Sections 6.14 through 6.20 are reserved for expansion.]

II. Criminal Actions

§ 6.21 Criminal Prosecution of Debtor

Caveat: The manual committee strongly advises against pursuing simultaneous civil and criminal actions against the debtor. As set out in the following two sections, both creditor and attorney face substantial risks in pursuing criminal prosecution in any case. If criminal charges are brought or threatened before the civil suit is resolved, the debtor will almost certainly demand that the criminal charges be dropped as a condition of settlement. Even participating in such a discussion opens the creditor's attorney to a charge that he has violated Tex. Disciplinary Rules Prof'l Conduct R. 4.04(b). Refusing to discuss the criminal case may make settlement of the civil action impossible. Therefore, the attorney should caution the creditor to defer criminal prosecution, or the threat of prosecution, until the civil action is resolved.

Criminal prosecution of a debtor should be pursued with extreme caution. The client's potential exposure for malicious prosecution and unreasonable collection efforts must be evaluated. See section 6.29 below and section 17.49 in this manual. The attorney and the client should consult with the prosecutor's office before the client institutes criminal proceedings against a debtor. Various crimes relating to debts and credit are reviewed in this chapter. See sections 6.25, 6.26, 6.27, 6.28, and 6.29. Threats of criminal prosecution may violate the Texas Debt Collection Practices Act and the federal Fair Debt Collec-

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tion Practices Act. *See* Tex. Fin. Code § 392.301(a); 15 U.S.C. §§ 1692–1692p.

A creditor cannot threaten criminal action if the debtor has not violated the law. Tex. Fin. Code § 392.301(a)(6). Likewise, the creditor does not have the power and authority to determine the guilt or innocence of the debtor. *Brown v. Oaklawn Bank*, 718 S.W.2d 678, 680 (Tex. 1986).

§ 6.22 Ethical Considerations for Attorneys

A lawyer must not present, participate in presenting, or threaten to present criminal charges solely to gain an advantage in a civil matter. *See* Tex. Disciplinary Rules Prof'l Conduct R. 4.04(b). A lawyer who represents a creditor in a civil suit cannot "assist" in prosecuting a criminal charge against a defendant even if both the creditor and the attorney insist that the motivation is not solely to gain an advantage in the civil matter. *See* Tex. Comm. on Prof'l Ethics, Op. 455 (1988).

Giving any notice required by law or applicable rules of practice or procedure as a prerequisite to instituting criminal charges is allowed, unless the underlying criminal charges were made without probable cause. Tex. Disciplinary Rules Prof'l Conduct R. 4.04 cmt. 2. See, for example, section 6.26:5, notice required for prosecution of theft by check.

§ 6.23 False Statement to Obtain Property or Credit or in the Provision of Certain Services

It is an offense if a person intentionally or knowingly makes a materially false or misleading written statement to obtain property or credit for himself or another or in providing an appraisal of real property for compensation. Tex. Penal Code § 32.32(b), (b–1). "Credit" is broadly defined to include a loan of money; furnishing property or service on credit; extending the due date of an obligation; comaking, endorsing, or guaranteeing a note or other instrument for obtaining credit; a line or letter of credit; and a credit card. Tex. Penal Code § 32.32(a). Making the written false or misleading statement is the offense; actually acquiring the property or credit is not a required element. *Cheney v. State*, 755 S.W.2d 123, 129 (Tex. Crim. App. 1988). Whether the offense is classified as a felony or a misdemeanor will depend on the value of the property or the amount of credit obtained. *See* Tex. Penal Code § 32.32(c).

§ 6.24 Credit and Debit Card Abuse

Various acts involving the use of a credit or debit card may constitute criminal offenses. Tex. Penal Code § 32.31(b) lists eleven offenses, including presentment or use of a card that has expired or been revoked, use of a fictitious card to obtain property or services, and sale of a debit or credit card without being the issuer. These offenses are state jail felonies, unless it is shown at trial that the offense was committed against an elderly individual, in which case the offense is a felony of the third degree. Tex. Penal Code § 32.31(d).

§ 6.25 Issuance of Bad Check

§ 6.25:1 Elements of Offense

It is an offense if a person issues or passes a check knowing that there are not sufficient funds available to pay in full the check and all other checks outstanding on his account at that time. *See* Tex. Penal Code § 32.41(a). The issuer's knowledge of insufficient funds is presumed (except in the case of a postdated check or order) if: (1) he had no account with the bank or other drawee at the time he issued the check or order; or (2) payment was refused by the bank or other drawee for lack of funds or insufficient funds on presentation within thirty days after issue and the issuer failed to pay the holder in

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full within ten days after receiving notice of that refusal. Tex. Penal Code § 32.41(b).

§ 6.25:2 Notice

If the check was refused for lack of funds or insufficient funds, notice may be actual notice or notice given in writing that is sent by (1) first-class mail supported by an affidavit of service or (2) registered or certified mail with a return receipt requested. Tex. Penal Code § 32.41(c)(1). The notice must be sent to the address (1) on the check or order, (2) in the bank's records, or (3) in the holder's records. Tex. Penal Code § 32.41(c)(2). The notice must also contain the following statement:

> This is a demand for payment in full for a check or order not paid because of a lack of funds or insufficient funds. If you fail to make payment in full within 10 days after the date of receipt of this notice, the failure to pay creates a presumption for committing an offense, and this matter may be referred for criminal prosecution.

Tex. Penal Code § 32.41(c)(3). If notice is given in accordance with subsection (c), there is a presumption that it was received no later than five days after it was sent. Tex. Penal Code § 32.41(d).

Practice Note: To avoid potential violations of the federal Fair Debt Collection Practices Act and the Texas Debt Collection Practices Act, the better practice is to have the creditor send the required notice, not the creditor's attorney.

§ 6.25:3 Restitution

A person charged with an offense under this section may make restitution for the bad checks or sight orders. Restitution shall be made through the prosecutor's office if collection and processing were initiated through that office. In other cases restitution may be, with the approval of the court in which the offense is filed: (1) made through the court; or (2) collected by a law enforcement agency if a peace officer of that agency executes a warrant against the person charged with the offense. Tex. Penal Code § 32.41(e).

§ 6.25:4 Classification of Offense

Issuance of a bad check is a class C misdemeanor unless the check was issued to pay a child support obligation established by court order; in that case, it is a class B misdemeanor. Tex. Penal Code § 32.41(f).

§ 6.26 Theft of Property or Service by Check

§ 6.26:1 Issuance of Bad Check vs. Theft by Check

Prosecution for issuance of a bad check or similar sight order under Penal Code section 32.41 is usually used only for the payment of a preexisting debt by a bad check. Theft of property or service by check is a more serious offense. The key distinction between the two offenses is whether the issuer of the check received any property. The same logic presumably extends to theft of service. Receipt of property and proof of its value are critical elements in the offense of theft. They are not required elements in the offense of issuance of a bad check. *Christiansen v. State*, 575 S.W.2d 42, 44 (Tex. Crim. App. 1979); *see also* Tex. Penal Code §§ 31.03, 31.06, and 32.41.

Issuance of a bad check or similar sight order is not a lesser included offense of theft by check of property or service. Tex. Penal Code § 32.41(g).

Practice Tip: Check your local district attorney's office before filing a theft by check complaint. Statutory notice under Texas Penal Code section 31.06(f)(3) may be required. In Travis

County, a driver's license number, or other identification number, is required on the face of the check.

§ 6.26:2 Elements of Offense

Theft of Property: A person commits theft of property if he unlawfully appropriates it with the intent to deprive the owner of the property. Tex. Penal Code § 31.03(a). Appropriation of property is unlawful if it is without the owner's consent or the property is received with knowledge that it is stolen by another. Tex. Penal Code § 31.03(b)(1), (2).

Theft of Service: A person commits theft of service if, with intent to avoid payment for service that the actor knows is provided only for compensation:

1. the actor intentionally or knowingly secures the service by deception, threat, or false token;
2. having control of the disposition of the services of another to which the actor is not entitled, the actor intentionally or knowingly diverts the other's services to the actor's own benefit or to the benefit of another not entitled to the services;
3. having control of personal property under a written rental agreement, the actor holds the property beyond the expiration of the rental period without the effective consent of the owner, thereby depriving the owner of the use of the property for further rentals; or
4. the actor intentionally or knowingly secures the performance of the service by agreeing to provide compensation and, after the service is rendered, fails to make payment after receiving notice demanding payment.

Tex. Penal Code § 31.04(a).

§ 6.26:3 Presumption for Theft by Check

If the actor did not have sufficient funds in the account to pay the check or similar sight order, intent to deprive the owner of property under Penal Code section 31.03 (Theft) or to avoid payment for service under section 31.04 (Theft of Service) is presumed if the issuer had no account with the bank at the time he issued the check or similar sight order or the bank refused payment for lack of funds or insufficient funds on presentation within thirty days after issue, and the issuer failed to pay the holder in full within ten days after receiving notice of that refusal. Tex. Penal Code § 31.06(a).

§ 6.26:4 Presumption for Stop Payment on Check

Intent to deprive an owner of property is presumed if:

1. the actor ordered the bank or other drawee to stop payment on the check or order;
2. the bank or drawee refused payment to the holder on presentation of the check or order within thirty days after issue;
3. the owner gave the actor notice of the refusal of payment and made a demand to the actor for payment or return of the property; and
4. the actor failed to pay the holder within ten days after receiving the demand for payment or return the property to the owner within ten days after receiving the demand for return of the property.

Tex. Penal Code § 31.06(f).

Partial restitution does not preclude the presumption of intent for theft by check. Tex. Penal Code § 31.06(e). For presumptions of intent

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regarding theft of service, *see* Tex. Penal Code § 31.04(b).

§ 6.26:5 Notice—Theft by Check

The notice required by Tex. Penal Code § 31.06(f)(3) may be actual notice or notice in writing that is sent by (1) first-class mail supported by an affidavit of service or (2) registered or certified mail with a return receipt requested. Tex. Penal Code § 31.06(b)(1). Notice must be sent to the address (1) on the check or order, (2) in the bank's records, or (3) in the holder's records. *See* Tex. Penal Code § 31.06(b)(2). If the property is rental property, the better practice is to send notice by registered or certified mail or by telegram to the person who took control of the property under the rental agreement at the address shown on the agreement.

The notice must include the following language:

> This is a demand for payment in full for a check or order not paid because of a lack of funds or insufficient funds. If you fail to make payment in full within 10 days after the date of receipt of this notice, the failure to pay creates a presumption for committing an offense, and this matter may be referred for criminal prosecution.

Tex. Penal Code § 31.06(b)(3).

If notice is given, there is a presumption that it was received no later than five days after it was sent. Tex. Penal Code § 31.04(d).

Practice Note: To avoid potential violations of the federal Fair Debt Collection Practices Act and the Texas Debt Collection Practices Act, the better practice is to have the creditor send the required notice, not the creditor's attorney.

§ 6.26:6 Classification of Offense

The classifications for theft of property and theft of service vary from class C misdemeanors to first-degree felonies, depending on the value of the stolen property or service. *See* Tex. Penal Code §§ 31.03(e), 31.04(e).

§ 6.26:7 Theft as Ground for Removing Limitation on Exemplary Damages

Although there are generally limits on the recovery of exemplary damages, those limitations are removed if the action is based on theft punishable as a third-degree felony or higher. *See* Tex. Civ. Prac. & Rem. Code § 41.008(c)(13); *see also* Tex. Civ. Prac. & Rem. Code §§ 41.003, 41.008(b).

§ 6.27 Hindrance of Secured Creditor

§ 6.27:1 Elements of Offense

A person who has signed a security agreement creating a security interest or lien on property commits an offense if, with intent to hinder enforcement of that interest or lien, he destroys, removes, conceals, encumbers, or otherwise harms or reduces the value of the property. Tex. Penal Code § 32.33(b). Removal occurs if the property is transported, without the secured party's effective consent, from the state in which the property was located when the security interest or lien attached. Tex. Penal Code § 32.33(a)(1).

A debtor under a security agreement who does not have a right to sell or dispose of secured property or is required to account to the secured party for the proceeds of a permitted sale or disposition commits an offense if, with intent to appropriate the proceeds, he sells or disposes of the property or does not account to the secured

party for the sale or other disposition as required. Tex. Penal Code § 32.33(e).

A debtor who removes the property to another state with the intent to hinder enforcement of the security interest or lien may be subject to extradition under the Uniform Criminal Extradition Act. *See* Tex. Code Crim. Proc. art. 51.13.

§ 6.27:2 Presumption of Intent

Intent to hinder enforcement is presumed if the debtor fails to pay any part of the secured debt when due and, after demand by the secured party, fails to deliver possession of the secured property to the secured party. Tex. Penal Code § 32.33(c). Despite the statutory presumption, difficult fact questions may be involved in proving intent to hinder. *See, e.g., Guernsey Community Federal Credit Union v. Gonzalez*, 539 S.W.2d 896 (Tex. Civ. App.—El Paso 1976, writ ref'd n.r.e.).

§ 6.27:3 Classification of Offense

Hindering a secured creditor is classified as either a misdemeanor or felony, depending on the value of the property involved. Tex. Penal Code § 32.33(d).

§ 6.27:4 Combining Criminal Prosecution with Repossession

A secured creditor will often request his attorney to threaten the debtor with prosecution for hindrance if the debtor does not voluntarily relinquish possession of the collateral. If the debt is a consumer debt, such a threat may violate Tex. Fin. Code § 392.301. *See Brown v. Oaklawn Bank*, 718 S.W.2d 678, 680 (Tex. 1986) (bank's letters threatening criminal prosecution violated Texas Debt Collection Act). Even if the debt is not a consumer debt, such a threat may violate Tex. Disciplinary Rules Prof'l Conduct R. 4.04.

§ 6.28 Unauthorized Automobile Title Transfer

A person commits an offense if he acquires, accepts possession of, or exercises control over the motor vehicle of another under a written or oral agreement to arrange for the transfer of the vehicle to a third party and—

1. knowing the vehicle is subject to a security interest, lease, or lien, transfers the vehicle to a third party without first obtaining written authorization from the vehicle's secured creditor, lessor, or lienholder;
2. intending to defraud or harm the vehicle's owner, transfers the vehicle to a third party;
3. intending to defraud or harm the vehicle's owner, disposes of the vehicle in a manner other than by transfer to a third party; or
4. does not disclose the location of the vehicle on the request of the vehicle's owner, secured creditor, lessor, or lienholder.

Tex. Penal Code § 32.34(b). This offense is either a class A misdemeanor, a state jail felony, or a third-degree felony, depending on the nature of the offense. Tex. Penal Code § 32.34(f), (g).

§ 6.29 Malicious Criminal Prosecution

A plaintiff in a malicious criminal prosecution claim must establish—

1. commencement of a criminal prosecution against the plaintiff;
2. causation (initiation or procurement) of the action by the defendant;
3. termination of the prosecution in the plaintiff's favor;

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4. innocence of the plaintiff;
5. absence of probable cause for the proceedings;
6. malice in filing the charge; and
7. damage to the plaintiff.

Richey v. Brookshire Grocery Co., 952 S.W.2d 515, 517 (Tex. 1997).

The creditor who considers bringing a criminal action against a debtor should make certain there is probable cause to believe the debtor has committed a crime; he must not file criminal charges merely to collect a debt. If the creditor had probable cause to believe the debtor had committed a crime, the fact that the creditor was attempting to collect a debt is not sufficient to show malice. *See Jackson v. Train*, 495 S.W.2d 36, 39 (Tex. Civ. App.—Beaumont 1972, no writ) (creditor not liable for malicious prosecution; all facts fully and fairly disclosed to prosecutor; no showing of malice).

§ 6.30 Setoff against Deposit

Except as otherwise provided by the Truth in Lending Act, 15 U.S.C. §§ 1601–1667f, or other federal law—

> a bank has a right of setoff, without further agreement or action, against all accounts owned by a depositor to whom or on whose behalf the bank has made an advance of money by loan, overdraft, or otherwise if the bank has previously disclosed this right to the depositor. If the depositor defaults in the repayment or satisfaction of the obligation, the bank, without notice to or consent of the depositor, may set off or cancel on its books all or part of the accounts owned by the depositor and apply the value of the accounts in payment of and to the extent of the obligation.

Tex. Fin. Code § 34.307(a). "The relationship of a bank to its general depositors is that of debtor to creditor. It follows that the bank has the right to set off against an amount on deposit an equal amount of indebtedness owed by the depositor to the bank." *Sears v. Continental Bank & Trust Co.*, 562 S.W.2d 843, 843 (Tex. 1997).

For purposes of section 34.307, a default occurs if an obligor has failed to make a payment as provided by the terms of the loan or other credit obligation and a grace period provided for by the agreement or law has expired. An obligation is not required to be accelerated or matured for a default to authorize setoff of the depositor's obligation against the defaulted payment. Tex. Fin. Code § 34.307(b).

A bank may not exercise its right of setoff under section 34.307 against an account unless the account is due the depositor in the same capacity as the defaulted credit obligation. A trust account for which a depositor is trustee, including a trustee under a certificate of trust delivered under section 34.306(b), is not subject to the right of setoff unless the trust relationship is solely evidenced by the account as provided by subchapter B, chapter 11, and chapters 112 and 113 of the Texas Estates Code. Tex. Fin. Code § 34.307(c).

Section 34.307 does not limit the exercise of another right of setoff, including a right under contract or common law. Tex. Fin. Code § 34.307(d).

Chapter 9 of the Texas Business and Commerce Code does not generally apply to a right of recoupment or setoff. Tex. Bus. & Com. Code § 9.109(d)(10). But its provisions both recognize and affect such rights in specific contexts. *See* Tex. Bus. & Com. Code § 9.340. Section 9.340 contains three important provisions: (1) If a debtor has a deposit account at a bank to which the debtor's secured party holding a security interest in the deposit account also owes money, the bank can offset the account in respect to a

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debt of the secured party; (2) generally a bank can permit a third party to take a security interest in a deposit account maintained with the bank without impairing any common-law or statutory right the bank has to offset the deposit account balance against a debt owed the bank by the account owner; and (3) as an exception to the foregoing general rule, even a bank's right of setoff will be ineffective as against a secured party of the bank's deposit account holder who takes the steps to acquire control over the account prescribed by Tex. Bus. & Com. Code § 9.104(a)(3) (the secured party in effect becomes the bank's customer or owner of the account). *See also* Tex. Bus. & Com. Code § 9.404 (with respect to possible claims by way of recoupment of an account debtor against an assignee of the account).

See Tex. Bus. & Com. Code § 4.303 regarding priority rights of payment between checks presented to the bank and the bank's offset rights. See section 27.70 in this manual regarding the relationship between offset and garnishment.

§ 6.31 Suit on Debt vs. Suit on Bad Check

Ordinarily the creditor will want to sue on the account or note itself and, in the alternative, on the check. Attorney's fees are recoverable in suits on sworn accounts, whereas they have not been available in suits on worthless checks. Recovery of attorney's fees is allowed, however, if the claim is founded on an oral or written contract. Awards of attorney's fees in suits on bad checks should therefore be permitted on the theory that a check is a contract. *See* Tex. Civ. Prac. & Rem. Code § 38.001(8). *See also 1/2 Price Checks Cashed v. United Automobile Insurance Co.*, 344 S.W.3d 378 (Tex. 2011) (holder entitled to recover attorney's fees against drawer of dishonored check).

Suit on the check may be preferable to suit on the account or note for the following reasons:

1. Venue for a suit on the contract may be in a distant county, but venue for a suit on the check may be permitted in a closer county. *See* Tex. Civ. Prac. & Rem. Code §§ 15.001–.039.
2. The check may be viewed by the court as an admission of the debt.
3. The passing of a bad check by the defendant may create a bias favorable to the creditor with the trier of fact.
4. Suit on a bad check will enable judicial foreclosure of a worker's lien if one is allowed by Tex. Prop. Code § 70.001.

Suits on a note are discussed at section 14.25 in this manual. Criminal prosecution on a bad check is discussed at section 6.25 above. Worker's possessory liens are discussed at section 7.2.

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Chapter 7

Creation and Enforcement of Liens

I. Property Code Liens

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

§ 7.1:1 Scope of Lien

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

§ 7.1:2 Who May Claim Lien

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

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

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

§ 7.1:3 Property Subject to Lien

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

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

Tex. Prop. Code § 58.003.

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

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

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

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

§ 7.1:5 Lien Priority

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

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

§ 7.1:6 Attorney's Fees

Attorney's fees are not authorized by the worker's lien statutes, but Tex. Civ. Prac. & Rem. Code § 38.001 provides for reasonable attorney's fees in a suit for services rendered or labor performed or a suit on a contract. For a discussion of attorney's fees, see chapter 31 in this manual.

§ 7.2 Worker's Possessory Liens

§ 7.2:1 Scope of Worker's Possessory Lien

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

§ 7.2:2 Availability of Worker's Possessory Lien

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

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

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

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

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

Possession of the article is an essential element of the statutory worker's lien but is irrelevant to the constitutional lien. The constitutional lien survives the worker's relinquishment of the article to the owner, but ordinarily the statutory lien does not. The constitutional lien does not authorize the worker to retain a repaired article pending payment for the repairs, but the statute creating a worker's lien for repairs provides this specific right. The constitutional lien can serve as a basis for a suit for recovery of payment, but will not serve as a defense to an action for conversion. *See generally Garcia v. Rutledge*, 649 S.W.2d 307, 311 (Tex. App.—Amarillo 1982, no writ) (discussing the difference between the constitutional and statutory liens); *River Oaks Chrysler-Plymouth, Inc. v. Barfield*, 482 S.W.2d 925, 927–8 (Tex. Civ. App.—Houston [14th Dist.] 1972, writ dism'd) (discussing the fact that the constitutional lien does not require possession, gives no possessory rights, and is not a defense to conversion).

§ 7.2:4 Requirement of Possession Generally

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

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

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

The worker repossessing an article under the repair statute may charge for the costs of repos-

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sessing the article to the extent of the reasonable fair market value of the services required to take possession of the article. The reasonable fair market value is defined as the actual cost of the repossession. Tex. Prop. Code § 70.001(d).

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

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

§ 7.2:6 Priority of Worker's Possessory Lien

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

§ 7.2:7 Enforcement of Worker's Possessory Lien

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

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

Under Property Code section 70.005, a lienholder possessing designated property for sixty days after the repair charges accrue must send a first notice of sale, requesting the owner to pay the unpaid charges, if the owner's Texas residence is known. See form 7-4 in this chapter. If the charges are not paid before the eleventh day after the date of the request, a second notice must be sent to the owner, stating that, after twenty days, the lienholder may sell the property at a public sale. See form 7-5. If the request for payment and notice of sale under section 70.005 is premature, however, this will not invalidate a public sale, if the public sale takes place more than twenty days after the notice. *Cranetex, Inc. v. Precision Crane & Rigging of Houston, Inc.*, 760 S.W.2d 298, 304 (Tex. App.—Texarkana 1988, writ denied). If the property owner's residence is outside Texas or is unknown, the lienholder may sell the property without notice at a public sale after the sixtieth day after the unpaid charges accrued. Proceeds of the sale are applied to the repair charges and, if the repaired property is a garment, to the reasonable costs of the sale. Excess proceeds are paid to the person entitled to them, as discussed at section 7.2:9 below.

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

If the property subject to the lien is a motor vehicle, and the lienholder determines that the vehicle's only residual value is as a source of parts or scrap metal, or that it is not economical to dispose of the vehicle at a public sale, the lienholder may sell, give, or otherwise dispose of the vehicle to a motor vehicle demolisher under Tex. Transp. Code ch. 683. Tex. Prop. Code § 70.006(f–1), (f–2).

See form 7-6 for a notice of sale for a motor vehicle, motorboat, vessel, or outboard motor under a worker's possessory lien.

§ 7.2:8 Judicial Supervision of Sale

Tex. Prop. Code §§ 70.005–.006 do not require judicial supervision or public notice of the sale. If the attorney believes that a sale would create constitutional problems (see section 7.2:10 below), the lienholder should probably obtain a court judgment and then sell the chattel pursuant to a writ of execution and order of sale, rather than proceeding with a public sale as prescribed under sections 70.005 and 70.006. *See Adams v. Department of Motor Vehicles*, 520 P.2d 961, 965 (Cal. 1974); Gary Spivey, Annotation, *Garagemen's Lien: Modern View as to Validity of Statute Permitting Sale of Vehicle without Hearing*, 64 A.L.R. 3d Art. 814 (1975).

§ 7.2:9 Excess after Sale

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

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

§ 7.2:10 Constitutionality

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

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and then proceed with a judicial sale under a writ of execution.

§ 7.3 Landlord's Liens

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

§ 7.4 Other Property Code Liens

§ 7.4:1 Types of Liens

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

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

Chapter 56 of the Property Code provides for a statutory scheme to perfect liens against mineral properties. The chapter has unique notice and filing requirements somewhat similar to the mechanic's and materialman's lien process. The Property Code also addresses hospital/emergency medical services liens at chapter 55, railroad worker's liens at chapter 57, newspaper employee's liens at chapter 60, motor vehicle mortgages at chapter 61, broker's and appraiser's liens at chapter 62, and manufactured home liens at chapter 63.

§ 7.4:2 Enforcement Provisions

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

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

Mineral liens are enforced in a similar manner as a mechanic's or materialman's lien, although the timing requirements differ. Tex. Prop. Code § 56.041 *et seq.*

[Sections 7.5 through 7.10 are reserved for expansion.]

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II. Private Mechanic's and Materialman's Liens

§ 7.11 Overview

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

Under chapter 53 of the Texas Property Code, the owner of real property being improved under a private construction contract is required to withhold from construction payments earned by the general contractor (called an "original contractor" by the Property Code) a statutory retainage equal to 10 percent of the payments earned by the general contractor. In addition, the owner may be required to pay subcontractors funds earned by but not yet paid to the general contractor that are "trapped" in the owner's possession by the receipt from subcontractors of claims of unpaid amounts owing on the project. The Property Code establishes procedures whereby the unpaid claimant can assert a mechanic's lien on the property being improved to secure the owner's obligation to use the retainage and "trapped funds" to pay the claim. If the owner does not make the required payments to the lien claimant out of the retainage, the claimant can seek judicial foreclosure of the lien for the purpose of selling the property to obtain proceeds to pay the claim. The statute governing the perfection of claims on private projects is discussed at section 7.12 below.

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

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

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

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

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§ 7.12 Statutory Mechanic's Lien

§ 7.12:1 Mechanic's Liens Generally

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

Chapter 53 establishes a procedure whereby mechanic's lien claimants owed money for their labor or materials may "perfect" a claim against retainage and trapped construction payments in the owner's possession. By following the requirements of chapter 53, the claimant also obtains a lien against the owner's property, and this lien can be judicially foreclosed to generate funds to pay the claimant in the event the owner has not withheld or refuses to pay the statutorily mandated amounts. To accomplish this, the lien claimant must give notices and file a lien affidavit that meets the requirements of chapter 53 within the statutorily defined time frames. However, even if the claimant follows the procedures set forth in chapter 53, the amount the property owner is required to pay the claimant may prove to be less than the unpaid amount owing to the claimant. The lien may also be subject to prior mortgages or encumbrances.

§ 7.12:2 Scope and Utility of Lien

A mechanic's lien may be established by any person who (1) labors, specially fabricates material, or furnishes labor or materials for construction or repair in Texas of (a) a house, building, or improvement; (b) a levee or embankment to be erected for the reclamation of overflow land along a river or creek; or (c) a railroad; and (2) does so under or by virtue of a contract with the owner or the owner's agent, trustee, receiver, contractor, or subcontractor. Tex. Prop. Code § 53.021(a). Because the statute (Tex. Prop. Code § 53.001(3)) requires that labor be used in the "direct prosecution of the work" to qualify for the lien, it is difficult to qualify off-site labor unless the Texas Property Code expressly provides otherwise, as with the manufacture of specially fabricated materials. Tex. Prop. Code § 53.001(12). The statute defines "materials" to include (1) material, machinery, fixtures, or tools incorporated or consumed in the work or that are ordered and delivered for incorporation or consummation; (2) reasonable rent and costs of actual running repairs for construction equipment used or reasonably required and delivered for use in the direct prosecution of the work at the site of the construction or repair; or (3) power, water, fuel, and lubricants consumed or ordered and delivered for consumption in the direct prosecution of the work. Tex. Prop. Code § 53.001(4). For material suppliers, it is sufficient to show either delivery of the materials to the construction site or that the materials were furnished to a contractor for the specific project. It is not necessary to show how the contractor ultimately used the materials. *W.L. MacAtee & Sons, Inc. v. House*, 153 S.W.2d 460 (Tex. 1941). *See also Addison Urban Development Partners, LLC v. Alan Ritchey Materials Co., LC*, 437 S.W.3d 597, 606 (Tex. App.—Dallas 2014, no pet) (finding that lien provided by Tex. Prop. Code § 53.021 does not require showing of how contractor used delivered materials, only that materials were delivered for specific project); *Lexcom, Inc. v. Gray*, 740 S.W.2d 83, 85 (Tex. App.—Dallas 1987, no writ) ("In order to establish a lien, the materialman need not prove that the materials furnished actually went into the construction.").

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Architects, Engineers, and Surveyors: The Property Code grants mechanic's lien rights to architects, engineers, and surveyors who, by virtue of a written contract with the owner or the owner's agent, trustee, or receiver, prepare a plan or plat in connection with the actual or proposed design, construction, or repair of improvements on real property or the location of the boundaries of the real property. Tex. Prop. Code § 53.021(c). The right to a lien can now be established for plans that were intended for a project even if they are not actually used. However, the work must be done pursuant to written contract; an oral contract will not suffice. *See Centurion Planning Corp., Inc. v. Seabrook Venture II*, 176 S.W.3d 498, 507 (Tex. App.—Houston [1st Dist.] 2004, no pet.) (noting that Tex. Prop. Code § 53.021(c)'s use of word "written" precludes basing lien on oral contract).

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

Demolition Services: The Property Code grants mechanic's lien rights to a person who performs labor or furnishes labor or materials for demolition of a structure on real property under or by virtue of a written contract with the owner or the owner's agent, trustee, receiver, contractor, or subcontractor. Tex. Prop. Code § 53.021(e).

Lending Services: Creditors advancing money to contractors are not entitled to a mechanic's lien, even if the funds are used to pay for labor and materials for a specific construction project. *Verschoyle v. Holifield*, 123 S.W.2d 878, 883 (Tex. 1939); *F.&C. Engineering Co. v. Moore*, 300 S.W.2d 323, 325 (Tex. Civ. App.—San Antonio 1957, writ ref'd n.r.e.).

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

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

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

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

Attorney's Fees: Statutory mechanic's liens do not secure attorney's fees incurred in filing the lien, although attorney's fees are recoverable in litigation to enforce and foreclose the lien. *See* Tex. Prop. Code § 53.156; *Palomita Inc. v. Medley*, 747 S.W.2d 575, 577 (Tex. App.—Corpus Christi 1988, no writ) (holding that section 53.156 does not support attachment of attorney's fees to mechanic's liens); *Dossman v. National Loan Investors, L.P.*, 845 S.W.2d 384, 386–87 (Tex. App.—Houston [1st Dist.] 1992, writ denied) (affirming *Palomita*). *But see In re Bigler L.P.*, 458 B.R. 345, 385–388 (Bankr. S.D. Tex. 2011) (disagreeing with "*Palomita* and its progeny" and attaching attorney's fees to

mechanic's lien that arose after, but was superior to, deed of trust lien).

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

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

§ 7.12:3 Property Subject to Lien

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

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

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

Lien Attaches to Original Tract Configuration: The mechanic's lien attaches to the tract as configured at the start of construction under the original contract. The subsequent conveyance of portions of the tract, even if before the filing of the actual lien affidavit, does not prevent the lien's attachment to the conveyed portions. *Valdez v. Diamond Shamrock*, 842 S.W.2d 273 (Tex. 1992).

Leasehold Estate: The general rule is that a mechanic's lien will attach only to the interest that the party contracting for the construction project has in the real property that is the subject of the improvements. This means that contractors working for tenants will normally be able to place a lien only on the tenant's leasehold estate. In such instances, the termination of the leasehold estate will extinguish the mechanic's lien claim against the property. *See Diversified Mortgage Investors v. Lloyd D. Blaylock General Contractor, Inc.*, 576 S.W.2d 794, 805 (Tex. 1978). The only exception to this general rule is that, if the tenant is acting as the landlord's agent for the work, the lien claim will attach to the fee title of the fee owner. *Rosen v. Peck*, 445 S.W.2d 241 (Tex. Civ. App.—Waco 1969, no writ). However, landlords rarely agree to authorize a lien for work by a tenant, and Texas courts have held that a tenant who does leasehold finish-out pursuant to the terms of a typical lease agreement is generally not the landlord's agent for purposes of authorizing a mechanic's lien against the landlord's fee interest. *See Diversified Mortgage Investors*, 576 S.W.2d at 805; *2811 Associates v. Metroplex Lighting & Electric*, 765 S.W.2d 851 (Tex. App.—Dallas 1989, writ denied). *But see Bond v. Kagan-Edelman Enterprises*, 985 S.W.2d 253 (Tex. App.—Houston [1st Dist.] 1999), *rev'd in part*, 20 S.W.3d 706 (Tex. 2000) (finding that fee owner of commercial property, where lessee of property contracted with subcontractor to finish out

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premises, was liable as owner to subcontractor claimant on statutory retainage and fund trapping claims).

Practice Note: The effectiveness of enforcing a mechanic's lien claim against a leasehold estate to collect payment of the lien generally depends on the financial circumstances of the tenant. Under most modern commercial leases, it is an event of default for a tenant to allow a mechanic's lien to be filed against the leasehold property. See, for example, 4 State Bar of Tex., *Texas Real Estate Forms Manual* ch. 25, forms 25-2, 25-3, 25-6 (3d ed. 2017). Since the landlord will almost certainly terminate the lease rather than allow a stranger to the lease to take possession of the leasehold as a purchaser at a mechanic's lien foreclosure sale, the mechanic's lien claimant has little chance of realizing a significant monetary recovery through a foreclosure sale of the leasehold. Nonetheless, if the tenant's business is more or less viable, the threat of disrupting that business operation through either prompting action under the lease by the landlord or foreclosing the mechanic's lien against the leasehold estate may be effective leverage to collect payment from the tenant. However, if the tenant is insolvent or otherwise financially unstable, the threat of losing the leasehold may not be effective leverage to collect from the tenant. Thus, whenever possible, the contractor would prefer to contract directly with the owner to do "landlord's finish-out work" rather than with the tenant for "tenant's finish-out work."

§ 7.12:4 Payment Bonds

The claimant's right to seek judicial foreclosure of a statutory mechanic's lien against the real property is cut off if a bond of proper form is filed of record. The two types of bonds provided for in the Texas Property Code that relate to a claimant's payment rights are statutory payment bonds and lien release bonds. *See* Tex. Prop. Code §§ 53.171(c), 53.201(b).

Statutory Payment Bond: The payment bond or "Property Code payment bond" (also called "statutory bond") is a payment bond posted by an original contractor that meets the requirements set out in Tex. Prop. Code §§ 53.202–.203. Bonds posted by subcontractors are not Property Code payment bonds. They are generally referred to as common law bonds. If a statutory payment bond in the requisite form and substance is filed in the public records, the lien claimant cannot file a mechanic's lien against the owner's property or file a suit against the owner, but instead must pursue payment on the payment bond. Tex. Prop. Code § 53.201(b). The filing of the payment bond also relieves the owner of any obligation to withhold statutory retainage, observe fund trapping notices, or pay undisputed claims. *Industrial Indemnity Co. v. Zack Burkett Co.*, 677 S.W.2d 493, 495 (Tex. 1984) (construing article 5472d, section 7, of Texas Revised Civil Statutes, now codified in Tex. Prop. Code § 53.201). In other words, the property is protected from liens filed by subcontractors and suppliers. *Sentry Insurance Co. v. Radcliff Materials of Texas, Inc.*, 687 S.W.2d 437 (Tex. Civ. App.—Houston [14th Dist.] 1985, no writ); *Fondren Construction Co. v. Briarcliff Housing Development Associates, Inc.*, 196 S.W.3d 210, 216 (Tex. App.—Houston [1st Dist.] 2006, no pet.).

The bond must be in a penal sum at least equal to the total of the original contract amount, be written in favor of the owner, and have the written approval of the owner endorsed on the bond. The bond must also be executed by both the original contractor as principal and a corporate surety authorized and admitted to do business in the state of Texas and licensed by the state to execute bonds as a surety. Tex. Prop. Code § 53.202.

The bond and the contract between the original contractor and the owner (or a memorandum of contract) must be filed in the county where the owner's property is located on which the con-

struction is being performed. Tex. Prop. Code § 53.203. The bond must be approved by the owner, and that approval must be endorsed across the face of the bond. Once filed in the real property records as required under section 53.203, a purchaser, lender, or other person acquiring an interest in the property is entitled to rely on the record of the bond and the contract as constituting payment of all claims as if each claimant had filed a complete release and relinquishment of lien rights. Tex. Prop. Code § 53.204.

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

Advantage of Bond Claim: A claimant on a bonded job has the important advantage of not having to worry about "fund trapping" and statutory retainage. As long as the statutory requirements are met for perfecting the bond claim, a claimant's valid claim should be paid by the surety. This advantage is particularly significant to those subcontractors who provide work (or deliver material) toward the end of the project. On an unbonded job, the funds available may be insufficient to pay such claimants, and the statutory retainage may likewise not be sufficient to cover all of the claims. With a payment bond, the claimants do not have to worry about the amount of contract funds remaining or the amount of the other claims (as long as the total amount of claims does not exceed the penal limits of the bond).

Requirements for Perfecting Bond Claim: The best way to perfect a bond claim is to satisfy the requirements for a lien claim. The lien, if properly perfected, is also a perfected claim against the bond. Tex. Prop. Code § 53.206(b). Claimants should elect to perfect the claim as if a lien is being sought because, if the bond claim is defective in some way, the claimant will be able to fall back on its lien claim.

The alternate method for perfecting the claim against a payment bond is to furnish the surety with the same notices that were required to be sent to the owner for a lien claim. Again, it is highly recommended that a claimant meet the requirements for perfecting a lien claim even if the claimant knows that a payment bond has been provided to the owner. However, if a claimant is unable or unwilling for some reason to comply with the lien perfection procedures, the notice to owner can be modified so that it is addressed and sent to the surety. A copy should be sent to the original contractor and the owner. The claimant must send a written notice to the surety giving it fair notice of the amount and nature of the claim asserted no later than the fifteenth day of the third month following the month in which the work was performed or material delivered. The claimant must also send the required notices to the original contractor (including the "second month notice"). *See* Tex. Prop. Code § 53.206.

If the owner receives any notices for a lien affixed under subchapter C, the owner must mail the surety a copy of all notices received. However, failure of the owner to send copies of the notices to the surety does not relieve the surety of any liability under the bond if the claimant has complied with the requirements for perfecting a claim. Tex. Prop. Code § 53.207.

Practice Note: The attorney should perfect the claim both ways. When there is a bond on a private project, a claimant may perfect the claim as a lien claim by sending the owner and origi-

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nal contractor the proper notice letters and by filing the mechanic's lien affidavit. To perfect the claim as a bond claim as well, the claimant need only send the surety a copy of everything the claimant sends to the owner. By sending the surety all the notices, the claim is perfected against the bond in the event that there is some technical defect in the mechanic's lien affidavit. On the other hand, if the claim is properly perfected as a lien claim, the claimant has the lien on the property if there is a problem with the validity of the bond.

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

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

If a lien is filed by a subcontractor or supplier and the general contractor disputes the claim, the general contractor may choose (or may be required by contract) to file a bond to indemnify. This will "rid" the owner's property of the lien while the claim is disputed. This process is also referred to as "bonding around a lien."

Requirements for a bond to indemnify are as follows:

1. The bond must be filed with the county clerk in the county in which the property subject to the lien is located. Tex. Prop. Code § 53.171(b).
2. The bond must—
   a. describe the property on which the liens are claimed;
   b. refer to each lien claimed in a manner sufficient to identify it;
   c. be in an amount that is double the amount of the liens referred to in the bond unless the total amount of the lien exceeds $40,000, in which case the bond must be in an amount that is the greater of 1-1/2 times the amount of the lien or the sum of $40,000 and the amount of the lien;
   d. be payable to the party claiming the lien;
   e. be executed by—
      i. the party filing the bond as principal; and
      ii. a corporate surety authorized and admitted to do business under the law in this state and licensed by this state to execute the bond as surety; and
   f. be conditioned substantially that the principal and surety will pay to the named obligees or to their assignees the amount that the named obligees would have been entitled to recover if their claim had been proved to be a valid

and enforceable lien on the property. Tex. Prop. Code § 53.172.

3. After the bond is filed, the county clerk shall issue notice of the bond to all named obligees. Tex. Prop. Code § 53.173(a).

   a. A copy of the bond must be attached to the notice. Tex. Prop. Code § 53.173(b).

   b. The notice must be served on each obligee by having a copy delivered to the obligee by certified mail, return receipt requested, to the address of the claimant as listed in the lien affidavit. Tex. Prop. Code § 53.173(c).

4. If the claimant's lien affidavit does not state the claimant's address, the notice is not required to be mailed to the claimant. Tex. Prop. Code § 53.173(d).

5. A party making or holding a lien claim may not sue on the bond later than one year after the date on which the notice is served or after the date on which the underlying lien claim becomes unenforcable under section 53.158 (statute of limitations for lien claims). Tex. Prop. Code § 53.175(a).

6. The bond is not exhausted by one action against it. Each named obligee or assignee of an obligee may maintain a separate suit on the bond in any court of jurisdiction in the county in which the real property is located. Tex. Prop. Code § 53.175(b).

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

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

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

1. the statement is in writing and substantially complies with a form in Property Code section 53.284;

2. the claimant has actually received payment in good and sufficient funds in full for the lien or payment bond claim; or

3. the statement is in a written original contract or subcontract for the construction, remodel, repair, or land development related to a single-family house, townhouse, or duplex and the statement is made before labor or materials are provided under the original contract or subcontract. (Note that this subsection does not apply to a person who supplies only material and not labor. *See* Tex. Prop. Code § 53.282(c).)

Tex. Prop. Code § 53.282(a).

If an owner or original contractor sends an explanation, in writing, of the basis for nonpayment, evidence of a contractual waiver of lien rights, and a notice or request for release of the lien to the claimant at his address stated in the

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lien affidavit, and the claimant does not release the filed lien affidavit on or before the fourteenth day after the date the owner or original subcontractor sends such explanation, evidence, and notice, the filing of a lien rendered unenforceable by a lien waiver under Property Code section 53.282(a)(3) will violate Texas Civil Practices and Remedies Code section 12.002. Tex. Prop. Code § 53.282(b).

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

Subchapter L applies to contracts executed on or after January 1, 2012. Subchapter L does not apply to written agreements to subordinate, release, waive, or satisfy all or part of a lien or bond claim in (1) an accord and satisfaction of an identified dispute, (2) an agreement concerning an action pending in a court or arbitration proceeding, or (3) an agreement that is executed after an affidavit claiming the lien has been filed or the bond claim has been made. Tex. Prop. Code § 53.287.

§ 7.12:6 Perfecting Statutory Lien Generally

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

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

Even though Texas courts have consistently held that chapter 53 of the Property Code is to be "liberally construed for purposes of protecting laborers and materialmen" (*see Republic Bank Dallas, N.A. v. Interkal, Inc.*, 691 S.W.2d 605, 607 (Tex. 1985)), lien claimants are strongly urged to strictly comply with the statutory requirements. The so-called liberal construction policy has historically been applied to the wording and content of notices and affidavits—but not to the statutory deadlines. *See Suretec Insurance Co. v. Myrex Industries*, 232 S.W.3d 811, 815–816 (Tex. App.—Beaumont 2007, pet. denied) (finding notice mailed on a Monday the 16th to be insufficient, when the deadline for mailing was defined by statute as the 15th of the same month); *Wesco Distribution, Inc. v. Westport Group, Inc.*, 150 S.W.3d 553, 561 (Tex. App.—Austin 2004, no pet.) (finding that notice was insufficient when timely mailed but without sufficient postage, then remailed late with correct postage); *Bunch Electric Co. v. Tex-Craft Builders, Inc.*, 480 S.W.2d 42, 45–46 (Tex. Civ. App.—Tyler 1972) (finding that subcontractor had no cause of action on bond claim when neither actual notice nor notice by certified mail

could be proved); *Hunt Developers, Inc. v. Western Steel Co.*, 409 S.W.2d 443, 449 (Tex. Civ. App.—Corpus Christi 1966, no writ) ("The Legislature did not intend that the materialman should lose his lien through the technicalities of a warning, where the owner was not misled to his prejudice."); *Day v. Van Horn Trading Co.*, 183 S.W. 85 (Tex. Civ. App.—Austin 1916, no writ).

§ 7.12:7 Relationship of Claimant to Owner

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

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

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

Original Contractor: An original contractor is defined as "a person contracting with an owner either directly or through the owner's agent." Tex. Prop. Code § 53.001(7). On large projects, it is not uncommon to have more than one original contractor. For example, if the mechanical and electrical contractors on a project contract directly with the owner, both contractors will be considered original contractors under the lien statute. Tex. Prop. Code § 53.002.

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

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

Practice Note: In the construction industry, a subcontractor is often referred to as a "second-tier" contractor, "third-tier" contractor, and so forth, depending on how far down the chain of contracts the subcontractor is from the original contractor. These are not terms used by the Property Code, however, and for purposes of the mechanic's lien statutes found in the Code the only meaningful distinction is whether the subcontractor contracted with an original contractor or another subcontractor. The major difference between the first-tier and second-tier subcontractors (and all lower tiers) is an additional preliminary notice that only second-tier subcontractors/suppliers must give to the original contractor to perfect their lien rights. Texas has no limit on the number of tiers down the food chain a claimant can be and still be eligible to perfect a claim. First tier subcontractors/suppliers and second tier subcontractors/suppliers are also referred to by the statute as "derivative claimants."

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§ 7.12:8 Proper Parties for Statutory Lien Notices

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

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

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

Subcontractor: Before the subcontractor can file a mechanic's lien affidavit, the subcontractor must first give statutorily prescribed notices of the unpaid amount of the claim to (1) the original contractor and the owner of unpaid amounts owing by a subcontractor and (2) the owner of unpaid amounts owing by the original contractor. Tex. Prop. Code § 53.056. The notice of claim must state the amount of the claim. Tex. Prop. Code § 53.056(b).

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

§ 7.12:9 Deadlines for Notices of Unpaid Contract Amounts

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

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

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

Tex. Prop. Code § 53.001(8).

Thus, residential construction contracts cover both homesteads and part-time, nonhomestead

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residences such as vacation homes. The requirements of Property Code sections 53.251–.260 pertaining to residential construction contracts are in addition to the other requirements of chapter 53. Tex. Prop. Code § 53.251(b).

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

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

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

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

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

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

A subcontractor who contracted with the original contractor must give notice of the unpaid balance to the owner with a copy to the original contractor by the fifteenth day of the third month following each month for which the material or labor was provided. Tex. Prop. Code § 53.056(b), (c). A subcontractor who con-

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

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

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

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

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

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

owner and the original contractor that will affect the subcontractor. However, the delay in presenting the claim to the owner may adversely affect the amount of funds "trapped" in the owner's hands by the notice, as discussed in section 7.12:20 below.

Specially Fabricated Materials: Sections 53.021 and 53.058 of the Property Code establish additional notice requirements for contractors who provide specially fabricated materials. In order for a claimant providing specially fabricated materials to fully protect his lien rights, the claimant must give the owner notice not later than the fifteenth day of the second month after the month in which the claimant receives and accepts the order for the specially fabricated materials. Tex. Prop. Code § 53.058(b). If the contract is with a person other than the original contractor, the claimant must also give notice within that same time to the original contractor. Tex. Prop. Code § 53.058(b). The notice must contain a statement that the order has been received and accepted and that includes the price of the order. Tex. Prop. Code § 53.058(c). This notice must be sent by registered or certified mail, return receipt requested, to the last known business address or residence address of the owner or reputed owner and the original contractor as applicable. Tex. Prop. Code § 53.058(d). It is not necessary that the specially fabricated materials actually be delivered to the construction site for the claimant to perfect the lien claim. Tex. Prop. Code § 53.021(b). If the claimant actually delivers the specially fabricated materials to the job site, the claimant must also comply with the normal notice procedures for material suppliers. Tex. Prop. Code § 53.058(e). A claimant providing specially fabricated materials who fails to give the section 53.058 notice will still have a valid claim as to delivered items if the required notices are given under section 53.056 of the Property Code. Tex. Prop. Code § 53.058(f). See form 7-13 for a notice regarding specially fabricated materials.

§ 7.12:10 Notice for Contractual Retainage Claims

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

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

Retainage Claims on Nonresidential Projects: A subcontractor on a nonresidential construction project may give the owner written notice of a subcontract containing a retainage agreement under section 53.057 instead of or in addition to the notice under section 53.056 (labor and materials) or section 53.252 (specially fabricated materials). Tex. Prop. Code § 53.057(a). Notice under section 53.057 must be given to the owner not later than the earlier of (1) the thirtieth day after the date the retainage agreement is completed, terminated, or abandoned; or (2) the thirtieth day after the date the original contract is terminated or abandoned.

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Tex. Prop. Code § 53.057(b). If the claimant's retainage agreement is with a subcontractor and not with the original contractor, the claimant must also give notice within that time frame to the original contractor. Tex. Prop. Code § 53.057(b–1). If the claimant is a subcontractor, filing a notice for contractual retainage under section 53.057 and section 53.055 will relieve the subcontractor of the obligation to send monthly fund-trapping notices for the retainage under section 53.056. *See* Tex. Prop. Code § 53.057(e); *see also* Tex. Prop. Code § 53.056(b).

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

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

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

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

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

Tex. Prop. Code § 53.057(f)(1)(B).

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

effective only for the amount of contractual retainage earned by the claimant as of the day the demand was sent. Tex. Prop. Code § 53.057(g)(3).

§ 7.12:11 Funds Subject to Lien Claims

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

> (a) During the progress of work under an original contract for which a mechanic's lien may be claimed and for 30 days after the work is completed, the owner shall retain:
>
> (1) 10 percent of the contract price of the work to the owner; or
>
> (2) 10 percent of the value of the work, measured by the proportion that the work done bears to the work to be done, using the contract price or, if there is no contract price, using the reasonable value of the completed work.

Tex. Prop. Code § 53.101.

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

The punchlist work required to complete the contract scope of work extends the date of completion and, therefore, the deadline for filing mechanic's liens. However, performing warranty work will generally not extend the completion date. In 1999, the definition of "completion" was modified to make it clear that replacement or repair of work performed under the contract will not extend the date.

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

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

Once the owner receives a notice of default with such a statement, the owner may withhold

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trapped funds from payments owing to the original contractor until the time for filing the affidavit of mechanic's lien has passed or, if a lien affidavit has been filed, until the lien claim is satisfied or released. Tex. Prop. Code § 53.082. The amount trapped is the amount the owner owes the original contractor, over and above offsets and back charges. *Lennox Industries v. Phi Kappa Sigma Educational & Building Ass'n*, 430 S.W.2d 404 (Tex. Civ. App.—Austin 1968, no writ); *accord Page*, 102 S.W.3d at 720.

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

Filing Liens and Trapping Funds at Project's End: Under Property Code sections 53.084 and 53.101, the owner has to hold statutory retainage funds for only thirty days past "completion of the work," which the Texas Supreme Court has interpreted to mean the completion or termination of the original contract under which a claimant is proceeding. *See* Tex. Prop. Code §§ 53.084, 53.101. *See Page v. Marton Roofing, Inc.*, 102 S.W.3d 733, 735 (Tex. 2003) (fund-trapping liens); *Page v. Structural Wood Components, Inc.*, 102 S.W.3d 720, 725 (Tex. 2003) (statutory liens). Moreover, all lien affidavits must be filed within thirty days of completion of the original contract. Accordingly, these statutes effectively shorten the time otherwise given a claimant for giving a fund-trapping notice. *See, e.g., Bond v. Kagan-Edelman Enterprises*, 985 S.W.2d 253 (Tex. App.—Houston [1st Dist.] 1999), *rev'd in part*, 20 S.W.3d 706 (Tex. 2000).

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

§ 7.12:12 Demands for Payment

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

Practice Note: All derivative claimants should include demand language to the owner in all second-month and third-month notices. In other words, while the derivative claimant is properly fulfilling the notice requirements of the

Property Code, he is also able to make demand on the owner for the claim. If the original contractor fails to notify the owner that the claim is disputed, the owner is, at least by the terms of the statute, authorized to release the money to the claimant.

§ 7.12:13 Mechanic's Lien Affidavit

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

§ 7.12:14 Form of Statutory Lien Affidavit

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

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

Tex. Prop. Code § 53.054.

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

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

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

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

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

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

§ 7.12:15 Requests for Information

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

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

1. a description of the property being improved legally sufficient to identify it;
2. a statement of whether a bond is in place on the construction project and, if a bond does exist, the name of the bonding company and a copy of the bond;
3. a statement of whether there are any prior recorded liens or security interests against the real property and the name and address of any persons having lien or security interests; and
4. the date on which the original contract for the project was executed.

Tex. Prop. Code § 53.159(a).

See form 7-17 in this chapter for a request to an owner.

Request to Original Contractor: On written request from any person furnishing labor or materials under the original contract, the original contractor is required to provide within a reasonable time not exceeding ten days from the receipt of the request—

1. the name and last known address of the person to whom the original contractor has furnished labor and materials for the project (usually the owner);
2. confirmation of whether the original contractor furnished or was furnished with a payment bond;
3. if a bond does exist, the name and address of the surety and a copy of the bond; and
4. the date on which the original contract for the project was executed.

Tex. Prop. Code § 53.159(b).

See form 7-18 for a request to an original contractor.

Request to Subcontractor: On written request from an owner, original contractor, bond surety on the original contract, or any person furnishing work under a subcontract, a subcontractor is required to provide within a reasonable

time not exceeding ten days from receipt of the request—

1. the name and last known address of each person from whom the subcontractor purchased labor or materials (other than materials furnished from the subcontractor's inventory);
2. the name and last known address of each person to whom the subcontractor furnished labor or materials;
3. whether the subcontractor has furnished or been furnished a payment bond on the project; and
4. if a payment bond exists, the name and last known address of the surety and a copy of the bond.

Tex. Prop. Code § 53.159(c).

See form 7-19 for a request to a subcontractor.

Information from Claimant: An owner, contractor, or bond surety may request that a claimant for a lien or under a bond furnish a copy of any applicable written agreement, purchase order, or contract and any billing statement or payment request reflecting the amount claimed and, if further requested, the estimated amount due for each calendar month in which the claimant performed labor or furnished materials. The claimant must provide the information within thirty days of receipt of the request. Tex. Prop. Code § 53.159(d).

Payment of Costs: If the person from whom information is requested does not have a direct contractual relationship on the project with the person requesting the information, the person requesting the information may be required to pay for the actual costs, not to exceed $25, of furnishing the information. Tex. Prop. Code § 53.159(e).

Failure to Provide Information: If a person other than a claimant requested to furnish information under Property Code section 53.159(e) fails to provide it, that person may be liable to the requesting person for the reasonable and necessary costs incurred in obtaining the requested information elsewhere. Tex. Prop. Code § 53.159(f).

No Tolling: Chapter 53 does not allow requests for information necessary to prepare a notice letter or a lien affidavit under Code section 53.159 to toll the statutory time limits for sending a notice of claim or filing a mechanic's lien affidavit. Therefore, the claimant should always allow enough time to obtain the required information elsewhere should the requested party fail to provide it in a timely manner.

§ 7.12:16 Deadlines for Filing Statutory Lien Affidavit

The lien affidavit itself must be filed by the earlier of (1) the fifteenth day of the fourth calendar month after the month in which the indebtedness accrues on a nonresidential construction contract (Tex. Prop. Code § 53.052(a)); (2) the fifteenth day of the third month after the month in which the indebtedness accrues on a residential construction project (Tex. Prop. Code § 53.052(b)); or (3) the thirtieth day after completion or termination of the original contract under which the claim arises (*Page v. Structural Wood Components, Inc.*, 102 S.W.3d 720, 723–24 (Tex. 2003)).

Original Contractor: Indebtedness to an original contractor accrues—

1. on the last day of the month in which a written declaration by the original contractor or the owner is received by the other party to the original contract stating that the original contract has been terminated; or
2. on the last day of the month in which the original contract has been completed, finally settled, or abandoned.

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Tex. Prop. Code § 53.053(b).

Subcontractor: Indebtedness to a subcontractor accrues on the last day of the last month in which the labor was performed or the material furnished. Tex. Prop. Code § 53.053(c).

Specially Fabricated Materials: Indebtedness for specially fabricated materials accrues on the last day of—

1. the last month in which materials were delivered;
2. the last month in which delivery of the last of the material would normally have been required at the job site; or
3. the month of any material breach or termination of the original contract by the owner or contractor or of the subcontract under which the specially fabricated material was furnished.

Tex. Prop. Code § 53.053(d).

Retainage: "A claim for retainage accrues on the last day of the month in which all work called for by the contract between the owner and the original contractor has been completed, finally settled, or abandoned." Tex. Prop. Code § 53.053(e).

Architects, Engineers, and Surveyors: Since an architect, engineer, or surveyor is considered to be an original contractor, the "accrual of indebtedness" for determining the lien filing deadline will run from the completion of services. *See* Tex. Prop. Code § 53.053(b). The indebtedness may accrue before the actual start of construction, if all the contract work is preparatory in nature. This means that the architect, engineer, or surveyor may have to file a lien before the start of construction.

§ 7.12:17 Special Homestead Requirements

If labor or materials are provided for work on a homestead property, no mechanic's lien can be created against the property unless the original contractor meets very specific statutory requirements before the start of construction on the project. If the original contractor does not meet these requirements, no subcontractor providing labor or materials for the project will be able to meet the statutory requirements to perfect a mechanic's lien on the homestead property. Tex. Const. art. XVI, § 50; Tex. Prop. Code § 53.254.

Basic Requirements: If a homestead is involved, to create a valid mechanic's lien against the property—

1. the original contractor and the owner must execute a written agreement setting out the terms of the contract before work commences;
2. if the owner of the homestead is married, both spouses must sign the contract; and
3. the contract must be filed with the clerk of the county in which the homestead is located.

Tex. Prop. Code § 53.254. The contract inures to the benefit of all persons who labor or furnish material for the original contractor. Tex. Prop. Code § 53.254(d).

Texas Constitution article XVI, section 50(a), may provide further limitations on when a mechanic's lien attaches to a homestead property. If the work and material furnished by a contractor on a residential homestead property is for renovation or repair work on an existing homestead, the claimant must satisfy the specific requirements in subsections (a)(5)(A)–(D) of article XVI, § 50, of the Constitution in addition to the requirements of Tex. Prop. Code § 53.254. On the other hand, if the work and

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material furnished by an original contractor is for new construction of a residential homestead property, then a constitutional mechanic's lien may arise simply if the contract is in writing. *Cavazos v. Munoz*, 305 B.R. 661, 678 (S.D. Tex. 2004) (citing *Spradlin v. Jim Walter Homes, Inc.*, 34 S.W.3d 578, 581 (Tex. 2000)).

Practice Note: While Code section 53.254 provides that the contract must be signed before construction starts, no particular time for the filing of the contract is specified. However, filing the contract before the start of construction will evidence that the contract was timely executed.

Extensions of Credit: Any homestead construction project involving a loan has additional statutory requirements that must be met in connection with closing the construction contract with the owner. A contract for the improvement (as opposed to new construction) of homestead property cannot be signed before the fifth day after the owner has made written application for the extension of credit unless the owner must make immediate repairs to conditions that materially affect the health or safety of the people residing in the homestead. Tex. Const. art. XVI, § 50(a)(5)(B). Because the validity of the lien is in issue, lenders are reluctant to waive the five-day period. The construction contract cannot be executed except in the office of the lender, an attorney, or a title company. Tex. Const. art. XVI, § 50(a)(5)(D). (That is, there are no more "kitchen table closings" by home improvement salesmen that create liens on the property.) The owner can rescind a construction contract within three days after execution. Tex. Const. art. XVI, § 50(a)(5)(C).

Additional Notices: Certain additional notices are required with respect to homestead construction projects.

Disclosure Statement. The Texas Property Code provides that a mandatory disclosure statement must be provided to the owner—

1. by a third-party lender, before closing of the loan (Tex. Prop. Code § 53.257);
2. by the original contractor, before the residential construction contract is executed (Tex. Prop. Code § 53.255(a)); and
3. by any lien claimant, with the second-month notice letter to the owner (Tex. Prop. Code § 53.252(a), (b)).

See form 7-10 in this chapter for a disclosure statement.

Practice Note: There are no statutory penalties for failing to give the notice, and the statute expressly provides that the failure of an original contractor or a lender to provide the statement will not invalidate a lien. Tex. Prop. Code §§ 53.255(c), 53.257(c). However, some attorneys argue that the statute creates a new civil cause of action in favor of residential owners.

Notice of Proposed Subcontractors. Before beginning construction, the original contractor must provide the owner with a list of the proposed subcontractors and suppliers for the project. Tex. Prop. Code § 53.256. This list must contain the notice set forth at Property Code section 53.256 and must be updated within fifteen days after each occasion in which a subcontractor or supplier is added or deleted. Tex. Prop. Code § 53.256(a)(2), (b). The owner may waive the right to receive the list by a written waiver that meets the requirements of Property Code section 53.256(d). The waiver may be included in the residential construction contract or may be separate. Tex. Prop. Code § 53.256(d). There is no express penalty for failure to provide the list, and the failure to provide the list does not invalidate a lien. Tex. Prop. Code § 53.256(c). See form 7-11 for a list of subcontractors and suppliers. The list of subcontractors can be an important tool for the owner and should not be waived without thoughtful consideration and legal guidance.

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Disbursement of Funds. Whenever the original contractor requests payment on a residential construction contract (whether from the owner or a third-party lender), the original contractor must provide a disbursement statement showing at minimum the name and address of every person contracting directly with the original contractor and whom the original contractor intends to pay with the requested funds. Tex. Prop. Code § 53.258. If the owner finances the construction through a third-party lender, the lender must obtain a signed disbursement statement from the original contractor for each advance and provide to the owner a statement of funds disbursed since the last disbursement statement. Tex. Prop. Code § 53.258(b). The original contractor's or the lender's failure to provide the statement does not invalidate a mechanic's lien claim, but there are criminal penalties for the intentional, knowing, or reckless provision of false or misleading information in a disbursement statement. Tex. Prop. Code § 53.258(e), (f). See form 7-20 for a disbursement statement.

Final Payment Affidavit. As a condition to final payment, the original contractor must execute and deliver to the owner an affidavit stating that the original contractor has paid each person in full for all labor and materials used in the construction of improvements on the real property (or, in the alternative, stating who has not been paid, and, if known, their address and telephone number and the amount owing). Tex. Prop. Code § 53.259(a). See form 7-21 for an affidavit of bills paid.

Practice Note: The mechanic's lien statutes pertaining to homesteads do not differentiate between the residential homestead and the business homestead. Accordingly, if a contractor intends to work on a business location owned by an individual rather than a corporate entity, the contractor should carefully evaluate whether a business homestead issue exists.

§ 7.12:18 Owner's Financial Liability

The owner is liable to an original contractor for any unpaid portion of the original construction contract that was earned by the original contractor. However, there are statutory limits on an owner's liability to subcontractors. In general, the owner's maximum liability to the subcontractors as a group under any particular original contract is the sum of—

1. the 10 percent statutory retainage the owner is required to hold back from the original contractor for thirty days after final completion of the construction project; and
2. any funds "trapped" under a proper notice of nonpayment under Tex. Prop. Code §§ 53.081–.084.

However, the claimant traps only those funds owed by the owner to the contractor over and above offsets and back charges. *Lennox Industries v. Phi Kappa Sigma Educational & Building Ass'n*, 430 S.W.2d 404 (Tex. Civ. App.—Austin 1968, no writ), *overruled in part by Hayek v. Western Steel Co.*, 478 S.W.2d 786 (Tex. 1972), *but supported by Page v. Structural Wood Components, Inc.*, 102 S.W.3d 720 (Tex. 2003).

§ 7.12:19 Priority of Lien Claims

The perfection of a mechanic's and materialman's lien does not guarantee a claimant payment. Instead, it improves the claimant's chances of payment and gives him a right to a share of any funds available or that should be available to pay mechanic's and materialman's lien claimants. The priority of the various types of claims determines what funds, if any, should be or are available to pay claims and also the amount of any judgment the claimant is entitled to receive in a suit brought to foreclose his mechanic's and materialman's lien.

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Except for the special preference to (1) individual artisans and mechanics as to statutory retainage under Tex. Prop. Code § 53.104 and (2) liens for preconstruction work by architects, engineers, and surveyors under Tex. Prop. Code §§ 53.021(c), 53.124(e), the priority date of a perfected mechanic's lien claim relates back to the date of the start of construction or the delivery of materials for the project under the contract between the owner and the original contractor. Tex. Prop. Code § 53.124(a). For this purpose, a subcontractor's claim priority will be determined by tracing back through the chain of subcontracts to the start of construction under the original contract with the owner. The effect is that (except for the statutory exceptions referenced above) all lien claims of all subcontractors under the same original contract will have the same priority date, regardless of the actual dates of filing of the respective lien affidavits. As such, a properly recorded affidavit claiming a mechanic's and materialman's lien that is recorded, for example, in April has equal footing with one properly recorded in June. If the proceeds of a foreclosure sale of property are insufficient to discharge properly perfected mechanic's and materialman's liens that have equal footing in full, the various liens share pro rata in the proceeds. Tex. Prop. Code § 53.122(b).

In determining the priority of mechanic's liens against other liens, Tex. Prop. Code §§ 53.123, 53.124, along with the "relation back" doctrine, provide generally that a mechanic's lien will be superior to other liens (except for the special preferences noted above) that come into existence after the inception of the mechanic's lien, as well as prior liens that exist at the inception of the mechanic's lien as long as the contracting party had an equitable or legal interest in the property at the time of the mechanic's lien's inception. *See Diversified Mortgage Investors v. Lloyd D. Blaylock General Contractor, Inc.*, 576 S.W.2d 794, 806–807 (Tex. 1978) (finding mechanic's lien normally to be superior to deed of trust lien when mechanic's lien's inception was prior to recording of deed of trust lien and during owner's option to purchase period, but not if owner had no legal or equitable interest prior to purchasing property and mechanic's lien's inception was after recording of deed of trust). However, these statutory provisions and the "relation back" doctrine are somewhat limited by whether items supplied by contractors and subcontractors are "removable" or not. See "Priority of Claims for Removables" below for further discussion.

Multiple Original Contracts: If there is more than one original contractor on a project and construction under the separate contracts with the different original contractors began on different dates, the date of relative lien priority for the claimant is determined by the start of construction under the particular original contract under which the claimant performed.

Priority with Respect to Third Parties: All subcontractors with a perfected lien have preference over other creditors of the original contractor. Tex. Prop. Code § 53.121.

Priority of Claims for Removables: Under the "relation back" doctrine and statutory provisions discussed above, mechanic's lien claimants generally have a preferential first priority over all other liens on removable improvements, regardless of the relative priority of filing. Tex. Prop. Code §§ 53.122, 53.124. This preference even extends under certain circumstances to deeds of trust that are filed before the inception of the mechanic's lien. *See Diversified Mortgage Investors*, 576 S.W.2d at 806–07; *First National Bank in Dallas v. Whirlpool Corp.*, 517 S.W.2d 262, 269 (Tex. 1974) (giving priority to lien recorded after deed of trust when items were considered removable). The courts, however, have required claimants to be able to prove that they furnished the removable (i.e., to be able to identify the specific removable) in order to have the preference. *See Kaspar v. Cockrell-*

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Riggens Lighting Co., 511 S.W.2d 109, 111 (Tex. Civ. App.—Eastland 1974, no writ) (overruling trial court when it disregarded jury finding that items could not be separated and identified from similar items that were supplied for same project); *In re Jamail*, 609 F.2d 1387, 1390–91 (5th Cir. 1980) (declining to give priority to materialman's lien for goods delivered that supplier could not separately identify from similar items supplied by others). Thus, for example, a lumber supplier could not remove an air handling unit because the lumber supplier did not provide the unit. The original contractor, however, is entitled to remove all removables provided by it and its subcontractors and suppliers since the entirety of the construction was provided pursuant to his contract with the owner. *L&N Consultants, Inc. v. Sikes*, 648 S.W.2d 368, 370–371 (Tex. Civ. App.—Dallas 1983, writ ref'd n. r. e.).

"Removable improvements" generally means items that can be removed without material injury to the land or other improvements. *First National Bank in Dallas v. Whirlpool Corp.*, 517 S.W.2d 262, 269 (Tex. 1974). The question of "material injury" is usually one of fact. Postremoval damage to the remaining property might also be considered in determining whether an item was a "removable" under the mechanic's lien statutes. *Exchange Savings & Loan Ass'n v. Monocrete Pty. Ltd.*, 629 S.W.2d 34, 36–37 (Tex. 1982) (removal of roofing tiles would cause material injury to townhouse as matter of law because it would expose structure to post-removal damage by elements). Because the priority preference for removables defeats prior recorded liens (*Whirlpool Corp.*, 517 S.W.2d at 269), the lien for removables can be a useful tool for extracting payment from the project owner or an existing lienholder, but it is not a self-help lien. The contractor must obtain judicial foreclosure of the lien before removal and cannot simply resort to self-help remedies. *See* Tex. Prop. Code § 53.154; *P&T Manufacturing Co., Inc. v. Exchange Savings & Loan Ass'n*, 633 S.W.2d 332, 333 (Tex. App.—Dallas 1982, writ ref'd n.r.e.).

Whether a particular item constitutes a "removable" is a question of fact for a jury to decide and will be decided on a case-by-case basis. The following questions must be asked to determine removability. Will the removal cause: (1) material damage to the land; (2) material damage to an improvement that was already in existence at the time the improvement in question was installed or affixed; (3) material detriment or material injury to the building or lot; or (4) material injury to the improvement itself? In determining whether an item is removable, the court will look to the manner of its attachment to the land or existing improvements, the extent to which the removal of the item would require repairs, modifications, or protection of the land or existing improvements, the status of the construction at the time the removal is sought, and the function of the improvements sought to be removed. *Exchange Savings & Loan Ass'n*, 629 S.W.2d 34, 37 (Tex. 1982).

The following is a list of some of the items that courts have treated as removables:

1. Garbage disposals and dishwashers. *See Whirlpool Corp.*, 517 S.W.2d at 270;
2. Air-conditioning and heating system equipment such as furnaces, air-conditioning coils, compressors, thermostats, and condensing units. *See Houck Air Conditioning, Inc. v. Mortgage & Trust, Inc.*, 517 S.W.2d 593, 596 (Tex. Civ. App.—Waco 1974, no writ);
3. Windows and doors that can be removed by temporarily taking out surrounding brick without causing ultimate damage to a residence. *See First Continental Real Estate Investment Trust v. Continental Steel Co.*, 569 S.W.2d 42, 47 (Tex. Civ. App.—Fort Worth 1978, no writ);

4. Lighting fixtures, cabinets, chimes, buttons, mailboxes, and lamps. *See Kaspar v. Cockrell-Riggens Lighting Co.*, 511 S.W.2d 109, 110–111 (Tex. Civ. App.—Eastland 1974, no writ);

5. Picture screen, ticket booth, neon sign, and speaker poles at drive-in movie theater. *See Freed v. Rozman*, 304 S.W.2d 235, 240–241 (Tex. Civ. App.—Texarkana 1951, writ ref'd n.r.e.);

6. Refinery pumps fastened to beds of concrete. *See Mogul Production & Refining Co. v. Southern Engine & Pump Co.*, 244 S.W. 212, 213–214 (Tex. Civ. App.—Beaumont 1922, no writ);

7. Carpets, appliances, air-conditioning, and heating components, smoke detectors, burglar alarms, light fixtures, and door locks. *See Richard H. Sikes, Inc. v. L&N Consultants, Inc.*, 586 S.W.2d 950, 954 (Tex. Civ. App.—Waco 1979, writ ref'd n.r.e.);

8. Mirrors. *See Occidental Nebraska FSB v. East End Glass Co.*, 773 S.W.2d 687, 689 (Tex. App.—San Antonio 1989, no writ);

9. Pumps, compressors, fans for air-conditioning and heat systems, toilets, basins, doors, windows, light fixtures, wall switches, electrical control panels, building hardware, and cabinets. *See In re Orah Wall Financial Corp.*, 84 B.R. 442, 449–447 (Bankr. W.D. Tex. 1986);

10. Highway billboard signs. *See Hoarel Sign Co. v. Dominion Equity Corp.*, 910 S.W.2d 140, 143 (Tex. App.—Amarillo 1995, writ denied);

11. Light fixtures, gears, electrical panels, lamps, wire, and electrical wire. *See In re Demay International, LLC*, 431 B.R. 164, 174 (Bankr. S.D. Tex. 2010);

12. Chiller to provide air-conditioning. *See RDI Mechanical, Inc. v. WPVA, L.P.*, No. 01-06-00962-CV, 2008 WL 920315, at *3 (Tex. App.—Houston [1st Dist.] Apr. 3, 2008, no pet.) (mem. op.); and

13. Air-conditioning compressors, acoustic tiles and ceiling grid, air handling units, distribution air grills, doors, elevator equipment and cab, and electric circuit breaker panels. *See Cornerstone Bank. N.A. v. J.N. Kent Construction Co.*, No. 05-91-00499-CV, 1992 WL 86591, at *3–5 (Tex. App.—Dallas Apr. 17, 1992, no pet.) (not designated for publication).

The following is a list of some of the items that the courts have treated as nonremovable:

1. Concrete roof tiles. *See Monocrete Pty. Ltd.*, 629 S.W.2d at 37;

2. Window frames. *See McCallen v. Mogul Production & Refining Co.*, 257 S.W. 918, 923 (Tex. Civ. App.—Galveston 1923, no writ);

3. Certain types of cabinets. *See Houck Air Conditioning, Inc.*, 517 S.W.2d at 596;

4. Lumber used in construction of a house. *See Cameron County Lumber Co. v. Al & Lloyd Parker Inc.*, 62 S.W.2d 63, 64 (Tex. 1933);

5. Bricks used to construct a veneer for a house. *See Chamberlain v. Dollar Savings Bank*, 451 S.W.2d 518, 519–520 (Tex. Civ. App.—Amarillo 1970, no writ);

6. Shell homes. *See Irving Lumber Co. v. Alltex Mortgage Co.*, 446 S.W.2d 64, 69 (Tex. Civ. App.—Dallas 1969), *aff'd*, 468 S.W.2d 341 (Tex. 1971);

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7. Duct work for air-conditioning and heating systems, copper plumbing, piping, sheet rock, electrical wiring and conduit, electromagnetic insulation, glass brick interior wall, and suspended ceiling. *See In re Orah Wall Financial Corp.*, 84 B.R. at 446–448; and

8. Exterior glass, including gasket material and aluminum framing. *See Cornerstone Bank. N.A.*, 1992 WL 86591, at *3.

§ 7.12:20 Payment on Perfected Claims

The owner is to use the retainage and trapped funds to pay the perfected mechanic's lien claimants on a priority class by priority class basis. If the retainage and trapped funds held by the owner are insufficient to discharge all the perfected lien claims of a particular class, the available funds are to be divided pro rata among the claimants of the class in accordance with the relative amount of their claims.

If the owner properly disburses among the perfected claimants the full amount of the retainage and trapped funds the owner was required to hold under the Texas Property Code, the claimants cannot pursue the owner or the owner's property for the balance of their respective payment claims.

Practice Note: It is not uncommon for the retainage and trapped funds held by the owner to be less than the perfected claims. This occurs, for example, when a particular lien claimant fails to trap funds in the owner's hands but otherwise perfects a lien claim.

Practice Note: Because (1) claims of equal priority may accrue and be perfected throughout the entire construction period and for thirty days thereafter and (2) fact issues may exist as to the validity of the payment claims made by any one or more of the claimants (which will affect the calculation of the proper pro rata division of funds among claimants), the owner is typically reluctant to make any payment on lien claims before thirty-one days after final completion of the construction project, and even then disbursement of funds carries great potential risks to the owner. Unless a global agreement can be reached among the claimants and the owner, the owner may be forced to interplead the funds or seek a judicial determination of the proper amounts owing to the respective claimants. The delay and cost of such litigation is, of course, a great incentive for the various parties to compromise and settle their claims.

Attorney's Fees: The court must award both original contractors and subcontractors equitable costs and attorney's fees in a foreclosure action. However, with respect to a lien or claim arising out of a residential construction contract, the court is not required to order the property owner to pay costs and attorney's fees. Tex. Prop. Code § 53.156.

§ 7.12:21 Judicial Enforcement of Lien

Limitations for Filing Suit: If the claimant has timely filed and perfected a mechanic's lien affidavit but the owner refuses to pay the amount properly owing to the claimant, the claimant can seek payment through a judicial foreclosure sale of the property that was the subject of the mechanic's lien affidavit. Statutory mechanic's liens can be foreclosed only by judicial action. If the claim pertains to a nonresidential construction claim, suit to foreclose the lien must be filed within two years of the later of the last day a claimant may file the lien affidavit or one year after completion, termination, or abandonment of the work under the original contract under which the lien is claimed. Tex. Prop. Code § 53.158(a). If the claim pertains to a residential construction contract, suit to foreclose the lien must be filed by the later of one year after the last day a claimant could file a lien affidavit under section 53.052 of the Texas Property Code

or one year after completion, termination, or abandonment of the original contract. Tex. Prop. Code § 53.158(b).

Jurisdiction: A suit to foreclose a lien on real property may be filed in district court in all counties. In addition, suits to foreclose liens on real property in Harris, Tarrant, El Paso, and Dallas counties may be filed in those counties' statutory county courts at law. The amount in controversy must exceed $500 and be less than $100,000 for the suit to be filed in Harris County. Tex. Gov't Code § 25.1032(c)(3) (Harris County), § 25.2222(b)(7) (Tarrant County), § 25.0592(a) (Dallas County), § 25.0372(a) (El Paso County). Lastly, suits to foreclose a lien on real property may not be filed in constitutional county courts. Tex. Gov't Code § 26.043.

Venue: There is no mandatory venue provision governing where a suit to foreclose on a lien must be brought. Section 53.154 of the Property Code requires only that the suit be heard by a "court of competent jurisdiction." However, section 53.157 of the Code provides that a mechanic's lien may be extinguished by "failing to institute suit to foreclose the lien in the county in which the property is located . . . ." Therefore, chapter 53 appears to require a claimant to file suit to foreclose a lien in the county where the project is located. While there is no case that decides the issue definitively, the best practice is to file suit in the county where the project is located.

Judicial Foreclosure Proceeds: If the owner's property goes to judicial foreclosure sale, the sales proceeds will be used to pay each class of claimant in accordance with its relative priority for as far as the sales proceeds will go. If the available sales proceeds are not sufficient to pay all the claims of a particular priority class, the available funds will be divided pro rata among the claimants in accordance with the relative amount of their claims, as determined by the court. Tex. Prop. Code §§ 53.104(b), 53.122(b).

Attorney's Fees and Costs: A court must award costs and reasonable attorney's fees for a suit to foreclose on a lien, declare a lien claim invalid, or enforce a bond claim. However, with respect to a lien or claim arising out of a residential construction contract, the court is not required to order the property owner to pay costs and attorney's fees. Tex. Prop. Code § 53.156.

§ 7.12:22 Arbitration of Claim

While chapter 53 of the Texas Property Code establishes a statutory system for handling mechanic's lien claims on construction projects, the parties may execute contracts providing for mandatory binding arbitration of mechanic's lien claims. *Dalton Contractors v. Bryan Autumn Woods*, 60 S.W.3d 351, 353–54 (Tex. App.—Houston [1st Dist.] 2001, no pet.), *cited with approval in CVN Group, Inc. v. Delgado*, 95 S.W.3d 234, 242 (Tex. 2002); *Hearthshire Braeswood Plaza v. Bill Kelly Co.*, 849 S.W.2d 380, 390–91 (Tex. App.—Houston [14th Dist.] 1993, writ denied). Where no contractual provision exists, arbitrators will make rulings or findings regarding the validity of a lien, but the actual foreclosure of the lien will be handled by the district court. Tex. Prop. Code § 53.154.

§ 7.12:23 Removing Invalid Mechanic's Liens

Texas Property Code sections 53.160–.162 establish a summary motion procedure for removing invalid mechanic's lien claims. *See* Tex. Prop. Code §§ 53.160–.162. A suit and a summary motion must be filed. A bond may be required in connection with an order removing the lien, pending the final outcome in the litigation. Tex. Prop. Code § 53.161. The Code also establishes procedures for reviving the lien if the claimant should ultimately prevail in court. *See* Tex. Prop. Code § 53.162.

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§ 7.12:24 Prompt Pay Statute

While not part of the mechanic's lien statutes in Texas Property Code chapter 53, Code chapter 28, on prompt payment to contractors and subcontractors, provides significant rights to the mechanic's lien claimant. Chapter 28 provides that for private (not public) projects, on receipt from a contractor of a written request for payment of an invoiced amount, the owner has thirty-five days to make the payment (less statutory or contractual retainage) for work properly performed or materials delivered. *See* Tex. Prop. Code § 28.002(a). Once the contractor receives payment he must pay his subcontractors their respective shares of the draw not less than seven days after receipt of payment from the owner. Tex. Prop. Code § 28.002(b). In turn, these subcontractors must pay their subcontractors their proportionate share within seven days thereafter. Tex. Prop. Code § 28.002(c).

If a good-faith dispute exists concerning the amount properly payable, the owner, contractor, or subcontractor may not withhold more than (1) 110 percent of the amount in dispute on residential construction projects and (2) 100 percent of the amount in dispute on nonresidential construction projects. Tex. Prop. Code § 28.003.

Contractors and subcontractors have a statutory right to suspend work on private nonresidential construction projects if the owner does not make payment in accordance with the statute. The work cannot be suspended, however, until the tenth day after the claimant gives notice to the owner that payment has not been received and notifies the owner of the intent to suspend performance. Tex. Prop. Code § 28.009(a). If there is construction financing on the project, the same notices must be given to the lender. Tex. Prop. Code § 28.009(b). Once work is suspended, the claimant is not required to perform further work until the amount due is paid, plus the cost of shutting down and restarting work. Tex. Prop. Code § 28.009(c)(1). The claimant is not responsible for damages arising from the claimant's suspension of work unless the claimant was notified in writing before suspension either that payment has been made or a good-faith dispute exists concerning the payment. Tex. Prop. Code § 28.009(c)(2). The notice of good faith must include a list of specific reasons for nonpayment. Tex. Prop. Code § 28.009(d). If a reason given for nonpayment is allegedly defective or incomplete work, the claimant must be given reasonable time to either adjust its payment claim or correct the defective work. Tex. Prop. Code § 28.009(d).

§ 7.13 Constitutional Mechanic's Lien on Real Property

§ 7.13:1 Scope and Utility of Lien

In addition to the specific statutory procedures outlined above, the Texas Constitution provides a self-executing lien for improvements to property made by an original contractor who is in direct privity of contract with the owner. The original contractor need not comply with the requirements of chapter 53 of the Property Code to enforce such a constitutional lien. This right, however, is very limited. Article XVI, section 37, of the Texas Constitution provides:

> Mechanics, artisans and material men, of every class, shall have a lien upon the buildings and articles made or repaired by them for the value of their labor done thereon, or material furnished therefor; and the Legislature shall provide by law for the speedy and efficient enforcement of said liens.

Tex. Const. art. XVI, § 37.

Benefits Only Original Contractors: Only original contractors may claim a constitutional lien. "Original contractor" means only those in privity with the property owner. *Da-Col Paint*

Manufacturing Co. v. American Indemnity Co., 517 S.W.2d 270, 273 (Tex. 1974). Subcontractors and suppliers not contracting directly with the owner do not have a constitutional lien and are relegated to statutory liens. *First National Bank v. Sledge*, 653 S.W.2d 283, 285 (Tex. 1983). *See also First National Bank of Paris v. Lyon-Gray Lumber Co.*, 194 S.W. 1146, 1150 (Tex. App.—Texarkana 1917), *aff'd*, 217 S.W. 133 (1919); *In re A&M Operating Co.*, 182 B.R. 997 (E.D. Tex. 1995). But see the discussion of "sham contracts" below. A materialman supplying materials to another materialman also will not qualify for a constitutional lien. *Huddleston v. Nislar*, 72 S.W.2d 959, 962 (Tex. App.—Amarillo 1934, writ ref'd).

Sham Contractors: A person who labors, specially fabricates materials, or furnishes labor or materials under a direct contractual relationship with another person is deemed to be an original contractor in direct contractual relationship with the owner if the owner contracted with the other person for the construction or repair and (1) the owner can effectively control that person through the ownership of voting stock, interlocking directorships, or otherwise; (2) that other person can effectively control the owner through the ownership of voting stock, interlocking directorships, or otherwise; or (3) the contract was made without good-faith intention of the parties that the other person was to perform the contract. Tex. Prop. Code § 53.026(a)(1), (a)(3). Such owner-controlled contractors have liens as original contractors and are commonly called "sham contractors."

While a valid constitutional lien normally requires direct contractual privity with the owner, Tex. Prop. Code § 53.026 may allow a subcontractor or supplier to prevail on a constitutional lien claim against an owner. *See Trinity Drywall Systems v. TOKA General Contractors, Ltd.*, 416 S.W.3d 201, 212 (Tex. App.—El Paso 2013, pet. denied) (construing "sham contract" provisions of Tex. Prop. Code § 53.026 as allowing subcontractors to have rights of original contractors to constitutional liens). *But see Southwest Properties, L.P. v. Lite-Dec, Inc.*, 989 S.W.2d 69, 72 (Tex. App.—San Antonio 1998, pet. denied) (construing application of Tex. Prop. Code § 53.026 as loosening subcontractor lien notice requirements but not creating contractual alter ego liability for owners acting as original contractors).

Limitations of Constitutional Lien: Many types of work are not covered by the constitutional lien, such as claims for water or sewer lines, landscaping, and other similar work not considered a "building." *See, e.g., Campbell v. City of Dallas*, 120 S.W.2d 1095, 1097 (Tex. App.—Waco 1938, writ ref'd) (water and sewer lines); *Black, Sivalls & Bryson v. Operators' Oil & Gas Co.*, 37 S.W.2d 313, 316 (Tex. App.—Eastland 1931, writ dism'd) (repairing grade after a flood). See section 7.13:2 below for discussion of the term *building*.

Although a constitutional lien exists without the necessity of filing a lien affidavit, certain circumstances that would bar collection of the debt can prevent enforcement of the lien. For example, a constitutional lien cannot be enforced against a good-faith purchaser for value of the property who had no knowledge of the lien claim. *See Cavazos v. Munoz*, 305 B.R. 661, 681–82 (S.D. Tex. 2004). Therefore, in order to preserve such a claim against a subsequent good-faith purchaser, claimants are encouraged to file a lien affidavit in the county records for the property in question. The filing of the lien affidavit will put prospective purchasers of the property on notice of the lien. *See Detering Co. v. Green*, 989 S.W.2d 479, 481 (Tex. App.—Houston [1st Dist.] 1999, no writ) (materialman's statutory lien affidavit was not timely filed and therefore failed to protect constitutional lien against third party who purchased from foreclosing bank); *FDIC v. Bodin Concrete Co.*, 869 S.W.2d 372 (Tex. App.—Dallas 1993, writ denied) (remanding to trial court for deter-

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mination of priority of constitutional lien vis-à-vis deed of trust); *Justice Mortgage Investors v. C.B. Thompson Construction Co.*, 533 S.W.2d 939 (Tex. App.—Amarillo 1976, writ ref'd n.r.e.); *Wood v. Barnes*, 420 S.W.2d 425, 429 (Tex. App.—Dallas 1967, writ ref'd n.r.e.) (filing lien or giving actual notice to third parties required to protect constitutional lien against third parties). See section 7.13:5 below.

Practice Note: Because the constitutional lien is both limited in scope and cut off by a sale to a bona fide purchaser, the original contractor should always attempt to perfect a statutory lien. A constitutional lien should be treated as a remedy of last resort if the original contractor fails to timely perfect a statutory lien under the Property Code.

§ 7.13:2 Eligibility—Real Property

Because the constitutional lien is restricted to work or material furnished for construction or repair of buildings or articles, defining the terms *building* and *article* becomes important. Although the constitutional provision refers to buildings and not the underlying land, decisional law has consistently found the lien to attach also to the land on which the building sits. *See, e.g., Myers v. Houston*, 30 S.W. 912, 913 (Tex. 1895); *Ferrell v. Ertel*, 100 S.W.2d 1084, 1088 (Tex. App.—Fort Worth 1936, writ dism'd). "Building" has been defined to include a pier. *See Ambrose & Co. v. Hutchison*, 356 S.W.2d 215, 216–17 (Tex. App.—Fort Worth 1962, no writ). Some actual construction must be made before a constitutional lien attaches. *See Branecky v. Seaman*, 688 S.W.2d 117, 120 (Tex. App.—Corpus Christi 1984, writ ref'd n.r.e.).

§ 7.13:3 Enforcement Generally

The lien claimant must file suit to enforce the lien. However, there is no requirement of notice or fulfillment of other statutory obligations before suit is filed. *Dee's Cabinet Shop, Inc. v. Weber*, 562 S.W.2d 945, 947 (Tex. App.—Fort Worth 1978, no writ). When a suit for foreclosure of real property under a constitutional lien is filed, the attorney should also file a notice of lis pendens to protect the claimant's priority against a bona fide sale or encumbrance. *See* Tex. Prop. Code § 13.004.

§ 7.13:4 Enforcement against Public Property or Homestead

A constitutional lien cannot attach to public buildings or grounds or to a homestead unless the claimant has complied with other constitutional or statutory requirements for perfecting such a lien. *Atascosa County v. Angus*, 18 S.W. 563 (Tex. 1892) (public buildings); *J.D. McCollom Lumber Co. v. Whitfield*, 59 S.W.2d 1106, 1107 (Tex. App.—Austin 1933, writ ref'd) (homesteads).

§ 7.13:5 Enforcement against Third Parties

A claimant's constitutional lien is valid against the property owner even if the claimant takes no affirmative steps, such as recording the contract, to perfect the lien. *Brick & Tile, Inc. v. Parker*, 186 S.W.2d 66, 67 (Tex. 1945). This self-executing aspect of the lien, however, does not protect the claimant if the property is sold or mortgaged to a bona fide purchaser. Third parties may cut off the constitutional lien claimant's rights to the property unless they have notice of the claim. *Irving Lumber Co. v. Alltex Mortgage Co.*, 446 S.W.2d 64, 72 (Tex. App.—Dallas 1969), *aff'd*, 468 S.W.2d 341 (Tex. 1971).

If the constitutional lien involves construction, constructive notice of the constitutional lien protects the lien claimant. Some courts have held that anyone acquiring an interest in property while it is under construction has constructive notice of a potential constitutional lien. *Inman v. Clark*, 485 S.W.2d 372, 374 (Tex. App.—Houston [1st Dist.] 1972, no writ); *Tomlinson v.*

Higginbotham Bros. & Co., 229 S.W.2d 920, 922 (Tex. App.—Eastland 1950, no writ). The party claiming bona fide purchaser status has the burden of proving the absence of actual or constructive notice; it is an affirmative defense. *Contract Sales Co. v. Skaggs*, 612 S.W.2d 652, 653 (Tex. App.—Dallas 1981, no writ).

If the property is involved in bankruptcy, the trustee or debtor-in-possession can avoid a constitutional lien unless some notice of the lien has been recorded. *See In re Mid-America Petroleum, Inc.*, 83 B.R. 937, 943 (Bankr. N.D. Tex. 1988); *McEvoy v. Ron Watkins, Inc.*, 105 B.R. 362, 364–65 (Bankr. N.D. Tex. 1987).

§ 7.14 Constitutional Lien on Personal Property

The Texas Constitution grants every original contractor a constitutional lien "upon the buildings and articles made or repaired by [the contractor] for the value of their labor done thereon, or material furnished therefor." Tex. Const. art. XVI, § 37.

For a petition and application to foreclose a constitutional lien on personal property, see form 7-22 in this chapter.

§ 7.14:1 Eligibility—Personal Property

The term *articles made* is restricted to articles specially fabricated according to the purchaser's specifications, rather than articles manufactured for sale on the open market, such as refrigerators and ranges installed in an apartment complex. *First National Bank in Dallas v. Whirlpool Corp.*, 517 S.W.2d 262, 268 (Tex. 1974). If the articles are specially made in accordance with the ultimate purchaser's instructions, the lien will attach. *In re A&M Operating Co.*, 182 B.R. 986, 991 (Bankr. E.D. Tex. 1993), *rev'd in part*, 182 B.R. 997 (Bankr. E.D. Tex. 1995), *aff'd*, 84 F.3d 433 (5th Cir. 1996).

§ 7.14:2 Possessory Rights in Property

Unlike a claimant who may have a right to possession by virtue of a lien arising from Tex. Prop. Code ch. 70, a constitutional lien claimant has no authority under the constitutional provision itself to keep or repossess the repaired article pending payment. *Garcia v. Rutledge*, 649 S.W.2d 307, 311 (Tex. App.—Amarillo 1982, no writ). If he does so solely on the basis of the constitutional lien, he may be liable for conversion. *Clifton v. Jones*, 634 S.W.2d 883, 886 (Tex. App.—El Paso 1982, no writ). The right to this constitutional lien, which may be foreclosed through the courts, and any right to retain possession until the debt is paid are two separate and distinct rights. *Paul v. Nance Buick Co.*, 487 S.W.2d 426, 428 (Tex. App.—El Paso 1972, no writ). Therefore the attorney should strongly consider coupling a petition for writ of sequestration with the constitutional lien suit. See section 8.16 in this manual regarding sequestration and form 7-23 in this chapter for an application and affidavit for writ of sequestration in a suit to foreclose a constitutional lien.

§ 7.15 No Personal Liability of Owner

A constitutional lien by itself does not create any personal liability in the owner. *Fox v. Christopher & Simpson Iron Works Co.*, 199 S.W. 833, 835 (Tex. App.—Galveston 1917, writ ref'd).

§ 7.16 Attorney's Fees

A constitutional lien itself does not provide for payment of attorney's fees. *Rhoades v. Miller*, 414 S.W.2d 942, 944 (Tex. App.—Tyler 1967, no writ). The lien claimant may be entitled to attorney's fees either under a contractual provision for their payment or under Tex. Civ. Prac. & Rem. Code ch. 38. *See Wood v. Barnes*, 420 S.W.2d 425, 429–30 (Tex. App.—Dallas 1967,

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writ ref'd n.r.e.). See chapter 31 in this manual regarding attorney's fees.

§ 7.17 Priority of Constitutional Lien

If property involved in construction is the subject of a constitutional lien, lien priorities among competing claimants are generally determined by the date of inception of the liens. *See University Savings & Loan Ass'n v. Security Lumber Co.*, 423 S.W.2d 287, 293–96 (Tex. 1967).

If the property subject to the constitutional lien is chattel, actual notice may be required because establishing constructive notice of the lien would be impossible under ordinary circumstances. *See Continental Radio Co. v. Continental Bank & Trust Co.*, 369 S.W.2d 359, 362 (Tex. App.—Houston 1963, writ ref'd n.r.e.) (finding good-faith mortgagee's lien on airplane was superior to lien asserted by installer of autopilot when mortgagee had no actual or constructive notice of installer's lien).

If the property is a chattel subject to a competing claim under the Uniform Commercial Code, resolution of the priority conflict depends in part on whether the constitutional lien claimant has possession of the chattel. *Garcia v. Rutledge*, 649 S.W.2d 307, 311 (Tex. App.—Amarillo 1982, no writ). However, if possession is authorized by another statute, such as Tex. Prop. Code § 70.001, a valid constitutional lien may take priority over a perfected security interest under Tex. Bus. & Com. Code § 9.333. *See Nelms v. Gulf Coast State Bank*, 516 S.W.2d 421, 424 (Tex. App.—Houston [1st Dist.] 1974), *aff'd*, 525 S.W.2d 866 (Tex. 1975).

The attorney representing a party who wishes to assert a constitutional mechanic's lien for repairs should ensure that a bank holding a security interest in the same property has a record of the mechanic's lien. If the bank becomes insolvent and is then subject to FDIC receivership, a mechanic's lien of which the bank has no record cannot be enforced against the FDIC. *See D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447 (1942). The existence of federal recording statutes governing certain types of property may also preempt state statutes governing mechanic's liens. *See Aero Support Systems, Inc. v. FDIC*, 726 F. Supp. 651, 653 (N.D. Tex. 1989).

[Sections 7.18 through 7.20 are reserved for expansion.]

III. Bond Claims on Governmental Projects

§ 7.21 Bond Claims on State and Local Public Works Contracts

§ 7.21:1 State and Local Projects Generally

Since mechanic's liens cannot be asserted against public works in Texas, the legislature has provided subcontractors with alternative methods to secure their rights to payment for work on government projects. *See City of LaPorte v. Taylor*, 836 S.W.2d 829, 831–32 (Tex. App.—Houston [1st Dist.] 1992, no writ). These methods include maintaining a lien on money due the prime contractor and pursuing a claim on a payment bond. The amount of money involved in a contract for public works determines the relief that a subcontractor can pursue.

A "governmental entity" refers to a governmental or quasi-governmental authority authorized by state law to make a public work contract.

This could include a department, board, or agency of the state or a school district or subdivision of a school district. Tex. Gov't Code § 2253.001(1). A "public work contract" is a contract for constructing, altering, or repairing a public building or carrying out or completing any public work. Tex. Gov't Code § 2253.001(4). Public work labor or material is labor or material used to carry out this purpose. *See* Tex. Gov't Code § 2253.001(5).

Governmental Entity That Is Not a Municipality or Joint Board: If the amount of the contract does not exceed $25,000, an aggrieved party (who provides proper notice) can maintain a lien on the money, bonds, or warrants due for the work if the governmental entity is not a municipality or joint board created under subchapter D, chapter 22, of the Texas Transportation Code. Tex. Prop. Code § 53.231(a). When this type of governmental entity enters into a contract with a prime contractor for a public work project in excess of $25,000, the contractor is required to execute a payment bond in the amount of the contract. Tex. Gov't Code § 2253.021(a)(2)(A).

Municipality or Joint Board: If the amount of the contract does not exceed $50,000, an aggrieved party (who provides proper notice) can maintain a lien on the money, bonds, or warrants due for the work if the governmental entity is a municipality or joint board created under subchapter D, chapter 22, of the Texas Transportation Code. Tex. Prop. Code § 53.231(b). When a municipality or joint board created under subchapter D, chapter 22, of the Transportation Code enters into a contract with a prime contractor for a public work project in excess of $50,000, the contractor is required to execute a payment bond in the amount of the contract. Tex. Gov't Code § 2253.021(a)(2)(B).

Contracts in Excess of $100,000: If the contract is in excess of $100,000, the prime contractor must also execute a performance bond. *See* Tex. Gov't Code § 2253.021(a)(1).

A payment bond provides security to parties who contract with the prime contractor to ensure that the prime contractor will be able to make payment to the downstream subcontractors and suppliers under the contract. *See* Tex. Gov't Code § 2253.021(c). The performance bond, on the other hand, acts as security for the government should the contractor fail to complete the project. *See* Tex. Gov't Code § 2253.021(b).

There are no payment bonds available for the protection of prime contractors (i.e., those with a direct contractual relationship with the public entity). If a public entity fails to pay, the prime contractor is left to contractual remedies and statutory claims procedures. Indeed, sovereign immunity may insulate the public entity from suit, a topic beyond the scope of this manual. *See generally* Tex. Gov't Code ch. 2260.

§ 7.21:2 Perfection

To recover in a suit on a payment bond for a public work project, a claimant must "perfect" his claim. Perfection of a claim means providing the proper notice and information required under the applicable statutes. Texas courts have recognized that the rules regarding the substance of notices should be liberally construed. *See S.A. Maxwell Co. v. R.C. Small & Associates*, 873 S.W.2d 447, 454 (Tex. App.—Dallas 1994, writ denied) (construing article 5160 of the Texas Revised Civil Statutes, repealed and replaced by Tex. Gov't Code § 2253.041). It is important to note, however, that strict compliance will be required as to rules regarding the time and manner of giving notice. Failure to timely and procedurally comply with the requirements could result in the loss of all potential recovery. *See S.A. Maxwell Co.*, 873 S.W.2d at 451.

Contracts under $25,000: The Texas Property Code requires the lien claimant to send

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written notice of his claim by registered or certified mail to (1) the officials of the state, county, town, or municipality whose duty it is to pay the contractor and (2) the contractor at the contractor's last known business or residence address. Tex. Prop. Code § 53.232. The notice should include—

1. the amount claimed;
2. the name of the party to whom the materials were delivered or for whom the labor was performed;
3. the dates and place of delivery or performance;
4. a description reasonably sufficient to identify the materials delivered or labor performed and the amount due;
5. a description reasonably sufficient to identify the project for which the material was delivered or the labor performed; and
6. the claimant's business address.

Tex. Prop. Code § 53.233. The notice must be sent not later than the fifteenth day of the second month following the month in which the labor was performed or the material furnished. Tex. Prop. Code § 53.234. If the claim involves an action on a bond, the claimant must sue on the bond within six months after the bond is filed. Tex. Prop. Code § 53.239.

Contracts Exceeding $25,000: To perfect a claim, the aggrieved party must mail to the prime contractor and the surety written notice of the claim. Tex. Gov't Code § 2253.041(a). "The notice must be mailed on or before the 15th day of the third month after each month in which any of the claimed labor was performed or any of the claimed material was delivered." Tex. Gov't Code § 2253.041(b). The statute also requires that the notice be accompanied by a sworn statement of account that states that—

1. the amount claimed is just and correct; and
2. all just and lawful offsets, payments, and credits known to the affiant have been allowed.

Tex. Gov't Code § 2253.041(c).

The statement of account must also include the amount of any retainage that has not become due under the terms of the contract between the beneficiary and the prime contractor or between the beneficiary and a subcontractor. Tex. Gov't Code § 2253.041(d). The aggrieved party may also enclose a copy of the written agreement and a statement of the completion or the value of the partial completion of the agreement. Tex. Gov't Code § 2253.042.

All notices must be sent by certified or registered mail. Notice to a prime contractor must be addressed to the contractor's residence or last known business address. Tex. Gov't Code § 2253.048(a), (b). Notices are effective on the day they are sent and not on the day received. *See* Tex. Gov't Code § 2253.041(b); *see also Buckner v. Anderson-Dunham, Inc.*, 482 S.W.2d 350 (Tex. App.—Eastland 1972, writ ref'd n.r.e.) (construing article 5160, section B, of the Texas Revised Civil Statutes, repealed and replaced by Tex. Gov't Code § 2253.041).

Oral Contracts: If the contract between the parties was an oral agreement, the notice for a claim must contain—

1. the name of the party for whom the labor was performed or to whom the material was delivered;
2. the approximate date of performance or delivery;
3. a description of the public work labor or material for reasonable identification; and
4. the amount due.

Tex. Gov't Code § 2253.043(a).

The claim should be itemized, and documents should be included that identify the work performed or material delivered, the job, and the destination of the delivery. Tex. Gov't Code § 2253.043(b).

Multiple Claims: If a party seeks a lump sum for several items of labor or material, the party should include in the notice a description of the labor or material provided, the name of the party for whom the labor was performed or to whom the material was delivered, and the approximate date of performance or delivery. The notice should also provide whether the contract was written or oral, the amount of the contract, and the amount claimed. Tex. Gov't Code § 2253.044. If the claim is for work or materials under a written unit price agreement, the party should attach to the sworn statement a list of units and unit prices as set under the contract and a statement of those completed or partially completed units. Tex. Gov't Code § 2253.045.

Retainage: "Retainage" refers to payments under the contract that are not required to be paid within the month after the month in which the labor is performed or materials are delivered. Tex. Gov't Code § 2253.001(7). A claim for retainage is limited to the amount specified for retainage in the contract, and in no event may it exceed 10 percent of the total contract price. Tex. Gov't Code § 2253.076(c).

To recover for a claim for retainage, written notice of the claim must be mailed to the prime contractor and the surety on or before the ninetieth day after the date of final completion of the contract. Tex. Gov't Code § 2253.046. The notice should contain the amount of the contract, any amount paid, and the outstanding balance. Tex. Gov't Code § 2253.046(b).

No Direct Contractual Relationship with Prime Contractor: It is important to note that additional notice requirements exist for second- or lower-tier subcontractors, who do not have a direct contractual relationship with the prime contractor. In addition to the notices described above, on or before the fifteenth day of the second month after the date of the beginning of delivery of material or performance of labor, the second-tier subcontractor must mail written notice to the prime contractor and send a copy of the statement to the subcontractor with whom the second-tier subcontractor has a direct contractual relationship. If the claim is for retainage, the notice must state that the contract provides for retainage and generally provide the nature of the retainage. Tex. Gov't Code § 2253.047.

Notice for Each Claim: The importance of perfecting each claim for each month is illustrated in *S.A. Maxwell Co.*, 873 S.W.2d at 451–53. In this case, the second-tier subcontractor shipped materials to a warehouse under an agreement with the subcontractor in May 1990. The subcontractor retrieved the materials from the warehouse on May 31 and June 4. When the second-tier subcontractor was not paid, he attempted to perfect his claim by sending notice on July 26, 1990, and a second notice on August 15, 1990. A person not in a direct contractual relationship with the prime contractor must send notice on or before the fifteenth day of the second month after materials are delivered, and, in this case, the court held that the materials were "delivered" when the contractor picked them up, both on May 31 and June 4. Thus, to perfect a claim for the first pickup, the second-tier subcontractor had to send notice by July 15 (not July 26). Accordingly, the court held that he had not properly perfected his claim for this first delivery.

§ 7.21:3 Requests for Information

To properly file a bond claim, the claimant must send notices to the prime contractor and the surety who provided the bond. Tex. Gov't Code § 2253.041. The addresses of the prime con-

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tractor and the surety may be obtained from the governmental entity for whom the work is being performed. Tex. Gov't Code § 2253.026. The surety's information is also available from the Texas Department of Insurance. The governmental entity may charge a reasonable fee for a copy of the bond.

Practice Note: Do not expect the request to be processed timely if it is made at the last minute. It is good practice to routinely request this information at the start of each job.

Prime Contractor's Obligations: On request from anyone who provides public work, prime contractors must provide—

1. the name and last known address of the governmental entity with whom the prime contractor contracted for the public work;
2. a copy of the payment and performance bonds for the public work, including bonds furnished by or to the prime contractor; and
3. the name of the surety issuing the payment bond and the performance bond and the toll-free telephone number maintained by the Texas Department of Insurance under subchapter B, chapter 521, of the Texas Insurance Code for obtaining information concerning licensed insurance companies.

Tex. Gov't Code § 2253.024(a). The prime contractor must provide this information within ten days from receiving a request. Tex. Gov't Code § 2253.024(c).

Subcontractor's Obligations: A subcontractor must provide, on written request from a governmental entity, the prime contractor, the surety on a bond covering the public work contract, or any other person providing work under the subcontract—

1. the name and last known address of each person from whom the subcontractor purchased public work labor or material, other than public work material from the subcontractor's inventory;
2. the name and last known address of each person to whom the subcontractor provided public work labor or material;
3. a statement of whether the subcontractor furnished a bond for the benefit of its subcontractors and materialmen;
4. the name and last known address of the surety on the bond the subcontractor furnished; and
5. a copy of that bond.

Tex. Gov't Code § 2253.024(b). The subcontractor must also provide this information within ten days from receiving a request. Tex. Gov't Code § 2253.024(c).

The prime contractor or the subcontractor may require payment of the actual cost of producing this information (up to $25) if the requestor does not have a direct contractual relationship with the provider. Tex. Gov't Code § 2253.024(d). Failure to produce this information may result in the prime contractor or subcontractor being liable to the requestor for the reasonable and necessary costs incurred in obtaining the requested information. Tex. Gov't Code § 2253.024(e).

Payment Bond Beneficiary's Obligations: If a request for information is made to the payment bond beneficiary by the prime contractor or the surety, the beneficiary must provide within thirty days—

1. a copy of any applicable written agreement or purchase order; and
2. any statement or payment request of the beneficiary that shows the amount claimed and the work performed by

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> the beneficiary for which the claim is made.

Tex. Gov't Code § 2253.025(a). If it is requested, the beneficiary must also provide the estimated amount due for each calendar month in which the beneficiary performed labor or provided material. Tex. Gov't Code § 2253.025(b).

§ 7.21:4 Procedures after Perfection

Once the bond claim has been perfected, it is still incumbent on the claimant to press its claim by following up with the surety. Often negotiations result in compromise and settlement on payment of an agreed amount by the bonding company or the prime contractor (who generally is required to indemnify the bonding company). In other cases, it is necessary for the claimant to file suit or institute arbitration proceedings to force the prime contractor or surety to pay the balance due under the contract.

The substantive requirements to perfect a bond claim on state and local public works contracts can be easily completed. The true hurdle is ensuring that all deadlines have been timely met and that all notices contain the necessary information. Failure to do so can result in loss of the security provided by the payment bond. Where the prime contractor becomes insolvent, failure to meet the perfection deadlines can totally eliminate any recovery on a valid claim for payment. *See S.A. Maxwell Co. v. R.C. Small & Associates*, 873 S.W.2d 447 (Tex. App.—Dallas 1994, writ denied).

§ 7.22 Bond Claims on Federal Public Works Projects

§ 7.22:1 Federal Projects Generally

The Miller Act, 40 U.S.C. §§ 3131–3134, requires the prime contractor of a federal project to furnish a payment bond to insure payment to individuals who supply labor or materials for the federal project. The Miller Act was designed as an alternative remedy to the mechanic's lien available in ordinary private construction disputes because the lien cannot attach to government property. *United States v. Aetna Casualty & Surety Co.*, 981 F.2d 448, 450 (9th Cir. 1992).

> The amount of the payment bond shall equal the total amount payable by the terms of the contract unless the officer awarding the contract determines, in a writing supported by specific findings, that a payment bond in that amount is impractical, in which case the contracting officer shall set the amount of the payment bond. The amount of the payment bond shall not be less than the amount of the performance bond.

40 U.S.C. § 3131(b)(2). The performance bond, which protects the project owner, is required to be in such amount as the officer awarding the federal contract deems adequate for the protection of the United States. 40 U.S.C. § 3131(b). The performance and payment bond requirements of the Miller Act apply to all contracts of more than $100,000 for the construction, alteration, or repair of any public building or public work of the United States. The federal acquisition regulation provides alternative payment protections for contracts that are more than $25,000 and not more than $100,000. The contracting officer selects from among these alternative protections and specifies in the solicitation of offers the payment protections selected. 40 U.S.C. § 3132.

§ 7.22:2 Perfection

In order to have the right to sue on the payment bond, a first-tier subcontractor on a federal project is not required to give any specific notice. The Miller Act provides that any subcontractor who has not been paid in full for its labor or material before the expiration of ninety days after the last day on which labor was done or

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material supplied has the right to sue on the payment bond for the amount unpaid at the time the suit is filed. 40 U.S.C. § 3133(b)(1). It is presumed that the general contractor has notice of the amounts due and unpaid to its own subcontractors. *See Continental Casualty Co. v. United States*, 305 F.2d 794, 797 (8th Cir.), *cert. denied*, 371 U.S. 922 (1962).

However, any second-tier subcontractor, defined as "a person having a direct contractual relationship with a subcontractor but no contractual relationship, express or implied, with the contractor furnishing the payment bond," must perfect its claim on the bond by giving written notice to the general contractor within the ninety-day period, stating with substantial accuracy the amount claimed and the name of the party to whom the material was supplied or for whom the labor was performed. 40 U.S.C. § 3133(b)(2). The notice must be served by any means that provides written, third-party verification of delivery to the contractor at any place he maintains an office or conducts his business or at his residence; or in any manner in which the U.S. marshal for the district in which the public improvement is situated may serve summons. 40 U.S.C. § 3133(b)(2). The notice must be received by the contractor, rather than merely being mailed, within the ninety-day period. *Pepper Burns Insulation, Inc. v. Artco Corp.*, 970 F.2d 1340, 1343 (4th Cir. 1992), *cert. denied*, 506 U.S. 1053 (1993).

Unlike the procedure for bond claims in state and local public works projects, bond claims on federal projects do not require repeated notices to be sent either to the general contractor or to the surety. Notice to the principal contractor is a strict condition precedent to suit under the Miller Act by a supplier who deals with a subcontractor, but the supplier is not required to give notice to the surety before commencing suit. *Continental Casualty Co.*, 305 F.2d at 797.

§ 7.22:3 "Subcontractor" vs. "Materialman"

Although the Miller Act is to be construed liberally, it is limited by a proviso that the payment bond protects only those persons who have a contractual agreement with a prime contractor or first-tier subcontractor engaged in a federal project. Persons supplying labor or material to a mere "materialman" are not protected. *United States v. Aetna Casualty & Surety Co.*, 981 F.2d 448, 450 (9th Cir. 1992). The United States Supreme Court has defined a subcontractor as "one who performs for and takes from the prime contractor a specific part of the labor or material requirements of the original contract." *See Clifford F. MacEvoy Co. v. United States*, 322 U.S. 102, 109 (1944). The test for whether one is a subcontractor is based on the "substantiality and importance of his relationship with the prime contractor." *F.D. Rich Co. v. United States*, 417 U.S. 116, 123 (1974). This means that even though a supplier may have an express written contract directly with the prime contractor, the supplier may not qualify as a "subcontractor" unless the supplier's relationship with the prime contractor is "substantial" enough. If the supplier does not qualify as a subcontractor, those who provide labor or material to that supplier are dealing with a mere materialman and cannot claim protection under the Miller Act payment bond.

The Court in *F.D. Rich* reasoned, "It is the substantiality of the relationship which will usually determine whether the prime contractor can protect himself, since he can easily require bond security or other protection from those few 'subcontractors' with whom he has a substantial relationship in the performance of the contract." *F.D. Rich Co.*, 417 U.S. at 123–24.

The Court acknowledged, however, that "'this method of protection is generally inadequate to cope with remote and undeterminable liabilities incurred by an ordinary materialman.'" *F.D.*

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Rich Co., 417 U.S. at 123 (quoting *Clifford F. MacEvoy Co.*, 322 U.S. at 110).

In distinguishing a subcontractor from a materialman, courts apply a balancing test with certain factors tending to weigh in favor of a subcontractor relationship—particularly if the company assumed a significant and definable part of the construction project—and other factors tending to weigh in favor of a materialman relationship.

Generally, courts have found the following factors to weigh in favor of a subcontractor relationship:

1. The product supplied is custom fabricated.
2. The product supplied is a complex integrated system.
3. A close financial interrelationship exists between the companies.
4. A continuing relationship exists with the prime contractor as evidenced by the requirement of shop drawing approval by the prime contractor or the requirement that the supplier's representative be on the job site.
5. The supplier is required to perform on site.
6. There is a contract for labor in addition to materials.
7. The term *subcontractor* is used in the agreement.
8. The materials supplied do not come from existing inventory.
9. The supplier's contract constitutes a substantial portion of the prime contract.
10. The supplier is required to furnish all the material of a particular type.
11. The supplier is required to post performance bonds.
12. There is a back charge for costs of correcting the supplier's mistakes.
13. There is a system of progressive or proportionate fee payment.

Generally, courts have found the following factors to weigh in favor of a materialman relationship:

1. A purchase order form is used by the parties.
2. The materials come from preexisting inventory.
3. The item supplied is relatively simple in nature.
4. The contract is a small percentage of the total construction costs.
5. Sales tax is included in the contract price.

Aetna Casualty & Surety Co., 981 F.2d at 451–52.

Practice Note: Lower-tier suppliers of labor or materials on federal projects would be well advised to tailor their agreements to incorporate as many of the factors weighing toward "subcontractor" classification as possible.

§ 7.22:4 Oral Contracts

The Miller Act does not require that the contract between the claimant and the general contractor or a subcontractor be in writing. There simply must be some underlying contract, whether established in a telephone call or a formal document. *United States v. William L. Crow Construction Co.*, 826 F. Supp. 647, 654 (E.D.N.Y. 1993).

§ 7.22:5 Express or Implied Contractual Relationship

As suggested by the foregoing discussion, the Miller Act protects subcontractors (as opposed

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to mere materialman) and, provided they give proper notice, persons having direct contractual relationships with the subcontractor but no contractual relationship, express or implied, with the prime contractor. Recovery under the theory of implied contracts known as "quantum meruit" is appropriate when the breaching party has been unjustly enriched through its wrongful conduct, and such recovery may also be appropriate when the aggrieved party has been induced to perform beyond the scope of the express contract, resulting in a benefit to the breaching party. *United States v. Mountain States Construction Co.*, 588 F.2d 259, 262 (9th Cir. 1978). Thus under appropriate circumstances a supplier of labor or material might be able to recover on the bond even though its contract claim may be barred for lack of a signed writing or other technical defect. The supplier might be able to recover amounts greater than the contract price if change orders were performed but never documented in an express contract. The cases are unclear as to whether second-tier subcontractors or other lower-tier claimants can maintain a suit against the prime contractor or the surety based on an implied contract under the principles of quantum meruit. *See Undersea Engineering & Construction Co. v. International Telephone & Telegraph Corp.*, 429 F.2d 543 (9th Cir. 1970), *abrogated on other grounds by Avery v. United States*, 829 F.2d 817 (9th Cir. 1987) (work performed by second-tier subcontractor done under its express "sub" contract with subcontractor, thus negating implied contract with prime contractor); *but see Fidelity & Deposit Co. of Maryland v. Harris*, 360 F.2d 402 (9th Cir. 1966) (second-tier subcontractor's supplier could recover against contractor on ground of unjust enrichment).

§ 7.22:6 Procedures after Perfection

Just as in a state project, bond claimants on federal projects must pursue their claims against the surety by negotiation and, if necessary, litigation or alternative dispute resolution proceedings. Any lawsuit on a Miller Act bond must be filed in federal court in the federal district in which the contract was to be performed. Lawsuits under the Miller Act must be filed within one year after the day on which the last of the labor was performed or material was supplied by the claimant. 40 U.S.C. § 3133(b)(4).

§ 7.23 Texas Property Code Construction Trust Fund

Chapter 162 of the Texas Property Code provides a potential additional source of recovery for a claimant who is seeking to be paid under a construction contract for the improvement of real property. Chapter 162 provides that (1) all payments under a construction contract to an original contractor, a subcontractor, or an officer, director, or agent of a contractor or subcontractor and (2) all loan proceeds received by an owner, original contractor, or subcontractor or by an officer, director, or agent of an owner, contractor, or subcontractor for the purpose of improving specific real property are "trust funds" for the benefit of persons furnishing labor or materials on the construction project. Tex. Prop. Code §§ 162.001, 162.003.

However, chapter 162 does not apply to a lender, title company, closing agent, or corporate surety (Tex. Prop. Code § 162.004) or to a contractor's fee under a cost-plus contract (Tex. Prop. Code § 162.001(c)).

§ 7.23:1 Parties Liable as Trustees

An owner, original contractor, and subcontractor and their respective officers, directors, and agents who receive, control, or direct the "trust funds" (that is, the construction payments or loan proceeds) are deemed to be "trustees" of the funds. Tex. Prop. Code § 162.002.

§ 7.23:2 Beneficiaries of Trust

An artisan, laborer, mechanic, contractor, subcontractor, or materialman who labors or furnishes labor or materials for the construction or repair of an improvement on real property is a beneficiary of any trust funds paid or received in connection with the improvement. Tex. Prop. Code § 162.003(a). A property owner is a beneficiary of trust funds paid or received in connection with a residential construction contract, including funds deposited into a construction account. Tex. Prop. Code § 162.003(b).

§ 7.23:3 Residential Homestead Projects

A contractor who enters into a written contract with a property owner to construct improvements to a residential homestead in an amount exceeding $5,000 shall deposit the trust funds in a construction account in a financial institution. Tex. Prop. Code § 162.006. The contractor must maintain account records in accordance with the requirements of Property Code section 162.007. *See* Tex. Prop. Code § 162.007.

§ 7.23:4 Penalties for Misapplication of Monies by Trustees

A trustee who knowingly or intentionally retains, uses, or diverts trust funds without first fully paying all current or past-due obligations incurred by the trustee to the "beneficiaries" (that is, the unpaid contractors) has misapplied the trust funds. Tex. Prop. Code § 162.031(a). If the misapplied amount exceeds $500, this is a Class A misdemeanor if there is no intent to defraud and a third-degree felony if intent to defraud is shown. Tex. Prop. Code § 162.032.

Practice Note: The statute, by imposing a statutory duty on the trustee, creates a civil cause of action for damages arising from the trustee's breach of his duties. The statute also allows the claimant to sue certain individuals including the owner and officers of the business entity to get to the individual who actually handled the money or directed the use of the funds.

Intent to Defraud: The statute defines "intent to defraud" to include—

1. retaining, using, disbursing, or diverting trust funds with the intent to deprive the beneficiaries of the trust funds;
2. the trustee's failing to establish and maintain a separate construction account or the required account records for residential homestead improvement contracts of $5,000 or more; and
3. misapplying trust funds that were paid in reliance on a false bills-paid affidavit.

Tex. Prop. Code § 162.005(1); *see also* Tex. Prop. Code §§ 53.085, 162.006, 162.007. While the trustee is not required to open more than one bank account per project, the statute does specifically prohibit the trustee from comingling its own funds with the trust account. Failure to keep the accounts and the records is in and of itself a Class A misdemeanor. Tex. Prop. Code § 162.032(c).

Affirmative Defenses: The statute establishes three affirmative defenses for a trustee accused of misappropriation. The first is that a trustee may affirmatively plead that trust funds not paid to the beneficiary of the trust were used to pay the trustee's "actual expenses directly related to the construction or repair of the improvement." Tex. Prop. Code § 162.031(b). Thus, the trustee may use construction funds to pay overhead expenses, as long as the expenses are actually incurred and are necessary to obtain or complete the project. However, the trustee will have to prove that the payments were for actual expenses directly related to the construction. The second affirmative defense is that,

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after notice to the claimant, the trustee merely retained the money because of the trustee's reasonable belief that the beneficiary was not entitled to such funds or that the trustee was otherwise authorized or required by other provisions of the Property Code to withhold the funds. The trustee must prove that it withheld payment based on a reasonable belief. Tex. Prop. Code § 162.031(b). The third affirmative defense is that the trustee paid the beneficiaries the monies they were entitled to receive no later than thirty days following written notice to the trustee of the filing of a criminal complaint or other notice of a pending criminal investigation. Tex. Prop. Code § 162.031(c).

A trustee who commingles trust funds with other funds in the trustee's possession does not defeat a trust created by chapter 162 of the Property Code. Tex. Prop. Code § 162.031(d).

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Form 7-1

Affidavit to Fix Worker's Lien

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 a resident of [**county**] County, Texas. On [**date**], I entered into an employment contract with [**name of employer**], Employer, to provide labor or services in [**county**] County, Texas, as a [**type of employment**] to [**describe work**] at Employer's [**type of premises**], located at [**address, city**], Texas. The work was performed for Employer's benefit.

"Under the terms of the employment contract between Employer and me, Employer was obligated to pay me $[**amount**] per [**time period**] for the labor or services described above. Employer now owes me $[**amount**] but refuses to pay me.

"This debt accrued within the past thirty days. Since then I have given Employer an account of the labor or services performed with regard to [**describe property for which lien is claimed**]. A copy of the account is attached to this affidavit and is incorporated in this affidavit for all purposes.

"The facts stated in this affidavit are within my personal knowledge and are true and correct."

____
[Name of affiant]
Affiant

SIGNED under oath before me on ______________________________.

____
Notary Public, State of Texas

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Attach an account of services with amount due. Copies of the affidavit and attached account should be both served on the employer or the employer's agent and filed with the county clerk.

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Form 7-2

See section 14.10 in this manual for other forms of party designation. See also section 14.2 regarding exercising caution in pleading conditions precedent. Do not add prejudgment interest to the amounts claimed.

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.

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

Petition and Application to Foreclose Worker's Lien

1. *Parties.* Plaintiff is [**name of plaintiff**], whose 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 numbers of Plaintiff's Social Security number are [**numbers**]./Plaintiff has not been issued a Social Security number.] Defendant is [**name of defendant**], who can be served with citation at [**address, city, state**].

2. *Facts.* On [**date**], Plaintiff as employee and Defendant as employer entered into a contract by which Defendant employed Plaintiff to provide labor or services as a [**type of employment**] to [**describe work**] at Defendant's [**type of premises**], located at [**address, city, county**] County, Texas. The work was performed for Defendant's benefit.

3. *Debt.* Under terms of the contract between Plaintiff and Defendant, Defendant was obligated to pay Plaintiff, as wages for labor or services rendered in [**describe work**], $[**amount**] per [**time period**]. Defendant now owes Plaintiff $[**amount**] but refuses to pay Plaintiff.

4. *Conditions Precedent.* All conditions precedent have been performed or have occurred.

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5. *Lien.* Under section 58.002 of the Texas Property Code, Plaintiff holds a worker's lien on [**describe property**]. This lien was fixed by Plaintiff on [**date**]. A copy of the lien affidavit, served on Defendant, is attached as Exhibit [**exhibit number/letter**] and is incorporated by reference.

6. *Attorney's Fees.* Defendant's failure to pay Plaintiff for Plaintiff's labor or services has made it necessary for Plaintiff to employ the undersigned attorney to file suit. This claim was timely presented to Defendant and remains unpaid. Reasonable fees for the attorney's services rendered and to be rendered through trial and appeal are at least $[**amount**].

7. *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 worker'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.

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____

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

Attach a copy of the worker's lien affidavit (form 7-1). Prepare an application for a writ of sequestration (form 7-3).

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Form 7-3

To prevent destruction or waste of the property in which a worker's lien is claimed and to avoid losing the property to a bona fide purchaser, the claimant should seek to sequester the property at the time the suit to foreclose the lien is filed; see section 7.1:5 in this chapter. A petition to foreclose a worker's lien is at form 7-2. Additional sequestration forms are at forms 8-8 through 8-16. See section 14.10 for other forms of party designation. In most counties, the clerk will prepare the writ of sequestration and the return. In some cases, the attorney may wish to prepare them for the clerk.

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

Use the same caption as in the petition and application to foreclose the worker's lien unless the cause has been transferred.

Application and Affidavit for Writ of Sequestration in Suit on Worker's Lien

1. *Parties.* Plaintiff [**name of plaintiff**], whose address is [**address, city, state**], makes this Application for Writ of Sequestration. 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 the required findings by the court. The following paragraphs are sample allegations; the actual allegations must be drafted to fit the facts.

2. *Facts.* In this suit, now pending in this Court, Plaintiff is seeking damages from Defendant and foreclosure or enforcement of a lien under section 58.002 of the Texas Property Code in the following personal property: [**describe each item of property with sufficient certainty that it can be identified and distinguished from similar property**]. Each item of property has the following value: [**list each item and its value**]. All this property is in Defendant's possession at [**address, city, county**] County, Texas.

3. *Lien.* On [**date**], Plaintiff as employee and Defendant as employer entered into a contract by which Defendant employed Plaintiff to provide labor or services as a [**type of employment**] to [**describe work**] at Defendant's [**type of premises**], located at [**address, city,**

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county] County, Texas. The work was performed for Defendant's benefit. Under the terms of the contract, Defendant was obligated to pay Plaintiff, as wages for labor or services rendered, $[**amount**] per [**time period**]. Defendant now owes Plaintiff $[**amount**] but refuses to pay Plaintiff. Plaintiff holds a worker's lien on this property under section 58.002 of the Texas Property Code, which was fixed on [**date**].

4. *Grounds.* Defendant refused to surrender possession of the property when specifically and rightfully requested by Plaintiff to do so. This refusal by Defendant is an intentional concealment of the property and therefore jeopardizes Plaintiff's lien on the property. Plaintiff fears that Defendant may dispose of or further conceal the property or may convey the property to a third party without notice of Plaintiff's claim to a lien on the property.

5. *Prayer.* Plaintiff prays that a writ of sequestration issue and that Plaintiff receive all further relief to which Plaintiff may be entitled.

____
[**Name**]
Attorney for Plaintiff
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:

"I am Plaintiff in this cause.

Select one of the following.

"I have personal knowledge of the facts stated above, and they are true and correct."

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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.

____
[Name of affiant]
Affiant

SIGNED under oath before me on ______________________________.

____
Notary Public, State of Texas

Prepare the following to take to the hearing: form 8-9 (order for issuance of writ of sequestration), form 8-4 (bond to defendant), form 8-10 (writ of sequestration), and form 8-12 (officer's return).

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Form 7-4

First Notice of Sale under Worker's Possessory Lien

[Property Other Than Motor Vehicle, Motorboat, Vessel, or Outboard Motor]

[**Date**]

To: [**name and address of owner**], Owner

Re: [**describe property subject to lien**]

I have maintained possession of the property described above, which you own and which I repaired at your request, for at least sixty days after the repair charges accrued against you.

A total of $[**amount**] is now due for the repair of this property, and I request that you pay the charges due immediately. If you do not make payment within ten days after receipt of this notice, I intend to sell the property at public sale, after twenty days' notice, and to apply the proceeds of the sale to payment of the charges. I will then pay any excess to the person entitled to it.

____
[**Name**]

Certified Mail No. [**number**]
Return Receipt Requested

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Form 7-5

Second Notice of Sale under Worker's Possessory Lien

[Property Other Than Motor Vehicle, Motorboat, Vessel, or Outboard Motor]

[**Date**]

To: [**name and address of owner**], Owner

Re: [**describe property subject to lien**]

I have maintained possession of the property described above, which you own and which I repaired at your request, for at least sixty days after the repair charges accrued against you. At least ten days before the date of this notice, you were advised that, if you failed to pay the charges within ten days, I would sell the property after twenty days' notice. You have not paid the charges within ten days after your receipt of the first notice.

A total of $[**amount**] is now due for the repair of this property, and I request that you pay the charges due immediately. If you do not make payment within twenty days after receipt of this second notice, I intend to sell the property at public sale and to apply the proceeds of the sale to payment of the charges. I will then pay any excess to the person entitled to it.

The public sale will be at [**address, city, county**] County, Texas, on [**date**] at [**time**].

____

[**Name**]

Certified Mail No. [**number**]
Return Receipt Requested

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Form 7-6

Texas Property Code section 70.006 discusses the sale of motor vehicles, motorboats, vessels, and outboard motors, including the requirements of this notice. Written notice must be given to the owner and each holder of a lien recorded on the certificate of title. Tex. Prop. Code § 70.006(a). A copy of the notice must be filed with the county tax assessor-collector's office in the county in which the repairs were made not later than thirty days after the date on which the charges accrue. Tex. Prop. Code § 70.006(a). Unless an exception exists for notice by publication under Tex. Prop. Code § 70.006(c), the notice must be sent by certified mail with return receipt requested and include the amount of the charges and a request for payment. Tex. Prop. Code § 70.006(b).

A holder of a possessory lien on a motor vehicle under Tex. Prop. Code § 70.001, other than a person licensed as a franchised dealer under the Texas Occupations Code, must include additional information in the notice. See Tex. Prop. Code § 70.006(b–1) for those requirements.

Notice of Sale under Worker's Possessory Lien

[Motor Vehicle, Motorboat, Vessel, or Outboard Motor]

[**Date**]

To: [**name and address of owner**], Owner
[**name and address of lienholder**], Lienholder

Re: [**describe motor vehicle, motorboat, vessel, or outboard motor**]

I [**include if applicable:**, [**legal name**], [taxpayer identification number/employer identification number] [**number**],] have maintained possession of the [motor vehicle/motorboat/vessel/outboard motor] described above, which I have repaired at the owner's request.

A total of $[**amount**] is now due for the repair of this [vehicle/motorboat/vessel/outboard motor], and I request that the charges due be paid immediately. The charges accrued on [**date**].

Include the following if applicable. See Tex. Prop. Code § 70.006(b–1) to determine applicability.

The physical address at which the repairs to the motor vehicle were made is [**address**]. Attached is a signed copy of the work order authorizing the repairs on the motor vehicle.

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Continue with the following.

If I do not receive payment within thirty days after this notice is mailed, I intend to sell the [vehicle/motorboat/vessel/outboard motor] at public sale and to apply the proceeds of the sale to payment of the charges. I will then pay any excess to the person entitled to it.

The public sale will be at [**address, city, county**] County, Texas, on [**date**] at [**time**].

____
[**Name**]

Certified Mail No. [**number**]
Return Receipt Requested

Attach a copy of the work order if applicable.

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Form 7-7

Notice to Owner of Filing of Lien Affidavit

[**Date**]

[**Name and address of owner**]
[**Name and address of original contractor**]

Re: Notice of filing of an Affidavit Claiming Mechanic's and Materialman's Lien with respect to the construction project at [**specify**] ("Property")

[**Salutation**]

By this letter I am forwarding to you the enclosed copies of an affidavit claiming a mechanic's and materialman's lien against the Property that was filed in the official real property records of [**county**] County, Texas, on [**date**].

This affidavit pertains to the unpaid sums owing for labor or material provided by [**name of original contractor**] in connection with the construction of improvements on the Property. You are hereby notified that if this claim remains unpaid, the owner of the Property may be personally liable, and the owner's Property may be subjected to a lien unless (1) the owner withholds payment from the contractor for payment of the claim or (2) the claim is otherwise paid or settled.

Sincerely yours,

____

[**Name of attorney**]

Certified Mail No. [**number**]
Return Receipt Requested

Certified Mail No. [**number**]
Return Receipt Requested

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Attach a copy of the lien affidavit (form 7-15).

Form 7-8

Notice of Claim to Owner and Original Contractor

[**Date**]

[**Name and address of owner**]
[**Name and address of original contractor**]

Re: Claims of [**name of claimant**] ("Claimant") for unpaid billings totaling $[**amount**] ("Claim Amount"); [**specify**] construction project ("Project")

[**Salutation**]

This is to provide you with notice that Claimant is owed the Claim Amount for its past-due and unpaid billings for [labor/materials/labor and materials] furnished on the Project. Claimant furnished [**description of work and/or materials furnished**] for the Project under Claimant's agreement with [**name of customer**].

This notice is sent in compliance with the Texas Property Code's mechanic's lien provisions. Accordingly, we must notify you that if the Claim Amount remains unpaid, the owner of the premises may be personally liable, and the owner's property may be subjected to a lien unless the owner withholds payment from the contractor for payment of the claim or the claim is otherwise paid or settled.

Also, further notice is given that all of the Claim Amount has accrued and is past due. Accordingly, demand for payment of the claim in the Claim Amount is hereby made.

Enclosed are copies of the statements or billings that constitute this claim.

This also constitutes notice pursuant to section 162.001 *et seq.* of the Texas Property Code (the Trust Fund Act) that Claimant has a priority interest in the construction funds for this project in your possession now or released to you in the future. The Trust Fund Act states

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that project owners and contractors are trustees of the construction funds they receive. Such funds must be used to pay for the labor and materials on the Project and cannot be used for other purposes. The owner and contractor are deemed to be trustees of the Project funds for the benefit of unpaid subcontractors and suppliers, including Claimant, to see that payment is made. Consequently, you are directed to set aside such construction funds to cover the Claim Amount. Diversion of construction trust funds constitutes violation of the Trust Fund Act.

Please contact me immediately regarding this notice.

Sincerely yours,

____

[Name of attorney]

Certified Mail No. **[number]**
Return Receipt Requested

Certified Mail No. **[number]**
Return Receipt Requested

> Attach the notice at form 7-9 if the lien is against homestead property.

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Form 7-9

To fix a lien on homestead, the following statement must be included in or attached to form 7-8, the notice required to be given to the owner under Property Code section 53.252. Tex. Prop. Code § 53.254. The language is derived from the statute, and the user must be careful not to alter the prescribed language.

Notice to Owner Regarding Liens against Homestead Property

If a subcontractor or supplier who furnishes materials or performs labor for construction of improvements on your property is not paid, your property may be subject to a lien for the unpaid amount if:

1. after receiving notice of the unpaid claim from the claimant, you fail to withhold payment to your contractor that is sufficient to cover the unpaid claim until the dispute is resolved; or

2. during construction and for 30 days after completion of construction, you fail to retain 10 percent of the contract price or 10 percent of the value of the work performed by your contractor.

If you have complied with the law regarding the 10 percent retainage and you have withheld payment to the contractor sufficient to cover any written notice of claim and have paid that amount, if any, to the claimant, any lien claim filed on your property by a subcontractor or supplier, other than a person who contracted directly with you, will not be a valid lien on your property. In addition, except for the required 10 percent retainage, you are not liable to a subcontractor or supplier for any amount paid to your contractor before you received written notice of the claim.

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Form 7-10

The language of this disclosure is based on Tex. Prop. Code § 53.255(b). The disclosure must be substantially similar to the statutory language.

Contractor's Disclosure Statement for Residential Construction

Date:

Owner:

Contractor:

Property:

[Lender:]

Know Your Rights and Responsibilities under the Law. You are about to enter into a transaction to build a new home or remodel existing residential property. Texas law requires your contractor to provide you with this brief overview of some of your rights, responsibilities, and risks in this transaction.

Conveyance to Contractor Not Required. Your contractor may not require you to convey your real property to your contractor as a condition to the agreement for the construction of improvements on your property.

Know Your Contractor. Before you enter into your agreement for the construction of improvements to your real property, make sure that you have investigated your contractor. Obtain and verify references from other people who have used the contractor for the type and size of construction project on your property.

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Get It in Writing. Make sure that you have a written agreement with your contractor that includes (1) a description of the work the contractor is to perform; (2) the required or estimated time for completion of the work; (3) the cost of the work or how the cost will be determined; and (4) the procedure and method of payment, including provisions for statutory retainage and conditions for final payment. If your contractor made a promise, warranty, or representation to you concerning the work the contractor is to perform, make sure that promise, warranty, or representation is specified in the written agreement. An oral promise that is not included in the written agreement may not be enforceable under Texas law.

Read Before You Sign. Do not sign any document before you have read and understood it. NEVER SIGN A DOCUMENT THAT INCLUDES AN UNTRUE STATEMENT. Take your time in reviewing documents. If you borrow money from a lender to pay for the improvements, you are entitled to have the loan closing documents furnished to you for review at least one business day before the closing. Do not waive this requirement unless a bona fide emergency or another good cause exists, and make sure you understand the documents before you sign them. If you fail to comply with the terms of the documents, you could lose your property. You are entitled to have your own attorney review any documents. If you have any question about the meaning of a document, consult an attorney.

Get a List of Subcontractors and Suppliers. Before construction commences, your contractor is required to provide you with a list of the subcontractors and suppliers the contractor intends to use on your project. Your contractor is required to supply updated information on any subcontractors and suppliers added after the list is provided. Your contractor is not required to supply this information if you sign a written waiver of your rights to receive this information.

Monitor the Work. Lenders and governmental authorities may inspect the work in progress from time to time for their own purposes. These inspections are not intended as quality control inspections. Quality control is a matter for you and your contractor. To ensure that

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your home is being constructed in accordance with your wishes and specifications, you should inspect the work yourself or have your own independent inspector review the work in progress.

Monitor Payments. If you use a lender, your lender is required to provide you with a periodic statement showing the money disbursed by the lender from the proceeds of your loan. Each time your contractor requests payment from you or your lender for work performed, your contractor is also required to furnish you with a disbursement statement that lists the name and address of each subcontractor or supplier that the contractor intends to pay from the requested funds. Review these statements and make sure that the money is being properly disbursed.

Claims by Subcontractors and Suppliers. Under Texas law, if a subcontractor or supplier who furnishes labor or materials for the construction of improvements on your property is not paid, you may become liable and your property may be subject to a lien for the unpaid amount, even if you have not contracted directly with the subcontractor or supplier. To avoid liability, you should take the following actions:

1. If you receive a written notice from a subcontractor or supplier, you should withhold payment from your contractor for the amount of the claim stated in the notice until the dispute between your contractor and the subcontractor or supplier is resolved. If your lender is disbursing money directly to your contractor, you should immediately provide a copy of the notice to your lender and instruct the lender to withhold payment in the amount of the claim stated in the notice. If you continue to pay the contractor after receiving the written notice without withholding the amount of the claim, you may be liable and your property may be subject to a lien for the amount you failed to withhold.

2. During construction and for thirty days after final completion, termination, or abandonment of the contract by the contractor, you should withhold or cause your lender to

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withhold 10 percent of the amount of payments made for the work performed by your contractor. This is sometimes referred to as "statutory retainage." If you choose not to withhold the 10 percent for at least thirty days after final completion, termination, or abandonment of the contract by the contractor and if a valid claim is timely made by a claimant and your contractor fails to pay the claim, you may be personally liable and your property may be subject to a lien up to the amount that you failed to withhold.

If a claim is not paid within a certain time period, the claimant is required to file a mechanic's lien affidavit in the real property records in the county in which the property is located. A mechanic's lien affidavit is not a lien on your property, but the filing of the affidavit could result in a court imposing a lien on your property if the claimant is successful in litigation to enforce the lien claim.

Some Claims May Not Be Valid. When you receive a written notice of a claim or when a mechanic's lien affidavit is filed on your property, you should know your legal rights and responsibilities regarding the claim. Not all claims are valid. A notice of a claim by a subcontractor or supplier is required to be sent, and the mechanic's lien affidavit is required to be filed, within strict time periods. The notice and the affidavit must contain certain information. All claimants may not fully comply with the legal requirements to collect on a claim. If you have paid the contractor in full before receiving a notice of a claim and have fully complied with the law regarding statutory retainage, you may not be liable for that claim. Accordingly, you should consult your attorney when you receive a written notice of a claim to determine the true extent of your liability or potential liability for that claim.

Obtain a Lien Release and a Bills-Paid Affidavit. When you receive a notice of claim, do not release withheld funds without obtaining a signed and notarized release of lien and claim from the claimant. You can also reduce the risk of having a claim filed by a subcontractor or supplier by requiring as a condition of each payment made by you or your lender that your contractor furnish you with an affidavit stating that all bills have been paid. Under

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Texas law, on final completion of the work and before final payment, the contractor is required to furnish you with an affidavit stating that all bills have been paid. If the contractor discloses any unpaid bill in the affidavit, you should withhold payment in the amount of the unpaid bill until you receive a waiver of lien or release from that subcontractor or supplier.

Obtain Title Insurance Protection. You may be able to obtain a title insurance policy to insure that the title to your property and the existing improvements on your property are free from liens claimed by subcontractors and suppliers. If your policy is issued before the improvements are completed and covers the value of the improvements to be completed, you should obtain, on the completion of the improvements and as a condition of your final payment, a "completion of improvements" policy endorsement. This endorsement will protect your property from liens claimed by subcontractors and suppliers that may arise from the date the original title policy is issued to the date of the endorsement.

I have received a copy of this contractor's disclosure statement for residential construction.

I have also received a copy of the attached contractor's list of subcontractors and suppliers.

____
[Name of owner]

Attach list of subcontractors and suppliers (form 7-11).

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Form 7-11

The prescribed language in the "Notice" paragraph of this form must appear in a minimum of ten-point bold-faced type. The list may be given either with form 7-10 or before the commencement of construction. This list must be updated and provided to the owner not later than the fifteenth day after a subcontractor or supplier is added or deleted unless the owner has signed a written waiver of the right to receive updates. Tex. Prop. Code § 53.256.

Contractor's List of Subcontractors and Suppliers

Date:

Owner:

Contractor:

Property:

[Lender:]

NOTICE: THIS LIST OF SUBCONTRACTORS AND SUPPLIERS MAY NOT BE A FINAL LISTING. UNLESS YOU SIGN A WAIVER OF YOUR RIGHT TO RECEIVE UPDATED INFORMATION, THE CONTRACTOR IS REQUIRED BY LAW TO SUPPLY UPDATED INFORMATION, AS THE INFORMATION BECOMES AVAILABLE, FOR EACH SUBCONTRACTOR OR SUPPLIER USED IN THE WORK PERFORMED ON YOUR RESIDENCE.

Name of subcontractor or supplier:

Address:

Telephone number:

Repeat above information as needed.

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> If this list was not delivered with form 7-10, include the following.

I have received a copy of this list of subcontractors and suppliers.

____

[Name of owner]

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Form 7-12

Notice to Original Contractor by Second-Tier Claimant

[**Date**]

[**Name and address of original contractor**]

Re: Claims of [**name of claimant**] ("Claimant") for unpaid billings totaling $[**amount**] ("Claim Amount"); [**specify**] construction project ("Project")

[**Salutation**]

This is to provide you with the required notice, in accordance with section 53.056 of the Texas Property Code, that Claimant is owed the Claim Amount for its billings to [**name of customer**] for [labor/materials/labor and materials] furnished on the Project. Claimant's [labor/materials/labor and materials] are generally described as [**description of work and/or materials furnished**].

Enclosed are copies of Claimant's unpaid statements or billings. Please contact me regarding this notice. Thank you for your attention to this matter.

Sincerely yours,

____

[**Name of attorney**]

Certified Mail No. [**number**]
Return Receipt Requested

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Form 7-13

This notice must be sent to the owner by the fifteenth day of the second month following the claimant's receipt and acceptance of an order for the specially fabricated material. The original contractor must also be sent notice if the indebtedness was incurred by a person other than the original contractor. Tex. Prop. Code §§ 53.058, 53.253.

Notice Regarding Specially Fabricated Material[s]

[**Date**]

[**Name and address of owner**]
[**Name and address of original contractor**]

Re: [**specify**] construction project ("Project")

[**Salutation**]

[**Name of claimant**] ("Claimant") has received and accepted an order from [**name of customer**] for specially fabricated [**description**] to be delivered to your Project after [they are/it is] made. The price of the specially fabricated order is $[**amount**]. This notice is sent to you in compliance with the mandatory provisions of Texas law regarding receipt of orders for specially fabricated materials. This is not intended as a comment in any way on Claimant's customer, [**name of customer**], but is merely sent in compliance with the state law.

Claimant is pleased to be a participant in this Project and looks forward to working with [**name of customer**] toward the Project's successful conclusion.

Sincerely yours,

____

[**Name of attorney**]

Certified Mail No. [**number**]
Return Receipt Requested

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Certified Mail No. [**number**]
Return Receipt Requested

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Form 7-14

This notice must be given to the owner by the earlier of the thirtieth day after the date the claimant's retainage agreement is completed, terminated, or abandoned; or the thirtieth day after the date the original contract is terminated or abandoned. Tex. Prop. Code § 53.057(b). The original contractor also must be sent notice if the claimant's contract is not with the original contractor. Tex. Prop. Code § 53.057(b–1). Please refer to Texas Property Code section 53.057 for additional requirements for this notice.

Notice of Agreement Providing for Retainage

[Date]

[Name and address of owner]
[Name and address of original contractor]

Re: Notice for Contractual Retainage Claim—**[describe in detail the name and location of the construction project]** ("Project")

[Salutation]

[Name of claimant] ("Claimant"), at **[address of claimant]**, is pleased to have been selected as a [subcontractor/supplier] for the Project. Claimant's contract with **[name of contractor]**, at **[address of contractor]**, provides that [10/**[specify other percentage]**] percent of the contract price may be withheld as retainage. Claimant therefore respectfully submits its notice of contractual retainage agreement. This notice is required by section 53.057 of the Texas Property Code.

The general nature of the agreement is as follows: [**specify, e.g.,** 10 percent of contract price as adjusted by the change orders].

The date or dates when retainage is payable are as follows: [**specify, e.g.,** thirty days after final completion of our portion of the work on the Project].

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We believe the total amount to be retained under our contract will be $[**amount**]. Also [**percent**] percent of increases to Claimant's contract by change order(s) will be subject to retainage.

This notice is not in any way to be considered a negative comment regarding Claimant's customer, [**name of customer**], and Claimant looks forward to working toward a successful completion of your Project.

Sincerely yours,

____

[**Name of attorney**]

Certified Mail No. [**number**]
Return Receipt Requested

Certified Mail No. [**number**]
Return Receipt Requested

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Form 7-15

If the lien relates to a homestead, the affidavit must contain the notice preceding the title of this form. The language of the notice is prescribed by Tex. Prop. Code § 53.254(f) and must appear at the top of the page in a minimum of ten-point bold-faced type or equivalent.

NOTICE: THIS IS NOT A LIEN. THIS IS ONLY AN AFFIDAVIT CLAIMING A LIEN.

Affidavit Claiming Mechanic's and Materialman's Lien

Affiant, [**name of affiant**], on oath swears that the following statements are true and are within the personal knowledge of Affiant:

"My name is [**name of affiant**]. I am the [claimant/[**title**] of [**name of claimant**]] ('Claimant'). This affidavit is made to perfect a mechanic's and materialman's lien against the real property described below:

"1. Claimant has an unpaid claim in the amount of $[**amount**] ('Claim Amount') for [labor/materials/labor and materials] furnished on the construction of improvements generally known as the [**specify**] construction project. The Claim Amount is, within my personal knowledge, just and true, the same is due and unpaid, and all just and lawful offsets, payments, and credits have been allowed. The Claim Amount is for [labor/materials/labor and materials] furnished and described below, on which a systematic record has been kept.

"2. The name and last known address of the owner or reputed owner ('Owner') of the real property and improvements on which this claim is made are [**name and address**].

"3. The Claim Amount represents the unpaid contract price due Claimant, or, in the alternative, is the reasonable value of the unpaid portion of Claimant's [labor/materials/labor and materials] furnished, which are described below.

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"4. Claimant's [labor/materials/labor and materials] furnished for construction of improvements on the real property described below [is/are] generally described as [**describe, e.g.**, specially fabricated and installed plumbing, heating, ventilating, and air-conditioning duct work, equipment, and allied systems]. Payment of the Claim Amount is requested for work performed or materials furnished during each of the following months: [**specify months**].

"5. Claimant furnished the above-described [labor/materials/labor and materials] under a [subcontract/contract/purchase order] with [**name of customer**], whose last known address is [**address**].

"6. The name and last known address of the original contractor on the above-referenced project are [**name and address**].

"7. The legal description of the real property improved by Claimant's above-described [labor/materials/labor and materials] is [**legal description**]. That real property and improvements on it are sought to be charged with Claimant's lien.

"8. Claimant claims a mechanic's and materialman's lien on the above-described real property and improvements thereon to secure payment of its Claim Amount in accordance with the Texas Property Code.

"9. Claimant's physical address is [**address**]. Claimant's mailing address is [**address**].

"10. Claimant's notice[s] of mechanic's lien [was/were] sent to Owner by United States certified mail, return receipt requested, on the following date[s]: [**specify date[s]**].

"11. In compliance with the Texas Property Code, Claimant is sending one copy of this affidavit to Owner at its last known address and also one copy to the above-referenced original contractor at its last known address."

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____
[Name of affiant]

SUBSCRIBED AND SWORN TO before me on ________________________________

by **[name of affiant]**.

____
Notary Public, State of Texas

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Form 7-16

Copies of the lien affidavit must be sent within five days of filing the lien affidavit. Tex. Prop. Code § 53.055(a).

Cover Letter Sending Copy of Lien Affidavit

[**Date**]

[**Name and address of owner**]
[**Name and address of original contractor**]

Re: Claim of [**name of claimant**] ("Claimant"); mechanic's and materialman's lien

[**Salutation**]

Enclosed is a copy of Claimant's affidavit claiming a mechanic's and materialman's lien ("Affidavit").

In accordance with the Texas Property Code, we notify you again that if the claim described in the Affidavit remains unpaid, the owner of the property described may be liable, unless the owner withholds payment from the contractor for the amount of the claim or it is otherwise settled or paid.

Claimant was forced to proceed with securing its lien rights because Claimant has not received payment from any source on the claim set forth in the Affidavit.

Include the following if applicable.

Previous written demand by Claimant for payment of this claim was made on [**date**]. No notice of dispute regarding this claim was submitted. Therefore demand for payment of the claim amount is hereby made in accordance with section 53.083 of the Texas Property Code.

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Continue with the following.

Please contact me on receipt of this letter so that we may discuss a prompt resolution of this matter.

Sincerely yours,

____
[Name of attorney]

Enc.
Certified Mail No. **[number]**
Return Receipt Requested

Certified Mail No. **[number]**
Return Receipt Requested

Attach a copy of the lien affidavit (form 7-15). For residential construction on a homestead, also attach the notice at form 7-9.

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Form 7-17

Request for Information to Owner

[Date]

[Name and address of owner]

Re: Request for information on **[specify]** construction project ("Project")

[Salutation]

[Name of claimant] is furnishing [labor/materials/labor and materials] for the Project. This is to respectfully request that you, as owner of the Project, furnish to us the following information not later than the tenth day after the date you receive this request, as required by sections 53.106 and 53.159 of the Texas Property Code:

1. a sufficient legal description of the real property being improved;

2. whether there is a surety bond and, if so, the name and last known address of the surety and a copy of the bond;

3. whether there are any prior recorded liens or security interests on the Project property being improved and, if so, the name and address of the person or entity having the lien or security interest;

4. the date on which the original contract for the Project was executed; and

5. whether there is an affidavit of commencement or affidavit of completion filed, and, if so, a copy of each affidavit.

Thank you for your cooperation and prompt attention.

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Sincerely yours,

____

[Name of attorney]

Certified Mail No. **[number]**
Return Receipt Requested

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Form 7-18

Request for Information to Original Contractor

[**Date**]

[**Name and address of original contractor**]

Re: Request for information on [**specify**] construction project ("Project")

[**Salutation**]

[**Name of claimant**] is furnishing [labor/materials/labor and materials] for the Project. This is to respectfully request that you, as original contractor for the Project, furnish to us the following information not later than the tenth day after you receive this request, as required by section 53.159 of the Texas Property Code:

1. the name and last known address of the person to whom you furnished labor and materials for the Project;

2. whether you have furnished or have been furnished any payment bonds for any work on the Project and, if so, the name and last known address of the surety or sureties and a copy of each bond; and

3. the date on which the original contract for the Project was executed.

Thank you for your cooperation and prompt attention.

Sincerely yours,

____

[**Name of attorney**]

Certified Mail No. [**number**]
Return Receipt Requested

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Form 7-19

Request for Information to Subcontractor

[Date]

[Name and address of subcontractor]

Re: Request for information on **[specify]** construction project ("Project")

[Salutation]

[Name of claimant] has furnished [labor/materials/labor and materials] for the Project under your subcontract on the Project. This is to respectfully request that you, as a subcontractor for the Project, furnish to us the following information not later than the tenth day after you receive this request, as required by section 53.159 of the Texas Property Code:

1. the name and last known address of each person from whom you purchased labor or materials for the Project, other than the materials that were furnished from your inventory;

2. the name and last known address of each person to whom you furnished labor and materials for the Project; and

3. whether you have furnished or have been furnished any payment bonds for any work on the Project and, if so, the name and last known address of the surety or sureties and a copy of each bond.

Thank you for your cooperation and prompt attention.

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Sincerely yours,

____

[**Name of attorney**]

Certified Mail No. [**number**]
Return Receipt Requested

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Form 7-20

Contractor's Disbursement Disclosure for Residential Construction (Consumer-Owned)

Date:

Owner:

Property:

Project: [**include description**]

Contractor:

[Lender:]

The following information is required to be provided under section 53.258 of the Texas Property Code in connection with this payment request for construction on the Property. This statement will be furnished by depositing the statement in the United States mail, first class, postage paid, and properly addressed to Owner or by hand delivering the statement to Owner before Contractor receives the requested funds.

A. **Bills Paid.** The following is a list of bills or expenses for labor or materials used on the Project that have been paid and for which Contractor is requesting payment:

Name and address of subcontractor or supplier:

Description of bill or expense paid:

Amount paid:

Repeat above information as needed.

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B. Bills to Be Paid. The following is a list of bills or expenses relating to labor or materials used on the Project that will be paid from the funds requested. This list contains the name and address of each person who subcontracted directly with Contractor and whom Contractor intends to pay from the requested funds.

Name and address of payee:

Description of bill or expense to be paid:

Amount to be paid:

Repeat above information as needed.

____

[Name of contractor]

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Form 7-21

This form may be used as written by an original contractor to fulfill the requirements of Tex. Prop. Code §§ 53.085, 53.258, 53.259; the wording may be modified if the affidavit is made for a subcontractor or supplier under Tex. Prop. Code § 53.085.

[Final] Bills-Paid Affidavit

Date:

Owner:

Owner's Mailing Address: [**include county**]

Contractor:

Contractor's Mailing Address: [**include county**]

Affiant: [**include relationship to contractor**]

Affiant's Mailing Address: [**include county**]

Property: [**include legal description**]

Improvements:

Affiant swears individually and on behalf of Contractor that the following statements are true and within the personal knowledge of Affiant:

1. Affiant has personal knowledge of the facts stated in this affidavit. Affiant has full authority to make the agreements in this affidavit on behalf of Contractor.

2. Affiant understands that Owner has required this affidavit as a condition of payment for labor or materials used in construction of the Improvements.

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3. Contractor has paid each of Contractor's subcontractors, laborers, and materialmen in full for all labor and materials provided to Owner or Contractor for construction of the Improvements, excepting only the amounts owed to the persons identified below:

List all subcontractors, laborers, and materialmen and amounts owed to each. If there are no unpaid subcontractors, laborers, or materialmen, state "None."

Name:

Address:

Telephone number:

Amount owed:

Repeat above information as needed.

Include the following if applicable.

Contractor warrants and represents that the following specified bills or classes of bills will be paid by Contractor from the funds paid to Contractor by Owner in reliance on this affidavit:

Name of payee or description of class:

Amount:

Repeat above information as needed.

Include the following if applicable.

In consideration of the funds paid to Contractor by Owner in reliance on this affidavit, Contractor waives and releases all of Contractor's statutory and constitutional mechanic's lien rights connected with the construction of the Improvements, conditioned on the actual payment or collection if payment is made by check or draft.

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Include the following if applicable.

Contractor agrees to indemnify and hold Owner harmless from any loss or expense resulting from false or incorrect information in this affidavit.

Continue with the following.

____
[Name of affiant]

SUBSCRIBED AND SWORN TO before me on ______________________________ by **[name of affiant]**.

____
Notary Public, State of Texas

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Form 7-22

The sworn account suit is the usual method by which a constitutional lien is foreclosed, and this petition initiates that kind of suit. By following the form petitions in chapter 14 of this manual, the attorney can modify this form to fit other situations. For other forms of party designation, see section 14.10. See also section 14.2 regarding exercising caution in pleading conditions precedent. The affidavit, statement of account, and any invoices must also be attached; abbreviations and other items in the account must be explained for clarity if necessary. The application for a writ of sequestration (form 7-23) should be filed when suit on the debt is filed. The sworn account procedure is discussed at section 14.21, and sequestration is discussed at sections 8.16 through 8.24.

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.

Caveat: In calculating the amount due on the account, do not include any interest that may have been posted to it.

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

Petition and Application to Foreclose Constitutional Lien on Personal Property

1. *Parties.* Plaintiff is [**name of plaintiff**], whose 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 numbers of Plaintiff's Social Security number are [**numbers**]./Plaintiff has not been issued a Social Security number.] Defendant is [**name of defendant**], who can be served with citation at [**address, city, state**].

2. *Facts.* In the usual course of business, Plaintiff [made/repaired] for Defendant the following article[s] of personal property: [**describe property**], as shown on the attached statement of account. Defendant accepted the article[s] and became bound to pay Plaintiff [its/their] designated price, which is a reasonable, usual, and customary price for such [an] item[s]. The statement of account is attached as Exhibit [**exhibit number/letter**] and incorporated by reference. This account represents a transaction or series of transactions of which a systematic record has been kept.

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3. *Debt.* Defendant has defaulted by failing to make payments on the account. The principal balance due Plaintiff on the account is $[**amount**] after all just and lawful offsets, payments, and credits have been allowed, as shown on Exhibit [**exhibit number/letter**]. Plaintiff has demanded that Defendant pay this amount, but Defendant has not done so.

4. *Conditions Precedent.* All conditions precedent have been performed or have occurred.

5. *Lien.* Under article XVI, section 37, of the Texas Constitution, Plaintiff holds a lien on the above-described article[s], because Plaintiff [made/repaired] the article[s] as requested by Defendant. [This/These] article[s] [is/are] now in Defendant's possession. Plaintiff has a right to repossess and reclaim possession of the article[s] under Plaintiff's right to enforce and satisfy Plaintiff's constitutional lien claim against the article[s].

6. *Attorney's Fees.* Defendant's default has made it necessary for Plaintiff to employ the undersigned attorney to file suit. This claim was timely presented to Defendant and remains unpaid. Reasonable fees for the attorney's services rendered and to be rendered through trial and appeal are at least $[**amount**].

7. *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 account;

    c. Plaintiff be granted foreclosure of the constitutional 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;

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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). Attach an affidavit for suit on a sworn account (form 14-2). Prepare an application for a writ of sequestration (form 7-23).

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Form 7-23

The lienholder should apply for a writ of sequestration on personal property subject to the lien at the time suit is filed on the debt; see sections 7.14:2, 8.16, and 8.17 in this manual. For a petition on a sworn account seeking foreclosure of the lien, see form 7-22. Additional sequestration forms are at forms 8-8 through 8-16. See section 14.10 for other forms of party designation. In most counties, the clerk will prepare the writ of sequestration and the return. In some cases, the attorney may wish to prepare them for the clerk.

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

> Use the same caption as in the petition and application to foreclose the constitutional lien unless the cause has been transferred.

Application and Affidavit for Writ of Sequestration in Suit on Constitutional Lien on Personal Property

1. *Parties.* Plaintiff, [**name of plaintiff**], whose address is [**address, city, state**], makes this Application for Writ of Sequestration. 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 the required findings by the court. The following paragraphs are sample allegations; the actual allegations must be drafted to fit the facts.

2. *Facts.* In this suit, now pending in this Court, Plaintiff is seeking damages from Defendant and foreclosure or enforcement of a constitutional lien pursuant to article XVI, section 37, of the Texas Constitution, in the following personal property: [**describe each item of property with sufficient certainty that it can be identified and distinguished from similar property**]. Each item of property has the following value: [**list each item and its value**]. All this property is in Defendant's possession at [**address, city, county**] County, Texas.

3. *Lien.* On [**date**], Plaintiff [delivered to Defendant/repaired] the property described above, for which Defendant still owes Plaintiff $[**amount**]. Defendant refuses to pay

this amount to Plaintiff. Plaintiff holds a lien on this property under article XVI, section 37, of the Texas Constitution, having [made/repaired] the property. This property is in Defendant's possession.

Select one of the following.

4. *Grounds.* Plaintiff fears that Defendant may convey the property to a third party without notice of Plaintiff's claim to a constitutional lien on the property, so that the conveyance would probably sever Plaintiff's constitutional lien.

Or

4. *Grounds.* Defendant refused to surrender possession of the property when specifically and rightfully requested by Plaintiff to do so. This refusal by Defendant is an intentional concealment of the property and therefore jeopardizes Plaintiff's lien on the property.

Continue with the following.

5. *Prayer.* Plaintiff prays that a writ of sequestration issue and that Plaintiff receive all further relief to which Plaintiff may be entitled.

____
[Name]
Attorney for Plaintiff
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:

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"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 a writ of sequestration in this cause.]

Select one of the following.

"I have personal knowledge of the facts stated above, and they are 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.

____
[Name of affiant]
Affiant

SIGNED under oath before me on __________________________.

____
Notary Public, State of Texas

Prepare the following to take to the hearing: form 8-9 (order for issuance of writ of sequestration), form 8-4 (bond to defendant), form 8-10 (writ of sequestration), and form 8-12 (officer's return).

Form 7-24

If a claimant or potential claimant is required to execute a waiver and release in exchange for or to induce the payment of a progress payment and is not paid in exchange for the waiver and release, or if a single payee check or joint payee check is given in exchange for the waiver and release, the waiver and release must substantially comply with the form below, described in Texas Property Code section 53.284(b). *See* Tex. Prop. Code § 53.284(a), (b).

Conditional Waiver and Release on Progress Payment
(Pursuant to Tex. Prop. Code § 53.284)

Project ________________

Job No. ________________

On receipt by the signer of this document of a check from ______________ (maker of check) in the sum of $_________ payable to ____________________ (payee or payees of check) and when the check has been properly endorsed and has been paid by the bank on which it is drawn, this document becomes effective to release any mechanic's lien right, any right arising from a payment bond that complies with a state or federal statute, any common law payment bond right, any claim for payment, and any rights under any similar ordinance, rule, or statute related to claim or payment rights for persons in the signer's position that the signer has on the property of ______________ (owner) located at __________________ ____________________ (location) to the following extent: ______________________ (job description).

This release covers a progress payment for all labor, services, equipment, or materials furnished to the property or to ________________ (person with whom signer contracted) as indicated in the attached statement(s) or progress payment request(s), except for unpaid retention, pending modifications and changes, or other items furnished.

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Before any recipient of this document relies on this document, the recipient should verify evidence of payment to the signer.

The signer warrants that the signer has already paid or will use the funds received from this progress payment to promptly pay in full all of the signer's laborers, subcontractors, materialmen, and suppliers for all work, materials, equipment, or services provided for or to the above referenced project in regard to the attached statement(s) or progress payment request(s).

Date ____________________________

____________________________________ (Company name)

By __________________________________ (Signature)

____________________________________ (Title)

STATE OF TEXAS)

COUNTY OF)

This instrument was ACKNOWLEDGED before me, the undersigned Notary Public, by ____________________________________ (signer's name), as ________________ (title) of ________________ (company) known to me to be the person whose name is subscribed to the foregoing instrument, who after being duly sworn acknowledged to me that the same was the act of ________________ (company) and that he/she executed same as an act of such company for the purposes and consideration stated therein and further swore that the foregoing was true and correct.

SUBSCRIBED AND SWORN TO on this the ______ day of ____________, 20____.

____

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Form 7-25

If a claimant or potential claimant is required to execute an unconditional waiver and release to prove the receipt of good and sufficient funds for a progress payment and the claimant or potential claimant asserts in the waiver and release that the claimant or potential claimant has been paid the progress payment, the waiver and release must substantially comply with the form below, described in Texas Property Code section 53.284(c). Tex. Prop. Code § 53.284(a), (c). The notice provision must appear at the top of the document, printed in bold type at least as large as the largest type used in the document, but not smaller than ten-point type. Tex. Prop. Code § 53.284(c)(1).

NOTICE: This document waives rights unconditionally and states that you have been paid for giving up those rights. It is prohibited for a person to require you to sign this document if you have not been paid the payment amount set forth below. If you have not been paid, use a conditional release form.

Unconditional Waiver and Release on Progress Payment (Pursuant to Tex. Prop. Code § 53.284)

Project ___________________

Job No. ___________________

The signer of this document has been paid and has received a progress payment in the sum of $___________ for all labor, services, equipment, or materials furnished to the property or to ____________________ (person with whom signer contracted) on the property of ______________________ (owner) located at _____________________ (location) to the following extent: _____________________ (job description). The signer therefore waives and releases any mechanic's lien right, any right arising from a payment bond that complies with a state or federal statute, any common law payment bond right, any claim for payment, and any rights under any similar ordinance, rule, or statute related to claim or payment rights for persons in the signer's position that the signer has on the above referenced project to the following extent:

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This release covers a progress payment for all labor, services, equipment, or materials furnished to the property or to _________________ (person with whom signer contracted) as indicated in the attached statement(s) or progress payment request(s), except for unpaid retention, pending modifications and changes, or other items furnished.

The signer warrants that the signer has already paid or will use the funds received from this progress payment to promptly pay in full all of the signer's laborers, subcontractors, materialmen, and suppliers for all work, materials, equipment, or services provided for or to the above referenced project in regard to the attached statement(s) or progress payment request(s).

Date ___________________________

________________________________ (Company name)

By _____________________________ (Signature)

________________________________ (Title)

STATE OF TEXAS)

COUNTY OF)

This instrument was ACKNOWLEDGED before me, the undersigned Notary Public, by _________________________________ (signer's name), as _______________ (title) of _______________ (company) known to me to be the person whose name is subscribed to the foregoing instrument, who after being duly sworn acknowledged to me that the same was the act of _______________ (company) and that he/she executed same as an act of such company for the purposes and consideration stated therein and further swore that the forego-ing was true and correct.

SUBSCRIBED AND SWORN TO on this the ______ day of ____________, 20____.

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____
NOTARY PUBLIC, STATE OF TEXAS

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Form 7-26

If a claimant or potential claimant is required to execute a waiver and release in exchange for or to induce the payment of a final payment and is not paid in good and sufficient funds in exchange for the waiver and release, or if a single payee check or joint payee check is given in exchange for the waiver and release, the waiver and release must substantially comply with the form below, described in Texas Property Code section 53.284(d). Tex. Prop. Code § 53.284(a), (d).

Conditional Waiver and Release on Final Payment (Pursuant to Tex. Prop. Code § 53.284)

Project ________________

Job No. ________________

On receipt by the signer of this document of a check from ______________ (maker of check) in the sum of $___________ payable to ___________________ (payee or payees of check) and when the check has been properly endorsed and has been paid by the bank on which it is drawn, this document becomes effective to release any mechanic's lien right, any right arising from a payment bond that complies with a state or federal statute, any common law payment bond right, any claim for payment, and any rights under any similar ordinance, rule, or statute related to claim or payment rights for persons in the signer's position that the signer has on the property of ___________________ (owner) located at _______ ____________________ (location) to the following extent: ____________________ (job description).

This release covers the final payment to the signer for all labor, services, equipment, or materials furnished to the property or to ________________ (person with whom signer contracted).

Before any recipient of this document relies on this document, the recipient should verify evidence of payment to the signer.

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The signer warrants that the signer has already paid or will use the funds received from this final payment to promptly pay in full all of the signer's laborers, subcontractors, materialmen, and suppliers for all work, materials, equipment, or services provided for or to the above referenced project up to the date of this waiver and release.

Date ____________________________

________________________________ (Company name)

By ______________________________ (Signature)

________________________________ (Title)

STATE OF TEXAS)

COUNTY OF)

This instrument was ACKNOWLEDGED before me, the undersigned Notary Public, by ____________________________________ (signer's name), as _______________ (title) of ________________ (company) known to me to be the person whose name is subscribed to the foregoing instrument, who after being duly sworn acknowledged to me that the same was the act of ________________ (company) and that he/she executed same as an act of such company for the purposes and consideration stated therein and further swore that the foregoing was true and correct.

SUBSCRIBED AND SWORN TO on this the ______ day of ____________, 20____.

____
NOTARY PUBLIC, STATE OF TEXAS

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Form 7-27

If a claimant or potential claimant is required to execute an unconditional waiver and release to prove the receipt of good and sufficient funds for a final payment and the claimant or potential claimant asserts in the waiver and release that the claimant or potential claimant has been paid the final payment, the waiver and release must substantially comply with the form below, described in Texas Property Code section 53.284(e). Tex. Prop. Code § 53.284(a), (e). The notice provision must appear at the top of the document, printed in bold type at least as large as the largest type used in the document, but not smaller than ten-point type. Tex. Prop. Code § 53.284(e)(1).

NOTICE: This document waives rights unconditionally and states that you have been paid for giving up those rights. It is prohibited for a person to require you to sign this document if you have not been paid the payment amount set forth below. If you have not been paid, use a conditional release form.

Unconditional Waiver and Release on Final Payment (Pursuant to Tex. Prop. Code § 53.284)

Project ____________________

Job No. ____________________

The signer of this document has been paid in full for all labor, services, equipment, or materials furnished to the property or to ____________________ (person with whom signer contracted) on the property of ______________________ (owner) located at ______________ ______________________ (location) to the following extent: __________________________ (job description). The signer therefore waives and releases any mechanic's lien right, any right arising from a payment bond that complies with a state or federal statute, any common law payment bond right, any claim for payment, and any rights under any similar ordinance, rule, or statute related to claim or payment rights for persons in the signer's position.

The signer warrants that the signer has already paid or will use the funds received from this final payment to promptly pay in full all of the signer's laborers, subcontractors, material-

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men, and suppliers for all work, materials, equipment, or services provided for or to the above referenced project up to the date of this waiver and release.

Date ____________________________

________________________________ (Company name)

By ______________________________ (Signature)

________________________________ (Title)

STATE OF TEXAS)

COUNTY OF)

This instrument was ACKNOWLEDGED before me, the undersigned Notary Public, by ______________________________ (signer's name), as ______________ (title) of ______________ (company) known to me to be the person whose name is subscribed to the foregoing instrument, who after being duly sworn acknowledged to me that the same was the act of ______________ (company) and that he/she executed same as an act of such company for the purposes and consideration stated therein and further swore that the foregoing was true and correct.

SUBSCRIBED AND SWORN TO on this the ______ day of ____________, 20____.

____

NOTARY PUBLIC, STATE OF TEXAS

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Chapter 8

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Chapter 8

Prejudgment Remedies

I. Prejudgment Remedies Generally

§ 8.1 Use of Prejudgment Remedies

The prejudgment remedies discussed in this chapter are typically used after suit is filed, but before judgment is obtained, to preserve the debtor's assets for satisfying the eventual judgment. Note that an alternative remedy not covered in this chapter may be available for an employee who is owed wages as prescribed by Tex. Lab. Code §§ 61.051–.067.

§ 8.2 Summary of Prejudgment Remedies

§ 8.2:1 Mechanic's and Other Liens

Liens commonly encountered in collections work not involving real property are constitutional mechanic's liens; farm, factory, or store worker's liens; worker's possessory liens; and landlord's liens. See chapter 7 in this manual for a discussion of liens and chapter 28 for a discussion of landlord-tenant law.

§ 8.2:2 Garnishment

Prejudgment garnishment allows a creditor to reach assets of the debtor that are in possession of a third party, including debts that third parties owe to the debtor, to secure the property until judgment is entered. See sections 8.11 through 8.15 below regarding prejudgment garnishment.

§ 8.2:3 Sequestration

Sequestration enables a secured creditor to preserve his collateral until a disputed claim to the collateral is settled by disposition of the underlying case. See sections 8.16 through 8.24 below regarding sequestration.

§ 8.2:4 Attachment

Attachment enables an unsecured creditor (or a creditor without a claim on subject property) to preserve the debtor's nonexempt property for satisfaction of a probable judgment in the underlying case. Generally, the plaintiff must show that the defendant plans to hide property or otherwise cause the plaintiff to lose the ability to collect a debt. Attachment is effected by an officer's authorized seizure and retention of the debtor's nonexempt property. See sections 8.25 through 8.32 below regarding attachment.

§ 8.2:5 Distinction between Garnishment, Sequestration, and Attachment

The foregoing judicial prejudgment remedies are often confused. Briefly, garnishment reaches the defendant's property in the hands of a third party, such as a bank in which the defendant has deposited funds. Sequestration reaches any of the debtor's property in which the creditor has a secured interest, regardless of its exempt status. Attachment reaches any nonexempt property of the debtor.

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§ 8.2:6 Injunction

Injunctions are used in collections litigation to maintain the status quo regarding property in dispute pending outcome of the litigation. *See Transport Co. of Texas v. Robertson Transports, Inc.*, 261 S.W.2d 549, 553 (Tex. 1953). An injunction may be used to enjoin a debtor from selling, alienating, or further encumbering property. See sections 8.33 through 8.40 below regarding injunction.

§ 8.3 Cautions Regarding Use of Prejudgment Remedies

§ 8.3:1 Effect on Debtor

Using any of the prejudgment remedies discussed in this chapter as coercive measures may backfire on the creditor. The debtor may respond by filing bankruptcy and using the avoidance powers of the Bankruptcy Code to nullify any such action made within ninety days of filing. *See, e.g., Weaver v. Aquila Energy Marketing Corp.*, 196 B.R. 945, 950–51 (S.D. Tex. 1996) (natural gas seller's writ of garnishment against nonpaying purchaser, granted by trial court less than ninety days before purchaser's filing for bankruptcy, was later avoided in bankruptcy proceedings). The debtor could also file a counterclaim or cross-claim (for destruction of his business, for example) for an amount much greater than the creditor's claim.

§ 8.3:2 Affidavits and Unsworn Declarations by Attorneys

Although the applicable statutes allow it, attorneys should not sign affidavits on their clients' behalf unless they have actual knowledge of the facts set out in the affidavit. The general risks involved if attorneys execute affidavits are discussed at section 19.17:3 in this manual. The additional risks in seeking writs of garnishment, sequestration, or attachment in prejudgment proceedings should make the attorney even more cautious, because wrongful issuance of the writ can lead to substantial damages, potentially rendering both client and attorney liable. Therefore, only a person with actual, personal knowledge of the facts, preferably a personal representative of the creditor, should sign an affidavit supporting an application for a writ for any of these prejudgment remedies. Similarly, attorneys should avoid executing an unsworn declaration under Tex. Civ. Prac. & Rem. Code § 132.001 in support of a prejudgment remedy.

§ 8.3:3 Form Pleadings

Because of the constitutional problems and challenges surrounding prejudgment remedies and the possibility of substantial damages arising from a successful counterclaim, the manual committee emphasizes that the attorney should take the highest degree of care in drafting an application for a writ and a supporting affidavit or unsworn declaration. These documents are never routine forms, but rather pleadings that detail in each case the uniqueness of the "immediate danger" or threat to the likelihood of the plaintiff's recovery on the debt.

§ 8.4 Indemnity Bonds

An officer must execute a writ issued by a Texas court without requiring a bond indemnifying him, and he is not liable for damages resulting from execution of a writ if he in good faith executes or attempts to execute the writ as provided by law. Tex. Civ. Prac. & Rem. Code § 7.003; *see also Richardson v. Parker*, 903 S.W.2d 801, 804 (Tex. App.—Dallas 1995, no writ). An officer is liable, however, for injury or loss resulting from his own negligence. Tex. Civ. Prac. & Rem. Code § 34.061. For further discussion of this topic, see section 27.23 in this manual.

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[Sections 8.5 through 8.10 are reserved for expansion.]

II. Judicial Prejudgment Remedies

Prejudgment remedies are extraordinary remedies codified in Title 3 of the Civil Practices and Remedies Code, and their associated ancillary proceedings are governed by part VI of the Texas Rules of Civil Procedure. Tex. Civ. Prac. & Rem. Code §§ 61.001–66.003; Tex. R. Civ. P. 592–734. Their use should be in strict compliance with prescriptions therein.

§ 8.11 Prejudgment Garnishment Generally

§ 8.11:1 Purpose and Use of Prejudgment Writ of Garnishment

Prejudgment garnishment is an extraordinary remedy by which a creditor (the plaintiff) can, before judgment, prevent a third party (the garnishee) from delivering any effects or paying any debt owed by the garnishee to a defendant debtor. Tex. Civ. Prac. & Rem. Code §§ 63.001–.008. If the garnishee is a corporation or a joint-stock company, after service of the writ the garnishee may not permit or recognize a sale or transfer of shares or an interest alleged to be owned by the defendant. Tex. Civ. Prac. & Rem. Code § 63.003. Both prejudgment and postjudgment garnishment remedies are governed by Tex. Civ. Prac. & Rem. Code §§ 63.001–.008 and Tex. R. Civ. P. 657–679. For a discussion of postjudgment garnishment, see part IV. in chapter 27 of this manual.

§ 8.11:2 Constitutionality

The Texas prejudgment garnishment statutes and rules meet federal constitutional requirements. *Southwest Metal Fabricators v. Internacional de Aceros, S.A.*, 503 F. Supp. 76 (S.D. Tex. 1980); *Lincoln Ten, Ltd. v. White*, 706 S.W.2d 125 (Tex. App.—Houston [14th Dist.] 1986, no writ).

§ 8.11:3 Availability of Prejudgment Garnishment

A prejudgment writ of garnishment is available if—

1. an original attachment has been issued; or
2. the plaintiff sues on the debt and makes an affidavit that—
   a. the debt is just, due, and unpaid;
   b. within the plaintiff's knowledge, the defendant does not possess property in Texas subject to execution sufficient to satisfy the debt; and
   c. the garnishment is not sought to injure the defendant or the garnishee.

Tex. Civ. Prac. & Rem. Code § 63.001(1), (2). Observe that Tex. Civ. Prac. & Rem. Code § 63.001(3) is applicable only when the plaintiff has a valid, subsisting judgment it is seeking to enforce.

§ 8.11:4 Risks to Creditor in Seeking Prejudgment Garnishment

As with all prejudgment remedies, caution must be used in seeking the writ of garnishment before judgment. Issuance of a writ before judgment may force a defendant out of business or may cause him severe economic loss, and the creditor's attorney must be sure the client is

aware of the risks involved and has assented to the procedure. A debtor may institute proceedings for wrongful garnishment in some circumstances. Significant federal constitutional issues may also be involved.

§ 8.12 Garnishment Procedure

§ 8.12:1 When Writ Available

An application for a prejudgment writ of garnishment may be filed either at the commencement of a suit or at any time during its progress. Tex. R. Civ. P. 658.

§ 8.12:2 Availability against Financial Institutions

Garnishment may not be issued against or served on a financial institution that has its principal office or a branch in Texas to collect a prospective money judgment against the financial institution before the judgment is final and all appeals have been foreclosed by law. Tex. Fin. Code § 59.007(a). "Financial institution" means a bank, savings association, or savings bank maintaining an office, branch, or agency office in this state. Tex. Fin. Code § 31.002(25).

§ 8.12:3 Availability against Customer of Financial Institution

Prejudgment garnishment is available against a customer of a financial institution. Tex. Fin. Code §§ 59.007(b), 59.008.

A claim against a customer of a financial institution must be delivered or served as otherwise required or permitted by law at the address designated as the address of the registered agent of the financial institution in a registration filed with the secretary of state pursuant to Tex. Fin. Code § 201.102 (out-of-state financial institutions) or Tex. Fin. Code § 201.103 (Texas financial institutions). A claim against a customer of a financial institution that has complied with Tex. Fin. Code §§ 201.102, 201.103 will be ineffective as to the financial institution unless it is served or delivered to the registered address. However, the customer bears the burden of preventing or limiting the institution's compliance by seeking an appropriate remedy, including a restraining order, injunction, protective order, or other appropriate remedy. If the financial institution has not filed a registration with the secretary of state pursuant to Tex. Fin. Code §§ 201.102, 201.103, the institution is subject to service or delivery of all claims against customers of the financial institution as otherwise provided by law. Tex. Fin. Code § 59.008.

§ 8.12:4 Application

The application must be supported by an affidavit of the plaintiff, his agent, his attorney, or another person having personal knowledge of relevant facts. It must meet all statutory requirements and must state grounds for issuing the writ and specific facts relied on by the plaintiff sufficient to warrant the required findings by the court. Two or more grounds for the writ may be stated conjunctively or disjunctively. Tex. R. Civ. P. 658. An application is at form 8-1 in this chapter. An amendment to the Civil Practices and Remedies Code authorizes the use of an unsworn declaration in lieu of an "affidavit required by statute or required by rule, order, or requirement adopted as provided by law." Act of May 25, 2011, 82d Leg., R.S., ch. 847, § 1 (current version at Tex. Civ. Prac. & Rem. Code § 132.001). The statutory form for an unsworn declaration with its jurat is at form 19-5 in this manual. The unsworn declaration must (1) be in writing, (2) be subscribed by the person making the declaration as true under penalty of perjury, and (3) include a jurat in prescribed form. The substantial form of the required jurat is set forth in Tex. Civ. Prac. & Rem. Code § 132.001(d). The second requirement (subscription under penalty of perjury) appears to supplant an affidavit's requirements showing affirmatively that it

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is based on personal knowledge, the facts sought to be proved would be "admissible in evidence" at a conventional trial, and the facts recited therein are "true and correct."

§ 8.12:5 Affidavit—Information and Belief or Personal Knowledge

An affidavit must be made on personal knowledge and must contain facts that would constitute admissible evidence. Facts may be stated on information and belief if the grounds for such belief are specifically stated. The trial court has discretion to determine whether an affidavit meets the "personal knowledge" requirement of Tex. R. Civ. P. 658. *See Metroplex Factors, Inc. v. First National Bank*, 610 S.W.2d 862, 865 (Tex. Civ. App.—Fort Worth 1980, writ ref'd n.r.e.); *see also Hudler-Tye Construction, Inc. v. Pettijohn & Pettijohn Plumbing, Inc.*, 632 S.W.2d 219, 222 (Tex. App.—Fort Worth 1982, no writ). An affidavit not affirmatively stating the specific grounds for issuance and the specific acts of the defendant entitling the plaintiff to issuance of the writ will not support issuance of the writ. If the affidavit is made on information and belief, the grounds for that belief must be specifically stated. *El Periodico, Inc. v. Parks Oil Co.*, 917 S.W.2d 777, 778–79 (Tex. 1996). The attorney should not execute the affidavit unless he has personal knowledge of relevant facts. See sections 8.3:2 and 19.17:3 in this manual. An affidavit is at form 8-2 in this chapter.

§ 8.12:6 Statutory Requirements for Affidavit or Unsworn Declaration in Lieu Thereof

The affidavit or unsworn declaration in lieu thereof must state that—

1. the debt is just, due, and unpaid;
2. within the plaintiff's knowledge, the defendant does not possess property in Texas subject to execution sufficient to satisfy the debt; and
3. the garnishment is not sought to injure the defendant or the garnishee.

Tex. Civ. Prac. & Rem. Code § 63.001(2). The rule has not been amended to address unsworn declarations authorized by Tex. Civ. Prac. & Rem. Code § 132.001. Tex. Civ. Prac. & Rem. Code § 132.001.

The plaintiff is not required to prove as a matter of fact that the debtor does not have assets sufficient to satisfy the debt. The statute requires only that the plaintiff have no knowledge of any property owned by the defendant within the state sufficient to satisfy the debt. Tex. Civ. Prac. & Rem. Code § 63.001(2)(B), (3); *cf. 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.) (trial court's order quashing postjudgment garnishment was reversed when plaintiff made affidavit that defendant had not, within his knowledge, property in his possession within this state, subject to execution, sufficient to satisfy such judgment; statute does not expressly or impliedly state that plaintiff must prove such as matter of fact).

The fact that the affidavit fails to state that within the plaintiff's knowledge the debtor does not possess property in Texas subject to execution sufficient to satisfy the debt does not give the debtor a claim for wrongful garnishment (although it may serve as a basis for quashing the writ on the garnishee's motion). *Cf. Canyon Lake Bank v. Townsend*, 649 S.W.2d 809 (Tex. App.—Austin 1983, writ ref'd n.r.e.) (postjudgment garnishment case construing affidavit requirement identical to affidavit requirement for prejudgment garnishment under Tex. Civ. Prac. & Rem. Code § 63.001(2)(B)).

Significant defects in a garnisher's affidavit may be waived by the garnishee if the garnishee fails to appear and answer. *See Sherry Lane National*

Bank v. Bank of Evergreen, 715 S.W.2d 148, 150 (Tex. App.—Dallas 1986, writ ref'd n.r.e.).

§ 8.12:7 Hearing

A hearing must be held before a prejudgment writ of garnishment may issue. The hearing may be ex parte. Tex. R. Civ. P. 658.

§ 8.12:8 Order for Prejudgment Garnishment

The court's order must make specific findings of facts to support the statutory grounds found to exist. The order must also specify the maximum value of property or indebtedness that may be garnished and the amount of the bond required of the plaintiff. The court further must find the amount of bond required for the defendant to replevy. Unless the defendant exercises his option under Tex. R. Civ. P. 664, this amount must be the amount of the plaintiff's claim, one year's accrual of interest (if allowed by law), and the estimated costs of court. The court's order may direct issuance of more than one writ at the same time, or in succession, to be sent to different counties. Tex. R. Civ. P. 658. An order is at form 8-3 in this chapter.

§ 8.13 Other Garnishment Issues

§ 8.13:1 Garnishee's Duty to Raise Debtor's Defenses

The garnishee has a duty to raise any of the defendant's defenses to the garnishment of which he is aware. This duty is not discharged by notifying the defendant of the garnishment action. *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.).

§ 8.13:2 Bond for Prejudgment Garnishment

Before issuance of a prejudgment writ of garnishment, a bond payable to the defendant in the amount set by the court, with sufficient surety or sureties as provided by statute, must be filed by the party applying for the writ. After notice to the opposite party, before or after issuance of the writ, a motion may be filed to increase or reduce the amount of the bond. Tex. R. Civ. P. 658a. For detailed provisions covering the bond and hearing to reduce the amount of the bond, see Tex. R. Civ. P. 658a. A bond is at form 8-4 in this chapter.

§ 8.13:3 Service of Writ on Garnishee and Defendant

Once the application, affidavit, and bond are filed, the case must be docketed in the name of the plaintiff as plaintiff and the garnishee as defendant, and the writ of garnishment must be served on the garnishee. Tex. R. Civ. P. 659. Copies of the writ, the application, accompanying affidavit(s), and the order must be served on the defendant as soon as practicable following service of the writ on the garnishee. Tex. R. Civ. P. 663a. The forms of the writ and notice to the defendant are prescribed in Tex. R. Civ. P. 661 and 663a. For a writ to be served on the garnishee, see form 8-5 in this chapter; for a notice to the defendant, see form 8-7. Form 8-6 is the officer's return. In *Walnut Equipment Leasing Co. v. J-V Dirt & Loam*, 907 S.W.2d 912, 916 (Tex. App.—Austin 1995, writ denied), a postjudgment garnishment case, the court held that the garnisher must serve the debtor in accordance with Tex. R. Civ. P. 663a; failure to do so is fatal to the creditor's garnishment action, even though the debtor may have actual notice of it. *See also Mendoza v. Luke Furia Investments, Inc.*, 962 S.W.2d 650, 652 (Tex. App.—Corpus Christi 1998, no pet.) (holding garnishor to strict compliance with Tex. R. Civ. P. 663a's requirements in serving

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postjudgment writ of garnishment); *Hering v. Norbanco Austin I, Ltd.*, 735 S.W.2d 638, 641–42 (Tex. App.—Austin 1987, writ denied) ("We conclude that Rule 663a is unambiguous and means exactly what it says—the debtor must be served."); *contra Del-Phi Engineering Associates v. Texas Commerce Bank-Conroe, N.A.*, 771 S.W.2d 589, 592 (Tex. App.—Beaumont 1989, no writ) (debtor waived statutorily required notice by appearing at hearing on motion to dissolve writ of garnishment). The better practice is comply with rule 663a and serve the defendant with notice.

For discussion of service on a garnishee-financial institution, see section 27.59:2 in this manual.

It is recommended that, instead of serving the defendant personally or by e-mail, 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. The notice at form 8-7 is to be used as a cover sheet only and not as a substitute for the writ with notice language included on it. These forms are usually prepared by the clerk of the court.

Although the debtor must be served with notice of the garnishment proceedings, the garnishee does not have standing to sue or to appeal based on a right of service belonging to the debtor. *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.).

After service of the writ "the garnishee may not deliver any effects or pay any debt to the defendant." Any such delivery or payment is void as to the amount of the debt, effects, shares, or interest necessary to satisfy the plaintiff's demand. Tex. Civ. Prac. & Rem. Code § 63.003(a), (b).

§ 8.13:4 Replevy by Defendant

At any time before judgment, the defendant may replevy all or part of the garnished property (or the proceeds from sale of the garnished property if it has been sold under order of the court) by posting bond. Tex. R. Civ. P. 664. The court must find in its order for issuance of a writ of garnishment the amount of bond required for the defendant to replevy. Tex. R. Civ. P. 658. This amount must be the amount of the plaintiff's claim, one year's interest if allowed by law on the claim, and the estimated costs of court, unless the defendant exercises his option under rule 664 to post bond in the amount of the value of the property, as estimated by the officer who levied the writ, plus one year's interest at the legal rate. Tex. R. Civ. P. 658, 664. On reasonable notice (which may be less than three days), the amount or denial of the bond, the sufficiency of the sureties, or the estimated value of the property may be reviewed, on motion of either party, by the court that authorized issuance of

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the writ. Tex. R. Civ. P. 664. On motion by the defendant with reasonable notice to the opposing party (which may be less than three days), the defendant may move to substitute other property for the property garnished. Tex. R. Civ. P. 664.

§ 8.13:5 Motion to Dissolve or Modify Writ

A defendant whose property or account has been garnished or any intervening party claiming an interest in garnished property may seek by sworn written motion to dissolve or modify the writ. Tex. R. Civ. P. 664a. *But see Central Park Bank v. LeBlanc*, 659 S.W.2d 872 (Tex. App.—San Antonio 1983, no writ), in which the court approved the unsworn motion of the *garnishee* to dissolve the writ, saying the error, if any, was harmless. The lack of a sworn motion was a pleading error that, unless controverted by motion, plea in abatement, or special exception, was waived.

The motion to dissolve or modify "shall admit or deny each finding of the order directing the issuance of the writ except where the movant is unable to admit or deny the finding, in which case movant shall set forth the reasons why he cannot admit or deny." Tex. R. Civ. P. 664a. This requirement does not necessarily mean that the denial must appear on the face of the motion, or that each individual finding must be separately denied. *See Glassman & Glassman v. Somoza*, 694 S.W.2d 174, 177 (Tex. App.—Houston [14th Dist.] 1985, no writ) (motion that set forth findings of court and attached affidavit that denied "the findings set out above" sufficient, because requirements of rule 664a met by reading motion and affidavit together); *see also Metroplex Factors, Inc. v. First National Bank*, 610 S.W.2d 862, 866–67 (Tex. Civ. App.—Fort Worth 1980, writ ref'd n.r.e.) (defendant's motion to quash, which discussed court's findings but did not specifically enumerate admissions or denials of findings, sufficient to comply with Tex. R. Civ. P. 664a).

§ 8.13:6 Hearing on Motion to Dissolve or Modify

The motion to dissolve must be heard promptly, after reasonable notice to the plaintiff (which may be less than three days), and the issue must be determined not later than ten days after the motion is filed. The parties may agree to an extension of time. Filing a motion to dissolve stays further proceedings under the writ until after the hearing on the motion. Exceptions exist for perishable property. Tex. R. Civ. P. 664a.

§ 8.13:7 Burden of Proof for Motion to Dissolve or Modify

The movant for dissolution or modification has the burden to prove that the reasonable value of the property garnished exceeds the amount necessary to secure the debt, interest for one year, and probable costs. The movant also has the burden to prove facts to justify substitution of property. Tex. R. Civ. P. 664a.

The plaintiff has the burden to prove the grounds relied on for issuance of the writ. Tex. R. Civ. P. 664a. Any failure to carry this burden with respect to each statutory ground will require the trial court to dissolve the writ. *Huie-Clark Joint Venture v. American States Insurance Co.*, 629 S.W.2d 109, 110–11 (Tex. App.—Dallas 1981, writ ref'd n.r.e.).

§ 8.14 Third-Party Rights to Garnished Property

Garnishment of a debt represented by a promissory note does not affect the rights of a holder in due course, even though the garnishment action occurred before the negotiation of the note. The debtor has the responsibility to protect himself by bringing into the garnishment case all claimants to the property to be garnished. Failure to

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do so may subject the debtor to double liability. *Williams v. Stansbury*, 649 S.W.2d 293, 296 (Tex. 1983) (purchaser of promissory note with holder-in-due-course status had right to demand that debtor pay note according to its terms and was not require to intervene in postjudgment garnishment proceeding in order to protect his rights; debtor had responsibility to bring into garnishment case all claimants to note in order to protect himself).

It has been held an abuse of discretion for the trial court to deny intervention in a garnishment proceeding to one who would be deprived of a substantial right to assert a security interest to the fund that is subject to garnishment. *Apparel Contractors v. Vantage Properties*, 620 S.W.2d 666, 668 (Tex. Civ. App.—Dallas 1981, writ ref'd n.r.e.) (postjudgment garnishment).

§ 8.15 Wrongful Garnishment

Note: Most Texas cases concerning wrongful garnishment are based on wrongful postjudgment garnishment. See section 27.71 in this manual.

A garnishment is wrongful if the facts set forth in the affidavit are false. *Chandler v. Cashway Building Materials, Inc.*, 584 S.W.2d 950, 952 (Tex. Civ. App.—El Paso 1979, no writ) (postjudgment garnishment). However, even if the applicant for the writ swears falsely that he knows of no property in Texas possessed by the debtor subject to execution and sufficient to satisfy the debt, the debtor may not recover for wrongful garnishment unless he pleads and proves that he does in fact have nonexempt property in Texas sufficient to satisfy the debt and that the plaintiff knew as much before applying for the writ. *King v. Tom*, 352 S.W.2d 910, 913 (Tex. Civ. App.—El Paso 1961, no writ). *But see Barr v. Cardiff*, 75 S.W. 341 (Tex. Civ. App. 1903, writ ref'd) (ground alleged by plaintiff for suing out writ of garnishment did not in fact exist, and even though affiant believed its existence, writ held to be wrongfully sued out, resulting in actual damage to defendant). This analysis and result would apply for false statements in an unsworn declaration under Tex. Civ. Prac. & Rem. Code § 132.001.

Damages may be recovered for wrongful garnishment for injuries proximately caused by the wrongful act. *Aetna Casualty & Surety Co. v. Raposa*, 560 S.W.2d 106, 110 (Tex. Civ. App.—Fort Worth 1977, writ dism'd by agr.).

§ 8.16 Sequestration Generally

§ 8.16:1 Purpose and Use

Sequestration is the extraordinary remedy by which, before judgment, a creditor can possess the goods securing his debt or one claiming title to disputed property can effectively control possession while the dispute is justly settled. Tex. Civ. Prac. & Rem. Code §§ 62.001–.063.

Sequestration differs from attachment in that it requires the claimant to have an interest in the sequestered property. *See* Tex. Civ. Prac. & Rem. Code § 62.001. It is pursued as an ancillary remedy to an underlying claim.

Through use of the writ of sequestration, the property is physically (or constructively, in the case of real property) possessed by a sheriff or constable and placed in the court's custody until the property interest claimed by the creditor can be established. The most common use of the writ is by commercial lenders whose loans are secured by security interests in personal property, such as automobiles, trucks, tractors and trailers, boats, and airplanes. And in the oil field, it may apply to loans secured by drilling rigs and drilling or oil field equipment. The Texas sequestration statutes and rules are located at Tex. Civ. Prac. & Rem. Code §§ 62.001–.063 and Tex. R. Civ. P. 696–716.

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§ 8.16:2 Constitutionality

The Texas sequestration statutes and rules are constitutional. *Marrs v. South Texas National Bank*, 686 S.W.2d 675, 678 (Tex. App.—San Antonio 1985, writ ref'd n.r.e.); *Monroe v. General Motors Acceptance Corp.*, 573 S.W.2d 591, 594 (Tex. Civ. App.—Waco 1978, no writ).

§ 8.16:3 Availability—Title, Possession, Enforcement of Lien

Sequestration is available to the plaintiff if he sues for title to or possession of real property, personal property, or fixtures or for the foreclosure or enforcement of a mortgage, lien, or security interest in the property and a reasonable conclusion may be drawn that there is immediate danger that the defendant or the party in possession will conceal, dispose of, ill-treat, waste, or destroy the property or remove it from the county. Tex. Civ. Prac. & Rem. Code § 62.001(1), (2).

Sequestration is available to a plaintiff in a suit to try title to real property, to remove a cloud on the title, to foreclose a lien, or to partition real property if the plaintiff makes an oath that one or more of the defendants is a nonresident of Texas. Tex. Civ. Prac. & Rem. Code § 62.001(4); *but see Shaffer v. Heitner*, 433 U.S. 186 (1977) (minimum contacts required for sequestration of nonresident's property).

§ 8.16:4 Ejectment

Sequestration is also available to a plaintiff if he sues for title to or possession of property from which he has been ejected by force or violence. Tex. Civ. Prac. & Rem. Code § 62.001(3).

§ 8.16:5 Claim on Personal Property Not Due

A writ of sequestration may be issued for personal property under a mortgage or lien even though the right of action on the mortgage or lien has not accrued. In these cases, final judgment may not be rendered against the defendant until the right of action has accrued. Tex. Civ. Prac. & Rem. Code § 62.003.

§ 8.17 Sequestration Procedure

§ 8.17:1 When Writ Available

An application for a prejudgment writ of sequestration may be filed either at the commencement of the suit or at any time during its progress. Tex. R. Civ. P. 696.

§ 8.17:2 Application

The application must be made under oath and must set out specific facts that state the nature of the claim, the amount in controversy (if any), and the grounds for issuance of the writ. Tex. Civ. Prac. & Rem. Code § 62.022. Two or more grounds may be stated conjunctively or disjunctively. The property to be sequestered must be described with such certainty that it may be identified and distinguished from like property, and the value of each article and the county in which each article is located must be stated. Tex. R. Civ. P. 696. For an application and affidavit, see form 8-8 in this chapter. For the sequestration of motor vehicles, many courts and constables require the use of the vehicle identification number in order to accurately distinguish the vehicle to be sequestered from other vehicles of a similar make and model.

§ 8.17:3 Affidavit

The application must be supported by an affidavit of the plaintiff, his agent, his attorney, or

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other persons having knowledge of relevant facts. Tex. R. Civ. P. 696. (The rule has not been amended to address unsworn declarations authorized by Tex. Civ. Prac. & Rem. Code § 132.001.) The application and affidavit must be made on personal knowledge and must state facts that would be admissible in evidence. However, the facts may be stated on information and belief if the grounds of such belief are specifically stated. Tex. R. Civ. P. 696. In this manual the application and affidavit are combined; see form 8-8 in this chapter.

See section 8.12:6 for a discussion on the use of an unsworn declaration in lieu of an affidavit authorized by Tex. Civ. Prac. & Rem. Code § 132.001. Attorneys generally should not execute an unsworn declaration in support of a client's application. See sections 8.3:2 and 19.17:3 in this manual.

§ 8.17:4 Hearing

Before the writ can issue, the court must hold a hearing. Tex. R. Civ. P. 696. The hearing may be ex parte, but some courts require notification to the defendant (or his attorney, if known) by telephone, or otherwise, of the hearing. The only evidence typically considered by the court is the sworn pleadings. See section 8.19:2 below regarding service of the writ.

If a judge for the court in which the application is pending is unavailable, the party requesting sequestration may be able to have the order signed by another judge sitting in that county, subject to local rules. *See, e.g.*, Tex. Gov't Code § 74.094(a) (district and statutory county court judges have authority to conduct hearings and sign orders for other courts without transferal of case. The judgment, order, or action is valid and binding as if the case were pending in the court of the judge who acts in the matter.).

§ 8.17:5 Order

No writ may issue except on written order of the court. Tex. R. Civ. P. 696. The court's order must include—

1. specific findings of fact supporting the statutory grounds for the issuance of the writ found by the court to exist;
2. a clear description of each item of property to be sequestered so that it may be identified and distinguished from like property;
3. the value of each item of property to be sequestered;
4. the county in which each item is located;
5. the amount of bond required of the plaintiff (see section 8.18 below); and
6. the amount of bond required of the defendant to replevy (see section 8.21 below).

Tex. R. Civ. P. 696. The order may direct the issuance of several writs at the same time or in succession, to be sent to different counties. Tex. R. Civ. P. 696. For an order of sequestration, see form 8-9 in this chapter.

It is good practice to contact the sheriff or constable to whom the writ will be sent before drafting the order, so that the order may address any particular concerns or requirements of that office. For example, some constables require that the order specify that the property may be returned to the plaintiff without the requirement of a replevy bond, as long as the sequestration bond complies with the requirements of rule 708 of the Texas Rules of Civil Procedure. Additionally, some constables will allow the plaintiff to select the location for storage of the sequestered property during the ten-day replevy period, as long as the order contains language to that effect. There may be other additional concerns or requirements.

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It is also advisable to obtain a certified copy of the order and the sequestration and replevy bonds, because some sheriffs and constables require production of these documents before the sequestered property will be released to the plaintiff.

§ 8.18 Plaintiff's Sequestration Bond

§ 8.18:1 Requisites of Sequestration Bond

Before the writ can issue, the court must fix the amount of the applicant's sequestration bond to the defendant. The bond is to be set in the amount that would adequately compensate the defendant if the plaintiff were to fail to prosecute the suit to effect and pay all damages and costs adjudged against him for wrongfully suing out the writ, including the elements of damages stated in Tex. Civ. Prac. & Rem. Code §§ 62.044, 62.045. Tex. R. Civ. P. 696. A bond is at form 8-4 in this chapter.

§ 8.18:2 Conditions of Sequestration Bond

The bond must be conditioned that the plaintiff will prosecute his suit to effect and pay, to the extent of the penal amount of the bond, all damages and costs adjudged against the plaintiff in case it shall be decided that the writ of sequestration was wrongfully issued. Tex. R. Civ. P. 698.

The plaintiff may combine the conditions of the sequestration bond with the further conditions listed in rule 708 for a plaintiff's replevy bond. If the plaintiff combines the sequestration and replevy bond language in its initial bond, the plaintiff will not later be required to give an additional bond to replevy unless the court orders otherwise. Tex. R. Civ. P. 698, 708. See section 8.22 below regarding replevy by the plaintiff.

§ 8.18:3 Sureties and Modification of Bond

The bond must be executed by the surety or sureties as provided by statute, to be approved by the officer issuing the writ. Either party, before or after issuance of the writ, may file a motion to increase or decrease the amount of the bond or to question the sufficiency of the sureties; a hearing is required. Tex. R. Civ. P. 698.

§ 8.18:4 Release of Bond

The plaintiff should remember to include in any judgment, settlement, or other order disposing of the litigation language releasing the plaintiff and its surety from continued liability on the sequestration bond.

§ 8.19 Writ of Sequestration

§ 8.19:1 Requisites of Writ

The writ must be directed "to the Sheriff or any Constable within the State of Texas" (not naming a specific county) and must command him to take the described property into his possession if it is found in his county and to keep it, subject to further order of the issuing court, unless it is replevied. Tex. R. Civ. P. 699. The writ must describe the property as it is described in the application or affidavits. On the face of the writ, "in ten-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 claimed by you have been sequestered. 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

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RIGHT TO SEEK TO REGAIN POSSESSION OF THE PROPERTY BY FILING WITH THE COURT A MOTION TO DISSOLVE THIS WRIT.

Tex. R. Civ. P. 700a; *see also* Tex. Civ. Prac. & Rem. Code § 62.023; Tex. R. Civ. P. 699. A writ of sequestration is at form 8-10 in this chapter.

§ 8.19:2 Service of Writ on Defendant

The defendant must be served with a copy of the writ, the application, accompanying affidavits, and the court's order in "any manner provided for service of citation" or as provided for in Tex. R. Civ. P. 21a. Tex. R. Civ. P. 700a. Rule 21a provides for service electronically through the electronic filing manager, in person, by mail, by commercial delivery service, by fax, by e-mail, or by such other manner as the court in its discretion may direct. A notice, in ten-point type and in a manner calculated to advise a reasonably attentive person of its contents, concerning replevy rights must be prominently displayed on the face of the copy of the writ served on the defendant. Service must be had on the defendant "as soon as practicable following the levy of the writ" and not before. Tex. R. Civ. P. 700a. The defendant should not be served until after sequestration has occurred. For a notice to the defendant, see form 8-11 in this chapter.

Practice Note: It is recommended that, instead of serving the defendant personally or by e-mail, his copy of the application and affidavit be served by certified mail, return receipt requested, and by regular mail.

§ 8.19:3 Failure of Defendant to Surrender Property

Often the defendant is served contemporaneously with execution of the writ, because the defendant is the party likely to be in possession of the property to be sequestered. If the defendant fails or refuses to surrender the property to the officer executing the writ, the plaintiff should have the defendant served with a copy of the writ and order and proceed with a motion for contempt against the defendant for failure to abide by the court's order. After notice and a hearing, the defendant may be held in contempt of court. Alternatively, the plaintiff may file a motion for show cause contemporaneously with the application for writ of sequestration and set a hearing on the motion, so that the defendant is immediately on notice that failure to attend the hearing and explain why the defendant did not surrender the property may result in a writ of attachment or capias writ.

If the plaintiff has reason to believe that the defendant will fail or refuse to surrender the property to be sequestered, the plaintiff should include in the order authorizing the issuance of the writ language directly ordering the defendant to surrender the property to the officer.

§ 8.19:4 Errors in Affidavit, Bond, or Writ

Clerical errors in the affidavit, bond, writ of sequestration, or officer's return may be amended. Application in writing must be made to the judge of the court in which the suit was filed. After notice to the opponent, the writ may be amended in the manner and on the terms the court authorizes. However, the amendment can reach only clerical errors and may not change or add to the grounds for sequestration stated in the affidavit. In addition, the amendment must appear to the judge to be in furtherance of justice. Tex. R. Civ. P. 700.

§ 8.20 Dissolution or Modification of Writ of Sequestration

§ 8.20:1 Motion to Dissolve Writ

After issuance of the writ, the defendant or any intervening party who claims an interest in the sequestered property may seek dissolution of the

writ by sworn written motion. Reasonable notice (which may be less than three days) must be given to the plaintiff. A hearing on the defendant's motion must be held promptly, and the issue must be determined not later than ten days after the filing of the motion unless the parties agree to an extension. The writ must be dissolved unless the plaintiff proves the specific facts alleged and the grounds relied on for its issuance—for example, immediate danger, ejectment by force or violence, or nonresidence of the defendant. Tex. R. Civ. P. 712a; *see* Tex. Civ. Prac. & Rem. Code §§ 62.001, 62.041–.043.

§ 8.20:2 Motion to Reduce Amount Sequestered

The movant may also seek to reduce the amount of property sequestered if the total amount described and authorized by the court's order exceeds the amount necessary to secure the plaintiff's claim (plus interest for one year, if allowed by law, and costs). The burden of proof to show excessive property sequestered is on the movant. Tex. R. Civ. P. 712a.

§ 8.20:3 Procedure

The filing of the motion stays any further proceeding under the writ (except for orders concerning the care, preservation, or sale of perishable property) until determination of the issue after a hearing. Unless the parties otherwise agree, the motion must be promptly heard (after reasonable notice to the plaintiff, which may be less than three days), and the issue must be determined not later than ten days after filing. The court may determine the issue on the basis of uncontroverted affidavits "setting forth such facts as would be admissible in evidence." Otherwise the parties must submit evidence. Tex. R. Civ. P. 712a; Tex. Civ. Prac. & Rem. Code §§ 62.041–.043.

§ 8.20:4 Effect of Dissolution

If the writ is dissolved, the action proceeds as though no writ had been issued, except that the defendant's cause of action for damages (if any) for wrongful sequestration is a compulsory counterclaim. Tex. Civ. Prac. & Rem. Code §§ 62.043, 62.044. In addition to other damages, the defendant may recover reasonable attorney's fees incurred in dissolution of the writ. Tex. Civ. Prac. & Rem. Code § 62.044. If the sequestered personalty is consumer goods, the defendant is entitled to recover, in addition to reasonable attorney's fees, the greater of $100, the finance charge contracted for, or actual damages. These damages may not be awarded if the plaintiff shows that his failure to prove his specific allegations was the result of a bona fide error including proof that he used reasonable procedures to avoid such error. Tex. Civ. Prac. & Rem. Code § 62.045. The right to seek dissolution of the writ is cumulative of the defendant's right to replevy. The filing of the motion stays any further proceedings under the writ until a hearing on the motion is had and the motion is ruled on. Tex. Civ. Prac. & Rem. Code § 62.041. Presumably the defendant may replevy if the motion is denied.

§ 8.21 Defendant's Right to Replevy Sequestered Property

§ 8.21:1 Right to Replevy

If the sequestered property has not been claimed, replevied, or sold, the defendant may replevy all or part of the property at any time before judgment. If the property has been sold by court order, the defendant can replevy the proceeds of the sale. Tex. R. Civ. P. 701.

§ 8.21:2 Required Bond

To replevy either the property itself or the sale proceeds, the defendant first must give a bond, with sufficient sureties to be approved by the

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officer who levied the writ, payable to the plaintiff in an amount fixed by the court's order. Tex. R. Civ. P. 701.

§ 8.21:3 Challenge to Bond

On reasonable notice (which may be less than three days) to the opposing party, either party may challenge the amount of the bond, the denial of the bond, the sufficiency of the sureties, or the estimated value of the property, before the court that authorized issuance of the writ. Tex. R. Civ. P. 701.

§ 8.21:4 Condition of Bond on Personalty

> If the property to be replevied be personal property, the condition of the bond shall be that the defendant will not remove the same out of the county, or that he will not waste, ill-treat, injure, destroy, or dispose of the same, according to the plaintiff's affidavit, and that he will have such property, in the same condition as when it is replevied, together with the value of the fruits, hire or revenue thereof, forthcoming to abide the decision of the court, or that he will pay the value thereof, or the difference between its value at the time of replevy and the time of judgment and of the fruits, hire or revenue of the same in case he shall be condemned to do so.

Tex. R. Civ. P. 702.

§ 8.21:5 Condition of Bond on Realty

If the property to be replevied is real estate, the condition of the defendant's bond must be that he will not injure the property and that he will pay the value of any rents generated by the real estate if he is required to do so. Tex. R. Civ. P. 703.

§ 8.21:6 Effect of Adverse Judgment

If the suit is decided against the defendant, judgment must be rendered against all the obligors on the defendant's bond, jointly and severally, for the value of the property replevied (as of the date of the execution of the replevy bond) and the value of the fruits, hire, revenue, or rent derived from it. Tex. R. Civ. P. 704.

§ 8.22 Plaintiff's Replevy Bond

§ 8.22:1 Plaintiff's Right to Replevy Sequestered Property

The plaintiff may replevy the property if the defendant has not done so within ten days after levy and service of the writ of sequestration. Tex. R. Civ. P. 708. To replevy, the plaintiff must post a replevy bond payable to the defendant. The purpose of the replevy bond is separate from that of the sequestration bond, and the replevy bond is intended to guarantee that the plaintiff will have the property in the same condition to abide the decision of the court. *Kelso v. Hanson*, 388 S.W.2d 396, 399 (Tex. 1965).

§ 8.22:2 Conditions of Plaintiff's Replevy Bond

For personal property, the conditions of the bond must be that the plaintiff—

1. will hold the sequestered property in the same condition as received, together with the value of its fruits, hire, or revenue until final decision of the court; and
2. will pay either the value of the personal property or the difference between its value at the time of replevy and the time of judgment

(regardless of the cause of the difference in value, and of the fruits, hire, or revenue of the property in case it is required).

Tex. R. Civ. P. 708.

If realty is sequestered, the plaintiff must not injure the property, and he must pay the value of the rents of the same if he is later ordered to do so. Tex. R. Civ. P. 708.

The plaintiff may combine its replevy bond with the sequestration bond in order to avoid the posting of two bonds, unless the court orders otherwise. See section 8.18:2 above regarding the posting of a combined bond.

§ 8.22:3 Notice and Review of Plaintiff's Replevy Bond

As in the case of the defendant's replevy bond, both parties have the right on reasonable notice (which may be less than three days) to prompt judicial review of the amount of the bond, the denial of the bond, the sufficiency of the sureties, and the estimated value of the property. The replevy bond must be filed with the constable. Tex. R. Civ. P. 708. A plaintiff's replevy bond is at form 8-13 in this chapter.

§ 8.22:4 Release of Plaintiff's Replevy Bond

The plaintiff should remember to include in any judgment, settlement, or other dispositive order language releasing the plaintiff and its surety from continued liability on the replevy bond.

§ 8.23 Emergency Sale of Perishable Goods after Sequestration

If after ten days from levy of the writ of sequestration the defendant has not replevied the property and (1) either the plaintiff or the defendant has filed a written affidavit that all or part of the property is likely to be wasted, destroyed, or greatly depreciated in value by continued retention and (2) the officer having possession of the property has certified to the truth of the affidavit, on presentation of the affidavit and certificate, the judge must order the sale of the property or of the portion of the property that is likely to be wasted, destroyed, or depreciated in value by retention. Either party may replevy the property before the sale. Tex. R. Civ. P. 710. Forms in this chapter for an emergency sale are at forms 8-14 (application), 8-15 (affidavit), and 8-16 (order).

§ 8.24 Wrongful Sequestration

If a writ of sequestration is dissolved, any action for wrongful sequestration must be brought as a compulsory counterclaim. Tex. Civ. Prac. & Rem. Code § 62.044(a). The creditor is guilty of wrongful sequestration if he has obtained a prejudgment writ of sequestration, seized the property, and then voluntarily dismissed the suit without returning the property to the debtor. In that case, the debtor has a right to institute an independent action to recover damages suffered by reason of the wrongful sequestration. Moreover, a voluntary dismissal is a final judgment in favor of the debtor, and the debtor is entitled to return of the property or a judgment against all the obligors on the replevy bond. *See Burnett Trailers, Inc. v. Polson*, 387 S.W.2d 692, 694–95 (Tex. Civ. App.—San Antonio 1965, writ ref'd n.r.e.).

A wrongful sequestration action may allow the debtor to recover actual and exemplary damages and attorney's fees or, for wrongful sequestration of consumer goods, attorney's fees and the greater of $100, the finance charge contracted for, or actual damages. Tex. Civ. Prac. & Rem. Code §§ 62.044–.045. At least one court has held that one claiming wrongful sequestration may recover damages, even though the claimant suffered no actual damages and never lost possession of the property. *See Callaway v. East*

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Texas Government Credit Union, 619 S.W.2d 411, 414 (Tex. Civ. App.—Tyler 1981, writ ref'd n.r.e.).

§ 8.25 Attachment Generally

§ 8.25:1 Purpose and Use of Attachment

Attachment is an extraordinary remedy allowing a creditor to seize the debtor's property to secure payment of a probable judgment on an otherwise unsecured debt. Attached property is held in the court's custody to be available for execution if the plaintiff obtains a judgment in the underlying cause. *See generally* Tex. Civ. Prac. & Rem. Code §§ 61.001–.082.

§ 8.25:2 Constitutionality

The Texas attachment statutes have not been reviewed for due-process compliance in any recently published opinion.

§ 8.25:3 Strategic Use

Strategically, attachment may be used against a debtor—

1. to prevent a debtor from alienating, destroying, or removing property from the jurisdiction, which would frustrate recovery on the debt; or
2. to obtain jurisdiction over a nonresident debtor who has property located within the jurisdiction. However, minimum contacts between the defendant and the foreign state must be found in order to confer in personam jurisdiction over the debtor. *See Shaffer v. Heitner*, 433 U.S. 186 (1977) (sequestration).

§ 8.25:4 Property That May Be Attached

Only property subject to levy under a writ of execution may be attached. Tex. Civ. Prac. & Rem. Code § 61.041. The property need not be in the debtor's possession to be attached. *See Briggs v. Briggs*, 227 S.W. 511, 512 (Tex. Civ. App.—Texarkana 1921, no writ) (person in possession of two bales of cotton, holding bales as security for money owed him by owner of bales, had no right to resist levy under writ of attachment solely on ground that property had been pledged to hiim and had been delivered into his possession).

§ 8.25:5 When Writ Available

An application for a writ of attachment may be filed at the commencement of a suit or at any time during its progress. Tex. R. Civ. P. 592.

§ 8.25:6 Requirements Generally

A writ of attachment may issue if three general conditions and any one of nine specific conditions (see section 8.25:7 below) occur. The general conditions are that—

1. the defendant is justly indebted to the plaintiff;
2. the attachment is not sought to injure or harass the defendant; and
3. without the attachment the plaintiff's debt would be lost.

Tex. Civ. Prac. & Rem. Code § 61.001. The "indebtedness" can be based in tort, and the amount in controversy need not be liquidated, if personal service on the defendant cannot be effected within the state. Tex. Civ. Prac. & Rem. Code § 61.005. Otherwise, attachment is not available for a tort action, and the amount in controversy must be liquidated. *Cleveland v. San Antonio Building & Loan Ass'n*, 223 S.W.2d 226, 228 (Tex. 1949).

§ 8.25:7 Specific Grounds

In addition to meeting the general requirements set out in section 8.25:6 above, an applicant for a writ of attachment must show at least one of the following nine specific grounds:

1. The defendant is not a resident of Texas or is a foreign corporation or is acting as such (but see section 8.25:3 above regarding minimum contacts).
2. The defendant is about to move from Texas permanently and has refused to pay or secure the debt due the plaintiff.
3. The defendant is in hiding so that ordinary process of law cannot be served on him.
4. The defendant has hidden or is about to hide his property for the purpose of defrauding his creditors.
5. The defendant is about to remove his property from Texas without leaving an amount sufficient to pay his debts.
6. The defendant is about to remove all or part of his property from the county in which the suit is brought with the intent to defraud his creditors.
7. The defendant has disposed of or is about to dispose of all or part of his property with the intent to defraud his creditors.
8. The defendant is about to convert all or part of his property into money for the purpose of placing it beyond the reach of his creditors.
9. The defendant owes the plaintiff for property obtained by the defendant under false pretenses.

Tex. Civ. Prac. & Rem. Code § 61.002.

§ 8.25:8 Availability against Financial Institutions

An attachment may not be issued against or served on a financial institution that has its principal office or a branch in Texas to collect a prospective money judgment against the financial institution before the judgment is final and all appeals have been foreclosed by law. Tex. Fin. Code § 59.007(a). "Financial institution" means "a bank, savings association, or savings bank maintaining an office, branch, or agency office in this state." Tex. Fin. Code § 31.002(25).

§ 8.25:9 Availability against Customer of Financial Institution

Attachment is available against a customer of a financial institution. Tex. Fin. Code §§ 59.007(b), 59.008.

A claim against a customer of a financial institution must be delivered or served as otherwise required or permitted by law at the address designated as the address of the registered agent of the financial institution in a registration filed with the secretary of state pursuant to Tex. Fin. Code § 201.102 (out-of-state financial institutions) or Tex. Fin. Code § 201.103 (Texas financial institutions). A claim against a customer of a financial institution that has complied with Tex. Fin. Code §§ 201.102, 201.103 will be ineffective as to the financial institution unless it is served or delivered to the registered address. However, the customer bears the burden of preventing or limiting the institution's compliance by seeking an appropriate remedy, including a restraining order, injunction, protective order, or other appropriate remedy. If the financial institution has not filed a registration with the secretary of state pursuant to Tex. Fin. Code §§ 201.102, 201.103, the institution is subject to service or delivery of all claims against customers of the financial institution as otherwise provided by law. Tex. Fin. Code § 59.008.

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§ 8.26 Attachment Procedure

§ 8.26:1 Application

The statutes governing attachment do not provide for the use of an application for a writ of attachment. The writ is issued instead on the basis of one or more affidavits alone. The rules of procedure, however, require an application and hearing. *See* Tex. R. Civ. P. 592. The application requires an affidavit, but in a supporting capacity; an affidavit is not sufficient in itself.

§ 8.26:2 Requisites of Application

The application must comply with all statutory requirements and must state the grounds for issuing the writ and the specific facts relied on by the plaintiff to warrant the required findings by the court. The grounds may be stated conjunctively or disjunctively. The application must be made on personal knowledge and must "set forth such facts as would be admissible in evidence," but the facts may be based on information and belief if the grounds are specified. The application must be supported by one or more affidavits (see section 8.26:3 below). Tex. R. Civ. P. 592. An application for a writ of attachment is at form 8-17 in this chapter, and an affidavit is at form 8-18.

§ 8.26:3 Affidavit

One or more affidavits must support an application for a writ of attachment filed with the court. Affidavits may be made by the plaintiff, the plaintiff's agent, other persons with "knowledge of relevant facts," or the plaintiff's attorney, but attorneys should be extremely wary of making the affidavit, as discussed in section 19.17:3 in this manual. Like the application, 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. 592. (The rule has not been amended to address unsworn declarations authorized by Tex. Civ. Prac. & Rem. Code § 132.001.) The affidavit must recite the statutory general and appropriate specific grounds, which are listed in sections 8.25:6 and 8.25:7 above, and must state the amount of the demand. Tex. Civ. Prac. & Rem. Code § 61.022. An affidavit is at form 8-18 in this chapter.

The applicant could use an unsworn declaration under Tex. Civ. Prac. & Rem. Code § 132.001 in lieu of an affidavit. See section 8.12:6 for a discussion of the use of an unsworn declaration in lieu of an affidavit authorized by Tex. Civ. Prac. & Rem. Code § 132.001.

§ 8.26:4 Hearing

Before a writ of attachment may issue, the court must hold a hearing (which may be ex parte) on the plaintiff's application for the writ. Tex. R. Civ. P. 592. If the plaintiff prevails at the hearing, the court may issue a written order authorizing issuance of the writ.

§ 8.26:5 Order

No writ of attachment may issue except on written order of the court, which must recite specific findings of fact to support the statutory grounds. The court must specify the maximum value of property that may be attached and the amount of bond required of the plaintiff. The order must require that the attached property be kept safe and preserved subject to further orders of the court. The court also must state the amount of bond required of the defendant to replevy. Tex. R. Civ. P. 592. An order is at form 8-19 in this chapter.

§ 8.26:6 Sheriff's and Clerk's Responsibilities

The sheriff or constable levies on the property specified in the writ of attachment that is owned

by the defendant and found in the officer's jurisdiction. When levying on the property, the officer either takes the goods and retains them or, in the case of real property, places an endorsement on the writ and files it with the county clerk in the county in which the property is located. The clerk records the attachment in the appropriate records. Tex. Civ. Prac. & Rem. Code § 61.043; Tex. Prop. Code § 12.012.

§ 8.27 Plaintiff's Bond for Attachment

§ 8.27:1 Requisites of Bond

The plaintiff must file with the officer authorized to issue a writ a bond payable to the defendant in an amount fixed by the court's order. The bond must be in an amount that, in the court's opinion, will adequately compensate the defendant if the plaintiff does not prosecute the suit to effect and that will cover all damages and costs that may be adjudged against the plaintiff for wrongfully suing. Tex. R. Civ. P. 592a. For an attachment bond, see form 8-4 in this chapter.

§ 8.27:2 Sureties

The bond must be backed by sufficient surety or sureties as provided by statute. Tex. R. Civ. P. 592a; *see* Tex. Civ. Prac. & Rem. Code § 61.023 (requiring "two or more good and sufficient sureties"). *But see* Tex. Ins. Code §§ 3503.001–.005 (allowing guaranty solely by a surety company provided reinsurance requirements are met). The officer issuing the writ must approve the choice of sureties. The bond must be conditioned that the plaintiff will prosecute the suit to effect and pay to the extent of the penal amount of the bond all damages and costs that may be adjudged for wrongfully suing out the writ of attachment. Tex. R. Civ. P. 592, 592a. Certain governmental entities are exempt from bond requirements. Tex. Civ. Prac. & Rem. Code § 6.001.

§ 8.27:3 Modification of Bond

After notice to the opposite party, either before or after issuance of the writ, either the defendant or the plaintiff may file a motion to increase or reduce the amount of the bond or to question the sufficiency of the bond's sureties. On hearing the motion, the court will enter an order on the final amount of the bond or the sufficiency of the bond's sureties. Tex. R. Civ. P. 592a.

§ 8.28 Writ of Attachment

§ 8.28:1 Requisites of Writ

The writ of attachment is to be directed to any sheriff or constable within Texas. It commands the officer to attach and hold in that officer's county the defendant's property of a reasonable value in approximately the amount fixed by the court, unless the defendant has replevied it. Tex. R. Civ. P. 593. The form of the writ is contained in Tex. R. Civ. P. 594, 598a. See form 8-20 in this chapter.

§ 8.28:2 Service of Writ on Defendant

As soon as practicable following levy of the writ, the defendant must be served with copies of the application, affidavits, orders of the court, and writ of attachment. The defendant may be served in any manner prescribed for service of citation or as provided in Tex. R. Civ. P. 21a. The writ served on the defendant must display on its face, in ten-point type and in a manner calculated to advise a reasonably attentive person of its contents, the following pronouncement:

> To __________, Defendant:
>
> You are hereby notified that certain properties alleged to be owned by you have been attached. If you claim any rights in such property, you are advised:

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> 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. 598a. The defendant should not be served before attachment has occurred. A notice of attachment and an officer's return are at forms 8-21 and 8-22 in this chapter.

Practice Note: It is recommended that, instead of serving the defendant personally or by e-mail, his copy of the application and affidavit be served by certified mail, return receipt requested, and by regular mail.

§ 8.28:3 Errors in Affidavit, Bond, or Writ

Clerical errors in the affidavit, bond, writ of attachment, or return may be corrected by amendment. Application must be made in the court in which the suit was filed, and, after notice to the opponent, the writ may be amended in the manner that the court authorizes. However, the amendment can reach only clerical errors and cannot add to or change the grounds for attachment as stated in the affidavit. In addition, the amendment must appear to the court "to be in furtherance of justice." Tex. R. Civ. P. 609.

§ 8.29 Defendant's Rights in Attached Property

§ 8.29:1 Replevy

If the attached property has not been claimed or sold, the defendant may replevy all or part of it at any time before judgment or may recover the proceeds from any sale made under court order. To replevy, the defendant must give a bond payable to the plaintiff with sufficient surety or sureties as provided by statute; the sureties are to be approved by the officer who levied under the writ. The amount of the defendant's bond must be—

1. the amount fixed by the court in its original order granting the plaintiff's writ of attachment (the amount of the plaintiff's claim, one year's accrual of interest if allowed by law on the claim, and the estimated costs of court); or

2. at the defendant's option, the value of the property sought to be replevied (the value to be estimated by the officer) plus one year's interest at the legal rate from the date of the bond.

The bond must also be conditioned that the defendant will satisfy, to the extent of the penal amount of the bond, any judgment that may be rendered. Tex. R. Civ. P. 592, 599.

§ 8.29:2 Defendant's Right to Substitute Property

On reasonable notice to the plaintiff, which may be less than three days, the defendant may apply to the court for substitution of other property of equal value for the attached property. If the court considers the values of the properties equal, it may authorize substitution, and personal property thus released from attachment must be delivered to the defendant. Liens resulting from the original attachment order on the released property are terminated, and the substituted property is deemed to have been attached from the date of the levy on the property originally attached. If liens have been affixed to property since the original date of levy, that property may not be used for substitution. Tex. R. Civ. P. 599.

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§ 8.30 Dissolution or Modification of Writ of Attachment

§ 8.30:1 Motion and Hearing

A defendant whose property has been attached or any intervening party who claims an interest in the property may by sworn written motion seek to vacate, dissolve, or modify the writ and the order directing its issuance for any extrinsic or intrinsic grounds or cause. After reasonable notice to the plaintiff, which may be less than three days, the motion must be heard promptly. Each issue presented by the motion must be decided not later than ten days after filing of the motion. Except for orders concerning the care, preservation, or sale of perishable property, the filing of the motion stays any further proceedings under the writ until a hearing occurs and every issue is determined. Tex. R. Civ. P. 608.

§ 8.30:2 Burden of Proof

At the hearing the plaintiff is required to prove the grounds for the issuance of the writ, or it will be dissolved. The court, however, may modify both its previous order granting the writ and the writ itself. The movant, though, bears the burden of proving that the reasonable value of the attached property exceeds the amount necessary to secure the debt, interest for one year, and probable costs. The movant must also prove that the facts justify the substitution of property if substitution is desired. The court may base its determination on uncontroverted affidavits that present facts otherwise admissible in evidence. If the affidavit is controverted, evidence must be presented. Tex. R. Civ. P. 608.

§ 8.30:3 Orders

The court may make orders as justice requires, including orders concerning the care, preservation, or disposition of the property (or its proceeds if it has been sold). If the movant has given a replevy bond, an order vacating or dissolving the writ vacates the bond and discharges the sureties. If the court modifies its order or the writ, it can make further orders with respect to the bond consistent with the modification. Tex. R. Civ. P. 608.

§ 8.31 Emergency Sale of Perishable Goods after Attachment

§ 8.31:1 Availability of Emergency Sale

The court may order the sale of personal property that has been attached but not claimed or replevied if the property is in danger of serious and immediate waste or decay or if retention of the property until trial will cause such an expense or deterioration in value as to greatly lessen the amount likely to be realized from the property. Tex. R. Civ. P. 600.

§ 8.31:2 Notice, Hearing, and Order

In determining whether the attached property is perishable and should therefore be sold, the court may consider affidavits and oral testimony. The court could consider an unsworn declaration under Tex. Civ. Prac. & Rem. Code § 132.001 in lieu of an affidavit. If the court determines that the property should be sold, it may issue a preliminary order directing the sheriff or constable to sell it for cash at public auction. The court in its discretion may give the parties notice of the sale or may order the sale without notice if the urgency of the situation demands it. Tex. R. Civ. P. 601. Forms in this chapter for an emergency sale are at forms 8-23 (application), 8-24 (affidavit), and 8-25 (order) in this chapter may be used for an emergency sale.

§ 8.31:3 Bond

An applicant for an order of sale who is not the defendant must file a bond with the court pay-

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able to the defendant. The bond must have two or more court-approved "good and sufficient sureties" responsible to the defendant for damages the defendant sustains if the sale is illegally and unjustly applied for or made. Tex. R. Civ. P. 602.

§ 8.31:4 Sale

The court-ordered sale of the perishable property is to be conducted in the same manner as sales of personal property under execution. Tex. R. Civ. P. 603; *see also* Tex. R. Civ. P. 649, 650. Under the proper circumstances, however, the court may order that both the sale and its advertisement occur earlier than ten days, ordinarily required under rule 650, in which case notice shall be as directed by the court's order. Tex. R. Civ. P. 603. The officer making the sale must promptly give the proceeds to the court clerk and must make a written, signed return of the order of sale, detailing the events of the sale and itemizing the expenses attending it. Tex. R. Civ. P. 604.

§ 8.32 Postjudgment Disposal of Attached Property

§ 8.32:1 Personal Property

If the plaintiff succeeds in the suit, the attachment lien on the debtor's personal property is foreclosed as in the case of other liens. The court will direct that the proceeds of any personalty already sold be applied to satisfaction of the judgment. If attached personalty is still in the hands of the attaching officer, the court will order its sale to satisfy the judgment. Tex. Civ. Prac. & Rem. Code § 61.062.

§ 8.32:2 Replevied Personal Property

If attached personal property has been replevied by the defendant, the judgment is taken against the defendant and sureties on the replevy bond for the amount of the judgment, interest, and costs, or for the value of the property replevied and interest, according to the terms of the defendant's replevy bond. Tex. Civ. Prac. & Rem. Code § 61.063.

§ 8.32:3 Real Property

If realty has been attached, the court will order its sale to satisfy the judgment. No order or decree foreclosing the attachment lien is necessary, but the judgment must briefly recite the issuance and levy of the attachment. This recital will be sufficient to preserve the attachment lien. The purchaser of real property sold under execution to satisfy the judgment will be vested with the same estate in the property that the defendant in attachment possessed at the time the writ of attachment was levied. Tex. Civ. Prac. & Rem. Code § 61.062.

§ 8.33 Injunction Generally

§ 8.33:1 Purpose and Use of Injunctive Relief

Injunction is an extraordinary remedy that may be used to prevent irreparable injury to personal or property rights when legal remedies are not available. *See generally* Tex. Civ. Prac. & Rem. Code §§ 65.001–.045. Injunction is a court's command that a party act or refrain from acting in a specific way. *See Passel v. Fort Worth Independent School District*, 440 S.W.2d 61, 63 (Tex. 1969), *on appeal after remand*, 453 S.W.2d 888 (Tex. Civ. App.—Fort Worth 1970, writ ref'd n.r.e.), *cert. denied*, 402 U.S. 968 (1971). In collection matters, the main purpose of the injunction is to restrain the defendant in pending litigation from violating the plaintiff's rights in a manner that would render a judgment ineffectual. *See* Tex. Civ. Prac. & Rem. Code § 65.011(2). Defendants pursued by creditors often try to dispose of assets before a judgment is rendered.

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§ 8.33:2 Bases for Injunctive Relief

Courts may issue injunctions under express statutory authority or general principles of equity. *See* Tex. Const. art. V, §§ 8, 16; Tex. Civ. Prac. & Rem. Code §§ 65.001–.015; Tex. Civ. Prac. & Rem. Code § 65.001 ("The principles governing courts of equity govern injunction proceedings if not in conflict with [chapter 65] on injunctions or other law"). Injunctive relief is designed primarily to grant relief against the threatened violation of a right when legal remedies are inadequate. The existence of a right violated is a prerequisite to the granting of an injunction, and, where it is clear that the complainant does not have the right that he claims, he is not entitled to an injunction. *See Garland v. Shepherd*, 445 S.W.2d 602, 604 (Tex. Civ. App.—Dallas 1969, no writ) (writ of injunction dismissed when plaintiff's alleged right to be protected was dependent on several contingencies and therefore unvested). In addition to the general injunction statute, many other statutes provide for injunctive relief in specific situations.

§ 8.33:3 Types of Injunctive Relief

Injunctions may be either prohibitory—prohibiting certain acts—or mandatory—commanding a party to act. Injunctive relief proceeds in stages and is distinguished by the time relief is issued and the duration of the relief. The forms of injunctive relief are discussed below.

Temporary Restraining Order: A temporary restraining order expires at the end of the period set by its own terms, not to exceed fourteen days, but the court may extend the order for one additional period and may grant additional extensions if the request is unopposed. It may be issued without notice to the adverse party and without a hearing if otherwise "immediate and irreparable injury, loss, or damage will result to the applicant." Every restraining order shall include an order setting a certain date for hearing on the temporary or permanent injunction sought. Tex. R. Civ. P. 680.

Temporary Injunction: A temporary injunction operates until disposition of the case on the merits, and it replaces any existing temporary restraining order. Tex. R. Civ. P. 680. It may not be issued without notice to the adverse party. Tex. R. Civ. P. 681. Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe, in reasonable detail and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only on the parties to the action, their officers, agents, servants, employees, and attorneys, and on those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise. Every order granting a temporary injunction shall include an order setting the cause for trial on the merits with respect to the ultimate relief sought. Tex. R. Civ. P. 683.

Permanent Injunction: A permanent injunction may operate indefinitely or until an appointed date. It is part of the final judgment.

Permanent injunctions are rarely sought as ultimate relief in collection matters, so this part of the manual will focus on the temporary injunction and, to a lesser extent, the temporary restraining order.

§ 8.34 Substantive Requirements for Injunctive Relief

Injunctive relief is proper if the applicant can demonstrate the following four grounds for relief: (1) the existence of a wrongful act, (2) the existence of imminent harm, (3) the existence of irreparable injury, and (4) the absence of an adequate remedy at law. *Hues v. Warren Petroleum Co.*, 814 S.W.2d 526, 529 (Tex. App.—Houston [14th Dist.] 1991, writ denied) (citing *Priest v. Texas Animal Health Commission*, 780 S.W.2d

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874, 875 (Tex. App.—Dallas 1990, no writ)). The grant or refusal of a permanent or temporary injunction is ordinarily within the sound discretion of the trial court, and the trial court's action will not be disturbed on appeal absent a clear abuse of discretion. *Priest*, 780 S.W.2d at 875. As a prerequisite to the granting of an injunction, the pleadings and prayer must state the particular form of injunction sought and the prayer must specify the type of judgment sought. *Warren Petroleum*, 814 S.W.2d at 529–30 (citing *American Precision Vibrator Co. v. National Air Vibrator Co.*, 764 S.W.2d 274, 279 (Tex. App.—Houston [1st Dist.] 1988, no writ; *Fairfield v. Stonehenge Ass'n Co.*, 678 S.W.2d 608, 611 (Tex. App.—Houston [14th Dist.] 1984, no writ)).

§ 8.34:1 Underlying Cause of Action

A plaintiff must have a genuine cause of action against a defendant to be entitled to injunctive relief. *Valenzuela v. Aquino*, 853 S.W.2d 512 (Tex. 1993); *Walling v. Metcalfe*, 863 S.W.2d 56, 58 (Tex. 1993).

§ 8.34:2 Probable Recovery and Probable Injury

For a temporary injunction, the applicant must show the probability of recovering in the underlying suit and of suffering an injury in the interim unless the injunction is granted. *Walling v. Metcalfe*, 863 S.W.2d 56, 57 (Tex. 1993); *State v. Southwestern Bell Telephone Co.*, 526 S.W.2d 526, 528 (Tex. 1975). It is not necessary to show that the plaintiff will ultimately prevail in the litigation. *Southwestern Bell*, 526 S.W.2d at 528; *Oil Field Haulers Ass'n v. Railroad Commission*, 381 S.W.2d 183, 196 (Tex. 1964). The threat of injury to the plaintiff must be supported by evidence, not merely by speculation or conjecture. *See Dallas General Drivers, Warehousemen & Helpers v. Wamix, Inc.*, 295 S.W.2d 873, 879 (Tex. 1956); *Texas Industrial Gas v. Phoenix Metallurgical Corp.*, 828 S.W.2d 529, 532 (Tex. App.—Houston [1st Dist.] 1992, no writ).

§ 8.34:3 Irreparable Injury

A showing of irreparable injury is one of the requirements for issuance of a temporary restraining order. Tex. R. Civ. P. 680. "Irreparable injury" is also an independent ground for obtaining a temporary injunction. Tex. Civ. Prac. & Rem. Code § 65.011(5). At least one court, however, has disapproved of granting a temporary injunction based on this ground, because it seemed to eliminate the requirement that the plaintiff had no adequate remedy at law. *See Speedman Oil Co. v. Duval County Ranch Co.*, 504 S.W.2d 923, 929 n.1 (Tex. Civ. App.—San Antonio 1974, writ ref'd n.r.e.).

§ 8.34:4 Inadequate Legal Remedy

The applicant must allege and prove that no adequate remedy at law can prevent or reduce the threatened injury. *Texas Industrial Gas v. Phoenix Metallurgical Corp.*, 828 S.W.2d 529, 532 (Tex. App.—Houston [1st Dist.] 1992, no writ). Legal remedies are inadequate if the defendant will be unable to provide damages, such as when a defendant is rapidly depleting assets from which damages would be paid. *R.H. Sanders Corp. v. Haves*, 541 S.W.2d 262, 265–66 (Tex. Civ. App.—Dallas 1976, no writ) (defendant was stripping corporation of its assets).

To preclude an equitable remedy, an available legal remedy must be "as practical and efficient to the ends of justice as the equitable remedy." *Irving Bank & Trust Co. v. Second Land Corp.*, 544 S.W.2d 684, 688 (Tex. Civ. App.—Dallas 1976, writ ref'd n.r.e.). By this principle, the remedy of sequestration might not preclude injunctive relief in a suit for title or possession of specific property. *See Surko Enterprises v. Borg-Warner Acceptance Corp.*, 782 S.W.2d 223 (Tex. App.—Houston [14th Dist.] 1989, no writ).

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§ 8.34:5 Interrelationship of Inadequate Legal Remedy and Irreparable Injury

The relationship between the grounds of inadequate legal remedy and irreparable injury is ambiguous. Some courts recite the two grounds conjunctively, suggesting that the applicant must prove both grounds. *Ballenger v. Ballenger*, 694 S.W.2d 72, 76 (Tex. App.—Corpus Christi 1985, no writ); *see also Texas Industrial Gas v. Phoenix Metallurgical Corp.*, 828 S.W.2d 529, 532 (Tex. App.—Houston [1st Dist.] 1992, no writ). Other courts pair the two grounds disjunctively. *See Houck v. Kroger Co.*, 555 S.W.2d 803, 805 (Tex. Civ. App.—Houston [14th Dist.] 1977, writ ref'd n.r.e.). Still other courts try to have it both ways. *See Inman v. Padrezas*, 540 S.W.2d 789, 797 (Tex. Civ. App.—Corpus Christi 1976, no writ) ("One seeking injunctive relief must plead irreparable injury and/or that he has no adequate remedy at law, and/or that irreparable injury is threatened."). The better practice is to prove both grounds.

§ 8.34:6 Balancing of Equities

An injunction will not be granted unless the threatened injury to the plaintiff outweighs the harm that the injunction might bring to the defendant or if granting it would "disserve the public interest." *Morgan v. Fletcher*, 518 F.2d 236, 239 (5th Cir. 1975); *see also Viking Homes, Inc. v. Larkin*, 452 S.W.2d 25, 28 (Tex. Civ. App.—Houston [14th Dist.] 1970, no writ). This doctrine of balancing equities has numerous exceptions and corollaries. One important exception is that the doctrine does not apply if granting an injunction would "aid an act which, if done, would be criminal or illegal." *Riley v. Davidson*, 196 S.W.2d 557, 559 (Tex. Civ. App.—Galveston 1946, writ ref'd n.r.e.).

§ 8.34:7 Other Equity Issues

The applicant must have "clean hands"; injunctive relief will be denied to anyone who has caused the conditions of which he complains or has acquiesced as the conditions have developed. *Vaughan v. Kizer*, 400 S.W.2d 586, 589–90 (Tex. Civ. App.—Waco 1966, writ ref'd n.r.e.). Also, laches may foil an application for an injunction if the applicant has waited too long to seek protection. *Keene v. Reed*, 340 S.W.2d 859, 860 (Tex. Civ. App.—Waco 1960, writ ref'd).

§ 8.35 Availability of Injunction

§ 8.35:1 Discretion of Trial Court

The grant or refusal of an injunction is ordinarily within the court's sound discretion, and the action will be reversed only on a showing of clear abuse of that discretion. *Walling v. Metcalfe*, 863 S.W.2d 56, 58 (Tex. 1993); *Repka v. American National Insurance Co.*, 186 S.W.2d 977, 981 (Tex. 1945). If a plaintiff has adequate grounds, alleges a cause of action, and introduces evidence tending to sustain the cause, the trial court does not abuse its discretion by issuing a temporary injunction. *Southwestern Greyhound Lines v. Railroad Commission*, 99 S.W.2d 263, 270 (Tex. 1936).

§ 8.35:2 Unsecured Creditor

Unsecured creditors may be unable to obtain an injunction seizing or impounding property, because, absent an authorizing statute, a court of equity lacks jurisdiction to seize or impound assets unless the claimant either has a lien on those assets or has reduced his claim to judgment. *Garland v. Shepherd*, 445 S.W.2d 602, 605 (Tex. Civ. App.—Dallas 1969, no writ); *see also Nowak v. Los Patios Investors, Ltd.*, 898 S.W.2d 9 (Tex. App.—San Antonio 1995, no writ); *Perryton Feeders, Inc. v. Feldmann*, 483 S.W.2d 386 (Tex. Civ. App.—Amarillo 1972,

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writ ref'd n.r.e.). Attachment is the proper remedy for such a situation. See sections 8.25 through 8.32 above.

§ 8.35:3 Preventing Transfer of Assets

If ownership of the property is disputed, injunctions sometimes issue to prevent transfer that could defraud the rightful owner. Examples include—

1. prohibiting transfer of funds that the defendant had fraudulently obtained from the plaintiff, *Baucum v. Texam Oil Corp.*, 423 S.W.2d 434, 442 (Tex. Civ. App.—El Paso 1967, writ ref'd n.r.e.);
2. enjoining the mortgagor of an automobile from transferring its title, in part on the basis that he held the certificate of title only by mistake, *Hall v. Universal C.I.T. Credit Corp.*, 298 S.W.2d 858, 859 (Tex. Civ. App.—Eastland 1957, no writ); and
3. making the debtor's primary creditor a de facto receiver of the debtor's business by ordering all receipts paid to the creditor, *Surko Enterprises v. Borg-Warner Acceptance Corp.*, 782 S.W.2d 223 (Tex. App.—Houston [1st Dist.] 1989, no writ).

§ 8.36 Procedural Requirements for Temporary Injunction

§ 8.36:1 Procedure Generally

The plaintiff may seek a temporary injunction in the original petition as either the sole remedy or an ancillary remedy, or a separate petition may request the injunction as an ancillary remedy. The manual committee recommends a separate application because in collection cases a temporary restraining order or temporary injunction is usually sought as an interim pretrial remedy. This section discusses procedural requirements for the injunction; section 8.34 above discusses substantive requirements. Differences in procedure for the temporary restraining order are discussed at section 8.37 below. An application is at form 8-26 in this chapter.

§ 8.36:2 Allegation of Grounds

The application must contain "a plain and intelligible statement of the grounds" for issuance of the writ. Tex. R. Civ. P. 682. Several grounds may be pleaded alternatively if each is sufficient, and proof of only one is necessary. *Bales v. Jones*, 288 S.W.2d 266, 268 (Tex. Civ. App.—Fort Worth 1956, writ ref'd n.r.e.).

§ 8.36:3 Allegation of Facts

The application must plead facts, not legal conclusions. *Texas State Board of Medical Examiners v. McKinney*, 315 S.W.2d 387, 390 (Tex. Civ. App.—Waco 1958, no writ). Allegations of fact should be direct, certain, and particular and leave nothing to inference. The petition should contain specific fact allegations showing a right in the pleader, the wrong done by the defendant, and the resulting injury. *Mendoza v. Canizales*, 695 S.W.2d 266, 268 (Tex. App.—San Antonio 1985, no writ) (citing *Texas State Board of Registration for Professional Engineers v. Dalton, Hinds & O'Brien Engineering Co.*, 382 S.W.2d 130, 135 (Tex. Civ. App.—Corpus Christ 1964, no writ)). The applicant has the burden of proof. *Butler v. Butler*, 296 S.W.2d 635, 637 (Tex. Civ. App.—Fort Worth 1956, no writ). The application is strictly construed. *Thomas v. Bunch*, 41 S.W.2d 359, 362 (Tex. Civ. App.—Fort Worth 1931), *aff'd*, 49 S.W.2d 421 (Tex. 1932).

§ 8.36:4 Negation of Inferences Contrary to Injunctive Relief

The application must negate "every reasonable inference arising upon the facts so stated, that the party might not, under other pertinent sup-

posable facts, be entitled to relief." *Gillis v. Rosenheimer*, 64 Tex. 243, 246 (1885) ("The rule of pleading, that the statements of a party are to be taken most strongly against himself, is re-enforced in injunction suits by the further requirement that the material and essential elements which entitle him to relief shall be sufficiently certain to negative every reasonable inference arising upon the facts so stated, from which it might be deduced that he might not, under other supposable facts connected with the subject, thus be entitled to relief."); *see also Mendoza v. Canizales*, 695 S.W.2d 266, 268 (Tex. App.—San Antonio 1985, no writ) (sustaining injunction against enforcement of contract between plaintiff boxer and defendant manager when pleadings clearly set out unique manager-boxer relationship, recited the importance of boxer receiving proper training, alleged manager prevented training and supervision and participation in remunerative boxing contests, and stated that manager's conduct harmed boxer, the damages were largely intangible, boxer had no adequate remedy at law, and the harm would likely continue without intervention by the court). This rule is often invoked to deny or dissolve a temporary injunction when the applicant has failed to disprove or negate facts that would undermine the alleged grounds for the injunction if they were proved. *See, e.g., Southwestern Associated Telephone Co. v. City of Dalhart*, 254 S.W.2d 819, 826 (Tex. Civ. App.—Amarillo 1952, writ ref'd n.r.e.) (affirming denial of temporary injunction against city's attempt to raise telephone rates pursuant to its ordinance, where applicant did not plead or prove that city was trying to enforce various remedies against it during pending dispute); *Refrigeration Discount Corp. v. Meador*, 134 S.W.2d 331, 332 (Tex. Civ. App.—Eastland 1939, no writ) (overturning injunction by district court in Erath County, Texas, enjoining execution of judgment rendered by county court at law in Tarrant County, where application for injunction pointed to amount of the order ($167) as proof that amount in controversy did not meet jurisdictional requirements of the county court ($200) but failed to allege that amount sued for or value of the property did not exceed $200).

§ 8.36:5 Request for Relief

A party seeking injunctive relief must state the particular form of injunctive relief sought in both the pleadings and prayer, and the prayer must specify the type of judgment sought. *Hues v. Warren Petroleum Co.*, 814 S.W.2d 526, 529–30 (Tex. App.—Houston [14th Dist.] 1991, writ denied) (denial of injunction affirmed when petition requested court enjoin defendants from storing gaseous products and saltwater in salt dome but did not request injunctive relief in prayer "nor plead the specific type of injunctive relief sought") (citing *American Precision Vibrator Co. v. National Air Vibrator Co.*, 764 S.W.2d 274, 279 (Tex. App.—Houston [1st Dist.] 1988, no writ); *Fairfield v. Stonehenge Ass'n Co.*, 678 S.W.2d 608, 611 (Tex. App.—Houston [14th Dist.] 1984, no writ)); *Scoggins v. Cameron County Water Improvement District No. 15*, 264 S.W.2d 169, 173 (Tex. Civ. App.—Austin 1954, writ ref'd n.r.e.) ("to be entitled to injunctive relief the petition must specify the relief sought . . . a court is without authority to grant relief beyond that so specified) (citing *Fletcher v. King*, 75 S.W.2d 980, 982 (Tex. Civ. App.—Amarillo 1934, writ ref'd)). In *Villalobos v. Holguin*, the court said, "We recognize that the rule is . . . that an injunction decree must be as definite, clear and precise as possible and when practicable it should inform the defendant of the acts he is restrained from doing, without calling on him for inferences or conclusions about which persons might well differ and without leaving anything for further hearing. . . . This view gives effect to the equally important rule that the decree must not be so broad as to enjoin a defendant from activities which are lawful and a proper exercise of his rights." *See Villalobos v. Holguin*, 208 S.W.2d 871, 875 (Tex. 1948).

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§ 8.36:6 Verification

The application must be verified by affidavit. Tex. R. Civ. P. 682. (The rule has not been amended to address unsworn declarations authorized by Tex. Civ. Prac. & Rem. Code § 132.001.) Affidavits based on "information and belief" are insufficient. *Ex parte Rodriguez*, 568 S.W.2d 894, 897 (Tex. Civ. App.—Fort Worth 1978, no writ) (under Tex. R. Civ. P. 682, affidavits based on "information and belief" are insufficient); *Durrett v. Boger*, 234 S.W.2d 898, 900 (Tex. Civ. App.—Texarkana 1950, no writ) ("[A]n affidavit on information and belief [is] insufficient to meet the requirements of Rule 682."). The applicant's attorney should not make the affidavit; see section 19.17:3 in this manual. If an injunction is granted after notice and hearing, however, it is not essential that the petition be sworn to, because a full and complete hearing was had before the court. *Williams v. City of Tom Bean*, 688 S.W.2d 618, 621 (Tex. App.—Dallas 1985, no writ) (affirming temporary injunction based on unverified petition when hearing was had after notice and when respondent did not challenge sufficiency of petition by special exception or other pleading but instead objected during hearing). See Tex. Gov't Code § 312.011(1) for the requirements for affidavits. The application at form 8-26 in this chapter includes an affidavit. The court could consider an unsworn declaration under Tex. Civ. Prac. & Rem. Code § 132.001 in lieu of an affidavit.

§ 8.36:7 Notice

"No temporary injunction shall be issued without notice to the adverse party." Tex. R. Civ. P. 681. Tex. R. Civ. P. 680 allows temporary restraining orders to issue without notice if it clearly appears from specific facts shown by affidavit or verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before notice can be served and a hearing had on the matter. The adverse party must be given notice before the required hearing on the temporary injunction.

§ 8.36:8 Bond

Before the injunction issues, the applicant must execute and file a bond to the adverse party in the amount fixed by the court. Tex. R. Civ. P. 684. For a discussion of the bond, see section 8.38 below.

§ 8.37 Temporary Restraining Order

Temporary restraining orders have the same procedural requirements as temporary injunctions discussed in section 8.36 above, except that notice to the adverse party is not required if "it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before notice can be served and a hearing had thereon." Tex. R. Civ. P. 680.

§ 8.38 Bond for Injunctive Relief

Before issuance of a temporary injunction or temporary restraining order, the applicant must execute and file a bond to the adverse party in the amount fixed by the court. The bond is "conditioned that the applicant will abide the decision which may be made in the cause, and that he will pay all sums of money and costs that may be adjudged against him if the restraining order or temporary injunction shall be dissolved in whole or in part." The bond must have "two or more good and sufficient sureties, to be approved by the clerk." Tex. R. Civ. P. 684. The execution of an obligation by a surety company is in full compliance with a rule that requires the obligation to be executed by one or more sureties. Tex. Ins. Code § 3501.002(b)(1). See generally Tex. Ins. Code §§ 3503.001–.005. A bond given for a temporary restraining order is sometimes continued for a succeeding temporary

injunction, but more often the plaintiff must execute a new bond.

For a bond, see form 8-31 in this chapter.

§ 8.39 Order for Injunctive Relief

§ 8.39:1 Order Generally

The order granting a temporary injunction or temporary restraining order must meet the requirements of Tex. R. Civ. P. 683 precisely. Rule 683 states in relevant part: "Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail and not by reference to the complaint or other document, the act or acts sought to be restrained." *See Fasken v. Darby*, 901 S.W.2d 591, 593 (Tex. App.—El Paso 1995, no writ) (temporary injunction dissolved when it did not identify harm appellees would have suffered if it had not issued; injunction did not comply with rule 683). If a court issues an order that does not conform to the rule, the nonconformity constitutes an abuse of discretion and mandates reversal. *Smith v. Hamby*, 609 S.W.2d 866, 868 (Tex. Civ. App.—Fort Worth 1980, no writ) (citing *Charter Medical Corp. v. Miller*, 547 S.W.2d 77, 78 (Tex. Civ. App.—Dallas 1977, no writ); *Board of Equalization of City of Plano v. Wells*, 473 S.W.2d 88, 91 (Tex. Civ. App.—Dallas 1972, no writ). The injunction is void even if the defendant does not bring the order's nonconformity to the court's attention. *Fasken*, 901 S.W.2d at 593 ("An injunction that fails to identify the harm that will be suffered if it does not issue must be declared void and be dissolved . . . even when the complaining party fails to bring the error to the trial court's attention"); *University Interscholastic League v. Torres*, 616 S.W.2d 355, 358 (Tex. Civ. App.—San Antonio 1981, no writ) (failure of temporary injunction order to meet strict requirements of rule 683 on its face renders order fatally defective and void, whether specifically raised by point of error or not) (citing *State v. Cook United, Inc.*, 464 S.W.2d 105, 106 (Tex. 1971); *Hamby*, 609 S.W.2d at 868; *Charter Medical Corp.*, 547 S.W.2d at 78; *Holt v. City of San Antonio*, 547 S.W.2d 715, 716 (Tex. Civ. App.—San Antonio 1977, writ ref'd n.r.e.)). Requirements for temporary injunctions and temporary restraining orders are generally the same, but the latter have some additional requirements, discussed at section 8.40 below. An order for issuance of a temporary injunction is at form 8-29 in this chapter.

§ 8.39:2 Statement of Grounds

In stating the reasons for its issuance, the order must be "specific in terms." Tex. R. Civ. P. 683. The stated reasons must be legally sufficient and must not be mere conclusory statements. *Martin v. Linen Systems for Hospitals*, 671 S.W.2d 706, 710 (Tex. App.—Houston [1st Dist.] 1984, no writ). The court need not explain its reasons for believing that the applicant will prevail on the merits, but it must explain why the applicant will be injured if the injunction is denied. If the order fails to meet the requirement of rule 683 that the reasons for issuance be specifically stated, the order will be invalid. *Courtlandt Place Historical Foundation v. Doerner*, 768 S.W.2d 924, 925 (Tex. App.—Houston [1st Dist.] 1989, no writ).

§ 8.39:3 Statement of Acts Enjoined

The order must "describe in reasonable detail and not by reference to the complaint or other document, the act or acts sought to be restrained." Tex. R. Civ. P. 683. The description of enjoined acts must be clear, definite, and precise, so that the defendant need not make inferences or draw conclusions about matters that persons might differ on. *Villalobos v. Holguin*, 208 S.W.2d 871, 875 (Tex. 1948).

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§ 8.39:4 Persons Affected

Rule 683 state in relevant part that "[e]very order granting an injunction and every restraining order . . . is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise." Tex. R. Civ. P. 683.

§ 8.39:5 Setting for Trial Date

Every order granting a temporary injunction must include an order setting a date for trial on the merits with respect to the ultimate relief sought. Tex. R. Civ. P. 683. If the order granting an injunction fails to include the trial setting, the order must be dissolved. *InterFirst Bank San Felipe v. Paz Construction Co.*, 715 S.W.2d 640, 641 (Tex. 1986) (judgment reversed without oral hearing and injunction order found void because it did not include order setting cause for trial on merits; rule 683 requirement that "[e]very order granting a temporary injunction shall include an order setting the cause for trial on the merits with respect to the ultimate relief sought" is mandatory and must be strictly followed); *Higginbotham v. Clues*, 730 S.W.2d 129 (Tex. App.—Houston [14th Dist.] 1987, no writ).

§ 8.40 Additional Requirements for Temporary Restraining Order

Temporary restraining orders must meet requirements in addition to those described in section 8.39 above. Every such order must define the threatened injury, state why the injury would be irreparable, state why the order was granted without notice, set the date for a hearing on the application for a temporary injunction, and be endorsed with the date and hour of issuance. Tex. R. Civ. P. 680.

An order for issuance of a temporary restraining order is at form 8-27 in this chapter, and a temporary restraining order is at form 8-28.

Form 8-1

The attorney should consult sections 8.11 through 8.15 in this chapter before using the prejudgment garnishment remedy.

The application must be accompanied with one or more affidavits. Tex. R. Civ. P. 658. Both the garnishee and the defendant must be served. *See* Tex. R. Civ. P. 659, 661, 663a. The application is discussed at section 8.12:4 in this chapter, and an affidavit is at form 8-2. See section 14.2 in this manual regarding exercising caution in pleading conditions precedent.

The clerk will docket the application to show the garnishee as the defendant, but the prejudgment garnishment proceeding should be conducted as an ancillary part of the underlying cause. *See* Tex. R. Civ. P. 659. In most counties, the clerk will prepare the writ of garnishment and the return. In some cases, the attorney may wish to prepare them for the clerk.

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

> Use the same docket number and court designation as in the original petition (unless the cause has been transferred), but include the garnishee's name in the style, as in "Carl Creditor, Plaintiff, v. Dan Debtor, Defendant and LastNational Bank, Garnishee."

Application for Prejudgment Writ of Garnishment

1. *Parties.* [**Name of plaintiff**], Plaintiff, whose address is [**address, city, state**], makes this Application for Prejudgment Writ of Garnishment. Garnishee is [**name of garnishee**], who can be served with citation at [**address, city, state**]. Defendant is [**name of defendant**], who can be served with citation at [**address, city, state**].

2. *Facts.* Plaintiff has reason to believe that Garnishee has property belonging to Defendant or is indebted to Defendant. Within Plaintiff's knowledge, Defendant does not possess property in Texas subject to execution sufficient to satisfy the debt. This garnishment is not sought to injure Defendant or Garnishee.

3. *Affidavit.* Plaintiff is entitled to the issuance of a writ of garnishment before judgment on the grounds stated in the attached affidavit. The affidavit is incorporated in this application by reference.

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4. *Conditions Precedent.* All conditions precedent have been performed or have occurred.

5. *Prayer.* Plaintiff prays that a writ of garnishment issue before judgment and that 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 8-2). Prepare the following, as necessary, to take to the hearing: form 8-3 (order for issuance of writ of garnishment), form 8-4 (bond to defendant), form 8-5 (writ to be served on garnishee), and form 8-6 (officer's return) with a copy of the writ, application, and affidavit(s) to be served on the defendant.

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Form 8-2

This affidavit may be executed by the plaintiff, his agent or attorney, or someone having knowledge of relevant facts. Tex. R. Civ. P. 658. Even though Tex. R. Civ. P. 658 permits the plaintiff's attorney to execute this affidavit, the manual committee recommends that the attorney not execute any affidavit for a client; see sections 8.3:2 and 19.17:3 in this manual. See Tex. Civ. Prac. & Rem. Code § 63.001 for statutory affidavit requirements.

[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 8-1.

Affidavit for Prejudgment Writ of Garnishment

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 a prejudgment writ of garnishment in this cause.]

Select one of the following.

"I have personal knowledge of the facts stated in this affidavit, and they are 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.

"In this suit, now pending in this Court, Plaintiff has filed an action against Defendant alleging [**describe type of action, e.g.,** an unpaid debt based on a secured promissory note].

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"This debt is just, due, and unpaid. Within my knowledge, Defendant does not possess property in Texas subject to execution sufficient to satisfy the debt. This garnishment is not sought to injure Defendant or Garnishee.

> State specific facts relied on by the plaintiff to warrant issuance of the writ. The following paragraph is a sample allegation; the actual allegations must be drafted to fit the facts.

"Defendant has stated to me that he is conducting a going-out-of-business sale, that he has sold Plaintiff's collateral, that he does not intend to pay any of his creditors, and that he plans to move out of the country in two weeks. In the past, Defendant has often promised to pay Plaintiff but has failed to do so.

> Continue with the following.

"In the suit against Defendant, Plaintiff has alleged that Defendant has damaged Plaintiff in the amount of $[**amount**]. Plaintiff should be permitted to garnish property of Defendant in that amount."

____
[Name of affiant]
Affiant

SIGNED under oath before me on ____________________________.

____
Notary Public, State of Texas

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Form 8-3

This form assumes the hearing was ex parte. *See* Tex. R. Civ. P. 658. For appearances by the defendant or garnishee, modify the form as appropriate. Unless the defendant chooses to replevy under Tex. R. Civ. P. 664, the amount of the defendant's replevy bond must be the amount of the plaintiff's claim, plus one year's accrual of interest if allowed by law on the claim, and estimated costs of court. 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 8-1.

Order for Issuance of Prejudgment Writ of Garnishment

At the hearing on Plaintiff's Application for Prejudgment Writ of Garnishment in this cause, Plaintiff appeared by and through his attorney of record. The hearing was conducted without notice to Defendant or Garnishee.

The Court finds that—

> Specific findings of fact must be made; findings 1.–4. are examples only.

1. Defendant executed a promissory note payable to Plaintiff. The note was due on February 1, 2018, and was secured by a 2005 Dodge pickup truck, VIN 1234567890;

2. this note is in default, and there is currently due to Plaintiff from Defendant $5,000, which represents unpaid principal and interest on the note;

3. Defendant is in the process of going out of business;

4. Defendant has sold the above-described collateral in which Plaintiff has a security interest;

> Findings 5. and 6. are required in all orders.

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5. within Plaintiff's knowledge, Defendant has no property in Defendant's possession in Texas subject to execution sufficient to satisfy the debt; and

6. the garnishment is not sought to injure Defendant or Garnishee.

It is therefore ORDERED that a prejudgment writ of garnishment be issued against [**name of garnishee**] for property or indebtedness 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 or indebtedness by posting a bond in the amount of $__________, payable to Plaintiff, conditioned 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 writ of garnishment (with application, affidavit, and order) to the defendant and the garnishee.

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Form 8-4

The form of the bond is suggested by Tex. R. Civ. P. 592b. Bonds are discussed at sections 8.13:2 (prejudgment garnishment), 8.18 (sequestration), and 8.27 (attachment) 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. See form 8-13 for a plaintiff's replevy bond for sequestered property and form 8-31 for a bond to a defendant for an injunction. If this form is used for a writ of sequestration, the plaintiff may add the conditions required by Tex. R. Civ. P. 708 for a replevy bond (see form 8-13); no separate replevy bond will then be required.

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

Bond to Defendant for [Writ of Attachment/Writ of Sequestration/ Writ of Prejudgment Garnishment]

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 [**type of remedy sought, e.g.,** writ of attachment].

SIGNED on ______________________________.

____
[**Name of plaintiff**]
Principal

____
[**Name of surety company**]
Surety

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By ______________________________
Agent for Surety

APPROVED on ______________________________.

____
[Name of clerk], Clerk
[Designation of court]

By ______________________________
Deputy

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Form 8-5

The form of the writ, including clauses governing time for the garnishee to appear, is set forth in Tex. R. Civ. P. 661. Usually the writ is provided by the clerk. Additional language must be included in the copy of the writ served on the defendant. For a notice to be served on the defendant, see form 8-7 in this chapter.

[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 8-1.

Writ of Garnishment to Be Served on Garnishee

To [**name of garnishee**], Garnishee:

WHEREAS, in the [**designation**] Court of [**county**] County [**include the number of the precinct if a justice court**], in a certain cause where [**name of plaintiff**] is Plaintiff and [**name of defendant**] is Defendant, Plaintiff, claiming an indebtedness against [**name of defendant**] of $[**amount**], besides interest and costs of suit, has applied for a writ of garnishment against you, [**name of garnishee**]; therefore you are hereby commanded to appear before the Court at [**location of court**]

Select one of the following. Select the first option if the writ is issued from a county or district court. Select the second option if the writ is issued from a justice court.

at 10:00 A.M. on the Monday next after the expiration of twenty days from the date of service of this writ,

Or

at or before 10:00 A.M. on the Monday next after the expiration of ten days from the date of service of this writ,

Continue with the following.

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then and there to answer on oath what, if anything, you are indebted to [**name of defendant**] and were indebted when this writ was served on you, and what effects, if any, of [**name of defendant**] you have in your possession and had when this writ was served, and what other persons, if any, within your knowledge, are indebted to [**name of defendant**] or have effects belonging to Defendant in their possession. You are further commanded NOT to pay to Defendant any debt or to deliver to Defendant any effects, pending further order of this Court. Herein fail not, but make due answer as the law directs.

ISSUED on ______________________________.

____
[**Name of clerk**], Clerk
[**Designation of court**]

Prepare form 8-6 (officer's return for prejudgment writ of garnishment) if needed and form 8-7 (notice to be served on defendant). Unless the clerk provides an extra copy of the writ that includes the notice language required by Tex. R. Civ. P. 663a, photocopy the writ and add the notice language (see form 8-7) before service on the defendant.

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Form 8-6

A return is usually included in the form writ furnished by the clerk. If the attorney prepares the writ, a return should be provided. The officer receiving the writ "shall make return thereof as of other citations." Tex. R. Civ. P. 663. 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 8-7.

[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 8-1.

Officer's Return for Prejudgment 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 the within named Garnishee, in person, 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 $____________.

____
SHERIFF OR CONSTABLE

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Form 8-7

The defendant is to receive a copy of the application, affidavit(s), order, and writ of garnishment. Tex. R. Civ. P. 663a. The writ is the same as the one to be served on the garnishee, except it must contain the additional notice set forth in Tex. R. Civ. P. 663a. The notice must be "prominently displayed on the face of the copy of the writ served on the defendant, in ten-point type and in a manner calculated to advise a reasonably attentive person of its contents."

Service may be as provided by Tex. R. Civ. P. 21a, which includes service by registered or certified mail or by telephonic document transfer. For a writ to be served on the garnishee and adapted for service on the defendant, see form 8-5 in this chapter.

Proof of service of the writ of garnishment on the defendant may be documented with this form, which is to be used as a cover sheet for the writ.

[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 8-1.

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**]

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Attach a copy of the writ (form 8-5). Include a certificate of service (form 19-1).

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Form 8-8

This form may be used to sequester property for which foreclosure or enforcement of a mortgage, lien, or security interest in personal property or fixtures is sought. Discussion of foreclosure of many kinds of liens is at sections 7.1 through 7.4 in this manual. If sequestration of real property is sought in a suit for title, partition, or possession for other purposes, this form must be adapted to fit existing facts. Real property is generally beyond the scope of this manual. The application and affidavit may be combined with the original petition; here, the application and affidavit are in one form, to be filed separately when or after the petition is filed. For a discussion of the application and affidavit, see section 8.17.

This form is based on the requirements for application and affidavit set forth in Tex. R. Civ. P. 696 and the grounds stated in Tex. Civ. Prac. & Rem. Code § 62.001. In most counties, the clerk will prepare the writ of sequestration and the return. In some cases, the attorney may wish to prepare them for the clerk. See forms 8-10 and 8-12.

See section 8.16:3 regarding the grounds for and availability of sequestration. See section 14.10 for other forms of party designation.

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

> Use the same caption as in the original petition unless the cause has been transferred.

Application and Affidavit for Writ of Sequestration

1. *Parties.* [**Name of plaintiff**], Plaintiff, whose address is [**address, city, state**], makes this Application for Writ of Sequestration. 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 the required findings by the court. The following paragraphs are sample allegations; the actual allegations must be drafted to fit the facts.

2. *Facts.* In this suit, now pending in this Court, Plaintiff is seeking damages from Defendant and [foreclosure/enforcement] of Plaintiff's [security interest/mortgage/lien] in the following property: [**describe each item of property with sufficient certainty that it can be identified and distinguished from similar property**]. Each item of property has the following value: [**list each item and its value**]. All this property is in Defendant's possession at [**address, city,**

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county] County, Texas. Plaintiff has a valid and existing [security interest/mortgage/lien] in this property.

3. *Default.* The debt owed to Plaintiff, as described in the original petition, is just and unsatisfied. Defendant has failed and refused to pay [**number**] payments of $[**amount**] each, although he agreed to do so. Plaintiff has exercised the right to accelerate the obligations owed by Defendant as set out in the [agreement/security agreement] between Plaintiff and Defendant. Defendant currently owes Plaintiff $[**amount**].

4. *Grounds.* Plaintiff fears Defendant may conceal the property or may remove it from [**county**] County during the pendency of this suit because Defendant refused to surrender possession of the property when specifically and rightfully requested by Plaintiff to do so. This refusal by Defendant is an intentional concealment of the property and therefore jeopardizes Plaintiff's [security interest/mortgage/lien] in the property.

5. *Prayer.* Plaintiff prays that a writ of sequestration issue and that 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**]

Affidavit

BEFORE ME, the undersigned authority, on this day personally appeared [**name of affiant**], who swore on oath that the following facts are true:

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"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 a writ of sequestration in this cause.]

Select one of the following.

"I have personal knowledge of the facts stated above, and they are 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.

____
[Name of affiant]
Affiant

SIGNED under oath before me on ______________________________.

____
Notary Public, State of Texas

Prepare the following, as necessary, to take to the hearing: form 8-9 (order for issuance of writ of sequestration), form 8-10 (writ of sequestration), form 8-12 (officer's return), and form 8-4 (bond to defendant).

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Form 8-9

The order is discussed at section 8.17:5 in this chapter. Usually the hearing will be ex parte. *See* Tex. R. Civ. P. 696. For appearance by the defendant, modify the form as appropriate. The content of this form is based on the requirements set forth at Tex. R. Civ. P. 696, including the requirement that the order make specific findings of fact to support the statutory grounds under Tex. Civ. Prac. & Rem. Code § 62.001.

Describe each item of property to be sequestered "with such certainty that it may be identified and distinguished from property of a like kind, giving the value of each article of the property and the county in which it is located." Tex. R. Civ. P. 696.

The court's order must specify the amount of both the plaintiff's sequestration bond and the defendant's replevy bond. Tex. R. Civ. P. 696.

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

> Use the same caption as in the application for writ of sequestration at form 8-8.

Order for Issuance of Writ of Sequestration

At the hearing on Plaintiff's Application for Writ of Sequestration 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 on specific statutory grounds must be made. The following are examples; the actual findings must be drafted to fit the facts.

1. this cause is still pending in this Court;

2. Plaintiff is seeking damages from Defendant and [foreclosure/enforcement] of Plaintiff's asserted [security interest/mortgage/lien] in the following property with value as stated: [**describe property, including value**];

3. the property is located in [**city, county**] County, Texas; and

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> The court's order must make specific findings to support the statutory grounds found to exist; the following example tracks the specific grounds set forth in the application and affidavit at form 8-8.

4. Defendant or the party in possession may conceal the property or remove it from the county during the pendency of this suit. Defendant refused to surrender possession of the property when specifically and rightfully requested by Plaintiff to do so. This refusal by Defendant constitutes an intentional concealment of the property and therefore jeopardizes Plaintiff's [security interest/mortgage/lien] in the property.

It is therefore ORDERED that a writ of sequestration be issued, conditioned that Plaintiff must post a bond in the amount of $____________, payable to Defendant, conditioned and approved as required by law.

It is further ORDERED that Defendant may replevy any of the property 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]

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If the application is granted, have the clerk issue a writ of sequestration (with application, affidavit, and order) for service on the defendant.

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Form 8-10

A copy of the writ, application and affidavit, and order must be served on the defendant. Tex. R. Civ. P. 700a. Usually the form is provided by the clerk. The language in the notice to the defendant of his right to file a replevy bond and seek dissolution of the writ is from Tex. R. Civ. P. 699, 700a. The time frame for the officer's return is dictated by Tex. R. Civ. P. 15. The writ is discussed at section 8.19 in this chapter.

Describe each item of property "with such certainty that it may be identified and distinguished from property of a like kind." Tex. R. Civ. P. 696; *see* Tex. R. Civ. P. 699 ("describing the same as it is described in the application or affidavits").

The language in the notice to the defendant must be in ten-point type. Tex. Civ. Prac. & Rem. Code § 62.023; Tex. R. Civ. P. 699.

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

Use the same caption as in the application for writ of sequestration at form 8-8.

Writ of Sequestration

To the sheriff or any constable of any county within the state of Texas, greetings:

Plaintiff has applied for and given bond for a writ of sequestration in this cause, which is now pending in this Court. You are therefore commanded to take into your possession, if it is found in your county, the following property: [**describe property**]. You are commanded to keep the property safe and preserved, subject to the further order of this Court, unless it is replevied.

Herein fail not, but have you this writ, with your return showing how you have executed it, before this Court on or before the Monday next after the expiration of twenty days from the date the writ is served.

You are to display to the interested persons present at the time of the levy the following:

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To [**name of defendant**], Defendant:

You are hereby notified that certain properties alleged to be claimed by you have been sequestered. 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.

ISSUED on ________________________________.

____
[**Name of clerk**], Clerk
[**Designation of court**]

Prepare officer's return if needed (form 8-12).

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Form 8-11

The manual committee recommends serving this notice with the other documents. The notice must be in ten-point type. Tex. R. Civ. P. 700a.

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

Use the same caption as in the application for writ of sequestration at form 8-8.

Notice of Sequestration

To **[name of defendant]**, Defendant:

You are hereby notified that certain properties alleged to be claimed by you have been sequestered. 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, the application, accompanying affidavits, and the orders of the court. Include a certificate of service (form 19-1).

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Form 8-12

A return is usually included in the form writ furnished by the clerk. If the attorney prepares the writ, a return should be provided. The attorney should make sure the return meets the requirements of the Texas Rules of Civil Procedure. See section 16.8 in this manual for a discussion of the officer's return. A writ of sequestration is at form 8-10.

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

Use the same caption as in the application for writ of sequestration at form 8-8.

Officer's Return for Writ of Sequestration

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 issuing the writ.

The distance actually traveled by me in execution of this process was ______ miles, and my fees are $____________.

____
SHERIFF OR CONSTABLE

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Form 8-13

Replevy by the plaintiff is discussed at section 8.22 in this chapter. The amount of the replevy bond shall not be less than the amount fixed by the court's order. Tex. R. Civ. P. 708.

For a form sequestration bond, which is to be filed with the application for the writ of sequestration, see form 8-4. If the sequestration bond is conditioned as provided in Tex. R. Civ. P. 708, the plaintiff will not be required to file this replevy bond. Tex. R. Civ. P. 698.

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. The sufficiency of the surety or sureties is to be approved by the officer. Tex. R. Civ. P. 708.

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

> Use the same caption as in the application for writ of sequestration at form 8-8.

Plaintiff's Replevy Bond for Sequestered Property

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

> Select one of the following. The first option is to be used for personal property and the second for real property.

Plaintiff will have the sequestered property, in the same condition as when it is replevied, together with the value of its fruits, hire, or revenue, forthcoming to abide the decision of the Court; or that Plaintiff will pay its value, or the difference between its value at the time of replevy and the time of judgment (regardless of the cause of the difference in value and of the fruits, hire, or revenue of the same in case Plaintiff is condemned to do so).

> Or

Plaintiff will not injure the property and that Plaintiff will pay the value of the rents of the property if condemned to do so.

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Continue with the following.

SIGNED on ______________________________.

____
[Name of plaintiff]
Principal

____
[Name of surety company]
Surety

By:______________________________
Agent for Surety

APPROVED by ______________________________ on ____________________.
Levying Officer Date

APPROVED AS TO FORM:

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

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Form 8-14

Perishable personal property that has been sequestered may be sold during pendency of the suit under conditions outlined in Tex. R. Civ. P. 710. The sale of perishable goods is discussed at section 8.23 in this chapter. Tex. R. Civ. P. 710 requires an affidavit and that the officer having possession of the property certify to the truth of the affidavit. This form includes a request that the property be sold as under ordinary execution. *See* Tex. R. Civ. P. 711.

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

> Use the same caption as in the application for writ of sequestration at form 8-8.

Application for Emergency Sale of Perishable Property
[after Sequestration]

[Name of plaintiff], Plaintiff in this action, makes this Application for Emergency Sale of Perishable Personal Property.

The [sheriff/constable] of [**county**] County, Texas, under writ of sequestration has seized and holds [**describe property as in form 8-8**]. This property is likely to be wasted, destroyed, or greatly depreciated in value before this cause can be heard on its merits, greatly lessening the amount likely to be realized from the property. The interest of justice will be served by selling the property and placing the proceeds in the registry of this Court.

An affidavit, certified by the officer and stating that the condition of the property requires its sale, is attached to and incorporated in this application.

Plaintiff requests that the described property be sold as under ordinary execution, as provided for by rule 710 of the Texas Rules of Civil Procedure, and that the proceeds be placed in the registry of this Court.

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____

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

Attach affidavit(s) (form 8-15). Prepare form 8-16 (order for emergency sale).

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Form 8-15

This affidavit is based on the requirements of Tex. R. Civ. P. 710. The affidavit is to be made by the plaintiff and attached to the application. Emergency sale of perishable goods is discussed at section 8.23 in this chapter. An application is at form 8-14.

The attorney should not swear to the truth of the facts on which the application is based. See section 19.17:3 in this manual.

[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 8-14.

Affidavit for Emergency Sale of Perishable Property

[after Sequestration]

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 an order for emergency sale.]

"More than ten days have expired since the levy of the writ of sequestration, and Defendant has not replevied the property or dissolved the writ. The following property was seized under the writ: [**describe property as in form 8-14**]. This property is likely to [waste/greatly depreciate in value/be destroyed] if continued to be kept in storage, in that [**state facts supporting allegation**]."

____
[Name of affiant]
Affiant

SIGNED under oath before me on ______________________________.

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____
Notary Public, State of Texas

Officer's Certification of Affidavit

I CERTIFY on ____________________________ that the foregoing affidavit is true.

____
[Name of officer]
[Title of officer]

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Form 8-16

Emergency sale of perishable goods is discussed at section 8.23 in this chapter. The application and affidavit on which this order is based are at forms 8-14 and 8-15. The hearing will probably be ex parte because the rule does not provide for notice to or participation of the adverse party. *See* Tex. R. Civ. P. 710. If appropriate, include a signature line for the defendant's attorney.

Tex. R. Civ. P. 712 requires the officer making the sale to return the order of sale to the court and at the time of making the return to pay the clerk or justice of the peace the proceeds of the sale.

[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 8-14.

Order for Emergency Sale of Perishable Property

[after Sequestration]

The Court has heard Plaintiff's Application for Emergency Sale of Perishable Personal Property in this cause. 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 8-14**].

It is further ORDERED that the proceeds of the sale be placed in the registry of this Court pending a trial of this cause on its merits. 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 ______________________________.

____
JUDGE PRESIDING

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APPROVED AS TO FORM:

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

Include the following if applicable.

____
[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.

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Form 8-17

The attorney should consult sections 8.25 through 8.32 in this chapter before seeking attachment.

The application may be filed at commencement of the suit or at any time during its progress and must be supported by one or more affidavits. Tex. R. Civ. P. 592. An affidavit is at form 8-18. The application is discussed at section 8.26:1. In most counties, the clerk will prepare the writ of attachment and the return. In some cases, the attorney may wish to prepare them for the clerk.

For other forms of party designation, see section 14.10 in this manual. See section 14.2 regarding exercising caution in pleading conditions precedent. Under the paragraph setting out the facts, include in the allegation the appropriate specific ground for attachment from the list found at Tex. Civ. Prac. & Rem. Code § 61.002.

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

> Use the same caption as in the original petition unless the cause has been transferred.

Application for Writ of Attachment

1. *Parties.* **[Name of plaintiff]**, Plaintiff, whose address is **[address, city, state]**, makes this Application for Writ of Attachment. 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 the required findings by the court and state grounds for issuing the writ. The following paragraph is a sample of fact and ground allegations; the actual allegations must be drafted to fit the situation.

2. *Facts.* During the period from about January 29, 2018, through February 19, 2018, Plaintiff sold and delivered to Defendant face brick and fireplace equipment, which had a fair market value and agreed purchase price of $3,053.90. Plaintiff has made demand for this amount, but Defendant has not paid. Defendant has stated that he intends to sell his property and move to another state permanently and has refused to pay or secure the debt due Plaintiff.

3. *Affidavit.* Plaintiff is entitled to the issuance of a writ of attachment on the grounds stated in the attached affidavit. The affidavit is incorporated in this application by reference.

4. *Conditions Precedent.* All conditions precedent have been performed or have occurred.

5. *Prayer.* Plaintiff prays that a writ of attachment issue and that 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 8-18). Prepare the following to take to the hearing: form 8-19 (order for issuance of writ of attachment), form 8-4 (bond to defendant), form 8-20 (writ of attachment), and form 8-22 (officer's return).

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Form 8-18

This affidavit is to be executed by the plaintiff, his agent or attorney, or someone having knowledge of relevant facts. The affidavit is to be attached to the application; see form 8-17 in this chapter. The affidavit is discussed at section 8.26:3.

The attorney should use the appropriate ground(s) stated in Tex. Civ. Prac. & Rem. Code § 61.002 and state material facts. The facts should not be stated in a conclusory fashion but should go beyond a "bare assertion of fact." The affidavit should carefully track the facts and grounds presented in the application. The facts stated should be admissible in evidence.

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

Use the same caption as in the application for writ of attachment at form 8-17.

Affidavit for Writ of Attachment

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 a writ of attachment in this cause.]

Select one of the following.

"I have personal knowledge of the facts stated in this affidavit, and they are 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.

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"In this suit, now pending in this Court, Plaintiff is seeking damages from Defendant, [**include if applicable:** a resident of [**county**] County, Texas,] alleging [**describe type of action, e.g.,** an unpaid debt].

"Defendant is justly indebted to Plaintiff. This attachment is not sued out for the purpose of injuring or harassing Defendant, and Plaintiff will probably lose the debt unless an attachment is issued.

The following paragraph is a sample fact allegation; the actual allegations must be drafted to fit the facts.

"During the period from about January 29, 2018, through February 19, 2018, Plaintiff sold and delivered to Defendant face brick and fireplace equipment, which had a fair market value and agreed purchase price of $3,053.90. I have made demand for this amount, but Defendant has refused to pay or secure his debt. Defendant has stated to me that he intends to sell his property and move to another state.

Continue with the following.

"In the suit against Defendant, Plaintiff has alleged that Defendant has damaged Plaintiff in the amount of $[**amount**]. Plaintiff should be permitted to attach property of Defendant in that amount."

____
[**Name of affiant**]
Affiant

SIGNED under oath before me on ______________________________.

____
Notary Public, State of Texas

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Form 8-19

The order is discussed at section 8.26:5 in this chapter. This form assumes that the hearing will be ex parte. For appearance by the defendant, modify the form as appropriate.

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

> Use the same caption as in the application for writ of attachment at form 8-17.

Order for Issuance of Writ of Attachment

At the hearing on Plaintiff's Application for Writ of Attachment 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 on specific statutory grounds must be made. Findings 1.–5. are examples; the actual findings must be drafted to fit the facts.

1. during the period from about January 29, 2018, through February 19, 2018, Plaintiff sold and delivered to Defendant certain face brick and fireplace equipment;

2. these materials had a fair market value and agreed purchase price of $3,053.90;

3. Plaintiff has demanded payment from Defendant, but Defendant has not made payment;

4. Defendant is indebted to Plaintiff in the amount of $3,053.90;

5. Defendant has stated that he intends to sell his property and move to another state;

> Findings 6. and 7. are required in all orders.

6. the attachment is not sued out to injure or harass Defendant; and

7. Plaintiff will probably lose his debt unless this attachment is issued.

It is therefore ORDERED that a writ of attachment be issued against Defendant for property in Defendant's possession in the maximum amount of $___________, conditioned that Plaintiff must post a bond in the amount of $___________, payable to Defendant, conditioned and approved as required by law.

It is further ORDERED that the property be kept safe and preserved subject to further orders of this Court.

It is further ORDERED that Defendant may replevy any of the property 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]

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If the application is granted, have the clerk issue a writ of attachment (with application, affidavit(s), and order) to the defendant.

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Form 8-20

The language of the writ is dictated by Tex. R. Civ. P. 594, 598a. Usually the form is provided by the clerk. Copies of the writ, application, affidavit(s), and order must be served on the defendant. Tex. R. Civ. P. 598a. The writ is discussed at section 8.28 in this chapter. The language in the notice to the defendant must be in ten-point type. Tex. R. Civ. P. 598a.

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

Use the same caption as in the application for writ of attachment at form 8-17.

Writ of Attachment

To the sheriff or any constable of any county within the state of Texas, greetings:

We command that you attach forthwith as much of the property of [**name of defendant**], if it is found in your county, repleviable on security, as shall be of value sufficient to make the sum of $[**amount**], and the probable costs of suit, to satisfy the demand of [**name of plaintiff**], and that you keep and secure in your hands the property so attached, unless replevied, that the same may be liable to further proceedings thereon to be had before our Court in [**city**], County of [**county**]. You will true return make of this writ on or before 10:00 A.M. of Monday, [**date**], showing how you have executed the same.

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 attached. If you claim any rights in such property, you are advised:

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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.

ISSUED on ______________________________.

____
[Name of clerk], Clerk
[Designation of court]

Prepare the officer's return (form 8-22).

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Form 8-21

The manual committee recommends serving this notice with the other documents. The documents must be served "as soon as practicable" following levy of the writ. The notice must be in ten-point type. Tex. R. Civ. P. 598a.

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

> Use the same caption as in the application for writ of attachment at form 8-17.

Notice of Attachment

To **[name of defendant]**, Defendant:

You are hereby notified that certain properties alleged to be owned by you have been attached. 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, the application, accompanying affidavits, and the orders of the court. Include a certificate of service (form 19-1).

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Form 8-22

A return is usually included in the form writ furnished by the clerk. If the attorney prepares the writ, a return should be provided. The attorney should make sure the return meets the requirements of the Texas Rules of Civil Procedure. See section 16.8 in this manual for a discussion of the officer's return. A writ of attachment is at form 8-20.

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

> Use the same caption as in the application for writ of attachment at form 8-17.

Officer's Return for Writ of Attachment

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:

____

____

____.

The property remains in my custody, subject to the further order of the court issuing the writ.

The distance actually traveled by me in execution of this process was ______ miles, and my fees are $____________.

____

SHERIFF OR CONSTABLE

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Form 8-23

Perishable personal property that has been attached may be sold during pendency of the suit under conditions outlined in Tex. R. Civ. P. 600. The sale of perishable goods is discussed at section 8.31 in this chapter.

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

Use the same caption as in the application for writ of attachment at form 8-17.

Application for Emergency Sale of Perishable Property

[after Attachment]

[Name of plaintiff], Plaintiff in this action, makes this Application for Emergency Sale of Perishable Property.

The [sheriff/constable] of [**county**] County, Texas, under writ of attachment has seized and holds [**describe property as in form 8-17**]. This property is likely to be wasted, destroyed, or greatly depreciated in value before this cause can be heard on its merits, greatly lessening the amount likely to be realized from the property. 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 this application and incorporated by reference. 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, as provided for by rule 600 of the Texas Rules of Civil Procedure, and that the proceeds be placed in the registry of this Court.

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

Attach affidavit(s) (form 8-24) and a bond (adapt form 8-4). Prepare form 8-25 (order for emergency sale).

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Form 8-24

The rules do not state who must make the affidavit in support of an application for emergency sale of perishable personal property. *See* Tex. R. Civ. P. 601. This form is drafted for execution by the plaintiff or the plaintiff's agent. Emergency sale of perishable goods is discussed at section 8.31 in this chapter. This affidavit is to be attached to the application; see form 8-23. The attorney should not swear to the truth of the facts on which the application is based. See sections 8.3:2 and 19.17:3 in this manual.

[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 8-23.

Affidavit for Emergency Sale of Attached Property

[after Attachment]

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 an order for emergency sale.]

"Since levy of the writ of attachment in this cause, sufficient time has passed for Defendant to replevy the property or dissolve the writ. The following property was seized under the writ: [**describe property as in form 8-17**]. This property is likely to [waste/decay/cause great expense/greatly deteriorate in value] if continued to be kept in storage, in that [**state facts supporting allegation**]."

____
[Name of affiant]
Affiant

SIGNED under oath before me on ______________________________.

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____

Notary Public, State of Texas

© STATE BAR OF TEXAS

Form 8-25

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. Emergency sale of perishable goods is discussed at section 8.31 in this chapter. The application on which this order is based is at form 8-23.

[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 8-23.

Order for Emergency Sale of Attached Property

[after Attachment]

The Court has heard Plaintiff's Application for Emergency Sale of Perishable Property in this cause. 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 8-23**].

It is further ORDERED that the proceeds of the sale be placed in the registry of this Court pending a trial of this cause on its merits. 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 ______________________________.

____
JUDGE PRESIDING

© STATE BAR OF TEXAS

APPROVED AS TO FORM:

____

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

> If the application is granted, the clerk should issue an order of sale.

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Form 8-26

A temporary restraining order will be granted without notice only if it clearly appears from specific facts shown in the verified application that the applicant will suffer immediate and irreparable injury, loss, or damage before notice can issue and a hearing can be held. Tex. R. Civ. P. 680. This form seeks both a temporary restraining order and a subsequent temporary injunction. No separate application for a temporary injunction is included in this manual, because a temporary injunction and a temporary restraining order are usually sought simultaneously. In most counties, the clerk will prepare the temporary restraining order. In some cases, the attorney may wish to prepare it for the clerk. See form 8-28 in this chapter. For further discussion, see sections 8.36 and 8.37. See section 14.2 in this manual regarding exercising caution in pleading conditions precedent.

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

> Use the same caption as in the original petition unless the cause has been transferred.

Application and Affidavit for Temporary Restraining Order and Temporary Injunction

1. *Parties.* [**Name of plaintiff**], Plaintiff, whose address is [**address, city, state**], makes this Application for Temporary Restraining Order and Temporary Injunction. Defendant is [**name of defendant**], who can be served with citation at [**address, city, state**]. [**Include if applicable:** Third-Party Defendant is [**name of party possessing defendant's property**], who can be served with citation at [**address, city, state**].]

> State specific facts relied on by the plaintiff to warrant issuance of the restraining order and the temporary injunction. The following paragraph is a sample allegation; the actual allegations must be drafted to fit the facts.

2. *Facts.* In this suit, now pending in this Court, Plaintiff is seeking damages from Defendant. Plaintiff lent Defendant $5,000 and received Defendant's promissory note for that amount. On December 31, 2017, Defendant defaulted on the note. The sum of $4,800, representing principal and interest, remains due and unpaid on the debt. Plaintiff believes that Defendant's assets are being secreted and placed beyond Plaintiff's reach. This belief is based on the fact that, after Defendant was served with Plaintiff's original petition in this cause,

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Defendant stated to Plaintiff that, unless Plaintiff withdrew this suit, Defendant would liquidate his business property and hide the proceeds and all cash now in Defendant's bank accounts in another state.

> State grounds for issuance of the restraining order and the temporary injunction. The following paragraph is a sample allegation of grounds; the actual allegations must be drafted to fit the facts.

3. *Grounds.* Plaintiff will suffer immediate and irreparable injury, loss, or damage if Defendant's conduct described above is not enjoined for these reasons: Defendant will not be able to satisfy the judgment that will probably be rendered in Plaintiff's favor in this suit; Defendant lacks nonexempt property with which to satisfy the judgment; Defendant has demonstrated unwillingness to pay Plaintiff's claim; and this conduct of Defendant will result in Defendant's not having assets subject to execution.

> The following paragraph will be suitable for most applications, but ensure that these allegations fit the specific situation.

Plaintiff does not have an adequate remedy at law because if Defendant's conduct continues Defendant will not have assets to satisfy an award of damages, because proceedings such as sequestration and garnishment will be more costly to Plaintiff than will injunctive relief, and because these proceedings will not be effective until after Defendant has placed most or all of Defendant's assets beyond Plaintiff's reach. Plaintiff has exercised due diligence in prosecuting this claim. The injury to Plaintiff if Defendant continues the conduct described above would outweigh any injury the restraining order and injunction might cause Defendant, and issuance of the restraining order and injunction would not disserve the public interest.

4. *Conditions Precedent.* All conditions precedent have been performed or have occurred.

5. *Prayer.* Plaintiff prays that—

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a. without notice to Defendant [**include if applicable:** or Third-Party Defendant], the Court issue a temporary restraining order restraining Defendant [**include if applicable:** or Third-Party Defendant] and [his/their] officers, agents, servants, and employees from directly or indirectly [**describe conduct to be restrained, e.g.,** transferring or removing any of Defendant's funds or other property in Third-Party Defendant's possession];

b. the Court set a date and time for a hearing on this application for a temporary injunction;

c. Defendant be cited to appear and answer;

d. after hearing, the Court issue a temporary injunction enjoining Defendant [**include if applicable:** or Third-Party Defendant] and [his/their] officers, agents, servants, and employees from directly or indirectly [**describe conduct to be restrained, e.g.,** transferring or removing any of Defendant's funds or other property in Third-Party Defendant's possession] during the pendency of this action;

e. Plaintiff be granted reasonable expenses incurred in obtaining the restraining order and injunction; and

f. Plaintiff be granted all further relief to which Plaintiff may be entitled.

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____

[Name]
Attorney for Plaintiff
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:

"I am [Plaintiff/[**other capacity, e.g.,** credit manager of Plaintiff]] in this cause. I have personal knowledge of the facts stated above, and they are true and correct. [**Include if affiant is agent:** I am authorized to make this affidavit and to apply for injunctive relief on behalf of Plaintiff.]"

____

[Name of affiant]
Affiant

SIGNED under oath before me on _______________________________.

____

Notary Public, State of Texas

Prepare the following to take to the hearing: form 8-27 (order granting temporary restraining order and setting hearing on temporary injunction), form 8-28 (temporary restraining order), and form 8-31 (bond to defendant).

Form 8-27

This form should be prepared in advance of and brought to the ex parte hearing on the application for a temporary restraining order. The form is divided into one part granting the restraining order and a second part setting a hearing on the application for a temporary injunction. Each part must be signed by the judge if the restraining order is granted; if a restraining order is denied but a hearing is set on the temporary injunction application, only the second part is signed. The order is discussed at section 8.39 in this chapter. The conduct to be enjoined must be described clearly, definitely, and precisely, so that the defendant will not have to draw inferences or conclusions about what is proscribed.

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

Use the same caption as in the application at form 8-26.

Order for Issuance of Temporary Restraining Order and Setting Hearing on Application for Temporary Injunction

At the hearing on Plaintiff's Application for Temporary Restraining Order and Temporary Injunction, Plaintiff appeared by and through his attorney of record. The hearing was conducted without notice to Defendant.

The Court finds that—

1. it clearly appears from specific facts shown by Plaintiff's verified application that immediate and irreparable injury, loss, or damage will result to Plaintiff before notice can be served on Defendant and before a hearing can be held on Plaintiff's application for a temporary injunction because, unless [**describe conduct to be restrained, e.g.,** the transferring or removing of Defendant's funds and other property in the possession of First National Bank of Austin] is immediately restrained, Defendant will [**describe injury, e.g.,** be unable to satisfy the judgment that will probably be rendered in Plaintiff's favor in this cause]. This injury will be irreparable unless this restraint is ordered because [**state why injury will be irreparable, e.g.,** all of Defendant's nonexempt assets will be placed beyond Plaintiff's reach];

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2. unless this restraint is ordered immediately, without notice to Defendant, Plaintiff will suffer irreparable injury immediately, because no other legal remedy can be obtained and effected before the injury occurs;

3. Plaintiff has no adequate remedy at law;

4. Plaintiff has exercised due diligence in prosecuting the underlying claim in this cause;

5. Plaintiff's injury will outweigh any injury to Defendant that may occur on issuance of this restraining order;

6. the restraining order will not disserve the public interest;

7. the status quo should be maintained, in the public interest; and

8. Plaintiff's bond in the amount of $___________ will fully protect Defendant's rights until a hearing can be held on Plaintiff's application for a temporary injunction.

It is therefore ORDERED that a temporary restraining order issue, operative until the date of the hearing hereinafter ordered, restraining and enjoining [**name[s]**] from [**describe conduct to be restrained, e.g.,** transferring or removing any funds or other property belonging to [**name of defendant**] in the possession of [**name of third-party defendant**]], provided that, before the issuance of the restraining order, Plaintiff must post bond in the amount of $___________, payable to Defendant, conditioned and approved as required by law.

SIGNED on ______________________________ at ________________ __.M.

____
JUDGE PRESIDING

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APPROVED AS TO FORM:

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

Order Setting Hearing on Application for Temporary Injunction

It is ORDERED that [**name of defendant**], Defendant in this cause, appear before this Court on __________________ at ________ __.M. at [**address, city**], Texas, to show cause, if any, why the temporary injunction requested by Plaintiff should not issue against Defendant.

SIGNED on ________________________________.

____
JUDGE PRESIDING

> If the application is granted in full, have the clerk issue a restraining order (form 8-28) and citation for hearing with a copy of the application. If the application for a restraining order is denied but a hearing on the temporary injunction is set, have the clerk issue citation for hearing with a copy of the application.

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Form 8-28

The conduct restrained must be described clearly, definitely, and precisely, so that the defendant will not have to draw inferences or conclusions about what is proscribed; see section 8.39 in this chapter.

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

Use the same caption as in the application at form 8-26.

Temporary Restraining Order

STATE OF TEXAS)

To [**name of each person and entity restrained**]:

Plaintiff has applied and given bond for a temporary restraining order and temporary injunction in this cause.

On the basis of the application, the Court has ordered the issuance of a temporary restraining order because it appears to the Court that, unless you are restrained as ordered below before notice can issue and a hearing can be held, Plaintiff will be irreparably injured because [**describe injury, e.g.,** Defendant will not be able to satisfy the judgment that will probably be rendered in Plaintiff's favor in this cause because Defendant's nonexempt assets will be beyond Plaintiff's reach].

You are therefore commanded to obey the order of this Court and to immediately desist and refrain from [**describe conduct restrained, e.g.,** transferring or removing any funds or other property of [**name of defendant**] in the possession of [**name of third-party defendant**]].

You are further ordered to appear before this Court at __________ __.M. on ________________________ at [**address, city**], Texas, to show cause why a temporary injunction, effective until final judgment in this cause, should not be granted as prayed for.

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ISSUED at ____________ __.M. on ______________.

____

[**Name of clerk**], Clerk
[**Designation of court**]

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Form 8-29

This form should be prepared in advance of and brought to the hearing on the application for a temporary injunction. This manual contains no separate application for the temporary injunction, because it is assumed that the plaintiff will initially file a combined application for a temporary restraining order and a temporary injunction; see form 8-26 in this chapter.

If the defendant appears without counsel or does not appear, the form should be modified accordingly. The order probably should recite that notice was given. *See* Tex. R. Civ. P. 681.

The order must state the reasons the court believes the plaintiff will be injured if the injunction does not issue. The enjoined conduct must be described clearly, definitely, and precisely, so that the defendant will not have to draw inferences or conclusions about what is proscribed. See section 8.39.

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

Use the same caption as in the application at form 8-26.

Order for Issuance of Temporary Injunction

After due notice was given, the Court heard Plaintiff's Application for Temporary Injunction in this cause. Plaintiff and Defendant appeared by and through their attorneys of record.

The Court finds that—

1. Defendant intends to [**state defendant's wrongful action, e.g.,** liquidate his personal property, close his bank accounts, and remove all his assets from this state, to effectively place them beyond Plaintiff's reach before a judgment can be rendered in this cause];

2. Plaintiff will probably be awarded a recovery in this cause;

3. if Defendant's threatened conduct as described above is not enjoined during the pendency of this suit, Plaintiff will be injured because [**state reasons for injury, e.g.,** Defendant will not have nonexempt assets available to satisfy Plaintiff's judgment for damages, so that the judgment will be ineffectual and Plaintiff will have no adequate remedy at law];

4. Plaintiff has exercised due diligence in prosecuting the underlying claim in this cause;

5. Plaintiff's injury will outweigh any injury to Defendant that may occur on issuance of this injunction;

6. the injunction will not disserve the public interest;

7. Defendant's intended conduct as described above will change the status quo, which should be maintained in the public interest; and

8. Plaintiff's bond in the amount of $___________ will fully protect Defendant's rights during the pendency of this action.

It is therefore ORDERED that a temporary injunction issue, operative until judgment is entered in this cause, enjoining [**name[s]**] from [**describe conduct enjoined, e.g.,** transferring or removing any funds or other property belonging to [**name of defendant**] in the possession of [**name of third-party defendant**]], provided that, before the issuance of the injunction, Plaintiff must post bond in the amount of $___________, payable to Defendant, conditioned and approved as required by law.

SIGNED on ______________________________.

____
JUDGE PRESIDING

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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]

Order Setting Cause for Trial

It is ORDERED that the foregoing cause of action is set for trial on

______________________, at ______________ __.M. at [**designation and location of court**].

SIGNED on ________________________________.

____
JUDGE PRESIDING

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Form 8-30

The conduct enjoined must be described clearly, definitely, and precisely, so that the defendant will not have to draw inferences or conclusions about what is proscribed; see section 8.39 in this chapter.

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

Use the same caption as in the application at form 8-26.

Temporary Injunction

STATE OF TEXAS)

To **[name of each person enjoined]**:

Plaintiff has applied and given bond for a temporary injunction in this cause, and the Court has ordered that the injunction issue.

You are therefore commanded to obey the order of this Court and to immediately desist and refrain from [**describe conduct enjoined, e.g.,** transferring or removing any funds or other property of [**name of defendant**] in the possession of [**name of third-party defendant**]].

This writ is returnable at or before 10:00 A.M. on the Monday next after the expiration of twenty days from the date of service hereof.

ISSUED on ______________________________.

____
[**Name of clerk**], Clerk
[**Designation of court**]

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Form 8-31

Two or more good and sufficient sureties, to be approved by the clerk, are required. Tex. R. Civ. P. 684. 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.

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

Use the same caption as in the application at form 8-26.

Bond to Defendant for Injunction

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 abide the decision that may be made in this cause and that Plaintiff will pay all amounts of money and costs that may be adjudged against Plaintiff if the temporary restraining order or temporary injunction ordered in this cause is dissolved in whole or in part.

SIGNED on ____________________.

____
[Name of plaintiff]
Principal

____
[Name of surety company]
Surety

By:___________________________
Agent for Surety

APPROVED on ____________________________.

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____
[Name of clerk], Clerk
[Designation of court]

By:______________________________
Deputy

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Chapter 14

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Chapter 14

Petitions and Causes of Action

I. Petitions

§ 14.1 Statement of Cause of Action

Each petition must contain a short statement of the cause of action that gives fair notice of the claim and a demand for judgment for the relief that the party seeks. The plaintiff may state more than one claim in a petition and may present more than one statement of the claim alternatively or hypothetically. Tex. R. Civ. P. 47–48.

§ 14.2 Allegation of Conditions Precedent

The plaintiff should plead generally, when appropriate, that every condition precedent has been performed or has occurred. After such a plea, the plaintiff must prove only those conditions specifically denied by the defendant. Tex. R. Civ. P. 54. The attorney should use caution in asserting that all conditions precedent have been met; the attorney's signature on the pleading certifies that the allegations contained in it are likely to have evidentiary support. Tex. Civ. Prac. & Rem. Code § 10.001(3).

The defendant's answer "denying all conditions precedent to the satisfaction of the claim" is not a specific denial. The plaintiff does not in response to such an answer have to prove the performance or occurrence of any condition precedent. Tex. R. Civ. P. 54. *Hill v. Thompson & Knight*, 756 S.W.2d 824, 826 (Tex. App.—Dallas 1988, no writ) (creditor not required to prove ownership because defendant failed to specifically deny any condition precedent to recovery on note).

In consumer-goods cases, pleading that "all conditions precedent have been performed" in a deficiency suit satisfies the requirement that the plaintiff plead that the foreclosure sale was performed in a commercially reasonable manner. The plaintiff has no further burden to prove commercial reasonableness unless the defendant specifically denies the commercial reasonableness of the sale. *Greathouse v. Charter National Bank-Southwest*, 851 S.W.2d 173, 176–77 (Tex. 1992). See section 14.29 below regarding deficiency judgments generally. For nonconsumer-goods transactions, see the discussion in section 14.29:4 below.

§ 14.3 Damages

Items of special damage must be specifically stated. Tex. R. Civ. P. 56. This requirement applies particularly to collections litigation because of the many special types of damages involved, such as statutory interest, contractual interest, attorney's fees, and costs. Unliquidated damages may be sought if the petition states that the damages sought are within the jurisdictional limits of the court. On special exception, the court can require that the petitioner amend the petition to specify the maximum amount claimed. Tex. R. Civ. P. 47. Although there are generally limits on the recovery of exemplary damages, those limitations are removed if the action is based on theft punishable as a third-degree felony or higher. *See* Tex. Civ. Prac. & Rem. Code § 41.008(c)(13); *see also* Tex. Civ. Prac. & Rem. Code §§ 41.003, 41.008(b).

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§ 14.4 Expedited Actions

§ 14.4:1 Application of the Expedited Action Process

Rule 169 was added to rules effective March 31, 2013, to promote the prompt, efficient, and cost-effective resolution of civil actions. *See* 76 Tex. B.J. 221 (2013). Rule 169 is mandatory and applies 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, attorney's fees, expenses, costs, interest, or any other type of damage of any kind, does not exceed $100,000. Tex. R. Civ. P. 169(a)(1); *see also* Tex. R. Civ. P. 169, cmt. 1. Tex. R. Civ. P. 47, 190.2 were revised to conform to the expedited actions procedures. Tex. R. Civ. P. 190.2(a)(1) was added to include in level 1 discovery control plan "any suit that is governed by the expedited actions process in Rule 169" and the rule was recaptioned as "Discovery Control Plan—Expedited Actions and Divorces Involving $50,000 or Less (Level 1)." *See* 76 Tex. B.J. 221 (2013). Rule 47(c), by requiring a statement of monetary relief sought, now expressly requires the plaintiff to plead into the requirements of the rule, or describe relief that falls outside the rule. *See* Tex. R. Civ. P. 47(c).

Rule 47 requires: (1) a short statement of the claim to give sufficient and fair notice of the claim involved; (2) a statement that the damages sought are within the jurisdictional limits of the court; (3) a statement of the monetary relief sought, and (4) a demand for judgment for all the other relief to which the party deems itself entitled. Tex. R. Civ. P. 47(a)–(d).

The expedited actions process applies in 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, prejudgment interest, and attorney's fees. Tex. R. Civ. P. 169(a)(1). The expedited process does not apply to actions filed pursuant to the Texas Family Code, the Property Code, the Tax Code, or to medical liability claims governed by chapter 74 of the Texas Civil Practice and Remedies Code. Tex. R. Civ. P. 169(a)(2).

See part II. in chapter 19 for more information about expedited actions.

§ 14.4:2 Statement of Claim

In order to plead into the expedited process, a claimant's pleadings must indicate that the party seeks monetary relief of $100,000 or less, including damages of any kind, penalties, costs, expenses, prejudgment interest, and attorney's fees. Tex. R. Civ. P. 169(a)(1). The following language may be used to plead into the expedited rules: "Plaintiff intends that discovery be conducted under Level 1 and affirmatively pleads that this suit is governed by the expedited-actions process in Tex. R. Civ. P. 169."

If additional, nonmonetary relief is pleaded, the case will not be governed by the expedited rules. Tex. R. Civ. P. 169(c)(1)(B). Importantly, a claimant that does not plead as required by section (c) of rule 47 may not conduct discovery until the pleading is amended to comply with rule 47. Tex. R. Civ. P. 47.

§ 14.4:3 Special Exceptions in Attempt to Force Pleading into Expedited Action

A defendant that wishes to force a plaintiff into the expedited process may seek to use a special exception. Tex. R. Civ. P. 47. A defendant, out of an abundance of caution, may also wish to have the court rule on any outstanding discovery requests, since a plaintiff may not conduct discovery until he complies with the pleading requirements of rule 47. The following special exception may accomplish this purpose:

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> Defendant specially excepts to the Plaintiff's Petition in that it fails to comply with Tex. R. Civ. P. 47 which requires the Plaintiff to identify the amount of damages being sought, and whether Plaintiff seeks only monetary relief. Defendant requests that Plaintiff comply with Tex. R. Civ. P. 47(c) and amend the Petition to identify the amount of damages being sought, and whether Plaintiff seeks only monetary relief. Defendant requests that this special exception be set for hearing and that said special exception be granted. Defendant further requests that the Plaintiff be ordered to not conduct any discovery until the Petition is amended to comply with Tex. R. Civ. P. 47, and that any outstanding discovery requests served by Plaintiff on Defendant, if any, be quashed as untimely under Tex. R. Civ. P. 47.

§ 14.4:4 Effect of Mandatory Expedited Action Process on Parties

Since a plaintiff will always be the master of his petition, he will be able to plead in or out of the expedited rules. However, a defendant, even one with counter-claims in excess of $100,000 or a nonmonetary claim, may be forced to try the case under the expedited process unless he can show "good cause." *See* Tex. R. Civ. P. 169(a)(1), (c)(1)(A).

§ 14.4:5 Removal from Expedited Action Process

A court must remove a suit from the expedited process in two instances. First, a suit must be removed from the expedited process on a showing of "good cause." Tex. R. Civ. P. 169(c)(1)(A). Second, a court must remove the suit from the expedited process if a claimant, other than a counter-claimant, files a pleading, an amended pleading, or a supplemental pleading that seeks nonmonetary relief. Tex. R. Civ. P. 169(c)(1)(B). The rules *do not* provide that the parties can opt out of the expedited action process by agreement. The process is mandatory except in the two instances referenced immediately above.

In determining "good cause" to remove a suit from the expedited action process the court should consider factors such as—

1. whether the damages sought by multiple claimants against the same defendant exceed, in the aggregate, the relief allowed under rule 169(a)(1);
2. whether a defendant has filed, in good faith, a compulsory counterclaim that seeks nonmonetary relief;
3. the number of parties and witnesses;
4. the complexity of the legal and factual issues; and
5. whether an interpreter is necessary.

Tex. R. Civ. P. 169, cmt. 3.

Further, a pleading, an amended pleading, or a supplemental pleading that removes a case from the expedited process may not be filed without leave of court unless it is filed the earlier of thirty days after the discovery period is closed (the discovery period opens on filing of suit and closes 180 days after any discovery request of any kind is served on any party) or thirty days before the date set for trial. Tex. R. Civ. P. 169(c)(2), 190.2(b)(1). Leave to amend a pleading may only be granted if good cause outweighs any prejudice to the opposing party. Tex. R. Civ. P. 169(c)(2).

If a suit is removed from the expedited process then discovery must be reopened. Tex. R. Civ. P. 169(c)(3), 190.2(c). Once discovery is reopened, all discovery must be completed within the

timeframes set forth in the new discovery control plan ordered by the court (within the limitations provided in Tex. R. Civ. P. 190.3 and 190.4). Any person previously deposed may be redeposed. And, on motion by any party, the court should continue the trial date so that discovery under the new control plan can be completed. Tex. R. Civ. P. 190.2(c).

§ 14.5 Allegations about Parties

§ 14.5:1 Information to Be Pleaded

The original petition should contain appropriate allegations about the parties, such as—

1. the complete true name and any alias of each individual defendant (*see* Tex. R. Civ. P. 79);
2. any assumed business name (Tex. R. Civ. P. 28);
3. the name and kind of entity, if any defendant is not an individual;
4. information about any individual who can accept service for any defendant that is not an individual;
5. the name and address of the registered agent for any corporate defendant;
6. the capacity of any defendant (for example, personal representative, receiver) not being sued for his own liability;
7. the residential address of each party (Tex. R. Civ. P. 79);
8. the business address of each defendant; and
9. all other addresses where each defendant might be found, to aid in serving the petition.

Additionally, Tex. Civ. Prac. & Rem. Code § 30.014 requires each party to include partial identification information in its initial pleading in a civil action filed in a district court, county court, or statutory county court. The last three numbers of the party's driver's license number (if issued) and the last three numbers of the party's Social Security number (if issued) must be included. Tex. Civ. Prac. & Rem. Code § 30.014(a). A court may order that an initial pleading be amended to include this information and may find a party in contempt if the party does not amend the pleading as ordered. Tex. Civ. Prac. & Rem. Code § 30.014(b).

§ 14.5:2 Purpose and Use of Allegations

Allegations about the parties provide necessary information for service of process. This information should be in the petition instead of a separate letter, because cover letters can easily become separated from the petition. Considered in light of the stated cause of action, party allegations help determine whether jurisdiction and venue are proper. These allegations also establish, for purposes of res judicata and joinder, who is involved in the suit. The plaintiff's attorney must take care to include all necessary parties, all parties whose liability is sought, and all individuals whose personal liability is sought to satisfy debts of corporate defendants and other such entities. Individual liability for debts of entities is discussed in part II. in chapter 6 of this manual.

§ 14.6 Ascertaining Status of Business as Party to Suit

§ 14.6:1 Generally

A suit can be maintained only by and against parties who have an actual or legal existence. *Ray Malooly Trust v. Juhl*, 186 S.W.3d 568, 571 (Tex. 2006). The attorney should therefore ascertain that both his client and the defendant exist as legal entities with the capacity to sue or be sued.

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§ 14.6:2 Corporations and Limited Liability Companies

A Texas corporation or a foreign corporation authorized to transact business in Texas loses its privilege to file suit if it fails to pay franchise taxes. Tex. Tax Code § 171.252. Limited liability companies are considered corporations for franchise tax purposes. *See* Tex. Tax Code § 171.002(a). The attorney should call the secretary of state's office corporations section at 512-463-5555 to determine a corporation's or limited liability company's standing. This information is also available online by subscribing to secretary of state's online SOS-Direct resource. See section 3.22 in this manual for additional information on contacting the secretary of state's office.

A foreign corporation need not be registered to bring suit in Texas. *See* Tex. Bus. Orgs. Code § 9.251. This statute also applies to foreign limited liability companies. See part II. in chapter 6 of this manual regarding corporations and limited liability companies.

§ 14.6:3 Limited Partnerships and Limited Liability Partnerships

Limited partnerships and limited liability partnerships can lose their privilege to file suit if they fail to file a periodic report required by the Texas Revised Limited Partnership Act. *See* Tex. Bus. Orgs. Code § 153.307. The attorney should call the secretary of state's office at 512-463-5555 to determine the standing of a limited partnership or limited liability partnership. See also section 6.9 in this manual regarding limited partnerships and section 6.10 regarding limited liability partnerships.

§ 14.6:4 Business Operating under Assumed Name

A business operating under an assumed name must have a properly filed assumed name certificate to bring an action based on a contract or act in which the assumed name was used. Tex. Bus. & Com. Code § 71.201.

§ 14.7 Multiple Defendants—Joinder of Parties

§ 14.7:1 Required Joinder

A person subject to process must be joined as a party if—

1. complete relief cannot be accorded among the other parties without his joinder, or
2. his interest in the action is such that disposition of the matter in his absence may—
   a. subject any other party to a substantial risk of incurring multiple or otherwise inconsistent obligations because of the claimed interest, or
   b. impair or impede the unjoined party's ability to protect his interest as a practical matter.

If a person is indispensable and cannot be made a party, the court must dismiss the cause. In determining whether a party is indispensable, the court will consider, among other matters—

1. the extent to which a judgment rendered without the person's joinder might be prejudicial to him or to the joined parties;
2. the extent to which this prejudice can be lessened or avoided by including protective provisions in the judgment, by shaping the relief, or by any other measure;
3. whether a judgment rendered without the person's joinder would be adequate; and

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4. whether dismissal for nonjoinder will leave the plaintiff with an adequate remedy.

Tex. R. Civ. P. 39.

A party whose presence is truly indispensable is rare; the court can usually adjudicate the dispute between the parties already joined. *Indian Beach Property Owners' Ass'n v. Linden*, 222 S.W.3d 682, 698 (Tex. 2007); *Cooper v. Texas Gulf Industries*, 513 S.W.2d 200, 204 (Tex. 1974). A failure to join "indispensable" parties does not render a judgment void. *Browning v. Placke*, 698 S.W.2d 362, 363 (Tex. 1985).

§ 14.7:2 Permissive Joinder

Multiple defendants may be joined if—

1. a right to relief is asserted against them jointly, severally, or alternatively;
2. the claimed right arises out of the same transaction, occurrence, or series of transactions or occurrences; and
3. any question of law or fact common to all of them will arise in the action.

Tex. R. Civ. P. 40(a).

§ 14.7:3 Joinder of Spouse

A spouse may generally be sued without the other spouse's joinder. Tex. Fam. Code § 1.105. In a suit to reach joint-management community property, both spouses should be joined, although failure to do so will not render the judgment void, and the judgment will bind the party-spouse. *Dr. Donald R. Klein & Associates, M.D., P.A. v. Klein*, 637 S.W.2d 507, 508–509 (Tex. 1982); *Dulak v. Dulak*, 513 S.W.2d 205, 207 (Tex. 1974), *overruled by statute as recognized in Stauffer v. Henderson*, 801 S.W.2d 858, 868 (Tex. 1990). In a suit to reach community property under one spouse's sole management and control, it is presumably not fatal to omit the other spouse as a party; in a suit affecting community property, each spouse should be a proper party. See section 27.33 in this manual regarding community and separate property.

§ 14.7:4 Joinder of Party to Instrument

An assignor, endorser, or other party not primarily liable on an instrument may be joined in a suit against the principal obligor. Tex. R. Civ. P. 30. A conditionally liable party may be sued without joining the maker or principal obligor if the principal obligor—

1. is a nonresident or resides in a place at which he cannot be reached by ordinary process of law;
2. has an unknown residence that cannot be ascertained by use of reasonable diligence;
3. is dead; or
4. is actually or notoriously insolvent.

Tex. Civ. Prac. & Rem. Code § 17.001(b). A surety cannot otherwise be sued without joinder of his principal. Tex. R. Civ. P. 31. An absolute guarantor, however, can be sued without joining the principal. See section 14.31:1 below regarding guarantors and sureties.

The exceptions to joinder of guarantors and principal obligors cannot be enlarged. An insane maker, therefore, must be joined in a suit against his guarantor. *Johnson v. First Mortgage Loan Co.*, 135 S.W.2d 806, 810–11 (Tex. Civ. App.—Austin 1939, no writ). The plaintiff, however, may sue a comaker singly and may proceed to judgment without joinder of the other comakers, even if the defendant was an accommodation party. It is the defendant's duty to join other comakers. *Reed v. Buck*, 370 S.W.2d 867, 873 (Tex. 1963).

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§ 14.8 Entities as Defendants

§ 14.8:1 Entities as Defendants Generally

The petition should name every entity and individual against whom the creditor would impose liability. Rules about names under which various entities, rather than individuals, can or should be named as defendants are discussed in the following sections. A defendant's entity status should be alleged, and the name, address, and capacity of an individual who can accept service for the entity should be stated. *See Reynolds v. Haws*, 741 S.W.2d 582, 589 (Tex. App.—Fort Worth 1987, writ denied) (entity not party to suit without being named in pleadings). The petition should name as defendants all individuals (for example, partners, shareholders, directors) against whom personal liability is sought. *See Ray Malooly Trust v. Juhl*, 186 S.W.3d 568 (Tex. 2006) (holding that a trust is not a legal entity and civil suits may be maintained only by or against parties having an actual or legal existence). Service of process is discussed in chapter 16 of this manual. See forms 14-14 through 14-20 in this chapter for clauses for party designation.

§ 14.8:2 Texas Corporation or Limited Liability Company

A corporation or limited liability company should be sued in its corporate name. *See* Tex. Bus. Orgs. Code § 2.101(1). The statute also applies to nonprofit corporations; *see also* Tex. Bus. Orgs. Code § 2.109 (professional corporations). A dissolved corporation may be sued in its corporate name within three years after dissolution. Tex. Bus. Orgs. Code § 11.356. The statute also applies to nonprofit corporations and limited liability companies; *see* Tex. R. Civ. P. 29; *see also* Tex. Bus. Orgs. Code § 2.109 (professional corporations). If individual liability for directors, shareholders, or members is sought, those individuals must be identified and named as defendants. See part II. in chapter 6 of this manual. See forms 14-14 through 14-20 in this chapter for additional clauses for party designation.

§ 14.8:3 Foreign Corporation

A foreign corporation that is transacting or has transacted business in Texas can be sued in Texas, even if it is not registered to transact business in this state. Tex. Bus. Orgs. Code § 9.051. Allegations pertaining to service on the corporation will vary depending on the status of the corporation's registration. See chapter 16 in this manual.

Entering into a contract by mail or by other means with a Texas resident is doing business in Texas for the purpose of allowing long-arm jurisdiction, if any part or all of the contract is to be performed in Texas by either party. Also, the act of recruiting Texas residents, directly or through an intermediary located in Texas, for employment inside or outside Texas is deemed doing business in Texas. Tex. Civ. Prac. & Rem. Code § 17.042(3). The petition should allege the specific basis for jurisdiction. The liability of shareholders of a foreign corporation for corporate debts, liabilities, and obligations for which they are not otherwise liable by statute or agreement is governed by the laws of the jurisdiction of incorporation of the foreign corporation. Tex. Bus. Orgs. Code § 1.104.

§ 14.8:4 When Corporation Must Be Represented by Attorney

A corporation must be represented in litigation by an attorney. *Handy Andy, Inc. v. Ruiz*, 900 S.W.2d 739, 741 n.1 (Tex. App.—Corpus Christi 1994, writ denied); *Moore v. Elektro-Mobil Technik GmbH*, 874 S.W.2d 324, 327 (Tex. App.—El Paso 1994, writ denied); *Electronic Data Systems, Inc. v. Tyson*, 862 S.W.2d 728, 737 (Tex. App.—Dallas 1993, no writ).

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§ 14.8:5 Partnerships

A partnership may be sued in the name of the partnership. Tex. R. Civ. P. 28. All general partners are jointly and severally liable for all obligations of the partnership. Tex. Bus. Orgs. Code § 152.304. A suit against the partnership, with service on one or more partners, authorizes judgment against the partnership and the partner(s) actually served. Tex. Civ. Prac. & Rem. Code § 17.022. *See also* Tex. Civ. Prac. & Rem. Code § 31.003 (court may render judgment against partnership if suit is against several partners who are jointly indebted under a contract and citation has been served on at least one but not all of the partners); Tex. Bus. Orgs. Code § 152.306(a), (b) (judgment may be entered against partner who has been served in suit against partnership if judgment is obtained against partner and remains unsatisfied for ninety days; exceptions exist). An individual partner who enters an appearance, although not served, will also be subject to individual liability. *Bentley Village, Ltd. v. Nasits Building Co.*, 736 S.W.2d 919, 923 (Tex. App.—Tyler 1987, no writ).

Long-arm jurisdiction can attach to a foreign partnership doing business in Texas (see section 14.8:3 above). *See* Tex. Civ. Prac. & Rem. Code § 17.042. See forms 14-14 through 14-20 in this chapter for clauses for party designation.

§ 14.8:6 Business Operating under Assumed Name

A partnership, private corporation, unincorporated association, or individual doing business under an assumed name may be sued under the assumed name, partnership name, or common name. Tex. R. Civ. P. 28. For clarity, it is the better practice to allege both the assumed name and the name of the partnership, association, individual, or corporation operating under that name. See section 14.9:2 below. A court, in its discretion, may substitute the true name of the defendant in the judgment; the plaintiff is not necessarily required to replead. *Trails East v. Mustafa*, 713 S.W.2d 422, 424 (Tex. App.—Fort Worth 1986, no writ); *but see Bailey v. Vanscot Concrete Co.*, 894 S.W.2d 757, 760–61 (Tex. 1995) (court declined to substitute correct name of defendant when plaintiff failed to add correct name). See also the discussion in section 17.63:9 in this manual.

§ 14.8:7 Association

A foreign or domestic unincorporated joint-stock company or association doing business in Texas may be sued in its company or distinguishing name without naming its individual stockholders or members. Tex. Rev. Civ. Stat. art. 6133. A nonresident joint-stock company or association may be subject to long-arm jurisdiction if it meets the "doing business" test; see section 16.14 in this manual. *See* Tex. Civ. Prac. & Rem. Code § 17.042. To obtain personal liability against individual members, it is necessary to also name and serve the individual members as defendants. *See* Tex. Rev. Civ. Stat. arts. 6136, 6137. Individual liability is discussed at section 6.31 in this manual. See forms 14-14 through 14-20 in this chapter for clauses for party designation.

§ 14.9 Party Designations in Caption of Petition

§ 14.9:1 Party Designation Generally

The parties' capacities are not a required part of the caption, but they are often included for clarity. To the extent possible, reasonably complete names should be used. For a sole plaintiff and a sole defendant, the recommended form is set out below.

ACME CORPORATION,
Plaintiff

v.

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JOHN L. DOE,
Defendant

§ 14.9:2 Assumed Name

An individual, partnership, unincorporated association, or corporation can sue or be sued in an assumed name, but the court or any party may move for substitution of the true name. Tex. R. Civ. P. 28. A person cannot maintain an action or proceeding in any Texas court arising out of a contract or act in which an assumed name was used until an original, new, or renewed business or professional name certificate has been filed. Tex. Bus. & Com. Code § 71.201(a) (formerly Business and Commerce Code section 36.25). See section 14.8:6 above. Because the court clerk may index a pleading or judgment under the names in the caption instead of the introductory paragraph, the recommended form includes both the true name and the assumed name.

ACME CORPORATION,
Plaintiff

v.

JOHN L. DOE, individually and

doing business as
ONE-DAY LAUNDRY,
Defendant

§ 14.9:3 Multiple Parties

Although not required by rule or statute, listing the names of all parties in the caption ensures that all of them will be indexed in the court records.

ACME CORPORATION,
Plaintiff

v.

JOHN L. DOE, JANE C. DOE,
and RICHARD E. ROE,
Defendants

In the petition and answer, and subsequent amended or supplemental petitions and answers, the parties should be listed by their full names in the caption. In other pleadings if listing all parties would be unduly burdensome, the form set out below is suggested.

ACME CORPORATION,
Plaintiff

v.

JOHN L. DOE, et al.,
Defendants

See Abramcik v. U.S. Home Corp., 792 S.W.2d 822, 824 (Tex. App.—Houston [14th Dist.] 1990, writ denied).

§ 14.10 Additional Forms of Party Designation

§ 14.10:1 Residences and Identification of Parties

The petition should state the names of the parties and, if known, their addresses. Tex. R. Civ. P. 79. Also, each party must include the last three numbers of his driver's license number (if issued) and the last three numbers of his Social Security number (if issued) in the initial pleading in a civil action filed in a district court, county court, or statutory county court. Tex. Civ. Prac. & Rem. Code § 30.014(a).

§ 14.10:2 Multiple Parties

In a petition with multiple defendants a simple listing of the parties is suggested.

Defendants are [**name of defendant**], individually and doing business as [**name of business**], who can be served at [**address, city, state**], and [**name of defendant**], who can be served at [**address, city, state**].

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Attorneys who store forms electronically may want to add the following clause at the end of the party allegations paragraph to avoid changing *Defendant* to *Defendants* throughout the forms:

> Unless the context clearly indicates otherwise, the singular noun "Defendant" in this pleading includes all defendants listed above.

§ 14.10:3 Plaintiff Using Assumed Name

A plaintiff may sue under an assumed name, but the court or another party may move for substitution of the true name. Tex. R. Civ. P. 28. To sue on a transaction made under an assumed name, a plaintiff must first comply with chapter 71 of the Texas Business and Commerce Code. Tex. Bus. & Com. Code § 71.201 (formerly Business and Commerce Code section 36.25). Recommended language for an individual is set out in clause 14-15-1 in this chapter. See section 14.10:4 below if the assumed name is being used by a corporation.

§ 14.10:4 Corporate Plaintiff

A corporation should sue in its corporate name and show its corporate status.

Texas Corporation: See clause 14-15-2 in this chapter.

Foreign Corporation Operating in Texas: A foreign corporation cannot bring suit in a Texas court on a cause of action based on a business transaction in the state without being registered to transact business in Texas. *See* Tex. Bus. Orgs. Code ch. 9, subch. A. This requirement applies to intrastate business, but not to interstate business. *Killian v. Trans Union Leasing Corp.*, 657 S.W.2d 189, 192 (Tex. App.—San Antonio 1983, writ ref'd n.r.e.). See clause 14-15-3.

Foreign Corporation Not Operating in Texas: Foreign corporations not engaged in intrastate business in Texas may bring suit without being registered to transact business. A foreign corporation is not considered to be transacting business in Texas merely by engaging in interstate commerce in this state or by conducting an isolated transaction completed within thirty days. Tex. Bus. Orgs. Code § 9.251 (statute lists other instances of transactions not considered doing business in Texas). See clause 14-15-4.

Corporation Using Assumed Name: See clause 14-15-5.

§ 14.10:5 Partnership as Plaintiff

A partnership may sue under its partnership, assumed, or common name, but the court or another party may move for substitution of the true names of the partnership or the partners if an assumed or common name is used. Tex. R. Civ. P. 28.

Partnership with No Partnership, Assumed, or Common Name: See clause 14-15-6 in this chapter.

Partnership Using Partnership (but Not Assumed) Name (for Example, Limited or General Partnership): See clause 14-15-7.

Partnership Using Assumed or Common Name: See clause 14-15-8.

§ 14.10:6 Individual as Defendant

Personal service is discussed at section 16.3 in this manual. Out-of-state service on an individual is discussed briefly at section 16.9, and long-arm service is discussed at section 16.14.

Most forms in this manual provide examples of citing an individual Texas resident as a defendant. Other common instances of individuals as

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defendants are listed in form 14-16 in this chapter.

Nonresident Individual Not Required to Have Registered Agent, Having Texas Resident as Person in Charge of Business (Long-Arm Service): *See* Tex. Civ. Prac. & Rem. Code § 17.043. See clause 14-16-1.

Nonresident Individual Having Neither Regular Place of Business nor Registered Agent in Texas (Long-Arm Service): *See* Tex. Civ. Prac. & Rem. Code § 17.044. See clause 14-16-2.

Individual Using Assumed Name: See clause 14-16-3.

Personal Representatives of Deceased Nonresident for Whom Secretary of State Is Agent: If the defendant is a nonresident for whom the secretary of state is an agent for service of process and the defendant dies, the secretary of state remains the agent for a nonresident administrator, executor, or personal representative for the deceased's estate. *See Estate of Pollack v. McMurrey*, 858 S.W.2d 388, 391 (Tex. 1991) (holding secretary of state agent for estate, but only for service of process). If the deceased has no administrator, executor, or personal representative, the secretary of state is an agent for service of process on an heir (as determined by the law of the foreign jurisdiction). *See* Tex. Civ. Prac. & Rem. Code § 17.044(c). If the secretary of state is served with duplicate copies of process as agent for a nonresident administrator, executor, or personal representative, a statement of the person's name and address will be required by the secretary of state, who will immediately mail a copy of the process to the person. Tex. Civ. Prac. & Rem. Code § 17.045(e).

Guardian of Incompetent Nonresident for Whom Secretary of State Is Agent: If the nonresident for whom the secretary of state is an agent is judged incompetent, the secretary of state remains the agent for that person's guardian or personal representative. *See* Tex. Civ. Prac. & Rem. Code § 17.044(d). If the secretary of state is served with duplicate copies of process as agent for a guardian or personal representative, a statement of the person's name and address will be required by the secretary of state, who will immediately mail a copy of the process to the person. Tex. Civ. Prac. & Rem. Code § 17.045(e).

§ 14.10:7 Corporation as Defendant

In some cases a corporation's liability can be fixed on shareholders or other individuals. Individual liability for corporate debts is discussed in part II. in chapter 6 of this manual. Allegations suitable for those pleadings are beyond the scope of this manual. For brief discussions of service on corporations, see sections 16.11 and 16.12 in this manual. Long-arm service is discussed at section 16.14.

Texas Corporation

Registered Agent. *See* Tex. Bus. Orgs. Code § 5.201 (business corporations, nonprofit corporations), § 2.109 (professional corporations); *see also* Tex. Bus. Orgs. Code § 5.255. See clause 14-17-1 in this chapter.

Registered Agent Cannot Be Found. *See* Tex. Bus. Orgs. Code § 5.251 (business corporations, nonprofit corporations), § 2.109 (professional corporations); *see also* Tex. Bus. Orgs. Code § 5.255. See clause 14-17-2.

No Registered Agent. Statutory authorities relevant to this situation are the same as those cited above for the situation in which the registered agent cannot be found. See clause 14-17-3.

Foreign Corporation Registered to Transact Business in Texas

For brief discussions of service on foreign corporations operating in Texas, see sections

16.11:3 (business corporations) and 16.12:2 (nonprofit corporations) in this manual.

Registered Agent. *See* Tex. Bus. Orgs. Code §§ 5.201, 9.001, 9.004, 9.201 (business corporations, nonprofit corporations), § 2.109 (professional corporations); *see also* Tex. Bus. Orgs. Code § 5.255. See clause 14-17-4.

No Registered Agent. *See* Tex. Bus. Orgs. Code § 5.251 (business corporations, nonprofit corporations), § 2.109 (professional corporations); *see also* Tex. Bus. Orgs. Code § 5.255; ch. 9, subch. A. See clause 14-17-5.

Foreign Corporation Not Registered to Transact Business in Texas

For a brief discussion of foreign corporations not required to be registered to conduct some transactions in Texas, see section 16.11:4 in this manual.

Corporation with Person in Charge of Business in Texas (Long-Arm Service). See Tex. Civ. Prac. & Rem. Code §§ 17.043, 17.045, which are discussed at section 16.14. See clause 14-17-6.

No Agent in Texas (Long-Arm Service). See Tex. Civ. Prac. & Rem. Code §§ 17.044, 17.045, which are discussed at section 16.14. See clause 14-17-7.

Corporation Using Assumed Name: See clause 14-17-8.

§ 14.10:8 Partnership (including Limited Liability Partnership) as Defendant

Because Tex. R. Civ. P. 99 requires that the citation be directed to the defendant, it is good practice to name the partnership and every partner who may be individually liable and to state his partnership status. Service on any partner authorizes judgment on the partnership. Tex. Civ. Prac. & Rem. Code § 17.022.

Practice Tip: Despite the language of section 17.022, the more cautious practice may be to serve separate citations on the partnership and the partners.

Limited liability partnerships shield partners from certain acts or omissions of other partners or representatives of the partnerships. This subject is discussed in more detail in section 6.10. The partnership should be identified as a limited liability partnership in the petition; otherwise, the rules regarding service on partnerships also apply to limited liability partnerships. *See* Tex. Bus. Orgs. Code §§ 152.304, 152.802; *see also* Tex. Bus. Orgs. Code § 5.255.

Texas Partnership

Principal Office in County of Suit. See Tex. Civ. Prac. & Rem. Code §§ 17.022, 31.003, which are summarized at section 16.10 in this manual. See clause 14-18-1 in this chapter.

Agent in County of Suit. See Tex. Civ. Prac. & Rem. Code § 17.021, which is summarized at section 16.10. See clause 14-18-2.

Foreign Partnership (Long-Arm Service)

Partnership with Person in Charge of Business in Texas. See Tex. Civ. Prac. & Rem. Code §§ 17.043, 17.045, which are discussed at section 16.14. See clause 14-18-3.

No Agent in Texas. See Tex. Civ. Prac. & Rem. Code § 17.044, which is discussed at section 16.14. See clause 14-18-4.

Partnership Using Assumed Name: See clause 14-18-5.

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§ 14.10:9 Limited Partnership as Defendant

Each general partner of a limited partnership, as well as the limited partnership's registered agent for service of process, may be served. Tex. Bus. Orgs. Code § 5.255. See section 6.9 in this manual regarding the liability of individual limited partners for partnership obligations. Service on limited partnerships is discussed at section 16.10.

Texas Limited Partnership

Principal Office in County of Suit. See Tex. Civ. Prac. & Rem. Code §§ 17.022, 31.003, which are summarized at section 16.10. See clause 14-19-1 in this chapter.

The examples shown in clause 14-19-1 assume that the general partner being served is also a named defendant in the suit. With one service, both the limited partnership and the general partner are served. Tex. Civ. Prac. & Rem. Code § 17.022. Service may also be obtained on the limited partnership through its registered agent for service of process. Tex. Bus. Orgs. Code §§ 5.201, 5.255. If serving the registered agent is advisable (for instance, if no liability is alleged against a general partner), clause 14-17-1 should be used, altering it as appropriate to reflect that the defendant is a limited partnership (there are no presidents or vice-presidents). Serving only the registered agent, however, will not allow a subsequent judgment against a general partner.

Agent in County of Suit. Service on an agent or clerk is authorized in certain circumstances. See Tex. Civ. Prac. & Rem. Code § 17.021, which is summarized at section 16.10, for particulars. See clause 14-19-2.

Foreign Limited Partnership Registered to Transact Business in Texas: *See* Tex. Bus. Orgs. Code § 5.255; ch. 9, subch. A. See clause 14-19-3.

Foreign Limited Partnership Not Registered to Transact Business in Texas

Partnership with Person in Charge of Business in Texas (Long-Arm Service). See Tex. Civ. Prac. & Rem. Code §§ 17.043, 17.045, which are discussed at section 16.14. See clause 14-19-4.

No Agent in Texas (Long-Arm Service). See Tex. Civ. Prac. & Rem. Code § 17.044, which is discussed at section 16.14. See clause 14-19-5.

Limited Partnership Using Assumed Name: See clause 14-19-6.

§ 14.10:10 Association or Joint-Stock Company as Defendant

See the brief discussion of service on these entities at section 16.13:4 in this manual.

Texas Association or Joint-Stock Company: See Tex. Rev. Civ. Stat. art. 6134, which is summarized at section 16.13:4. Members of the association or joint-stock company should be served only if the plaintiff anticipates that a judgment against the defendant organization will be returned without satisfaction and that the plaintiff will then try to reach personal property of the members to satisfy the judgment. *See* Tex. Rev. Civ. Stat. art. 6137. See clause 14-20-1 in this chapter.

Foreign Association or Joint-Stock Company (Long-Arm Service)

Organization with Person in Charge of Business in Texas. See Tex. Civ. Prac. & Rem. Code §§ 17.043, 17.045, which are discussed at section 16.14. See clause 14-20-2.

No Agent in Texas. See Tex. Civ. Prac. & Rem. Code § 17.044, which is discussed at section 16.14. See clause 14-20-3.

Association or Joint-Stock Company Using Assumed Name: See clause 14-20-4.

§ 14.10:11 Limited Liability Company as Defendant

Chapter 5, subchapters E and F, of the Texas Business Organizations Code discuss registered agents and service of process. See also section 14.8:2 above. Service on limited liability companies is discussed at section 16.13:2 in this manual.

Texas Limited Liability Company

Registered Agent. *See* Tex. Bus. Orgs. Code §§ 5.201, 5.255. See clause 14-21-1 in this chapter.

Registered Agent Cannot Be Found. *See* Tex. Bus. Orgs. Code §§ 5.251, 5.255. See clause 14-21-2.

No Registered Agent. *See* Tex. Bus. Orgs. Code §§ 5.251, 5.255. See clause 14-21-3.

Foreign Limited Liability Company Registered to Transact Business in Texas

Registered Agent. *See* Tex. Bus. Orgs. Code §§ 5.201, 5.255; ch. 9, subch. A. See clause 14-21-4.

No Registered Agent. *See* Tex. Bus. Orgs. Code §§ 5.251, 5.255; ch. 9, subch. A. See clause 14-21-5.

Foreign Limited Liability Company Not Registered to Transact Business in Texas: The reach of the long-arm statute includes nonresident individuals, foreign corporations, joint-stock companies, associations, and partnerships. Use the language in clause 14-18-3, altering it as appropriate.

Limited Liability Company Using Assumed Name: See clause 14-21-6.

§ 14.10:12 Defendant's Whereabouts Unknown

If the defendant's whereabouts are unknown, use the following language or alternative language setting forth the particular grounds specified by Tex. R. Civ. P. 109 for service by publication:

> The residence of Defendant is unknown and after due diligence Plaintiff and Plaintiff's counsel have been unable to locate him. Therefore, Plaintiff seeks service of process by publication.

See section 16.16 and forms 16-7 through 16-13 in this manual.

[Sections 14.11 through 14.20 are reserved for expansion.]

II. Causes of Action

§ 14.21 Action on Sworn Account

§ 14.21:1 Purpose and Use

A suit on sworn account is probably the most useful collection procedure available to creditors. A defendant who does not file a proper sworn denial to a properly filed suit on sworn account cannot dispute the accuracy of the stated charges. *See* Tex. R. Civ. P. 93(10), 185; *Vance v. Holloway*, 689 S.W.2d 403, 404 (Tex. 1985); *Airborne Freight Corp. v. CRB Marketing, Inc.*, 566 S.W.2d 573, 574–575 (Tex. 1978) (at trial, sworn account constituted prima facie evidence

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of debt without necessity of formally introducing account into evidence); *Huddleston v. Case Power & Equipment Co.*, 748 S.W.2d 102, 103 (Tex. App.—Dallas 1988, no writ). "Rule 185, is not a rule of substantive law but a rule of procedure regarding the evidence necessary to establish a prima facie case or right to recover." *Rizk v. Financial Guardian Insurance Agency, Inc.*, 584 S.W.2d 860, 862 (Tex. 1979); *Southern Management Services, Inc. v. SM Energy Co.*, 398 S.W.3d 350, 354 (Tex. App.—Houston [14th Dist.] 2013, no pet.); *Hou-Tex Printers, Inc. v. Marbach*, 862 S.W.2d 188, 190 (Tex. App.—Houston [14th Dist.] 1993, no writ). However, when the defendant timely files a verified denial of the correctness of the account, the evidentiary effect of the sworn account is destroyed, and the plaintiff must present further proof of his claim. *Schum v. Munck Wilson Mandala, LLP*, 497 S.W.3d 121, 125 (Tex. App.—Texarkana 2016, no pet.) (citing *Woodhaven Partners, Ltd. v. Shamoun & Norman, L.L.P.*, 422 S.W.3d 821, 833 (Tex. App.—Dallas 2014, no pet.)); *Southern Management Services*, 398 S.W.3d at 354.

§ 14.21:2 Applicability

Tex. R. Civ. P. 185 states:

> When any action or defense is founded upon an open account or other claim for goods, wares, and merchandise, including any claim for a liquidated money demand based upon written contract or founded on business dealings between the parties, or is for personal service rendered, or labor done or labor or materials furnished, on which a systematic record has been kept, and is supported by the affidavit of the party, his agent or attorney taken before some officer authorized to administer oaths, to the effect that such claim is, within the knowledge of affiant, just and true, that it is due, and that all just and lawful offsets, payments and credits have been allowed, the same shall be taken as prima facie evidence thereof, unless the party resisting such claim shall file a written denial, under oath. A party resisting such a sworn claim shall comply with the rules of pleading as are required in any other kind of suit, provided, however, that if he does not timely file a written denial, under oath, he shall not be permitted to deny the claim, or any item therein, as the case may be. No particularization or description of the nature of the component parts of the account or claim is necessary unless the trial court sustains special exceptions to the pleadings.

It is an extremely broad rule, which includes claims for goods, services, labor or materials furnished, and any claim for liquidated money demand founded on business dealings between the parties, on which a systematic record has been kept. A suit on a sworn account has been used in the following areas:

1. Insurance Premiums. *See Bernsen v. Live Oaks Insurance Agency, Inc.*, 52 S.W.3d 306 (Tex. App.—Corpus Christi 2001, no pet.) (unpaid truck insurance premiums);

2. Freight Services. *See Continental Carbon Co. v. Sea-Land Services, Inc.*, 27 S.W.3d 184 (Tex. App.—Dallas 2000, pet. denied) (ocean freight services);

3. Medical Services. *See Solano v. Syndicated Office Systems*, 225 S.W.3d 64 (Tex. App.—El Paso 2005, no pet.); *Andrews v. East Texas Medical Center-Athens*, 885 S.W.2d 264 (Tex. App.—Tyler 1994, no writ);

4. Attorney's Fees. *See Becker-White v. Goodrum*, 472 S.W.3d 337 (Tex. App.—Houston [14th Dist.] 2015, pet. denied) (bench trial judgment affirmed for plaintiff on proper sworn account)); *Woodhaven Partners, Ltd. v. Shamoun & Norman, L.L.P.*, 422 S.W.3d 821, 833 (Tex. App.—Dallas 2014, no pet.);

5. Oil & Gas Lease Expenses. *See Southern Management Services, Inc. v. SM Energy Co.*, 398 S.W.3d 350 (Tex. App.—Houston [14th Dist.] 2013, no pet.); *Vance v. Holloway*, 689 S.W.2d 403 (Tex. 1985);

6. Advertising. *See Livingston Ford Mercury, Inc. v. Haley*, 997 S.W.2d 425 (Tex. App.—Beaumont 1999, no pet.) (radio advertising); and

7. Staffing Services. *See Myan Management Group, L.L.C. v. Adam Sparks Family Revocable Trust*, 292 S.W.3d 750 (Tex. App.—Dallas 2009, no pet.).

The sworn account procedure has been held inapplicable to suits on—

1. breach of a lease. *See AKIB Construction, Inc. v. Neff Rental, Inc.*, No. 14-07-00063-CV, 2008 WL 878835, at *2–3 (Tex. App.—Houston [14th Dist.] Apr. 3, 2008, no pet.) (mem. op.) (citing *Murphy v. Cintas Corp.*, 923 S.W.2d 663, 665 (Tex. App.—Tyler 1996, writ denied) (sworn account cannot be based on a lease agreement); *Meineke Discount Muffler Shops, Inc. v. Coldwell Banker Property Management Co.*, 635 S.W.2d 135, 138 (Tex. App.—Houston [1st Dist.] 1982, writ ref'd n.r.e.). *But see Baldwin v. Liberty Leasing Co.*, No. 05-99-00267-CV, 2000 WL 781430, at *1–2 (Tex. App.—Dallas June 20, 2000, pet. denied) (not designated for publication) (applying Tex. R. Civ. P. 185 in the context of an action for liquidated money demand based on written contract for lease of medical equipment);

2. transactions resting on a special contract. *See Meaders v. Biskamp*, 316 S.W.2d 75, 78 (Tex. 1958) (contract for sale of real estate not sworn account in claim for attorney's fees). *But see Carr Well Service, Inc. v. Skytop Rig Co.*, 582 S.W.2d 500, 502 (Tex. Civ. App.—El Paso 1979, writ ref'd n.r.e.) (action on special contract can be brought as sworn account if transaction is among types listed in Tex. R. Civ. P. 185);

3. transactions between third parties or parties who are strangers to the transaction. *See Tandan v. Affordable Power, L.P.*, 377 S.W.3d 889, 894–95 (Tex. App.—Houston [14th Dist.] 2012, no pet.) (plaintiff failed to produce evidence other than sworn account that defendant was party to transaction); *American Alloy Steel, Inc. v. Armco, Inc.*, 777 S.W.2d 173, 178 (Tex. App.—Houston [14th Dist.] 1989, no writ) (purchaser of goods sued seller but submitted sworn account based on contract for sale of goods to subsequent buyer) *See generally Lee v. McCormick*, 647 S.W.2d 735 (Tex. App.—Beaumont 1983, no writ));

4. promissory notes. *Hou-Tex Printers, Inc. v. Marbach*, 862 S.W.2d 188, 190 (Tex. App.—Houston [14th Dist.] 1993, no writ). However, it is arguable that a note is within rule 185 as a liquidated claim based on written contract between the parties on which a systematic record has been kept. *See*

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Baldwin, 2000 WL 781430 at *1–2; and

5. credit card debt. *See Williams v. Unifund CCR Partners Assignee of Citibank*, 264 S.W.3d 231, 234 (Tex. App.—Houston [1st Dist.] 2008, no pet.) (credit card debt not sworn account); *Tully v. Citibank (South Dakota), N.A.*, 173 S.W.3d 212 (Tex. App.—Texarkana 2005, no pet.) (same); *Bird v. First Deposit National Bank*, 994 S.W.2d 280, 282 (Tex. App.—El Paso 1999, pet. denied) (same). However, if the account is based on a merchant-seller's credit card, rather than a bank's credit card, the sworn account rule appears to include such claims. *Williams*, 264 S.W.3d at 234–35 (citing *Bird*, 994 S.W.2d at 282).

§ 14.21:3 Elements

The elements of a sworn account are that—

1. the sale and delivery of merchandise or performance of services;
2. amount of the account is "just," i.e., the prices charged are pursuant to an express agreement, or in the absence of an agreement, that the charges are usual, customary, or reasonable; and
3. the outstanding amount remains unpaid.

Ellis v. Reliant Energy Retail Services, L.L.C., 418 S.W.3d 235, 246 (Tex. App.—Houston [14th Dist.] 2013, no pet.) (citing *PennWell Corp. v. Ken Associates*, 123 S.W.3d 756, 766 (Tex. App.—Houston [14th Dist.] 2003, pet. denied)).

§ 14.21:4 Plaintiff's Pleadings

A sworn account petition is at form 14-1 in this chapter. A sworn account must be supported by the affidavit of the party, his agent, or his attorney. See form 14-2. This affidavit must state that within the affiant's knowledge—

1. the claim is just and true;
2. the claim is due; and
3. all just and lawful offsets, payments, and credits have been allowed.

Tex. R. Civ. P. 185.

A single affidavit, properly prepared, documented, and executed, can support both a sworn account petition and a subsequent summary judgment motion. The basic sworn account affidavit is at form 14-2 in this chapter. This affidavit may be combined with the requirements of a business records affidavit as set out in Tex. R. Evid. 902(10). The supporting documentation should be sufficiently itemized and explained so that the judge can ascertain the date and nature of the transaction or payment history. If necessary, a key or explanation of invoicing or billing should be attached to the pleading. *See Price v. Pratt*, 647 S.W.2d 756, 757 (Tex. App.—Corpus Christi 1983, no writ) (undefined and unexplained abbreviations on business records did not support sworn account). If the supporting documentation does not sufficiently describe the nature of the component parts of the account or claim, the defendant can specially except to the pleadings. Tex. R. Civ. P. 185; *see also Southern Management Services, Inc. v. SM Energy Co.*, 398 S.W.3d 350, 355 (Tex. App.—Houston [14th Dist.] 2013, no pet.) (pleading was sufficient when it contained list of invoices but not actual invoices and defendant did not specially except or lack of specificity); *Willie v. Donovan & Watkins, Inc.*, No. 01-00-01039-CV, 2002 WL 537682, at *2 (Tex. App.—Houston [1st Dist.] Apr. 11, 2002, no pet.) (not designated for publication) (finding that pleading was sufficient

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when invoices were attached and trial court denied special exceptions).

The affidavit can be signed by the party, his agent, or his attorney, as long as it is executed by someone with personal knowledge of the matters stated. The creditor's attorney should exercise extreme caution in signing a sworn account affidavit, because personal knowledge is required. See section 19.17:3 in this manual, and Tex. Disciplinary Rules Prof'l Conduct R. 3.03.

Normally, a statement of account or invoice copies, if not voluminous, are referenced in the sworn account affidavit. The attorney should review any attachments carefully from a defense perspective. Do the attachments raise issues as to the correct party? Does the statement balance match the petition? Do the attachments raise usury issues?

§ 14.21:5 Defendant's Pleadings

A party resisting a sworn claim must timely file a written denial, under oath, that complies with the general rules of pleading that are required in any other kind of suit. If he fails to file a proper denial, he will not be permitted to deny the claim on the account in its entirety or to deny any item that is a part of it. Tex. R. Civ. P. 185. The filing of a proper verified denial by the defendant destroys the evidentiary effect of the plaintiff's itemized account and forces the plaintiff to prove his case at common law. *Worley v. Butler*, 809 S.W.2d 242 (Tex. App.—Corpus Christi 1990, no writ); *Nichols v. William A. Taylor, Inc.*, 662 S.W.2d 396, 398 (Tex. App.—Corpus Christi 1983, no writ) (citing *Rizk v. Financial Guardian Insurance Agency, Inc.*, 584 S.W.2d 860 (Tex. 1979); *Crawford v. Pullman, Inc.*, 630 S.W.2d 377 (Tex. App.—Houston [14th Dist.] 1982, no writ)).

The written denial, under oath, must appear in the defendant's answer. An affidavit filed in opposition to the motion for summary judgment will not constitute a proper denial of the sworn account. *Boodhwani v. Bartosh*, No. 03-02-00432-CV, 2003 WL 743854, at *1 (Tex. App.—Austin Mar. 6, 2003, no pet.) (citing *Cooper v. Scott Irrigation Construction, Inc.*, 838 S.W.2d 743 (Tex. App.—El Paso 1992, no writ); *Rush v. Montgomery Ward*, 757 S.W.2d 521 (Tex. App.—Houston [14th Dist.] 1988, writ denied); *Zemaco, Inc. v. Navarro*, 580 S.W.2d 616, 620 (Tex. Civ. App.—Tyler 1979, writ dism'd w.o.j.)).

Sworn General Denial Insufficient: A sworn denial of "each and every allegation" of a petition, demanding "strict proof thereof," is a general denial that cannot meet the requirements of Tex. R. Civ. P. 93(10) and 185. *Huddleston v. Case Power & Equipment Co.*, 748 S.W.2d 102, 102–04 (Tex. App.—Dallas 1988, no writ); *see also Cooper v. Scott Irrigation Construction, Inc.*, 838 S.W.2d 743, 746 (Tex. App.—El Paso 1992, no writ) (statement in defendant's affidavit that "cost of repairs and the loss to my 1990 cotton crop far exceed any amount otherwise due and owing for the pipeline system" was not sufficient as sworn denial of account).

Broad, Generalized Sworn Denial Insufficient: "The defendant's written denial must state more than a broad generalization that he 'specifically denies' the sworn account allegations; instead, the verified affidavit must address the facts on which the defendant intends to rebut the plaintiff's affidavit." *Woodhaven Partners, Ltd. v. Shamoun & Norman, L.L.P.*, 422 S.W.3d 821, 833 (Tex. App.—Dallas 2014, no pet.) (quoting *Andrews v. East Texas Medical Center-Athens*, 885 S.W.2d 264, 267 (Tex. App.—Tyler 1994, no writ)).

Amended Sworn Account Requires Amended Sworn Denial: When an amended sworn account substantially differs from the original, the party resisting the account must file another sworn denial. *See Southern Management Services, Inc. v. SM Energy Co.*, 398 S.W.3d 350,

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356 (Tex. App.—Houston [14th Dist.] 2013, no pet.) (plaintiff-creditor filed amended sworn account with new invoices and credits that reduced balance by approximately $50,000; defendant did not file a sworn denial of the amended account; summary judgment for creditor affirmed).

§ 14.21:6 Defenses

Affirmative Defenses: Even without a proper sworn denial of account, a debtor may still present affirmative defenses. *See Rizk v. Financial Guardian Insurance Agency, Inc.*, 584 S.W.2d 860, 863 (Tex. 1979) (failure of consideration and statute of limitations could be raised in the absence of verified denial).

Statute of Limitations: Actions on sworn account must be brought not later than four years after the day the cause of action accrued. Tex. Civ. Prac. & Rem. Code § 16.004(c). The cause of action accrues on the day that the dealings in which the parties were interested together cease. Tex. Civ. Prac. & Rem. Code § 16.004(c). *See Kaldis v. Crest Financial*, 463 S.W.3d 588, 596 (Tex. App.—Houston [1st Dist.] 2015, no pet.) (cause of action accrued no earlier than when account was charged off and closed); *Bank of America v. Jeff Taylor LLC*, 358 S.W.3d 848, 854 (Tex. App.—Tyler 2012, no pet.); *Livingston Ford Mercury, Inc. v. Haley*, 997 S.W.2d 425, 429 (Tex. App.—Beaumont 1999, no pet.) (jury finding of open account; stipulation between the parties that open account was not subject to limitations defense).

Practice Tip: Accounts referred with charges over four years old do not give rise to the defense of statute of limitations if there are transactions on the account that are less than four years old. *See* Tex. Civ. Prac. & Rem. Code § 16.004(c); *Kaldis*, 463 S.W.3d at 596; *Childs v. Taylor Cotton Oil Co.*, 612 S.W.2d 245, 248–50 (Tex. Civ. App.—Tyler 1981, writ ref'd n.r.e.) (in sworn account suit between two merchants with ten-year history of transactions, court applied predecessor statute to Tex. Civ. Prac. & Rem. Code § 16.004(c) to find four-year limitations period applied and did not commence until cessation of dealings together).

"Stranger to the Transaction" Defense: If defendant is not named on the invoice or statement as named in the petition, the suit may be subject to the "stranger to the transaction" defense. "When the plaintiff's evidence fails to identify the defendant as the debtor on the account, 'the sworn account is not considered as prima facie proof of the debt.'" *Tandan v. Affordable Power, L.P.*, 377 S.W.3d 889, 894–95 (Tex. App.—Houston [14th Dist.] 2012, no pet.) (statement attached to petition named defendant and another company, raised fact question as to which company was indebted; sworn denial not required to controvert account) (citing *Sundance Oil Co. v. Aztec Pipe & Supply Co., Inc.*, 576 S.W.2d 780 (Tex. 1978)). If the name on an invoice is not defendant's legal name, consider pleading that defendant does business under the assumed name. The assumed name is established if defendant does not file a verbal denial. *See* Tex. R. Civ. P. 93(14).

Payment: Rule 95 of the Texas Rules of Civil Procedure states: "When a defendant shall desire to prove payment, he shall file with his plea an account stating distinctly the nature of such payment, and the several items thereof; failing to do so, he shall not be allowed to prove the same, unless it be so plainly and particularly described in the plea as to give the plaintiff full notice of the character thereof." Tex. R. Civ. P. 95. If the defendant fails to provide an account, or to precisely identify the payments in its pleading, the payment evidence is inadmissable. *See Sage Street Associates v. Northdale Construction Co.*, 863 S.W.2d 438, 443–44 (Tex. 1993) (defendant's general pleading regarding "payments to subcontractors and suppliers" failed to satisfy the rule).

§ 14.22 Action on Written Contract

§ 14.22:1 Elements

The elements of a cause based on a written debt or contract are that—

1. there was a valid agreement;
2. the plaintiff performed or tendered performance;
3. the defendant breached; and
4. the plaintiff suffered damages.

Tamuno Ilfiesimama v. Haile, No. 01-15-00829-CV, 2017 WL 1173885, at *7 (Tex. App.—Houston [1st Dist.] Mar. 30, 2017, pet. denied); *Woodhaven Partners, Ltd. v. Shamoun & Norman, L.L.P.*, 422 S.W.3d 821, 837 (Tex. App.—Dallas 2014, no pet.); *Hussong v. Schwan's Sales Enterprises, Inc.*, 896 S.W.2d 320, 326 (Tex. App.—Houston [1st Dist.] 1995, no writ); *see also Valero Marketing & Supply Co. v. Kalama International, L.L.C.*, 51 S.W.3d 345, 351 (Tex. App.—Houston [1st Dist.] 2001, no pet.) (summary judgment in favor of defendant-seller in breach-of-contract case was proper where plaintiff did not prove he tendered performance). For a petition for a suit on a written contract, see form 14-3 in this chapter. Suits on specific kinds of written agreements—for example, promissory notes and leases—are discussed in subsequent sections of this chapter.

§ 14.22:2 Terms of Agreement

The plaintiff's petition should plead every essential, material part of the contract. *See Valero Marketing & Supply Co. v. Kalama International, L.L.C.*, 51 S.W.3d 345, 351 (Tex. App.—Houston [1st Dist.] 2001, no pet.) (defendant's no evidence summary judgment granted; no evidence that plaintiff tendered performance under the contract). If the contract is available and reproducible, a copy may be attached to the petition and incorporated into it by reference. *See* Tex. R. Civ. P. 59. The attached exhibit will fill in any gaps in the pleadings. The contract will prove itself unless its execution or authority is specifically denied by sworn denial. Tex. R. Civ. P. 93(7); *see Rockwall Commons Associates, Ltd. v. MRC Mortgage Grantor Trust I*, 331 S.W.3d 500, 506 (Tex. App.—El Paso 2010, no pet.) (in failing to file verified denials as to execution of written instruments, and in failing to file verified denial of assignment of any of those instruments, defendants admitted validity of instruments and their assignments). If the original instrument cannot be produced because it has been lost or destroyed, the contents of the agreement can be proved by the oral testimony of witnesses even if the defendant objects that the testimony violates the best-evidence rule. *See* Tex. Bus. & Com. Code § 3.309(a); *Briscoe v. Goodmark Corp.*, 130 S.W.3d 160 (Tex. App.—El Paso 2003, no pet.) (allowing oral testimony under Tex. Bus. & Com. Code § 3.309(a) about terms of lost promissory notes) (citing *Hayes v. Bouligny*, 420 S.W.2d 800, 802 (Tex. Civ. App.—Corpus Christi 1967, no writ). See also Tex. R. Evid. 1001–1008 for proof of contents of writings.

§ 14.22:3 Performance of Contract by Plaintiff

The plaintiff must plead and prove that he has performed or tendered his obligations under the contract. *See Krayem v. USRP (PAC), L.P.*, 194 S.W.3d 91, 94 (Tex. App.—Dallas 2006, pet. denied); *Valero Marketing & Supply Co. v. Kalama International, L.L.C.*, 51 S.W.3d 345, 351–54 (Tex. App.—Houston [1st Dist.] 2001, no pet.).

§ 14.22:4 Breach of Contract by Defendant

A petition must plead the defendant's breach of contract. *Hussong v. Schwan's Sales Enter-*

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prises, Inc., 896 S.W.2d 320, 326 (Tex. App.—Houston [1st Dist.] 1995, no writ). "Breach" has been defined, in part, as the failure to perform any promise which forms a whole or part of any agreement, including the refusal of a party to recognize the existence of an agreement or the doing of something inconsistent with its existence. *DeSantis v. Wackenhut Corp.*, 732 S.W.2d 29, 34 (Tex. App.—Houston [14th Dist.] 1987), *aff'd in part, rev'd in part on other grounds*, 793 S.W.2d 670 (Tex. 1990). *See also Norsworthy v. American Lease Plan*, 447 S.W.2d 768, 770 (Tex. Civ. App.—Houston [14th Dist.] 1969, no writ) (allegation that certain amount was due and owing was not sufficient allegation that defendant breached lease agreement; summary judgment for plaintiff reversed).

"Whether a party has breached a contract is a question of law for the judge, not a question of fact for the jury." *Lafarge Corp. v. Wolff, Inc.*, 977 S.W.2d 181, 186 (Tex. App.—Austin 1998, pet. denied) (citing *Garza v. Southland Corp.*, 836 S.W.2d 214, 219 (Tex. App.—Houston [14th Dist.] 1992, no writ)). "When the evidence is undisputed regarding a person's conduct under a contract, the court as a matter of law determines whether the conduct shows performance or breach of a contract obligation." *Lafarge Corp.*, 977 S.W.2d at 186.

§ 14.22:5 Consideration

A written contract presumes consideration for its execution. *Burges v. Mosley*, 304 S.W.3d 623, 628 (Tex. App.—Tyler 2010, no pet.); *Doncaster v. Hernaiz*, 161 S.W.3d 594, 603 (Tex. App.—San Antonio 2005, no pet.). *See also Simpson v. MBank Dallas, N.A.*, 724 S.W.2d 102, 107 (Tex. App.—Dallas 1987, writ ref'd n.r.e.) (guaranty was written, signed by guarantor, and recited that it was executed "for value received"; therefore, the guaranty presumed consideration, and the burden was on guarantor to plead and prove the absence of consideration). Lack or failure of consideration must be specifically pleaded by verified pleading. Tex. R. Civ. P. 93(9).

§ 14.22:6 Proving Charges for Services by Affidavit

The necessity and reasonableness of charges for services may be proved by affidavit. This affidavit may not be used in a sworn account action. *See* Tex. Civ. Prac. & Rem. Code § 18.001.

§ 14.22:7 Statute of Limitations—Written Contracts Generally

Actions for debt, whether on written or oral contracts, must be brought not later than four years after the day the cause of action accrued. Tex. Civ. Prac. & Rem. Code § 16.004(a)(3). "Cause of action" means the right to institute suit. *Moreno v. City of El Paso*, 71 S.W.3d 898, 900 (Tex. App.—El Paso 2002, pet. denied), (citing *Flores v. Lively*, 818 S.W.2d 460, 461 (Tex. App.—Corpus Christi 1991, writ denied).

In applying the limitation statutes, a cause of action is generally said to accrue "when the wrongful act affects an injury, regardless of when the plaintiff learned of such injury." An exception to the general rule is known as the discovery rule, which tolls the running of the limitations period until the time the injured party discovers or through the use of reasonable care and diligence should have discovered the injury. *Enterprise-Laredo Associates v. Hachar's, Inc.*, 839 S.W.2d 822, 837 (Tex. App.—San Antonio 1992, writ denied) (citing *Moreno v. Sterling Drug, Inc.*, 787 S.W.2d 348, 351 (Tex. 1990)); *El Paso Associates, Ltd. v. J.R. Thurman & Co.*, 786 S.W.2d 17, 20 (Tex. App.—El Paso 1990, no writ). "Some contract breaches may be inherently undiscoverable and objectively verifiable. But those cases should be rare, as diligent contracting parties should generally discover any breach during the relatively long four-year limitations period provided for such claims." *Via Net v. TIG Insurance Co.*, 211 S.W.3d 310, 315

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(Tex. 2006). *See also Taub v. Houston Pipeline Co.*, 75 S.W.3d 606, 618–20 (Tex. App.—Texarkana 2002, pet. denied) (discovery rule did not extend limitations on oil and gas contract because injury was not "inherently undiscoverable").

§ 14.22:8 Statute of Limitations—Actions by or against Carriers for Hire

An action brought by a carrier of property for hire to recover its charges, or an action against a carrier for recovery of an overcharge, must be brought not later than three years from the day the cause of action accrued. Tex. Civ. Prac. & Rem. Code § 16.006(a), (b). If a person has presented a written claim for overcharges within the three-year period, the limitations period for the claimant is extended for six months from the date written notice is given by the carrier to the claimant of the disallowance of the claim, in whole or in part, as specified in the carrier's notice. Tex. Civ. Prac. & Rem. Code § 16.006(c). If the carrier either brings an action to recover charges relating to the service provided or, without beginning an action, collects charges relating to that service, the limitations period is extended for ninety days from the day the action is begun or the charges are collected. Tex. Civ. Prac. & Rem. Code § 16.006(d).

§ 14.22:9 Statute of Limitations—Sale of Goods

An action for breach of contract for a sale of goods must be commenced within four years after the cause accrued unless the parties, by the original agreement, reduce the period of limitations to not less than one year. Tex. Bus. & Com. Code § 2.725(a). *See also Buck v. Acme Brick Co.*, 666 S.W.2d 276, 277 (Tex. App.—Beaumont 1984, no writ) (holding that four-year limitations period applied to sale of bricks).

§ 14.23 Action on Oral Debt

§ 14.23:1 Elements

The elements of an action on a contract are the same whether the contract is oral or written. See section 14.22:1 above for a list of the elements. A plaintiff trying to recover on an oral debt or contract may encounter problems, such as a shorter limitations period (see part III. in chapter 17 of this manual), a statute of frauds defense (see section 17.13), and proof of the existence of the contract or its material terms. The plaintiff will also have to plead and prove consideration. *Okemah Construction, Inc. v. Barkley-Farmer, Inc.*, 583 S.W.2d 458, 460 (Tex. Civ. App.—Houston [1st Dist.] 1979, no writ).

If the suit is based on services rendered by the plaintiff, the attorney should consider using the affidavit described in section 14.22:6 above. For a petition for a suit on an oral debt, see form 14-4 in this chapter.

§ 14.23:2 Statute of Limitations

See sections 14.22:7 and 14.22:9 above.

§ 14.24 Action on Revolving Credit Account

§ 14.24:1 Elements

The elements of an action on a revolving credit account are the same as for any other kind of contract; see section 14.22:1 above. The El Paso court of appeals has held that a line of credit issued by a financial institution does not create the sort of debtor-creditor relationship required to bring suit as a sworn account under Tex. R. Civ. P. 185 because no title to personal property passes from the bank to the cardholder. *Bird v. First Deposit National Bank*, 994 S.W.2d 280, 282 (Tex. App.—El Paso 1999, pet. denied). However, in *Bird* the court did not reach the

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issue of whether a credit card issued directly by a provider of goods or services, such as a gasoline card or department store card, would be subject to collection by a suit on sworn account. This decision was followed by the Houston court of appeals. *Williams v. Unifund CCR Partners Assignee of Citibank*, 264 S.W.3d 231, 234 (Tex. App.—Houston [1st Dist.] 2008, no pet.) (holding that a credit card issued by a financial institution is a special contract that does not create the sort of debtor-creditor relationship to bring a claim within the scope of Tex. R. Civ. P. 185). If an action on a sworn account is not available, it may be possible to prove the necessity and reasonableness of charges for services by an affidavit. *See* Tex. Civ. Prac. & Rem. Code § 18.001.

Consumer credit transactions, that is, credit sales of goods or services intended for personal, family, or household use and not for business or commercial purposes, are governed by the Texas Finance Code and by various federal statutes and regulations. Consumer retail credit transactions are subject to numerous, strict requirements for disclosure and finance charge limits, and the creditor's attorney should review those statutes before filing suit to determine whether potential liability against the creditor exists. The Texas Debt Collection Practices Act and the federal Fair Debt Collection Practices Act should also be reviewed carefully. See parts II. and III. in chapter 2 of this manual for a discussion of these Acts.

See form 14-5 in this chapter for a petition for suit on a revolving credit account and form 14-6 for a petition for suit on a retail installment contract. With respect to retail installment contracts, note that the creditor cannot accelerate the maturity of any part or all of the amount owed under such a contract unless the contract provides for acceleration and either the debtor is in default under any of his obligations or the creditor believes in good faith that the prospect of payment is impaired. *See* Tex. Fin. Code § 345.062.

§ 14.24:2 Statute of Limitations

See sections 14.22:7 and 14.22:9 above.

§ 14.25 Action on Note

§ 14.25:1 Elements

To collect on a promissory note as a matter of law, the holder or payee must establish that—

1. there is a note;
2. the plaintiff is the legal owner and holder of the note;
3. the defendant is the maker of the note; and
4. a certain balance is due and owing.

Kaspar v. Patriot Bank, No. 05-10-01530-CV, 2012 WL 2087182, at *2 (Tex. App.—Dallas June 8, 2012, no pet.) (mem. op.) (citing *Blankenship v. Robins*, 899 S.W.2d 236, 238 (Tex. App.—Houston [14th Dist.] 1994, no writ)). An action on a note is usually one of the easiest cases to try. Normally the plaintiff will introduce the original of the note, which will entitle him to a judgment unless the defendant establishes a defense. *See, e.g., Clark v. Dedina*, 658 S.W.2d 293, 296 (Tex. App.—Houston [1st Dist.] 1983, writ dism'd) (introduction of note in evidence makes prima facie case for holder, where execution of note has not been denied under oath); *see also* Tex. Bus. & Com. Code § 3.308. For a petition for a suit on a note, see form 14-7 in this chapter.

§ 14.25:2 Execution and Delivery

Denial of execution of a written instrument must be verified, or the note will be received in evidence as fully proved. Tex. R. Civ. P. 93(7); *see also Vince Poscente International, Inc. v. Compass Bank*, 460 S.W.3d 211, 215–16 (Tex. App.—Dallas 2015, no pet.) (in absence of verified denial of signature, promissory notes

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received into evidence as fully proved); *Wheeler v. Security State Bank, N.A.*, 159 S.W.3d 754, 756–57 (Tex. App.—Texarkana 2005, no pet.) (same).

§ 14.25:3 Persons Entitled to Enforce Note

Persons entitled to enforce a note include a holder of a note, a nonholder in possession of an instrument with the rights of a holder, and a person not in possession of a note who is entitled to enforce it because the instrument was lost, stolen, destroyed, or paid by mistake. *See* Tex. Bus. & Com. Code §§ 3.301, 3.309. A party who fails to qualify as a "holder" for lack of an endorsement may still prove that it owns the note. *See Martin v. New Century Mortgage Co.*, 377 S.W.3d 79, 84–85 (Tex. App.—Houston [1st Dist.] 2012, no pet.) (ownership established through common-law assignment rather than negotiation).

§ 14.25:4 Consideration

If the petition alleges that the action is based on a written instrument, it is unnecessary to plead the existence or nature of the consideration; failure or lack of consideration is purely a defensive matter that must be raised by verified answer under Tex. R. Civ. P. 93(9). "All written contracts, including guaranty agreements, are presumed, at the outset, to be supported by consideration." *Cortez v. National Bank of Commerce of Brownsville*, 578 S.W.2d 476, 479 (Tex. Civ. App.—Corpus Christi 1979, writ refused n.r.e.).

§ 14.25:5 Maturity

If the note is introduced in evidence and the date for payment has passed, maturity should be apparent on its face. *See* Tex. Civ. Prac. & Rem. Code § 16.036(d); *The Cadle Co. v. Butler*, 951 S.W.2d 901, 909 (Tex. App.—Corpus Christi 1997, no writ) (deed of trust executed as single instrument in combination with promissory note, but containing no maturity date, had the same maturity date as promissory note). If maturity or liability depends on a condition, the plaintiff should allege and prove the happening of the contingency or the performance or occurrence of the agreed condition. See section 14.25:7; Tex. R. Civ. P. 54; *Wakefield v. Ayers*, No. 01-14-00648-CV, 2016 WL 4536454, at *10 (Houston [1st Dist.] Aug. 30, 2016, no pet.) ("A party seeking to recover under a contract bears the burden of proving that all conditions precedent have been satisfied.") (citing *Associated Indemnity Corp. v. CAT Contracting, Inc.*, 964 S.W.2d 276, 283 (Tex. 1998)).

§ 14.25:6 Acceleration

See section 2.111 in this manual for a discussion of acceleration.

§ 14.25:7 Conditions Precedent

The creditor should allege in its petition that all conditions precedent with respect to the claim have been performed or have occurred. The debtor will then be required to specifically deny the performance or occurrence of the conditions precedent. *See* Tex. R. Civ. P. 54. A denial stating merely that the debtor denies that all conditions precedent to the satisfaction of the claim have been satisfied and demanding strict proof with respect to those conditions is not a sufficient denial. *See Miller v. University Savings Ass'n*, 858 S.W.2d 33, 36 (Tex. App.—Houston [14th Dist.] 1993, writ denied) (proof of notice of intent to accelerate was waived by guarantor's failure to specifically deny creditor's conditions precedent pleading); *see also Hill v. Thompson & Knight*, 756 S.W.2d 824, 825–26 (Tex. App.—Dallas 1988, no writ) (where creditor pleaded that all conditions precedent had been met, debtor's failure to specifically deny fulfillment of any conditions precedent removed burden of creditor from proving conditions precedent had been met).

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§ 14.25:8 Negotiability

The negotiability of an instrument is a question of law. *Ward v. Stanford*, 443 S.W.3d 334, 343 (Tex. App.—Dallas 2014, pet. denied) (citing *FFP Marketing Co. v. Long Lane Master Trust IV*, 169 S.W.3d 402, 408–09 (Tex. App.—Fort Worth 2005, no pet.). If the suit is between the payee and the maker of the note, it is unimportant whether the note is negotiable or nonnegotiable. If the note has been transferred, concepts of negotiability, real and personal defenses, and holder in due course become relevant. See section 2.112 in this manual regarding holder in due course.

§ 14.25:9 Secondary Liability of Endorser

To hold an endorser liable on a negotiable instrument, the plaintiff must additionally plead endorsement, presentment, and dishonor. *See* Tex. Bus. & Com. Code §§ 3.415, 3.502, 3.503. These requirements can be waived in the note or by other means. *See* Tex. Bus. & Com. Code § 3.504.

§ 14.25:10 Statute of Limitations—Note Payable at Definite Time

The limitation period for a negotiable note payable at a definite time is six years from the due date stated in the note or, if accelerated, from the date of acceleration. Tex. Bus. & Com. Code § 3.118(a). A note is "payable at a definite time" if it is payable (1) on elapse of a definite period of time after sight or acceptance; (2) on a fixed date or dates; or (3) at a time or times readily ascertainable at the time the promise or order is issued, all subject to rights of prepayment, acceleration, extension at the holder's option, or extension to a further definite time at the option of the maker or acceptor or automatically on or after a specified act or event. Tex. Bus. & Com. Code § 3.108(b).

When a note payable at a definite time is not negotiable, the applicable statute of limitations is four years. *See Guniganti v. Kalvakuntla*, 346 S.W.3d 242, 247–48 (Tex. App.—Houston [14th Dist.] 2011, no pet.) (six-year limitations statute did not apply because note was determined to be nonnegotiable).

§ 14.25:11 Statute of Limitations—Demand Note

For a negotiable demand note, the limitation period is six years after demand. If no demand is made, the action is barred if neither principal nor interest is paid for a continuous period of ten years. Tex. Bus. & Com. Code § 3.118(b). A demand note is one that is payable on demand or at sight, that otherwise indicates that it is payable at the will of the holder, or that does not state any time for payment. Tex. Bus. & Com. Code § 3.108(a).

When a demand note is not negotiable, the applicable statute of limitations is four years. *See Guniganti v. Kalvakuntla*, 346 S.W.3d 242, 247–48 (Tex. App.—Houston [14th Dist.] 2011, no pet.) (six-year limitations statute did not apply because note was determined to be nonnegotiable).

§ 14.25:12 Statute of Limitations—Other Commercial Paper

A variety of other limitations statutes exist for negotiable instruments, including unaccepted drafts, accepted drafts, certified checks, teller's checks, cashier's checks, traveler's checks, and certificates of deposit. *See* Tex. Bus. & Com. Code § 3.118(c)–(f).

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§ 14.26 Action on Lease of Personal Property

§ 14.26:1 Governing Law

Leases of personal property are governed by either Tex. Bus. & Com. Code §§ 2A.101–.532 or the common law of bailments for hire. *See Franklin v. Jackson*, 847 S.W.2d 306, 308 (Tex. App.—El Paso 1992, writ denied) (lease of personal property is a form of a bailment for hire). UCC article 2A governs leases of "goods," which are defined as all things that are moveable at the time of identification to the lease contract or are fixtures. "Goods" includes the unborn young of animals, but does not include money, documents, instruments, accounts, chattel paper, general intangibles, or minerals or the like, including oil and gas, before extraction. Tex. Bus. & Com. Code § 2A.103(a)(8).

§ 14.26:2 Lease Defined (UCC)

A lease is a "transfer of the right to possession and use of goods for a term in return for consideration." A sale, including a sale on approval or a sale or return, or retention or creation of security interest, is not a lease. Tex. Bus. & Com. Code § 2A.103(a)(10).

§ 14.26:3 Lease Intended as Security Agreement

A further distinction exists between a true lease and a lease intended as a security agreement. A true lease is one in which the lessor retains title to the property and therefore generally prevails against the lessee's creditors. A lease intended as security is one in which the lessor retains a security interest by reserving title until the lessee performs his obligations. *See* Tex. Bus. & Com. Code §§ 1.201(b)(35), 1.203. Whether a transaction in the form of a lease creates a lease or security interest is determined by the facts of each case. Tex. Bus. & Com. Code § 1.203(a). *See, e.g., Federal Sign & Signal Corp. v. Berry*, 601 S.W.2d 137, 139 (Tex. Civ. App.—Austin 1980, no writ) (fact that final payment was nominal consideration supported determination that lease was inteded as security agreement).

If the lease provides on its face that, on compliance with its terms, the lessee becomes owner of the property, it is deemed as a matter of law to be intended for security. *Excel Auto & Truck Leasing LLP v. Alief Independent School District*, 249 S.W.3d 46, 51 (Tex. App.—Houston [1st Dist.] 2007, pet. denied) (citing *In re Triplex Marine Maintenance, Inc.*, 258 B.R. 659 (Bankr. E.D. Tex. Nov. 13, 2000)); *Superior Packing, Inc. v. Worldwide Leasing & Finance, Inc.*, 880 S.W.2d 67, 71 (Tex. App.—Houston [14th Dist.] 1994, writ denied) (citing the previous version of Tex. Bus. & Com. Code Ann. 1.203). If the transaction allows the lessee to become the owner for no additional consideration or a nominal consideration, the lease is deemed to be intended as a security interest. Tex. Bus. & Com. Code § 1.201(b)(37); *Horton v. Dental Capital Leasing Corp.*, 649 S.W.2d 655, 657 (Tex. App.—Texarkana 1983, no writ).

Foreclosure of a security interest is discussed at section 14.28 below.

§ 14.26:4 Elements and Remedies

A lease is a contract. *Vermont Information Processing, Inc. v. Montana Beverage Corp.*, 227 S.W.3d 846, 854 (Tex. App.—El Paso 2007, no pet.); *Franklin v. Jackson*, 847 S.W.2d 306, 308 (Tex. App.—El Paso 1992, writ denied). Therefore, the elements for an action on a lease are the same as those for other contracts. See section 14.22:1 above. If the parties to a contract have agreed to the remedy to be applied in the case of breach, it will be enforced by the courts unless it is illegal or against public policy. *Doyle v. Second Master-Bilt Homes, Inc.*, 453 S.W.2d 226, 229 (Tex. Civ. App.—Fort Worth 1970, writ ref'd n.r.e.). In some cases, the lessor can sue for rent owed under the lease, demand return of the

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property, sue for conversion in an appropriate situation, or pursue other remedies as long as those remedies are listed in the contract. *See Shasteen v. Mid-Continent Refrigerator Co.*, 517 S.W.2d 437, 439–40 (Tex. Civ. App.—Dallas 1974, writ ref'd n.r.e.).

A lessor under a personal property lease governed by UCC article 2A may on the lessee's default—

1. cancel the lease contract, retaining the right to recover for damages based on prior default;
2. identify and dispose of goods identified to the contract;
3. withhold delivery of the goods and take possession of goods previously delivered;
4. stop delivery of the goods by a bailee;
5. dispose of the goods and recover damages, or retain the goods and recover damages or, in a proper case, rent; and
6. exercise any other rights or remedies provided for in the lease contract.

Tex. Bus. & Com. Code § 2A.523(a).

See the petition at form 14-8 in this chapter, which may be used for a suit on a true lease but not on a lease intended as security. *See Kinerd v. Colonial Leasing Co.*, 800 S.W.2d 187 (Tex. 1990); *see also* Tex. Bus. & Com. Code § 1.201(b)(35) (definition of "security interest"), § 1.203 (lease distinguished from security interest). Also note that the sworn account procedure cannot be used for a suit on a lease. *Van Zandt v. Fort Worth Press*, 359 S.W.2d 893 (Tex. 1962); *Meineke Discount Muffler Shops, Inc. v. Coldwell Banker Property Management Co.*, 635 S.W.2d 135, 138 (Tex. App.—Houston [1st Dist.] 1982, writ ref'd n.r.e.); *Parmer v. Anderson*, 456 S.W.2d 271 (Tex. Civ. App.—Dallas 1970, no writ).

§ 14.26:5 Disclosures

See 15 U.S.C. § 1667a for various disclosures required for certain consumer leases of personal property. The federal consumer lease statute is discussed at section 2.77 in this manual. The attorney should review those statutes before filing suit to determine whether potential liability against the creditor exists.

§ 14.26:6 Criminal Prosecution

A person having control of personal property under a written rental agreement who intentionally holds the property beyond the expiration of the rental period may be charged with the criminal offense of "theft of service." Tex. Penal Code § 31.04(a)(3). See section 6.26:6 in this manual for further discussion.

§ 14.26:7 Statute of Limitations

An action for default of a lease of personal property must be brought within four years from the date the cause of action accrues unless the parties (except in the case of a consumer lease) in the original contract reduce the period of limitations to not less than one year. Tex. Bus. & Com. Code § 2A.506(a). If a first action is so terminated as to leave available a remedy by another action for the same breach, the second action may be brought either within the first action's limitation period or within six months from termination of the first action, unless the first action was terminated voluntarily or from dismissal for want of prosecution. Tex. Bus. & Com. Code § 2A.506(c).

The cause of action accrues when an act or omission or breach of warranty is or should have been discovered by the plaintiff. Tex. Bus. & Com. Code § 2A.506(b).

§ 14.27 Actions by Secured Creditors—Preliminary Considerations

§ 14.27:1 Creditor's Options

On default, the creditor may—

1. repossess the collateral and either sell it at foreclosure sale or retain it in satisfaction of the debt;
2. sue for enforcement of the lien; or
3. sue for enforcement of the underlying debt.

Repossession is discussed in chapter 5 of this manual, and a postforeclosure suit for deficiency is discussed at section 14.29 below. Suit to enforce the lien is discussed in chapter 7, and suit on the underlying debt is discussed at section 14.28:4 below. The notice requirements to guarantors are discussed at section 5.35.

§ 14.27:2 Default

Default is not determined by law but by the terms of the underlying security agreement. A typical security agreement may specify the following events of default:

1. Default in payments.
2. Failure to comply with any of the terms or conditions of the contract.
3. Failure to procure or maintain insurance on an automobile or on the life of the buyer as required by the contract.
4. Institution by the buyer or against the buyer or his property of a proceeding in bankruptcy, receivership, or insolvency.
5. Belief by the seller that the property is in danger of misuse or confiscation.

These events of default do not violate the restrictions on accelerating installment payments set out in Tex. Fin. Code § 348.109. *See Hernandez v. Forbes Chevrolet Co.*, 680 S.W.2d 75, 78 (Tex. App.—Corpus Christi 1984, cause dism'd as moot); *Lundquist Buick-Opel, Inc. v. Wikoff*, 659 S.W.2d 466, 469 (Tex. App.—Corpus Christi 1983, no writ).

A contractual provision of default will be strictly construed. *See Shumway v. Horizon Credit Corp.*, 801 S.W.2d 890, 893 (Tex. 1991) (acceleration provisions must be clear and unequivocal); *Ramo, Inc. v. English*, 500 S.W.2d 461, 466 (Tex. 1973); *Motor & Industrial Finance Corp. v. Hughes*, 302 S.W.2d 386, 394 (Tex. 1957).

§ 14.27:3 Failure to Pay as Default

If default in payment is the ground for enforcement, the attorney should make certain that the debtor is actually in default under the note and security agreement. The creditor is often in a better position than the attorney to compute amounts due. Further, if proper credit for items such as unearned interest is not given to the debtor, there may be a violation of usury laws. See part V. in chapter 2 of this manual regarding usury. The attorney should advise the client to give the debtor credit for all unearned interest, make the computation, and provide a payment history, if possible. The attorney should review this information and compare it with the debtor's obligations.

§ 14.27:4 Notice of Default

Once it has been determined that the debtor is in default, the creditor should notify the debtor of default by sending a letter, by certified mail with return receipt requested, to the debtor at his residence and business addresses. While many security agreements and notes contain waivers of notice of default, the better practice is to ignore the waiver provisions and inform the debtor of default. For a letter notifying the debtor of default, see form 5-5 in this manual.

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§ 14.27:5 Acceleration

In virtually every case, the underlying debt must be accelerated before the creditor can proceed to enforce the security interest. See section 2.111 in this manual for a discussion of acceleration.

§ 14.28 Foreclosure of Security Interest

Chapter 5 of this manual discusses nonjudicial repossession and foreclosure of security interests in personal property. In particular, see section 5.4, which discusses considerations in choosing self-help repossession or judicial foreclosure.

§ 14.28:1 Elements

For a security interest to be foreclosed, there must be a valid security agreement between the creditor and the debtor, with value having been given to the creditor. The agreement must be in writing, signed by the debtor, and must describe the collateral. The debtor must have rights in the collateral and must have defaulted in his obligations under the agreement. Tex. Bus. & Com. Code §§ 9.203, 9.601.

Although preferable, perfection of a security interest is not necessary for the security agreement to be valid. *Gulf Oil Co. v. First National Bank of Hereford*, 503 S.W.2d 300, 307 (Tex. Civ. App.—Amarillo 1973, no writ).

Security interests can arise in a variety of debtor-creditor causes of action, including sworn accounts, notes, revolving credit accounts, and retail installment contracts.

§ 14.28:2 Pleading Requirements

In addition to pleading the elements of the underlying debt—for example, sworn account, note, or retail installment contract—the attorney should plead the existence of the security agreement and the nature of the default. In most cases, the security agreement will provide that default of the underlying debt will constitute default of the security agreement. Attaching copies of the security agreement and the underlying debt instrument and incorporating them by reference will satisfy this pleading requirement. Otherwise, the attorney should plead the specific default that is the basis of the suit. In the prayer, foreclosure should be specifically requested. *See* Tex. R. Civ. P. 47(c).

Refer to the sections of this chapter concerning the specific underlying cause of action (sworn account, note, retail installment contract, and so forth) for other pleading guidelines and to section 20.9:3 in this manual regarding judgments for foreclosure.

§ 14.28:3 Statute of Limitations

There is a split in the courts of appeals regarding whether a suit to foreclose a lien can be brought after the underlying debt is barred by limitations. *See Holman St. Baptist Church v. Jefferson*, 317 S.W.3d 540, 546–47 (Tex. App.—Houston [14th Dist.] 2010, pet. denied) (running of statute of limitations on action to collect personally from debtor does not bar right to use collateral in lender's possession to repay debt); *Miller, Hiersche, Martens & Hayward, P.C. v. Bent Tree National Bank*, 894 S.W.2d 828, 830 (Tex. App.—Dallas 1995, no writ) (foreclosure allowed past limitations period); *contra Proulx v. Wells*, 235 S.W.3d 213, 215 (Tex. 2007) (exception exists to procuring service within limitations period when diligence has been exercised, but no exception exists for filing suit within limitations period); *Gant v. DeLeon*, 786 S.W.2d 259, 260 (Tex. 1990); *Slagle v. Prickett*, 345 S.W.3d 693, 696–97 (Tex. App.—El Paso 2011, no pet.); *McBryde v. Curry*, 914 S.W.2d 616, 619 (Tex. App.—Texarkana 1995, writ denied) (when debt barred by limitations, right to foreclose also barred). If a limitations period applies, the applicable period is the one attach-

ing to the underlying cause of action, such as a negotiable instrument or a written contract. See sections 14.22:7 and 14.22:9 above.

The manual committee is not aware of a Texas case applying a statute of limitations to a secured creditor's right to nonjudicial foreclosure of personal property. It has been suggested that there is no statute of limitations on nonjudicial foreclosure of personal property; because the contractual obligation survives even if the right to enforce the contract judicially expires, so too does the secured creditor's right to foreclose survive. *See Miller*, 894 S.W.2d at 830.

§ 14.28:4 Suit on Underlying Debt

The secured party may sue for the entire amount due and recover a personal judgment against the debtor without reference to or resorting to the security. *Maupin v. Chaney*, 163 S.W.2d 380, 382 (Tex. 1942); *Garza v. Allied Finance Co.*, 566 S.W.2d 57, 62 (Tex. Civ. App.—Corpus Christi 1978); *Lazidis v. Goidl*, 564 S.W.2d 453, 456 (Tex. Civ. App.—Dallas 1978, no writ).

The secured party is not required to exhaust his remedies against the security before suing on the underlying debt and after obtaining a personal judgment against the debtor on the underlying debt may enforce that judgment against the collateral by a writ of execution. A judicial sale of the collateral under execution is a foreclosure of the security interest. Therefore, the secured party may purchase at the sale and, after the purchase, hold the collateral free of any other requirements of chapter 9 of the Texas Uniform Commercial Code. *Garza*, 566 S.W.2d at 62; *see also* Tex. Bus. & Com. Code § 9.601.

The lien obtained through levy of execution relates back to the earliest of the date of the perfection of the security interest, the date of the filing of a financing statement covering the collateral, or, in the case of agricultural liens, the date specified by statute; therefore, the secured party is afforded a benefit as the first to file. Tex. Bus. & Com. Code § 9.601(e). If the plaintiff does not seek judicial foreclosure but only prays for a specific money judgment combined with a general prayer, a judgment of foreclosure of the security interest should not be granted, because judicial foreclosure is an additional remedy to that of seeking a personal judgment against the debtor and a general prayer is not sufficient to establish a request for judicial foreclosure. The existence of the collateral is immaterial to a suit for a judgment on the debt. *Garza*, 566 S.W.2d at 62.

§ 14.29 Deficiency Suit

Texas Business and Commerce Code chapter 9 recognizes that an obligor (not necessarily the same person as the debtor (*see* Tex. Bus. & Com. Code §§ 9.608(a)(4), 9.102(a)(60)) is liable for a deficiency remaining after the disposition of any collateral or other collection efforts unless the parties have agreed otherwise. *See* Tex. Bus. & Com. Code §§ 9.608(a)(4), 9.615(d), (e) and the official comments; *Smith v. Community National Bank*, 344 S.W.3d 561, 570 (Tex. App.—Eastland 2011, pet. denied).

§ 14.29:1 Availability

If a deficiency balance remains after foreclosure, the obligor is liable for that deficiency unless the underlying transaction is the sale of accounts, chattel paper, payment intangibles, or promissory notes. Tex. Bus. & Com. Code §§ 9.608, 9.615. However, the parties are free to modify the obligor's liability by agreement. *See* Tex. Bus. & Com. Code § 9.608 cmt. 3.

§ 14.29:2 Elements

To recover a deficiency after a nonjudicial foreclosure of collateral, the creditor must prove—

1. a valid debt;

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2. a valid security agreement;
3. default of the security agreement;
4. valid notice to the debtor of the sale after repossession (Tex. Bus. & Com. Code §§ 9.611–.614);
5. acceleration of the debt (if acceleration occurred);
6. disposition of the collateral in a commercially reasonable manner (Tex. Bus. & Com. Code § 9.610); and
7. a deficiency balance remaining on the debt after sale (Tex. Bus. & Com. Code § 9.616).

See Tex. Bus. & Com. Code §§ 9.203, 9.504, 9.601.

Two Texas Supreme Court decisions that construed the provisions of chapter 9 relating to deficiency judgments have been limited in their applicability by the July 1, 2001, revisions to chapter 9 of the Texas Business and Commerce Code. *See* Tex. Bus. & Com. Code § 9.626. The decision in *Greathouse v. Charter National Bank-Southwest*, 851 S.W.2d 173 (Tex. 1992), concerning the pleading requirements in deficiency actions, is now effectively limited to actions on consumer obligations only. Likewise, application of *Tanenbaum v. Economics Laboratory, Inc.*, 628 S.W.2d 769 (Tex. 1982), which held that a secured party whose collection, enforcement, disposition, or acceptance of collateral is not commercially reasonable is absolutely barred from collecting a deficiency, has been similarly limited to consumer cases. Under the 2001 revisions to chapter 9, commercial cases follow the rebuttable or refutable presumption rule. The secured party need not prove compliance with the provisions of chapter 9, subchapter F (generally, the commercial reasonableness standard), unless the debtor or secondary obligor puts the secured party's compliance in issue. Tex. Bus. & Com. Code § 9.626(a)(1); *Smith v. Community National Bank*, 344 S.W.3d 561, 572–73 (Tex. App.—Eastland 2011, pet. denied). However, once at issue, the amount of any deficiency recoverable by the secured creditor or secondary obligor will be reduced or possibly eliminated by the effect of his failure to comply with the commercial reasonableness standard. Tex. Bus. & Com. Code § 9.626(a); *Smith*, 344 S.W.3d at 572–73.

The secured party must give notice to the debtor and secondary obligors before disposing of the collateral. Tex. Bus. & Com. Code § 9.611. Such notice must be authenticated, but the "safe harbor" provisions provided in Tex. Bus. & Com. Code § 9.611(e) satisfy the notice requirements. An exception to the notice requirement is provided for collateral that is perishable, threatens to decline speedily in value, or is customarily sold on a recognized market. The notice requirement may be waived by a debtor or secondary obligor but only by a postdefault, authenticated agreement. Tex. Bus. & Com. Code § 9.624(a). See section 14.27 above regarding default and acceleration and sections 5.31 regarding notice, 5.32 regarding commercial reasonableness of the disposition of the collateral, and 5.38 regarding disposition of the collateral generally. A petition for a deficiency judgment cause of action is at form 14-9 in this chapter.

§ 14.29:3 Notice of Deficiency

Consumer-Goods Transactions: "Consumer goods" are goods that are used or bought for use primarily for personal, family, or household purposes. Tex. Bus. & Com. Code § 9.102(a)(23). See also section 2.121:2 in this manual. A secured party must provide a consumer obligor with a written explanation of a deficiency that conforms to Tex. Bus. & Com. Code § 9.616 before attempting to collect the deficiency. Subsection 9.616(a) defines "explanation" as a writing that states the amount of the deficiency; provides an explanation in accordance with subsection (c) of how the secured party calculated the deficiency; states, if applicable, that future debits, credits, charges (including additional

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credit service charges or interest), rebates, and expenses may affect the amount of the deficiency; and provides a telephone number or mailing address from which additional information concerning the transaction is available. The explanation must be provided to the consumer debtor or obligor no later than the time of the first written attempt to collect the deficiency. Tex. Bus. & Com. Code § 9.616(b). The debtor or obligor need not wait, however, until an attempt to collect is made but can instead make a request that obligates the secured party to provide an explanation within fourteen days after receipt of the request. Tex. Bus. & Com. Code § 9.616(a)–(b), (e). If no attempt is made to collect a deficiency, no explanation need be given.

Section 9.616(c) contains the requirements for how a calculation of a surplus or deficiency must be explained to satisfy subsection (a). The following information must be provided in the following order:

1. the aggregate amount of obligations secured by the security interest under which the disposition was made and, if the amount reflects a rebate of unearned interest or credit service charge, an indication of that fact, calculated as of a specified date—
   a. if the secured party takes or receives possession of the collateral after default, not more than thirty-five days before the secured party takes or receives possession; or
   b. if the secured party takes or receives possession of the collateral before default or does not take possession of the collateral, not more than thirty-five days before the disposition;
2. the amount of proceeds of the disposition;
3. the aggregate amount of the obligations after deducting the amount of proceeds;
4. the amount, in the aggregate or by type, and the types of expenses, including expenses of retaking, holding, preparing for disposition, processing, and disposing of the collateral, and attorney's fees secured by the collateral that are known to the secured party and related to the current disposition;
5. the amount, in the aggregate or by type, and types of credits, including rebates of interest or credit service charges, to which the obligor is known to be entitled and that are not reflected in the amount in section 9.616(c)(1); and
6. the amount of the surplus or deficiency.

Tex. Bus. & Com. Code § 9.616(c).

A secured party has some discretion concerning how to explain rebates of interest or credit service charges. The rebates may be included in the aggregate amount of obligations secured under subsection (c)(1) or they may be included with other types of rebates and credits under subsection (c)(5). However, rebates of interest or credit service charges are the only types of rebates for which this discretion is provided. The explanation must indicate whether rebates of precomputed interest are included. The expenses and attorney's fees to be described under subsection (c)(4) are those relating to the most recent disposition rather than those incurred in connection with earlier enforcement efforts and that have been resolved by the parties. Tex. Bus. & Com. Code. § 9.616(c) cmt. 3.

The secured party who fails to comply with section 9.616(b)(2) is liable for any loss caused plus $500. Tex. Bus. & Com. Code § 9.625(b)–(c), (e). (See the discussion in section 17.50 in this

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manual.) Section 9.616 also pertains to the explanation and calculation of a surplus. Note: There may be other applicable notices under the federal Fair Debt Collection Practices Act and the Texas Debt Collection Practices Act. See sections 2.11 through 2.36 in this manual.

Nonconsumer-Goods Transactions: Before bringing suit against the debtor for a deficiency, it is good practice to notify the debtor of the sale of the collateral, the net proceeds of sale, and the resulting deficiency. This notice gives the creditor the opportunity to negotiate payment before resorting to litigation.

Attorney's Fees: In both consumer and nonconsumer goods transactions, if the underlying debt agreement does not provide for payment of attorney's fees, the notice should also satisfy the requirements of Tex. Civ. Prac. & Rem. Code § 38.001, allowing recovery of attorney's fees in the deficiency suit.

§ 14.29:4 Pleading Requirements

In consumer-goods transactions, the creditor must plead commercial reasonableness. This pleading requirement may be satisfied either by pleading specifically or by pleading that all conditions precedent have been performed. If pleaded specifically, the creditor has the burden of proof, but if "all conditions precedent" is pleaded, the debtor must specifically deny commercial reasonableness, or the creditor is relieved from his burden of proof. *See Greathouse v. Charter National Bank-Southwest*, 851 S.W.2d 173, 177 (Tex. 1992) (creditor pleaded that all conditions precedent had been performed; because guarantor did not specifically deny commercially reasonable disposition of collateral, creditor not required to prove commercial reasonableness at trial); Tex. R. Civ. P. 54. If the creditor fails to plead commercial reasonableness or all conditions precedent, however, the debtor's failure to plead lack of commercial reasonableness does not supply, by default, the proof necessary to establish the creditor's right. *Whirlybirds Leasing Co. v. Aerospatiale Helicopter Corp.*, 749 S.W.2d 915, 919 (Tex. App.—Dallas 1988, no writ), *abrogated on other grounds by Greathouse*, 851 S.W.2d at 174 n.2 (because creditor failed to notify debtor of its intent to dispose of collateral or to make proper disposal, creditor repossessed and disposed of collateral in full satisfaction of indebtedness).

The application of *Greathouse* has been limited to consumer-goods transactions by Tex. Bus. & Com. Code § 9.626. Under this new section, in nonconsumer-goods transactions, a secured party is not required to prove compliance with Code provisions unless the debtor or secondary obligor raises the issue. If the debtor or secondary obligor raises the issue and the secured party does not prove compliance, the debtor or obligor is credited with the greater of the actual disposition proceeds or the proceeds that would have been realized if the secured party had complied with the Code. Tex. Bus. & Com. Code § 9.626.

§ 14.29:5 Amount of Sale as Determining Deficiency

If the sale was commercially reasonable and the debtor received notice, the fact that a better price could have been obtained will not affect the amount of the deficiency. Tex. Bus. & Com. Code § 9.627(a); *Lister v. Lee-Swofford Investments, L.L.P.*, 195 S.W.3d 746, 753 (Tex. App.—Amarillo 2006, no pet.) (minimal sale proceeds, creditor's inexperience in disposing of type of collateral, and failure of many dealers to attend auction did not conclusively establish commercial unreasonableness); *Siboney Corp. v. Chicago Pneumatic Tool Co.*, 572 S.W.2d 4, 8 (Tex. Civ. App.—Houston [1st Dist.] 1978, writ ref'd n.r.e.) (the fact that better price could have been obtained does not render sale commercially unreasonable).

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§ 14.30 Fraudulent Transfer

A petition for a fraudulent transfer cause of action is at form 14-10 in this chapter.

§ 14.30:1 Availability

Fraudulent transfer laws enable a party to negate or undo the effect of a transfer of property that would otherwise place the property beyond the reach of the transferor's creditors. Only creditors can bring fraudulent transfer claims. *See* Tex. Bus. & Com. Code §§ 24.005–.006. The term *claims* covers a broad concept, including liquidated, unliquidated, matured, unmatured, legal, equitable, or even disputed claims. Tex. Bus. & Com. Code § 24.002(3).

§ 14.30:2 What Constitutes Transfer

A "transfer" can be either a transfer of title or of any interest in the debtor's property or the creation of a lien or other encumbrance in the property. A disclaimer of inheritance is not a transfer. Tex. Bus. & Com. Code § 24.002(12).

§ 14.30:3 When Transfer or Obligation Occurs

A transfer of realty (other than fixtures) is made when the transfer is so far perfected that a good-faith purchaser of the asset from the debtor against whom applicable law permits the transfer to be perfected cannot acquire an interest in the asset superior to the interest of the transferee. A transfer of personalty or fixtures occurs when the transfer is so far perfected that a creditor on a simple contract cannot acquire a judicial lien (other than under the fraudulent transfer statutes themselves) superior to the transferee's interest. Tex. Bus. & Com. Code § 24.007(1).

An obligation is incurred when the writing executed by the obligor is delivered to or for the benefit of the obligee, if the obligation is evidenced by a writing. Otherwise, it is incurred when it becomes effective between the parties. Tex. Bus. & Com. Code § 24.007(5).

§ 14.30:4 Present vs. Future Creditors

A present creditor is one whose claim arose before the transfer was made or the obligation was incurred. Tex. Bus. & Com. Code § 24.006(a). A future creditor is one whose claim arose within a reasonable time after the transfer was made or the obligation was incurred. Tex. Bus. & Com. Code § 24.005(a).

§ 14.30:5 Insiders

Certain transfers to insiders can be avoided by either present or future creditors. *See* Tex. Bus. & Com. Code §§ 24.005(b)(1), 24.006(b). The list of insiders is expansive, including relatives, partners, officers and directors of a debtor corporation, partnerships in which the debtor is a partner, "affiliates," or "persons in control." *See* Tex. Bus. & Com. Code § 24.002(7) for the list of these insiders. *See also In re Holloway*, 955 F.2d 1008, 1010 (5th Cir. 1992); *Telephone Equipment Network, Inc. v. TA/Westchase Place, Ltd.*, 80 S.W.3d 601, 609 (Tex. App.—Houston [1st. Dist.] 2002, no pet.) (principal factors in determining insider status are (1) the closeness of the relationship between the transferee and debtor and (2) whether the transactions were at arm's length); *J. Michael Putman, M.D.P.A. Money Purchase Pension Plan v. Stephenson*, 805 S.W.2d 16, 18 (Tex. App.—Dallas 1991, no writ) (list of insiders contained in section 24.002(7) is merely illustrative).

§ 14.30:6 Insolvency

Insolvency is a factor in fraudulent transfers that can be attacked by either present or future creditors. *See* Tex. Bus. & Com. Code §§ 24.005(b)(9), 24.006. A debtor is insolvent if the sum of his debts is greater than the sum of his assets at a fair valuation. Tex. Bus. & Com. Code § 24.003(a). The sum of the debtor's

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assets does not include property that has been transferred, concealed, or removed with intent to hinder, delay, or defraud creditors or that has otherwise been transferred in a manner making the transfer voidable under the Fraudulent Transfer Act. Tex. Bus. & Com. Code § 24.003(d). Debts are not included to the extent they are secured by a valid lien on the property of the debtor not included as an asset. Tex. Bus. & Com. Code § 24.003(e).

The debtor is presumed to be insolvent if he is not paying his debts as they come due. Tex. Bus. & Com. Code § 24.003(b).

§ 14.30:7 Value and Reasonably Equivalent Value

Value is given for a transfer or an obligation if, in exchange for the transfer or obligation, property is transferred or an antecedent debt is secured or satisfied. Value does not include an unperformed promise made otherwise than in the ordinary course of the promisor's business to furnish support to the debtor or another person. Tex. Bus. & Com. Code § 24.004(a).

A person gives "reasonably equivalent value" if that person acquires an interest of the debtor in an asset by a regularly conducted, noncollusive foreclosure sale or execution of a power of sale for the acquisition or disposition of the debtor's interest on default under a mortgage, deed of trust, or security agreement. Tex. Bus. & Com. Code § 24.004(b). "Reasonably equivalent value" includes, but is not limited to, a transfer or obligation that is within the range of values for which the transferor would have sold the assets in an arm's-length transaction. Tex. Bus. & Com. Code § 24.004(d).

The operable date for valuation is the date of the transfer. *See, e.g., First National Bank of Seminole v. Hooper*, 48 S.W.3d 802, 808 (Tex. App.—El Paso 2001, pet. denied) (transfer occurred on creation of lien rather than date of foreclosure sale; therefore, operable date for valuation was date lien created), *rev'd on other grounds*, 104 S.W.3d 83 (Tex. 2003); *see also* Tex. Bus. & Com. Code §§ 24.002(12), 24.007(1).

§ 14.30:8 Transfer with Intent to Hinder, Delay, or Defraud

A transfer made or obligation incurred by a debtor is fraudulent as to a present or future creditor if the debtor made the transfer or incurred the obligation with actual intent to hinder, delay, or defraud any creditor. Tex. Bus. & Com. Code § 24.005(a)(1). "Actual intent" may be determined by considering the following "badges of fraud," among other factors:

1. The transfer or obligation was to an insider.
2. The debtor retained possession or control of the property after the transfer.
3. The transfer or obligation was concealed.
4. Before the transfer was made or the obligation was incurred, the debtor had been sued or threatened with suit.
5. The transfer was of substantially all the debtor's assets.
6. The debtor absconded.
7. The debtor removed or concealed assets.
8. The value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred.
9. The debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred.

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10. The transfer occurred shortly before or shortly after a substantial debt was incurred.

11. The debtor transferred the essential assets of his business to a lienor who transferred those assets to an insider of the debtor.

Tex. Bus. & Com. Code § 24.005(b); *see also Ho v. McArthur Ranch, L.L.C.*, 395 S.W.3d 325, 328–29 (Tex. App.—Dallas 2013, no pet.) (applying factors in Tex. Bus. & Com. Code § 24.005(b) in context of breach of rental contract).

Ordinarily the question of intent is a fact question, unless the fraud is admitted, the fraudulent intent is apparent on the surface, or there is some interest reserved in the property inconsistent with the alleged conveyance. *See BMG Music v. Martinez*, 74 F.3d 87, 90 (5th Cir. 1996); *Quinn v. Dupree*, 303 S.W.2d 769, 774 (Tex. 1957) (no fraudulent intent for debtor to prefer one creditor over another); *Letsos v. H.S.H., Inc.*, 592 S.W.2d 665, 670 (Tex. App.—Waco 1980, writ ref'd n.r.e.).

A transfer or obligation is not voidable under section 24.005(a)(1) against a person who took in good faith and for a reasonably equivalent value or against any subsequent transferee or obligee. Tex. Bus. & Com. Code § 24.009(a). However, a transferee cannot show "good faith" if the transferee is on inquiry notice that the transfer may be voidable and fails to conduct a diligent investigation into the circumstances of the transfer, even if the investigation would not have discovered evidence of fraud. *Janvey v. GMAG, L.L.C.*, No. 19-0452, 2019 WL 6972237, at *7 (Tex. Dec. 20, 2019). A person is on "inquiry notice" when he or she is aware of facts that would prompt a reasonable person to investigate further. *Janvey*, 2019 WL 6972237, at *4 (citing Black's Law Dictionary (11th ed. 2019)).

The general statute of limitations for this cause of action is either four years after the transfer was made or the obligation was incurred or, if later, within one year after the transfer or obligation was or could reasonably have been discovered by the claimant. Tex. Bus. & Com. Code § 24.010(a)(1). If the action is brought on behalf of a spouse, minor, or ward, it must be brought within two years after it accrues or, if later, within one year after the transfer or obligation was or could reasonably have been discovered by the claimant. Tex. Bus. & Com. Code § 24.010(b)(1). *But see Smith v. American Founders Financial Corp.*, 365 B.R. 647, 676–79 (S.D. Tex. 2007) (Tex. Bus. & Com. Code § 24.010 preempted by section 546(a) of the Bankruptcy Code).

§ 14.30:9 Transfer for Less Than Reasonably Equivalent Value—Present or Future Creditors

A transfer made or obligation incurred by a debtor is fraudulent as to a present or future creditor if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor either—

1. was engaged in or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or

2. intended to incur, or believed or reasonably should have believed that the debtor would incur, debts beyond the debtor's ability to pay as they became due.

Tex. Bus. & Com. Code § 24.005(a)(2). *See also Colonial Leasing Co. v. Logistics Control Group International*, 762 F.2d 454 (5th Cir. Tex. 1985) (noting that "[u]nder Texas law, one may bring

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an action under the Fraudulent Transfer Act as a creditor of the transferor merely by virtue of a legal action, pending and unliquidated at the time of transfer, against the transferor"); *Hollins v. Rapid Transit Lines, Inc.*, 440 S.W.2d 57, 59 (Tex. 1969) (tort claimants are entitled to file causes of action under the Texas Uniform Fraudulent Transfer Act based on pending, unliquidated tort claims); *Blackthorne v. Bellush*, 61 S.W.3d 439, 443–44 (Tex. App.—San Antonio 2001, no pet.) (interim injunctive relief is available to remedy a fraudulent transfer for which the claimant asserts an equitable interest). See section 14.30:7 above regarding reasonably equivalent value.

A transfer is not voidable on these grounds if it resulted from termination of a lease on default by the debtor when the termination is in accordance with the lease and applicable law or enforcement of an article 9 security interest. Tex. Bus. & Com. Code § 24.009(e).

The general statute of limitations for this cause of action is four years from the date the transfer was made or the obligation was incurred. Tex. Bus. & Com. Code § 24.010(a)(2). If the action is brought on behalf of a spouse, minor, or ward, the cause of action is extinguished unless brought within two years after it accrues or, if later, within one year after the transfer or obligation was or could reasonably have been discovered by the claimant. Tex. Bus. & Com. Code § 24.010(b)(1). *But see Smith v. American Founders Financial Corp.*, 365 B.R. 647, 676–79 (S.D. Tex. 2007) (Tex. Bus. & Com. Code § 24.010 preempted by section 546(a) of the Bankruptcy Code).

§ 14.30:10 Transfer for Less Than Reasonably Equivalent Value—Present Creditors Only

A transfer made or obligation incurred by a debtor is fraudulent as to a present creditor if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or became insolvent as a result of the transfer or obligation. Tex. Bus. & Com. Code § 24.006(a).

The general statute of limitations for this cause of action is four years from the date the transfer was made or the obligation was incurred. Tex. Bus. & Com. Code § 24.010(a)(2). If the action is brought on behalf of a spouse, minor, or ward, it must be brought within two years after it accrues or, if later, within one year after the transfer or obligation was or could reasonably have been discovered by the claimant. Tex. Bus. & Com. Code § 24.010(b)(1). *But see Smith v. American Founders Financial Corp.*, 365 B.R. 647, 676–79 (S.D. Tex. 2007) (Tex. Bus. & Com. Code § 24.010 preempted by section 546(a) of the Bankruptcy Code).

§ 14.30:11 Transfers to Insiders—Present Creditors Only

A transfer made by a debtor is fraudulent as to a present creditor if the transfer was made to an insider for an antecedent debt, the debtor was insolvent at the time, and the insider had reasonable cause to believe that the debtor was insolvent. Tex. Bus. & Com. Code § 24.006(b).

Such a transfer is not voidable—

1. to the extent the insider gave new value to or for the benefit of the debtor after the transfer was made, unless the new value was secured by a valid lien;
2. if made in the ordinary course of business or financial affairs of the debtor and the insider; or
3. if made under a good-faith effort to rehabilitate the debtor and the transfer secured present value given for that

purpose as well as an antecedent debt of the debtor.

Tex. Bus. & Com. Code § 24.009(f).

The statute of limitations for this cause of action is one year after the transfer was made. Tex. Bus. & Com. Code § 24.010(a)(3). *But see Smith v. American Founders Financial Corp.*, 365 B.R. 647, 676–79 (S.D. Tex. 2007) (Tex. Bus. & Com. Code § 24.010 preempted by section 546(a) of the Bankruptcy Code).

§ 14.30:12 Remedies of Creditors

The remedies a creditor in a fraudulent transfer action can seek include—

1. avoidance of the transfer or obligation to the extent necessary to satisfy the creditor's claim;
2. an attachment or other provisional remedy against the asset transferred or other property of the transferee in accordance with applicable law relating to ancillary proceedings;
3. injunctive relief against further disposition or transfer of the asset;
4. appointment of a receiver to take charge of the asset transferred;
5. if judgment has been obtained on a claim against the debtor, a levy of execution on the asset; or
6. any other relief circumstances may require.

Tex. Bus. & Com. Code § 24.008. A creditor may also seek exemplary damages. *See* Tex. Bus. & Com. Code § 24.008(a)(3)(c); *In re Galaz*, 850 F.3d 800, 804 (5th Cir. 2017) (affirming exemplary damages in fraudulent transfer suit). If the transfer or obligation is avoidable, the court must render judgment for the creditor against the transferee of the asset or the person for whose benefit the transfer was made, or any subsequent transferee, other than a good faith transferee, who took for value or from any subsequent transferee, in the amount of the value of the asset transferred as of the time of the transfer, subject to adjustment as the equities may require. Tex. Bus. & Com. Code § 24.009(b). Adjustment of the value of the asset may *not* take into account—

1. physical additions or changes to the asset;
2. repairs to the asset;
3. payment of tax on the asset;
4. payment of any debt secured by a lien on the asset superior or equal to the rights of the voiding creditor; or
5. preservation of the asset.

Tex. Bus. & Com. Code § 24.009(c).

§ 14.30:13 Credits Accruing to Good-Faith Transferees

Although a good-faith transferee is not entitled to credit for payments made for repair or upkeep of the asset (see section 14.30:12 above), he is entitled to a claim or credit, to the extent he gave value for the transfer or obligation, to—

1. a lien, prior to the rights of the voiding creditor, or a right to retain any interest in the asset transferred;
2. enforcement of any obligation incurred; or
3. a reduction in the amount of liability on the judgment.

Tex. Bus. & Com. Code § 24.009(d)(1). The good-faith transferee is also entitled to a lien against the asset, superior to the rights of the voiding creditor, to the extent of the value of improvements the transferee made. Tex. Bus. & Com. Code § 24.009(d)(2).

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§ 14.30:14 Attorney's Fees

In any proceeding under the Uniform Fraudulent Transfer Act, the court may award costs and reasonable attorney's fees as are equitable and just. Tex. Bus. & Com. Code § 24.013.

§ 14.31 Action on Guaranty

§ 14.31:1 Guarantors, Sureties, and Accommodation Parties

A guaranty is an undertaking to pay another's debt or perform his obligation on the happening of one or more contingencies. *See Starcrest Trust v. Berry*, 926 S.W.2d 343, 350 (Tex. Civ. App.—Austin 1996, no writ). A surety is a party who promises to answer for the debt of another. *Crimmins v. Lowry*, 691 S.W.2d 582, 585 (Tex. 1985). At common law, the surety was directly liable for performance of the obligation, while the guarantor's liability was only indirect. *Arnett v. Simpson*, 235 S.W. 982, 985 (Tex. Civ. App.—Amarillo 1921, writ dism'd). Sureties are defined to include guarantors for Uniform Commercial Code purposes. Tex. Bus. & Com. Code § 1.201(b)(39); Tex. Civ. Prac. & Rem. Code § 43.001.

The law recognizes a distinction between guaranty of collection and guaranty of payment, also called absolute guaranty and unconditional guaranty. An absolute guarantor is primarily liable and waives any requirement that the creditor take action against the principal obligor as a condition precedent to his or her liability on the guaranty. *Corona v. Pilgrim's Pride Corp.*, 245 S.W.3d 75, 81 (Tex. App.—Texarkana 2008, pet. denied) (citing *Hopkins v. First National Bank at Brownsville*, 551 S.W.2d 343, 345 (Tex. 1977)). A guaranty of collection is an undertaking of the guarantor to pay if the debt cannot be collected from the primary obligor by the use of reasonable diligence. *Cox v. Lerman*, 949 S.W.2d 527, 530 (Tex. App.—Houston [14th Dist.] 1997, no writ). With a conditional guaranty, the principal debtor must be joined in the suit unless excused pursuant to section 17.001 of the Civil Practice and Remedies Code. *Cox*, 949 S.W. at 530 (citing *Ford v. Darwin*, 767 S.W.2d 851, 854 (Tex. App.—Dallas 1989, writ denied)).

If the party's signature is accompanied by words indicating unambiguously that he is guaranteeing collection instead of payment of another party's obligation in the instrument, the signer is obligated to pay the instrument only if—

1. execution of judgment against the other party has been returned unsatisfied;
2. the other party is insolvent or is in an insolvency proceeding;
3. the other party cannot be served with process; or
4. it is otherwise apparent that payment cannot be obtained from the other party.

Tex. Bus. & Com. Code § 3.419(d).

Accommodation Party: An accommodation party is liable in the capacity in which he has signed. Tex. Bus. & Com. Code § 3.419(b). This liability is defined in terms of the accommodation party's status under the Code—as, for example, a maker or endorser. Therefore, an accommodation endorser is entitled to the same presentment and notice of dishonor as is any other endorser. Tex. Bus. & Com. Code § 3.419(b). The accommodation party is not liable to the party accommodated. Tex. Bus. & Com. Code § 3.419(e).

§ 14.31:2 Elements

The creditor enforcing a guaranty must establish—

1. the existence and ownership of the guaranty contract;

2. the performance of the terms of the contract by plaintiff;
3. the occurrence of the condition on which liability is based; and
4. guarantor's failure or refusal to perform the promise.

Corona v. Pilgrim's Pride Corp., 245 S.W.3d 75, 80 (Tex. App.—Texarkana 2008, pet. denied) (citing *Barclay v. Waxahachie Bank & Trust Co.*, 568 S.W.2d 721, 723 (Tex. Civ. App.—Waco 1978, no writ)). For a petition for a suit on an absolute guaranty, see form 14-11 in this chapter.

Independent consideration to the guarantor generally is not required to create a valid guaranty contract. Consideration to the principal is sufficient consideration to bind the guarantor, as is postponement of enforcement of the debt. If a guaranty is entered into independently of the transaction that caused the obligation, the guaranty must be supported by consideration independent of the obligation. *See Gooch v. American Sling Co.*, 902 S.W.2d 181, 185 (Tex. App.—Fort Worth 1995, no writ) (citing *Fourticq v. Fireman's Fund Insurance Co.*, 679 S.W.2d 562, 564 (Tex. App.—Dallas 1984, no writ) (indemnity agreement signed after creditor provided notice of termination of underlying contract lacked consideration because neither indemnitor nor primary debtor received any benefit, nor did creditor suffer a detriment). *See also Windham v. Cal-Tim, Ltd.*, 47 S.W.3d 846 (Tex. App.—Beaumont 2001, pet. denied) (earlier execution of lease to principal sufficient consideration for guaranty when circumstances indicated lease and guaranty part of same transaction).

§ 14.31:3 Joinder of Principal Obligor

Generally, a surety cannot be sued without joinder of the principal obligor unless judgment has already been rendered against the principal or the case is governed by a specific rule or law providing otherwise. Tex. R. Civ. P. 31. Additionally, the surety may require by written notice that the obligee bring immediate suit if the obligation is a contract for the payment of money or performance of an act. Tex. Civ. Prac. & Rem. Code § 43.002(a).

Statutory Exceptions to Joinder Requirement: In addition to when a judgment has been rendered against the principal, the guarantor can be sued without joinder of the principal obligor if the principal obligor—

1. is a nonresident or resides in a place at which he cannot be reached by ordinary process of law;
2. resides in a place that is unknown and cannot be ascertained by the use of reasonable diligence;
3. is dead; or
4. is actually or notoriously insolvent.

Tex. Civ. Prac. & Rem. Code § 17.001(b). If the principal obligor is not joined, the exception on which the exclusion is based must be pleaded and proved. *Zimmerman v. Bond*, 392 S.W.2d 149, 151 (Tex. Civ. App.—Dallas 1965, no writ) (judgment against guarantor reversed because primary obligor not joined to the lawsuit, and no exception pleaded). By its express terms, section 17.001 applies to suits on contracts involving several obligors or parties that are conditionally liable. *Threlkeld-Covington, Inc. v. Baker Drywall Co.*, 837 S.W.2d 840, 843 (Tex. App.—Eastland 1992, no writ).

Contractual Waiver of Joinder: In almost every guaranty agreement, the guarantor waives the necessity of joining the principal obligor in a suit against the guarantor. These waivers are valid. *See Universal Metals & Machinery, Inc. v. Bohart*, 539 S.W.2d 874, 877 (Tex. 1976) (guarantors waived any requirement that the holder of the note must exhaust its rights or take action against the maker); *Yandell v. Tarrant State Bank*, 538 S.W.2d 684, 687–88 (Tex. Civ.

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App.—Fort Worth 1976, writ ref'd n.r.e.) (waiver upheld against guarantor on a note).

Practice Note: Usually the creditor will want to pursue both the primary obligor and the guarantor of a note or contract. Although creditor may not be legally required to join the obligor, especially if the guarantor has expressly waived the joinder requirement, the better practice is to name both the principal obligor and the guarantor as party defendants.

Notes for Which Maker Is Also Guarantor: If the maker of the note also signs as a guarantor, he must file a verified denial that he is liable in his capacity as a guarantor or he will have admitted liability in that capacity. *Breckenridge v. Nationsbank of Texas, N.A.*, 79 S.W.3d 151, 158 (Tex. App.—Texarkana 2002, pet. denied).

§ 14.31:4 Discharge of Liability

A surety, guarantor, or accommodation party is discharged from liability on a contract if a right of action has accrued on the contract, the surety has given notice to the creditor to sue on the contract, and the obligee fails to prosecute such a suit. Tex. Civ. Prac. & Rem. Code § 43.002.

§ 14.31:5 Surety's or Accommodation Party's Rights against Principal Obligor

A surety who, because of his suretyship relation, pays part or all of a judgment against his primary obligor is subrogated to the judgment creditor's rights under the judgment. Tex. Civ. Prac. & Rem. Code § 43.004(b). Similarly, an accommodation party who pays a negotiable instrument is entitled to reimbursement from the accommodated party and is entitled to enforce the instrument against the accommodated party. Tex. Bus. & Com. Code § 3.419(f).

§ 14.31:6 Guarantor's Obligation When Defects Exist in Underlying Contract

Under certain facts, a guarantor may not be permitted to rely on defects in the underlying contract to defend an unambiguous guarantee. *Universal Metals & Machinery, Inc. v. Bohart*, 539 S.W.2d 874, 877 (Tex. 1976) (guarantor, who contracted as primary, absolute, unconditional obligor, is not freed from liability because of forged signature of maker of underlying promissory note); *Farmers & Merchants State Bank v. Reece Supply Co.*, 79 S.W.3d 615 (Tex. App.—Eastland 2002, pet. denied) (guarantor bank was unable to assert offset defense for unfit goods because bank signed unconditional payment guaranty); *El Paso Refining, Inc. v. Scurlock Permian Corp.*, 77 S.W.3d 374 (Tex. App.—El Paso 2002, pet. denied) (usury is personal defense and may not be asserted by guarantor unless contract with guarantor also contains usurious provision); *Bair Chase Property Co., L.L.C. v. S&K Development Co.*, 260 S.W.3d 133, 146 (Tex. App.—Austin 2008, pet. denied) (same).

§ 14.32 Suit on Acknowledgment of Debt

While acknowledgment may be used to overcome a limitations defense, the Texas Supreme Court has held that a written acknowledgment of debt is an independent cause of action. *See DeRoeck v. DHM Ventures, LLC*, 556 S.W.3d 831, 834 (Tex. 2018) (per curiam) ("A suit on a debt is separate from a suit on a later written acknowledgment of the debt, and the latter is not barred by limitations merely because the former is."). *See also Siegel v. McGavock Drilling Co.*, 530 S.W.2d 894, 896 (Tex. Civ. App.—Amarillo 1975, writ ref'd n.r.e.) (when debtor signs written acknowledgment of previous debt, it supports an action on promise to pay that is independent of previous debt); *Simpson v. Williams Rural High School District*, 153 S.W.2d

852, 855 (Tex. App.—Amarillo 1941, writ ref'd) (when obligation is extinguished by operation of law instead of satisfaction by debtor, moral obligation to pay remains and is sufficient consideration for new promise). See section 17.64 in this manual for further discussion of acknowledgment as a means to defeat a limitations defense.

§ 14.32:1 Elements

An acknowledgment of debt must—

1. be in writing and signed by the party to be charged;
2. contain an unequivocal acknowledgment of the justness or the existence of the particular obligation; and
3. refer to the obligation and express a willingness to honor that obligation.

DeRoeck v. DHM Ventures, LLC, 556 S.W.3d 831, 834 (Tex. 2018) (per curiam), *citing Stine v. Stewart*, 80 S.W.3d 586, 591 (Tex. 2002) (per curiam); *see also* Tex. Civ. Prac. & Rem. Code § 16.065.

The Uniform Electronic Transactions Act, Tex. Bus. & Com. Code §§ 322.001–.021, applies to electronic records and signatures relating to a transaction. Tex. Bus. & Com. Code § 322.003(a). "Electronic record" means a record created, generated, sent, communicated, received, or stored by electronic means. Tex. Bus. & Com. Code § 322.002(7). An e-mail satisfies all of the disjunctive definitions of an electronic record. *Khoury v. Tomlinson*, 518 S.W.3d 568, 576 (Tex. App.—Houston [1st Dist.] 2017, no pet.).

A record or signature may not be denied legal effect or enforceability solely because it is in electronic form. Tex. Bus. & Com. Code § 322.007(a). If a law requires a signature, an electronic signature satisfies the law. Tex. Bus. & Com. Code § 322.007(d). "Electronic signature" means an electronic sound, symbol, or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record. Tex. Bus. & Com. Code § 322.002(8). In *Khoury*, the court held that the e-mail name or address in the "from" field satisfies the definition of an electronic signature. *Khoury*, 518 S.W.3d at 579.

§ 14.32:2 Limitations

A suit for acknowledgment of debt should be filed within the acknowledgment's own limitations period. *See Stine v. Stewart*, 80 S.W.3d 586, 592–93 (Tex. 2002) (per curiam), (four-year statute of limitations governs acknowledgments, which are new contractual promises to pay; third-party creditor beneficiary properly sued within four-year limitations period); *City of Houston v. Moody*, 572 S.W.2d 13, 16 (Tex. Civ. App.—Houston [1st Dist.] 1978, writ ref'd n.r.e.).

§ 14.32:3 Pleading

A pleading of acknowledgment must be made "upon the new promise" and "must declare upon it as the cause of action." "The correct practice is either to (1) to quote the writing alleged to constitute the new promise, or (2) to attach it to the pleading as an exhibit." *DeRoeck*, 556 S.W.3d at 834–35, *citing Hanley v. Oil Capital Broadcasting Ass'n*, 171 S.W.2d 864, 865 (Tex. 1943).

§ 14.32:4 Exception for Consumer Debt Buyers

Effective September 1, 2019, a debt buyer, as defined by the Texas Finance Code and as distinguished from the original consumer creditor, may not commence an action on an acknowledgement to revive a time-barred consumer debt. Acts 2019, 86th Leg., R.S., ch. 1055, §§ 2, 3 (H.B. 996) (codified at Tex. Fin. Code § 392.307 and known as the Fair Consumer

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Debt Collection Act). A debt buyer may not, directly or indirectly, commence an action against or initiate arbitration with a consumer to collect a consumer debt after the expiration of the applicable limitations period provided by section 16.004 of the Texas Civil Practice and Remedies Code or section 3.118 of the Texas Business and Commerce Code. If an action to collect a consumer debt is barred under subsection (c), the cause of action is not revived by a payment of the consumer debt, an oral or written reaffirmation of the consumer debt, or any other activity on the consumer debt. Tex. Fin. Code § 392.307(c), (d). The changes effective September 1, 2019, apply only to an action of a debt buyer to collect a consumer debt if the action occurs on or after that date. An action of a debt buyer to collect a consumer debt that occurs before September 1, 2019, is governed by the law in effect immediately before that date, and the former law is continued in effect for that purpose. *See* Acts 2019, 86th Leg., R.S., ch. 1055, § 4 (H.B. 996).

§ 14.33 Confirmation of Arbitration Award

Confirmation of an arbitration award is governed by the Texas General Arbitration Act (the "Act"), Tex. Civ. Prac. & Rem. Code §§ 171.001–.098. The Act applies to debts and credit agreements. *See* Tex. Civ. Prac. & Rem. Code § 171.002.

An arbitration award, by itself, is not an enforceable judgment. An award becomes a judgment after a court enters an order confirming the award. Either party can apply for an order to confirm the award, either to conclude a pending lawsuit that was abated while the parties arbitrated the dispute, or in a new lawsuit brought for the purpose of seeking enforcement of the final arbitration award when the nonprevailing party delays or refuses to comply with the award. *See* Tex. Civ. Prac. & Rem. Code § 171.087, 171.092.

A proceeding to confirm an arbitration award is in the nature of an enforcement proceeding. *See Babcock & Wilcox Co. v. PMAC, Ltd.*, 863 S.W.2d 225, 236 (Tex. App.—Houston [14th Dist.] 1993, writ denied). A party to an arbitration is required as part of the arbitration enforcement process to return to the trial court to confirm the award and make it into an enforceable final judgment. *See Kline v. O'Quinn*, 874 S.W.2d 776, 784–85 (Tex. App.—Houston [14th Dist.] 1994, writ denied).

A written arbitration agreement that provides for or authorizes an arbitration in this state confers jurisdiction on the court to enforce the agreement and to render judgment on an award under the Act. Tex. Civ. Prac. & Rem. Code § 171.081.

§ 14.33:1 Jurisdiction and Venue

The filing with the clerk of the court of an application for an order, including a judgment or decree, invokes the jurisdiction of the court. Tex. Civ. Prac. & Rem. Code § 171.082(a).

§ 14.33:2 Place of Filing

Unless otherwise provided, a party must file the initial application in the county in which an adverse party resides or has a place of business or, if an adverse party does not have a residence or place of business in this state, in any county. When an arbitration agreement provides that the hearing before the arbitrators is to be held in a county in Texas, an application to confirm an arbitration award must be filed with the clerk of the court of that county. If a hearing before the arbitrators has been held, the application must be filed with the clerk of the court of the county in which the hearing was held. If a proceeding is pending in a court relating to arbitration of an issue subject to arbitration under an agreement before the filing of the initial application, a party must file the initial application and any subsequent application relating to the arbitration in

that court. Tex. Civ. Prac. & Rem. Code § 171.096.

§ 14.33:3 Transfer

On application of a party adverse to the party who filed the initial application, a court that has jurisdiction but that is located in a county other than as described by Tex. Civ. Prac. & Rem. Code § 171.096 shall transfer the application to a court of a county described by that section. The court shall transfer the application by an order comparable to an order sustaining a plea of privilege to be sued in a civil action in a district court of a county other than the county in which an action is filed. The party must file the application under this section (1) not later than the twentieth day after the date of service of process on the adverse party, and (2) before any other appearance in the court by that adverse party, other than an appearance to challenge the jurisdiction of the court. Tex. Civ. Prac. & Rem. Code § 171.097.

§ 14.33:4 Time of Filing

An applicant for a court order may file the application (1) before arbitration proceedings begin in support of those proceedings; (2) during the period the arbitration is pending before the arbitrators; or (3) subject to Tex. Civ. Prac. & Rem. Code chapter 171, at or after the conclusion of the arbitration. Tex. Civ. Prac. & Rem. Code § 171.083.

There is no limitations period prescribed in the Texas Civil Practice and Remedies Code for the filing of an application to confirm an arbitration award. *But see Guzy v. Guzy*, No. 1:17-CV-228-RP, 2017 WL 3032432 at *2 (W.D. Tex. July 17, 2017) (*citing FIA Card Services, N.A. v. Gachiengu*, 571 F.Supp.2d 799, 804 (S.D. Tex. 2008)) (limitations period under Federal Arbitration Act to file application to confirm award is one year).

However, the time for modifying, correcting, or vacating an award is prescribed: an application must be brought within ninety days after delivery of a copy of the award to the applicant. Tex. Civ. Prac. & Rem. Code §§ 171.088(b), 171.091(b).

§ 14.33:5 Application and Fees

On the filing of the initial application and the payment to the clerk of the fees of court required to be paid on the filing of a civil action in the court, the clerk shall docket the proceeding as a civil action pending in that court. Tex. Civ. Prac. & Rem. Code § 171.082(b).

§ 14.33:6 Content of Application to Confirm

A court may require that an application filed under this chapter—

1. show the jurisdiction of the court;
2. have attached a copy of the agreement to arbitrate;
3. define the issue subject to arbitration between the parties under the agreement;
4. specify the status of the arbitration before the arbitrators; and
5. show the need for the court order sought by the applicant.

Tex. Civ. Prac. & Rem. Code § 171.085(a).

In describing the status of the arbitration, the applicant should review the conduct of the arbitration proceeding and include allegations that the applicant complied with all requirements of the conduct of the arbitration proceeding and that an arbitration award was issued.

The applicant may show the need for a court order by stating that the other party failed to comply with the terms of the award. As appro-

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priate, the applicant may state that the other party has not brought a timely action to vacate, modify, or correct the award. The application should conclude with a prayer for an order confirming the award and for rendition of a judgment enforcing its terms.

A court may not find an application inadequate because it fails to state a requirement of Tex. Civ. Prac. & Rem. Code § 171.085(a) unless the court, in its discretion, (1) requires that the applicant amend the application to meet the requirements of the court, and (2) grants the applicant a ten-day period to comply. Tex. Civ. Prac. & Rem. Code § 171.085(b).

While an application may confirm attorney's fees awarded in the arbitration award, a court may not award additional attorney's fees for confirming the arbitration award. *International Bank of Commerce-Brownsville v. International Energy Development Corp.*, 981 S.W.2d 38, 55 (Tex. App.—Corpus Christi 1998, pet. denied) (concluding that trial court erred by awarding additional attorney's fees in an application to confirm an arbitration award). Nor can attorney's fees incurred to enforce an arbitration award be recovered. *See Executone Information Systems, Inc. v. Davis*, 26 F.3d 1314, 1331 (5th Cir. 1994); *Amalgamated Meat Cutters v. Great W. Food Co.*, 712 F.2d 122, 125 (5th Cir. 1983); *Kline v. O'Quinn*, 874 S.W.2d 776, 785 (Tex. App.—Houston [14th Dist.] 1994, writ denied); *Babcock & Wilcox Co. v. PMAC, Ltd.*, 863 S.W.2d 225, 236 (Tex. App.—Houston [14th Dist.] 1993, writ denied).

§ 14.33:7 Hearing and Notice

The court shall hear each initial and subsequent application to confirm an arbitration award in the manner and with the notice required by law or court rule for making and hearing a motion filed in a pending civil action in a district court. Tex. Civ. Prac. & Rem. Code § 171.093.

An action to confirm an arbitration award is intended to be an expedited proceeding. *See Jack B. Anglin Co., Inc. v. Tipps*, 842 S.W.2d 266, 269, 272 (Tex. 1992).

§ 14.33:8 Service of Process

On the filing of an initial application to confirm an arbitration award, the clerk of the court shall issue process for service on each adverse party named in the application and attach a copy of the application to the process. Tex. Civ. Prac. & Rem. Code § 171.094(a). To the extent applicable, the process and service and the return of service must be in the form and include the substance required for process and service on a defendant in a civil action in a district court. Tex. Civ. Prac. & Rem. Code § 171.094(b). An authorized official may serve process for an initial application. Tex. Civ. Prac. & Rem. Code § 171.094(c). The rules authorize numerous additional persons to serve process. *See* Tex. Civ. Prac. & Rem. Code § 171.095(a); Tex. R. Civ. P. 21a(d).

§ 14.33:9 Confirmation of Award

Unless grounds are offered for vacating, modifying, or correcting an award under Tex. Civ. Prac. & Rem. Code § 171.088 (vacating award) or § 171.091 (modifying or granting award), the court, on application of a party, shall confirm the award. Tex. Civ. Prac. & Rem. Code § 171.087. *See Hoskins v. Hoskins*, 497 S.W.3d 490, 494 (Tex. 2016) ("The statutory text could not be plainer: the trial court 'shall confirm' an award unless vacatur is required under one of the enumerated grounds in [sections 171.088 or 171.091] . . . [the Act] leaves no room for courts to expand on those grounds . . . ."); *see also Premium Plastics Supply, Inc. v. Howell*, 537 S.W.3d 201, 205–06 (Tex. App.—Houston [1st Dist.] 2017, no pet.) (trial court correctly granted summary judgment in suit to confirm arbitration award, finding that counterclaims were barred by res judicata because they should

have been raised in the then-concluded arbitration proceeding).

An arbitrator's award has the same effect as a judgment of a court of last resort, and the trial judge may not substitute his judgment for the arbitrator's merely because he would have reached a different conclusion. *See Holk v. Biard*, 920 S.W.2d 803, 806–807 (Tex. App.—Texarkana 1996) (orig. proceeding [leave denied]).

A mistake of fact or law is insufficient to set aside an arbitration award. *Anzilotti v. Gene D. Liggin, Inc.*, 899 S.W.2d 264, 266 (Tex. App.—Houston [14th Dist.] 1995, no writ).

Errors in the application of substantive law by the arbitrators during the proceedings in arbitration are not reviewable by the court on a motion to vacate an award. *Jamison & Harris v. National Loan Investors*, 939 S.W.2d 735, 737 (Tex. App.—Houston [14th Dist.] 1997, writ denied) (arbitrator's refusal to admit evidence of fraud in the inducement in the execution of notes and further refusal to admit evidence of partial discharge of notes by release of one of the parties to the note not reviewable by the trial court on a motion to vacate an award).

If an application to vacate is denied and a motion to modify or correct the award is not pending, the court shall confirm the award. Tex. Civ. Prac. & Rem. Code § 171.088(c). If an application to modify or correct is granted, the court shall modify or correct the award to effect its intent and shall confirm the award as modified or corrected. If the application to modify or correct is not granted, the court shall confirm the award. Tex. Civ. Prac. & Rem. Code § 171.091(c).

§ 14.33:10 Judgment on Award; Costs

On granting an order that confirms an award, the court shall enter a judgment or decree conforming to the order. The judgment or decree may be enforced in the same manner as any other judgment or decree. The court may award: (1) costs of the application and of the proceedings subsequent to the application; and (2) disbursements. Tex. Civ. Prac. & Rem. Code § 171.092.

§ 14.33:11 Appeal

A party may appeal a judgment confirming or denying confirmation of an award. Tex. Civ. Prac. & Rem. Code § 171.098(a)(3). The appeal shall be taken in the manner and to the same extent as an appeal from an order or judgment in a civil action. Tex. Civ. Prac. & Rem. Code § 171.098(b).

§ 14.34 Sister-State or Federal Judgments Enforced through Uniform Enforcement of Foreign Judgments Act (UEFJA)

Under the United States Constitution, each state must give a final judgment of a sister state the same force and effect the judgment would be entitled to in the state in which it was rendered. *Bard v. Charles R. Myers Insurance Agency, Inc.*, 839 S.W.2d 791, 794 (Tex. 1992) (citing U.S. Const. art. IV, § 1). In Texas, the enforcement of foreign judgments is governed by the Texas version of the UEFJA, Tex. Civ. Prac. & Rem. Code § 35.001 *et seq.*; *Karstetter v. Voss*, 184 S.W.3d 396, 401 (Tex. App.—Dallas 2006, no pet.).

§ 14.34:1 Enforcement Options

A creditor seeking to "domesticate" a judgment from a federal court, or from another state, may either use the affidavit procedure set out in the Uniform Enforcement of Foreign Judgments Act, Tex. Civ. Prac. & Rem. Code §§ 35.001–.007, or bring an independent action in a Texas court, Tex. Civ. Prac. & Rem. Code § 35.008. When a judgment creditor proceeds under the

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UEFJA, the filing of the foreign judgment comprises both a plaintiff's original petition and a final judgment. *Walnut Equipment Leasing Co. v. Wu*, 920 S.W.2d 285, 286 (Tex. 1996) (citing *Lawrence Systems, Inc. v. Superior Feeders, Inc.*, 880 S.W.2d 203, 208 (Tex. App.—Amarillo 1994, writ denied). The affidavit procedure is faster and easier than bringing an independent action. The independent action is discussed at section 14.35 below.

§ 14.34:2 Procedure

The creditor or his attorney must file with the clerk of any court of competent jurisdiction a copy of the sister-state judgment authenticated in accordance with an act of Congress or a statute of this state (*see* Tex. Civ. Prac. & Rem. Code § 35.003(a)), and an affidavit showing the name and last known post office addresses of the judgment debtor and judgment creditor (Tex. Civ. Prac. & Rem. Code § 35.004(a)).

The judgment creditor or the judgment creditor's attorney must promptly mail notice of the filing to the judgment debtor at debtor's last known address, and file proof of mailing of the notice with the clerk of the court. Tex. Civ. Prac. & Rem. Code § 35.004(b). Notice must include the name and post office addresses of the judgment creditor and, if the judgment creditor has a Texas attorney, the attorney's name and address. Tex. Civ. Prac. & Rem. Code § 35.004(c). On receipt of proof of mailing of the notice, the court clerk must note the mailing in the docket. Tex. Civ. Prac. & Rem. Code § 35.004(d).

See form 14-12 in this chapter for authenticating a foreign judgment in Texas.

§ 14.34:3 Authentication of Judgment and Bill of Costs

In the context of Tex. Civ. Prac. & Rem. Code § 35.003, a sister-state judgment or bill of costs can be authenticated in one of the following ways:

1. The judgment can be proved or admitted by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the attestation is in proper form. 28 U.S.C. § 1738. The authentication is often referred to as an "exemplified judgment." *See also Medical Administrators, Inc. v. Koger Properties, Inc.*, 668 S.W.2d 719, 721 (Tex. App.—Houston [1st Dist.] 1983, no writ) (when plaintiff sues on judgment of sister state in Texas and introduces his judgment, authenticated according to 28 U.S.C. § 1738, he thereby establishes prima facie case); *Paschall v. Geib*, 405 S.W.2d 385 (Tex. Civ. App.—Dallas 1966, writ ref'd n.r.e.) (fact that foreign judgment and judge's certificate were signed by two different individuals was not defect).

Practice Note: Requesting an exemplified judgment copy, also called a "triple-sealed" copy, from the foreign court is the most common way to authenticate a sister-state judgment.

2. Evidence of judicial proceedings of another state may be admissible if less is shown than required by the federal statute, as long as it conforms to the rules of evidence of the state where the trial is being held. *Medical Administrators, Inc.*, 668 S.W.2d at 721 (citing *Donald v. Jones*, 445 F.2d 601, 606 (5th Cir. 1971), cert. denied, 404 U.S. 992 (1971)). A copy of a judgment can be authenticated according to Tex. R. Evid. 901(b)(7) or 902. The certification should be checked, however, to see that it is self-authenticating, in conformance with Tex. R. Evid. 902. *See Whitehead v. Bulldog Battery*

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Corp., 400 S.W.3d 115, 118–19 (Tex. App.—Dallas 2013, pet. denied) (mem. op. on reh'g); *Sanders v. State*, 787 S.W.2d 435, 438–40 (Tex. App.—Houston [1st Dist.] 1990, pet. ref'd).

3. A copy of a judgment of another state can be authenticated by the testimony of a witness who has compared the offered copy with the original record entry of the judgment; such a copy then becomes admissible as an "examined copy," and is sufficient prima facie proof of it. *Schwartz v. Vecchiotti*, 529 S.W.2d 603, 604–05 (Tex. Civ. App.—Houston [1st Dist.] 1975, writ ref'd n.r.e.).

4. A copy of a judgment of a federal court can apparently be authenticated by no more than the certification of the rendering court's clerk under the seal of that court. *See Intertype Corp. v. Sentinel Publishing Co.*, 206 S.W. 548, 549 (Tex. Civ. App.—San Antonio 1918, no writ).

§ 14.34:4 Defensive Matters

If the judgment debtor can show a ground on which enforcement should be stayed, the Texas court must stay enforcement if the debtor can provide the same sort of security required for staying enforcement of Texas judgments. Tex. Civ. Prac. & Rem. Code § 35.006(b); *see also* Tex. Civ. Prac. & Rem. Code § 52.006. The following are some of the grounds most often used to attack the validity of a sister-state judgment.

Merits of Original Controversy: The defendant cannot avoid a foreign judgment by pleading a matter that goes to the merits of the original controversy; on those matters the foreign judgment is conclusive, and a Texas court cannot relitigate a matter tried before a sister state's court with jurisdiction over the parties and subject matter. *Massachusetts v. Davis*, 168 S.W.2d 216, 220 (Tex. 1942); *Shaps v. Union Commerce Bank*, 476 S.W.2d 466, 468 (Tex. Civ. App.—Beaumont, writ ref'd n.r.e.), *cert. denied*, 409 U.S. 1060 (1972).

Collateral Attack on Judgment: As a general rule, a sister state's judgment that is final and nonpenal in nature can be collaterally attacked only if it is void as rendered on the following grounds:

1. The rendering court lacked jurisdiction.

2. The judgment has been paid or otherwise discharged.

3. It is a cause of action for which the forum state has not provided a court.

4. The judgment was procured by fraud.

Milwaukee County v. M.E. White Co., 296 U.S. 268, 271–72 (1935); *Williams v. State of Washington*, 581 S.W.2d 494, 496 (Tex. Civ. App.—Dallas 1979, writ ref'd n.r.e.).

Jurisdiction: Personal jurisdiction in Texas does not appear to be an avenue for attack. *Haaksman v. Diamond Offshore (Bermuda), Ltd.*, 260 S.W.3d 476, 479 (Tex. App.—Houston [14th Dist.] 2008, pet. denied) ("Courts in other states have held that, although a judgment debtor may contest recognition by arguing that the *foreign-country* court lacked personal jurisdiction over the judgment debtor, the judgment debtor may not assert that the court of the state in which the judgment is filed does not have in personam jurisdiction over the judgment debtor.") (citing *Pure Fishing, Inc. v. Silver Star Co.*, 202 F. Supp. 2d 905, 910 (N.D. Iowa 2002) (holding a party seeking the recognition and enforcement of a foreign judgment under Iowa's Uniform Foreign Money-Judgment Recognition Act is not required to establish a basis for exercise of personal jurisdiction over the judgment debtor)).

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The validity of a sister-state judgment will be tested against the law of that state, except that in all cases the requirements of due process must be satisfied. *O'Brien v. Lanpar Co.*, 399 S.W.2d 340, 341 (Tex. 1966); *Country Clubs, Inc. v. Ward*, 461 S.W.2d 651, 656 (Tex. Civ. App.—Dallas 1970, writ ref'd n.r.e.). For example, on the question of jurisdiction over a nonresident defendant, a Texas court may consider whether the defendant was properly served under the sister state's long-arm statute; the Texas court also may examine the long-arm statute of the rendering sister state to ascertain whether it afforded the defendant due process. *See Mitchim v. Mitchim*, 518 S.W.2d 362 (Tex. 1975) (court examined whether Arizona long-arm statute afforded due process); *Brown's Inc. v. Modern Welding Co.*, 54 S.W.3d 450 (Tex. App.—Corpus Christi 2001, no pet.) (denial of domestication because of failure to comply with Washington's personal jurisdiction service requirements); *Country Clubs, Inc.*, 461 S.W.2d at 656 (denial of domestication because of failure to comply with Kentucky long-arm statute) When a collateral attack is made on a duly authenticated foreign judgment filed in Texas, the trial court has only two alternatives: it can enforce the judgment or, if proper evidence is before it, declare the judgment void for want of jurisdiction. *Corporate Leasing International v. Bridewell*, 896 S.W.2d 419, 422 (Tex. App.—Waco 1995, orig. proceeding) (abuse of discretion for Texas court to vacate Michigan judgment). *See also Mindis Metals, Inc. v. Oilfield Motor & Control, Inc.*, 132 S.W.3d 477, 482 (Tex. App.—Houston [14th Dist.] 2004, pet. denied) (finding that appeal is better vehicle than mandamus for reviewing trial court's order to vacate domesticated foreign state's judgment).

Fraud: Full faith and credit can be denied the judgment of a sister state if it was procured through extrinsic fraud. False testimony constitutes instrinsic fraud, and the judgment of a sister state cannot be successfully challenged on that ground. *Chapman v. Schefsky*, 470 S.W.2d 786, 788 (Tex. Civ. App.—Waco 1971, writ ref'd n.r.e.). Extrinsic fraud refers to fraud that is collateral to the question determined in the original action and that denies the defendant the benefit of a fair adversary proceeding. *See* E.H. Schopler, Annotation, *Fraud as Defense to Action on Judgment of Sister State*, 55 A.L.R.2d 673, 687 (1957).

§ 14.34:5 Statute of Limitations

An action on a foreign judgment is barred in Texas if it is barred under the laws of the jurisdiction in which it was rendered. Tex. Civ. Prac. & Rem. Code § 16.066(a). An action against a judgment debtor who has resided in Texas for ten years before the action may not be brought on a foreign judgment rendered more than ten years before the commencement of the Texas action. Tex. Civ. Prac. & Rem. Code § 16.066(b).

§ 14.35 Common-Law Action to Enforce Sister-State Judgments

As an alternative to using the notice and affidavit procedure of the Uniform Enforcement of Foreign Judgments Act as described in section 14.34 above, the creditor may have his judgment domesticated by bringing a common-law suit to enforce it. *See* Tex. Civ. Prac. & Rem. Code § 35.008.

§ 14.35:1 Procedure

A petition must be prepared, filed, and served as in any other suit. It should allege the particulars of the sister-state suit—that is, proper subject matter jurisdiction, proper service according to the laws or rules of the sister state, and the rendering of a final, valid, and subsisting judgment. An authenticated copy of the sister-state judgment should be attached to the petition. See section 14.34:3 above regarding authentication and see form 14-13 in this chapter for a petition.

§ 14.35:2 Burden of Proof

Once the plaintiff introduces a properly authenticated copy of the sister-state judgment, he creates a prima facie case of the validity of the judgment, and the burden shifts to the defendant to disprove its validity. *Mitchim v. Mitchim*, 518 S.W.2d 362, 364 (Tex. 1975); *In re M.L.W.*, 358 S.W.3d 772, 774 (Tex. App.—Texarkana 2012, no pet.).

There is a split in the courts of appeals about whether this presumption applies to a default judgment taken in the sister state. Cases holding that the presumption exists include *Cash Register Sales & Services of Houston, Inc. v. Copelco Capital, Inc.*, 62 S.W.3d 278, 280 (Tex. App.—Houston [1st Dist.] 2001, no pet.); *Minuteman Press International, Inc. v. Sparks*, 782 S.W.2d 339, 342 (Tex. App.—Fort Worth 1989, no writ); *First National Bank v. Rector*, 710 S.W.2d 100, 103 (Tex. App.—Austin 1986, writ ref'd n.r.e.); and *Hart v. Calkins Manufacturing, Inc.*, 623 S.W.2d 451, 452 (Tex. App.—Texarkana 1981, no writ). Cases holding that a default judgment is not entitled to the presumption of validity include *Jackson v. Randall*, 544 S.W.2d 439, 441 (Tex. Civ. App.—Texarkana 1976, no writ), and *Country Clubs, Inc. v. Ward*, 461 S.W.2d 651, 652 (Tex. Civ. App.—Dallas 1970, writ ref'd n.r.e.).

§ 14.35:3 Defensive Matters

See section 14.34:4 above for a discussion of defensive matters that can be raised.

§ 14.35:4 Attorney's Fees

No express statutory authority exists for recovery of attorney's fees, but if the parties stipulate that the law of the sister state applies to the case and attorney's fees can be recovered under that law, attorney's fees are recoverable. *See Tibbetts v. Tibbetts*, 679 S.W.2d 152, 154 (Tex. App.—Dallas 1984, no writ). See chapter 31 in this manual for a general discussion of Texas law regarding attorney's fees. Rules for the determination of the law of other states and foreign countries are set forth in Tex. R. Evid. 202–203. See the discussion of proof of foreign law at section 14.34 above.

§ 14.35:5 Limitation

A common-law suit to enforce a foreign judgment is barred by the same limitations periods as a suit under the Uniform Enforcement of Foreign Judgments Act. See the discussion in section 14.34:5 above.

§ 14.36 Foreign-Country Judgments

Based on a strong need for uniformity between states with respect to foreign-country judgments, and to protect due process rights of Texas citizens and businesses, the Texas legislature revised the Texas Foreign-Country Money Judgment Recognition Act to conform to the updated Uniform Foreign-Country Money Judgments Recognition Act. *See* Acts 2017, 85th Leg., R.S., ch. 390, § 1 (S.B. 944), eff. June 1, 2017. See also Tex. Civ. Prac. & Rem. Code §§ 36A.001–.011, which may be cited as the Uniform Foreign-Country Money Judgments Recognition Act.

A lawsuit is required to recognize a foreign-country judgment. *See Bannerman v. Gordy*, No. A-15-MC-557-LY, 2017 U.S. Dist. LEXIS 168696, at *4 (W.D. Tex. Oct. 12, 2017) (court dismissed plaintiff's attempt to enforce filed Canadian judgment because plaintiff failed to file complaint under Act, failed to pay civil filing fee, and failed to serve defendants).

§ 14.36:1 Applicability

The Act applies to a foreign-country judgment to the extent that the judgment (1) grants or denies recovery of a sum of money and (2) under the law of the foreign country in which

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the judgment is rendered, is final, conclusive, and enforceable. Tex. Civ. Prac. & Rem. Code § 36A.003(a). The Act excludes a judgment for taxes, fine, or other penalty, and excludes a judgment for divorce, support, maintenance, or in connection with other domestic relations. *See* Tex. Civ. Prac. & Rem. Code § 36A.003(b).

The party seeking recognition has the burden of establishing that the Act applies to the foreign-country judgment. Tex. Civ. Prac. & Rem. Code § 36A.003(c).

§ 14.36:2 Standards for Recognition

A Texas court shall recognize a foreign-country judgment, unless one of the exceptions in section 36A.004(b) or (c) applies. Tex. Civ. Prac. & Rem. Code § 36A.004(a).

A Texas court may not recognize a foreign-country judgment if:

(1) the judgment was rendered under a judicial system that does not provide impartial tribunals or procedures compatible with the requirements of due process of law;

(2) the foreign court did not have personal jurisdiction over the defendant; or

(3) the foreign court did not have jurisdiction over the subject matter.

Tex. Civ. Prac. & Rem. Code § 36A.004(b).

For a nonexclusive list of bases for personal jurisdiction, see Tex. Civ. Prac. & Rem. Code § 36A.005.

A Texas court is not required to recognize a foreign-country judgment if—

(1) the defendant in the proceeding in the foreign court did not receive notice of the proceeding in sufficient time to enable the defendant to defend;

(2) the judgment was obtained by fraud that deprived the losing party of an adequate opportunity to present the party's case;

(3) the judgment or the cause of action on which the judgment is based is repugnant to the public policy of this state or the United States;

(4) the judgment conflicts with another final and conclusive judgment;

(5) the proceeding in the foreign court was contrary to an agreement between the parties under which the dispute in question was to be determined otherwise than by proceedings in the foreign court;

(6) jurisdiction was based only on personal service and the foreign court was a seriously inconvenient forum for the trial of the action;

(7) the judgment was rendered in circumstances that raise substantial doubt about the integrity of the rendering court with respect to the judgment;

(8) the specific proceeding in the foreign court leading to the judgment was not compatible with the requirements of due process of law; or

(9) it is established that the foreign country in which the judgment was rendered does not recognize judgments rendered in this state.

Tex. Civ. Prac. & Rem. Code § 36A.004(c).

§ 14.36:3 An Action (Lawsuit) Is Required for Recognition

If recognition of a foreign-country judgment is sought as an original matter, the issue of recognition may be raised by filing an action seeking recognition of the foreign-country judgment. Tex. Civ. Prac. & Rem. Code § 36A.006(a). If recognition of a foreign-country judgment is sought in a pending action, the issue of recognition may be raised by counterclaim, cross-claim, or affirmative defense. Tex. Civ. Prac. & Rem. Code § 36A.006(b).

§ 14.36:4 Effect of Recognition

If the court in a proceeding under section 36A.006 finds that the foreign-country judgment is entitled to recognition, then, to the extent that the foreign-country judgment grants or denies recovery of a sum of money, the foreign-country judgment is—

(1) conclusive between the parties to the same extent as the judgment of a sister state entitled to full faith and credit in this state would be conclusive; and

(2) enforceable in the same manner and to the same extent as a judgment rendered in this state.

Tex. Civ. Prac. & Rem. Code § 36A.007.

§ 14.36:5 Stay of Texas Proceeding Pending Appeal of Foreign-Country Judgment

If a party establishes that an appeal from a foreign-country judgment is pending or will be taken, the court may stay any proceedings with regard to the foreign-country judgment until:

(1) the appeal is concluded;

(2) the time for appeal expires; or

(3) the appellant has had sufficient time to prosecute the appeal and has failed to do so.

Tex. Civ. Prac. & Rem. Code § 36A.008.

§ 14.36:6 Limitations Period

An action to recognize a foreign-country judgment must be brought within the earlier of the time during which the foreign-country judgment is effective in the foreign country or fifteen years from the date that the judgment became effective in the foreign country. Tex. Civ. Prac. & Rem. Code § 36A.009.

§ 14.36:7 Converting Foreign Currency

The objective of civil money judgments is to place the judgment creditor in a position as close as possible to that in which he would have been if the obligation had been carried out by the judgment debtor or if the injury had not occurred. In enforcing a foreign judgment, the court should assure that neither party receives a windfall or is penalized as a result of the currency conversion. *Restatement of Foreign Relations Law of United States* § 823 cmt. c (1987). If the foreign currency has depreciated since the injury or breach, judgment should be given at the rate of exchange applicable on the date of the injury or the breach. If the foreign currency has appreciated since the injury or breach, judgment should be given at the rate of exchange applicable on the date of judgment or date of payment. *El Universal, Compania Periodistica Nacional, S.A. de C.V. v. Phoenician Imports, Inc.*, 802 S.W.2d 799, 803–04 (Tex. App.—Corpus Christi 1990, writ denied).

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§ 14.37 Federal Court Judgments

§ 14.37:1 Effect of Federal Court Judgment

Every district court judgment, other than one entered in favor of the United States, constitutes a lien on the property located in the state in which the district court judgment was rendered, to the same extent and under the same conditions as a state court judgment in that state, and the lien ceases to be a lien in the same manner and time. If state law requires certain procedures before a lien attaches, those requirements will apply to federal judgments only if the state law authorizes the judgment of a federal court to be conformed to rules and requirements relating to state court judgments. 28 U.S.C. § 1962.

§ 14.37:2 Out-of-State Federal Court Judgments

A final judgment for the recovery of money or property entered in any federal district court, bankruptcy court, appeals court, or the Court of International Trade may be registered in any other district by filing a certified copy of the judgment with the other court. The judgment then has the same force and effect as a judgment of the district court in which it is registered, and it may be enforced in a like manner. A certified copy of the satisfaction of any judgment in whole or in part may be registered in any district in which the judgment is abstracted and recorded. 28 U.S.C. § 1963.

Federal court judgments can also be domesticated under the Uniform Enforcement of Foreign Judgments Act, Tex. Civ. Prac. & Rem. Code §§ 35.001–.007. See section 14.34 above.

§ 14.37:3 Indexing Texas Federal District Court Abstracts of Judgment

An abstract of a judgment rendered by a federal court in Texas may be recorded and indexed on the certificate of the clerk of the court. Tex. Prop. Code § 52.007. The phrase *on the certificate of the clerk of the court* apparently refers to the certificate of the clerk of the federal court in which the judgment was rendered, because the prior version of this law provided that such an abstract of judgment "may be recorded and indexed in the same manner and with like force and effect as provided for judgments of the Courts of this State, upon the certificates of the clerks of such United States courts." Acts 1925, 39th Leg., *repealed by* Acts 1983, 68th Leg., R.S., ch. 576, § 6 (S.B. 748), eff. Jan. 1, 1984.

Form 14-1

For discussion of the action on a sworn account, see section 14.21 in this chapter. See section 14.2 regarding exercising caution in pleading conditions precedent.

A suit on a sworn account is the simplest method for reducing an appropriate claim to judgment. It should be used for any retail or commercial claim, whether secured or not, if the transaction can be adequately substantiated and if (1) the claim is based on a sale of goods by which title to personal property passed or on the furnishing of personal services, labor, or materials; and (2) a systematic record of the transaction was kept. The account must be supported by an affidavit; see form 14-2. If the substantiation of the transaction will not satisfy the evidentiary standards for a sworn account, another form petition in this chapter, such as the petition for suit on a written contract at form 14-3, should be used.

The attorney may wish to consider filing a petition containing multiple causes of action, including breach of contract (see forms 14-3 and 14-4) and quantum meruit.

Caveat: In computing the balance due the plaintiff, do not include any interest that may have been posted to the account.

Texas Civil Practice and Remedies Code section 30.014(a) requires certain parties to include partial identification information in initial pleadings in civil actions filed in district, county, or statutory county courts. A court may order that an initial pleading be amended to contain this information if the court determines that the pleading does not contain the information. Tex. Civ. Prac. & Rem. Code § 30.014(b).

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

Petition for Suit on Sworn Account

1. *Discovery Level.* The damages sought are within the jurisdictional limits of this Court. Tex. R. Civ. P. 47(b). This lawsuit seeks only monetary relief aggregating $100,000 or less. Tex. R. Civ. P. 47(c)(1). Discovery is intended to be conducted under Level 1. Tex. R. Civ. P. 190.2.

> If lawsuit seeks nonmonetary relief and/or damages in excess of $100,000, see Tex. R. Civ. P. 47 and 190 to properly plead the claims for relief and discovery levels.

2. *Parties.* Plaintiff is [**name of plaintiff**]. [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 numbers of Plaintiff's Social Security number are [**numbers**]./Plaintiff has not been

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issued a Social Security number.] Plaintiff's address is [**address, city, state**]. Defendant is [**name of defendant**], who can be served with citation at [**address, city, state**].

> See section 14.10 and forms 14-15 through 14-21 for other forms of party designation.

3. *Facts.* In the usual course of business, Plaintiff sold to Defendant one or more items of goods, wares, merchandise, or services, as shown on the attached statement of account. Defendant accepted each item and became bound to pay Plaintiff the designated price, which is a reasonable, usual, and customary price for such an item. The statement of account is attached as Exhibit [**exhibit number/letter**] and incorporated by reference. This account represents a transaction or series of transactions for which a systematic record has been kept.

> Include the following if foreclosure of a security interest is sought.

To secure the debt created by the note, Defendant executed a security agreement granting Plaintiff a security interest in [**describe collateral explicitly**]. The security agreement is attached as Exhibit [**exhibit number/letter**] and incorporated by reference.

> Plead additional facts if required for venue; see part II. of chapter 15.

4. *Debt.* Defendant has defaulted by failing to make payments on the account. The principal balance due Plaintiff on the account is $[**amount**] after all just and lawful offsets, payments, and credits have been allowed, as shown on Exhibit [**exhibit number/letter**]. Plaintiff has demanded that Defendant pay this amount, but Defendant has not done so.

5. *Conditions Precedent.* All conditions precedent have been performed or have occurred.

6. *Attorney's Fees.* Defendant's default has made it necessary for Plaintiff to employ the undersigned attorney to file suit.

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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 [**describe contract, credit application, etc.**].

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**].

7. *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 account;

c. Plaintiff be granted judgment for prejudgment and postjudgment interest at the highest legal or contractual rate allowed by law;

d. Plaintiff be granted judgment for at least $[**amount**] as reasonable attorney's fees, with additional contingent amounts in the event of appellate proceedings;

e. Plaintiff be granted judgment for all costs of court; [;/; and]

Include the following if foreclosure is sought.

f. Plaintiff be granted foreclosure of Plaintiff's security interest in the collateral; and

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Continue with the following.

[f./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 and attach a verification for suit on a sworn account (form 14-2).

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Form 14-2

This verification must be attached to the petition for suit on a sworn account (see form 14-1 in this chapter). The attorney should be certain to credit the account with all just and lawful offsets, payments, and credits. *See* Tex. R. Civ. P. 185.

Verification for Suit on Sworn Account

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**].

"2. I am employed by [**name of plaintiff**], and [I have/a person under my supervision has] care, custody, and control of all records concerning the account of [**name of defendant**], Defendant.

"3. I hereby aver that the claim attached as Exhibit [**exhibit number/letter**] to Plaintiff's original petition is within the personal knowledge of the affiant, is just and true, and is due by Defendant to Plaintiff and that all just and lawful offsets, payments, and credits to this account have been allowed.

"4. These records show that a total principal balance of $[**amount**], exclusive of interest, is due and payable by [**name of defendant**], Defendant, to [**name of plaintiff**], Plaintiff, and demand for payment was made more than thirty days ago."

____
[Name of affiant]
Affiant

SIGNED under oath before me on ____________________________.

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____

Notary Public, State of Texas

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Form 14-3

This petition may be used for a suit on a debt based on a written contract, whether secured or not. Other forms in this chapter are better suited to other kinds of contracts; for examples, see forms 14-1 (sworn account), 14-7 (note), and 14-8 (lease of personal property). Because this form cannot fit every possible agreement giving rise to a debt, the attorney should take care to modify it to fit the facts. The action on a written contract is discussed at section 14.22. See section 14.2 regarding exercising caution in pleading conditions precedent.

Caveat: In computing the balance due the plaintiff, do not include any interest that may have been posted to the account.

Texas Civil Practice and Remedies Code section 30.014(a) requires certain parties to include partial identification information in initial pleadings in civil actions filed in district, county, or statutory county courts. A court may order that an initial pleading be amended to contain this information if the court determines that the pleading does not contain the information. Tex. Civ. Prac. & Rem. Code § 30.014(b).

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

Petition for Suit on Written Contract

1. *Discovery Level.* The damages sought are within the jurisdictional limits of this Court. Tex. R. Civ. P. 47(b). This lawsuit seeks only monetary relief aggregating $100,000 or less. Tex. R. Civ. P. 47(c)(1). Discovery is intended to be conducted under Level 1. Tex. R. Civ. P. 190.2.

> If lawsuit seeks nonmonetary relief and/or damages in excess of $100,000, see Tex. R. Civ. P. 47 and 190 to properly plead the claims for relief and discovery levels.

2. *Parties.* Plaintiff is [**name of plaintiff**]. [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 numbers of Plaintiff's Social Security number are [**numbers**]./Plaintiff has not been issued a Social Security number.] Plaintiff's address is [**address, city, state**]. Defendant is [**name of defendant**], who can be served with citation at [**address, city, state**].

> See section 14.10 and forms 14-15 through 14-21 for other forms of party designation.

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3. *Facts.* Attached to this petition as Exhibit [**exhibit number/letter**] is a copy of an agreement executed by Plaintiff and Defendant. The agreement is incorporated in this petition by reference. Plaintiff has fully complied with the agreement.

Include the following if foreclosure of a security interest is sought.

To secure the debt created by the agreement, Defendant executed a security agreement granting Plaintiff a security interest in [**describe collateral explicitly**]. The security agreement is attached as Exhibit [**exhibit number/letter**] and incorporated by reference.

Plead additional facts if required for venue; see part II. of chapter 15.

4. *Default.* Defendant defaulted in paying the debt. [**Include if applicable:** Plaintiff has accelerated the debt according to the terms of the agreement.] There is currently due the sum of $[**amount**], plus accrued interest as provided for in the agreement.

5. *Conditions Precedent.* All conditions precedent have been performed or have occurred.

6. *Attorney's Fees.* 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 contract.

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**].

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7. *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 agreement;

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; and

Continue with the following.

[g./h.] Plaintiff be granted all further relief to which Plaintiff may be entitled.

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____

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

Attach exhibit(s).

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Form 14-4

This petition contains fundamentals for a suit on a debt that is not supported by a signed agreement. Because oral contracts can vary greatly in the scope of their terms, special drafting will often be required for the petition, and the attorney should be careful to modify this form to fit the facts. For discussion of suit on an oral debt, see section 14.23 in this chapter. See section 14.2 regarding exercising caution in pleading conditions precedent.

Caveat: Do not include unearned interest.

Texas Civil Practice and Remedies Code section 30.014(a) requires certain parties to include partial identification information in initial pleadings in civil actions filed in district, county, or statutory county courts. A court may order that an initial pleading be amended to contain this information if the court determines that the pleading does not contain the information. Tex. Civ. Prac. & Rem. Code § 30.014(b).

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

Petition for Suit on Oral Debt

1. *Discovery Level.* The damages sought are within the jurisdictional limits of this Court. Tex. R. Civ. P. 47(b). This lawsuit seeks only monetary relief aggregating $100,000 or less. Tex. R. Civ. P. 47(c)(1). Discovery is intended to be conducted under Level 1. Tex. R. Civ. P. 190.2.

> If lawsuit seeks nonmonetary relief and/or damages in excess of $100,000, see Tex. R. Civ. P. 47 and 190 to properly plead the claims for relief and discovery levels.

2. *Parties.* Plaintiff is [**name of plaintiff**]. [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 numbers of Plaintiff's Social Security number are [**numbers**]./Plaintiff has not been issued a Social Security number.] Plaintiff's address is [**address, city, state**]. Defendant is [**name of defendant**], who can be served with citation at [**address, city, state**].

> See section 14.10 and forms 14-15 through 14-21 for other forms of party designation.

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3. *Facts.* [**Describe agreement, e.g.,** Plaintiff lent Defendant $1,000 on January 1, 2009. Defendant agreed to repay Plaintiff the entire amount on December 31, 2010, and Plaintiff and Defendant agreed that the debt would bear interest at the rate of 10 percent per year until paid, the interest to be due and payable at maturity of the debt.]

> Plead additional facts if required for venue; see part II. of chapter 15.

4. *Default.* Defendant defaulted in paying the debt. There is currently due the sum of $[**amount**], plus accrued interest as provided for in the agreement. Plaintiff has demanded that Defendant pay this debt, but Defendant has not done so.

5. *Conditions Precedent.* All conditions precedent have been performed or have occurred.

> Include the following request for attorney's fees if Tex. Civ. Prac. & Rem. Code ch. 38 applies.

6. *Attorney's Fees.* Defendant's default has made it necessary for Plaintiff to employ the undersigned attorney to file suit. This claim was timely presented to Defendant and remains unpaid. Reasonable fees for the attorney's services rendered and to be rendered through trial and appeal are no less than $[**amount**].

7. *Prayer.* Plaintiff prays that—

   a. Defendant be cited to appear and answer;

   b. Plaintiff be granted judgment for $[**amount**] as the amount due on the debt;

   c. Plaintiff be granted judgment for prejudgment and postjudgment interest at the highest legal or contractual rate allowed by law;

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d. Plaintiff be granted judgment for at least $[**amount**] as reasonable attorney's fees, with additional contingent amounts in the event of appellate proceedings;

e. Plaintiff be granted judgment for all costs of court; and

f. 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**]

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Form 14-5

This petition may be used for a suit on a revolving credit account. The sworn account petition at form 14-1 in this chapter will usually also be appropriate for an action on a commercial or consumer open revolving credit account, whether secured or not. Form 14-6 should be used for a suit on a retail installment contract—that is, for a single purchase, not on a revolving account, that includes a time-price differential in each installment. Preparing a statement of account, showing charges, credits, and accrued interest, is not required, but it is often helpful in demonstrating the claim and is preferred by many courts.

A general request for foreclosure, in the absence of a limiting request for an order of sale, includes a request for possession. *Unicut, Inc. v. Texas Commerce Bank-Chemical*, 704 S.W.2d 442, 445–46 (Tex. App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.). See section 14.2 regarding exercising caution in pleading conditions precedent.

Caveat: Do not include any interest that may have been posted to the account.

Texas Civil Practice and Remedies Code section 30.014(a) requires certain parties to include partial identification information in initial pleadings in civil actions filed in district, county, or statutory county courts. A court may order that an initial pleading be amended to contain this information if the court determines that the pleading does not contain the information. Tex. Civ. Prac. & Rem. Code § 30.014(b).

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

Petition for Suit on Revolving Credit Account

1. *Discovery Level.* The damages sought are within the jurisdictional limits of this Court. Tex. R. Civ. P. 47(b). This lawsuit seeks only monetary relief aggregating $100,000 or less. Tex. R. Civ. P. 47(c)(1). Discovery is intended to be conducted under Level 1. Tex. R. Civ. P. 190.2.

> If lawsuit seeks nonmonetary relief and/or damages in excess of $100,000, see Tex. R. Civ. P. 47 and 190 to properly plead the claims for relief and discovery levels.

2. *Parties.* Plaintiff is [**name of plaintiff**]. [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 numbers of Plaintiff's Social Security number are [**numbers**]./Plaintiff has not been

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issued a Social Security number.] Plaintiff's address is [**address, city, state**]. Defendant is [**name of defendant**], who can be served with citation at [**address, city, state**].

> See section 14.10 and forms 14-15 through 14-21 for other forms of party designation.

3. *Facts.* Attached to this petition as Exhibit [**exhibit number/letter**] is a copy of a revolving credit agreement between Plaintiff and Defendant. The agreement is incorporated in this petition by reference. Plaintiff sold and delivered to Defendant one or more items of goods, wares, merchandise, or services on credit under the terms of the agreement. Defendant accepted each item and became bound to pay Plaintiff the designated price, which is a reasonable, usual, and customary price for such an item.

> Include the following if foreclosure of a security interest is sought.

To secure the debt created by the note, Defendant executed a security agreement granting Plaintiff a security interest in [**describe collateral explicitly**]. The security agreement is attached as Exhibit [**exhibit number/letter**] and incorporated by reference.

> Plead additional facts if required for venue; see part II. of chapter 15.

4. *Default.* Defendant defaulted in making required payments on the account. Defendant's default constitutes an anticipatory breach of the agreement. [**Include if applicable:** Plaintiff has accelerated the debt according to the terms of the agreement.] The principal balance due Plaintiff on the account is $[**amount**], plus accrued interest as provided for in the agreement, after all just and lawful offsets, credits, and payments have been allowed. [**Include if applicable:** This amount is shown on the statement of account attached as Exhibit [**exhibit number/letter**] and incorporated by reference.]

5. *Conditions Precedent.* All conditions precedent have been performed or have occurred.

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6. *Attorney's Fees.* 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 [**describe account, contract, agreed terms and conditions, etc.**].

> 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**].

7. *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 account;

   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;

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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; and

Continue with the following.

[g./h.] 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).

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Form 14-6

This petition may be used for a suit on a single retail sales contract, whether secured or not, that includes a time-price differential and that is payable in regular, equal installments. If suit is on a revolving charge account, in which interest is periodically charged on the unpaid balance, form 14-5 in this chapter should be used.

"Applicable charges" should be included in or deleted from the list in paragraph 4. below as appropriate according to the terms of the contract. If maturity of the contract has been accelerated, the attorney should be careful not to include unearned time-price differential—that is, that portion included in installments that had not come due when acceleration occurred. See section 2.86. Preparing a statement of account, showing charges, credits, and earned time-price differential, is not required, but it is often helpful in demonstrating the claim and is preferred by many courts. See section 14.2 regarding exercising caution in pleading conditions precedent.

Texas Civil Practice and Remedies Code section 30.014(a) requires certain parties to include partial identification information in initial pleadings in civil actions filed in district, county, or statutory county courts. A court may order that an initial pleading be amended to contain this information if the court determines that the pleading does not contain the information. Tex. Civ. Prac. & Rem. Code § 30.014(b).

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

Petition for Suit on Retail Installment Contract

1. *Discovery Level.* The damages sought are within the jurisdictional limits of this Court. Tex. R. Civ. P. 47(b). This lawsuit seeks only monetary relief aggregating $100,000 or less. Tex. R. Civ. P. 47(c)(1). Discovery is intended to be conducted under Level 1. Tex. R. Civ. P. 190.2.

> If lawsuit seeks nonmonetary relief and/or damages in excess of $100,000, see Tex. R. Civ. P. 47 and 190 to properly plead the claims for relief and discovery levels.

2. *Parties.* Plaintiff is [**name of plaintiff**]. [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 numbers of Plaintiff's Social Security number are [**numbers**]./Plaintiff has not been issued a Social Security number.] Plaintiff's address is [**address, city, state**]. Defendant is [**name of defendant**], who can be served with citation at [**address, city, state**].

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See section 14.10 and forms 14-15 through 14-21 for other forms of party designation.

3. *Facts.* Attached to this petition as Exhibit [**exhibit number/letter**] is a copy of a retail installment contract between Plaintiff and Defendant. The agreement is incorporated in this petition by reference. Plaintiff sold and delivered to Defendant one or more items of goods, wares, merchandise, or services on credit under the terms of the contract. Defendant accepted each item and became bound to pay Plaintiff the designated price, which is a reasonable, usual, and customary price for such an item.

Include the following if foreclosure of a security interest is sought.

To secure the debt created by the note, Defendant executed a security agreement granting Plaintiff a security interest in [**describe collateral explicitly**]. The security agreement is attached as Exhibit [**exhibit number/letter**] and incorporated by reference.

Plead additional facts if required for venue; see part II. of chapter 15.

4. *Default.* Defendant defaulted in making required payments on the account. [**Include if applicable:** Plaintiff has accelerated the debt according to the terms of the contract.] The principal balance due Plaintiff on the account is $[**amount**], plus applicable charges such as official fees, insurance charges, delinquency charges, and earned time-price differential, after all just and lawful offsets, credits, and payments have been allowed. [**Include if applicable:** This amount is shown on the statement of account attached as Exhibit [**exhibit number/letter**] and incorporated by reference.]

5. *Conditions Precedent.* All conditions precedent have been performed or have occurred.

6. *Attorney's Fees.* Defendant's default has made it necessary for Plaintiff to employ the undersigned attorney to file suit.

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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 [**describe contract, etc.**].

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**].

7. *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 account;

   c. Plaintiff be granted judgment for earned and unpaid time-price differential 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]

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Include the following if foreclosure is sought.

g. Plaintiff be granted foreclosure of Plaintiff's security interest in the collateral; and

Continue with the following.

[g./h.] 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).

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Form 14-7

This petition should be used if the claim is based on a promissory note, whether secured or not. If the creditor has repossessed the collateral through self-help and suit is for a deficiency after application of the proceeds, the petition at form 14-9 in this chapter should be used. If payment of the note has been guaranteed, the attorney should consider using the petition at form 14-11. The action on a note is discussed at section 14.25, and foreclosure of a security interest is discussed at sections 14.27 and 14.28. See also section 14.2 regarding exercising caution in pleading conditions precedent.

Texas Civil Practice and Remedies Code section 30.014(a) requires certain parties to include partial identification information in initial pleadings in civil actions filed in district, county, or statutory county courts. A court may order that an initial pleading be amended to contain this information if the court determines that the pleading does not contain the information. Tex. Civ. Prac. & Rem. Code § 30.014(b).

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

Petition for Suit on Note

1. *Discovery Level.* The damages sought are within the jurisdictional limits of this Court. Tex. R. Civ. P. 47(b). This lawsuit seeks only monetary relief aggregating $100,000 or less. Tex. R. Civ. P. 47(c)(1). Discovery is intended to be conducted under Level 1. Tex. R. Civ. P. 190.2.

> If lawsuit seeks nonmonetary relief and/or damages in excess of $100,000, see Tex. R. Civ. P. 47 and 190 to properly plead the claims for relief and discovery levels.

2. *Parties.* Plaintiff is [**name of plaintiff**]. [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 numbers of Plaintiff's Social Security number are [**numbers**]./Plaintiff has not been issued a Social Security number.] Plaintiff's address is [**address, city, state**]. Defendant is [**name of defendant**], who can be served with citation at [**address, city, state**].

> See section 14.10 and forms 14-15 through 14-21 for other forms of party designation.

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3. *Note [and Security Agreement].* Attached to this petition as Exhibit [**exhibit number/letter**] is a copy of a note executed by Defendant. 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, Defendant executed a security agreement granting Plaintiff a security interest in [**describe collateral explicitly**]. The security agreement is attached as Exhibit [**exhibit number/letter**] and incorporated by reference.

Plead additional facts if required for venue; see part II. of chapter 15.

4. *Default.* Defendant 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.

5. *Conditions Precedent.* All conditions precedent have been performed or have occurred.

6. *Attorney's Fees.* 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 [**describe promissory note**].

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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**].

7. *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 due on the note;

d. Plaintiff be granted judgment for 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]

Include the following if foreclosure is sought.

g. Plaintiff be granted foreclosure of Plaintiff's security interest in the collateral; and

Continue with the following.

[g./h.] Plaintiff be granted all further relief to which Plaintiff may be entitled.

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____

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

Attach exhibit(s).

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Form 14-8

This form may be used for a writ on a true lease but not on a lease intended as a security agreement. This form contains alternative language for use if the debtor still has possession of the property. It also assumes that the default is based on the lessee's nonpayment of rent. If the basis for alleging default is a contractual act of default other than failure to make a payment, the petition should be altered accordingly. See section 14.26 in this chapter.

Although this petition states that the plaintiff is entitled to "immediate" possession of the leased property, it does not ask for any prejudgment action such as a writ of sequestration. See sections 8.16 through 8.24 regarding sequestration.

See section 14.2 regarding exercising caution in pleading conditions precedent.

Texas Civil Practice and Remedies Code section 30.014(a) requires certain parties to include partial identification information in initial pleadings in civil actions filed in district, county, or statutory county courts. A court may order that an initial pleading be amended to contain this information if the court determines that the pleading does not contain the information. Tex. Civ. Prac. & Rem. Code § 30.014(b).

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

Petition for Suit on Lease of Personal Property

1. *Discovery Level.* The damages sought are within the jurisdictional limits of this Court. Tex. R. Civ. P. 47(b). This lawsuit seeks only monetary relief aggregating $100,000 or less. Tex. R. Civ. P. 47(c)(1). Discovery is intended to be conducted under Level 1. Tex. R. Civ. P. 190.2.

> If lawsuit seeks nonmonetary relief and/or damages in excess of $100,000, see Tex. R. Civ. P. 47 and 190 to properly plead the claims for relief and discovery levels.

2. *Parties.* Plaintiff is [**name of plaintiff**]. [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 numbers of Plaintiff's Social Security number are [**numbers**]./Plaintiff has not been issued a Social Security number.] Plaintiff's address is [**address, city, state**]. Defendant is [**name of defendant**], who can be served with citation at [**address, city, state**].

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> See section 14.10 and forms 14-15 through 14-21 for other forms of party designation.

3. *Facts.* Attached to this petition as Exhibit [**exhibit number/letter**] is a copy of a personal property lease executed by Plaintiff and Defendant. The lease is incorporated in this petition by reference. Under the terms of the lease, Defendant was to have possession of the leased property and was to make periodic payments to Plaintiff for use of the property. Plaintiff delivered the property to Defendant and has performed all obligations under the lease.

> Plead additional facts if required for venue; see part II. of chapter 15.

4. *Default.* Defendant defaulted by failing to make required payments under the lease. This default constitutes an anticipatory repudiation of the lease. [**Include if applicable:** Plaintiff has accelerated the debt according to the terms of the lease.] There is currently due under the lease the sum of $[**amount**] [**include if applicable:** , plus applicable charges such as taxes, official fees, and delinquency charges as provided for in the lease].

5. *Conditions Precedent.* All conditions precedent have been performed or have occurred.

> Include the following paragraph if the plaintiff has not recovered possession of the leased property.

6. *Plaintiff's Right to Possession.* The lease provides that the leased property is and remains Plaintiff's property and that Defendant has not acquired any right, title, or interest in it. Because of Defendant's default, Plaintiff is entitled to immediate possession of the leased property. Alternatively, Plaintiff is entitled to recover the value of the leased property.

> Continue with the following.

7. *Attorney's Fees.* Defendant's default has made it necessary for Plaintiff to employ the undersigned attorney to file suit.

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> 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**].

8. *Prayer.* Plaintiff prays that—

a. Defendant be cited to appear and answer;

b. Plaintiff be granted judgment for $[**amount**] [**include if applicable:** , plus applicable charges such as taxes, official fees, and delinquency charges as provided for in the lease];

c. Plaintiff be granted judgment for prejudgment and postjudgment interest on the matured, unpaid debt at the highest legal or contractual rate allowed by law;

d. Plaintiff be granted judgment for at least $[**amount**] as reasonable attorney's fees, with additional contingent amounts in the event of appellate proceedings;

e. Plaintiff be granted judgment for all costs of court [;/; and]

> Include the following if judicial repossession of the property is sought.

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f. Plaintiff be granted judgment for possession of the leased property or, in the alternative, for its value; and

Continue with the following.

[f./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).

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Form 14-9

This petition should be used only if the secured creditor has repossessed the collateral by self-help, has sold it and applied the proceeds to the debt, and wants a judgment for the deficiency under Tex. Bus. & Com. Code §§ 9.608, 9.615. This procedure is not available in some consumer transactions or if the security agreement prohibits it. If the creditor has not repossessed the collateral and suit is instead for judgment on the total debt and for foreclosure, another petition in this chapter should be used, such as the petition for suit on a note at form 14-7. The action for a deficiency judgment is discussed at section 14.29, and commentary and other forms for self-help repossession are found in chapter 5. See section 14.2 regarding exercising caution in pleading conditions precedent.

Texas Civil Practice and Remedies Code section 30.014(a) requires certain parties to include partial identification information in initial pleadings in civil actions filed in district, county, or statutory county courts. A court may order that an initial pleading be amended to contain this information if the court determines that the pleading does not contain the information. Tex. Civ. Prac. & Rem. Code § 30.014(b).

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

Petition for Deficiency Judgment

1. *Discovery Level.* The damages sought are within the jurisdictional limits of this Court. Tex. R. Civ. P. 47(b). This lawsuit seeks only monetary relief aggregating $100,000 or less. Tex. R. Civ. P. 47(c)(1). Discovery is intended to be conducted under Level 1. Tex. R. Civ. P. 190.2.

> If lawsuit seeks nonmonetary relief and/or damages in excess of $100,000, see Tex. R. Civ. P. 47 and 190 to properly plead the claims for relief and discovery levels.

2. *Parties.* Plaintiff is [**name of plaintiff**]. [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 numbers of Plaintiff's Social Security number are [**numbers**]./Plaintiff has not been issued a Social Security number.] Plaintiff's address is [**address, city, state**]. Defendant is [**name of defendant**], who can be served with citation at [**address, city, state**].

> See section 14.10 and forms 14-15 through 14-21 for other forms of party designation.

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3. *Note and Security Agreement.* Attached to this petition as Exhibit [**exhibit number/letter**] is a copy of a note executed by Defendant. 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. To secure the debt created by the note, Defendant executed a security agreement granting Plaintiff a security interest in [**describe collateral explicitly**]. The security agreement is attached as Exhibit [**exhibit number/letter**] and incorporated by reference.

Plead additional facts if required for venue; see part II. of chapter 15.

4. *Default.* Defendant defaulted in paying the note. [**Include if applicable:** Plaintiff accelerated the debt according to the terms of the note or security interest.] Plaintiff foreclosed its security interest in the collateral, which was sold in accordance with Texas law. There is currently due the sum of $[**amount**], plus accrued interest as provided for in the note.

5. *Conditions Precedent.* All conditions precedent have been performed or have occurred.

6. *Attorney's Fees.* 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 [**describe agreement, e.g.,** security agreement].

Continue with the following.

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Reasonable fees for the attorney's services rendered and to be rendered through trial and appeal are no less than $[**amount**].

7. *Prayer.* Plaintiff prays that—

   a. Defendant be cited to appear and answer;

   b. Plaintiff be granted judgment for $[**amount**] as the net principal amount due on the note;

   c. Plaintiff be granted judgment for accrued and unpaid interest due on the note;

   d. Plaintiff be granted judgment for 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).

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Form 14-10

This petition assumes that the debt has already been reduced to judgment and the debtor conveyed his property to the transferee, intending to place it beyond the judgment creditor's reach. The petition should be modified as appropriate to reflect the facts of the case.

Fraudulent transfers are discussed at section 14.30 in this chapter. *See also* Tex. Bus. & Com. Code §§ 24.001–.013.

Texas Civil Practice and Remedies Code section 30.014(a) requires certain parties to include partial identification information in initial pleadings in civil actions filed in district, county, or statutory county courts. A court may order that an initial pleading be amended to contain this information if the court determines that the pleading does not contain the information. Tex. Civ. Prac. & Rem. Code § 30.014(b).

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

Petition for Fraudulent Transfer Action

1. *Discovery Level.* The damages sought are within the jurisdictional limits of this Court. Tex. R. Civ. P. 47(b). This lawsuit seeks only monetary relief aggregating $100,000 or less. Tex. R. Civ. P. 47(c)(1). Discovery is intended to be conducted under Level 1. Tex. R. Civ. P. 190.2.

> If lawsuit seeks nonmonetary relief and/or damages in excess of $100,000, see Tex. R. Civ. P. 47 and 190 to properly plead the claims for relief and discovery levels.

2. *Parties.* Plaintiff is **[name of plaintiff]**. [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 numbers of Plaintiff's Social Security number are **[numbers]**./Plaintiff has not been issued a Social Security number.] Plaintiff's address is **[address, city, state]**. Defendant Judgment Debtor is **[name of defendant judgment debtor]**, who can be served with citation at **[address, city, state]**. Defendant Transferee is **[name of defendant transferee]**, who can be served with citation at **[address, city, state]**.

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See section 14.10 and forms 14-15 through 14-21 for other forms of party designation.

3. *Underlying Debt.* On **[date]**, judgment was rendered in Cause No. **[number]**, styled "**[style of case]**" in **[designation and location of court]** in favor of Plaintiff and against Defendant Judgment Debtor, in the amount of $**[amount]**. The judgment remains unpaid. Plaintiff perfected its lien against Defendant Judgment Debtor's nonexempt real property located in **[county]** County, Texas, by filing an abstract of judgment. Copies of the judgment and the recorded abstract of judgment are attached as Exhibits **[exhibit number/letter]** and **[exhibit number/letter]** respectively and incorporated by reference.

4. *Transfer.* On **[date]**, Defendant Judgment Debtor executed and delivered a deed conveying to Defendant Transferee, **[describe relationship to defendant judgment debtor, e.g.,** his father], his interest in certain real property described as follows: **[describe property]**. A copy of the recorded deed is attached as Exhibit **[exhibit number/letter]** and incorporated by reference. On the date of the transfer, this property had a fair market value of $**[amount]**.

5. *Nature of Fraudulent Transfer.* The transfer referred to in paragraph 4. was a fraud against the rights of Defendant Judgment Debtor's creditors, because

The following options are examples only.

the transfer was made with the intent to hinder, delay, or defraud Plaintiff and Defendant Judgment Debtor's other creditors.

And/Or

the transfer was made without Defendant Judgment Debtor's receiving reasonably equivalent value in exchange for the property, and Defendant Judgment Debtor was insolvent when the transfer was made.

And/Or

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the transfer was made to an insider for an antecedent debt, Defendant Judgment Debtor was insolvent at the time, and Defendant Transferee had reasonable cause to believe that Defendant Judgment Debtor was insolvent.

Continue with the following.

[**Describe particulars of the transaction, e.g.,** Although Defendant Judgment Debtor transferred the property in question to Defendant Transferee in June 2010, Defendant Judgment Debtor continues to receive rent from tenants.]

Include the foreclosure language in form 14-7 if foreclosure of the property is sought. Continue with the following.

6. *Attorney's Fees.* Plaintiff found it necessary to employ the undersigned attorney to file suit. A reasonable fee for the attorney's services that have and will be rendered is no less than $[**amount**] in accordance with section 24.013 of the Texas Business and Commerce Code. Plaintiff is also entitled to recover attorney's fees through appeal.

7. *Prayer.* Plaintiff prays that—

a. Defendant Judgment Debtor and Defendant Transferee be cited to appear and answer;

b. Plaintiff be granted judgment against Defendant Transferee for $[**amount**];

c. the Court enter judgment that the transfer of the above-described property from Defendant Judgment Debtor to Defendant Transferee was void with respect to Plaintiff;

d. the Court enter its decree setting aside and canceling the deed conveying the above-described property as fraudulent;

e. the Court award prejudgment and postjudgment interest as allowed by law;

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f. Plaintiff be granted judgment for at least $[**amount**] as punitive damages;

g. Plaintiff be granted judgment for $[**amount**] for attorney's fees through appeal;

h. Plaintiff be granted judgment for all costs of court [;/; and]

Include the following if foreclosure is sought.

i. Plaintiff be granted foreclosure of Plaintiff's security interest in the collateral; and

Continue with the following.

[i./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).

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Form 14-11

This petition may be used for a suit against either an absolute or an unconditional guarantor. It assumes that the guarantor is guaranteeing payment of a promissory note. If another form of debt is the subject of the guaranty, the petition should be modified accordingly.

The attorney should review the language of the guaranty agreement to ascertain that the guarantor has made the guaranties set out in this form petition. The language may be altered to quote or paraphrase the specific language of the guaranty or may be omitted entirely, because the guaranty agreement is incorporated by reference in the petition.

Guaranties are discussed at section 14.31 in this chapter. See section 14.2 regarding exercising caution in pleading conditions precedent.

Texas Civil Practice and Remedies Code section 30.014(a) requires certain parties to include partial identification information in initial pleadings in civil actions filed in district, county, or statutory county courts. A court may order that an initial pleading be amended to contain this information if the court determines that the pleading does not contain the information. Tex. Civ. Prac. & Rem. Code § 30.014(b).

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

Petition for Suit on Guaranty

1. *Discovery Level.* The damages sought are within the jurisdictional limits of this Court. Tex. R. Civ. P. 47(b). This lawsuit seeks only monetary relief aggregating $100,000 or less. Tex. R. Civ. P. 47(c)(1). Discovery is intended to be conducted under Level 1. Tex. R. Civ. P. 190.2.

> If lawsuit seeks nonmonetary relief and/or damages in excess of $100,000, see Tex. R. Civ. P. 47 and 190 to properly plead the claims for relief and discovery levels.

> Select one of the following. Select the first paragraph if the suit is against both the principal obligor and the guarantor. Select the second paragraph if the suit is against the guarantor only. See section 14.10 and forms 14-15 through 14-21 for other forms of party designation.

2. *Parties.* Plaintiff is [**name of plaintiff**]. [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 numbers of Plaintiff's Social Security number are [**numbers**]./Plaintiff has not been

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issued a Social Security number.] Plaintiff's address is [**address, city, state**]. Defendants are [**name of principal obligor**], Principal Obligor, who can be served with citation at [**address, city, state**], and [**name of guarantor**], Guarantor, who can be served with citation at [**address, city, state**].

Or

2. *Parties.* Plaintiff is [**name of plaintiff**]. [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 numbers of Plaintiff's Social Security number are [**numbers**]./Plaintiff has not been issued a Social Security number.] Plaintiff's address is [**address, city, state**]. Defendant is [**name of guarantor**], Guarantor, who can be served with citation at [**address, city, state**]. [**Name of principal obligor**], Principal Obligor, has not been made a defendant in this suit because

Select one or more of the following for suit against the guarantor only.

Guarantor has waived the requirement for joinder of the principal obligor.

And/Or

Principal Obligor is actually or notoriously insolvent.

And/Or

Principal Obligor cannot be reached by the ordinary process of law.

And/Or

Principal Obligor's residence is unknown and cannot be ascertained by the use of reasonable diligence.

And/Or

Principal Obligor resides beyond the limits of the state.

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And/Or

Principal Obligor is dead.

And/Or

Judgment has already been rendered against Principal Obligor.

Plead additional facts if required for venue; see part II. of chapter 15.

3. *Guaranty.* Attached to this petition as Exhibit [**exhibit number/letter**] is a copy of a guaranty agreement executed by Guarantor. The guaranty agreement is incorporated in this petition by reference. As shown on Exhibit [**exhibit number/letter**], Guarantor unconditionally guaranteed to pay Plaintiff all principal, interest, and collection expenses due Plaintiff on every claim against or indebtedness of Principal Obligor.

4. *Debt and Principal Obligor's Default.* Attached to this petition as Exhibit [**exhibit number/letter**] is a copy of a note executed by Principal Obligor. 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. Principal Obligor 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.

5. *Guarantor's Default.* Under the terms of Exhibit [**exhibit number/letter**], Guarantor is indebted to Plaintiff for Principal Obligor's debt described in this petition. [**Include unless the guarantor has specifically waived demand:** Plaintiff has demanded that Guarantor pay this debt, but Guarantor has not done so.]

6. *Conditions Precedent.* All conditions precedent have been performed or have occurred.

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7. *Attorney's Fees.* [Defendant's/Defendants'] 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[s] and remains unpaid.

Include the following if the claim for attorney's fees is based on contract.

Defendant[s] agreed to pay reasonable attorney's fees according to the terms of the [**describe guaranty agreement**].

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**].

8. *Prayer.* Plaintiff prays that—

   a. Defendant[s] 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;

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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).

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Form 14-12

This Affidavit and the Notice of Filing Foreign Judgment (Form 14-13) should be filed at the time a foreign judgment is filed under the Uniform Enforcement of Foreign Judgments Act, Tex. Civ. Prac. & Rem. Code §§ 35.001–.007. The Affidavit, along with a properly authenticated foreign judgment, and the Notice of Filing should be mailed certified and first-class to the judgment debtor at the judgment debtor's last known address, as stated in the Affidavit. See the related discussion at section 14.34:2 in this chapter.

The manual committee recommends that the attorney not execute any affidavit for a client; see section 19.17:3 in this manual. Texas Civil Practice and Remedies Code section 30.014 requires each party to include partial identification in its initial pleading in a civil action filed in district court, county court, or statutory county court. See form 14-1 for sample language.

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

Affidavit—Filing of Foreign Judgment

BEFORE ME, the undersigned authority, on this day personally appeared [**name of affiant**], who swore on oath that the following facts are true:

"My name is [**name of affiant**]. I have personal knowledge of the facts stated in this affidavit. I am authorized to make this affidavit on behalf of Judgment Creditor[s], [**name[s] of judgment creditor[s]**].

"Judgment Creditor[s] own[s] a judgment against [**name of judgment debtor[s]**], Judgment Debtor[s]. The last known post office address of Judgment Debtor is [**address, city, state**]. The last known post office address of Judgment Creditor, [**name of judgment creditor**], is [**address, city, state**].

"The name and address of the Texas attorney for Judgment Creditor is [**name of attorney**], who may be found at [**address, city, state**].

"On [**date**], copies of the following documents were mailed by certified mail and United States first-class mail, return receipt requested, with proper postage paid, to Judgment

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Debtor at the above stated address for Judgment Debtor. Documents mailed to Judgment Debtor include (1) an exemplified copy of the foreign judgment, (2) this Affidavit, and (3) a notice of filing foreign judgment."

____
[Name of affiant]
Affiant

SIGNED under oath before me on ________________________________.

____
Notary Public, State of Texas

Attach a properly authenticated copy of the foreign judgment.

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Form 14-13

This Notice of Filing Foreign Judgment should be filed at the time a foreign judgment is filed under the Uniform Enforcement of Foreign Judgments Act, Tex. Civ. Prac. & Rem. Code §§ 35.001–.007. The affidavit (form 14-12), along with a properly authenticated foreign judgment and this notice of filing, should be mailed certified and first-class to the judgment debtor at the judgment debtor's last known address, as stated in the affidavit. See the related discussion at section 14.34:2 in this chapter.

Texas Civil Practice and Remedies Code section 30.014(a) requires certain parties to include partial identification information in initial pleadings in civil actions filed in district, county, or statutory county courts. A court may order that an initial pleading be amended to contain this information if the court determines that the pleading does not contain the information. Tex. Civ. Prac. & Rem. Code § 30.014(b).

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

Notice of Filing of Foreign Judgment

1. The attached judgment is being filed in Texas. The documents listed in paragraph 5 accompany this notice and are incorporated herein by reference.

2. The name and last known post office address of Judgment Debtor[s] are [**name[s] of judgment debtor[s]**], [**address, city, state**].

3. The name and post office address of Judgment Creditor[s] are [**name[s] of judgment creditor[s]**], [**address, city, state**].

4. The name and address of the Texas attorney for Judgment Creditor are [**name of attorney**], [**address, city, state**].

5. PROOF OF MAILING: On [**date**], copies of the following were mailed by certified mail and United States first-class mail, return receipt requested, with proper postage paid, to Judgment Debtor at the above stated address for Judgment Debtor. Documents mailed to Judgment Debtor include true and correct copies of (1) exemplified copy of foreign judgment, (2) an affidavit, and (3) this Notice of Filing Foreign Judgment.

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____

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

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Form 14-14

This petition should be used to commence an independent action. A properly authenticated copy of the sister-state judgment and bill of costs must be attached. The attorney should ascertain the accuracy of the statements in this petition regarding sister-state courts and modify the petition as appropriate. The plaintiff will almost always have incurred postjudgment costs in the foreign jurisdiction. In the rare case in which judgment for such costs is not sought, paragraph 4. and the prayer must be modified. See Tex. Fin. Code §§ 304.002–.003 and section 20.11 in this manual regarding postjudgment interest. See section 14.2 regarding exercising caution in pleading conditions precedent.

Texas Civil Practice and Remedies Code section 30.014(a) requires certain parties to include partial identification information in initial pleadings in civil actions filed in district, county, or statutory county courts. A court may order that an initial pleading be amended to contain this information if the court determines that the pleading does not contain the information. Tex. Civ. Prac. & Rem. Code § 30.014(b).

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

Petition for Suit on Foreign Judgment

1. *Discovery Level.* The damages sought are within the jurisdictional limits of this Court. Tex. R. Civ. P. 47(b). This lawsuit seeks only monetary relief aggregating $100,000 or less. Tex. R. Civ. P. 47(c)(1). Discovery is intended to be conducted under Level 1. Tex. R. Civ. P. 190.2.

> If lawsuit seeks nonmonetary relief and/or damages in excess of $100,000, see Tex. R. Civ. P. 47 and 190 to properly plead the claims for relief and discovery levels.

2. *Parties.* Plaintiff is **[name of plaintiff]**. [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 numbers of Plaintiff's Social Security number are **[numbers]**./Plaintiff has not been issued a Social Security number.] Plaintiff's address is **[address, city, state]**. Defendant is **[name of defendant]**, who can be served with citation at **[address, city, state]**.

> See section 14.10 and forms 14-15 through 14-21 for other forms of party designation.

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3. *Facts.* Attached to this petition as Exhibit [**exhibit number/letter**] is a properly authenticated copy of a judgment against Defendant granted Plaintiff in a court of a sister state ("sister-state judgment"). The sister-state judgment is incorporated in this petition by reference. Defendant was duly served with citation in that cause, in accordance with the rules of procedure and the laws of that state. The court that rendered the sister-state judgment is a court of general jurisdiction and was created and organized under the laws of that state. The sister-state judgment is final, valid, and subsisting and is entitled to be accorded full faith and credit by the courts of Texas.

Plead additional facts if required for venue; see part II. of chapter 15.

4. *Enforcement.* Plaintiff is entitled to enforcement of the sister-state judgment as well as postjudgment interest accruing on it. Plaintiff has also been required to pay costs of court in addition to those awarded in the sister-state judgment. A properly authenticated bill of costs is attached as Exhibit [**exhibit number/letter**] and incorporated by reference.

5. *Conditions Precedent.* All conditions precedent have been performed or have occurred.

6. *Prayer.* Plaintiff prays that—

a. Defendant be cited to appear and answer;

b. the Court grant full faith and credit to the sister-state judgment and grant judgment for all amounts, including prejudgment and postjudgment interest, due under it;

c. Plaintiff be granted judgment for all postjudgment costs incurred in the state in which Plaintiff obtained the judgment that is the subject of this action, as shown on Exhibit [**exhibit number/letter**];

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d. Plaintiff be granted judgment for all costs incurred in this Court;

e. Plaintiff be granted judgment for postjudgment interest on the total amount of the judgment of this Court at the rate of **[percent]** percent per year from the date of the judgment until paid; and

f. 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).

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Form 14-15

Texas Civil Practice and Remedies Code section 30.014(a) requires certain parties to include partial identification information in initial pleadings in civil actions filed in district, county, or statutory county courts. A court may order that an initial pleading be amended to contain this information if the court determines that the pleading does not contain the information. Tex. Civ. Prac. & Rem. Code § 30.014(b).

Clauses for Party Designation—Plaintiffs

Plaintiff Using Assumed Name

Clause 14-15-1

Plaintiff is [**true name of plaintiff**], doing business as [**assumed name of plaintiff**]. [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 numbers of Plaintiff's Social Security number are [**numbers**]./Plaintiff has not been issued a Social Security number.]

Texas Corporation

Clause 14-15-2

Plaintiff is [**true (corporate) name of plaintiff**], a [corporation/nonprofit corporation/professional corporation] organized under the laws of the state of Texas.

Foreign Corporation Operating in Texas

Clause 14-15-3

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Plaintiff is [**true (corporate) name of plaintiff**], a [corporation/nonprofit corporation/professional corporation] organized under the laws of the state of [**state**] and authorized to transact business in Texas.

Foreign Corporation Not Operating in Texas

Clause 14-15-4

Plaintiff is [**true (corporate) name of plaintiff**], a [corporation/nonprofit corporation/professional corporation] organized under the laws of the state of [**state**].

Corporation Using Assumed Name

Clause 14-15-5

> If the corporate plaintiff is operating under an assumed name (see section 14.10:3 in this chapter), include the following sentence after the sentence chosen from the alternatives above.

Plaintiff is [**true (corporate) name of plaintiff**], a [corporation/nonprofit corporation/professional corporation] organized under the laws of the state of [**state**] and doing business as [**assumed name of plaintiff**].

Partnership with No Partnership, Assumed, or Common Name

Clause 14-15-6

Plaintiffs are [**names of partners**], who are partners. [The last three numbers of [**name of partner A**]'s driver's license number are [**numbers**]./[**Name of partner A**] has not been issued a driver's license.] [The last three numbers of [**name of partner A**]'s Social Security number are [**numbers**]./[**Name of partner A**] has not been issued a Social Security number.] [The last three numbers of [**name of partner B**]'s driver's license number are [**numbers**]./[**Name of partner**

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B] has not been issued a driver's license.] [The last three numbers of [**name of partner B**]'s Social Security number are [**numbers**]./[**Name of partner B**] has not been issued a Social Security number.]

Partnership Using Partnership (but Not Assumed) Name (for Example, Limited or General Partnership)

Clause 14-15-7

Plaintiff is [**name of partnership**], a partnership.

Partnership Using Assumed or Common Name

Clause 14-15-8

Plaintiff is [**name of partnership**], doing business as [**assumed or common name**].

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Form 14-16

Clauses for Party Designation—Individual as Defendant

Nonresident Individual Not Required to Have Registered Agent, Having Texas Resident as Person in Charge of Business (Long-Arm Service)

Clause 14-16-1

Defendant is [**name of defendant**], a resident of the state of [**state**], who resides at [**address, city, state**]. Because Defendant engages in business in Texas and has done so at all material times but is not required to designate or maintain an agent in this state and has not done so, service on Defendant should be made by serving [**name of defendant's person in charge in Texas**], who will be in charge of Defendant's business in Texas at the time of service, at [**address, city**], Texas. [**Include other information and addresses that may be helpful in obtaining service.**] A true copy of the process, together with notice of service, will be sent by registered mail, return receipt requested, to Defendant's principal place of business at [**address, city, state**]. Plaintiff's cause of action arose from or is connected with one or more transactions with Defendant that occurred or were consummated in Texas, as more particularly described in this pleading and any included exhibits.

Nonresident Individual Having Neither Regular Place of Business nor Registered Agent in Texas (Long-Arm Service)

Clause 14-16-2

Defendant, [**name of defendant**], a resident of the state of [**state**], engages in business in Texas and has done so at all material times but does not maintain a place of regular business in Texas or a designated agent on whom

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process can be served. Service on Defendant, therefore, should be made by serving Defendant's statutory agent for service of process, the Secretary of State of Texas, at Service of Process, Secretary of State, P.O. Box 12079, Austin, TX 78711-2079, and forwarded to Defendant's home or home office, [**address**]. Plaintiff's cause of action arose from or is connected with one or more transactions with Defendant that occurred or were consummated in Texas, as more particularly described in this pleading and any included exhibits.

Individual Using Assumed Name

Clause 14-16-3

> If the defendant operates under an assumed name, include the following sentence after the description of the defendant selected from those above.

Defendant is doing business as [**assumed name of defendant**].

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Form 14-17

Clauses for Party Designation—Corporation as Defendant

Texas Corporation—Registered Agent

Clause 14-17-1

Defendant is [**name of defendant**], a [corporation/nonprofit corporation/ professional corporation] organized under the laws of the state of Texas. Service on Defendant can be made by serving its registered agent, [**name of registered agent**], or its president or any vice-president, at [**address, city**], Texas. [**Include other information and addresses that may be helpful in obtaining service.**]

Texas Corporation—Registered Agent Cannot Be Found

Clause 14-17-2

> The designation suggested below includes an address for the corporate defendant's registered office, even though it is not statutorily required in this situation. Including the address helps the secretary of state's citations office to process the citation more efficiently.

Defendant is [**name of defendant**], a [corporation/nonprofit corporation/ professional corporation] organized under the laws of the state of Texas. Defendant's registered office is at [**address, city**], Texas. At least two unsuccessful attempts have been made on different business days to serve Defendant's registered agent(s), and, because no registered agent of Defendant can be found at Defendant's registered office despite reasonable diligence, service on Defendant should be made by serving the Secretary of State of Texas, at Service of Process, Secretary of State, P.O. Box 12079, Austin, TX 78711-

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2079, and forwarded to Defendant's home or home office, [**address, city, state**].

Texas Corporation—No Registered Agent

Clause 14-17-3

Defendant is [**name of defendant**], a [corporation/nonprofit corporation/ professional corporation] organized under the laws of the state of Texas. The last known address of Defendant's registered office is [**address, city**], Texas. Because Defendant has failed to appoint or maintain a registered agent within Texas, service on Defendant should be made by serving the Secretary of State of Texas, at Service of Process, Secretary of State, P.O. Box 12079, Austin, TX 78711-2079, and forwarded to Defendant's home or home office, [**address, city, state**].

Foreign Corporation Registered to Transact Business in Texas—Registered Agent

Clause 14-17-4

Defendant is [**name of defendant**], a [corporation/nonprofit corporation/ professional corporation] organized under the laws of the state of [**state**] and authorized to transact business in Texas. Service on Defendant can be made by serving its registered agent, [**name of registered agent**], or its president or any vice-president, at [**address, city, state**]. [**Include other information and addresses that may be helpful in obtaining service.**]

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Foreign Corporation Registered to Transact Business in Texas—No Registered Agent

Clause 14-17-5

> The designation suggested below includes an address for the corporation's principal office in its state of incorporation, even though it is not statutorily required in this situation; including the address helps the secretary of state's citations office to process the citation more efficiently.

Defendant is [**name of defendant**], a [corporation/nonprofit corporation/ professional corporation] organized under the laws of the state of [**state**] and authorized to transact business in Texas. Defendant's principal office in its state of incorporation is [**address, city, state**]. Because Defendant has failed to appoint or maintain a registered agent within Texas, service on Defendant should be made by serving the Secretary of State of Texas, at Service of Process, Secretary of State, P.O. Box 12079, Austin, TX 78711-2079, and forwarded to Defendant's home or home office, [**address, city, state**].

Foreign Corporation Not Registered to Transact Business in Texas—Corporation with Person in Charge of Business in Texas (Long-Arm Service)

Clause 14-17-6

Defendant is [**name of defendant**], a [corporation/nonprofit corporation/ professional corporation] organized under the laws of the state of [**state**]. Because Defendant engages in business in Texas and has done so at all material times but is not required to designate or maintain an agent in this state and has not done so, service on Defendant should be made by serving [**name of defendant's person in charge in Texas**], who will be in charge of Defendant's business in Texas at the time of service, at [**address, city**], Texas. [**Include other information and addresses that may be helpful in obtaining service.**] A true copy of the process, together with notice of service, will be sent by regis-

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tered mail, return receipt requested, to Defendant's principal place of business, at [**address, city, state**]. Plaintiff's cause of action arose from or is connected with one or more transactions with Defendant that occurred or were consummated in Texas, as more particularly described in this pleading and any included exhibits.

Foreign Corporation Not Registered to Transact Business in Texas—No Agent in Texas (Long-Arm Service)

Clause 14-17-7

Defendant is [**name of defendant**], a [corporation/nonprofit corporation/professional corporation] organized under the laws of the state of [**state**]. Defendant's home office address is [**address, city, state**]. Because Defendant engages in business in Texas and has done so at all material times but does not maintain a place of regular business in Texas or a designated agent on whom process can be served, service on Defendant should be made by serving the Secretary of State of Texas, at Service of Process, Secretary of State, P.O. Box 12079, Austin, TX 78711-2079, and forwarded to Defendant's home or home office, [**address, city, state**]. Plaintiff's cause of action arose from or is connected with one or more transactions with Defendant that occurred or were consummated in Texas, as more particularly described in this pleading and any included exhibits.

Corporation Using Assumed Name

Clause 14-17-8

> If the corporate defendant operates under an assumed name, include the following sentence at the end of the language chosen from other designations suggested above.

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Defendant is [**name of defendant**], a [corporation/nonprofit corporation/ professional corporation] doing business as [**assumed name of defendant**].

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Form 14-18

Clauses for Party Designation—Partnership (including Limited Liability Partnership) as Defendant

Texas Partnership—Principal Office in County of Suit

Clause 14-18-1

Defendant [**name of partnership**] is a partnership having its principal place of business in [**county**] County, Texas, and process should be served on Defendant [**name of partner**], a partner, at [**address, city**], Texas. [**Include other information and addresses that may be helpful in obtaining service.**] [**For each additional partner named as a defendant, include:** Defendant [**name of partner**], a partner, should also be served at [**address, city, state**].]

Texas Partnership—Agent in County of Suit

Clause 14-18-2

Defendant [**name of partnership**] is a partnership having its principal place of business in [**county**] County, Texas, and process should be served on [**name of agent or clerk in partnership's local office**], who is an agent or clerk employed in Defendant's office, place of business, or agency, at [**address, city**], Texas. [**Include other information and addresses that may be helpful in obtaining service.**] [**For each partner named as a defendant, include:** Defendant [**name of partner**], a partner, should also be served at [**address, city, state**].] Plaintiff's cause of action grew out of or is connected with business transacted or done in the county in which this action is brought and in which this office, place of business, or agency is located, as more particularly described in this pleading and any included exhibits.

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Foreign Partnership—Partnership with Person in Charge of Business in Texas (Long-Arm Service)

Clause 14-18-3

Defendant [**name of partnership**] is a partnership having its principal place of business in the state of [**state**], whose address is [**address, city, state**]. Because Defendant engages in business in Texas and has done so at all material times but is not required to designate or maintain an agent in this state and has not done so, service on Defendant should be made by serving [**name of defendant's person in charge in Texas**], who will be in charge of Defendant's business in Texas at the time of service, at [**address, city**], Texas. [**Include other information and addresses that may be helpful in obtaining service.**] A true copy of the process, together with notice of service, will be sent by registered mail, return receipt requested, to Defendant's principal place of business, at [**address, city, state**]. Plaintiff's cause of action arose from or is connected with one or more transactions with Defendant that occurred or were consummated in Texas, as more particularly described in this pleading and any included exhibits. [**Include similar allegations for each partner named as a defendant.**]

Foreign Partnership—No Agent in Texas (Long-Arm Service)

Clause 14-18-4

Defendant [**name of partnership**] is a partnership having its home office at [**address, city, state**]. Because Defendant engages in business in Texas and has done so at all material times but does not maintain a place of regular business in Texas or a designated agent on whom process can be served, service on Defendant should be made by serving the Secretary of State of Texas, at Ser-

vice of Process, Secretary of State, P.O. Box 12079, Austin, TX 78711-2079, and forwarded to Defendant's home or home office, at [**address, city, state**]. Plaintiff's cause of action arose from or is connected with one or more transactions with Defendant that occurred or were consummated in Texas, as more particularly described in this pleading and any included exhibits. [**Include similar allegations for each partner named as a defendant.**]

Partnership Using Assumed Name

Clause 14-18-5

> If the partnership operates under both an assumed name and a firm name, include the following sentence at the end of the language chosen from other designations suggested above.

Defendant [**name of partnership**] is a partnership doing business as [**assumed name of defendant**].

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Form 14-19

Clauses for Party Designation—Limited Partnership as Defendant

Texas Limited Partnership—Principal Office in County of Suit

Clause 14-19-1

Defendant is [**name of limited partnership**], a limited partnership having its principal place of business in [**county**] County, Texas. Service on Defendant can be made by serving Defendant [**name of general partner**], general partner,

Select one of the following.

Select if general partner is an individual.

at [**address, city**], Texas.

Or

Select if general partner is a Texas corporation.

a corporation organized under the laws of Texas, through its registered agent, [**name of registered agent**], or its president or any vice-president, at [**address, city**], Texas.

Or

Select if general partner is a foreign corporation.

a corporation organized under the laws of the state of [**state**] and authorized to transact business in Texas, through its registered agent, [**name of registered agent**], or its president or any vice-president, at [**address, city, state**].

Continue with any other information and addresses that may be helpful in obtaining service.

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Texas Limited Partnership—Agent in County of Suit

Clause 14-19-2

Defendant is [**name of limited partnership**], a limited partnership having its principal place of business in [**county**] County, Texas. Service on Defendant can be made by serving [**name of agent or clerk in firm's local office**], who is an agent or clerk employed in Defendant's office, place of business, or agency, at [**address, city**], Texas. [**Include other information and addresses that may be helpful in obtaining service.**] Plaintiff's cause of action grew out of or is connected with business transacted or done in the county in which this action is brought and in which this office, place of business, or agency is located, as more particularly described in this pleading and any included exhibits.

Foreign Limited Partnership Registered to Transact Business in Texas

Clause 14-19-3

Defendant is [**name of limited partnership**], a limited partnership organized under the laws of the state of [**state**] and authorized to transact business in Texas. Service on Defendant can be made by serving its registered agent at [**address, city**], Texas. [**Include other information and addresses that may be helpful in obtaining service.**]

Foreign Limited Partnership Not Registered to Transact Business in Texas—Partnership with Person in Charge of Business in Texas (Long-Arm Service)

Clause 14-19-4

Defendant is [**name of limited partnership**], a limited partnership organized under the laws of the state of [**state**], whose address is [**address, city, state**]. Because Defendant engages in business in Texas and has done so at all

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material times but is not required to designate or maintain an agent in this state and has not done so, service on Defendant should be made by serving [**name of defendant's person in charge in Texas**], who will be in charge of Defendant's business in Texas at the time of service, at [**address, city**], Texas. [**Include other information and addresses that may be helpful in obtaining service.**] A true copy of the process, together with notice of service, will be sent by registered mail, return receipt requested, to Defendant's principal place of business, at [**address, city, state**]. Plaintiff's cause of action arose from or is connected with one or more transactions with Defendant that occurred or were consummated in Texas, as more particularly described in this pleading and any included exhibits.

Foreign Limited Partnership Not Registered to Transact Business in Texas—No Agent in Texas (Long-Arm Service)

Clause 14-19-5

Defendant is [**name of limited partnership**], a limited partnership organized under the laws of the state of [**state**]. Defendant's home office address is [**address, city, state**]. Because Defendant engages in business in Texas and has done so at all material times but does not maintain a place of regular business in Texas or a designated agent on whom process can be served, service on Defendant should be made by serving the Secretary of State of Texas, at Service of Process, Secretary of State, P.O. Box 12079, Austin, TX 78711-2079, and forwarded to Defendant's home or home office, [**address, city, state**]. Plaintiff's cause of action arose from or is connected with one or more transactions with Defendant that occurred or were consummated in Texas, as more particularly described in this pleading and any included exhibits.

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Limited Partnership Using Assumed Name

Clause 14-19-6

> If the limited partnership operates under an assumed name, include the following sentence at the end of the language chosen from other designations suggested above.

Defendant [**name of defendant**] is a limited partnership doing business as [**assumed name of defendant**].

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Form 14-20

Clauses for Party Designation—Association or Joint-Stock Company as Defendant

Texas Association or Joint-Stock Company

Clause 14-20-1

Defendant [**name of association or company**] is [an association/a joint-stock company] having its principal place of business in [**county**] County, Texas. Service on Defendant can be made by serving its general agent, [**name of general agent**], or its president, secretary, or treasurer at [**address, city**], Texas. [**Include other information and addresses that may be helpful in obtaining service.**] [**For each additional member to be served, include: [Name of member**], a member of Defendant, should also be served, at [**address, city**], Texas.]

Foreign Association or Joint-Stock Company (Long-Arm Service)—Organization with Person in Charge of Business in Texas

Clause 14-20-2

Defendant [**name of association or company**] is [an association/a joint-stock company] having its principal place of business in the state of [**state**]. Because Defendant engages in business in Texas and has done so at all material times but is not required to designate or maintain an agent in this state and has not done so, service on Defendant should be made by serving [**name of defendant's person in charge in Texas**], who will be in charge of Defendant's business in Texas at the time of service, at [**address, city**], Texas. [**Include other information and addresses that may be helpful in obtaining service.**] A true copy of the process, together with notice of service, will be sent by regis-

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tered mail, return receipt requested, to Defendant's principal place of business, at [**address, city, state**]. Plaintiff's cause of action arose from or is connected with one or more transactions with Defendant that occurred or were consummated in Texas, as more particularly described in this pleading and any included exhibits.

Foreign Association or Joint-Stock Company (Long-Arm Service)—No Agent in Texas

Clause 14-20-3

Defendant [**name of association or company**] is [an association/a joint-stock company] having its principal place of business in the state of [**state**]. Defendant's home office address is [**address, city, state**]. Because Defendant engages in business in Texas and has done so at all material times but does not maintain a place of regular business in Texas or a designated agent on whom process can be served, service on Defendant should be made by serving the Secretary of State of Texas, at Service of Process, Secretary of State, P.O. Box 12079, Austin, TX 78711-2079, and forwarded to Defendant's home or home office, [**address, city, state**]. Plaintiff's cause of action arose from or is connected with one or more transactions with Defendant that occurred or were consummated in Texas, as more particularly described in this pleading and any included exhibits.

Association or Joint-Stock Company Using Assumed Name

Clause 14-20-4

> If the defendant operates under an assumed name, include the following sentence at the end of the language chosen from other designations suggested above.

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Defendant [**name of defendant**] is [an association/a joint-stock company] doing business as [**assumed name of defendant**].

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Form 14-21

Clauses for Party Designation—Limited Liability Company as Defendant

Texas Limited Liability Company—Registered Agent

Clause 14-21-1

Defendant is [**name of defendant**], a limited liability company organized under the laws of the state of Texas. Service on Defendant can be made by serving its registered agent, [**name of registered agent**], or any of its managers, at [**address, city**], Texas. [**Include other information and addresses that may be helpful in obtaining service.**]

Texas Limited Liability Company—Registered Agent Cannot Be Found

Clause 14-21-2

Defendant is [**name of defendant**], a limited liability company organized under the laws of the state of Texas. Defendant's registered office is at [**address, city**], Texas. At least two unsuccessful attempts have been made on different business days to serve the registered agent and the manager of Defendant, and, because no registered agent or manager of Defendant can be found at Defendant's registered office despite reasonable diligence, service on Defendant should be made by serving the Secretary of State of Texas, at Service of Process, Secretary of State, P.O. Box 12079, Austin, TX 78711-0279, and forwarded to Defendant's home or home office, at [**address, city, state**].

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Texas Limited Liability Company—No Registered Agent

Clause 14-21-3

Defendant is [**name of defendant**], a limited liability company organized under the laws of the state of Texas. The last known address of Defendant's registered office is [**address, city**], Texas. Because Defendant has failed to appoint or maintain a registered agent within Texas, service on Defendant should be made by serving the Secretary of State of Texas, at Service of Process, Secretary of State, P.O. Box 12079, Austin, TX 78711-0279, and forwarded to Defendant's home or home office, [**address, city, state**].

Foreign Limited Liability Company Registered to Transact Business in Texas—Registered Agent

Clause 14-21-4

Defendant is [**name of defendant**], a limited liability company organized under the laws of the state of [**state**] and authorized to transact business in Texas. Service on Defendant can be made by serving its registered agent, [**name of registered agent**], or any manager, at [**address, city, state**]. [**Include other information and addresses that may be helpful in obtaining service.**]

Foreign Limited Liability Company Registered to Transact Business in Texas—No Registered Agent

Clause 14-21-5

Defendant is [**name of defendant**], a limited liability company organized under the laws of the state of [**state**] and authorized to transact business in Texas. Defendant's principal office in its state of incorporation is [**address, city, state**]. Because Defendant has failed to appoint or maintain a registered

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agent within Texas, service on Defendant should be made by serving the Secretary of State of Texas, at Service of Process, Secretary of State, P.O. Box 12079, Austin, TX 78711-0279, and forwarded to Defendant's home or home office, [**address, city, state**].

Limited Liability Company Using Assumed Name

Clause 14-21-6

> If the entity defendant operates under an assumed name, include the following sentence at the end of the language chosen from other designations suggested above.

Defendant [**name of defendant**] is a limited liability company doing business as [**assumed name of defendant**].

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Form 14-22

This form, and the accompanying order at form 14-23, can be used to seek confirmation of an arbitration award in the form of a court judgment. See section 14.33 in this chapter for more information about confirmation of arbitration awards.

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

Application to Confirm Arbitration Award

Applicant applies to this Court for an order under Tex. Civ. Prac. & Rem. Code § 171.001–.098 and in support of this application shows:

1. *Parties.* [**Name of applicant**] is Applicant in this case. [**Name of respondent**] is Respondent in this case.

Select the following if there is a proceeding pending in the court where this application is filed.

2. *Venue.* This application is filed in this Court, as there is a proceeding pending in this cause that was referred to arbitration.

Select the following if there is no pending proceeding, and the arbitration agreement provides that the hearing before the arbitrators is to be held in a specific county.

2. *Venue.* This application is filed as an initial application in this county, as the agreement to arbitrate provides that the hearing before the arbitrators is to be held in this county.

Select the following if there is no pending proceeding and the hearing before the arbitrators was held in this county.

2. *Venue.* This application is filed as an initial application in this county, as the hearing before the arbitrators has been held in this county.

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> Select the following if there is no pending proceeding, none of the previous conditions apply, and the adverse party resides in or has a place of business in this county.

2. *Venue.* This application is filed as an initial application in the county in which the adverse party resides or has a place of business.

> Select the following if there is no pending proceeding, none of the previous conditions apply, and the adverse party does not reside in or have a place of business in Texas.

2. *Venue.* This application is filed as an initial application in this county, as the adverse party does not have a residence or place of business in Texas.

3. *Arbitration Agreement.* On [**date**], [**name of applicant**] and [**name of respondent**] entered into a written agreement. In [paragraph/section] [**number**] of that agreement, the parties agreed to arbitrate [**describe subject of arbitration provision**]. A copy of the parties' agreement is attached as Exhibit [**exhibit number/letter**] and incorporated herein by reference.

4. *Facts.* On [**date**], a controversy arose between Applicant and Respondent in that [**describe controversy**]. The arbitration agreement described above required the parties to arbitrate this controversy on the following issues: [**specify issues**].

5. *Arbitration Proceedings.* On [**date**], arbitration proceedings were held in accordance with the arbitration agreement and an award was made on [**date**]. A copy of that award is attached as Exhibit [**exhibit number/letter**] and incorporated herein by reference.

6. *Conditions Precedent.* All conditions precedent have been performed or have occurred.

WHEREFORE, Applicant requests that [Respondent be cited to appear and answer/ notice of hearing be sent to Respondent] and this Court enter judgment that—

a. confirms the arbitration award; and

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b. awards costs of suit to Applicant.

Date: [**date**]

____

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

Attach exhibit(s).

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Form 14-23

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

Judgment

On this day, this matter came for consideration. After reviewing the pleadings and considering the argument of counsel, judgment is entered as follows:

It is hereby ordered that the [**name of arbitration award**] in [**style of action**] before [**name of arbitrator**] dated [**date of arbitration award**] is hereby CONFIRMED.

Applicant, [**name of applicant**], is awarded against Respondent, [**name of respondent**], the following: [**describe award, including damages, prejudgment interest, court costs, and other pertinent provisions**] as set forth in the arbitration award at Exhibit [**number/letter**].

Applicant is awarded costs against Respondent in the amount of $[**amount**] in bringing this action to confirm the award.

All amounts awarded herein or in the [**name of arbitration award**] shall bear interest at the statutory rate from and after the date of entry of this Judgment.

Dated: [**date**]

____

JUDGE PRESIDING

APPROVED AS TO FORM:

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____

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

____

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

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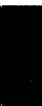

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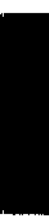

Chapter 15

Jurisdiction and Venue

I. Jurisdiction

§ 15.1 Jurisdictional Limits of Trial Courts

§ 15.1:1 Jurisdiction Generally

"Subject-matter jurisdiction refers to the kinds of controversies a court has authority to hear, as determined by the constitution, jurisdictional statutes, and the pleadings." *Perry v. Del Rio*, 53 S.W.3d 818, 824 (Tex. App.—Austin), *appeal dismissed*, 66 S.W.3d 239 (Tex. 2001). When a statute creates a right and prescribes a remedy to enforce that right, a court has subject-matter jurisdiction to act in the manner provided by the statute that created that right. *Tarrant Appraisal District v. Gateway Center Associates, Ltd.*, 34 S.W.3d 712, 714 (Tex. App.—Fort Worth 2000, no pet.).

Texas courts have limited subject-matter jurisdiction; they have no power to act other than that specifically given by the Texas Constitution or by statute. Subject-matter jurisdiction is essential to the authority of a court to decide a case. *Texas Ass'n of Business v. Texas Air Control Board*, 852 S.W.2d 440, 443 (Tex. 1993). Subject-matter jurisdiction is an issue that may not be waived by the parties and may be raised for the first time on appeal. *Texas Ass'n of Business*, 852 S.W.2d at 445; *see also Acosta v. State*, 70 S.W.3d 921, 922–23 (Tex. App.—El Paso 2002, no pet.); *Ex parte Cross*, 69 S.W.3d 810, 813 (Tex. App.—El Paso 2002, no pet.) (question of law subject to sua sponte review by the court of appeals).

For a court to exercise subject-matter jurisdiction over a case, a party must allege facts that affirmatively demonstrate the court's jurisdiction to hear that case. *Mogayzel v. Texas Department of Transportation*, 66 S.W.3d 459, 463 (Tex. App.—Fort Worth 2001, pet. denied). When incurable defects are shown on the face of a plaintiff's pleadings, the court lacks subject-matter jurisdiction. *City of Longview v. Head*, 33 S.W.3d 47, 54 (Tex. App.—Tyler 2000, no pet.) (dismissal required when subject-matter jurisdiction lacking regardless of stage of proceeding). Any decision rendered by a court not having jurisdiction is void. *Cleveland v. Ward*, 285 S.W. 1063, 1071 (Tex. 1926), *overruled on other grounds by Walker v. Packer*, 827 S.W.2d 833, 842 (Tex. 1992); *In re Burlington Northern & Santa Fe Railway Co.*, 12 S.W.3d 891, 895 (Tex. App.—Houston [14th Dist.] 2000, mandamus denied); *Solomon, Lambert, Roth & Associates v. Kidd*, 904 S.W.2d 896, 901 (Tex. App.—Houston [1st Dist.] 1995, no writ). Subject-matter jurisdiction is a power that exists by operation of law and may not be conferred on any court by consent of the parties or by waiver. *Burke v. Satterfield*, 525 S.W.2d 950, 953 (Tex. 1975); *Walls Regional Hospital v. Altaras*, 903 S.W.2d 36, 40–41 (Tex. App.—Waco 1994, no writ); *Nash v. Civil Service Commission*, 864 S.W.2d 163, 166 (Tex. App.—Tyler 1993, no writ). In contrast, although a court may not have jurisdiction over a party, that party may appear and consent to personal jurisdiction. *Campsey v. Brumley*, 55 S.W.2d 810, 812 (Tex. Comm'n App. 1932, holding approved). When jurisdiction has been properly acquired, no subsequent event will serve to divest the court of jurisdic-

tion. *Color Tile, Inc. v. Ramsey*, 905 S.W.2d 620, 622 (Tex. App.—Houston [14th Dist.] 1995, no writ).

The amount claimed generally determines which court has jurisdiction. See section 15.2 below. Many statutory courts have special jurisdictional requirements, and the attorney should always consult the statute creating the particular court. The following sections summarize the jurisdictional scheme of Texas trial courts.

§ 15.1:2 Justice Court

Justice courts, as creatures of statute, are governed by a legislative grant of jurisdiction. *Color Tile, Inc. v. Ramsey*, 905 S.W.2d 620, 622 (Tex. App.—Houston [14th Dist.] 1995, no writ). Justice courts have original jurisdiction of—

1. civil matters in which the amount in controversy is $10,000 or less (effective through August 31, 2020), exclusive of interest (unless the district or county court has exclusive jurisdiction over the case);
2. forcible entry and detainer cases; and
3. foreclosures of mortgages and enforcement of liens on personal property when the amount in controversy is otherwise within the justice court's jurisdiction.

Tex. Gov't Code § 27.031(a). Note that the jurisdictional limits for civil matters in justice courts increase to $20,000 effective September 1, 2020. Acts 2019, 86th Leg., R.S., ch. 696, § 32 (S.B. 2342), eff. Sept. 1, 2020.

A justice of the peace has also the power to issue writs of attachment, garnishment, and sequestration in cases in which the court otherwise has jurisdiction, Tex. Gov't Code § 27.032, and the power to issue distress warrants, Tex. R. Civ. P. 610.

Small claims cases are lawsuits brought for the recovery of money damages, civil penalties, personal property, or other relief allowed by law, in amounts not more than $10,000, excluding statutory interest and court costs but including attorney's fees, if any. Tex. R. Civ. P. 500.3. Effective September 1, 2013, small claims courts as such were abolished in Texas, and small claims cases were moved to the justice courts. Acts 2011, 82d Leg., 1st C.S., ch. 3, § 5.06 (HB 79), eff. Sept. 1, 2013.

§ 15.1:3 Constitutional County Court

The Texas Constitution provides for a constitutional county court in each county of the state. *See* Tex. Const. art. V, § 15. Constitutional county courts have—

1. concurrent jurisdiction with justice courts if the amount in controversy exceeds $200 but does not exceed $10,000 (effective through August 31, 2020), exclusive of interest;
2. concurrent jurisdiction with district courts if the amount in controversy exceeds $500 but does not exceed $5,000, exclusive of interest; and
3. the power to issue writs necessary to enforce the court's jurisdiction, specifically including writs of mandamus, attachment, garnishment, injunction, sequestration, certiorari, and supersedeas.

Tex. Gov't Code §§ 26.042(a), 26.051; *see also* Tex. Const. art. V, § 16. Note that, effective September 1, 2020, county courts have concurrent jurisdiction with justice courts if the amount in controversy exceeds $200 but does not exceed $20,000. Acts 2019, 86th Leg., R.S., ch. 696, § 31 (S.B. 2342), eff. Sept. 1, 2020.

Among other matters, the constitutional county court does not have jurisdiction in a suit for the enforcement of a lien on land or a suit for the

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trial of the right to property valued at $500 or more and levied on under a writ of execution, sequestration, or attachment. Tex. Gov't Code § 26.043(2), (6). To enforce their jurisdictional authority, constitutional county courts have extensive writ jurisdiction. *See* Tex. Gov't Code §§ 26.050–.051.

§ 15.1:4 Statutory County Court (County Court at Law)

In larger counties, the legislature has established statutory county courts that effectively displace the constitutional county court. *See* Tex. Const. art. V, § 1. Statutorily created county courts at law that have concurrent jurisdiction with constitutional county courts also have concurrent jurisdiction with district courts if the amount in controversy, as alleged in the petition, exceeds $500 but does not exceed $200,000, excluding interest, statutory or punitive damages and penalties, and attorney's fees and costs. Tex. Gov't Code § 25.0003(c)(1). Effective September 1, 2020, statutorily created county courts at law that have concurrent jurisdiction with constitutional county courts also have concurrent jurisdiction with district courts if the amount in controversy, as alleged in the petition, exceeds $500 but does not exceed $250,000, excluding interest, statutory or punitive damages and penalties, and attorney's fees and costs. Acts 2019, 86th Leg., R.S., ch. 696, § 2 (S.B. 2342), eff. Sept. 1, 2020. The statutes relating to statutory county courts of each county are in chapter 25 of the Texas Government Code. The statute creating the particular court should always be consulted. *See, e.g.*, Tex. Gov't Code § 25.0592 (Dallas County), § 25.0732 (El Paso County), § 25.0862 (Galveston County) (examples of statutory county courts that have concurrent jurisdiction with the district court in civil cases regardless of amount in controversy). A statutory county court may issue writs of injunction, mandamus, sequestration, attachment, garnishment, certiorari, supersedeas, and all writs necessary to enforce its jurisdiction. Tex. Gov't Code § 25.0004(a). The statutory county court has concurrent jurisdiction with district courts in eminent domain cases (Tex. Prop. Code § 21.001) and with constitutional county courts in probate matters (unless a county has a statutory probate court) (Tex. Gov't Code § 25.0003(d)–(e)).

§ 15.1:5 District Court

District courts are courts of general jurisdiction and have exclusive, original jurisdiction over cases that are not within the subject-matter jurisdiction of any other court. Tex. Const. art. V, §§ 1, 8. Neither the Texas Constitution nor the Texas Government Code prescribes a minimum or maximum amount in controversy for district court jurisdiction. *See* Tex. Const. art. V, § 8; Tex. Gov't Code §§ 24.007–.008. By legislative act in 1985, the prior constitutional and statutory $500 minimum jurisdiction was repealed. Following the 1985 legislative repeals and subsequent appellate court disagreements on minimum jurisdiction, the supreme court held that the district courts may no longer have a jurisdictional minimum amount in controversy. *See Dubai Petroleum Co. v. Kazi*, 12 S.W.3d 71, 75 n.4 (Tex. 2000).

District courts may have concurrent jurisdiction with one or more inferior courts. District courts may issue writs of mandamus, injunction, sequestration, attachment, garnishment, certiorari, supersedeas, and all other writs necessary to enforce their jurisdiction. Tex. Gov't Code § 24.011.

§ 15.2 Jurisdictional Amount in Controversy

§ 15.2:1 Amount in Controversy Generally

When subject matter is not exclusive, the amount in controversy determines the court with jurisdiction. That amount is determined from the

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plaintiff's pleadings, unless the defendant alleges and proves that the allegations are fraudulently made for the purpose of conferring jurisdiction that otherwise would not exist. *Lane v. Davis*, 337 S.W.2d 292, 293–94 (Tex. Civ. App.—San Antonio 1960, no writ). The plaintiff may not arbitrarily reduce a liquidated claim to an amount within the jurisdictional limits of the justice courts. *Hooper Lumber Co. v. Texas Fixture Co.*, 230 S.W. 141 (Tex. 1921). The amount in controversy established in the plaintiff's pleadings, not the proof of his allegations or the result of the case, determines jurisdiction. *Brannon v. Pacific Employers Insurance Co.*, 224 S.W.2d 466, 469 (Tex. 1949); *Campsey v. Brumley*, 55 S.W.2d 810, 812 (Tex. Comm'n App. 1932, holding approved). Each type of court has its own formula for calculating the amount in controversy. Whether attorney's fees, costs, or penalties are added to the debt when figuring the amount in controversy depends on the governing statute of the court in question. Many of the statutes creating the county courts at law have specific items that may or may not be included in the amount in controversy. *See, e.g., Sears, Roebuck & Co. v. Big Bend Motor Inn, Inc.*, 818 S.W.2d 542 (Tex. App.—Fort Worth 1991, writ denied).

For an unliquidated claim, the plaintiff's petition need state only that the damages sought are within the jurisdictional limits of the court. Tex. R. Civ. P. 47(b). Omitting the amount in controversy from the petition does not necessarily deprive the court of jurisdiction, unless lack of jurisdiction is clear from the pleadings. The plaintiff may prevail if the jurisdictional amount in controversy is proved at trial; failure to plead damages is a defect in pleading subject to special exceptions and amendment. *Peek v. Equipment Service Co.*, 779 S.W.2d 802, 804–05 (Tex. 1989).

Special rules apply in the case of multiple claims against one defendant or foreclosure of a lien; see sections 15.2:3 and 15.2:7 below.

§ 15.2:2 Amount of Debt

Only the amount due and unpaid at the time suit is instituted is included in computing the amount in controversy. *See Metropolitan Life Insurance Co. v. Evans*, 96 S.W.2d 152, 153 (Tex. Civ. App.—Beaumont 1936, no writ). The amount due and unpaid is the balance after applying all credits, not the amount of the original debt. *See Salter v. Nelson*, 341 S.W.2d 567, 568 (Tex. Civ. App.—Fort Worth 1960, no writ). Any expected reduction in the claimed amount because of an intended offset from another transaction is not included. *Manly v. Citizens National Bank*, 110 S.W.2d 993, 994 (Tex. Civ. App.—Eastland 1937, no writ).

§ 15.2:3 Multiple Claims

When a plaintiff makes separate, independent, but joinable claims against multiple parties, each claim is judged on its own merit. *Borrego v. del Palacio*, 445 S.W.2d 620, 622 (Tex. Civ. App.—El Paso 1969, no writ). When one plaintiff makes multiple claims against one defendant, the claims are aggregated for purposes of determining the amount in controversy for jurisdictional purposes. Tex. Gov't Code § 24.009 (district courts); *Box v. Associates Investment Co.*, 389 S.W.2d 687, 689 (Tex. Civ. App.—Dallas 1965, no writ).

§ 15.2:4 Interest

The jurisdictional statutes usually exclude interest in determining the amount in controversy. *See, e.g.*, Tex. Gov't Code § 26.042(a) (county courts). The nature of interest determines whether it is included in the amount in controversy. Interest as an element of damages (for example, interest accruing from the loss of use of money) is included in calculating the amount in controversy. On the other hand, interest eo nomine (interest in addition to the amount of damages), that is, in the name of interest (for example, interest defined by statute or fixed by

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the parties to a contract) is not included in determining the amount in controversy. *Bankers Health & Accident Co. v. Adair*, 153 S.W.2d 273, 273–74 (Tex. Civ. App.—San Antonio 1941, no writ). The plaintiff's attorney should carefully decide whether interest should be included in determining the amount in controversy based on whether the interest is eo nomine or interest as damages. *See, e.g., Eanes v. Haynes*, 135 S.W.2d 190 (Tex. Civ. App.—Eastland 1939, no writ); *Oppenheim v. Hood*, 33 S.W.2d 265 (Tex. Civ. App.—Dallas 1930, writ ref'd).

§ 15.2:5 Attorney's Fees

Generally, a demand for attorney's fees is included in the amount in controversy and is considered in fixing the court's jurisdiction. *Johnson v. Universal Life & Accident Insurance Co.*, 94 S.W.2d 1145 (Tex. 1936); *Long v. Fox*, 625 S.W.2d 376, 378 (Tex. App.—San Antonio 1981, writ ref'd n.r.e.). However, in statutory county courts, attorney's fees are excluded from calculation of the amount in controversy. Tex. Gov't Code § 25.0003(c)(1); *see also Whitley v. Morning*, 814 S.W.2d 537, 538 (Tex. App.—Tyler 1991, no writ).

§ 15.2:6 Costs

Costs of court are not included in computing the amount in controversy. *See National Life & Accident Insurance Co. v. Halfin*, 99 S.W.2d 997, 998 (Tex. Civ. App.—San Antonio 1936, no writ).

§ 15.2:7 Foreclosure of Lien

The jurisdictional amount is determined by the value of the property on which foreclosure is sought if the value exceeds the amount of the debt. *Southwestern Drug Corp. v. Webster*, 246 S.W.2d 241 (Tex. Civ. App.—Amarillo 1951, no writ).

§ 15.2:8 Immunity

The state's consent to be sued must be affirmatively established in the plaintiff's pleadings when a government agency is sued. *University of Texas Medical Branch at Galveston v. Mullins*, 57 S.W.3d 653, 656 (Tex. App.—Houston [14th Dist.] 2001, no pet.). The state's consent to suit may be alleged "by reference to a statute or to express legislative permission." *Mullins*, 57 S.W.3d at 656 (quoting *Texas Department of Transportation v. Jones*, 8 S.W.3d 636, 638 (Tex. 1999)).

A trial court lacks subject-matter jurisdiction over a suit against a governmental unit absent the state's consent to a suit. *Texana Community MHMR Center v. Silvas*, 62 S.W.3d 317, 321 (Tex. App.—Corpus Christi 2001, no pet.).

§ 15.2:9 Plea to the Jurisdiction

A plea to the jurisdiction is the procedure to contest the trial court's subject-matter jurisdiction. To determine whether a court has subject-matter jurisdiction over a case challenged by a plea to the jurisdiction, the trial court must look solely to the pleadings. *University of Texas Medical Branch at Galveston v. Mullins*, 57 S.W.3d 653, 656 (Tex. App.—Houston [14th Dist.] 2001, no pet.). A trial court is required to examine evidence to determine whether it has subject-matter jurisdiction before proceeding with the case. Because a court must not act without determining whether it has subject-matter jurisdiction to do so, the court should hear evidence as necessary to determine the issue before proceeding with the case. However, inquiry into the substance of the claims presented by the plaintiff should not go further than is required to establish jurisdiction. *Bland Independent School District v. Blue*, 34 S.W.3d 547, 554 (Tex. 2000).

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§ 15.3 Suit in Federal Court

§ 15.3:1 Availability of Federal Jurisdiction

Federal jurisdiction may be established when there is diversity of citizenship between the litigants and the amount in controversy exceeds $75,000. 28 U.S.C. § 1332(a). Factors to consider in filing suit in federal court include venue and procedural rules and the status of the dockets. Comprehensive discussion of federal practice is beyond the scope of this manual, but a few important matters are discussed below.

§ 15.3:2 Pleadings

The plaintiff's initial pleading is called a complaint. Fed. R. Civ. P. 7(a). The ground for federal jurisdiction must affirmatively appear in the complaint. Fed. R. Civ. P. 8(a).

§ 15.3:3 Corporation Citizenship

A corporation is deemed a citizen of the state in which it is incorporated *and* of the state in which its principal place of business is located. *See* 28 U.S.C. § 1332(c)(1). Diversity jurisdiction, therefore, does not exist if either party is a corporation and the other party's domicile is in the same state with the corporation's principal place of business *or* its place of incorporation.

§ 15.3:4 Venue

28 U.S.C. § 1391 discusses venue generally and governs all civil actions brought in U.S. district courts, except as otherwise provided by law. *See* 28 U.S.C. § 1391(a)(1). Proper venue must be determined without regard to whether the action is local or transitory in nature, except as otherwise provided by law. 28 U.S.C. § 1391(a)(2).

A civil action based on diversity jurisdiction can be brought only in—

1. a judicial district in which any defendant resides, if all defendants reside in the state in which the district is located;
2. a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred or in which a substantial part of the property that is the subject of the action is situated; or
3. a judicial district in which any defendant is subject to personal jurisdiction with respect to the action, if there is no district in which the action may otherwise be brought.

28 U.S.C. § 1391(b).

A natural person, including an alien lawfully admitted for permanent residence in the United States, is deemed to reside in the judicial district in which that person is domiciled. 28 U.S.C. § 1391(c)(1).

> An entity with the capacity to sue and be sued in its common name under applicable law, whether or not incorporated, shall be deemed to reside, if a defendant, in any judicial district in which such defendant is subject to the court's personal jurisdiction with respect to the civil action in question and, if a plaintiff, only in the judicial district in which it maintains its principal place of business.

28 U.S.C. § 1391(c)(2). A defendant that does not reside in the United States may be sued in any judicial district, and the joinder of such a defendant must be disregarded in determining where the action may be brought with respect to other defendants. 28 U.S.C. § 1391(c)(3).

If a corporation is subject to personal jurisdiction in a state with more than one judicial district, the corporation is deemed to reside in any district in that state within which its contacts

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would be sufficient to subject it to personal jurisdiction if that district were a separate state. If there is no such district, the corporation is deemed to reside in the district in which it has the most significant contacts. 28 U.S.C. § 1391(d).

[Sections 15.4 through 15.10 are reserved for expansion.]

II. Venue

§ 15.11 Venue Generally

Venue is the place in which a plaintiff has a legal right to file suit regardless of the defendant's objections. In Texas, the primary venue statutes are found in chapter 15 of the Civil Practice and Remedies Code; however, there are numerous special venue statutes in various other Texas statutes. A court shall determine the venue of a suit based on the facts existing at the time the cause of action that is the basis of the suit accrued. Tex. Civ. Prac. & Rem. Code § 15.006. When one or more plaintiffs is joined in a suit, each must independently establish proper venue. Tex. Civ. Prac. & Rem. Code § 15.003(a); *American Home Products Corp. v. Clark*, 38 S.W.3d 92, 94 (Tex. 2000).

§ 15.12 Pleading Venue Facts

Venue facts should be pleaded to support the choice of venue because when properly pleaded, all venue facts are taken as true unless they are specifically denied by the adverse party. *Sanes v. Clark*, 25 S.W.3d 800, 803 (Tex. App.—Waco 2000, pet. denied) (citing *GeoChem Tech Corp. v. Verseckes*, 962 S.W.2d 541, 543 (Tex. 1998); Tex. R. Civ. P. 87(3)(a)). If the plaintiff's venue allegations are specifically denied, the plaintiff must support his pleading by prima facie proof, in the form of an affidavit complying with Tex. R. Civ. P. 87(3), that the cause of action accrued in the county of suit. Tex. R. Civ. P. 87(2)(b). No party, however, may ever be required for venue purposes to support the existence of a cause of action by prima facie proof. Tex. R. Civ. P. 87(2)(b), (3)(a).

§ 15.13 Mandatory or Permissive Venue Generally

"Proper venue" means venue as provided in the mandatory venue provisions contained in sections 15.001–.020 or by the permissive venue rules and the general venue rule when the mandatory rules do not apply, or by another statute prescribing mandatory venue. Mandatory venue provisions supersede the general venue rule. Tex. Civ. Prac. & Rem. Code § 15.001(b). If there is no mandatory venue then the permissive venue section may provide an alternative to the general venue rule. *See* Tex. Civ. Prac. & Rem. Code §§ 15.031–.039.

If the creditor has a choice of where to file suit, his attorney should consider such factors as travel expenses for counsel and witnesses, docket congestion, and how a local judge and jury will respond to the creditor, his counsel, and the nature of the claim asserted.

§ 15.14 Plaintiff's Choice of Venue

Venue may be proper in more than one county under the venue rules. *In re Henry*, 274 S.W.3d 185, 190 (Tex. App.—Houston [1st Dist.] 2008, orig. proceeding [mand. denied]) (op. on reh'g) (citing *GeoChem Tech Corp. v. Verseckes*, 962 S.W.2d 541, 544 (Tex. 1998)). In general, plaintiffs are allowed to choose venue first, and the plaintiff's choice of venue cannot be disturbed as

long as the suit is initially filed in a county of proper venue. *In re Henry*, 274 S.W.3d at 190 (citing *KW Construction v. Stephens & Sons Concrete Contractors, Inc.*, 165 S.W.3d 874, 879 (Tex. App.—Texarkana 2005, pet. denied); *Gerdes v. Kennamer*, 155 S.W.3d 541, 549 (Tex. App.—Corpus Christi 2004, no pet.); *Chiriboga v. State Farm Mutual Automotive Insurance Co.*, 96 S.W.3d 673, 678 (Tex. App.—Austin 2003, no pet.)).

A plaintiff does not lose the right to choose between two counties in which mandatory venue is proper by filing its first suit in a county in which venue was improper if the first suit is nonsuited before a decision on venue. The venue statutes do not say that the plaintiff may choose venue only once; they simply say that if the county chosen is not proper, the case must be transferred if a sufficient motion is filed and ruled on. *See GeoChem Tech Corp.*, 962 S.W.2d at 542 (citing Tex. Civ. Prac. & Rem. Code § 15.063).

§ 15.14:1 Multiple Defendants

If the plaintiff establishes proper venue against one defendant, venue is proper against all other defendants in all claims or actions arising out of the same transaction, occurrence, or series of transactions or occurrences. Tex. Civ. Prac. & Rem. Code § 15.005; *American Home Products Corp. v. Clark*, 38 S.W.3d 92, 94 (Tex. 2000). In a suit in which two or more defendants are joined, any action or omission by one defendant in relation to venue, including a waiver of venue by one defendant, does not impair or diminish the right of any other defendant to properly challenge venue. Tex. Civ. Prac. & Rem. Code § 15.0641.

§ 15.14:2 Multiple Claims

If the plaintiff properly joins two or more claims or causes of action arising from the same transaction, occurrence, or series of transactions or occurrences, and one of the claims or causes of action is governed by a mandatory venue provision, the mandatory venue of that claim or cause of action will control. Tex. Civ. Prac. & Rem. Code § 15.004. Rules for multiple plaintiffs and intervening plaintiffs can be found at Tex. Civ. Prac. & Rem. Code § 15.003. These rules are not discussed in this manual.

§ 15.14:3 Counterclaims, Cross-Claims, and Third-Party Claims on Venue

Venue of the main action shall establish venue of a counterclaim, cross-claim, or third-party claim properly joined under the Texas Rules of Civil Procedure or any applicable statute. Tex. Civ. Prac. & Rem. Code § 15.062(a). If an original defendant properly joins a third-party defendant, venue shall be proper for a claim arising out of the same transaction, occurrence, or series of transactions or occurrences by the plaintiff against the third-party defendant if the claim arises out of the subject matter of the plaintiff's claim against the original defendant. Tex. Civ. Prac. & Rem. Code § 15.062(b).

§ 15.15 Venue Rules

§ 15.15:1 General Venue Rule

The general venue rule is that suit shall be brought—

1. in the county in which all or a substantial part of the events giving rise to the claim occurred;
2. in the county of the defendant's residence at the time the cause of action accrued if the defendant is a natural person;
3. in the county of the defendant's principal office in Texas if the defendant is not a natural person; or

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4. if the first three provisions do not apply, in the county in which the plaintiff resided at the time of the accrual of the cause of action.

Tex. Civ. Prac. & Rem. Code § 15.002(a).

"Principal office" means a principal office of the corporation, unincorporated association, or partnership in this state in which the decision makers for the organization within this state conduct the daily affairs of the organization. The mere presence of an agency or representative does not establish a principal office. Tex. Civ. Prac. & Rem. Code § 15.001(a).

"Residence" requires (1) a fixed place of abode within the possession of the party; (2) occupied or intended to be occupied consistently over a substantial period of time; (3) that is permanent rather than temporary. *In re S.D.*, 980 S.W.2d 758, 760–61 (Tex. App.—San Antonio 1998, pet. denied) (citing *Snyder v. Pitts*, 150 Tex. 407, 241 S.W.2d 136, 140 (1951)). In meeting these requirements, Texas law is clear that an element of permanency is necessary before a party can be considered a resident of a particular county. *In re S.D.*, 980 S.W.2d at 761 (citing *Tieuel v. Southern Pacific Trans. Co.*, 654 S.W.2d 771, 774 (Tex. App.—Houston [14th Dist.] 1983, no writ)). For venue purposes, an individual may have more than one residence. *GeoChem Tech Corp. v. Verseckes*, 962 S.W.2d 541, 543–44 (Tex.1998) (citing *Snyder*, 241 S.W.2d at 140; *Rosales v. H.E. Butt Grocery Co.*, 905 S.W.2d 745, 748 (Tex. App.—San Antonio 1995, writ denied)).

§ 15.15:2 Mandatory Venue Provisions in Civil Practice and Remedies Code Chapter 15

The attorney should always review the numerous mandatory venue provisions found at Tex. Civ. Prac. & Rem. Code §§ 15.011–.020 and review any mandatory venue sections in applicable debt collection statutes to determine whether the nature of the suit or of the parties falls within the general rule or one of the provisions for mandatory venue. Some of the mandatory provisions found in Civil Practice and Remedies Code chapter 15 that may be applicable in debt collection are:

Land: Actions for recovery of real property or an estate or interest in real property, for partition of real property, to remove encumbrances from the title to real property, for recovery of damages to real property, or to quiet title to real property shall be brought in the county in which all or a part of the property is located. Tex. Civ. Prac. & Rem. Code § 15.011.

Landlord-Tenant: Except as provided by another statute prescribing mandatory venue, a suit between a landlord and a tenant arising under a lease shall be brought in the county in which all or a part of the real property is located. In this section, "lease" means any written or oral agreement between a landlord and a tenant that establishes or modifies the terms, conditions, or other provisions relating to the use and occupancy of the real property that is the subject of the agreement. Tex. Civ. Prac. & Rem. Code § 15.0115.

Injunction against Suit: Actions to stay proceedings in a suit shall be brought in the county in which the suit is pending. Tex. Civ. Prac. & Rem. Code § 15.012.

Injunction against Execution of Judgment: Actions to restrain execution of a judgment based on invalidity of the judgment or of the writ shall be brought in the county in which the judgment was rendered. Tex. Civ. Prac. & Rem. Code § 15.013.

Counties: An action against a county shall be brought in that county. Tex. Civ. Prac. & Rem. Code § 15.015.

Certain Political Subdivisions: Except as provided by a law not contained in this chapter,

an action against a political subdivision that is located in a county with a population of 100,000 or less shall be brought in the county in which the political subdivision is located. If the political subdivision is located in more than one county and the population of each county is 100,000 or less, the action shall be brought in any county in which the political subdivision is located. In this section, "political subdivision" means a governmental entity in this state, other than a county, that is not a state agency. The term includes a municipality, school or junior college district, hospital district, or any other special purpose district or authority. Tex. Civ. Prac. & Rem. Code § 15.0151.

Major Transaction: An action arising from a major transaction shall be brought in a county if the party against whom the action is brought has agreed in writing that a suit arising from the transaction may be brought in that county. Tex. Civ. Prac. & Rem. Code § 15.020(b). See section 15.15:6 below for information on major transactions.

§ 15.15:3 Mandatory Venue Provisions in Other Texas Statutes

An action governed by any other statute prescribing mandatory venue shall be brought in the county required by that statute. Tex. Civ. Prac. & Rem. Code § 15.016. The more commonly encountered venue provisions applicable to suits on debts are set out briefly in the following sections, but the attorney should remember that on occasion one of the venue provisions not discussed here may apply.

Receivership of Corporation: An action to have a receiver appointed for a corporation with property in this state shall be brought in the county in which the principal office of the corporation is located. Tex. Civ. Prac. & Rem. Code § 64.071.

Usury: A suit for the statutory penalties for usury is controlled by section 305.006(a)(1)–(5) of the Texas Finance Code, which states that such an action shall be brought in the county in which—

(1) the transaction was entered into;

(2) the usurious interest was charged or received;

(3) the creditor resides at the time of the cause of action, if the creditor is an individual;

(4) the creditor maintains its principal office, if the creditor is not an individual; or

(5) the obligor resides at the time of the accrual of the cause of action.

Tex. Fin. Code § 305.006(a)(1)–(5).

Arbitration:

(a) Except as otherwise provided by this section, a party must file the initial application:

(1) in the county in which an adverse party resides or has a place of business; or

(2) if an adverse party does not have a residence or place of business in this state, in any county.

(b) If the agreement to arbitrate provides that the hearing before the arbitrators is to be held in a county in this state, a party must file the initial application with the clerk of the court of that county.

(c) If a hearing before the arbitrators has been held, a party must file the initial application with

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the clerk of the court of the county in which the hearing was held.

(d) Consistent with Section 171.024, if a proceeding is pending in a court relating to arbitration of an issue subject to arbitration under an agreement before the filing of the initial application, a party must file the initial application and any subsequent application relating to the arbitration in that court.

Tex. Civ. Prac. & Rem. Code § 171.096.

Probate/Guardianship: Venue will be governed by Tex. Est. Code ch. 33 or Tex. Civ. Prac. & Rem. Code §§ 15.007, 15.031.

Trusts: Venue will be governed by Tex. Prop. Code § 115.002.

§ 15.15:4 Venue in Suit on Consumer Debt

In an action founded on a contractual obligation of the defendant to pay money arising out of or based on a consumer transaction for goods, services, loans, or extensions of credit intended primarily for personal, family, household, or agricultural use, suit by a creditor on or by reason of the obligation may be brought in either the county in which the defendant signed the contract or the county in which the defendant resides when the action is commenced. A consumer cannot waive this venue right in the contract. Tex. Civ. Prac. & Rem. Code § 15.035(b). In most such cases, filing in another county is a violation of the Texas Deceptive Trade Practices Act, unless the plaintiff did not know or have reason to know that the county in which suit was filed was not a proper county. Tex. Bus. & Com. Code § 17.46(b)(23).

Under the federal Fair Debt Collection Practices Act, an action brought by a debt collector must be brought in either the county in which the consumer signed the contract or the county in which the consumer resides when the action is commenced. 15 U.S.C. § 1692i(a)(2). Failure to file suit in a county of proper venue renders the debt collector liable for damages. 15 U.S.C. § 1692k. See part II. in chapter 2 of this manual.

§ 15.15:5 Venue in Breach of Contract (Nonconsumer)

In a breach of contract action, "the county in which all or a substantial part of the events or omissions took place" includes the county in which the contract was formed, was to be performed, or was allegedly breached. *See Krchnak v. Fulton*, 759 S.W.2d 524, 526 (Tex. App.—Amarillo 1988, writ denied); *see also* Tex. Civ. Prac. & Rem. Code § 15.002(a)(1) (general venue rule). There are generally two locations where venue may be proper in a suit on a written contract to perform an obligation in a particular county: (1) where the contract expressly names the county or a definite place in that county or (2) in the county where the defendant is domiciled. *WTFO, Inc. v. Braithwaite*, 899 S.W.2d 709, 716 (Tex. App.—Dallas 1995, no writ) (citing Tex. Civ. Prac. & Rem. Code § 15.035(a)). Therefore, a contract (such as a promissory note) may be sued on in the county designated therein for payment, even though the maker of the note is a resident of another county. This exception applies only in a case where the defendant agreed at the time he executed the instrument to perform his obligation in a particular place other than his place of residence. *WTFO, Inc.*, 899 S.W.2d at 716 (citing *Hibbler v. Walker*, 598 S.W.2d 19, 20 (Tex. Civ. App.—Texarkana 1980, no writ); *see also Texas Workers' Compensation Assigned Risk Pool v. Perry-Packard Co.*, 643 S.W.2d 202, 203 (Tex. App.—Austin 1982, no writ)). The place of performance for payment of a contract must be named specifically at the time the instrument was exe-

cuted to avoid the loss of venue under section 15.035(a). The ability to redesignate in writing the place of performance at some time in the future by appellant or any holder of the indebtedness makes the place of payment uncertain. Otherwise, leaving open a contract's term of place of performance at the time of execution of the contract would allow the holder at some future time to determine venue at its own will and pleasure. *WTFO, Inc.*, 899 S.W.2d at 716 (citing *Hibbler*, 598 S.W.2d at 20).

§ 15.15:6 Venue by Agreement

Major Transaction: An action arising from a major transaction shall be brought in a county if the party against whom the action is brought has agreed in writing that a suit arising from the transaction may be brought in that county. Tex. Civ. Prac. & Rem. Code § 15.020(b). "Major transaction" means a transaction evidenced by a written agreement under which a person pays or receives, or is obligated to pay or entitled to receive, consideration with an aggregate stated value equal to or greater than $1 million. The term does not include a transaction entered into primarily for personal, family, or household purposes, or to settle a personal injury or wrongful death claim, without regard to the aggregate value. Tex. Civ. Prac. & Rem. Code § 15.020(a). However, an action arising from a major transaction may not be brought in a county if (1) the party bringing the action has agreed in writing that an action arising from the transaction may not be brought in that county, and the action may be brought in another county of this state or in another jurisdiction; or (2) the party bringing the action has agreed in writing that an action arising from the transaction must be brought in another county of this state or in another jurisdiction, and the action may be brought in that other county, under this section or otherwise, or in that other jurisdiction. Tex. Civ. Prac. & Rem. Code § 15.020(c). Furthermore, these venue provisions do not apply to an action if (1) the agreement described by section 15.020 was unconscionable at the time that it was made; (2) the agreement regarding venue is voidable under chapter 272 of the Business and Commerce Code (relating to certain construction contracts); or (3) venue is established under a statute of this state other than this title.

Forum Selection Clauses: Although the terms are often used interchangeably and are often not used with precision, forum and venue are not synonymous. *Liu v. Cici Enterprises, LP*, 14-05-00827-CV, 2007 WL 43816, at *2 (Tex. App.—Houston [14th Dist.] Jan. 9, 2007, no pet.) (mem. op.). "Forum" generally refers to a sovereign or a state. *In re Great Lakes Dredge & Dock Co. L.L.C.*, 251 S.W.3d 68, 73 (Tex. App.—Corpus Christi 2008, orig. proceeding). Venue refers to the propriety of prosecuting, in a particular form, a suit on a given subject matter with specific parties, over which the forum must, necessarily, have subject-matter jurisdiction. *Scott v. Gallagher*, 209 S.W.3d 262, 264 (Tex. App.—Houston [1st Dist.] 2006, no pet.) (quoting *Gordon v. Jones*, 196 S.W.3d 376, 383 (Tex. App.—Houston [1st Dist.] 2006, no pet.). At common law, venue meant the neighborhood, place, or county in which the injury is declared to have been done or in fact declared to have happened. *In re Great Lakes Dredge & Dock Co.*, 251 S.W.3d at 73 (quoting *State v. Blankenship*, 170 S.W.3d 676, 681 (Tex. App.—Austin 2005, pet. ref'd) (quoting *Black's Law Dictionary* 1557 (6th ed. 1991)). In Texas, "venue" refers to the county in which suit is proper within the forum state. *In re Great Lakes Dredge & Dock Co.*, 251 S.W.3d at 73 (citing *Accelerated Christian Education, Inc. v. Oracle Corp.*, 925 S.W.2d 66, 73 (Tex. App.—Dallas 1996, no writ) *overruled in part on other grounds by In re Tyco Electronic Power Systems, Inc.*, No. 05-04-01808-CV, 2005 WL 237232; *Estrada v. State*, 148 S.W.3d 506, 508 (Tex. App.—El Paso 2004, no pet.)). Thus, a "forum" selection agreement is one that chooses another state or sovereign as the location for trial, whereas a "venue" selection agreement chooses a particular county or

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court within that state or sovereign. *In re Great Lakes Dredge & Dock Co.*, 251 S.W.3d at 73–74.

The distinction between a forum selection clause and a venue selection clause is critical. Under Texas law, forum selection clauses are enforceable unless shown to be unreasonable and may be enforced through a motion to dismiss. *Liu*, 2007 WL 43816, at *2 (citing *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 10, (1972); *Michiana Easy Livin' Country, Inc. v. Holten*, 168 S.W.3d 777, 793 (Tex. 2005)). In contrast, venue selection cannot be the subject of private contract unless otherwise provided by statute. *Liu*, 2007 WL 43816, at *2 (citing *Fleming v. Ahumada*, 193 S.W.3d 704, 712–13 (Tex. App.—Corpus Christi 2006, no pet.); *Bristol-Myers Squibb Co. v. Goldston*, 957 S.W.2d 671, 673–74 (Tex. App.—Fort Worth 1997, pet. dism'd by agr.)).

The burden of proof on a party challenging the validity of a forum selection clause is heavy. *In re Lyon Financial Services, Inc.*, 257 S.W.3d 228, 232 (Tex. 2008) (orig. proceeding) (per curiam). Forum selection clauses are presumptively enforceable, and there is a "heavy, but not impossible, burden of proof" to defeat application of the clauses. *Lyon*, 257 S.W.3d at 231 (quoting *In re AIU Insurance Co.*, 148 S.W.3d 109, 113 (Tex. 2004) (orig. proceeding)). A trial court abuses its discretion in refusing to enforce a forum selection clause unless the party opposing enforcement of the clause can clearly show that (1) enforcement would be unreasonable or unjust, (2) the clause is invalid for reasons of fraud or overreaching, (3) enforcement would contravene a strong public policy of the forum where the suit was brought, or (4) the selected forum would be seriously inconvenient for trial. *Lyon*, 257 S.W.3d at 232 (citing *AIU Insurance*, 148 S.W.3d at 112; *In re Automated Collection Technologies, Inc.*, 156 S.W.3d 557, 559 (Tex. 2004) (orig. proceeding) (per curiam)). Mandamus relief is available to enforce forum selection agreements because there is no adequate remedy by appeal when a trial court abuses its discretion by refusing to enforce a valid forum-selection clause that covers the dispute. *Lyon*, 257 S.W.3d at 231; *AIU Insurance*, 148 S.W.3d at 115–120.

§ 15.16 Transient Person

A transient person may be sued in any county in which he may be found. Tex. Civ. Prac. & Rem. Code § 15.039.

§ 15.17 Motion to Transfer Generally

Generally, a plaintiff has the first opportunity to fix venue in a proper county by filing suit in that county. The defendant may object to the plaintiff's venue choice by filing a motion to transfer venue. *In re Pepsico, Inc.*, 87 S.W.3d 787, 789 (Tex. App.—Texarkana 2002) (citing *In re Masonite Corp.*, 997 S.W.2d 194, 197 (Tex.1999) (orig. proceeding)).

§ 15.17:1 Objecting to Venue

A defendant must challenge improper venue or assert a mandatory venue provision by objecting to a plaintiff's venue choice through a motion to transfer venue filed concurrently with or before an answer. *See* Tex. Civ. Prac. & Rem. Code § 15.063. A motion objecting to improper venue may be in a separate instrument filed concurrently with or before the filing of the movant's first responsive pleading, or the motion may be combined with other objections and included in the movant's first responsive pleading. Tex. R. Civ. P. 86(2). The court, on motion filed and served concurrently with or before the filing of the answer, shall transfer an action to another county of proper venue if the county in which the action is pending is not a proper county as provided by this chapter. Tex. Civ. Prac. & Rem. Code § 15.063(1). An objection to improper venue is waived if not made by written motion filed before or concurrently with

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any other plea, pleading, or motion, except a special appearance motion provided for in rule 120a. Tex. R. Civ. P. 86(1).

However, as identified in the selections below, under certain circumstances, a written consent of the parties to transfer the case to another county may be requested at any time before trial, and a motion to transfer venue because an impartial trial cannot be had in the county where the action is pending may be asserted after an answer is on file. (See sections 15.17:2 and 15.17:3).

A motion to transfer venue must state—

1. that the action should be transferred to the specific county of proper venue and that such a transfer is requested;
2. that the action should be transferred because the county in which it is pending is not proper or because mandatory venue in another county is prescribed by one or more specific provisions, clearly designated; and
3. the legal and factual basis for the transfer.

Tex. R. Civ. P. 86(3). A party who seeks to transfer venue of the action to another specified county under the general rule, the mandatory venue rules, or the permissive venue rule has the burden to prove that venue is maintainable in the county to which transfer is sought. Tex. R. Civ. P. 87(2)(a), (b). Verification of the motion to transfer is not required. Tex. R. Civ. P. 86(3).

Because all properly pleaded venue facts must be taken as true unless specifically denied, the defendant's motion to transfer should specifically deny the venue facts pleaded in the original petition. In *Gonzalez v. Nielson*, a motion to transfer venue that specifically denied that the cause of action arose in the county of suit and generally denied that any permissive exception to the general venue statute applied was found insufficient because it did not specifically deny that the contract was payable in the county of suit. 770 S.W.2d 99, 102 (Tex. App.—Corpus Christi 1989, writ denied).

Several older cases have held that a district court does not have the power to change the venue of a suit on its own motion. Such an order, if entered, is void, and the proper method to prevent its enforcement is to enjoin the clerk of the court from execution of the transfer order. *See, e.g., Wight v. Moss*, 87 S.W.2d 837, 838 (Tex. Civ. App.—Dallas 1935, no writ).

§ 15.17:2 Impartial Trial Cannot Be Had

Texas Civil Practice and Remedies Code section 15.063(2) requires the court, on motion filed and served concurrently with or before the filing of the answer, to transfer the action to another county of proper venue if "an impartial trial cannot be had in the county in which the action is pending." This can be contrasted with the procedure for a motion based on impartial trial, which is found in rules 257–259 of the Texas Rules of Civil Procedure.

§ 15.17:3 Written Consent of Parties

Section 15.063(3) of the Civil Practice and Remedies Code and Tex. R. Civ. P. 86(1) permit the parties to file a written consent to transfer venue to another county of proper venue at any time. *See also* Tex. Civ. Prac. & Rem. Code § 15.002; *Farris v. Ray*, 895 S.W.2d 351, 352 (Tex. 1995). Transfer is discretionary with the court if the written consent of the parties is filed after the answer has been filed. However, the Civil Practice and Remedies Code uses mandatory language: "The court, on motion filed and served concurrently with or before the filing of the answer, shall transfer an action to another county of proper venue if . . . written consent of the parties . . . is filed at any time." Tex. Civ. Prac. & Rem. Code § 15.063. In contrast, rule

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87(2)(c) provides that the motion "shall be determined in accordance with Rule 255," and rule 255 states that on written consent of the parties filed with the court, the court may transfer the trial to the court in "any other county having jurisdiction of the subject matter of such suit."

The words "at any time" used in section 15.063 conflict with the broader provision that requires the filing of the motion to transfer before or concurrently with the answer; however, it is reasonable to assume that the intent of section 15.063 is to give the parties the absolute right to select another county of proper venue before the court becomes involved in the action, whereas once the court is involved, the court should have the discretion to deny a written consent of the parties in the interest of judicial efficiency.

A motion to transfer is required to satisfy the mandatory transfer provision of section 15.063. However, the rules refer to filing a "motion" and to filing a "written consent"; therefore, a formal motion to transfer under the discretionary transfer provision of rule 255 may not be required.

§ 15.17:4 Statutory Forum Non Conveniens

Section 15.002(b) of the Civil Practice and Remedies Code provides a *forum non conveniens* transfer of venue. On the defendant's motion (filed and served either before or concurrently with the answer), a court of proper venue may transfer an action to any other county of proper venue, if the court finds that—

1. maintenance of the action in the county of suit would work an injustice to the movant considering the movant's economic and personal hardship;
2. the balance of interests of all the parties predominates in favor of the action being brought in the other county; and
3. the transfer of the action would not work an injustice to any other party.

Tex. Civ. Prac. & Rem. Code § 15.002(b).

§ 15.17:5 Waiver

A party may expressly waive venue rights by clear, overt acts evidencing an intent to waive or impliedly, by taking some action inconsistent with an intent to pursue the venue motion. *Toliver v. Dallas Fort Worth Hospital Council*, 198 S.W.3d 444, 446–47 (Tex. App.—Dallas 2006, no pet.) (motion to transfer venue not waived when defendant filed motion before filing any other pleading that invoked court's jurisdiction; defendant also did not waive motion to transfer venue by filing in federal court) (citing *Carlile v. RLS Legal Solutions, Inc.*, 138 S.W.3d 403, 406 (Tex. App.—Houston [14th Dist.] 2004, no pet.) (defendant never obtained hearing on venue motion and moved for new trial after losing at summary judgment without pursuing ruling on venue motion; defendant's motion for new trial was construed as "affirmative action" by which he submitted to jurisdiction of trial court); *Grozier v. L-B Sprinkler & Plumbing Repair*, 744 S.W.2d 306, 309–10 (Tex. App.—Fort Worth 1988, writ denied) (filing a motion for new trial when venue motion was pending was "an act seeking to invoke the authority of the court whose authority" defendant challenged). Generally, these actions invoke the judicial power and jurisdiction of the courts. *Toliver*, 198 S.W.3d at 47 (citing *Gentry v. Tucker*, 891 S.W.2d 766, 768 (Tex. App.—Texarkana 1995, no writ) (motion will be waived if the defendant who is filing it, without first insisting upon its disposition, tries the case on the merits)); *Grozier*, 744 S.W.2d at 310; *McGrede v. Coursey*, 131 S.W.3d 189, 196 (Tex. App.—San Antonio 2004, no pet.) (holding that party invoked the trial court's jurisdiction and waived any objection to venue by filing an answer to petition alleging conversion of estate assets before he filed motion to transfer venue). However, filing

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a notice of removal to federal court before filing a motion to transfer in state court does not waive the motion. *Toliver*, 198 S.W.3d at 47 (citing *Antonio v. Marino*, 910 S.W.2d 624, 630 (Tex. App.—Houston [14th Dist.] 1995, no writ)). See section 15.17:14 below for amending motions to transfer venue.

Although a trial court may rule on a venue motion without a hearing, the movant has a duty to request a hearing to urge the motion within a reasonable time; failure to do so may result in a waiver. *See Grozier*, 744 S.W.2d at 311; *Whitworth v. Kuhn*, 734 S.W.2d 108, 111 (Tex. App.—Austin 1987, no writ) (per curiam) (in dicta, court indicated the trial court could have refused a motion to transfer because the movant waited more than a year after filing his motion to transfer venue before requesting a hearing on that motion); *see also* Tex. R. Civ. P. 87(1) ("the determination of a motion to transfer venue shall be made promptly by the court . . ."). In *Accent Energy Corp. v. Gillman*, 824 S.W.2d 274, 276–77 (Tex. App.—Amarillo 1992, writ denied), no waiver resulted in a case in which a motion was filed and a hearing was immediately set but other parties moved for continuance and thereafter continued to file amended pleadings, resulting in a three-year delay on the hearing.

A court is specifically required to make its determination of the motion to transfer promptly and in a reasonable time before trial. Tex. R. Civ. P. 87(1).

§ 15.17:6 Filing, Service, and Hearing

A copy of any instrument filed pursuant to rule 86 must be served in accordance with rule 21a. Tex. R. Civ. P. 86(5); *see* Tex. R. Civ. P. 21a. "Any instrument" includes the motion to transfer venue, any amendments or a response to the motion, a reply to the response, any supporting affidavits, and any attachments, including discovery products. *See* Tex. R. Civ. P. 86.

The movant has a duty to request a setting on the motion to transfer and provide each party with at least forty-five days' notice of the hearing. Any response or opposing affidavits must be filed at least thirty days before the hearing, and any reply to the response and additional affidavits must be filed at least seven days before the hearing. Leave of court must be obtained to alter these requirements. Tex. R. Civ. P. 87(1). There are special provisions for motions by parties joined after a venue hearing. See section 15.17:15 below.

§ 15.17:7 Basis of Determination

All venue challenges are determined by the court, without a jury. Tex. R. Civ. P. 87(4). The court must determine the motion to transfer venue on the basis of the pleadings, any stipulations made by and between the parties, and properly filed affidavits, attachments, and discovery products. Tex. Civ. Prac. & Rem. Code § 15.064(a); Tex. R. Civ. P. 87(3)(a), (b), 88. Deposition transcripts, responses to requests for admissions, answers to interrogatories, and other discovery products containing information relevant to venue may be considered by the court in making a venue determination if they are attached to or incorporated by reference in an affidavit. Tex. R. Civ. P. 88. Such an affidavit may be made by a party, a witness, or an attorney who has knowledge of the discovery. Tex. R. Civ. P. 88. A similar discovery provision is set forth for motions to transfer that are based on the ground that an impartial trial cannot be had. *See* Tex. R. Civ. P. 88(c), 257–59.

§ 15.17:8 Plaintiff's Response

A response to the defendant's motion to transfer is not required except that (1) when a venue fact pleaded in the petition is specifically denied by the defendant, the plaintiff must make prima facie proof of that fact and (2) when a venue fact is properly pleaded in the defendant's motion,

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the plaintiff must specifically deny it or it will be taken as true. Tex. R. Civ. P. 86(4), 87(3)(a).

Prima facie proof requires an affidavit to be attached to the response. *See* Tex. R. Civ. P. 87(3)(a). Verification of a response is not required. Tex. R. Civ. P. 86(4). Except on leave of court, any response or opposing affidavits must be filed at least thirty days before the hearing on the motion to transfer. Tex. R. Civ. P. 87(1). See forms 15-1 (Plaintiff's Response to Motion to Transfer Venue) and 15-2 (Affidavit).

§ 15.17:9 Movant's Reply to Response

The party seeking transfer of venue may reply to any response made to his motion, although he is not required to do so. Tex. R. Civ. P. 87(1). The reply may be accompanied by additional affidavits supporting the motion to transfer. Tex. R. Civ. P. 87(1). Except on leave of court, any reply and any additional affidavits must be filed at least seven days before the hearing on the motion to transfer. Tex. R. Civ. P. 87(1). A reply gives the movant the opportunity to make prima facie proof of venue facts specifically denied in the nonmovant's response. *See* Tex. R. Civ. P. 86(4), 87(3)(a).

§ 15.17:10 Discovery

Discovery shall not be abated or affected by pendency of a motion to transfer. Tex. R. Civ. P. 88.

§ 15.17:11 Burden of Proof

The plaintiff seeking to maintain venue in the county of suit must adequately plead in the original petition and in his response to the motion to transfer those venue facts that support his choice of venue. *See* Tex. R. Civ. P. 87(2)(a). In addition, he must supply prima facie proof of venue facts the defendant has specifically denied, and he must specifically deny the venue facts pleaded by the defendant. Any properly pleaded venue facts not specifically denied will be taken as true. Tex. R. Civ. P. 87(3)(a).

The plaintiff may seek to maintain venue under the general venue rule, a mandatory or permissive venue provision, or the law governing venue in multiple claims. Tex. R. Civ. P. 87(2)(a); *see* Tex. Civ. Prac. & Rem. Code §§ 15.002, 15.011–.020, 15.031–.033, 15.035, 15.038–.039, 15.062.

If the plaintiff adequately pleads and makes prima facie proof that venue is proper in the county of suit, the case will not be transferred unless the adverse party establishes that an impartial trial cannot be had where the action is pending or establishes a ground of venue in a different county by prima facie proof of a mandatory venue exception. Tex. R. Civ. P. 87(3)(c).

Any venue facts pleaded by the defendant seeking transfer must be taken as true unless specifically denied by the plaintiff. Once denied, the movant's facts must be supported by prima facie proof. Tex. R. Civ. P. 87(3)(a). The defendant must prove through his pleadings, affidavits, and attachments that venue is maintainable in the county to which transfer is sought on the basis of the general venue rule, a mandatory or permissive exception, or the law governing venue in multiple claims. Tex. R. Civ. P. 87(2)(a).

If a motion to transfer is based on the parties' filed written consent, specific venue facts should be alleged that will establish that the court to which transfer is sought has jurisdiction of the subject matter of the suit. *See* Tex. R. Civ. P. 87(2)(c), 255.

§ 15.17:12 Prima Facie Proof

To make prima facie proof it is necessary to first properly plead the venue facts and then support them by affidavit or affidavits. Affidavits may be accompanied by "duly proved" attachments, or in some cases unsworn declarations. See sec-

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tions 8.3:2, 8.12:6, 19.17 and 19.19 in this manual for requirements of affidavits and unsworn declarations. Affidavits must be made on personal knowledge, set forth specific facts "as would be admissible in evidence," and show affirmatively that the affiant is competent to testify. Tex. R. Civ. P. 87(3)(a); *see also Cox Engineering, Inc. v. Funston Machine & Supply Co.*, 749 S.W.2d 508, 512 (Tex. App.—Fort Worth 1988, no writ) (error not preserved if no affidavits filed).

Generally, in determining venue, the trial court may consider only the pleadings and affidavits. The court may consider relevant information in depositions, responses to requests for admission, answers to interrogatories, and other discovery products attached to or incorporated by reference in an affidavit of a party, a witness, or an attorney who has knowledge of such discovery. Tex. R. Civ. P. 88; *Cox Engineering, Inc.*, 749 S.W.2d at 512.

§ 15.17:13 Proof of Merits Not Required

The venue statute and the rules distinguish between proof concerning the merits of a case and proof concerning the situs of the accrual of a cause of action. In all venue hearings, no factual proof concerning the merits of the case is required to establish venue. The court must determine venue questions from the pleadings and affidavits. Tex. Civ. Prac. & Rem. Code § 15.064(a). The existence of a cause of action, if pleaded properly, is established as alleged by the pleadings. Tex. R. Civ. P. 87(2)(b)(3)(a). But if the allegations are specifically denied, the plaintiff must make prima facie proof that the cause of action, or a part thereof, accrued in the county of suit. Tex. R. Civ. P. 87(3)(a).

§ 15.17:14 Amending the Motion to Transfer

A timely filed motion to transfer venue may be amended to cure defects in the original motion if the amended motion is filed before the trial court rules on the original motion; the properly filed amended motion relates back to and supersedes the original motion to transfer venue. *In re Pepsico, Inc.*, 87 S.W.3d 787, 794 (Tex. App.—Texarkana 2002, orig. proceeding).

§ 15.17:15 Subsequently Added Parties

Later Added Defendant: If venue has been sustained as against a motion to transfer or if an action has been transferred to a proper county in response to a motion to transfer, no further motions to transfer shall be considered regardless of whether the movant was a party to the prior proceedings or was added as a party subsequent to the venue proceedings, unless the motion to transfer is based on the grounds that an impartial trial cannot be had under Tex. R. Civ. P. 257–259 (unfair trial for local prejudice) or on the ground of mandatory venue, provided that such claim was not available to the other movant or movants. Tex. R. Civ. P. 87(5).

Intervening Party: An intervening party has the status of a plaintiff and is in no better position than the plaintiff to contest the venue of the action. *First Heights Bank, FSB v. Gutierrez*, 852 S.W.2d 596, 618 (Tex. App.—Corpus Christi 1993, writ denied) (citing *Campbell v. Galbreath*, 441 S.W.2d 297 (Tex. Civ. App.—Waco 1969, writ dism'd w.o.j.)).

§ 15.17:16 Procedure When Motion to Transfer Venue Sustained

If a motion to transfer venue is sustained, the case is not dismissed but is transferred to the proper court. Tex. R. Civ. P. 89.

§ 15.17:17 Costs and Fees

If a motion to transfer venue is sustained, the costs incurred before the time the suit is filed in the transferee court are taxed against the plaintiff. Tex. R. Civ. P. 89. The clerk of the trans-

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feree court must mail notification to the plaintiff or his attorney that transfer is completed and that the filing fee in the proper court is due and payable within thirty days of the mailing of the notification. If the filing fee is not timely paid, any court of the transferee county to which the case might have been assigned may dismiss the case on its own motion or the motion of a party without prejudice to the refiling of the case. Tex. R. Civ. P. 89.

The plaintiff's attorney should ask the clerk of the original court to ascertain the costs payable in that court before transfer and indicate on the transferred file that he is the plaintiff's attorney of record. The attorney should ask the clerk of the transferee court for the cause number of the transferred case and the specific court the case is assigned to, if appropriate.

§ 15.18 Postvenue Proceedings

§ 15.18:1 Order Granting Motion to Transfer Venue is Res Judicata

Once a venue determination has been made, that determination is conclusive as to those parties and claims. Because venue is then fixed in any suit involving the same parties and claims, it cannot be overcome by a nonsuit and subsequent refiling in another county. *In re Team Rocket, L.P.*, 256 S.W.3d 257, 260 (Tex. 2008) (orig. proceeding) (citing *H.H. Watson Co. v. Cobb Grain Co.*, 292 S.W. 174, 177 (Tex. Comm'n App. 1927, judgm't adopted). However, if the lawsuit is nonsuited prior to a determination on the motion to transfer, the plaintiff will not be precluded from choosing a proper county for venue. *GeoChem Tech Corp. v. Verseckes*, 962 S.W.2d 541, 542–43 (Tex. 1998) (contrasting the current motion to transfer venue procedure with old plea-of-privilege procedure). The venue statutes do not say that the plaintiff may choose venue only once; they simply say that if the county chosen is not proper, the case must be transferred if a sufficient motion is filed *and ruled on*. *GeoChem*, 962 S.W.2d at 544 (citing Tex. Civ. Prac. & Rem. Code § 15.063) (emphasis added).

§ 15.18:2 Rehearing

Tex. R. Civ. P. 87 provides that if an action has been transferred to a proper county in response to a motion to transfer, no further motions to transfer shall be considered. *In re Chester*, 309 S.W.3d 713, 716 (Tex. App.—Houston [14th Dist.] 2010, no pet.) (citing *In re Team Rocket, L.P.*, 256 S.W.3d 257, 260 (Tex. 2008) (orig. proceeding); Tex. R. Civ. P. 87(5)). Although a trial court's ruling transferring venue is interlocutory for the parties and not subject to immediate appeal, the order is final for the transferring court as long as it is not altered within the court's thirty-day plenary jurisdiction. *In re Chester*, 309 S.W.3d at 716 (citing *Team Rocket*, 256 S.W.3d at 260; *In re Southwestern Bell Telephone Co.*, 35 S.W.3d 602, 605 (Tex. 2000) (orig. proceeding) (per curiam)). A court retains plenary jurisdiction to correct its error for thirty days after the order of transfer is signed. *In re Chester*, 309 S.W.3d at 716 (citing *HCA Health Services of Texas, Inc. v. Salinas*, 838 S.W.2d 246, 248 (Tex. 1992) (orig. proceeding) (per curiam)). The thirty-day deadline for plenary power after granting a motion to transfer will not be extended by any motions to reconsider. *See In re Chester*, 309 S.W.3d at 716–718; *In re Darling Homes*, No. 05-05-00497-CV, 2005 WL 1390378 (Tex. App.—Dallas June 14, 2005, orig. proceeding [mand. denied]) (mem. op.).

§ 15.18:3 Mandamus

Although mandamus is not available to review the propriety of venue in the county of suit in cases outside the ambit of section 15.0642 of the Texas Civil Practice and Remedies Code, it is properly employed to correct improper venue procedure. Tex. Civ. Prac. & Rem. Code Ann. § 15.0642. *In re Shell Oil Co.*, 128 S.W.3d 694,

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696 (Tex. App.—Beaumont 2004, orig. proceeding) (trial court refused to transfer suit to previously-determined county of venue) (citing *In re Missouri Pacific R.R. Co.*, 998 S.W.2d 212, 215 n. 18 (Tex. 1999) (it is presumed that there is no adequate remedy for failure to enforce mandatory venue statute; plaintiffs failed to present prima facie evidence that venue was proper in county where suit was brought; burden shifted to defendant to prove venue was proper in its chosen county; and defendant established venue in its chosen county); *In re Masonite Corp.*, 997 S.W.2d 194, 198 (Tex. 1999) (orig. proceeding) (trial court transferred cases to improper counties after plaintiffs conceded venue was improper and defendant offered prima facie proof of proper county); *HCA Health Services of Texas, Inc. v. Salinas*, 838 S.W.2d 246, 248 (Tex. 1992) (orig. proceeding) (per curiam) (mandamus proper against judge who ordered case to be prosecuted to final judgment in his court after first court mistakenly transferred venue of case then vacated its order); *Union Carbide Corp. v. Moye*, 798 S.W.2d 792, 793 (Tex. 1990) (orig. proceeding) (denial of continuance to supplement record with affidavits and discovery products pertinent to motion for change of venue was abuse of discretion); *Henderson v. O'Neill*, 797 S.W.2d 905, 905 (Tex. 1990) (orig. proceeding) (per curiam) (trial court abused its discretion in failing to comply with applicable forty-five-day notice requirement before ruling on motion to transfer); *see also In re Chester*, 309 S.W.3d 713, 716–17 (Tex. App.—Houston [14th Dist.] 2010, no pet.) (trial court abused discretion when it vacated order to transfer venue after its plenary power to modify or vacate the order had expired under Tex. R. Civ. P. 329b(b)).

In exceptional circumstances—such as when a trial judge makes no attempt to follow rule 87 and acknowledges deviation from required procedure—mandamus will issue to correct improper venue procedure. *In re Shell Oil Co.*, 128 S.W.3d 696 (citing *Henderson*, 797 S.W.2d at 905; *Dorchester Master Ltd. Partnership v. Anthony*, 734 S.W.2d 151 (Tex. App.—Houston [1st Dist.] 1987, orig. proceeding); *Stephens v. Culver*, 1996 WL 404037, 1996 Tex. App. LEXIS 3048 (Tex. App.—Houston [1st Dist.] 1996)). Mandamus was appropriate to enforce the notice requirements in a venue proceeding. *See Henderson*, 797 S.W.2d at 905. Mandamus was also proper to enforce the prohibition against a second venue determination. *See Dorchester Master Ltd. Partnership*, 734 S.W.2d at 152.

§ 15.18:4 Generally No Interlocutory Appeal

Once the trial court has ruled on proper venue, that decision cannot generally be the subject of an interlocutory appeal. Once a venue determination has been made, that determination is conclusive as to those parties and claims. *In re Team Rocket, L.P.*, 256 S.W.3d 257, 259–60 (Tex. 2008) (orig. proceeding); *see* Tex. Civ. Prac. & Rem. Code § 15.064(a); Tex. R. Civ. P. 87(6). Because venue is then fixed in any suit involving the same parties and claims, it cannot be overcome by a nonsuit and subsequent refiling in another county. *Team Rocket*, 256 S.W.3d at 260 (citing *H.H. Watson Co. v. Cobb Grain Co.*, 292 S.W. 174, 177 (Tex. Comm'n App. 1927)).

§ 15.18:5 Interlocutory Appeal in Limited Circumstances with Multiple Plaintiffs

However, in a suit in which there is more than one plaintiff, whether the plaintiffs are included by joinder, by intervention, because the lawsuit was begun by more than one plaintiff, there is the potential for an interlocutory appeal. *See* Tex. Civ. Prac. & Rem. Code § 15.003. Each plaintiff must, independently of every other plaintiff, establish proper venue. If a plaintiff cannot independently establish proper venue, that plaintiff's part of the suit, including all of that plaintiff's claims and causes of action, must

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be transferred to a county of proper venue or dismissed, as is appropriate, unless that plaintiff, independently of every other plaintiff, establishes that: (1) joinder of that plaintiff or intervention in the suit by that plaintiff is proper under the Texas Rules of Civil Procedure, (2) maintaining venue as to that plaintiff in the county of suit does not unfairly prejudice another party to the suit, (3) there is an essential need to have that plaintiff's claim tried in the county in which the suit is pending, and (4) the county in which the suit is pending is a fair and convenient venue for that plaintiff and all persons against whom the suit is brought. Tex. Civ. Prac. & Rem. Code § 15.003(a).

An interlocutory appeal may be taken of a trial court's determination under Tex. Civ. Prac. & Rem. Code § 15.003(a) that (1) a plaintiff did or did not independently establish proper venue or (2) a plaintiff that did not independently establish proper venue did or did not establish the items prescribed by subsections (a)(1)–(4). Tex. Civ. Prac. & Rem. Code § 15.003(b).

An interlocutory appeal permitted by Tex. Civ. Prac. & Rem. Code § 15.003(b) must be taken to the court of appeals district in which the trial court is located under the procedures established for interlocutory appeals. The appeal may be taken by any party that is affected by the trial court's determination. The court of appeals shall (1) determine whether the trial court's order is proper based on an independent determination from the record and not under either an abuse of discretion or substantial evidence standard and (2) render judgment not later than the 120th day after the date the appeal is perfected. Tex. Civ. Prac. & Rem. Code § 15.003(c).

An interlocutory appeal under Tex. Civ. Prac. & Rem. Code § 15.003(b) has the effect of staying the commencement of trial in the trial court pending resolution of the appeal. Tex. Civ. Prac. & Rem. Code § 15.003(d).

§ 15.18:6 Appeal after Trial

On appeal from the trial on the merits, if venue was improper it shall in no event be harmless error and shall be reversible error. *Wilson v. Texas Parks & Wildlife Department*, 886 S.W.2d 259, 261 (Tex. 1994) (citing Tex. Civ. Prac. & Rem. Code § 15.064(b)). In determining whether venue was or was not proper, the appellate court shall consider the entire record, including the trial on the merits. *Wilson*, 886 S.W.2d at 262; *see also Ruiz v. Conoco, Inc.*, 868 S.W.2d 752, 757 (Tex. 1993). The appellate court is obligated to conduct an independent review of the entire record to determine whether venue was proper in the ultimate county of suit. *Ruiz*, 868 S.W.2d at 758. However, a court's ruling or decision to grant or deny a transfer for *forum non conveniens* is not grounds for appeal or mandamus and is not reversible error. *See* Tex. Civ. Prac. & Rem. Code § 15.002(b), (c).

§ 15.19 Venue in Justice Courts

See the appendix to this manual for venue rules in justice courts. *See also* Tex. Civ. Prac. & Rem. Code ch. 15, subch. E.

§ 15.20 Venue in Federal Court

"Venue" refers to the geographic specification of the proper court or courts for the litigation of a civil action that is within the subject-matter jurisdiction of the U.S. district courts in general and does not refer to any grant or restriction of subject-matter jurisdiction providing for a civil action to be adjudicated only by the district court for a particular district or districts. 28 U.S.C. § 1390(a). The venue statutes for federal court litigation are found in 28 U.S.C. §§ 1390–1413. Some of the more relevant sections are discussed herein, but a full review of the issue is not included in this manual. 28 U.S.C. § 1391 discusses venue generally and governs all civil actions brought in U.S. district courts, except as otherwise provided by law. *See* 28 U.S.C.

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§ 1391(a)(1). Proper venue must be determined without regard to whether the action is local or transitory in nature, except as otherwise provided by law. 28 U.S.C. § 1391(a)(2).

VENUE IN GENERAL.

A civil action may be brought in

(1) a judicial district in which any defendant resides, if all defendants are residents of the State in which the district is located;

(2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated; or

(3) if there is no district in which an action may otherwise be brought as provided in this section, any judicial district in which any defendant is subject to the court's personal jurisdiction with respect to such action.

28 U.S.C. § 1391(b).

RESIDENCY.

For all venue purposes

(1) a natural person, including an alien lawfully admitted for permanent residence in the United States, shall be deemed to reside in the judicial district in which that person is domiciled;

(2) an entity with the capacity to sue and be sued in its common name under applicable law, whether or not incorporated, shall be deemed to reside, if a defendant, in any judicial district in which such defendant is subject to the court's personal jurisdiction with respect to the civil action in question and, if a plaintiff, only in the judicial district in which it maintains its principal place of business; and

(3) a defendant not resident in the United States may be sued in any judicial district, and the joinder of such a defendant shall be disregarded in determining where the action may be brought with respect to other defendants.

28 U.S.C. § 1391(c).

RESIDENCY OF CORPORATIONS IN STATES WITH MULTIPLE DISTRICTS.

For purposes of venue under this chapter, in a State which has more than one judicial district and in which a defendant that is a corporation is subject to personal jurisdiction at the time an action is commenced, such corporation shall be deemed to reside in any district in that State within which its contacts would be sufficient to subject it to personal jurisdiction if that district were a separate State, and, if there is no such district, the corporation shall be deemed to reside in the district within which it has the most significant contacts.

28 U.S.C. § 1391(d).

CHANGE OF VENUE.

(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought or to

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any district or division to which all parties have consented.

(b) Upon motion, consent or stipulation of all parties, any action, suit or proceeding of a civil nature or any motion or hearing thereof, may be transferred, in the discretion of the court, from the division in which pending to any other division in the same district. Transfer of proceedings in rem brought by or on behalf of the United States may be transferred under this section without the consent of the United States where all other parties request transfer.

(c) A district court may order any civil action to be tried at any place within the division in which it is pending.

(d) Transfers from a district court of the United States to the District Court of Guam, the District Court for the Northern Mariana Islands, or the District Court of the Virgin Is-lands shall not be permitted under this section. As otherwise used in this section, the term "district court" includes the District Court of Guam, the District Court for the Northern Mariana Islands, and the District Court of the Virgin Islands, and the term "district" includes the territorial jurisdiction of each such court.

28 U.S.C. § 1404.

CURE OR WAIVER OF DEFECTS.

(a) The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.

(b) Nothing in this chapter shall impair the jurisdiction of a district court of any matter involving a party who does not interpose timely and sufficient objection to the venue.

(c) As used in this section, the term "district court" includes the District Court of Guam, the District Court for the Northern Mariana Islands, and the District Court of the Virgin Islands, and the term "district" includes the territorial jurisdiction of each such court.

28 U.S.C. § 1406.

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Form 15-1

This form contains sample allegations relating to venue situations frequently encountered in collections litigation. For a discussion of the response to motion to transfer venue, see section 15.17:1 in this chapter. Venue is discussed generally in part II. in this chapter.

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

Plaintiff's Response to Motion to Transfer Venue

1. *Parties.* [**Name of plaintiff**], Plaintiff, files this Response to Motion to Transfer Venue filed herein by [**name of defendant**], Defendant, and as grounds would show the Court the following:

> Paragraph 2. is an example only; the actual allegations must be drafted to fit the fact situation.

2. *Facts.* This action is based on a written contract between Plaintiff and Defendant. Under its express terms, [**add the specific contractual terms that fix venue in a specific county, e.g.,** Defendant was obligated to pay $5,000 to Plaintiff in Austin, Travis County, Texas, on June 17, 2018]. Defendant defaulted on the obligation, as alleged in Plaintiff's original petition on file in this cause. The petition is adopted and incorporated by reference into this response. The allegations in the petition are true and correct.

3. *Denials.* Plaintiff denies that this suit is not filed in the proper county. Plaintiff further denies that [mandatory/permissive] venue of this action is set in [**county named by the defendant**] County by [**statutory authority cited by the defendant**]. [**Continue with specific denials of venue facts asserted by the defendant in his motion to transfer venue.**]

4. *Venue Facts.* [**Set out venue facts that are specifically denied by the defendant in his motion to transfer venue and that are to be established by prima facie proof through the affidavits and attachments attached to this motion.**]

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Continue with the following.

Because of the foregoing facts, venue in this cause is proper in [**county**] County, Texas, pursuant to [**statutory authority, e.g.,** section 15.035 of the Texas Civil Practice and Remedies Code].

5. *Prayer.* Plaintiff prays that Defendant's Motion to Transfer Venue be in all things overruled and that 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**]

Include a certificate of service (form 19-1). Attach opposing affidavit(s) (form 15-2) and attachments, if any. Prepare the order (form 15-3) and file it with the response to motion to transfer venue.

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Form 15-2

This affidavit is for use with the response to motion to transfer venue (form 15-1 in this chapter) to make prima facie proof of venue facts specifically denied by the defendant. The affidavit must be made on personal knowledge, set forth specific facts as would be admissible in evidence, and show affirmatively that the affiant is competent to testify. Tex. R. Civ. P. 87(3)(a). Note that discovery products to be considered by the court in making the venue determination should be attached to or incorporated by reference in an affidavit of a party, a witness, or an attorney who has knowledge of such discovery. Tex. R. Civ. P. 88.

The attorney should not swear to the truth of the facts on which the opposing affidavit is based. See section 19.17:3 in this manual.

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

Affidavit

[Opposing Transfer]

BEFORE ME, the undersigned authority, personally appeared [**name of affiant**], who swore on oath that the following facts are true:

"My name is [**name of affiant**]. I am of sound mind and capable of making this affidavit. I am personally acquainted with the facts herein stated, and they are true and correct. [**Include if applicable:** I am authorized to make this affidavit.]"

State specific facts that would be admissible in evidence showing how the affiant has personal knowledge of the matters stated herein and setting forth his evidence.

____

[**Name of affiant**]
Affiant

SIGNED under oath before me on ______________________________.

____

Notary Public, State of Texas

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Form 15-3

This form should be prepared and filed with the plaintiff's response to the defendant's motion to transfer venue. See form 15-1 in this chapter for a response to the motion to transfer venue.

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

Order Overruling Motion to Transfer Venue

At the hearing on Defendant's Motion to Transfer Venue and Plaintiff's response in this cause, the venue issues were tried by the Court, which found that the Motion to Transfer Venue of **[name of defendant]**, Defendant, should be overruled.

It is therefore ORDERED that Defendant's Motion to Transfer Venue is overruled and that all costs incurred in this venue hearing are taxed against **[name of defendant]**, Defendant.

SIGNED on ______________________________.

____
JUDGE PRESIDING

APPROVED AS TO FORM:

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

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____

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

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Chapter 16

Service of Process

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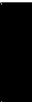

Chapter 16

Service of Process

§ 16.1 Citation

§ 16.1:1 Citation Generally

The citation notifies the defendant that he has been sued. The return is the report of service on the defendant. *See* Tex. R. Civ. P. 99, 107. The clerk must retain a copy of the citation in the court's file. Tex. R. Civ. P. 99(a). The return may be a separate document or may be endorsed on or attached to the citation. Tex. R. Civ. P. 107(a).

Before submitting a default judgment, verify that the citation and the return are both file-stamped with the date of filing. The party requesting citation shall be responsible for obtaining service of the citation and a copy of the petition. Tex. R. Civ. P. 99(a). The citation informs the defendant of the suit and advises when, where, and how to answer. The purpose of citation is to give the court jurisdiction over the parties and to provide notice to the defendant that it has been sued, by a particular party asserting a particular claim, so that due process will be served and that the defendant will have an opportunity to appear and defend the action.

Strict compliance with the rules for service of citation is required. "There are no presumptions in favor of valid issuance, service, and return of citation . . . " *Primate Construction, Inc. v. Silver*, 884 S.W.2d 151, 152 (Tex. 1994) (citing *Uvalde Country Club v. Martin Linen Supply Co.*, 690 S.W. 2d 884, 885 (Tex. 1985); *McKanna v. Edgar*, 388 S.W.2d 927, 929–30 (Tex. 1965)); *Wilson v. Dunn*, 800 S.W.2d 833, 836–37 (Tex. 1990); *Master Capital Solutions Corp. v. Araujo*, 456 S.W.3d 636, 639 (Tex. App.—El Paso 2015, no pet.). A one-day error in the citation's stated date of filing of petition resulted in reversal of default judgment in *Montgomery v. Hitchcock*, No. 03-1400643-CV, 2016 WL 3068219, at *2–3 (Tex. App.—Austin May 25, 2016, no pet.). *But see Bashir v. Khader*, No. 01-12-00260-CV, 2012 WL 4742769, at *2 (Tex. App.—Houston [1st Dist.] Oct. 4, 2012, no pet.) (mem. op.) ("Although [defendant] complained of clerical errors in the citation, he had the burden to prove that the errors misled him and caused him to fail to answer the suit"; such seems contrary to the strict compliance requirement of *Primate*).

On the filing of a petition, the clerk issues and delivers the citation as directed by the requesting party. If requested, separate or additional citations will also be issued by the clerk. Tex. R. Civ. P. 99(a). The issuance of a citation includes preparing, dating, attesting to, and delivering it to an officer or other appropriate person for service. *See London v. Chandler*, 406 S.W.2d 203, 204 (Tex. 1966).

The citation is invalid if it is amended without the trial court's approval. *See* Tex. R. Civ. P. 118; *In re I.G.*, No. 03-13-00765-CV, 2015 WL 4448836, at *3 (Tex. App.—Austin July 17, 2015, pet. denied); *Suave v. State*, 638 S.W.2d 608, 610 (Tex. App.—Dallas 1982, pet. ref'd). If the citation is inaccurate, an additional, accurate citation can simply be issued. Tex. R. Civ. P. 99(a). As with all stages of service of process, precision is required. The citation generally cannot be issued or served on Sunday; see Tex. R. Civ. P. 6 for exceptions.

The citation should not mislead. In one case, the supreme court voided a default judgment when the citation stated that the sheriff or constable

"shall deliver" citation to the defendant in person but the defendant was instead served by certified mail. The court found the discrepancy could mislead the defendant into believing that subsequent personal service would occur. *Smith v. Commercial Equipment Leasing Co.*, 678 S.W.2d 917, 917–18 (Tex. 1984).

§ 16.1:2 Citation Requirements

Style: The citation must be styled "The State of Texas." Tex. R. Civ. P. 15, 99(b)(1).

Signature and Seal: The citation must be signed by the clerk under seal of the court. Tex. R. Civ. P. 99(b)(2). *Midstate Environmental Services, LP v. Peterson*, 435 S.W.3d 287, 290 (Tex. App.—Waco 2014, no pet.) (lack of seal was "glaring defect"; also, citation was not directed to defendant). *But see Consolidated American Industries, Inc. v. Greit-Amberoaks, L.P.*, No. 03-07-00173-CV, 2008 WL 5210925, at *2 (Tex. App.—Austin Dec. 12, 2008, no pet.) (mem. op.) (seal requirement met when citation is signed by deputy of district court as "issued and given under my hand and seal of said court"). Note that per Tex. R. App. P. 34.5(f), "on any party's motion or its own initiative, the appellate court may direct the trial court clerk to send it any original document."

Location of Court: The citation must contain the court's name and location. Tex. R. Civ. P. 99(b)(3). *Faaborg v. Allcorn*, No. 11-05-00365-CV, 2006 WL 3238241, at *2 (Tex. App.—Eastland Nov. 9, 2006, no pet.) (mem. op.) ("County Court at Law #2, Williamson County, Texas" properly stated the name and location of court—though address not stated). See also Tex. R. Civ. P. 99(11), requiring court clerk's address.

Date of Filing Petition: The citation must state the date of filing of the petition. Tex. R. Civ. P. 99(b)(4); *Montgomery v. Hitchcock*, No. 03-1400643-CV, 2016 WL 3068219, at *2–3 (Tex. App.—Austin May 25, 2016, no pet.) (one-day error was fatal defect); *In re J.T.O.*, No. 04-07-00241-CV, 2008 WL 139295, at *1 (Tex. App.—San Antonio Jan. 16, 2008, no pet.) (mem. op.) (wrong date was fatal error) (citing *Mansell v. Insurance Co. of the West*, 203 S.W.3d 499, 501 (Tex. App.—Houston 2006, no pet.); *Hance v. Cogswell*, 307 S.W.2d 277, 278, 280 (Tex. Civ. App.—Austin 1957, no writ) (incomplete filing date); *Garza v. Garza*, 223 S.W.2d 964 (Tex. Civ. App.—San Antonio 1949, no writ) (incomplete filing date)).

Date of Issuance: The citation must state the date of issuance. Tex. R. Civ. P. 99(b)(5). The failure to do so, however, will not affect the validity of the default judgment unless harm is demonstrated. *Higginbotham v. General Life & Accident Insurance Co.*, 796 S.W.2d 695, 697 (Tex. 1990) (citing *London v. Chandler*, 406 S.W.2d 203 (Tex. 1966)). The suit must be on file when the citation is issued. *McGraw-Hill, Inc. v. Futrell*, 823 S.W.2d 414, 417 (Tex. App.—Houston [1st Dist.] 1992, writ denied) (citing *Moorehead v. Transportation Bank*, 62 S.W.2d 184, 185 (Tex. Civ. App.—Amarillo 1933, no writ)).

File Number: The citation must show the file number. Tex. R. Civ. P. 99(b)(6); *In re S.B.S.*, 282 S.W.3d 711, 714 (Tex. App.—Amarillo 2009, pet. denied) (citing *Durham v. Betterton*, 14 S.W. 1060, 1060–61 (1891); *Martinez v. Wilber*, 810 S.W.2d 461, 463 (Tex. App.—San Antonio 1991, writ denied) (erroneous file number is fatal error).

Names of Parties: The citation must show the names of the parties. Tex. R. Civ. P. 99(b)(7). *See Union Pacific Corp. v. Legg*, 49 S.W.3d 72, 77–79 (Tex. App.—Austin 2001, no pet.) ($50 million judgment reversed because citation named Union Pacific Railroad Company, when Union Pacific Corporation was the named defendant); *Mantis v. Resz*, 5 S.W.3d 388, 390–91 (Tex. App.—Fort Worth 1999, pet. denied) *overruled in part on other grounds by Sheldon v.*

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Emergency Medicine Consultants, I, P.A., 43 S.W.3d 701, 702 n.2 (Tex. App.—Fort Worth 2001, no pet.) (petition and citation naming defendant Michael Mantis sufficient, though defendant's name was Michael Mantas).

Directed to Defendant: The citation must be directed to the defendant, Tex. R. Civ. P. 99(b)(8). A citation directed to defendant and the sheriff or constable is sufficient. *Barker CATV Construction, Inc. v. Ampro, Inc.*, 989 S.W.2d 789, 792–93 (Tex. App.—Houston [1st Dist.] 1999, no pet.). While the citation may, and in some cases must, be served on an agent, it is invalid if it is directed to the agent rather than the principal. *See ISO Production Management 1982, Ltd. v. M&L Oil & Gas Exploration, Inc.*, 768 S.W.2d 354, 356 (Tex. App.—Waco 1989, no writ) (citation directed to president of limited partnership's corporate general partner) (citing *Stafford Construction Co., Inc. v. Martin*, 513 S.W.2d 667, 668–70 (Tex. Civ. App.—El Paso 1975, no writ)).

Name and Address of Plaintiff's Attorney: The citation must include the name and address of the plaintiff's attorney; otherwise the plaintiff's address should be included. Tex. R. Civ. P. 99(b)(9).

Time in Which to Answer: The citation must state the time in which the Texas Rules of Civil Procedure require defendant to file a written answer. Tex. R. Civ. P. 99(b)(10).

Court Clerk's Address: The citation must contain the address of the clerk. Tex. R. Civ. P. 99(b)(11).

Default Judgment Warning: The citation "shall notify the defendant that in case of failure of defendant to file an answer, judgment by default may be rendered for the relief demanded in the petition. The citation shall direct the defendant to file a written answer to the plaintiff's petition on or before 10:00 A.M. on the Monday next after the expiration of twenty days [fourteen days in justice court; *see* Tex. R. Civ. P. 502.5(d)] after the date of service thereof. The requirement of subsections 10 and 12 of this section shall be in the form set forth in section c of this rule." Tex. R. Civ. P. 99(b)(12). See the next paragraph.

Required Notice Pursuant to Tex. R. Civ. P. 99(c): This rule requires that the citation include the following notice: "You have been sued. You may employ an attorney. If you or your attorney do not file a written answer with the clerk who issued this citation by 10:00 A.M. on the Monday next following the expiration of twenty days after you were served this citation and petition, a default judgment may be taken against you." Tex. R. Civ. P. 99(c). See Tex. R. Civ. P. 501.1(c) for notice in justice courts.

Petition Copies: The plaintiff must provide sufficient copies for use in serving parties to be served. Tex. R. Civ. P. 99(d).

Plaintiff May Prepare: The plaintiff or plaintiff's attorney may prepare the citation. It should be presented to the clerk for signing and affixing a seal to same. Tex. Civ. Prac. Rem. Code § 17.027; Tex. R. Civ. P. 99(b)(2).

Statement of Inability to Afford Payment of Court Costs (Formerly Pauper's Oath): If service of process is requested in a county other than in the county of suit, the clerk must indicate on the citation if a statement of inability to afford payment of court costs has been filed. If a statement has been filed, the sheriff or constable must execute the service without demanding payment. Tex. R. Civ. P. 126.

§ 16.2 Kinds of Service

There are three kinds of service:

1. Personal Service—This is delivery of the citation and petition to the defendant in person or to an authorized rep-

resentative of a corporate defendant or other entity; see section 16.3 below.

2. Substituted or Alternate Service—This is service on someone other than the named defendant or service by leaving the citation and petition at the defendant's usual place of business; see section 16.7.

3. Constructive Service—This is citation by publication or service by publication. Because it is constructive, not actual service, it is not a favored method of service. It is discussed at section 16.16. When a defendant's identity is known, service by publication is generally inadequate. *In re E.R.*, 385 S.W.3d 552, 560 (Tex. 2012).

Some form of service must be accomplished. Even if the defendant has actual notice of the suit, lack of proper service may void a default judgment. *Wilson v. Dunn*, 800 S.W.2d 833, 836–37 (Tex. 1990); *Deanne v. Deanne*, 689 S.W.2d 262, 263 (Tex. App.—Waco 1985, no writ). The plaintiff must exercise extreme diligence in the issuance and service of citation if the lawsuit was filed close to the deadline for the applicable statute of limitation. The mere filing of a suit, without diligence in effecting service, will not toll limitations. *Ashley v. Hawkins*, 293 S.W.3d 175, 179 (Tex. 2009); *Murray v. San Jacinto Agency, Inc.*, 800 S.W.2d 826, 830 (Tex. 1990); *Gant v. DeLeon*, 786 S.W.2d 259, 260 (Tex. 1990) (per curiam). Diligence is rarely proven in these cases. *See* Mark P. Blendon, *Service of Process and Default Judgments*; State Bar of Texas 15th Annual Collections & Creditors' Rights Course 6 (2017).

§ 16.3 Personal Service

As to who may serve process, see Tex. R. Civ. P. 103 and section 16.6 below. A defendant should be served in person whenever possible. This is the preferred method of service. Alternate forms of service are not usually permitted unless personal service is impractical. Personal service may be made by any person authorized to serve citation and other notices under Tex. R. Civ. P. 103 by—

1. delivering to the defendant, in person, a true copy of the citation, with the petition attached and the date of delivery endorsed on it, to the defendant in person, or

2. mailing a true copy of the citation, with petition attached, to the defendant by registered or certified mail, return receipt requested.

Tex. R. Civ. P. 106(a). No one who is a party or who is interested in the outcome of the suit may serve process. Tex. R. Civ. P. 103. A nonresident or a resident defendant who is temporarily out of the state can be served in the sister state by "any disinterested person who is not less than eighteen years of age, in the same manner as provided in Rule 106." Tex. R. Civ. P. 108. A party in a foreign country may be served according to the provisions of Tex. R. Civ. P. 108a. Service on a business entity is discussed beginning at section 16.11 below.

The manner of service must strictly comply with the Texas Rules of Civil Procedure. *Smith v. Commercial Equipment Leasing Co.*, 678 S.W.2d 917, 918 (Tex. 1984) (actual manner of service—certified mail—conflicted with terms of citation, which specified personal service only).

§ 16.4 Service by Private Process Server

The party requesting citation is responsible for obtaining service of citation and petition. Tex. R. Civ. P. 99(a). The attorney should consider selecting an experienced certified process server to aid in obtaining proper service. A creditor's

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rights attorney can benefit from regularly using a capable, professional process server.

Generally, it is not necessary to rely on a constable or sheriff to serve citation. A process server may be authorized by court order to serve citation. The court may order service by any person eighteen years old or older, as long as that person is neither a party nor interested in the outcome of the litigation. *See* Tex. R. Civ. P. 103. The Texas Supreme Court appoints the commissioners of the Judicial Branch Certification Commission (JBCC), which oversees certification and licensing of Texas process servers, guardians, court reporters, and court interpreters. A list of over 3,000 certified process servers and a process server complaint form can be found at the Process Server Certification link at **www.txcourts.gov/jbcc**. The telephone number for the JBCC is (512) 475-4368.

A process server certified under order of the Texas Supreme Court must include his identification number and the expiration date of his certification in his return of service. Tex. R. Civ. P. 107(b)(10). *See also* Tex. Civ. Prac. Rem. Code § 17.030(b)(2)(J). The return must be signed by the authorized person serving or attempting to serve the citation, and, if that person is not a sheriff, constable, or clerk of the court, the return must either be verified or signed under penalty of perjury. Tex. R. Civ. P. 107(e). See Tex. R. Civ. P. 107(e) for the statement that must be included in a return signed under penalty of perjury.

Service by registered or certified mail, if requested, must be made by the clerk of the court in which the case is pending. Tex. R. Civ. P. 103.

§ 16.5 Service by Officer or Process Server

Pursuant to Tex. R. Civ. P. 103, most process can be served by a private process server. See section 16.4 above. But some documents must be served by an officer: "[O]nly a sheriff or constable may serve a citation in an action of forcible entry and detainer, 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." Tex. R. Civ. P. 103. For service of writs of garnishment, see Tex. R. Civ. P. 663 ("The sheriff or constable . . . shall immediately [serve garnishee]").

Service by publication should be made only by an officer or court clerk. *See* Tex. R. Civ. P. 116. Often, a private process server can effect service more quickly than a constable or sheriff. Officers are often busy handling criminal matters and other emergencies. The plaintiff's attorney may request that the clerk send documents to be served directly to the private process server, constable, sheriff, or back to the attorney. Having the citation sent to the attorney is recommended because the attorney or his staff can check the documents for accuracy before forwarding them for service. This method provides an opportunity for the attorney to ask the person serving process to send a draft of the proposed return to the attorney. This allows the attorney to verify before filing that the return is precise, as it must be. If additional instructions are needed, they can be provided. This procedure provides a more personal contact between the attorney and the person serving process.

Sheriffs and constables are not restricted to service in their own counties. Citation and other notices "may be served anywhere by (1) any sheriff or constable or other person authorized by law or, (2) by any person authorized by law or by written order of the court who is not less than eighteen years of age." Tex. R. Civ. P. 103. Tex. Loc. Gov't Code § 86.021(d) provides that a constable may execute process anywhere in the county in which his precinct is located or in a contiguous county, "[r]egardless of the Texas Rules of Civil Procedure," but the constable

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may not retain a fee for serving civil process. There is no statute governing where a sheriff may serve process. The Local Government Code provides that the sheriff "shall execute all process and precepts directed to the sheriff by legal authority." Tex. Loc. Gov't Code § 85.021(a). See also section 16.4 above.

§ 16.6 Procedure for Service

Substituted service on individuals is discussed at section 16.7 below. For service on business entities through the secretary of state, see section 16.11:2.

§ 16.6:1 Involvement of Attorney and Staff

The procedure recommended in this manual calls for the creditor's attorney to be more involved in service of process than is customary in most other kinds of litigation. The attorney is responsible for proper service. *See* Tex. R. Civ. P. 99(a). This additional work is warranted because it helps ensure that service is accomplished correctly. Also, the procedure will be more efficient because it should avoid time-consuming corrective measures that might be required or having an additional citation issued and properly served.

A precise return is required. *Insurance Co. of Pennsylvania v. Lejeune*, 297 S.W.3d 254, 256 (Tex. 2009) (mem. op.) (clerk failed to state hour of receipt on return as required by Tex. R. Civ. P. 16 and 105; reversed and remanded). Strict compliance with applicable statutory provisions and the court's orders regarding issuance and service of citation is required to support a default judgment. Virtually any deviation will be sufficient to set aside a default judgment. *See U.S. Bank National Association as Trustee for SROF-2013-M4 Remic Trust I v. TFHSP LLC Series 6481*, 487 S.W.3d 715, 718 (Tex. App.—Fort Worth 2016, no pet.) (citing *McKanna v. Edgar*, 388 S.W.2d 927, 929–30 (Tex. 1965)). Failure to strike through inapplicable form language may invalidate service. *See Primate Construction, Inc. v. Silver*, 884 S.W.2d 151, 152 (Tex. 1994) (form language recited that defendant was served with original, instead of amended petition; fatal defect).

§ 16.6:2 Citation to Server

It is recommended that in *every* case, the attorney request the clerk to send the citation to the attorney's office. This procedure allows the attorney to confirm that the citation satisfies all the requirements of Tex. R. Civ. P. 99. If the citation is not precise, the attorney should consider requesting a new citation and pointing out the issue. The clerk is to provide additional citations on request. Tex. R. Civ. P. 99(a). Amending a citation or return based on Tex. R. Civ. P. 118 is not recommended, as the rule is vague. Once a correct citation is in hand, the attorney can then directly contact the server or officer when forwarding the citation, so that he can provide specific information about the defendant's location and request that a draft return be sent to the attorney prior to filing. This procedure also allows the attorney to monitor service more efficiently; see section 16.6:3 below.

§ 16.6:3 Service of Citation

When service has been accomplished, the answer day should be calculated (see section 16.17 below) and calendared. The attorney should ask the person serving process to send a draft return to the attorney before filing the return. The attorney should confirm that the return is precise, including that the correct party was served, that the capacity of the party served is shown if appropriate, and so forth. See section 16.8. The attorney should particularly scrutinize the service documents if substituted service or service on an agent was used. The return must precisely comply with Tex. R. Civ. P. 107, which was amended effective in 2012 to include many more specific requirements than previously. *See*

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Tex. R. Civ. P. 107(a); Texas Supreme Court, *Final Approval of Amendments to Texas Rules of Civil Procedure 99 et al.*, Misc. Docket No. 11-9250 (Dec. 12, 2011); 75 Tex. B.J. 56; *see also* Acts 2011, 81st Leg., R.S., ch. 245, § 1 (H.B. 962), eff. Jan. 1, 2012. On confirmation of same, the server should sign and file the return. The return may be, but is not required to be, electronically filed. Tex. R. Civ. P. 107(g). Processing the return through the law office removes the need to check it at the courthouse and lessens the likelihood of a challenge to its sufficiency. A date-stamped copy of the return should be e-mailed or delivered to the plaintiff's attorney. Especially with e-filing, confirm that the return itself is stamped with date of filing. The record must establish that the return was on file ten days, excluding date of filing and date of judgment, before a default judgment can be granted. *See* Tex. R. Civ. P. 107(h).

If the server is unable to serve the citation, the attorney may request that the server file it with the court. Additional citations shall be issued by the clerk on request. Tex. R. Civ. P. 99(a). See section 16.6:4.

§ 16.6:4 Alias or Pluries Citation

Citations do not expire under Texas law. Officers, however, will typically return an unserved citation to the clerk or plaintiff's attorney after several unsuccessful service attempts have been made. Unless the first citation is defective, it should still be valid for service.

If the original citation has been returned unserved to the clerk, the plaintiff's attorney may request that a new citation be issued pursuant to Tex. R. Civ. P. 99(a). The first new citation issued may be denoted an "alias" citation; the second, a "pluries" citation; a subsequent citation, a "second pluries citation" and so forth. Issuance of an alias or other subsequent citation requires payment of an additional fee.

There is no requirement that a new citation be issued when substituted service is sought. *See* Tex. R. Civ. P. 106(b).

§ 16.6:5 Service by Certified or Registered Mail

Service of citation may be made by registered or certified mail, return receipt requested. The court clerk mails the citation, with a copy of the petition attached. Tex. R. Civ. P. 103, 106. The primary problem with service of citation by certified or registered mail is that there is no way to compel the defendant to legibly sign for the letter; he may refuse delivery, or sign illegibly. It is best to send certified mail, restricted to the addressee only, though the signature problems persist. Restricted delivery is required in justice court. Tex. R. Civ. P. 501.2(b)(2).

The signature on the return receipt (green card) must be that of the defendant or his authorized agent for service, unless a Tex. R. Civ. P. 106(b) order authorizes substituted service by mail. See section 16.6:6; *American Universal Insurance Co. v. D.B.&B., Inc.*, 725 S.W.2d 764, 765, 767 (Tex. App.—Corpus Christi 1987, writ ref'd n.r.e.) (person who signed was not authorized agent); *Pharmakinetics Laboratories, Inc. v. Katz*, 717 S.W.2d 704, 706 (Tex. App.—San Antonio 1986, no writ) (return receipt insufficient when addressed to defendant's agent but signed by unidentified person). The return of service by mail must meet all the requirements governing the return of personal service and must contain the return receipt with the addressee's signature. Tex. R. Civ. P. 107(c); *see Metcalf v. Taylor*, 708 S.W.2d 57, 58–59 (Tex. App.—Fort Worth 1986, no writ) (return failed to show either when citation was served or manner of service and was not signed by officer); *Melendez v. John R. Schatzman, Inc.*, 685 S.W.2d 137, 138 (Tex. App.—El Paso 1985, no writ). The return need not state the actual date of delivery, however, if the postmark on the return receipt is clear. *Nelson v. Remmert*, 726 S.W.2d

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171, 172 (Tex. App.—Houston [14th Dist.] 1987, writ ref'd n.r.e.).

§ 16.6:6 Substituted Service by Mail

Substituted service by mail was approved by the supreme court in *State Farm Fire & Casualty Co. v. Costley*, 868 S.W.2d 298, 299 (Tex. 1993) (per curiam). *Costley* illustrates that mail service is best made in conjunction with a motion, affidavit, and substitute service order, pursuant to Tex. R. Civ. P. 106(b). With such an order, one may avoid the need for a mail receipt with addressee's signature otherwise required by Tex. R. Civ. P. 107(c). *See Singh v. Trinity Marketing & Distribution Co.*, 397 S.W.3d 257, 263–64 (Tex. App.—El Paso 2013, no pet.) (citing *Costley*, 868 S.W.2d at 299); *Rowsey v. Matetich*, No. 03-08-00727-CV (Tex. App.—Austin Aug. 12, 2010, no pet.) (mem. op.) (citing *Costley*, 868 S.W.2d at 299, and approving substituted service by mail without certified mail receipt). *But see Titus v. Southern County Mutual Insurance*, No. 03-05-00310-CV, 2009 WL 2196041, at * (Tex. App.—Austin July 24, 2009, no pet.) (mem. op.) (noting that the supreme court has made clear that there is a heavy burden to support substituted service by first-class mail). Therefore, the substituted service affidavit should specifically report the attempts at personal service and result of each attempt. If defendant evades service, the attorney should state the facts establishing same. Build a strong record to justify mail service, and comply with Tex. R. Civ. P. 106(b). See section 16.7 for discussion of substituted service.

§ 16.7 Substituted Service on Individual

For information on substituted service by mail, see section 16.6:6 above. For more about substituted service on business entities, see section 16.11:2.

If personal service cannot be effected, substituted service may be used. Tex. R. Civ. P. 106(b) states:

> Upon motion *supported by affidavit* stating the location of the defendant's usual place of business or usual place of abode or other place where the defendant can probably be found and stating specifically the facts showing that service has been attempted under either (a)–(1) or (a)–(2) at the location named in such affidavit but has not been successful, the court may authorize service
>
> 1. by leaving a true copy of the citation, with a copy of the petition attached, with anyone over sixteen years of age at the location specified in such affidavit, or
> 2. in any other manner that the affidavit or other evidence before the court shows will be reasonably effective to give the defendant notice of the suit.

Tex. R. Civ. P. 106(b) (emphasis added).

Note that such substituted service requires a motion; a factual affidavit stating defendant's usual place of business, usual place of abode, or other place defendant can probably be found, with details of prior service attempts; and a court order authorizing substituted service.

§ 16.7:1 Effect of Substituted Service

Substituted service can survive the "I did not receive it" plea. In *Mixon v. Nelson*, the court signed a substituted service order allowing service by posting to front door of residence. Because the return confirmed service was pursuant to order, it was sufficient to establish service. Defendant's denial of receipt of the posted citation and petition is not evidence that process

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was not properly posted and raises no fact issue as to substituted service. *Mixon v. Nelson*, No. 03-15-00287-CV, 2016 WL 4429936, at *3 (Tex. App.—Austin, August 19, 2016, no pet.) (mem. op.) (citing *State Farm Fire & Casualty Co. v. Costley*, 868 S.W.2d 298, 298–99 (Tex. 1993) (per curiam)). Though not required by most orders, consider mailing additional copy of the documents to defendant by certified and first class mail. If a new trial motion is filed claiming nonreceipt, mailed copies may reassure the court that the plaintiff not only had defendant properly served per the court's order, but made additional efforts to give defendant notice of the suit.

§ 16.7:2 Affidavit Requirements

Process servers and officers often have their own "rule 106" affidavits. Caution should be exercised in using their affidavits. The validity of a future default judgment probably depends on the diligence used in attempting personal service and the specificity and accuracy of the affidavit affirming diligence before substituted service is sought. *See Medford v. Salter*, 747 S.W.2d 519, 520 (Tex. App.—Corpus Christi 1988, no writ). Failure to secure the affidavit voids any attempt at substituted service and any judgment based on that service. *Wilson v. Dunn*, 800 S.W.2d 833, 836 (Tex. 1990).

If the affidavit is vague, it may be insufficient. See *Hubicki v. Festina*, 226 S.W.3d 405, 408 (Tex. 2007) (per curiam) (affidavit failed to establish that alternative service at one of defendant's two residence addresses was reasonably calculated to provide defendant with notice in time to answer and defend); *Torres v. Haynes*, 432 S.W.3d 370, 372 (Tex. App.—San Antonio 2014, no pet.) (absence of motion supported by affidavit compelled reversal). *See* form 16-1.

Tex. R. Civ. P. 106 does not require that both personal service and service by mail be attempted before substituted service is sought. *Harrison v. Dallas Court Reporting College, Inc.*, 589 S.W.2d 813, 815 (Tex. Civ. App.—Dallas 1979, no writ). There is also no requirement that the service be attempted at both the defendant's residential and business addresses. *Pratt v. Moore*, 746 S.W.2d 486, 488–89 (Tex. App.—Dallas 1988, no writ). A specific showing of what attempts were made to serve the defendant must appear in the affidavit, however, and failure to show the specific attempts will render the substituted service invalid. *See Medford*, 747 S.W.2d at 520. The affidavit must also state that service was attempted at the location of the defendant's usual place of business or usual place of abode or other place where the defendant can probably be found. *See* Tex. R. Civ. P. 106(b); *Garrels v. Wales Transportation, Inc.*, 706 S.W.2d 757, 759 (Tex. App.—Dallas 1986, no writ).

§ 16.7:3 Need for Strict Compliance with Order

The substituted service order must be followed strictly. *Smith v. Commercial Equipment Leasing Co.*, 678 S.W.2d 917, 918 (Tex. 1984); *Dolly v. Aethos Communications Systems*, 10 S.W.3d 384, 388–89 (Tex. App.—Dallas 2000, no pet.); *Vespa v. National Health Insurance Co.*, 98 S.W.3d 749, 752 (Tex. App.—Fort Worth 2003, no. pet.) (return failed to state that Tex. R. Civ. P. 106 order was posted at front door with citation and petition as required by order); *Becker v. Russell*, 765 S.W.2d 899, 901 (Tex. App.—Austin 1989, no writ) (same); *Hurd v. D.E. Goldsmith Chemical Metal Corp.*, 600 S.W.2d 345 346 (Tex. Civ. App.—Houston [1st Dist.] 1980, no writ) (return failed to state that address at which papers were left was defendant's usual place of business).

Service on the defendant's agent, unless the agent is affirmatively shown to be the defendant's agent for service of process, will not suffice. *Encore Builders v. Wells*, 636 S.W.2d 722, 723 (Tex. App.—Corpus Christi 1982, no writ). Service on the defendant's attorney, without

explicit authorization, does not constitute effective service. The court can give this explicit authorization under Tex. R. Civ. P. 106(b) if the court finds that this service will be reasonably effective to give the defendant notice of the suit. *See Leach v. City National Bank of Laredo*, 733 S.W.2d 578, 580 (Tex. App.—San Antonio 1987, no writ).

See forms 16-1 and 16-9 through 16-11 for forms for substituted service.

§ 16.8 Return of Service

Before the return is filed, the attorney should review a draft to verify that it meets the requirements of applicable law and will support a default judgment. The return must precisely comply with the many specific requirements of Tex. R. Civ. P. 107, which was amended effective in 2012. *See* Tex. R. Civ. P. 107(a). A person who knowingly or intentionally falsifies a return of service may be prosecuted for tampering with a governmental record as provided by chapter 37 of the Texas Penal Code. Tex. Civ. Prac. & Rem. Code § 17.030(d).

The court may allow process or proof of service to be amended. *See* Tex. R. Civ. P. 118. The rule is vague; the better practice is to have a new citation issued and served, and proper return filed. The process must be endorsed with the hour and date the officer or other authorized person received it, the manner in which he executed it, and the time and place the process was served; it must be signed officially by the officer or authorized person. Process must be executed and returned "without delay." Tex. R. Civ. P. 16, 105.

The requirements for a return include:

1. The officer or authorized person must complete a return of service that may, but need not, be endorsed on or attached to the citation. Tex. R. Civ. P. 107(a). *See also* Tex. Civ. Prac. & Rem. Code § 17.030(b)(1)(A).

2. The return, along with any document to which it is attached, must include—

   a. the cause number and case name;

   b. the court in which the case is filed;

   c. a description of what was served;

   d. the date and time the process was received for service;

   e. the person or entity served;

   f. the address served;

   g. the date of service or attempted service;

   h. the manner of delivery of service or attempted service;

   i. the name of the person who served or attempted to serve the process; and

   j. if the person who served or attempted to serve the process is a process server certified under order of the Texas Supreme Court, his identification number and the expiration date of his certification.

   Tex. R. Civ. P. 107(b). *See also* Tex. Civ. Prac. & Rem. Code § 17.030(b)(2).

3. The return must include a description of what was served. Tex. R. Civ. P. 107(b)(3); *In re J.B.*, No. 02-15-00040-CV, 2015 WL 9435961, at *3 (Tex. App.—Fort Worth Dec. 23, 2015, no pet.) (mem. op.).

4. If the defendant is a corporation or partnership, the return must show the name of the individual to whom the citation and petition were delivered and that person's title or capacity. *See*

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Cox Marketing, Inc. v. Adams, 688 S.W.2d 215, 218 (Tex. App.—El Paso 1985, no writ). The title and capacity of recipient of process may be otherwise established in the court record.

5. If the citation was served by mail under rule 106, the return must contain the return receipt (green card), signed by the addressee. Tex. R. Civ. P. 107(c).

6. If the citation was not served, the return must show the diligence used by the officer or authorized person to execute the citation, the cause of failure to execute it, and where the defendant is to be found, if ascertainable. Tex. R. Civ. P. 107(d).

7. The citation must be signed by the officer or authorized person who serves or attempts to serve the citation. If signed by someone other than a sheriff, constable, or clerk of the court, the return must either be verified or signed under penalty of perjury. A return signed under penalty of perjury must include the statement prescribed in Tex. R. Civ. P. 107(e). *See* Tex. R. Civ. P. 107(e). *See also* Tex. Civ. Prac. & Rem. Code § 17.030(c).

8. If the citation was served by substituted service as provided in Tex. R. Civ. P. 106(b), the proof of service must be made in the manner ordered by the court. Tex. R. Civ. P. 107(f). The attorney should confirm that the manner of service required by Tex. R. Civ. P. 107(b)(8) precisely mirrors the order. See section 16.7:3.

9. The return and any document to which it is attached must be filed with the court and may be filed electronically or by facsimile, if available. Tex. R. Civ. P. 107(g). *See also* Tex. Civ. Prac. & Rem. Code § 17.030(b)(1)(B). It is important to verify that the return itself is file-stamped to establish that it was on file ten days before judgment. *See* Tex. R. Civ. P. 107(h). Absence of file-stamp on return itself may cause reversal of judgment. *Midstate Environmental Services, LP v. Peterson*, 435 S.W.3d 287, 290–91 (Tex. App.—Waco 2014, no pet.) (citation to which return was probably attached was file-stamped, but return was not, in violation of Tex. R. Civ. P. 107(h); judgment reversed).

10. If substituted service will be requested under Tex. R. Civ. P. 106(b), the process server's affidavit must specifically establish the facts showing service has been attempted by regular methods. *See* Tex. R. Civ. P. 106, 107. The affidavit should report when and where each service attempt was made and the result of each attempt. See section 16.7:2

11. If the citation was served on the secretary of state because the corporate defendant's registered agent could not be found at the registered office (Tex. Bus. Orgs. Code § 5.251), the process server's affidavit or the return for the unserved citation must specifically state, "the diligence used by the officer in executing the citation or the cause of his failure to execute it." *David A. Carl Enterprises, Inc. v. Crow-Shutt #14*, 553 S.W.2d 118, 120 (Tex. Civ. App.—Houston [1st Dist.] 1977, no writ). *See* Tex. R. Civ. P. 107(d) and section 16.11:2 below. A showing of diligence requires specific factual statements describing how the person actually attempted to serve the defendant, not merely a general statement that reasonable diligence was used. *See Medford v. Salter*, 747 S.W.2d 519, 520 (Tex. App.—Corpus

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Christi 1988, no writ). An affidavit should include for each service attempt on whom service was attempted; the person's office or title; and the when, where, and result of each attempt. *See Paramount Credit, Inc. v. Montgomery*, 420 S.W.3d 226, 231 (Tex. App.—Houston [1st Dist.] 2013, no pet.).

12. If the citation was served on the secretary of state for any reason, the return must show that the secretary of state was served with duplicate copies of the process. *See* Tex. Bus. Orgs. Code § 5.252; Tex. Civ. Prac. & Rem. Code § 17.045(a). Also, a service certificate from the secretary of state should be filed with the court.

See forms 16-1 (Service on Individual Defendant, in Person), 16-2 (Service on Registered Agent, an Individual), and 16-3 (Service on Registered Agent, Organization).

§ 16.9 Out-of-State Service on Individual

A resident defendant's absence from the state does not prevent his being served; the rule provides for service by a disinterested person who is at least eighteen years of age with the same effect as if he had been served with citation within the state. Service on a nonresident individual can also be had. *See* Tex. R. Civ. P. 108. Also, if the defendant engaged in business in Texas, service can be had under the long-arm statute, Tex. Civ. Prac. & Rem. Code §§ 17.041–.045, discussed at section 16.14 below. See forms 14-15 through 14-21 in this manual for clauses for party designation.

§ 16.10 Service on Partnership

Service on any partner will support a judgment against the partnership and against the individual partner actually served. Tex. Civ. Prac. & Rem. Code §§ 17.022, 31.003. If the partnership has an office, place of business, or agency in a state or county other than that in which the partnership "resides," citation may be served on any agent or clerk employed there if the action grew out of that business and the suit was brought in that county. Tex. Civ. Prac. & Rem. Code § 17.021(a). Service on an agent or clerk is also permissible if no partner can be found "after diligent search and inquiry." Tex. Civ. Prac. & Rem. Code § 17.021(b). A foreign partnership engaging in business in Texas may be served under the long-arm statute, discussed at section 16.14 below. Individual liability for partnership debts is discussed briefly at sections 6.8 through 6.10 in this manual. See forms 14-18 and 14-19 for clauses for party designation.

If a default judgment against a partnership or unincorporated association is attacked by restricted appeal (formerly "writ of error") the judgment will not stand unless the plaintiff shows strict compliance with the requirements of Tex. Civ. Prac. & Rem. Code § 17.021(a). *See Ashley Forest Apartments (Lindsay Enterprises) v. Almy*, 762 S.W.2d 293, 294–95 (Tex. App.—Houston [14th Dist.] 1988, no writ).

The citation must also comply with the requirement of Tex. R. Civ. P. 99 that it be "directed to the defendant." To withstand an attack on a default judgment against a partnership, the citation must be directed to the partnership and not just a partner. *ISO Production Management 1982, Ltd. v. M&L Oil & Gas Exploration, Inc.*, 768 S.W.2d 354, 355–56 (Tex. App.—Waco 1989, no writ). A judgment may stand against an individual partner not served if he files an answer or otherwise appears either personally or through his attorney. *Bentley Village, Ltd. v. Nasits Building Co.*, 736 S.W.2d 919, 923 (Tex. App.—Tyler 1987, no writ).

Service may be had on a limited partnership by serving any general partner or the registered agent for service of process. Tex. Bus. Orgs.

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Code §§ 5.201, 5.255(2). If the registered agent is an organization as described in Tex. Bus. Orgs. Code § 5.201(b)(2)(B), any employee of the organization may receive service at the registered office. Tex. Bus. Orgs. Code § 5.201(d). If the limited partnership fails to appoint or maintain an agent for service of process or if the registered agent cannot be found with reasonable diligence, service may be had through the secretary of state. Tex. Bus. Orgs. Code § 5.251. No special statutes exist regarding service on a limited liability partnership. The rules applicable to partnerships apply.

§ 16.11 Service on Business Corporation

§ 16.11:1 Service on Texas Corporation

The president, all vice-presidents, and the registered agent are agents for service on a corporation, and citation may be served on any one of them. Tex. Bus. Orgs. Code §§ 5.201, 5.255(1). The record must show that the person to be served is one of the statutorily designated persons. To determine whether service has been properly effected, the court may consider as prima facie evidence the recitals in the petition, citation, and return of service. *See Pleasant Homes v. Allied Bank of Dallas*, 776 S.W.2d 153, 154 (Tex. 1989) (return reciting service on named "V.P." was sufficient); *Advertising Displays, Inc. v. Cote*, 732 S.W.2d 360, 362 (Tex. App.—Houston [14th Dist.] 1987, no writ). If the registered agent is an organization as described in Tex. Bus. Orgs. Code § 5.201(b)(2)(B), any employee of the organization may receive service at the registered office. Tex. Bus. Orgs. Code § 5.201(d).

If the corporation has failed to appoint or maintain a registered agent or if with reasonable diligence the registered agent cannot be found at the registered office, service may be effected on the Texas secretary of state. Tex. Bus. Orgs. Code § 5.251. See section 16.11:2 below and Tex. Bus. Orgs. Code § 5.252. Because a specific procedure is provided by the Business Organizations Code, the attorney should not use the substituted service procedure set out in Tex. R. Civ. P. 106(b) for a corporation if attempts to serve the corporation have been unsuccessful. In such a case, "the officer's [unserved] return must itself show the diligence used by the officer to execute the citation and the cause of his failure to execute." For service on the secretary of state to support a default judgment, there must be "affirmative proof" in the record to show reasonable diligence, and no presumption will be indulged to aid the officer's return. *See Paramount Credit, Inc. v. Montgomery*, 420 S.W.3d 226, 231 (Tex. App.—Houston [1st Dist.] 2013, no pet.); *David A. Carl Enterprises, Inc. v. Crow-Shutt #14*, 553 S.W.2d 118, 120 (Tex. Civ. App.—Houston [1st Dist.] 1977, no writ); *see also Advertising Displays, Inc. v. Cote*, 732 S.W.2d 360, 363 (Tex. App.—Houston [14th Dist.] 1987, no writ) (describing efforts that demonstrated "reasonable diligence").

The record must show that the secretary of state forwarded the process, notice, or demand by certified mail, with return receipt requested, addressed to the corporation at its most recent address on file with the secretary of state. Tex. Bus. Orgs. Code § 5.253. If a defendant corporation fails to keep the secretary of state notified of its current address, a default judgment based on the faulty address will apparently stand; *see Tankard-Smith, Inc. General Contractors v. Thursby*, 663 S.W.2d 473, 475–76 (Tex. App.—Houston [14th Dist.] 1983, writ ref'd n.r.e.); *TXXN, Inc. v. D/FW Steel Co.*, 632 S.W.2d 706, 707–08 (Tex. App.—Fort Worth 1982, no writ). Also, absent fraud or mistake, the failure of the corporation to claim the notice sent by the secretary of state will not void a default judgment. *Zuyus v. No'Mis Communications, Inc.*, 930 S.W.2d 743, 746–47 (Tex. App.—Corpus Christi 1996, no writ). Service on a security-dealer defendant through the Texas Securities commissioner was insufficient when neither the

citation nor return stated title or affiliation of person served or that the person served was authorized to accept service for the commissioner. *Harvestons Securities v. Narnia Investments*, 218 S.W.3d 126, 134–35 (Tex. App.—Houston [14th Dist.] January 11, 2007, pet. denied).

§ 16.11:2 Service through Secretary of State

Important statutory address change: Pursuant to Tex. Bus. Orgs. Code § 5.253, the statutory address for service by the secretary of state is the "most recent address of the [defendant entity] on file with the secretary of state." Previously, the Texas Business Corporation Act required the registered office address. The Business Organizations Code became effective as to all entities on January 1, 2010.

Note that the statutory address for service (most recent address on file with secretary of state) may differ from the certificate of last known address required by Tex. R. Civ. P. 239a. *See Katy Venture, Ltd. v. Cremona Bistro Corp.*, 469 S.W.3d 160, 163 (Tex. 2015) (per curiam) (plaintiff should not have used ineffective statutory service address as last known address; because defendant's current address was known to plaintiff, that address should have been stated in certificate of last known address).

When Authorized: The secretary of state is the deemed agent of an entity when (l) the entity fails to appoint or does not maintain a registered agent in Texas; (2) with reasonable diligence, the registered agent cannot be found at the registered office; or (3) the certificate of authority of a foreign filing entity has been revoked, or the entity transacts business in Texas without being registered as required by chapter 9. Tex. Bus. Orgs. Code § 5.251. Though diligence may be established through the unexecuted return, an affidavit may more effectively communicate specific service attempts, establishing diligence. See form 16-11.

In order to exercise reasonable diligence, the officer or process server must attempt to effect service on the registered agent, and the attempt must be made at the registered office. In *Paramount Credit, Inc. v. Montgomery*, reasonable diligence was not established because the record did not show an attempt to serve the registered agent at the registered office. *See Paramount Credit, Inc. v. Montgomery*, 420 S.W.3d 226 (Tex. App.—Houston [1st Dist.] 2013, no pet.). The record should show on whom, where, when, how, and in what capacity attempted service of process was made. *Paramount*, 420 S.W.3 at 231; *see also Legends Landscapes LLC v. Brown*, No. 06-13-00129-CV, 2014 WL 1260624, at *8 (Tex. App.—Texarkana Mar. 27, 2014, no pet.) (mem. op.) (no reasonable diligence when evidence showed service attempted on entity only; service must instead be attempted on registered agent personally); *Humphrey Co. v. Lowry Water Wells*, 709 S.W.2d 310, 311 (Tex. App.—Houston [14th Dist.] 1986, no writ) (no reasonable diligence when petition did not allege that address at which service could be effected was the registered office of defendant); *David A. Carl Enterprises, Inc. v. Crow-Shutt #14*, 553 S.W.2d 118, 120 (Tex. App.—Houston [1st Dist.] 1977, no writ) (no reasonable diligence when citation showed service at address other than registered office address). Thus, while service on a proper officer or agent may be effected anywhere, if unsuccessful it will support substituted service on the secretary of state only if it has been attempted on the registered agent at the registered office. *Ingram Industries, Inc. v. U.S. Bolt Manufacturing*, 121 S.W.3d 31, 34 (Tex. App.—Houston [1st Dist.] 2003, no pet.) (reasonable diligence established by one attempt to serve registered agent at registered office; record as whole may be considered as to diligence).

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A corporation has a duty to keep the secretary of state apprised of its current registered office address and is negligent if it fails to do so. *Campus Investments, Inc. v. Cullever*, 144 S.W.3d 464, 466 (Tex. 2004) (per curiam) (citing Tex. Bus. Corp. Act arts. 2.10, 2.10-1, 8.09. These statutes were replaced in 2010 by the Business Organizations Code. *See, e.g.*, Tex. Bus. Orgs. Code § 5.253, requiring secretary of state to now forward process to entity's most recent address on file with the secretary of state, not the registered office address).

Even if the plaintiff has knowledge of another location where an agent for service might be found, he does not have to attempt service at any address other than the registered office in order to exercise reasonable diligence. *See Ingram Industries*, 121 S.W.3d at 35; *State v. Interaction, Inc.*, 17 S.W.3d 775, 779 (Tex. App.—Austin, 2000, pet. denied); *Harold-Elliott Co. v. K.P./Miller Realty*, 853 S.W.2d 752, 754–55 (Tex. App.—Houston [1st Dist.] 1993, no writ) (calling for statutory amendment to require service attempt at alternate known address); *Advertising Displays, Inc. v. Cote*, 732 S.W.2d 360, 363 (Tex. App.—Houston [14th Dist.] 1987, no writ); *TXXN, Inc. v. D/FW Steel Co.*, 632 S.W.2d 706, 708 (Tex. App.—Fort Worth 1982, no writ). But a more recent address, if known, should be reported in the Tex. R. Civ. P. 239a certification of last known address. *Katy Venture, Ltd. v. Cremona Bistro Corp.*, 469 S.W.3d 160, 163 (Tex. 2015) (per curiam). This allows the clerk to give required notice of interlocutory or default judgment to a defendant.

Reasonable diligence must be established from the face of the record—either from the unexecuted return or process server's affidavit. An affidavit is the recommended method to prove diligence. Plaintiff's counsel must guard against reliance on conclusory returns or affidavits, as statements must be factual. Reasonable diligence may be established from the information on the unexecuted return, which is prepared pursuant to Tex. R. Civ. P. 107(d) ("When the officer or authorized person has not served the citation, the return shall 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."). Proof of diligence must be on file at the time the default judgment was rendered. *Marrot Communications, Inc. v. Town & Country Partnership*, 227 S.W.3d 372, 376–78 (Tex. App.—Houston [1st Dist.] 2007, pet. denied). The unserved citation must be signed. *Hot Shot Messenger Service v. State*, 818 S.W.2d 905, 907 n.3 (Tex. App.—Austin 1991, no writ) (per curiam) (citing Tex. R. Civ. P. 107).

The unexecuted return must demonstrate on its face that service on the registered agent at the registered office was actually attempted. *See RWL Construction v. Erickson*, 877 S.W.2d 449, 451–52 (Tex. App.—Houston [1st Dist.] 1994, no writ); *Bilek & Purcell Ind., Inc. v. Paderwerk Gebr. Benteler GmbH & Co.*, 694 S.W.2d 225, 226–27 (Tex. App.—Houston [lst Dist.] 1985, no writ). But the record as a whole may be considered to determine whether the reasonable diligence standard is satisfied. *G.F.S. Ventures v. Harris*, 934 S.W.2d 813, 816 (Tex. App.—Houston [1st Dist.] 1996, no writ).

Proof may also be established by an affidavit from the officer or authorized person explaining his diligence, but the affidavit must give specific information and may not be simply conclusory in nature. *Longoria v. Exxon Mobil Corp.*, No. 04-15-00536-CV, 2016 WL 4013783, at *8 (Tex. App.—San Antonio July 27, 2016, pet. denied) (mem. op.) (citing *Wilson v. Dunn*, 800 S.W.2d 833, 836 (Tex. 1990); *Beach, Bait & Tackle, Inc. v. Holt*, 693 S.W.2d 684, 686 (Tex. App.—Houston [14th Dist.] 1985, no writ.); *Mackie Construction Co. v. Carpet Service, Inc.*, 645 S.W.2d 594, 596 (Tex. App.—Eastland 1982, no writ). Unsuccessful attempts at substituted service by mail that appear in the record may also be evidence of reasonable diligence.

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See National Multiple Sclerosis Society v. Rice, 29 S.W.3d 174, 177 (Tex. App.—Eastland 2000, no pet.) (mail returned "attempted not known" did not establish diligence); *Advertising Displays, Inc. v. Cote*, 732 S.W.2d 360, 362–63 (Tex. App.—Houston [14th Dist.] 1987, no writ). Process is now forwarded by the secretary of state to the "most recent address on file" pursuant to Tex. Bus. Orgs. Code § 5.253; process was previously forwarded to the registered office address.

The following registered-office cases may be instructive in establishing, for the record, the most recent address on file. If the location of the registered office is not otherwise established by the recitals in the petition, citation, or return, it may be established by a certificate from the secretary of state certifying to the registered agent and the location of the registered office. *See Humphrey Co. v. Lowry Water Wells*, 709 S.W.2d 310, 312 (Tex. App.—Houston [14th Dist.] 1986, no writ). However, the certificate of the secretary of state showing that the secretary of state mailed process to a particular address does not, standing alone, establish that such address was in fact the defendant's registered office. *Humphrey*, 709 S.W.2d at 311; *Global Truck & Equipment, Inc. v. Plaschinski*, 683 S.W.2d 766, 768 (Tex. App.—Houston [14th Dist.] 1984, no writ).

Perfecting Service on the Secretary of State: Duplicate copies of the citation and petition must be served on the secretary of state. *See* Tex. Bus. Orgs. Code § 5.252. For instructions on serving the secretary of state, see secretary of state Form 2401, available at **www.sos.state.tx.us/forms.shtml.**

Of course, the secretary will be unavailable to personally receive countless citations. Previously, Tex. Bus. Corp. Act arts. 2.11 and 8.10 allowed service on the secretary, the assistant secretary, or any clerk having charge of the corporation department. At least one court held service on any other employee invalid. *See Travis Builders, Inc. v. Graves*, 583 S.W.2d 865, 867–68 (Tex. App.—Tyler 1979, no writ). There may be an issue as to validity of service of process that is not made by "delivering to the secretary" per Tex. Bus. Orgs. Code § 5.252(a)(1).

Validity of service delivered to an employee of the secretary of state's office is indirectly supported by *Campus Investments, Inc.*, 144 S.W.3d at 466. In *Campus*, the Texas Supreme Court noted that "A certificate . . . from the secretary of state conclusively establishes that process was served." The practitioner should always file such a certificate after serving the secretary of state. *Campus* was decided under the Business Corporations Act, not the Business Organizations Code. The Whitney-service certificate (discussed below) apparently remains conclusive as to service. *See also MC Phase II Owner, LLC v. TI Shopping Center, LLC*, 477 S.W.3d 489, 493–94 (Tex. App.—Amarillo 2015, no pet.) (absence of Whitney-service certificate from secretary of state was fatal omission).

Secretary of State's Duties: Tex. Bus. Orgs. Code § 5.253 requires the secretary of state to immediately forward process by certified mail, return receipt requested, to the "most recent address of the entity on file with the secretary of state." The secretary of state requires a plaintiff to designate the specific address to which the defendant's documents are to be mailed. Thus the plaintiff apparently must search the secretary of state's records, determine "the most recent address of the entity on file," and advise the secretary of state of that address. To bolster the record, the attorney should include the most recent address in an affidavit, filed before entry of judgment.

Service is invalid if the secretary of state forwards process to the wrong address when the defendant has supplied the secretary of state with the correct address. *Westmont Hospitality*

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Group, Inc. v. Morris, No. 07-07-0173-CV, 2009 WL 996989, at *4 (Tex. App.—Amarillo Apr. 14, 2009, no pet.) (mem. op.); *Texas Inspection Services, Inc. v. Melville*, 616 S.W.2d 253, 254–55 (Tex. App.—Houston [lst Dist.] 1981, no writ).

Most Recent Address on File: In *El Paisano Northwest Highway, Inc. v. Arzate*, the plaintiff attempted to serve the defendant at the registered office. After four failed attempts, an affidavit detailing each attempt was filed and the plaintiff served the secretary of state under Tex. Bus. Orgs. Code § 5.251(1)(B) (allowing service after reasonable diligence in attempting to find the registered agent at the registered office). The secretary of state forwarded the service of citation to the defendant's registered address, but the process was returned marked "unclaimed." After the trial court entered a default judgment, the defendant appealed, claiming that process should have been sent to the address of its principal place of business. The court of appeals found that the secretary of state's certificate "conclusively established that the secretary of state received the service of process for El Paisano and forwarded it to El Paisano as required by statute" and upheld the default judgment. *El Paisano Northwest Highway, Inc. v. Arzate*, No. 05-12-01457-CV, 2014 WL 1477701, at *1–3 (Tex. App.—Dallas Apr. 14, 2014, no pet.) (mem. op.) (citing *Campus Investments, Inc.*, 144 S.W.3d at 466).

The court in *El Paisano* also noted that the statute requires the secretary of state to forward the process to "the most recent address of the entity on file with the secretary of state." Tex. Bus. Orgs. Code § 5.253(b)(1). In the absence of evidence in the record that the defendant's principal place of business was the most recent address on file, the court found the secretary of state's service certificate to indirectly establish the most recent address on file with the secretary of state.

Practice Note: A cautious plaintiff serving a defendant through the secretary of state should review the secretary of state's records and establish in the trial court record before judgment the "most recent address on file with the secretary of state." This could be done in an affidavit or in the original petition in which an address is pleaded as both the defendant's registered office address and the "most recent address on file with the secretary of state," if true. If not, consider pleading both the defendant's registered office address and the most recent address on file with the secretary of state.

Proof of Service; Whitney Certificate: The term *Whitney certificate* arises out of *Whitney v. L&L Realty Corp.*, 500 S.W.2d 94 (Tex. 1973). It is also sometimes referred to as the secretary of state service certificate, or secretary of state certificate. The issue in *Whitney* was whether the record must show not only service on the secretary of state but also that the secretary of state forwarded process to the defendant. Proof of both is required and easily proved by a Whitney certificate, stating that the secretary of state forwarded a copy of the process. *Campus Investments, Inc.*, 144 S.W.3d at 466; *Whitney*, 500 S.W.2d at 96; *MC Phase II Owner, LLC*, 477 S.W.3d at 492. The secretary of state certificate alone establishes service of process, if service on the secretary of state is authorized. *Campus Investments, Inc.*, 144 S.W.3d at 466 (noting that improper default judgment arising from defective citation through substituted service on secretary of state could be remedied through bill of review). *See also Amor Real Estate Investments, Inc. v. AWC, Inc.*, No. 05-15-00887-CV, 2016 WL 2753572, at *1–2 (Tex. App.—Dallas May 10, 2016, no pet.) (certificate established proper service, though the certificate noted "no response [apparently, as to certified mail delivery attempt] has been received in this office") (citing *Campus Investments, Inc.*, 144 S.W.3d at 466); *El Paisano*, 2014 WL 1477701, at *1–3; *Catalyst Partners, Inc. v. BASF Corp.*, No. 02-10-00377-CV, 2011 WL 2306836, at * (Tex.

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App.—Fort Worth June 9, 2011, no pet.) (mem. op.) (though process returned "Attempted Not Known," certificate conclusively establishes that process was served) (citing *Campus Investments, Inc.*, 144 S.W.3d at 466); *Autodynamics Inc. v. Vervoort*, No. 14-10-00021-CV, 2011 WL 1260077, at *4 (Tex. App.—Houston [14th Dist.] Apr. 5, 2011, no pet.) (mem. op.) (attempt to serve registered agent at registered office constituted reasonable diligence; defendant properly served through secretary of state; certificate conclusive that process was served, though not conclusive as to reasonable diligence) (citing *Campus Investments, Inc.*, 144 S.W.3d at 466).

Some courts may still require the filing of the return of citation, in addition to the secretary of state certificate, as that was the common practice. *Campus* establishes that the certificate is conclusive as to service on the secretary of state. The secretary of state service certificate, or Whitney certificate, should be purchased from the secretary of state, as it requires only a nominal fee, and should be filed for the purpose of establishing service. For instructions on obtaining the certificate, see secretary of state Form 2401, available at **www.sos.state.tx.us/forms.shtml**. *See* Tex. Bus. Orgs. Code § 2.252(b) ("Notice on the secretary of state . . . is returnable in not less than 30 days."). The certificate must establish to whom and where the secretary of state forwarded process. It need not state that the person to whom the process was directed was the registered agent or that the place to which it was directed was the proper address, as long as the information appears elsewhere in the record. *Advertising Displays, Inc. v. Cote*, 732 S.W.2d 360, 362 (Tex. App.—Houston [14th Dist.] 1987, no writ).

Filing the Whitney certificate at least thirty days after serving the secretary of state should avoid the thirty-day issue in Tex. Bus. Orgs. Code § 5.252(b). *But see American Discovery Energy, Inc. v. Apache Corp.*, 367 S.W.3d 704, 706–07 (Tex. App.—Houston [14th Dist.] 2012, no pet.) (filing return of citation with trial court less than thirty days after unsuccessful attempt at service of process found acceptable to support default judgment; court distinguished between "notice" and "process" when construing Tex. Bus. Orgs. Code § 5.252(b)). The Whitney certificate must be on file when the judgment is signed. *See Southern Gulf Operators, Inc. v. Meehan*, 969 S.W.2d 586, 588 (Tex. App.—Beaumont 1998, no pet.). Pursuant to Tex. R. Civ. P. 107(h), it is best to have the Whitney certificate and proof of service filed ten days before judgment, excluding the date of filing and the date of judgment.

§ 16.11:3 Foreign Corporation Required to Register to Conduct Business in Texas

If a foreign corporation is transacting business in Texas, it may be required to register and have a registered agent in Texas. Tex. Bus. Orgs. Code §§ 9.001, 9.004. Service on such a corporation is the same as for a domestic corporation—citation may be served on the president, any vice-president, or the registered agent. Tex. Bus. Orgs. Code §§ 5.201, 5.255(1). If the registered agent is an organization as described in Tex. Bus. Orgs. Code § 5.201(b)(2)(B), any employee of the organization may receive service at the registered office. Tex. Bus. Orgs. Code § 5.201(d). If there is no registered agent or if he cannot be found at the registered office with reasonable diligence, the secretary of state is an agent for service. Tex. Bus. Orgs. Code § 5.251. See section 16.11:2 above.

For a default judgment against a foreign corporation to stand, some cases require an affirmative showing on the face of the record, by proof independent of the allegations in the petition, recitals in the citation, or statements in the officer's return, that the person served was in fact the defendant's agent for service. *NBS Southern, Inc. v. Mail Box, Inc.*, 772 S.W.2d 470, 471–72 (Tex. App.—Dallas 1989, writ denied); *but see*

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Conseco Finance Servicing v. Klein Independent School District, 78 S.W.3d 666, 671–72 (Tex. App.—Houston [14th Dist.] 2002, no pet.) (holding that a recital in the petition naming the registered agent is sufficient prima facie evidence unless the defaulted defendant proves otherwise).

A default judgment against a foreign corporation was held to be void when the pleadings referred only to the defendant's "address" (a post office box) and not to the "home office"; that the defendant received actual notice was irrelevant. *Bank of America, N.T.S.A. v. Love*, 770 S.W.2d 890, 891–92 (Tex. App.—San Antonio 1989, writ denied); *see also Carjan Corp. v. Sonner*, 765 S.W.2d 553, 555 (Tex. App.—San Antonio, 1989, no writ) (citation sent to "last known mailing address" did not establish that citation was sent to "home office" address when petition did not indicate that address was "home office"); *Seeley v. KCI USA, Inc.*, 100 S.W.3d 276, 279 (Tex. App.—San Antonio 2002, no pet.) (court refused to infer that the address listed in the petition was the defendant's home office address); *but see Mahon v. Caldwell, Haddad, Skaggs, Inc.*, 783 S.W.2d 769, 771 (Tex. App.—Fort Worth 1990, no writ) (service on defendant individually and as partner at his "place of business" rather than at "home or home office" address complied with long-arm service requirements; if only one address given in contract as business address, home business address is "home address" or "home office"). *Mahon* has been criticized. *See, e.g.*, *Healey v. Healey*, No. 12-15-00047-CV, 2016 WL 4098750, at *2 (Tex. App.—Tyler July 29, 2016, n.p.h.). The better practice is to state in the petition and citation that the defendant's address is the defendant's "home address" or "home office address." *See World Distributors, Inc. v. Knox*, 968 S.W.2d 474, 477–78 (Tex. App.—El Paso 1998, no writ).

If a foreign corporation is formed when a certificate of formation (or similar instrument) filed with a foreign governmental authority takes effect, the law of the jurisdiction in which the foreign governmental authority is located governs the formation and internal affairs of the corporation. Tex. Bus. Orgs. Code § 1.102. If the foreign corporation is not formed by the filing instrument, the law governing the corporation's formation and internal affairs is that of the jurisdiction of formation. Tex. Bus. Orgs. Code § 1.103. See Tex. Bus. Orgs. Code § 1.002(43) for a definition of the term *formation.*

§ 16.11:4 Foreign Corporation Not Having Certificate of Authority to Conduct Business in Texas

In many cases that might give rise to a collection suit (for example, conducting an isolated transaction, not in the course of a number of repeated, like transactions), a foreign corporation may do business in Texas without being required to register. *See* Tex. Bus. Orgs. Code § 9.002. In these cases, citation may be served under the Texas long-arm statute, discussed at section 16.14 below.

If a foreign corporation's registration is revoked, the secretary of state is the agent of the foreign corporation for service of process. Tex. Bus. Orgs. Code § 5.251.

§ 16.11:5 Professional Corporation

The Texas Business Organizations Code does not contain specific provisions regarding service on a professional corporation. Rules applicable to a for-profit corporation, therefore, apply. Tex. Bus. Orgs. Code § 2.109. See section 16.11:2 above.

§ 16.11:6 Allegations in Pleadings

Form 14-17 in this manual contains party designations for a suit against a corporate defendant.

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§ 16.12 Service on Nonprofit Corporation

§ 16.12:1 Texas Nonprofit Corporation

Service on a nonprofit corporation may be effected by serving the president, any vice-president, or the registered agent of the corporation. Tex. Bus. Orgs. Code §§ 5.201, 5.255(1). If a committee is authorized to perform the corporation's chief executive function, each member of the committee is an agent of the corporation. Tex. Bus. Orgs. Code § 5.255(5). If the registered agent is an organization as described in Tex. Bus. Orgs. Code § 5.201(b)(2)(B), any employee of the organization may receive service at the registered office. Tex. Bus. Orgs. Code § 5.201(d). If there is no registered agent or the agent cannot be found at the registered office with reasonable diligence, the secretary of state can be served. Tex. Bus. Orgs. Code § 5.251. See section 16.11:2 above.

§ 16.12:2 Foreign Nonprofit Corporation

Citation for a foreign nonprofit corporation authorized to transact business in Texas may be served on the president, any vice-president, the registered agent, or any member of a committee performing the chief executive function of the corporation. Tex. Bus. Orgs. Code §§ 5.201, 5.255(1), (5). If the registered agent is an organization as described in Tex. Bus. Orgs. Code § 5.201(b)(2)(B), any employee of the organization may receive service at the registered office. Tex. Bus. Orgs. Code § 5.201(d). If there is no registered agent or he cannot be found at the registered office with reasonable diligence, the secretary of state is an agent for service. Tex. Bus. Orgs. Code § 5.251. A corporation engaging in business in Texas without maintaining a designated registered agent in the state may be served under the long-arm statute, discussed at section 16.14 below.

§ 16.13 Service on Other Business Entities

§ 16.13:1 Professional Association

Service on a professional corporation may be effected on each person who is a governing person of the corporation or the registered agent. Tex. Bus. Orgs. Code §§ 5.201, 5.255(4). If the registered agent is an organization as described in Tex. Bus. Orgs. Code § 5.201(b)(2)(B), any employee of the organization may receive service at the registered office. Tex. Bus. Orgs. Code § 5.201(d).

§ 16.13:2 Limited Liability Company

Service on a limited liability company or a series of a limited liability company may be effected on the managers or members, if any, or on the registered agent of the company. Tex. Bus. Orgs. Code §§ 5.201, 5.255(3), 5.302, 5.305. If the registered agent is an organization as described in Tex. Bus. Orgs. Code § 5.201(b)(2)(B), any employee of the organization may receive service at the registered office. Tex. Bus. Orgs. Code § 5.201(d). If the company fails to appoint or maintain an agent or the agent cannot be found through reasonable diligence, service may be effected through the secretary of state. Tex. Bus. Orgs. Code § 5.251.

§ 16.13:3 Series of Limited Liability Company

Service on a series of a limited liability company may be effected on the managers or members, if any. The registered agent of the limited liability company is an agent of each series of the company for the purpose of service of process. Tex. Bus. Orgs. Code § 5.302(a). Service on a series of a limited liability company that is served on the registered agent must include the name of the company and the name of the series on which the process is to be served. Tex. Bus. Orgs. Code § 5.302(b).

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The secretary of state is an agent of a series of a limited liability company for purposes of service of process on the series of the company if the secretary of state is the agent of the company pursuant to Tex. Bus. Orgs. Code § 5.251. The duplicate copies of the process delivered to the secretary of state must include both the name of the company and the name of the series of the company on which the process is to be served. The secretary of state shall forward to the limited liability company named in the process one of the copies of the process, notice, or demand as provided in Tex. Bus. Orgs. Code § 5.253. The secretary of state is not required to send a copy of the process to the series of the limited liability company. Tex. Bus. Orgs. Code § 5.304.

Each governing person of a series of a limited liability company as described in Tex. Bus. Orgs. Code § 101.608 is an agent of the series for purpose of service of process. Tex. Bus. Orgs. Code § 5.305.

§ 16.13:4 Service on Association or Joint-Stock Company

Citation for a domestic or foreign unincorporated joint-stock company or association may be served on the president, secretary, treasurer, or general agent. Tex. Rev. Civ. Stat. art. 6134. But see Tex. Civ. Prac. & Rem. Code § 17.023, which provides that citation may be served by (1) serving the president, vice-president, cashier, assistant cashier, or treasurer of the association; (2) serving the local agent of the association in the county in which the suit is brought; or (3) leaving a copy of the citation at the principal office of the association during office hours. If no officer on whom citation may be served resides in the county in which suit is brought and the association has no agent in that county, citation may be served on any agent representing the association in Texas.

Party designations for pleading an unincorporated entity as a defendant are at form 14-19 in this manual.

§ 16.14 Service under Texas Long-Arm Statute

§ 16.14:1 Jurisdictional and Statutory Reach of Long-Arm Statute

By its terms, the Texas long-arm statute reaches any foreign corporation, nonresident natural person, foreign partnership, foreign association, or foreign joint-stock company doing business in Texas. Tex. Civ. Prac. & Rem. Code §§ 17.041–.045. "Doing business" is defined, albeit nonexclusively, in Tex. Civ. Prac. & Rem. Code § 17.042. See also *Kawasaki Steel Corp. v. Middleton*, 699 S.W.2d 199, 201 (Tex. 1985), in which the supreme court dispensed entirely with the statutory requirements of doing business in Texas in order to find jurisdiction over the defendant because the defendant sold a product that could be reasonably expected to find its way through the stream of commerce to Texas.

As a practical matter, the reach of long-arm jurisdiction has become coextensive with the "minimum contacts" doctrine first expressed by the U.S. Supreme Court in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

The requirements for exercise of long-arm jurisdiction are as follows:

1. The nonresident defendant must have purposefully established minimum contacts with Texas. In this regard, there must be a substantial connection between the defendant and Texas arising out of the action or conduct of the defendant in Texas. If specific jurisdiction is asserted, the cause of action must arise out of or relate to the defendant's contacts with Texas; if general jurisdiction is asserted, there must

have been continuous and systematic contacts between the defendant and Texas and a showing of substantial activities by the defendant in Texas.

2. The assertion of personal jurisdiction must comport with fair play and substantial justice. In order to defeat personal jurisdiction, the defendant must present a compelling case that the presence of some consideration would render jurisdiction unreasonable.

CSR Ltd. v. Link, 925 S.W.2d 591, 594–95 (Tex. 1996); *Guardian Royal Exchange Assurance v. English China Clays, P.L.C.*, 815 S.W.2d 223, 226–29 (Tex. 1991).

§ 16.14:2 Person to Be Served

Service on Registered Agent: The registered agent of an entity may be served on behalf of the entity. Tex. Bus. Orgs. Code § 5.201(b)(1). The registered agent may be (1) an individual who is a Texas resident and has consented to serve as the registered agent of the entity or (2) an organization that is registered or authorized to do business in Texas and has consented to serve as the registered agent of the entity. Tex. Bus. Orgs. Code § 5.201(b)(2). If the registered agent is an organization as described in Tex. Bus. Orgs. Code § 5.201(b)(2)(B), any employee of the organization may receive service at the registered office. Tex. Bus. Orgs. Code § 5.201(d). The designation or appointment of a person as registered agent by an organizer is an affirmation that the person named in the filing instrument has consented to serve in that capacity. Tex. Bus. Orgs. Code § 5.2011.

Service on Secretary of State: Citation may be served on the secretary of state in the following situations:

1. The defendant does not maintain a place of regular business in Texas or a designated agent, regardless of any statutory requirement. Service on the secretary of state is permissible only if service cannot be effected on the person in charge of the defendant's business in Texas (see discussion above). *See McKanna v. Edgar*, 388 S.W.2d 927, 929 (Tex. 1965).

2. The nonresident defendant has not appointed or maintained in Texas a designated agent for service when required to do so.

3. Two unsuccessful attempts have been made on different business days to serve each designated registered agent.

4. The defendant is not required to designate an agent for service, but becomes a nonresident after a cause of action arises but before the cause is matured by suit in a court of competent jurisdiction.

Tex. Civ. Prac. & Rem. Code § 17.044.

If the secretary of state is served, duplicate copies of the citation and petition must be delivered and the pleading must state the name and home or home office address of the defendant. Tex. Civ. Prac. & Rem. Code § 17.045(a). To sustain a default judgment, the record must contain proof, such as a certificate from the secretary of state, that the defendant was in fact served by the secretary of state. *Whitney v. L&L Realty Corp.*, 500 S.W.2d 94, 96 (Tex. 1973). If the petition does not allege that the defendant performed a specific act in Texas, the defendant's evidence that he is a nonresident of Texas will negate jurisdiction. *Siskind v. Villa Foundation for Education, Inc.*, 642 S.W.2d 434, 438 (Tex. 1982). A default judgment based on long-arm service by the secretary of state will not be sustained unless the petition contains allegations that, if true, would make the defendant amenable to process by use of the long-arm statute, and there is proof in the record that the defendant

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was, in fact, served in the manner required by statute. *See McKanna*, 388 S.W.2d at 927; *South Mill Mushrooms Sales v. Weenick*, 851 S.W.2d 346, 350 (Tex. App.—Dallas 1993, writ denied).

To comply strictly with the long-arm statute, substituted service on an individual nonresident with no regular place of business and no registered agent for service of process in Texas requires that the secretary of state be provided with a home address or home office address for service. *Chaves v. Todaro*, 770 S.W.2d 944, 946 (Tex. App.—Houston [1st Dist.] 1989, no writ); *see also Bannigan v. Market Street Developers, Ltd.*, 766 S.W.2d 591, 592–93 (Tex. App.—Dallas 1989, no writ) (mailing petition to "merchant's notice address" did not strictly comply with statute, which requires plaintiff to provide secretary of state with "home address" or "home office address"). The address must be current; providing the secretary of state with an out-of-date address for a nonresident doing business in Texas may render a default judgment void on direct attack. On a collateral attack, recitations of due service on the face of the judgment would probably suffice. *Bludworth Bond Shipyard v. M/V Caribbean Wind*, 841 F.2d 646, 649 n.7, 650 (5th Cir. 1988).

It is not necessary that the secretary of state personally be served. *Capitol Brick, Inc. v. Fleming Manufacturing Co.*, 722 S.W.2d 399, 400 (Tex. 1986). For letters for service of citation on the secretary of state, see forms 16-9 and 16-10 in this chapter.

Service on Person in Charge of Nonresident Defendant's Business: If the defendant is not required to maintain a registered agent for service of process and the action arises from the nonresident's business in Texas, citation may be served on the person who, at the time of service, is in charge of any business in which the nonresident defendant is engaged in Texas. A copy of the process and notice of service on that person must be sent to the defendant or to the defendant's principal place of business by registered mail or by certified mail, return receipt requested. Tex. Civ. Prac. & Rem. Code §§ 17.043, 17.045(c), (d).

Service on Administrators of Nonresident Decedents and on Agents of Nonresident Incompetents: If the secretary of state was the agent for service of process on a nonresident decedent, the secretary of state is the agent for the decedent's nonresident administrator, executor, or personal representative or, if no personal representative is appointed, for the deceased's heir under the law of the foreign jurisdiction. Tex. Civ. Prac. & Rem. Code § 17.044(c).

If the secretary of state is an agent for service of process on a nonresident who is adjudged incompetent, the secretary of state is an agent for service of process on the nonresident's guardian or personal representative. Tex. Civ. Prac. & Rem. Code § 17.044(d).

If the secretary of state is served with duplicate copies of process as an agent for a nonresident administrator, executor, heir, guardian, or personal representative of a nonresident, the secretary of state shall require a statement of the person's name and address and shall immediately mail a copy of the process to the person. Tex. Civ. Prac. & Rem. Code § 17.045(e).

The attorney should obtain a certificate from the secretary of state confirming service. *See Capitol Brick, Inc. v. Fleming Manufacturing Co.*, 722 S.W.2d 399, 401 (Tex. 1986); *MC Phase II Owner, LLC v. TI Shopping Center, LLC*, 477 S.W.3d 489, 493–94 (Tex. App.—Amarillo 2015, no pet.) (citing *Campus Investments, Inc. v. Cullever*, 144 S.W.3d 464, 466 (Tex. 2004) (per curiam)). For letters for service of citation on the secretary of state, see forms 16-9 and 16-10 in this chapter.

§ 16.15 Sheriff or Constable Reluctant to Serve Citation

The attorney occasionally will encounter difficulty in getting a sheriff or constable to serve a defendant whose whereabouts are known. Often, the problems result from the officers' busy schedules. The attorney should provide the officer with as much information as possible and stay directly in touch with the officer to supply additional information as required. The attorney should also consider selecting a private process server, certified by the Supreme Court of Texas. See **www.txcourts.gov/jbcc** for a list of over three thousand certified process servers.

§ 16.15:1 Statutory Remedies

The Local Government Code requires that "[t]he sheriff shall execute all process and precepts directed to the sheriff by legal authority and shall return the process or precept to the proper court on or before the date the process or precept is returnable," and, for failing to do so or for making a false return, the sheriff will be liable for up to $100 to the court to which the process is returnable and will be liable to the injured party for all damages sustained. Tex. Loc. Gov't Code § 85.021. A similar duty is imposed on constables, subjecting them to a fine of from $10 to $100 and costs, for the benefit of the injured party. Tex. Loc. Gov't Code §§ 86.021, 86.024. An officer commits a class A misdemeanor if, with intent to obtain a benefit or to harm another, he intentionally or knowingly violates a law relating to his office or employment. Tex. Penal Code § 39.02(a)(1), (b). *Held unconstitutional on other grounds*, *Ex parte Perry*, 483 S.W.3d 884, 889 n.5, 901–02 (Tex. Crim. App. 2016).

§ 16.15:2 Practical Remedies

See sections 16.4, 16.5, and 16.16:6 for more information about using a private process server. When dealing with a sheriff or constable who seems reluctant to carry out his duty, it is more desirable to persuade him to act than to force the issue.

Possible actions the attorney could take include—

1. writing the officer, advising him that the attorney knows the defendant is available for service, sending him copies of the statutes and rulings mentioned in section 16.15:1 above, and pointing out his liability;
2. writing or calling the county attorney in the officer's county, advising him of the situation and requesting that he attempt to persuade the sheriff or constable to carry out his statutory duty so that legal action against the officer can be avoided; and
3. writing the officer, advising him of the facts and requesting a copy of his bond or the name of the insurance company that provided his bond. A sheriff or constable cannot take office without furnishing a bond, and an officer who intends to be in office for any period will not want a claim made against his bond.

If suit was filed in a county other than that in which service is to be made, remind the officer that any action to enforce sanctions against him will be in the court in which suit was filed and not in his home county.

§ 16.16 Service by Publication (Not Recommended)

§ 16.16:1 Grounds for Citation by Publication

This is a method of last resort and is not recommended; service by publication is not a favored method of service. *See Curley v. Curley*, 511 S.W.3d 131, 134–35 (Tex. App.—El Paso 2014,

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no pet.) (citing *In re E.R.*, 385 S.W.3d 552, 564–66 (Tex. 2012)). *In re E.R.* discusses the serious due-process issues with publication service and is critical of the method. The supreme court states, "[W]hen a defendant's identity is known, service by publication is generally inadequate." *In re E.R.*, 385 S.W.3d at 560.

Default judgments with actual notice to the defendant are often overturned. The law abhors a default. *Benefit Planners v. Rencare, Ltd.*, 81 S.W.3d 855, 857–58 (Tex. App.—San Antonio 2002, pet. denied) (citing *Hock v. Salaices*, 982 S.W.2d 591, 593 (Tex. App.—San Antonio 1998, no pet.)). Service by publication generally provides no notice of the lawsuit to the defendant. Such judgments are even more likely to be set aside or reversed. It is the most expensive service method. Only a sheriff or constable or court clerk should serve by publication in a newspaper, and only a court clerk should serve by publication on the Public Information Internet Website. See Tex. R. Civ. P. 116 and discussion at section 16.16:6 below.

Understanding that such service is discouraged, citation by publication is authorized if—

1. after diligent search, the residence of any party defendant is unknown to the plaintiff;
2. the defendant is a transient person and after due diligence the plaintiff has been unable to locate him; or
3. the defendant is absent from or is a nonresident of Texas and the plaintiff has attempted but failed to obtain personal service of nonresident notice pursuant to Tex. R. Civ. P. 108.

Tex. R. Civ. P. 109. *See also In re E.R.*, 385 S.W.3d at 564; *Wood v. Brown*, 819 S.W.2d 799, 800 (Tex. 1991).

In most jurisdictions, the clerk will issue a citation based on the affidavit, and a motion and court order will not be required (the approach used in this manual). Because a few courts require a motion, the attorney should ascertain what the court (or clerk) will require. Although Tex. R. Civ. P. 109 permits the plaintiff or his agent or attorney to execute the affidavit, the attorney should not swear to the truth of the facts on which the application is based, especially if the information is derived from a client or other person, including facts about the defendant's whereabouts; only persons with actual knowledge should sign affidavits incorporating these facts. See section 19.17:3 in this manual. Before preparing the affidavit, the attorney should discuss with the plaintiff the diligence used in trying to learn the defendant's whereabouts, the basis for statements that the defendant is out of the state, efforts to serve the defendant under Tex. R. Civ. P. 108, and other relevant facts for inclusion in the affidavit.

It is the court's duty, before granting judgment, "to inquire into the sufficiency of the diligence exercised in attempting to ascertain the residence or whereabouts of the defendant." Tex. R. Civ. P. 109. If there is no appearance after publication service, an attorney ad litem shall be appointed to defend the suit and judgment shall be rendered as in other cases. See section 16.16:5. A statement of the evidence, approved and signed by the judge, shall be filed in the cause. Tex. R. Civ. P. 244.

The affidavit for service by publication should specify facts showing diligence instead of merely reciting that diligence was used. A deficient affidavit may cause reversal of the judgment. *Wood v. Brown*, 819 S.W.2d at 800 (judgment reversed, insufficient affidavit for publication service).

Suits against unknown shareholders of a defunct corporation or against unknown heirs of a decedent may be based on service by publication. Tex. R. Civ. P. 111.

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Diligence is not shown and a judgment of foreclosure and tax sale can be set aside after citation by publication if a search of county tax rolls or attorney's files would have produced the taxpayer's address; a search of city records may be insufficient. *Doue v. City of Texarkana*, 786 S.W.2d 474, 477 (Tex. App.—Texarkana 1990, writ denied).

§ 16.16:2 Alternative to Service by Publication

On motion, the court may order a method of service different from publication if the alternative would be as likely as publication to give the defendant actual notice. Tex. R. Civ. P. 109a. Citation by publication should be used only as a last resort when other methods are impractical.

§ 16.16:3 Problems with Service by Publication

Citation by publication will not be effective to support an in personam judgment against a nonresident of Texas. *Sgitcovich v. Sgitcovich*, 241 S.W.2d 142, 146 (Tex. 1951), *cert. denied*, 342 U.S. 903 (1952). Even a slight defect in the procedure may render a default judgment invalid. *Fleming v. Hernden*, 564 S.W.2d 157, 159–60 (Tex. App.—El Paso 1978, writ ref'd n.r.e.). If the plaintiff obtains a judgment rendered on service of citation by publication without the defendant's having appeared in person or by an attorney of his own selection, the court can grant a new trial based on an affidavit filed by the defendant within two years after signing of the judgment and showing good cause. Tex. R. Civ. P. 329(a). If service was invalid, good cause is not required. *In re E.R.*, 385 S.W.3d 552, 563 (Tex. 2012).

§ 16.16:4 Procedure for Service by Publication

Effective June 1, 2020, the citation must be served by publication on the "Public Information Internet Website," at **https://www.txcourts.gov/judicial-data/citation-by-publication/**. *See* Acts 2019, 86th Leg., R.S., ch. 606, § 9.03 (S.B. 891), eff. Sept. 1, 2019 (codified at Tex. Gov't Code § 72.034); Tex. R. Civ. P. 116. The citation must also be printed in a newspaper published in the county in which the suit is pending (or if the suit involves land, the county in which the land is located), unless the county in which the publication is required does not have any newspaper published, printed, or generally circulated in the county. The citation must be published once a week for four consecutive weeks, the first publication being at least twenty-eight days before the return date. Tex. R. Civ. P. 116. Citation by publication in a newspaper is served by the sheriff or constable of any county or the clerk of the court in which the case is pending; citation on the Public Information Internet Website is served by the clerk of the court in which the case is pending. Tex. R. Civ. P. 116.

The officer's return for publication in a newspaper must state how the citation was published, specify the dates of publication, be signed by the officer who served the citation, and be accompanied by an image of the publication. The return for publication on the Public Information Internet Website must specify the dates of publication and be generated by the Office of Court Administration. Tex. R. Civ. P. 117. Requisites of the citation and return are in Tex. R. Civ. P. 99, 114. Usually the attorney submits the plaintiff's affidavit to the clerk of the court in which the case is pending, who issues the citation and may also serve the citation by publication. Some courts have required a motion and hearing before ordering citation by publication. For an affidavit and a letter to the clerk requesting citation by publication, see forms 16-12 and 16-13 in this chapter. Use caution. As noted at section 16.16:3 above, a slight defect may render the default judgment invalid or void.

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§ 16.16:5 Appointment of Attorney Ad Litem

If service has been made by publication and no answer has been filed or appearance entered within the prescribed time, the court must appoint an attorney ad litem to defend the suit on behalf of the defendant. Tex. R. Civ. P. 244; *see Cahill v. Lyda*, 826 S.W.2d 932, 933 (Tex. 1992) (per curiam).

See forms 16-16 through 16-18 in this chapter for a motion for appointment of attorney ad litem and for orders appointing and discharging the attorney. The attorney ad litem's fees are taxed as costs, Tex. R. Civ. P. 244, and are generally paid by the plaintiff. See form 16-18. Tex. R. Civ. P. 244 also requires the judge to approve and sign a statement of the evidence.

§ 16.16:6 Citation by Publication by Private Process Server Questionable

Although Tex. R. Civ. P. 103 authorizes service (without restricting the type of service) by any person authorized by law or by written order of the court who is not less than eighteen years old, Tex. R. Civ. P. 116, as to publication service, requires citation by publication in a newspaper to be served by a sheriff or constable or by the clerk of the court in which the case is pending, and citation by publication on the Public Information Internet Website to be served by the clerk of the court where the case is pending. The safer procedure is to comply with Tex. R. Civ. P. 116. Use an officer or clerk of court when serving by publication.

§ 16.17 Appearance Deadline and Time for Default Judgment

In district and county courts, the deadline for the defendant's appearance is 10:00 A.M. on the Monday next after the expiration of twenty days after the date of service. *See* Tex. R. Civ. P. 99(c). For justice courts, the deadline is generally the end of the fourteenth day after the date of service. Tex. R. Civ. P. 501.1(c). Justice court practitioners should read the extensively revised 2013 justice court rules 500–510. This chapter does not cover all changes, including special rules for eviction (Tex. R. Civ. P. 510) and repair and remedy cases (Tex. R. Civ. P. 509). 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; 76 Tex. B.J. 440 (2013); 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).

If citation was effected by publication for a suit filed in district or county court, the deadline is 10:00 A.M. on the first Monday after the expiration of forty-two days from the date of issuance of the citation. If the case is filed in justice court, the deadline is the end of the forty-second day after the day citation was issued. Tex. R. Civ. P. 502.5(e).

A default judgment cannot be granted until proof of service has been on file with the clerk for ten days (three days in the justice court), exclusive of the day of filing and the day of judgment. Tex. R. Civ. P. 107(h), 501.3(h). Therefore, confirm that a file-stamped copy of return is on file.

A default judgment can be obtained when the defendant has been served with process outside the state under the provisions of rule 108 or 108a. *See* Tex. R. Civ. P. 107 cmt. If the defendant places his answer in the mail before the deadline, he has met the deadline if the clerk receives it no later than ten days after the deadline. Tex. R. Civ. P. 5; *Milam v. Miller*, 891 S.W.2d 1, 2 (Tex. App.—Amarillo 1994, writ ref'd).

§ 16.18 Pleadings Must Support Default Judgment

When approving a default judgment, compare it to the petition, considering the parties, claims, damages, and finality of judgment. The petition, citation, return of citation, and judgment should mirror each other. *See* Tex. R. Civ. P. 301 ("The judgment shall conform to the pleadings"); *G&O Diaz Trucking v. Multi Service Technology Solutions Corp.*, No. 05-14-00032-CV, 2014 WL 5768714, at *4–5 (Tex. App.—Dallas Nov. 6, 2014, no pet.) (mem. op.) (sworn account; name variance of plaintiff, here abbreviated "MSTSC" vs. "MSTSI"; reversed and remanded).

Check that the following requirements for petitions are mirrored in the judgment:

1. The petition must precisely name the parties. *Google, Inc. v. Expunction Order*, 441 S.W.3d 644, 646–47 (Tex. App.—Houston [1st Dist.] 2014, no pet.) (Google never served or named a party; expunction order void);

2. The petition must assert a legally cognizable cause of action. The petition must allege facts that give rise to a cause of action. If no liability exists as a matter of law on the facts alleged in the petition, a default judgment cannot be granted. *First Dallas Petroleum, Inc. v. Hawkins*, 727 S.W.2d 640, 645 (Tex. App.—Dallas 1987, no writ);

3. The petition must assert a cause of action on which relief is granted. A default judgment must be based on the pleadings before the court. To support a default judgment, the petition must attempt to state a cause of action that is within the court's jurisdiction, must give fair notice of the claim asserted and the relief sought, and must not affirmatively disclose the invalidity of the claim. *Stoner v. Thompson*, 578 S.W.2d 679, 682–85 (Tex. 1979);

4. The petition must include specific allegations. Mere conclusory allegations of a cause of action may not be sufficient to support a judgment by default. In *Paramount Pipe & Supply Co. v. Muhr*, 749 S.W.2d 491, 494–95 (Tex. 1988), the court stated:

   > In [*Stoner*, 578 S.W.2d at 684–85] we wrote that while a petition which serves as the basis for a default judgment may be subject to special exceptions, the default judgment will be held erroneous only if (1) the petition (or other pleading of the non defaulting party that seeks affirmative relief) does not attempt to state a cause of action that is within the jurisdiction of the court, or, (2) the petition (or pleading for affirmative relief) does not give fair notice to the defendant of the claim asserted, or (3) the petition affirmatively discloses the invalidity of such claim;

   Paramount, 749 S.W.2d at 494.

   See also Low v. Henry, 221 S.W.3d 609, 612 (Tex. 2007) (fair notice standard met when opposing party can ascertain nature of claim, basic issues, and evidence that might be relevant to the controversy);

5. The petition must request the damages or relief which is granted. Tex. R. Civ. P. 301. *See, e.g., Capitol Brick, Inc. v. Fleming Manufacturing Co.*, 722 S.W.2d 399, 401 (Tex. 1986) (judgment modified where award exceeded

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amount of prayer); *Portfolio Recovery Associates, LLC v. Talplacido*, No. 05-13-00682-CV, 2014 WL 2583691, at *2–3 (Tex. App.—Dallas June 10, 2014, no pet.) (mem. op.) (same, prayer for other relief at law or equity was not request for monetary damages);

6. The petition must be consistent; beware of exhibits. The petition must not contain internal contradictions. *See Cecil v. Hydorn*, 725 S.W.2d 781, 782 (Tex. App.—San Antonio 1987, no writ) (no default judgment could be granted on that portion of plaintiff's case in which allegations of petition conflicted with attached exhibits); *King Fuels, Inc. v. Hashim*, No. 14-13-00010-CV, 2014 WL 2446613, at *4 (Tex. App.—Houston [14th Dist.] May 29, 2014, no pet.) (mem. op.) (contract allowed recovery of cost of improvements on Exhibit D of contract, but it was blank);

7. A petition against nonresident defendants must allege jurisdictional facts. In actions against nonresidents, the petition must make sufficient jurisdictional allegations to put the defendant on notice that he is responsible to answer. *Capitol Brick, Inc. v. Fleming Manufacturing Co.*, 722 S.W.2d 399, 400 (Tex. 1986); *see also Whitney v. L&L Realty Corp.*, 500 S.W.2d 94, 95 (Tex. 1973); *McKanna v. Edgar*, 388 S.W.2d 927, 929–30 (Tex. 1965);

8. The petition should not establish that venue is improper. If defendant does not challenge plaintiff's choice of venue, it is fixed in the county chosen by plaintiff. *Wilson v. Texas Parks & Wildlife Department*, 886 S.W.2d 259, 260 (Tex. 1994), *overruled in part on other grounds by Golden Eagle Archery, Inc. v. Jackson*, 24 S.W.3d 362 (Tex. 2000). But in *Jackson v. Biotectronics, Inc.*, 937 S.W.2d 38, 43 (Tex. App.—Houston [14th Dist.] 1996, no writ), the appellate court reviewed the record to confirm that it did not affirmatively demonstrate that venue was improper;

9. The petition must be on file. The plaintiff's petition on which judgment is sought must be on file on the date the default judgment is granted. *See Carborundum Co. v. Keese*, 313 S.W.2d 332, 334–35 (Tex. Civ. App.—Amarillo 1958, writ ref'd n.r.e.) (where petition is filed but subsequently lost, no default judgment can be granted unless Tex. R. Civ. P. 77 substitution procedures are followed). The plaintiff must serve the defendant with the live pleading that is on file at the time of service. *Caprock Construction Company v. Guaranteed Floorcovering, Inc.*, 950 S.W.2d 203, 204–05 (Tex. App.—Dallas 1997, no writ).

§ 16.19 Default Judgment on Liquidated Damages

Tex. R. Civ. P. 241 states:

> When a judgment by default is rendered against the defendant, or all of several defendants, if the claim is liquidated and proved by an instrument in writing, the damages shall be assessed by the court, or under its direction, and final judgment shall be rendered therefor, unless the defendant shall demand and be entitled to a trial by jury.

A claim is liquidated if the amount of damages caused by the defendant can be accurately calculated from (1) the factual, as opposed to conclusory, allegations in the petition and (2) an

instrument in writing. Whether a claim is liquidated must be determined from the language of the petition, as a seemingly liquidated claim may be unliquidated because of pleading allegations which require proof for resolution. *Sherman Acquisition II LP v. Garcia*, 229 S.W.3d 802, 809 (Tex. App.—Waco 2007, no pet.) (citing *Pentes Design, Inc. v. Perez*, 840 S.W.2d 75, 79 (Tex. App.—Corpus Christi 1992, writ denied).

§ 16.19:1 Standard of Proof

The court must be able to calculate the amount of the judgment with certainty solely from the instruments sued on and the factual, as opposed to the merely conclusory, allegations of the petition. *See Abcon Paving, Inc. v. Crissup*, 820 S.W.2d 951, 953 (Tex. App.—Fort Worth 1991, no writ); *Willacy County v. South Padre Land Co.*, 767 S.W.2d 201, 204 (Tex. App.—Corpus Christi 1989, no writ); *BLS Limousine Service, Inc. v. Buslease, Inc.*, 680 S.W.2d 543, 547 (Tex. App.—Dallas 1984, writ ref'd n.r.e.).

§ 16.19:2 Sworn Account

A proper sworn account is a liquidated claim. *See Novosad v. Cunningham*, 38 S.W.3d 767, 773 (Tex. App.—Houston [14th Dist.] 2001, no pet.); *Mantis v. Resz*, 5 S.W.3d 388, 392 (Tex. App.—Fort Worth 1999, pet. denied) *overruled in part on other grounds by Sheldon v. Emergency Medicine Consultants, I, P.A.*, 43 S.W.3d 701, 702 n.2 (Tex. App.—Fort Worth 2001, no pet.).

§ 16.19:3 Requirement of Sufficiency

Not every writing is sufficient. The writing must be sufficiently specific for the court to calculate damages with certainty. *Higgins v. Smith*, 722 S.W.2d 825, 827 (Tex. App.—Houston [14th Dist.] 1987, no writ) (in action on alleged oral loan, five canceled checks were insufficient written instruments where they did not establish parties to loan, date of repayment, or terms of repayment).

§ 16.20 Default Judgment on Unliquidated Damages

If damages are unliquidated or not proved by an instrument in writing, Tex. R. Civ. P. 243 states that the court "shall hear evidence as to damages" before final default judgment may be granted. But case law allows the use of affidavits. "We conclude that because unobjected to hearsay is, as a matter of law, probative evidence, affidavits can be evidence for purposes of an unliquidated-damages hearing pursuant to Rule 243." *Texas Commerce Bank, N.A. v. New*, 3 S.W.3d 515, 516 (Tex. 1999); *see also Barganier v. Saddle Brook Apartments*, 104 S.W.3d 171, 173–74 (Tex. App.—Waco 2003, no pet.).

"Conclusory evidence of damages is no evidence of damages and will not support an award of damages in a default judgment." *RO-BT Investments, LLP v. Le Properties*, No. 14-13-00034-CV, 2014 WL 259826, at *4 (Tex. App.—Houston [14th Dist.] Jan. 9, 2014, no pet) (mem. op.) (citing *McCoy v. Waller Group, LLC*, No. 05-10-01479-CV, 2012 WL 1470147, at *2 (Tex. App.—Dallas Apr. 26, 2012, no pet.) (mem. op.); *Lefton v. Griffith*, 136 S.W.3d 271, 277 (Tex. App.—San Antonio 2004, no pet.). Affidavits should be specific, establish personal knowledge, and explain how damages were calculated.

If the cause of action is based in tort, the plaintiff must establish that the damages sustained were caused by defendant's conduct. *Morgan v. Compugraphic Corp.*, 675 S.W.2d 729, 732 (Tex. 1984).

To support a default judgment, the court must hear sufficient evidence on all unliquidated damages. *See* Tex. R. Civ. P. 243; *Holt Atherton Industries v. Heine*, 835 S.W.2d 80, 83 (Tex. 1992). *See also Otis Elevator Co. v. Parmelee*,

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850 S.W.2d 179, 181 (Tex. 1993) (trial court, on imposing case-determinative discovery sanctions, improperly awarded unliquidated damages without hearing evidence). Unliquidated damages include the following:

1. Any damages not proved by an instrument in writing. Tex. R. Civ. P. 243;
2. Attorney's fees "actually incurred." ("Attorney's fees are by their very nature unliquidated unless the exact amount is fixed by agreement." *Freeman v. Leasing Associates*, 503 S.W.2d 406, 408 (Tex. Civ. App.—Houston [14th Dist.] 1973, no writ);
3. "Reasonable" attorney's fees. *Odom v. Pinkston*, 193 S.W.2d 888, 891 (Tex. Civ. App.—Austin 1946, writ ref'd n.r.e.); and
4. "Collection expenses" (in addition to attorney's fees) if the written instrument does not fix the exact amount. *Odom*, 193 S.W.2d at 891.

If a party is not present or represented by counsel when testimony is taken on damages following entry of a default judgment, the trial court must require the court reporter to make a record of the evidence. The plaintiff's attorney should request a record if the court fails to do so. Otherwise, the defendant may seek a new trial on unliquidated damages on the ground that the testimony on which the judgment was based was not recorded, and consequently no statement of facts is available for review of the sufficiency of the evidence. *Houston Pipe Coating Co. v. Houston Freightways*, 679 S.W.2d 42, 45 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.). *See also Rogers v. Rogers*, 561 S.W.2d 172, 173 (Tex. 1978); *Morgan Express, Inc. v. Elizabeth-Perkins, Inc.*, 525 S.W.2d 312, 314 (Tex. Civ. App.—Dallas 1975, writ ref'd)). The rule that, absent a statement of facts, the appellate court must presume that the evidence was sufficient does not apply on direct review of a default judgment if no statement of facts is available. *Morgan Express*, 525 S.W.2d at 315; *see also* Michael Pohl & David Hittner, *Judgments by Default in Texas*, 37 Sw. L.J. 421, 453 (1983) (explaining that proof is required to support a default judgment for unliquidated damages).

§ 16.21 Certificate of Last Known Address

At or before the taking of a default judgment, the attorney should provide written certification to the clerk of the last known mailing address of defendant(s). The clerk will provide written notice of the judgment to defendant and note the fact of such mailing on the docket. *See* Tex. R. Civ. P. 239a:

> At or immediately prior to the time an interlocutory or final default judgment is rendered, the party taking the same or his attorney shall certify to the clerk in writing the *last known mailing address of the party against whom the judgment is taken*, which certificate shall be filed among the papers in the cause. Immediately upon the signing of the judgment, the clerk shall mail written notice thereof to the party against whom the judgment was rendered at the address shown in the certificate, *and note the fact of such mailing on the docket*. . . . Failure to comply with the provisions of this rule shall not affect the finality of the judgment.

Tex. R. Civ. P. 239a (emphasis added).

Note that the statutory address for service of an entity through the secretary of state (the most recent address on file with secretary of state) may differ from the certificate of last known address required by Tex. R. Civ. P. 239a. *See Katy Venture, Ltd. v. Cremona Bistro Corp.*, 469 S.W.3d 160, 163 (Tex. 2015) (per curiam)

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(plaintiff should not have used ineffective statutory service address as last known address; because defendant's current address was known to plaintiff, that address should have been stated in certificate of last known address).

When providing a last known address, the attorney should request that the clerk provide defendant notice of judgment and, pursuant to Tex. R. Civ. P. 239a, "[n]ote the fact of mailing on the docket." Defendants sometimes claim they received no notice of the judgment. The docket entry may establish that defendant received prompt notice of judgment.

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Form 16-1

This manual recommends that the attorney review the return of service before filing with the court. See Tex. R. Civ. P. 107 and section 16.8 in this chapter for the requirements of a return of service. This form can be accessed at the Texas Judicial Branch Certification Commission's web page for process server forms at **www.txcourts.gov/jbcc/process-server-certification/forms/**.

Return of Service on Individual Defendant, in Person

RETURN OF SERVICE
SERVICE ON INDIVIDUAL DEFENDANT, IN PERSON

Case Name: ____

Cause Number: __________ Court: ____________________ of __________ County, Texas

1. **Date & Time of Receipt** of Specified Documents by process server: ________________, 20___ at _____ ___.m.
2. **Date & Time of Delivery** of Specified Documents to Defendant: ________________, 20___ at _____ ___.m.
3. **Defendant:** ______________________________
4. **Stated Address: (Place of delivery)** ______________________________
5. **Specified Documents**: a true copy of the citation with date of delivery endorsed thereon with a true copy of the following documents attached thereto:
____
____
6. **Method of Service:** by delivering to Defendant, in person, at the Stated Address.

I am certified under order of Texas Supreme Court to serve process, including citations in Texas. I am not a party to or interested in the outcome of this suit. My identification number and certification expiration date appear below. I received and delivered the Specified Documents to Defendant as stated above. All statements made herein are true. This return is verified or is signed under penalty of perjury.

Signature: ______________________________ **[Complete if signed before a Notary]**

Print Name: ______________________________

Identification Number: ______________________________

Certification Expires: ______________________________

Signed and sworn to by the said ____________________ before me on ______________, 20____.
to certify which witness my hand and seal of office.

____
Notary Public for the State of Texas

[Complete if not signed before a Notary]

My full name is: ________________________. My date of birth is: ____________________.
My address is: ______________________________; zip code __________; United States.
My server identification number: ________________. My certification expires: ________________.
I declare under penalty of perjury that the foregoing, including the Return of Service, is true and correct.
Executed in ________________________, County, Texas, U.S.A., on ______________(date).

____
Declarant (signature)

End of Return. The following does not constitute part of the return:
1) For service on individual Defendant, in person.
2) Line 4, Stated Address, must be complete, including apartment or room number, if any.
3) Line 5, Specified Documents, must be fully and precisely completed.

RET.IND/10.31.13

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Form 16-2

This manual recommends that the attorney review the return of service before filing with the court. See Tex. R. Civ. P. 107 and section 16.8 in this chapter for the requirements of a return of service. This form can be accessed at the Texas Judicial Branch Certification Commission's web page for process server forms at **www.txcourts.gov/jbcc/process-server-certification/forms/**.

Return of Service on Registered Agent, an Individual

RETURN OF SERVICE
SERVICE ON REGISTERED AGENT, AN INDIVIDUAL

Case Name: ____________________

Cause Number: __________ Court: ____________________ of __________ County, Texas

1. **Date & Time of Receipt** of Specified Documents by process server: ______________, 20___ at _____ ___.m.
2. **Date & Time of Delivery** of Specified Documents to Defendant: ______________, 20___ at _____ ___.m.
3. **Defendant:** ____________________
4. **Defendant's Registered Agent:** ____________________
5. **Stated Address:** (Place of delivery) ____________________
6. **Specified Documents:** a true copy of the citation with date of delivery endorsed thereon with a true copy of the following documents attached thereto:
   ____
   ____
7. **Method of Service:** by delivering to Defendant, by delivering to Defendant's Registered Agent, in person, at the Stated Address.

I am certified under order of Texas Supreme Court to serve process, including citations in Texas. I am not a party to or interested in the outcome of this suit. My identification number and certification expiration date appear below. I received and delivered the Specified Documents to Defendant as stated above. All statements made herein are true. This return is verified or is signed under penalty of perjury.

Signature: ____________________ **[Complete if signed before a Notary]**

Print Name: ____________________

Identification Number: ____________________

Certification Expires: ____________________

Signed and sworn to by the said ____________________ before me on ______________, 20_____.
to certify which witness my hand and seal of office.

____
Notary Public for the State of Texas

[Complete if not signed before a Notary]

My full name is: ____________________. My date of birth is: ____________________.
My address is: ____________________; zip code __________; United States.
My server identification number: ______________. My certification expires: ______________.
I declare under penalty of perjury that the foregoing, including the Return of Service, is true and correct.
Executed in ____________________, County, Texas, U.S.A., on ______________(date).

____
Declarant (signature)

End of Return. The following does not constitute part of the return:
1) For service on registered agent, an individual.
2) Line 5, Stated Address, must be complete, including suite or room number, if any.
3) Line 6, Specified Documents, must be fully and precisely completed.

RET.RAIND/10.31.13

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Form 16-3

This manual recommends that the attorney review the return of service before filing with the court. See Tex. R. Civ. P. 107 and section 16.8 in this chapter for the requirements of a return of service. This form can be accessed at the Texas Judicial Branch Certification Commission's web page for process server forms at **www.txcourts.gov/jbcc/process-server-certification/forms/**.

Return of Service on Registered Agent Organization

RETURN OF SERVICE
SERVICE ON REGISTERED AGENT ORGANIZATION

Case Name: ______________________________

Cause Number: __________ Court: ______________ of __________ County, Texas

1. **Date & Time of Receipt** of Specified Documents by process server: ______________, 20___ at _____ ___.m.
2. **Date & Time of Delivery** of Specified Documents to Defendant: ______________, 20___ at _____ ___.m.
3. **Defendant:** ______________
4. **Defendant's Registered Agent:** ______________
5. **Defendant's Registered Office:** ______________
6. **Registered Agent's Employee:** ______________
7. **Specified Documents:** a true copy of the citation with date of delivery endorsed thereon with a true copy of the following documents attached thereto:
____
____
8. **Method of Service:** by delivering to Defendant, by delivering to Defendant's Registered Agent, by delivering to the Registered Agent's Employee, in person, at Defendant's Registered Office.

I am certified under order of Texas Supreme Court to serve process, including citations in Texas. I am not a party to or interested in the outcome of this suit. My identification number and certification expiration date appear below. I received and delivered the Specified Documents to Defendant as stated above. All statements made herein are true. This return is verified or is signed under penalty of perjury.

Signature: ______________________ **[Complete if signed before a Notary]**

Print Name: ______________________

Identification Number: ______________________

Certification Expires: ______________________

Signed and sworn to by the said ______________________ before me on ______________, 20_____.
to certify which witness my hand and seal of office.

____
Notary Public for the State of Texas

[Complete if not signed before a Notary]

My full name is: ______________________. My date of birth is: ______________________.
My address is: ______________________; zip code __________; United States.
My server identification number: ______________. My certification expires: ______________.
I declare under penalty of perjury that the foregoing, including the Return of Service, is true and correct.
Executed in ______________________, County, Texas, U.S.A., on ______________ (date).

____
Declarant (signature)

End of Return. The following does not constitute part of the return:
1) For service on registered agent organization at registered office, see Bus.Org.C. §5.201(d).
2) Line 5, Defendant's Registered Office, must be complete, including suite or room number, if any.
3) Line 7, Specified Documents, must be fully and precisely completed. RET.RAORG/10.31.13

Form 16-4

Substituted service is discussed at section 16.7 in this chapter. This form must be supported by an affidavit (form 16-5 or 16-6).

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

Motion for Substituted Service

1. *Parties.* [**Name of plaintiff**], Plaintiff in this cause, moves for substituted service of process on Defendant, [**name of defendant**].

2. *Grounds.* Service of citation on Defendant has been attempted by [personally delivering it to Defendant at/sending it by [registered/certified] mail to] [**location named in the affidavit**], but these attempts at service have not been successful, as shown by the attached affidavit.

3. *Facts.* [**Include a summary of the facts.**]

Select one of the following.

4. *Requested Method of Service.* As authorized by rule 106(b) of the Texas Rules of Civil Procedure, service on Defendant should be made by leaving a copy of the citation, along with a copy of the petition attached, with anyone over sixteen years of age at [**location specified in the affidavit**].

Or

4. *Requested Method of Service.* [**Describe other manner of service, e.g.,** Service should be made by delivering a copy of the citation, with a copy of the petition attached, to [**name of defendant's attorney**], an attorney, or by affixing it to the door of [**location**]. This manner of service will be reasonably effective to give Defendant notice of this suit because

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[describe basis of belief, e.g., [name of defendant's attorney] presently represents Defendant in another suit and consequently has frequent contact with Defendant.]]

Continue with the following.

5. *Prayer.* Movant prays that the Court direct that citation be served on Defendant in the manner described above.

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

Attach the executed original of the affidavit (form 16-5 or 16-6).
Prepare an order for substituted service (form 16-7).

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Form 16-5

Substituted service is discussed at section 16.7 in this chapter. This affidavit establishes diligence in attempting service, to allow service on the Texas secretary of state.

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

Affidavit in Support of Motion for Substituted Service by Certified Process Server

"My name is [**name of affiant**]. I am a private process server retained by [**name of Plaintiff's law firm**]. I am certified by the Texas Supreme Court to serve process, including citations in Texas. I am not a party to nor interested in the outcome of this suit. I am over the age of eighteen years and competent to make this affidavit.

"'Defendant' refers to [**name of defendant**].

"'Stated Address' refers to [**address where service was attempted**].

"I know that the Stated Address is Defendant's usual place of [business/abode] because [**state reason**].

"I have personal knowledge of the matters stated herein, and this affidavit is true. I believe that service by posting at the front door of the Stated Address or by delivering process to someone over the age of sixteen years at that location will inform Defendant of the pending suit. I personally have attempted to serve the Defendant by delivering the citation to the Defendant as stated in paragraphs 6 and 7. The Defendant was unavailable, and I was unable to deliver the citation.

"The following are my specific attempts to serve Defendant at the Stated Address. On the dates indicated I went to the Stated Address with the results indicated.

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[Date] **[time]** **[describe attempt at service]**

Repeat as necessary.

Include if applicable.

"The following are my specific attempts at locations other than the Stated Address.

[Date] **[time]** **[describe attempt at service]**"

Repeat as necessary.

____
[Name of process server]
Process Server
[Texas certification number]
Certification Expires: **[date]**

SIGNED under oath before me on **[date]**.

____
[Name of notary public]
Notary Public, State of Texas

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Form 16-6

Tex. R. Civ. P. 106 requires that a motion for substituted service be supported by an affidavit. The court will usually require the most direct form of evidence, so the form provided here calls for the affidavit to be executed by the officer or authorized person who attempted service. If the person who received the citation has been unsuccessful in serving the defendant in person or by registered or certified mail and the attorney and the officer or authorized person believe service may be possible under an alternate provision of rule 106, the attorney should prepare an additional affidavit supporting the motion and have a person who has personal knowledge of the situation execute it. The completed affidavit(s) will be filed with the motion for substituted service at form 16-4 in this chapter. No single form affidavit will be appropriate for every situation, and each should be specially drafted based on facts related to the attorney by the person who attempted service; the following is merely an example. Substituted service is discussed at section 16.7.

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

Affidavit in Support of Motion for Substituted Service by Officer

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 authorized to serve citations under rule 103 of the Texas Rules of Civil Procedure.

"Citation for Defendant, [**name of defendant**], in this cause was delivered to the office of the [Sheriff of [**county**] County, Texas/Constable of Precinct No. [**number**] of [**county**] County, Texas/[**name and address of person authorized to serve citations**]].

> State specific facts relied on by the plaintiff to warrant an order for substituted service. The following paragraphs are sample fact allegations; the actual allegations must be drafted to fit the fact situation.

> Select one of the following.

"I attempted to make personal service on Defendant at [**address, city**], Texas, a residential address shown on the citation, on [**number**] occasions on [**date[s] of attempted service**] but

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was told by someone at that address that Defendant was not there. This residential address is Defendant's usual place of abode.

Or

"I attempted to make personal service on Defendant at [**address, city**], Texas, a business address shown on the citation, on [**number**] occasions on [**dates of attempted service**] but was told by someone at that address that Defendant was not there. This business address is Defendant's usual place of business.

Or

"On [**date**], I mailed by certified mail a true copy of the citation, with a copy of the petition attached, to [**address, city**], Texas, as shown on the citation, with delivery restricted to Defendant only, as addressee, but the citation was returned marked 'unclaimed.'

Continue with the following.

"I have personal knowledge of the facts stated above, and they are true and correct."

____
[**Name of affiant**]
Affiant

SIGNED under oath before me on ______________________________.

____
Notary Public, State of Texas

Send the original and a copy of the affidavit to the officer.

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Form 16-7

This order should provide for service by the same method requested in the motion for substituted service (form 16-4). Usually a hearing will not be required and the order can be delivered or mailed to the clerk with the motion and affidavit. Substituted service is discussed at section 16.7. The return of service should factually confirm that the manner of service was precisely as authorized in the order for substituted service.

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

Order for Substituted Service

The Court has considered Plaintiff's Motion for Substituted Service on Defendant, [**name of defendant**], in this cause and the evidence in support of the motion.

The Court finds that—

1. service of citation on Defendant has been attempted by [personally delivering it to Defendant at/sending it by [registered/certified] mail to] [**location specified in the affidavit**], but these attempts at service have not been successful; and

2. the manner of service ordered will be reasonably effective in giving Defendant notice of the suit.

It is therefore ORDERED that service of citation may be made on Defendant, [**name of defendant**], by

Select one of the following.

leaving a copy of the citation, with a copy of the petition attached, with anyone over sixteen years of age at [**location named in the affidavit**].

Or

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[**describe other manner of service, e.g.,** delivering a copy of the citation, with a copy of the petition attached, to [**name of person to be served**].]

Continue with the following.

SIGNED on ______________________________.

____
JUDGE PRESIDING

Include the order with the motion (form 16-4) and affidavit (form 16-5 or 16-6) or send them to the court clerk.

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Form 16-8

This letter may be used if the attorney does not desire a personal appearance before the judge. The attorney should ascertain whether local practice requires a hearing or permits submission of the motion for substituted service by mail. The letter contains alternative language for situations in which the citation either has or has not been returned to the court. *Caveat:* See the discussion at sections 16.6:3 and 16.6:4 in this chapter concerning issuance of citation and return of unserved citation. To ascertain the correct fee, the clerk should be contacted.

A copy of the signed order should be attached to the citation and served on the defendant. The service return should specify the documents delivered to defendant by the process server, generally the citation, petition and the order for substituted service.

Letter to Clerk Transmitting Motion for Substituted Service

[**Date**]

[**Name or identification and address of clerk**]

Re: Motion for Substituted Service
[**style of case**]
Cause No. [**number**]
[**designation and location of court**]

[**Salutation**]

Please bring the enclosed motion for substituted service and attached affidavit[s] to the judge's attention and ask the judge to sign the enclosed order for substituted service if the motion is granted.

Select one of the following. Select the first paragraph if the original citation has not been returned to the court. Select the second paragraph if the citation has been returned to the court.

Please forward a certified copy of the signed order to me in the enclosed addressed, stamped envelope.

Or

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If the order is signed, please issue an alias citation for the defendant named in the order and send the citation and a certified copy of the order to [**name and address of officer or process server**] for service. Please send a dated copy of the order to me in the enclosed addressed, stamped envelope.

Continue with the following.

My check for your fee is enclosed. Thank you for your service.

Sincerely yours,

____

[**Name of attorney**]

Enc.

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Form 16-9

The record must show grounds for service on the secretary of state. Often, the grounds for service are that with reasonable diligence, the registered agent cannot be found at the registered office. See generally section 16.11:2 in this chapter and Tex. Bus. Orgs. Code § 5.251. As noted in section 16.11:2, reasonable diligence is best shown through the process server's affidavit (form 16-5). As discussed in section 16.11:2 and Tex. Bus. Orgs. Code § 5.253, the secretary of state shall forward process to the most recent address of the entity on file with the secretary of state. Instead of a return of service, a certificate from the secretary of state should be obtained. See discussion about Whitney Certificates at section 16.11:2. "A certificate . . . from the Secretary of State conclusively establishes that process was served. . . . " *Campus Investments, Inc. v. Cullever*, 144 S.W.3d 464, 466 (Tex. 2004). Service on the secretary of state can be accomplished by private process server, sheriff, constable, or clerk of the court. *See* Tex. R. Civ. P. 103.

For service pursuant to the Texas long-arm statute, see section 16.14. Request that the secretary of state forward process to the defendant at the defendant's home or home office address. *See* Tex. Civ. Prac. & Rem. Code § 17.045(a) and section 16.14:2.

Letter Transmitting Citation for Service on Secretary of State

[**Date**]

[**Name of constable**]
Constable, Precinct 1, Travis County
4717 Heflin Lane, Suite 127
Austin, TX 78721

Re: Secretary of State
[**style of case**]
Cause No. [**number**]
[**designation and location of court**]

[**Salutation**]

Enclosed are duplicate copies of the citation and petition in the referenced cause to be served on the secretary of state of Texas. In addition to serving duplicate copies of the citation and petition, please deliver to the secretary of state the enclosed letter and check.

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We will obtain a Whitney service certificate from the secretary of state, confirming service. (*Campus Investments, Inc. v. Cullever*, 144 S.W.3d 464, 466 (Tex. 2004).) Therefore, we do not require that a citation return be filed.

My check for your fee is enclosed. If you have a question or need additional information, please telephone me (collect if long distance).

Thank you for your immediate attention to this matter.

Sincerely yours,

____

[**Name of attorney**]

Certified Mail No. [**number**]
Return Receipt Requested

Enc.

Prepare a letter to secretary of state (form 16-10).

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Form 16-10

This letter should be sent to the officer or other person serving the secretary of state to be delivered to the secretary of state when process is served. If a private process server or court clerk serves citation, change letter accordingly. To ascertain the correct fee, contact the secretary of state's administrative unit at 512-463-5560.

The record must show grounds for service on the secretary of state. Often, the grounds for service are that with reasonable diligence, the registered agent cannot be found at the registered office. See generally section 16.11:2 in this chapter and Tex. Bus. Orgs. Code § 5.251. Pursuant to Tex. Bus. Orgs. Code § 5.253, the secretary of state shall forward process to the most recent address of the entity on file with the secretary of state. Instead of a return of service, a certificate from the secretary of state should be obtained. See the discussion about Whitney Certificates at section 16.11:2. "A certificate . . . from the Secretary of State conclusively establishes that process was served. . . . " *Campus Investments, Inc. v. Cullever*, 144 S.W.3d 464, 466 (Tex. 2004). Service on the secretary of state can be accomplished by private process server, sheriff, constable, or clerk of the court. *See* Tex. R. Civ. P. 103.

For service pursuant to the Texas long-arm statute, see section 16.14. Request that the secretary of state forward process to the defendant at the defendant's home or home office address. *See* Tex. Civ. Prac. & Rem. Code § 17.045(a) and section 16.14:2.

Letter to Secretary of State

[**Date**]

Secretary of State of Texas
Austin, Texas

HAND DELIVERY BY CONSTABLE, PRECINCT 1, TRAVIS COUNTY, TEXAS

Re: [**style of case**]
Cause No. [**number**]
[**designation and location of court**]

[**Salutation**]

The person delivering this letter is also delivering duplicate copies of citation and the petition in the referenced cause, served on you based on the grounds stated in the petition, and a check for your fees for service and for a certificate of service.

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Select one of the following paragraphs. The second option should be used for service pursuant to the long-arm statute.

Please forward the citation and petition to the defendant's most recent address on file with the Texas secretary of state, which is [**address, city, state**].

Or

The defendant's home or home office address to which the citation and petition should be mailed is [**address, city, state**].

Continue with the following.

Please furnish the usual copy of your letter transmitting the process to the defendant. When the return receipt has been returned to you, please send us your service certificate in the enclosed addressed, stamped envelope, confirming service.

Thank you for your prompt and courteous attention to this matter.

Sincerely yours,

____

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

Enc.

Send this letter to the constable using the transmittal letter at form 16-9.

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Form 16-11

Service through the secretary of state is discussed at section 16.11:2 in this chapter. This affidavit establishes diligence in attempting service, to allow service on the Texas secretary of state.

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

Affidavit in Support of Service on Secretary of State

"My name is [**name of affiant**]. I am a private process server retained by [**name of plaintiff's law firm**]. I am certified by the Texas Supreme Court to serve process, including citations in Texas. I am not a party to nor interested in the outcome of this suit. I am over the age of eighteen years and competent to make this affidavit.

"'Defendant' refers to [**name of defendant**].

"'Registered Agent' refers to [**name of affiant**].

"'Registered Office' refers to [**registered office address for defendant**].

"Most recent address of Defendant on file with Texas secretary of state is [**address, city, state**].

"I am a process server certified under supreme court order. I have personal knowledge of the matters stated herein, and this affidavit is true. I personally have attempted to serve Defendant by delivering the citation to Registered Agent at Defendant's Registered Office. Registered Agent was unavailable, and I was unable to deliver the citation.

[**Date**] [**time**] [**describe attempt at service**]

Repeat as necessary.

Include if applicable.

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"The following are my specific attempts at locations other than the registered office.

[**Date**] [**time**] [**describe attempt at service**]"

Repeat as necessary.

Continue with the following.

____

[**Name of process server**]
Process Server
[**Texas certification number**]
Certification Expires: [**date**]

SIGNED under oath before me on [**date**].

____

Notary Public, State of Texas

Form 16-12

Service by publication is not recommended. See section 16.16:1 in this chapter. Service by publication is discussed at section 16.16 in this chapter. Only the alternative grounds most likely to be used in a collection suit are presented here as options.

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

Use the same caption as in the original petition.

Affidavit for Citation by Publication

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 [Plaintiff/[**title of affiant, e.g.,** credit manager and duly authorized agent for Plaintiff]/attorney of record for Plaintiff] in this cause.

"This affidavit is made to authorize the clerk of this Court to issue citation for Defendant, [**name of defendant**], by publication, in accordance with rule 109 of the Texas Rules of Civil Procedure.

Include a statement of facts on which the affidavit is based. The following paragraph is a sample of fact allegations; the actual allegations must be drafted to fit the fact situation.

"Mail sent to all of Defendant's known home or home office addresses has been returned with the notation that Defendant has moved and left no forwarding address. Persons at Defendant's last known residence and business addresses have told me that they do not know Defendant's whereabouts or forwarding address. The Texas Department of Public Safety has told me that [**address, city, state**], Defendant's last residence address known to me, is the address for Defendant still shown on its records.

Select one of the following.

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"Defendant's residence is unknown to me [**include if the affiant is an agent or attorney:** and to Plaintiff]. After using due diligence, as described above, [I/Plaintiff and I] have been unable to learn Defendant's whereabouts."

Or

"Defendant is a transient. After using due diligence, as described above, [I/Plaintiff and I] have been unable to learn Defendant's whereabouts."

Or

"Defendant is absent from Texas, and, as described above, Plaintiff has attempted to obtain personal service as provided for by rule 108 of the Texas Rules of Civil Procedure but has been unable to do so."

Or

"Defendant is not a resident of Texas, and Plaintiff has attempted to obtain personal service of nonresident notice on Defendant as provided for by rule 108 of the Texas Rules of Civil Procedure but has been unable to do so."

Or

"Defendant is absent from Texas, is not within the United States, and is not in the armed forces of the United States, and, as described above, Plaintiff has attempted to obtain personal service of nonresident notice on Defendant as provided for by rule 108 of the Texas Rules of Civil Procedure but has been unable to do so."

Continue with the following.

____
[Name of affiant]
Affiant

SIGNED under oath before me on ______________________________.

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____

Notary Public, State of Texas

File the executed affidavit, using the transmittal letter at form 16-13 if mailed to the clerk.

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Form 16-13

This letter may be used to mail the client's affidavit to the clerk with a request for issuance of citation for service by publication. The letter requests that the citation be returned to the attorney. It is recommended that all citations be processed through the attorney's office (see section 16.6 in this chapter). To ascertain the correct fee, contact the clerk. Most clerks will issue citation based on an affidavit (see form 16-12). Citation by publication is discussed at section 16.16, and is not recommended, see section 16.16:1. The clerk of the court in which the case is pending may serve the citation by publication. See form 16-15.

Letter to Clerk Requesting Issuance of Citation by Publication

[**Date**]

[**Name or identification and address of clerk**]

Re: [**style of case**]
Cause No. [**number**]
[**designation and location of court**]

[**Salutation**]

Please issue a citation to be served by publication for the referenced cause, based on the enclosed affidavit. Please send the citation to me for forwarding to the appropriate officer. A stamped, addressed envelope and a check for your fee are enclosed.

Thank you for your service.

Sincerely yours,

____

[**Name of attorney**]

Enc.

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Form 16-14

This letter may be used if the plaintiff's attorney prefers to send the citation to the sheriff or constable rather than having the clerk do so or having the clerk serve the citation and if he wants to see the officer's return to check all documents for correctness. It is recommended that the citation be processed through the attorney's office (see sections 16.6 and 16.8 in this chapter). Service by publication is discussed at section 16.16.

To ascertain the correct fee, contact the officer. In some cases, the clerk collects the officer's fee (local practices vary); in such a case, it is unnecessary to send payment with this letter and that sentence should be deleted or modified.

It is good practice, although not required, to send the citation by certified mail to the officer, obtaining proof (by the green return card) that the officer received the citation.

Caveat: See section 16.16:6 concerning service of citation by publication by a sheriff, constable, or the court clerk under Tex. R. Civ. P. 116 and citation generally under Tex. R. Civ. P. 103. See Tex. R. Civ. P. 117 as to return of citation by publication.

Letter to Officer Transmitting Citation to Be Served by Publication

[**Date**]

[**Name, title, and address of officer**]

Re: [**style of case**]
Cause No. [**number**]
[**designation and location of court**]

[**Salutation**]

Enclosed is a citation in the referenced cause to be served by publication.

When the citation has been published for four consecutive weeks, please complete your return by inserting the hour and date of receipt, the title of the newspaper and county of its publication, and the dates of publication and by signing it in your official capacity. Please mail the completed return to me with a printed copy of the published citation in the enclosed addressed, stamped envelope.

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My check for your fee is enclosed. If you have a question or need additional information, please telephone me (collect if long distance).

Thank you for your immediate attention to this matter.

Sincerely yours,

____
[Name of attorney]

Certified Mail No. [**number**]
Return Receipt Requested

Enc.

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Form 16-15

This letter may be used to mail the client's affidavit to the clerk for issuance of citation and its service by publication. Most clerks will issue citation based on an affidavit (see form 16-12 in this chapter). Contact the clerk to ascertain whether a fee is required, and if so, the amount. Service by publication is discussed at section 16.16.

Letter Requesting Clerk to Issue and Serve Citation by Publication

[**Date**]

[**Name or identification and address of clerk**]

Re: [**style of case**]
Cause No. [**number**]
[**designation and location of court**]

[**Salutation**]

Please issue a citation to be served by publication in the referenced cause, based on the enclosed affidavit.

When the citation has been published for four consecutive weeks, please complete your return by inserting the hour and date of receipt, the title of the newspaper and county of its publication, and the dates of publication and by signing it in your official capacity. Please mail the completed return to me with a printed copy of the published citation in the enclosed addressed, stamped envelope.

My check for your fee is enclosed. If you have a question or need additional information, please telephone me (collect if long distance).

Thank you for your immediate attention to this matter.

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Sincerely yours,

____

[Name of attorney]

Enc.

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Form 16-16

This motion should be used by the plaintiff to request the court to appoint an attorney to defend the suit on behalf of the defendant when service has been made by publication and no answer has been filed or appearance entered within the prescribed time. See Tex. R. Civ. P. 244 and section 16.16:5 in this chapter. For an order granting this motion, see form 16-17.

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

Use the same caption as in the original petition unless the cause has been transferred.

Motion for Appointment of Attorney Ad Litem

1. *Parties.* **[Name of plaintiff]**, Plaintiff, moves the Court to appoint an attorney ad litem to defend this suit on behalf of **[name of defendant]**, Defendant in this cause, as required by rule 244 of the Texas Rules of Civil Procedure.

2. *Facts.* On **[date]**, service was made by publication in **[title of newspaper]** for the statutory time. No answer has been filed or appearance entered by Defendant within the time prescribed by the Texas Rules of Civil Procedure.

3. *Grounds.* Under rule 244 of the Texas Rules of Civil Procedure, an attorney ad litem should be appointed to defend this suit on behalf of Defendant, because service has been made by publication and no answer has been filed or appearance entered within the prescribed time.

4. *Prayer.* Plaintiff prays that—

   a. the Court appoint an attorney ad litem to represent and defend this suit on behalf of Defendant;

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b. on entry of final judgment in this cause, the attorney ad litem be awarded at least $[**amount**] as reasonable fees for his services and discharged from further representation of Defendant; 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**]

Prepare an order appointing attorney ad litem (form 16-17).

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Form 16-17

This order appoints an attorney ad litem to defend the suit on behalf of the defendant when service has been made by publication and no answer has been filed or appearance entered within the prescribed time, as required by Tex. R. Civ. P. 244. This order is based on the motion at form 16-16 in this chapter.

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

Order Appointing Attorney Ad Litem

The Court has considered Plaintiff's Motion for Appointment of Attorney Ad Litem in this cause and the evidence in support of the motion.

The Court finds that—

1. service has been made by publication for the statutory time and no answer has been filed or appearance entered within the prescribed time; and

2. the Court should appoint an attorney ad litem to defend the suit on behalf of Defendant.

It is therefore ORDERED that ______________________________ be appointed attorney ad litem to defend this suit on behalf of Defendant.

SIGNED on ______________________________.

____
JUDGE PRESIDING

Include the order with the motion (form 16-16) when it is filed with the clerk.

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Form 16-18

This order is to be submitted to the court at the same time as the final judgment. It is based on the motion and order at forms 16-16 and 16-17 in this chapter. See chapter 20 on judgments generally and forms 20-10 through 20-15.

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

Order for Discharge and Compensation of Attorney Ad Litem

The Court has considered Plaintiff's Motion for Appointment of Attorney Ad Litem and the evidence in support of that motion.

The Court finds that **[name of attorney ad litem]** was appointed attorney ad litem and appeared on behalf of **[name of defendant]**, Defendant in this suit.

It is therefore ORDERED that **[name of attorney ad litem]** is hereby discharged from further representation on behalf of Defendant.

Final judgment in this suit is being ORDERED this day, with attorney's fees to be paid by Plaintiff and taxed as costs against Defendant.

SIGNED on ______________________________.

____
JUDGE PRESIDING

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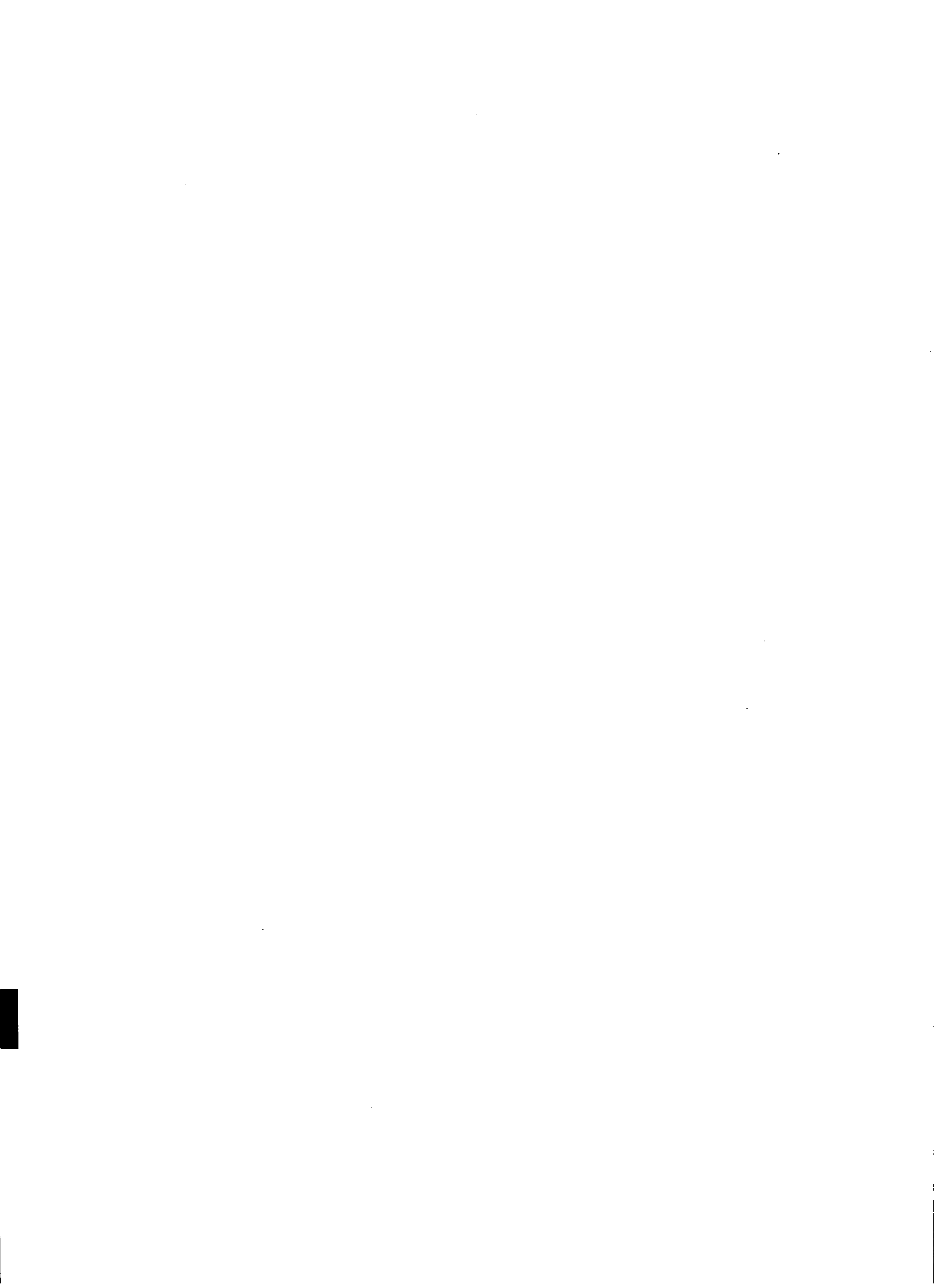

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Chapter 17

Defenses and Counterclaims

I. Defenses

§ 17.1 Accord and Satisfaction

§ 17.1:1 Accord and Satisfaction Generally

An accord is an agreement in which, in satisfaction of a claim, one of the parties undertakes to give or perform, and the other to accept, something other than that to which the claimant is or considers himself to be entitled. Satisfaction is the execution or performance of the agreement. *Hunt v. Facility Insurance Corp.*, 78 S.W.3d 564, 568 (Tex. App.—Austin 2002, pet. denied) (citing *Stevens v. State Farm Fire & Casualty Co.*, 929 S.W.2d 665, 673 (Tex. App.—Texarkana 1996, writ denied)); *Texas Commerce Bank National Ass'n v. Geary*, 938 S.W.2d 205, 214 (Tex. App.—Dallas 1997), rev'd on other grounds, *Geary v. Texas Commerce Bank, N.A.*, 967 S.W.2d 836, 837 (Tex. 1998) (per curiam) (citing *Fortner v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 687 S.W.2d 8, 13 (Tex. App.—Dallas 1984, writ ref'd n.r.e.)). Accord and satisfaction rests on a new contract, express or implied, in which the parties agree to the discharge of the existing obligation by tender and acceptance of the lesser amount. *Lopez v. Munoz*, 22 S.W.3d 857, 863 (Tex. 2000); *Jenkins v. Henry C. Beck Co.*, 449 S.W.2d 454, 455 (Tex. 1969); *Gammon v. Hodes*, No. 03-13-00124-CV, 2015 WL 1882274, at *8 (Tex. App.—Austin Apr. 24, 2015, pet. denied) (mem. op.).

Accord and satisfaction requires proof of a dispute and an unmistakable communication to the creditor that tender of the reduced sum is on the condition that acceptance will satisfy the underlying obligation; the parties must specifically and intentionally agree to the discharge of one of the party's existing obligations. *Lopez*, 22 S.W.3d at 863 (to prevail on its defense, defendant required to present summary judgment evidence that fee was disputed and claimants specifically and intentionally agreed to relinquish any claims they might have against defendant for its alleged overcharge); (*Hairston v. Southern Methodist University*, 441 S.W.3d 327, 337 (Tex. App.—Dallas 2013, pet. denied) (accord and satisfaction established where plaintiff signed agreement to accept partial satisfaction of amount claimed under alleged oral contract).

The bona fide dispute must be to the claim itself. *Vaughn Excavating & Construction, Inc. v. Centergas Fuels, Inc.*, 223 S.W.3d 591, 592–93 (Tex. App.—Amarillo 2007, no pet.) (no dispute where defendant paid agreed amount for fuel he later claimed was defective and evidence suggested that truck's mechanical problems had causes other than fuel at issue; defendant's attempt at offset by way of accord and satisfaction was more in nature of counterclaim); *Klemp Corp. v. Thompson*, 402 S.W.2d 257, 261 (Tex. Civ. App.—Waco 1966, no writ). *See also* Tex. Bus. & Com. Code § 3.311 (statutory defense of accord and satisfaction does not apply to a liquidated amount not subject to a bona fide dispute; see section 17.1:5).

A document in which the parties expressly provide that each retains rights under the original contract and that only part of the contract is can-

celed cannot qualify as an accord and satisfaction. *Stewart & Stevenson Services v. Enserve, Inc.*, 719 S.W.2d 337, 342 (Tex. App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.), *disapproved on other grounds*, *Casu v. Marathon Refining Co.*, 896 S.W.2d 388 (Tex. App.—Houston [1st Dist.] 1995, writ denied).

Parties may vary the effect of accord and satisfaction by contract. *See Milton M. Cooke Co. v. First Bank & Trust*, 290 S.W.3d 297, 304–05 (Tex. App.—Houston [1st Dist.] 2009, no pet.).

§ 17.1:2 Sufficiency of Consideration

The mere payment of part of a debt that is liquidated and undisputed is not consideration that supports a promise to accept the same in full payment of the debt. *Petty v. Citibank (South Dakota) N.A.*, 218 S.W.3d 242, 247 (Tex. App.—Eastland 2007, no pet.); *Jeanes v. Hamby*, 685 S.W.2d 695, 697–98 (Tex. App.—Dallas 1984, writ ref'd n.r.e.); *DeLuca v. Munzel*, 673 S.W.2d 373, 375 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.).

Additional consideration, however slight, technical, or insignificant, has been held to be valuable consideration that supports an accord and satisfaction by part payment of a liquidated and undisputed claim. *See, e.g., Brunswick Corp. v. Suburban Bowling, Inc.*, 398 S.W.2d 294 (Tex. Civ. App.—Eastland 1965, no writ) (removal of bowling equipment supplied sufficient additional consideration for accord and satisfaction on unpaid balance of promissory notes).

If the claim is unliquidated or there is a dispute regarding liability, acceptance of less than what the claimant believes he is owed is a valid accord and satisfaction. *Industrial Life Insurance Co. v. Finley*, 382 S.W.2d 100, 106 (Tex. 1964).

If one of the two different amounts is due but there is a genuine dispute as to which is the proper amount, the entire demand is unliquidated and payment of the undisputed amount or liability on the condition that it is in full satisfaction of the entire claim will discharge the entire debt if the creditor accepts it. *Grindstaff v. North Richland Hills Corp. No. 2*, 343 S.W.2d 742, 745 (Tex. Civ. App.—Fort Worth 1961, writ ref'd n.r.e.).

§ 17.1:3 Mutual Assent

Accord and satisfaction requires mutual assent, either expressly or tacitly. There must be an unmistakable communication to the creditor that tender of the lesser sum or alternative satisfaction is on the condition that acceptance constitutes full satisfaction of the underlying obligation. *Republic Underwriters Insurance Co. v. Mex-Tex, Inc.*, 150 S.W.3d 423, 427 (Tex. 2004) (quoting *Jenkins v. Henry C. Beck Co.*, 449 S.W.2d 454, 455 (Tex. 1969)). The condition must be plain, definite, and certain; the statement accompanying tender must be "so clear, full and explicit that it is not susceptible of any other interpretation"; and the offer must be accompanied by acts and declarations that the creditor is "bound to understand." *Jenkins*, 449 S.W.2d at 455.

§ 17.1:4 Mistake

An accord and satisfaction may be set aside based on mistake. To prove unilateral mistake, a party must show that (1) the mistake is of so great a consequence that enforcement of the con-tract as made would be unconscionable, (2) the mistake relates to a material feature of the contract, (3) the mistake was made regardless of the exercise of ordinary care, and (4) the parties can be placed in status quo in the equity sense. *Boland v. Mundaca Investment Corp.*, 978 S.W.2d 146, 149 (Tex. App.—Austin 1998, no pet.). If the defense of mistake is established, there is no mutual assent, and the creditor may recover the balance due. *Hines v. Massachusetts Mutual Life Insurance Co.*, 174 S.W.2d 94, 97–

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98 (Tex. Civ. App.—Fort Worth 1943, no writ); *see also International Life Insurance Co. v. Stuart*, 201 S.W. 1088 (Tex. Civ. App.—Fort Worth 1918, no writ).

§ 17.1:5 Known Insolvency of Debtor Exception

If (1) the debtor (or guarantor) was insolvent or seriously "financially embarrassed," (2) the debtor's insolvency or "financial embarrassment" was known to the creditor on the date of the payment, and (3) the creditor accepted his payment on that date in consideration of the debtor's insolvency or seriously embarrassed financial condition in full settlement and release of the debtor's liability, there is a valid accord and satisfaction, even if the claim is liquidated and undisputed. *Prather v. Citizens National Bank*, 582 S.W.2d 903, 906–07 (Tex. Civ. App.—Waco 1979, writ ref'd n.r.e.).

§ 17.1:6 Third Parties and Guarantors

A liquidated claim as well as an unliquidated or disputed claim may be discharged by an accord and satisfaction on acceptance by the creditor of a lesser amount from a third person. *Thompson v. Pechacek*, 365 S.W.2d 207, 211 (Tex. Civ. App.—Fort Worth 1963, no writ). The substitution by a debtor of the obligation of an independent third party is a sufficient consideration to sustain a contract on the part of the creditor to release a part of the debt. *Ralston v. Aultman, Miller & Co.*, 26 S.W. 746 (Tex. Civ. App.—Fort Worth 1894, no writ); but see *Johnson v. Hoover & Lyons*, 165 S.W. 900 (Tex. Civ. App.—Amarillo 1914, writ dism'd).

A guarantor may enter into an accord and satisfaction, and acceptance of partial payment with knowledge of a guarantor's insolvency will extinguish a debt. *Diamond Paint Co. v. Embry*, 525 S.W.2d 529, 532 (Tex. Civ. App.—Houston [14th Dist.] 1975, writ ref'd n.r.e.).

§ 17.1:7 Executory or Executed

Accord and satisfaction can be either executory (the promise must be performed before the old obligation is discharged) or executed (the accord is fully paid or the promise itself is taken as satisfaction). *DoAll Dallas Co. v. Trinity National Bank*, 498 S.W.2d 396, 401 (Tex. Civ. App.—Texarkana 1973, writ ref'd n.r.e.).

§ 17.1:8 Election of Remedies

An accord without complete satisfaction does not bar a suit on the original cause of action. *Rutherford v. Page, Southerland & Page*, 429 S.W.2d 602, 609 (Tex. Civ. App.—Austin 1968, writ ref'd n.r.e.). However, an executory accord may be enforced in favor of a debtor who, in accordance with the terms of an agreement with the creditor, tenders performance that the creditor refuses to accept. *Alexander v. Handley*, 146 S.W.2d 740, 743 (Tex. 1941). An accord that is unbreached by the debtor is a defense against suit on the claim. *Pacific Employers Insurance Co. v. Brannon*, 242 S.W.2d 185 (Tex. 1951).

The satisfaction may be the new promise itself. If the parties expressly agree that the promise itself is accepted as satisfaction of the underlying obligation, the accord and satisfaction is fully executed by a novation that bars an action on the underlying debt. *DoAll Dallas Co.*, 498 S.W.2d at 400. See section 17.3 below for a discussion of novation.

Once tender of payment or other substituted performance has been accepted and nothing remains to be done by either party to the agreement, the settlement is fully executed and not executory. *Thompson v. Pechacek*, 365 S.W.2d 207, 209 (Tex. Civ. App.—Fort Worth 1963, no writ).

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§ 17.1:9 Pleading and Proof

Accord and satisfaction is an affirmative defense that must be specifically pleaded. Tex. R. Civ. P. 94. The burden of proof is on the party asserting the defense. *Harris v. Rowe*, 593 S.W.2d 303, 306 (Tex. 1979).

§ 17.2 Accord and Satisfaction by Use of Instrument under Texas Business and Commerce Code

A person against whom a claim is asserted may also establish a defense of accord and satisfaction by using a check and following the steps set forth in Tex. Bus. & Com. Code § 3.311. *See Baeza v. Hector's Tire & Wrecker Service, Inc.*, 471 S.W.3d 585, 591 (Tex. App.—El Paso 2015, no pet.) ("A party may assert the defense of accord and satisfaction under a common law doctrine, under statutory authority, or both."). The elements are similar to those in the common law, but the statutory defense also requires the use of a negotiable written instrument sent with a "good faith" intent for it to be a full settlement of a dispute. *Baeza*, 471 S.W.3d at 593; Tex. Bus. & Com. Code § 3.311(a)(1); *Leach v. Wilbur-Ellis Co.*, No. 07-14-00022-CV, 2014 WL 4553204, at *2 (Tex. App.—Amarillo Sept. 15, 2014, no pet.) (mem. op.). Section 3.311 is meant to encourage "informal dispute resolution by [use of] full satisfaction checks" (see section 17.1:5). Tex. Bus. & Com. Code § 3.311 cmt. 3.

Section 3.311 does not conflict with the common-law doctrine of accord and satisfaction; it is "based on a belief that the common-law rule produces a fair result." *Flores v. Hansen*, No. 2-09-465-CV, 2010 Tex. App. LEXIS 7663 (Tex. App.—Fort Worth, September 16, 2010, no pet.); *Milton M. Cooke Co. v. First Bank & Trust*, 290 S.W.3d 297, 304 (Tex. App.—Houston [1st Dist.] 2009, no pet.); Tex. Bus. & Com. Code § 3.311 cmt. 3.

Like the common-law doctrine, accord and satisfaction under Tex. Bus. & Com. Code § 3.311 can be altered by contract. *See* Tex. Bus. & Com. Code § 1.302; *Leach*, 2014 WL 4553204, at *2.

§ 17.2:1 Elements

Accord and satisfaction exists under Tex. Bus. & Com. Code § 3.311 if—

1. the debtor in good faith tendered an instrument to the creditor in full satisfaction of the claim;
2. the instrument or an accompanying writing contained a conspicuous statement to the effect that the instrument was tendered as full satisfaction of the claim;
3. the amount of the claim was unliquidated or subject to bona fide dispute; and
4. the creditor obtained payment of the instrument.

Tex. Bus. & Com. Code § 3.311(a), (b); *Leach v. Wilbur-Ellis Co.*, No. 07-14-00022-CV, 2014 WL 4553204, at *2 (Tex. App.—Amarillo Sept. 15, 2014, no pet.) (mem. op.).

Restrictive endorsements do not need to be on the check itself but can be in an accompanying written communication. In *Custom Transit, LP vs. Richway Cartage, Inc.*, 375 S.W.3d 337, 347–48 (Tex. App.—Houston [14th Dist.] 2012, pet. denied), the court held that the creditor's oral agreement to accept "full payment" for less than the total amount owed was sufficient to find accord and satisfaction.

§ 17.2:2 Requirement for Liquidated Claim or Bona Fide Dispute

Importantly, a statement on the instrument that the check is being tendered in full satisfaction or

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marked "paid in full" is not sufficient to constitute an accord and satisfaction if the claim is liquidated and not subject to a bona fide dispute. *Petty v. Citibank (South Dakota) N.A.*, 218 S.W.3d 242, 246 (Tex. App.—Eastland 2007, no pet.) (mere payment of part of debt that is undisputed is not sufficient consideration to support promise to accept same in full payment of entire debt and does not bar creditors suit to recover balance) (quoting Tex. Bus. & Com. Code § 3.311 cmt. 4: "Section 3–311 does not apply to cases in which the debt is a liquidated amount and not subject to a bona fide dispute").

§ 17.2:3 Defeating Debtor's Attempt at Accord and Satisfaction

The debtor's attempt at accord and satisfaction will be defeated if—

1. a creditor organization, within a reasonable time before the tender, sends a conspicuous statement to the debtor that communications concerning disputed debts, including an instrument tendered as satisfaction, be sent to a designated person, office, or place and the instrument or accompanying communication is not sent there; or
2. the creditor, whether an organization or not, tenders repayment of the amount of the instrument to the debtor within ninety days after payment.

Tex. Bus. & Com. Code § 3.311(c). *See also Leach v. Wilbur-Ellis Co.*, No. 07-14-00022-CV, 2014 WL 4553204, at *3 (Tex. App.—Amarillo Sept. 15, 2014, no pet.) (mem. op.) (conspicuousness requirement of section 3.311(c)(1)(A) does not apply to an express provision of a note). Even if the creditor takes these preventive actions, however, the court may still find an accord and satisfaction if, within a reasonable time before collection of the instrument was initiated, the creditor or his agent having direct responsibility with respect to the disputed debt knew that the instrument was tendered in full satisfaction of the claim. Tex. Bus. & Com. Code § 3.311(d). *See also Khoury v. Bekins Moving & Storage Co.*, No. 05-98-00619-CV, 2000 WL 1073607, at *2 (Tex. App.—Dallas Jul. 24, 2000, no pet.) (not designated for publication) (in order to avoid accord and satisfaction, the check must be returned to the maker); *Metromarketing Services, Inc. v. HTT Headwear, Ltd.*, 15 S.W.3d 190, 197 (Tex. App.—Houston [1st Dist.] 2000, no pet.) ("to repudiate a transaction that purports to fully satisfy a claim, a creditor should return the check"); *Indiana Lumbermen's Mutual Insurance Co. v. State of Texas*, 1 S.W. 3d 264, 267 (Tex. App.—Fort Worth 1999, pet. denied) (state was required to return checks without cashing them to avoid accord and satisfaction).

Comment 7 to section 3.311 describes the situation when a debtor sends a "full payment" check to a lock box: "If a full satisfaction check is sent to a lock box or other office processing checks sent to the claimant, it is irrelevant whether the clerk processing the check did or did not see the statement that the check was tendered as full satisfaction of the claim. Knowledge of the clerk is not imputed to the organization because the clerk has no responsibility with respect to an accord and satisfaction. Moreover, there is no failure of 'due diligence' under [Tex. Bus. & Com. Code § 1.202(f)] if the claimant does not require its clerks to look for full satisfaction statements on checks or accompanying communications. Nor is there any duty of the claimant to assign that duty to its clerks. [Section 3.311(c)] is intended to allow a claimant to avoid an inadvertent accord and satisfaction by complying with either subsection (c)(1) or (2) without burdening the check-processing operation with extraneous and wasteful additional duties." Tex. Bus. & Com. Code § 3.311 cmt. 7.

Practice Note: Despite the legal bases to defeat an accord and satisfaction defense based on a "full payment" check, the creditor and cred-

itor's counsel should consider not cashing the "full payment" check and returning it to the debtor. Alternatively, one should attempt to obtain an express confirmation from the debtor (by letter or electronically) confirming rescission of the restrictive endorsement, and permitting the creditor to negotiate the check as an unconditional payment against a specific outstanding debt.

§ 17.3 Novation

§ 17.3:1 Novation Generally

Novation is the substitution of a new agreement between the same parties or the substitution of a new party with respect to an existing agreement. When a novation occurs, only the new agreement can be enforced. *Supply Pro, Inc. v. Ecosorb International, Inc.*, No. 01-15-00621-CV, 2016 WL 4543136, at *7 (Tex. App.—Houston [1st Dist.] Aug. 30, 2016, no pet.) (mem. op.); *New York Party Shuttle, LLC v. Bilello*, 414 S.W.3d 206, 214 (Tex. App.—Houston [1st Dist.] 2013, pet. denied). "A novation agreement need not be in writing or evidenced by express words of agreement, and an express release is not necessary to effect a discharge of an original obligation by novation. . . . The intent to accept the new obligation in lieu and in discharge of the old one may be inferred from the facts and circumstances surrounding the transaction [and] the conduct of the parties." *Supply Pro*, 2016 WL 4543136, at *7 (quoting *Bank of North America v. Bluewater Maintenance, Inc.*, 578 S.W.2d 841, 842 (Tex. Civ. App.—Houston [1st Dist.] 1979, writ ref'd n.r.e.)).

§ 17.3:2 Elements

Novation requires—

1. a previous valid obligation;
2. a mutual agreement of all parties to the acceptance of a new contract;
3. the extinguishment of the old contract; and
4. a valid new agreement.

Vickery v. Vickery, 999 S.W.2d 342, 356 (Tex. 1999); *Farkooshi v. Afisco Interest, LLC*, No. 14-13-00201-CV, 2014 WL 4161708, at *4 (Tex. App.—Houston [14th Dist.] Aug. 21, 2014, no pet.) (mem. op.).

An express release is not necessary to discharge an original obligation by novation, because the intent or agreement to discharge the old obligation by the new one may be inferred from the facts and circumstances and conduct of the parties. A novation agreement need not be in writing or evidenced by express words because, like any other ultimate fact, it may be inferred from the acts and conduct of the parties and from other facts and circumstances. *Computed Imaging Service v. Fayette Memorial Hospital*, No. 03-00-232-CV, 2001 WL 23188, at *2 (Tex. App.—Austin Jan. 11, 2001, no pet.) (mem. op.) (citing *Commercial Credit Corp. v. Brown*, 471 S.W.2d 914, 919 (Tex. Civ. App.—Amarillo 1971, writ ref'd n.r.e.). Nonetheless, the parties' intent is a key factor in novation. *Dodson v. Sizenbach*, 663 S.W.2d 13 (Tex. App.—Houston [14th Dist.] 1983, no writ). Economic duress vitiates a novation. *Dodson*, 663 S.W.2d at 16 (citing *Thomas Construction Co. v. Kelso Marine, Inc.*, 639 F.2d 216 (5th Cir. 1981)).

In the absence of express agreement, whether a new contract operates as a novation of an earlier contract is usually a question of fact and can only become a question of law when the state of the evidence is such that reasonable minds cannot differ as to its effect. *Goldman v. Olmstead*, 414 S.W.3d 346, 358 (Tex. App.—Dallas 2013, pet. denied).

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§ 17.3:3 Novation Compared with Accord and Satisfaction

An accord and satisfaction may or may not also be a novation. The satisfaction in an accord and satisfaction is usually the performance of the new promise and not the new promise itself. *DoAll Dallas Co. v. Trinity National Bank*, 498 S.W.2d 396, 400 (Tex. Civ. App.—Texarkana 1973, writ ref'd n.r.e.). It is the execution or performance of the new agreement. *Stevens v. State Farm Fire & Casualty Co.*, 929 S.W.2d 665, 673 (Tex. App.—Texarkana 1996, writ denied); *Fortner v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 687 S.W.2d 8, 13 (Tex. App.—Dallas 1987, writ ref'd n.r.e.). However, the satisfaction may be the new promise itself. A novation is the acceptance of the new promise in lieu of and in extinguishment of the old obligation. If the new promise itself is accepted as satisfaction, the transaction is more properly termed a novation. *DoAll Dallas Co.*, 498 S.W.2d at 400. For a discussion of accord and satisfaction, see section 17.1 above.

§ 17.3:4 Pleading Requirements

Novation must be specifically pleaded; it cannot be shown by a general denial. Tex. R. Civ. P. 94; *Farkooshi v. Afisco Interest, LLC*, No. 14-13-00201-CV, 2014 WL 4161708, at *4 (Tex. App.—Houston [14th Dist.] Aug. 21, 2014, no pet.) (mem. op.).

§ 17.4 Payment

§ 17.4:1 Application of Payments to Open Account

Generally, when a contract does not specify how payments shall be applied to a running account, payments shall be applied to the oldest portion of the account. *W.E. Grace Manufacturing Co. v. Levin*, 506 S.W.2d 580 (Tex. 1974); *Mazelheri v. Simons Petroleum, Inc.*, No. 05-05-00719-CV, 2006 WL 1738275, at *4 (Tex. App.—Dallas June 27, 2006, pet. denied) (mem. op.). Where there is a running account with various items of charges and credits occurring at different times and no direction of payment has been made by the debtor, payments on account as whole are applied by law to oldest unpaid portion of account, even if oldest part of account is barred by limitations. *Watson v. Cargill, Inc.*, 573 S.W.2d 35, 39 (Tex. Civ. App.—Waco 1978, writ ref'd n.r.e.). However, there is an exception to this rule. If the parties have agreed that a payment shall be applied to a certain indebtedness or the debtor has directed such application, the agreement or direction is controlling. *Victor v. Harden*, No. 01-97-00250-CV, 1998 WL 285947, at *6 (Tex. App.—Houston [14th Dist.], June 4, 1998, no pet.) (not designated for publication); *Watson*, 573 S.W.2d at 39.

§ 17.4:2 Pleading Requirements for Payment as Defense

Payment must be specifically pleaded; it cannot be shown by a general denial. *See* Tex. R. Civ. P. 94; *Southwestern Investment Co. v. Allen*, 328 S.W.2d 866, 868 (Tex. 1959). A defendant pleading payment as a defense must file with his plea an account itemizing the payments. Otherwise, he will not be allowed to prove payment unless it is so plainly and particularly described in the plea as to give the plaintiff full notice of the defense. Tex. R. Civ. P. 95.

§ 17.5 Rescission

§ 17.5:1 Rescission as Defense

The parties may rescind their contract by mutual agreement, discharging themselves from their respective duties. The mutual release of their rights is sufficient consideration for the rescission agreement. The other party must accept an offer of rescission either affirmatively or by acquiescence in a manner and under circumstances sufficient to constitute an election to

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treat the contract as terminated. A mere expression of repudiation by one party is not an offer of rescission. *Texas Gas Utilities Co. v. Barrett*, 460 S.W.2d 409, 414 (Tex. 1970).

A signed sales agreement that by its terms excludes modification or rescission except by a signed writing cannot be otherwise modified or rescinded. Tex. Bus. & Com. Code § 2.209(b). See the discussion of oral modification under Code section 2.209(b) at section 17.7:3 below.

§ 17.5:2 Pleading Requirements

Rescission is a matter constituting an avoidance or affirmative defense and must be affirmatively pleaded. Tex. R. Civ. P. 94; *Wilson v. Remmel Cattle Co.*, 542 S.W.2d 938, 942 (Tex. Civ. App.—Amarillo 1976, writ ref'd n.r.e.).

§ 17.5:3 Rescission as Equitable Contractual Remedy

An otherwise valid contract may be rescinded to avoid unjust enrichment. *Helms v. Swanson*, No. 12-14-00280-CV, 2016 WL 1730737, at *5 (Tex. App.—Tyler, Apr. 26, 2016, pet. denied); *Neese v. Lyn*, 479 S.W.3d 368, 369 (Tex. App.—Dallas 2015, no pet.). Grounds for rescission include the following:

1. Fraud. *Dallas Farm Machinery Co. v. Reaves*, 307 S.W.2d 233, 238–39 (Tex. 1957). See also section 17.42 below.
2. Mutual mistake. *Myrad Properties, Inc. v. LaSalle Bank, N.A.*, 300 S.W.3d 746, 750 (Tex. 2009). See also section 17.12 below.
3. Unilateral mistake. *James T. Taylor & Son, Inc. v. Arlington Independent School District*, 335 S.W.2d 371, 373 (Tex. 1960). See also section 17.12:4 below.
4. Duress. *Country Cupboard, Inc. v. Texster Corp.*, 570 S.W.2d 70, 74 (Tex. Civ. App.—Dallas 1978, writ ref'd n.r.e.). See also section 17.19 below.
5. Incapacity. *James v. Barnett*, 404 S.W.2d 886, 888 (Tex. Civ. App.—Dallas 1966, writ ref'd n.r.e.) (incapacity due to minority); *Hays v. Spangenberg*, 94 S.W.2d 899, 902 (Tex. Civ. App.—Austin 1936, no writ) (mental incapacity). See section 17.8 below.

To be entitled to rescission, a party must show either (1) that it and the other party are in the status quo (e.g., that it is not retaining a benefit received under the contract without restoration to the other party), or (2) that there are special equitable considerations that obviate the need for the parties to be in the status quo. *Helms*, 2016 WL 1730737, at *5.

§ 17.6 Merger and Parol Evidence Rule

§ 17.6:1 Merger and Parol Evidence Rule Generally

Merger is the absorption of one contract into another contract, extinguishing the former. It is largely a matter of intention of the parties. *Capstone Building Corp. v. IES Commercial, Inc.*, No. 10-15-00182-CV, 2016 WL 1722665, at *2 (Tex. App.—Waco Apr. 28, 2016, pet. denied); *Texland Petroleum, L.P v. Scythian, Ltd.*, No. 07-11-00141-CV, 2012 WL 1252967, at *2 (Tex. App.—Amarillo, Apr. 13, 2012, no pet.) (mem. op.) ("As a general principle, when two contracts are entered into by the same parties, covering the same subject matter, but containing terms which are so inconsistent that the terms of the two contracts cannot subsist together, the legal effect of the subsequent contract is to rescind the earlier contract.") (citing *South Plains Lamesa Railroad, Ltd. v. Kitten Family*

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Living Trust, No. 07-06-0209-CV, 2008 WL 223847, at *2 (Tex. App.—Amarillo Jan. 28, 2008, pet. denied) (mem. op.). However, a prior agreement is not superseded by or merged into a subsequent agreement relating to the same subject matter if the first agreement could constitute a separate agreement or where the first agreement is not fully integrated into the second agreement but merely modifies the first agreement in some respect. Stated another way, when the parties manifest an intent to have any of the original contract's provisions survive, merger is inapplicable. Thus, application of the doctrine of merger completely discharges the earlier, inconsistent contract. *Texland Petroleum*, 2012 WL 1252967, at *2. *See also Hubacek v. Ennis State Bank*, 317 S.W.2d 30, 32 (Tex. 1958) (oral agreement that was not inconsistent with written agreement was enforceable as not superseded by or merged with written agreement).

The doctrine of merger is closely allied with the parol evidence rule. If parties have entered into a valid, integrated agreement dealing with the subject matter of the contract, the parol evidence rule prevents enforcement of prior or contemporaneous agreements inconsistent with the integrated agreement. Unless there is ambiguity, fraud, or accident, it is presumed that all prior agreements of the parties relating to the transaction have been merged into the instrument. *Greater Houston Development, Inc. v. Harris County*, No. 14-10-00364-CV, 2010 WL 4950634, at *5 (Tex. App.—Houston [14th Dist.] Dec. 7, 2010, no pet.) (mem. op.); *Adams v. McFadden*, 296 S.W.3d 743, 752 (Tex. App.—El Paso 2009, *pet. granted, judgment vacated, and remanded by agreement*); *Edascio, L.L.C. v. NextiraOne L.L.C.*, 264 S.W.3d 786, 796 (Tex. App.—Houston [1st Dist.] 2008, pet. denied).

§ 17.6:2 Sale of Goods

Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented:

1. by course of performance, course of dealing, or usage of trade (defined in Tex. Bus. & Com. Code § 1.303), and
2. by evidence of consistent additional terms, unless the court finds that the writing was intended also as a complete and exclusive statement of the terms of the agreement.

Tex. Bus. & Com. Code § 2.202.

§ 17.7 Modification

§ 17.7:1 Availability

Modification in a contract is some change in an original agreement that introduces a new or different element into the details of the agreement but leaves the general purpose and effect of the subject matter undisturbed. *Archibald v. Act III Arabians*, 755 S.W.2d 84, 86 (Tex. 1988), citing *Webb v. Finger Contract Supply Co.*, 447 S.W.2d 906, 908 (Tex. 1969). *See also Shores Ag-Air, Inc. v. MPH Products Co.*, No. 13-15-00525-CV, 2016 WL 2955066, at *4 (Tex. App.—Corpus Christi May 19, 2016, no pet.) ("Parties may agree to alter their original contract") (citing *Mid Plains Reeves, Inc. v. Farmland Industries*, 768 S.W.2d 318, 321 (Tex. App.—El Paso 1989, writ denied)). There must be mutual assent to any modification, because one party cannot unilaterally remake a contract. *Hill v. Heritage Resources, Inc.*, 964 S.W.2d 89, 114 (Tex. App.—El Paso 1997, pet. denied); *Kitten v. Vaughn*, 397 S.W.2d 530, 533 (Tex. Civ. App.—Austin 1965, no writ).

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§ 17.7:2 Consideration

Generally, modification of an existing contract must be supported by consideration. *Hathaway v. General Mills, Inc.*, 711 S.W.2d 227, 228 (Tex. 1986); *Liberty Mutual Insurance Co. v. Sims*, No. 12-14-00123-CV, 2015 WL 7770166, at *7 (Tex. App.—Tyler Dec. 3, 2015, pet. denied); *Dupree v. Boniuk Interests, Ltd.*, 472 S.W.3d 355, 367 (Tex. App.—Houston [1st Dist.] 2015, no pet.); *Hill v. Heritage Resources, Inc.*, 964 S.W.2d 89, 113 (Tex. App.—El Paso 1997, pet. denied) ("To conclude that there was a valid modification, the jury had to favorably determine . . . that the modification is based upon new consideration."). Consideration may consist of a benefit that accrues to one party, or, alternatively, a detriment incurred by the other party. *Walden v. Affiliated Computer Services, Inc.*, 97 S.W.3d 303, 315 (Tex. App.—Houston [14th Dist.] 2003, pet. denied); *see also Roark v. Stallworth Oil & Gas, Inc.*, 813 S.W.2d 492, 496 (Tex. 1991) ("Consideration is a present exchange bargained for in return for a promise. It consists of either a benefit to the promisor or a detriment to the promisee. The detriment must induce the making of the promise, and the promise must induce the incurring of the detriment."). A promise to fulfill a pre-existing obligation cannot serve as new consideration for an amendment to a contract. *Walden*, 97 S.W.3d at 319.

An exception exists for contracts for the sale of goods, which require no consideration to be modified. Tex. Bus. & Com. Code § 2.209(a). *See also El Paso Natural Gas Co. v. Minco Oil & Gas*, 8 S.W.3d 309, 314 (Tex. 1998) (quoting comment 2 to Uniform Commercial Code § -2-209; "modifications made [under subsection 2.209(a)] must meet the test of good faith imposed by this Act. The effective use of bad faith to escape performance on the original contract terms is barred, and the extortion of a 'modification' without legitimate commercial reason is ineffective as a violation of the duty of good faith. . . . The test of 'good faith' between merchants or as against merchants includes 'observance of reasonable commercial standards of fair dealing in the trade' (Section 2-103), and may in some situations require an objectively demonstrable reason for seeking a modification.").

§ 17.7:3 Oral Modification

Texas common law generally permits oral modification of a written contract that does not have to be in writing under the statute of frauds even if the contract contains a no-oral-modification clause, because such a written contract is of no higher legal degree than an oral contract. *Hobby Lobby Stores, Inc. v. Standard Renewable Energy, LP*, No. 02-15-00124-CV, 2016 WL 4247969, at *5 (Tex. App.—Fort Worth Aug. 11, 2016, pet. denied) (mem. op.); *Hyatt Cheek Builders-Engineers Co. v. Board of Regents of the University of Texas System*, 607 S.W.2d 258, 265 (Tex. App.—Texarkana 1980, writ dism'd) ("Such a written bargain is of no higher legal degree than an oral one, and either may vary or discharge the other.").

Not every oral modification to a contract within the statute of frauds is barred. *American Garment Properties v. CB Richard Ellis-El Paso, L.L.C.*, 155 S.W.3d 431, 437 (Tex. App.—El Paso 2004; no pet.); *Group Hospital Services, Inc. v. One & Two Brookriver Center*, 704 S.W.2d 886, 890 (Tex. App.—Dallas 1986, no writ.). Contracts that must be written to be enforceable may be modified by oral agreement to extend the time of performance of the contract if the parol agreement is made before the contract expires. *Gulf Production Co. v. Continental Oil Co.*, 164 S.W.2d 488, 491 (Tex. 1942); *Voss Road Exxon LLC v. Vlahakos*, No. 01-10-00146-CV, 2011 WL 2623989, at *6 (Tex. App.—Houston [1st Dist.] June 30, 2011, no pet.) (mem. op.). The critical determination is whether the modification materially effects the obligations of the underlying agreement. *American Garment Properties*, 155 S.W.3d at 437; *see*

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also Dracopoulas v. Rachal, 411 S.W.2d 719, 721 (Tex. 1967) (exception to general rule against oral modification of contracts permits parties to agree orally to extend time of performance of contract required to be in writing, so long as oral agreement is made before expiration of written contract). Where the character or value of the underlying agreement is unaltered, oral modifications are enforceable. *American Garment Properties*, 155 S.W.3d at 437; *Group Hospital Services, Inc.*, 704 S.W.2d at 890. Nevertheless, the parties to contracts that must be in writing may not create a new contract by oral agreement that is partly written and partly oral. *English v. Marr*, 506 S.W.2d 333, 336 (Tex. Civ. App.—Houston [1st Dist.] 1974, no writ).

A signed agreement for the sale of goods that excludes modification or rescission except by a signed writing cannot be otherwise modified or rescinded. But except as between merchants such a requirement on a form supplied by the merchant must be separately signed by the other party. Tex. Bus. & Com. Code § 2.209(b). The requirements of the statute of frauds (section 2.201) must be satisfied if the contract as modified is within its provisions. Tex. Bus. & Com. Code §§ 2.201, 2.209(c). Although an attempt at modification or rescission does not satisfy the requirements of subsections (b) or (c), it can operate as a waiver. Tex. Bus. & Com. Code § 2.209(d). A party who has made a waiver affecting an executory portion of the contact may retract the waiver by reasonable notification received by the other party that strict performance will be required of any term waived, unless the retraction would be unjust in view of a material change of position in reliance on the waiver. Tex. Bus. & Com. Code § 2.209(e).

§ 17.8 Lack of Capacity

§ 17.8:1 Minority and Removal of Disabilities of Minority

The age of majority in Texas is eighteen. Tex. Civ. Prac. & Rem. Code § 129.001. Except as otherwise expressly provided by statute or by the constitution, every person who has been married in accordance with the law of Texas, regardless of age, has the power and capacity of an adult, including the capacity to contract. Tex. Fam. Code § 1.104. A minor of at least seventeen, or at least sixteen if self-supporting and living separate and apart from his parents, managing conservator, or guardian, may petition the court to have his disabilities of minority removed for limited or general purposes. Tex. Fam. Code § 31.001(a).

§ 17.8:2 Minors and Contracts

The contract of a minor is not void but is merely voidable at his option. The minor may set aside the entire contract at his option, but he is not entitled to enforce portions that are favorable to him while disaffirming other provisions that he finds burdensome. *See Seger v. Yorkshire Insurance Co.*, 503 S.W.3d 388, 406 (Tex. 2016); *Dairyland County Mutual Insurance Co. v. Roman*, 498 S.W.2d 154, 158 (Tex. 1973); *PAK Foods Houston, LLC v. Garcia*, 433 S.W.3d 171, 176 (Tex. App.—Houston [14th Dist.] 2014, pet. dism'd). A minor at the time of contracting can ratify the contract after attaining majority. If he does, he is bound by its terms. *PAK Foods Houston*, 433 S.W.3d at 176. A minor cannot disaffirm a contract if he induced the seller to enter the contract by fraudulently representing himself as an adult. *Cain v. Coleman*, 396 S.W.2d 251, 253 (Tex. Civ. App.—Texarkana 1965, no writ) (citing *Evans v. Henry*, 230 S.W.2d 620, 621 (Tex. Civ. App.—San Antonio 1950, no writ)).

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A minor disaffirming his contract must restore property still in his possession or control. As a general rule, however, a minor may repudiate his contract for the purchase of property and is entitled to the return of the money that he has paid under the contract even if he cannot tender return of the property because he has squandered or dissipated it or the proceeds from its sale. *Bullock v. Sprowls*, 54 S.W. 661, 662–63 (Tex. 1899); *James v. Barnett*, 404 S.W.2d 886, 888 (Tex. Civ. App.—Dallas 1966, writ ref'd n.r.e.).

Minors can be bound to contracts for necessaries, although they are bound only to the extent of the reasonable value of those necessaries. *Parsons v. Keys & McKnight*, 43 Tex. 557 (1875); *Johnson v. Newberry*, 267 S.W. 476, 481 (Tex. Comm'n App. 1924, judgm't adopted); *see Bowman v. Bowman*, 96 S.W.2d 667, 668 (Tex. Civ. App.—Eastland 1936, no writ).

§ 17.8:3 Determination of Incapacity

A person has the mental capacity to contract if he appreciates the effect of what he is doing and understands the nature and consequences of his acts and the business he is transacting. *Mandell & Wright v. Thomas*, 441 S.W.2d 841, 845 (Tex. 1969); *Rowland v. Herrin*, No. 03-07-00247-CV, 2010 WL 566881, at *2 (Tex. App.—Austin Feb. 14, 2010, no pet.) (mem. op.). A provision of court-ordered, emergency, or voluntary mental health services to a person is not a determination or adjudication of that person's mental competence and does not limit that person's legal capacity or property rights. Tex. Health & Safety Code § 576.002(a). Mental capacity, or a lack thereof, may be shown by circumstantial evidence, including: (1) a person's outward conduct, "manifesting an inward and causing condition"; (2) any pre-existing external circumstances tending to produce a special mental condition; and (3) the prior or subsequent existence of a mental condition from which a person's mental capacity (or incapacity) at the time in question may be inferred. *Bach v. Hudson*, 596 S.W.2d 673, 676 (Tex. Civ. App.—Corpus Christi 1980, no writ.). *But see Riggins v. Hill*, No. 14-09-00495-CV, 2011 WL 5248347 at *9 (Tex. App.—Houston [14th Dist.] Nov. 3, 2011, pet. denied) (mem. op.) (stating that "[m]ere nervous tension, anxiety or personal problems do not amount to mental incapacity sufficient to raise a fact issue to defeat a summary-judgment motion"). *See also* Tex. Health & Safety Code § 576.002(b) (a person is presumed mentally competent unless a judicial finding to the contrary is made under the Texas Estates Code.

In general, the question of whether a person knows or understands the nature and consequences of his act at the time of making a contract is a question of fact. *See Fox v. Lewis*, 344 S.W.2d 731, 739 (Tex. Civ. App.—Austin 1961, writ ref'd n.r.e.). The burden of proving incapacity is on the party seeking to rescind the contract. *Rowland v. Herren*, 2010 WL 566881, at *2.

§ 17.8:4 Effect of Incapacity on Power to Contract

If a person was incompetent when he made a contract, the contract is voidable. *Cole v. McWillie*, 464 S.W.3d 896, 900 (Tex. App.—Eastland 2015, pet. denied). *But see Smith v. Christley*, 755 S.W.2d 525, 532–33 (Tex. App.—Houston [14th Dist.] 1988, writ denied) (relying on the *Restatement (Second) of Contracts* (1981) § 15 to say that if contract is made by incompetent party on fair terms and other party has no reason to know of incompetency and because of partial or complete performance equities would not best be served by avoidance of contract, contract will cease to be voidable).

A contract made by a person who was sane at the time the contract was made can be enforced regardless of subsequent insanity. *Kern v. Smith*, 164 S.W.2d 193, 195 (Tex. Civ. App.—

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Texarkana 1942, writ ref'd w.o.m.). Mental incapacity, to the extent it nullifies the obligor's obligation, is a defense against a holder in due course. Tex. Bus. & Com. Code § 3.305(a)(1)(B).

A contract for necessaries entered into by an insane person is enforceable to the extent of the value of the goods or services furnished. *Legler v. Legler*, 189 S.W.2d 505, 512 (Tex. Civ. App.—Austin 1945, writ ref'd w.o.m.). Even if there is no express contract, one will be implied for the reasonable value of the goods or services provided if necessaries are furnished to the insane person. *Chandler v. Warlick*, 321 S.W.2d 897, 901 (Tex. Civ. App.—Eastland 1958, writ ref'd n.r.e.).

§ 17.9 Lack or Failure of Consideration

§ 17.9:1 Lack or Failure of Consideration Generally

A lack (or want) of consideration is different from a failure of consideration. Both are grounds for cancellation or rescission of a contract, because the transaction operates as constructive or legal fraud as to one who receives nothing of value in exchange for property. *Radford v. Snyder National Farm Loan Ass'n*, 121 S.W.2d 478, 480 (Tex. Civ. App.—Amarillo 1938, no writ).

A failure-of-consideration defense presupposes that there was consideration for the agreement in the first place, but that it later failed. *Cheung-Loon, LLC v. Cergon, Inc.*, 392 S.W.3d 738, 748 (Tex. App.—Dallas 2012, no pet.) (a failure of consideration occurs when, because of some supervening cause arising after the contract is formed, the promised performance fails); *Bassett v. American National Bank*, 145 S.W.3d 692, 696 (Tex. App.—Fort Worth 2004, no pet.). A complete failure of consideration constitutes a defense to an action on a written agreement. *Parker v. Dodge*, 98 S.W.3d 297, 301 (Tex. App.—Houston [1st Dist.] 2003, no pet.). Breach of contract, however, does not constitute a "supervening cause" that would prevent performance. *Bernal v. Garrison*, 818 S.W.2d 79, 84 (Tex. App.—Corpus Christi 1991, no writ).

Failure of consideration is grounds for cancellation or rescission of a contract only when one receives nothing of value in exchange for the agreement. *See Radford v. Snyder National Farm Loan Ass'n*, 121 S.W.2d 478, 480 (Tex. Civ. App.—Amarillo 1938, no writ). Cancellation or rescission of consideration happens when, because of some supervening cause after an agreement is reached, the promised performance fails. *Bernal*, 818 S.W.2d at 84; *Stewart v. U.S. Leasing Corp.*, 702 S.W.2d 288, 290 (Tex. App.—Houston [1st Dist.] 1985, no writ); *O'Shea v. Coronado Transmissions Co.*, 656 S.W.2d 557, 563 (Tex. App.—Corpus Christi 1983, writ ref'd n.r.e.). Partial failure of consideration is a *pro tanto* defense and will not invalidate the entire contract or prevent recovery on it. *Cheung-Loon*, 392 S.W.3d at 748; *Estate of Menifee v. Barrett*, 795 S.W.2d 810, 815 (Tex. App.—Texarkana 1990, no writ); *Huff v. Speer*, 554 S.W.2d 259, 263 (Tex. Civ. App.—Houston [1st Dist.] 1977, writ ref'd n.r.e.). A contract that lacks consideration, lacks mutuality of obligation and is unenforceable. *Federal Sign v. Texas Southern University*, 951 S.W.2d 401, 408 (Tex. 1997).

Lack of consideration, on the other hand, occurs when a contract, at its inception, does not impose obligations on both parties. Without a mutuality of obligation, a contract is unenforceable. *Cheung-Loon*, 392 S.W.3d at 747; *National Bank of Commerce v. Williams*, 84 S.W.2d 691, 692 (Tex. 1935); *Johnson v. Bond*, 540 S.W.2d 516, 520 (Tex. Civ. App.—Fort Worth 1976, writ ref'd n.r.e.). *But see 1464-Eight, Ltd. v. Joppich*, 154 S.W.3d 101, 105–06,

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110 (Tex. 2004) (adopting the Restatement (Second) of Contracts which provides that recital of nominal consideration in either a guaranty or an option contract supports the underlying promise regardless of whether the recital amount was ever paid).

§ 17.9:2 Pleading Requirements

Failure of consideration is a defense that must be affirmatively pleaded and verified. Tex. R. Civ. P. 93(9), 94; *Philadelphia Indemnity Insurance Co. v. White*, 490 S.W.3d 468, 485 (Tex. 2016). Want of consideration must also be affirmatively pleaded and verified. Tex. R. Civ. P. 93(9), 94; *Cheung-Loon, LLC v. Cergon, Inc.*, 392 S.W.3d 738 (Tex. App.—Dallas 2012, pet. dismissed).

§ 17.10 Lack of Mutuality

Contracts are construed in favor of mutuality of obligation, because it is presumed that parties to an agreement intend it to be effectual. *Texas Gas Utilities Co. v. Barrett*, 460 S.W.2d 409, 412 (Tex. 1970); *Chan v. Montebello Development Co., LP*, No. 14-06-00936-CV, 2008 WL 2986379, at *7 (Tex. App.—Houston [14th Dist.] July 31, 2008, pet. denied) (mem. op.).

The doctrine of mutuality of obligation does not apply to unilateral contracts. A unilateral contract is binding, therefore, if supported by independent consideration. An option supported by consideration is unilateral; it is not founded on mutual promises, but it is binding on the promisor who has received consideration for his promise and optional on the party who has purchased the option. *See, e.g., Johnson v. Breckenridge-Stephens Title Co.*, 257 S.W. 223, 225–26 (Tex. 1924); *Colligan v. Smith*, 366 S.W.2d 816, 820 (Tex. Civ. App.—Fort Worth 1963, writ ref'd n.r.e.). Once the option is accepted, it then becomes a bilateral contract that is binding on both parties. *Tye v. Apperson*, 689 S.W.2d 320, 323 (Tex. App.—Fort Worth 1985, writ ref'd n.r.e.).

§ 17.11 Waiver and Estoppel

§ 17.11:1 Waiver

Waiver is an affirmative defense that may be asserted against a party who intentionally relinquishes a known right or engages in intentional conduct inconsistent with claiming the right. *BMG Direct Marketing v. Peake*, 178 S.W.3d 763, 780 (Tex. 2005); *In re GE Capital Corp.*, 203 S.W.3d 314, 316 (Tex. 2006); *Trelltex, Inc. v. Intecx, LLC*, 494 S.W.3d 781, 790 (Tex. App.—Houston [14th Dist.] 2016, no pet.); *Byrd v. Estate of Nelms*, 154 S.W.3d 149, 162 (Tex. App.—Waco 2004, pet. denied); *Continental Casing Corp. v. SIDERCA Corp.*, 38 S.W.3d 782, 789 (Tex. App.—Houston [14th Dist.] 2001, no pet.). Waiver may be established by a party's express renunciation of a known right, or by silence or inaction for a reasonable time period as to show an intention to yield the known right. *Byrd*, 154 S.W.3d at 162; *Continental Casing*, 38 S.W.3d at 789.

In general, a waiver will occur when someone dispenses with the performance of something he has a right to do, or where one in possession of any right does or forbears to do something, conferred by law or contract, with full knowledge of the material facts. *Nixon Construction Co. v. Downs*, 441 S.W.2d 284, 286 (Tex. Civ. App.—Houston [1st Dist.] 1969, no writ). Nonetheless, a party may enforce a right it has previously waived by giving sufficient notice to the other party, so that the other party has reasonable time to comply. *Rodriguez v. Classical Custom Homes, Inc.*, 176 S.W.3d 928, 932 (Tex. App.—Dallas 2005, no pet.).

Waiver is ordinarily a question of fact. But when the facts and circumstances are admitted or clearly established, the question becomes one of law. *Tenneco, Inc. v. Enterprise Products Co.*,

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925 S.W.2d 640, 643 (Tex. 1996); *In re Estate of Downing*, 461 S.W.3d 231, 241 (Tex. App.—El Paso 2015, no pet.).

To establish an implied waiver of a legal right, there must be clear, unequivocal, and decisive acts of the party showing such a purpose or acts amounting to an estoppel. *Trelltex*, 494 S.W.3d at 790. Therefore, waiver is a matter of intent; for an implied waiver to be found through a party's actions, intent must be clearly demonstrated by the surrounding facts and circumstances pertaining to the particular case. *In re General Electric Capital Corp.*, 203 S.W.3d at 316; *Trelltex*, 494 S.W.3d at 790; *Continental*, 38 S.W.3d at 789. Essentially unilateral in its character, waiver is a legal consequence from an act or conduct of the party against whom it operates, and no act of the party in whose favor it is made is necessary to complete it. Waiver need not be founded on a new agreement or be supported by consideration. *Massachusetts Bonding & Insurance Co. v. Orkin Exterminating Co.*, 416 S.W.2d 396, 401 (Tex. 1967).

A waiver of a condition can be established by conduct occurring after the time for performance of the condition has expired if the allegedly waived condition "is not a material part of the agreed equivalent of the obligor's promise and its nonperformance does not materially affect the value received by the obligor." *Bimco Iron & Metal Corp.*, 464 S.W.2d at 357. Silence or inaction, for a sufficient period to show an intention to yield the known right, is enough to prove waiver. *Tenneco Inc.*, 925 S.W.2d at 643. *Trelltex*, 494 S.W.3d at 790. Such silence or inaction, however, must be coupled with knowledge of the right and with other circumstances, such as inaction for an unreasonable period of time, to evidence the intention to waive. *Furr v. Hall*, 553 S.W.2d 666 (Tex. Civ. App.—Amarillo 1977, writ ref'd n.r.e.).

Generally, once a right is waived, it is lost forever and cannot be reclaimed without the other party's consent. *Burton v. National Bank of Commerce*, 679 S.W.2d 115, 118 (Tex. App.—Dallas 1984, no writ). However, under certain circumstances, a party may enforce a right it has previously waived by giving sufficient notice to the other party, so that the other party has reasonable time to comply. *Rodriguez v. Classical Custom Homes, Inc.*, 176 S.W.3d 928 (Tex. App.—Dallas 2005, no pet.).

What is a reasonable time depends on the circumstances in each case and, therefore, is a question of fact. *Continental Casing*, 38 S.W.3d at 789. However, while waiver is ordinarily a question of fact, "where the facts and circumstances are admitted or clearly established, the question becomes one of law." *Tenneco Inc.*, 925 S.W.2d at 643.

§ 17.11:2 Sales of Goods

A party who has made a waiver affecting an executory portion of a contract for the sale of goods may retract the waiver by reasonable notification received by the other party that strict performance will be required of any term waived, unless the retraction would be unjust in view of a material change of position in reliance on the waiver. Tex. Bus. & Com. Code § 2.209(e).

§ 17.11:3 Estoppel

Estoppel generally prevents one party from misleading another to the other's detriment or to the misleading party's own benefit. *Ulico Casualty Co. v. Allied Pilots Ass'n*, 262 S.W.3d 773, 778 (Tex. 2008); *Johnson & Higgins of Texas, Inc. v. Kenneco Energy, Inc.*, 962 S.W.2d 507, 515–16 (Tex. 1998); *Rice v. Metropolitan Life Insurance Co.*, 324 S.W.3d 660, 667 n.6 (Tex. App.—Fort Worth 2010 no pet.). A person who by his speech or conduct has induced another to act in a particular manner ought not to be permitted to adopt an inconsistent position to the loss or injury of the other. *Burton v. National Bank of*

Commerce, 679 S.W.2d 115, 117 (Tex. App.—Dallas 1984, no writ).

§ 17.11:4 Equitable Estoppel

Equitable estoppel is defensive in character. It is based on the principle that if one party by his conduct induces another to act in a particular manner, he should not be allowed to adopt an inconsistent position and thereby cause loss or injury to the other. *Fabrique, Inc. v. Corman*, 796 S.W.2d 790, 792 (Tex. App.—Dallas 1990), *writ denied*, 806 S.W.2d 801 (Tex. 1991) (per curiam). The linchpin for equitable estoppel is equity-fairness. *Trammell v. Galaxy Ranch School, LP (In re Trammell)*, 246 S.W.3d 815, 826 (Tex. App.—Dallas 2006, no pet.) (quoting *Grigson v. Creative Artists Agency L.L.C.*, 210 F.3d 524, 528 (5th Cir. 2000); *City of Fredericksburg v. Bopp*, 126 S.W.3d 218, 221 (Tex. App.—San Antonio 2003, no pet.); *In re Shockley*, 123 S.W.3d 642, 653 (Tex. App.—El Paso 2003, no pet.); *Texas Enterprises, Inc. v. Arnold Oil Co.*, 59 S.W.3d 244, 249 (Tex. App.—San Antonio 2001, orig. proceeding).

To invoke the doctrine of equitable estoppel, a party must satisfy the following elements:

1. A false representation or concealment of material facts;
2. Made with actual or constructive knowledge of the facts;
3. To a party who had neither the knowledge nor the means to acquire knowledge of the real facts;
4. With the intention that the representation should be, and the result that it is, relied on or acted on by the party to whom it was made to the party's prejudice.

Ulico Casualty Co. v. Allied Pilots Ass'n, 262 S.W.3d 773, 778 (Tex. 2008) (quoting *Johnson & Higgins of Texas, Inc. v. Kenneco Energy, Inc.*, 962 S.W.2d 507, 515–16 (Tex. 1998)). Failure to prove any of these elements is fatal to the defense.

Equitable estoppel may arise from silence or inaction, if one with a duty to speak or act fails to do so and the silence or inaction misleads the other party to his detriment. *Smith v. National Resort Communities, Inc.*, 585 S.W.2d 655, 658 (Tex. 1979). Absent a fiduciary or confidential relationship between the parties, a mere contractual relationship does not impose an affirmative duty to disclose. *Crim Truck & Tractor Co. v. Navistar International Transportation Corp.*, 823 S.W.2d 591, 594 (Tex. 1992); *cf. Anderson, Greenwood & Co. v. Martin*, 44 S.W.3d 200, 212–13 (Tex. App.—Houston [14th Dist.] 2001, pet. denied) (duty to disclose does exist if necessary to correct misleading information or false impression).

§ 17.11:5 Judicial Estoppel

The doctrine of judicial estoppel is not strictly speaking estoppel at all, but arises from positive rules of procedure based on justice and sound public policy. *Long v. Knox*, 291 S.W.2d 292, 295 (Tex. 1956). It is to be distinguished from equitable estoppel based on inconsistency in judicial proceedings because the elements of reliance and injury essential to equitable estoppel need not be present for judicial estoppel to apply. *Long*, 291 S.W.2d at 295.

Under the doctrine of judicial estoppel, a party is estopped merely by the fact of having alleged or admitted either in his pleadings, in a former proceeding under oath, or in other statements made under oath in the course of a former judicial proceeding, a position contrary to the assertion sought to be made. *See Miller v. Gann*, 842 S.W.2d 641, 641 (Tex. 1992); *Long*, 291 S.W.2d at 295; *Nine Syllables, LLC v. Evans*, No. 05-13-01677-CV, 2015 WL 3932751, at *4 (Tex. App.—Dallas June 26, 2015, no pet.) (mem. op.); *Byrd v. Estate of Nelms*, 154 S.W.3d 149

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(Tex. App.—Waco 2004, pet. denied). Furthermore, the person seeking the protection of the doctrine of judicial estoppel need not have been a party to the prior proceeding in which the statement was made. *Swilley v. McCain*, 374 S.W.2d 871 (Tex. 1964).

To establish the defense of a judicial estoppel, a party must show—

1. a sworn, prior inconsistent statement made in a judicial proceeding;
2. which was successfully maintained in the prior proceeding;
3. not made inadvertently or by mistake, or pursuant to fraud or duress; and
4. which is deliberate, clear, and unequivocal.

Long, 291 S.W.2d at 295; *Nine Syllables*, 2015 WL 3932751, at *4; *Andrews v. Diamond, Rash, Leslie & Smith*, 959 S.W.2d 646, 650 (Tex. App.—El Paso 1997, writ denied); *Huckin v. Joseph P. Connor & Stern, Flanz, Carnley & Wilson, P.C.*, 928 S.W.2d 180, 182–83 (Tex. App.—Houston [14th Dist.] 1996, no writ).

In *Jackson v. Hancock & Canada, L.L.P.*, 245 S.W.3d 51, 55–57 (Tex. App.—Amarillo 2007, pet. denied), the court held that the plaintiffs' failure to list a legal malpractice cause of action in their bankruptcy schedule constituted judicial estoppel, notwithstanding that the bankruptcy was dismissed; inadvertence occurs only when the debtor lacks knowledge of the undisclosed claim or has no motive for its concealment.

§ 17.11:6 Promissory Estoppel

Promissory estoppel is recognized as a defensive doctrine which permits one who has relied on a promise to prevent an attack on the enforceability of the promise. *In re Weekley Homes, L.P.*, 180 S.W.3d 127, 133 (Tex. 2005); *Hruska v. First State Bank of Deanville*, 747 S.W.2d 783, 785 (Tex. 1998); *Bechtel Corp. v. CITGO Products Pipeline Co.*, 271 S.W.3d 898, 926 (Tex. App.—Austin 2008, no pet.); *Stanley v. Citifinancial Mortgage Co.*, 121 S.W.3d 811, 820 (Tex. App.—Beaumont 2003, no pet.); *Robbins v. Payne*, 55 S.W.3d 740, 747 (Tex. App.—Amarillo 2001, pet. denied). Promissory estoppel prevents a promisor who has induced substantial action or forbearance by another from denying that promise if injustice can be avoided only be enforcement, but it does not create a contract right that does not otherwise exist. *Bechtel*, 271 S.W.3d at 926 (citing *Sun Oil Co. (Delaware) v. Madeley*, 626 S.W.2d 726, 734 (Tex. 1981) and *Hruska*, 747 S.W.2d at 785). Rather, it merely "prevents a party from insisting upon his strict legal rights"—i.e., the right to avoid his promise as not contractually binding—"when it would be unjust to allow him to enforce them." *Bechtel*, 271 S.W.3d at 926 (quoting *In re Weekley Homes, L.P.*, 180 S.W.3d at 133).

The elements of promissory estoppel are—

1. a promise;
2. foreseeability of reliance thereon by the promise; and
3. substantial reliance by the promisee to his detriment.

See English v. Fischer, 660 S.W.2d 521, 524 (Tex. 1983); *Gilmartin v. KVTV*, 985 S.W.2d 553, 558 (Tex. App.—San Antonio 1998, no pet.).

Promissory estoppel does not apply to a promise covered by a valid contract between parties but does apply to a promise outside the contract. *Barnett v. Coppell North Texas Court, Ltd.*, 123 S.W.3d 804, 805 (Tex. App.—Dallas 2003, no pet.); *Richter v. Wagner Oil Co.*, 90 S.W.3d 890, 899 (Tex. App.—San Antonio 2002, no pet.); *El Paso Healthcare System, Ltd. v. Piping Rock Corp.*, 939 S.W.2d 695, 699 (Tex. App.—El Paso 1997, writ denied). Where there is no actual contract, the promissory estoppel theory

may be invoked, thereby supplying a remedy that will enable the injured party to be compensated for his foreseeable, definite, and substantial reliance. *Wheeler v. White*, 398 S.W.2d 93, 97 (Tex. 1965); *Bechtel*, 271 S.W.3d at 926; *MCN Energy Enterprises, Inc. v. Omagro de Colombia, L.D.C.*, 98 S.W.3d 766, 774 (Tex. App.—Fort Worth 2003, pet. denied); *Barnett v. Coppell North Texas Court, Ltd.*, 123 S.W.3d at 825.

§ 17.11:7 Pleading Requirements

Waiver and estoppel are affirmative defenses and must be affirmatively pleaded. Tex. R. Civ. P. 94.

§ 17.12 Mutual and Unilateral Mistake

§ 17.12:1 Elements of Mutual Mistake

If parties to an agreement have contracted under a mutual misconception or ignorance of a material fact, the agreement will be avoided. *Williams v. Glash*, 789 S.W.2d 261, 264 (Tex. 1990). The elements of mutual mistake are: (1) a mistake of fact, (2) held mutually by the parties, and (3) which materially affects the agreed-on exchange. Both parties must have "the same misunderstanding of the same material fact." *In re Estate of Childs*, No. 04-15-00623-CV, 2016 WL 3452624, at *4 (Tex. App.—San Antonio June 22, 2016, no pet.) (mem. op.) (quoting *City of The Colony v. North Texas Municipal Water District*, 272 S.W.3d 699, 735 (Tex. App.—Fort Worth 2010, no pet.)); *Lacy v. Ticor Title Insurance Co.*, 794 S.W.2d 781, 784 (Tex. App.—Dallas 1990), *writ denied*, 803 S.W.2d 265 (Tex. 1991).

The parol evidence rule does not bar extrinsic evidence of mutual mistake. *Glash*, 789 S.W.2d at 264; *Dyer v. Cotton*, 333 S.W.3d 703, 718 (Tex. App.—Houston [1st Dist.] 2010, no pet.).

§ 17.12:2 Remedies for Mutual Mistake

Reformation of the agreement is a proper remedy when the true agreement of the parties is shown and the provision erroneously written into the instrument is there by mutual mistake. *Myrad Properties, Inc. v. LaSalle Bank, N.A.*, 300 S.W.3d 746, 751 (Tex. 2009); *Cherokee Water Co. v. Forderhause*, 741 S.W.2d 377, 379 (Tex. 1987) ("The underlying objective of reformation is to correct a mutual mistake made in preparing a written instrument so that the instrument truly reflects the original agreement of the parties."); *Goff v. Southmost Savings & Loan Ass'n*, 758 S.W.2d 822, 826 (Tex. App.—Corpus Christi 1988, writ denied). Otherwise, mutual mistake is an equitable ground that excuses a party's failure to perform. *See Crump v. Frenk*, 404 S.W.3d 146, 153 n.11 (Tex. App.—Texarkana 2013, no pet.); *A.L.G. Enterprises v. Huffman*, 660 S.W.2d 603, 606 (Tex. App.—Corpus Christi 1983), *aff'd as reformed*, 672 S.W.2d 230 (Tex. 1984) (per curiam).

§ 17.12:3 Pleading Requirements for Mutual Mistake

Mutual mistake must be affirmatively pleaded, or it will be waived. Tex. R. Civ. P. 94; *Flores v. Medline Industries, Inc.*, No. 13-14-00436-CV, 2015 WL 9257070, at *4 (Tex. App.—Corpus Christi Dec. 17, 2015, no pet.).

§ 17.12:4 Unilateral Mistake

One party's mistake usually will not constitute a ground for relief, if it was not known to or induced by an act of the other party. *Flores v. Medline Industries, Inc.*, 2015 WL 9257070, at *4 (Tex. App.—Corpus Christi Dec. 17, 2015, no pet.).

However, equitable relief against a unilateral mistake will be granted if (1) the mistake is of so great a consequence that it would be unconscio-

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nable to enforce the contract as made, (2) the mistake relates to a material feature of the contract, (3) the mistake was made regardless of the exercise of ordinary care, and (4) the parties can be placed in status quo in the equity sense (that is, rescission must not result in prejudice to the other party except for the loss of his bargain). There may be other circumstances, such as the acts and extent of knowledge of the parties that will govern or influence the extension of relief. *James T. Taylor & Son, Inc. v. Arlington Independent School District*, 335 S.W.2d 371, 373 (Tex. 1960); *Flores*, 2015 WL 9257070, at *6.

Unilateral mistake must be affirmatively pleaded, or it will be waived. Tex. R. Civ. P. 94; *see also Flores*, 2015 WL 9257070, at *6 (characterizing unilateral mistake as an "affirmative defense").

§ 17.13 Statute of Frauds

§ 17.13:1 Statute of Frauds Generally

The phrase *statute of frauds* refers to a principle carried forward from English statutory law into several Texas statutes, providing that certain types of promises or agreements are not enforceable unless the promise or agreement or a memorandum of it is in writing and signed by the party to be charged or by someone lawfully authorized to sign for him.

The primary purpose of the statute of frauds is to remove uncertainty, prevent fraudulent claims, and reduce litigation. *Givens v. Dougherty*, 671 S.W.2d 877, 878 (Tex. 1984); *Garza v. Robinson*, No. 13-11-00015-CV, 2013 WL 3326465, at *4 (Tex. App.—Corpus Christi, June 27, 2013, no pet.) (mem. op.). *See also Davis v. Crockett*, 398 S.W.2d 302, 305 (Tex. Civ. App.—Dallas 1965, no writ) (statute of frauds prevents fraud and perjury in certain types of transactions by requiring the agreement to be evidenced by a signed writing). The party pleading the statute of frauds bears the initial burden of establishing its applicability. Once that party meets its initial burden, the burden shifts to the opposing party to establish an exception that would take the verbal contract out of the statute of frauds. Whether a contract comes within the statute of frauds is a question of law. *See* Tex. R. Civ. P. 94; *Dynegy, Inc. v. Yates*, 422 S.W.3d 638, 642 (Tex. 2013). Whether a contract falls within the statute of frauds is a question of law. *Thomas v. Miller*, 500 S.W.3d 601, 607 (Tex. App.—Texarkana 2016, no pet.).

§ 17.13:2 Transactions Covered by Various Statutes of Frauds

Texas law requires that certain transactions be memorialized by a signed writing, including the following:

1. A contract for the sale of goods for a price of $500 or more. Tex. Bus. & Com. Code § 2.201(a).
2. A loan agreement in which the amount involved exceeds $50,000. Tex. Bus. & Com. Code § 26.02(b). This does not apply to credit card, charge card, or open-end account agreements. Tex. Bus. & Com. Code § 26.02(a)(2). See section 17.13:3 below for further requirements.
3. A promise by an executor or administrator to answer out of his own estate for the debt or damage due from his decedent. Tex. Bus. & Com. Code § 26.01(b)(1).
4. A promise by one person to answer for the debt, default, or miscarriage of another. Tex. Bus. & Com. Code § 26.01(b)(2); *Dynegy, Inc. v. Yates*, 422 S.W.3d 638, 639–40 (Tex. 2013).
5. An agreement made on consideration of marriage or on consideration of nonmarital conjugal cohabitation. Tex. Bus. & Com. Code § 26.01(b)(3).

6. A contract for the sale of real estate. Tex. Bus. & Com. Code § 26.01(b)(4); *Thomas v. Miller*, 500 S.W.3d 601, 610 (Tex. App.—Texarkana May 6, 2016, no pet.).

7. A lease of real estate for a term longer than one year. Tex. Bus. & Com. Code § 26.01(b)(5).

8. An agreement which is not to be performed within one year from the making of the agreement. Tex. Bus. & Com. Code § 26.01(b)(6).

9. A promise or agreement to pay a commission for the sale or lease of an oil or gas mining lease, an oil or gas royalty, minerals, or a mineral interest. Tex. Bus. & Com. Code § 26.01(b)(7).

10. An agreement, promise, contract, or warranty of cure relating to medical care and results made by a physician or health care provider other than a pharmacist. Tex. Bus. & Com. Code § 26.01(b)(8).

11. A security interest in collateral other than property in the possession or under the control of the secured party or, if the collateral is a certified security, that has been delivered to the secured party under Tex. Bus. & Com. Code § 8.301. Tex. Bus. & Com. Code § 9.203(b)(3)(A)–(D). (Note that revised chapter 9 contemplates creation of a security agreement by "authentication," which includes execution by means other than signing a writing. *See* Tex. Bus. & Com. Code § 9.102(a)(7); *see also* Tex. Bus. & Com. Code § 9.102(a)(70) (definition of "record").

12. A trust in either real or personal property (with specified exceptions for personal property trusts). Tex. Prop. Code § 112.004.

13. A contract for a commission for the sale or purchase of real estate. Tex. Occ. Code § 1101.806(c).

14. A contract between a principal and a sales representative in which the sales representative is to solicit wholesale orders within the state. Tex. Bus. & Com. Code § 54.002.

15. A contingent fee contract for legal services between attorney and client. Tex. Gov't Code § 82.065.

§ 17.13:3 Loan Agreement

The rights and obligations of the parties to a loan agreement controlled by Tex. Bus. & Com. Code § 26.02 are determined solely from the terms of the written loan agreement. Any prior or contemporaneous oral agreements between the parties are superseded by and merged into the loan agreement. Tex. Bus. & Com. Code § 26.02(c), (d).

A financial institution (as defined in Tex. Bus. & Com. Code § 26.02(a)(1)) must give written notice to the obligor of the applicable statute of frauds and merger provisions of section 26.02. This notice must be either in a separate writing signed by the debtor or obligor or incorporated into one or more of the loan documents signed by him.

The notice must be in type that is bold-faced, capitalized, underlined, or otherwise set out from surrounding written material so as to be conspicuous and must state substantially as follows:

> This written loan agreement represents the final agreement between the parties and may not be contradicted by evidence of prior, contemporaneous, or subsequent oral agreements of the parties.

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> There are no unwritten oral agreements between the parties.

Tex. Bus. & Com. Code § 26.02(e). Although the statutory notice form above refers to subsequent agreements, the statute itself does not.

§ 17.13:4 Exceptions

In addition to specific statutory exceptions to the statute of frauds, oral contracts governed by the statute of frauds may be enforced in the following situations.

Main Purpose: If the promise is to pay the debt, default, or miscarriage of another, an oral promise is enforceable if (1) the promisor intended to create primary responsibility in itself to pay for the debt, (2) there was consideration for the promise, and (3) the consideration given for the promise was primarily for the promisor's own use and benefit. *Dynegy, Inc. v. Yates*, 422 S.W.3d 638, 642 (Tex. 2013). *See also Haas Drilling Co. v. First National Bank*, 456 S.W.2d 886, 890 (Tex. 1970), which seems to add a fourth element that obtaining the benefit is the promisor's main or leading purpose in making the promise. The question of intent to be primarily responsible for the debt is a question for the finder of fact, taking into account all the facts and circumstances of the case. *Dynegy*, 422 S.W.3d at 642.

Promissory Estoppel: If the oral promise is to sign a written agreement that itself complies with the statute of frauds, it is enforceable if the promisor should have expected the promise to result in some definite and substantial injury to the promisee, the injury occurred, and the court must enforce the promise to avoid injustice. *Nagle v. Nagle*, 633 S.W.2d 796, 800 (Tex. 1982); *"Moore" Burger, Inc. v. Phillips Petroleum Co.*, 492 S.W.2d 934 (Tex. 1972). *See also Trammel Crow Co. No. 60 v. Harkinson*, 944 S.W.2d 631, 636 (Tex. 1995) (promissory estoppel exception does not apply to Real Estate License Act).

Estoppel: If the oral promise is to sell or lease land, it is enforceable to avoid actual fraud if there has been payment of consideration, possession by the purchaser, and valuable and permanent improvements made by the purchaser. *Nagle*, 633 S.W.2d at 799, 800 (noting that promissory estoppel applies to sale of land only when promise is to sign document that itself complies with statute of frauds); *Hooks v. Bridgewater*, 229 S.W. 1114, 1116 (Tex. 1921).

Substantial (Partial) Performance: If one party has completed performance under the contract to an extent that she has suffered substantial detriment, has no adequate remedy, and it would perpetrate a fraud on her to permit the other party to plead the statute of frauds and reap an unearned benefit, an oral contract is enforceable. In order to establish the partial performance exception, the party alleging the exception must show that (1) she had performed acts unequivocally referable to the agreement, (2) the acts were performed in reliance on the agreement, (3) as a result of the acts she had experienced substantial detriment, (4) she has no adequate remedy for their loss, and (5) the other party would reap an unearned benefit such that not enforcing the agreement would amount to a virtual fraud. *Thomas v. Miller*, 500 S.W.3d 601, 609 (Tex. App.—Texarkana 2016, no pet.). The partial performance must be "unequivocally referable to the agreement and corroborative of the fact that a contract actually was made." *Miller*, 500 S.W.3d at 610 (quoting *Heritage Constructors, Inc. v. Chrietzbert Electric, Inc.*, No. 06-14-00048-CV, 2015 WL 3378377, at *6 (Tex. App.—Texarkana Dec. 9, 2014, no pet.) (mem. op.).

Fully Executed Contract: Contracts that have been fully executed cannot be invalidated by the statute of frauds. *See Rozelle v. Fellows*, No. 04-07-00600-CV, 2008 WL 4809214, at *2 (Tex. App.—San Antonio Nov. 5, 2008, pet. denied) (mem. op.) (citing *Frost National Bank v. Burge*, 29 S.W.3d 580, 595 (Tex. App.—

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Houston [14th Dist.] 2000, no pet.) ("It is well settled Texas law that the Statute of Frauds does not apply to a fully executed contract."); *Pou v. Dominion Oil Co.*, 265 S.W. 886, 888 (Tex. Comm'n App. 1924, judgm't adopted).

Oral Modification to Extend Time of Performance: Even if the contract is covered by the statute of frauds, the parties may agree orally to extend the time of performance of a contract that is required to be in writing, if the oral modification is made before the expiration of the written contract. *Voss Road Exxon LLC v. Vlahakos*, No. 01-10-00146-CV, 2011 WL 2623989, at *6 (Tex. App.—Houston [1st Dist.] June 30, 2011, no pet.) (mem. op.).

Exceptions to the statute of frauds are strictly applied by the courts. *See Hooks*, 229 S.W. at 1116.

§ 17.13:5 Pleading Requirements

A statute of frauds defense must be affirmatively pleaded. Tex. R. Civ. P. 94; *First National Bank v. Zimmerman*, 442 S.W.2d 674, 675–76 (Tex. 1969).

§ 17.14 Unconscionability

§ 17.14:1 Sales of Goods

The basic test for unconscionability is whether, given the parties' general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing when the parties made the contract. Tex. Bus. & Com. Code § 2.302 cmt. 1. *See, e.g., Royston, Rayzor, Vickery & Williams, LLP v. Lopez*, 467 S.W.3d 494, 502 (Tex. 2015) (arbitration clause not unconscionable); *In re FirstMerit Bank, N.A.*, 52 S.W.3d 749, 757–58 (Tex. 2001, orig. proceeding) (arbitration clause not unconscionable). The principle is one of preventing oppression and unfair surprise and not of disturbing allocation of risks because of superior bargaining power. *In re FirstMerit Bank*, 52 S.W.3d at 757. If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract or it may enforce the remainder of the contract without the unconscionable clause as to avoid any unconscionable result. Tex. Bus. & Com. Code § 2.302(a). When it claims or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose, and effect to aid the court in making the determination. Tex. Bus. & Com. Code § 2.302(b).

§ 17.14:2 Personal Property Leases

If the court as a matter of law finds a personal property lease or any clause of a lease to have been unconscionable at the time it was made, the court may refuse to enforce the lease contract, it may enforce the remainder of the lease contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable results, and refuse to enforce it. Tex. Bus. & Com. Code § 2A.108(a). With respect to a consumer lease, if the court as a matter of law finds that a lease contract or any clause of a lease contract has been induced by unconscionable conduct or that unconscionable conduct has occurred in the collection of a claim arising from a lease contract, the court may grant appropriate relief. Tex. Bus. & Com. Code § 2A.108(b). Before making a finding of unconscionability, the court, on its own motion or that of a party, shall afford the parties a reasonable opportunity to present evidence as to the setting, purpose, and effect of the lease contract, or clause thereof or the of the conduct. Tex. Bus. & Com. Code § 2A.108(c). In an action in which the lessee claims unconscionability with respect to a consumer lease, if the court finds unconscionability, the court shall

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award reasonable attorney's fees to the lessee. If the court does not find unconscionability and the lessee claiming unconscionability has brought or maintained an action he or she knew to be groundless, the court shall award reasonable attorney's fees to the party against whom the claim is made. In determining attorney's fees, the amount of the recovery on behalf of the claimant under subsections (a) and (b) is not controlling. Tex. Bus. & Com. Code § 2A.108(d)(1)–(3).

§ 17.14:3 Other Contracts

No single test exists for finding unconscionability; it is determined on a case-by-case basis by looking at the totality of the circumstances as of the time the contract was formed. *Coonly v. Gables Residential Services, Inc.*, No. 04-12-00702-CV, 2013 WL 6022261, at *5 (Tex. App.—San Antonio Nov. 13, 2013, no pet.) (mem. op.); *Pony Express Courier Corp. v. Morris*, 921 S.W.2d 817, 821 (Tex. App.—San Antonio 1996, no writ). An inquiry into potential unconscionability begins with two broad questions: (1) how the parties arrive at the terms in controversy (the procedural aspect), and (2) are there legitimate commercial reasons justifying the terms of the contract (the substantive aspect)? *Coonly*, 2013 WL 6022261, at *5 ("In other words, in deciding the fairness of a contract's substantive terms, the court must also consider whether there were 'procedural abuses,' such as an unfair bargaining position between the parties at the time the agreement was made"); *Pony Express*, 921 S.W.2d at 821; *Ski River Development, Inc. v. McCalla*, 167 S.W.3d 121 (Tex. App.—Waco 2005, pet. denied) (party asserting unconscionability bears the burden of proving both procedural and substantive unconscionability).

In determining whether a contract is unconscionable, a court examines (1) the "entire atmosphere" in which the agreement was made; (2) the alternatives, if any, available to the parties at the time the contract was made; (3) the "non-bargaining" ability of one party; (4) whether the contract was illegal or against public policy; and (5) whether the contract is oppressive or unreasonable. *Ski River Development*, 167 S.W.3d at 136. Factors that may contribute to an unconscionable bargaining process include (1) knowledge of the stronger party that the weaker party will be unable to receive substantial benefits from the contract and (2) knowledge of the stronger party that the weaker party is unable reasonably to protect his interests by reason of physical or mental infirmities, ignorance, illiteracy or inability to understand the language of the agreement. *Coonly*, 2013 WL 6022261, at *5; *Ski River Development*, 167 S.W.3d at 136.

§ 17.15 Negligent Misrepresentation

§ 17.15:1 Elements

The elements of a claim for negligent misrepresentation are:

1. the representation is made by a defendant in the course of his business or in a transaction in which it has a pecuniary interest;
2. the defendant supplies false information for the guidance of others in its business;
3. the defendant did not exercise reasonable care or competence in obtaining or communicating the information; and
4. the plaintiff suffers pecuniary loss by justifiably relying on the representation.

Federal Land Bank Ass'n v. Sloane, 825 S.W.2d 439, 442 (Tex. 1991); *D&R Constructors, Inc. v. Texas Gulf Energy, Inc.*, No. 01-15-00604-CV, 2016 WL 4536959, at *16 (Tex. App.—Houston [1st Dist.] Aug. 30,v 2016, pet. denied) (mem.

op.); *Scherer v. Angell*, 253 S.W.3d 777, 781 (Tex. App.—Amarillo 2007, no pet.); *Fondren Construction Co. v. Briarcliff Housing Development Associates, Inc.*, 196 S.W.3d 210, 218 (Tex. App.—Houston [1st Dist.] 2006, no pet.); *Roof Systems, Inc. v. Johns Manville Corp.*, 130 S.W.3d 430, 438 (Tex. App.—Houston [14th Dist.] 2004, no pet.).

§ 17.15:2 Misrepresentation in Course of Business

The plaintiff must prove that the defendant misrepresented an existing fact in the course of the defendant's business. *Miksch v. Exxon Corp.*, 979 S.W.2d 700, 706 (Tex. App.—Houston [14th Dist.] 1998, pet. denied); *see also McCamish, Martin, Brown & Loeffler v. F.E. Appling Interests*, 991 S.W.2d 787, 794 (Tex. 1999) (negligent misrepresentation cause of action available only when information is transferred by attorney to known party for known purpose); *Trans-Gulf Corp. v. Performance Aircraft Services, Inc.*, 82 S.W.3d 691, 696 (Tex. App.—Eastland 2002, no pet.) (section 552(2) of Restatement of Torts requires actual knowledge of recipient's identity and specific intent on part of alleged tortfeasor that claimant would rely on misrepresentation); *Facciolla v. Linbeck Construction Corp.*, 968 S.W.2d 435, 443 (Tex. App.—Texarkana 1998, no pet.) (plaintiff never established that defendant ever made misrepresentation directly to plaintiff).

§ 17.15:3 False Information

The "false information" contemplated in a negligent misrepresentation case is a misstatement of existing fact, not a promise of future conduct. *Scherer v. Angell*, 253 S.W. 3d 777, 782 (Tex. App.—Amarillo 2007, no pet.); *Miller v. Raytheon Aircraft Co.*, 229 S.W.3d 358, 379 (Tex. App.—Houston [1st Dist.] 2007, no pet.); *New York Life Insurance Co. v. Miller*, 114 S.W.3d 114, 124 (Tex. App.—Austin 2003, no pet.); *Allied Vista, Inc. v. Holt*, 987 S.W.2d 138, 141 (Tex. App.—Houston [14th Dist.] 1999, pet. denied) (holding that defendant's representations that it would provide plaintiff equipment needed to start a plant and pay plaintiff a salary while starting plant did not support negligent mis-representation claim because they were not misrepresentations of existing fact). A promise to act or not to act in the future cannot form the basis of a negligent misrepresentation claim. *See Miksch v. Exxon Corp.*, 979 S.W.2d 700, 706 (Tex. App.—Houston [14th Dist.] 1998, pet. denied).

§ 17.15:4 Relation to Existing Contract

It is questionable whether negligent misrepresentation applies to parties who have contracts with each other. *See First Bank v. Burmitt*, 519 S.W.3d 95, 112 (Tex. 2017) (holding that damages for misrepresentation are "not . . . recoverable under a breach-of-contract claim," but remanding for further proceedings to determine sufficiency of plaintiff's evidence that he suffered "an injury independent from economic losses recoverable under a breach-of-contract claim"); *Scherer v. Angell*, 253 S.W. 3d 777, 781 (Tex. App.—Amarillo 2007, no pet.) ("there must be an independent injury, other than a breach of contract, to support a negligent misrepresentation finding") (citing *D.S.A., Inc. v. Hillsboro Independent School District*, 973 S.W.2d 662, 663 (Tex. 1998) (per curiam)); *Bluebonnet Savings Bank, F.S.B. v. Grayridge Apartment Homes, Inc.*, 907 S.W.2d 904, 908 (Tex. App.—Houston [1st Dist.] 1995, writ denied) ("Negligent misrepresentation is a cause of action recognized in lieu of a breach of contract claim, not usually available where a contract was actually in force between the parties," quoting *Airborne Freight Corp. v. C.R. Lee Enterprises, Inc.*, 847 S.W.2d 289, 295 (Tex. App.—El Paso 1992, writ denied). *But see Carousel's Creamery, LLC v. Marble Slab Creamery, Inc.*, 134 S.W.3d 385, 392–93 (Tex. App.—Houston [1st Dist.] 2004, pet. dism'd) (finding no obligation for plaintiff to show injury inde-

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pendent of "hypothetical" contract claim when plaintiff had abandoned its claim for breach of contract against defendant).

§ 17.16 Fraud (in Inducement)

§ 17.16:1 Elements

Common law fraud and fraud in the inducement are one and the same; the latter term is merely used to describe the means by which the fraud is perpetrated. Fraud in the inducement has six elements. Those elements include:

1. a material representation;
2. that was false;
3. that was made with knowledge of its falsity or recklessly without any knowledge of its truth and as a positive assertion;
4. that was made with the intention that it be acted on by the party;
5. that the party acted in reliance on it; and
6. that he thereby suffered injuries.

In re FirstMerit Bank, N.A., 52 S.W.3d 749, 758 (Tex. 2001, orig. proceeding); *Green International v. Solis*, 951 S.W.2d 384, 390 (Tex. 1997); *T.O. Stanley Boot Co. v. Bank of El Paso*, 847 S.W.2d 218, 222 (Tex. 1992); *Eagle Properties, Ltd. v. Scharbauer*, 807 S.W.2d 714, 723 (Tex. 1990); *Stone v. Lawyer's Title Insurance Corp.*, 554 S.W.2d 183, 185 (Tex. 1977); *see also Formosa Plastics Corp. v. Presidio Engineers & Contractors, Inc.*, 960 S.W.2d 41, 46 (Tex. 1998) (legal duty not to fraudulently procure a contract is separate and independent from duties established by contract itself). The absence of any one of these elements prevents recovery. *Stephanz v. Laird*, 846 S.W.2d 895, 903 (Tex. App.—Houston [14th Dist.] 1993, writ denied) (to prevail on actionable fraud cause of action, party asserting the claim must satisfy all elements of the tort for each alleged misrepresentation); *Mumphord v. First Victoria National Bank*, 605 S.W.2d 701, 704 (Tex. Civ. App.—Corpus Christi 1980, no writ); *Sawyer v. Pierce*, 580 S.W.2d 117, 124 (Tex. Civ. App.—Corpus Christi 1979, writ ref'd n.r.e.).

§ 17.16:2 Material Representation

"Material" information is that which a reasonable person would attach importance to and would be induced to act on in determining his choice of actions in the transaction in question. *In re Media Arts Group, Inc.*, 116 S.W.3d 900, 910 (Tex. App.—Houston [14th Dist.] 2003, orig. proceeding [mand. denied]); *Citizens National Bank v. Allen Rae Investments, Inc.*, 142 S.W.3d 459, 478–79 (Tex. App.—Fort Worth 2004, no pet.).

§ 17.16:3 Parol Evidence Rule

If a party claims fraud or misrepresentation based on a promise inconsistent with the terms of a contract, the parol evidence rule prevents enforcement of such additional terms. *See Town North National Bank v. Broaddus*, 569 S.W.2d 489, 491 (Tex. 1978); *Hubacek v. Ennis State Bank*, 317 S.W.2d 30, 32–33 (Tex. 1958); *Hallmark v. Port/Cooper-T. Smith Stevedoring Co.*, 907 S.W.2d 586, 590 (Tex. App.—Corpus Christi 1995, no writ); *Weinacht v. Phillips Coal Co.*, 673 S.W.2d 677, 679 (Tex. App.—Dallas 1984, no writ).

In the Town North National Bank case, the court held that a promissory note that is clear and express in its terms cannot be varied or contradicted by parol agreements or by representations of the payee that the maker would not be held liable according to the tenor of the instrument. The court reasoned that a party to a written agreement is charged as a matter of law with knowledge of its provisions and as a matter of law cannot claim fraud when he is bound to the provisions unless he can demonstrate that he

was tricked into its execution. The court specifically held that under the facts of the case, the mere representation by a payee to the maker that the maker will not be liable on the note does not constitute fraud in the inducement so as to be an exception to the parol evidence rule. *Town North National Bank*, 569 S.W.2d at 491.

Texas courts have uniformly followed *Town North* in recognizing that fraud cannot be legally predicated in an instrument case on a representation which directly contradicts the terms of the writing itself. *Simmons v. Compania Financiera Libano, S.A.*, 830 S.W.2d 789, 791 (Tex. App.—Houston [1st Dist.] 1992, writ denied); *Lindeburg v. Gulfway National Bank*, 624 S.W.2d 278, 281 (Tex. Civ. App.—Corpus Christi 1981, writ ref'd n.r.e.).

Similarly, in *Albritton Development Co. v. Glendon Investments, Inc.*, the court disregarded testimony that the payee was induced to execute the note on the representation that it was due only when the payee had lined up additional business prospects. In affirming a summary judgment for the payee the court stated: "It is well established that written instruments, including promissory notes, cannot be changed by evidence of a prior or contemporaneous oral agreement that contravenes the terms of the written instrument." *Albritton Development Co. v. Glendon Investments, Inc.*, 700 S.W.2d 244, 246 (Tex. Civ. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.), (citing *Town North*, 569 S.W.2d at 491). *See also Edlund v. Bounds*, 842 S.W.2d 719, 725 (Tex. App.—Dallas 1992, writ denied) (to establish fraud in inducement sufficient to allow exception to parol evidence rule, there must be some showing of some type of trickery, deceit, or device employed by payee as well as showing that payee represented to maker that he would not be liable on note).

§ 17.16:4 Puffery or Opinion Is Not Fraud

"'Puffery' is an expression of opinion by a seller not made as a representation of fact." *Dowling v. NADW Marketing, Inc.*, 631 S.W.2d 726, 729 (Tex. 1982). Pure expressions of opinion generally are not actionable. *Helena Chemical Co. v. Wilkins*, 47 S.W.3d 486, 502 (Tex. 2001) (mere puffery not actionable under DTPA, section 17.46(b)(5) or (b)(7), but may be actionable under section 17.46(b)(23) or 17.50(a)(3)); *Trenholm v. Ratcliff*, 646 S.W.2d 927, 931 (Tex. 1983); *Angelo Broadcasting, Inc. v. Satellite Music Network, Inc.*, 836 S.W.2d 726, 733 (Tex. App.—Dallas 1992, writ denied), *overruled on other grounds*, *Hines v. Hash*, 843 S.W.2d 464, 469–70 (Tex. 1992).

Whether a statement is an actionable statement of "fact" or merely an innocuous statement of "opinion" often depends upon the circumstances in which a statement is made. *Transport Insurance Co. v. Faircloth*, 898 S.W.2d 269, 276 (Tex. 1995); *Citizens National Bank v. Allen Rae Investments, Inc.*, 142 S.W.3d 459, 478–79 (Tex. App.—Fort Worth 2004, no pet.). When determining whether a statement constitutes mere puffing, the court considers the following factors:

1. The statement's specificity—imprecise or vague representations constitute mere opinions;
2. The speaker's knowledge—an opinion may constitute actionable fraud if the speaker has knowledge of its falsity;
3. The levels of knowledge of the buyer and seller—the seller's superior knowledge coupled with the lack of knowledge of the buyer operated to make a divergence into representations of fact; and
4. Whether the statement related to a present or future happening—an

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> expression of an opinion as to the happening of a future event may constitute actionable fraud where the speaker purports to have special knowledge of the facts that will occur or exist in the future.

Transport Insurance Co., 898 S.W.2d at 276; *GJP, Inc. v. Ghosh*, 251 S.W.3d 854, 889 (Tex. App.—Austin 2008, no pet.); *Citizens National Bank*, 142 S.W.3d at 478; *Angelo Broadcasting, Inc. v. Satellite Music Network, Inc.*, 836 S.W.2d 726, 733 (Tex. App.—Dallas 1992, writ denied), overruled on other grounds, *Hines v. Hash*, 843 S.W.2d 464, 469–70 (Tex. 1992).

Cases in which courts have held that statements were merely puffing or opinion include *Autohaus, Inc. v. Aguilar*, 794 S.W.2d 459, 464 (Tex. App.—Dallas 1990) *writ denied*, 800 S.W.2d 853 (Tex. 1991) (per curiam) (statements made by a Mercedes salesman that Mercedes-Benz was the best-engineered car in the world, and "joking" that the car would "probably" only need to be brought in for an oil and filter change every 7,500 miles was nonactionable puffing); *Duperier v. Texas State Bank*, 28 S.W.3d 740, 749 (Tex. App.—Corpus Christi 2000, pet. dism'd by agmt.) (statements that bank notes were safe and suitable investment and there was no chance yield on notes would fall to zero were bank officer's opinion).

Cases in which courts have held that statements were more than mere expressions of opinion include *Helena Chemical Co. v. Wilkins*, 47 S.W.3d 486, 502–504 (Tex. 2001) (misrepresentations about seed characteristics, quality, and grade amounted to more than mere puffing); *Pennington v. Singleton*, 606 S.W.2d 682, 687 (Tex. 1980) (statement that boat and motor were "new" or in "excellent" or "perfect" condition were not mere opinion); *Gore v. Scotland Golf, Inc.*, 136 S.W.3d 26, 32–33 (Tex. App.—San Antonio 2003, pet. denied) (representations that the seller's relationship with his primary customer was "healthy" when he had knowledge of the falsity of the statement); *Hedley Feedlot, Inc. v. Weatherly Trust*, 855 S.W.2d 826, 838 (Tex. App.—Amarillo 1992, writ denied) (representations about the type of cattle, weight, projected cost of feeding, the length of time on feed, and the projected gain of the cattle went beyond mere opinion); *Milt Ferguson Motor Co. v. Zeretzke*, 827 S.W.2d 349, 355 (Tex. App.—San Antonio 1991, no writ) (statements in car dealership pamphlets, magazine articles, newspaper articles, and advertisements and by salesman at the car dealership stating that the car was "a good, excellent, motor vehicle," "a better car than the Calais that they [dealership] had," and "a good car and that they [purchasers] would have no problems" were not merely puffing or opinion); *Wheeler v. Box*, 671 S.W.2d 75, 77 (Tex. App.—Dallas 1984, no writ) (representations by seller of business that they would provide efficient business operation and complete support, would buy the business back if it did not work out, and would personally fine tune the Boxes' business constituted more than puffery).

§ 17.16:5 Statements of Value Not Fraud

When no confidential relationship exists between parties, a representation of value is merely an opinion that cannot be made the basis of recovery for fraud. *See McCollum v. P/S Investments, Ltd.*, 764 S.W.2d 252, 254 (Tex. App.—Dallas 1988, writ denied); *Cravens v. Skinner*, 626 S.W.2d 173, 177 (Tex. App.—Fort Worth 1981, no writ); *Ryan v. Collins*, 496 S.W.2d 205, 210 (Tex. Civ. App.—Tyler 1973, writ ref'd n.r.e.); *Fossier v. Morgan*, 474 S.W.2d 801, 803 (Tex. Civ. App.—Houston [1st Dist.] 1972, no writ); *Frankfurt v. Wilson*, 353 S.W.2d 490, 496 (Tex. Civ. App.—Dallas 1961, no writ).

§ 17.16:6 Falsity

A statement is not fraudulent unless the maker knew it was false when made or made it reck-

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lessly without knowledge of the truth. *DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670, 688 (Tex. 1990), *cert. denied*, 498 U.S. 1048 (1991); *Kelly v. LINTV of Texas*, 27 S.W.3d 564, 572 (Tex. App.—Eastland 2000, pet. denied).

When the statement or representation alleged to be fraudulent is in the nature of a promise or an act to be performed in the future, and not a statement of an existing fact or pertinent fact, the pleader must allege and prove that, at the time the statement or promise was made, the person making the promise did not intend to perform it. *Formosa Plastics Corp. v. Presidio Engineers & Contractors, Inc.*, 960 S.W.2d 41, 48 (Tex. 1998); *T.O. Stanley Boot Co. v. Bank of El Paso*, 847 S.W.2d 218, 222 (Tex. 1992); *Cerullo v. Gottlieb*, 309 S.W.3d 160, 166 (Tex. App.—Dallas 2010, pet. denied); *Mays v. Pierce*, 203 S.W.3d 564, 573 (Tex. App.—Houston [14th Dist.] 2006, pet. denied); *Wyatt v. McGregor*, 855 S.W.2d 5, 12 (Tex. App.—Corpus Christi 1993, no writ). The mere failure to perform a contract is not evidence of fraud. *Formosa Plastics*, 960 S.W.2d at 48; *Crim Truck & Tractor Co. v. Navistar International Transportation Corp.*, 823 S.W.2d 591, 597 (Tex. 1992); *Spoljaric v. Percival Tours, Inc.*, 708 S.W.2d 432, 435 (Tex. 1986); *Bernstein v. Portland Savings & Loan Ass'n*, 850 S.W.2d 694, 703 (Tex. App.—Corpus Christi 1993, writ denied).

A party's later denial that a promise of future performance was made is a factor showing no intent to perform when the promise was made. *T.O. Stanley Boot Co.*, 847 S.W.2d at 222; *Spoljaric*, 708 S.W.2d at 435.

Representations as to future or contingent events are not deemed fraudulent merely because the predictions do not come true. *Fina Supply v. Abilene National Bank*, 726 S.W.2d 537, 540 (Tex. 1987) (representation as to the legal effect of documents to be amended in the future is a statement of opinion and will not support fraud in an arm's-length transaction); *Gardner v. Dorsey*, 272 S.W. 266, 270–71 (Tex. Civ. App.—El Paso 1925, writ dism'd) (statements about future value not fraudulent unless plaintiff proves intent to deceive). Mere breakage of a promise or failure to perform does not prove that the representation was fraudulent. *Spoljaric*, 708 S.W.2d at 435; *Bernstein*, 850 S.W.2d at 703. To be actionable, the promise must be made with the intention, design, and purpose of deceiving and with no intention of performing the act. Failure to perform coupled with other facts is a circumstance to be considered to establish intent. Intent to defraud can be shown by circumstantial evidence. "A party's denial that he ever made a promise is a factor showing no intent to perform when he made the promise." *Spoljaric*, 708 S.W.2d at 434–35.

If there is no contract liability, there is no tort liability for fraud, regardless of whether there was or was not an intention to perform the promise. *Bank of El Paso v. T.O. Stanley Boot Co.*, 809 S.W.2d 279, 288 (Tex. App.—El Paso 1991), *aff'd in part, rev'd in part on other grounds*, 847 S.W.2d 218 (Tex. 1992); *Guaranty Bank v. Lone Star Life Insurance Co.*, 568 S.W.2d 431, 434 (Tex. Civ. App.—Dallas 1978, writ ref'd n.r.e.).

§ 17.16:7 Reliance

In order to be actionable fraud, the defrauded party must have relied on the misrepresentation. If the misrepresentation concerns matters that are generally known or equally available to both parties at the time the transaction occurs, there is no actionable fraud. *Jones v. Herring*, 16 S.W.2d 325, 328 (Tex. Civ. App.—Austin 1929, writ dism'd). A duty to investigate exists when the defrauded party is aware of facts that would cause the ordinarily intelligent and prudent person to investigate. *Bush v. Stone*, 500 S.W.2d 885, 889–90 (Tex. Civ. App.—Corpus Christi 1973, writ ref'd n.r.e.). However, parties may contractually disclaim reliance on representations, and "such a disclaimer, where the parties'

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intent is clear and specific, should be effective to negate a fraudulent inducement claim." *Schlumberger Technology Corp. v. Swanson*, 959 S.W.2d 171, 179 (Tex. 1997) (citing *Prudential Insurance Co. of America v. Jefferson Associates, Ltd.*, 896 S.W.2d 156, 161–62 (Tex. 1995)).

In *Schlumberger*, two parties had concluded a dispute with a settlement-release agreement that contained a disclaimer clause stating that neither party was relying on any advice or statement of the other. Swanson then sought to set aside the release contract based on a fraud in the inducement claim. The court held that where the parties are dealing at arm's length, and the disclaimer expresses a clear intent to waive fraudulent inducement claims, such a disclaimer of reliance could be binding. Under the facts of *Schlumberger*, the court barred the fraudulent inducement claims as a matter of law. *Schlumberger*, 959 S.W.2d at 180–81.

§ 17.16:8 Intention

When evidence of an intention not to perform is so weak that it creates only a mere surmise or suspicion, it constitutes no evidence and will not support a verdict. *T.O. Stanley Boot Co. v. Bank of El Paso*, 847 S.W.2d 218. The mere failure to perform is not, in itself, evidence of intent not to perform. *Chancellors Racquet Club v. Schwarz*, 661 S.W.2d 194, 196 (Tex. App.—Houston [1st Dist.] 1983, writ ref'd n.r.e.) (quoting *Stone v. Enstam*, 541 S.W.2d 473, 481 (Tex. Civ. App.—Dallas 1976, no writ).

§ 17.16:9 Failure to Disclose

The failure to disclose a material fact within the knowledge of a party may only be actionable where there is a duty to disclose. *Bradford v. Vento*, 48 S.W.3d 749, 755 (Tex. 2001). Whether such duty exists is a question of law. *Citizens National Bank v. Allen Rae Investments, Inc.*, 142 S.W.3d 459, 476–77 (Tex. App.—Fort Worth 2004, no pet.). A duty to disclose may arise in a commercial context in four situations:

1. when there is a fiduciary relationship between the parties;
2. when one voluntarily discloses information, the whole truth must be disclosed;
3. when one makes a representation, new information must be disclosed when that new information makes the earlier representation misleading or untrue; or
4. when one makes a partial disclosure and conveys a false impression.

Citizens National Bank, 142 S.W.3d at 477; *Lesikar v. Rappeport*, 33 S.W.3d 282, 299 (Tex. App.—Texarkana 2000, pet. denied).

§ 17.16:10 Fraudulent Inducement of "As Is" Contract

A valid "as is" provision can negate causation for a variety of claims, including fraud. But a "buyer is not bound by an agreement to purchase something 'as is' that he is induced to make because of a fraudulent representation or concealment of information by the seller." *See Prudential Insurance Co. of America v. Jefferson Associates, Ltd.*, 896 S.W.2d 156, 161–62 (Tex. 1995).

§ 17.16:11 Disclaiming Reliance

A contract's inclusion of a merger clause is insufficient, by itself, to negate a cause of action for fraudulent inducement. *Italian Cowboy Partners, Ltd. v. Prudential Insurance Co. of America*, 341 S.W.3d 323, 331–32 (Tex. 2011). In *Italian Cowboy Partners, Ltd.*, the supreme court reinforced its prior holdings that pure merger clauses, without an expressed clear and unequivocal intent to disclaim reliance or waive claims for fraudulent inducement, were ineffective to preclude such claims. Even merger

clauses that also contain a statement that no representations were made other than those contained in the contract is not sufficient to defeat a fraudulent inducement claim: "Such language achieves the purpose of ensuring that the contract at issue in-validates or supersedes any previous agreements, as well as negating the apparent authority of an agent to later modify the contract's terms." *Italian Cowboy Partners, Ltd.*, 341 S.W.3d at 334–35. *See also Community Management, LLC v. Cutten Development., L.P.*, No. 14-14-00854-CV, 2016 WL 3554704, at *5 (Tex. App.—Houston [14th Dist.] June 28, 2016, pet. denied) (mem. op.) (applying the holdings of *Schlumberger Technology Corp. v. Swanson*, 959 S.W.2d 170 (Tex. 1997) and *Italian Cowboy* to an apartment complex purchase agreement).

Instead, to avoid a fraud-in-the-inducement claim, a contract must also contain a specific clause that uses clear and unequivocal language disclaiming reliance. *Community Management*, 2016 WL 3554704, at *5. For example, in *Schlumberger* the contract provided, "[None] of us is relying upon any statement or representation of any agent of the parties being released here-by. Each of us is relying on his or her own judgment. . . ." *Schlumberger*, 959 S.W.2d at 180. And in *Forest Oil Corp. v. McAllen*, 268 S.W.3d 51, 55 (Tex. 2008), the contract stated that "in executing the releases contained in this Agreement, [the parties are not] relying upon any statement or representation of any agent of the par-ties being released hereby. [We are] relying on [our] own judgment . . ." "In each case, the intent to disclaim reliance on others' representations—that is, to rely only on one's own judgment-was evident from the language of the contract itself. . . . There is a significant difference between a party disclaiming its reliance on certain representations, and therefore potentially relinquishing the right to pursue any claim for which reliance is an element, and disclaiming the fact that no other representations were made." ". . . This elevated requirement of precise language helps ensure that parties to a contract-even sophisticated parties represented by able attorneys—understand that the contract's terms disclaim reliance, such that the contract may be binding even if it was induced by fraud." *Italian Cowboy Partners, Ltd.*, 341 S.W.3d at 335–36 (citing *Forest Oil Corp.*, 268 S.W.3d at 62; and *Schlumberger*, 959 S.W.2d at 179–80).

Assuming that there is a clear and unequivocal disclaimer-of-reliance clause, the court then requires an analysis to determine "the circumstances surrounding [the contract's] formation" in order to determine whether such a provision is binding on the parties involved. This would include an analysis of whether the terms of the contract were negotiated, rather than boilerplate; whether, during negotiations, the parties specifically discussed the issue which became the topic of the subsequent dispute, whether the complaining party was represented by counsel, whether the parties dealt with each other in an arm's length transaction, and whether the parties were knowledgeable in business matters. *Italian Cowboy Partners, Ltd.*, 341 S.W.3d at 336–37, n.8. (citing *Forest Oil Corp.*, 268 S.W.3d at 60). If the situation also indicates a "once and for all" settlement of claims, this may constitute an additional factor urging rejection of fraud-based claims.

§ 17.16:12 Remedies

There are three remedies that are available to a defrauded party pleading fraud in the inducement:

1. An affirmative right to damages for being led into the transaction. Under this form of relief the injured party does not seek to undo the fraudulent transaction, but instead claims sufficient compensation to make his position as good as it would have been had he not entered into the transaction at all;

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2. Rescission of the fraudulent transaction and restoration of the situation which the parties occupied before the fraudulent transaction was entered into; or

3. "Benefit of the bargain" damages against the fraudulent person for the kind of bargain which he represented that he was making.

27 Williston on Contracts § 69:47 (4th ed. 2017); *Mason v. Peterson*, 250 S.W. 142, 146 (Tex. Comm'n App. 1923, holding approved, judgm't adopted); *Gage v. Langford*, 615 S.W.2d 934, 939–40 (Tex. Civ. App.—Eastland 1981, writ ref'd n.r.e.). Therefore, a party urging fraud in the inducement, either as plaintiff or defendant, must establish not only the fraud but also the correct remedy. *Gage*, 615 S.W.2d at 940.

In *Gage*, the payee of a $550,000 promissory note sued the maker for the unpaid balance. The maker alleged fraud in the inducement as an affirmative defense to payment on the note. The note had been originally issued as payment for the privilege of entering the payee's land to salvage abandoned oil well equipment. The payee had originally stated that there were 271 salvage wells located on the property. It was later determined that there were in fact only 206 wells, and of those, fifty-one were unsalvageable. The jury found that the payee had fraudulently induced the maker to sign the contract. However, no issue was submitted as to the amount of damages incurred by the maker because of the shortage of wells. The maker asserted that he need only establish fraud in the inducement to preclude recovery on the note. The court disagreed and found that the maker must establish the amount of damages he incurred as a result of the fraudulent representation which he failed to do. The court said that if the note was cancelled there would be an implicit finding that the maker was damaged in an amount equal to the remaining balance on the note. Without some proof as to the extent of his injury, these implied damages could not stand. Instead, the court held that the maker must establish the damages resulting from the fraudulent inducement and either seek recession or affirm the obligation and seek a set-off in the amount of any damage. *Gage*, 615 S.W.2d at 941.

§ 17.16:13 Fraud as Affirmative Defense

Fraud, as an affirmative defense, must be affirmatively pleaded. Tex. R. Civ. P. 94; *Philadelphia Indemnity Insurance Co. v. White*, 490 S.W.3d 468, 485 (Tex. 2016).

§ 17.17 Deceptive Trade Practices

"Unconscionable action or cause of action" is defined as an act or practice which, to a consumer's detriment, takes advantage of the lack of knowledge, ability, experience, or capacity of the consumer to a grossly unfair degree. Tex. Bus. & Com. Code § 17.45(5). See section 17.41 below regarding the Deceptive Trade Practices–Consumer Protection Act.

§ 17.18 Ambiguity

§ 17.18:1 Elements and Proof

In contract law, the terms "ambiguous" and "ambiguity" have a more specific meaning than merely denoting a lack of clarity in language. *RSUI Indemnity Co. v. The Lynd Co.*, 466 S.W.3d 113, 119 (Tex. 2014); *Universal C.I.T. Credit Corp. v. Daniel*, 243 S.W.2d 154, 157 (Tex. 1951). "An ambiguity does not arise simply because the parties offer conflicting interpretations," but only when "the application of pertinent rules of interpretation to the face of the instrument leaves it genuinely uncertain which one of two or more meanings is the proper meaning." Thus, a contract is ambiguous only if, after applying the rules of construction, it remains subject to two or more reasonable inter-

pretations. *RSUI Indemnity Co.*, 466 S.W.3d at 119 (quoting *American Manufacturers Mutual Insurance Co. v. Schaefer*, 124 S.W.3d 154, 157 (Tex. 2003); *Daniel*, 243 S.W.2d at 157).

While extrinsic evidence of the parties' intent is not admissible to create an ambiguity, the contract may be read in light of the circumstances surrounding its execution to determine whether an ambiguity exists. *Plains Exploration & Production Co. v. Torch Energy Advisors Inc.*, 473 S.W.3d 296, 305 (Tex. 2015); *Balandran v. Safeco Insurance Co. of America*, 972 S.W.2d 738, 741 (Tex. 1998). Consideration of the surrounding facts and circumstances is simply an aid in the construction of the contract's language and has its limits. *Plains Exploration*, 473 S.W.3d at 305; *Sun Oil Co. (Delaware) v. Madeley*, 626 S.W.2d 726, 731 (Tex. 1981). The rule that extrinsic evidence is not admissible to create an ambiguity "obtains even to the extent of prohibiting proof of circumstances surrounding the transaction when the instrument involved, by its terms, plainly and clearly discloses the intention of the parties, or is so worded that it is not fairly susceptible of more than one legal meaning or construction." *Sun Oil Co.*, 626 S.W.2d at 732. Mere disagreement over the interpretation of an agreement does not necessarily render the contract ambiguous. *Plains Exploration*, 473 S.W.3d at 305. Nor is uncertainty or lack of clarity in the language chosen by the parties sufficient to render a contract ambiguous. *J.M. Davidson, Inc. v. Webster*, 128 S.W.3d 223, 240 (Tex. 2002); *TWI XVIII, Inc. v. Christopher S. Carroll No. 1, Ltd.*, No. 02-12-00065-CV, 2013 WL 1457725, at *4 (Tex. App.—Fort Worth April 11, 2013, pet denied) (mem. op.). If it can be given a certain or definite legal meaning or interpretation, a contract is not ambiguous and the court will construe it as a matter of law. Interpretation of a contract becomes a fact issue to be resolved by extrinsic evidence if application of pertinent rules of construction leaves a general uncertainty about which of two meanings is proper. *El Paso Field Services, L.P. v. MasTec North America, Inc.*, 389 S.W.3d 802, 806 (Tex. 2012).

§ 17.18:2 Pleading Requirements

A court may conclude that an agreement is ambiguous even in the absence of such a pleading by either party. *J.M. Davidson, Inc. v. Webster*, 128 S.W.3d 223, 231 (Tex. 2002); *Seabourne v. Seabourne*, 493 S.W.3d 222, 228 (Tex. App.—Texarkana 2016, no pet.); *Fleming v. Kirklin Law Firm, P.C.*, No. 14-14-00202-CV, 2015 WL 7258700, at *4 (Tex. App.—Houston [14th Dist.] 2015, no pet.) (mem. op.).

§ 17.19 Duress

§ 17.19:1 Duress Generally

Duress is any mental, physical, or other coercion of another that caused a party to act contrary to his own free will or to submit to a situation or conditions against his own volition or interests. It requires a threat to do some act the threatening party has no legal right to do, some illegal exaction or some fraud or deception, and imminent restraint such as to destroy free agency without present means of protection. *Robertson v. Robertson*, No. 13-14-00523-CV, 2015 WL 7820814, at *8 (Tex. App.—Corpus Christi Dec. 3, 2015, no pet.) (mem. op.); *Doe v. Catholic Diocese of El Paso*, 362 S.W.3d 707, 719 (Tex. App.—El Paso 2011, no pet.) (to constitute duress, the threat must be of such character to overcome the willpower of a person and cause them to do what he or she otherwise would not).

In re Frank Kent Motor Co., 361 S.W.3d 628, 632 (Tex. 2011) (orig. proceeding), *cert. denied*, 568 U.S. 820 (2012), set out the elements of economic duress or business coercion as (1) a threat of an act that the actor had no legal right to do, (2) a threat of such a nature it destroys the other party's free agency, (3) a threat that overcomes the other party's free will and causes it to do what it otherwise would not have done and

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that it was not legally bound to do, (4) imminent restraint, and (5) no means of protection. Duress frequently depends on the motive on which a claim is based. It may be shown when a threatening party acts oppressively to further his own economic interests. *State National Bank v. Farah Manufacturing Co.*, 678 S.W.2d 661, 685 (Tex. App.—El Paso 1984, writ dism'd by agr.).

For example, threatening to sue or actually filing suit does not constitute duress as a matter of law. *McMahan v. Greenwood*, 108 S.W.3d 467, 482 (Tex. App.—Houston [14th Dist.] 2003, pet. denied).

§ 17.19:2 Pleading Requirements

Duress is an affirmative defense that must be specifically pleaded. Tex. R. Civ. P. 94. The question of what constitutes duress is a matter of law, and the question of whether it exists in a particular situation is generally a question of fact. *Robertson v. Robertson*, No. 13-14-00523-CV, 2015 WL 7820814, at *8 (Tex. App.—Corpus Christi Dec. 3, 2015, no pet.) (mem. op.); *Doe v. Catholic Diocese of El Paso*, 362 S.W.3d 707, 719–20 (Tex. App.—El Paso 2011, no pet.).

§ 17.20 Undue Influence

Undue influence is overcoming the free will of an individual and substituting the will of another, causing the individual to do an act that he would not otherwise have done. *B.A.L. v. Edna Gladney Home*, 677 S.W.2d 826, 831 (Tex. App.—Fort Worth 1984, writ ref'd n.r.e.). To establish a claim of undue influence, a contestant must prove: (1) the existence and exertion of an influence, (2) the effective operation of such influence so as to subvert or overpower the person's mind when executing the document, and (3) the person would not have executed the document but for the influence. *In re Adkins*, No. 13-15-00066-CV, 2015 WL 13310094, at *9 (Tex. App.—Corpus Christi June 23, 2015, orig. proceeding) (mem. op.) (citing *Rothermel v. Duncan*, 369 S.W.2d 917, 922 (Tex. 1963)). Influence cannot be branded as undue merely because it is persuasive and effective. Not all persuasion, entreaty, importunity, or intercession is condemned; what constitutes undue influence depends on the particular facts and circumstances of each case viewed in the light of applicable principles of law. *B.A.L.*, 677 S.W.2d at 830. Undue influence may be shown by direct or circumstantial evidence. *In re Adkins*, 2015 WL 13310094, at *9.

§ 17.21 Variance between Offer and Acceptance ("Perfect Tender" Rule)

§ 17.21:1 Common-Law Contracts

No contract exists if there is a variance in the terms of the offer and acceptance or a deficiency in the tender of the subject matter. *MRC Permian Co. v. Three Rivers Operating Co.*, No. 05-14-00353-CV, 2015 WL 4639711, at *10 (Tex. App.—Dallas Aug. 5, 2015, pet. denied) (acceptance that is conditioned on terms at variance with those in offer operates as counteroffer and terminates original offer).

§ 17.21:2 Sale of Goods

A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered, or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms. Tex. Bus. & Com. Code § 2.207(a). The additional terms are to be construed as proposals for addition to the contract. Between merchants, the additional terms become part of the contract unless (1) the offer is expressly limited to acceptance on the terms of the offer, (2) they materially alter it, or (3) notification of objection has

already been or is given within a reasonable time after notice of them is received. Tex. Bus. & Com. Code § 2.207(b). Conduct by both parties that recognizes the existence of a contract is sufficient to establish a contract for sale although the writing of the parties does not otherwise establish a contract. In such case, the terms of the particular contract consist of those terms on which the writing of the parties agree, together with any supplementary terms incorporated under any other provisions of the Texas Uniform Commercial Code, Tex. Bus. & Com. Code §§ 1.101–9.809. Tex. Bus. & Com. Code § 2.207(c).

§ 17.22 Laches

To invoke the equitable doctrine of laches, the moving party ordinarily must show an unreasonable delay by the opposing party in asserting its rights and also the moving party's good faith and detrimental change in position because of the delay. *In re Laibe Corp.*, 307 S.W.3d 314, 318 (Tex. 2010) (orig. proceeding) (per curiam); *Bruno Independent Living Aids v. Yzaguirre*, No. 13-15-00408-CV, 2016 WL 9000744, at *3 (Tex. App.—Corpus Christi Mar. 31, 2016, no pet.) (mem. op.); *Gutierrez v. Draheim*, No. 01-14-00267-CV, 2016 WL 921470, at *3 (Tex. App.—Houston [1st Dist.] Mar. 10, 2016, no pet.) (mem. op.) "Generally in the absence of some element of estoppel or such extraordinary circumstances as would render inequitable the enforcement of petitioners' right after a delay, laches will not bar a suit short of the period set forth in the limitation statute." *Caldwell v. Barnes*, 975 S.W.2d 535, 538 (Tex. 1998) (quoting *Barfield v. Howard M. Smith Co. of Amarillo*, 426 S.W.2d 834, 840 (Tex. 1968)). The party asserting laches has the burden of proving it. *Brewer v. Nationsbank of Texas, N.A.*, 28 S.W.3d 801, 804 (Tex. App.—Corpus Christi 2000, no pet.).

If one party has deliberately made promises to induce the other to delay bringing a cause of action against him, equitable estoppel may be applied to prevent the party who induced the delay from asserting the defense of laches and the statute of limitations. *See Hill v. Bartlette*, 181 S.W.3d 541, 545–46 (Tex. App.—Texarkana 2005, no pet.); *O'Dowd v. Johnson*, 666 S.W.2d 619, 621 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.).

Laches is an affirmative defense and must be specifically pleaded. Tex. R. Civ. P. 94.

§ 17.23 Impossibility of Performance

Under the doctrine of impossibility of performance, a party's performance under a contract is discharged or excused when supervening circumstances make the performance impossible or impracticable: "Where, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary." *Garcia v. Baumgarten*, No. 03-14-00267-CV, 2015 WL 4603866, at *5 (Tex. App.—Austin July 30, 2015, no pet.) (mem. op.) (quoting the Restatement (Second) of Contracts § 261 (1981)); *see also Centex Corp. v. Dalton*, 840 S.W.2d 952, 954 (Tex. 1992) (discussing the issue of foreseeability in deciding which party bore the risk of the supervening impossibility and must therefore bear the costs of nonperformance).

"Original impossibility" is impossibility of performance existing when the contract is entered into, so that the contract was for doing something that from the outset was impossible. "Supervening impossibility" is a condition that develops after the inception of the contract. The manual committee is not aware of any Texas cases that have enforced a contract against the defense of original objective impossibility because of facts existing when the promise is

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made that the promisor neither knows nor has reason to know. *See, e.g., Hollis v. Gallagher*, No. 03-11-00278-CV, 2012 WL 3793288, at *6-7 (Tex. App.—Austin Aug. 28, 2012, no pet.) (mem. op.) (restrictive covenant was not enforceable when it could only be waived by signatures of developers, both of whom died after instrument was executed; court also explained difference between objective and subjective impossibility: "Something is objectively impossible if 'the thing cannot be done,'" whereas subjective impossibility is "due wholly to the inability of the individual promisor.").

If the obligation to perform is absolute, impossibility of performance occurring after the contract is made is not an excuse for nonperformance if the impossibility might reasonably have been anticipated and guarded against in the contract. *Huffines v. Swor Sand & Gravel Co.*, 750 S.W.2d 38, 40 (Tex. App.—Fort Worth 1988, no writ). This is true even though the impossibility may subsequently have occurred by virtue of an "act of God" or some other circumstance over which the parties have no control. Impossibility is also not an excuse if it subsequently occurred by virtue of the act or default of the promisor or by the acts of a third party. *Metrocon Construction Co. v. Gregory Construction Co.*, 663 S.W.2d 460, 462 (Tex. App.—Dallas 1983, writ ref'd n.r.e.). *But see Erickson v. Rocco*, 433 S.W.2d 746, 752 (Tex. Civ. App.—Houston [14th Dist.] 1968, writ ref'd n.r.e.) (excusing nonperformance of covenant to maintain fire insurance policy when policy was cancelled after fire destroyed most of property).

The fact that a contract is more burdensome or economically impracticable to perform than originally anticipated does not excuse its nonperformance. *Reeder v. Wood County Energy, LLC*, 320 S.W.3d 433, 446 (Tex. App.—Tyler 2010, pet. granted), *rev'd on other grounds*, 395 S.W.3d 789 (Tex. 2012); *Huffines*, 750 S.W.2d at 40; *Alamo Clay Products, Inc. v. Gunn Tile Co.*, 597 S.W.2d 388, 392 (Tex. Civ. App.—San Antonio 1980, writ ref'd n.r.e.).

If impossibility of performance is because of the plaintiff's wrongful interference, it excuses nonperformance by the injured party. *Atkinson Gas Co. v. Albrecht*, 878 S.W.2d 236, 239 (Tex. App.—Corpus Christi 1994, writ denied). The nonbreaching party will also be entitled to any damages sustained as a result of the interference. *Longview Construction & Development v. Loggins Construction Co.*, 523 S.W.2d 771, 779 (Tex. Civ. App.—Tyler 1975, writ dism'd by agr.).

§ 17.24 Illegality

The performance of a contract is excused by a supervening impossibility caused by the operation of a change in the law. *Centex Corp. v. Dalton*, 840 S.W.2d 952, 954 (Tex. 1992); *Morales v. Hidalgo County Irrigation Dist. No. 6*, No. 13-14-00205-CV, 2015 WL 5655802, at *2 (Tex. App.—Corpus Christi Sept. 24, 2015, pet. denied) (mem. op.). When the illegality does not appear on the face of the contract, it will not be held void unless facts showing its illegality are before the court. If a contract could have been performed in a legal manner, the fact that it also may have been performed in an illegal manner does not make it void. *See Morales*, 2015 WL 5655802, at *2; *Lewis v. Davis*, 199 S.W.2d 146, 148–49 (Tex. 1947). When constructions of a contract are possible, courts must apply the construction that does not result in a violation of the law. *Morales*, 2015 WL 5655803, at *2.

If a contract is against public policy, it is illegal, void, and unenforceable. *Alma Investments, Inc. v. Bahia Mar Co-Owners Ass'n*, 999 S.W.2d 820, 824 (Tex. App.—Corpus Christi 1999, pet. denied); *Montgomery v. Browder*, 930 S.W.2d 772, 778 (Tex. App.—Amarillo 1996, writ denied); *Baron v. Mullinax, Wells, Mauzy & Baab, Inc.*, 623 S.W.2d 457, 461 (Tex. App.—Texarkana 1981, writ ref'd n.r.e.). In the absence

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of expressed direction from the legislature, whether a promise or agreement will be unenforceable on public policy grounds will be determined by weighing the interest in enforcing agreements versus the public policy interest against such enforcement. *Fairfield Insurance Co. v. Stephens Martin Paving, LP*, 246 S.W.3d 653, 663 (Tex. 2008). Texas has long recognized a strong public policy in favor of preserving the freedom of contract. Tex. Const. art. I, § 16 ("No bill of attainder, ex post facto law, retroactive law, or any law impairing the obligation of contracts, shall be made."); *Fairfield Insurance*, 246 S.W.3d at 664.

Illegality is an affirmative defense that ordinarily must be specifically pleaded. Tex. R. Civ. P. 94. Failure to plead illegality of a contract ordinarily constitutes a waiver of the defense; if the document shows illegality on its face, however, an affirmative pleading to that effect is unnecessary. *Lewkowicz v. El Paso Apparel Corp.*, 625 S.W.2d 301, 303 (Tex. 1981).

§ 17.25 Revocation of Acceptance

A buyer may revoke his acceptance of a lot or commercial unit whose nonconformity substantially impairs its value to him if he has accepted it either (1) on the reasonable assumption that its nonconformity would be cured and it has not been seasonably cured or (2) without discovery of the nonconformity if his acceptance was reasonably induced either by the difficulty of discovery before acceptance or by the seller's assurances. Tex. Bus. & Com. Code § 2.608(a); *see Clipper Bulk Shipping, Ltd. v. Sun Coast Resources, Inc.*, No. 09-12-00478-CV, 2013 WL 5658375, at *2–3 (Tex. App.—Beaumont June 26, 2013, no pet.) (mem. op.).

Revocation of acceptance must occur within a reasonable time after the buyer discovers or should have discovered the ground for it and before any substantial change in condition of the goods which is not caused by their own defects. *See Clipper Bulk Shipping, Ltd.*, 2013 WL 5658375, at *3. It is not effective until the buyer notifies the seller of it. Tex. Bus. & Com. Code § 2.608(b). A buyer who so revokes has the same rights and duties with regard to the goods involved as if he had rejected them. Tex. Bus. & Com. Code § 2.608(c).

The right of a buyer to revoke exists only after the buyer has initially accepted the goods in question. Once a buyer has properly revoked acceptance of a product, the seller has no right to cure by repair or by replacement. In addition to recovery of the purchase price, including the full trade-in credit of any property traded in, the buyer who has properly exercised his right to revoke may recover prejudgment interest, postjudgment interest, and attorney's fees when the proper predicate for such recovery has been made. *Gappelberg v. Landrum*, 666 S.W.2d 88, 91 (Tex. 1984).

If the buyer has made substantial changes in the condition of the goods that increased their value, revocation is still available. *Village Mobile Homes v. Porter*, 716 S.W.2d 543, 551–52 (Tex. App.—Austin 1986, writ ref'd n.r.e.).

A buyer who accepts a nonconforming good and who has no right to revoke the acceptance is limited to recovering the difference between the value of the good as received and the value had the good been conforming. Tex. Bus. & Com. Code § 2.714(b); *Manon v. Tejas Toyota, Inc.*, 162 S.W.3d 743, 748 (Tex. App.—Houston [14th Dist.] 2005, no pet.).

§ 17.26 Rejection by Buyer

§ 17.26:1 Rejection Generally

If the goods fail to conform to the contract, the buyer may accept the whole, reject the whole, or accept any commercial unit(s) and reject the rest. Tex. Bus. & Com. Code § 2.601. For an installment contract, the buyer may reject any

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installment which is nonconforming if the nonconformity substantially impairs the value of that installment and cannot be cured, or if the nonconformity is a defect in the required documents. But if the nonconformity does not substantially impair the value of the whole contract and the seller gives adequate assurance of its cure, the buyer must accept that installment. Tex. Bus. & Com. Code § 2.612(b), (c). An "installment contract" is one which requires or authorizes the delivery of goods in separate lots to be separately accepted even though the contract contains a clause "each delivery is a separate contract" or its equivalent. Tex. Bus. & Com. Code § 2.612(a). Whenever nonconformity or default with respect to one or more installments substantially impairs the value of the whole contract there is a breach of the whole. But the aggrieved party reinstates the contact if he accepts a nonconforming installment without seasonably notifying of cancellation or if he brings an action with respect only to past installments or demand performance as to further installments. Tex. Bus. & Com. Code § 2.612(c).

§ 17.26:2 Notification of Rejection

Rejection of goods must be within a reasonable time after delivery or tender. It is ineffective unless the buyer seasonably notifies the seller. CPDE. The buyer's failure to state in connection with rejection a particular defect which is ascertainable by reasonable inspection precludes him from relying on the unstated defect to justify rejection or to establish breach (1) where the seller could have cured if it stated reasonably; or, (2) between merchants, when the seller has, after rejection made a request in writing for a full and final written statement of all defects on which the buyer proposes to rely. Tex. Bus. & Com. Code § 2.605(a). Payment against documents made without reservation of rights precludes recovery of the payment for defect apparent in the documents. Tex. Bus. & Com. Code § 2.605(b).

§ 17.26:3 Seller's Right to Cure

If any tender or delivery by the seller is rejected because of nonconformity and the time for performance has not yet expired, the seller may seasonably notify the buyer of his intention to cure and may then within the contract time make a conforming delivery. Tex. Bus. & Com. Code § 2.508(a). If the buyer rejects a nonconforming tender which the seller has reasonable grounds to believe would be acceptable with or without money allowance the seller may, if he seasonably notifies the buyer, have a further reasonable time to substitute tender. Tex. Bus. & Com. Code § 2.508(b).

§ 17.26:4 Buyer's Responsibility for Goods after Rejection

If the buyer has before rejection taken physical possession of goods in which he does not have a security interest under the provisions of Tex. Bus. & Com. Code § 2.711(c), he is under a duty after rejection to hold them with reasonable care at the seller's disposition for a time sufficient to permit the seller to remove them. Tex. Bus. & Com. Code § 2.602(b)(2). The seller has no further obligations with regard to goods rightfully rejected. Tex. Bus. & Com. Code § 2.602(b)(3). If the seller does not reclaim them within a reasonable time after notification of rejection, the buyer may store the goods for the seller's account, reship them to the seller, or resell them for the seller's account, retaining a commission of not more than 10 percent. Tex. Bus. & Com. Code §§ 2.603–.604.

§ 17.27 Usury

See sections 2.51 through 2.63 in this manual regarding usury generally. Although not specifically listed as an affirmative defense in Tex. R. Civ. P. 94, recent cases suggest that the defense should be so pleaded. *Lagow v. Hamon*, 384 S.W.3d 411, 413 (Tex. App.—Dallas 2012, no pet.); *Ainsworth v. CACH, LLC*, No. 14-11-

00502-CV, 2012 WL 1205525, at *1 (Tex. App.—Houston [14th Dist.] Apr. 10, 2012, pet. denied) (mem. op.); *Ally v. Bank & Trust of Bryan/College Station*, No. 10-11-00080-CV, 2012 WL 662324 (Tex. App.—Waco Feb. 29, 2012, no pet.) (mem. op.).

A pleading asserting usury must be verified. Tex. R. Civ. P. 93(11).

§ 17.28 Discharge in Bankruptcy

A debtor's discharge in bankruptcy operates as an injunction against the commencement or continuance of an action, the employment of process, or an act, to collect, recover, or offset any such debt as a personal liability of the debt, whether or not discharge of such debtor is waived. 11 U.S.C. § 524. Exceptions such as fraud are described in 11 U.S.C. § 523. See chapter 35 of this manual for a discussion of bankruptcy issues.

§ 17.29 Truth in Lending

See sections 2.71 through 2.73 in this manual regarding the federal truth-in-lending laws.

§ 17.30 Billing Errors

See section 2.74 in this manual regarding the federal Fair Credit Billing Act.

§ 17.31 Illiteracy

Absent proof of mental incapacity, a person who signs a contract is presumed to have read and understood the contract unless he was prevented from doing so by trick or artifice. *Delfingen US-Texas, LP v. Valenzuela*, 407 S.W.3d 791, 801 (Tex. App.—El Paso 2013, no pet.). Illiteracy will not relieve a party of the consequences of his contract. 407 SW.3d at 801; *Nguyen Ngoc Giao v. Smith & Lamm, P.C.*, 714 S.W.2d 144, 146–47 (Tex. App.—Houston [1st Dist.] 1986, no writ). *See also Amouri v. Southwest Toyota, Inc.*, 20 S.W.3d 165 (Tex. App.—Texarkana 2000, pet. denied) (illiteracy irrelevant where contract was procured by fraud).

[Sections 17.32 through 17.40 are reserved for expansion.]

I. Counterclaims

§ 17.41 Texas Deceptive Trade Practices–Consumer Protection Act (DTPA)

§ 17.41:1 Acts Violating DTPA

Violations of the Deceptive Trade Practices–Consumer Protection Act (DTPA) include—

1. a breach of an express or implied warranty;
2. an unconscionable act or course of action;
3. a violation of Texas Insurance Code chapter 541; or
4. the use or employment of a false, misleading, or deceptive act or practice, specifically enumerated in the "laundry list" provisions of Tex. Bus. & Com. Code § 17.46(b), that the consumer relies on to his detriment.

Tex. Bus. & Com. Code § 17.50(a). The DTPA does not itself create any warranties. *Helena Chemical Co. v. Wilkins*, 47 S.W.3d 486, 505

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(Tex. 2001); *La Sara Grain Co. v. First National Bank*, 673 S.W.2d 558, 565 (Tex. 1984).

The most common "laundry list" violations are—

1. representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities that they do not have or that a person has a sponsorship, approval, status, affiliation, or connection that he does not have (Tex. Bus. & Com. Code § 17.46(b)(5));

2. representing that goods or services are of a particular standard, quality, or grade or that goods are of a particular style or model if they are of another (Tex. Bus. & Com. Code § 17.46(b)(7));

3. representing that an agreement confers or involves rights, remedies, or obligations that it does not have or involve or that are prohibited by law (Tex. Bus. & Com. Code § 17.46(b)(12));

4. representing that work or services have been performed on or parts replaced in goods if the work or services were not performed or the parts replaced (Tex. Bus. & Com. Code § 17.46(b)(22));

5. filing suit in a court of improper venue (Tex. Bus. & Com. Code § 17.46(b)(23)); and

6. failing to disclose information concerning goods or services that was known at the time of the transaction if the failure to disclose was intended to induce the consumer into a transaction into which he would not otherwise have entered (Tex. Bus. & Com. Code § 17.46(b)(24)).

§ 17.41:2 Incorporation of DTPA into Debt Collection Practices Act and Other Laws

Violation of a number of other statutes also constitutes a violation of the DTPA, including—

1. Tex. Fin. Code § 392.404(a) (Texas Debt Collection Practices Act; see sections 2.31 through 2.36 in this manual);

2. Tex. Bus. & Com. Code § 51.302 (Business Opportunity Act; see section 2.109); and

3. Tex. Bus. & Com. Code § 601.204 (formerly the Home Solicitation Transactions Act; see section 2.108).

§ 17.41:3 Who Can Bring DTPA Action

Only a consumer may bring a DTPA action. *See* Tex. Bus. & Com. Code § 17.50(a). A "consumer" is an individual, partnership, corporation, the state of Texas, or a subdivision or agency of the state that seeks or acquires by purchase or lease any goods or services, except for a business consumer with assets of $25 million or more. Tex. Bus. & Com. Code § 17.45(4). A "business consumer" is an individual, partnership, or corporation who seeks or acquires by purchase or lease any goods or services for commercial or business use. Tex. Bus. & Com. Code § 17.45(10).

§ 17.41:4 Transactions Excluded from DTPA

The types of claims listed below cannot be brought under the DTPA.

Negotiated Contract: The DTPA does not apply to claims arising out of a written contract if (1) the contract relates to a transaction, project, or set of transactions related to the same

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project involving total consideration by the consumer of more than $100,000; (2) in negotiating the contract the consumer is represented by legal counsel not directly identified, suggested, or selected by the defendant or defendant's agent; and (3) the cause of action does not involve the consumer's residence. Tex. Bus. & Com. Code § 17.49(f).

Transaction Limit: The DTPA does not apply to claims arising out of a transaction, project, or set of transactions relating to the same project involving a total consideration by the consumer of more than $500,000, other than a cause of action involving the consumer's residence. Tex. Bus. & Com. Code § 17.49(g).

Professional Services: The DTPA does not apply to claims for damages based on professional services, the essence of which is the providing of advice, judgment, opinion, or similar professional skill. This exemption does not apply to (1) an express misrepresentation of material fact that cannot be characterized as advice, judgment, or opinion; (2) a failure to disclose information in violation of Tex. Bus. & Com. Code § 17.46(b)(24); (3) an unconscionable act or course of action that cannot be characterized as advice, judgment, or opinion; (4) breach of an express warranty that cannot be characterized as advice, judgment, or opinion; or (5) a violation of Tex. Bus. & Com. Code § 17.46(b)(26). Tex. Bus. & Com. Code § 17.49(c).

Waiver: A consumer may waive his rights to a DTPA action if (1) the waiver is in writing, is signed by him, and is in the form prescribed by Tex. Bus. & Com. Code § 17.42(a); (2) he is not in a significantly disparate bargaining position; and (3) in negotiating the contract the consumer is represented by legal counsel not directly identified, suggested, or selected by the defendant or defendant's agent. Tex. Bus. & Com. Code § 17.42(a).

§ 17.41:5 Presuit Notice by Consumer

Before filing suit, the consumer must give at least sixty days' written notice to the prospective defendant, advising the defendant of the specific complaint and the amount of economic damages, damages for mental anguish, and expenses, including attorney's fees, reasonably incurred by the consumer in asserting the claim. Tex. Bus. & Com. Code § 17.505(a). The consumer may give notice *after* filing suit, however, if the action is brought as a counterclaim or if the sixty-day-notice requirement would cause the applicable statute of limitations to bar the consumer's claim. Tex. Bus. & Com. Code § 17.505(b). During the sixty-day period, a written request to inspect the goods subject to dispute may be presented to the consumer. Tex. Bus. & Com. Code § 17.505(a).

If the defendant does not receive written notice, he may file a plea in abatement within thirty days after filing his original answer. Abatement is not available if Tex. Bus. & Com. Code § 17.505(b) applies. Tex. Bus. & Com. Code § 17.505(c). The suit shall be abated if the notice requirement was not met, and abatement will continue until sixty days after written notice is served. Tex. Bus. & Com. Code § 17.505(d), (e).

§ 17.41:6 Penalties for DTPA Violation

A consumer prevailing in a DTPA action can recover economic damages, court costs, and reasonable and necessary attorney's fees. Tex. Bus. & Com. Code § 17.50(b), (d). If the defendant's conduct is found to be knowing, the court may award additional damages of up to three times the amount of economic damages and may also award mental anguish damages. If the defendant's conduct was intentional, the mental anguish damages may be trebled as well. Tex. Bus. & Com. Code § 17.50(b)(1).

If a DTPA judgment is not satisfied within three months of the date of final judgment, the court

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may appoint a receiver or revoke or suspend the defendant's license to do business in this state. The court may not appoint a receiver or revoke or suspend a defendant's license if the defendant is a licensee of or regulated by a state agency with statutory authority to revoke or suspend the license or appoint a receiver or trustee. Tex. Bus. & Com. Code § 17.50(b)(4).

§ 17.41:7 Groundless or Harassing DTPA Suit

If a consumer brings a suit that is groundless in fact or law, in bad faith, or for purposes of harassment, the court must award the defendant reasonable and necessary attorney's fees and court costs. Tex. Bus. & Com. Code § 17.50(c).

§ 17.42 Fraud

§ 17.42:1 Common-Law Fraud

Fraud occurs if—

1. a material representation was made;
2. the representation was false;
3. the party made the representation knowing it was false when he made it or made it recklessly without any knowledge of its truth and as a positive assertion;
4. the party made the representation intending the complainant to act on it;
5. the complainant acted in reliance on it; and
6. the complainant suffered an injury as a result.

Exxon Corp. v. Emerald Oil & Gas Co., L.C., 348 S.W.3d 194, 217 (Tex. 2011); *In re First-Merit Bank, N.A.*, 52 S.W.3d 749, 758 (Tex. 2001, orig. proceeding); *American Dream Team, Inc. v. Citizens State Bank*, 481 S.W.3d 725, 737 (Tex. App.—Tyler 2015, pet. denied). The absence of any one of these elements prevents recovery. *Custom Leasing, Inc. v. Texas Bank & Trust Co. of Dallas*, 516 S.W.2d 138, 143 (Tex. 1974); *Mumphord v. First Victoria National Bank*, 605 S.W.2d 701, 704 (Tex. Civ. App.—Corpus Christi 1980, no writ).

Common-law fraud may be pleaded as an affirmative cause of action (*see, e.g., Trenholm v. Ratcliff*, 646 S.W.2d 927 (Tex. 1983)) or as an affirmative defense (*see, e.g., Oilwell Division, United States Steel Corp. v. Fryer*, 493 S.W.2d 487, 490 (Tex. 1973)). As an affirmative defense, fraud must be properly and specifically pleaded. Tex. R. Civ. P. 94; *Cranetex, Inc. v. Precision Crane & Rigging of Houston, Inc.*, 760 S.W.2d 298, 304 (Tex. App.—Texarkana 1988, writ denied).

To prevail on an actionable fraud cause of action, the party asserting the claim must satisfy all elements of the tort for each alleged misrepresentation. *Stephanz v. Laird*, 846 S.W.2d 895, 903 (Tex. App.—Houston [14th Dist.] 1993, no writ).

§ 17.42:2 Material Representation

Material information is that which a reasonable person would attach importance to and would be induced to act on in determining his choice of actions in the transaction in question. *Italian Cowboy Partners, Ltd. v. Prudential Insurance Co. of America*, 341 S.W.3d 323, 337 (Tex. 2011); *Wilmot v. Bouknight*, 466 S.W.3d 219, 227 (Tex. App.—Houston [1st Dist.] 2015, pet. denied); *In re Media Arts Group, Inc.*, 116 S.W.3d 900, 910 (Tex. App.—Houston [14th Dist.] 2003, orig. proceeding [mand. denied]); *Citizens National Bank v. Allen Rae Investments, Inc.*, 142 S.W.3d 459, 78–79 (Tex. App.—Fort Worth 2004, no pet.). In *Town North National Bank v. Broaddus*, 569 S.W.2d 489 (Tex. 1978), the court held that a promissory note that is clear and express in its terms can-not be varied or contradicted by parol agreements or by repre-

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sentations of the payee that the maker would not be held liable according to the tenor of the instrument. The court reasoned that a party to a written agreement is charged as a matter of law with knowledge of its provisions and as a matter of law cannot claim fraud when he is bound to the provisions unless he can demonstrate that he was tricked into its execution.

Misrepresentation can take the form of a false statement of a material fact, a promise of future performance made with no intent to perform, a statement of opinion based on a false statement of fact, a statement of opinion that the maker knows to be false, or a false expression of opinion made by one claiming or implying to have special knowledge of the subject matter of the opinion. *Italian Cowboy Partners, Ltd.*, 341 S.W.3d at 337–38; *Ernst & Young, L.L.P. v. Pacific Mutual Life Insurance Co.*, 51 S.W.3d 573, 577 (Tex. 2001); *Trenholm v. Ratcliff*, 646 S.W.2d 927, 930 (Tex. 1983); *see also Tilton v. Marshall*, 925 S.W.2d 672, 678 (Tex. 1996); *T.O. Stanley Boot Co. v. Bank of El Paso*, 847 S.W.2d 218, 222 (Tex. 1992).

§ 17.42:3 Opinion Is Not Fraud

"Puffery is an expression of opinion by a seller not made as a representation of fact." *Dowling v. NADW Marketing, Inc.*, 631 S.W.2d 726, 729 (Tex. 1982). Pure expressions of opinion generally are not actionable. *Helena Chemical Co. v. Wilkins*, 47 S.W.3d 486, 502 (Tex. 2001) (mere puffery not actionable under DTPA section 17.46(b)(5) or (b)(7) but may be actionable under section 17.46(b)(23) or 17.50(a)(3)); *Trenholm v. Ratcliff*, 646 S.W.2d 927, 931 (Tex. 1983); *Angelo Broadcasting, Inc. v. Satellite Music Network, Inc.*, 836 S.W.2d 726, 733 (Tex. App.—Dallas 1992, writ denied), *overruled on other grounds*, *Hines v. Hash*, 843 S.W.2d 464, 469–70 (Tex. 1992).

A pure expression of opinion is not a representation of material fact and thus is not an actionable basis for a fraud claim. *Italian Cowboy Partners, Ltd. v. Prudential Insurance Co. of America*, 341 S.W.3d 323, 337–38 (Tex. 2011). Whether a statement is an actionable statement of "fact" or merely an innocuous statement of "opinion" often depends on the circumstances in which a statement is made. *Italian Cowboy Partners, Ltd.*, 341 S.W.3d at 338; *Transport Insurance Co. v. Faircloth*, 898 S.W.2d 269, 276 (Tex. 1995); *Allen v. Devon Energy Holdings, LLC*, 367 S.W.3d 355, 368 (Tex. App.—Houston [1st Dist.] 2012, pet. withdrawn); *Citizens National Bank v. Allen Rae Investments, Inc.*, 142 S.W.3d 459, 478–79 (Tex. App.—Fort Worth 2004, no pet.). When determining whether a statement constitutes mere puffing, the court considers the following factors:

1. The statement's specificity—imprecise or vague representations constitute mere opinions;
2. The speaker's knowledge—an opinion may constitute actionable fraud if the speaker has knowledge of its falsity;
3. The levels of knowledge of the buyer and seller—the seller's superior knowledge coupled with the lack of knowledge of the buyer operated to make a divergence into representations of fact; and
4. Whether the statement related to a present or future happening—an expression of an opinion as to the happening of a future event may constitute actionable fraud where the speaker purports to have special knowledge of the facts that will occur or exist in the future.

Devon Energy Holdings, 367 S.W.3d at 368; *Transport Insurance Co.*, 898 S.W.2d at 276; *Citizens National Bank*, 142 S.W.3d at 473.

Statements of opinion may be actionable when—

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1. the speaker expresses the opinion with knowledge that it is false;
2. the speaker has superior knowledge and should have known that the other party was justifiably relying on the speaker's superior knowledge; or
3. the statement of opinion is so intertwined with other misstatements of fact that the representation as a whole amounts to a false representation of fact.

Transport Insurance Co., 898 S.W.2d at 276; *Devon Energy Holdings*, 367 S.W.3d 355 at 370.

§ 17.42:4 Statements of Value Are Not Fraud

When no confidential relationship exists between parties, a representation of value is merely an opinion that cannot be made the basis of recovery for fraud. *McCollum v. P/S Investments, Ltd.*, 764 S.W.2d 252 (Tex. App.—Dallas 1988, writ denied); *Cravens v. Skinner*, 626 S.W.2d 173 (Tex. App.—Fort Worth 1981, no writ); *Ryan v. Collins*, 496 S.W.2d 205 (Tex. Civ. App.—Tyler 1973, writ ref'd n.r.e.); *Fossier v. Morgan*, 474 S.W.2d 801 (Tex. Civ. App.—Houston [1st Dist.] 1972, no writ); *Frankfurt v. Wilson*, 353 S.W.2d 490 (Tex. Civ. App.—Dallas 1961, no writ); *Gainesville National Bank v. Bamberger*, 77 Tex. 48, 13 S.W. 959 (1890).

§ 17.42:5 Silence as Misrepresentation

Silence can be misrepresentation if a party has an affirmative duty to speak. The duty to speak "arises when one party knows that the other party is relying on the [concealed] fact, provided that he knows the relying party is ignorant of the facts and does not have an equal opportunity to discover the truth." *Libhart v. Copeland*, 949 S.W.2d 783, 801 (Tex. App.—Waco 1997, no writ) (quoting *New Process Steel Corp. v. Steel Corp. of Texas*, 703 S.W.2d 209, 214 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.)). A party typically has a duty to speak in fiduciary or confidential situations. *Wilson v. Sysco Food Services of Dallas, Inc.*, 940 F. Supp. 1003, 1014–15 (N.D. Tex. 1996); *see also Castillo v. Neely's TBA Dealer Supply, Inc.*, 776 S.W.2d 290, 295–96 (Tex. App.—Houston [1st Dist.] 1989, writ denied). Other situations in which a party has been found to have the affirmative duty to speak include the following:

1. Specific representations about a bonus plan give rise to the duty to disclose changes in the plan. *Spoljaric v. Percival Tours, Inc.*, 708 S.W.2d 432, 435 (Tex. 1986).
2. Once information is voluntarily disclosed, a party has the duty to disclose the whole truth. *State National Bank v. Farah Manufacturing Co.*, 678 S.W.2d 661, 681 (Tex. App.—El Paso 1984, writ dism'd by agr.).
3. When information is already disclosed, a party has the duty to disclose new information if he knows that new information will make the old representation wrong or misleading. *Metro National Corp. v. Dunham-Bush, Inc.*, 984 F. Supp. 538, 554 (S.D. Tex. 1997); *Susanoil, Inc. v. Continental Oil Co.*, 519 S.W.2d 230, 236 (Tex. Civ. App.—San Antonio 1975, writ ref'd n.r.e.).

§ 17.42:6 Ratification by Defrauded Party

A defrauded party can ratify the fraud if he has full knowledge of the fraud and of all material facts, clearly manifests his intention of abiding by the underlying intent of the contract, and waives all rights to recover for the deception. *Conoco, Inc. v. Fortune Production Co.*, 35

S.W.3d 23, 32–33 (Tex. App.—Houston [1st Dist.] 1998, pet. granted), *rev'd* 52 S.W.3d 671 (Tex. 2000); *Arroyo Shrimp Farm, Inc. v. Hung Shrimp Farm, Inc.*, 927 S.W.2d 146, 153–54 (Tex. App.—Corpus Christi 1996, no writ); *Tex-acadian Fuels, Inc. v. Lone Star Energy Storage, Inc.*, 896 S.W.2d 233, 237 (Tex. App.—Houston [1st Dist.] 1995, writ granted w.r.m.), *vacated pursuant to settlement*, 922 S.W.2d 549 (Tex. 1996).

§ 17.42:7 Contributory or Comparative Negligence of Defrauded Party

If a party has been induced to enter into a contract by fraudulent representations, the person committing the fraud cannot defeat a claim for damages based on a plea that the defrauded party might have discovered the truth by the exercise of due diligence or proper care. *Koral Industries v. Security-Connecticut Life Insurance Co.*, 802 S.W.2d 650, 651 (Tex. 1990) (per curiam); *Trenholm v. Ratcliff*, 646 S.W.2d 927, 933 (Tex. 1983); *Matis v. Golden*, 228 S.W.3d 301, 311 (Tex. App.—Waco 2007, no pet.). *But see Athey v. Mortgage Electronic Registration Systems*, 314 S.W.3d 161, 163–65 (Tex. App.—Eastland 2010, pet. denied) (applying more stringent rule when representation directly contradicted provision in promissory note).

§ 17.42:8 Statutory Fraud—Elements

Fraud in a transaction involving real estate or stock in a corporation or joint-stock company consists of—

1. a false representation of a past or existing material fact, if the representation is made to a person for the purpose of inducing that person to enter into a contract and is relied on by that person in entering into the contract;
2. a false promise to act, if the false promise is material, is made with the intention of not fulfilling it, is made to a person for the purpose of inducing that person to enter into a contract, and is relied on by that person in entering into the contract; or
3. having actual awareness of the falsity of a representation or promise made by another, failing to disclose the falsity, and benefiting from the false representation or promise.

Tex. Bus. & Com. Code § 27.01(a), (d).

§ 17.42:9 Statutory Fraud—Defendant's State of Mind

A person who makes a false representation or promise is liable for actual damages, and a person making a false representation or promise with actual knowledge of its falsity is also liable for exemplary damages. Tex. Bus. & Com. Code § 27.01(b), (c).

§ 17.42:10 Statutory vs. Common-Law Fraud

Statutory fraud is distinguishable from common-law fraud in the following ways:

1. The failure to disclose another party's fraud has no precise parallel in the Texas common law. *See* Tex. Bus. & Com. Code § 27.01(d).
2. Statutory fraud does not require scienter as an element for recovery of actual damages. *See In re Guardianship of Patlan*, 350 S.W.3d 189, 200 (Tex. App.—San Antonio 2011, no pet.); *Ritchey v. Pinnell*, 324 S.W.3d 815, 821 (Tex. App.—Texarkana 2010, no pet.) (citing *Larsen v. Carlene Langford & Associates*, 41 S.W.3d 245, 249 (Tex. App.—Waco 2001, pet. denied)); *Robbins v.*

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Capozzi, 100 S.W.3d 18, 26 (Tex. App.—Tyler 2002, no pet.); *Diversified, Inc. v. Walker*, 702 S.W.2d 717, 723 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.).

3. Attorney's fees and costs of suit are recoverable in a statutory fraud action. Tex. Bus. & Com. Code § 27.01(e).

§ 17.42:11 Pleading

Fraud is waived if not affirmatively pleaded. Tex. R. Civ. P. 94; *Youmans v. Corpora*, 552 S.W.2d 569, 570–71 (Tex. Civ. App.—Waco 1977, no writ). Fraud does not render a contract void; until the defrauded party initiates appropriate action to obtain relief, the transaction is merely voidable. *Saunders v. Alamo Soil Conservation District*, 545 S.W.2d 249, 251 (Tex. Civ. App.—San Antonio 1976, writ ref'd n.r.e.); *see Fortune Production Co. v. Conoco, Inc.*, 52 S.W.3d 671, 676–77 (Tex. 2000). The presumption is in favor of the fairness of a transaction, and fraud is never presumed. *See William B. Roberts, Inc. v. McDrilling Co.*, 579 S.W.2d 335, 339 (Tex. Civ. App.—Corpus Christi 1979, no writ); *Neuhaus v. Kain*, 557 S.W.2d 125, 136 (Tex. Civ. App.—Corpus Christi 1977, writ ref'd n.r.e.). Failure to plead or prove any element of fraud if a suit for specific performance rests solely on fraud will permit the granting of the plaintiff's motion for instructed verdict. *Neuhaus*, 557 S.W.2d at 138; *see Texas Farmers Insurance Co. v. Murphy*, 996 S.W.2d 873, 879–80 (Tex. 1999).

§ 17.43 Usury

See sections 2.51 through 2.63 in this manual regarding usury generally. Usury penalties act as a setoff to the creditor's claim. *See Steves Sash & Door Co. v. Ceco Corp.*, 751 S.W.2d 473, 475–76 (Tex. 1988); *Miller v. First State Bank*, 551 S.W.2d 89, 95 (Tex. Civ. App.—Fort Worth 1977), *aff'd as modified*, 563 S.W.2d 572 (Tex. 1978).

A pleading asserting usury must be verified. Tex. R. Civ. P. 93(11).

§ 17.44 Other Violations

For Finance Code violations, see sections 2.81 through 2.90 in this manual. For consumer lease violations, see section 2.77. For home solicitation transactions violations, see section 2.108. For Business Opportunity Act violations, see section 2.109.

§ 17.45 Breach of Warranty

§ 17.45:1 Express Warranty

If, with reference to goods being sold, the seller makes to the buyer any promise, description, or affirmation of fact or uses a sample or model, he has created an express warranty that the goods will conform to it. Tex. Bus. & Com. Code § 2.313(a). A warranty can be created without the seller's use of formal language of warranty and without an intent to make a warranty, but a warranty is not created merely by affirming the goods' value, expressing an opinion about the goods, or commending them. Tex. Bus. & Com. Code § 2.313(b).

A suit for breach of an express warranty is based on a contract and is governed by the law of contracts. *1/2 Price Checks Cashed v. United Automobile Insurance Co.*, 344 S.W.3d 378, 388 (Tex. 2011) (citing *Medical City Dallas, Ltd. v. Carlisle Corp.*, 251 S.W.3d 55, 60–61 (Tex. 2008)); *Smith v. Kinslow*, 598 S.W.2d 910, 912 (Tex. Civ. App.—Dallas 1980, no writ). The buyer must show that the warranty was part of the basis of the bargain. *Lyda Constructors, Inc. v. Butler Manufacturing Co.*, 103 S.W.3d 632, 637–38 (Tex. App.—San Antonio 2003, no pet.); *Crosbyton Seed Co. v. Mechura Farms*,

875 S.W.2d 353, 361 (Tex. App.—Corpus Christi 1994, no writ).

The federal consumer products warranties statutes proscribe deceptive trade practices relating to written warranties for consumer goods. *See* 15 U.S.C. §§ 2301–2312.

§ 17.45:2 Implied Warranty of Merchantability

A contract for the sale of goods implies a warranty that the goods are merchantable if the seller is a merchant dealing in that kind of goods. Tex. Bus. & Com. Code § 2.314(a). To be merchantable, generally the goods must be fit for the ordinary purposes for which they are used. Tex. Bus. & Com. Code § 2.314(b)(3). Proof of a defect in the goods is required in an action for breach of the implied warranty of merchantability. *Hyundai Motor Co. v. Rodriguez*, 995 S.W.2d 661, 664–65 (Tex. 1999); *General Motors Corp. v. Brewer*, 966 S.W.2d 56, 57 (Tex. 1998); *Plas-Tex, Inc. v. U.S. Steel Corp.*, 772 S.W.2d 442, 443–44 (Tex. 1989); *Everett v. TK-Taito, L.L.C.*, 178 S.W.3d 844, 853–54 (Tex. App.—Fort Worth 2005, no pet.).

Reliance on a misrepresentation is not an element of a claim for breach of the implied warranty of merchantability. *Khan v. Velsicol Chemical Corp.*, 711 S.W.2d 310, 319 (Tex. App.—Dallas 1986, writ ref'd n.r.e.).

§ 17.45:3 Implied Warranty of Fitness for Particular Purpose

An implied warranty that the goods are fit for a particular purpose arises if the seller, at the time of contracting, has reason to know the particular purpose for which the goods are required and that the buyer is relying on the seller's particular skill or judgment in selecting or furnishing suitable goods. Tex. Bus. & Com. Code § 2.315.

Reliance on a misrepresentation is not an element of a claim for breach of the implied warranty of fitness for a particular purpose. *Khan v. Velsicol Chemical Corp.*, 711 S.W.2d 310, 319 (Tex. App.—Dallas 1986, writ ref'd n.r.e.).

§ 17.45:4 Implied Warranty of Good and Workmanlike Performance

Performance of some services carries an implied warranty of good and workmanlike performance. This implied warranty applies to—

1. new construction, *Centex Homes v. Buecher*, 95 S.W.3d 266, 272–73 (Tex. 2002); *Humber v. Morton*, 426 S.W.2d 554, 555 (Tex. 1968), and
2. repair or modification of existing tangible goods or other property, *Rocky Mountain Helicopters, Inc. v. Lubbock County Hospital District*, 987 S.W.2d 50, 52–53 (Tex. 1998); *Melody Home Manufacturing Co. v. Barnes*, 741 S.W.2d 349, 354 (Tex. 1987); *Trans-Gulf Corp. v. Performance Aircraft Services, Inc.*, 82 S.W.3d 691, 696–97 (Tex. App.—Eastland 2002, no pet.).

It does not, however, extend to the provision of purely professional services. *Dennis v. Allison*, 698 S.W.2d 94, 95–96 (Tex. 1985); *Hogue v. Propath Laboratory, Inc.*, 192 S.W.3d 641, 646–47 (Tex. App.—Fort Worth 2006, pet. denied); *Chapman v. Paul R. Wilson, Jr., D.D.S.*, 826 S.W.2d 214, 227–28 (Tex. App.—Austin 1992, writ denied). This warranty cannot be waived. *Melody Home Manufacturing Co.*, 741 S.W.2d at 355; *Welwood v. Cypress Creek Estates, Inc.*, 205 S.W.3d 722, 730 (Tex. App.—Dallas 2006, no pet.). It will not be imposed unless there is a demonstrated need for it, and it extends only to services provided to remedy defects existing at the time of the transaction. *Rocky Mountain Helicopters, Inc.*, 987 S.W.2d at 52–53; *Parkway Co. v. Woodruff*, 901 S.W.2d 434, 439 (Tex.

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1995); *Humble National Bank v. DCV, Inc.*, 933 S.W.2d 224, 239 (Tex. App.—Houston [14th Dist.] 1996, pet. denied).

§ 17.45:5 Warranty of Title

A sale of goods automatically creates a warranty that the seller has good title to the goods sold, that their transfer is rightful, and that they are free of any security interest or other encumbrance of which the buyer at the time of contracting has no knowledge. Tex. Bus. & Com. Code § 2.312(a). The warranty can be excluded or modified by appropriate words or conduct. Tex. Bus. & Com. Code § 2.312(b).

§ 17.45:6 Disclaimer of UCC Implied Warranties

An implied warranty can be excluded or modified by the use of language such as "as is," by an examination of the goods by the buyer (or by his refusal to examine) if the examination should have revealed the defect, "by course of dealing or course of performance or usage of trade," or by other words or conduct tending to limit warranty. Tex. Bus. & Com. Code § 2.316(b), (c). *See also Prudential Insurance Co. of America v. Jefferson Associates, Ltd.*, 896 S.W.2d 156, 161 (Tex. 1995); *Welwood v. Cypress Creek Estates, Inc.*, 205 S.W.3d 722, 726–27 (Tex. App.—Dallas 2006, no pet.).

A disclaimer of implied warranties must be conspicuous. Tex. Bus. & Com. Code § 2.316(b); *Cate v. Dover Corp.*, 790 S.W.2d 559, 560–61 (Tex. 1990); *Dewayne Rogers Logging, Inc. v. Propac Industries, Ltd.*, 299 S.W.3d 374, 389–90 (Tex. App.—Tyler 2009, pet. denied). The standard for conspicuousness is whether a reasonable person against whom the disclaimer is to operate ought to have noticed it. Tex. Bus. & Com. Code § 1.201(b)(10).

§ 17.45:7 Remedies

In addition to suing under breach of warranty, a consumer can bring suit under the Texas Deceptive Trade Practices–Consumer Protection Act (DTPA). Tex. Bus. & Com. Code § 17.50(a)(2). See section 17.41 above for a discussion of the DTPA.

§ 17.46 Fair Debt Collection Practices Act

See sections 2.11 through 2.20 in this manual regarding the Fair Debt Collection Practices Act.

§ 17.47 Texas Debt Collection Practices Act

See sections 2.31 through 2.36 in this manual regarding the Texas Debt Collection Practices Act.

§ 17.48 Sale and Leaseback of Homestead

Any sale or purported sale in whole or in part of a homestead for a fixed purchase price that is less than the appraised fair market value of the property at the time of the sale or purported sale, and in connection with which the buyer of the property executes a lease of the property to the seller at lease payments that exceed the fair rental value of the property, is considered to be a loan with all payments made from the seller to the buyer in excess of the sales price considered to be interest subject to provisions of the Texas Finance Code. Tex. Prop. Code § 41.006(a). Furthermore, the taking of any deed in connection with such a transaction is a deceptive trade practice and the deed is void, and no lien attaches to the homestead property as a result of the purported sale. Tex. Prop. Code § 41.006(b). This statute, however, does not apply to the sale of a family homestead to a parent, stepparent, grandparent, child, stepchild, brother, half

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brother, sister, half sister, or grandchild of an adult member of the family. Tex. Prop. Code § 41.006(c).

§ 17.49 Unreasonable Debt Collection Practices

If a creditor resorts to "cruel devices" to enforce collection with the intended effect of causing great mental anguish and those actions result in damages, the creditor will be liable for those damages. *Duty v. General Finance Co.*, 273 S.W.2d 64, 65–66 (Tex. 1954); *see Ware v. Paxton*, 359 S.W.2d 897, 900 (Tex. 1962); *Gonzalez v. Temple-Inland Mortgage Corp.*, 28 S.W.3d 622, 626 (Tex. App.—San Antonio 2000, no pet.).

Unfair collection practices is an intentional tort derived from the common law. *Hidden Forest Homeowners Ass'n v. Hern*, No. 04-10-00551-CV, 2011 WL 6089881, at *4 (Tex. App.—San Antonio Dec. 7, 2011, no pet.) (mem. op.) (citing *General Finance Co.*, 273 S.W.2d at 66; *EMC Mortgage Corp. v. Jones*, 252 S.W.3d 857, 868 (Tex. App.—Dallas 2008, no pet.)). The Supreme Court of Texas has not directly addressed the elements to be proven in an action for unfair collection practices. *Hidden Forest*, 2011 WL 6089881, at *4 ("A decision of the case before us does not require that we undertake to outline the limits to which such a creditor may go, but we do hold that resort to every cruel device which his cunning can invent in order to enforce collection when that course of conduct has the intended effect of causing great mental anguish to the debtor, resulting in physical injury and causing his loss of employment, renders the creditor liable to respond in damages.") (quoting *General Finance Co.*, 273 S.W.2d at 66); *Moore v. Savage*, 362 S.W.2d 298, 298–99 (Tex. 1962) (per curiam) (refusing to review the definition of "unreasonable collection efforts" because the issue was not preserved for appeal), ref'g appeal from 359 S.W.2d 95, 96 (Tex. Civ. App.—Waco 1962, writ ref'd n.r.e.). While the elements are not clearly defined and the conduct deemed to constitute an unreasonable collection effort varies from case to case, a plaintiff must generally prove that "[a] defendant['s] debt collection efforts 'amount to a course of harassment that was willful, wanton, malicious, and intended to inflict mental anguish and bodily harm.'" *EMC Mortgage Corp.*, 252 S.W.3d at 868–69.

As discussed in *Hidden Forest*, 2011 WL 6089881, at *5, Texas courts have found the following evidence sufficient to state a cause of action for unreasonable debt collection: sending a large man to the plaintiff's home, who "yelling and screaming, demanded the keys to the house, and told the [Plaintiff's] family to get out." (citing *EMC Mortgage Corp.*, 252 S.W.3d at 864, 870); falsely accusing the plaintiff of committing a crime (citing *Lloyd v. Myers*, 586 S.W.2d 222, 227 (Tex. Civ. App.—Waco 1979, writ ref'd n.r.e.)); sending a large man to the plaintiff's home, who stood over the plaintiff shouting, shaking his finger and calling him a liar (citing *Credit Plan Corp. of Houston v. Gentry*, 516 S.W.2d 471, 475 (Tex. Civ. App.—Houston [14th Dist.] 1974), *rev'd on other grounds by Gentry v. Credit Plan Corp. of Houston*, 528 S.W.2d 571 (Tex. 1975)); sending a representative to the plaintiff's home, confronting and embarrassing the plaintiff's fiancée in front of social guests (citing *Bank of North America v. Bell*, 493 S.W.2d 633, 635 (Tex. Civ. App.—Houston [14th Dist.] 1973, no writ)); calling the plaintiff five times in one night, with the final call including a threat of personal violence (citing *Pioneer Finance & Thrift Corp. v. Adams*, 426 S.W.2d 317, 319 (Tex. Civ. App.—Eastland 1968, writ ref'd n.r.e.)). Additionally, Texas courts have held that it is unreasonable to persist in collection efforts once the debtor has informed the collector/lender that the debt has been paid in full. *See Pullins v. Credit Exchange of Dallas, Inc.*, 538 S.W.2d 681, 682–83 (Tex. Civ. App.—Waco 1976, writ ref'd n.r.e.) (holding that repeated and harassing efforts to collect

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$50 debt were unreasonable where plaintiff consistently asserted debt was paid). The Fifth Circuit has observed that the tort of unreasonable collection is intended to deter "outrageous collection techniques." *McDonald v. Bennett*, 674 F.2d 1080, 1089 n.8 (5th Cir. 1982).

Neither malice nor intent to cause mental or emotional pain is required, only a finding of reckless disregard for the debtor's welfare. *Moore v. Savage*, 359 S.W.2d 95, 96 (Tex. Civ. App.—Waco 1962, writ ref'd n.r.e.); *Western Guaranty Loan Co. v. Dean*, 309 S.W.2d 857, 860 (Tex. Civ. App.—Dallas 1957, writ ref'd n.r.e.). *But see EMC Mortgage Corp.*, 252 S.W.3d 868–69 (plaintiff must show that defendant's conduct "amounted to a course of harassment which was willful, wanton, malicious, and intended to inflict mental anguish and bodily harm") (quoting *Montgomery Ward & Co. v. Brewer*, 416 S.W.2d 837, 844 (Tex. Civ. App.—Waco 1967, writ ref'd n.r.e.)).

This cause of action appears to have been subsumed into the state and federal debt collection statutes. See parts II. and III. in chapter 2 of this manual.

§ 17.50 Remedies for Failure to Comply with Chapter 9

Under certain circumstances, a secured party who fails to comply with chapter 9 of the Texas Business and Commerce Code is subject to injunctive relief, restrictive or mandatory, and may be liable for resulting losses caused to the debtor, the obligor, or a secondary obligor. Tex. Bus. & Com. Code § 9.625. Note that the potential damages are those resulting from a failure to comply with the requirements imposed by all of chapter 9, not just those imposed by subchapter F relating to default and enforcement. The compensable loss may include that resulting from the debtor's inability to obtain, or from increased costs of, alternative financing. Tex. Bus. & Com. Code § 9.625(b). As is the case throughout revised chapter 9, special rules are applicable if the collateral consists of consumer goods; a debtor or a secondary obligor on an obligation secured by consumer goods may recover from a secured party who fails to comply with subchapter F (Tex. Bus. & Com. Code §§ 9.601–.628) an amount not less than the credit service charge plus 10 percent of the principal amount of the obligation or the time-price differential plus 10 percent of the cash price. Tex. Bus. & Com. Code § 9.625(c)(2). In addition to the general provisions described above, special statutory damages of $500 are recoverable in each case from a person who—

1. fails to promptly release or transfer back to the debtor a deposit account after the debt it secured has been paid off, as required by Tex. Bus. & Com. Code § 9.208;
2. fails to promptly send an authenticated release to a debtor who has paid off a secured debt as required by Tex. Bus. & Com. Code § 9.209;
3. files a financing statement he is not entitled to file under Tex. Bus. & Com. Code § 9.509(a);
4. fails to cause the secured party of record to file or send the termination statement required by Tex. Bus. & Com. Code § 9.513(a) or (c);
5. fails to provide an explanation or calculation of surplus or deficiency as required by Tex. Bus. & Com. Code § 9.616(b)(1) as part of a pattern or practice of noncompliance; or
6. fails to comply with Tex. Bus. & Com. Code § 9.616(b)(2).

Tex. Bus. & Com. Code § 9.625(e).

Likewise, a debtor or consumer may recover damages under Tex. Bus. & Com. Code § 9.625(b) as well as special statutory damages of $500 from a person who fails to comply with

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a request under Tex. Bus. & Com. Code § 9.210 without reasonable cause. Tex. Bus. & Com. Code § 9.625(f). Section 9.210 establishes the requirements of a communication in order for it to be considered a "request" and describes the types of requests that can be made and the contents and deadline (fourteen days after receipt) for a secured party to respond to a request. Section 9.210 also specifies how often a debtor may obtain a response to a request without charge (once every six months) and the statutory maximum a secured party may charge for more frequent requests ($25). Tex. Bus. & Com. Code § 9.210(g).

Section 9.625, together with the many sections it cross-references and the sections that limit recoveries against secured parties (Tex. Bus. & Com. Code §§ 9.605, 9.628), should be carefully studied by the attorney collecting for a secured lender.

For additional discussion of deficiency suits, see part X. in chapter 2, chapter 5, and section 14.29 in this manual.

§ 17.51 Tortious Interference with Existing Contract

§ 17.51:1 Elements

The elements of tortious interference with existing contract include that—

1. the plaintiff had a valid contract;
2. the defendant willfully and intentionally interfered with the contract;
3. the interference was a proximate cause of the plaintiff's injury; and
4. the plaintiff incurred actual damage or loss.

See Prudential Insurance Co. v. Financial Review Services, 29 S.W.3d 74, 77–78 (Tex. 2000); *Powell Industries, Inc. v. Allen*, 985 S.W.2d 455, 456 (Tex. 1998); *Texas Beef Cattle Co. v. Green*, 921 S.W.2d 203, 210 (Tex. 1996); *Holloway v. Skinner*, 898 S.W.2d 793, 795–96 (Tex. 1995); *Deuell v. Texas Right to Life Commission, Inc.*, 508 S.W.3d 679 (Tex. App.—Houston [1st Dist.] 2016, pet. denied). See also the current edition of State Bar of Texas, *Texas Pattern Jury Charges—Business, Consumer, Insurance & Employment* PJC 106.1.

Tortious interference with contract embraces all intentional invasions of contractual relations, including any act interfering with the performance of a contract, either by preventing that performance or by making its performance impossible or more burdensome, difficult, or expensive, regardless of whether breach of contract is induced. *See Tippett v. Hart*, 497 S.W.2d 606, 611 (Tex. Civ. App.—Amarillo 1973, writ ref'd n.r.e.).

Interference with a contract is tortious only if it is intentional. *Southwestern Bell Telephone Co. v. John Carlo Texas, Inc.*, 843 S.W.2d 470, 472 (Tex. 1992); *Seelbach v. Clubb*, 7 S.W.3d 749, 756–57 (Tex. App.—Texarkana 1999, pet. denied). The intent required is an intent to interfere, not just an intent to do the particular acts that were done. Intentional interference does not require the intent to injure; it requires only that the defendant wants to cause the consequences of its act or that the consequences are substantially certain to result from the act. *Southwestern Bell Telephone Co.*, 843 S.W.2d at 757.

§ 17.51:2 Defenses

There are two defenses to a tortious interference claim: (1) legal justification or excuse and (2) truth.

Legal Justification or Excuse: A party avoids liability for tortious interference if it has a legal justification or excuse for its act. *Sterner v. Marathon Oil Co.*, 767 S.W.2d 686, 689–90 (Tex. 1989). Legal justification or excuse for

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interference with another's contractual relations is an affirmative defense for which the defendant has the burden of proof. *Sterner*, 767 S.W.2d at 690. Under the defense of legal justification or excuse, one is privileged to interfere with another's contract if (1) the interference is done in a bona fide exercise of one's own rights or (2) one has a right in the subject matter equal or superior to that of the other party. *Southwestern Bell Telephone Co. v. John Carlo Texas, Inc.*, 843 S.W.2d 470, 472 (Tex. 1992); *Sakowitz, Inc. v. Steck*, 669 S.W.2d 105, 107 (Tex. 1984). See also the current edition of State Bar of Texas, *Texas Pattern Jury Charges—Business, Consumer, Insurance & Employment* PJC 106.2.

In *Texas Beef Cattle Co. v. Green*, the Texas Supreme Court held that a party is justified in interfering with another's contract if it exercises (1) its own legal rights or (2) a good-faith claim to a colorable legal right, even though that claim ultimately proves to be mistaken. 921 S.W.2d 203, 211 (Tex. 1996). If the trial court finds as a matter of law that the defendant had a legal right to interfere with the contract, then the defendant has conclusively established the justification defense. The motivation behind assertion of that right is irrelevant. Improper motives cannot transform lawful actions into actionable torts. If a party has a legal right to do something, he may do so with impunity regardless of motive and, if in exercising that legal right in a legal way, damage results to another, there is no cause of action against him. Even if the defendant cannot establish a legal right as a matter of law, the defendant may nevertheless prevail on its justification defense if (1) the trial court determines that the defendant interfered while exercising a colorable right, and (2) the jury finds that although mistaken, the defendant exercised that colorable legal right in good faith. *Texas Beef Cattle*, 921 S.W.2d at 211. *See also Holloway v. Skinner*, 898 S.W.2d 793, 796 (Tex. 1995) (dislike of third party and taking pleasure in harm caused to him not a relevant motivation behind assertion of defendant's legal rights); *Montgomery v. Phillips Petroleum Co.*, 49 S.W.2d 967, 972 (Tex. Civ. App.—Amarillo 1932, writ ref'd) ("Whatever a man has a legal right to do, he may do with impunity, regardless of motive, and if in exercising his legal right in a legal way damage results to another, no cause of action arises against him because of a bad motive in exercising the right.") (quoting 1 R.C.L. § 6 at 319).

The decision in *Texas Beef Cattle*, however, left the term "colorable right" undefined. More recent court decisions have construed the term colorable right to mean having the appearance of truth, or seemingly valid and genuine, or having an appearance of right or justice. A right is colorable if it appears without further inquiry. That is, if it appears on its face genuine, truthful, valid, or existing. *Bennett v. Computer Associates International, Inc.*, 932 S.W.2d 197, 202 (Tex. App.—Amarillo 1996, writ denied).

Truth: A defendant who intentionally causes a third person not to perform a contract with the plaintiff is not liable for interfering with the contractual relation by giving the third person truthful information or honest advice within the scope of a request for advice. *Financial Review Service v. Prudential Insurance Co. of America*, 50 S.W.3d 495, 505 (Tex. App.—Houston [14th Dist.] 1998, pet. granted) (Prudential could communicate with insureds to acknowledge receipt of claim and advise of any actions taken with respect to claim but could not malign Financial Review Services, a hospital bill auditor, by accusing it of fraud); *Robles v. Consolidated Graphics, Inc.*, 965 S.W.2d 552, 561 (Tex. App.—Houston [14th Dist.] 1997, no pet.) (defendant informed business that its agent was taking double commissions).

[Sections 17.52 through 17.60 are reserved for expansion.]

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II. Statutes of Limitation—General Considerations

§ 17.61 Limitations Periods

For a discussion of the periods applicable to specific causes of action, see chapter 14 of this manual.

§ 17.62 Pleading Requirements

As an affirmative defense, a statute of limitations must be affirmatively pleaded. Tex. R. Civ. P. 94. If the plaintiff affirmatively pleads compliance with the statute of limitations, the defendant is relieved of pleading it as an affirmative defense. *Herrin Transportation Co. v. Parker*, 425 S.W.2d 876, 879 (Tex. Civ. App.—Houston [1st Dist.] 1968) (refusing to extend the general rule); *Raney v. White*, 267 S.W.2d 199, 200 (Tex. Civ. App.—San Antonio 1954, writ ref'd).

There is a split in the courts of appeals regarding whether the defendant can raise a limitations defense by special exception instead of affirmative defense. *Hubler v. City of Corpus Christi*, 564 S.W.2d 816, 823 (Tex. Civ. App.—Corpus Christi 1978, writ ref'd n.r.e.) (special exception proper); *contra InterFirst Bank San Antonio N.A. v. Murry*, 740 S.W.2d 550, 550–51 (Tex. App.—San Antonio 1987, no writ) (special exception was wrong pleading; defendant should have filed plea in bar).

§ 17.63 Tolling of Limitations

§ 17.63:1 Commencing Suit

Filing a petition, coupled with a bona fide intention to serve process on the defendant at once, interrupts the running of the limitations period. *Gant v. DeLeon*, 786 S.W.2d 259, 260 (Tex. 1990) (when a plaintiff files suit within the limitations period but does not obtain service upon the defendant until after the period has expired, the date of service relates back to the date of filing only if the plaintiff has exercised diligence in obtaining service); *Gore v. City of DeSoto*, No. 05-07-01024-CV, 2008 WL 2454684, at *2, (Tex. App.—Dallas June 19, 2008, no pet.) (mem. op.). *See also Proulx v. Wells*, 235 S.W.3d 213, 215 (Tex. 2007) ("A timely filed suit will not interrupt the running of limitations unless the plaintiff exercises due diligence in the issuance and service of citation."). The plaintiff must exercise diligence in the issuance and service of citation if the lawsuit was filed close to the deadline for the applicable statute of limitations. *Ashley v. Hawkins*, 293 S.W.3d 175, 179 (Tex. 2009). The mere filing of a suit, without diligence in effecting service, will not toll limitations. *Proulx*, 235 S.W.3d at 215 (citing *Murray v. San Jacinto Agency, Inc.*, 800 S.W.2d 826, 830 (Tex. 1990)).

Although lack of diligence to procure service of process is generally a fact question, it may be determined as a matter of law if no excuse is offered for the delay in procuring service. *See, e.g., City of DeSoto*, 2008 WL 2454684, at *2; *Ashley*, 293 S.W.3d at 179; *Perry v. Kroger Stores, Store No. 119*, 741 S.W.2d 533, 534 (Tex. App.—Dallas 1987, no writ).

Filing a petition in a court that has no jurisdiction is not "commencing a suit" within the meaning of the statute of limitations and will not interrupt its running. *See Brown v. Owens*, 663 S.W.2d 30, 34 (Tex. App.—Houston [14th Dist.] 1983), *aff'd in part, rev'd in part on other grounds*, 674 S.W.2d 748 (Tex. 1984). But if an action is dismissed because the trial court lacked jurisdiction and the action is recommenced in a court of proper jurisdiction within sixty days from the date the dismissal or other disposition becomes final, the period between the first filing and the date of the second filing of the same action in a different court is not counted as part of the limitations period, unless the adverse party shows in abatement that the first filing was

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made with "intentional disregard of proper jurisdiction." Tex. Civ. Prac. & Rem. Code § 16.064.

§ 17.63:2 Defendant Absent from Texas

Any period during which the defendant is absent from the state, for whatever purpose, while suit could be maintained will toll limitations for the period of the defendant's absence. Tex. Civ. Prac. & Rem. Code § 16.063.

§ 17.63:3 Plaintiff's Disability

If at the time the cause of action accrued the plaintiff was younger than eighteen years of age (whether married or not) or was of unsound mind, the period during which he was under that disability is not included in the limitations period. Tex. Civ. Prac. & Rem. Code § 16.001(a), (b). A person may not tack one legal disability to another to extend a limitations period. Tex. Civ. Prac. & Rem. Code § 16.001(c). A disability that arises after a limitations period starts does not toll limitations. Tex. Civ. Prac. & Rem. Code § 16.001(d).

§ 17.63:4 Plaintiff's or Defendant's Death

Limitations is tolled by the death of either the plaintiff or the defendant. It resumes running either twelve months after death or when an administrator or executor of the decedent's estate qualifies, whichever is earlier. Tex. Civ. Prac. & Rem. Code § 16.062.

§ 17.63:5 Fraud

Fraud by the defendant will prevent the running of the limitations period until the fraud is discovered or should have been discovered by the exercise of reasonable diligence. *Estate of Stonecipher v. Estate of Butts*, 591 S.W.2d 806, 809 (Tex. 1979); *see also Estate of Stonecipher v. Estate of Butts*, 686 S.W.2d 101, 102 (Tex. 1985) (later proceeding after remand); *Scott v. Furrow*, No. 04-15-00074-CV, 2016 WL 889473, at *3 (Tex. App.—San Antonio, March 9, 2016, pet. denied).

§ 17.63:6 Estoppel

The defendant may be estopped from pleading limitations if he or his agent or representative makes a representation that induces the plaintiff to delay filing suit within the applicable limitations period. *Dixon v. Lee*, No. 14-97-00671-CV, 1998 WL 802460, at *2 (Tex. App.—Houston [14th Dist.] Nov. 19, 1998, no pet.); *Villages of Greenbriar v. Torres*, 874 S.W.2d 259, 264 (Tex. App.—Houston [1st Dist.] 1994, writ denied). Estoppel as a defense to a claim of limitations must be affirmatively pleaded. Tex. R. Civ. P. 94. See sections 17.11:3 and 17.11:4 above regarding estoppel and equitable estoppel.

§ 17.63:7 Defendant's Bankruptcy

If an action is stayed by federal bankruptcy law, limitations on the action is tolled until the stay is terminated. 11 U.S.C. § 108(c).

§ 17.63:8 Limitations Expire on Weekend or Holiday

If the last day of the statute of limitations is a Saturday, Sunday, or holiday, the period for filing suit is extended to include the next day that county offices are open for business. Tex. Civ. Prac. & Rem. Code § 16.072.

§ 17.63:9 Suit against Defendant in Assumed Name

Limitations on a cause of action against a person or business operating under an assumed name may be tolled pending the filing of an amended pleading against the correct party to be sued. Tex. R. Civ. P. 28. Suit in the assumed name puts the real party in interest in court. *University of*

Texas Health Science Center v. Bailey, 332 S.W.3d 395, 399–400 (Tex. 2009); *Chilkewitz v. Hyson*, 22 S.W.3d 825, 828–29 (Tex. 1999). But the plaintiff should amend the pleadings to substitute the correct legal name of the actual defendant before judgment. *Chilkewitz*, 22 S.W.3d at 828–29.

§ 17.63:10 Defendant's Part Payment

Payment on a debt, by itself, neither interrupts the running of the limitations period nor acknowledges the justness of the debt by an implied promise to pay it. *Gabriel v. Alhabbal*, 618 S.W.2d 894, 897 (Tex. App.—Houston [1st Dist.] 1991, writ ref'd n.r.e.); *Siegel v. McGavock Drilling Co.*, 530 S.W.2d 894, 896 (Tex. Civ. App.—Amarillo 1975, writ ref'd n.r.e.); *Mandola v. Oggero*, 508 S.W.2d 861, 863 (Tex. Civ. App.—Houston [14th Dist.] 1974, no writ). Certain writings may, however, constitute a new promise to pay an old debt. See section 17.64 below.

§ 17.63:11 Alter Ego or Subsidiary Corporation

Any claim against a corporation must be brought within the three-year period following the date of its dissolution. Tex. Bus. Orgs. Code § 11.359. The corporation may further limit the time available to bring a claim by giving notice to a person having or asserting such a claim by registered or certified mail to the claimant's last known address. Tex. Bus. Orgs. Code § 11.358. Under section 11.358, the written claim must be in sufficient detail to reasonably inform the corporation of the nature and amount of the claim and must identify the claimant. The claimant has 120 days from the date this notice was sent to submit its written claim. If the claimant fails to submit the claim within the 120 days after notice is sent, the claim will be barred. If the claimant submits its claim, the corporation may, but is not obliged to, send notice of its rejection of the claim. If it rejects the claim and sends notice of its rejection to the claimant, the claimant has 180 days from the date the notice of rejection is sent to file suit, or the suit is barred. Tex. Bus. Orgs. Code § 11.359.

A suit against a corporation tolls limitations as to the alter ego of that corporation. *Matthews Construction Co. v. Rosen*, 796 S.W.2d 692, 693 (Tex. 1990); *Gentry v. Credit Plan Corp. of Houston*, 528 S.W.2d 571, 575 (Tex. 1975).

A suit against a subsidiary corporation will not toll limitations against the parent corporation, regardless of common stock ownership, a duplication of officers and directors, or common control resulting from stock ownership, unless management and operation of the parent and subsidiary are so assimilated that the subsidiary is simply a name or conduit through which the parent conducts its business. *Wright v. Gifford-Hill & Co.*, 736 S.W.2d 828, 833–34 (Tex. App.—Waco 1987, writ ref'd n.r.e.).

§ 17.63:12 Misnamed Defendant

If a party misnames the defendant in a lawsuit but actually serves the correct party, an amended pleading that includes the correct party will relate back to the date of the original petition for purposes of limitations. *Enserch Corp. v. Parker*, 794 S.W.2d 2, 4–5 (Tex. 1990). However, if the plaintiff names and serves the correct party, nonsuits that party, and then seeks to replead against that party, limitations are not tolled. *Johnson v. Coca-Cola Co.*, 727 S.W.2d 756, 758–59 (Tex. App.—Dallas 1987, writ ref'd n.r.e.). *See also Pierson v. SMS Financial II, L.L.C.*, 959 S.W.2d 343 (Tex. App.—Texarkana 1998, no pet.) (explaining differences between serving wrong party and serving correct party under wrong name). A misnomer differs from a misidentification. *Enserch Corp. v. Parker*, 794 S.W.2d 2, 4–5 (Tex. 1990). Misidentification—the consequences of which are generally harsh—arises when two separate legal entities exist and a plaintiff mistakenly sues an

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entity with a name similar to that of the correct entity. In such a case, limitations is not tolled. *In re Greater Houston Orthopaedic Specialists, Inc.*, 295 S.W.3d 323, 325–26 (Tex. 2009) (orig. proceeding) (per curiam).

§ 17.63:13 Discovery Rule

Limitations will be tolled until the date the plaintiff's injury was or should reasonably have been discovered. The plaintiff must show that injury was inherently undiscoverable and evidence of the injury is objectively verifiable. *HECI Exploration Co. v. Neel*, 982 S.W.2d 881, 886 (Tex. 1998); *Woods v. William M. Mercer, Inc.*, 769 S.W.2d 515, 517–18 (Tex. 1988); *Willis v. Maverick*, 760 S.W.2d 642, 644–45 (Tex. 1988); *see also Tate v. Goins, Underkofler, Crawford & Langdon*, 24 S.W.3d 627, 636 (Tex. App.—Dallas 2000); *Computer Associates International v. Altai, Inc.*, 918 S.W.2d 453, 455–56 (Tex. 1996) (superseded in part by Tex. Civ. Prac. & Rem. Code § 16.010).

§ 17.64 Acknowledgment or Extension of Debt

§ 17.64:1 Extension of Limitations through Signed Writing

The debtor's acknowledgment of a debt barred by limitations will not revive the debt unless the acknowledgment is in writing and signed by the debtor. Tex. Civ. Prac. & Rem. Code § 16.065. Mere payment by itself does not interrupt the running of the statute of limitations or acknowledge the justness of the debt with an implicit promise to pay. *Sarikhanian v. Sarkissian*, No. 14-96-860-CV, 1997 WL 688948, at *2 (Tex. App.—Houston [14th Dist.] Nov. 6, 1997, no pet.) (per curiam) (not designated for publication); *Siegel v. McGavock Drilling Co.*, 530 S.W.2d 894, 896 (Tex. Civ. App.—Amarillo 1975, writ ref'd n.r.e.). See section 14.32:4 in this manual.

§ 17.64:2 Type and Specificity of Acknowledgment Required

The acknowledgment of the justness of a debt must (1) be in writing and be signed by the party to be charged, (2) contain an unequivocal acknowledgment of the justness or the existence of the particular obligation, and (3) refer to the obligation and express a willingness to honor that obligation. *DeRoeck v. DHM Ventures, LLC*, 531 S.W.3d 831, 834 (Tex. 2018), *citing Stine v. Stewart*, 80 S.W.3d 586, 591 (Tex. 2002) ("An acknowledgment of the justness of a claim that appears to be barred by limitations is not admissible in evidence to defeat the law of limitations if made after the time that the claim is due unless the acknowledgment is in writing and is signed by the party to be charged."). A claim of acknowledgment does not always require an explicit promise to pay. "[I]f the writing acknowledges the justness of the claim, the acknowledgment imports (1) an admission that the claim is a subsisting debt and (2) a promise to pay it, if unaccompanied by any circumstances repelling the presumption of willingness or intention to pay. The acknowledgment can come before or after suit on the original debt is barred by limitations." *DeRoeck*, 531 S.W.3d at 834, *citing Hanley v. Oil Capital Broadcasting Ass'n*, 171 S.W.2d 864, 865–66 (Tex. 1943).

The writing should specifically identify the debt, particularly if there is any question about the identity of the debt. *Cotulla v. Urbahn*, 135 S.W. 1159, 1162–63 (Tex. 1911); *Parks v. Seybold*, No. 03-99-00562-CV, 2015 WL 4481768, at *2 (Tex. App.—Dallas July 23, 2015, no pet.) (mem. op.); *Murphy v. Fairfield Financial Group, Inc.*, No. 03-99-00562-CV, 2000 WL 689758, at *6 n.7 (Tex. App.—Austin May 31, 2000, pet. denied) (not designated for publication). The written acknowledgment can be quite brief (for example, "interest on note" or "partial payment on note dated August 30, 1998"), especially if it is accompanied by partial payment. *First National Bank v. Gamble*, 132 S.W.2d 100,

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101–02 (Tex. 1939); *Roadside Stations, Inc. v. 7HBF, Ltd.*, 904 S.W.2d 927, 931 (Tex. App.—Fort Worth 1995, no writ). See form 1-6 in this manual for a form letter agreement setting forth an acknowledgment of the debt and agreement to pay.

§ 17.64:3 Pleading Requirements

A pleading of acknowledgment must be made "upon the new promise" and "must declare upon it as [the] cause of action, in order to avoid [a] plea of limitations." *DeRoeck v. DHM Ventures, LLC*, 531 S.W.3d 831, 834 (Tex. 2018), *quoting Hanley v. Oil Capital Broadcasting Ass'n*, 171 S.W.2d 864, 866 (Tex. 1943). There is no exception for a pleading of acknowledgment. "A petition is sufficient if it gives fair and adequate notice of the facts upon which the pleader bases his claim." The key inquiry is whether the opposing party "can ascertain from the pleading the nature and basic issues of the controversy and what testimony will be relevant." *DeRoeck*, 531 S.W.3d at 835, *quoting Horizon/CMS Healthcare Corp. v. Auld*, 34 S.W.3d 887, 896–97 (Tex. 2002). Use of the word "acknowledgment" in the petition is not required. *DeRoeck*, 531 S.W.3d at 834, *citing Hanley*, 171 S.W.2d at 865–66.

§ 17.64:4 Oral Agreements

If an oral agreement to extend the time for payment on a note is made after the due date and before the debt is barred by the statute of limitations and if the agreement is supported by new consideration, the extension constitutes a substitution of contracts, and limitations runs from the due date of the new contract. *Heisch v. Adams*, 16 S.W. 790, 791 (Tex. 1891); *Manandhar v. Jamshed*, No. 02-11-00027-CV, 2011 WL 3835980, at *3–4 (Tex. App.—Fort Worth Aug. 31, 2011, no pet.) (mem. op.). If the oral promise is made after limitations have expired on the original debt, however, the claim cannot be enforced, even though the oral promise was supported by consideration. *Fuqua v. Fuqua*, 750 S.W.2d 238, 241–42 (Tex. App.—Dallas 1988, writ denied).

§ 17.65 Agreement by Parties to Change Limitations

Parties cannot agree to limit a limitations period to a period shorter than two years, unless the agreement relates to a sale or purchase of a business entity in which one of the parties is agreeing to pay or receive at least $500,000. Tex. Civ. Prac. & Rem. Code § 16.070(a), (b). Also, parties to contracts for the sale of goods can agree to reduce the applicable limitations period to a period of not less than one year, but they cannot agree to extend the limitations period beyond four years. Tex. Bus. & Com. Code § 2.725(a).

An agreement that the creditor may extend the note without notice at the creditor's option from time to time is void as against public policy, because it circumvents the applicable statute of limitations. *Simpson v. McDonald*, 179 S.W.2d 239, 242–43 (Tex. 1944). *See also Duncan v. Lisenby*, 912 S.W.2d 857, 858–59 (Tex. App.—Houston [14th Dist.] 1995, no writ) ("[a] general agreement in advance to waive or not to plead the statute of limitations on a particular obligation is void as against public policy."(citing *American Alloy Steel, Inc. v. Armco, Inc.*, 777 S.W.2d 173, 177 (Tex. App.—Houston [14th Dist.] 1989, no writ).

§ 17.66 Amended Pleading

If a plaintiff files a petition before limitations bar it, no amendment or supplement will be subject to a plea of limitations, even if it changes any facts or grounds for liability or defense, unless the amendment or supplement is wholly based on a new, distinct, or different transaction or occurrence. Tex. Civ. Prac. & Rem. Code § 16.068; *Vaughn Building Corp. v. Austin Co.*, 620 S.W.2d 678, 682 (Tex. Civ. App.—Dallas 1981), *aff'd*, 643 S.W.2d 113 (Tex. 1982);

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Inwood National Bank v. Hoppe, 596 S.W.2d 183, 186 (Tex. Civ. App.—Texarkana 1980, writ ref'd n.r.e.).

§ 17.67 Counterclaims and Cross-Claims

If a defendant has a counterclaim or cross-claim that arises out of the same transaction or occurrence as the plaintiff's cause of action, it will not be barred by limitations, even if it would have been barred if filed as a separate action. The counterclaim or cross-claim must be filed no later than the thirtieth day after the date on which the party's answer is due. Tex. Civ. Prac. & Rem. Code § 16.069(a), (b).

A setoff claim by the defendant against the plaintiff does not qualify as "arising out of the same transaction or occurrence," unless the facts of the case otherwise qualify the defendant's claim as a proper counterclaim or cross-claim. *I.O.I. Systems v. City of Cleveland*, 615 S.W.2d 786, 791 (Tex. Civ. App.—Houston [1st Dist.] 1980, writ ref'd n.r.e.).

A defendant may not "piggyback" Tex. Civ. Prac. & Rem. Code § 16.069 with the "relation back" rule of Tex. Civ. Prac. & Rem. Code § 16.068 to extend the running of limitations by one year on a counterclaim that, at the time the original answer was filed, was already barred by limitations. *See MBank Fort Worth v. Trans Meridian, Inc.*, 820 F.2d 716, 720 (5th Cir. 1987). *But see E.P. Operating Co. v. Sonora Exploration Corp.*, 862 S.W.2d 149, 151–52 (Tex. App.—Houston [1st Dist.] 1993, writ denied) (disapproving of *MBank Fort Worth*). See section 17.66 above regarding amended or supplemental pleadings and their effect on limitations.

§ 17.68 Limitations Issues for Defendant Recently Moved to Texas, Foreign Cause of Action

A claim cannot be brought against a person who moved to Texas if the claim is barred by the law of limitations of the state or country from which the person came. Tex. Civ. Prac. & Rem. Code § 16.067(a). Conversely, if the defendant is sued within the limitations period of the foreign state (or, presumably, country), the fact that the action has a shorter limitations period under Texas law will not protect the defendant; he may be sued under the foreign state's statute of limitation. *See State of California v. Copus*, 309 S.W.2d 227, 231–32 (Tex.), *cert. denied*, 356 U.S. 967 (1958).

For a person who has moved to Texas to be able to assert the statute of limitations as a bar to recovery on a debt incurred before moving to Texas, he must have resided in Texas for twelve months. This statute does not affect the provisions of Tex. Civ. Prac. & Rem. Code § 16.067(a), discussed in the paragraph above. *See* Tex. Civ. Prac. & Rem. Code § 16.067(c).

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Discovery

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Chapter 18

Discovery

I. Discovery Generally

§ 18.1 Form and Scope of Pretrial Discovery

§ 18.1:1 Forms and Uses of Pretrial Discovery

Once suit has been filed, but before trial, several discovery vehicles are available. Permissible forms of discovery are—

1. requests for disclosure (see Tex. R. Civ. P. 190.2(b)(6), 194);
2. motions and requests for production, examination, and copying of documents and other tangible things (see Tex. R. Civ. P. 196.1–.6 and part VI. in this chapter);
3. requests and motions for entry and examination of property (see Tex. R. Civ. P. 196.7);
4. written interrogatories to parties (see Tex. R. Civ. P. 197 and part IV. in this chapter);
5. requests of a party for admission of any matter within the scope of discovery, including statements of opinion or fact or of the application of law to fact, or the genuineness of any documents served with the request or otherwise made available for inspection and copying (see Tex. R. Civ. P. 198 and part III. in this chapter);
6. oral or written depositions of any party or nonparty (see Tex. R. Civ. P. 199–203 and part II. in this chapter); and
7. motions for physical and mental examination of a party or person under the legal control of a party (see Tex. R. Civ. P. 204).

Tex. R. Civ. P. 192.1.

These devices are used to narrow the issues, to obtain evidence for use at trial, to secure information about the existence of evidence that may be used at trial, and to ascertain how and from whom the evidence may be procured. *Great American Insurance Co. v. Murray*, 437 S.W.2d 264, 267 (Tex. 1969). The ultimate purpose of discovery is to seek the truth so that disputes may be decided by what the facts reveal, not by what facts are concealed. *Jampole v. Touchy*, 673 S.W.2d 569, 573 (Tex. 1984), *overruled on other grounds by Walker v. Packer*, 827 S.W.2d 833 (Tex. 1992). Consequently, the objective of the Texas discovery rules is to prevent trial by ambush. *Gutierrez v. Dallas Independent School District*, 729 S.W.2d 691, 693 (Tex. 1987).

§ 18.1:2 Scope of Discovery

Subject to the limitations and protective orders explained below, discovery may be obtained about any relevant and nonprivileged matter of a claim or defense, even though the information sought may be inadmissible at trial, if the information appears reasonably calculated to lead to the discovery of admissible evidence. Tex. R. Civ. P. 192.3(a); *see also* Tex. R. Evid. 401–403;

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In re CSX Corp., 124 S.W.3d 149, 152 (Tex. 2003).

Because its purpose is to seek the truth, discovery is not limited to information that will be admissible at trial. This broad grant is limited, however, by the legitimate interests of the opposing party. Discovery may not be used for overly broad requests, harassment, or disclosure of privileged information. *Jampole v. Touchy*, 673 S.W.2d 569, 573 (Tex. 1984), *overruled on other grounds by Walker v. Packer*, 827 S.W.2d 833 (Tex. 1992). So-called "fishing expeditions" have been disapproved of by the supreme court. *In re Ford Motor Co.*, 427 S.W.3d 396, 397 (Tex. 2014) (plaintiff sent deposition notices to two of defendant's expert witnesses and sought detailed financial and business information for all cases that the expert witnesses' companies had handled for Ford or any other automobile manufacturer from 2000 to 2011; the supreme court found this to be a fishing expedition and just the type of overbroad discovery the rules are intended to prevent); *In re National Lloyds Insurance Co.*, 449 S.W.3d 486, 489 (Tex. 2014) (orig. proceeding) (per curiam) (requests for production of documents); *K Mart Corp. v. Sanderson*, 937 S.W.2d 429, 431 (Tex. 1996) (interrogatories); *Dillard Department Stores, Inc. v. Hall*, 909 S.W.2d 491, 492 (Tex. 1995) (requests for production of documents); *Texaco, Inc. v. Sanderson*, 898 S.W.2d 813, 815 (Tex. 1995) (requests for production of documents).

§ 18.1:3 Matters Discoverable

A party may obtain discovery of the items listed below.

Generally: Any matter that is not privileged and is relevant to the subject matter of the pending action, whether it relates to the claim or defense of any party. Tex. R. Civ. P. 192.3(a); *see also* Tex. R. Evid. 401; *In re Ford Motor Co.*, 427 S.W.3d 396, 397 (Tex. 2014).

Documents and Tangible Things: The existence, description, nature, custody, condition, location, and contents of documents and tangible things that constitute or contain matters relevant to the subject matter of the action. Tex. R. Civ. P. 192.3(b).

Persons with Knowledge of Relevant Facts and Their Statements: The name, address, and telephone number of persons having knowledge of relevant facts, and a brief statement of each person's connection with the case. "Knowledge of relevant facts" means that the person has or may have knowledge of any discoverable matter. Tex. R. Civ. P. 192.3(c). The person need not have admissible information or personal knowledge of the facts. Also, the statement of any person with knowledge of relevant facts, a "witness statement," regardless of when the statement was made. Tex. R. Civ. P. 192.3(h).

Trial Witnesses: The name, address, and telephone number of any person who is expected to testify at trial, but not rebuttal or impeaching witnesses the necessity of whose testimony cannot reasonably be anticipated before trial. Tex. R. Civ. P. 192.3(d).

Testifying and Consulting Experts: See Tex. R. Civ. P. 192.7(c) for a definition of "testifying expert" and Tex. R. Civ. P. 192.7(d) for "consulting expert." Although the following may be discovered as to a testifying expert, they may only be discovered as to a consulting expert whose mental impressions or opinions have been reviewed by a testifying expert. These discoverable materials include—

1. the expert's name, address, and telephone number;
2. the subject matter on which the expert will testify;
3. the facts known by the expert that relate to or form the basis of his mental impressions or opinions formed or made in connection with the case,

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regardless of when and how the information was acquired;

4. the expert's mental impressions and opinions formed or made in connection with the case and any methods used to derive them;
5. any bias of the expert;
6. all documents, tangible things, reports, models, or data compilations provided to, reviewed by, or prepared by or for the expert in anticipation of a testifying expert's testimony; and
7. the expert's current resume and bibliography.

Tex. R. Civ. P. 192.3(e).

Indemnity and Insuring Agreements: Except as otherwise provided by law, the existence and contents of any indemnity or insurance agreement under which any person may be liable to satisfy part or all of a judgment rendered in the action or to indemnify or reimburse for payments made to satisfy the judgment, although such disclosure does not make information concerning the agreement admissible in evidence at trial. Tex. R. Civ. P. 192.3(f).

Settlement Agreements: The existence and contents of any relevant portions of a settlement agreement, although such disclosure does not make information concerning the agreement admissible in evidence at trial. Tex. R. Civ. P. 192.3(g).

Potential Parties: The name, address, and telephone number of any potential party. Tex. R. Civ. P. 192.3(i).

Contentions: Any other party's legal contentions and the factual bases for those contentions. Tex. R. Civ. P. 192.3(j).

Net Worth: Under section 41.0115 of the Texas Civil Practice and Remedies Code, a party seeking net worth discovery is required to first demonstrate and obtain a finding from the trial court that there is a substantial likelihood of success on the merits of a claim for exemplary damages. Tex. Civ. Prac. & Rem. Code § 41.0115(a). However, the legislature did not specifically define "substantial likelihood." Evidence submitted by a party to a court in support of (or opposition to) a motion made under section 41.0115(a) may be made in the form of an affidavit or a response to discovery. (Note that the fact that the statute is silent on live testimony seems to suggest that live testimony is barred.)

The provisions of section 41.0115 did not become effective until September 1, 2015, and apply only to lawsuits filed on or after that date. Whether this statute is to be applied retroactively is still unclear because the Texas Supreme Court has yet to rule on the issue. *See In re Michelin North America, Inc.*, No. 05-15-01480-CV, 2016 WL 890970, at *8 (Tex. App.—Dallas Mar. 9, 2016, orig. proceeding) (mem. op.); *In re Robinson Helicopter Co., Inc.*, No. 01-15-00594-CV, 2015 WL 4623939, at *1 (Tex. App.—Houston [1st Dist.] Aug. 4, 2015, orig. proceeding [mand. denied]) (mem. op.); Pat Long-Weaver, *Examining Texas's Net Worth Discovery Statute*, 79 Tex. B.J. 686 (2016).

§ 18.2 Discovery Control Plans and Discovery Period

§ 18.2:1 Levels of Discovery Control Plans

All civil cases must be governed by a discovery control plan as provided by the Texas Rules of Civil Procedure. Under the expedited actions rules, if a lawsuit seeks only monetary relief aggregating $100,000 or less excluding post-judgment interest (and is not a lawsuit governed by the Family Code, Property Code, Tax Code, or chapter 74 of the Civil Practice and Remedies Code), limitations on discovery are in place. Tex. R. Civ. P. 169.

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All suits filed on or after March 1, 2013 (whether the suit is an original petition, counter-claim, cross-claim, or third-party claim), must include a statement specifying the damages sought. Tex. R. Civ. P. 47(c). A party that fails to comply with rule 47(c) may not conduct discovery until the party's pleading is amended to comply. Tex. R. Civ. P. 47.

Every plaintiff's original pleading must also allege in its first numbered paragraph whether control plan discovery is intended to be conducted under level 1, 2, or 3. Tex. R. Civ. P. 190.1. The three levels of discovery control plans follow:

1. A level 1 discovery control plan applies to civil cases filed under the expedited action rules process of Tex. R. Civ. P. 169 and divorces 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. Tex. R. Civ. P. 190.2(a). Plaintiffs seeking to conduct discovery under a level 1 plan should, in the first numbered paragraph of their original pleading, include language such as the following:

   This lawsuit seeks only monetary relief aggregating $100,000 or less. Tex. R. Civ. P. 47(c)(1). Discovery is intended to be conducted under Level 1. Tex. R. Civ. P. 190.2.

2. A level 2 discovery control plan applies to civil cases not governed by a level 1 or level 3 plan. Tex. R. Civ. P. 190.3(a). Plaintiffs seeking to conduct discovery under a level 2 plan should, in the first numbered paragraph of their original pleading, include language such as the following:

   Plaintiff intends that discovery be conducted under Level 2 and affirmatively pleads that this suit is not governed by the expedited actions process in Tex. R. Civ. P. 169 because **[specify]**. Tex. R. Civ. P. 190.3.

3. A level 3 discovery control plan should be pleaded when a plan must be tailored to the circumstances of the suit. A level 3 plan can be instituted on motion of one party, by agreement of the parties, or on the court's own initiative. Tex. R. Civ. P. 190.4(a). Note that a case can be conducted under a level 3 plan only by court order. Tex. R. Civ. P. 190, cmt. 1. Plaintiffs seeking to conduct discovery under a level 3 plan should, in the first numbered paragraph of their original pleading, include language such as the following:

   Plaintiff intends that discovery be conducted under Level 3. Tex. R. Civ. P. 190.4.

§ 18.2:2 Level 1 Discovery Control Plan

Discovery in a level 1 suit must be conducted within the discovery period, which begins when suit is filed and continues until 180 days after the date the first request for discovery of any kind is served on the party. Tex. R. Civ. P. 190.2(b)(1). Limitations on discovery in level 1 lawsuits are discussed in section 18.22 (depositions), section 18.43:2 (requests for admissions), section 18.53:3 (interrogatories), and section 18.73:3 (requests for production) below. Rules for requests for disclosure in level 1 lawsuits are discussed in section 18.63 below.

If a suit is removed from the expedited actions process in rule 169, the discovery period reopens, and discovery must be completed within the limitations provided in Tex. R. Civ. P. 190.3 or Tex. R. Civ. P. 190.4, whichever is applicable. Any person previously deposed may

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be redeposed. On motion of any party, the court should continue the trial date if necessary to permit completion of discovery. Tex. R. Civ. P. 190.2(c).

§ 18.2:3 Level 2 Discovery Control Plan

Discovery in a level 2 suit must be conducted within the discovery period, which begins when suit is filed and continues until the earlier of thirty days before the date set for trial or nine months after the earlier of the date of the first oral deposition or the due date of the first response to written discovery. Tex. R. Civ. P. 190.3(b). Limitations on depositions in level 2 suits are discussed in section 18.22 below. Limitations on interrogatories in level 2 suits are discussed in section 18.53:3.

§ 18.2:4 Level 3 Discovery Control Plan

A level 3 discovery control plan may address any issue concerning discovery or the matters listed in Tex. R. Civ. P. 166 and may change any limitation on the time for or amount of discovery otherwise called for under the Texas Rules of Civil Procedure. If the matter is not covered in the plan, the applicable of Tex. R. Civ. P. 190.2 or 190.3 applies. Tex. R. Civ. P. 190.4(b).

The plan must include not only a discovery period and appropriate limits on the amount of discovery, but also a date either for trial or for a conference to determine a trial setting and deadlines for joining additional parties, amending or supplementing pleadings, and designating expert witnesses. Tex. R. Civ. P. 190.4(b).

§ 18.2:5 Modification of Discovery Control Plans

The court may modify a discovery control plan at any time and must do so when the interest of justice requires. Tex. R. Civ. P. 190.5. Unless a suit is governed by the expedited actions process in rule 169, the court must allow additional discovery related to new, amended, or supplemental pleadings or new information disclosed in a response or an amended or supplemental response if the pleadings or responses were made after the discovery deadline or so nearly before the deadline that an adverse party does not have an adequate opportunity to conduct discovery related to the new matters and the adverse party would be unfairly prejudiced without the additional discovery. The court must allow additional discovery regarding matters that have changed materially after the discovery cutoff if trial is set or postponed so that the trial date is more than three months after the discovery period ends. Tex. R. Civ. P. 190.5.

Also, except where specifically prohibited, discovery procedures and limitations may be modified by court order for good cause or by agreement of the parties. Such an agreement is enforceable if it complies with rule 11 or, as it affects an oral deposition, if it is made part of the deposition record. Tex. R. Civ. P. 191.1.

§ 18.2:6 Discovery Not Subject to Discovery Control Plans

Depositions before suit or to investigate claims, as provided under rule 202, and discovery to enforce judgment under rule 621a, as discussed in chapter 26 of this manual, are not covered by discovery control plans. Tex. R. Civ. P. 190.6.

§ 18.3 Exemptions from Discovery

§ 18.3:1 Work Product

The work product of an attorney or the attorney's representative that contains that person's mental impressions, opinions, conclusions, or legal theories (the "core work product") is not discoverable. Tex. R. Civ. P. 192.5(b)(1); *National Union Fire Insurance Co. v. Valdez*, 863 S.W.2d 458, 461 (Tex. 1993); *see also In re*

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State ex rel. Skurka, 512 S.W.3d. 444, 453 (Tex. App.—Corpus Christi–Edinburg 2016, no pet., orig. proceeding) (applying the work product doctrine in the context of Tex. Code Crim. Proc. art. 39.14). The work product exemption is of continuing duration. *Owens-Corning Fiberglass Co. v. Caldwell*, 818 S.W.2d 749, 751–52 (Tex. 1991); *In re Baptist Hospitals of Southeast Texas*, 172 S.W.3d 136, 144 (Tex. App.—Beaumont 2005, orig. proceeding). See Tex. R. Civ. P. 192.5(a) for the definition of "work product."

There is no presumption that documents are privileged. *In re E.I. DuPont de Nemours & Co.*, 136 S.W.3d 218, 225 (Tex. 2004) (privilege log alleged that withheld documents were covered by the attorney-client and/or work product privileges). Therefore, the party who seeks to limit discovery by asserting a privilege has the burden of proof. To meet its burden, the party seeking to assert the privilege must make a prima facie showing of the applicability of the privilege and produce evidence to support the privilege. *In re USA Waste Management Resources, L.L.C.*, 387 S.W.3d 92, 96 (Tex. App.—Houston [14th Dist.] 2012, orig. proceeding [mand. denied]) (affidavit about facts of litigation established that consultation with attorney was protected by attorney-client privilege). The prima facie standard requires showing only the minimum evidence necessary to support a rational inference that the allegation of fact is true. *See In re Kristensen*, No. 14-14-00448-CV, 2014 WL 3778903, at *2, 5 (Tex. App.—Houston [14th Dist.] July 13, 2014, no pet.) (per curiam) (mem. op.) (interpreting a trial judge's handwritten comment on a typed order that assertions of privilege "must be established by evidence" to be a correct application of the law regarding the invocation of a privilege). This standard can be satisfied by filing an affidavit in support of the assertion of the privilege. A prima facie showing can also be made by testimony or, if deemed necessary, production of the documents to the court for in camera inspection. *In re ExxonMobil Corp.*, 97 S.W.3d 353, 357 (Tex. App.—Houston [14th Dist.] 2003, orig. proceeding) (numerous documents reviewed in camera by trial court to determine applicability of attorney-client privilege).

Work product other than "core work product" is discoverable only on a showing that the party seeking discovery has substantial need of the materials and is unable without undue hardship to obtain the substantial equivalent of the material by other means. Tex. R. Civ. P. 192.5(b)(2) *In re Larkin*, No. 01-15-00392-CV, 2016 WL 1054729, at *2 (Tex. App.—Houston [1st Dist.] Mar. 17, 2016, no pet.) (mem. op.) (overturning trial court's order to produce core work product when requesting party made no showing of a substantial need of the materials); *see also Occidental Chemical Corp. v. Banales*, 907 S.W.2d 488, 490 (Tex. 1995) (distinguishing between protection of core work product and noncore work product, before promulgation of Tex. R. Civ. P. 192.5); *National Tank Co. v. Brotherton*, 851 S.W.2d 193, 200–202 (Tex. 1993) (discussing the definition of "work product").

§ 18.3:2 "Consulting-Only" Experts

The identity, mental impressions, and opinions of a consulting expert whose mental impressions and opinions have not been reviewed by a testifying expert are not discoverable. But if his mental impressions or opinions have been reviewed by a testifying expert, all the information discoverable regarding testifying experts is also discoverable regarding that consulting expert. Tex. R. Civ. P. 192.3(e). See Tex. R. Civ. P. 192.7(d) for the definition of "consulting expert."

§ 18.3:3 Limitations on Scope of Discovery

The court may limit otherwise allowable discovery if either (1) the discovery sought is unreasonably cumulative or duplicative or is obtainable from some other source that is more

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convenient, less burdensome, or less expensive, or (2) the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake, and the importance of the proposed discovery in resolving the issues. Tex. R. Civ. P. 192.4.

§ 18.4 Ethical Considerations in Pretrial Discovery

§ 18.4:1 Legal Advice to Adverse Party

In dealing with an unrepresented party, a lawyer cannot indicate that the lawyer is a disinterested party. Tex. Disciplinary Rules Prof'l Conduct R. 4.03, *reprinted in* Tex. Gov't Code Ann., tit. 2, subtit. G, app. A (West 2013) (Tex. State Bar R. art. X, § 9). Generally, the lawyer should not give advice to an unrepresented person other than the advice to obtain counsel. Tex. Disciplinary Rules Prof'l Conduct R. 4.03 cmt.

§ 18.4:2 Permissible Communication

Any statement contained in the notice that discusses the legal effect of answering or not answering interrogatories or requests for admissions may constitute the giving of legal advice. *See* Tex. Disciplinary Rules Prof'l Conduct R. 4.03 & cmt. The notice may—

1. give instructions on answering the interrogatories or requests for admissions;
2. state the time periods within which the answers or admissions must be received; and
3. contain a statement to the effect that, if the requests are not to be admitted, the recipient either must specifically deny the requests or must state in detail the reasons for his inability to admit or deny them.

These statements are merely aids to help the party answer the interrogatories or requests and to get answers to the requesting party or his attorney within the relevant period; they are not statements of legal consequences.

§ 18.4:3 Impermissible Communication

The attorney must avoid including in notices to an unrepresented person statements going beyond mere instructions and purporting to give legal advice, such as that—

1. a party may be ordered to pay costs of proof, including attorney's fees, if he denies a requested admission that is later proved to be true;
2. an admission applies only to the subject proceeding and may not be used against the party in any other proceeding; and
3. failure to respond may result in the entry of judgment or the imposition of other sanctions.

See Tex. Comm. on Prof'l Ethics, Op. 380 (1975) (collection letter that stated in extensive detail the legal results of nonpayment was improper), Op. 355 (1971) (attorney should not advise opposing party represented by counsel about the law through guise of deposition).

Discovery requests should not contain legal advice or threats about possible consequences of not replying. *See* Tex. Disciplinary Rules Prof'l Conduct R. 4.02, 4.04 (regarding communication with parties represented by another attorney and prohibiting use of threats of criminal or disciplinary charges to gain an advantage in a civil matter).

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§ 18.5 Attorney's Fees for Pretrial Discovery

Although there is no provision for the pretrial recovery of attorney's fees for the mere undertaking of discovery, fees may be recovered if the other party does not cooperate when required to do so by the Texas Rules of Civil Procedure. See part VII. in this chapter.

§ 18.6 Separate or Combined Submission of Interrogatories and Requests for Admissions

§ 18.6:1 Combined Submission Generally

Some attorneys combine interrogatories with requests for admissions in the hope of obtaining a tactical opportunity not available through separate use of these diverse methods of discovery. This practice is expressly allowed by Tex. R. Civ. P. 192.2. In theory, this hybrid type of discovery combines the automatic admissibility of evidence when facts are admitted with the probative effect of consequent answers to interrogatories requested in the same document for admissions that are denied. Although this combined discovery tactic appears to possess all the advantages available under both procedures, some factors should be considered before attempting to combine the two, and in this manual the two procedures are presented separately.

§ 18.6:2 Difference in Tactics

Interrogatories are intended to be used in discovering admissible evidence, whereas requests for admissions are used to isolate and refine those matters of fact that need to be tried. Logically, requests for admissions are useful after (not during) discovery by interrogatories or depositions. By separating the two kinds of procedures, one is able to use answers obtained from interrogatories or depositions to frame more meaningful requests for admissions, thereby improving the quality and quantity of information admissible for trial of the issues.

§ 18.6:3 Difference as Evidence

Answers to interrogatories are subject to the general rules of evidence and must be properly offered at trial or at an appropriate pretrial hearing to have probative value. *Richards v. Boettcher*, 518 S.W.2d 286, 288 (Tex. App.—Texarkana 1974, writ ref'd n.r.e.). Matters admitted under a request for admissions, however, are "conclusively established as to the party making the admission unless the court permits the party to withdraw or amend the admission." Tex. R. Civ. P. 198.3. They need not be introduced into evidence to be properly before the trial or appellate court. *See Red Ball Motor Freight, Inc. v. Dean*, 549 S.W.2d 41, 43 (Tex. App.—Tyler 1977, writ dism'd w.o.j.). See also section 18.46 below. The practitioner should be aware, however, that admissions made pursuant to Tex. R. Civ. P. 198 may be introduced and read into evidence against the party making the admission. *See Welch v. Gammage*, 545 S.W.2d 223, 226 (Tex. App.—Austin 1976, writ ref'd n.r.e.) ("The better practice is to introduce the requests for admissions and the responses into evidence. Nevertheless, requests for admissions and responses may be considered as a part of the record if they were filed with the clerk of the court at trial time.").

At trial, the party relying on admissions must protect the record by objecting to the controverting evidence and to the submission of any issue bearing on the facts admitted. *Marshall v. Vise*, 767 S.W.2d 699, 700 (Tex. 1989); *USAA County Mutual Insurance Co. v. Cook*, 241 S.W.3d 93, 102 (Tex. App.—Houston [1st Dist.] 2007, no pet.). *Compare Beasley v. Burns*, 7 S.W.3d 768, 770 (Tex. App.—Texarkana 1999, pet. denied) (declining to extend the rule in *Marshall* to summary judgment proceedings on the basis that such proceedings are not trials), *with Acevedo v. Commission for Lawyer Discipline*, 131 S.W.3d

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99, 105 n.3 (Tex. App.—San Antonio 2004, pet. denied) (questioning *Beasley*'s characterization of a summary judgment proceeding as not a "trial"). Failure to promptly protect the record waives the right to rely on the controverted admissions. *Marshall*, 767 S.W.2d at 700. *See also Acevedo*, 131 S.W.3d at 104 (discussing waiver of right to rely on deemed admissions in the summary judgment and trial contexts).

§ 18.7 Supplementation of Discovery

§ 18.7:1 Supplementation Generally

If a party learns that his response to written discovery was incomplete or incorrect when made or has become incomplete or incorrect, he must generally amend or supplement his response unless the additional or corrective information has been made known to the other parties either in writing, on the record at a deposition, or through other discovery responses. Tex. R. Civ. P. 193.5(a)(2). If the written discovery sought the identification of persons with knowledge of relevant facts, trial witnesses, or expert witnesses, the party must amend or supplement the response. Tex. R. Civ. P. 193.5(a)(1).

The supplementation requirement applies, whether or not the evidence is to be used in a party's case in chief or during rebuttal, if the party offering the evidence knows of the evidence before trial. *See Alvarado v. Farah Manufacturing Co.*, 830 S.W.2d 911, 913–14 (Tex. 1992).

A party who fails to amend or supplement a discovery response in a timely manner may not introduce into evidence the discovery that was not timely disclosed or offer the testimony of a witness (other than a named party) who was not timely identified, unless the court finds that either there was good cause for the lack of timeliness or the failure to amend or supplement timely will not unfairly surprise or prejudice the other parties. Tex. R. Civ. P. 193.6(a); *Montie v. Bastrop County*, No. 03-16-00123-CV, 2016 WL 6156232, at *3 (Tex. App.—Austin Oct. 19, 2016, no pet.); *Alvarado*, 830 S.W.2d at 913–14. See also section 18.15 below. The burden of showing good cause or the absence of unfair surprise or prejudice is on the party seeking to introduce the witness or evidence. Tex. R. Civ. P. 193.6(b); *Alvarado*, 830 S.W.2d at 914.

§ 18.7:2 Time of Amended or Supplemental Response

The amended or supplemental response must be made reasonably promptly after the party discovers the need for it. An amended or supplemental response made less than thirty days before trial is presumed not to have been made reasonably promptly. Tex. R. Civ. P. 193.5(b).

See section 18.15 below regarding the consequences of failure to timely respond.

§ 18.7:3 Form of Amended or Supplemental Response

The amended or supplemental response must be in the same form as the initial response and must be verified if the original response had to be verified. Failure to comply with this form requirement will not make the response untimely unless the party making the response refuses to correct the form defect within a reasonable time after it is pointed out. Tex. R. Civ. P. 193.5(b).

See section 18.15 below regarding the consequences of failure to timely respond.

§ 18.7:4 Supplementation and Experts

A party's duty to amend and supplement written discovery regarding a testifying expert is governed by rule 193.5. If an expert is retained by, employed by, or otherwise under the control of a party, that party must also amend or supplement

any deposition testimony or written report by the expert but only with regard to the expert's mental impressions or opinions and the basis for them. Tex. R. Civ. P. 195.6.

§ 18.8 Protective Orders

§ 18.8:1 Availability

A protective order is available to any person from whom discovery is sought and any other person affected by the discovery request. Tex. R. Civ. P. 192.6(a).

A party may also obtain a protective order if discovery is sought not from him personally but from an individual who is not a party. *See Mahan v. Stover*, 679 S.W.2d 707, 709–10 (Tex. App.—Beaumont 1984, writ dism'd w.o.j.) (court of appeals upheld protective order requiring defendant to pay plaintiff's experts for depositions in advance by depositing $600 in court registry and additional $600 for each day depositions were to be taken).

§ 18.8:2 Grounds

Protective orders are intended to protect the movant from undue burden, unnecessary expense, harassment, annoyance, or invasion of personal, constitutional, or property rights. Tex. R. Civ. P. 192.6(b). A party seeking a protective order must specifically plead a particular privilege or immunity from discovery and produce evidence supporting the applicability of the privilege or immunity; otherwise the privilege or immunity is waived. *Peeples v. Honorable Fourth Supreme Judicial District*, 701 S.W.2d 635, 637 (Tex. 1985); *Taylor v. Taylor*, 747 S.W.2d 940, 945 (Tex. App.—Amarillo 1988, writ denied). The burden of requesting a hearing is now on the party seeking production. *McKinney v. National Union Fire Insurance Co.*, 772 S.W.2d 72, 75 (Tex. 1989). If protection is sought regarding the time or place of discovery, the movant must state a reasonable time or place for discovery with which he will comply. Tex. R. Civ. P. 192.6(a).

A motion for a protective order should not be made when an objection to written discovery is appropriate. However, the filing of a motion for protective order does not waive an objection. A party must comply with the discovery request to the extent a protective order is not sought unless it is unreasonable under the circumstances to do so before obtaining a ruling on the motion. Tex. R. Civ. P. 192.6(a). The party that seeks a protective order must show particular, specific, and demonstrable injury by facts sufficient to justify the protective order. *In re Wal-Mart Stores, Inc.*, No. 08-15-00126-CV, 2016 WL 7230399, at *7 (Tex. App.—El Paso Dec. 14, 2016, orig. proceeding [mand. pending]) (citing *In re Collins*, 286 S.W.3d 911, 919 (Tex. 2009) (orig. proceeding)).

§ 18.8:3 Burden of Proof under Rule 192.6(b)

Rule 192.6(b) permits a trial court to "make any order in the interest of justice," including limiting the depositions in a manner designed to "protect the movant from undue burden, unnecessary expense, harassment, annoyance, or invasion of personal, constitutional, or property rights." Tex. R. Civ. P. 192.6(b). However, a party resisting discovery cannot prevail simply by making conclusory allegations that the requested discovery is unduly burdensome or unnecessarily harassing. The resisting party must produce some evidence that supports the request for a protective order. *See Garcia v. Peeples*, 734 S.W.2d 343, 345 (Tex. 1987). In the case of depositions, for instance, although "[m]any deponents consider any deposition harassing and burdensome and perhaps annoying, . . . unless the purpose of the deposition can be shown to be only for an improper purpose, or unless it is an undue burden, the trial court cannot limit the deposition on these bases." *In re Amaya*, 34 S.W.3d 354, 358 (Tex.

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App.—Waco 2001, orig. proceeding). *See also In re Issuance of Subpoenas of Bennett*, 502 S.W.3d 373, 377 (Tex. App.—Houston [14th Dist.] 2016, orig. proceeding).

§ 18.8:4 Scope of Protection

The court may order that—

1. the requested discovery not be sought in whole or in part;
2. the extent or subject matter of discovery be limited;
3. the discovery not be undertaken at the time or place specified;
4. the discovery be undertaken only by the method or on the terms and conditions or at the time and place directed by the court; or
5. the results of discovery be sealed or otherwise protected, subject to the provisions of rule 76a.

Tex. R. Civ. P. 192.6(b).

§ 18.9 Objections to Written Discovery

§ 18.9:1 Written Discovery Defined

"Written discovery" means requests for disclosure, requests for production and inspection of documents and tangible things, requests for entry onto property, interrogatories, and requests for admissions. Tex. R. Civ. P. 192.7(a).

§ 18.9:2 Time and Form for Objection

The responding party must make his objection to written discovery in writing (either in the response or in a separate document) within the time for response. The objection must state specifically the legal or factual basis for the objection and the extent to which the party is refusing to comply with the request. Tex. R. Civ. P. 193.2(a). An objection that is not made within the time required is waived unless the court excuses the waiver for good cause shown. Tex. R. Civ. P. 193.2(e). See form 18-25 in this chapter.

§ 18.9:3 Partial Objection

If the responding party is objecting to part of the discovery request, he must comply with the unobjectionable part unless it is unreasonable under the circumstances to do so. Tex. R. Civ. P. 193.2(b). An example of such a situation would be if the requesting party asks for "all documents relevant to the lawsuit." In that case, the responding party may object to the request as overly broad and refuse to comply with it entirely. Tex. R. Civ. P. 193 cmt. 2.

§ 18.9:4 Objection to Time or Place for Production

If the objection is to the requested time or place for production, the responding party must state a reasonable time or place for complying with the request and must comply at that time and place without further request or order. Tex. R. Civ. P. 193.2(b). See section 18.75:3 below for further discussion of objections to requests for production.

§ 18.9:5 Basis for Objection

The responding party must have a good-faith factual and legal basis for his objection that exists at the time the objection is made. Tex. R. Civ. P. 193.2(c). Furthermore, an objection obscured by numerous unfounded objections is waived unless the court excuses the waiver for good cause shown. Tex. R. Civ. P. 193.2(e).

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§ 18.9:6 Hearing and Ruling on Objections

Any party may at any reasonable time request a hearing on an objection. The party making the objection must present any evidence necessary to support his objection. The evidence may be either live testimony or affidavits served at least seven days before the hearing or at such other reasonable time as the court permits. Tex. R. Civ. P. 193.4(a).

To the extent the court sustains the objection, the responding party has no further duty to respond to the discovery request. If the court overrules the objection, the responding party must produce the requested material or information within thirty days after the court's ruling or at such time as the court orders. Tex. R. Civ. P. 193.4(b).

A party need not request a ruling on his own objection to preserve it. Tex. R. Civ. P. 193.4(b).

§ 18.10 Assertions of Privilege

§ 18.10:1 Only Written Discovery Governed

The rules set out in this section regarding privileges apply only to written discovery. *See* Tex. R. Civ. P. 193.3. See section 18.9:1 above for a definition of written discovery.

§ 18.10:2 How Privilege Is Asserted

The party claiming that information responsive to written discovery is privileged must state, either in the response or in a separate document—

1. that information or material responsive to the request is being withheld;
2. the request to which the information or material relates; and
3. the privilege(s) asserted.

Tex. R. Civ. P. 193.3(a). An exception to this requirement exists for privileged communications to or from a lawyer or lawyer's representative or a privileged document of the lawyer or lawyer's representative created or made from the point at which the party consults a lawyer with a view to obtaining professional legal services from the lawyer in the prosecution or defense of a specific claim in the litigation in which the discovery is requested and concerning the litigation in which the discovery is requested. Tex. R. Civ. P. 193.3(c). See also section 18.3:1 above. A privilege or exemption sought must be specifically pleaded and supported by evidence (by either affidavit or testimony), and if necessary, the party asserting the privilege must submit the allegedly privileged items for an in camera inspection. *See In re Insurance Placement Services*, No. 03-11-00374-CV, 2011 WL 2768825, at *2 (Tex. App.—Austin July 14, 2011, no pet.) (mem. op.); *Loftin v. Martin*, 776 S.W.2d 145, 147 (Tex. 1989) (assertion of investigative privilege), *disapproved on other grounds by Walker v. Packer*, 827 S.W.2d 833, 842 (Tex. 1992).

§ 18.10:3 Requesting Party's Response to Assertion of Privilege

After receiving a response indicating that material or information is being withheld on grounds of privilege, the requesting party may serve a written request that the withholding party identify the information and material withheld. Within fifteen days of service of that request, the withholding party must both—

1. describe the information or materials withheld, without revealing the privileged information itself or otherwise waiving the privilege, in a way that would enable another party to determine the applicability of the privilege; and

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2. assert the applicable specific privilege for each item or group of items withheld.

Tex. R. Civ. P. 193.3(b). The same exception regarding specific communications to or from an attorney or attorney's representative set out in section 18.10:2 above applies to the withholding party's obligations set out in the paragraph above. Tex. R. Civ. P. 193.3(c).

§ 18.10:4 Hearing and Ruling on Assertion of Privilege

As with objections, any party may at any reasonable time request a hearing on a claim of privilege asserted under Tex. R. Civ. P. 193. The party making the claim of privilege must present any evidence necessary to support his claim; that evidence may be either live testimony or affidavits served at least seven days before the hearing or at such other reasonable time as the court permits. Tex. R. Civ. P. 193.4(a). Affidavits asserting a privilege must contain more than global reiterations of facts ascertainable from the face of the documents (or other evidence) themselves. *Weisel Enterprises, Inc. v. Curry*, 718 S.W.2d 56, 58 (Tex. 1986); *In re Insurance Placement Services*, No. 03-11-00374-CV, 2011 WL 2768825, at *2–3 (Tex. App.—Austin July 14, 2011, no pet., orig. proceeding) (mem. op.).

To the extent the court sustains the claim of privilege, the responding party has no further duty to respond to the discovery request. To the extent the court overrules the claim of privilege, the withholding party must produce the information or material within thirty days of the court's ruling or at such time as the court orders. Tex. R. Civ. P. 193.4(b).

§ 18.10:5 In Camera Inspection

If the court determines that in camera review is necessary, the material or information must be segregated and produced to the court in a sealed wrapper within a reasonable time following the hearing. Tex. R. Civ. P. 193.4(a).

§ 18.10:6 Use of Material or Information Withheld under Claim of Privilege

A party may not use, at any hearing or trial, material or information withheld from discovery under a claim of privilege, including a claim sustained by the court, without timely amending or supplementing the party's response to the discovery. Tex. R. Civ. P. 193.4(c).

§ 18.11 Cooperation in Discovery and Certification of Conference

Parties and their attorneys are expected to cooperate in discovery and to make any agreements reasonably necessary for the efficient disposition of the cause. All discovery motions or requests for hearings related to discovery must contain a certificate by the movant that reasonable efforts to resolve the discovery dispute without the necessity of court intervention have been made and have failed. Tex. R. Civ. P. 191.2.

§ 18.12 Signatures on Discovery Documents

§ 18.12:1 Requirement of Signature

Every disclosure, discovery request, notice, response, and objection must be signed by either the party's attorney or the party, if he is proceeding pro se. The signature must be accompanied by the signatory's address, telephone number, fax number, if any, and State Bar identification number if the signatory is an attorney. Tex. R. Civ. P. 191.3(a).

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§ 18.12:2 Effect of Signature on Discovery Request, Notice, Response, or Objection

The signature on a discovery request, notice, response, or objection constitutes a certification that to the best of the signer's knowledge, information, and belief, formed after reasonable inquiry, the request, notice, response, or objection—

1. is consistent with the rules of civil procedure and warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law;
2. has a good-faith factual basis;
3. is not interposed for any improper purpose, such as to harass or annoy or to cause unnecessary delay or needless increase in the cost of litigation; and
4. is not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation.

Tex. R. Civ. P. 191.3(c). If a request, notice, response, or objection is not signed, it must be struck unless it is signed promptly after the omission is called to the attention of the party proffering it. A party is not obligated to take any action with respect to a request or notice that is not signed. Tex. R. Civ. P. 191.3(d).

§ 18.12:3 Effect of Signature on Disclosure

The signature on a disclosure constitutes a certification that to the best of the signer's knowledge, information, and belief, formed after reasonable inquiry, the disclosure is complete and correct when it is made. Tex. R. Civ. P. 191.3(b).

§ 18.12:4 Sanctions for False Certification

If the certification is false without substantial justification, the court may, on motion or its own initiative, impose on the person making the certification or the party on whose behalf the request, notice, response, or objection was made, or both, an appropriate sanction as for a frivolous pleading or motion under chapter 10 of the Texas Civil Practice and Remedies Code. Tex. R. Civ. P. 191.3(e).

§ 18.13 Filing and Service of Discovery Materials

§ 18.13:1 Materials That Must Be Filed

Discovery materials that must be filed are—

1. discovery requests, deposition notices, and subpoenas required to be served on nonparties;
2. motions and responses to motions pertaining to discovery matters; and
3. agreements concerning discovery matters, to the extent required to comply with rule 11.

Tex. R. Civ. P. 191.4(b).

§ 18.13:2 Materials Not to Be Filed

Discovery materials that are *not* filed are—

1. discovery requests, deposition notices, and subpoenas required to be served only on parties;
2. responses and objections to discovery requests and deposition notices, regardless of on whom the requests or notices were served;
3. documents and tangible things produced in discovery; and

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4. certain statements prepared in connection with the assertion of privileges (under rule 193.3(b) or (d)).

Tex. R. Civ. P. 191.4(a). Certain exceptions exist. For example, the court may order these discovery materials to be filed, a person may file discovery materials in support of or in opposition to a motion or for other use in a court proceeding, and a person may file discovery materials necessary for a proceeding in an appellate court. Tex. R. Civ. P. 191.4(c).

For materials not required to be filed, the person required to serve them must keep the originals or exact copies during the pendency of the case and any related appellate proceedings begun within six months after judgment is signed, unless otherwise provided by the trial court. Tex. R. Civ. P. 191.4(d).

§ 18.13:3 Method of Service

Discovery requests may be served on any party at any time from after the commencement of the action until thirty days before the end of the discovery period. See Tex. R. Civ. P. 196.1(a) (requests for production), 197.1 (interrogatories), and 198.1 (requests for admissions). See section 18.2 above regarding the discovery period. If the party is represented by an attorney, the requests must be served on the attorney unless service on the party himself is ordered by the court. Copies of the requests must be served on all parties but not filed with the court clerk. Tex. R. Civ. P. 191.4(a)(1), 191.5.

Service of requests for discovery can be done either by serving through the electronic service system, in person, by mail (certified mail, return receipt requested is often best to prove delivery), by commercial delivery service, by fax, by e-mail, or by such other manner as a court instructs. Tex. R. Civ. P. 21a(a)(1)–(2).

Service of documents by e-mail is a 2013 amendment to rule 21a with at least one court enforcing service via this means. *See University of Texas Medical Branch at Galveston v. Callas*, 497 S.W.3d 58, 66 (Tex. App.—Houston [14th Dist.] 2016, pet. denied).

For service of requests for disclosure, see section 18.62 below.

§ 18.13:4 Presumption of Service

Sending notice or documents pursuant to rule 21a raises a rebuttable presumption that service was done properly. *Mathis v. Lockwood*, 166 S.W.3d 743, 745 (Tex. 2005). Under rule 21a, service is complete when (1) properly addressed and postpaid documents are deposited in the mail or with a commercial delivery service, (2) sent by fax with proof of receipt, or (3) done by electronic service and the documents are transmitted to the serving party's electronic filing service provider. Tex. R. Civ. P. 21a(b)(1)–(3). The rule does not address when service by e-mail is complete.

Practice Note: Because the rule does not address when e-mail service is complete, consider using an additional method of service.

A certificate of service (or affidavit) is also prima facie evidence that service took place. *Mocega v. Urquhart*, 79 S.W.3d 61, 65 (Tex. App.—Houston [14th Dist.] 2002, pet. denied). However, the presumption can be rebutted when an opposing party offers proof of nonreceipt. *Cliff v. Huggins*, 724 S.W.2d 778, 780 (Tex. 1987).

§ 18.14 Availability of Mandamus

Mandamus is available to correct a clear abuse of discretion in a discovery matter. *Walker v. Packer*, 827 S.W.2d 833, 839 (Tex. 1992) (citing *Johnson v. Fourth Court of Appeals*, 700 S.W.2d 916, 917 (Tex. 1985)). The party seeking mandamus relief must establish that (1) the trial court abused its discretion and (2) no ade-

quate remedy by appeal exists. *In re Essex Insurance Co.*, 450 S.W.3d 524, 526 (Tex. 2014). *See Dillard Department Stores, Inc. v. Hall*, 909 S.W.2d 491, 492 (Tex. 1995); *General Motors Corp. v. Lawrence*, 651 S.W.2d 732, 733 (Tex. 1983) (discovery order was overly broad in scope, sought production of nonrelevant information, and would have caused undue burden and expense); *but see Walker*, 827 S.W.2d at 840–42 (Tex. 1992) (party seeking review of discovery order must show that remedy offered by ordinary appeal inadequate; appellate remedy not inadequate merely because it may involve more expense or delay than obtaining extraordinary writ). The court in *Walker* gave three specific situations in which mandamus is an appropriate remedy:

1. When the appellate court would not be able to cure the trial court's error, as when the trial court erroneously orders the disclosure of privileged information that would materially affect the rights of the aggrieved party.
2. When the party's ability to present a viable claim or defense at trial is vitiated or severely compromised by the trial court's discovery error.
3. When the trial court disallows discovery and the missing discovery cannot be made part of the appellate record, or the trial court after later request refuses to make it part of the record, and the reviewing court is unable to evaluate the effect of the trial court's error on the record before it.

Walker, 827 S.W.2d at 843–44.

§ 18.15 Failure to Timely Respond

A party who fails to make, amend, or supplement a discovery response in a timely manner may not introduce in evidence the material or information that was not timely disclosed or offer the testimony of a witness (other than a named party) who was not timely identified, unless the court finds that either there was good cause for the lack of timeliness or the failure to make, amend, or supplement timely will not unfairly surprise or prejudice the other parties. Tex. R. Civ. P. 193.6(a). The burden to establish good cause or lack of unfair surprise or unfair prejudice is on the party seeking to introduce the evidence or call the witness. A finding of unfair surprise or unfair prejudice must be supported by the record. Tex. R. Civ. P. 193.6(b).

§ 18.16 Discovery from Financial Institutions

A party seeking discovery (such as a third-party request for production pursuant to Tex. R. Civ. P. 176 and 205) from a bank, savings and loan, credit union, or trust company must comply with the provisions described in the Texas Finance Code, even if the financial institution is chartered under the laws of another state. Tex. Fin. Code §§ 59.001(5), 59.006(a). However, certain record requests or inquiries, mainly from a state or federal government agency, are not subject to the special rules described in the Code. Tex. Fin. Code § 59.006(a)(1)–(8).

If the financial information being requested concerns a customer who is a party to the lawsuit, the requesting party must serve the financial institution with a record request that provides a minimum of twenty-four days to comply and must pay the institution's reasonable costs of reproduction, postage, research, delivery, and attorney's fees or agree to post a bond in an amount estimated by the institution to cover such costs before the institution is required to comply with the request. Tex. Fin. Code § 59.006(b). The customer who is a party bears the burden of preventing or limiting the institution's compliance with the record request by seeking an appropriate remedy, such as a motion to quash or motion for protective order. Tex. Fin. Code § 59.006(e). The customer must serve the motion on the financial institution and the

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requesting party not later than the date on which the institution's compliance with the record request is required. Tex. Fin. Code § 59.006(e). Otherwise, once the requirements of section 59.006(b) are met, the institution must comply with the request. Tex. Fin. Code § 59.006(c).

If the financial information being requested concerns a customer who is not a party to the lawsuit, the requesting party must—

1. provide notice (by certified mail or personal service) to the nonparty stating the rights of the customer under section 59.006(e) and a copy of the request to each affected nonparty;
2. file a certificate of service of that notice both with the court and the institution; and
3. request the nonparty's written consent authorizing the institution to comply with the request.

Tex. Fin. Code § 59.006(c).

If the nonparty customer consents, the institution need not produce the record before the later of (1) the twenty-fourth day after the date that compliance with the record request is required or (2) the fifteenth day after the date of receipt of its customer's consent. Tex. Fin. Code § 59.006(f).

If the nonparty customer does not execute the written consent or fails to respond to the requesting party's request for compliance, the requesting party must file a written motion seeking an in camera inspection of the requested information with the court. Tex. Fin. Code § 59.006(d). In response to the motion for in camera inspection, the court may review the documents to determine their relevance to the underlying matter and can order that any part of the records be redacted and, furthermore, that a protective order be signed prohibiting disclosure to any nonparty as well as ordering that the documents be used only in the underlying lawsuit. Tex. Fin. Code § 59.006(d). The financial institution need not produce the record before the fifteenth day after the date a court orders production of the record after an in camera inspection. Tex. Fin. Code § 59.006(f)(3).

For a notice to a nonparty customer of request for financial records, see form 18-1 in this chapter. For a motion to inspect nonparty financial records, see form 18-2.

[Sections 18.17 through 18.20 are reserved for expansion.]

II. Depositions

§ 18.21 Source of Rule and Purpose of Deposition

§ 18.21:1 Source and Purpose Generally

Depositions are used for discovery and to perpetuate the testimony of any party or witness as evidence for later use at trial by means of a written transcript of oral or written questions and answers. Oral depositions are governed by Tex. R. Civ. P. 199, depositions on written questions are governed by Tex. R. Civ. P. 200, depositions outside Texas for use in Texas proceedings and depositions taken in Texas for use outside the state are governed by Tex. R. Civ. P. 201, and depositions before suit or to investigate a claim are governed by Tex. R. Civ. P. 202. Signing, certification, and use of depositions is governed by Tex. R. Civ. P. 203.

§ 18.21:2 Who May Be Deposed

A party may take the deposition of any person or entity before any officer authorized by law to take depositions. Tex. R. Civ. P. 199.1(a). Individuals, public or private corporations, partnerships, associations, governmental agencies, or other organizations may be deposed. Tex. R. Civ. P. 199.2(b)(1).

§ 18.22 Length of Examination

For suits filed on or after March 1, 2013, the time limits imposed by Tex. R. Civ. P. 190 apply. Unless modified by the court, level 1 suits allow each party up to six hours to depose all witnesses. The parties may agree to expand this limit up to ten hours total, but not more except by court order. Tex. R. Civ. P. 190.2(b)(2). Unless modified by the court, level 2 suits allow each side up to fifty hours to depose parties on the opposing side, experts designated by those parties, and persons subject to those parties' control. However, if one side designates more than two experts, the opposing side has an additional six hours of deposition time for each additional expert designated. In level 2 suits, "side" refers to all litigants with generally common interests in the litigation. Tex. R. Civ. P. 190.3(b)(2). For level 3 suits, the discovery control plan must include appropriate limits on the amount of discovery. If no limit is placed on length of depositions, the appropriate limit according to Tex. R. Civ. P. 190.2 or 190.3 will be imposed. Tex. R. Civ. P. 190.4(b). See section 18.2 above regarding discovery control plans generally.

No side may examine or cross-examine a witness for more than six hours. Breaks taken during the deposition do not count toward this time limit. Tex. R. Civ. P. 199.5(c).

§ 18.23 Forms of Deposition

§ 18.23:1 Methods of Examination

Oral depositions may be taken in person or by telephone or "other remote electronic means." Tex. R. Civ. P. 199.1(a), (b). These "remote" depositions are discussed in section 18.27 below. Depositions may also be taken by written questions, as discussed at section 18.29.

§ 18.23:2 Nature of Questions

Whatever deposition method is used, questions should elicit information about material evidence and witnesses within the witness's knowledge. Written questions should be phrased to seek specific factual answers to each question. For sample written deposition questions to the client to establish certain favorable facts, see form 18-6 in this chapter; see also the interrogatories in forms 18-15 through 18-20.

§ 18.23:3 Production of Documents by Witness

One of the more valuable benefits of a deposition is the ability to require the witness to produce documents or tangible things within the scope of discovery and within the witness's possession, custody, or control, and then elicit testimony regarding the items produced. Both oral depositions and depositions on written questions allow a party to demand that the witness bring these items with him to the deposition. *See* Tex. R. Civ. P. 199.2(b)(5), 200.1(b), 205.3. Such a demand is contained within a subpoena duces tecum. See section 18.30 below regarding subpoenas generally.

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§ 18.24 Deposition before Suit Is Filed or to Investigate Claims

§ 18.24:1 When Permitted

A person may petition the court for an order authorizing taking an oral or written deposition, either to perpetuate or obtain the person's own testimony or that of any other person in an anticipated suit or to investigate a potential claim or suit. Tex. R. Civ. P. 202.1.

§ 18.24:2 Petition

The person seeking the deposition must file a verified petition in the proper court of any county in which venue of the anticipated action may lie or in which the witness resides if no suit is yet anticipated. The petition must—

1. be in the name of the petitioner;
2. state that the petitioner either anticipates litigation in which he may be a party or seeks to investigate a potential claim by or against him;
3. state the subject matter of the anticipated litigation and the petitioner's interest in it;
4. if suit is anticipated, either state the names, addresses, and telephone numbers of persons expected to have interests adverse to the petitioner or state that those names, addresses, and telephone numbers cannot be ascertained through diligent inquiry and describe those persons;
5. state the names, addresses, and telephone numbers of the persons to be deposed, the substance of the testimony expected, and the petitioner's reason for desiring to obtain the testimony; and
6. request a court order authorizing the petitioner to take the depositions of the persons named in the petition.

Tex. R. Civ. P. 202.2.

§ 18.24:3 Notice and Service

At least fifteen days before the date of the hearing, the petitioner must serve, in accordance with Tex. R. Civ. P. 21a, a copy of the petition and notice of the hearing on the witnesses and, if suit is anticipated, on each anticipated adverse party named in the petition. Tex. R. Civ. P. 202.3(a).

Unnamed persons described in the petition whom the petitioner expects to have interests adverse to the petitioner may be served by publication with the petition and notice of hearing. This notice must be first published at least fourteen days before the date of the hearing and state its time and place. The petition and notice must be published once each week for two consecutive weeks in the newspaper of broadest circulation in the county in which the petition is filed or, if no such newspaper exists, in the newspaper of broadest circulation in the nearest county in which a newspaper is published. Tex. R. Civ. P. 202.3(b).

The court may modify the notice periods and may extend the notice period to permit service on any expected adverse party. Tex. R. Civ. P. 202.3(d).

§ 18.24:4 Suppression of Deposition to Perpetuate Testimony

After the filing of a deposition taken after notice by publication, an interested party may, in the proceeding or by bill of review, move to suppress all or part of the deposition and may also oppose the deposition by any other means available. Tex. R. Civ. P. 202.3(b)(2). The right to move to suppress is cumulative of all other rights to oppose the deposition.

§ 18.24:5 Order

The court must order a deposition to be taken if, but only if, it finds that allowing the requested deposition may prevent a failure or delay of justice in an anticipated suit or that the likely benefit of allowing the petitioner to take the deposition to investigate the potential claim outweighs the burden and expense of the procedure. Tex. R. Civ. P. 202.4(a). The court order must state whether a deposition will be oral or written and may also state the time and place at which a deposition will be taken. The order must also contain any protections the court finds necessary or appropriate to protect the witness or any person who may be affected by the procedure. Tex. R. Civ. P. 202.4(b).

§ 18.25 Depositions in Foreign Jurisdictions

§ 18.25:1 Method of Taking

A written or oral deposition of a person or entity that is to be taken in another state, a foreign country, or any other foreign or domestic jurisdiction for use in Texas may be taken by—

1. notice;
2. letter rogatory, letter of request, or other such device;
3. agreement of the parties; or
4. court order.

Tex. R. Civ. P. 201.1(a). A deposition in another jurisdiction may be taken by telephone, videoconference, teleconference, or other electronic means under the provisions of rule 199. Tex. R. Civ. P. 201.1(g).

§ 18.25:2 Deposition of Party by Notice

A party may take a deposition by notice as if the deposition were being taken in Texas, except that the deposition officer may be a person authorized to administer oaths where the deposition is being taken. Tex. R. Civ. P. 201.1(b).

§ 18.25:3 Letter Rogatory

A letter rogatory is a document addressed to a foreign court requesting that a witness be examined under that court's jurisdiction. Letters rogatory are typically used to take a deposition in a country that is not a party to the Hague Evidence Convention. See section 18.25:4 below regarding letters of request. On motion by a party, the court in which an action is pending must issue a letter rogatory on just and appropriate terms, regardless of whether any other manner of obtaining the deposition is impractical or inconvenient. The letter must be addressed to the appropriate authority in the jurisdiction in which the deposition is to be taken, request and authorize that authority to summon the witness at a time and place stated in the letter for examination on oral or written questions, and request and authorize that authority to cause the witness's testimony to be reduced to writing and returned, along with any items marked as exhibits, to the party requesting the letter rogatory. Tex. R. Civ. P. 201.1(c).

§ 18.25:4 Letter of Request, Applicable Treaty, or Convention

A letter of request is essentially the same as a letter rogatory (see section 18.25:3 above), except that it is addressed to a court in a country subscribing to the Hague Evidence Convention and is in the form prescribed by the Convention. *See* Convention on the Taking of Evidence Abroad in Civil and Criminal Matters, Mar. 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444. On motion by a party, the court or clerk of court must issue a letter of request or other such device in accordance with an applicable treaty or international convention on terms that are just and appropriate. The letter or other device must be issued regardless of whether any other manner of obtaining the deposition is impractical or

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inconvenient. The letter or other device must be in the form prescribed by the treaty or convention under which it is issued, as presented by the movant to the court or clerk, and must state the time, place, and manner of the examination of the witness. Tex. R. Civ. P. 201.1(d).

§ 18.25:5 Objections to Form of Letter

A party must make any objection to the form of the device in writing and serve it on all other parties by the time set by the court or the objection is waived. Tex. R. Civ. P. 201.1(e).

§ 18.25:6 Departures from Requirements of Deposition Taken in Texas

Evidence obtained in response to a letter rogatory, letter of request, or other device need not be excluded merely because it is not a verbatim transcript, or the testimony was not taken under oath, or for any similar departure from the requirements of depositions taken within Texas under the Texas Rules of Civil Procedure. Tex. R. Civ. P. 201.1(f).

§ 18.26 Deposition by Nonstenographic Recording

§ 18.26:1 Nonstenographic Recording Generally

Any party may take an oral deposition by nonstenographic means, including videotape recording. Tex. R. Civ. P. 199.1(c).

An audiotaped deposition taken without a court reporter is typically much less expensive than a stenographic one. Many attorneys use audiotaped depositions as a postjudgment discovery tool. See section 26.2:2 in this manual.

A videotaped deposition adds an obvious visual element to the deposition process. In a closely contested case, letting the jury see the witness's behavior and reaction during the deposition could prove crucial—and favorable—to the case.

§ 18.26:2 Mechanics of Nonstenographic Deposition

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) (discussing predecessor statutes with similar language); 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).

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).

§ 18.26:3 Notice of Deposition by Nonstenographic Recording

At least five days' notice must be given to the witness and all other parties. The notice must specify the type of nonstenographic recording that will be used and whether the deposition will also be recorded stenographically. Any other party may then serve written notice designating another method for recording in addition to the method specified, at the expense of that other party unless the court orders otherwise. Tex. R. Civ. P. 199.1(c).

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§ 18.26:4 Use of Nonstenographic Deposition and Court Reporter's Transcription

A nonstenographic deposition or a written transcription of such a recording may be used to the same extent as a stenographic deposition. But the court may, for good cause shown, require that the party seeking to use the nonstenographic deposition or written transcription first obtain a complete transcript of the deposition recording from a certified court reporter. The court reporter's transcription must be made from the original or a certified copy of the deposition recording. Tex. R. Civ. P. 203.6(a).

The court reporter must deliver the original transcript to the attorney requesting the transcript, and the court reporter's certificate must include a statement that it is a true record of the nonstenographic recording. The party to whom the court reporter delivered the transcript must make the transcript available for inspection and copying by the witness or any party. Tex. R. Civ. P. 203.6(a).

§ 18.27 Deposition by Telephone or Other Remote Electronic Means

A party may take an oral deposition by telephone or other remote electronic means (for example, videoconference) after giving reasonable prior written notice of his intent to do so. A deposition taken by telephone is considered as having been taken in the district and at the place where the deponent is located when answering the questions. The officer taking the deposition may be located with the party noticing the deposition instead of with the witness if the witness is placed under oath by a person present with the witness and authorized to administer oaths in that jurisdiction. Tex. R. Civ. P. 199.1(b).

A party may attend an oral deposition in person, even if it is being taken by telephone or other remote electronic means. The party taking a deposition by telephone or other remote electronic means must make arrangements for all persons to attend by the same means. If the party noticing the deposition appears in person, any other party may appear by remote electronic means if that party makes necessary arrangements with the deposition officer and the party noticing the deposition. Tex. R. Civ. P. 199.5(a)(2).

§ 18.28 Oral Deposition

§ 18.28:1 When Deposition May Be Taken

After commencement of the action, a party may take the testimony of any person or entity by deposition on oral examination. Tex. R. Civ. P. 199.1(a). Leave of court to take an oral deposition is required only if a party seeks to take a deposition outside the discovery period. Tex. R. Civ. P. 199.2(a). See section 18.2 above regarding the discovery period.

§ 18.28:2 Time and Place

The time and place for an oral deposition must be reasonable. Depositions may be taken—

1. in the county of the witness's residence;
2. in the county where the witness is employed or regularly transacts business in person;
3. in the county of suit, if the witness is a party or a person designated by a party that is an organization;
4. in the county in which the witness was served with a subpoena or within 150 miles of service, if the witness either is not a Texas resident or is a transient person; or

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5. at another convenient place directed by the court in which the cause is pending.

Tex. R. Civ. P. 199.2(b)(2). It can be an abuse of discretion to order a deposition taken in a place contrary to that stated in the Rules of Civil Procedure. *See Wal-Mart Stores v. Street*, 754 S.W.2d 153, 155 (Tex. 1988). *But see First State Bank, Bishop v. Chappell & Handy, P.C.*, 729 S.W.2d 917, 922 (Tex. App.—Corpus Christi–Edinburg 1987, writ ref'd n.r.e.) (no abuse of discretion in ordering chairman of defendant bank to appear at deposition in place not designated by applicable rule).

If the potential for discovery abuse is very great, the trial judge must be especially sensitive to the actual need for the depositions as well as alternative means of taking them. *Dresser Industries v. Solito*, 668 S.W.2d 893, 895 (Tex. App.—Houston [14th Dist.] 1984, no writ) (order that corporate defendant produce for deposition in United States, at own expense, seven overseas witnesses whose testimony of dubious importance held to be abuse of discretion).

For a discussion of depositions in foreign jurisdictions, see section 18.25 above.

§ 18.28:3 Modification of Deposition Rules or Procedures

An agreement affecting an oral deposition is enforceable if the agreement is recorded in the deposition transcript or has been agreed to in writing as a rule 11 agreement. Tex. R. Civ. P. 191.1. See generally section 18.2:5 above regarding modification of discovery control plans.

§ 18.28:4 Time for Notice of Deposition

Reasonable notice must be given by a party proposing to take an oral deposition. Tex. R. Civ. P. 199.2(a). Whether notice is reasonable is within the court's discretion and determined on a case-by-case basis. *See Hycarbex, Inc. v. Anglo-Suisse, Inc.*, 927 S.W.2d 103, 111 (Tex. App.—Houston [14th Dist.] 1996, no writ); *Hogan v. Beckel*, 783 S.W.2d 307, 308–09 (Tex. App.—San Antonio 1989, writ denied); *Gutierrez v. Walsh*, 748 S.W.2d 27, 28 (Tex. App.—Corpus Christi–Edinburg 1988, no writ); *Bohmfalk v. Linwood*, 742 S.W.2d 518, 520 (Tex. App.—Dallas 1987, no writ).

§ 18.28:5 Contents and Service of Notice

A notice for oral deposition must state—

1. the name of the witness (see section 18.28:8 below if the witness is an organization);
2. the time and place of the deposition; and
3. whether the deposition is to be taken by telephone or other remote means and, if so, must identify the means.

Tex. R. Civ. P. 199.2(b)(1)–(3). If persons other than the witness, parties, spouses of parties, counsel, and the deposition officer are to be present, their identities must be disclosed unless separate notice is given. Tex. R. Civ. P. 199.2(b)(4), 199.5(a)(3). A notice may include a request that the witness bring documents or other tangible things with him. Tex. R. Civ. P. 199.2(b)(5); see section 18.28:7 below. The notice must be served on the witness and all parties. Tex. R. Civ. P. 199.2(a). For a notice, see form 18-3 in this chapter.

§ 18.28:6 Subpoena

The witness may be compelled to attend by being served with a subpoena under Tex. R. Civ. P. 176. If the witness is not a party but is not a hostile witness, it is good practice to notify the witness in writing that he will be receiving a subpoena and (if appropriate) to inform him of the nature of the questions to be asked at the

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deposition. If, however, the witness is a party or is retained by, employed by, or otherwise subject to the control of a party, service of the notice of deposition on the party's attorney has the same effect as a subpoena served on the witness. Tex. R. Civ. P. 199.3. See section 18.30 below regarding subpoenas.

§ 18.28:7 Request for Production (Subpoena Duces Tecum); Subpoena to Compel Attendance

The notice of deposition may include a request that the witness produce documents or other tangible things within the scope of discovery and within his possession, custody, or control. If the witness is not a party, this request must comply with Tex. R. Civ. P. 205, and the designation of materials required to be identified in the subpoena must be attached to or included in the notice. Tex. R. Civ. P. 199.2(b)(5). If a subpoena duces tecum or subpoena to compel attendance on a nonparty is required, it can be issued by an officer authorized to take depositions, the clerk of the appropriate court, or an attorney authorized to practice law in Texas. Tex. R. Civ. P. 176.4. If the witness is a party or subject to the control of a party, document requests are governed by Tex. R. Civ. P. 193 and 196. Tex. R. Civ. P. 199.2(b)(5).

§ 18.28:8 If Witness Is Organization

If an organization is named as the witness, the notice must state with reasonable particularity the matters on which examination is requested. In response, the organization named in the notice must, within a reasonable time before the deposition, designate one or more individuals to testify on its behalf and set forth for each individual designated the matters on which the individual will testify. Each such individual must testify as to matters that are known or are reasonably available to the organization. Tex. R. Civ. P. 199.2(b)(1).

§ 18.28:9 Oath of Witness

Every person whose deposition is taken by oral examination must first be placed under oath. Tex. R. Civ. P. 199.5(b).

§ 18.28:10 Examination, Cross-Examination, and Written Cross-Questions of Witness

The oral deposition generally must be conducted in the same manner as if the testimony were being obtained in court during trial. Tex. R. Civ. P. 199.5(d). This requirement is a limit on the conduct of the attorneys and the witnesses in the deposition, not on the scope of the interrogation. Tex. R. Civ. P. 199 cmt. 3. An attorney may not ask a question solely to harass or mislead the witness, for any improper purpose, or without a good-faith legal basis for asking it. Tex. R. Civ. P. 199.5(h). Written cross-questions on oral examination will be propounded to the witness by the officer authorized to take the deposition. Tex. R. Civ. P. 199.5(b).

§ 18.28:11 Court Reporter's Fee

The attorney taking the deposition of the witness is responsible (as is his firm) for paying the court reporter and will receive the original deposition from the reporter. Tex. Gov't Code § 52.059(a).

§ 18.28:12 Objections

Objections to questions during deposition are limited to "objection, leading" and "objection, form." Objections to testimony are limited to "objection, nonresponsive." These objections are waived if not stated as phrased above during the deposition. All other objections need not be made or recorded during the deposition to be later raised with the court. The objecting party must, on request by the party taking the deposition, give a clear and concise explanation of his objection, or the objection is waived. Argumen-

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tative or suggestive objections or explanations waive the objection and may be grounds for either terminating the deposition or assessing costs or other sanctions. The officer taking the deposition may not rule on objections but must record them for ruling by the court and may not fail to record testimony because an objection has been made. Tex. R. Civ. P. 199.5(e).

§ 18.28:13 Instructions Not to Answer

An attorney may instruct the witness not to answer only if necessary to preserve a privilege, comply with a court order or the rules of civil procedure, protect the witness from an abusive question or one for which an answer would be misleading, or secure a ruling on an alleged violation of the rules of civil procedure. The attorney so instructing must give a concise, nonargumentative, nonsuggestive explanation of the grounds for the instruction, if requested by the party asking the question. Tex. R. Civ. P. 199.5(f).

§ 18.28:14 Conferences between Witness and Attorney

Private conferences between the witness and his attorney during the actual taking of the deposition are improper except to determine whether a privilege should be asserted. These conferences may, however, be taken during recesses and adjournments. Failure to comply may result in the court's allowing in evidence at trial statements, objections, discussions, and other occurrences during the deposition that reflect on the credibility of the witness or the testimony. Tex. R. Civ. P. 199.5(d).

§ 18.28:15 Hearings on Objections and Assertions of Privilege

Any party may, at any reasonable time, request a hearing on an objection or assertion of privilege by an instruction not to answer or by suspension of the deposition. The party seeking to avoid discovery must present any evidence necessary to support his objection or assertion of privilege, either by testimony or by affidavits served on opposing parties at least seven days before the hearing. If the court determines that an in camera review of some or all of the requested discovery is necessary to rule, answers to the deposition questions may be made in camera, to be transcribed and sealed if the privilege is sustained, or made in an affidavit produced to the court in a sealed wrapper. Tex. R. Civ. P. 199.6.

§ 18.29 Deposition on Written Questions

§ 18.29:1 When and Where Deposition May Be Taken

Depositions on written questions may be taken outside the discovery period only by leave of court or by agreement of the parties. Tex. R. Civ. P. 200.1(a). See section 18.2 above regarding the discovery period. The rules governing location of oral depositions also govern depositions on written questions. Tex. R. Civ. P. 199.2(b), 200.1(b). See section 18.28:2 above.

§ 18.29:2 Notice

A notice of intent to take a deposition on written questions must be served on the witness and all parties at least twenty days before the deposition is taken. Tex. R. Civ. P. 200.1(a). The content of the notice must comply generally with Tex. R. Civ. P. 199.2(b). See section 18.28:5 above. The direct questions to be propounded to the witness must also be attached to the notice. Tex. R. Civ. P. 200.3(a). If additional persons besides the witness, parties, spouses of parties, counsel, employees of counsel, and the deposition officer will be present at the deposition, their identities must also be included in the notice unless separate notice is given. Tex. R. Civ. P. 199.5(a)(3). The notice may also include a request for production of documents as permitted by Tex. R.

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Civ. P. 199.2(b)(5), which governs the request, service, and response. Tex. R. Civ. P. 200.1(b).

§ 18.29:3 Subpoena

If the witness is a party or is retained by, employed by, or otherwise subject to the control of a party, service of the notice on the party's attorney has the effect of a subpoena served on the witness. Tex. R. Civ. P. 200.2. Nonparties may be compelled to testify by being served with a subpoena. Tex. R. Civ. P. 205. See section 18.30 below regarding subpoenas generally.

§ 18.29:4 Objections and Additional Questions

Within ten days after the notice and direct questions are served, any party may object to the direct questions and also serve cross-questions on all other parties. Tex. R. Civ. P. 200.3(b). Rule 200.3(b) has additional deadlines regarding objections to the cross-questions and service of redirect questions. Objections to the form of a question are waived unless asserted in accordance with rule 200.3(b). Tex. R. Civ. P. 200.3(c).

§ 18.29:5 Officers Who May Take Deposition

A deposition on written questions may be taken in Texas by a clerk of a district court, a judge or clerk of a county court, or a Texas notary public. Tex. Civ. Prac. & Rem. Code § 20.001(a). See Tex. Civ. Prac. & Rem. Code § 20.001(b)–(d) regarding persons who can take a deposition outside Texas.

§ 18.29:6 Conducting Deposition

The deposition officer must—

1. take the deposition on written questions at the time and place set out in the notice;
2. record the testimony of the witness under oath in response to the questions; and
3. prepare, certify, and deliver the deposition transcript in accordance with rule 203.

Tex. R. Civ. P. 200.4. See section 18.31 below regarding preparation, certification, and delivery of the deposition transcript.

§ 18.29:7 Use of Deposition on Written Questions

Because depositions on written questions do not allow the examining attorney to follow up on the deponent's responses or on documents the deponent has brought under a subpoena duces tecum, they are best used in situations in which the information sought is already known but needs to be proved for summary judgment or trial purposes. In collections litigation, a good use would be to prove up business records without having to bring the custodian of the records to court. A set of deposition questions for this purpose is found at form 18-6 in this chapter. Alternatively, an affidavit can be used for proving up a business record. See form 19-3 in this manual.

§ 18.30 Subpoenas

§ 18.30:1 Parties

Subpoenas are used to compel the witness's attendance at either oral or written depositions. A subpoena is not necessary to compel the attendance of a party-witness or an agent or employee subject to control of the party. For such a witness, notice of the deposition has the same effect as a subpoena. Tex. R. Civ. P. 199.3, 200.2.

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§ 18.30:2 Requirements

Every subpoena must be issued in the name of "the State of Texas" and must—

1. state the style of the suit and its cause number;
2. state the court in which the suit is pending;
3. state the date it is issued;
4. identify the person to whom it is directed;
5. state the time, place, and nature of the action required by the person to whom it is directed, as provided in rule 176.2;
6. identify the party who requested the subpoena and the party's attorney, if any;
7. state the text of rule 176.8(a); and
8. be signed by the person issuing the subpoena.

Tex. R. Civ. P. 176.1.

§ 18.30:3 Nonparties

A subpoena duces tecum orders the nonparty witness to bring documents or other tangible items under the witness's control to the deposition. The subpoena must designate with reasonable particularity the items or categories of items to be brought. Tex. R. Civ. P. 205. See form 18-4 in this chapter for a subpoena with duces tecum language. If the witness is not a party but is not a hostile witness, it is good practice to notify the witness in writing that he will be receiving a subpoena.

§ 18.30:4 Who May Issue Subpoena

The clerk of the appropriate district, county, or justice court, an attorney authorized to practice law in Texas, or an officer authorized to take depositions in Texas may issue a subpoena. Tex. R. Civ. P. 176.4.

§ 18.30:5 Subpoena to Organization

If the subpoena is directed to a corporation, partnership, association, government agency, or other organization and the matters on which examination is sought 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. 176.6(b).

§ 18.30:6 Limitations of Subpoena Power and Protection of Person Served

A person is not required to appear in a county that is more than 150 miles from where he resides or is served. This limitation does not apply to witnesses (such as a party or a party's representative) whose appearance may be compelled by notice alone under Tex. R. Civ. P. 199.3 or 200.2. Tex. R. Civ. P. 176.3(a). If the 150-mile limit impedes the taking of a necessary deposition, the attorney should arrange to conduct the deposition sufficiently close to the witness to satisfy this rule. Also, a subpoena may not be used for discovery to an extent, in a manner, or at a time other than as provided by the rules of discovery. Tex. R. Civ. P. 176.3(b). The issuing party must take reasonable steps to avoid imposing undue burden or expense on the person served. Tex. R. Civ. P. 176.7. A court may impose reasonable conditions on compliance with a subpoena, including compensating the witness for any undue hardship. Tex. R. Civ. P. 176.7; *see, e.g., BASF FINA Petrochemicals L.P. v. H.B. Zachry Co.*, 168 S.W.3d 867, 875 (Tex. App.—Houston [1st Dist.] 2004, pet. denied).

§ 18.30:7 Service and Return of Service

A subpoena may be served at any place within the state of Texas by any sheriff or constable of

Texas or any person who is not a party and is eighteen years of age or older. It must be served by delivering a copy to the witness and tendering to him any fees required by law. Tex. R. Civ. P. 176.5(a). For proof of service, see Tex. R. Civ. P. 176.5(b).

§ 18.31 Postdeposition Procedure

§ 18.31:1 Submission to Witness, Changes, and Signature

After transcription of the testimony, the deposition officer must provide the original deposition transcript to the witness or to his attorney of record if he has one. The witness is to examine and sign the transcript under oath. No erasures or obliterations are to be made to the original testimony in the transcript. Any changes must be made in writing on a separate sheet of paper, along with a statement of the witness's reasons for the changes. If the witness does not sign and return the original transcript within twenty days of its submission to him (or to his attorney of record), he is deemed to have waived his right to make any changes to his testimony. Tex. R. Civ. P. 203.1(b). These submission and signature requirements may be waived by the witness and all parties, and they do not apply to depositions on written questions or nonstenographic depositions. Tex. R. Civ. P. 203.1(c).

§ 18.31:2 Transcription, Certification, and Delivery

The officer responsible for the deposition must certify the deposition transcript. *See* Tex. R. Civ. P. 203.2. The officer must deliver the deposition transcript to the party who asked the first question appearing in the transcript and must give notice of delivery to all other parties. Tex. R. Civ. P. 203.3. For a nonstenographic deposition, delivery is made to the party requesting it. Tex. R. Civ. P. 203.3(a). The officer must serve notice of delivery on all other parties. Tex. R. Civ. P. 203.3(b).

§ 18.31:3 Exhibits

On request of a party, the original documents and things produced at the deposition must be marked for identification and annexed to the transcript by the deposition officer. The person producing the materials may produce copies instead of originals if he gives all other parties fair opportunity at the deposition to compare the copies with the originals. If the person offers originals rather than copies, the deposition officer must make copies to be attached to the original deposition transcript and return the originals to the person who produced them. The person who produced the originals must preserve them for hearing or trial and make them available for inspection or copying by any other party on seven days' notice. Copies annexed to the original transcript may be used for all purposes. Tex. R. Civ. P. 203.4.

§ 18.31:4 Inspection and Copying

On reasonable request, the party receiving the original deposition transcript or nonstenographic recording must make it available for inspection or copying by any other party to the suit. On payment of a reasonable fee, the deposition officer must furnish a copy of the deposition to any party or to the witness. Tex. R. Civ. P. 203.3(c).

§ 18.31:5 Motion to Suppress

If a deposition transcript has been delivered and notice of delivery has been given at least one day before the case is called for trial, errors and irregularities in the manner in which the testimony is transcribed, signed, delivered, or otherwise dealt with by the deposition officer are waived unless a motion to suppress all or part of a deposition is filed and served before trial commences. Tex. R. Civ. P. 203.5.

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§ 18.32 Necessity for and Form of Response

§ 18.32:1 Failure to Appear or Answer

After service of a subpoena, a witness who fails to appear for the taking of his deposition or refuses to answer a question during his deposition may incur sanctions. *See* Tex. R. Civ. P. 215.1(b); *see also Wiley v. Browning*, 670 S.W.2d 729, 731 (Tex. App.—Tyler 1984, no writ). See also part VII. in this chapter.

§ 18.32:2 Errors of Noticing Party

Reasonable attorney's fees and expenses incurred for attending a deposition may be recovered if the noticing party fails to attend and proceed or if a witness does not attend because of fault of the noticing party. Tex. R. Civ. P. 215.5.

§ 18.33 Use and Effect of Deposition

§ 18.33:1 Use

A deposition may contain helpful, admissible evidence. Additionally, a deposition is useful for exploring the knowledge of the witness for the purpose of discovering evidence and determining the need for additional investigation; it may lay the groundwork for subsequent discovery procedures (such as requests for admissions) that will establish admissible evidence or isolate and refine matters of fact that need to be tried. For a discussion of requests for admissions, see part III. in this chapter.

§ 18.33:2 Inclusion in Evidence Generally

Depositions must be read into evidence at trial, not merely filed with the court, or introduced as exhibits in their entirety to be considered part of the record on appeal. *Johnson by Johnson v. Li*, 762 S.W.2d 307, 308–09 (Tex. App.—Fort Worth 1988, writ denied); *Robertson Truck Lines v. Hogden*, 487 S.W.2d 401, 402 (Tex. App.—Beaumont 1972, writ ref'd n.r.e.). However, the deposition need not be read into the record or played in chronological order. *Jones v. Colley*, 820 S.W.2d 863, 866 (Tex. App.—Texarkana 1991, writ denied).

The proper method for introducing deposition testimony into evidence is for the practitioner to read the proffered questions in the deposition transcript while another person reads the answers from the deposition transcript from the witness stand. *See Fenn v. Boxwell*, 312 S.W.2d 536, 546 (Tex. App.—Amarillo 1958, writ ref'd n.r.e.). Nonetheless, nothing prevents offering and admitting the complete deposition transcript into evidence in the absence of an objection, even if it is not read at trial. *See Fenn*, 312 S.W.2d at 546.

All or part of a deposition may be used for any purpose in the same proceeding in which it was taken. "Same proceeding" includes a proceeding in a different court but involving the same subject matter and parties (or their representatives or successors in interest). The deposition is admissible against a party joined in the suit after the deposition was taken if the deposition is admissible under Tex. R. Evid. 804(b)(1) or the party has had a reasonable opportunity to redepose the witness and has failed to do so. Tex. R. Civ. P. 203.6(b).

§ 18.33:3 Use in Summary Judgment

Depositions properly filed with the court may be used as summary judgment evidence. Also, depositions not filed with the court clerk may be used as summary judgment evidence if copies of the material, appendixes containing the evidence, or a notice containing specific references to the discovery or specific references to other instruments are filed and served on all parties together with a statement of intent to use the

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specified discovery as summary judgment proof at least twenty-one days before the hearing if the proof is to be used to support the summary judgment or at least seven days before the hearing if the proof is to be used to oppose the summary judgment. Tex. R. Civ. P. 166a(d). Depositions properly submitted as summary judgment proof can be considered on appeal.

Conflicting inferences that can be drawn from a deposition and from an affidavit filed by the same party in opposition to a motion for summary judgment raise a fact issue precluding summary judgment. *Randall v. Dallas Power & Light Co.*, 752 S.W.2d 4, 5 (Tex. 1988) (deposition testimony cannot be given controlling effect over affidavit); *see also Highlands Insurance Co. v. Currey*, 773 S.W.2d 750, 752 (Tex. App.—Houston [14th Dist.] 1989, writ denied) (deposition of one party's witness contradicted statements in adverse party's affidavit, precluding partial summary judgment). However, in *Cantu v. Peacher*, 53 S.W.3d 5 (Tex. App.—San Antonio 2001, pet. denied), the court held that the preclusive effect depends on the nature and extent of the differences. *See also Dyer v. Shafer, Gilliland, Davis, McCollum & Ashley, Inc.*, 779 S.W.2d 474, 477 (Tex. App.—El Paso 1989, writ denied) (deposition testimony as reliable as, if not more reliable than, ex parte affidavit offered as summary judgment evidence).

[Sections 18.34 through 18.40 are reserved for expansion.]

III. Requests for Admissions

§ 18.41 Admissions Generally

§ 18.41:1 Purpose

Requests for admissions under rule 198 "primarily serve 'to simplify trials by eliminating matters about which there is no real controversy, but which may be difficult or expensive to prove.'" *Medina v. Zuniga*, No. 17-0498, 2019 WL 1868012, at *3 (Tex. Apr. 26, 2019) (quoting *Sanders v. Harder*, 227 S.W.2d 206, 208 (Tex. 1950)). Requests for admissions can also serve to authenticate or stipulate to the admissibility of evidence. *Medina*, 2019 WL 1868012, at *3 (quoting *Wheeler v. Green*, 157 S.W.3d 439, 443 (Tex. 2005)). However, requests may not be used to trap an opponent into admitting that he has no cause of action or ground of defense. *Medina*, 2019 WL 1868012, at *3 (quoting *U.S. Fidelity & Guaranty Co. v. Goudeau*, 272 S.W.3d 603, 610 (Tex. 2008)).

Many collections cases, in which the fact of the unpaid debt is not in dispute but the debtor has nonetheless filed an answer, are properly reduced to judgment by using admissions to establish the elements of the cause of action. See part III. in chapter 19 of this manual regarding summary judgments.

§ 18.41:2 Source of Rule

The requests-for-admissions rule, Tex. R. Civ. P. 198, has its source in and is almost identical to Fed. R. Civ. P. 36.

§ 18.41:3 Who May Be Served

The rule governing requests for admissions does not provide for making such requests on nonparties. *See* Tex. R. Civ. P. 198.1. *See also In re Anand*, No. 01-12-01106-CV, 2013 WL 1316436, at *3 (Tex. App.—Houston [1st Dist.] Apr. 2, 2013, no pet., orig. proceeding) (per

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curiam) (mem. op.) ("Rule 205 . . . governs discovery of nonparties . . . .").

§ 18.42 Scope of Requests for Admissions

Subject to certain limitations and protective orders, requests for admissions may inquire about any relevant matter of claim or defense, even though it may be inadmissible at trial, if the information appears reasonably calculated to lead to the discovery of admissible evidence. Tex. R. Civ. P. 192.3(a). Requests for admissions may relate to statements of opinion or of fact or of the application of law to fact, including the genuineness of any document described in the request. Tex. R. Civ. P. 198.1. For a general discussion of the scope of discovery, see part I. in this chapter.

§ 18.43 Form of Requests for Admissions

§ 18.43:1 Nature of Requests

Requests should be specific statements that the recipient is asked to admit or deny. It is generally more effective to first use a more exploratory form of discovery (such as interrogatories) to uncover and develop evidence and then use requests for admissions to establish specific matters of fact.

For pattern requests, see forms 18-8 (sworn account), 18-9 (contract or revolving credit account), 18-10 (promissory note), 18-11 (foreclosure of security interest), 18-12 (lease of personalty), and 18-13 (guaranty agreement) in this chapter.

§ 18.43:2 Format and Number of Requests

Requests are usually phrased as statements sought to be affirmed. Each request must be separately set forth. A copy of a document whose genuineness is sought to be established should be served with the request, even if a copy has already been made available. Questions should be short and simple and should lend themselves to unambiguous answers; confusing questions may lead to confusing answers that the court may construe against the proponent. The questions should address the proper subject matter for requests for admissions. *See* Tex. R. Civ. P. 198.1.

Level 1 discovery limits a party to no more than fifteen requests for admissions. Each discrete subpart of a request for admission is considered a separate request. Tex. R. Civ. P. 190.2(b)(5).

§ 18.43:3 Legal Advice or Threats

The instructions preceding the request, being a communication with an adverse party, should not contain legal advice or threats about possible consequences of not replying. See section 18.4:3 above. For a form set of instructions, see form 18-7 in this chapter.

§ 18.44 Method of Service

See sections 18.13:3 and 18.13:4 above for a discussion about serving requests for admissions.

§ 18.45 Responses

§ 18.45:1 No Response or Late Response

If a responding party fails to serve a sufficient written answer or objection on the requesting party within thirty days after service of the request or otherwise as agreed by the parties (or fifty days if the requests were served on a defendant before his answer day), each requested matter will be deemed admitted without the necessity of a court order. Tex. R. Civ. P.

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198.2(a), (c); *In re TT Fountains of Tomball, Ltd.*, No. 01-15-00817-CV, 2016 WL 3965117 (Tex. App.—Houston [1st Dist.] July 21, 2016, orig. proceeding); *Skelton v. Commission for Lawyer Discipline*, 56 S.W.3d 687, 692 (Tex. App.—Houston [14th Dist.] 2001, no pet.). The trial court has no discretion to refuse to deem the matters admitted. *Curry v. Clayton*, 715 S.W.2d 77, 79 (Tex. App.—Dallas 1986, no writ). Nevertheless, the defaulting party can file a motion to amend, withdraw, or strike previously admitted matters. *Curry*, 715 S.W.2d at 78 n.3. See section 18.46 below.

Tex. R. Civ. P. 21a extends by three days the time period for responding to requests for admissions that are served by mail. Further, Tex. R. Civ. P. 4 allows the last day of the time period to run to a day that is not a Saturday, Sunday, or legal holiday. Therefore, in a case in which the record contained evidence of mailing, a party's response to requests for admissions was timely filed on the thirty-fifth day. *Benger Builders, Inc. v. Business Credit Leasing, Inc.*, 764 S.W.2d 336, 337–38 (Tex. App.—Houston [1st Dist.] 1988, writ denied). The time for response runs from the date of mailing, not the date of receipt, of the requests. *Cherry v. North American Lloyds*, 770 S.W.2d 4, 5 (Tex. App.—Houston [1st Dist.] 1989, writ denied).

Due diligence should be exercised in seeking an extension of time to file answers to requests. *See Boyter v. M.C.R. Construction Co.*, 673 S.W.2d 938, 940 (Tex. App.—Dallas 1984, writ ref'd n.r.e.). To avoid having requests deemed admitted, a party should move for permission to file late answers and obtain an order to that effect before the time for answering has expired. Tex. R. Civ. P. 5. The court has broad discretion to refuse or grant such a motion. *See Hoffman v. Texas Commerce Bank*, 846 S.W.2d 336, 338 (Tex. App.—Houston [14th Dist.] 1992, writ denied). *But see Liberty Mutual Fire Insurance Co. v. Hayden*, 805 S.W.2d 932, 935 (Tex. App.—Beaumont 1991, no writ) (trial court should have had full evidentiary hearing to determine date party received request for admissions).

§ 18.45:2 Effect of Objections

The party seeking an admission may move for a determination of the sufficiency of an objection. Unless the court determines that an objection is justified, it must order that an answer be served. Tex. R. Civ. P. 215.4(a). Any objection must be served within the time for response. Tex. R. Civ. P. 193.2(a). See section 18.9 above regarding objections to written discovery.

§ 18.45:3 Form of Response

Unless the responding party states an objection or asserts a privilege, he must either specifically admit or deny the request or explain in detail the reasons he cannot admit or deny it. A response must fairly meet the substance of the request. The responding party may qualify an answer or deny a request in part only when good faith requires. Tex. R. Civ. P. 198.2(b).

Lack of information or knowledge is not a proper response unless the responding party states that he has made a reasonable inquiry and that the information known or easily obtainable is insufficient to enable him to admit or deny the request. An assertion that the request presents an issue for trial is not a proper response. Tex. R. Civ. P. 198.2(b).

See section 18.9 above regarding objections to written discovery and section 18.10 regarding assertions of privilege.

§ 18.45:4 Inadequate Response

The party requesting the admission may move to determine the sufficiency of answers or objections. If the court determines that an answer is inadequate, it may order the matter admitted or it may order the respondent to serve an amended

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answer. Unless the court determines that an objection is justified, it must order that an answer be served. Incomplete or evasive answers may be treated as a failure to answer and may therefore be deemed admitted. Tex. R. Civ. P. 215.4(a); *see First Title Co. of Corpus Christi v. Cook*, 625 S.W.2d 814, 818 (Tex. App.—Fort Worth 1981, writ dism'd); *see also Kansas City Title Insurance Co. v. Atlas Life Insurance Co.*, 336 S.W.2d 204, 207 (Tex. App.—Texarkana 1960, no writ). The proponent's attorney's fees and expenses in a proceeding to determine the sufficiency of answers or objections may be recoverable. *See* Tex. R. Civ. P. 215.4(b). See also section 18.45:6 below.

§ 18.45:5 Failure to Admit

The failure to serve a sufficient written answer or objection constitutes a violation of discovery. If the respondent fails to admit the genuineness of a document or the truth of a matter as requested and the proponent subsequently proves the genuineness of the document or truth of the matter, the proponent may request the court to order the respondent to pay for the reasonable expenses in making its proof, including reasonable attorney's fees. The court must make this order unless it finds that (1) the request was held objectionable, (2) the admission sought was of no substantial importance, (3) the party failing to admit had a reasonable ground to believe he might prevail on the matter, or (4) other good reason exists for the failure to admit. Tex. R. Civ. P. 215.4(b).

§ 18.45:6 Expenses

The provisions concerning the award of expenses in connection with a motion to compel are applicable to motions to determine the sufficiency of the answers or objections to requests for admissions. Tex. R. Civ. P. 215.4(a); see also section 18.83 below. Additionally, if a party fails to admit the truth of any matter or the genuineness of any document as requested under Tex. R. Civ. P. 198 and if the party requesting the admission thereafter proves the truth of the matter or the genuineness of the document, the requesting party may apply to the court for an order requiring the failing party to pay the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court is required to make the order unless the request was held objectionable under rule 193, the admission sought was of no substantial importance, the party failing to admit had a reasonable ground to believe that he might prevail on the matter, or there was other good reason for the failure to admit. Tex. R. Civ. P. 215.4(b).

§ 18.45:7 Method of Service

Responses must be served on the requesting party and on all parties of record. Tex. R. Civ. P. 191.5.

§ 18.46 Withdrawal or Amendment of Admissions

The court may permit withdrawal or amendment of admissions on a showing of good cause and a finding that the party relying on the responses will not be unduly prejudiced and that the presentation of the merits of the case will be subserved by permitting the withdrawal or amendment. Tex. R. Civ. P. 198.3. *Pitre v. Sharp*, No. 05-15-00173-CV, 2016 WL 2967826, at *3 (Tex. App.—Dallas May 13, 2016, no pet.). Good cause is established by showing the failure to respond was an accident or mistake, not intentional or the result of conscious indifference. *Marino v. King*, 355 S.W.3d 629, 633 (Tex. 2011); *Wheeler v. Green*, 157 S.W.3d 439, 442 (Tex. 2005). Undue prejudice depends on whether withdrawing an admission will delay trial or significantly hamper the opposing party's ability to prepare for trial. *Marino*, 355 S.W.3d at 633; *Wheeler*, 157 S.W.3d at 443.

The rules governing admissions are designed to bring about a fair disposition of litigation with a minimum of delay. They were never designed as traps for the unwary, nor should they be construed to deny a litigant the right to present the truth to the trier of the facts. Therefore, the right to amend answers on proper motion rests within the sound discretion of the trial court. *Stelly v. Papania*, 927 S.W.2d 620, 622 (Tex. 1996); *Pitre*, 2016 WL 2967826, at *3. That discretion may be exercised to preclude amendment if the proponent would be prejudiced. *See Ice Service Co. v. Scruggs*, 284 S.W.2d 185, 190–91 (Tex. App.—Fort Worth 1955, writ ref'd n.r.e.).

§ 18.47 Sanctions

Tex. R. Civ. P. 215 governs the sanctions applicable to discovery by requests for admissions, as well as other forms of discovery. Sanctions apply to any party abusing discovery. See part VII. below for a discussion of sanctions.

§ 18.48 Use, Effect, and Evidentiary Value of Requests and Responses

§ 18.48:1 Use and Effect

Under rule 198, admissions may be used only in the suit in which the requests were served, and in no other legal proceeding. Tex. R. Civ. P. 198.3. Admissions may be used by all parties to the suit, including parties that were joined after the admissions were made. *Jolet v. Garcia*, No. 05-97-01461-CV, 2000 WL 276906, at *3 (Tex. App.—Dallas March 15, 2000, pet. denied) (mem. op., not designated for publication). But an admission may be used against only the party making the admission. Tex. R. Civ. P. 198.3. *See also Grimes v. Jalco, Inc.*, 630 S.W.2d 282, 284 (Tex. App.—Houston [1st Dist.] 1981, writ ref'd n.r.e.), *overruled on other grounds by Medina v. Herrera*, 927 S.W.2d 597, 605 (Tex. 1996) (finding that a judicial admission by defendant that plaintiff was an employee and not an independent contractor was not binding on plaintiff). Deemed admissions may be employed as summary judgment proof. *Elkins v. Jones*, 613 S.W.2d 533, 534 (Tex. App.—Austin 1981, no writ).

A matter admitted is conclusively established as to the party making the admission unless the court permits the party to withdraw or amend the admission. Tex. R. Civ. P. 198.3. Further, a party appearing in one capacity cannot be bound by an admission sent to it in another capacity, because admissions are binding against only the party making the admission. *U.S. Fidelity & Guaranty Co. v. Goudeau*, 272 S.W.3d 603, 610 (Tex. 2008).

§ 18.48:2 Matters Deemed Admitted Automatically

Unanswered requests for admissions are automatically deemed admitted unless the court, on motion, permits their withdrawal or amendment. No motion to have the matters deemed admitted is necessary. Tex. R. Civ. P. 198.2(c), 198.3. Nonetheless, local practice may require the filing of a motion before answers are deemed admitted.

Because deemed admissions can amount to a death-penalty sanction, there are due-process limits in the application of this rule. "Absent flagrant bad faith or callous disregard for the rules, due process bars merits-preclusive sanctions." *Medina v. Zuniga*, No. 17-0498, 2019 WL 1868012, at *3 (Tex. Apr. 26, 2019) (quoting *Wheeler v. Green*, 157 S.W.3d 439, 443 (Tex. 2005)). When moving for judgment, therefore, consider supporting the deemed admissions with additional evidence as to each element in addition to facts supporting the debtor's flagrant bad faith or callous disregard toward his duty to respond. *See Cleveland v. Taylor*, 397 S.W.3d 683, 695–96 (Tex. App.—Houston [1st Dist.] 2012, pet. denied).

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Practice Note: The best practice is to refer to a court's local rules for further guidance.

§ 18.48:3 Evidentiary Effect of Deemed Admissions

Admissions, deemed or otherwise, are considered judicial admissions. *Sherman Acquisition II LP v. Garcia*, 229 S.W.3d 802, 812 (Tex. App.—Waco 2007, no pet.). Thus, matters deemed admitted cannot be controverted by live testimony, deposition testimony, or summary judgment affidavits. *Marshall v. Vise*, 767 S.W.2d 699, 700 (Tex. 1989). If a jury determines facts that are contrary to a judicial admission, the admission is controlling. *See Marshall*, 767 S.W.2d at 700 (citing *Shaw v. National County Mutual Fire Insurance Co.*, 723 S.W.2d 236, 238 (Tex. App.—Houston [1st Dist.] 1986, no writ)).

If requests are deemed admitted, the court should not allow evidence to controvert the matters taken as true. However, it is the responsibility of the party relying on the admissions to prevent controverting evidence from being used. *Marshall*, 767 S.W.2d at 700. Neither can the court ignore judicial admissions on its own motion. *Pathfinder Personnel Service v. Worsham*, 619 S.W.2d 475, 476 (Tex. App.—Houston [14th Dist.] 1981, no writ). On the other hand, a court is not bound by deemed admissions if the matters requested to be admitted are appropriately within its discretion. *See Satterfield v. Huff*, 768 S.W.2d 839, 840–41 (Tex. App.—Austin 1989, writ denied).

§ 18.48:4 Offering Admissions in Evidence

Admissions need not be introduced in evidence to be properly before the trial court or court of appeals. *Red Ball Motor Freight, Inc. v. Dean*, 549 S.W.2d 41, 43 (Tex. App.—Tyler 1977, writ dism'd w.o.j.). In order to avoid confusion and promote clarity in the records, however, it is advisable to do so. Denials and objections to requests for admissions have no probative value. *American Communications Telecommunications, Inc. v. Commerce North Bank*, 691 S.W.2d 44, 48 (Tex. App.—San Antonio 1985, writ ref'd n.r.e.). At trial, a party relying on admissions must protect the record by objecting to controverting evidence and to the submission of any issue bearing on the facts admitted. *Marshall v. Vise*, 767 S.W.2d 699, 700 (Tex. 1989). Failure to properly protect the record waives the right to rely on the controverted admissions. *See Marshall*, 767 S.W.2d at 700 (holding that party waived right to rely on admissions controverted by testimony admitted at trial without objection); *see also Acevedo v. Commission for Lawyer Discipline*, 131 S.W.3d 99, 104–05 (Tex. App.—San Antonio 2004, pet. denied) (discussing waiver of right to rely on deemed admissions in summary judgment and trial contexts).

§ 18.48:5 Admissions as Summary Judgment Evidence

Admissions are proper summary judgment evidence. *Wenco of El Paso/Las Cruces, Inc. v. Nazario*, 783 S.W.2d 663, 665 (Tex. App.—El Paso 1989, no writ); *Velchoff v. Campbell*, 710 S.W.2d 613, 614 (Tex. App.—Dallas 1986, no writ). Answers to requests for admissions, however, may be used only against the party filing the answers and may not be used by the party answering the admissions to raise fact issues to defeat a summary judgment motion. *Jeffrey v. Larry Plotnick Co.*, 532 S.W.2d 99, 102 (Tex. App.—Dallas 1975, no writ). Furthermore, neither denials to requests for admissions nor nonresponsive or self-serving responses may be used to raise a fact issue on a motion for summary judgment. *Canutillo Independent School District v. Kennedy*, 673 S.W.2d 407, 408 (Tex. App.—El Paso 1984, writ ref'd n.r.e.); *Denton Construction Co. v. Mike's Electric Co.*, 621 S.W.2d 846, 848 (Tex. App.—Fort Worth 1981, writ ref'd n.r.e.). A party who has failed to answer requests will not be allowed to present

summary judgment proof contradictory to those admissions. *Henke Grain Co. v. Keenan*, 658 S.W.2d 343, 347 (Tex. App.—Corpus Christi–Edinburg 1983, no writ).

[Sections 18.49 and 18.50 are reserved for expansion.]

IV. Interrogatories

§ 18.51 Interrogatories Generally

§ 18.51:1 Purpose

Interrogatories are written questions directed solely to a party and answered by that party under oath. Tex. R. Civ. P. 197. Interrogatories are designed to elicit the basic facts of the case and to provide mutual knowledge of all relevant facts gathered by the parties. *Texas Department of Corrections v. Herring*, 513 S.W.2d 6, 8 (Tex. 1974); *see also Hickman v. Taylor*, 329 U.S. 495, 507 (1947) (discussing the value of pretrial discovery in helping the parties understand the facts and reducing the possibility of surprise). Some of the functions formerly performed by interrogatories are now fulfilled by requests for disclosure. See part V. below regarding requests for disclosure.

§ 18.51:2 Source of Rule

The Texas interrogatory rule, Tex. R. Civ. P. 197, has its source in Fed. R. Civ. P. 33, and there is substantial similarity in the language of the two rules. However, rule 197 and other rules governing interrogatories cover a number of matters not mentioned in the federal rule, such as the following:

1. The responding party's answers, objections, and other responses must be preceded by the interrogatory. Tex. R. Civ. P. 193.1.
2. Answers, subject to any objections as to admissibility, may be used only against the party answering the interrogatory. Tex. R. Civ. P. 197.3; *Palmer v. Espey Huston & Associates*, 84 S.W.3d 345, 356 (Tex. App.—Corpus Christi–Edinburg 2002, pet. denied).
3. Answers based on public records may be supplied by specifying the records from which the answers may be derived, in such a manner as to permit the propounding party to locate and identify the records from which the answers may be ascertained as readily as can the party served. For business records, the responding party must produce the documents at the time and place stated or afford the propounding party reasonable opportunity to examine, audit, or inspect those records and to make copies, compilations, abstracts, or summaries. Tex. R. Civ. P. 197.2(c).
4. Objection may be made to portions of interrogatories.
5. Any party may request a hearing about objections. Tex. R. Civ. P. 193.4(a).

§ 18.52 Scope of Interrogatories

Interrogatories may inquire into any matter within the scope of discovery except matters covered by Tex. R. Civ. P. 195 (testifying expert witnesses). They may inquire whether the party makes a specific factual or legal contention and may ask the party to state the factual theories and describe in general the factual bases for the party's claims or defenses, but may not be used to require the party to marshal all of his avail-

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able proof or the proof the party intends to offer at trial. Tex. R. Civ. P. 197.1. Interrogatories may not ask a party to state all his legal and factual assertions. Tex. R. Civ. P. 197 cmt. 1.

So-called "fishing expeditions" are not allowed in interrogatories. *K Mart Corp. v. Sanderson*, 937 S.W.2d 429, 431 (Tex. 1996). Interrogatories requesting a party to detail all relevant knowledge and opinions of each potential witness may be improper. *Compare Housing Authority of El Paso v. Rodriguez-Yepez*, 828 S.W.2d 499, 501 (Tex. App.—El Paso) (interrogatories held to be improper), *writ denied per curiam*, 843 S.W.2d 475 (Tex. 1992), *with Gustafson v. Chambers*, 871 S.W.2d 938, 945–46 (Tex. App.—Houston [1st Dist.] 1994, no writ) (interrogatories held to be proper).

§ 18.53 Form of Interrogatories

§ 18.53:1 Nature of Interrogatories

Interrogatories should be phrased to seek specific and precise answers in response to each question. They should be neither too narrow nor overbroad. For example, a narrowly drawn interrogatory that asked for the identities of fact witnesses who had "seen, heard, or known about" an accident was strictly interpreted so as not to include a request for disclosure of any potential witness with "knowledge of relevant facts," and an undisclosed witness was allowed to testify. *Robledo v. Grease Monkey, Inc.*, 758 S.W.2d 834, 835 (Tex. App.—Corpus Christi–Edinburg 1988, no writ). An interrogatory asking for the identity of any persons with knowledge of "any fact or record relating or pertaining to this cause of action" was found to be overbroad. *Lunsmann v. Spector*, 761 S.W.2d 112, 114 (Tex. App.—San Antonio 1988, no writ).

It is a good practice to establish specific matters of fact by requests for admissions (see part III. in this chapter), which often will be propounded after the receipt of (and based on information derived from) answers to interrogatories and requests for disclosure.

For pattern interrogatories, see forms 18-15 (sworn account), 18-16 (contract or revolving credit account), 18-17 (promissory note), 18-18 (foreclosure of security interest), 18-19 (lease of personalty), and 18-20 (guaranty agreement) in this chapter.

§ 18.53:2 Format of Interrogatories

Because answers must be preceded by the interrogatories, the proponent should leave room after each question to allow the respondent to answer in the space provided. *See* Tex. R. Civ. P. 193.1. If a question relates to a document in the plaintiff's possession, it is a good practice to attach a copy to the interrogatories—even if a copy has been filed or furnished previously—to avoid confusion about the document to which the question refers.

§ 18.53:3 Number of Interrogatories

For cases controlled by level 1 discovery control plan, a party may serve no more than fifteen written interrogatories, excluding interrogatories asking a party only to identify or authenticate specific documents. Tex. R. Civ. P. 190.2(b)(3). For cases controlled by level 2, a party may serve no more than twenty-five written interrogatories, excluding interrogatories asking a party only to identify or authenticate specific documents. Tex. R. Civ. P. 190.2(b)(3). Each discrete subpart of an interrogatory is considered a separate interrogatory, but not every factual inquiry is such a discrete subpart. A "discrete subpart," generally, is one that calls for information not logically or factually related to the primary interrogatory. Tex. R. Civ. P. 190.2(b)(3), 190.3(b)(3), 190 cmt. 3; *see also Braden v. Downey*, 811 S.W.2d 922, 927–28 (Tex. 1991). The attorney should avoid using interrogatories to ask about matters covered by requests for disclosure if there is any possibility of otherwise

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exceeding the interrogatory limit. See part V. below.

The court may modify the number of interrogatories and must do so when the interest of justice requires. Tex. R. Civ. P. 190.5. See forms 18-21 and 18-22 in this chapter for a motion and order enlarging or reducing the number of interrogatories.

§ 18.53:4 Legal Advice or Threats

Interrogatories, being communications with an adverse party, should not contain legal advice or threats about possible consequences of not replying. See section 18.4:3 above. For a form set of instructions, see form 18-14 in this chapter.

§ 18.53:5 Deadline for Propounding Interrogatories

Parties may serve interrogatories no later than thirty days before the end of the discovery period. Tex. R. Civ. P. 197.1.

§ 18.54 Service and Filing of Interrogatories

§ 18.54:1 Who May Be Served

A party may serve interrogatories on any other party, adverse or not. Tex. R. Civ. P. 197.1. Interrogatories must be served on all parties of record. Tex. R. Civ. P. 191.5. Rule 197.1 has no provisions for making interrogatory requests on nonparties. *See* Tex. R. Civ. P. 197.1. *See also In re Anand*, No. 01-12-01106-CV, 2013 WL 1316436, at *3 (Tex. App.—Houston [1st Dist.] Apr. 2, 2013, no pet., orig. proceeding) (per curiam) (mem. op.) ("Rule 205 . . . governs discovery of nonparties . . . .").

§ 18.54:2 Method of Service

See sections 18.13:3 and 18.13:4 above for a discussion about service of interrogatories.

§ 18.54:3 Filing of Interrogatories

Interrogatories are not filed with the court. Tex. R. Civ. P. 191.4(a). Instead, the propounding party must keep the original or an exact copy during the pendency of the case and any related appellate proceedings begun within six months after judgment is signed, unless otherwise provided by the trial court. Tex. R. Civ. P. 191.4(d).

§ 18.55 Response

§ 18.55:1 Time for Response

The responding party must serve his written response on the requesting party within thirty days after service unless the interrogatories were served on the defendant before his answer was due. In that case, the defendant has fifty days after service to serve his response. Tex. R. Civ. P. 197.2(a).

§ 18.55:2 Contents of Response

A response must include the responding party's answers to the interrogatories. The response may include objections and assertions of privilege, as applicable. Tex. R. Civ. P. 197.2(b). Objections are discussed at section 18.9 above, and privilege is discussed at section 18.10.

§ 18.55:3 Option to Produce Records

If public records, the responding party's business records, or a compilation, abstract, or summary of those business records will supply the answer to an interrogatory and the burden of deriving or ascertaining the answer is substantially the same for the requesting party as for the responding party, the responding party may

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specify (and, if applicable, produce) those records or compilations, abstracts, or summaries. The records must be specified in sufficient detail to permit the requesting party to locate and identify the documents as readily as can the responding party. If the responding party has specified business records, he must state a reasonable time and place for examination of those records, must produce the documents at the time and place stated in the interrogatories (or as otherwise agreed by the parties or ordered by the court), and must afford the requesting party a reasonable opportunity to inspect them. Tex. R. Civ. P. 197.2(c).

§ 18.55:4 Form of Response

Each interrogatory must be answered fully in writing, based on all information readily available to the responding party or his attorney when the response is made. The response must be preceded by the question to which the answer pertains. Tex. R. Civ. P. 193.1. If the responding party's answer is based on information obtained from other persons, his answer may state that fact. Tex. R. Civ. P. 197.2(d)(1).

§ 18.55:5 Verification

Answers must be made under oath, signed, and verified by the responding party (not his agent or attorney). The party need not sign answers to interrogatories about persons with knowledge of relevant facts, fact witnesses, and legal contentions. Tex. R. Civ. P. 197.2(d). It is an abuse of discretion for the trial court to dismiss a case with prejudice for failure to comply with the verification and signature requirements, without providing reasonable notice to the responding party of the defect and an opportunity to correct it. *United States Leasing Corp. v. O'Neill, Price, Anderson & Fouchard, Inc.*, 553 S.W.2d 11, 13 (Tex. App.—Houston [14th Dist.] 1977, no writ) (interpreting former Texas Rules of Civil Procedure 215a(c)). *See also State Farm Fire & Casualty Co. v. Morua*, 979 S.W.2d 616 (Tex. 1998). Amended or supplemental responses to interrogatories must also be verified by the responding party. Tex. R. Civ. P. 193.5(b); *Morua*, 979 S.W.2d at 620. (See section 18.7 above regarding amended and supplemental responses to discovery requests.) However, waiting until trial before objecting to a lack of verification may result in waiver of the objection. *Morua*, 979 S.W.2d at 621 (objection waived after thirteen months without objection).

§ 18.55:6 Method of Service

Copies of the responses must be served on all parties of record. Tex. R. Civ. P. 191.5. See Tex. R. Civ. P. 21a regarding methods of service.

§ 18.56 Use and Effect of Interrogatories and Answers

§ 18.56:1 Use

Answers to interrogatories may be used against only the answering party. Tex. R. Civ. P. 197.3. The answers are hearsay as to other parties and should not be admitted in evidence against them following a proper and timely objection. In *Price Pfister, Inc. v. Moore & Kimmey, Inc.*, 48 S.W.3d 341, 348–49 (Tex. App.—Houston [14th Dist.] 2001, pet. denied), the court permitted the answering party to use its own answer where, in addition to the answer itself, the party offering the answer testified during cross-examination that he prepared the interrogatory answer and swore to it under oath. *See also United Services Automobile Ass'n v. Ratterree*, 512 S.W.2d 30, 33 (Tex. App.—San Antonio 1974, writ ref'd n.r.e.). Once interrogatories are admitted and read into evidence, they become testimonial evidence. *In re Marriage of Richards*, 991 S.W.2d 32, 38 (Tex. App.—Amarillo 1999, pet. dism'd) (citing *Eubanks v. Eubanks*, 892 S.W.2d 181, 181–82 (Tex. App.—Houston [14th Dist.] 1994, no writ)). *See also Bastida v. Aznaran*, 444 S.W.3d 98, 105 (Tex. App.—Dallas 2014, no

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pet.) (upholding summary judgment on evidence presented in affidavit that could have been controverted by interrogatories but was not).

On a motion for summary judgment, the nonmoving party may not resort to his own answers to the moving party's interrogatories as proof of the existence of a genuine issue of material fact. *Thurman v. Frozen Food Express*, 600 S.W.2d 369, 370 (Tex. App.—Dallas 1980, no writ); *see also Yates v. Fisher*, 988 S.W.2d 730, 731 (Tex. 1998) (per curiam). Neither may the moving party rely on his own answers to interrogatories in support of his motion for summary judgment. These answers may be used only against the party filing the answers. *Holmes v. Canlen Management Corp.*, 542 S.W.2d 199, 201 (Tex. App.—El Paso 1976, no writ).

In a multiparty case, any party may use interrogatories against the answering party. *Ticor Title Insurance Co. v. Lacy*, 803 S.W.2d 265, 266 (Tex. 1990); *Smith v. Christley*, 755 S.W.2d 525, 530 (Tex. App.—Houston [14th Dist.] 1988, writ denied). The answering party, however, is required to answer only the proponent of the interrogatories, not all parties, and he is not required to supplement the answers to interrogatories of a party who has settled, for the benefit of other parties who remain in the lawsuit. *See Austin Ranch Enterprises v. Wells*, 760 S.W.2d 703, 710 (Tex. App.—Fort Worth 1988, writ denied).

One party may rely on interrogatories and answers of another party in the same suit. *Lacy*, 803 S.W.2d at 266. Therefore, if one party asks an opponent for information, it is considered a request by all parties. A party, however, may not respond to an interrogatory seeking the identity of witnesses by referring to another party's answer to a similar interrogatory. *See American Cyanamid Co. v. Frankson*, 732 S.W.2d 648, 655 (Tex. App.—Corpus Christi–Edinburg 1987, writ ref'd n.r.e.). A supplemental answer to one party, however, may be adequate supplementation to the same inquiry propounded by another party. *See Ward v. O'Connor*, 816 S.W.2d 446, 447 (Tex. App.—San Antonio 1991, no writ) (allowing plaintiff to supplement answers to interrogatories from multiple defendants in one document titled "Supplemental to All Other Discovery").

§ 18.56:2 Inclusion in Evidence

To have probative value, answers to interrogatories must be properly offered at trial or at an appropriate hearing. *Sammons Enterprises, Inc. v. Manley*, 540 S.W.2d 751, 757 (Tex. App.—Texarkana 1976, writ ref'd n.r.e.); *Richards v. Boettcher*, 518 S.W.2d 286, 288 (Tex. App.—Texarkana 1974, writ ref'd n.r.e.).

[Sections 18.57 through 18.60 are reserved for expansion.]

V. Requests for Disclosure

§ 18.61 Purpose and Nature of Requests for Disclosure

The ability to make requests for disclosure improves efficiency; parties can make a single request for basic information common to all litigation by simply referencing the list of information and documents found in Tex. R. Civ. P. 194.2. Tex. R. Civ. P. 194.

Requests for disclosure are a hybrid of basic interrogatories and requests for production. *See* Tex. R. Civ. P. 194. They are similar to interrogatories in that the respondent may be required to

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disclose information such as the correct names of the parties, addresses and telephone numbers of persons having knowledge of relevant facts, and the legal theories and factual bases of the respondent's defenses or claims. They are similar to requests for production in that the respondent may be required to produce documents or other things, such as insurance contracts or settlement agreements. *See* Tex. R. Civ. P. 194.2.

In an expedited action, 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. Tex. R. Civ. P. 190.2(b)(6). A request for disclosure under rule 190.2 is not considered a request for production.

§ 18.62 Who May Be Served

The rule governing requests for disclosure has no provisions for serving such requests on nonparties. *See* Tex. R. Civ. P. 194.1. *See also In re Anand*, No. 01-12-01106-CV, 2013 WL 1316436, at *3 (Tex. App.—Houston [1st Dist.] Apr. 2, 2013, no pet., orig. proceeding) (per curiam) (mem. op.) ("Rule 205 . . . governs discovery of nonparties . . . .").

§ 18.63 Requesting and Using Requests for Disclosure

The procedure for submitting a request for disclosure is set out in Tex. R. Civ. P. 194.1, which simply requires that the requesting party serve another party with a written request seeking various information available under Tex. R. Civ. P. 194.2. Service of the request for disclosure must be made by the requesting party no later than thirty days before the end of the discovery period. Tex. R. Civ. P. 194.1. The party may obtain disclosure by serving the following request: "Pursuant to Rule 194, you are requested to disclose, within 30 days of service of this request, the information or material described in Rule [state rule, e.g., 194.2, or 194.2(a), (c), and (f), or 194.2(d)–(g)]." Tex. R. Civ. P. 194.1. See form 18-23 in this chapter for a sample request for disclosure. The following request may be made in an expedited action under rule 190.2: "Pursuant to Rule 190.2(b)(6), you are requested to disclose 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."

Responses to requests for disclosure should be introduced into evidence in the same manner as answers to interrogatories. No objections or assertions of work product may be made to requests for disclosure. Tex. R. Civ. P. 194.5. Responses to requests for disclosure under rule 194.2(c) and (d) that have been changed by an amended or supplemental response are not admissible and may not be used for impeachment. Tex. R. Civ. P. 194.6.

§ 18.64 Deadline for Response

Generally, the responding party must serve a written response on the requesting party within thirty days of being served with the request. However, if the request for disclosure was served on a defendant before the defendant's answer day, that defendant has fifty days from the date of service to serve his response. A response to a request for disclosure for any testifying expert under rule 194.2(f) is governed by the deadlines set out in rule 195. Tex. R. Civ. P. 194.3.

§ 18.65 Form for Response

If documents or other items are responsive to the request for disclosure, those items must ordinarily be served with the written response. If the copies are voluminous, the response must state a reasonable time and place for production of them. Otherwise, the responding party must produce the items at the time and place stated in the

request, unless the parties agree otherwise or the court orders otherwise, and must provide the requesting party a reasonable opportunity to inspect them. Tex. R. Civ. P. 194.4.

§ 18.66 No Objection or Claim of Work Product Privilege

The responding party may not object to a request for disclosure or assert a work product privilege. Tex. R. Civ. P. 194.5.

[Sections 18.67 through 18.70 are reserved for expansion.]

VI. Requests for Production

§ 18.71 Requests for Production Generally

§ 18.71:1 Purpose

Tex. R. Civ. P. 196 provides for the discovery and production of documents and things from parties. The appropriate method is to serve a request on the party from whom production is sought. If a party fails to comply with a proper request, sanctions may be sought under Tex. R. Civ. P. 215. For a discussion of sanctions, see part VII. in this chapter.

Nonparties may be compelled by subpoena to produce documents without the necessity of a court order. See Tex. R. Civ. P. 205.3 and section 18.78 below. Sections 18.72 through 18.75 pertain only to requests for production from parties.

§ 18.71:2 Use of Requests for Production

A request for production is a simple and direct method of discovering tangible things and obtaining the inspection and copying of documents. A request for production may also be used to obtain access to documents that cannot be reached by a subpoena duces tecum, but in such a case the requests must not be overly broad, and the documents sought must be properly designated in accordance with Tex. R. Civ. P. 196.1(b). See section 18.73:1 below.

§ 18.71:3 Who May Be Served

Production requests may be served on parties and in certain circumstances on nonparties. See section 18.78 below for more information on production from nonparties.

§ 18.72 Scope of Requests for Production

Subject to certain exemptions and protective orders, requests for production may seek any tangible things that appear reasonably calculated to lead to the discovery of admissible evidence; see Tex. R. Civ. P. 192 and section 18.1 above. A party may obtain discovery of the existence, description, nature, custody, condition, location, and contents of any documents and tangible things constituting or containing matters relevant to the subject matter of the action. "Documents and tangible things" include books, papers, accounts, drawings, graphs, charts, photographs, electronic or videotape recordings, data, and data compilations. A person is required to produce a document or tangible thing that is within his possession, custody, or control. Tex. R. Civ. P. 192.3(b). Actual physical possession is not required. Constructive possession is sufficient. Possession, custody, or control of an item refers to a person having physical possession or a right to possession that is equal or superior to that of the person who has physical possession. Tex. R. Civ. P. 192.7(b). A

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request may also be directed to permit entry on designated land or other property. Tex. R. Civ. P. 196.7.

§ 18.73 Form of Requests for Production

§ 18.73:1 Nature of Requests

A request for production must designate by individual item or by category the items to be produced or inspected and must describe with reasonable particularity each item and category. The request must state a reasonable time and place for production. Tex. R. Civ. P. 196.1(b). For a sample request for production, see form 18-24 in this chapter.

To obtain discovery of data or information that exists in electronic or magnetic form, the requesting party must specifically request production of electronic or magnetic data and specify the form in which he wants it produced. Tex. R. Civ. P. 196.4.

§ 18.73:2 Testing or Examination

If testing or sampling of the items is requested, the requesting party must describe the means, manner, and procedure for testing with sufficient particularity to inform the producing party of that means, manner, and procedure. Tex. R. Civ. P. 196.1(b). Testing, sampling, or examination must not extend to destruction or material alteration of an item without authorization by the court. Tex. R. Civ. P. 196.5.

§ 18.73:3 Format and Number of Requests

There is no particular format required for a request for production. The proponent, however, should keep in mind the potential for imposition of sanctions if the court finds that a request for inspection or production is "unreasonably frivolous, oppressive, or harassing" under Tex. R. Civ. P. 215.3; see part VII. in this chapter regarding sanctions.

For an expedited action (level 1) case filed after March 1, 2013, a party may serve no more than fifteen requests for production. Each discrete subpart is considered a separate request for production. Tex. R. Civ. P. 190.2(b)(4).

§ 18.73:4 Legal Advice or Threats

The request for production, being a communication with an adverse party, should not contain legal advice or threats about possible consequences for not complying. See section 18.4:3 above. For a form set of instructions, see form 18-24 in this chapter.

§ 18.73:5 Drafting Requests Narrowly

Requests should be carefully drafted so as not to be too narrow or overbroad. For example, photographs and videotapes are considered separate types of documents; therefore, a request for "all photographs" was held not to include a videotape offered into evidence at trial. *County of Dallas v. Harrison*, 759 S.W.2d 530, 531 (Tex. App.—Dallas 1988, no writ). The request must be specific and state particularly what material is requested; "all notes, records, memoranda, documents, and communications" is overbroad. *Loftin v. Martin*, 776 S.W.2d 145, 148 (Tex. 1989); *see also In re Shipmon*, 68 S.W.3d 815, 821 (Tex. App.—Amarillo 2001, orig. proceeding) (requests for documents without any limitation on time deemed overbroad on their face).

§ 18.74 Method of Service

See sections 18.13:3 and 18.13:4 above for a discussion about serving requests for production.

§ 18.75 Responses and Objections to Requests for Production

§ 18.75:1 Deadline for Answering

Responses and objections must be served within thirty days after service of the request, except that if the request is served before a defendant's answer day, that defendant may respond and object within fifty days after service of the request. Tex. R. Civ. P. 196.2(a); *see also Hobson v. Moore*, 734 S.W.2d 340, 341 (Tex. 1987) (objections not served within thirty days waived). Sanctions for failure to respond or permit discovery in accordance with rule 196 requests are discussed in part VII. in this chapter.

§ 18.75:2 Contents of Responses

Responses must be in writing and must state as appropriate, with respect to each item or category of items, that—

1. production, inspection, or other requested action will be permitted as requested;
2. the requested items are being served on the requesting party with the response;
3. production, inspection, or other requested action will occur at a specified time and place, if the responding party is objecting to the time and place of production; or
4. no items have been identified, after a diligent search, that are responsive to the request.

Tex. R. Civ. P. 196.2(b).

§ 18.75:3 Objections

Objections are discussed generally at section 18.9 above. A party objecting to production of documents on grounds of relevancy has the burden of pleading and proving that the documents are not relevant. *Valley Forge Insurance Co. v. Jones*, 733 S.W.2d 319, 321 (Tex. App.—Texarkana 1987, no writ). Relevance is determined by weighing the probative value of the information sought against the burden of production. *Independent Insulating Glass/Southwest, Inc. v. Street*, 722 S.W.2d 798, 803 (Tex. App.—Fort Worth 1987, writ dism'd); *see, e.g., Lunsmann v. Spector*, 761 S.W.2d 112, 114 (Tex. App.—San Antonio 1988, no writ) (request for copies of pleadings from all lawsuits involving defendant insurance company during past three years, in which defense asserted was same as in present case, denied as unduly burdensome; plaintiff could ascertain information from public records). Requests for production may not be used as "fishing expeditions." *Loftin v. Martin*, 776 S.W.2d 145, 148 (Tex. 1989) (request for production that fails to identify a particular type of document is overbroad); *but see Kern v. Gleason*, 840 S.W.2d 730, 736 (Tex. App.—Amarillo 1992, no writ); *Chamberlain v. Cherry*, 818 S.W.2d 201, 204–05 (Tex. App.—Amarillo 1991, no writ) (use of words "any and all" did not invalidate otherwise proper request).

Failure to present evidence of objections requires production of the documents sought. *See Wadley Research Institute v. Whittington*, 843 S.W.2d 77, 86 (Tex. App.—Dallas 1992, no writ) (responding party must locate all documents requested and specifically state objections or exemptions that justify nonproduction).

§ 18.75:4 Service of Responses and Objections

Responses must be served on all parties to the action but not filed with the court. Tex. R. Civ. P. 191.4(a), 191.5. See Tex. R. Civ. P. 21a concerning methods of service.

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§ 18.76 Production

§ 18.76:1 Production Generally

Subject to any objections stated in the response, the responding party must produce the requested documents or tangible things within the person's possession, custody, or control at the time and place stated in the request or in the response, unless otherwise agreed or ordered, and must give the requesting party a reasonable opportunity to inspect them. Tex. R. Civ. P. 196.3(a).

§ 18.76:2 Form of Production

Copies may be produced in lieu of originals unless authenticity of the original is questioned or the substitution would be unfair in the circumstances. If originals are produced, the producing party may retain the originals while the requesting party inspects and copies them. Tex. R. Civ. P. 196.3(b).

A party who produces documents or tangible things for inspection must either produce them as they are kept in the usual course of business or organize and label them to correspond with the categories in the request. Tex. R. Civ. P. 196.3(c). The producing party cannot withhold production by requiring the requesting party to inspect documents at the office of the producing party's attorney unless the documents are voluminous. *Overall v. Southwestern Bell Yellow Pages, Inc.*, 869 S.W.2d 629, 631 (Tex. App.—Houston [14th Dist.] 1994, no writ).

Special rules for production of electronic or magnetic data are set out at rule 196.4.

§ 18.76:3 Cost of Production

The expense of producing items is borne by the responding party, and the expense of inspecting, copying, and so forth is borne by the requesting party, unless otherwise ordered. Tex. R. Civ. P. 196.6.

§ 18.77 Authentication of Documents Produced

A party's production of a document in response to a request for production authenticates that document for use against that party in any pretrial proceeding or trial unless, within ten days (unless modified by the court) after the party has actual notice that the document will be used, the party objects to the authenticity of the document or any part of it, stating the specific basis for the objection. Such an objection must be either on the record or in writing and have a good-faith basis in both fact and law. An objection to the authenticity of only part of the document does not affect the authenticity of the remainder. If such an objection is made, the party attempting to use the document should be given a reasonable opportunity to establish its authenticity. Tex. R. Civ. P. 193.7. The ten-day period for objection to authenticity does not run from the date of production but from the party's actual awareness that the document will be used. Tex. R. Civ. P. 193 cmt. 7.

The requesting party may identify before trial the documents intended to be offered, triggering the ten-day deadline for objection to their authenticity. Tex. R. Civ. P. 193 cmt. 7. The following notice may also be used to trigger the objection deadline: "Pursuant to Rule 193.7, be advised that we will rely on documents produced by [producing party] in discovery in our pretrial motions and at trial."

§ 18.78 Production from Nonparties

§ 18.78:1 Nonparty Production Generally

A party may compel production of documents and other tangible items from nonparties either by subpoena or by court order. Tex. R. Civ. P. 205.1(d); 205.3. The ability of attorneys to obtain documents from nonparties by subpoena and to issue their own subpoenas (see section

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18.30:4 above) effectively gives them the power to demand production both from nonparties and parties without the need for court action.

A party may depose any person or entity. Tex. R. Civ. P. 199.1(a), 200.1(a). When requesting the mental health or medical records of a nonparty, the requesting party must serve the request on the nonparty. *See* Tex. R. Civ. P. 196.1(c). A party may gain entry on the land or other property of a nonparty to inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it. Tex. R. Civ. P. 196.7. A party may file a motion for physical or mental examination of a nonparty under the legal control of a party. Tex. R. Civ. P. 204. The rules governing requests for disclosure, interrogatories, and requests for admissions have no provisions for making such requests on nonparties. *See* Tex. R. Civ. P. 194.1, 197.1, 198.1. *See also In re Anand*, No. 01-12-01106-CV, 2013 WL 1316436, at *3 (Tex. App.—Houston [1st Dist.] Apr. 2, 2013, no pet., orig. proceeding) (per curiam) (mem. op.) ("Rule 205 . . . governs discovery of nonparties . . . .").

Special rules apply to discovery sought from financial institutions. See section 18.16 above. Subpoenas are discussed in more detail at section 18.30.

§ 18.78:2 Limitations of Subpoena

A person may not be required by subpoena to produce documents in a county that is more than 150 miles from where he resides or is served. Tex. R. Civ. P. 176.3(a). If the documents are sufficiently important and the 150-mile requirement would otherwise prevent production, the documents may be produced at a location close to the nonparty.

§ 18.78:3 Procedure

A party seeking production from a nonparty must serve on the nonparty and all parties a subpoena and notice, using "the form of notice required under the rules governing the applicable form of discovery." Tex. R. Civ. P. 205.2. Because rule 196 imposes no particular form of notice, the only guidelines are those set out in Tex. R. Civ. P. 205.3(b). See section 18.78:4 below.

The notice and subpoena must be served a reasonable time before the response is due but no later than thirty days before the end of any applicable discovery period. Tex. R. Civ. P. 205.3(a). A copy of the notice must be served on the nonparty and all parties at least ten days before the subpoena compelling production from the nonparty is served. Tex. R. Civ. P. 205.2.

§ 18.78:4 Contents of Notice

The notice must state—

1. the name of the person from whom production or inspection is sought to be compelled;
2. a reasonable time and place for the production or inspection; and
3. the items to be produced or inspected, either by individual item or category, describing each item and category with reasonable particularity and, if applicable, describing any desired testing or sampling with sufficient specificity to inform the nonparty of the means, manner, and procedure for testing or sampling.

Tex. R. Civ. P. 205.3(b).

§ 18.78:5 Response from Nonparty

The nonparty must respond to the notice and subpoena, but need not appear in person at the time and place of production unless he is also commanded to appear and give testimony, either in the same subpoena or a separate one. He must either produce the items as they are kept in the

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usual course of business or organize and label them to correspond with the categories in the request. Tex. R. Civ. P. 176.6(c), 205.3(d).

§ 18.78:6 Objections and Claims of Privilege

If the person commanded to produce documents under the subpoena wishes to object, he must do so before the time specified in the subpoena for performance. He need not comply with that part of the subpoena he has objected to unless ordered to do so by the court. The party requesting the subpoena may request such an order anytime after the objection is made. Tex. R. Civ. P. 176.6(d).

Similarly, the nonparty may withhold documents from production based on a claim of privilege, but if he does so he must comply with Tex. R. Civ. P. 193.3. *See* Tex. R. Civ. P. 176.6(c). See section 18.10 above for a discussion of privilege.

§ 18.78:7 Authentication of Document Produced

Production of a document from a nonparty authenticates the document for use against the nonparty to the same extent as a party's production of a document authenticates it for use against the party under Tex. R. Civ. P. 193.7. *See* Tex. R. Civ. P. 176.6(c). See section 18.77 above for discussion.

§ 18.78:8 Cost of Production

If the recipient of the request for production could be considered to be the custodian of the records requested, he is entitled to payment of $1 for production of those records. He is not entitled to additional fees for production of more than one record. Tex. Civ. Prac. & Rem. Code § 22.004(a). If the recipient is the defendant, a check for $1 should be attached to the request; the bank endorsement on the canceled check could provide valuable information regarding the location of the defendant's funds.

If the recipient is a nonparty but not the custodian of records, he is entitled to reasonable costs of production from the requesting party. Tex. R. Civ. P. 205.3(f).

[Sections 18.79 and 18.80 are reserved for expansion.]

VII. Sanctions

§ 18.81 Source of Rule and Purpose of Sanctions

The Texas sanctions rule, Tex. R. Civ. P. 215, is similar to Fed. R. Civ. P. 37, although the Texas rule is more expansive than the federal rule in the options provided to the trial court in the exercise of its discretionary control over discovery.

Sanctions are used in the litigation process to secure compliance with the discovery rules, to deter future violations, and to facilitate the litigation of lawsuits. *See Response Time, Inc. v. Sterling Commerce (North America), Inc.*, 95 S.W.3d 656 (Tex. App.—Dallas 2002, no pet.); *Dolenz v. Nationwide Mutual Fire Insurance Co.*, No. 14-94-01112-CV, 1996 WL 101134, at *3 (Tex. App.—Houston [14th Dist.] Mar. 7, 1996, writ denied); *Waguespack v. Halipoto*,

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633 S.W.2d 628, 631–32 (Tex. App.—Houston [14th Dist.] 1982, writ dism'd w.o.j.); *see also Downer v. Aquamarine Operators*, 701 S.W.2d 238, 242 (Tex. 1985), *cert. denied*, 476 U.S. 1159 (1986) (purpose of sanctions not only to ensure compliance with rules but also to deter abuse).

Sanctions also have been imposed to punish parties who violate discovery rules. *See Carr v. Harris County*, 745 S.W.2d 531, 532 (Tex. App.—Houston [1st Dist.] 1988, no writ). When ruling on a motion for sanctions, the trial court is not limited to considering only the violation for which sanctions are sought but may consider the entire record and other matters that have occurred throughout the litigation. *See Van Es v. Frazier*, 230 S.W.3d 770, 777–78 (Tex. App.—Waco 2007, pet. denied); *Davenport v. Scheble*, 201 S.W.3d 188, 194 (Tex. App.—Dallas 2006, pet. denied); *Tidrow v. Roth*, 189 S.W.3d 408, 412 (Tex. App.—Dallas 2006, no pet.); *Garcia Distributing, Inc. v. Fedders Air Conditioning, U.S.A., Inc.*, 773 S.W.2d 802, 806–07 (Tex. App.—San Antonio 1989, writ denied); *Larson v. H.E. Butt Grocery Co.*, 769 S.W.2d 694, 696–97 (Tex. App.—Corpus Christi–Edinburg 1989, writ denied); *First State Bank, Bishop v. Chappell & Handy, P.C.*, 729 S.W.2d 917, 921 (Tex. App.—Corpus Christi–Edinburg 1987, writ ref'd n.r.e.).

Discovery sanctions barring introduction of certain evidence for failure to timely respond to discovery requests do not survive a nonsuit; thus, such evidence is admissible in a subsequent suit between the parties on the same issue. *Schein v. American Restaurant Group, Inc.*, 852 S.W.2d 496, 497 (Tex. 1993).

§ 18.82 Abuse of Discovery

§ 18.82:1 Forms of Discovery Abuse and Sanctions Available

Abuse of the discovery process may include—

1. failure to designate an entity representative for deposition under rules 199.2(b)(1) or 200.1(b) (Tex. R. Civ. P. 215.1(b)(1));
2. failure to appear for deposition after proper notice (Tex. R. Civ. P. 215.1(b)(2)(A));
3. failure to answer oral or written deposition questions (Tex. R. Civ. P. 215.1(b)(2)(B));
4. failure to serve answers or objections to properly served interrogatories under rule 197 (Tex. R. Civ. P. 215.1(b)(3)(A));
5. failure to answer an interrogatory under rule 197 (Tex. R. Civ. P. 215.1(b)(3)(B));
6. failure to serve a written response to a properly served request for inspection under rule 196 (Tex. R. Civ. P. 215.1(b)(3)(C));
7. failure to respond that discovery will be permitted as requested or to permit discovery under a request for inspection under rule 196 (Tex. R. Civ. P. 215.1(b)(3)(D));
8. failure to comply with any person's written request for his own prior statement under rule 192.3(h) (Tex. R. Civ. P. 215.1(e));
9. failure to comply with proper discovery requests (Tex. R. Civ. P. 215.2(b));
10. failure to obey an order to provide or permit discovery, including an order under rule 204 or 215.1 (Tex. R. Civ. P. 215.2(b));
11. abuse of the discovery process in seeking, making, or resisting discovery (Tex. R. Civ. P. 215.3);
12. propounding interrogatories or requests for inspection or production

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that are "unreasonably frivolous, oppressive, or harassing" (Tex. R. Civ. P. 215.3);

13. submitting a response or answer that is "unreasonably frivolous or made for the purpose of delay" (Tex. R. Civ. P. 215.3);

14. failure to admit the genuineness of any document or the truth of the matter asserted in a request for admission and the requesting party thereafter proves the genuineness or truth of the matter (Tex. R. Civ. P. 215.4);

15. providing an evasive or incomplete answer (Tex. R. Civ. P. 215.1(c));

16. failure of the party to attend after giving notice of a deposition (Tex. R. Civ. P. 215.5(a)); and

17. failure of a witness to attend an oral deposition because of the fault of the party giving notice (Tex. R. Civ. P. 215.5(b)).

§ 18.82:2 Motion to Compel or Motion for Sanctions

Depending on the violation, a party, on reasonable notice to other parties and all other persons affected, may move for sanctions or an order compelling discovery. Tex. R. Civ. P. 215.1. However, the better practice is to seek a motion to compel before requesting sanctions. Motions or responses under rule 215 may have exhibits attached, including affidavits, discovery pleadings, or any other documents. Tex. R. Civ. P. 215.6. Like all discovery motions, these motions must contain a certificate by the movant stating that efforts to resolve the discovery dispute without the necessity of court intervention have been attempted and have failed. *See* Tex. R. Civ. P. 191.2. See section 18.84 below regarding available sanctions. See forms 18-26 through 18-28 in this chapter.

Practice Note: Some local rules require a party to include a certificate of conference with any motion filed to show either that the parties discussed the matter before the filing of the motion or that the party that filed the motion attempted to confer on the matter first but was unsuccessful.

§ 18.82:3 Court's Discretion

A trial court may, after notice and hearing, impose sanctions on any party that abuses the discovery process. Tex. R. Civ. P. 215.3. The sanctions are within that court's discretion and will be set aside only if the court clearly abused its discretion. *Bodnow Corp. v. City of Hondo*, 721 S.W.2d 839, 840 (Tex. 1986).

For a discussion of the standards for permissible sanctions under Tex. R. Civ. P. 215 within which the trial court is to exercise its discretion, see *Spohn Hospital v. Mayer*, 104 S.W.3d 878, 881–82 (Tex. 2003); *Chrysler Corp. v. Blackmon*, 841 S.W.2d 844 (Tex. 1992); and *TransAmerican Natural Gas Corp. v. Powell*, 811 S.W.2d 913 (Tex. 1991) (sanctions must be just—for example, they must relate directly to abuse found and must not be excessive). To ensure that a sanction is not excessive, the court must consider whether lesser sanctions would fully promote compliance. *Chrysler Corp.*, 841 S.W.2d at 849; *TransAmerican*, 811 S.W.2d at 917. In *TransAmerican*, the supreme court also discussed the constitutional due-process limitations on severe sanctions. *TransAmerican*, 811 S.W.2d at 917–18. Before a court may deprive a party of its right to present the merits of its case because of discovery abuse, it must determine that the party's hindrance of the discovery process justifies a presumption that its claims or defenses lack merit. *GTE Communications Systems v. Tanner*, 856 S.W.2d 725, 730 (Tex. 1993).

See section 18.84:3 below regarding the options available to the court regarding the exclusion of evidence not disclosed in discovery.

§ 18.83 Attorney's Fees and Expenses on Motion to Compel

§ 18.83:1 If Motion Granted

If a party applies for an order compelling discovery, the court must, after opportunity for a hearing and on granting the motion, require the resisting party or deponent or the party or attorney advising the conduct, or both of them, to pay the moving party's reasonable expenses incurred in obtaining the order, including attorney's fees, unless the opposition to the motion was substantially justified or other circumstances make an award of expenses unjust. The court also has discretion to apportion the reasonable expenses incurred in relation to a motion that is granted in part and denied in part. Tex. R. Civ. P. 215.1(d).

Practice Note: It is good practice to include on the proposed order a date by which the moving party's reasonable expenses must be paid by the other party and where payment must be made. Including this in a proposed order can clarify matters and avoid confusion, without having to bring the matter before the court again.

§ 18.83:2 If Motion Denied

If the motion to compel is denied, after opportunity for hearing, the court may order the moving party or the attorney advising that the motion be prosecuted to pay the opposing party or deponent the reasonable expenses incurred in opposing the motion, including attorney's fees, unless there was substantial justification for making the motion or there are other circumstances making the award unjust. The court also has discretion to apportion the reasonable expenses incurred in relation to a motion that is granted in part and denied in part. Tex. R. Civ. P. 215.1(d).

§ 18.83:3 Amount of Reasonable Expenses

In determining the amount of reasonable expenses, including attorney's fees, the court must award expenses that are reasonable in relation to the amount of work reasonably expended in obtaining an order compelling compliance or opposing a denied motion. Tex. R. Civ. P. 215.1(d). Attorney's fees are discussed in chapter 31 in this manual.

§ 18.84 Sanctions against Parties

§ 18.84:1 Proper Court

Sanctions against a party for deposition abuse may be imposed by the court in which the action is pending or any district court in the district in which the deposition is taken. For all other discovery matters, sanctions for discovery abuse are imposed by the court in which the case is pending. Tex. R. Civ. P. 215.1(a).

§ 18.84:2 Available Sanctions

If a deponent fails to appear or to be sworn or to answer a question after being directed to do so by a district court in the district in which the deposition is being taken, the failure may be considered a contempt of that court. Tex. R. Civ. P. 215.2(a).

After notice and hearing, the court in which an action is pending may enter all such orders as are just with respect to the failure to comply with proper discovery requests or failure to obey an order of the court regarding discovery. Specifically, the court may enter an order that does the following:

1. Disallows any further discovery of any kind or of a particular kind by the dis-

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obedient party. Tex. R. Civ. P. 215.2(b)(1). This sanction is particularly applicable to the abuse of "burying the adversary in paperwork" by the party seeking discovery. *See* William Wayne Kilgarlin & Don Jackson, *Sanctions for Discovery Abuse under New Rule 215*, 15 St. Mary's L.J. 767, 797 (1984).

2. Charges all or any portion of the expenses of discovery or taxable court costs, or both, against the disobedient party or the attorney advising him. Tex. R. Civ. P. 215.2(b)(2). This provision appears to permit the trial court to charge the abusing party with all reasonable expenses incurred during the entire discovery process.

3. Deems that the matters regarding which the order was made or any other designated facts will be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order. Tex. R. Civ. P. 215.2(b)(3).

4. Precludes the disobedient party from supporting or opposing designated claims or defenses or prohibits introduction of designated matters in evidence. Tex. R. Civ. P. 215.2(b)(4); *see In re T.K.D-H.*, 439 S.W.3d 473, 479 (Tex. App.—San Antonio 2014, no pet.).

5. Strikes out pleadings or parts thereof, stays further proceedings until the order is obeyed, dismisses with or without prejudice the action or proceedings or any part thereof, or renders a judgment by default against the disobedient party ("death penalty" sanction). Tex. R. Civ. P. 215.2(b)(5).

6. In lieu of or in addition to any of the foregoing orders, treats as contempt the failure to obey any orders except an order to submit to a physical or mental examination. Tex. R. Civ. P. 215.2(b)(6). For a general discussion of contempt of court, see section 26.7 in this manual.

7. Applies any of the sanctions listed above for failure to comply with a rule 204 order requiring a party to appear or produce another for examination, unless the person failing to comply shows that he is unable to appear or to produce the person for examination. Tex. R. Civ. P. 215.2(b)(7).

8. In lieu of or in addition to any of the foregoing orders, requires the party failing to obey the order or the attorney advising him, or both, to pay reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make the award unjust. Such an order shall be subject to review on appeal from the final judgment. Tex. R. Civ. P. 215.2(b)(8). Attorney's fees are discussed in chapter 31 in this manual.

Notice is essential before sanctions can be imposed. However, a party who does not receive adequate notice must specifically object to lack of notice to preserve error for appeal. *Prade v. Helm*, 725 S.W.2d 525, 527 (Tex. App.—Dallas 1987, no writ). A trial court cannot sua sponte order sanctions if there is no motion for sanctions before that court. *Zep Manufacturing Co. v. Anthony*, 752 S.W.2d 687, 689–90 (Tex. App.—Houston [1st Dist.] 1988, no writ). However, on motion, a trial court can impose sanctions even though the party has not disobeyed a formal discovery request or a discovery order. *Plorin v. Bedrock Foundation & House Leveling Co.*, 755 S.W.2d 490, 491 (Tex. App.—Dallas 1988, writ denied) (failure to comply with discovery agreement). A trial judge cannot impose sanctions for pretrial discovery abuses after the court loses plenary jurisdiction. *Faherty v.*

Knize, 764 S.W.2d 922 (Tex. App.—Waco 1989, no writ) (more than thirty days after judgment signed, no motion for new trial filed and no appeal perfected).

§ 18.84:3 Automatic Exclusion of Evidence

Failure to properly respond to, amend, or supplement a discovery response in a timely manner results in the automatic exclusion of the evidence or testimony that is the subject of the request, unless the trial court finds either good cause for the failure or that the failure will not unfairly surprise or prejudice the other parties. Tex. R. Civ. P. 193.6(a). The burden of proof is on the party seeking admission of the evidence, and the finding of good cause or lack of unfair surprise or unfair prejudice must be supported by the record. Tex. R. Civ. P. 193.6(b).

Even if the party seeking to introduce the evidence or call the witness fails to carry the burden imposed by Tex. R. Civ. P. 193.6(a), (b), the court may grant a continuance or postpone the trial to allow a response to be made, amended, or supplemented and to allow opposing parties to conduct discovery regarding any new information presented by that response. Tex. R. Civ. P. 193.6(c).

§ 18.85 Sanctions against Nonparties

§ 18.85:1 Proper Court

An application for an order for sanctions against a deponent who is not a party must be made to the court in the district in which the deposition is being taken. Tex. R. Civ. P. 215.1(a).

§ 18.85:2 Contempt of Court Sanctions

Failure to appear or to be sworn or to answer a question after being directed to do so by a district court in the district in which the deposition is being taken may be considered a contempt of that court. Tex. R. Civ. P. 215.2(a). A nonparty may be incarcerated for contempt. *See Hennessy v. Marshall*, 682 S.W.2d 340, 343 n.1 (Tex. App.—Dallas 1984, no writ). The sanction of contempt of court is applicable if a nonparty fails to comply with an order for production, inspection, copying, or photographing under rule 205.3 or an order for entry on property under rule 196.7. Tex. R. Civ. P. 215.2(c). For a general discussion of contempt of court, see section 26.7 in this manual.

§ 18.85:3 Award of Expenses

In addition to the sanctions discussed above, Tex. R. Civ. P. 215.1(d) apparently authorizes the charging of expenses and attorney's fees on motion to compel to nonparties. See section 18.83 above for discussion of expenses on motion to compel. Attorney's fees are discussed in chapter 31 in this manual.

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Form 18-1

This notice should be used to obtain discovery from a financial institution concerning its customer who is not a party to the suit. See Texas Finance Code section 59.006 regarding discovery of customer records and subsection (c), specifically, regarding requests to a nonparty. For discussion of discovery from financial institutions, see section 18.16 in this chapter. This notice should be sent by both certified and regular first-class mail.

Notice to Nonparty of Request for Financial Records

[**Date**]

[**Name and address of nonparty customer**]

Re: [**style of case**]
Cause No. [**number**]
[**designation and location of court**]

[**Salutation**]

Attached please find [**name of requesting party**]'s ("Requesting Party") proposed [**discovery request, e.g.,** Notice of Oral Deposition, Request for Production of Documents] ("Record Request") to be served on [**name of financial institution**] in accordance with Texas Finance Code section 59.006. You have the right to prevent or limit the financial institution's compliance with this Record Request by seeking an appropriate remedy, including filing a motion to quash the Record Request or a motion for a protective order. Any motion filed shall be served on [**name of financial institution**] and the Requesting Party before the date that compliance with the Record Request is required. A financial institution is not liable to its customer or another person for disclosure of a record in compliance with this section.

Before [**name of financial institution**] may release your records, you can choose to sign an authorization to release the records, as permitted by Texas Finance Code section 59.006(c)(3).

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If you do not execute the authorization form by [**date**], the Requesting Party will ask the court to inspect the requested records in chambers, as permitted by Texas Finance Code section 59.006(d). The court may order [**name of financial institution**] to produce the requested records without your consent. Thus, if you do not wish those records to be produced, you bear the burden under Texas Finance Code section 59.006(e) of preventing or limiting [**name of financial institution**]'s compliance with the Record Request. You can fulfill that burden by seeking an appropriate remedy with the court, including filing a motion to quash the Record Request or a motion for a protective order.

If you choose to authorize the Requesting Party to inspect the records, please return the enclosed authorization to me, signed and notarized, in the self-addressed, stamped envelope provided.

Sincerely yours,

____
[**Name of attorney**]

Certified Mail No. [**number**]
Return Receipt Requested

Enc. [**copy of record request**]

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Authorization to Release Financial Records

Date: ______________

To Whom It May Concern:

Re: [**name and address of nonparty customer**]

I, _________________________, authorize [**name of attorney of requesting party**] or the law firm of [**name of law firm**] or their agents to inspect the originals and to make copies of the following financial records maintained by [**name of financial institution**]:

[**List records to be produced from discovery request.**]

In making this authorization, I release [**name of financial institution**] and its officers, directors, and employees from legal responsibility or liability for releasing the requested records to the extent indicated and authorized in this document. [**Name of financial institution**] is expressly authorized to accept a copy of this authorization as though it were an original.

Information obtained by this authorization is for use in pending litigation and shall not be disseminated for any other purpose.

____
Signature

____
Printed or typed name

____
Address

____
City, state, zip

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Form 18-2

This form should be used if the nonparty customer of the financial institution fails to return a signed authorization to release financial records. In accordance with Tex. Fin. Code § 59.006(d), the court, before ordering the requested records to be produced, may inspect the records to determine their relevance to the matter before the court. The court may also order redaction of portions of the records that the court determines should not be produced and must enter a protective order preventing the records that it orders produced from being (1) disclosed to a person who is not a party to the proceeding before the court and (2) used by a person for any reason other than resolving the dispute before the court. See Texas Finance Code section 59.006 regarding discovery of customer records and subsection (d), specifically, regarding nonexecution of written consent. For discussion of discovery from financial institutions, see section 18.16 in this chapter.

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

Motion to Inspect Financial Records of Nonparty

[**Name of requesting party**], Requesting Party, requests an in camera inspection of the records described in the [**discovery request, e.g.,** Notice of Oral Deposition, Request for Production of Documents] attached as Exhibit [**exhibit number/letter**].

1. *Facts.* Pursuant to Texas Finance Code section 59.006(c), Requesting Party gave notice to [**name of nonparty customer**] of a request for financial records and a copy of the request in the manner and within the time provided by Rule 21a of the Texas Rules of Civil Procedure. [**Include if applicable:** A copy of the notice is attached as Exhibit [**exhibit number/letter**].]

Requesting Party also filed a certificate of service with the court and financial institution indicating that [**name of nonparty customer**] had been mailed or served with the notice and a copy of the request. [**Include if applicable:** A copy of the certified mail, return receipt requested card confirming service of notice in compliance with Texas Finance Code section 59.006(c)(1) on [**name of nonparty customer**] is included as Exhibit [**exhibit number/letter**].]

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Requesting Party requested written consent from [**name of nonparty customer**] authorizing the financial institution to comply with the request. [**Name of nonparty customer**] did not execute the written consent as requested.

2. *Grounds.* Pursuant to Texas Finance Code section 59.006(d), Requesting Party seeks an in camera inspection of the requested records if [**name of nonparty customer**] does not execute a written consent.

3. *Prayer.* Requesting Party prays that an order granting this motion to inspect financial records be entered to permit Requesting Party an in camera inspection of the requested records and for all further relief to which Requesting Party may be entitled.

____

[**Name**]
Attorney for [**name of requesting party**]
State Bar No.:
[**E-mail address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

> Attach exhibit(s) if applicable. Include a certificate of service (form 19-1).

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Form 18-3

This notice should be addressed to the defendant through his attorney if he is represented by one. Otherwise, the notice should be sent directly to the defendant, addressed "To: [**name of defendant**], Defendant." For a form subpoena to be issued by an attorney, see form 18-4 in this chapter. For a notice of intention to take a deposition on written questions, see form 18-5.

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

Notice of Intention to Take Oral Deposition

[with Subpoena Duces Tecum]

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 witness**] at [**address, city, state**], before a certified court reporter, commencing on [**date and time**]. [**Include the following if the witness is not an individual:** [**Name of witness**] is directed to designate the person or persons to testify on its behalf. The matters on which examination is requested are [**list matters with reasonable particularity**]. The person(s) designated by the witness must appear and testify before the officer taking this deposition at the time and place stated in this notice.]

Include the following if a subpoena duces tecum is desired.

[**Name of witness**] 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, all documents identified in the attached Exhibit [**exhibit number/letter**].

Include the following if the deposition will be transcribed nonstenographically.

This deposition will be taken by nonstenographic method of [**describe method, e.g.,** videotape recording]. The deposition [will/will not] also be recorded stenographically.

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> Include the following if persons besides the parties, attorneys, employees of the attorneys, or spouses of parties will attend.

The following persons will attend the deposition: [**name[s]**].

> Continue with the following.

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

> Attach exhibit(s) if applicable. Include a certificate of service (form 19-1).

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Form 18-4

Subpoenas can be served by any sheriff or constable in the state of Texas or by any person eighteen years old or older and not a party to the suit. Tex. R. Civ. P. 176.5(a). This form assumes that a process server other than a sheriff or constable will serve the subpoena. This form also shows the process server's certification of the date and time of service and that service was accomplished personally. Tex. R. Civ. P. 176.5(b)(2). Alternatively, the witness's signed written memorandum, showing acceptance of the subpoena, may be attached. Tex. R. Civ. P. 176.5(b)(1).

This form can order the recipient to (1) appear at a deposition; (2) appear at a deposition and produce documents or other tangible items at the deposition; or (3) produce documents or other tangible items only. Rule 176 should be read carefully before altering this form to command appearance at a hearing or trial. A notice to a nonparty to produce documents or tangible things under rule 205.3 must be served at least ten days before the subpoena compelling production is served. Tex. R. Civ. P. 205.2.

Subpoena

[with Duces Tecum Language]

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**]

Include the following if the recipient is to be deposed.

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.

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> Include the following if the recipient is to produce documents or other tangible items.

You are [further] commanded to produce and permit inspection and copying on [**date and time**] at [**address, city, state**], of the following documents or tangible things in your possession, custody, or control: [**list documents or other items**].

> Include the following if a representative of an organization is sought for deposition.

The matters on which examination is requested are: [**list matters with reasonable particularity**]. You are to designate one or more persons to testify on your behalf as to matters known or reasonably available to you.

> Continue with the following.

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.

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**]

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Serve a copy of the subpoena on all parties. File a copy with the court showing the completed return of service, signed by the process server (see Tex. R. Civ. P. 191.4(b)). If only production of documents or other tangible things is sought from a nonparty, attach a request for production (form 18-24).

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Form 18-5

This notice should be addressed to the defendant through his attorney if he is represented by one. Otherwise, the notice should be sent directly to the defendant, addressed "To: [**name of defendant**], Defendant." See Tex. R. Civ. P. 21 and 21a for service requirements in specified situations.

See section 18.29:6 in this chapter regarding the procedure for taking a deposition on written questions, and section 18.29:7 for the uses of such depositions. Form 18-6 contains pattern deposition questions for a custodian of the creditor's business records in a sworn account case.

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

Notice of Intention to Take Deposition on Written Questions

[with Subpoena Duces Tecum]

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

> Select one of the following. Select the first paragraph if the witness is an individual. Select the second paragraph if the witness is a corporation, governmental agency, partnership, association, or other organization.

Please take notice that [**name of plaintiff**], Plaintiff, intends to take the deposition by written questions of [**name of witness**] at [**address, city, state**], before [**name of court reporter or notary public**], commencing on [**date and time**], to be used in the above-entitled and -numbered cause.

Or

Please take notice that [**name of plaintiff**], Plaintiff, intends to take the deposition by written questions of [**name of witness**] at [**address, city, state**], before [**name of court reporter or notary public**], commencing on [**date and time**], to be used in the above-entitled and -numbered cause. [**Name of witness**] is instructed to designate the person or persons to testify on its behalf with regard to matters pertaining to [**describe matters with reasonable particularity**].

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The person(s) designated by the witness must appear and testify before the officer taking this deposition at the time and place stated in this notice.

Include the following if a subpoena duces tecum is desired.

[Name of witness] 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, all documents identified in the attached Exhibit **[exhibit number/letter]**.

Continue with the following.

A copy of the written questions to be asked is attached as Exhibit **[exhibit number/letter]**.

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

Attach exhibit(s) if applicable. Include a certificate of service (form 19-1).

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Form 18-6

These questions may be used to establish the authenticity of business records or to establish through the client's deposition a part or all of the claim that cannot be proved by affidavit. This form is particularly helpful if the client is out of state and it would be cumbersome or expensive to bring him to Texas to testify. For pattern interrogatories to the defendant, see forms 18-15 through 18-20 in this chapter. These questions are to be used only as a guide and cannot be considered appropriate for all litigation. Questions based on written documents should be drafted to conform to the specific terms and conditions of the documents giving rise to the creditor's claim.

These questions are for a sworn account case in which the witness can prove up the written documentation supporting the account as business records, as well as the genuineness of the debt. Questions may be added to rebut any raised or anticipated defenses. The witness is to produce and attest to the accuracy of copies of (1) the creditor's records showing what was sold to the defendant, the charges for those sales, and any payments from or credits otherwise made to the defendant's account and (2) the invoice(s) sent to defendant.

Pattern Written Deposition Questions to Prove Up Business Records

1. Please state your name.

2. State where you reside.

3. By whom are you employed, and how long have you been so employed?

4. If your answer to question number 3. named **[name of plaintiff]**, state whether or not that entity is the plaintiff in the case for which this deposition is being taken.

5. Describe the general nature of the business of your employer.

6. In what capacity are you employed by Plaintiff?

7. Describe the nature of your duties with Plaintiff.

8. Is it a part of the usual and regular course of business of Plaintiff to keep regular books, accounts, and records of all its financial transactions, accounts, and business dealings?

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9. In connection with your employment by Plaintiff, are you familiar with the books, accounts, and records kept and maintained by Plaintiff in the usual and regular course of business?

10. Do you have any personal supervision, custody, or control over the books, accounts, and records kept and maintained by Plaintiff?

11. Have you examined the books, accounts, and records kept and maintained by Plaintiff in the regular course of business?

12. Do the books, accounts, and records kept by Plaintiff in the regular course of its business show that **[name of defendant]**, Defendant, had or has an account with Plaintiff?

13. If you answered question number 12. in the affirmative, please state whether or not the entries in the books, accounts, and records of Plaintiff that show Defendant's account with Plaintiff were made in the usual and regular course of business.

14. Are entries in the books, accounts, and records of Plaintiff regularly made at, near, or shortly after the time of the transactions, acts, or events recorded by the entries?

15. Is it part of the regular course of business of Plaintiff for an employee with personal knowledge to make entries or to furnish the information for making the entries in the books, accounts, and records kept by Plaintiff in the regular course of business?

16. Are the books, accounts, and records kept by Plaintiff in the regular course of business that show Defendant's account with Plaintiff permanent records of Plaintiff?

17. Are the entries in the books, accounts, and records kept by Plaintiff in the regular course of business that show Defendant's account with Plaintiff original entries of transactions between Plaintiff and Defendant?

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18. Do the books, accounts, and records of Plaintiff kept in the regular course of business show Defendant to be indebted to Plaintiff?

19. Is it part of the regular course of business of Plaintiff in keeping its books, accounts, and records to record therein all payments, offsets, credits, and allowances chargeable against its accounts?

20. What is the amount now shown by Plaintiff's books, accounts, and records to be due to Plaintiff by Defendant after the allowance of all offsets, payments, credits, and allowances shown on those books, accounts, and records?

21. Where are these books, accounts, and records of Plaintiff kept and maintained?

22. Do you have an exact copy of the account of Defendant with Plaintiff, as shown by Plaintiff's books, accounts, and records kept in the regular course of business?

23. If you answered question number 22. in the affirmative, please state whether the copy of the account shown by the ledger sheet or other records referred to in question number 22. was prepared by you or under your personal supervision.

24. Please hand to the officer taking this deposition a copy of the ledger sheet or other record referred to in question number 23., and have the officer attach it to this deposition as Plaintiff's Exhibit [**exhibit number/letter**].

25. State whether the permanent records of Plaintiff contain any of the following invoices showing merchandise sold by Plaintiff to Defendant: [**list invoice numbers and amounts charged**].

26. Are the original invoices referred to in your answer to question number 25. a part of the books, records, and accounts of Plaintiff kept in the regular course of business?

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27. Were the original invoices referred to in your answer to question number 25. made by you or under your direct supervision?

28. Please state where the originals of the invoices referred to in your answer to question number 25. are presently located, and please state who has custody of the invoices.

29. Do you have photocopies of the original invoices referred to in your answer to question number 25.?

30. Are the photocopies of the original invoices referred to in your answer to question number 25. true and correct copies of the originals?

31. Were the photocopies of the invoices referred to in your answer to question number 25. made by you or under your direct supervision?

32. Please hand to the officer taking this deposition the true and correct copies of the invoices referred to in your answer to question number 25. and ask the officer to number them as Plaintiff's exhibits and attach them to this deposition. Please state the exhibit numbers so assigned.

33. Do the permanent records of Plaintiff show that the merchandise referred to in the invoices was sold to Defendant?

34. Was the merchandise described in the invoices delivered to Defendant?

35. Please state how and when the merchandise was delivered to Defendant.

36. Please state where the merchandise was delivered to Defendant.

37. Please state how the merchandise was ordered from Plaintiff.

38. What amount of money, if any, did Defendant agree to pay to Plaintiff for the merchandise?

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39. Based on your experience, what, in your opinion, was the reasonable market value of the merchandise?

40. Was a statement showing the amount owed to Plaintiff by Defendant sent to Defendant?

41. If you answered question number 40. in the affirmative, please state the date or the approximate date on which such a statement was sent to Defendant.

42. To what address was that statement sent?

43. How was that statement sent?

44. If your answer to question number 43. was that the statement was sent by mail, please state whether the envelope containing the statement bore the correct amount of postage to reach the addressee.

45. Please state whether the envelope containing the statement referred to in question number 40. was properly addressed, sealed, and mailed in the usual course of business of Plaintiff.

46. Did the envelope referred to in question number 45. bear the name and return address of Plaintiff?

47. Was the envelope containing the statement referred to in question number 40. returned to Plaintiff by the United States Postal Service as being unclaimed or undelivered or for any other reason?

Ensure that the deposition officer has copies of all the exhibits to be propounded to the witness.

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Form 18-7

Attach to this form a copy of the facts requested to be admitted. For pattern requested admissions, see forms 18-8 through 18-13 in this chapter. This form is addressed to the defendant through his attorney if he is represented by one. Otherwise, the notice should be sent directly to the defendant, addressed "To: [**name of defendant**], Defendant." This form assumes that the requests for admissions are being served on the defendant after he has answered. Requests for admissions are discussed generally in part III. in this chapter.

The requested admissions listed in forms 18-8 through 18-13 are to be used only as a guide and cannot be considered appropriate for all litigation. These pattern sets include elements of more commonly encountered situations. Requested admissions based on written documents should be drafted to conform to the specific terms and conditions of the documents giving rise to the creditor's claim.

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

Plaintiff's Request for Admissions

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

Pursuant to rule 198 of the Texas Rules of Civil Procedure, you are requested to admit the truth of each of the relevant matters stated in the attached list of facts requested to be admitted [**include if applicable:** and to admit the genuineness of each of the relevant documents described in and exhibited with the attached requested admissions].

Each of the matters of which an admission is requested will be deemed admitted unless, within thirty days after service, you deliver or cause to be delivered to me a statement denying specifically each matter of which an admission is requested, objecting to the admission and stating the reason(s) for your objection, or stating in detail the reason(s) you cannot truthfully admit or deny the matter.

Please note that if, after you submit your responses to these requests for admissions, you learn that any such response was either incomplete when made, or, although complete and correct when made, it is no longer complete and correct, you must amend or supplement your

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response reasonably promptly after you discover the necessity for such a response. Any amended or supplemental response made less than thirty days before trial will be presumed not to have been made reasonably promptly. A failure to make, amend, or supplement a response in a timely manner may result in your not being able to introduce into evidence the material or information not timely disclosed.

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

Attach list of facts requested to be admitted. Include a certificate of service (form 19-1).

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Form 18-8

For a general discussion of the action on a sworn account, see section 14.21 in this manual.

Pattern Requests for Admissions—Sworn Account

1. Admit or Deny

that Plaintiff sold to Defendant the goods, wares, merchandise, or services described in the invoice attached as Exhibit [**exhibit number/letter**].

Answer:

2. Admit or Deny

that on [**date**], Plaintiff sold to Defendant the goods, wares, merchandise, or services described in the statement of account attached as Exhibit [**exhibit number/letter**].

Answer:

3. Admit or Deny

that Defendant received the goods, wares, merchandise, or services described in the invoice referred to in request number 1.

Answer:

4. Admit or Deny

that Defendant accepted the goods, wares, merchandise, or services delivered by Plaintiff and referred to in request number 1.

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Answer:

5. *Admit or Deny*

that the goods, wares, merchandise, or services referred to in request number 1. were delivered to Defendant by Plaintiff in the quantities shown on the attached Exhibit [**exhibit number/ letter**].

Answer:

6. *Admit or Deny*

that the price[s] charged for the goods, wares, merchandise, or services referred to in request number 1. [was/were] the price[s] agreed to by Defendant.

Answer:

7. *Admit or Deny*

that the balance shown on the invoices referred to in request number 1. represents the value of the goods, wares, merchandise, or services delivered to Defendant by Plaintiff.

Answer:

8. *Admit or Deny*

that the prices charged for the goods, wares, merchandise, or services referred to in request number 1. were the usual and customary prices therefor at the time when delivered and in the county where delivered.

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Answer:

9. Admit or Deny

that the principal amount due to Plaintiff from Defendant for the goods, wares, merchandise, or services referred to in request number 1. was $[**amount**] as of the date of filing of Plaintiff's original petition.

Answer:

10. Admit or Deny

that except for any credits or payments shown on the attached Exhibit [**exhibit number/letter**], Defendant has failed to pay the amount due Plaintiff on the account that is the subject of this suit.

Answer:

11. Admit or Deny

that on [**date**], Plaintiff presented to Defendant a claim for payment of the outstanding balance referred to in request number 9.

Answer:

12. Admit or Deny

that the goods, wares, merchandise, or services received by Defendant from Plaintiff conform to all representations and warranties made, if any.

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Answer:

13. Admit or Deny

that the goods, wares, merchandise, or services referred to in request number 1. were never rejected, disputed, or returned by Defendant.

Answer:

Attach exhibit(s).

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Form 18-9

This form is for an action on a written contract or revolving credit agreement. For a general discussion of the action on a written contract, see section 14.22 in this manual; see section 14.24 regarding revolving credit agreements. With modification, this sample set is suitable for use in actions on an oral contract; see section 14.23.

Pattern Requests for Admissions—Contract or Revolving Credit Agreement

1. Admit or Deny

that on or about [**date**], Plaintiff and Defendant entered into a written contractual agreement.

Answer:

2. Admit or Deny

that the document, a copy of which is attached as Exhibit [**exhibit number/letter**], is a genuine, true, and correct copy of the contractual agreement between Plaintiff and Defendant referred to in request number 1.

Answer:

3. Admit or Deny

that Plaintiff performed the acts described in the contractual agreement referred to in request number 1. of delivering to Defendant the goods, wares, merchandise, or services described in the agreement.

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Answer:

4. *Admit or Deny*

that under the contractual agreement referred to in request number 1., Defendant has made payments totaling $[**amount**].

Answer:

5. *Admit or Deny*

that on [**date**], under the terms of the contractual agreement, a copy of which is attached as Exhibit [**exhibit number/letter**], the principal amount due on the agreement referred to in request number 1. was $[**amount**].

Answer:

6. *Admit or Deny*

that Defendant received the contractual agreement, a copy of which is attached as Exhibit [**exhibit number/letter**].

Answer:

7. *Admit or Deny*

that on [**date**], Plaintiff presented to Defendant a claim for payment of the outstanding balance stated in request number 5.

Answer:

Attach exhibit(s).

Form 18-10

For a general discussion of the action on a promissory note, see section 14.25 in this manual. If foreclosure of the security interest is sought, combine these admissions with those at form 18-11.

Pattern Requests for Admissions—Promissory Note

1. Admit or Deny

that the document attached as Exhibit [**exhibit number/letter**] is a true and genuine copy of a promissory note.

Answer:

2. Admit or Deny

that the document attached as Exhibit [**exhibit number/letter**] was executed by Defendant [or by an agent of Defendant with full authority to bind Defendant to its terms].

Answer:

3. Admit or Deny

that Defendant received value in exchange for the promissory note referred to in request numbers 1. and 2. [**if necessary, set out the nature of the "value" given, e.g.,** by paying cash to Defendant in the amount stated in the promissory note].

Answer:

4. Admit or Deny

that by the execution of the promissory note referred to in request numbers 1. and 2., Defendant unconditionally promised to pay $[**amount**] to the order of Plaintiff.

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Answer:

5. *Admit or Deny*

that Plaintiff is the owner of the promissory note referred to in request numbers 1. and 2.

Answer:

6. *Admit or Deny*

that Plaintiff is the holder of the promissory note referred to in request numbers 1. and 2.

Answer:

7. *Admit or Deny*

that the promissory note referred to in request numbers 1. and 2. is the basis for this suit.

Answer:

8. *Admit or Deny*

that no payments have been made to retire the principal or accrued interest on the promissory note referred to in request numbers 1. and 2. for which Defendant has not been given credit.

Answer:

9. *Admit or Deny*

that the debt evidenced by the promissory note referred to in request numbers 1. and 2. is now due and payable.

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Answer:

10. Admit or Deny

that on [**date**], the date this suit was filed, the amount of $[**amount**] was due to Plaintiff as principal on the promissory note referred to in request numbers 1. and 2.

Answer:

11. Admit or Deny

that on [**date**], the date this suit was filed, the amount of $[**amount**] was due to Plaintiff as accrued interest on the promissory note referred to in request numbers 1. and 2.

Answer:

Attach exhibit(s).

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Form 18-11

These requested admissions should be used with the requests for admissions for a promissory note at form 18-10 if the creditor has a security interest in collateral to foreclose. For a general discussion of the action to foreclose a security interest, see section 14.28 in this manual. See also section 14.29 for discussion of a deficiency suit.

Tex. Bus. & Com. Code § 9.203(b)(1) requires that, for a security interest to attach, value must be given. Request number 2. should be altered as appropriate if "value" other than consideration given to the defendant is involved.

Pattern Requests for Admissions—Foreclosure of Security Interest or Deficiency Judgment

1. Admit or Deny

that Defendant executed the original security agreement, a copy of which is attached as Exhibit [**exhibit number/letter**].

Answer:

2. Admit or Deny

that Defendant received valuable consideration for the execution of the security agreement.

Answer:

3. Admit or Deny

that Plaintiff is the owner of the security interest in the collateral described in the security agreement.

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Answer:

4. Admit or Deny

that Defendant executed the original financing statement, a copy of which is attached as Exhibit [**exhibit number/letter**].

Answer:

5. Admit or Deny

that the debt described in the security agreement has not been paid in full by Defendant.

Answer:

6. Admit or Deny

that on the date of the execution of the security agreement, Defendant owned the collateral described in it.

Answer:

7. Admit or Deny

that no other person or entity has a claim to or right to the collateral described in the security agreement.

Answer:

8. Admit or Deny

that no other person or entity has a lien on the collateral described in the security agreement.

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Answer:

9. *Admit or Deny*

that Defendant has not performed all covenants and conditions contained in the security agreement.

Answer:

Include requests 10.–12. if applicable.

10. *Admit or Deny*

that Defendant received both notice of intent to accelerate and notice of acceleration from Plaintiff, copies of which are attached as Exhibits [**exhibit numbers/letters**].

Answer:

11. *Admit or Deny*

that the default referred to in the notices attached as Exhibits [**exhibit numbers/letters**] has not been cured or corrected by Defendant.

Answer:

12. *Admit or Deny*

that Defendant, to secure payment to Plaintiff of an obligation owed by Defendant, delivered the collateral described in the security agreement.

Answer:

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Include requests 13.–15. for a deficiency suit.

13. Admit or Deny

that the collateral was repossessed lawfully.

Answer:

14. Admit or Deny

that the collateral was disposed of in a commercially reasonable manner by [public/private] sale.

Answer:

15. Admit or Deny

that after the disposition of the collateral and all other credits and offsets applicable to the obligation secured by the security agreement, the amount of $[**amount**] remains due on that obligation.

Answer:

Attach exhibit(s).

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Form 18-12

For a general discussion of the action on a lease of personal property, see section 14.26 in this manual.

Pattern Requests for Admissions—Lease of Personal Property

1. Admit or Deny

that on or about [**date**], Plaintiff and Defendant entered into a written contractual agreement entitling Defendant to the use and enjoyment of [**describe leased personal property**] for an initial period of [**number**] months.

Answer:

2. Admit or Deny

that the document attached as Exhibit [**exhibit number/letter**] is a genuine, true, and correct copy of the agreement referred to in request number 1.

Answer:

3. Admit or Deny

that the document attached as Exhibit [**exhibit number/letter**] contains all the terms and conditions agreed to by and between Plaintiff and Defendant with respect to the lease of the personal property described in request number 1.

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Answer:

4. *Admit or Deny*

that under the terms of the agreement referred to in request number 1., Defendant was obligated and bound to pay to Plaintiff the total amount of $[**amount**], which was to be paid in [**number**] equal monthly installments of $[**amount**].

Answer:

5. *Admit or Deny*

that Defendant has made only [**number**] of the monthly payments called for by the agreement referred to in request number 1.

Answer:

6. *Admit or Deny*

that the balance due to Plaintiff by Defendant under the agreement referred to in request number 1. is $[**amount**] as of [**date**].

Answer:

7. *Admit or Deny*

that Plaintiff has declared Defendant to be in default under the terms of the agreement referred to in request number 1. and has called for the payment of the outstanding balance.

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Answer:

8. Admit or Deny

that the agreement referred to in request number 1. was not subject to cancellation by any party except as expressly provided for in the agreement.

Answer:

9. Admit or Deny

that the Defendant acquired no right, title, or interest in the personal property described in request number 1. except as expressly stated in the agreement referred to in request number 1.

Answer:

10. Admit or Deny

that the property leased by Defendant under the agreement referred to in request number 1. has performed and operated in accordance with any representations or warranties made by or on behalf of Plaintiff with respect to the suitability or durability of the property.

Answer:

11. Admit or Deny

that Plaintiff performed all its obligations under the agreement referred to in request number 1.

Answer:

Attach exhibit(s).

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Form 18-13

For a general discussion of the action on a guaranty, see section 14.31 in this manual.

Pattern Requests for Admissions—Guaranty Agreement

1. Admit or Deny

that on or about [**date**], Defendant executed and delivered to Plaintiff a written contractual agreement.

Answer:

2. Admit or Deny

that the document attached as Exhibit [**exhibit number/letter**] is a true and correct copy of the agreement referred to in request number 1.

Answer:

3. Admit or Deny

that on or about [**date**], [**name of person or entity incurring debt whose liability was guaranteed**] executed a [**describe underlying obligation guaranteed by defendant**] in the amount of $[**amount**], a copy of which is attached as Exhibit [**exhibit number/letter**].

Answer:

4. Admit or Deny

that under the terms of the agreement referred to in request number 1., Defendant unconditionally guaranteed the payment of the obligation referred to in request number 3.

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Answer:

5. *Admit or Deny*

that there is presently due on the obligation referred to in request number 3. the principal amount of $[**amount**], plus accrued interest as provided for in the debt agreement.

Answer:

6. *Admit or Deny*

that the instrument referred to in request number 1. has never been revoked by Defendant and remains in full force and effect.

Answer:

7. *Admit or Deny*

that Plaintiff is the present owner and holder of the obligation referred to in request number 3.

Answer:

8. *Admit or Deny*

that on [**date**], Plaintiff presented to Defendant a claim for payment of the outstanding balance stated in request number 5.

Answer:

Attach exhibit(s).

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Form 18-14

Attach a copy of the interrogatories to this form. Pattern interrogatories are at forms 18-15 through 18-20 in this chapter.

If the defendant is a corporation or other entity, two sets of interrogatories should be prepared. One set should be addressed to the corporation and the other set to a named individual, so that if the defendant fails to answer the interrogatories and the remedy of contempt rather than some other sanction is desired, the court will be able to order the incarceration of the noncomplying individual. See section 26.4:3. The interrogatories should be addressed to the defendant through his attorney if he is represented by one. If the defendant is not represented, the interrogatories should be sent directly to him, addressed "To: [**name of defendant**], Defendant."

The pattern interrogatories listed in forms 18-15 through 18-20 are to be used only as a guide and cannot be considered appropriate for all litigation. These sample sets include elements of commonly encountered situations. Interrogatories based on written documents should be drafted to conform to the specific terms and conditions of the documents giving rise to the creditor's claim. Information developed by the use of these questions may suggest further questions to be propounded in subsequent interrogatories or by other kinds of pretrial discovery.

For cases controlled by a level 1 discovery control plan, no more than fifteen written interrogatories can be served on any party. Unless the court has authorized additional interrogatories, no more than twenty-five written interrogatories can be served on a party in a level 2 case. See section 18.53:3. Therefore, the attorney should plan and draft interrogatories with caution and use the requests for disclosure allowed by Tex. R. Civ. P. 190.2(b)(6) and 194 to elicit basic information. This form assumes that requests for disclosure have already been served on the defendant or are being served contemporaneously with these interrogatories.

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

Plaintiff's Written Interrogatories

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

Pursuant to rule 197 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.

Please note that if, after you submit your responses to these interrogatories, you learn that any such response was either incomplete when made, or, although complete and correct

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when made, it is no longer complete and correct, you must amend or supplement your response reasonably promptly after you discover the necessity for such a response. Any amended or supplemental response made less than thirty days before trial will be presumed not to have been made reasonably promptly. A failure to make, amend, or supplement a response in a timely manner may result in your not being able to introduce into evidence the material or information not timely disclosed.

Definitions

As used in these interrogatories, the following definitions apply:

"You" or "your" refers to the person answering these interrogatories.

"Defendant" refers to the named Defendant, its officers, agents, representatives, and employees.

"Identify," with regard to a person, means to provide the following: (1) the person's full name; (2) any other names the person uses or has used in the past; (3) the person's residential address and telephone number; (4) the person's business address(es) and telephone number(s); (5) the person's employer and job title; (6) if the person is a former employee of Defendant, the person's last job title while so employed, and the date of termination; and (7) if the person is not an employee of Defendant but has some other connection with Defendant, for example, agent, independent contractor, officer, director, or customer, the person's connection with Defendant.

"Identify," with regard to a document, means to describe it with sufficient particularity so that a person never having seen it could comply with the requirements of rule 196 of the Texas Rules of Civil Procedure when designating the document in a request for production.

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____

[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).

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Form 18-15

For a general discussion of the sworn account procedure, see section 14.21 in this manual.

Pattern Interrogatories—Sworn Account

1. Identify the person answering these interrogatories.

2. State the manner of organization of Defendant—for example, corporation, partnership, limited partnership, sole proprietorship, or individual.

   a. If Defendant is a corporation, identify each officer and director.

   b. If Defendant is a partnership, identify each partner and state whether he is a general or limited partner.

3. Did Defendant receive the goods, wares, merchandise, or services described in each invoice attached as Exhibit [**exhibit number/letter**]? If not, identify separately by invoice which goods, wares, merchandise, or services were not received.

4. Did Defendant reject, dispute, or return any of the goods, wares, merchandise, or services received by Defendant and described in Exhibit [**exhibit number/letter**]? If so, state the date and manner of that rejection, dispute, or return. Alternatively, if you will do so without a formal request to produce, attach a genuine copy of each document or other written memorandum in support thereof; if you will not, identify each item of documentation or memorandum.

5. State the date, amount, and nature of every payment, credit, or offset against the account made the subject of Plaintiff's original petition that Defendant alleges Plaintiff has not allowed to Defendant. If you will do so without a request to produce, attach to your answer a copy of each document or written memorandum in support of each such payment,

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credit, or offset (for example, front and back of each check or cash receipt evidencing each payment) claimed by Defendant; or if you will not, state the date, amount, and nature of each such payment, credit, or offset and identify each piece of supporting documentation.

6. State whether Defendant or Defendant's attorney on behalf of Defendant has ever denied, either orally or in writing, the account made the subject of Plaintiff's original petition and state whether Defendant or Defendant's attorney on behalf of Defendant has ever claimed, either orally or in writing, any payment, credit, or offset to the account. If any such communication was in writing and if you will do so without a formal request to produce, attach a genuine copy of each writing; or if you will not, identify each writing. If any such communication was oral, state the date and substance of the communication, state the manner of its delivery, and state the name of the agent, representative, or employee of Plaintiff to whom such communication was directed.

7. Did Plaintiff present to Defendant a demand for payment of the claim made the subject of this suit? If so, state the date it was received, the name of the person receiving it, the relationship to Defendant of the person receiving it, and the amount of the demand.

8. Identify all persons whom you intend to call as witnesses at trial, other than rebuttal or impeaching witnesses the necessity of whose testimony cannot reasonably be anticipated before trial.

9. If Defendant contends or believes that the debt that is the subject of this suit is the obligation of any person or entity other than Defendant, identify such other persons or entities and state the fact and identify the documents on which that contention or belief is based.

Attach exhibit(s).

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Form 18-16

For a general discussion of the action on a written contract, see section 14.22 in this manual. With modification, this sample set is suitable for use in actions on an oral contract (section 14.23) or on a consumer revolving credit account (section 14.24).

Pattern Interrogatories—Contract or Consumer Revolving Credit Account

1. Identify the person answering these interrogatories.

2. State the manner of organization of Defendant—for example, corporation, partnership, limited partnership, sole proprietorship, or individual.

   a. If Defendant is a corporation, identify each officer and director.

   b. If Defendant is a partnership, identify each partner and state whether he is a general or limited partner.

3. Did Defendant enter into a written contractual agreement with Plaintiff on or about [**date**]?

4. Is the document attached as Exhibit [**exhibit number/letter**] a true and correct copy of the agreement referred to in interrogatory number 3.? If it is not, state all the terms of every agreement relating to the subject matter of this lawsuit. Alternatively, if you will do so without a formal request to produce, attach a genuine copy of each document relating the terms; or if you will not, identify each such agreement.

5. Did Plaintiff perform the acts described in the agreement referred to in interrogatory number 3.? If not, specifically describe the acts Plaintiff did not perform as required by the agreement.

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6. If Defendant contends or believes that the balance claimed by Plaintiff is not correct, state all the facts and identify all the documents on which that contention or belief is based.

7. Did Defendant receive the document attached as Exhibit [**exhibit number/letter**]? If so, state the date it was received, the name of the person receiving it, and the relationship to Defendant of the person receiving it.

8. Did Plaintiff present to Defendant a demand for payment of the claim that is the subject of this suit? If so, state the date it was received, the name of the person receiving it, the relationship to Defendant of the person receiving it, and the amount of the demand by Plaintiff.

9. Identify all persons whom you intend to call as witnesses at trial, other than rebuttal or impeaching witnesses the necessity of whose testimony cannot reasonably be anticipated before trial.

10. If Defendant contends or believes that the debt that is the subject of this suit is the obligation of any person or entity other than Defendant, identify such other persons or entities and state the facts and identify the documents on which that contention or belief is based.

Attach exhibit(s).

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Form 18-17

For a general discussion of the action on a promissory note, see section 14.25 in this manual. If foreclosure of a security interest is sought, combine these interrogatories with those at form 18-18.

Pattern Interrogatories—Promissory Note

1. Identify the person answering these interrogatories.

2. State the manner of organization of Defendant—for example, corporation, partnership, limited partnership, sole proprietorship, or individual.

   a. If Defendant is a corporation, identify each officer and director.

   b. If Defendant is a partnership, identify each partner and state whether he is a general or limited partner.

3. Is the document attached as Exhibit [**exhibit number/letter**] (the "Note") a true and genuine copy of a promissory note?

4. If the answer to interrogatory number 3. is not affirmative, state clearly each detail in the Note that Defendant contends makes it something other than a promissory note.

> Practice Note: As each discrete subpart is considered a separate interrogatory, interrogatory number 5. may be construed as eight interrogatories. Interrogatories are limited to fifteen in a level 1 case.

5. With reference to the Note, state or identify:

   a. The party signing the Note.

   b. The date the Note was signed.

   c. The place where the Note was signed.

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d. Each person present at the time the Note was signed.

e. The person to whom the Note was delivered.

f. The date and amount of each payment made under the Note, the form of each payment, the party making each payment, and the party to whom each payment was made.

g. The principal balance due on the date of last payment under the terms of the Note, and the mathematical computations used to compute the amount.

h. The date, amount, and nature of each offset or credit Defendant claims against the balance due.

6. Was the Note signed by Defendant?

7. If the answer to interrogatory number 6. is not affirmative, state whether Defendant knows the individual whose signature appears on the Note, then state the nature of every relationship Defendant has had with that individual, the inclusive dates of each such relationship, and the title or terminology that best describes each such relationship.

8. By reason of the execution of the Note, did Defendant unconditionally promise to pay the sum of $[**amount**] to Plaintiff?

9. If the answer to interrogatory number 8. is not affirmative, state each and every reason for executing the Note and whether you contend or believe the obligations created were satisfied.

10. If you do not believe that Plaintiff is the owner and/or holder of the Note, identify the individual, corporation, or other business entity that Defendant contends is the present owner and/or holder of the Note.

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11. If the answer to interrogatory number 10. is not Plaintiff, state the date on which the named individual or entity acquired the Note and the manner by which the Note was acquired.

12. Has Defendant made any payments to retire the principal or accrued interest on the Note?

13. If the answer to interrogatory number 12. is affirmative, state the date, method, and amount of each such payment made by Defendant and state the name and business and residence addresses of each person or entity to whom each such payment was made.

14. Has the Note been accelerated by Plaintiff?

15. Identify all persons whom you intend to call as witnesses at trial, other than rebuttal or impeaching witnesses the necessity of whose testimony cannot reasonably be anticipated before trial.

Attach exhibit(s).

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Form 18-18

For a general discussion of the action to foreclose a security interest, see section 14.28 in this manual. A deficiency suit is discussed at section 14.29. Interrogatory number 3. may be used if another party claims a security interest in the same collateral.

Pattern Interrogatories—Foreclosure of Security Interest or Deficiency Judgment

1. With reference to the original of the attached document titled "Security Agreement," a copy of which is attached as Exhibit [**exhibit number/letter**], state or identify:

   a. The party executing the Security Agreement.

   b. The date of its execution.

   c. The place of its execution.

   d. The name and address of each person present at the time of its execution.

   e. The name of the person to whom the Security Agreement was delivered or, if the Security Agreement was not delivered, what was done with the Security Agreement after its execution.

   f. The person owning the collateral described in the Security Agreement at the time of its execution.

   g. Each person claiming an interest in the collateral described in the Security Agreement, the date when each such interest was created, and the nature of each interest.

   h. The present location of the collateral described in the Security Agreement and the person who presently has control over the collateral.

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i. The name and address of every company insuring the collateral described in the Security Agreement, the date of each policy of insurance, the number of each policy of insurance, the kind of insurance, the name and address of the insured and the loss payee of each policy, the amount of each policy, and the present status of each policy.

j. The date and amount of each payment made on the obligation described in the Security Agreement, the form of each payment, the name and address of the party making each payment, and the name and address of the party to whom each payment was made.

2. With reference to the original of the document titled "Financing Statement," a copy of which is attached as Exhibit [**exhibit number/letter**], state or identify:

a. The party executing the Financing Statement.

b. The date of its execution.

c. The place of its execution.

d. Each person present at the time of its execution.

e. The person to whom the Financing Statement was delivered after execution.

> The following may be used if another party claims a security interest in the same collateral.

3. With reference to the collateral described in the Security Agreement, state or identify:

a. Each person having an interest in the collateral on [**date of execution of security agreement**].

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b. The person having possession of the collateral on [**date of execution of security agreement**].

c. Each date on which possession of the collateral was transferred, each transferee, the purpose of each transfer, and each person present at the time each transfer occurred.

d. Each person claiming any interest in the collateral at the time of answering these interrogatories and the nature of the interest claimed by each such person.

Attach exhibit(s).

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Form 18-19

For a general discussion of the action on a lease of personal property, see section 14.26 in this manual.

Pattern Interrogatories—Lease of Personal Property

1. Identify the person answering these interrogatories.

2. State the manner of organization of Defendant—for example, corporation, partnership, limited partnership, sole proprietorship, or individual.

   a. If Defendant is a corporation, identify each officer and director.

   b. If Defendant is a partnership, identify each partner and state whether he is a general or limited partner.

3. Did Defendant execute the written agreement attached as Exhibit [**exhibit number/letter**] (the "Lease")?

4. If the answer to interrogatory number 3. is not affirmative, state whether Defendant agreed to lease the personal property described in the Lease, the date of the agreement, whether the agreement was oral or in writing, and the terms and conditions of the agreement. In the alternative, if you will do so without a request to produce, attach a genuine copy of each such written agreement; or if you will not, identify each agreement.

5. Did Defendant lease the following personal property from Plaintiff: [**describe leased property**]?

6. State the exact time period during which Defendant was to be entitled to the use and enjoyment of the personal property described in interrogatory number 5.

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7. Did Defendant agree to pay Plaintiff a specified amount of money each month as rent for the personal property described in interrogatory number 5.?

8. If the answer to interrogatory number 7. is affirmative, state the amount of money that Defendant agreed to pay each month to Plaintiff and state the exact number of months that Defendant agreed to pay that amount.

9. State the date, method, and amount of each payment made to Plaintiff under the terms of the Lease or agreement and the person or entity to whom each payment was made.

10. Was any express warranty or representation made by Plaintiff to Defendant concerning the personal property referred to in interrogatory number 5. that was not honored?

11. If the answer to interrogatory number 10. is affirmative, state the character or nature of each warranty or representation made or given, the identity of the individual making or giving that warranty or representation, and the capacity in which that person was employed by or associated with Plaintiff.

12. Has the personal property leased by Defendant under the written agreement referred to in interrogatory number 3. failed to operate in accordance with any representation or warranty made or given by Plaintiff?

13. If the answer to interrogatory number 12. is affirmative, state in detail the nature of any malfunction or other defect in operation on which Defendant bases the contention that the personal property failed to operate in accordance with the warranty or representation allegedly made or given by Plaintiff, the date of each such malfunction, and the name of each person having knowledge of the facts.

14. Did Plaintiff present to Defendant a demand for payment of the claim made the subject of this suit? If so, state the date it was received, the name of the person receiving it, the

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relationship to Defendant of the person receiving it, and the amount of the demand by Plaintiff.

15. Identify all persons whom you intend to call as witnesses at trial, other than rebuttal or impeaching witnesses the necessity of whose testimony cannot reasonably be anticipated before trial.

Attach exhibit(s).

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Form 18-20

For a general discussion of the action on a guaranty, see section 14.31 in this manual.

Pattern Interrogatories—Guaranty Agreement

1. Identify the person answering these interrogatories.

2. State the manner of organization of Defendant—for example, corporation, partnership, limited partnership, sole proprietorship, or individual.

    a. If Defendant is a corporation, identify each officer and director.

    b. If Defendant is a partnership, identify each partner and state whether he is a general or limited partner.

3. Did Defendant execute the written agreement attached as Exhibit [**exhibit number/letter**]?

4. If the answer to interrogatory number 3. is not affirmative, state whether Defendant otherwise agreed to guarantee any obligations, orally or in writing, the date of the agreement, and a verbatim recitation of the terms and conditions of the agreement. In the alternative, if you will do so without a request to produce, attach a genuine copy of each written agreement; or if you will not, identify each written agreement.

5. Did [**name of person or entity whose liability is being guaranteed**] execute the [**describe obligation guaranteed by defendant**] attached as Exhibit [**exhibit number/letter**]?

6. If the answer to interrogatory number 5. is not affirmative, state every difference existing between the attached Exhibit [**exhibit number/letter**] and the original document referred to in interrogatory number 5.

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7. Who does Defendant contend or believe is the present owner and holder of the obligation guaranteed by Defendant and referred to in interrogatory number 5.?

8. If the answer to interrogatory number 7. is not Plaintiff, state the name and residence and business addresses of the person or entity that Defendant believes is the owner and present holder of the obligation guaranteed by Defendant and referred to in interrogatory number 5., the date on which such person or entity acquired its ownership, and the manner of the acquisition.

9. Identify all persons whom you intend to call as witnesses at trial, other than rebuttal or impeaching witnesses the necessity of whose testimony cannot reasonably be anticipated before trial.

10. If Defendant contends or believes that there is any reason why Defendant is not liable on the guaranty that is the subject of this suit, state the reason and identify all the facts and documents on which those contentions or beliefs are based.

Attach exhibit(s).

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Form 18-21

This motion to enlarge the number of interrogatories is governed by Tex. R. Civ. P. 190.5, which sets out the circumstances under which a level 2 or level 3 discovery control plan may be modified. All discovery motions must contain a certificate by the party filing the motion that efforts to resolve the discovery dispute without the necessity of court intervention have been attempted and have failed. Tex. R. Civ. P. 191.2. Local practice varies in the procedure for setting the hearing and filing the certificate of service and on whether a judge must sign the order setting the hearing or whether the signature by the court clerk or attorney is sufficient.

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

Plaintiff's Motion to Enlarge Number of Written Interrogatories

[**Name of plaintiff**], Plaintiff, pursuant to rule 190.5 of the Texas Rules of Civil Procedure, requests that the Court modify the discovery control plan governing this case, to allow Plaintiff to enlarge the number of interrogatories to be served on [**name of defendant**], Defendant, to [**number**], not including subparts.

1. *Original Discovery Control Plan.* This suit was filed on [**date**]. The suit is subject to a [level 2/level 3] discovery control plan, as described in rule 190 of the Texas Rules of Civil Procedure. As a result, each party was limited to serving on each other party no more than [twenty-five/[**number set out in court-mandated discovery control plan**]] written interrogatories, excluding interrogatories asking a party only to identify or authenticate specific documents.

2. *Need for Additional Interrogatories.* Plaintiff requests additional interrogatories because [**state reason(s) for necessity for asking for additional interrogatories, e.g.,** in his responses to Plaintiff's first set of interrogatories, Defendant alleges that his twin brother, and not Defendant, signed the promissory note in question. Additional discovery is required to investigate this claim]. The interest of justice requires the Court to enlarge the number of interrogatories Plaintiff may ask Defendant.

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3. *Efforts to Resolve.* A reasonable effort to resolve this discovery dispute without the necessity of Court intervention has been made and has failed.

4. *Prayer.* Plaintiff prays that—

   a. the Court modify the discovery control plan in this case to enlarge the number of interrogatories Plaintiff be permitted to serve on Defendant to [**number**] interrogatories, not including subparts, for good cause shown in this motion; and

   b. 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**]

Certificate of Conference

I certify that a reasonable effort has been made to resolve the discovery dispute without the necessity of court intervention and has failed.

____

[**Name**]
Attorney for [**name of movant**]

> Include a certificate of service (form 19-1) and notice of hearing (form 19-2). Prepare the order enlarging the number of interrogatories (form 18-22).

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Form 18-22

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

Order Enlarging Number of Interrogatories

On [**date**] the motion of [**name of plaintiff**], Plaintiff, was presented to modify the discovery control plan in this case, specifically to enlarge the number of interrogatories Plaintiff is allowed to serve on [**name of defendant**], Defendant, to [**number**] interrogatories, not including subparts.

The Court finds that justice requires that the number of interrogatories allowed to be served on Defendant by Plaintiff be enlarged to [**number**], not including subparts, based on [**state particular circumstances alleged in the motion**], as prescribed by the Texas Rules of Civil Procedure. Accordingly, the Court finds that Plaintiff's Motion to Enlarge Number of Written Interrogatories should be granted.

It is therefore ORDERED that Plaintiff's Motion to Enlarge Number of Written Interrogatories is hereby granted in all respects and the number of interrogatories that Plaintiff will be permitted to serve on Defendant is ordered enlarged to [**number**] interrogatories, not including subparts.

SIGNED on ______________________________.

____
JUDGE PRESIDING

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APPROVED AS TO FORM:

____

[Name]
Attorney for Plaintiff

____

[Name]
Attorney for Defendant

Attach the order to the motion at form 18-21 and file with the court clerk.

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Form 18-23

This notice should be addressed to the defendant through his attorney if he is represented by one. Otherwise, the notice should be sent directly to the defendant, addressed "To: **[name of defendant]**, Defendant." Requests for disclosure are discussed generally at part V. in this chapter.

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

Plaintiff's Requests for Disclosure

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

Pursuant to rule 194 of the Texas Rules of Civil Procedure, you are requested to disclose, within thirty days of service of this request, the information or material described in rule 194.2(a)–(i).

Include the following for level 1 discovery control plan only.

Pursuant to rule 190.2(b)(6), you are requested to disclose all documents, electronic information, and tangible items that you have in your possession, custody, or control and may use to support your claims or defenses.

Continue with the following.

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

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

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Form 18-24

This notice should be addressed to the defendant through his attorney if he is represented by one. Otherwise, send it directly to the defendant, addressed "To: **[name of defendant]**, Defendant." This form assumes that it is not being served before answer day.

If production is being sought from a nonparty, this form should be coupled with a subpoena commanding production. A notice to produce documents or tangible things under rule 205.3 must be served at least ten days before the subpoena is served. See section 18.30 in this chapter regarding subpoenas and form 18-4 for a subpoena. Also, unless the nonparty is also giving his deposition, he need not appear in person to produce the documents. Tex. R. Civ. P. 176.6(c). This form assumes that the party being served is the defendant.

See sections 18.71 through 18.77 regarding requests for production from parties and section 18.78 regarding production from nonparties.

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

Plaintiff's Request for Production of Documents and Tangible Things

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

Pursuant to rule 196 of the Texas Rules of Civil Procedure, you are requested to produce and permit the inspection and copying of each of the items or categories of items identified in the attached Exhibit A. You are to produce these items or categories of items at **[time and place for production]** no later than thirty days from the date you receive this request.

Please note that if, after you submit your responses to these requests for production, you learn that any such response was either incomplete when made, or, although complete and correct when made, it is no longer complete and correct, you must amend or supplement your response reasonably promptly after you discover the necessity for such a response. Any amended or supplemental response made less than thirty days before trial will be presumed not to have been made reasonably promptly. A failure to make, amend, or supplement a

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response in a timely manner may result in your not being able to introduce into evidence the material or information not timely disclosed.

Definitions

"You" or "your" refers to you, your attorneys, accountants, bookkeepers, agents, employees, and/or representatives.

"Defendant" means [**name of defendant**] and all agents, employees, and other persons acting on [his/her/its] behalf.

"Documents and tangible things" means the existence, description, nature, custody, condition, location, and contents of papers, books, accounts, drawings, graphs, charts, photographs, electronic or videotape recordings, data, and data compilations in your possession, custody, or control or known to you or your counsel, whether printed, computerized, microfilmed, reproduced by any other mechanical process or medium of expression, or written or produced by hand and whether or not claimed to be privileged, confidential, or personal, including but not limited to the final versions and all prior drafts of contracts; agreements; notes (including secretarial notes); business records; notebooks; work notes; work papers; communications (including intradepartmental communications and intercompany communications); facsimiles; telecopies; telefaxes; electronic mail; correspondence; statements; reports; telegrams; agendas; forms; memoranda; bulletins; appointment books; logs; messages; diaries; texts; manuals; reference works and materials; samples of materials; depositions; analyses; projections; damage projections; forecasts; statistical statements; financial records; reports; charts; brochures; purchase orders; estimates; computer inputs and outputs; calculations; compilations of data; demonstrative evidence (including physical models, sketches, charts, graphs, plans, drawings, etc.); journals; billings; billing statements and records; receipts; invoices; data compilations; slides; sketches; graphics; charts; movies; videotapes; photographs and the negatives thereof; summaries, records, or minutes of meetings

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or conferences; expressions of statements of policy; lists of people attending meetings or conferences; summaries, records, or reports of personal conversations or investigations; summaries, records, or reports of interviews; and all other writings, and any other similar matter, now or formerly in your possession, custody, or control or that of your counsel or of any other agent, representative, employee, bookkeeper, accountant, expert, or anyone else acting on your behalf, and includes documents used to support any conclusions or opinions reached. Any marginal comments appearing on any documents and any handwritten or other notations on any copy of a document render it original, requiring production of it or a true copy of it with such notations.

"Financial record" means, by way of example and without limitation, the original or true copies of the following items, whether printed, computerized, recorded, or reproduced by any other mechanical process or written or produced by hand: monthly unaudited statements and/or other periodic income and profit and loss statements; periodic balance sheets; financial statements or other statements regarding, relating to, or referring to your financial condition; federal and state income tax returns; volume of sales records; sales tax records and returns; payroll tax records and returns; cash disbursement journal(s); general ledger(s); receipts journal(s); accounts payable journal(s); and accounts receivable journal(s). If you are a partnership or limited partnership the phrase "financial record" also includes partnership agreement(s) and any amendments thereto and forms K-1 provided to the partners. Any marginal comments appearing on any financial record and any handwritten or other notations on any copy of a financial record render it original, requiring production of it or a true copy of it with such notations.

"Relate to" means to name, refer to either directly or indirectly, comment on, analyze, review, report on, form the basis of, be considered in the preparation of, result from, or have any logical relation or relevance to the entity, person, document, event, or action pertaining to the subject matter on which inquiry is made.

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"Knowledge" means not only the personal and present knowledge of the person inquired of, but also the present knowledge of any officers, directors, agents, servants, employees, attorneys, and representatives of the person inquired of and information available to them.

"The Claims" means the claims that are the subject of this lawsuit, as alleged in Plaintiff's original petition and amended or supplemental petition.

"Statement" is a written statement signed or otherwise adopted or approved by the person making it or a stenographic, mechanical, electrical, or other type of recording, or any transcription thereof that is a substantially verbatim recital of a statement made by the person and contemporaneously recorded.

"The Contract" means the contract dated [**date**] that is the subject of this lawsuit, as alleged in Plaintiff's original petition and amended or supplemental petition.

"The Note" means the promissory note dated [**date**] that is the subject of this lawsuit, as alleged in Plaintiff's original petition and amended or supplemental petition.

"The Guaranty" means the personal guaranty that is the subject of this lawsuit, as alleged in Plaintiff's original petition and amended or supplemental petition.

Instructions

If any document or response to these requests is withheld or objected to under a claim of attorney-client privilege, under a claim of limitation on scope of discovery pursuant to rule 192.4 or 193 of the Texas Rules of Civil Procedure, under a claim of work product pursuant to rule 192.5, under any other qualified privilege, or for any other reason, you are instructed to identify each such document with the following items:

1. the date of the document;

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2. the author and addressee(s);

3. all persons indicated as recipients of copies;

4. all persons known to you to have received the document and/or information or to have learned the substance of its contents;

5. the subject matter of the document and/or response; and

6. the specific privilege or objection alleged to be applicable or other reason for its being withheld or not answered.

If you or any of your attorneys, agents, or representatives at any time had possession or control of a document requested and that document has been lost, destroyed, or purged or is not presently in your possession, custody, or control, identify the document and describe the circumstances surrounding the loss, destruction, purge, or separation from your possession, custody, or control, indicating the dates that those circumstances occurred.

If you allege that any request is in any manner ambiguous, you are instructed to describe in detail the reasons for your allegations that the request is ambiguous, including but not limited to each interpretation that you allege the specific request for discovery is subject to. Notwithstanding, you are instructed to respond, to the best of your ability, to the request for production and produce the documents requested.

If you object to any request, you are instructed to identify, with specificity, the specific procedural rule(s) or substantive laws(s) on which you base your objection.

When producing documents and tangible things responsive to a request, you must either produce them as they are kept in the usual course of business or organize and label them to correspond with the categories in the request.

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____

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

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

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Exhibit A

1. All documents and tangible things that discuss, relate to, or refer to [**specify, e.g.,** the Note, the Guaranty, the Contract, or the services to be performed by you in connection with the Claims that are the subject matter of this litigation].

2. All documents and tangible things that discuss, relate to, or refer to any communication between you and Plaintiff regarding [**specify, e.g.,** the Note, the Guaranty, the Contract, or the services to be performed by you in connection with the Claims that are the subject matter of this litigation].

3. All contracts or agreements entered into between you and Plaintiff pertaining to the Claims asserted in this litigation.

4. All documents and tangible things that discuss, relate to, or refer to communications, including but not limited to correspondence, sent by you to Plaintiff or any nonprivileged third party or received by you from Plaintiff or any nonprivileged third party that discuss, relate to, or refer to the Claims [**specify, e.g.,** the Note, the Guaranty, or the Contract] that are the subject matter of this litigation.

5. All documents and tangible things that discuss, relate to, or refer to any and all Claims, counterclaims, allegations, and defenses you may have against Plaintiff.

6. All documents and tangible things written or reviewed by any testifying expert or by any consulting expert whose mental impressions or opinions have been reviewed by a testifying expert, in connection with this case, including but not limited to—

   a. all reports, models, data compilations, documents, communications, bills, reports, and writings that have been reviewed by the testifying and/or consulting expert in anticipation of a testifying expert's testimony;

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b. all reports, models, data compilations, documents, communications, bills, reports, and writings generated by and/or received from the testifying and/or consulting expert in anticipation of a testifying expert's testimony;

c. all publications or other documents, communications, reports, and writings that will be used in the trial of this lawsuit to substantiate the opinions or allegations of the testifying expert and/or that were or will be relied on by the testifying expert in reaching opinions or conclusions of fact or law;

d. all nonprivileged documents containing the names, addresses, and telephone numbers of any and all persons whose opinions the testifying and/or consulting expert is relying on in reaching opinions or conclusions of fact or law;

e. all reports and nonprivileged documents that describe the subject matter about which the testifying expert witness is expected to testify;

f. the facts known by the testifying expert and/or consulting expert that relate to or form the basis of the expert's mental impressions and opinions formed or made in connection with this case;

g. the testifying and/or consulting expert's mental impressions and opinions formed or made in connection with this case;

h. evidence of bias on the part of the testifying or consulting expert;

i. each testifying and consulting expert's current resume and bibliography;

j. each testifying and consulting expert's entire file for this case; and

k. all documents evidencing any agreement you have with your testifying and consulting experts regarding the method by which they are paid and any arrangements for payment for their services, including any contingency

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agreements, assignments of claims or an interest therein, and any lien agreements.

7. All documents and tangible things identified in your answers to interrogatories, if any.

8. Any documents and tangible things, including but not limited to photographs or other physical evidence, that will be used or offered at trial.

9. Any statements obtained from any person pertaining to the Claims, counterclaims, allegations, and defenses asserted in this lawsuit.

10. Any documents and tangible things describing, summarizing, or recording a history of payments, credits, deductions, interest charged, interest paid, principal paid, and charges pertaining to Plaintiff's account with you.

11. All documents and tangible things that discuss, relate to, or refer to each and every fact, reason, allegation, or theory under which you deny that you are liable to Plaintiff for the Claims that are the subject of this litigation.

12. All documents and tangible things that discuss, relate to, or refer to any basis for asserting that the amounts charged for items purchased from Plaintiff were not the usual and customary price(s) in [**county**] County, Texas.

13. All documents that discuss, relate to, or refer to your claim that the amounts charged for items purchased from Plaintiff were not the reasonable price(s) in [**county**] County, Texas.

Include the following if applicable.

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14. If you are claiming damages, produce all documents and tangible things that you relied on or used to support each element of your claim, including the source of your figures for arriving at that amount and how you arrived at that amount.

15. If you are requesting attorney's fees in this case, produce a copy of the contract or fee agreement between you and every attorney who was or is currently representing you, including all bills, statements, and/or invoices showing services rendered, the amounts charged, and all other charges for costs and expenses.

> If production is sought from a nonparty, serve a copy of this request on the nonparty by personal service, along with a subpoena (form 18-4). Attach a check to the recipient for $1, if applicable (see section 18.78:8).

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Form 18-25
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Form 18-25

1. *Adding Requests for Admission/Requests for Disclosure/Requests for Production to Interrogatories*

Clause 18-25-1

Objection. Instruction No. [**no.**] impermissibly seeks to add [Requests for Admission/ Requests for Disclosure/Requests for Production] to the proponent's Interrogatories and is thus outside the proper scope of the rules of discovery. *See* Tex. R. Civ. P. 197.

2. *Adding Interrogatories/ Requests for Admission/ Requests for Disclosure to Requests for Production*

Clause 18-25-2

Objection. Instruction No. [**no.**] impermissibly seeks to add [Interrogatories/Requests for Admission/Requests for Disclosure] to the proponent's Requests for Production and is thus outside the proper scope of the rules of discovery. *See* Tex. R. Civ. P. 196.

3. *Amount and Method of Calculating Economic Damages*

> Such a request or interrogatory is likely duplicative of request for disclosure (d). See Tex. R. Civ. P. 194.2(d).

Clause 18-25-3

Objection. This [Request/Interrogatory] improperly seeks discovery pertaining to the amount and method of calculating economic damages. *See* Tex. R. Civ. P. 194.2(d) (stipulating that information pertaining to the amount and method of calculating economic damages must be disclosed pursuant to a Request for Disclosure). Moreover, this [Request/Interrogatory] is overly broad, vague, and ambiguous in failing to limit its inquiry by scope of subject matter and time. This [Request/Interrogatory] also attempts to require Respondent to marshal

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all of its available proof or the proof it intends to offer at trial, contrary to the rules of discovery. *See* Tex. R. Civ. P. 197.1, cmt. 1. Further, this Interrogatory is unduly burdensome and harassing, calls for material not relevant to any claims or defenses, and is not reasonably calculated to lead to the discovery of admissible evidence.

4. Burdensome

Clause 18-25-4

Objection. This [Request/Interrogatory] is unduly burdensome.

5. Consulting Experts

Clause 18-25-5

Objection. This [Request/Interrogatory] improperly seeks discovery pertaining to consulting experts, in violation of the rules of discovery. *See* Tex. R. Civ. P. 192.3(e); Tex. R. Civ. P. 195.1.

Assertion of Privilege. This [Request/Interrogatory] seeks information subject to the consulting-expert privilege. *See* Tex. R. Civ. P. 192.3(e). Therefore, the requested information may not be discovered. *See* Tex. R. Civ. P. 192.3(a) ("In general, a party may obtain discovery regarding any matter that is not privileged . . . .")

6. Contentions

> Such a request or interrogatory may be duplicative of request for disclosure (c). Disclosure (c) pertains to legal theories and factual bases of the responding party's claims or defenses. See Tex. R. Civ. P. 194.2(c).

Clause 18-25-6

Objection. This [Request/Interrogatory] improperly seeks discovery pertaining to contentions, in violation of the rules of discovery. *See* Tex. R. Civ. P. 192.3(j); Tex. R. Civ. P. 197.1 ("An interrogatory may inquire whether a party makes a specific legal or factual contention and may ask the responding party to state the legal theories and to describe in general the factual bases for the party's claims or defenses, but interrogatories may not be used to require

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the responding party to marshal all of its available proof or the proof the party intends to offer at trial."); *see also* Tex. R. Civ. P. 194.2(c) (stipulating that information pertaining to legal theories and factual bases of claims or defenses must be disclosed pursuant to a request for disclosure). Moreover, this [Request/Interrogatory] is overly broad, vague, and ambiguous in failing to limit its inquiry by scope of subject matter and time. This [Request/Interrogatory] also attempts to require Respondent to marshal all of its available proof or the proof it intends to offer at trial, contrary to the rules of discovery. *See* Tex. R. Civ. P. 197.1, cmt. 1. Further, this [Request/Interrogatory] is unduly burdensome and harassing, calls for material not relevant to any claims or defenses, and is not reasonably calculated to lead to the discovery of admissible evidence.

7. Definitions and Instructions

a. Generally Broad Terms

> Use the following objection for an undefined, vague, or ambiguous term, e.g., "communication," "communications," "concerning," "person," and "persons."

Clause 18-25-7

Objection. The terms "[**insert term**]" and "[**insert term**]" are undefined, vague, and ambiguous.

> Use the following objection for an overly expansive definition of a term.

Objection. This definition attempts to require Respondent to marshal all of its available proof or the proof it intends to offer at trial, contrary to the rules of discovery. *See* Tex. R. Civ. P. 197.1, cmt. 1. The definition expands the natural meaning of the words to an extent that makes responding to the Interrogatories extremely difficult, if not impossible.

> Use the following objection for a definition of a term that is overly broad, burdensome, or harassing.

Objections. Definition No. [**no.**] of "[**insert term**]" is overly broad, unduly burdensome, and harassing and thus beyond the scope of the rules of discovery. *See* Tex. R. Civ. P. 192.3.

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b. "Consulting Expert"

Objection. Definition No. [**no.**] of "consulting expert" seeks to circumvent the definition of the phrase provided in Texas Rule of Civil Procedure 192.7(d) and thus seeks documents beyond the scope of discovery. This definition is also overly broad, unduly burdensome, and harassing and thus beyond the scope of the rules of procedure. *See* Tex. R. Civ. P. 192.3(e).

c. "Contentions"

Objection. Definition No. [**no.**] of "contentions" is overly broad, unduly burdensome, and harassing and thus beyond the scope of the rules of discovery. *See* Tex. R. Civ. P. 192.3(j).

d. "Documents and Tangible Things"

Objection. Definition No. [**no.**] of "documents and tangible things" is overly broad, unduly burdensome, and harassing, and thus beyond the scope of the rules of discovery. *See* Tex. R. Civ. P. 192.3(b). A party must describe with reasonable particularity the item sought. *See* Tex. R. Civ. P. 196.1(b) ("The request must *specify* the items to be produced or inspected, either by individual item or by category, and *describe with reasonable particularity* each item and category." (emphasis added)); *Davis v. Pate*, 915 S.W.2d 76, 79 n.2 (Tex. App.—Corpus Christi 1996, orig. proceeding) (distinguishing between "specificity" and "overbreadth" and explaining that appropriate objections to requests for production include both "specificity" and "overbreadth"); *Texaco, Inc. v. Dominguez*, 812 S.W.2d 451, 454 (Tex. App.—San Antonio 1991, orig. proceeding) (explaining that request for production "must be specific, must establish materiality, and must recite precisely what is wanted"). Respondent does not know what documents are being requested, because the Request does not describe the items requested with any reasonable particularity. *See Chamberlain v. Cherry*, 818 S.W.2d 201, 204 (Tex. App.—Amarillo 1991, orig. proceeding) (certain requests for production were proper only because they were "set forth . . . with reasonable particularity").

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e. "Electronic or Magnetic Data"

Objection. Definition No. [**no.**] of "electronic or magnetic data" seeks to circumvent the rules of discovery and thus seeks documents beyond the scope of discovery. *See* Tex. R. Civ. P. 196.4. This definition is also overly broad, unduly burdensome, and harassing and thus beyond the scope of the rules of discovery. *See* Tex. R. Civ. P. 192.3.

f. "Indemnity Agreements"

Objection. Definition No. [**no.**] of "indemnity agreements" is overly broad, unduly burdensome, and harassing and thus beyond the scope of the rules of discovery. *See* Tex. R. Civ. P. 192.3(f).

g. "Insuring Agreements"

Objection. Definition No. [**no.**] of "insuring agreements" is overly broad, unduly burdensome, and harassing and thus beyond the scope of the rules of discovery. *See* Tex. R. Civ. P. 192.3(f).

h. Persons with Knowledgeable Facts

Objection. Definition No. [**no.**] of "persons with knowledge of relevant facts" is overly broad, unduly burdensome, and harassing and thus beyond the scope of the rules of discovery. *See* Tex. R. Civ. P. 192.3(c).

i. Possession, Custody, or Control

Objection. Definition No. [**no.**] of "possession, custody, or control" seeks to circumvent the definition of the phrase provided in Texas Rule of Civil Procedure 192.7(b) and thus seeks documents beyond the scope of discovery.

j. Potential Parties

Objection. Definition No. [**no.**] of "potential parties" is overly broad, unduly burdensome, and harassing and thus beyond the scope of the rules of discovery. *See* Tex. R. Civ. P. 192.3(i).

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k. Persons with Knowledge of Relevant Facts

Objection. Definition No. [**no.**] of "statements of persons with knowledge of relevant facts" is overly broad, unduly burdensome, and harassing and thus beyond the scope of the rules of discovery. *See* Tex. R. Civ. P. 192.3(h).

l. Settlement Agreements

Objection. Definition No. [**no.**] of "settlement agreements" is overly broad, unduly burdensome, and harassing and thus beyond the scope of the rules of discovery. *See* Tex. R. Civ. P. 192.3(g).

m. Testifying Expert

Objection. Definition No. [**no.**] of "testifying expert" seeks to circumvent the definition of the phrase provided in Texas Rule of Civil Procedure 192.7(d) and thus seeks documents beyond the scope of discovery. This definition is also overly broad, unduly burdensome, and harassing and thus beyond the scope of the rules of procedure. *See* Tex. R. Civ. P. 192.3(e).

n. Trial Witness

Objection. Definition No. [**no.**] of "trial witnesses" is overly broad, unduly burdensome, and harassing and thus beyond the scope of the rules of discovery. *See* Tex. R. Civ. P. 192.3(d).

o. Written Discovery

Objection. Definition No. [**no.**] of "written discovery" seeks to circumvent the definition of the phrase provided in Texas Rule of Civil Procedure 192.7(a) and thus seeks documents beyond the scope of discovery. This definition is also overly broad, unduly burdensome, and harassing and thus beyond the scope of the rules of discovery. *See* Tex. R. Civ. P. 192.3.

8. Documents and Tangible Things

Clause 18-25-8

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Objection. This [Request/Interrogatory] improperly seeks discovery pertaining to documents and tangible things, in violation of the rules of discovery. *See* Tex. R. Civ. P. 192.3(b); Tex. R. Civ. P. 196.1; Tex. R. Civ. P. 197.

9. Duplicative

Clause 18-25-9

Objection. This [Request/Interrogatory] is duplicative of [Interrogatory/Request for Admission/Request for Disclosure/Request for Production] No. [**no.**].

10. Equal or Superior Access

Clause 18-25-10

Objection. [**Describe items**] are subject to the equal or superior access of the proponent.

11. Exceeds Number of Permissible Interrogatories

Clause 18-25-11

a. If under Level 1:

Objection. This Interrogatory exceeds the number of interrogatories allowed to be propounded on Respondent. *See* Tex. R. Civ. P. 190.2(b)(3) (providing that written interrogatories under Discovery Control Plan Level 1 are limited to fifteen in number and that "[e]ach discrete subpart of an interrogatory is considered a separate interrogatory").

b. If under Level 2:

Objection. This Interrogatory exceeds the number of interrogatories allowed to be propounded on Respondent. *See* Tex. R. Civ. P. 190.3(b)(3) (providing that written interrogatories under Discovery Control Plan Level 2 are limited to twenty-five in number and that "[e]ach discrete subpart of an interrogatory is considered a separate interrogatory").

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c. *If under Level 3—where order addresses number of interrogatories:*

Objection. This Interrogatory exceeds the number of interrogatories allowed to be propounded on Respondent. See Scheduling Order dated [**date**].

d. *If under Level 3—where order does NOT address number of interrogatories and Discovery Control Plan Level 1 would otherwise be applicable:*

Objection. This Interrogatory exceeds the number of interrogatories allowed to be propounded on Respondent. *See* Tex. R. Civ. P. 190.4(b) (providing that under Discovery Control Plan Level 3, "[t]he discovery limitations of Rule 190.2, if applicable, or otherwise of Rule 190.3 apply unless specifically changed in the discovery control plan ordered by the court"); Tex. R. Civ. P. 190.2(c)(3) (providing that written interrogatories are limited to twenty-five in number, and that "[e]ach discrete subpart of an interrogatory is considered a separate interrogatory").

e. *If under Level 3—where order does NOT address number of interrogatories and Discovery Control Plan Level 2 would otherwise be applicable:*

Objection. This Interrogatory exceeds the number of interrogatories allowed to be propounded on Respondent. *See* Tex. R. Civ. P. 190.4(b) (providing that under Discovery Control Plan Level 3, "[t]he discovery limitations of Rule 190.2, if applicable, or otherwise of Rule 190.3 apply unless specifically changed in the discovery control plan ordered by the court"); Tex. R. Civ. P. 190.3(b)(3) (providing that written interrogatories are limited to twenty-five in number, and that "[e]ach discrete subpart of an interrogatory is considered a separate interrogatory").

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12. Fishing Expedition

Clause 18-25-12

Objection. This [Request/Interrogatory] is overly broad, vague, and ambiguous in failing to limit its inquiry by scope of subject matter and time. Indeed, this [Request/Interrogatory] is nothing more than a fishing expedition, which is not permitted under the rules of discovery. *See K Mart Corp. v. Sanderson*, 937 S.W.2d 429, 431 (Tex. 1996) (clarifying that no discovery devices may be used for fishing expeditions (citing *Loftin v. Martin*, 776 S.W.2d 145, 148 (Tex. 1989) (explaining that requests for production may not be used for fishing expeditions, but implying that interrogatories and depositions may be so used)).

13. Improper Discovery Tool

Clause 18-25-13

Objection. This Interrogatory improperly seeks to add [Requests for Admission/Requests for Disclosure/Requests for Production] to Interrogatories, and is thus outside the proper scope of the rules of discovery. *See* Tex. R. Civ. P. 197.

14. Indemnity and Insuring Agreements

> Note: Such a request/interrogatory is likely duplicative of a request for disclosure (g). See Tex. R. Civ. P. 194.2(g).

Clause 18-25-14

Objection. This [Request/Interrogatory] improperly seeks discovery pertaining to indemnity and insuring agreements, in violation of the rules of discovery. *See* Tex. R. Civ. P. 192.3(f); Tex. R. Civ. P. 194.2(g) (stipulating that information pertaining to indemnity and insuring agreements must be disclosed pursuant to a request for disclosure).

15. Legal Theories and Factual Bases of Claims or Defenses

> Note: Such a request or interrogatory is likely duplicative of a request for disclosure (c). See Tex. R. Civ. P. 194.2(c).

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Clause 18-25-15

Objection. This [Request/Interrogatory] improperly seeks discovery pertaining to legal theories and factual bases of claims or defenses, in violation of the rules of discovery. *See* Tex. R. Civ. P. 194.2(c) (stipulating that information pertaining to legal theories and factual bases of claims or defenses must be disclosed pursuant to a request for disclosure); see also Tex. R. Civ. P. 197.1).

16. Limits by Scope or Time

Clause 18-25-16

Objection. This [Request/Interrogatory] is overly broad, vague, and ambiguous in failing to limit its inquiry by scope of subject matter and time.

17. Marshaling Evidence

Clause 18-25-17

Objection. This Interrogatory attempts to require this Defendant to marshal all of this Defendant's available proof or the proof this Defendant intends to offer at trial, contrary to the rules of discovery. *See* Tex. R. Civ. P. 197.1.

18. Medical Records and Bills—Obtained via Authorization of Requesting Party

Clause 18-25-18

> Note: Such a request or interrogatory is likely duplicative of request for disclosure (k). See Tex. R. Civ. P. 194.2(k).

Objection. This [Request/Interrogatory] improperly seeks discovery pertaining to medical records and bills obtained by virtue of an authorization furnished by the requesting party. *See* Tex. R. Civ. P. 194.2(k) (stipulating that information pertaining to medical records and bills obtained by virtue of an authorization furnished by the requesting party must be disclosed pursuant to a request for disclosure).

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19. Medical Records and Bills—Related to Injuries or Damages Asserted

Clause 18-25-19

> Note: Such a request or interrogatory is likely duplicative of request for disclosure (j). See Tex. R. Civ. P. 194.2(j).

Objection. This [Request/Interrogatory] improperly seeks discovery pertaining to medical records and bills related to injuries or damages asserted. *See* Tex. R. Civ. P. 194.2(j) (stipulating that information pertaining to medical records and bills related to injuries or damages asserted must be disclosed pursuant to a request for disclosure).

20. Names of Parties

Clause 18-25-20

> Note: Such a request or interrogatory is likely duplicative of request for disclosure (a). See Tex. R. Civ. P. 194.2(a).

Objection. This [Request/Interrogatory] improperly seeks discovery pertaining to the correct names of parties to the lawsuit. *See* Tex. R. Civ. P. 194.2(a) (stipulating that information pertaining to the correct names of parties to a lawsuit must be disclosed pursuant to a request for disclosure).

21. Outside the Scope of Discovery

Clause 18-25-21

Objection. This [Request/Interrogatory] seeks information outside the scope of discovery. *See* Tex. R. Civ. P. 192.3, 196, 197.

22. Persons with Knowledge of Relevent Facts

Clause 18-25-22

> Note: Such a request or interrogatory is likely duplicative of a request for disclosure (e). See Tex. R. Civ. P. 194.2(e).

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Objection. This [Request/Interrogatory] improperly seeks discovery pertaining to persons with knowledge of relevant facts, in violation of the rules of discovery. *See* Tex. R. Civ. P. 192.3(c); Tex. R. Civ. P. 194.2(e) (stipulating that information pertaining to persons with knowledge of relevant facts must be disclosed pursuant to a request for disclosure).

23. Potential Parties

Clause 18-25-23

> Note: Such a request or interrogatory is likely duplicative of a request for disclosure (b).

Objection. This [Request/Interrogatory] improperly seeks discovery pertaining to potential parties, in violation of the rules of discovery. *See* Tex. R. Civ. P. 192.3(i); see also Tex. R. Civ. P. 194.2(b) (stipulating that information pertaining to a potential party must be disclosed pursuant to a request for disclosure).

24. Privilege

> Note: Privilege is asserted pursuant to Texas Rule of Civil Procedure 193.3.

Clause 18-25-24

a. Clergy-Penitent

Assertion of Privilege. This [Request/Interrogatory] seeks information subject to the clergy-penitent privilege. *See* Tex. R. Evid. 505.

b. Consulting Expert

Assertion of Privilege. This [Request/Interrogatory] seeks information subject to the consulting-expert privilege. *See* Tex. R. Civ. P. 192.3(e)

c. Identity of Informer

Assertion of Privilege. This [Request/Interrogatory] seeks information subject to the identity-of-informer privilege. *See* Tex. R. Evid. 508.

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d. Lawyer-Client

Assertion of Privilege. This [Request/Interrogatory] seeks information subject to the lawyer-client privilege. *See* Tex. R. Evid. 503.

e. Mental Health

Assertion of Privilege. This [Request/Interrogatory] seeks information subject to the mental health privilege. *See* Tex. R. Evid. 510.

f. Party Communication

Assertion of Privilege. This [Request/Interrogatory] seeks information subject to the party-communication privilege. *See* Tex. R. Civ. P. 192.3 cmt. 8 ("Party Communication" included in definition of "Work Product" in rule 192.5).

g. Peer Review

Assertion of Privilege. This [Request/Interrogatory] seeks information protected by statute, see, e.g., Tex. R. Evid. 502, including state and federal statutes pertaining to medical committees and medical peer review committees.

h. Physician-Patient

Assertion of Privilege. This [Request/Interrogatory] seeks information subject to the physician-patient privilege. *See* Tex. Occ. Code Ann. § 159.002; Tex. R. Evid. 509.

i. Political Vote

Assertion of Privilege. This [Request/Interrogatory] seeks information subject to the political-vote privilege. *See* Tex. R. Evid. 506.

j. Required Reports Privileged by Statute

Assertion of Privilege. This [Request/Interrogatory] seeks information privileged by statute. *See* Tex. R. Evid. 502.

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k. Spousal Privilege

Assertion of Privilege. This [Request/Interrogatory] seeks information subject to spousal privileges. *See* Tex. R. Evid. 504.

l. Third-Person Privacy

Assertion of Privilege. This [Request/Interrogatory] seeks information subject to the personal and proprietary privileges of a third person, including that person's constitutional rights of privacy. Respondent will not unilaterally produce such information absent motion, hearing, and order of the Court or without proper authorization of the interested third person.

m. Trade Secrets

Assertion of Privilege. This [Request/Interrogatory] seeks confidential and proprietary information subject to the trade-secrets privilege. *See* Tex. R. Evid. 507.

n. Work Product

Assertion of Privilege. This [Request/Interrogatory] seeks information subject to the work-product privilege. *See* Tex. R. Civ. P. 192.5.

25. Relevance

Clause 18-25-25

Objection. This [Request/Interrogatory] calls for information not relevant to any claim or defense and not reasonably calculated to lead to the discovery of admissible evidence.

26. Settlement Agreements

> Note: Such a request or interrogatory is likely duplicative of request for disclosure (h). See Tex. R. Civ. P. 194.2(h).

Clause 18-25-26

Objection. This [Request/Interrogatory] improperly seeks discovery pertaining to settlement agreements, in violation of the rules of discovery. *See* Tex. R. Civ. P. 192.3(g); Tex. R. Civ. P. 194.2(h).

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27. Specificity

Clause 18-25-27

Objection. This Request fails to specify the items to be produced with reasonable particularity as required by the rules of discovery. In making a Request for Production, a party must describe with reasonable particularity the item sought. *See* Tex. R. Civ. P. 196.1(b) ("The request must *specify* the items to be produced or inspected, either by individual item or by category, and describe with *reasonable particularity* each item and category." (emphases added)); *Davis v. Pate*, 915 S.W.2d 76, 79 n.2 (Tex. App.—Corpus Christi 1996, orig. proceeding) (distinguishing between "specificity" and "overbreadth," and explaining that appropriate objections to requests for production include both "specificity" and "overbreadth"); *Texaco, Inc. v. Dominguez*, 812 S.W.2d 451, 454 (Tex. App.—San Antonio 1991, orig. proceeding) (explaining that a request for production "must be specific, must establish materiality, and must recite precisely what is wanted"). Defendant does not know what documents are being requested, because the Request is not specific as to the items sought. *See Chamberlain v. Cherry*, 818 S.W.2d 201, 204 (Tex. App.—Amarillo 1991, orig. proceeding) (holding that certain requests for production were proper only because they were "set forth . . . with reasonable particularity").

28. Statements of Persons with Knowledge of Relevant Facts

> Note: Such a request or interrogatory is likely duplicative of a request for disclosure (i). See Tex. R. Civ. P. 194.2(i).

Clause 18-25-28

Objection. This [Request/Interrogatory] improperly seeks discovery pertaining to statements of persons with knowledge of relevant facts, in violation of Texas Rule of Civil Procedure 192.3(h); see also Tex. R. Civ. P. 194.2(i) (stipulating that information pertaining to witness statements must be disclosed pursuant to a request for disclosure).

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29. Testifying Experts

Clause 18-25-29

> Note: Such a request or interrogatory is likely duplicative of a request for disclosure (f). See Tex. R. Civ. P. 194.2(f).

Objection. This [Request/Interrogatory] improperly seeks discovery pertaining to testifying expert witnesses, in violation of the rules of discovery. *See* Tex. R. Civ. P. 192.3(e); Tex. R. Civ. P. 194.2(f) (stipulating that information pertaining to testifying experts must be disclosed pursuant to a request for disclosure); Tex. R. Civ. P. 195.1.

30. Third-Party Personal Information

Clause 18-25-30

> Note: Third-party personal information includes employee files as well as the last known addresses and phone numbers of employees.

Objection. This [Request/Interrogatory] calls for information not relevant to any claim or defense and is not reasonably calculated to lead to the discovery of admissible evidence.

Assertion of Privilege. This [Request/Interrogatory] calls for matters subject to the proprietary privilege of a third party, including that party's individual rights of privacy.

31. Trial Exhibits

Clause 18-25-31

Objection. This [Request/Interrogatory] is premature and exceeds the permissible scope of discovery. *See* Tex. R. Civ. P. 166, 190, 192.3. Respondent will respond to this [Request/Interrogatory] pursuant to the Rules of Civil Procedure and the Court's Orders, including without limitation, any scheduling orders entered in this case.

Assertion of Privilege. This [Request/Interrogatory] seeks information subject to the work-product privilege. *See* Tex. R. Civ. P. 192.5. Respondent will not produce any trial exhibits without a court order.

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32. Trial Witnesses

Clause 18-25-32

Objection. This [Request/Interrogatory] is premature and exceeds the permissible scope of discovery. *See* Tex. R. Civ. P. 166, 190, 192.3(d). Respondent will respond to this Interrogatory pursuant to the Rules of Civil Procedure and the Court's Orders, including without limitation, any scheduling Orders entered in this case.

Assertion of Privilege. This [Request/Interrogatory] seeks information subject to the work-product privilege. *See* Tex. R. Civ. P. 192.5. Respondent will not produce a list of trial witnesses without a court order.

33. Witness Statements

Clause 18-25-33

> Note: Such an interrogatory is likely duplicative of a request for disclosure (i). See Tex. R. Civ. P. 194.2(i).

Objection. This [Request/Interrogatory] improperly seeks discovery pertaining to witness statements, in violation of the rules of discovery. *See* Tex. R. Civ. P. 194.2(i) (stipulating that information pertaining to witness statements must be disclosed pursuant to a Request for Disclosure).

34. Objections to Form

Clause 18-25-34

Ambiguous

Argumentative

Asked and Answered (see section entitled "Duplicative")

Assumes Facts Not in Evidence

Compound

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Confusing

General (i.e., too general)

Harassing

Leading

Misquoting (e.g., a deponent)

Narrative (i.e., calls for a narrative)

Repetitious (see section entitled "Duplicative")

Speculation (i.e., calls for speculation)

Unintelligible

Vague

(For example: Objection. This [Request/Interrogatory] is vague, ambiguous, utterly unintelligible, and harassing, and it assumes facts not in evidence.)

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Form 18-26

If the defendant does not respond to the plaintiff's discovery request or does so inadequately or inappropriately, the plaintiff should file a motion to compel discovery. Most likely the court will simply order that discovery be completed and delivered on a date certain. However, Tex. R. Civ. P. 215 provides a listing of potential sanctions for noncompliance.

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

Plaintiff's Motion to Compel Discovery

[**Name of plaintiff**], Plaintiff, moves that [**name of defendant**], Defendant, be required to respond to discovery and shows the Court as follows:

1. *Facts.* Plaintiff served discovery on Defendant consisting of [**describe type of discovery requested, e.g.,** interrogatories] in accordance with the Texas Rules of Civil Procedure. Defendant [failed to produce all the documents requested/failed to answer the interrogatories/asserted objections] within the time specified. Defendant's refusal to respond completely to or otherwise comply with Plaintiff's discovery requests is without substantial justification. [**Include if required by local rules:** True and correct copies of the discovery requests and responses are attached as Exhibit[s] [**exhibit number[s]/letter[s]**]].

2. *Grounds.* Pursuant to rule 215, Defendant's refusal to comply with Plaintiff's discovery request[s] is grounds for this Court to enter an order compelling Defendant to respond as required.

3. *Attorney's Fees and Expenses.* Defendant's refusal to comply has made it necessary for Plaintiff to employ the undersigned attorney to bring this proceeding to compel a response. Pursuant to rule 215, Plaintiff is entitled to recover reasonable expenses, including reasonable attorney's fees incurred in obtaining an order to compel. Reasonable attorney's

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fees and expenses for the services rendered and to be rendered in this regard are at least $[**amount**].

4. *Prayer.* Plaintiff prays that—

   a. the Court set this matter for hearing;

   b. Defendant, after notice of hearing, be ordered to respond to the discovery requested;

   c. Plaintiff be granted reasonable attorney's fees and expenses of at least $[**amount**] incurred in obtaining the order; 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**]

Certificate of Conference

I certify that a reasonable effort has been made to resolve the discovery dispute without the necessity of court intervention and has failed.

____

[**Name**]
Attorney for [**name of movant**]

> Include a certificate of service (form 19-1) and notice of hearing (form 19-2). Prepare the order compelling discovery (form 18-27).

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Form 18-27

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

Order Compelling Discovery

On [**date**], a hearing was held on Plaintiff's motion to compel discovery in the above-styled and -numbered cause. The Court finds that [**name of plaintiff**], Plaintiff, served on [**name of defendant**], Defendant, [**describe type of discovery request involved, e.g.,** interrogatories] in the time and manner prescribed in the Texas Rules of Civil Procedure. The Court further finds that Defendant failed to respond to Plaintiff's discovery request[s] in the time and manner prescribed by the rules.

Accordingly, the Court finds that Plaintiff's motion to compel discovery should be sustained.

It is therefore ORDERED that Defendant shall forward to Plaintiff by and through Plaintiff's attorney on or before [**date**] [**describe type of discovery requested, e.g.,** a set of full and complete sworn answers to Plaintiff's interrogatories].

The Court further finds that Plaintiff is entitled to $[**amount**] as reasonable attorney's fees for preparing and presenting this motion. Defendant is ORDERED to pay the attorney's fees to the attorney of record for Plaintiff on or before thirty days from the date this order is signed.

It is further ORDERED that Defendant's failure to comply with this order shall subject Defendant to sanctions, including striking Defendant's pleadings and entering judgment in favor of Plaintiff and against Defendant for all the relief prayed for in Plaintiff's petition.

SIGNED on ________________________________.

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JUDGE PRESIDING

APPROVED AS TO FORM:

[Name]
Attorney for Plaintiff

[Name]
Attorney for Defendant

Attach the order to the motion at form 18-26 and file with the court.

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Form 18-28

If the defendant fails to comply with the order compelling discovery, the next step is to file a motion for sanctions against the defendant. The range of sanctions permitted is described in Tex. R. Civ. P. 215. If contempt is sought, section 26.7 in this manual should be consulted. A motion for contempt is at form 26-12.

Prepare both this motion for sanctions and the order at form 18-29. Once the court has set a hearing, ensure that the notice of hearing is complete and send a copy of the motion and notice to the defendant or his attorney. Local practice or rules may vary on whether a judge must sign the order setting the hearing or whether the signature by the court clerk or attorney is sufficient and in the procedure for setting the hearing and filing the certificate of service.

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

Plaintiff's Motion for Sanctions

1. *Parties.* Plaintiff is [**name of plaintiff**]. Defendant is [**name of defendant**].

2. *Facts.* Plaintiff served [interrogatories/requests for admissions/requests for production/notice of intention to take oral or written deposition] on Defendant in the time and manner required by the Texas Rules of Civil Procedure. On [**date**], this Court ordered Defendant to [**specify, e.g.,** prepare and forward to Plaintiff, by and through this attorney of record, a full and complete sworn set of written answers to Plaintiff's interrogatories in full compliance with rule 197 of the Texas Rules of Civil Procedure]. However, as of this date, Defendant has failed to comply with the order as described above.

3. *Grounds.* Pursuant to rule 215 of the Texas Rules of Civil Procedure, Plaintiff requests the Court to set this matter for hearing and that the Court

Select one or more of the following.

disallow any further discovery by Defendant.

And/Or

disallow any further discovery through [**state particular type of discovery, e.g.,** interrogatories] by Defendant.

And/Or

charge [all/a portion of] [discovery/taxable court costs] against [Defendant/Defendant's attorney] as follows: [**set forth and identify items to be charged against the defendant or his attorney**].

And/Or

order that the following facts be taken as established for purposes of this lawsuit: [**list facts**].

And/Or

refuse to allow Defendant to [support/oppose] the following [claims/defenses]: [**list claims or defenses**].

And/Or

prohibit Defendant from introducing into evidence the following: [**list matters sought to be prohibited**].

And/Or

strike the following pleadings or portions of pleadings: [**identify pleadings or portions of pleadings to be struck**].

And/Or

stay further proceedings in this cause.

And/Or

dismiss [with/without] prejudice the following actions or proceedings: [**identify with specificity the actions or proceedings**].

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And/Or

enter default judgment against Defendant.

And

enter all orders in regard to Defendant's failure as the Court deems just.

Continue with the following.

4. *Attorney's Fees and Expenses.* Defendant's failure to [**state appropriate grounds, e.g.,** answer interrogatories] has made it necessary for Plaintiff to employ the undersigned attorney to bring this proceeding for sanctions. Under rule 215.2(b)(8) of the Texas Rules of Civil Procedure, Plaintiff is entitled to recover reasonable expenses, including reasonable attorney's fees, incurred in obtaining an order for sanctions. These fees are recoverable either from Defendant or his attorney, or both. Reasonable attorney's fees for the services rendered and to be rendered in this regard are at least $[**amount**]. In addition, Plaintiff has incurred expenses of at least $[**amount**].

5. *Prayer.* Plaintiff prays that—

a. the Court set this matter for hearing;

b. after notice and hearing, the Court impose sanctions on Defendant in accordance with rule 215 of the Texas Rules of Civil Procedure;

c. Plaintiff be granted reasonable attorney's fees from Defendant or his attorney, or both, in the amount of at least $[**amount**] incurred in obtaining the Court's order; and

d. Plaintiff be granted all further relief to which Plaintiff may be entitled.

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____

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

Certificate of Conference

I certify that a reasonable effort has been made to resolve the discovery dispute without the necessity of court intervention and has failed.

____

[Name]
Attorney for **[name of movant]**

Include a certificate of service (form 19-1) and notice of hearing (form 19-2). Prepare the order imposing sanctions (form 18-29).

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Form 18-29

For a motion for sanctions on which this order is based, see form 18-28 in this chapter. If requesting that the defendant's pleadings be struck, prepare a judgment to be entered by the court at the sanction hearing. Depending on local practice, it may be necessary to afford the defendant an opportunity to comply with discovery before sanctions may be imposed.

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

Order Imposing Sanctions

On [**date**], a hearing was held on Plaintiff's Motion for Sanctions in the above-styled and -numbered cause. The Court finds that Plaintiff, [**name of plaintiff**], served on Defendant, [**name of defendant**], [**describe type of discovery request involved, e.g.,** interrogatories] in the time and manner prescribed by the Texas Rules of Civil Procedure. The Court further finds that Defendant has failed to respond to Plaintiff's discovery request in the time and manner prescribed by the Rules of Civil Procedure.

Select one of the following.

It is therefore ORDERED that [**state ground[s] prayed for in motion, e.g.,** Defendant's pleadings be struck for failure to make discovery, and judgment will be entered as prayed for in Plaintiff's petition]. The Court further finds that Plaintiff is entitled to $[**amount**] as reasonable expenses and $[**amount**] as reasonable attorney's fees in bringing this proceeding and hereby ORDERS that these fees and expenses be paid by Defendant.

Or

It is therefore ORDERED that on or before [**date**], Defendant [**state appropriate relief, e.g.,** serve on Plaintiff and file with the Clerk of this Court a set of full and complete sworn written answers to Plaintiff's Interrogatories that were addressed to Defendant on [**date**]].

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The Court further finds that Plaintiff is entitled to $[**amount**] as reasonable expenses and $[**amount**] as reasonable attorney's fees in bringing this proceeding and ORDERS that Defendant pay to Plaintiff the sum of $[**amount**] for such expenses and attorney's fees on or before [**date**].

The Court further ORDERS that if Defendant fails to comply with this order, the following sanction[s] will be entered against Defendant without further hearing of the Court: [**list sanctions**].

SIGNED on ______________________________.

____
JUDGE PRESIDING

APPROVED AS TO FORM:

____
[**Name**]
Attorney for Plaintiff

____
[**Name**]
Attorney for Defendant

> Attach the order to the motion at form 18-28 and file with the court clerk.

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Chapter 19

Trial Procedure

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Chapter 19

Trial Procedure

I. Pretrial and Trial Procedure Generally

§ 19.1 Filing and Notice Requirement

Every pleading, plea, motion, or application to the court for an order, unless presented during a hearing or trial, must be filed with the clerk of the court in writing, must state the grounds therefor, and must set forth the relief or order sought. At the same time a true copy must be served on all other parties and must be noted on the docket. Tex. R. Civ. P. 21(a).

§ 19.2 Service

If the e-mail address of the party or attorney to be served is on file with the electronic file manager, a document filed under rule 21 must be served electronically. Otherwise, the document may be served in person, by mail, by commercial delivery service, by fax, by e-mail, or by such other manner as the court in its discretion may direct. Tex. R. Civ. P. 21(a).

An application to the court for an order and notice of any hearing thereon not presented during a hearing or trial must be served in accordance with rule 21a(a) on all other parties not less than three days before the time specified for the hearing, unless otherwise provided by the Texas Rules of Civil Procedure or unless the time is shortened by the court. Tex. R. Civ. P. 21(b). See form 19-2 for the notice of hearing.

§ 19.3 Multiple Parties

If there is more than one other party represented by different attorneys, one copy of each pleading must be served on each attorney in charge. Tex. R. Civ. P. 21(c).

§ 19.4 Certificate of Service

The party or attorney of record must certify to the court compliance with the rules in writing over signature on the filed pleading, plea, motion, or application. Tex. R. Civ. P. 21(d), 21a(e). See form 19-1 for certificate of service. The certificate of service raises a rebuttable presumption that service was done properly. Tex. R. Civ. P. 21a(c); *Mathis v. Lockwood*, 166 S.W.3d 743, 745 (Tex. 2005). See section 18.13:3 for service of discovery requests and documents.

Practice Note: Because the rules do not address when e-mail service is complete, consider using an additional method of service.

§ 19.5 Additional Copies

After one copy is served on a party, that party may obtain another copy of the same pleading on tendering reasonable payment for copying and delivering. Tex. R. Civ. P. 21(e).

§ 19.6 Electronic Filing

Requirement: Except in juvenile cases under Title 3 of the Family Code, attorneys must electronically file documents in courts where electronic filing has been mandated. Attorneys practicing in courts where electronic filing is available but not mandated and unrepresented parties may electronically file documents, but it

is not required. Tex. R. Civ. P. 21(f)(1). Although they are rarely encountered in collections matters, there are exceptions to the electronic filing requirement. *See* Tex. R. Civ. P. 21(f)(4).

E-Mail Address: The email address of an attorney or unrepresented party who electronically files a document must be included on the document. Tex. R. Civ. P. 21(f)(2).

Mechanism: Electronic filing must be done through the electronic filing manager established by the Office of Court Administration and an electronic filing service provider certified by the Office of Court Administration. Tex. R. Civ. P. 21(f)(3).

Timely Filing: Unless a document must be filed by a certain time of day, a document is considered timely filed if it is electronically filed at any time before midnight (in the court's time zone) on the filing deadline. An electronically filed document is deemed filed when transmitted to the filing party's electronic filing service provider, except:

1. if a document is transmitted on a Saturday, Sunday, or legal holiday, it is deemed filed on the next day that is not a Saturday, Sunday, or legal holiday; and
2. if a document requires a motion and an order allowing its filing, the document is deemed filed on the date that the motion is granted.

Tex. R. Civ. P. 21(f)(5).

Technical Failure: If a document is untimely due to a technical failure or a system outage, the filing party may seek appropriate relief from the court. If the missed deadline is one imposed by these rules, the filing party must be given a reasonable extension of time to complete the filing. Tex. R. Civ. P. 21(f)(6).

Electronic Signature: A document that is electronically served, filed, or issued by a court or clerk is considered signed if the document includes (1) a "/s/" and a name typed in the space where the signature would otherwise appear, unless the document is notarized or sworn or (2) an electronic image or scanned image of the signature. Tex. R. Civ. P. 21(f)(7).

Format: An electronically filed document must (1) be in text-searchable portable document format (PDF); (2) be directly converted to PDF rather than scanned, if possible; (3) not be locked; and (4) otherwise comply with the technology standards set by the Judicial Committee on Information Technology and approved by the supreme court. Tex. R. Civ. P. 21(f)(8).

Paper Copies: Unless required by local rule, a party need not file a paper copy of an electronically filed document. Tex. R. Civ. P. 21(f)(9).

Electronic Notices from Court: The clerk may send notices, orders, or other communications about the case to the party electronically. A court seal may be electronic. Tex. R. Civ. P. 21(f)(10).

Nonconforming Documents: The clerk may not refuse to file a document that fails to conform with this rule. But the clerk may identify the error to be corrected and state a deadline for the party to resubmit the document in a conforming format. Tex. R. Civ. P. 21(f)(11).

Official Record: The clerk may designate an electronically filed document or a scanned paper document as the official court record. The clerk is not required to keep both paper and electronic versions of the same document unless otherwise required by local rule. Tex. R. Civ. P. 21(f)(13).

§ 19.7 Sensitive Data

"Sensitive data" is defined in the rules and consists of: (1) a driver's license number, passport number, Social Security number, tax identifica-

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tion number, or similar government-issued personal identification number; (2) a bank account number, credit card number, or other financial account number; and (3) a birth date, home address, and the name of any person who was a minor when the underlying suit was filed. Tex. R. Civ. P. 21c; Tex. R. App. P. 9.9(a), 9.10(a). Sensitive data in a document must be redacted before that document is filed. There is an exception for sensitive data that is required by statute, court rule, or administrative regulation to be included in the filing. Tex. R. Civ. P. 21c(b); Tex. R. App. P. 9.9(b). Documents that are filed under seal are not required to be redacted. Tex. R. Civ. P. 21c(b); Tex. R. App. P. 9.2(c)(3), 9.10(f).

If a document filed in a civil case is required to contain sensitive data, the filer must notify the clerk by (1) designating the document as containing sensitive data when it is electronically filed or (2), if the document is not electronically filed, including on the upper left-hand side of the first page the phrase "NOTICE: THIS DOCUMENT CONTAINS SENSITIVE DATA." Tex. R. Civ. P. 21c(d); Tex. R. App. P. 9.9(d). Documents that contain sensitive data in violation of the rule must not be posted on the Internet. The burden is on the filer to redact sensitive data before the document is filed in one of two alternative methods:

1. Use the letter X in place of each omitted digit or character.
2. Remove the sensitive data in a manner indicating that the data has been redacted.

Tex. R. Civ. P. 21c(c), Tex. R. App. P. 9.9(c), 9.10(d).

The filing party must retain an unredacted version of the filed document during the pendency of the case and any related appellate proceedings filed within six months of the date the judgment is signed. Tex. R. Civ. P. 21c(c). The length of retention depends on the stage and type of proceeding. Tex. R. Civ. P. 21c(c).

§ 19.8 Filing and Serving Pleadings and Motions

Filing and Service Required: Every notice required by the rules, and every pleading, plea, motion, or other form of request required to be served under rule 21, other than the citation to be served on the filing of a cause of action and except as otherwise expressly provided in the rules, may be served by delivering a copy to the party to be served or the party's duly authorized agent or attorney of record. Tex. R. Civ. P. 21(a).

Service of Notice of Hearing: An application to the court for an order and notice of any hearing thereon, not presented during a hearing or trial, must be served on all other parties not less than three days before the time specified for the hearing, unless otherwise provided by these rules or shortened by the court. Tex. R. Civ. P. 21(b).

Who May Serve: Service of notice may be made by a party to the suit or his attorney of record, by a sheriff or constable, or by any other person competent to testify. Tex. R. Civ. P. 21a(d).

Multiple Parties: If there is more than one other party represented by different attorneys, one copy of each pleading must be served on each attorney in charge. Tex. R. Civ. P. 21(c).

Certificate of Service: The party or attorney of record must certify to the court compliance with this rule in writing over signature on the application. Tex. R. Civ. P. 21(d), see also Tex. R. Civ. P. 21(e). Rule 21 does not require that the certificate of service detail the method of service used. *See* Tex. R. Civ. P. 21; *Smith v. Mike Carlson Motor Co.*, 918 S.W.2d 669, 673 (Tex. App.—Fort Worth 1996, no writ). Likewise, rule 21 does not require a showing of

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actual receipt of notice by opposing counsel. *Gonzales v. Surplus Insurance Services*, 863 S.W.2d 96, 101–02 (Tex. App.—Beaumont 1993, writ denied) (intended recipient engaged in instances of selective acceptance and refusal of certified mail related to case); *Costello v. Johnson*, 680 S.W.2d 529, 531 (Tex. App.—Dallas 1984, writ. ref'd n.r.e.) (record not required to affirmatively show receipt of notice). Rule 21a creates a presumption that a document that is properly sent is received by the addressee. Although the presumption may be rebutted by an offer of proof of nonreceipt, the presumption has the force of a rule of law in the absence of proof to the contrary. *Thomas v. Ray*, 889 S.W.2d 237, 238 (Tex. 1994) (orig. proceeding); *Meek v. Bishop Peterson & Sharp, P.C.*, 919 S.W.2d 805, 809 (Tex. App.—Houston [14th Dist.] 1996, writ denied). Although not required by rules 21 and 21a, the better practice is to recite in the certificate of service the particular mode used to effect service and have available for the court's review evidence of service (for example, courier receipt, facsimile confirmation, certified mail receipt, domestic return receipt, certificate of mailing, or postal receipt). Rule 21a lists the methods of service.

Documents Filed Electronically: A document filed electronically under rule 21 must be served electronically through the electronic filing manager if the e-mail address of the party or attorney to be served is on file with the electronic filing manager. If the e-mail address of the party or attorney to be served is not on file with the electronic filing manager, the document may be served on that party or attorney as provided in rule 21a(a)(2). Tex. R. Civ. P. 21a(a)(1).

Documents Not Filed Electronically: A document not filed electronically may be served in person, by mail, by commercial delivery service, by fax, by e-mail, or by such other manner as the court in its discretion may direct. Tex. R. Civ. P. 21a(a)(2).

§ 19.9 Completion of Service

Service by Mail: Service by mail or commercial delivery service shall be complete on deposit of the document, postpaid and properly addressed, in the mail or with a commercial delivery service. Tex. R. Civ. P. 21a(b)(1).

Service by Facsimile: Service by fax is complete on receipt. Service completed after 5:00 P.M. local time of the recipient shall be deemed served on the following day. Tex. R. Civ. P. 21a(b)(2).

Electronic Service: Electronic service is complete on transmission of the document to the serving party's electronic filing service provider. The electronic filing manager will send confirmation of service to the serving party. Tex. R. Civ. P. 21a(b)(3).

E-Mail Service: Because the rule does not address when e-mail service is complete, the attorney should consider using an additional method of service.

§ 19.10 Time for Action after Service

Whenever a party has the right or is required to do some act within a prescribed period after the service of a notice or other paper on him and the notice or paper is served on him by mail, three days shall be added to the prescribed period. The amended rule grants additional time only when service is made by mail. Tex. R. Civ. P. 21a(c).

§ 19.11 Proof of Service

The party or attorney of record shall certify to the court compliance with this rule in writing over signature and on the filed instrument. A certificate by a party or an attorney of record, or the return of the officer, or the affidavit of any other person showing service of a notice shall be prima facie evidence of the fact of service. Nothing in the rule precludes any party from

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offering proof that the document was not received or, if service was by mail, that the document was not received within three days from the date that it was deposited in the mail, and on so finding, the court may extend the time for taking the action required of such party or grant such other relief as it deems just. Tex. R. Civ. P. 21a(e); *see also* Tex. R. Civ. P. 21(d) (requiring signed certificate of compliance with rule 21).

§ 19.12 Prima Facie Evidence of Service

The certificate of service is prima facie evidence of service. Tex. R. Civ. P. 21a(e). See form 19-1 in this manual for a certificate of service.

§ 19.13 Time for Service

Unless a specific rule provides otherwise and unless the application is presented during a hearing or trial, any application for a court order and notice of hearing must be served on all other parties at least three days before the time specified for the hearing. Tex. R. Civ. P. 21(b). *See* Tex. R. Civ. P. 4.

§ 19.14 Setting of Pretrial Hearings

The minimum time required for setting a matter for hearing varies both with the matter being heard and with local rules and practice. Once the court clerk sets a hearing date and time, all parties must be notified in writing of the setting as soon as possible.

§ 19.15 Notice of Hearing

An application to the court for an order and notice of any hearing thereon not presented during a hearing or trial must be served on all other parties not less than three days before the time specified for the hearing, unless otherwise provided by these rules or shortened by the court. Tex. R. Civ. P. 21(b).

Practice Note: When a motion is to be presented to the court for hearing, it is good practice to include a notice of hearing. The notice should be included at the end of the motion, before the certificate of service, or, depending on local practice, it may be filed as a separate document. A notice of hearing is at form 19-2 in this chapter.

§ 19.16 Hearing; Submission

An increasing number of courts are handling pretrial motions with a submission docket. Instead of oral argument, the court considers only the motion and response submitted. There is no right to present argument for or against a motion for summary judgment; all party participation necessary in a summary judgment proceeding occurs prior to the date set for hearing. *See Guereque v. Thompson*, 953 S.W.2d 458, 465 (Tex. App.—El Paso 1997, pet. denied) (no right to present oral argument at hearing); *Adamo v. State Farm Lloyds Co.*, 853 S.W.2d 673, 677 (Tex. App.—Houston [14th Dist.] 1993, writ denied) *cert. denied*, 511 U.S. 1053 (1994) (because oral hearing on summary judgment is "little more than argument of counsel," it is not reversible error for trial court to deny request for hearing; decision to grant oral hearing on summary judgment motion is purely within discretion of trial judge, and court of appeals cannot mandate that trial court hold oral hearing on summary judgment). The trial court is not required to conduct an oral hearing on a motion for summary judgment and may rule on the motion based solely on written submission. *Rorie v. Goodwin*, 171 S.W.3d 579, 583 (Tex. App.—Tyler 2005, no pet.). Therefore a supporting brief may often prove useful.

The procedure regarding submission dockets varies among courts, but generally the procedure is to obtain a submission date and time, which is the official date and time when the court will consider the motion and response. This submission date is the functional equivalent of a hear-

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ing date for purposes of filing motions and responses.

§ 19.17 Affidavits

§ 19.17:1 Definition

The Texas Government Code defines an "affidavit" as a statement in writing of a fact or facts signed by the party making it, sworn to before an officer authorized to administer oaths, and officially certified by the officer under his seal of office. *See* Tex. Gov't Code § 312.011. Normally an affidavit contains a jurat signed by an authorized officer (e.g., a notary), which certifies that the written statement was taken under oath before the officer. But a jurat is not essential for a written statement to meet the statutory definition of "affidavit"; proof that the writing was sworn to before an authorized officer may be supplied by other evidence. *See Mansions in the Forest, L.P. v. Montgomery County*, 365 S.W.3d 314, 316–17 (Tex. 2012) (per curiam) review granted, judgment rev'd on other grounds, 365 S.W.3d 314 (Tex. 2012) (in summary judgment, affidavit is proper when it contains acknowledgment by notary and recites that affiant was duly sworn and on oath stated contents of affidavit); *Asset Liquidation Group v. Wadsworth*, No. 01-15-00614-CV, 2016 WL 4375419, at *3 (Tex. App.—Houston 2016, no pet.) (mem. op.). Likewise, an acknowledgment by a notary (that an instrument was executed for the purposes therein expressed) will not by itself support a finding that a writing is an affidavit, but it will suffice "when coupled with language that the affiant personally appeared before the authorized officer, was duly sworn, and was deposed as follows." *Mansions in the Forest, L.P.*, 365 S.W.3d at 358–59 (citing *Perkins v. Crittenden*, 462 S.W.2d 565, 567 (Tex. 1970); *Ford Motor Co. v. Leggat*, 904 S.W.2d 643, 645–46) (Tex. 1995)). *See also Residential Dynamics, LLC v. Loveless*, 186 S.W.3d 192, 197 (Tex. App.—Forth Worth 2006, no pet.) (in summary judgment, affidavit without jurat held to be proper when it contained notary's acknowledgment; statement that affiant personally appeared, swore on oath, and deposed and stated information that followed; and affiant stated in affidavit that he had personal knowledge of facts stated therein).

§ 19.17:2 Contents of Affidavit

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

An affidavit must disclose the basis of the personal knowledge. *Radio Station KSCS v. Jennings*, 750 S.W.2d 760, 761–62 (Tex. 1988) (per curiam) (summary judgment); *M.G.M. Grand Hotel, Inc. v. Castro*, 8 S.W.3d 403, 406–07 (Tex. App.—Corpus Christi 1999, no pet.) (special appearance). It need not expressly state that its contents are true or that the affiant is competent to testify about the contents if competence is established by the facts in the affidavit. *Cook v. Frazier*, 765 S.W.2d 546, 551–52 (Tex. App.—Fort Worth 1989, no writ) (summary judgment). *See also Kyle v. Countrywide Home Loans, Inc.*, 232 S.W.3d 355, 361 (Tex. App.—Dallas 2007, pet. denied) (summary judgment; affiant not required to state all facts contained in affidavit are true when, considering affidavit in its entirety, affiant is clearly representing that facts stated therein are true and correct).

Unless otherwise authorized by statute, an affidavit is insufficient unless the allegations contained in it are direct and unequivocal, and perjury can be assigned to them if they prove to be incorrect. In the context of summary judgment, in order to raise an issue of fact the affidavit must contain facts and not mere conclusions.

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Brownlee v. Brownlee, 665 S.W.2d 111, 112 (Tex. 1984) (summary judgment); *Welch v. Doss Aviation, Inc.*, 978 S.W.2d 215, 222 (Tex. App.—Amarillo 1998, no pet.) (summary judgment); *Requipco, Inc. v. Am-Tex Tank & Equipment, Inc.*, 738 S.W.2d 299, 302 (Tex. App.—Houston [14th Dist.] 1987, writ ref'd n.r.e.) (summary judgment). It should positively and unqualifiedly represent the facts it discloses to be true and within the declarant's personal knowledge. *Brownlee*, 665 S.W.2d at 112. It should not merely recite that the affiant has personal knowledge of the facts testified to in the affidavit; it should show how the affiant has personal knowledge of these facts. *See Youngstown Sheet & Tube Co. v. Penn*, 363 S.W.2d 230, 233 (Tex. 1962); *Murfee v. Oquin*, 423 S.W.2d 172, 173–74 (Tex. Civ. App.—Amarillo 1967, writ ref'd n.r.e.).

§ 19.17:3 *Caveat:* "Knowledge and Belief"

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

Some affidavits, such as those supporting a sworn account petition, may be executed by the party, his agent, or his attorney. Tex. R. Civ. P. 185. The attorney should not execute any such affidavit unless the attorney has personal knowledge of the facts contained in it. *See* Tex. Disciplinary R. Prof'l Conduct 3.03. *See also* State Bar of Texas, Op. 405 (1983) (to knowingly verify false pleading may subject attorney to discipline and constitutes perjury).

§ 19.17:4 Affidavits and Business Records

An affidavit made under Tex. R. Civ. P. 185 and Tex. R. Evid. 902(10) may be used to authenticate and identify business records, and such an affidavit will support a summary judgment based on the pleadings. *Special Marine Products, Inc. v. Weeks Welding & Construction, Inc.*, 625 S.W.2d 822, 826–27 (Tex. App.—Houston [14th Dist.] 1981, no writ); *see also Hudspeth v. Investor Collection Services Ltd. Partnership*, 985 S.W.2d 477, 479 (Tex. App.—San Antonio 1998, no pet.) (lender need not file detailed proof reflecting calculations of balance due on note; affidavit of bank employee setting forth total balance due is sufficient). See section 19.50:1 below for the use of affidavits in summary judgment proceedings.

§ 19.17:5 Affidavits in Sworn Account Cases

See section 14.21:4 in this manual regarding the contents of an affidavit in a sworn account case.

§ 19.18 Verified Pleadings

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

1. defect of the parties (Tex. R. Civ. P. 93(4));
2. denial of partnership as alleged in any pleading (Tex. R. Civ. P. 93(5));
3. that any party alleged in any pleading to be a corporation is not incorporated as alleged (Tex. R. Civ. P. 93(6));
4. denial of the execution of a written instrument (Tex. R. Civ. P. 93(7));

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5. denial of genuineness of the indorsement or assignment of a written instrument upon which suit is brought by an idorsee or assignee (Tex. R. Civ. P. 93(8));

6. allegation that a written instrument on which a pleading is founded is without consideration or that the consideration has failed in whole or in part (Tex. R. Civ. P. 93(9));

7. denial of a sworn account (Tex. R. Civ. P. 93(10)); and

8. that a contract is usurious (Tex. R. Civ. P. 93(11)).

§ 19.19 Unsworn Declaration

An unsworn declaration may be used in lieu of an "affidavit required by statute or required by rule, order, or requirement adopted as provided by law." Tex. Civ. Prac. & Rem. Code § 132.001. The unsworn declaration must be (1) in writing; (2) subscribed by person making the declaration as true under penalty of perjury; and (3) must include a jurat in prescribed form. The substantial form of the required jurat is set forth in Tex. Civ. Prac. & Rem. Code § 132.001(d)–(f). See form 19-5. The second requirement (subscription under penalty of perjury) appears to supplant an affidavit's requirements showing affirmatively that it is based on personal knowledge, that the facts sought to be proved would be "admissible in evidence" at a conventional trial, and that the facts recited therein are "true and correct." *See, e.g.*, *Bahm v. State*, 219 S.W.3d 391, 394 (Tex. Crim. App. 2007) (inmate's unsworn declaration found to be proper when it included the "vital phrase" "under penalty of perjury" while also reciting facts "according to my belief").

§ 19.20 Exhibits

Parties may incorporate into their pleadings documentary exhibits such as promissory notes, accounts, mortgages, and other records and written instruments constituting, in whole or part, the claim sued on or the matter set up in defense by attaching copies or the originals to the pleadings, by filing copies or originals and referring to them, or by copying the documents into the body of the pleadings. Such documents will be deemed part of the pleadings. Tex. R. Civ. P. 59. A document is not put into evidence merely by attaching it to a pleading. If an exhibit is a necessary element of proof, it must be separately introduced into evidence at trial. *Johnson v. Mohammed*, No. 03-10-00763, 2013 WL 1955862, at *2 (Tex. App.—Austin 2013, pet. dism'd w.o.j.) (mem. op.); *National Medical Financial Services, Inc. v. Irving Independent School District*, 150 S.W.3d 901, 905 (Tex. App.—Dallas 2004, no pet.).

§ 19.21 Adoption by Reference

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

§ 19.22 Amended and Supplemental Pleadings

The distinction between amended and supplemental pleadings is clearly stated in Tex. R. Civ. P. 62–70, but the difference frequently becomes blurred in actual practice. *See, e.g.*, *Hawkins v. Anderson*, 672 S.W.2d 293, 294–96 (Tex. App.—Dallas 1984, no writ) (plaintiff initially filed negligence action in county court at law, then filed "first supplemental petition" adding a deceptive trade practice claim asking for treble damages and incorporating by reference the first pleading, thereby putting damages over jurisdic-

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tional maximum for the court; appeals court construed new petition as an amended pleading that superseded the original petition and alleged a new ground of recovery, and upheld dismissal of DTPA claim but overturned dismissal of negligence claim, holding that incorporating first pleading by reference was improper but did not make amended pleading void). An amended pleading adds to or takes from a previously filed pleading, whereas a supplemental pleading is addressed to a pleading of another party and is designed to answer allegations. Tex. R. Civ. P. 62, 69. For example, if the plaintiff must allege that the defendant waived the statute of limitations because the defendant raised the defense in his answer, he would do so in a supplemental petition. An amended pleading must identify the instrument being amended; it must be titled, for example, "Plaintiff's First Amended Petition" and is a complete substitute for the earlier pleading. Tex. R. Civ. P. 64.

§ 19.23 Misnamed Pleadings

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

§ 19.24 Response

Failing to respond to a pleading subjects a party to the risk of default judgment. See part II. in chapter 20 of this manual.

§ 19.25 Dismissal for Baseless Causes of Action

Texas Rule of Civil Procedure 91a governs dismissal of baseless causes of action (sometimes referred to as "early dismissal"). Rule 91a applies to all cases except those governed by the Family Code and inmate litigation. Tex. R. Civ. P. 91a.1. The procedures outlined in rule 91a are cumulative of other procedures that authorize dismissal in Texas. Tex. R. Civ. P. 91a.9. Moreover, the procedures of rule 91a are not exceptions to the special appearance rules of Texas Rule of Civil Procedure 120a or the challenge of venue rules of Texas Rule of Civil Procedure 86. Tex. R. Civ. P. 91a.8. A special appearance and/ or motion to transfer venue should be filed in the correct sequence to prevent waiver of objections to jurisdiction or venue. A litigant who files a motion to dismiss under rule 91a submits to the court's jurisdiction for the purposes contained in the motion and is bound by the court's ruling, including an award of attorney's fees and costs. Tex. R. Civ. P. 91a.8.

§ 19.25:1 Motion and Grounds for Dismissal

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. Tex. R. Civ. P. 91a.1.

§ 19.25:2 Contents of Motion

A motion to dismiss must—

1. state that it is made pursuant to Tex. R. Civ. P. 91a;
2. identify each cause of action to which it is addressed; and

3. state specifically the reasons the cause of action has no basis in law, no basis in fact, or both.

Tex. R. Civ. P. 91a.2.

§ 19.25:3 Time for Filing Motion to Dismiss, Response Thereto, Hearing, and Ruling

A motion to dismiss must be—

1. filed within sixty days after the first pleading containing the challenged cause of action is served on the movant;
2. filed at least twenty-one days before the motion is heard; and
3. ruled on within forty-five days after the motion is filed.

Tex. R. Civ. P. 91a.3.

Although a motion to dismiss must be filed at least twenty-one days before the hearing, the parties need only receive notice of the hearing fourteen days before the hearing. Tex. R. Civ. P. 91a.6. A response to a motion to dismiss is not required, but the deadline to file a response is not later than seven days before the date of the hearing. Tex. R. Civ. P. 91a.4.

The court may allow oral argument, but is not required to do so. With the exception of pleading exhibits permitted by Tex. R. Civ. P. 59, the court cannot consider evidence in ruling on the substance of the motion. Tex. R. Civ. P. 91a.6. (Note the contrast with Fed. R. Civ. P. 12(b)(6), which allows evidence to be submitted with the motion, but if evidence is submitted, the motion becomes a motion for summary judgment; furthermore there is no requirement that the motion to dismiss be filed before or contemporaneously with a responsive pleading as required by Fed. R. Civ. P. 12(b)(6).) Tex. R. Civ. P. 59 allows documentary exhibits such as notes, contracts, and records to be attached to a pleading in support of a claim or defense, and moreover, if an exhibit is attached, the pleading will not be defective if it fails to allege facts which can be supplied from the exhibit.

If a motion to dismiss a baseless claim is filed immediately on receipt of same, the baseless claim could be dismissed not earlier than twenty-one days after such baseless claim is filed. Tex. R. Civ. P. 91a.3(b). But, in no event will the baseless claim be dismissed more than 105 days after it is filed (i.e., the motion to dismiss is filed on the last day allowed by the rules and the court rules on the last day allowed by the rules). Tex. R. Civ. P. 91a.3(a), (b). By any modern day standard this constitutes "early dismissal."

§ 19.25:4 Effect of Nonsuit, Pleading Amendment, or Withdrawal of Motion to Dismiss

A nonsuit of a claim that is the subject of a motion to dismiss may be filed not later than three days before a hearing scheduled on the motion to dismiss. Similarly, a motion to dismiss may be withdrawn not later than three days before a hearing scheduled on the motion to dismiss. *See* Tex. R. Civ. P. 91a.5(a). Unless the parties agree that the motion to dismiss should not be heard, the court must rule on the motion unless the challenged cause of action is nonsuited or the motion to dismiss is withdrawn. In ruling on the motion to dismiss, the court cannot consider an unfiled nonsuit or amendment. Conversely, if claims are timely nonsuited or a motion to dismiss is timely withdrawn, the court cannot rule on the motion to dismiss. Tex. R. Civ. P. 91a.5(c).

A challenged cause of action may also be amended not later than three days before the date of the hearing on the motion to dismiss. Tex. R. Civ. P. 91a.5(a). If the challenged cause of action is amended, the motion to dismiss may be withdrawn or it may be amended to be

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directed at the amended cause of action. Tex. R. Civ. P. 91a.5(b). If the motion to dismiss is amended, the applicable time periods of rule 91a are restarted. Tex. R. Civ. P. 91a.5(d).

§ 19.25:5 Award of Costs and Attorney's Fees to Prevailing Party

The court may award costs and reasonable and necessary attorney's fees incurred with respect to the challenged cause of action to the prevailing party. Any award of costs or fees must be based on evidence. The court may not award attorney's fees and costs to parties in a suit brought by or against a governmental entity or in a suit by or against a public official acting in his official capacity or under color of law. Tex. R. Civ. P. 91a.7. There is no requirement in Fed. R. Civ. P. 12(b)(6) that the prevailing party must be awarded attorney's fees and costs. However, a litigant whose 12(b)(6) motion is granted may be able to petition the court for his attorney's fees pursuant to Fed. R. Civ. P. 54.

§ 19.26 Failure to Respond to, Amend, or Supplement Discovery Response

Failure to properly respond to, amend, or supplement a discovery response in a timely manner results in the automatic exclusion of the evidence or testimony that is the subject of the request, unless the trial court finds either good cause for the failure or that the failure will not unfairly surprise or prejudice the other parties. Tex. R. Civ. P. 193.6(a). The burden of proof is on the party seeking admission of the evidence, and the finding of good cause or lack of unfair surprise or unfair prejudice must be supported by the record. Tex. R. Civ. P. 193.6(b).

Even if the party seeking to introduce the evidence or call the witness fails to carry the burden imposed by Tex. R. Civ. P. 193.6(a), (b), the court may grant a continuance or postpone the trial to allow a response to be made, amended, or supplemented and to allow opposing parties to conduct discovery regarding any new information presented by that response. Tex. R. Civ. P. 193.6(c).

[Sections 19.27 through 19.30 are reserved for expansion.]

II. Expedited Actions

§ 19.31 Expedited Actions

Tex. R. Civ. P. 169 was added to rules effective March 31, 2013, to promote the prompt, efficient, and cost-effective resolution of civil actions. *See* 76 Tex. B.J. 221 (2013). The expedited actions process applies in a suit in which all claimants, other than counter-claimants, affirmative plead that they seek only monetary relief aggregating $100,000 or less, including damages of any kind, penalties, costs, expenses, prejudgment interest, and attorney's fees. Tex. R. Civ. P. 169(a)(1). The expedited process does not apply to actions filed pursuant to the Family Code, the Property Code, the Tax Code, or to medical liability claims governed by chapter 74 of the Texas Civil Practice and Remedies Code. Tex. R. Civ. P. 169(a)(2). Tex. R. Civ. P. 47 and 190.2 were revised to conform to the expedited actions procedures. Tex. R. Civ. P. 190.2(a)(1) was added to include in the Level 1 discovery control plan "any suit that is governed by the expedited actions process in Rule 169" and the rule was recaptioned as "Discovery Control Plan—Expedited Actions and Divorces Involving $50,000 or Less (Level 1)." *See* 76 Tex. B.J. 221 (2013). Rule 47(c), by requiring a statement of monetary relief sought, now expressly

requires the plaintiff to plead into the requirements of the rule or describe relief that falls outside the rule. Tex. R. Civ. P. 47(c).

See section 14.4 in this manual for information about expedited action considerations when drafting pleadings.

§ 19.31:1 Trial, Alternative Dispute Resolution, and Potential Recovery in Expedited Actions

On request by any party, the court must set the trial date within ninety days after the discovery period ends. The court may continue the case twice, but such continuances cannot be more than a total of sixty days cumulatively. Tex. R. Civ. P. 169(d)(2).

Unless the parties have agreed not to engage in alternative dispute resolution, the court may refer a case in the expedited action process to alternative dispute resolution once. The alternative dispute resolution must—

1. not exceed a half day in duration, excluding scheduling time;
2. not exceed a total cost of twice the amount of the applicable civil filing fees; and
3. be completed not more than sixty days before the first trial setting.

Tex. R. Civ. P. 169(d)(4)(A). The court must consider objections to the referral unless otherwise prohibited by statute. Tex. R. Civ. P. 169(d)(4)(B). The parties may agree to engage in alternative dispute resolution in a manner other than that provided for in the expedited process rules. Tex. R. Civ. P. 169(d)(4)(C).

If a plaintiff properly pleads into the expedited action process, and serves discovery with his petition, the case could be set for trial the day after discovery closes or 181 days after suit is filed. A maximum timeframe for taking the case to trial cannot be ascertained since the closure of the discovery period is calculated from the date that the first discovery requests are served. But, a diligent party will act quickly in serving discovery, and the case should be taken to trial on or about 330 days after the date the case is filed. *See* Tex. R. Civ. P. 169, 190.2(b)(1).

The rule requires economy in the use of time in trial. Each side in a case is allowed no more than eight hours to complete jury selection, opening statements, presentation of evidence, and examination and cross-examination of witnesses. Tex. R. Civ. P. 169(d)(3). "Side" has the same definition as set forth in Texas Rule of Civil Procedure 233 and means "one or more litigants who have common interests on matters with which the jury is concerned." Tex. R. Civ. P. 169(d)(3)(A), 233. Time spent on objections, bench conferences, bills of exception, and challenges for cause to a juror under rule 8 of the Texas Rules of Civil Procedure are not included in the time limit. Tex. R. Civ. P. 169(d)(3)(B). The eight-hour time limit for trial may be extended to no more than twelve hours per side on motion and a showing of good cause by any party. Tex. R. Civ. P. 169(d)(3). In determining whether good cause exists to extend the time allowed for trial, the court should consider the same factors listed above pertaining to removing the suit from the expedited action process. Tex. R. Civ. P. 169, cmt. 3.

A party that prosecutes a suit under rule 169 may not recover a judgment in excess of $100,000, excluding postjudgment interest. Tex. R. Civ. P. 169(b).

§ 19.31:2 Expert Testimony and Potential Recovery

Daubert and *Havner* challenges to expert testimony are not allowed pretrial except on request of the party offering the expert or as an objection to motion for summary judgment evidence.

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However, *Daubert* and *Havner* challenges may be made at the time of trial. A motion to strike an expert for late designation is also available. Tex. R. Civ. P. 169(d)(5). In terms of actual practice, the short timeframes for trial provided in rule 169 and limited discovery available under rule 190.2 may wholly prevent pretrial challenges to the admissibility of expert witnesses. *See Daubert v. Merrell Dow Pharmaceutical, Inc.*, 509 U.S. 579 (1993); *Havner v. E-Z Mart Stores*, 825 S.W.2d 456 (Tex. 1992).

§ 19.32 Discovery under Expedited Action Process

Application of Discovery Control Plan (Level 1): Discovery under the expedited action process is governed by Tex. R. Civ. P. 190.2 (also known as the "Level 1" discovery control plan). Tex. R. Civ. P. 190.2(a)(1). The rules generally do not allow the parties to agree to another discovery control plan. Tex. R. Civ. P. 190.1, 190.2(a)(2).

Discovery Control Plan (Level 1) Limitations: *Discovery Period*—Begins when the suit is filed, and ends 180 days after the date that the first discovery request of any kind is served on any party. Tex. R. Civ. P. 190.2(b)(1).

Total Time for Oral Deposition—Each party may have no more than six hours in total to examine and cross-examine all witness. Note that deposition time is per "party," while trial time is per "side." The parties may agree to extend this time to ten hours, but no more except by court order. The court may modify (increase or decrease) the deposition hours so that no party is given an unfair advantage. Tex. R. Civ. P. 190.2(b)(2).

Interrogatories—Limited to fifteen excluding interrogatories asking a party to identify or authenticate documents. Each discreet subpart of an interrogatory is a separate interrogatory. Tex. R. Civ. P. 190.2(b)(3).

Requests for Production—Limited to fifteen. Each discreet subpart of a request for production is a separate request for production. Tex. R. Civ. P. 190.2(b)(4).

Requests for Admission—Limited to fifteen. Each discreet subpart of a request for admission is a separate request for admission. Tex. R. Civ. P. 190.2(b)(5).

Requests for Disclosure—The standard requests for disclosure under rule 194.2 apply to expedited actions. Tex. R. Civ. P. 190.2(b)(6). Importantly, a party may request, as an additional request for disclosure, "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." Such a request for disclosure is not considered a request for production. *See* Tex. R. Civ. P. 190.2(b)(6).

The Level 1 discovery control plan rules do not specifically address requests for production or subpoenas duces tecum served with a deposition notice (whether oral or on written questions). *See generally* Tex. R. Civ. P. 190.2. Under rules 199 and 200, a party may serve requests for production with a notice of deposition. Tex. R. Civ. P. 199.2(b)(5), 200.1(b). Rules 193 and 196 govern requests for production served in conjunction with notices of deposition on parties or witnesses controlled by parties, and those rules do not contain a limitation on the number of requests for production that may be served on a party. Tex. R. Civ. P. 199.2(b)(5); *see also* Tex. R. Civ. P. 193, 196. If a party seeks to serve more than fifteen requests for production while under a Level 1 discovery control plan, it may do so by serving those requests for production with a notice of deposition. See also section 18.2 in this manual.

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[Sections 19.33 through 19.40 are reserved for expansion.]

III. Motion for Summary Judgment

§ 19.41 Purpose of Summary Judgment

The purpose of summary judgment is to eliminate patently unmeritorious claims or untenable defenses and to avoid delays of trial if there is no genuine issue of fact. *Swilley v. Hughes*, 488 S.W.2d 64, 68 (Tex. 1972). Summary judgment is not intended to deprive litigants of their right to a full hearing on the merits of any real issue of fact. An answer or response to an unsuccessful motion for summary judgment may produce the defendant's sworn testimony regarding his defenses, without need for further discovery on those defenses.

Summary judgment is a harsh remedy with complex and unclear procedural rules. All inferences are resolved in the nonmovant's favor. The judge (who does not risk reversal for denying a motion for summary judgment) may be hesitant to award a summary judgment because of the great statistical likelihood of reversal. *See* David Hittner & Lynne Liberato, *Summary Judgments in Texas*, 34 Hous. L. Rev. 1303, 1364 (1998). Summary judgments are well suited for commercial litigation in which the facts are more easily established by documentary evidence; see sections 19.45 (sworn accounts) and 19.46 (promissory notes) below. The attorney should carefully weigh these considerations in determining whether filing a motion for summary judgment is warranted.

§ 19.42 Availability of Summary Judgment

§ 19.42:1 Requirement of No Genuine Issue of Material Fact

The creditor can obtain a summary judgment against the debtor if—

> (i) the deposition transcripts, interrogatory answers, and other discovery responses referenced or set forth in the motion or response, and (ii) the pleadings, admissions, affidavits, stipulations of the parties, and authenticated or certified public records, if any, on file at the time of the hearing, or filed thereafter and before judgment with permission of the court, show that, except as to the amount of damages, *there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law* on the issues expressly set out in the motion or in an answer or any other response.

Tex. R. Civ. P. 166a(c) (emphasis added).

The question "is *not* whether the summary judgment proof *raises fact issues* with reference to the essential elements of a plaintiff's claim or cause of action, but is whether the summary judgment proof *establishes as a matter of law that there is no genuine issue of fact* as to one or more of the essential elements of the plaintiff's cause of action." *Gibbs v. General Motors Corp.*, 450 S.W.2d 827, 828 (Tex. 1970).

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§ 19.42:2 Requirement of Defendant's Appearance

The plaintiff may move for summary judgment at any time after the adverse party has appeared or answered. Tex. R. Civ. P. 166a(a). Summary judgment probably ceases to be available once the trial has begun. Many courts issue a docket control order that sets a specified deadline for filing dispositive motions, normally well before the date set for trial. *See* Comment, *Summary Judgment in Texas: A Selective Survey*, 14 Hous. L. Rev. 854, 861–62 (1977). Summary judgment should not be confused with judgment by default, which is available if the defendant has failed to appear and answer within certain time limits. *See* Tex. R. Civ. P. 239.

§ 19.43 Motion for Summary Judgment Generally

§ 19.43:1 Grounds

The motion must state specific grounds. Tex. R. Civ. P. 166a(c). The language of rule 166a(c) requiring that "the motion for summary judgment shall state the specific grounds" requires literal compliance. The grounds must be expressly presented in the motion. The grounds for summary judgment may not be raised only in an accompanying brief or memorandum in support. *Sysco Food Services, Inc. v. Trapnell*, 890 S.W.2d 796, 805 (Tex. 1994). The motion for summary judgment must state the specific grounds on which the judgment is sought, so that the issues will be defined and the respondent will be provided adequate information to oppose it. *Westchester Fire Insurance Co. v. Alvarez*, 576 S.W.2d 771, 772 (Tex. 1978), *overruled on other grounds by City of Houston v. Clear Creek Basin Authority*, 589 S.W.2d 671, 673 (Tex. 1979). The movant is confined to the specific grounds set forth in the motion. *See Clear Creek Basin Authority*, 589 S.W.2d at 677–78. It is unsettled what degree of specificity is required; the form motion in this chapter (form 19-9) summarizes the elements of the cause and directs the court's attention to the specific admission, answer, or other response by which the defendant has admitted each fact establishing that element for the plaintiff.

A court may not grant summary judgment relief for more than was specifically requested in the motion. *Mafrige v. Ross*, 866 S.W.2d 590, 591 (Tex. 1993), *overruled on other grounds by Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 192 (Tex. 2001).

Summary judgment may not be granted on an issue not presented in the motion for summary judgment. *Byrd v. Woodruff*, 891 S.W.2d 689, 700 (Tex. App.—Dallas 1994, writ dism'd by agr.). "Summary judgments may not be affirmed or reversed on grounds not expressly set forth in the motions presented to the trial court." *Benavides v. Moore*, 848 S.W.2d 190, 197 (Tex. App.—Corpus Christi 1992, writ denied). Further, summary judgment may not be granted as a matter of law on a cause of action not addressed in the summary judgment proceeding. *City of Beaumont v. Guillory*, 751 S.W.2d 491, 492 (Tex. 1988) (per curiam).

§ 19.43:2 Affirmative Defenses

An affirmative defense must be pleaded in a responsive pleading, or the defense will be waived. *F-Star Socorro, L.P. v. City of El Paso*, 281 S.W.3d 103, 108 (Tex. App.—El Paso 2008, no pet.). "If the party opposing a summary judgment relies on an affirmative defense, he must come forward with summary judgment evidence sufficient to raise an issue of fact on each element of the defense to avoid summary judgment." *Brownlee v. Brownlee*, 665 S.W.2d 111, 112 (Tex. 1984) (citing *City of Houston v. Clear Creek Basin Authority*, 589 S.W.2d 671, 678–79 (Tex. 1979)). The movant is not required to negate affirmative defenses. *Brownlee*, 665 S.W.2d at 112 (Tex. 1984). However, an unpleaded affirmative defense can be a proper

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basis for a summary judgment "when it is raised in the summary judgment motion, and the opposing party does not object to the lack of a rule 94 pleading in either its written response or before the rendition of judgment." *Roark v. Stallworth Oil & Gas, Inc.*, 813 S.W.2d 492, 494 (Tex. 1991) (petitioner sued for specific performance of contracts; in summary judgment motion, nonmovant relied on affirmative defense not included in earlier pleadings).

§ 19.43:3 Notice

The motion and any supporting affidavits must be filed with the court and served on the respondent at least twenty-one days before the time specified for hearing, except on leave of court, with notice to opposing counsel. Tex. R. Civ. P. 166a(c); *Ready v. Alpha Building Corporation*, 467 S.W.3d 580, 584 (Tex. App.—Houston [1st Dist.] 2015, no pet.). Service should be made in accordance with rules 21 and 21a.

The notice of summary judgment must include a specific submission date. *Ready*, 467 S.W.3d at 585–86 (notices stating motion would be submitted "after" date certain contained indefinite language that did not inform respondent of specific submission date or establish deadline for response), citing *Martin v. Martin, Martin & Richards, Inc.*, 989 S.W.2d 357, 359 (Tex. 1998) (per curiam) (trial court must give notice of submission date for a motion for summary judgment, because this date determines the date nonmovant's response is due); *Aguirre v. Phillips Properties, Inc.*, 111 S.W.3d 328, 332 (Tex. App.—Corpus Christi 2003, pet. denied) (op. on reh'g) ("failure to give notice of the submission date for a motion for summary judgment constitutes error."). The notice provisions associated with summary-judgment procedure under rule 166a are strictly construed. *Ready*, 467 S.W.3d at 585; *see also Nexen Inc. v. Gulf Interstate Engineering Co.*, 224 S.W.3d 412, 423 n.14 (Tex. App.—Houston [1st Dist.] 2006, no pet.) (appellate courts hold summary judgment movants to strict procedural and substantive standards). Notice of hearing for submission of a summary judgment motion is mandatory and essential to due process. *See* Tex. R. Civ. P. 166a(c); *Martin*, 989 S.W.2d at 359. "The failure to give notice of the submission date for a motion for summary judgment constitutes error . . . ." *Aguirre*, 111 S.W.3d at 332 (citing *Martin*, 989 S.W.2d at 359).

The clerk of court is not required to send notice of submission to the respondent. *Edwards v. Phillips*, No. 04-13-00725-CV, 2015 WL 1938873, at *3 (Tex. App.—San Antonio, Apr. 29, 2015, no pet.) (mem. op.); *see also Cronen v. City of Pasadena*, 835 S.W.2d 206, 209 (Tex. App.—Houston [1st Dist.] 1992, no writ) (applying Texas Rule of Civil Procedure 21a and finding that "a certificate of service creates a rebuttable presumption that the requisite notice [of the hearing] was [given]"), *overruled on other grounds by Lewis v. Blake*, 876 S.W.2d 314, 315 (Tex. 1994) (per curiam); *Krchnak v. Fulton*, 759 S.W.2d 524, 528 (Tex. App.—Amarillo 1988, writ denied) (rule regarding certificate of service "creates a presumption that the requisite notice was served and . . . has the force of a rule of law").

"A certificate by a party . . . showing service of a notice shall be prima facie evidence of the fact of service." Tex. R. Civ. P. 21a(e). *See Cliff v. Huggins*, 724 S.W.2d 778, 779–80 (Tex. 1987). A certificate of service is sufficient when it is sent to the address the respondent used on all pleadings. *Morris v. Sand Canyon Corp.*, No. 14-13-00931-CV, 2015 WL 2342503, at *3 (Tex. App.—Houston [14th Dist.] May 14, 2015, no pet.) (mem. op.) (proof of receipt not required; respondents offered no evidence to rebut presumption of notice based on certificates of service).

The certificate of service may be modified to include a statement that the motion for summary judgment and all supporting affidavits were filed

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and served at least twenty-one days before the time specified for hearing. *See* Tex. R. Civ. P. 166a(c). If service is made by mail rather than by personal service, three days must be added to the prescribed period for notice. Tex. R. Civ. P. 21a(c). Effective Jan. 1, 2014, Tex. R. Civ. P. 21a was amended to provide that three additional days are added only when notice or paper is served by mail; three additional days are no longer added when service is made by facsimile. *See* Tex. R. Civ. P. 21a(b), (c); Texas Supreme Court, *Order Adopting and Amending Texas Rule of Civil Procedure*, Misc. Docket No. 13-9165 (Dec. 13, 2013); 76 Tex. B.J. 809 (2013). Also, rule 4 applies to the calculation of the time periods prescribed by rule 166a(c) so that the day of service is not to be counted and the day of hearing is. *See* Tex. R. Civ. P. 4.

Except with leave of court, responsive pleadings (such as a sworn denial superseding the defendant's original unsworn answer) and evidence must be filed not later than seven days before the hearing. Tex. R. Civ. P. 63, 166a(c); *see Goswami v. Metropolitan Savings & Loan Ass'n*, 751 S.W.2d 487, 490 (Tex. 1988) (amended pleadings must be filed at least seven days before trial in accordance with rule 63; summary judgment hearing is "trial" for purposes of rule 63).

§ 19.43:4 Judgment Nihil Dicit as Alternative

If seeking a judgment without supporting affidavits, the attorney should consider a motion for judgment nihil dicit as a speedier alternative. See section 20.27 in this manual. The better practice is to state an additional ground for summary judgment and support that ground with an appropriate affidavit. If the defendant then amends his answer to include a sworn denial, the movant can proceed on the additional summary judgment ground.

§ 19.44 Responding to Motion for Summary Judgment

Responding to a traditional motion for summary judgment is not mandatory. *See* Tex. R. Civ. P. 166a(a). Once the movant with the burden of proof has established the right to a summary judgment on the issues presented, the nonmovant's response should present to the trial court a genuine issue of material fact that would preclude summary judgment. *Affordable Motor Co., Inc. v. LNA, LLC*, 351 S.W.3d 515, 519, 522 (Tex. App.—Dallas, 2011, pet. denied) (respondent established genuine issue of material fact precluding summary judgment when its response included controverting affidavit in opposition to movant's claim for attorney's fees); *Abdel-Fattah v. PepsiCo, Inc.*, 948 S.W.2d 381, 383 (Tex. App.—Houston [14th Dist.] 1997, no writ). If the movant does not establish the right to summary judgment on the issues presented, the burden of proof does not shift and the nonmovant is not required to respond. *M.D. Anderson Hospital & Tumor Institute v. Willrich*, 28 S.W.3d 22, 23 (Tex. 2000) (per curiam); *Rhone-Poulenc, Inc. v. Steel*, 997 S.W.2d 217, 222–23 (Tex. 1999); *Cove Investments, Inc. v. Manges*, 602 S.W.2d 512, 514 (Tex. 1980) (noting that, technically, no response is required when movant's proof is legally insufficient); *City of Houston v. Clear Creek Basin Authority*, 589 S.W.2d 671, 678 (Tex. 1979) (in absence of competent summary judgment proof by movant, no burden shifts to nonmovant). Failure to file a response does not authorize summary judgment by default in a traditional motion for summary judgment. *Wheeler v. Green*, 157 S.W.3d 439, 442 (Tex. 2005) (per curiam); *Rhône-Poulenc*, 997 S.W.2d at 222–23; *Cotton v. Ratholes, Inc.*, 699 S.W.2d 203, 205 (Tex. 1985) (per curiam) (stating *Clear Creek* did not shift burden of proof and thus, trial court cannot grant summary judgment by default). Even if the nonmovant does not file a response and the motion for summary judgment is uncontroverted, the movant must still carry

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the burden of proof. *See generally Clear Creek*, 589 S.W.2d at 675–77 (explaining history of traditional summary judgment rules in Texas).

In contrast to a traditional motion for summary judgment, responding to a no-evidence motion for summary judgment is mandatory; summary judgment may be granted by default in a no-evidence motion for summary judgment when the respondent fails to present evidence on the essential elements of its claim or defense for which it has the burden of proof at trial that are identified in the no-evidence motion. The court must grant the motion unless the respondent produces summary judgment evidence raising a genuine issue of material fact. Tex. R. Civ. P. 166a(i). *Roventini v. Ocular Sciences, Inc.*, 111 S.W.3d 719, 722–23 (Tex. App.—Houston [1st Dist.] 2003, no pet.) (traditional prohibition against summary judgment by default is inapplicable to motions filed under Tex. R. Civ. P. 166a(i)). *See also Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 602 (Tex. 2004) (upholding no-evidence summary judgment when plaintiffs offered less than a scintilla of evidence in support of product liability claim); *Gabriel v. Associated Credit Union of Texas*, 14-12-00349-CV, 2013 WL 865577, at *4–5 (Tex. App.—Houston [14th Dist.] Mar. 7, 2013, pet. denied) (mem. op.) (lender's no-evidence motion for summary judgment was properly granted when the borrower failed to produce a scintilla of damage evidence in the form of economic loss, damage to his credit, wrongful repossession, mental anguish damages, and damages stemming from mistakenly assessed late fees); *Flores v. Appler*, No. 05-09-01523-CV, 2011 WL 1994113, at *1 (Tex. App.—Dallas May 24, 2011) (mem. op.) (no-evidence summary judgment that asserted both traditional and no-evidence grounds was granted when respondent did not attach any evidence to response to motion for summary judgment and did not direct trial court to any evidence attached to motion for summary judgment); *Preston National Bank v. Stuttgart Auto Center Inc.*, No. 05-09-00020-CV, 2010 WL 3310727, at *3 (Tex. App.—Dallas Aug. 24, 2010, no pet.) (mem. op.) (no-evidence summary judgment was granted when bank did not offer any evidence of challenged elements of breach of duty and causation in its response).

Issues not expressly presented to the trial court during summary judgment proceedings by written motion, answer, or other response shall not be considered on appeal as grounds for reversal. *City of Houston v. Clear Creek Basin Authority*, 589 S.W.2d 671, 676 (Tex. 1979) (quoting Tex. R. Civ. P. 166a(c)). A late-filed response is inadmissible without leave of court. *See Benchmark Bank v. Crowder*, 919 S.W.2d 657, 663 (Tex. 1996) (summary judgment evidence was not properly before trial court when it was filed two days before hearing and record contained no order granting leave to file late evidence); *Kuntner & Kuntner v. Wells Fargo Bank, N.A.*, No. 02-14-00238-CV, 2015 WL 3523156, at *1–2 (Tex. App.—Fort Worth, June 4, 2015) (mem. op.) (no-evidence motion for summary judgment properly granted when respondents filed response on date of summary judgment hearing, attached no evidence to their response, and asked for ten-day extension of time "to file a more complete response" or alternatively for their response to be deemed timely filed); *Desrochers v. Thomas*, No. 04-12-00120-CV, 2013 WL 1223854, at *3 (Tex. App.—San Antonio Mar. 27, 2013, pet. denied) (mem. op.) (concluding summary judgment evidence was not properly before trial court when filed three days before hearing and record contained no order granting leave to file late evidence); *Trevino & Associates Mechanical, L.P. v. The Frost National Bank*, 400 S.W.3d 139, 145 (Tex. App.—Dallas 2013, no pet.) (grant of no-evidence summary judgment on counterclaim was proper when nonmovant failed to file response).

The rule requiring express presentment of issues to the trial court by written motion, answer or

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other response applies to pro se litigants as well as to parties represented by counsel. *See Guishard v. Money Management International, Inc.*, No. 14-14-000362-CV, 2015 WL 4984853, at *2–3 (Tex. App.—Houston [14th Dist.], Aug. 20, 2015) (mem. op.).

§ 19.45 Use of Summary Judgment in Suit on Sworn Account

§ 19.45:1 Based on Defendant's Unsworn Denial

Normally a summary judgment may not be obtained on the ground of deficiencies in pleadings or on the nonmovant's failure to file a response (see section 19.50:1 below). However, a summary judgment is proper if the plaintiff's sworn account petition is supported by an affidavit based on the personal knowledge of the affiant that conforms with rule 185 and the defendant fails to file a sworn denial in his answer as required by rule 93(10). Tex. R. Civ. P. 93(10), 166a(f), 185; *Notgrass v. Equilease Corp.*, 666 S.W.2d 635, 639 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); *see also Brightwell v. Barlow, Gardner, Tucker & Garsek*, 619 S.W.2d 249, 252–53 (Tex. Civ. App.—Fort Worth 1981, no writ); *Zemaco, Inc. v. Navarro*, 580 S.W.2d 616, 620 (Tex. Civ. App.—Tyler 1979, writ dism'd).

Sworn account cases are an exception to the general rule that pleadings are not summary judgment proof. If the respondent has failed to file a proper verified denial of a suit on sworn account, the pleadings can be the basis for summary judgment. *Enernational Corp. v. Exploitation Engineers, Inc.*, 705 S.W.2d 749, 750 (Tex. App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.); *Waggoners' Home Lumber Co. v. Bendix Forest Products Corp.*, 639 S.W.2d 327, 328 (Tex. App.—Texarkana 1982, no writ); *see also Hidalgo v. Surety Savings & Loan Ass'n*, 462 S.W.2d 540, 543 n.1 (Tex. 1971) (summary judgment could be granted on pleadings for suit on sworn account).

A sworn general denial is not sufficient to prevent a summary judgment in a suit on a sworn account. *Espinoza v. Wells Fargo Bank, N.A.*, 02-13-00111-CV (Tex. App.—Fort Worth 2013, pet. denied) (mem. op.); *Huddleston v. Case Power & Equipment Co.*, 748 S.W.2d 102, 103 (Tex. App.—Dallas 1988, no writ). The "written denial, under oath" required by rule 185 must also comply with Tex. R. Civ. P. 93(10), which requires a special sworn denial in the defendant's answer to put the plaintiff's claim at issue. *Cooper v. Scott Irrigation Construction, Inc.*, 838 S.W.2d 743, 746 (Tex. App.—El Paso 1992, no writ); *Huddleston*, 748 S.W.2d at 103. "In the absence of a sworn denial meeting the requirements of the rule, the account is received as prima facie evidence as against a defendant sued thereon, and the defendant may not dispute the receipt of the items or services, or the correctness of the stated charges although he may defend on other grounds." *Rizk v. Financial Guardian Insurance Agency, Inc.*, 584 S.W.2d 860, 862 (Tex. 1979). When a party suing on a sworn account files a motion for summary judgment on the singular ground that the nonmovant's pleading is insufficient under rules 185 and 93(10) because no proper sworn denial is filed, the nonmovant may amend and file a proper sworn denial. *Requipco, Inc. v. Am-Tex Tank & Equipment, Inc.*, 738 S.W.2d 299, 303 (Tex. App.—Houston [14th Dist.] 1987, writ ref'd n.r.e.) (where party suing on sworn account theory files its motion for summary judgment on sole ground that defendant has failed to file proper sworn denial, defendant may file amended answer to suit containing proper sworn denial as late as day of trial, but before he announces ready for trial), citing *Magnolia Fruit & Produce Co. v. Unicopy Corp. of Texas*, 649 S.W.2d 794, 797 (Tex. App.—Tyler 1983, writ dism'd w.o.j.). The nonmovant is not precluded from amending and filing a proper sworn denial to the suit by the time allowed under rule 63. *See*

Magnolia Fruit & Produce Co., 649 S.W.2d at 797; *but see John C. Flood of DC, Inc. v. Supermedia, LLC*, 408 S.W.3d 645, 653–54 (Tex. App.—Dallas 2013, pet. denied) (amended answer filed less than an hour before scheduled start of summary judgment hearing and without leave of court not considered in summary judgment proceeding).

§ 19.45:2 Plaintiff's Pleadings

There is no requirement that an account be pleaded with particularity or description of the nature of its component parts unless special exceptions to the pleadings have been raised by the defendant and sustained by the trial court. Tex. R. Civ. P. 185. In the repleading of such cases, the account pleaded should show the nature of the item sold, the date, and the charge. David Hittner & Lynne Liberato, *Summary Judgment in Texas*, 34 Hous. L. Rev. 1303, 1379–80 (1998). The court in one case found the pleadings to be legally insufficient to support summary judgment because they did not include a key to abbreviations or other explanations of the meanings of the items listed. *See Price v. Pratt*, 647 S.W.2d 756, 757 (Tex. App.—Corpus Christi 1983, no writ). A key or explanation of invoicing and billing done with computer numbers or abbreviations should be attached to the pleadings or be readily available if repleading is necessary. Hittner & Liberato at 1380.

If the motion for summary judgment is filed after the defendant timely files a proper, verified denial, the plaintiff will be required to submit summary judgment proof that establishes as a matter of law that no genuine issue of material fact exists as to the essential elements of the plaintiff's common-law cause of action. *See Gibbs v. General Motors Corp.*, 450 S.W.2d 827, 828 (Tex. 1970). The essential elements of a common-law action on a sworn account are that (1) there was a sale and delivery of merchandise; (2) the amount of the account is just—that is, the prices charged are in accordance with an agreement and are the usual, customary, and reasonable prices for that merchandise; and (3) the amount is unpaid. *Pat Womack, Inc. v. Weslaco Aviation, Inc.*, 688 S.W.2d 639, 641 (Tex. App.—Corpus Christi 1985, no writ); Hittner & Liberato at 1382; *see also Airborne Freight Corp. v. CRB Marketing, Inc.*, 566 S.W.2d 573, 574 (Tex. 1978) (per curiam). See the discussion of summary judgment proof at section 19.50 below.

See form 19-10 for an example of grounds to use when filing a motion for summary judgment on a sworn account.

§ 19.46 Use of Summary Judgment in Suit on Promissory Note

Summary judgment may be appropriate in a suit on a promissory note if no defense is offered or if the defendant does not present evidence in proper form to raise a fact issue on the elements necessary to his affirmative defense. *See Seale v. Nichols*, 505 S.W.2d 251, 254 (Tex. 1974). Summary judgment may also be available if the defendant's answers to requests for admissions judicially admit the necessary elements of the action. *See, e.g., Costello v. Johnson*, 680 S.W.2d 529, 530–31 (Tex. App.—Dallas 1984, writ ref'd n.r.e.) (answers to requests admitted execution of promissory notes, their validity, demand, and acceleration).

In a promissory note case, the motion for summary judgment and supporting evidence must prove—

1. that the note was executed by the defendant and delivered to the plaintiff by the defendant,

2. the plaintiff gave value for the note to the defendant,

3. the plaintiff was the hold and owner of the note,

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4. the defendant defaulted or the note was not paid in full at maturity, and

5. the amount due.

See Senegal v. Community Bank of Texas, N.A., No. 09-14-00142-CV, 2015 WL 2414295, at *2 (Tex. App.—Beaumont, May 21, 2015, no pet.) (mem. op.); *Goad v. Hancock Bank*, No. 14-13-00861-CV, 2015 WL 1640530, at *5 (Tex. App.—Houston [14th Dist.], Apr. 9, 2015, pet. denied) (mem. op.); *Manzo v. Lone Star National Bank*, No. 13-14-00155-CV, 2015 WL 214012, at *2 (Tex. App.—Corpus Christi Jan. 8, 2015, (mem. op.); *Jim Maddox Properties, LLC v. Wem Equity Capital Investments, Ltd.*, 446 S.W.3d 126, 132 (Tex. App.—Houston [1st Dist.] 2014, no pet.); *Alphaville Ventures, Inc. v. First Bank*, 429 S.W.3d 150, 152, 159 (Tex. App.—Houston [14th Dist.] 2014, no pet.) (movant failed to establish conclusively it was owner and holder of note and guarantee under assignment from original lender); *Energico Production, Inc. v. Frost National Bank*, No. 02-11-00148-CV, 2012 WL 254093, at *5 (Tex. App.—Fort Worth Jan. 26, 2012, pet. denied) (mem. op.).

It is not necessary to attach the original of the note to the affidavit. A photocopy is proper summary judgment evidence if the party introducing the copy swears it is a true and correct copy of the original note. *Life Insurance Co. of Virginia v. Gar-Dal, Inc.*, 570 S.W.2d 378, 380 (Tex. 1978); *see Zarges v. Bevan*, 652 S.W.2d 368, 369 (Tex. 1983) (real estate lien note). If a sworn or certified copy is attached, the motion or affidavit must clearly establish that the plaintiff is in possession of the note and is its present owner and holder. *Texas National Corp. v. United Systems International, Inc.*, 493 S.W.2d 738, 741 (Tex. 1973); *see* Tex. R. Civ. P. 166a(f). If the note is valid and complete on its face, the parol evidence rule excludes the nonmovant's oral statements that allege fraud or other extrinsic representations related to the contractual agreement. *Town North National Bank v. Broaddus*, 569 S.W.2d 489, 491–92 (Tex. 1978). *See also* Tex. Bus. & Com. Code § 26.02.

In a deficiency suit, the burden of pleading that the disposition of collateral was commercially reasonable is on the creditor. This burden may be satisfied by averring generally that all conditions precedent have been met. In that case, the creditor is required to prove commercial reasonableness only if the debtor specifically denies it in his answer. *Greathouse v. Charter National Bank-Southwest*, 851 S.W.2d 173, 176–77 (Tex. 1992).

In a suit on a promissory note, a movant for summary judgment could discharge the burden of proof without producing the note if its terms were established by affidavit or other proper summary judgment proof. The relevant terms of the note are the original principal amount, payment schedule, maturity date, interest rate (prematurity and postmaturity), default provisions, acceleration terms or notice, demand, and presentment requirements. *Sorrells v. Giberson*, 780 S.W.2d 936, 938 (Tex. App.—Austin 1989, writ denied).

For a discussion of the use of summary judgment in a suit on a negotiable instrument, see Comment, *Summary Judgment in Texas: A Selective Survey*, 14 Hous. L. Rev. 854, 893–97 (1977).

See form 19-11 in this chapter for an example of the grounds to use when filing a motion for summary judgment in a suit on a promissory note.

§ 19.47 Use of Summary Judgment in Suit for Breach of Contract

In breach of contract cases, the motion for summary judgment and supporting evidence must prove—

1. the existence of a valid contract;

2. performance or tendered performance by the plaintiff creditor;
3. breach of the contract by the defendant debtor; and
4. damages sustained by the plaintiff creditor as a result of the breach.

County Real Estate Venture v. Farmers & Merchants Bank, No. 01-13-00530-CV, 2015 WL 5911646, at *2–3 (Tex. App.—Houston [1st Dist.] Feb. 12, 2015, no pet.) (mem. op.) (bank's summary-judgment evidence failed to conclusively establish its claim for credit card balance owed when attachments to bank officer's affidavit contained no statement of account showing past-due charges or any calculation for claimed balance due that included offsets and credits); *SLT Dealer Group, Ltd. v. Americredit Financial Services, Inc.*, 336 S.W.3d 822, 828 (Tex. App.—Houston [1st Dist.] 2011, no pet.); *see also Mott v. Kellar*, No. 03-14-00291-CV, 2015 WL 4718996, at *2 (Tex. App.—Austin, Aug. 5, 2015, no pet.) (mem. op.) (breach of contract for deed; summary judgment reversed on appeal when maker raised genuine issue of material fact as to whether he made required payments under contract for deed).

The universal rule for measuring damages for the breach of a contract is just compensation for the loss or damage actually sustained. *Qaddura v. Indo-European Foods, Inc.*, 141 S.W.3d 882, 888 (Tex. App.—Dallas 2004, pet. denied) (citing *Stewart v. Basey*, 245 S.W.2d 484, 486 (Tex. 1952)). The most common interest protected in breach of contract cases is the expectation, or benefit-of-the-bargain, interest. *Qaddura*, 141 S.W.3d at 888–89. The supporting evidence most often includes documents and affidavits, each of which must satisfy standards for admissibility.

See forms 19-14 and 19-15 in this chapter for examples of the grounds to use when filing a motion for summary judgment in a suit for breach of contract.

§ 19.48 Use of Summary Judgment in Suit on Account Stated

In an account stated case, the motion for summary judgment and supporting evidence must prove—

1. transactions between the parties gave rise to the indebtedness of one party to the other;
2. there was an agreement, express or implied, between the parties that fixed the amount due; and
3. the party to be charged made an express or implied promise to pay the indebtedness.

Marc Core v. Citibank, N.A., No. 13-12-00648-CV, 2015 WL 1631680, at *6, 8 (Tex. App.—Corpus Christi Apr. 9, 2015, pet. denied) (mem. op.) (upholding summary-judgment where bank offered affidavit stating that monthly statements were sent to defendant and defendant paid minimum payments on many occasions, which showed that he actually received statements and agreed as to amount owed, "i.e., fixing the amount due"). *McFarland v. Citibank (S.D.), N.A.*, 293 S.W.3d 759, 763 (Tex. App.—Waco 2009, no pet.); *Dulong v. Citibank (S.D.), N.A.*, 261 S.W.3d 890, 893 (Tex. App.—Dallas 2008, no pet.).

Summary judgment on an account stated claim is proper if the evidence shows account statements were sent to the debtor, charges and payments were made on the account, fees and interest were charged on the account, and there is no evidence debtor ever disputed the fees or charges reflected on the statements. *Hays v. Citibank (South Dakota), N.A.*, No. 05-11-00187-CV (Tex. App.—Dallas 2012, no pet.) (mem. op.). Judgment may be rendered on less than all the relief sought. *Pegasus Transportation Group, Inc. v. CSX Transportation, Inc.*, 05-12-00465-CV (Tex. App.—Dallas, Aug. 14, 2013,

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no pet.) (mem. op.); *see also* Tex. R. Civ. P. 166a(e).

See form 19-13 in this chapter for an example of the grounds to use when filing a motion for summary judgment in a suit on an account stated.

§ 19.49 Use of Summary Judgment in Suit on Guaranty

In a suit on a guaranty, the motion for summary judgment and supporting evidence must establish—

1. the existence and ownership of the guaranty contract;
2. the terms of the underlying contract by the builder;
3. the occurrence of the conditions on which liability is based; and
4. the failure or refusal to perform the promise by the guarantor.

Marshall v. Ford Motor Co., 878 S.W.2d 629, 631 (Tex. App.—Dallas 1994, no writ); *see also Burchfield v. Prosperity Bank*, 408 S.W.3d 542 (Tex. App.—Houston [1st Dist.] 2013, no pet.) (bank may obtain summary judgment for entire indebtedness from a jointly-and-severally liable coguarantor for deficiency on note); *84 Lumber Co., L.P. v. David Powers*, 393 S.W.3d 299 (Tex. App.—Houston [1st Dist.] 2012, pet. denied) (corporate guarantor held liable for full amount of judgment against corporation).

The terms of a guaranty agreement determine whether the lender is required to collect from the borrower or on the collateral before looking to the guarantor to satisfy the debt. *See, e.g., Berry v. Encore Bank*, No. 01-14-00246-CV, 2015 WL 3485970, at *2 (Tex. App—Houston [1st Dist.] June 2, 2015, pet. denied) (mem. op.).

A signature followed by corporate office will result in personal liability in which the individual is clearly designated within the instrument as personal surety for the principal. *Material Partnerships, Inc. v. Ventura*, 102 S.W.3d 252, 259 (Tex. App.—Houston [14th Dist.] 2003, pet. denied); *see also American Petrofina Co. of Texas v. Bryan*, 519 S.W.2d 484, 487 (Tex. Civ. App.—El Paso 1975, no writ). The fact that a person is under an agency relation to another that is disclosed does not prevent him from becoming personally liable if the terms of the contract clearly establish the personal obligation. *American Petrofina*, 519 S.W.2d at 487. The addition of the corporate office by the signature may be construed as description personae of the signator rather than an indication of the capacity in which he signs. *Material Partnerships*, 102 S.W.3d at 259. "If the guaranty instrument is so worded that it can be given a certain or definite legal meaning or interpretation, it is not ambiguous and the court will construe the contract as a matter of law." *Western Bank-Downtown v. Carline*, 757 S.W.2d 111, 114 (Tex. App.—Houston [1st Dist.] 1988, writ ref'd) (citing *Coker v. Coker*, 650 S.W.2d 391 (Tex. 1983)).

See form 19-12 in this chapter for an example of the grounds to use when filing a motion for summary judgment in a suit on a guaranty.

§ 19.50 Summary Judgment Proof

§ 19.50:1 Evidence Generally

The mere filing of a pleading or a response to a summary judgment motion does not satisfy the burden of coming forward with sufficient evidence to prevent summary judgment from being granted. *American Petrofina, Inc. v. Allen*, 887 S.W.2d 829, 830 (Tex. 1994). Summary judgment evidence is not required to be described or set out in the motion in order to be considered. *Wilson v. Burford*, 904 S.W.2d 628, 629 (Tex. 1995) (per curiam). The usual practice is to describe in the motion or in a supporting brief the summary judgment proof relied on. To be considered by the trial or reviewing court, sum-

mary judgment evidence must be presented in a form that would be admissible at trial, although affidavit testimony is proper summary judgment evidence. *See Hidalgo v. Surety Savings & Loan Ass'n*, 462 S.W.2d 540, 545 (Tex. 1971).

The requirement to object to summary judgment evidence depends on whether the defect is formal or substantive. A defect is formal if the summary judgment proof is competent, but inadmissible. Hearsay and lack of personal knowledge are frequently raised objections to form. *See Washington DC Party Shuttle, LLC v. IGuide Tours, LLC*, 406 S.W.3d 723, 733–36 (Tex. App.—[14th Dist.] 2013, pet. denied) (en banc) (lack of personal knowledge); *Wakefield v. Wells Fargo Bank, N.A.*, No. 14-12-00686-CV, 2013 WL 6047031, at *2 (Tex. App.—Houston [14th Dist.] Nov. 14, 2013, no pet.) (mem. op.) (objection that affidavit was not based on personal knowledge was form defect that must be raised in trial court and objecting party should seek ruling on objection to preserve right on appeal). Texas Rule of Evidence 802 provides that "[i]nadmissible hearsay admitted without objection shall not be denied probative value merely because it is hearsay." As applied to summary judgment evidence, rule 802 has been held to mean that a hearsay objection is a defect in form that must be raised in a response or reply to a response. *See Stewart v. Sanmina Tex. L.P.*, 156 S.W.3d 198, 207 (Tex. App.—Dallas 2005, no pet.); *Rizkallah v. Conner*, 952 S.W.2d 580, 589 n.7 (Tex. App.—Houston [1st Dist.] 1997, no writ).

Failure to object to evidence at the trial court level waives any defects concerning form. *See Page v. State Farm Lloyds*, 259 S.W.3d 257, 265 (Tex. App.—Waco 2008), *rev'd on other grounds*, 315 S.W.3d 525 (Tex. 2010). Failure to object to the form of an affidavit results in a waiver of the complaint. *See, e.g., Alphaville Ventures, Inc. v. First Bank*, 429 S.W.3d 150, 159 (Tex. App.—Houston [14th Dist.] 2014, no pet.); *In re Evolution Petroleum Co.*, 359 S.W.3d 710, 713 n.2 (Tex. App.—San Antonio 2001, orig. proceeding). A defect is substantive if the summary judgment proof is incompetent: "any objections relating to substantive defects (such as lack of relevancy, conclusory) can be raised for the first time on appeal and are not waived by the failure to obtain a ruling from the trial court." *McMahan v. Greenwood*, 108 S.W.3d 467, 498 (Tex. App.—Houston [14th Dist.] 2003, pet. denied). "A complete absence of authentication is a defect of substance that is not waived by a party failing to object and may be urged for the first time on appeal." *In re Estate of Guerrero*, 465 S.W.3d 693, 706 (Tex. App.—Houston [14th Dist.] 2015, pet. denied). A substantive defect supporting or opposing a motion for summary judgment cannot be waived by failing to bring it to the trial court's attention. *Sanmina Texas L.P.*, 156 S.W.3d at 207; *Garcia v. John Hancock Variable Life Insurance Co.*, 859 S.W.2d 427, 434 (Tex. App.—San Antonio 1993, writ denied). There are inconsistencies among the courts concerning whether certain defects are formal or substantive. The safest practice is to present all objections in writing.

A party must object in writing to the form of summary judgment evidence and place the objections before the trial court, or the objection will be waived. *Grand Prairie Independent School District v. Vaughan*, 792 S.W.2d 944, 945 (Tex. 1990) (per curiam); *see also* Tex. R. Civ. P. 166a(f). The objection must be specific. *Womco, Inc. v. Navistar International Corp.*, 84 S.W.3d 272, 281 n.6 (Tex. App.—Tyler 2002, no pet.). The objecting party must also obtain a ruling on the objections. *Chance v. Elliott & Lilly, PC*, 462 S.W.3d 276, 282 (Tex. App.—El Paso 2015, no pet.) (ruling required on objection for failure to produce under Tex. R. Civ. P. 193.6); *Trusty v. Strayhorn*, 87 S.W.3d 756, 763–64 (Tex. App.—Texarkana 2002, no pet.). There is a split of authority regarding whether, pursuant to Tex. R. App. P. 33.1(a)(2)(A), an objection to summary judgment evidence can be preserved by an implicit ruling in the absence of

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a written, signed order. *See Sanmina Texas L.P.*, 156 S.W.3d at 206 (Tex. App.—Dallas 2005, no pet.). The better practice is to procure an order from the trial court on all evidence, especially the objections to hearsay evidence, before the time it enters the order granting or denying summary judgment. If such objections are made, the adverse party must seek an opportunity to amend its summary judgment proof. *Strachan v. FIA Card Services*, No. 14-09-01004-CV, 2011 WL 794958, at *2 (Tex. App.—Houston [14th Dist.] Mar. 8, 2011, pet. denied). To be effective and preserve error for appeal, most courts of appeals have held that an order of a trial court sustaining an objection to summary judgment evidence must be reduced to writing, signed by the trial court, and entered of record. *Utilities Pipeline Co. v. American Petrofina Marketing*, 760 S.W.2d 719, 723 (Tex. App.—Dallas 1988, no writ).

Rule 196.3 allows the producing party to offer a copy of the document unless the authenticity of the document is under scrutiny or because fairness under the circumstances of the case requires production of the original. Tex. R. Civ. P. 196.3(b). See Tex. R. Evid. 902(4) for certified copies of public records and Tex. R. Evid. 902(10) for business records accompanied by affidavit.

A nonmovant is not required to produce evidence to avoid summary judgment unless the movant has proved its case as a matter of law. *Priesmeyer v. Pacific Southwest Bank, F.S.B.*, 917 S.W.2d 937, 940 (Tex. App.—Austin 1996, no writ).

Summary judgment evidence must be properly before the court to be considered. *See Walker v. Sharpe*, 807 S.W.2d 442, 447 (Tex. App.—Corpus Christi 1991, no writ). Summary judgment evidence may be filed late, but only with leave of court. *Benchmark Bank v. Crowder*, 919 S.W.2d 657, 663 (Tex. 1996). A trial court can consider only evidence on file at the time of the hearing or filed after the hearing and before judgment with permission of the court. *Leinen v. Buffington's Bayou City Service Co.*, 824 S.W.2d 682, 685 (Tex. App.—Houston [14th Dist.] 1992, no writ). Summary judgment evidence must be submitted, at the latest, by the date summary judgment is rendered. *Priesmeyer*, 917 S.W.2d at 939.

§ 19.50:2 Discovery Documents

Deposition transcripts, answers to interrogatories, admissions, affidavits, stipulations of the parties, and authenticated or certified public records can support a summary judgment. Tex. R. Civ. P. 166a(c); *see generally Hidalgo v. Surety Savings & Loan Ass'n*, 462 S.W.2d 540 (Tex. 1971). Any document offered in a summary judgment proceeding or on which summary judgment is rendered must be on file at the time of the hearing or filed thereafter and before judgment with permission of the court. Tex. R. Civ. P. 166a(c). Such documents need not be formally introduced at the summary judgment hearing; it is sufficient if they are on file. Tex. R. Civ. P. 166a(c); *Perry v. Aggregate Plant Products Co.*, 786 S.W.2d 21, 23 (Tex. App.—San Antonio 1990, writ denied); *Able Finance Co. v. Whitaker*, 388 S.W.2d 437, 439 (Tex. Civ. App.—Tyler 1965, writ dism'd by agr.).

Tex. R. Civ. P. 166a(d) provides a mechanism for using as summary judgment proof discovery evidence that previously had not been filed with the clerk. Deposition excerpts submitted as summary judgment evidence need not be authenticated. *McConathy v. McConathy*, 869 S.W.2d 341, 342 (Tex. 1994) (holding that rule 166a(d) supersedes prior case law authentication requirements, including former requirement to include copy of court reporter's certificate as well as original affidavit certifying authenticity of copied excerpts); *see also E.B. Smith Co. v. United States Fidelity & Guaranty Co.*, 850 S.W.2d 621, 624 (Tex. App.—Corpus Christi 1993, writ denied) (interpreting term "specific

references" in rule 166a(d)); *but see Blanche v. First Nationwide Mortgage Corp.*, 74 S.W.3d 444, 452 (Tex. App.—Dallas 2002, no pet.) (holding that the rationale in *McConathy* is limited to depositions). See Tex. R. Evid. 901(b)(7), 902, regarding authentication of public documents and records.

§ 19.50:3 Witness Testimony

Oral testimony cannot be received at the hearing. Affidavits of interested witnesses and expert witnesses may support a summary judgment, which "may be based on uncontroverted testimonial evidence of an interested witness, or of an expert witness as to subject matter concerning which the trier of fact must be guided solely by the opinion testimony of experts, if the evidence is clear, positive and direct, otherwise credible and free from contradictions and inconsistencies, and could have been readily controverted." Tex. R. Civ. P. 166a(c). For an interested witness's testimony to establish fact, as a matter of law, it must "[have] no circumstances in evidence tending to discredit or impeach such testimony." *Swilley v. Hughes*, 488 S.W.2d 64, 67 (Tex. 1972) (quoting *Great American Reserve Insurance Co. v. San Antonio Plumbing Supply Co.*, 391 S.W.2d 41 (Tex. 1965)).

The supreme court has held:

> "[C]ould have been readily controverted" does not simply mean that the movant's summary judgment proof could have been easily and conveniently rebutted. Rather, it means that testimony at issue is of a nature which can be effectively countered by opposing evidence. If the credibility of the affiant or deponent is likely to be a dispositive factor in the resolution of the case, then summary judgment is inappropriate. On the other hand, if the non-movant must, in all likelihood, come forth with independent evidence to prevail, then summary judgment may well be proper in the absence of such controverting proof.

Casso v. Brand, 776 S.W.2d 551, 558 (Tex. 1989) (footnote omitted).

§ 19.50:4 Affidavits

A motion for summary judgment need not be supported by affidavits. *Teer v. Duddlesten*, 641 S.W.2d 569, 576 (Tex. App.—Houston [14th Dist.] 1982), *rev'd on other grounds*, 664 S.W.2d 702 (Tex. 1984). The court may consider depositions, the answers to interrogatories, admissions, and certified copies of documents without the necessity of a supporting affidavit by a witness. *Teer*, 641 S.W.2d at 576; *Citizens State Bank of Dickinson v. Shapiro*, 575 S.W.2d 375, 383 (Tex. Civ. App.—Tyler 1978, writ ref'd n.r.e.). It is unusual, however, for a summary judgment to be granted without supporting affidavits. David Hittner & Lynne Liberato, *Summary Judgments in Texas*, 34 Hous. L. Rev. 1303, 1335 (1998).

Affidavits may be used as summary judgment proof. Tex. R. Civ. P. 166a(c). If all material facts are established by other competent evidence (depositions, admissions, answers to interrogatories, stipulations of the parties, authenticated or certified public records, and in some cases pleadings), an affidavit is not strictly necessary; in practice, however, it is often required or expected by the court, and every summary judgment motion should have attached one or more affidavits (not executed by the attorney) establishing all elements of the cause and an affidavit by the attorney to support attorney's fees. For sample affidavits, see forms 19-17 (sworn account), 19-18 (promissory note), and 19-19 (attorney's fees) in this chapter; affidavits for other kinds of actions can be drafted by stating the elements pleaded in the

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petition or motion, using these affidavit forms as a model.

An affidavit must show affirmatively that it is based on personal knowledge and that the facts sought to be proved would be "admissible in evidence" at a conventional trial. Tex. R. Civ. P. 166a(f); *see also Ryland Group, Inc. v. Hood*, 924 S.W.2d 120, 122 (Tex. 1996) (per curiam) (quoting rule 166a(f)); *Brown v. Mesa Distributors, Inc.*, 414 S.W.3d 279, 287 (Tex. App.—Houston [1st Dist.] 2013, no pet.) (affidavit from company officer claiming personal knowledge of issue and company's records is sufficient evidence for summary judgment); *Espinoza v. Wells Fargo Bank, N.A.*, No. 02-13-00111-CV, 2013 WL 6046611, at *2 (Tex. App.—Fort Worth Nov. 14, 2013, pet. denied) (mem. op.) (bank records custodian's statement in affidavit that explained her relationship to bank and averred that her duties as records custodian included handling and management of this particular note was sufficient to show her personal knowledge of transaction). The mere statement in an affidavit that the affiant is a representative of the creditor (bank, lender, credit card issuer) is not sufficient to establish that the affiant has personal knowledge of the statement concerning the debt made therein. The affiant must affirmatively state in the affidavit how he gained personal knowledge in the scope of his employment of the statements concerning the debt. *Marc Core v. Citibank, N.A.*, No. 13-12-00648-CV, 2015 WL 1631680, at *3 (Tex. App.—Corpus Christi Apr. 9, 2015, pet. denied) (mem. op.); *Rose Core v. Citibank (S. Dakota), N.A.*, No. 11-13-00040-CV, 2015 WL 1004344, at *3 (Tex. App.—Eastland Feb. 27, 2015, no pet.) (mem. op.). The affidavit of an issuer of credit card debt is legally insufficient when it contains only unsupported conclusions as to the present balance due and owing. *See Akins v. FIA Card Services, N.A.*, No. 07-13-00244-CV, 2015 WL 780531, at * (Tex. App.—Amarillo, 2015, no pet.) (mem. op.). While affidavits customarily state that the facts recited therein are "true and correct," that recitation is not necessarily required. For example, when an affidavit is based on personal knowledge and is subscribed to and sworn before a notary public, it is not defective if, when considered in its entirety, its obvious effect is that the affiant is representing that the facts stated therein are true and correct. *See Kyle v. Countrywide Home Loans, Inc.*, 232 S.W.3d 355, 361 (Tex. App.—Dallas 2007, pet. denied) (citing *Federal Financial Co. v. Delgado*, 1 S.W.3d 181, 184 (Tex. App.—Corpus Christi 1999, no pet.)). This is a subjective determination that may be avoided by making the customary recitation that the recitations in the affidavit are "true and correct."

Business records affidavits under Tex. R. Evid. 902(1) are frequently used in collections cases to prove up the debt. Rule 902(10)(b) sets out a form of affidavit for use when business records are introduced under rule 803(6). The form is not exclusive. Tex. R. Evid. 902(10)(b). The rule provides that a business records affidavit "shall be sufficient if it follows [the prescribed form] though [the prescribed form] shall not be exclusive, and an affidavit which substantially complies with [the rule] shall suffice." Tex. R. Evid. 902(10)(b). An affidavit must only substantially comply with the sample provided within the rule. *See Rockwall Commons Associates, Ltd. v. MRC Mortgage Grantor Trust I*, 331 S.W.3d 500, 509 (Tex. App.—El Paso 2010, no pet.); *Kyle*, 232 S.W.3d at 360–61. Consequently, a business records affiant is not required to recite the exact words that appear in rule 902(10)(b).

The rules of evidence do not require that the qualified witness who lays the predicate for the admission of business records be their creator or have personal knowledge of the contents of the record; the witness is required only to have personal knowledge of the manner in which the records were kept. *Damron v. Citibank (S.D.), N.A.*, No. 03-09-00438-CV, 2010 Tex. App. LEXIS 7054, at *10–11 (Tex. App.—Austin Aug. 25, 2010, pet. denied); *Nice v. Dodeka,*

L.L.C., No. 09-10-00014-CV, 2010 Tex. App. LEXIS 8922, at *12–13 (Tex. App.—Beaumont Nov. 10, 2010, no pet.). Once a successor is assigned the rights to contracts in a case, it is not necessary that the predecessor verify those records through a separate custodian of records affidavit. *See Rockwall Commons Associates, Ltd.*, 331 S.W.3d at 511.

The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits. In order for defects in the form of affidavits or attachments to be grounds for reversal, they must be specifically identified by objection and the movant must be given the opportunity to amend. If the movant refuses to amend, the defects will constitute grounds for reversal. Tex. R. Civ. P. 166a(f).

A party can recover reasonable attorney's fees and other reasonable expenses incurred by the filing of affidavits by his opponent under rule 166a if it appears to the court's satisfaction that they were presented in bad faith or solely for the purpose of delay, and any offending party or attorney may be adjudged guilty of contempt. Tex. R. Civ. P. 166a(h).

A recent applicable amendment to the Civil Practices and Remedies Code authorizes the use of an unsworn declaration in lieu of an "affidavit required by statute or required by rule, order, or requirement adopted as provided by law." Tex. Civ. Prac. & Rem. Code § 132.001; Act of May 25, 2011, 82nd Leg., R.S., ch. 847, § 1, Tex. Gen. Laws 2119–20. The unsworn declaration (1) must be in writing; (2) must be subscribed by person making the declaration as true under penalty of perjury; and (3) must include a jurat in prescribed form. The substantial form of the required jurat is set forth in Tex. Civ. Prac. & Rem. Code § 132.001(d). *See* form 19-5. The second requirement (subscription under penalty of perjury) appears to supplant an affidavit's requirements showing affirmatively that it is based on personal knowledge, that the facts sought to be proved would be "admissible in evidence" at a conventional trial, and that the facts recited therein are "true and correct."

§ 19.50:5 Competence of Evidence

Expert opinion does not establish fact as a matter of law. *Gibbs v. General Motors Corp.*, 450 S.W.2d 827, 829 (Tex. 1970); *Broussard v. Moon*, 431 S.W.2d 534, 537 (Tex. 1968). The mere assertion of a legal conclusion will not establish a fact in support of a motion for summary judgment or raise an issue of fact in opposition to a motion. *Mercer v. Daoran Corp.*, 676 S.W.2d 580, 583 (Tex. 1984); *Hidalgo v. Surety Savings & Loan Ass'n*, 487 S.W.2d 702, 703 (Tex. 1972) (per curiam). Nor will hearsay statements discharge the burden of establishing fact. *Box v. Bates*, 346 S.W.2d 317, 319 (Tex. 1961). However, Tex. R. Evid. 802 states, "Inadmissible hearsay admitted without objection shall not be denied probative value merely because it is hearsay." Tex. R. Evid. 802. In *INA of Texas v. Bryant*, 686 S.W.2d 614 (Tex. 1985), the court of appeals considered hearsay evidence admitted without objection in reversing the trial court's grant of summary judgment. In affirming the decision, the supreme court expressly did not address the issue of the appellate court's consideration of hearsay statements. *See INA of Texas*, 686 S.W.2d at 615.

§ 19.50:6 Burden of Proof

Traditional Motion: The movant for summary judgment has the burden of showing that there is no genuine issue of material fact and that he is entitled to judgment as a matter of law. *Teer v. Duddlesten*, 664 S.W.2d 702, 703 (Tex. 1984); *Gibbs v. General Motors Corp.*, 450 S.W.2d 827, 828 (Tex. 1970); *Fulenwider v. City of Teague*, 680 S.W.2d 582, 584 (Tex. App.—Waco 1984, no writ); *see also* Tex. R. Civ. P. 166a(c). In deciding whether there is a disputed material fact issue, evidence favorable to the nonmovant will be taken as true; every reason-

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able inference must be indulged in favor of the nonmovant and any doubts resolved in the non-movant's favor; the nonmovant opposing summary judgment is not required to establish his right to prevail. *Montgomery v. Kennedy*, 669 S.W.2d 309, 311 (Tex. 1984); *Fulenwider*, 680 S.W.2d at 584.

Summary judgment is proper if the movant conclusively proves all the essential elements of his cause of action or defense as a matter of law. *Odeneal v. Van Horn*, 678 S.W.2d 941 (Tex. 1984); *City of Houston v. Clear Creek Basin Authority*, 589 S.W.2d 671, 678 (Tex. 1979).

The Supreme Court of Texas, in distinguishing Texas law from federal law, has stated that "we never shift the burden of proof to the nonmovant unless and until the movant has 'establish[ed] his entitlement to a summary judgment on the issues expressly presented to the trial court by conclusively proving all essential elements of his cause of action or defense as a matter of law.'" *Casso v. Brand*, 776 S.W.2d 551, 556 (Tex. 1989) (quoting *Clear Creek Basin Authority*, 589 S.W.2d at 678 n.5).

Once the movant has presented proper and sufficient summary judgment proof, the burden shifts to the nonmovant to come forward by written motion and sworn proof to controvert the summary judgment proof. *Clear Creek Basin Authority*, 589 S.W.2d at 678. A summary judgment cannot be granted on the failure of the nonmovant's proof if the movant has not conclusively established his cause of action. *Clear Creek Basin Authority*, 589 S.W.2d at 678. "If the party opposing a summary judgment relies on an affirmative defense, he must come forward with summary judgment evidence sufficient to raise an issue of fact on each element of the defense to avoid summary judgment." *Brownlee v. Brownlee*, 665 S.W.2d 111, 112 (Tex. 1984) (citing *Clear Creek Basin Authority*, 589 S.W.2d at 678–79).

No Evidence Motion: Tex. R. Civ. P. 166a(e) provides that "[a]fter adequate time for discovery, a party without presenting summary judgment evidence may move for summary judgment on the ground that there is no evidence of one or more essential elements of a claim or defense on which an adverse party would have the burden of proof at trial." The movant must specify the elements of the claim on which there is no evidence. A global no evidence claim that "there is no evidence of one or more essential elements of each of the claims made" is wholly deficient to put the respondent on notice about which element(s) the motion attacks. The rule is unequivocal; "(t)he motion must state the elements as to which there is no evidence." Tex. R. Civ. P. 166a(i); *Torres v. Saylor Marine, Inc.*, No. 13-10-00566-CV, 2011 WL 3855733, at *4 (Tex. App.—Corpus Christi Aug. 31, 2011, no pet.) (mem. op.); *Cornwell v. Dick Woodward & Associates*, No. 14-09-00940-CV, 2011 WL 166922, at *2 (Tex. App.—Houston [14th Dist.] Jan. 11, 2011, no pet.) (mem. op.) (no-evidence motion that merely challenges sufficiency of nonmovant's case and fails to state specifically elements for which there is no evidence is fundamentally defective and insufficient to support summary judgment as matter of law).

The movant is not required to negate affirmatively an element of a claim for which evidence is lacking. Tex. R. Civ. P. 166a(i).

In determining a "no-evidence" issue, the courts consider only the evidence and inferences that tend to support the finding and disregard all evidence and inferences to the contrary. *Bradford v. Vento*, 48 S.W.3d 749, 754 (Tex. 2001).

A party may not properly urge a no-evidence summary judgment on the claims or defenses on which it has the burden of proof. *Wortham v. Dow Chemical Co.*, 179 S.W.3d 189, 195 (Tex. App.—Houston [14th Dist.] 2005, no pet.); *Keszler v. Memorial Medical Center of East*

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Texas, 105 S.W.3d 122, 125 (Tex. App.—Corpus Christi 2003, no pet.).

§ 19.51 Partial Summary Judgment

§ 19.51:1 Uncontroverted Facts

A partial summary judgment may be granted if there is no genuine issue of material fact on some issues—for example, liability—reserving all controverted issues for trial. Tex. R. Civ. P. 166a(a), (e).

§ 19.51:2 Controverted Facts

If practicable, the court at a summary judgment hearing may, by examining the pleadings and evidence before it and interrogating attorneys, ascertain those material facts that exist and make an order specifying the facts that are established as a matter of law, and direct such further proceedings in the action as are just. Tex. R. Civ. P. 166a(e). For a form for such a partial summary judgment, see form 20-9 in this manual.

§ 19.52 Attorney's Fees

Attorney's fees must be specifically pleaded to be recovered. *Reintsma v. Greater Austin Apartment Maintenance*, 549 S.W.2d 434, 437 (Tex. Civ. App.—Austin 1977, writ dism'd). Attorney's fees included in a motion for summary judgment must be proved by the same summary judgment standards as the underlying cause. *Bakery Equipment & Service Co. v. Aztec Equipment Co.*, 582 S.W.2d 870, 873 (Tex. Civ. App.—San Antonio 1979, no writ). The notice and time requirements of chapter 38 of the Civil Practice and Remedies Code must be met. *See* Tex. Civ. Prac. & Rem. Code §§ 38.001–.002. *See generally* David Hittner & Lynne Liberato, *Summary Judgments in Texas*, 34 Hous. L. Rev. 1303, 1375–77 (1998).

Rule 166a(c) authorizes a summary judgment based on "uncontroverted testimonial evidence of an . . . expert witness as to subject matter concerning which the trier of fact must be guided solely by the opinion testimony of experts, if the evidence is clear, positive and direct, otherwise credible and free from contradictions and inconsistencies, and could have been readily controverted." Tex. R. Civ. P. 166a(c). An affidavit filed by the movant's attorney setting forth his opinion regarding reasonable attorney's fees is sufficient to support an award of attorney's fees, if uncontroverted by the nonmovant. *Sunbelt Construction Corp. v. S&D Mechanical Contractors, Inc.*, 668 S.W.2d 415, 418 (Tex. App.—Corpus Christi 1983, writ ref'd n.r.e.); *Bado Equipment Co. v. Ryder Truck Lines*, 612 S.W.2d 81, 83 (Tex. Civ. App.—Houston [14th Dist.] 1981, writ ref'd n.r.e.), *disapproved of on other grounds by McConnell v. Southside Independent School District*, 858 S.W.2d 337, 340 n.3 (Tex. 1993). Use of an affidavit is recommended; see form 19-19 in this chapter.

[Sections 19.53 through 19.60 are reserved for expansion.]

IV. Law of Other Jurisdictions

§ 19.61 When Foreign Law Used

In collections litigation, the need to apply the law of another jurisdiction may arise in either of two situations:

1. The plaintiff's suit may be based on a contract enforceable under the laws of

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another jurisdiction. (Judicial notice of the law of another jurisdiction is discussed in sections 19.62 through 19.64 in this chapter.)

2. The plaintiff may be attempting to enforce a judgment obtained in another jurisdiction and, in response to the defendant's plea that the foreign court did not have jurisdiction, may need to prove the validity of the service of process or the validity of the jurisdiction on which the judgment is based. (Enforcement of foreign judgments is discussed at sections 14.34 through 14.36 in this manual.)

§ 19.62 Proving Up Law of Foreign State

§ 19.62:1 Motion for Judicial Notice

A motion for judicial notice under rule 202 can be used to establish the law of a sister state. Under Tex. R. Evid. 202—

> A court upon its own motion may, or upon the motion of a party shall, take judicial notice of the constitutions, public statutes, rules, regulations, ordinances, court decisions, and common law of every other state . . . . A party requesting that judicial notice be taken of such matter shall furnish the court sufficient information to enable it properly to comply with the request . . . . A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken. Judicial notice of such matters may be taken at any stage of the proceeding. The court's determination shall be subject to review as a ruling on a question of law.

Tex. R. Evid. 202.

The Texas Supreme Court has held that it is unnecessary to plead foreign law that differs from Texas law if a motion has been made for judicial notice. *See Daugherty v. Southern Pacific Transportation Co.*, 772 S.W.2d 81, 83 (Tex. 1989). However, because notice is an important consideration in cases involving foreign law, the better practice is to plead the law of the sister state.

A motion for judicial notice under rule 202 cannot be used to establish the law of another nation (see section 19.64 below). See form 19-7 in this chapter for a motion for judicial notice and form 19-8 for an order taking judicial notice.

§ 19.62:2 Sufficient Information

> Rule 202 requires the moving party to furnish sufficient information to the trial court for it to determine the foreign law's applicability to the case and to furnish all parties any notice that the court finds necessary. . . . The determination of compliance with these requirements is within the discretion of the trial court.

Daugherty v. Southern Pacific Transportation Co., 772 S.W.2d 81, 83 (Tex. 1989). The motion should contain a significant recitation of the foreign state's law and a citation to where the law can be found. *Pittsburgh Corning Corp. v. Walters*, 1 S.W.3d 759, 769–70 (Tex. App.—Corpus Christi 1999, pet. denied). The better practice is to attach copies of the statutes or decisions to the motion. See Tex. R. Evid. 901(b)(7) regarding authentication and identification of public records, documents, and publications and Tex. R. Evid. 902 regarding self-authentication of domestic public documents and records.

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§ 19.62:3 Notice

It is recommended that notice of the motion for judicial notice be given to the adverse party, although Tex. R. Evid. 202 provides that necessity for such notice is left to the discretion of the judge. *See also Daugherty v. Southern Pacific Transportation Co.*, 772 S.W.2d 81, 83 (Tex. 1989). Under rule 202, absent prior notification, the request for an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed may be made after notice has been taken.

§ 19.62:4 Effect of Granted Motion

If the motion is granted, the court is presumed to have the same judicial knowledge of foreign laws as it has of its own state's laws. *Marsh v. Millward*, 381 S.W.2d 110, 112 (Tex. Civ. App.—Austin 1964, writ ref'd n.r.e.).

§ 19.62:5 Review of Motion

Tex. R. Evid. 202 expressly states that the determination of sister-state law by motion for judicial notice shall be subject to review as a question of law. But see section 19.63 below for a discussion of review of sister-state law under the common-law rule.

§ 19.63 Proving Up Law of Foreign State (Common-Law Method)

In addition to proof of sister-state law by a motion for judicial notice under Tex. R. Evid. 202, the existence of sister-state law may be brought before the court by the common-law method of formal pleading and proof. Under the common-law method, whether the law of another state exists is a fact question for the jury. Once the fact of the law is established, the questions of the applicability, competency, and construction of the sister-state law are for the court. *Commercial Credit Equipment Corp. v. West*, 677 S.W.2d 669, 673 (Tex. App.—Amarillo 1984, writ ref'd n.r.e.), *abrogated on other grounds by Greathouse v. Charter National Bank-Southwest*, 851 S.W.2d 173, 175 (Tex. 1992). In one case, the court ruled that if the sister-state law consists entirely of statutes and reports of judicial decisions, the construction and effect of the law are issues for the court; however, if judicial decisions of a sister state are conflicting, or inferences of fact must be drawn, or if the only proof offered is the parol testimony of expert witnesses as to the construction of a sister-state statute, the question of what the foreign law is becomes one of fact for the jury. *St. Louis & Santa Fe Railway v. Conrad*, 99 S.W. 209, 210–11 (Tex. Civ. App. 1906, no writ). The court in one case found that where the pleading gave sufficient notice to the opposing party of the intent to rely on sister-state law, the court could properly take judicial notice of such law. *Gould v. Awapara*, 365 S.W.2d 671, 673–74 (Tex. Civ. App.—Houston 1963, no writ). The trend in Texas is to treat determinations of foreign law as questions of law; however, it appears that the determination of sister-state law by pleading and proof is limited to appellate review as a question of fact. Common-law pleading and proof of sister-state law should be rejected whenever possible in favor of a motion for judicial notice. See Tex. R. Evid. 901(b)(7) regarding identification and authentication of public records, documents, and publications and Tex. R. Evid. 902 regarding self-authentication of domestic public documents and records.

§ 19.64 Determination of Law of Another Nation

Rule 203 states in part:

> (a) **Raising a Foreign Law Issue.** A party who intends to raise an issue about a foreign country's law must:

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(1) give reasonable notice by a pleading or other writing; and

(2) at least 30 days before trial, supply all parties a copy of any written materials or sources the party intends to use to prove the foreign law.

(b) **Translations.** If the materials or sources were originally written in a language other than English, the party intending to rely on them must, at least 30 days before trial, supply all parties both a copy of the foreign language text and an English translation.

(c) **Materials the Court May Consider; Notice.** In determining foreign law, the court may consider any material or source, whether or not admissible. If the court considers any material or source not submitted by a party, it must give all parties notice and a reasonable opportunity to comment and submit additional materials.

(d) **Determination and Review.** The court—not the jury—must determine foreign law. The court's determination must be treated as a ruling on a question of law.

Tex. R. Evid. 203. The law of a foreign country cannot be determined by a motion for judicial notice under rule 203; it must be pleaded and proved. However, the rule greatly relaxes the evidentiary proof requirements and creates a procedure comparable to judicial notice. It states that a court's determination of the law of a foreign country shall be reviewed as a question of law by appellate courts. When there is a failure of pleading or proof of the law of a foreign country, the majority of Texas decisions presume the foreign law to be identical to Texas law. *Pauska v. Daus*, 31 Tex. 67 (1868). See Tex. R. Evid. 901(b)(7) regarding identification and authentication of public records, documents, and publications and Tex. R. Evid. 902 regarding self-authentication of domestic public documents and records.

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Form 19-1

Most documents must now be filed electronically. *See* sections 19.4 and 19.6; Tex. R. Civ. P. 21, 21a.

Certificate of Service

I certify that a true copy of this [**name of document**] was served in accordance with rule 21a of the Texas Rules of Civil Procedure on the following on [**date**]:

[**Name of attorney of record or party to be served**] by [electronic filing manager/e-mail at [**e-mail address**]/fax at [**fax number**]/personal delivery at [**address**]/commercial delivery service at [**address**]/certified mail at [**address**]/first-class mail at [**address**]]. [**Repeat for each attorney of record or party to be served.**]

____
[**Name**]
Attorney for [**name**]

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Form 19-2

Notice of Hearing

The above motion is set for hearing on __________ at ______ __.M. in [**designation and location of court**].

SIGNED on ________________________________.

____
Judge or Clerk

Form 19-3

Certain business memoranda and records may be admitted in evidence based on this affidavit without the necessity of proving them by a witness at trial or by a deposition; certain notice requirements must be met, and the affidavit and records must be filed with the clerk at least fourteen days before trial. Tex. R. Evid. 902(10). For a notice to other parties, see form 19-4 in this chapter. If a copy of this affidavit is served on the defendant or the defendant's attorney, it should not be necessary to serve form 19-4 in addition to serving the affidavit. For a discussion of business records introduced by affidavit, see section 19.17:4.

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

Business Records Affidavit

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 of sound mind, capable of making this affidavit, and personally acquainted with the facts herein stated.

"I am the custodian of the records of **[name of employer]**. Attached hereto are **[number]** pages of records from **[name of employer]**. These records are kept by **[name of employer]** in the regular course of business, and it was the regular course of business of **[name of employer]** for an employee or representative of **[name of employer]** with knowledge of the act, event, condition, opinion, or diagnosis recorded to make the record or to transmit information thereof to be included in the record, and the record was made at or near the time or reasonably soon thereafter. The records attached hereto are the original or exact duplicates of the original."

____
[Name of affiant]
Affiant

SIGNED under oath before me on ______________________________.

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____
Notary Public, State of Texas

Attach a copy of each memorandum or record.

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Form 19-4

If business records are sought to be admitted in evidence on affidavit at trial, a business records affidavit and the accompanying records must be filed with the clerk of the court at least fourteen days before trial commences, and the other parties to the suit, including the defendant or the defendant's attorney, if he has one, must be given prompt notice of the filing of the records and affidavit. Tex. R. Evid. 902(10). Service of the notice may be made by any method authorized by rule 21a. Tex. R. Evid. 902(10). For a business records affidavit, see form 19-3 in this chapter. If a copy of form 19-3 is served on the defendant or the defendant's attorney, it should not be necessary to serve this notice in addition to serving the affidavit. For a discussion of business records introduced by affidavit, see section 19.17:4.

Notice to Other Party of Filing of Business Records Affidavit

[Date]

[Name and address of defendant's attorney]

Re: **[style of case]**
Cause No. **[number]**
[designation and location of court]

[Salutation]

Pursuant to the provisions of rule 902 of the Texas Rules of Evidence, **[name of affiant]**, an employee of **[name of employer]**, has executed an affidavit in support of certain business memoranda or records relevant to the referenced cause.

The affidavit and copies of the records have been filed with the court clerk for inclusion with the papers in the referenced cause and are available for your inspection and copying. The business records are to be used as evidence at the trial of the referenced cause.

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Sincerely yours,

____

[Name of attorney]

Certified Mail No. **[number]**
Return Receipt Requested

c: **[court clerk]**

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Form 19-5

An unsworn declaration may be used in lieu of a written sworn declaration, verification, certification, oath, or affidavit required by statute or required by a rule, order, or requirement adopted as provided by law, but not for a lien required to be filed with a county clerk, an instrument concerning real or personal property required to be filed with a county clerk, or an oath of office or an oath required to be taken before a specified official other than a notary public. *See* Tex. Civ. Prac. & Rem. Code § 132.001.

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

Jurat for Unsworn Declaration

My name is [**name**], my date of birth is [**date**], and my address is [**address, city, state, zip code**] and [**country**]. I declare under penalty of perjury that the foregoing is true and correct.

Executed in [**county**] County, State of [**state**], on the [**day**] day of [**month**], [**year**].

____
Declarant

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Form 19-6

The procedure for affidavits concerning cost and necessity of services is governed by Tex. Civ. Prac. & Rem. Code § 18.001; the form of the affidavit is contained in section 18.002.

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

Affidavit Concerning Cost and Necessity of Services

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 of sound mind and capable of making this affidavit.

Select one of the following. Select the first option if the affiant is the person providing the service. Select the second option if the affiant is the custodian of business records.

"On [**date**] I provided a service to [**name of person who received service**]. An itemized statement of the service and the charge for the service is attached to this affidavit and is a part of this affidavit.

Or

"I am the person in charge of the records of [**name of person who provided service**]. Attached to this affidavit are records that provide an itemized statement of the service and the charge for the service that [**name of person who provided service**] provided to [**name of person who received service**] on [**date**]. The attached records are a part of this affidavit.

"The attached records are kept by me in the regular course of business. The information contained in the records was transmitted to me in the regular course of business by [**name of person who provided service**] or an employee or representative of [**name of person who provided service**] who had personal knowledge of the information. The records were made at or

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near the time or reasonably soon after the time that the service was provided. The records are the original or an exact duplicate of the original.

Continue with the following.

"The service [I] provided was necessary, and the amount that [I/was] charged for the service was reasonable at the time and place that the service was provided."

____

[Name of affiant]

SIGNED under oath before me on ____________________________________.

____

Notary Public, State of Texas

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Form 19-7

This motion may be used to request the court to take judicial notice of the law of another state under Tex. R. Evid. 202 (discussed at section 19.62 in this chapter). The foreign law should be stated with sufficient specificity to avoid an objection that the plaintiff is pleading a conclusion. For an order granting this motion, see form 19-8.

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

Motion to Take Judicial Notice of Law of [name of state]

1. *Parties.* Movant is **[name of plaintiff]**, Plaintiff in this cause, who moves the Court to take judicial notice of the law of another state, as described below. Movant intends to use that law in this cause because it applies to and controls law and fact relevant to this cause. Respondent is **[name of defendant]**, Defendant in this cause.

2. *Facts.* Under the law of **[name of state]**, **[state foreign law, e.g.,** the maximum interest rate applicable to this suit is 21 percent], as shown by the copies of authorities attached hereto and incorporated by reference.

3. *Grounds.* The attached authorities and the law as stated therein are entitled to judicial notice by this Court under rule 202 of the Texas Rules of Evidence.

4. *Prayer.* Movant prays that—

   a. the Court set this matter for hearing;

   b. Respondent be given due notice as contemplated by rule 202 of the Texas Rules of Evidence;

   c. the Court take judicial notice of the above-stated law of another jurisdiction; and

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d. the Court apply that law to the trial of this cause.

____

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

> Include a certificate of service (form 19-1) and notice of hearing (form 19-2). Attach a copy of the statute, court opinion, etc., supporting the foreign law sought to be used. Prepare the order (form 19-8) to file with the motion.

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Form 19-8

This order establishes the law of another state as it applies to the creditor's suit and is based on the motion at form 19-7 in this chapter. For a discussion of this procedure, see section 19.62.

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

Order Taking Judicial Notice of Law of [name of state]

On [**date**] a hearing was held on Plaintiff's Motion to Take Judicial Notice of Law of [**name of state**] and to apply that law to this cause.

The Court finds that the law of [**name of state**] is as shown in copies attached to Plaintiff's motion, on file in this cause, specifically that the principle of law is [**state foreign law, e.g.,** that the maximum interest rate applicable to this suit is 21 percent].

It is therefore ORDERED that Plaintiff's Motion to Take Judicial Notice of Law of [**name of state**] is hereby sustained in all things and that the principle of law stated above shall apply to the trial of this cause.

SIGNED on ______________________________.

____
JUDGE PRESIDING

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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 the order to the motion (form 19-7) and file with the court clerk.

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Form 19-9

Ordinary summary judgment for a claimant is appropriate if pleadings and admissible summary judgment evidence demonstrate that there is no genuine issue of material fact (see sections 19.41 and 19.42 in this chapter) and the plaintiff is entitled to judgment as a matter of law. Tex. R. Civ. P. 166a(c). The motion is discussed at section 19.43.

Alternative grounds for paragraph 3. of this form are at forms 19-10 through 19-15. The grounds should be amended as appropriate to fit the facts of the case.

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

Plaintiff's Motion for Summary Judgment

1. *Parties.* Plaintiff is [**name of plaintiff**], who, pursuant to the provisions of rule 166a(a) of the Texas Rules of Civil Procedure, moves for summary judgment against [**name of defendant**], Defendant in this cause.

2. *Nature of Suit.* This cause is a suit [**describe action, e.g.,** on a written debt and for foreclosure of a security interest] plus interest, attorney's fees, and costs of court, as shown in Plaintiff's original petition on file in this cause, which is incorporated by reference in this motion.

3. *Grounds.*

> Insert as paragraph 3. specific grounds appropriate to the cause of action. See forms 19-10 (sworn account), 19-11 (promissory note and foreclosure), 19-12 (guaranty), 19-13 (consumer charge account), 19-14 (personal property lease), or 19-15 (suit on oral debt).

> Continue with the following.

Because there is no genuine issue of any material fact in this cause, Plaintiff is entitled to a summary judgment herein as a matter of law.

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4. *Alternative Partial Summary Judgment.* If summary judgment for Plaintiff is not rendered on the entire cause or for all relief requested, and if a trial is necessary on some of the issues in this cause, Plaintiff requests the Court, after examining the pleadings and summary judgment evidence before it and interrogating counsel to ascertain those material facts that are in good faith actually controverted, to make an order specifying those facts that appear to be without substantial controversy and directing such further proceedings in the action that are just.

5. *Attorney's Fees.* As shown by Plaintiff's original petition on file in this cause, Plaintiff has pleaded for attorney's fees

Select one of the following.

in a reasonable amount as provided by applicable statute.

Or

based on the provision for reasonable attorney's fees contained in the note or agreement on which this cause is founded.

Or

in the amount of [**percent**] percent of principal and interest due as provided in the note or agreement on which this cause is founded.

Or

in the amount of $[**amount**] as specifically provided in the note or agreement on which this cause is founded.

Select one of the following.

There is no genuine issue of fact about the basis for recovery of attorney's fees in this cause or about the amount thereof, and as a matter of law Plaintiff is entitled to recover attor-

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ney's fees as alleged in Plaintiff's original petition on file herein and as evidenced by Attorney's Affidavit in Support of Fees attached hereto.

Or

Plaintiff is entitled to recover attorney's fees as alleged in Plaintiff's original petition on file herein and as evidenced by Attorney's Affidavit in Support of Fees attached hereto, and the issue of attorney's fees should be set for hearing and should be heard by the Court immediately following the hearing on this Motion for Summary Judgment.

Continue with the following.

6. *Use of Unfiled Discovery Documents.* Plaintiff hereby gives notice of his intent to use unfiled discovery documents attached hereto as Exhibit [**exhibit number/letter**].

7. *Prayer.* Plaintiff prays that—

a. the Court set this matter for hearing;

b. Plaintiff be granted summary judgment for $[**amount**] on the debt owed Plaintiff; or alternatively, should the Court find some facts to be controverted, Plaintiff be granted a partial summary judgment specifying those facts that appear to be without substantial controversy;

c. Plaintiff be granted summary judgment for prejudgment interest, postjudgment interest, and costs of court, all as prayed for in Plaintiff's original petition on file herein;

d. Plaintiff be granted summary judgment for attorney's fees as prayed for in Plaintiff's original petition on file herein; or alternatively, the Court set a hearing on the matter of attorney's fees, to be held immediately following the

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summary judgment on this cause, and after the hearing Plaintiff be granted an order setting the amount of attorney's fees to be awarded; and

e. 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]

Include a notice of hearing (form 19-2) and a certificate of service (form 19-1). Attach any necessary affidavit(s); see forms 19-16 (sworn account), 19-17 (promissory note), and 19-18 (attorney's fees).

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Form 19-10

If applicable, incorporate one of the two alternatives below as paragraph 3. of form 19-9 in this chapter. See section 19.45 regarding motions for summary judgment on sworn accounts.

Grounds for Summary Judgment—Sworn Account

Select one of the following. Select the first option if summary judgment is based on the defendant's inadequate answer. Select the second option if the elements are established by discovery.

3. *Grounds.* This motion is based on the pleadings on file in this cause. Defendant has failed to comply with the requirements of rules 93(10) and 185 of the Texas Rules of Civil Procedure in that Defendant's answer is not a timely filed sworn pleading, verified by and supported by affidavit, denying the account that is the foundation of Plaintiff's cause of action. As a matter of law, therefore, there is no genuine issue of any material fact with respect to Plaintiff's cause of action on sworn account, and Plaintiff is entitled to a judgment against Defendant as prayed for in Plaintiff's original petition.

Or

3. *Grounds.* The pleadings, affidavits, and discovery documents, such as deposition transcripts, answers to interrogatories, and admissions, on file herein or attached hereto show that there is no genuine issue as to any material fact in this cause, in that—

a. In the usual course of business, Plaintiff sold and delivered to Defendant certain goods or services, as evidenced by [**describe evidence, e.g.,** Defendant's answers to Plaintiff's Written Interrogatories numbers 6 and 7].

b. The statement of account attached to Plaintiff's original petition on file herein accurately describes each item of goods or services delivered by Plaintiff to

Defendant, the price of each such item, and the delivery date of each such item, as evidenced by [**describe evidence**].

c. The price for each item of goods or services was [agreed to by Defendant/the usual and customary price for similar items], as evidenced by [**describe evidence**].

d. The above-described account has not been paid, as evidenced by [**describe evidence**].

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Form 19-11

If applicable, incorporate the promissory note text as paragraph 3. of form 19-9 in this chapter. See section 19.46 regarding motions for summary judgment on promissory notes.

Grounds for Summary Judgment—Promissory Note and Foreclosure

3. *Grounds.* The pleadings, affidavits, and discovery documents, such as deposition transcripts, answers to interrogatories, and admissions, on file herein or attached hereto show that there is no genuine issue as to any material fact in this cause, in that—

a. The note made the subject of this cause was executed by Defendant and was delivered to Plaintiff by Defendant, as evidenced by [**describe evidence**].

b. Plaintiff gave value for the note to Defendant, as evidenced by [**describe evidence**].

c. Plaintiff is the owner and holder of the note, as evidenced by [**describe evidence**].

d. The note matured, as evidenced by [**describe evidence**].

e. Defendant defaulted in payment of the note, as evidenced by [**describe evidence**].

f. The amount of $[**amount**] is due by Defendant to Plaintiff on the note, as evidenced by [**describe evidence**].

Continue with the following if foreclosure is sought.

g. Defendant, through the security agreement described in Plaintiff's original petition on file herein, granted to Plaintiff a security interest in the collateral therein described, as evidenced by [**describe evidence**].

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h. The collateral is presently in Defendant's possession, as evidenced by [**describe evidence**].

i. Defendant has failed to surrender possession of the collateral when demanded to do so by Plaintiff, as evidenced by [**describe evidence**].

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Form 19-12

If applicable, incorporate the guaranty text as paragraph 3. of form 19-9 in this chapter.

Grounds for Summary Judgment—Guaranty

3. *Grounds.* The pleadings, affidavits, and discovery documents, such as deposition transcripts, answers to interrogatories, and admissions, on file herein or attached hereto show that there is no genuine issue as to any material fact in this cause, in that—

a. The note guaranteed by the agreement made the subject of this cause was executed by [**name of borrower**], Borrower, and was delivered to Plaintiff by Borrower, as evidenced by [**describe evidence**].

b. Plaintiff gave value for the note to Borrower, as evidenced by [**describe evidence**].

c. Plaintiff is the owner and holder of the note, as evidenced by [**describe evidence**].

d. The note matured, as evidenced by [**describe evidence**].

e. Borrower defaulted in payment of the note, as evidenced by [**describe evidence**].

f. The amount of $[**amount**] is due by Borrower to Plaintiff on the note, as evidenced by [**describe evidence**].

g. Defendant guaranteed payment of the note, as evidenced by [**describe evidence**].

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h. Defendant defaulted in payment of the note under the guaranty agreement, as evidenced by [**describe evidence**].

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Form 19-13

If applicable, incorporate the consumer charge account text as paragraph 3. of form 19-9 in this chapter.

Grounds for Summary Judgment—Consumer Charge Account

3. *Grounds.* The pleadings, affidavits, and discovery documents, such as deposition transcripts, answers to interrogatories, and admissions, on file herein or attached hereto show that there is no genuine issue as to any material fact in this cause, in that—

a. Plaintiff and Defendant entered into an agreement, as described in Plaintiff's original petition on file herein, under which Defendant became obligated to pay Plaintiff for certain goods or services sold to Defendant by Plaintiff, as evidenced by [**describe evidence**].

b. Plaintiff performed all his obligations under the agreement by delivering the specified goods or services to Defendant, as evidenced by [**describe evidence**].

c. Defendant defaulted in payment of the debt created by the agreement, as evidenced by [**describe evidence**].

d. The amount of $[**amount**] is due by Defendant to Plaintiff under the agreement, as evidenced by [**describe evidence**].

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Form 19-14

If applicable, incorporate the personal property lease text as paragraph 3. of form 19-9 in this chapter.

Grounds for Summary Judgment—Personal Property Lease

3. *Grounds.* The pleadings, affidavits, and discovery documents, such as deposition transcripts, answers to interrogatories, and admissions, on file herein or attached hereto show that there is no genuine issue as to any material fact in this cause, in that—

a. Plaintiff and Defendant entered into a lease agreement, as described in Plaintiff's original petition on file herein, under which Defendant became obligated to pay Plaintiff for the use of certain property furnished to Defendant by Plaintiff, as evidenced by [**describe evidence**].

b. Plaintiff performed all his obligations under the agreement by furnishing the specified property to Defendant, as evidenced by [**describe evidence**].

c. Defendant defaulted in payment of the debt created by the agreement, as evidenced by [**describe evidence**].

d. The amount of $[**amount**] is due by Defendant to Plaintiff under the agreement, as evidenced by [**describe evidence**].

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Form 19-15

If applicable, incorporate the breach of contract text as paragraph 3. of form 19-9 in this chapter.

Grounds for Summary Judgment—Breach of Contract

3. *Grounds.* The pleadings, affidavits, and discovery documents, such as deposition transcripts, answers to interrogatories, and admissions, on the file herein or attached hereto show that there is no genuine issue as to any material fact in this cause, in that—

a. Plaintiff and Defendant entered into a contract, as described in Plaintiff's original petition on file herein, under which Defendant became obligated to pay Plaintiff for certain goods, services, or money furnished to Defendant by Plaintiff, as evidenced by [**describe evidence**].

b. Plaintiff performed all his obligations under the agreement by delivering the specified goods, services, or money to Defendant, as evidenced by [**describe evidence**].

c. Defendant breached the contract, as evidenced by [**describe evidence**].

d. As a result of the breach, Plaintiff sustained damages in the amount of $[**amount**], as evidenced by [**describe evidence**].

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Form 19-16

If applicable, incorporate the oral debt text as paragraph 3. of form 19-9 in this chapter.

Grounds for Summary Judgment—Oral Debt

3. *Grounds.* The pleadings, affidavits, and discovery documents, such as deposition transcripts, answers to interrogatories, and admissions, on file herein or attached hereto show that there is no genuine issue as to any material fact in this cause, in that—

a. Plaintiff and Defendant entered into an oral agreement, as described in Plaintiff's original petition on file herein, under which Defendant became obligated to pay Plaintiff for certain goods, services, or money furnished to Defendant by Plaintiff, as evidenced by [**describe evidence**].

b. Plaintiff performed all his obligations under the agreement by delivering the specified goods, services, or money to Defendant, as evidenced by [**describe evidence**].

c. Defendant defaulted in payment of the debt created by the agreement, as evidenced by [**describe evidence**].

d. The amount of $[**amount**] is due by Defendant to Plaintiff under the agreement, as evidenced by [**describe evidence**].

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Form 19-17

This form is an affidavit for a suit on a sworn account in which the defendant has filed a sworn denial as required by Tex. R. Civ. P. 93(10), 185. (If the defendant has not answered or if his answer does not comply with rule 185, summary judgment on the pleadings is available, and no other evidence is required. See section 19.45 in this chapter.)

For an affidavit for a suit on a promissory note, see form 19-18. For an affidavit for attorney's fees, see form 19-19. For a discussion of summary judgment proof, see section 19.50.

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

Plaintiff's Summary Judgment Affidavit for Suit on Sworn Account

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 of sound mind, capable of making this affidavit, and fully competent to testify to the matters stated herein, and I have personal knowledge of each of the matters stated herein.

Include the following paragraph if the affiant is an employee of the plaintiff.

"I am presently employed by [**name of plaintiff**], Plaintiff, in the capacity of [**capacity**], and I have been so employed since [**date**]. As part of my duties in such employment, I am custodian of the business records of Plaintiff.

Continue with the following.

"Attached to this affidavit as Exhibit [**exhibit number/letter**] is a true and correct copy of the statement of Defendant's account with Plaintiff. Attached to this affidavit as Exhibit [**exhibit number/letter**] is a true and correct copy of each invoice or other record for each sales transaction and each credit on Defendant's account. The attached exhibits are incorporated by reference into this affidavit.

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"Each such record was kept by Plaintiff in the regular course of business. It was the regular course of Plaintiff's business for Plaintiff or an employee or representative of Plaintiff, with personal knowledge of the act, event, or condition recorded, to make the record or to transmit information thereof to be included in the record. Each such record attached hereto was made at or near the time of the act, event, or condition recorded or reasonably soon thereafter. Each copy attached hereto is an exact duplicate of the original record, and each copy was made under my personal supervision.

"In the usual course of business, Plaintiff sold to Defendant certain goods, wares, merchandise, or services, as described in Exhibit [**exhibit number/letter**] of this affidavit. Defendant accepted the goods, wares, merchandise, or services.

"Exhibits [**exhibit number/letter**] and [**exhibit number/letter**] of this affidavit describe each such item delivered, the price of each such item, and the date each such item was delivered to Defendant.

"The price of each such item, as stated in Exhibits [**exhibit number/letter**] and [**exhibit number/letter**] of this affidavit, was [agreed to by Defendant/the usual and customary price for such an item].

"Defendant defaulted in paying this account. The balance of the account as stated in Exhibit [**exhibit number/letter**] of this affidavit is the amount owed to Plaintiff by Defendant after every just and lawful offset, credit, or payment has been allowed.

"On [**date**], Plaintiff demanded that Defendant pay the account. Because of Defendant's failure to do so, Plaintiff has been forced to employ [**name of attorney**], a licensed attorney, to file suit on the account."

____
[**Name of affiant**]
Affiant

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SIGNED under oath before me on ______________________________.

____
Notary Public, State of Texas

Attach exhibit(s).

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Form 19-18

This form is an affidavit for a suit on a promissory note (including optional foreclosure language). For an affidavit for a suit on a sworn account, see form 19-16 in this chapter. For an affidavit for attorney's fees, see form 19-19. For a discussion of summary judgment proof, see section 19.50.

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

Plaintiff's Summary Judgment Affidavit for Suit on Promissory Note

[with Foreclosure of Security Interest]

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 of sound mind, capable of making this affidavit, and fully competent to testify to the matters stated herein, and I have personal knowledge of each of the matters stated herein.

"Attached to this affidavit as Exhibit [**exhibit number/letter**] is a true and correct copy of a note executed by Defendant and delivered to Plaintiff by Defendant. Exhibit [**exhibit number/letter**] is incorporated by reference into this affidavit. Plaintiff is the owner and holder of the note, is presently in possession of the note, and is entitled to payment thereon.

"Plaintiff obtained the note by paying cash to Defendant in the amount stated in the note as principal.

"The note matured under its terms in that the due date stated in the note passed, and Plaintiff presented the note to Defendant for payment.

"Defendant defaulted in paying the total of principal and interest due on the note under its terms. After every payment has been applied, Defendant owes Plaintiff $[**amount**] as prin-

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cipal and $[**amount**] as interest on the note as of [**date**]. Interest continues to accrue thereafter at the rate of $[**amount**] per day.

"On [**date**], Plaintiff demanded that Defendant pay the note. Because of Defendant's failure to do so, Plaintiff was forced to employ [**name of attorney**], a licensed attorney, to file suit on the note.[")]

Continue with the following if seeking foreclosure of a security interest.

"To secure payment of the note, Defendant executed the security agreement included with the note in Exhibit [**exhibit number/letter**] of this affidavit, granting to Plaintiff a security interest in the collateral described in the security agreement.

"I have observed firsthand that the collateral is in Defendant's possession by visiting Defendant's premises on [**date**].

"On [**date**], Plaintiff demanded that Defendant surrender possession of the collateral to Plaintiff, which Defendant refused to do."

Continue with the following.

____
[**Name of affiant**]
Affiant

SIGNED under oath before me on ____________________________.

____
Notary Public, State of Texas

Attach exhibit(s).

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Form 19-19

Summary judgment for attorney's fees can be granted if an affidavit is filed by the movant's attorney stating his opinions regarding reasonable attorney's fees and this affidavit is not controverted by the opposing party. Use of an affidavit similar to this form is recommended as proof supporting the prayer for fees. For discussions of attorney's fees in summary judgment proceedings, see section 19.52 in this chapter.

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

Plaintiff's Summary Judgment Affidavit for Attorney's Fees

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 of sound mind, capable of making this affidavit, and fully competent to testify to the matters stated herein, and I have personal knowledge of each of the matters stated herein.

"On [**date**] Plaintiff employed me to collect the claim on which this suit is based. Between then and the date of this affidavit, I performed [**number**] hours of work on this matter, including doing or causing to be done the following:

Describe the work done; one or more of the following examples may be appropriate.

"Defendant's whereabouts were investigated.

"Defendant's assets were investigated.

"Demand was made on Defendant.

"The disputed claim was discussed with Defendant and with Plaintiff.

"Payment arrangements were made with Defendant.

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"One or more writs of [attachment/sequestration/prejudgment garnishment] were obtained.

"Prejudgment relief was obtained.

"Suit was filed.

"Requests for disclosure were served on one or more parties.

"Written interrogatories were served on one or more parties.

"Requests for production of documents were served on one or more parties.

"One or more orders compelling answers to written interrogatories and production of documents were obtained.

"Requests for admissions were served on one or more parties.

"One or more persons were deposed.

"An affidavit controverting Defendant's motion to transfer venue was prepared, and Plaintiff's position was argued at a venue hearing.

"A motion for judicial notice of the law of another state was prepared and presented at a hearing.

"A motion for summary judgment was prepared.

Continue with the following.

"If Plaintiff's Motion for Summary Judgment is granted, I am of the opinion that $[**amount**] would be a reasonable fee for services required to perform postjudgment discovery and to satisfy the judgment by writ of execution and other procedures.["]

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Include one or both of the following two paragraphs if applicable.

"If Plaintiff's Motion for Summary Judgment is granted and Defendant makes an unsuccessful appeal from this judgment, I am of the opinion that $[**amount**] would be a reasonable fee for services performed in this cause on appeal to the court of appeals.["]

And/Or

"If Plaintiff's Motion for Summary Judgment is upheld by the court of appeals and Defendant makes an unsuccessful appeal from this judgment and the judgment of the court of appeals, I am of the opinion that $[**amount**] would be a reasonable fee for services performed in this cause on appeal to the Texas Supreme Court."

Continue with the following.

____
[Name of attorney]
Affiant

SIGNED under oath before me on ______________________________.

____
Notary Public, State of Texas

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Chapter 20

Judgment

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Chapter 20

Judgment

I. Judgments Generally

§ 20.1 Written Orders

All judgments, decisions, and orders of any kind should be reduced to writing and signed by the trial judge with the date of signing stated. Tex. R. Civ. P. 306a(2). The date that the judgment was signed, as opposed to the date the judgment was rendered or entered, is the operative date for purposes of postjudgment motions and appeal. Rule 306a provides that time commences to run for appellate steps when the judge signs the judgment. *See* Tex. R. Civ. P. 306a(1). Also see section 20.12 below.

§ 20.2 Proposed Judgments

Any party may prepare and submit a proposed judgment to the court for signature. Tex. R. Civ. P. 305. In doing so, the party must serve it on all other parties who have appeared and remain in the case, in accordance with rule 21a. Failure to comply with rule 305 does not affect the time for perfecting an appeal. Tex. R. Civ. P. 305.

The most common issue with proposed judgments is whether the submission of one waives the party's right to challenge the judgment later in whole or in part. Caution must be exercised here. A motion for judgment on the verdict is an affirmation by the moving party that the jury findings are supported by the evidence. *See Sun Power, Inc. v. Adams*, 751 S.W.2d 689, 696 (Tex. App.—Fort Worth 1988, no writ). Generally, a party who moves for judgment on the verdict cannot complain of the part of the judgment based on those findings. *See Litton Industrial Products, Inc. v. Gammage*, 668 S.W.2d 319, 321–22 (Tex. 1984); *Andrew Shebay & Co. v. Bishop*, 429 S.W.3d 644, 647 (Tex. App.—Houston [1st Dist.] 2013, pet. denied). To preserve the right to complain about the judgment on appeal, the moving party should state in its motion for judgment that it agrees only with the form of the judgment and disagrees with the content and result. *See Hooks v. Samson Lone Star, L.P.*, 457 S.W.3d 52, 67 (Tex. 2015) (motion for judgment stating it was filed "without waiving any rights to contest or appeal" and signed "Approved as to Form" sufficient to preserve error); *First National Bank of Beeville v. Fojtik*, 775 S.W.2d 632, 633 (Tex. 1989) (per curiam); *Soon Phat, L.P. v. Alvarado*, 396 S.W.3d 78, 95–96 (Tex. App.—Houston [14th Dist.] 2013, pet. denied) (proposed judgment "approved as to form only" was sufficient to preserve right to appeal). The failure of a party to prepare and submit a proposed judgment to the court for signature does not preclude the party from challenging the judgment. *In re Marriage of Ames*, 860 S.W.2d 590, 592 (Tex. App.—Amarillo 1993, no writ).

§ 20.3 Caption

The judgment should contain the full names of the parties, as stated in the pleadings, for and against whom the judgment is rendered. Tex. R. Civ. P. 306. The rule does not require that all parties be included in the caption. Accordingly, if there are multiple defendants, only the first party need be identified in the caption, so long as all parties are identified by full name in the body of the judgment (see also section 20.4

below). Care should be exercised in identifying the parties to insure accuracy and avoid later difficulty in seeking to enforce the judgment.

§ 20.4 Recitals—Appearances of Parties

The recital section of the judgment should identify the full name of the parties and their participation in the proceeding, for example, who appeared, how the party appeared (in person, through counsel of record, or pro se), who defended at trial, who answered but failed to defend further, who defaulted, and what method of service was used on any defendant who defaulted. With rare exception, judgment may not be granted in favor of or against a party not named in the suit as a plaintiff or a defendant. *See Mapco, Inc. v. Carter*, 817 S.W.2d 686, 687 (Tex. 1991) (per curiam); *Exito Electronics, Co. v. Trejo*, 166 S.W.3d 839, 852 (Tex. App.—Corpus Christi–Edinburg 2005, no pet.). There may be instances, however, when the failure to name a party in the body of the judgment is not fatal, if the party's identity can be established from the caption of the case, the record, the pleadings, and the process. *Gomez v. Bryant*, 750 S.W.2d 810, 811 (Tex. App.—El Paso 1988, no writ). *See also Elliott v. Hamilton*, 767 S.W.2d 262, 263 (Tex. App.—Beaumont 1989, writ denied) (probate proceeding; "Persons, though not nominal parties to a lawsuit, may, by their active and open participation, so connect themselves with the litigation to have the legal effect of making them a party.").

§ 20.5 Recitals—Nature of Proceedings

Texas judgments typically also identify the nature and date of the proceedings. The rules do not require such a statement but it is helpful in providing the context for the decision. The judgment should therefore state the dates during which the case was tried and whether the case proceeded by bench or jury trial. If a part of the case has been resolved by dismissal, summary judgment, instructed verdict, or judgment notwithstanding the verdict, the judgment should reflect so. See the following forms: Motion for Entry of Default Judgment (Form 20-1) with supporting Certificate of Last Known Mailing Address (Form 20-2), Nonmilitary Affidavit (Form 20-3), Attorney's Fees Affidavit (Form 20-4), Default Judgment (Forms 20-5 and 20-6), Judgment Nihil Dicit (Form 20-7), Final Summary Judgment (Form 20-8), Partial Summary Judgment (Form 20-9), Partial Summary Judgment and Trial (Form 20-10), Agreed Judgment (Form 20-11), Judgment on Foreign Judgment (Form 20-12), and Judgment (Forms 20-13, 20-14, and 20-15).

§ 20.6 Evidence

The judgment need not describe the evidence on which it is based but should include a statement that the court heard evidence and is of the opinion that judgment should be rendered for the successful party.

§ 20.7 Conformity to Pleadings

The judgment of the court must conform to the pleadings, the nature of the case proved, and the verdict, if any. Tex. R. Civ. P. 301. When issues not raised by the pleadings are tried by express or implied consent of the parties, they will be treated in all respects as if they had been raised in the pleadings. Tex. R. Civ. P. 67. A pleading defect not properly raised before the charge to the jury or, in a nonjury case before judgment is signed, may be waived. Tex. R. Civ. P. 90.

§ 20.8 Findings of Fact

Findings of fact shall not be recited in a judgment; rather, they shall be filed as a separate document. Tex. R. Civ. P. 299a. In any case tried in a district court or county court without a jury, any party may request the court to state in writing its findings of fact and conclusions of law.

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Tex. R. Civ. P. 296. The procedures to request findings of fact and conclusions of law are set forth in Tex. R. Civ. P. 296–298. If findings of fact are not requested by the losing party, it is implied that the trial court made all findings necessary to support its judgment. *Worford v. Stamper*, 801 S.W.2d 108, 109 (Tex. 1990); *In re Crumbley*, 404 S.W.3d 156, 162 (Tex. App.—Texarkana 2013, orig. proceeding). When findings of fact are filed by the trial court, they form the basis of the judgment on all grounds of recovery and of defense stated therein. Tex. R. Civ. P. 299.

§ 20.9 Decretal Language in Judgment

The decretal language in a judgment determines the rights of the parties; it is the section in the judgment that begins "It is hereby ordered, adjudged and decreed" or "It is ordered." The judgment should determine the rights of all parties and dispose of all issues. *Felderhoff v. Knauf*, 819 S.W.2d 110, 111 (Tex. 1991) (per curiam). A court's judgment is its announcement of the resolution of the issues in the lawsuit. *State v. Naylor*, 466 S.W.3d 783, 788 (Tex. 2015). If the subject of the judgment is property, the judgment should describe the property with reasonable certainty. *See Dellana v. Walker*, 866 S.W.2d 355, 358 (Tex. App.—Austin 1993, writ denied) (trespass to try title). The judgment must be framed so as to give the prevailing party all the relief to which that party may be entitled in law or in equity. Tex. R. Civ. P. 301. If no relief is granted to a party, that party cannot recover under the judgment. See section 20.15 below (discussing language of finality in the judgment disposing of all parties and claims).

The following subsections discuss various forms of relief.

§ 20.9:1 Money Damages Awarded

Almost every judgment based on a creditor's claim will include the following as elements of damages:

1. principal debt (including net amount in case of counterclaim or other setoff or credit);
2. prejudgment interest (see section 20.10 below);
3. postjudgment interest at the highest rate allowed by law (see section 20.11 below);
4. attorney's fees (see chapter 31 in this manual); and
5. costs (usually recovered under Tex. R. Civ. P. 131 but may be allocated differently under rule 141 for good cause). *See Furr's Supermarkets, Inc. v. Bethune*, 53 S.W.3d 375, 378 (Tex. 2001) ("Rule 141's good cause exception to the mandate of Rule 131 is designed to account for a prevailing party's questionable conduct that occurs during litigation, permitting the trial judge some discretion to reassess costs so that the cost attendant to that conduct is not visited on an innocent, but losing party."). *See also State v. B&L Landfill, Inc.*, 758 S.W.2d 297, 300 (Tex. App.—Houston [1st Dist.] 1988, no writ) (trial court abused discretion in allotting costs contrary to rule 131 without explanation as required by rule 141).

An award of money damages should clearly state the amount recovered or otherwise furnish the means by which the damages can be ascertained. *See El Universal, Compania Periodistica Nacional, S.A. de C.V. v. Phoenician Imports, Inc.*, 802 S.W.2d 799, 802 (Tex. App.—Corpus Christi–Edinburg 1990, writ denied). Generally, a judgment for money damages in excess of the

amount pleaded is erroneous, even though a higher amount might be warranted by the evidence. *Borden v. Guerra*, 860 S.W.2d 515, 525 (Tex. App.—Corpus Christi–Edinburg 1993, writ dism'd by agr.). The Texas Supreme Court, however, has held that such a pleading problem may be remedied by a postverdict pleading amendment increasing the amount of the damages sought to the amount awarded by the jury, unless the opposing party establishes surprise or prejudice. *Greenhalgh v. Service Lloyds Insurance Co.*, 787 S.W.2d 938, 939 (Tex. 1990).

§ 20.9:2 Judgment Involving Property

When property is the subject of a judgment, the judgment should describe the property with reasonable certainty. For land, the description must be sufficient so that an officer executing a writ of possession could ascertain the boundaries of the land. *See Dellana v. Walker*, 866 S.W.2d 355, 358 (Tex. App.—Austin 1993, writ denied) (trespass to try title). The rules of procedure governing execution should be consulted to assist in determining the requisite specificity for different types of judgment. See Tex. R. Civ. P. 630 (judgment for money), Tex. R. Civ. P. 631 (judgment for sale of particular property), Tex. R. Civ. P. 632 (judgment for the delivery of certain property), and Tex. R. Civ. P. 633 (judgment for the recovery of personal property or its value).

§ 20.9:3 Foreclosure of Lien

All judgments foreclosing mortgages and other liens shall be that the plaintiff recover "his debt, damages and costs, with a foreclosure of the plaintiff's lien on the property subject thereto." Tex. R. Civ. P. 309. Unless the judgment is against a personal representative of an estate (see section 20.9:5 below), the judgment must further direct that an order of sale issue—

> to any sheriff or any constable within [Texas], directing him to seize and sell [the collateral] as under execution, in satisfaction of the judgment; and, if the property cannot be found, or if the proceeds . . . be insufficient to satisfy the judgment, then to take the money . . . remaining unpaid, out of any other property of the defendant, as in . . . ordinary executions.

Tex. R. Civ. P. 309. A judgment for foreclosure of a tax lien on real estate that fails to describe a definite tract of land is void. *AIC Management v. Crews*, 246 S.W.3d 640, 645 (Tex. 2008).

§ 20.9:4 Alternative Recoveries

If a plaintiff prevails on more than one theory, the judgment cannot award relief on all of them; to do so would violate the "one satisfaction" rule. *Tony Gullo Motors I, L.P., Inc. v. Chapa*, 212 S.W.3d 299, 303 (Tex. 2006). If the trier-of-fact finds for the plaintiff on more than one theory, the party is entitled to the recovery providing it the greatest relief. *See Tony Gullo*, 212 S.W.3d at 314; *Transport Insurance Co. v. Faircloth*, 898 S.W.2d 269, 274 (Tex. 1995). The successful party may make its election after it knows the amount it will recover under each of the alternative theories. *Tony Gullo*, 212 S.W.2d at 314. If the party does not make the election, the trial court is to render judgment affording the greatest recovery. *Birchfield v. Texarkana Memorial Hospital*, 747 S.W.2d 361, 367 (Tex. 1987).

§ 20.9:5 Judgment against Personal Representative

Each judgment for the recovery of money against an executor, administrator, or guardian must state that "it is to be paid in the due course of administration." Tex. R. Civ. P. 313. Instead of levying by execution, the judgment creditor is to certify the judgment to the probate court for enforcement, except that a "judgment against an executor appointed and acting under a will dis-

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pensing with the action of the county court [sitting in matters of probate] in reference to such estate shall be enforced against the property of the testator in the hands of such executor, by execution, as in other cases." Tex. R. Civ. P. 313.

§ 20.9:6 Judgment for Attorney's Fees

If attorney's fees are recoverable, a judgment should state a specific sum for legal work performed through trial. *See, e.g., Borg-Warner Protective Services Corp. v. Flores*, 955 S.W.2d 861, 865, 870 (Tex. App.—Corpus Christi–Edinburg 1997, no pet.) (judgment set forth specific sum for attorney fees based on lodestar method). The fees should be for a specific amount, not a percentage of the judgment. *See Arthur Andersen & Co. v. Perry Equipment Corp.*, 945 S.W.2d 812, 818–19 (Tex. 1997). The judgment may also allow for additional specified amounts in the event of appeal "provided they are conditioned on ultimate appellate success." *Borg-Warner*, 955 S.W.2d at 870; *see also A.G. Edwards & Sons, Inc. v. Beyer*, 235 S.W.3d 704, 707 n.1 (Tex. 2007) (court of appeals properly reformed trial court's unconditional grant of attorney's fees to condition award on unsuccessful appeal). Recently, the Texas Supreme Court has opined that a prevailing party at trial may be entitled to appellate attorney's fees as a successful appellant. *Ventling v. Johnson*, 466 S.W.3d 143, 154–55 (Tex. 2015).

§ 20.9:7 Judgment for Costs

In general, the successful party is entitled to recover from its adversary all of the taxable court costs it has incurred in the prosecution or defense of the lawsuit. Tex. R. Civ. P. 131; *Furr's Supermarkets, Inc. v. Bethune*, 53 S.W.3d 375, 376 (Tex. 2001); *Martinez v. Pierce*, 759 S.W.2d 114, 114 (Tex. 1988) (per curiam). The judgment can either state the amount of costs or state generally that costs are awarded against a particular party.

Practice Note: The preferred manner of addressing costs in a judgment is to use general language awarding costs and, thereafter, rely on the bill of costs prepared by the clerk to itemize the recoverable costs. If a bill of costs fails to include a recoverable cost, the issue is frequently resolved with a phone call to the clerk. If the issue cannot be resolved that way, a motion should be filed with the court to correct the bill of costs. Under rule 629, a correct bill of costs is required to be attached to a writ of execution, so diligence in review of the bill of costs may avoid a later problem in execution. Keep in mind that a writ of execution serves to recover not only taxable costs but the "further costs of executing the writ." Tex. R. Civ. P. 629.

Pursuant to rule 141, the court may allocate costs otherwise than against the losing party "for good cause, to be stated on the record." The trial court may also apportion the costs if it determines that neither side entirely prevailed. *See Mobil Producing Texas & New Mexico, Inc. v. Cantor*, 93 S.W.3d 916, 920 (Tex. App.—Corpus Christi–Edinburg 2002, no pet.) (without citing rule 141, court allocated costs to both parties: "A trial court does not abuse its discretion in taxing costs against both sides where neither party was wholly successful in that one expected to receive more while the other expected to pay less.").

By statute, recoverable court costs include clerk fees; service fees; fees of the court reporter for the original stenographic transcripts necessarily obtained for use in the suit; fees for masters, interpreters, and guardians ad litem; and "such other costs and fees as may be permitted by these rules and state statutes." Tex. Civ. Prac. & Rem. Code § 31.007; *In re Nalle Plastics Family L.P.*, 406 S.W.3d 168, 175–76 (Tex. 2013) (orig. proceeding). Other fees required by statute include court-appointed auditor fees (Tex. R. Civ. P. 172), alternative dispute resolution fees for an impartial third-party (Tex. Civ. Prac. &

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Rem. Code § 154.054), and witness fees (Tex. Civ. Prac. & Rem. Code § 22.001).

In general, no fees are allowed for copies of hearing transcripts or depositions. *See* Tex. Civ. Prac. & Rem. Code § 31.007(b)(2); Tex. R. Civ. P. 140. The appellate courts, however, do not all agree. *Compare Crescendo Investments, Inc. v. Brice*, 61 S.W.3d 465, 480–81 (Tex. App.—San Antonio 2001, pet. denied) (certified copies of depositions and trial transcripts are recoverable as costs), *with Gumpert v. ABF Freight Systems, Inc.*, 312 S.W.3d 237, 242 (Tex. App.—Dallas 2010, no pet.) (only the original transcript of a deposition is recoverable as costs; the cost to videotape a deposition or for copies of a deposition is not recoverable).

The cost of the transcript on appeal is recoverable as a cost. *Bayoud v. Nassour*, 408 S.W.2d 344, 345 (Tex. App.—Dallas 1966, writ ref'd n.r.e.). An appellant's fee for the original transcript covers the cost of an original and one copy. Tex. Gov't Code § 52.047(c).

In general, expert fees are not recoverable as a cost. *Headington Oil Co. v. White*, 287 S.W.3d 204, 212 (Tex. App.—Houston [14th Dist.] 2009, no pet.). Nor are miscellaneous expenses which are incurred in the representation of the client. *See Shenandoah Associates v. J&K Properties, Inc.*, 741 S.W.2d 470, 487 (Tex. App.—Dallas 1987, writ denied) (expenses, such as delivery services, travel, long-distance calls, bond premiums, postage, reproduction expenses, brief binding, office air conditioning, and secretarial time are not recoverable as costs); *see also Crescendo Investments*, 61 S.W.3d at 480–81 (noting that *Shenandoah* was decided before Tex. Civ. Prac. & Rem. Code § 31.007 became effective, which allows the recovery of costs for trial testimony transcripts).

§ 20.10 Prejudgment Interest Generally

Prejudgment interest is "compensation allowed by law as additional damages for lost use of the money due as damages during the lapse of time between the accrual of the claim and the date of judgment." In Texas, there are two bases for the recovery of prejudgment interest: (1) an enabling statute or (2) principles of equity. *Johnson & Higgins of Texas, Inc. v. Kenneco Energy, Inc.*, 962 S.W.2d 507, 528 (Tex. 1998) (citations omitted). These bases will be discussed further below. Once the appropriate basis for prejudgment interest has been determined, the interest amount should be calculated and stated in the judgment if possible. The mere recitation of the rate and accrual period often leads to later confusion. If a plaintiff's claim is based on a statutory or contractual right, a prayer for general relief will support the recovery of prejudgment interest. *See Benavidez v. Isles Construction Co.*, 726 S.W.2d 23, 25 (Tex. 1987); *Republic National Bank v. Northwest National Bank*, 578 S.W.2d 109, 117 (Tex. 1978) (written contract); *Olympia Marble & Granite v. Mayes*, 17 S.W.3d 437, 441 (Tex. App.—Houston [1st Dist.] 2000, no pet.) (statute). If, however, a party seeks to recover equitable prejudgment interest at common law as an element of damages, a general claim for relief is not sufficient. The party must specifically plead for it. *Bufkin v. Bufkin*, 259 S.W.3d 343, 358 (Tex. App.—Dallas 2008, pet. denied). A spreadsheet for calculating costs, attorney's fees, and interest accrued is at form 20-17.

Practice Note: The law regarding prejudgment interest is not always clear. Accordingly, the practitioner should always consider pleading for equitable prejudgment interest as an alternative; equitable prejudgment interest requires a pleading to support it. If the practitioner does not plead for equitable prejudgment interest, the result could well be that no prejudgment interest is awarded. *See Bufkin*, 259 S.W.3d at 357–58

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(plaintiff failed to show that agreement provided for interest and failed to show that prejudgment interest was available under Texas Finance Code; had plaintiff pleaded for equitable prejudgment interest, it was probably available).

§ 20.10:1 Equitable Prejudgment Interest

In *Johnson & Higgins of Texas, Inc. v. Kenneco Energy, Inc.*, 962 S.W.2d 507, 532 (Tex. 1998) the Texas Supreme Court extended the reach of Tex. Fin. Code § 304.102 to provide that equitable prejudgment interest in a common law claim was to be calculated in the same manner as under the statute.

§ 20.10:2 Contract Provides for Interest

Parties may contract for interest, provided that the interest is not usurious. "The right to interest is statutory and regulated, but, within such statutory framework, parties are at liberty to contract for the payment of conventional interest." *Triton Oil & Gas Corp. v. E.W. Moran Drilling Co.*, 509 S.W.2d 678, 687 (Tex. App.—Fort Worth 1974, writ ref'd n.r.e.). If a contract between the parties provides for interest or time-price differential, prejudgment interest may be recovered at the lesser of the interest rate in the contract or 18 percent per year. Tex. Fin. Code § 304.002.

§ 20.10:3 Contract Does Not Provide for Interest

If a contract between the parties does not provide for interest or time-price differential, section 304.003 of the Texas Finance Code applies and provides for a variable interest rate of between 5 and 15 percent per annum depending on the prime rate as of the date of the judgment. *See Meridian Hotels, Inc. v. LHO Financing Partnership I, L.P.*, 255 S.W.3d 807, 823 (Tex. App.—Dallas 2008, no pet.) (if the contract does not provide for interest, prejudgment interest and postjudgment interest are set by section 304.003); *ExxonMobil Corp. v. Valence Operating Co.*, 174 S.W.3d 303, 319 (Tex. App.—Houston [1st Dist.] 2005, pet. denied) (where contract did not specify interest, prejudgment interest governed by section 304.003). Interest under section 304.003 is computed as simple interest and accrues 180 days after the date the defendant receives written notice of the claim or the date suit is filed, whichever occurs first. Tex. Fin. Code § 304.104.

In the past, if the parties had not agreed to a specified rate of interest, prejudgment interest at the rate of 6 percent per annum was available on open accounts and contracts "ascertaining the sum payable." Tex. Rev. Civ. Stat. Ann. art. 5069–1.03. The interest commenced on the thirtieth day from and after the time when the sum was due and payable. The statute, however, was later amended twice and ultimately incorporated into the Texas Finance Code as follows:

> If a creditor has not agreed with an obligor to charge the obligor any interest, the creditor may charge and receive from the obligor legal interest at the rate of six percent a year on the principal amount of the credit extended beginning on the 30th day after the date on which the amount is due.

Tex. Fin. Code § 302.002.

As a result of the amendments, several courts have held that section 302.002 does not apply to an award of prejudgment interest, and therefore cannot be the basis for such an award. *See Walden v. Affiliated Computer Services, Inc.*, 97 S.W.3d 303, 329–31 (Tex. App.—Houston [14th Dist.] 2003, pet. denied) (examining history of statute and amendments, noting that section 301.002 specifically excludes "judgment interest" from the definition of "legal interest," "judgment creditor" from the definition of "creditor," and "judgment debtor" from the defi-

nition of "obligor," and holding that statute does not apply to an award of prejudgment interest); *Lamajak, Inc. v. Frazier*, 230 S.W.3d 786, 798 (Tex. App.—Dallas 2007, no pet.) (same statement); *Natural Gas Clearinghouse v. Midgard Energy Co.*, 113 S.W.3d 400, 413–14 (Tex. App.—Amarillo 2003, pet. denied) (by amending the statute and replacing the old language with new words, the legislature effectively repealed the provision regarding "contracts ascertaining the sum payable"); *Lucke v. Kimball*, No. 13-01-00362-CV, 2004 WL 102830, at *9 (Tex. App.—Corpus Christi–Edinburg Jan. 22, 2004, pet. denied) (mem. op.) (breach of fiduciary duty claim; section 302.002 did not apply because party was a "judgment debtor," not an "obligor"; prejudgment interest awarded under common law); *Cumberland Casualty & Surety Co. v. Nkwazi, L.L.C.*, No. 03-02-00270, 2003 WL 21354608, at *6 (Tex. App.—Austin Jun. 12, 2003, no pet.) (mem. op.) (section 302.002 does not provide a basis to award prejudgment interest in breach of contract claim).

Still other courts have ruled that section 302.002 does not authorize prejudgment interest because the section appears under a subchapter entitled "Usurious Interest" rather than "Judgment Interest." *See De La Morena v. Ingenieria E Maquinaria De Guadalupe, S.A.*, 56 S.W.3d 652, 659 (Tex. App.—Waco 2001, no pet.); *El Paso Natural Gas Co. v. Lea Partners, L.P.*, No. 08-01-00310-CV, 2003 WL 21940729, at *10 (Tex. App.—El Paso 2003, pet. denied) (mem. op.).

Finally, one court has interpreted section 302.002 to authorize prejudgment interest at six percent per annum provided that the action involved an extension of credit. *See Bufkin v. Bufkin*, 259 S.W.3d 343, 357 (Tex. App.—Dallas 2008, pet. denied) (section 302.002 is silent on contracts not involving extensions of credit; accordingly, it applies only to contracts involving the extension of credit).

Nonetheless, some courts, in dictum, have, without much analysis, interpreted section 302.002 to authorize prejudgment interest at 6 percent per annum. *See Mobil Producing Texas & New Mexico, Inc. v. Cantor*, 93 S.W.3d 916, 920 (Tex. App.—Corpus Christi–Edinburg 2002, no pet.) (section 302.002 would have provided basis for prejudgment interest had the recovery been based on breach of contract); *Wallace v. Ramon*, 82 S.W.3d 501, 505–06 (Tex. App.—San Antonio 2002, no pet.) (without discussion, applying former version of section 302.002 to support prejudgment interest award on contract claim); *Roach v. Dickenson*, 50 S.W.3d 709, 714 n.2 (Tex. App.—Eastland 2001, no pet.) (citing amended section 302.002 to award 6 percent prejudgment interest on contract claim where parties agreed that 6 percent was correct amount). The issue of whether section 302.002 authorizes prejudgment interest at a rate of 6 percent when a contract does not specify an interest rate has not been resolved by the Texas Supreme Court.

§ 20.10:4 Prejudgment Interest in Personal Injury, Wrongful Death, or Property Damage Case

Prejudgment Interest Required: A judgment in a wrongful death, personal injury, or property damage case earns prejudgment interest. Tex. Fin. Code § 304.102. The Texas Supreme Court has held that "property damage" means "claims for damage to tangible property, not economic loss or loss of economic opportunity." *Johnson & Higgins of Texas, Inc. v. Kenneco Energy, Inc.*, 962 S.W.2d 507, 530 (Tex. 1998).

Prejudgment Interest Rate: The prejudgment interest rate is equal to the postjudgment interest rate applicable at the time of judgment. Tex. Fin. Code § 304.103. Judgments in these cases earn interest at a rate that is calculated monthly and that is not less than 5 percent nor

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more than 15 percent, as determined by the Texas consumer credit commissioner. Tex. Fin. Code § 304.003.

Accrual of Prejudgment Interest: Except as otherwise provided by statute, prejudgment interest accrues on the amount of a judgment during the period beginning on the 180th day after the date the defendant receives written notice of a claim or on the date the suit is filed, whichever is earlier, and ending on the day preceding the date judgment is rendered. Prejudgment interest is computed as simple interest and is not compounded. Tex. Fin. Code § 304.104.

Effect of Settlement Offers: If a judgment for a claimant is less than the amount of a settlement offer of the defendant, prejudgment interest does not accrue on the amount of the judgment during the period that the offer may be accepted. Tex. Fin. Code § 304.105(a). If a judgment for a claimant is more than the amount of a settlement offer of the defendant, prejudgment interest does not accrue on the amount of the settlement during the period that the offer may be accepted. Tex. Fin. Code § 304.105(b). To prevent the accrual of prejudgment interest, a settlement offer must be in writing and delivered to the claimant or the claimant's attorney or representative. Tex. Fin. Code § 304.106. If a settlement offer does not provide for cash payment at the time of settlement, the amount of the settlement offer for the purpose of computing prejudgment interest is the cost or fair market value of the settlement offer at the time it is made. Tex. Fin. Code § 304.107.

§ 20.10:5 Prejudgment Interest and Attorney's Fees

Generally, prejudgment interest is not available on an award of attorney's fees. *See C&H Nationwide, Inc. v. Thompson*, 903 S.W.2d 315, 325–26 (Tex. 1994) (interpreting Tex. Rev. Civ. Stat. art. 5069–1.05, § 2 (now Tex. Fin. Code § 304.104), the court stated, "we disagree that our approach would allow prejudgment interest on costs and attorney's fees. These awards cannot fairly be considered a part of the 'amount of the judgment.'"); *Ellis County State Bank v. Keever*, 888 S.W.2d 790, 797 n.13 (Tex. 1994) (attorney's fees and costs are not part of the judgment for the purpose of prejudgment interest). *See also Hervey v. Passero*, 658 S.W.2d 148, 149 (Tex. 1983) (per curiam) ("An award of prejudgment interest on attorney's fees is contrary to the clear language of article 5069–1.03." The attorney fees are not an account or contract "ascertaining the sum payable.") *Alma Investments, Inc. v. Bahia Mar Co-Owners Ass'n, Inc.*, 497 S.W.3d 137, 146 (Tex. App.—Corpus Christi–Edinburg 2016, pet. denied) (recognizing general rule); *Sentinel Integrity Solutions, Inc. v. Mistras Group, Inc.*, 414 S.W.3d 911, 931 (Tex. App.—Houston [1st Dist.] 2013, pet. denied) (prejudgment interest not allowed on paid attorney's fees in covenants not to compete act; the act preempted any additional recovery); *Carbona v. CH Medical, Inc.*, 266 S.W.3d 675, 688 (Tex. App.—Dallas 2008, no pet.) (breach of contract action; citing *C&H Nationwide*: "This Court has held, and the supreme court has stated, that prejudgment interest cannot be recovered on attorney's fees."); *Berry Property Management, Inc. v. Bliskey*, 850 S.W.2d 644, 670 (Tex. App.—Corpus Christi–Edinburg 1993, writ dism'd by agr.) (DTPA action: "Prejudgment interest is not recoverable on attorney's fees awarded."); *Southwestern Bell Telephone Co. v. Vollmer*, 805 S.W.2d 825, 834 (Tex. App.—Corpus Christi–Edinburg 1991, writ denied) (DTPA action: prejudgment interest is not allowed on an award of attorney's fees).

In contrast, however, other appellate courts have recognized an exception to the general rule when the attorney's fees were paid before judgment: "The answer to the question of whether prejudgment interest may be calculated on attorneys' fees that have been paid prior to judgment, as in this case, is less than clear, with our sister states splitting on the issue, and the supreme

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court silent. . . . [W]e reaffirm our Court's holding that prejudgment interest is not recoverable on attorneys' fees awarded. However, we join our sister courts in holding that as an exception to this general rule, prejudgment interest is recoverable on attorneys' fees that have been paid prior to the entry of judgment." *Alma Investments*, 497 S.W.3d at 146. *See also A.V.I. Inc. v. Heathington*, 842 S.W.2d 712, 717–18 (Tex. App.—Amarillo 1992, writ denied) (permitting award of prejudgment interest on paid attorney fees in DTPA action); *Nova Casualty Co. v. Turner Construction Co.*, 335 S.W.3d 698, 706 (Tex. App.—Houston [14th Dist.] 2011, no pet.) (upholding award of prejudgment interest on attorney's fees paid before judgment); *Kurtz v. Kurtz*, No. 14-08-00351-CV, 2010 WL 1293769, at *12 (Tex. App.—Houston [14th Dist.] Apr. 6, 2010, no pet.) (mem. op.) (trial court did not abuse its discretion in awarding prejudgment interest on attorney's fees that had been paid prior to judgment); *Williams v. Colthurst*, 253 S.W.3d 353, 362 (Tex. App.—Eastland 2008, no pet.) (allowing award of prejudgment interest on attorney's fees paid prior to judgment in a breach of lease action).

§ 20.10:6 Prejudgment Interest and Future Damages

Statutory and common law prejudgment interest is not available in an award for future damages. Tex. Fin. Code § 304.1045; *Cavnar v. Quality Control Parking, Inc.*, 696 S.W.2d 549, 556 (Tex. 1985); *Dernick Resources, Inc. v. Wilstein*, 471 S.W.3d 468, 488 (Tex. App.—Houston [1st Dist.] 2015, pet. denied); *Durham Transportation Co. v. Beettner*, 201 S.W.3d 859, 874 (Tex. App.—Waco 2006, pet. denied).

§ 20.11 Postjudgment Interest

A judgment of a Texas court must state the postjudgment interest rate applicable to that judgment. Tex. Fin. Code § 304.001. Judgment interest is defined as "interest on a money judgment, whether the interest accrues before, on, or after the judgment is rendered." Tex. Fin. Code § 301.002(a)(7). Interest is defined as "compensation for the use, forbearance, or detention of money." Tex. Fin. Code § 301.002(a)(4). The award of postjudgment interest should be as specific as possible so that it may be readily calculated. A stated per diem amount is frequently used to accomplish this objective. If postjudgment interest is not specifically awarded in the judgment, the prevailing party is still entitled to recover it as a matter of law; the right to postjudgment interest is a creation of statute. *McDonald v. Taber*, No. 05-03-01642-CV, 2014 WL 2915312, at *4 (Tex. App.—Dallas Dec. 17, 2004, pet. denied) (mem. op.) (citing Tex. Fin. Code § 304.001). A spreadsheet for calculating costs, attorney's fees, and interest accrued is at form 20-17.

§ 20.11:1 Interest Rate or Time-Price Differential in Contract

A judgment of a Texas court on a contract that provides for a specific interest rate or time-price differential earns interest at a rate equal to the lesser of the rate specified in the contract, which may be a variable rate or 18 percent per year. Tex. Fin. Code § 304.002.

§ 20.11:2 Interest Rate or Time-Price Differential Not in Contract

A Texas court judgment to which Texas Finance Code section 304.002 does not apply, including court costs awarded in the judgment and any prejudgment interest, earns post-judgment interest at a rate determined by the prime rate as published by the Federal Reserve Bank of New York on the date of the computation. However, if that rate is less than 5 percent, the postjudgment interest rate is 5 percent; if that rate is more than 15 percent, the postjudgment interest rate is 15 percent. Tex. Fin. Code § 304.003. The current applicable rate can be found on the

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website of the Texas Office of Consumer Credit Commissioner at **https://occc.texas.gov**.

§ 20.11:3 Accrual of Postjudgment Interest

Postjudgment interest on a judgment of a Texas court accrues during the period beginning on the day the judgment is rendered and ending on the day the judgment is satisfied. Tex. Fin. Code § 304.005(a). Postjudgment interest compounds annually. Tex. Fin. Code § 304.006. Postjudgment interest on a conditional award of appellate attorney's fees, however, does not commence to accrue interest until the award is made final by the appropriate appellate court's judgment. *Ventling v. Johnson*, 466 S.W.3d 143, 156 (Tex. 2015).

§ 20.12 Date of Signing

All judgments should state the date of signing. Tex. R. Civ. P. 306a(2). The date that the judgment was signed, as opposed to the date the judgment was rendered or entered, is the operative date for purposes of postjudgment motions and appeal. *See* Tex. R. Civ. P. 306a(1); *Burrell v. Cornelius*, 570 S.W.2d 382, 384 (Tex. 1978). For this reason, the judgment should be presented for signature as soon as possible after rendition so that execution or other collection steps will not be delayed. *See also Louwien v. Dowell*, 534 S.W.2d 421, 422 (Tex. App.—Dallas 1976, orig. proceeding) (judgment can be changed at any time if it has not been signed); Tex. R. Civ. P. 627 (clerk upon request shall issue execution after thirty days after judgment signed, or after thirty days after motion for new trial or motion in arrest of judgment is overruled by order or by operation of law).

There is a limited exception to this general rule, however. If within twenty days after the judgment is signed, a party adversely affected by it or his attorney has not received notice under rule 306a(3), and does not have actual knowledge of the judgment, the periods for filing postjudgment motions and appeal commence on the date of receipt of notice under rule 306a(3), or on the date that actual knowledge of the signing was acquired, whichever occurs first, but in no event will such periods begin more than ninety days after the original judgment or other appealable order was signed. Tex. R. Civ. P. 306a(4).

§ 20.13 Notice of Judgment

When the final judgment is signed, the clerk must immediately notify the parties or their attorneys by first-class mail. Tex. R. Civ. P. 306a(3). The clerk's failure to send the notice, however, does not affect the timetable for filing an appeal, unless the party establishes that it did not receive the notice or acquire actual knowledge of the judgment within twenty days after the judgment was signed. In that case, the time to appeal begins on the date of actual receipt of the notice or the date actual knowledge of the judgment was acquired, whichever occurred first, but in no event shall the period begin more than ninety days after the judgment was signed. Tex. R. Civ. P. 306a(4). *See Board of Trustees of Bastrop I.S.D. v. Toungate*, 958 S.W.2d 365, 367 (Tex. 1997) (appellate timetable did not commence to run until party received notice); *Western Import Motors v. Mechinus*, 739 S.W.2d 125, 126 (Tex. App.—San Antonio 1987, no writ) (per curiam) (letter from adverse party's attorney containing proposed judgment, requesting that any objections be raised in seventy-two hours, and stating that if no objections were raised in that time court would be requested to sign judgment on certain date did not give actual knowledge of judgment so as to preclude extension of timetable under rule 306a(4)).

Practice Note: To attempt to protect against a claim of "no notice" of a final judgment, the plaintiff's attorney may want to send a copy of the signed judgment to the defendant's attorney of record by certified or registered mail, return receipt requested.

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§ 20.14 Execution on Judgment

The clerk of the court "shall issue execution to enforce [the] judgment." Tex. R. Civ. P. 622. Although no statute or rule specifically requires language of execution in the judgment, the better practice is to include in the judgment a statement specifically authorizing execution (and, as appropriate, such other writs as a writ of possession or an order of sale) to satisfy the judgment. Some clerks will not issue writs of execution without such language.

§ 20.15 Finality of Judgment

For a judgment to be final, it must dispose of all parties and claims in the case. *Farm Bureau County Mutual Insurance Co. v. Rogers*, 455 S.W.3d 161, 163 (Tex. 2015) (per curiam) ("the language of a judgment can make it final, even though it should have been interlocutory, if [the] language expressly disposes of all claims and all parties") (quoting *Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 200 (Tex. 2001); *Ford v. Exxon Mobil Chemical Co.*, 235 S.W.3d 615, 617 (Tex. 2007) (per curiam). The manner in which a judgment is reviewed for finality depends on whether or not the judgment followed a conventional trial, that is, a bench trial or a jury trial. Generally, if a judgment is rendered after a conventional trial on the merits, it will be presumed, for appeal purposes, that the court intended to and did dispose of all parties and issues. *Vaughn v. Drennon*, 324 S.W.3d 560, 562–63 (Tex. 2010) (per curiam); *Moritz v. Preiss*, 121 S.W.3d 715, 718–19 (Tex. 2003); *Good v. Baker*, 339 S.W.3d 260, 265 (Tex. App.—Texarkana 2011, pet. denied). Hence, no language of finality is required in a judgment following a conventional trial. Nonetheless, prudent practice dictates that language of finality should be included in such a judgment.

If, on the other hand, the judgment did not follow a conventional trial, but instead was a default judgment, a summary judgment, a nonsuit, a determination of a plea to the jurisdiction, a plea in abatement, a dismissal for want of prosecution, or similar order, the standard is different. In such cases, the judgment or order is final for purposes of appeal if, and only if, it either actually disposes of all claims and parties before the court, regardless of its language, or states with unmistakable clarity that it is a final judgment as to all claims and all parties. A judgment or order does not dispose of all claims and parties merely because it is titled "final" or because the word "final" appears elsewhere in the judgment or order, or because it awards costs. Nor does a judgment or order completely dispose of a case merely because it states that it is appealable; even interlocutory orders may sometimes be appealable. The inclusion of a "Mother Hubbard" clause ("all relief not granted is denied" or similar language) does not indicate that a judgment rendered without a conventional trial is final for purposes of appeal. *Farm Bureau*, 455 S.W.3d at 163; *Lehmann*, 39 S.W.3d at 203–04 (overruling *Mafrige v. Ross*, 866 S.W.2d 590 (Tex. 1993)). *See also Bovee v. Houston Press LLP*, No. 10-16-00051-CV, 2016 WL 1274755, at *1–2 (Tex. App.—Waco Mar. 31, 2016, no pet.) (mem. op.) (order entitled "Final Judgment" and including the language that "All relief not expressly granted herein is denied" was not a final judgment; it was clear that the order did not adjudicate all claims); *Youngblood & Associates, P.L.L.C. v. Duhon*, 57 S.W.3d 63, 65 (Tex. App.—Houston [14th Dist.] 2001, no pet.) (order entitled "final summary judgment" that included "Mother Hubbard" clause did not dispose of all claims and parties and was therefore not final appealable order).

For a judgment or order to be final, there must be some clear indication that the trial court intended the judgment or order to completely dispose of the entire case. *Farm Bureau*, 455 S.W.3d at 163; *Lehmann*, 39 S.W.3d at 205. "A statement like 'This judgment finally disposes of all parties and all claims and is appealable,' would leave no doubt about the court's inten-

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tion." *Lehmann*, 39 S.W.3d at 206. *But see Texas Political Subdivision v. Pharr San Juan Alamo I.S.D.*, No. 13-13-00691-CV, 2015 WL 4141217, at *2–3 (July 9, 2015, no pet.) (mem. op.) (order entitled "Final Order" did not dispose of claims for attorney fees and was therefore not final despite the inclusion of the following language: "All relief requested in this case and not expressly granted is denied. This instrument is a final and appealable Order disposing of all parties and claims herein.").

[Sections 20.16 through 20.20 are reserved for expansion.]

II. Default Judgment

§ 20.21 Default Judgment in General

A defendant who does not file a timely response to a petition risks entry of default judgment against him. At any time after a defendant is required to answer, the plaintiff may in turn take judgment by default against such defendant if he has not previously filed an answer, provided the return of service has been on file with the clerk for the required length of time required by rule. Tex. R. Civ. P. 107(h), 239. *See also Gentry v. Gentry*, 550 S.W.2d 167, 167 (Tex. App.—Austin 1977, no writ) (default judgment reversed when granted on same day return filed).

Practice Note: The mechanics of obtaining a default judgment vary from court to court. Some courts allow a default judgment to be taken after 10:00 A.M. on appearance day simply by presenting the default judgment in person. Other courts require that a default judgment be filed and submitted to the court on a submission docket without oral hearing. Still others require that a motion for default judgment be filed and set either on a submission docket or for oral hearing. The practitioner should review the local rules for the county and the particular court before seeking the default judgment. If there are any potential problems with the default judgment, for example the record is unclear as to effective service, the practitioner should file a motion for default judgment and attach to it the evidence that resolves the problem and clarifies the record.

§ 20.22 Return on File for Ten Days

For a default judgment to be granted, the return of service must have been on file for ten days before judgment, excluding the day of filing and the day of judgment. *Gentry v. Gentry*, 550 S.W.2d 167 (Tex. App.—Austin 1977, no writ); Tex. R. Civ. P. 107, 239. Under rule 103, citation may be served, and under rule 107 returned, by any person at least eighteen years old who is authorized by law or court order to serve citations. The return of service must be signed by such an authorized person, and if signed by a person other than a sheriff, constable, or clerk of the court, the return must either be verified or be signed under penalty of perjury. Tex. R. Civ. P. 107(e). A return signed under penalty of perjury must include the statement prescribed in Tex. R. Civ. P. 107(e).

§ 20.23 Certificate of Last Known Mailing Address

At or immediately before rendition of an interlocutory or final default judgment, the prevailing party or his attorney must certify to the clerk in writing the last known mailing address of the party against whom the judgment is taken. Immediately after the judgment is signed, the clerk must mail written notice to the party against whom the judgment was rendered at the address shown in the certificate. Tex. R. Civ. P.

239a. See form 20-2 in this chapter for a certificate of last known mailing address.

§ 20.24 Compliance with Servicemembers Civil Relief Act

If the defendant has defaulted in appearing, before entering judgment the plaintiff must file an affidavit, commonly referred to as a nonmilitary affidavit, "stating whether or not the defendant is in military service and showing necessary facts to support the affidavit" or "stating that the plaintiff is unable to determine whether or not the defendant is in military service." 50 U.S.C. § 3931(b)(1). The failure to file such an affidavit renders a default judgment voidable if the record reflects that the defendant was in military service. *Goshorn v. Brown*, No. 14-02-00852-CV, 2003 WL 22176976, at *3 (Tex. App.—Houston [14th Dist.] Sept. 23, 2003, no pet.) (mem. op.). If it appears that the defendant is in military service, the court may not enter a judgment without appointing an attorney to represent the defendant. 50 U.S.C. § 3931(b)(2). If the court is unable to determine whether the defendant is in military service, the court may require the plaintiff to file a bond to indemnify the defendant against any loss he may suffer by reason of the judgment should it thereafter be set aside. 50 U.S.C. § 3931(b)(3). There are no Texas cases, statutes, or rules on this requirement, and it is not consistently enforced throughout the state. The Department of Defense Manpower Data Center (DMDC) hosts a Servicemembers Civil Relief Act website that will provide the current active military status of an individual. To obtain certificates of service or nonservice, the practitioner can access the public website at **https://scra.dmdc.osd.mil**. The website is of relatively limited value without a Social Security number. Social Security numbers may be obtained through the use of various services, such as **www.tlo.com** or **Accurint .com**. There is no charge for a certificate. The certificate should then be attached to the nonmilitary affidavit. If there is insufficient personal information to use this site, an individual's active duty status may be verified through the military services. Contact information for each service headquarters is listed on the Department of Defense website at **www.defense.gov**.

See form 20-3 in this chapter for a nonmilitary affidavit. See section 2.78:9 in this manual for additional discussion of default judgments against service members.

§ 20.25 Citation

See chapter 16 of this manual regarding citation and service.

§ 20.26 Damages and Record

§ 20.26:1 Liquidated Damages

Damages will be assessed by the court in a default judgment "if the claim is liquidated and proved by an instrument in writing." Tex. R. Civ. P. 241. Damages may not be assessed without presenting evidence unless the claim is liquidated—that is, if the amount due can with sufficient certainty be calculated by the court solely from the instrument sued on and the factual, as opposed to conclusory, allegations of the petition. *Fears v. Mechanical & Industrial Technicians*, 654 S.W.2d 524, 530 (Tex. App.—Tyler 1983, writ ref'd n.r.e.); *Burrows v. Bowden*, 564 S.W.2d 474, 475 (Tex. App.—Corpus Christi–Edinburg 1978, no writ); *see* Michael Pohl & David Hittner, *Judgments by Default in Texas*, 37 Sw. L.J. 421, 436 (1983).

§ 20.26:2 Unliquidated Damages

To support a default judgment, the court must hear sufficient evidence on all unliquidated damages. *Holt Atherton Industries v. Heine*, 835 S.W.2d 80, 83 (Tex. 1992); Tex. R. Civ. P. 243. *See also Otis Elevator Co. v. Parmelee*, 850

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S.W.2d 179, 181 (Tex. 1993) (trial court, on imposing case-determinative discovery sanctions, improperly awarded unliquidated damages without hearing evidence). A party seeking a default judgment should therefore always request a transcript be taken of the hearing. Unliquidated damages include the following:

1. Any damages not proved by an instrument in writing. *See* Tex. R. Civ. P. 243. Typically, a balance on a promissory note is a liquidated damage because the difference between the amount of indebtedness alleged to be due and the face amount of the note does not create ambiguity or raise a question of fact regarding payment credits. *In re Northern Natural Gas Co.*, 327 S.W.3d 181, 187 (Tex. App.—San Antonio 2010, orig. proceeding). There may be situations, however, when the pleadings and written instrument are not sufficient to enable the court to make an accurate calculation of the amount due. *See Irlbeck v. John Deere Co.*, 714 S.W.2d 54, 57 (Tex. App.—Amarillo 1986, writ ref'd n.r.e.) (neither notes nor pleadings showed credits or offsets to which defendant was allowed).
2. Attorney's fees "actually incurred": "Attorney's fees are by their very nature unliquidated unless the exact amount is fixed by agreement." *Freeman v. Leasing Associates*, 503 S.W.2d 406, 408 (Tex. App.—Houston [14th Dist.] 1973, no writ).
3. "Reasonable" attorney's fees. *Odom v. Pinkston*, 193 S.W.2d 888, 891 (Tex. App.—Austin 1946, writ ref'd n.r.e.).
4. "Collection expenses" (in addition to attorney's fees) if the written instrument does not fix the exact amount. *Odom*, 193 S.W.2d at 891. Note: some trial courts will not allow the recovery of additional attorney's fees for post-judgment collection.

Note that affidavits constitute probative evidence to support a default judgment on unliquidated damages. *Texas Commerce Bank, N.A. v. New*, 3 S.W.3d 515, 516–17 (Tex. 1999).

If a party is not present or represented by counsel when testimony is taken on damages the trial court must require the court reporter to make a record of the evidence. *Houston Pipe Coating Co. v. Houston Freightways*, 679 S.W.2d 42, 45 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.). The plaintiff's attorney should request the reporter's presence if the court fails to do so. Otherwise, the defendant may seek a new trial on unliquidated damages on the ground that the testimony on which the judgment was based was not recorded, and consequently no statement of facts is available for review of the sufficiency of the evidence. *Houston Pipe Coating*, 679 S.W.2d at 45; *see also Rogers v. Rogers*, 561 S.W.2d 172, 173 (Tex. 1978) (former provisions of statute governing court reporter's duty considered not of controlling significance). The rule that, absent a statement of facts, the appellate court must presume that the evidence was sufficient does not apply on direct review of a default judgment if no statement of facts is available. *Morgan Express, Inc. v. Elizabeth-Perkins, Inc.*, 525 S.W.2d 312, 314 (Tex. App.—Dallas 1975, writ ref'd); *see also* Michael Pohl & David Hittner, *Judgments by Default in Texas*, 37 Sw. L.J. 421 (1983).

§ 20.26:3 Pleadings

A default judgment must be in accord with the pleadings. It is impermissible in a default judgment to render judgment for damages in excess of the damages specifically pleaded. *Simon v. BancTexas Quorum, N.A.*, 754 S.W.2d 283, 286 (Tex. App.—Dallas 1988, writ denied).

§ 20.27 Judgment Nihil Dicit

Judgment nihil dicit, wherein no answer placing the merits in issue is on file, is a form of default judgment. *Stoner v. Thompson*, 578 S.W.2d 679, 683 (Tex. 1979). Although there is a difference between a no-answer default judgment and a judgment nihil dicit, they are so similar that the same rules generally apply to each with respect to the effect and validity of the judgment. In both instances the non-answering party has admitted the facts properly pleaded and the justice of the opponent's claim, though a judgment nihil dicit carries a stronger confession than does a default judgment. *Stoner*, 578 S.W.2d at 682. *But see Roberts v. Mullen*, 446 S.W.2d 86, 89 (Tex. App.—Dallas 1969, writ ref'd n.r.e.) (such implied admission not always absolute and subject to rebuttal).

Judgment nihil dicit is usually limited to situations in which the defendant has entered some plea, usually dilatory, which has not placed the merits of the plaintiff's case in issue, or the defendant has placed the merits in issue by filing an answer, but the answer has been withdrawn. *Frymire Engineering Co. v. Grantham*, 524 S.W.2d 680, 681 (Tex. 1975).

A party who permits a judgment nihil dicit impliedly confesses judgment and waives all errors in pleading or proof that are not fundamental or jurisdictional, except those that the record shows were not intended to be waived. *O'Quinn v. Tate*, 187 S.W.2d 241, 245 (Tex. App.—Texarkana 1945, writ ref'd).

A judgment nihil dicit must accord with the pleadings so that the amount and terms of the judgment are ascertainable by reference to the petition. *Mullen v. Roberts*, 423 S.W.2d 576, 579 (Tex. 1968). Although the rules of procedure do not address how to obtain a judgment nihil dicit, a motion for entry of such a judgment is an effective method. Alternatively, the party should consider filing a motion for summary judgment.

A judgment nihil dicit is at form 20-7 in this chapter.

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Form 20-1

Some courts require a written motion before entertaining entry of default judgment.

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

Motion for Entry of Default Judgment

1. *Parties.* Movant is **[name of plaintiff]**, Plaintiff, who moves the Court to enter a default judgment against **[name of defendant]**, Defendant, pursuant to rule 239 of the Texas Rules of Civil Procedure.

2. *Grounds.* Plaintiff is entitled to be granted a default judgment against Defendant and as grounds would show the Court the following:

   a. Defendant continues to be indebted to Plaintiff as specifically pleaded in Plaintiff's original petition on file in this cause.

   Include the following if applicable.

   b. Plaintiff has not repossessed the collateral and foreclosed its lien described in Plaintiff's original petition.

   Continue with the following.

   c. Defendant has been duly served with citation in this cause, and the citation with the officer's return thereon has been on file with the clerk of this Court for ten days, exclusive of the day of filing and the day of judgment.

   d. Defendant has neither answered nor appeared within the time allowed by law and has wholly defaulted.

3. *Attachments.* Plaintiff has attached the following documents to this motion:

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a. Plaintiff's Certificate of Last Known Mailing Address.

Include the following if the defendant is an individual.

b. Plaintiff's Nonmilitary Affidavit.

Continue with the following.

c. Plaintiff's Attorney's Fee Affidavit.

4. *Prayer.* Plaintiff prays that the Court enter a default judgment in Plaintiff's favor against Defendant for the relief prayed for in Plaintiff's original petition and for all further relief to which Plaintiff may be entitled.

____
[Name]
Attorney for **[name of movant]**
State Bar No.:
[E-mail address]
[Address]
[Telephone]
[Telecopier]

Prepare and attach a certificate of last known mailing address (form 20-2); if the defendant is an individual, a nonmilitary affidavit (form 20-3); and an attorney's fees affidavit (form 20-4) and its exhibit(s). Prepare a default judgment (form 20-5 or form 20-6).

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Form 20-2

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

Certificate of Last Known Mailing Address

I certify that the last known mailing address of [**name of defendant**], Defendant, against whom judgment is taken in the above-entitled and -numbered cause, is [**mailing address, city, state, zip code**].

____
[**Name**]
Attorney for [**name of plaintiff**]
State Bar No.:
[**E-mail address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

Attach to the motion for entry of default judgment (form 20-1).

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Form 20-3

If the defendant is an individual, this affidavit must be filed before a default judgment may be entered. There are no Texas cases, statutes, or rules on this requirement, and it is not consistently enforced throughout the state. See section 20.24 in this chapter. The affidavit may be signed by the plaintiff or the plaintiff's attorney, but the party signing the affidavit should not swear to any facts about which he does not have personal knowledge. The Servicemembers Civil Relief Act imposes penalties including fines, imprisonment, or both on a person who knowingly makes or uses a false affidavit concerning a defendant's military service. 50 U.S.C. § 3912(c). See the caveat at section 19.17:3 in this manual.

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

Nonmilitary Affidavit

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/attorney of record for Plaintiff] in the above-entitled and -numbered cause. To my knowledge, based on a review of records related to this case [**include if applicable:** , the attached Military Status Report from the Department of Defense Manpower Data Center,] and my involvement in this case, [**name of defendant**], Defendant, was not in military service when this suit was filed, has not been in military service at any time since then, and is not now in any military service of the United States of America."

____
[**Name of affiant**]
Affiant

SIGNED under oath before me on ____________________________.

____
Notary Public, State of Texas

Attach to the motion for entry of default judgment (form 20-1).
Attach military status report if applicable.

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Form 20-4

In 2019, the Texas Supreme Court gave detailed guidance for proving attorney's fees. *See Rohrmoos Venture v. UTSW DVA Healthcare, LLP*, 578 S.W.3d 469 (Tex. 2019). *Rohrmoos Venture* adopted the "lodestar method" for calculating fees, which requires the fact finder to multiply the reasonable hourly rate times the reasonable hours worked to determine the lodestar amount. *Rohrmoos Venture*, 578 S.W.3d at 497–98. To support a lodestar calculation, the attorney's affidavit and supporting billing records should include specific information based on contemporaneously made time records that include evidence of (1) particular services performed, (2) who performed those 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, 502. To show the time worked was reasonable, the practitioner should provide time records, contemporaneously made and attached as exhibits. The affidavit, as well as any supporting billing records, should be consistent internally and should avoid listing hours that are excessive, redundant, or otherwise unnecessary.

It is recommended that the practitioner include in the affidavit a summary of the hours worked on the matter that lists each person who worked on the matter, along with each person's reasonable and necessary hours worked and reasonable hourly rate. The affidavit should also present the experience and legal education for each attorney or paralegal listed in the affidavit.

Client billing records should either be initially created in a way that protects client confidentiality and attorney-client privilege or be redacted appropriately before submission in support of a claim for attorney's fees. See chapter 31 in this manual for more information about proving attorney's fees.

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

Affidavit of [name of attorney]

[for Attorney's Fees]

Modify as appropriate.

BEFORE ME, the undersigned authority, on this day personally appeared [**name of affiant**], who swore under oath that the following facts are true:

"My name is [**name of attorney**]. I am more than eighteen years of age, of sound mind, and fully competent to make this affidavit. I am the attorney of record for Plaintiff in the above-styled and -numbered cause, and in that capacity I have personal knowledge of the matters set forth below.

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"I am a graduate of [**specify undergraduate institution and degree**]. I am a graduate of [**specify legal education**]. I have been licensed to practice law in the state of Texas since [**date**]. I am admitted to practice before [**specify court[s]**].

"[**List any board certifications.**]

"[**List any professional memberships and/or professional activities.**]

"Presently, I am employed by [**name of law firm**], a law firm having its principal place of business in [**city**], Texas. I have been with the firm since [**date**]. My prior employment history as an attorney is as follows: [**specify**].

"To the extent that I have specialized legal knowledge, it is in the areas of [**specify**]. My practice, throughout the time that I have been licensed, has included the representation of creditors in suits to collect debts. I am familiar with the types of fees usually and customarily charged in cases of this type in [**city, county**] County, Texas. It is my testimony that an hourly rate of $[**amount**] per hour is a reasonable and necessary rate in [**city, county**] County, Texas, for an attorney with my experience and expertise. [**Include education and experience of other attorneys or paralegals who worked on the case.**]

"Plaintiff employed me to collect the claim on which this suit is based. In consideration for such services, Plaintiff has agreed to pay reasonable attorney's fees. Between the beginning of my law firm's representation of Plaintiff in this matter and the date of this affidavit, I or other members of my law firm performed and will perform several hours of work on this matter, including doing or causing to be done the tasks described in the billing records attached. These records were kept by my law firm in the regular course of business, and it was the regular course of business of my law firm for an employee or representative, with knowledge of the acts, events, conditions, opinions, or diagnoses recorded therein, to make such records or to transmit information thereof to be included in such records; and the records were made at or near the time of the acts, events, conditions, opinions, or diagnoses. The records

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attached hereto are the originals or exact duplicates of the originals. I am a custodian of these records.

"A summary of the reasonable hours spent on this matter is set out below. The summary lists the reasonable and necessary hours worked by each attorney [**include as applicable:** , paralegal, and legal assistant] who worked on this matter, along with the reasonable hourly rate of each such person. The hours of work performed by each person were reasonable and necessary, and each person's hourly rate was reasonable for an attorney [**include as applicable:** , paralegal, and legal assistant] with similar experience and expertise in [**city, county**] County, Texas. [**If paralegal or legal assistant hours are listed, include the following:** Hours listed for paralegals and legal assistants represent only substantive legal work performed under the direction and supervision of an attorney.]

Include all members of firm listed on detailed billing records for the matter.

Name and Position	Hourly Rate	Hours Worked	Total Fee
[**Name**] Attorney	[**rate**]	[**hours**]	[**rate x hrs**]
[**Name**] Attorney	[**rate**]	[**hours**]	[**rate x hrs**]
[**Name**] [Paralegal, Legal Assistant]	[**rate**]	[**hours**]	[**rate x hrs**]

Continue as necessary.

Total Reasonable and Necessary Fees [**total fees**]

"I have reviewed the time records in this case, and I find that all the work performed [**include as applicable:** by the above-named attorneys, paralegals, and legal assistants] in this case has been reasonable and necessary. The fees in the case are reasonable and necessary if considered in light of the following factors:

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"1. The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform legal services properly: [**describe factor**].

"2. The likelihood that the acceptance of this case has precluded and will preclude me from accepting other employment: [**describe factor**].

"3. The fees customarily charged in this locality for similar legal services: [**describe factor, e.g.,** the fees charged by me are usual and customary in [**city, county**] County, Texas, for a case of this type involving the issues before the Court. A reasonable hourly rate in this matter would be $[**amount**] per hour. I have expended [**number**] hours in this matter and anticipate expending an additional [**number**] hours in postjudgment collection.]

"4. The amount involved and the results obtained: [**describe factor**].

"5. Time limitations imposed by my client or the circumstances: [**describe factor**].

"6. The nature and length of my professional relationship with my client: [**describe factor**].

"7. Any experience, reputation, or ability that I may have: [**describe factor**].

"8. Whether the fee is fixed or contingent: [**describe factor**].

"In addition, I anticipate having to attend the [default judgment/summary judgment] hearing in this matter, which I anticipate will require an additional [**hours**] hours of my time at the hourly rate described in my billing records attached hereto.

"It is further my opinion that, if a judgment for Plaintiff were to be unsuccessfully appealed by Defendant, the reasonable and necessary fee for services to be provided would be as follows:

"1. $[**amount**] for representation in the court of appeals;

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"2. $[**amount**] for representation should a petition for review by the Texas Supreme Court be sought;

"3. $[**amount**] for representation in the Texas Supreme Court if a petition for review is granted; and

"4. $[**amount**] for representation through oral argument and the completion of proceedings in the Texas Supreme Court.

"The foregoing matters are, within my personal knowledge, true and correct."

____
[Name of affiant]
Affiant

SIGNED under oath before me on ______________________________.

____
Notary Public, State of Texas

Attach time records as exhibits. Attach affidavit to the motion for entry of default judgment (form 20-1).

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Form 20-5

For a list of some requisites that should be met before a default judgment is obtained, see sections 20.22 through 20.26 in this chapter. See also sections 20.10 and 20.11 on judgment interest. See section 1.29 in this manual for a discussion of attorney's fees for appellate proceedings.

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

Default Judgment

[Providing for Additional Attorney's Fees for Unsuccessful Appeals]

At the hearing on this cause, Plaintiff appeared through his attorney of record. Defendant, although duly cited to appear and answer herein, has failed to file an answer within the time allowed by law. The citation with the officer's return thereon has been on file with the clerk of this Court for ten days, exclusive of the day of filing and the day of judgment.

The Court has considered the pleadings and records on file in this cause and the evidence and is of the opinion that judgment should be rendered for Plaintiff.

It is accordingly ADJUDGED that [**name of plaintiff**], Plaintiff, recover from [**name of defendant**], Defendant, judgment for—

1. $[**amount**] as the principal amount due;

2. $[**amount**] as interest on the principal amount through the day before the date of judgment;

3. $[**amount**] as attorney's fees for services rendered through the trial of this case;

4. $[**amount**] as additional attorney's fees if Defendant files an appeal in the court of appeals that is ultimately unsuccessful, $[**amount**] as additional attorney's fees if Defendant files a petition for review in the Supreme Court of Texas that is ultimately denied, and

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$[**amount**] as additional attorney's fees if Defendant's petition for review is granted but relief is not ultimately granted to Defendant;

5. $[**amount**] for costs of court; and

6. interest at the rate of [**percent**] percent per year on the total judgment from the date of judgment until paid.

> Include foreclosure language if appropriate (see form 20-16). Continue with the following.

It is ORDERED that Plaintiff shall have all writs of execution and other process necessary to enforce 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 [**name of plaintiff**]
State Bar No.:
[**E-mail address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

© STATE BAR OF TEXAS

____

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

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Form 20-6

For a list of some requisites that should be met before a default judgment is obtained, see sections 20.22 through 20.26 in this chapter. See also sections 20.10 and 20.11 on judgment interest. See section 1.29 in this manual for a discussion of attorney's fees for appellate proceedings.

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

Default Judgment

[Remittitur]

At the hearing on this cause, Plaintiff appeared through his attorney of record. Defendant, although duly cited to appear and answer herein, has failed to file an answer within the time allowed by law. The citation with the officer's return thereon has been on file with the clerk of this Court for ten days, exclusive of the day of filing and the day of judgment.

The Court has considered the pleadings and records on file in this cause and the evidence and is of the opinion that judgment should be rendered for Plaintiff.

It is accordingly ADJUDGED that [**name of plaintiff**], Plaintiff, recover from [**name of defendant**], Defendant, judgment for—

1. $[**amount**] as the principal amount due;

2. $[**amount**] as interest on the principal amount through the day before the date of judgment;

3. $[**amount**] as attorney's fees; however, if Defendant does not appeal this judgment to the court of appeals and time for appeal to that court has expired, Defendant shall be entitled to a remittitur of $[**amount**] against the judgment for attorney's fees; and if Defendant does not appeal from the court of appeals to the Supreme Court of Texas and time for that

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appeal has expired, Defendant shall be entitled to a remittitur of $[**amount**] against the judgment for attorney's fees;

4. $[**amount**] for costs of court; and

5. interest at the rate of [**percent**] percent per year on the total judgment from the date of judgment until paid.

Include foreclosure language if appropriate (see form 20-16). Continue with the following.

It is ORDERED that Plaintiff shall have all writs of execution and other process necessary to enforce 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 [**name of plaintiff**]
State Bar No.:
[**E-mail address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

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____

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

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Form 20-7

For a list of some requisites that should be met before a judgment nihil dicit is obtained, see sections 20.22 through 20.27 in this chapter. See also sections 20.10 and 20.11 on judgment interest. Some courts require a motion for entry of a judgment nihil dicit. See section 1.29 in this manual for a discussion of attorney's fees for appellate proceedings.

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

Judgment Nihil Dicit

At the hearing on this cause, Plaintiff appeared through his attorney of record. Defendant, although duly cited to appear and answer herein, has filed an answer but [that answer does not join issue with Plaintiff's claim on the merits/has withdrawn the answer before trial].

The Court has considered the pleadings and records on file in this cause and the evidence and is of the opinion that judgment should be rendered for Plaintiff.

It is accordingly ADJUDGED that [**name of plaintiff**], Plaintiff, recover from [**name of defendant**], Defendant, judgment for—

1. $[**amount**] as the principal amount due;

2. $[**amount**] as interest on the principal amount through the day before the date of judgment;

3. $[**amount**] as attorney's fees through the date of judgment;

4. additional attorney's fees in the amount of $[**amount**] if Defendant files a Motion for New Trial, plus the amount of $[**amount**] if an appeal of this cause is made to the court of appeals, plus the amount of $[**amount**] in the event either party files a Petition for Review in the Texas Supreme Court, plus the amount of $[**amount**] in the event the Petition for Review is granted, plus the amount of $[**amount**] in the event that either party seeks rehearing in the

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Texas Supreme Court, and all posttrial attorney's fees awarded in this paragraph are contingent on Plaintiff's prevailing;

5. $[**amount**] for costs of court; and

6. interest at the rate of [**percent**] percent per year on the total judgment from the date of judgment until paid.

Include foreclosure language if appropriate (see form 20-16). Continue with the following.

It is ORDERED that Plaintiff shall have all writs of execution and other process necessary to enforce 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 [**name of plaintiff**]
State Bar No.:
[**E-mail address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

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____

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

> Prepare and file a certificate of last known mailing address (form 20-2) and, if the defendant is an individual, a nonmilitary affidavit (form 20-3). See the affidavit for attorney's fees (form 20-4).

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Form 20-8

This form may be used for a final summary judgment disposing of all parties and issues. For other summary judgment forms, see forms 20-9 (partial summary judgment) and 20-10 (judgment after trial of some issues) in this chapter. For a motion for summary judgment, see form 19-9 in this manual. See also sections 20.10 and 20.11 on judgment interest. See section 1.29 for a discussion of attorney's fees for appellate proceedings.

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

Final Summary Judgment

On this date, the Court considered Plaintiff's Motion for Summary Judgment. [**Recite appearances, e.g.,** All parties appeared through their attorneys of record.]

The Court has considered the motion; the response, if any; the pleadings and official records on file in this cause; the evidence; and the arguments of counsel and finds that there is no genuine issue about any material fact and that Plaintiff is entitled to judgment as a matter of law.

It is accordingly ADJUDGED that [**name of plaintiff**], Plaintiff, recover from [**name of defendant**], Defendant, judgment for—

1. $[**amount**] as the principal amount due;

2. $[**amount**] as interest on the principal amount through the day before the date of judgment;

3. $[**amount**] as attorney's fees through the date of judgment;

4. additional attorney's fees in the amount of $[**amount**] if Defendant files a Motion for New Trial, plus the amount of $[**amount**] if an appeal of this cause is made to the court of appeals, plus the amount of $[**amount**] in the event either party files a Petition for Review in

the Texas Supreme Court, plus the amount of $[**amount**] in the event the Petition for Review is granted, plus the amount of $[**amount**] in the event that either party seeks rehearing in the Texas Supreme Court, and all posttrial attorney's fees awarded in this paragraph are contingent on Plaintiff's prevailing;

5. $[**amount**] for costs of court; and

6. interest at the rate of [**percent**] percent per year on the total judgment from the date of judgment until paid.

Include foreclosure language if appropriate (see form 20-16). Continue with the following.

It is ORDERED that Plaintiff shall have all writs of execution and other process necessary to enforce 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 [**name of plaintiff**]
State Bar No.:
[**E-mail address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

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____

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

Form 20-9

If at the hearing on a motion for summary judgment the court finds that there is a genuine issue about one or more material facts but no genuine issue about others, the court is to make an order specifying the facts that appear to be without substantial controversy and directing "such further proceedings in the action as are just." Tex. R. Civ. P. 166a(e) (see section 19.51 and form 19-9 in this manual). The order ("partial summary judgment") is interlocutory and after trial will be replaced by a final judgment (form 20-10).

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

Partial Summary Judgment

At the hearing on Plaintiff's Motion for Summary Judgment in this cause, [**recite appearances, e.g.,** all parties appeared through their attorneys of record].

Having examined the pleadings and the evidence before it and having interrogated counsel, the Court has ascertained that some material facts are actually and in good faith controverted and that the following material facts exist without substantial controversy: [**state facts**].

It is accordingly ORDERED that a trial be held in this cause and that the facts specified above be deemed established at that trial.

SIGNED on ______________________________.

____
JUDGE PRESIDING

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APPROVED AS TO FORM:

____
[Name]
Attorney for **[name of plaintiff]**
State Bar No.:
[E-mail address]
[Address]
[Telephone]
[Telecopier]

____
[Name]
Attorney for **[name of defendant]**
State Bar No.:
[E-mail address]
[Address]
[Telephone]
[Telecopier]

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Form 20-10

This form may be used for the occasional situation in which the court disposes of some matters by summary judgment and resolves controverted issues (usually attorney's fees) by later trial (see section 19.52 in this manual). If the controverted issues were not tried immediately after the hearing on the motion for summary judgment, the judge should have signed an interlocutory "partial summary judgment" (form 20-9), which will be replaced by this final judgment. For a motion for summary judgment, see form 19-9. See sections 20.10 and 20.11 on judgment interest. See section 1.29 for a discussion of attorney's fees for appellate proceedings.

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

Final Summary Judgment

At the hearing on Plaintiff's Motion for Summary Judgment in this cause, [**recite appearances, e.g.,** all parties appeared through their attorneys of record].

On [**date**], the Court entered its interlocutory summary judgment after it examined the pleadings and evidence before it, interrogated counsel, and found that there were no genuine issues of material fact concerning [**summarize material fact areas, e.g.,** the fact of Defendant's debt to Plaintiff and the amount of principal and interest owed] and that Plaintiff was entitled to judgment as a matter of law on these issues. Thereafter, a trial was held on the remaining genuine issues of material fact regarding [**summarize controverted material fact areas, e.g.,** the amount of attorney's fees for which Defendant should be liable to Plaintiff]. All parties appeared through their attorneys of record and announced that they were ready for trial.

Because a jury was not requested, the Court decided all fact questions at the trial. The Court considered the pleadings and records on file in this cause, the evidence, and the arguments of counsel and is of the opinion that judgment should be rendered for Plaintiff on the controverted facts.

It is accordingly ADJUDGED that [**name of plaintiff**], Plaintiff, recover from [**name of defendant**], Defendant, judgment for—

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1. $[**amount**] as the principal amount due;

2. $[**amount**] as interest on the principal amount through the day before the date of judgment;

3. $[**amount**] as attorney's fees through the date of judgment;

4. additional attorney's fees in the amount of $[**amount**] if Defendant files a Motion for New Trial, plus the amount of $[**amount**] if an appeal of this cause is made to the court of appeals, plus the amount of $[**amount**] in the event either party files a Petition for Review in the Texas Supreme Court, plus the amount of $[**amount**] in the event the Petition for Review is granted, plus the amount of $[**amount**] in the event that either party seeks rehearing in the Texas Supreme Court, and all posttrial attorney's fees awarded in this paragraph are contingent on Plaintiff's prevailing;

5. $[**amount**] for costs of court; and

6. interest at the rate of [**percent**] percent per year on the total judgment from the date of judgment until paid.

> Include foreclosure language if appropriate (see form 20-16). Continue with the following.

It is ORDERED that Plaintiff shall have all writs of execution and other process necessary to enforce this judgment.

This judgment finally disposes of all parties and all claims and is appealable.

SIGNED on ______________________________.

____
JUDGE PRESIDING

© STATE BAR OF TEXAS

APPROVED AS TO FORM:

____

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

____

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

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Form 20-11

See sections 20.10 and 20.11 in this chapter on judgment interest.

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

Agreed Judgment

At the hearing on this cause, the attorneys for Plaintiff and Defendant announced to the Court that Plaintiff and Defendant have agreed that judgment should be rendered for Plaintiff as requested.

The Court has considered the pleadings and records on file in this cause and the evidence and is of the opinion that judgment should be rendered for Plaintiff as agreed.

It is accordingly ADJUDGED that [**name of plaintiff**], Plaintiff, recover from [**name of defendant**], Defendant, judgment for—

1. $[**amount**] as the principal amount due;

2. $[**amount**] as interest on the principal amount through the day before the date of judgment;

3. $[**amount**] as attorney's fees;

4. $[**amount**] for costs of court; and

5. interest at the rate of [**percent**] percent per year on the total judgment from the date of judgment until paid.

Include foreclosure language if appropriate (see form 20-16). Continue with the following.

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It is ORDERED that Plaintiff shall have all writs of execution and other process necessary to enforce this judgment.

This judgment finally disposes of all parties and all claims and is appealable.

SIGNED on ______________________________.

____
JUDGE PRESIDING

APPROVED AS TO FORM AND SUBSTANCE:

____
[Name]
Attorney for **[name of plaintiff]**
State Bar No.:
[E-mail address]
[Address]
[Telephone]
[Telecopier]

____
[Name]
Attorney for **[name of defendant]**
State Bar No.:
[E-mail address]
[Address]
[Telephone]
[Telecopier]

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Form 20-12

For discussion of reducing a foreign judgment to a Texas judgment and the simplified filing procedure available under the Uniform Enforcement of Foreign Judgments Act, see section 14.34 and forms 14-12 and 14-13 in this manual. See sections 20.10 and 20.11 on judgment interest. See section 1.29 for a discussion of attorney's fees for appellate proceedings.

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

Judgment

[on Foreign Judgment]

At the hearing on this cause, [**recite appearances, e.g.,** all parties appeared through their attorneys of record]. The Court has considered the pleadings and official records on file in this cause and the evidence. It appears to the Court that Plaintiff is the owner of a final, valid, and subsisting judgment; that the judgment has not been satisfied; that the judgment was rendered by a court of general jurisdiction created under the laws of [**name of state**] and has been properly authenticated by the rendering jurisdiction; and that the judgment is entitled to be accorded full faith and credit by this Court. The Court is therefore of the opinion that judgment should be rendered for Plaintiff.

It is accordingly ADJUDGED that [**name of plaintiff**], Plaintiff, recover from [**name of defendant**], Defendant, judgment for—

1. $[**amount**] as the principal amount due;

2. $[**amount**] for all postjudgment costs incurred in the jurisdiction in which Plaintiff obtained the judgment that is the subject of this action;

3. $[**amount**] as interest on the foreign judgment from the date of that judgment until the date of judgment in this Court;

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4. $[**amount**] as additional attorney's fees if Defendant files an appeal in the court of appeals that is ultimately unsuccessful, $[**amount**] as additional attorney's fees if Defendant files a petition for review in the Supreme Court of Texas that is ultimately denied, and $[**amount**] as additional attorney's fees if Defendant's petition for review is granted but relief is not ultimately granted to Defendant;

5. $[**amount**] for costs incurred in this Court; and

6. interest at the rate of [**percent**] percent per year on this judgment in its entirety from the date of this judgment until paid.

It is ORDERED that Plaintiff shall have all writs of execution and other process necessary to enforce 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 [**name of plaintiff**]
State Bar No.:
[**E-mail address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

© STATE BAR OF TEXAS

____

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

Form 20-13

See form 20-14 in this chapter for a judgment based on a jury verdict and form 20-15 for a directed verdict judgment. See sections 20.10 and 20.11 on judgment interest. See section 1.29 in this manual for a discussion of attorney's fees for appellate proceedings.

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

Judgment
[Bench Trial]

At the hearing on this cause, all parties appeared through their attorneys of record and announced that they were ready for trial. Because a jury was not requested, the Court decided all fact questions.

The Court has considered the pleadings and official records on file in this cause, the evidence, and the arguments of counsel and is of the opinion that judgment should be rendered for Plaintiff.

It is accordingly ADJUDGED that [**name of plaintiff**], Plaintiff, recover from [**name of defendant**], Defendant, judgment for—

1. $[**amount**] as the principal amount due;

2. $[**amount**] as interest on the principal amount through the day before the date of judgment;

3. $[**amount**] as attorney's fees through the date of judgment;

4. additional attorney's fees in the amount of $[**amount**] if Defendant files a Motion for New Trial, plus the amount of $[**amount**] if an appeal of this cause is made to the court of appeals, plus the amount of $[**amount**] in the event either party files a Petition for Review in the Texas Supreme Court, plus the amount of $[**amount**] in the event the Petition for Review

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is granted, plus the amount of $[**amount**] in the event that either party seeks rehearing in the Texas Supreme Court, and all posttrial attorney's fees awarded in this paragraph are contingent on Plaintiff's prevailing;

5. $[**amount**] for costs of court; and

6. interest at the rate of [**percent**] percent per year on the total judgment from the date of judgment until paid.

> Include foreclosure language if appropriate (see form 20-16). Continue with the following.

It is ORDERED that Plaintiff shall have all writs of execution and other process necessary to enforce 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 [**name of plaintiff**]
State Bar No.:
[**E-mail address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

© STATE BAR OF TEXAS

____

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

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Form 20-14

See form 20-13 in this chapter for a judgment based on trial to the court and form 20-15 for a directed verdict judgment. See sections 20.10 and 20.11 on judgment interest. See section 1.29 in this manual for a discussion of attorney's fees for appellate proceedings.

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

Judgment

[Based on Jury Verdict]

At the hearing on this cause, all parties appeared through their attorneys of record and announced that they were ready for trial.

A jury was duly accepted, impaneled, and sworn. The jury returned its verdict after hearing evidence, arguments of counsel, and the Court's instructions and after receiving questions to be answered.

Based on the jury's verdict, it is ADJUDGED that [**name of plaintiff**], Plaintiff, recover from [**name of defendant**], Defendant, judgment for—

1. $[**amount**] as the principal amount due;

2. $[**amount**] as interest on the principal amount through the day before the date of judgment;

3. $[**amount**] as attorney's fees through the date of judgment;

4. additional attorney's fees in the amount of $[**amount**] if Defendant files a Motion for New Trial, plus the amount of $[**amount**] if an appeal of this cause is made to the court of appeals, plus the amount of $[**amount**] in the event either party files a Petition for Review in the Texas Supreme Court, plus the amount of $[**amount**] in the event the Petition for Review is granted, plus the amount of $[**amount**] in the event that either party seeks rehearing in the

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Texas Supreme Court, and all posttrial attorney's fees awarded in this paragraph are contingent on Plaintiff's prevailing;

5. $[**amount**] for costs of court; and

6. interest at the rate of [**percent**] percent per year on the total judgment from the date of judgment until paid.

> Include foreclosure language if appropriate (see form 20-16). Continue with the following.

It is ORDERED that Plaintiff shall have all writs of execution and other process necessary to enforce 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 [**name of plaintiff**]
State Bar No.:
[**E-mail address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

© STATE BAR OF TEXAS

____

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

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Form 20-15

If during the trial (usually after both sides have rested) it appears to the court that the evidence conclusively proves that the plaintiff is entitled to judgment as a matter of law, based either on the plaintiff's motion or on the court's own motion, the court can instruct the jury to return a verdict or can discharge the jury and render judgment. An oral motion is permissible but should later be put in writing and entered in the record. The motion must state the specific grounds for a directed verdict. Tex. R. Civ. P. 268. See form 20-13 in this chapter for a judgment based on a bench trial and form 20-14 for a judgment based on a jury verdict. See sections 20.10 and 20.11 on judgment interest. See section 1.29 in this manual for a discussion of attorney's fees for appellate proceedings.

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

Judgment

[Based on Directed Verdict]

At the hearing on this cause, all parties appeared through their attorneys of record and announced that they were ready for trial.

A jury was duly accepted, impaneled, and sworn. After [Plaintiff/both sides] rested, Plaintiff moved for a directed verdict. The Court has considered the pleadings and official records on file in this cause, the evidence, and the arguments of counsel and is of the opinion that Plaintiff's motion should be granted and that judgment should be rendered for Plaintiff as a matter of law.

It is accordingly ADJUDGED that [**name of plaintiff**], Plaintiff, recover from [**name of defendant**], Defendant, judgment for—

1. $[**amount**] as the principal amount due;

2. $[**amount**] as interest on the principal amount through the day before the date of judgment;

3. $[**amount**] as attorney's fees through the date of judgment;

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4. additional attorney's fees in the amount of $[**amount**] if Defendant files a Motion for New Trial, plus the amount of $[**amount**] if an appeal of this cause is made to the court of appeals, plus the amount of $[**amount**] in the event either party files a Petition for Review in the Texas Supreme Court, plus the amount of $[**amount**] in the event the Petition for Review is granted, plus the amount of $[**amount**] in the event that either party seeks rehearing in the Texas Supreme Court, and all posttrial attorney's fees awarded in this paragraph are contingent on Plaintiff's prevailing;

5. $[**amount**] for costs of court; and

6. interest at the rate of [**percent**] percent per year on the total judgment from the date of judgment until paid.

> Include foreclosure language if appropriate (see form 20-16). Continue with the following.

It is ORDERED that Plaintiff shall have all writs of execution and other process necessary to enforce this judgment.

This judgment finally disposes of all parties and all claims and is appealable.

SIGNED on ______________________________.

____
JUDGE PRESIDING

APPROVED AS TO FORM:

© STATE BAR OF TEXAS

____

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

____

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

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Form 20-16

The following paragraph must be included in every judgment foreclosing a security interest or other lien, except judgments against executors, administrators, or guardians. See sections 20.9:3 and 20.9:5 in this chapter. The collateral should be described as explicitly as possible so that the levying officer will be able to identify it. The description should not differ materially from that in the petition.

Additional Language to Foreclose Lien

It is further ADJUDGED that the security interest of [**name of plaintiff**], Plaintiff, in [**describe collateral**] is foreclosed; that an order of sale shall issue to any sheriff or any constable in the state of Texas, directing him to seize and sell the collateral as under execution, in satisfaction of this judgment; and that, if the collateral cannot be found or if the proceeds of the sale are insufficient to satisfy the judgment, the officer shall take the money, or any balance thereof remaining unpaid, out of any property of [**name of defendant**], Defendant, as in the case of ordinary executions.

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Form 20-17

This working spreadsheet is available as part of the Texas Collections Manual digital download and may be used to calculate total costs, including attorney's fees and interest accrued at the time satisfaction of a judgment is made. There are two tabs in the spreadsheet—one uses compound interest and the other uses simple interest. It may be accessed at **www.texasbarcle.com/collections-2020**. The numbers included are examples; the practitioner should enter figures relevant to the case.

Costs and Interest Rate Calculator

Payoff and Interest Calculation

File No.	
Debtor	
Date of Default	1/1/2009
Date of Judgment	1/1/2012
Principal Amount	$10,000.00
Pre-Judgment Rate	6.00%
Postjudgment Rate	5.00%
Attorney's Fees	$1,000.00
Court Costs	$500.00
Payoff Date	**1/1/2017**

Prejudgment Interest	
Annual Int	600
Daily Int	$1.64
Total Prejudgment Int	$1,800.00
Total Judgment Amount	$13,300.00

Postjudgment Interest	
Annual Int	$ 665.00
Daily Int	$ 1.82
Total Postjudgment Int	$ 3,328.64

Total Payoff Amount $16,628.64

Payoff Amoritization

Date	Payoff Amount	Date	Payoff Amount	Date	Payoff Amount
1/1/2017	$16,628.64	1/30/2017	$ 16,681.48	2/28/2017	$ 16,734.32
1/2/2017	16,630.47	1/31/2017	16,683.30	3/1/2017	16,736.14
1/3/2017	16,632.29	2/1/2017	16,685.12	3/2/2017	16,737.96
1/4/2017	16,634.11	2/2/2017	16,686.95	3/3/2017	16,739.78
1/5/2017	16,635.93	2/3/2017	16,688.77	3/4/2017	16,741.60
1/6/2017	16,637.75	2/4/2017	16,690.59	3/5/2017	16,743.42
1/7/2017	16,639.58	2/5/2017	16,692.41	3/6/2017	16,745.25
1/8/2017	16,641.40	2/6/2017	16,694.23	3/7/2017	16,747.07
1/9/2017	16,643.22	2/7/2017	16,696.05	3/8/2017	16,748.89
1/10/2017	16,645.04	2/8/2017	16,697.88	3/9/2017	16,750.71
1/11/2017	16,646.86	2/9/2017	16,699.70	3/10/2017	16,752.53
1/12/2017	16,648.68	2/10/2017	16,701.52	3/11/2017	16,754.36
1/13/2017	16,650.51	2/11/2017	16,703.34	3/12/2017	16,756.18
1/14/2017	16,652.33	2/12/2017	16,705.16	3/13/2017	16,758.00
1/15/2017	16,654.15	2/13/2017	16,706.99	3/14/2017	16,759.82
1/16/2017	16,655.97	2/14/2017	16,708.81	3/15/2017	16,761.64
1/17/2017	16,657.79	2/15/2017	16,710.63	3/16/2017	16,763.47
1/18/2017	16,659.62	2/16/2017	16,712.45	3/17/2017	16,765.29
1/19/2017	16,661.44	2/17/2017	16,714.27	3/18/2017	16,767.11
1/20/2017	16,663.26	2/18/2017	16,716.10	3/19/2017	16,768.93
1/21/2017	16,665.08	2/19/2017	16,717.92	3/20/2017	16,770.75
1/22/2017	16,666.90	2/20/2017	16,719.74	3/21/2017	16,772.58
1/23/2017	16,668.73	2/21/2017	16,721.56	3/22/2017	16,774.40
1/24/2017	16,670.55	2/22/2017	16,723.38	3/23/2017	16,776.22
1/25/2017	16,672.37	2/23/2017	16,725.21	3/24/2017	16,778.04
1/26/2017	16,674.19	2/24/2017	16,727.03	3/25/2017	16,779.86
1/27/2017	16,676.01	2/25/2017	16,728.85	3/26/2017	16,781.68
1/28/2017	16,677.84	2/26/2017	16,730.67	3/27/2017	16,783.51
1/29/2017	16,679.66	2/27/2017	16,732.49	3/28/2017	16,785.33

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Payment and Payoff Calculator

File No.				
Debtor				
Date of Default	1/1/2009		**Prejudgment Interest**	
Date of Judgment	1/1/2012		Annual Int	600
Principal Amount	$10,000.00		Daily Int	$1.64
Pre-Judgment Rate	6.00%		**Total Prejudgment Int**	
Postjudgment Rate	5.00%			$1,800.00
			Total Judgment Amount	
Attorney's Fees	$1,000.00			$13,300.00
Court Costs	$500.00		**Init Paydate**	**1/1/2013**

	Date	Payment	Principal	Accrued Interest	Payment to Principal	Payment to Interest	Running Balance
Judg	1/1/2012		$13,300.00	0	0	0	$13,300.00
Init PMT	1/1/2013	$500.00	$13,300.00	$666.82	$0.00	$500.00	$13,966.82
	1/1/2014	$500.00	$13,300.00	$831.82	$0.00	$500.00	$14,131.82
	1/1/2015	$500.00	$13,300.00	$996.82	$0.00	$500.00	$14,296.82
	1/1/2016	$500.00	$13,300.00	$1,161.82	$0.00	$500.00	$14,461.82
	1/1/2017	$500.00	$13,300.00	$1,328.64	$0.00	$500.00	$14,628.64
	1/1/2018	$500.00	$13,300.00	$1,493.64	$0.00	$500.00	$14,793.64
	1/1/2019		$13,300.00	$1,658.64	$0.00	$0.00	$14,958.64

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