2020 SUPPLEMENT to
Texas Real Estate Forms Manual

Third Edition

SARA E. DYSART
Chair, Manual Committee

This supplement updates the practice notes and forms and incorporates relevant statutory and case law handed down since 2019.

Digital Download

This supplement's complete digital download, containing the entire text of the manual in PDF and all State Bar of Texas–copyrighted forms in Word, can be securely downloaded from our website at **www.texasbarcle.com/real-estate-2020** (for details, go to **http://texasbarbooks.net/download-tips** or see the section titled "How to Download This Manual" in volume 1).

How to Use This Supplement

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

1. BE SURE that your manual is the third edition. Check the back of the title page in any volume; the final line on that page should state "Third Edition, 2017." If you do not have the third edition, you should obtain it and return this supplement for a refund, as current purchases of the third edition will automatically include a copy of this supplement. To order the third edition, e-mail **salesdesk@texasbar.com** or call 1-800-204-2222, ext. 1411 (8:30 A.M.–4:30 P.M., Monday through Friday).

2. Remove the spine card for volume 1 and replace it with the new one.

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 Use the instructions following this list of steps to remove outdated pages and insert new ones.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

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 When all the listed pages have been inserted and all superseded pages have been removed, the List of Effective Pages will remain.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

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

6. Occasionally the printer accidentally omits some pages from the supplement, and sometimes pages from the original manual will have been lost during use. We will be happy to provide new supplement pages and replacements for "old" pages or missing tab dividers. If you don't find your

missing pages in the stack of superseded pages you've removed and set aside, photocopy the List of Effective Pages, indicate which pages you're missing, and send the list, together with a label containing your complete mailing address, to: State Bar of Texas, TexasBarBooks, Missing Pages, P.O. Box 12487, Austin, TX 78711-2487; you may also send your request via e-mail to **books@texasbar.com** or fax to (512) 427-4404. For questions about orders and accounts, call (512) 427-1411; for technical support, call (512) 427-1499.

7. When steps 1–5 have been completed, discard the superseded pages. These instructions may be discarded or filed for future reference.

INSTRUCTIONS FOR REMOVING AND INSERTING PAGES

REMOVE OLD PAGES	*INSERT NEW PAGES*
VOLUME 1	
Title page – xx	Title page – xii
Behind tab SUMMARY OF CONTENTS	
Contents-1 – Contents-2	Contents-1 – Contents-2
Behind tab HOW TO DOWNLOAD THIS MANUAL	
Doc-1 – Doc-2	Doc-1 – Doc-2
Behind tab CHAPTER 1	
1-i – 1-12 1-15-1 – 1-15-12	1-i – 1-14 1-15-1 – 1-15-12
Behind tab CHAPTER 2	
All contents behind tab	2-i – 2-68
Behind tab CHAPTER 3	
3-i – 3-20 3-30-1 – 3-36-2	3-i – 3-20 3-30-1 – 3-38-2
Behind tab CHAPTER 4	
4-i – 4-14 4-22-3 – 4-22-6 4-26-1 – 4-26-2 4-28-1 – 4-31-22	4-i – 4-14 4-22-3 – 4-22-10 4-26-1 – 4-26-2 4-28-1 – 4-31-22

REMOVE OLD PAGES	*INSERT NEW PAGES*
Behind tab CHAPTER 5	
5-i – 5-viii	5-i – 5-viii
5-9 – 5-26	5-9 – 5-26
5-25-1 – 5-27-2	5-25-1 – 5-27-2
Behind tab CHAPTER 6	
6-i – 6-ii	6-i – 6-ii
6-9 – 6-1-6	6-9 – 6-1-6
Behind tab CHAPTER 7	
All contents behind tab	7-i – 7-2-2
VOLUME 2	
Title page – vi	Title page – vi
Behind tab CHAPTER 8	
8-i – 8-ii	8-i – 8-ii
8-15 – 8-18	8-15 – 8-16
Behind tab CHAPTER 9	
9-i – 9-iv	9-i – 9-iv
9-13 – 9-32	9-13 – 9-32
9-19-1 – 9-20-6	9-19-1 – 9-20-6
Behind tab CHAPTER 10	
10-i – 10-5-2	10-i – 10-5-2
10-9-1 – 10-9-2	10-9-1 – 10-9-2
10-17-17 – 10-17-20	10-17-17 – 10-17-20
10-19-1 – 10-21-2	10-19-1 – 10-21-2
10-25-1 – 10-25-2	10-25-1 – 10-25-2
Behind tab CHAPTER 11	
11-i – 11-1-6	11-i – 11-1-6
11-4-1 – 11-5-8	11-4-1 – 11-5-8
11-8-1 – 11-9-4	11-8-1 – 11-9-4

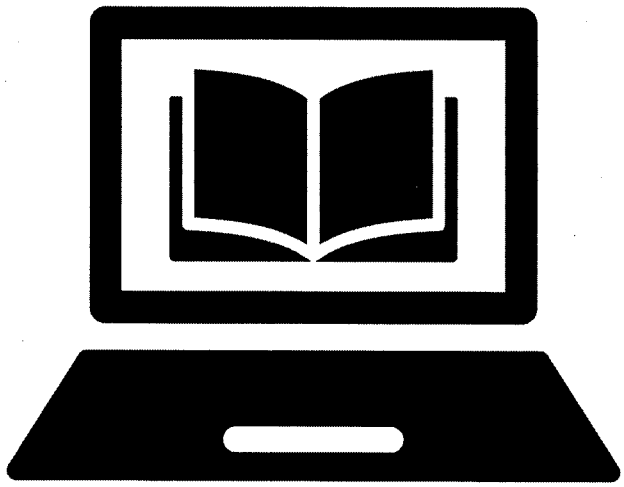
REMOVE OLD PAGES	*INSERT NEW PAGES*
Behind tab CHAPTER 12	
12-i – 12-20	12-i – 12-20
Behind tab CHAPTER 13	
13-1 – 13-2	13-1 – 13-2
Behind tab CHAPTER 14	
14-i – 14-22	14-i – 14-22
14-15-1 – 14-41-2	14-15-1 – 14-41-2
VOLUME 3	
Title page – vi	Title page – vi
Behind tab CHAPTER 16	
16-i – 16-76	16-i – 16-76
16-8-1 – 16-8-2	16-8-1 – 16-8-4
16-11-1 – 16-11-4	16-11-1 – 16-11-4
16-14-1 – 16-14-4	16-14-1 – 16-14-4
16-24-1 – 16-26-8	16-24-1 – 16-26-8
Behind tab CHAPTER 17	
17-i – 17-28	17-i – 17-28
Behind tab CHAPTER 18	
18-i – 18-10	18-i – 18-10
18-4-1 – 18-4-22	18-4-1 – 18-4-22
Behind tab CHAPTER 19	
All contents behind tab	19-i – 19-2-74
Behind tab CHAPTER 20	
20-i – 20-20	20-i – 20-20

REMOVE OLD PAGES	*INSERT NEW PAGES*
Behind tab CHAPTER 21	
21-i – 21-ii	21-i – 21-ii
21-13 – 21-14	21-13 – 21-14
21-13-1 – 21-14-2	21-13-1 – 21-14-2
VOLUME 4	
Title page – vi	Title page – vi
Behind tab CHAPTER 23	
23-i – 23-4-12	23-i – 23-4-14
23-10-1 – 23-10-4	23-10-1 – 23-10-4
23-15-1 – 23-15-2	23-15-1 – 23-15-2
23-17-3 – 23-17-4	23-17-3 – 23-17-4
23-21-1 – 23-22-4	23-21-1 – 23-22-4
Behind tab CHAPTER 24	
24-i – 24-1-18	24-i – 24-1-18
24-6-3 – 24-6-4	24-6-3 – 24-6-4
24-14-1 – 24-16-4	24-14-1 – 24-17-2
Behind tab CHAPTER 25	
All contents behind tab	25-i – 25-37-4
Behind tab CHAPTER 26	
26-i – 26-ii	26-i – 26-ii
26-25-3 – 26-25-4	26-25-3 – 26-25-4
26-32-1 – 26-34-2	26-32-1 – 26-34-2
26-37-1 – 26-39-6	26-37-1 – 26-41-2
Behind tab APPENDIX	
All contents behind tab	App-1 – App-6
Behind tab STATUTES & RULES CITED	
All contents behind tab	Stat-1 – Stat-38

REMOVE OLD PAGES	*INSERT NEW PAGES*
Behind tab CASES CITED	
All contents behind tab	Cases-1 – Cases-6
Behind tab SUBJECT INDEX TO FORMS	
All contents behind tab	Forms-1 – Forms-12
Behind tab LIST OF FORMS BY TITLE	
All contents behind tab	List-1 – List-16
Behind tab SUBJECT INDEX	
All contents behind tab	Subj-1 – Subj-30

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

Access Your Complimentary Digital Download at www.texasbarcle.com/real-estate-2020



The digital download includes forms in Word and the entire book as a fully hyperlinked PDF, including links to cases and statutes.

Questions? Call 800-204-2222, ext. 1499, or e-mail us at books@texasbar.com.

TexasBarBooks

TEXAS REAL ESTATE FORMS MANUAL

Third Edition

Volume 1

A project of the
Real Estate Forms Committee
of the
State Bar of Texas

Austin 2017

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

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

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

International Standard Book Number: 978-1-938873-48-5
International Standard Book Number: 978-1-938873-60-7 (2018 Supplement)
International Standard Book Number: 978-1-938873-70-6 (2019 Supplement)
International Standard Book Number: 978-1-938873-78-2 (2020 Supplement)
Library of Congress Control Number: 2017936428

State Bar of Texas
Austin, Texas 78711

The authors and the State Bar of Texas gratefully acknowledge permission of the copyright holder and publisher to reprint the following materials: ACORD 25 "Certificate of Liability Insurance," ACORD 28 "Evidence of Commercial Property Insurance," and ACORD 45 "Additional Interest Schedule."

Printed in the United States of America

Third Edition, 2017

Steven Calens Haley

1955–2018

The policy of the Real Estate Forms Committee is not to single out individual contributions to the manual, because the ultimate work product is the result of a collaborative process. The current committee, however, believes that the work of Steve Haley merits deviation from this policy.

As noted in the Preface, the manual originated as a project of the San Antonio Bar Association in 1949. The State Bar assumed responsibility for the project in 1970 and published the "gray book" in 1973 and the "blue book" in 1986. Steve joined the Real Estate Forms Committee in 1997. He took on the most challenging drafting assignments and never failed to deliver an exemplary product.

Steve was known for his commanding personality, insatiable curiosity, and love for his family. He loved to explore life through his work, his art, and his passion for long journeys throughout Texas and the world. He graduated from Robert E. Lee High School and continued on to Texas A&M University, where he graduated with honors in the class of 1978. Haley was a proud member of the Fighting Texas Aggie Corps of Cadets, Squadron 1, and a member of the prestigious Ross Volunteers. After graduating from A&M, Steve returned to Houston for law school, where he graduated with honors from the University of Houston Bates College of Law in 1981. He was an editor of the *Houston Law Review* and a member of the Phi Delta Phi Honors Society, as well as the Order of the Barons.

As Haley grew in his career, he received peer awards and statewide recognition for his writing, leadership, and contributions to the law. He was a recognized legal authority on Texas homestead law. He was also recognized in 2004 and 2007 to 2016 on the Texas Super Lawyers list for general litigation and real estate law and was selected by his peers to be included in *The Best Lawyers in America* from 2008 to 2016. Steve was elected as a member of the American College of Real Estate Lawyers. In July 2017, he received the Weatherbie Workhorse Award, which is given annually by the State Bar of Texas for outstanding contributions to real estate CLE. In addition, Steve received the award for Best Speaker at the State Bar's Advanced Real Estate Law Course in 2009. This award was renamed in his honor in 2018.

Steve knew how to make an entrance. He was tall, boisterous, and opinionated, and was loved and respected by all who knew him. A natural-born storyteller, he drew in listeners with his expansive knowledge, quick wit, and distinctive Texas drawl. Steve always woke before dawn. His morning routines set the pace of the life he lived: with strong conviction and fully prepared to handle what came his way. He took seriously the words of Sam Houston: "Do right and risk the consequences." New days were taken as opportunities for new projects and new journeys.

The members of the Real Estate Forms Committee dedicate this 2020 supplement of the *Texas Real Estate Forms Manual* to Steven Calens Haley.

TEXAS REAL ESTATE FORMS MANUAL

Contents

Preface

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

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

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

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

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

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

—Denise Vargo Cheney, *Chair*
Sara Eileen Dysart, *Vice-Chair*

Summary of Contents

A detailed chapter table of contents immediately precedes the text of each chapter.

How to Download This Manual

To install this manual's digital download, go to

www.texasbarcle.com/real-estate-2020

For details, see the section below titled "Downloading and Installing."

Texas Real Estate Forms Manual (3rd Ed.) Digital Download 2020

The complimentary downloadable version of the *Texas Real Estate Forms Manual*, third edition, contains the entire text of the printed manual. If you have questions or problems with this product not covered in the documentation available via the URLs below, please contact TexasBarBooks at (800) 204-2222, ext. 1499 for technical support or ext. 1411 for orders and accounts, or at **books@texasbar.com**.

Additional and Entity Licenses

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

Frequently Asked Questions

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

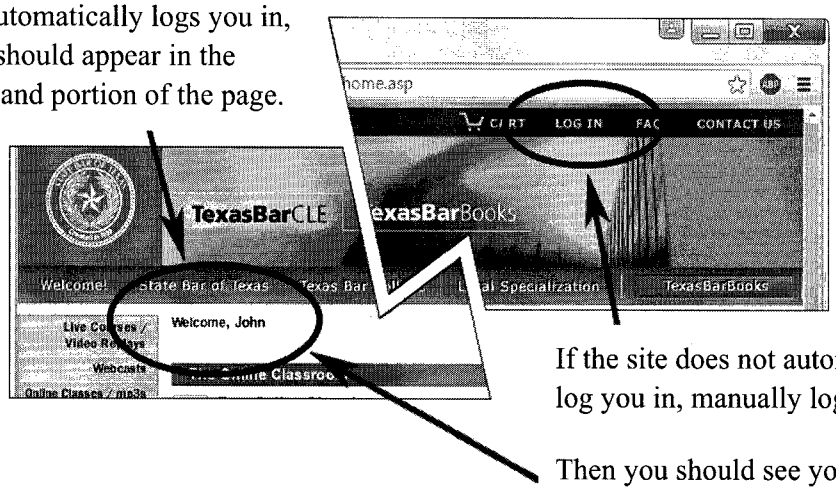
Downloading and Installing

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

To install this manual's complete digital download, follow the instructions below.

1. Log in at **www.texasbarcle.com**:

   If the site automatically logs you in, your name should appear in the upper left-hand portion of the page.



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

   Then you should see your name.

   If you are not yet a registered user of the site, on the log-in page, use the "New User? Click here" link to complete the quick, free registration.

2. Go to **www.texasbarcle.com/real-estate-2020**:

   After logging in, up in the browser's address bar, select all text after "texasbarcle.com/."

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

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

Chapter 1

Ethics and Professional Conduct

Forms

Chapter 1

Ethics and Professional Conduct

§ 1.1 Introduction

The Texas Disciplinary Rules of Professional Conduct set the standard of conduct for Texas attorneys and are found in the Texas Government Code in title 2, subtitle G, appendix A, following section 84.004 of the Government Code. The rules are also available online at **https://www.texasbar.com/Content/NavigationMenu/ForLawyers/ResourcesGuides1/EthicsResources**.

This chapter of the manual follows the attorney-client relationship from the initial client interview to the termination of the relationship, with examples of what a real estate attorney might do to document compliance with the rules. This chapter is very general and is not intended to be a substitute for a complete study of the rules.

The documents at the end of this chapter are examples only and provide general guidance, not "forms" for all transactions.

§ 1.1:1 The Texas Lawyer's Creed

On November 7, 1989, the Supreme Court of Texas and the Texas Court of Criminal Appeals adopted "The Texas Lawyer's Creed—A Mandate for Professionalism." An attorney adhering to the Creed agrees to advise a client of the contents of the Creed when undertaking a representation (article II, paragraph 1).

Recommended paragraphs for the disclosure about the Creed are found in the model engagement letters at forms 1-8, 1-9, and 1-10 in this chapter.

§ 1.1:2 Notice of Grievance Process

Section 81.079 of the Texas Government Code requires attorneys to notify clients of the grievance process. Notice must be provided by making available in the attorney's office grievance brochures prepared by the State Bar, by prominently posting a sign in the attorney's office describing the process, by including the information in a written contract for services, or by providing the information in a bill for services. Tex. Gov't Code § 81.079(b).

Example paragraphs for the disclosure about the Creed are found in the model engagement letters at forms 1-8, 1-9, and 1-10 in this chapter.

§ 1.2 Sources of Interpretation of Rules

Judicial decisions in Texas regarding ethical violations are referenced in the annotations to the Texas Disciplinary Rules of Professional Conduct.

The Professional Ethics Committee for the State Bar of Texas issues opinions on the rules and the Texas Code of Professional Responsibility (the predecessor to the rules). These opinions are published in the *Texas Bar Journal*.

An attorney may obtain informal explanations of the rules from the State Bar. A consultation with the disciplinary counsel's office may be not only informative but also probative of good faith should a question later arise. The telephone number of the attorney ethics line is 800-532-3947.

The Texas Center for Legal Ethics also maintains an online library, index, and text of all published opinions of the Committee on Professional Ethics; Texas cases dealing with ethics and professionalism; and a bibliography. The Center's website is at **https://www.legalethicstexas.com/Home**, and its phone number is 800-204-2222, ext. 1477.

§ 1.3 Disciplinary Action

Article VIII of the Texas Disciplinary Rules of Professional Conduct (Maintaining the Integrity of the Profession) generally governs an attorney's conduct. Rule 8.04 sets out a comprehensive restatement of all forms of conduct that will subject an attorney to disciplinary action. Tex. Disciplinary Rules Prof'l Conduct R. 8.04, *reprinted in* Tex. Gov't Code Ann., tit. 2, subtit. G, app. A (Tex. State Bar R. art. X, § 9). It includes conduct controlled by the State Bar Act and the State Bar Rules. The rules govern attorneys who are admitted to practice in Texas or specially admitted for a particular proceeding. A licensed Texas attorney's conduct in another state may also be the subject of a Texas grievance procedure. Tex. Disciplinary Rules Prof'l Conduct R. 8.05.

The rules do not prescribe either disciplinary procedures or penalties for a violation. Tex. Disciplinary Rules Prof'l Conduct preamble ¶ 14. Possible sanctions are found instead in the Texas Rules of Disciplinary Procedure. These rules are reproduced in the Texas Government Code in title 2, subtitle G, appendix A-1, following section 84.004 of the Government Code. The rules are also available online at **https://www.legalethicstexas.com/Ethics-Resources/Rules/Texas-Rules-of-Disciplinary-Procedure**.

§ 1.4 Consulting Potential Client

§ 1.4:1 Attorney-Client Relationship

The relationship of attorney and client is one of agent and principal. *Duval County Ranch Co. v. Alamo Lumber Co.*, 663 S.W.2d 627, 633 (Tex. App.—Amarillo 1983, writ ref'd n.r.e.). It is created by consent and governed by the general rules covering agency. *Bar Ass'n of Dallas v. Hexter Title & Abstract Co.*, 175 S.W.2d 108, 115 (Tex. App.—Fort Worth 1943), *aff'd*, 179 S.W.2d 946 (Tex. 1944). The fiduciary obligations and responsibilities imposed on the attorney are predicated on the existence of the attorney-client relationship. *See Shropshire v. Freeman*, 510 S.W.2d 405 (Tex. App.—Austin 1974, writ ref'd n.r.e.).

The attorney-client relationship can be implied from the conduct of the parties. *Duval County Ranch Co.*, 663 S.W.2d at 633. A written contract or payment of a retainer is not necessary. For example, gratuitous services can establish an attorney-client relationship. *Prigmore v. Hardware Mutual Insurance Co. of Minnesota*, 225 S.W.2d 897, 899 (Tex. App.—Amarillo 1949, no writ). But the fact that an attorney had business dealings with someone does not establish an attorney-client relationship. *McGary v. Campbell*, 245 S.W. 106, 116 (Tex. App.—Beaumont 1922, writ dism'd w.o.j.).

The existence of an attorney-client relationship is a question of fact. *Jinks v. Moppin*, 80 S.W. 390, 393 (Tex. App. 1904, no writ).

§ 1.4:2 Areas of Concern When Consulting Potential Client

Consultation alone does not create an attorney-client relationship. Nevertheless, some duties attach during a consultation. *See* Tex. Disciplinary Rules Prof'l Conduct preamble ¶ 12.

During a consultation, an attorney must maintain the requirements of confidentiality and must be wary to avoid current and future conflicts. A consultation and certainly an investigation may impose additional duties such as advising the potential client of the statute of limitations. *See Villarreal v. Cooper*, 673 S.W.2d 631 (Tex. App.—San Antonio 1984, no writ). At least one state has held attorneys liable for negligently investigating the claim, even though the attorney refused to take the case. *See Togstad v. Vesely, Otto, Miller & Keefe*, 291 N.W.2d 686 (Minn. 1980). Further confusion may result if an attorney has a continuing or gratuitous relationship with a client. *See Bresette v. Knapp*, 159 A.2d 329 (Vt. 1960).

An attorney should consider declining bad or unwanted business as well as the unwanted client. An attorney is not ethically required to represent all who seek the attorney's advice. *See* Tex. Disciplinary Rules Prof'l Conduct R. 6.01 & cmts.

§ 1.4:3 Refusing Representation

A potential client may believe that an attorney-client relationship is created by the initial interview. If the attorney decides not to represent a person, this should be made clear. The attorney should consider sending a letter to confirm that the proposed representation will not be undertaken. Form 1-1 in this chapter is an example of a nonrepresentation letter. Tex. Disciplinary Rules Prof'l Conduct R. 1.15(d) requires the potential client's documents to be returned. They may be withheld only if other law, such as a lien, permits the withholding of documents and if the client will not be prejudiced by the retention. *See* Tex. Comm. on Prof'l Ethics, Op. 395 (1979). If the documents are particularly valuable, the attorney should consider having their receipt acknowledged.

§ 1.4:4 Advising Potential Client

If the attorney declines the representation, there is a question about whether the attorney should advise the nonclient of any rights or statutes of limitation. Some attorneys, as a matter of policy, will advise the nonclient of such matters if the attorney is aware of them. Other attorneys believe that advice implies some representation of the nonclient and therefore, as a matter of policy, do not offer any advice in the nonrepresentation letter.

§ 1.5 Establishing Attorney-Client Relationship

§ 1.5:1 Disclosure of Conflicts

An attorney must disclose all potential conflicts before accepting employment and those that arise during the course of employment. Nonlitigation conflicts are addressed specifically in rule 1.06, comments 13–16. Unfortunately, these comments merely provide examples and conclude that the question is "often one of proximity and degree." Tex. Disciplinary Rules Prof'l Conduct R. 1.06 cmt. 13. Relevant factors include the duration of the relationship and intimacy that an attorney has with a client, the duties performed, the likelihood a conflict will arise, and the likelihood of resulting prejudice.

The disclosure requirement includes all personal conflicts, conflicts with current clients, and conflicts with past clients. For examples of disclosures and waivers of specific types of conflicts of interest, see forms 1-2 through 1-7 in this chapter.

Rule 1.12(a) states that an attorney employed by an organization represents the entity. Because investors often ask real estate attorneys to form a partnership or corporation, it is a good practice to clarify that the client is the entity and not the individual investors. See forms 1-5 and 1-6 for

examples of letters pertaining to the formation of a partnership and a corporation.

In addition, rule 1.12(e) requires the attorney to inform shareholders and officers that the attorney will not represent them if their interests are adverse to the interests of the entity. *See* Tex. Disciplinary Rules Prof'l Conduct R. 1.12(e) & cmt. 4.

§ 1.5:2 Consent Required for Representation of Multiple Clients

A typical real estate transaction may involve sellers, purchasers, guarantors, lenders, title insurance companies, trustees, real estate brokers and agents, mortgage brokers, tenants, and lien claimants, as well as the attorneys. In addition, if any of the parties are corporations or partnerships, the individual officers, directors, shareholders, partners, or venturers involved may have interests that diverge from those of the business entity. An attorney who provides legal counsel for more than one of the parties faces a potential conflict of interest that should be carefully examined before the attorney undertakes representation.

In examining the potential attorney-client relationship, the attorney should carefully consider the unique facts of the transaction and the purpose of the engagement. Representation may be analyzed under two theories: the traditional multiple-representation analysis (*see* Tex. Disciplinary Rules Prof'l Conduct R. 1.06) and the intermediaries analysis (*see* Tex. Disciplinary Rules Prof'l Conduct R. 1.07).

In many transactions, the multiple clients have adverse positions to each other but, because of economic constraints, want only one attorney to represent them in the transaction. Rule 1.06(a) prohibits an attorney from representing opposing parties in the same litigation. Rule 1.06(b) also prohibits an attorney from representing a client if the representation is substantially related and materially and directly adverse to the interest of another client of the attorney or if the attorney would be limited by other responsibilities. Notwithstanding the prohibition of rule 1.06(b), subsection (c) allows the attorney to represent multiple clients if the attorney believes each client's representation will not be materially affected and each client consents to the multiple representation after full disclosure.

Rule 1.07 may also affect the consent required for representation of multiple clients. Rule 1.07 can be read to require that an attorney obtain "each client's written consent" whenever "two or more parties with potentially conflicting interests" are represented by one attorney. One of the primary drafters of the rules has suggested that the literal language of rule 1.07 was in error and should be limited to situations in which an attorney mediates between clients, as illustrated by the comments to rule 1.07. See Robert P. Schuwerk & John F. Sutton, Jr., *A Guide to the Texas Disciplinary Rules of Professional Conduct*, 27A Hous. L. Rev., Oct. 1990, at 122.

If the attorney concludes that multiple representation is appropriate, obtaining written consent of the clients is advised. Form 1-3 in this chapter is a model letter for such a situation. See also forms 1-5, 1-6, and 1-7 for letters dealing with multiple representation. Separate engagement letters for each client may be appropriate in addition to the multiple-representation consent letter.

An additional problem that may arise is the division of the legal bill between multiple clients. Any representation of multiple clients will require a tailor-made consent agreement that clarifies the billing arrangement. See form 1-7 for an example of a consent agreement.

Further, if multiple parties are to receive cash or some other consideration, the attorney may have a duty to make sure all parties represented concur in the way the consideration is to be divided.

See Tex. Disciplinary Rules Prof'l Conduct R. 1.08(f); *Quintero v. Jim Walter Homes, Inc.*, 709 S.W.2d 225, 229 (Tex. App.—Corpus Christi–Edinburg 1985, writ ref'd n.r.e.) (involves litigation but easily analogized to business settlements).

§ 1.5:3 Legal Fees

An attorney may not enter into an agreement for, charge, or collect an illegal or unconscionable fee. Tex. Disciplinary Rules Prof'l Conduct R. 1.04(a). A fee is unconscionable if a competent attorney could not form a reasonable belief that the fee is reasonable. Tex. Disciplinary Rules Prof'l Conduct R. 1.04(a). In borderline cases the comments specify two indications of unconscionability: the attorney's overreaching with a client, especially one susceptible to such a practice, and the attorney's failing to give the client at the outset of the representation a clear explanation of how the fee will be calculated. Tex. Disciplinary Rules Prof'l Conduct R. 1.04 cmt. 8. Rule 1.04(b) lists a number of factors that may be considered in determining the reasonableness of a fee.

An attorney may not divide a fee with another attorney who is not a member or employee of the same firm unless (1) the client consents in writing to the terms of the arrangement ahead of time, (2) the division is in proportion to the services rendered by each attorney or is with an attorney who assumes joint responsibility for the representation, *and* (3) the aggregate fee is not unconscionable. Tex. Disciplinary Rules Prof'l Conduct R. 1.04(f).

Unless the agreement is confirmed by an arrangement conforming to paragraph (f)(2) of rule 1.04, the attorney may not collect fees or expenses in connection with the agreement except for (1) the reasonable value of legal services provided and (2) the reasonable and necessary expenses actually incurred. Tex. Disciplinary Rules Prof'l Conduct R. 1.04(g).

An attorney may share fees with an "of counsel" attorney (Tex. Comm. on Prof'l Ethics, Op. 450 (1988)) or with a former partner or associate (Tex. Disciplinary Rules Prof'l Conduct R. 1.04(h)).

Fees paid in advance of the performance of work, as well as any of the client's other property that comes into the attorney's possession, must be held in trust by the attorney. Tex. Disciplinary Rules Prof'l Conduct R. 1.14. Attorneys must keep complete records of client account funds for at least five years after the conclusion of the representation. Tex. Disciplinary Rules Prof'l Conduct R. 1.14(a). If a client's funds either are of an amount or are held for a long enough time that the interest generated is likely to exceed the costs of setting up and maintaining an account, an individual account must be set up for the client. For a client's funds that are of a small amount or are likely to be held only for a short time, attorneys are required to maintain an interest-bearing account in which to pool the funds. Under the Interest on Lawyers' Trust Accounts (IOLTA) program, interest from these pooled accounts is paid to the Texas Equal Access to Justice Foundation, which awards grants to organizations in Texas that serve the poor in legal matters. Attorneys must submit an annual IOLTA compliance statement to the foundation. State Bar Rules art. XI (1989) (found in the Texas Government Code in title 2, subtitle G, appendix A, following section 84.004 of the Government Code). See also the Rules Governing the Operation of the Texas Equal Access to Justice Program (reproduced in the Texas Rules of Court—State (West 2011)).

Although generally each party to a transaction pays its own attorney's fees, there are certain circumstances in which a prevailing party may contractually recover fees from the opposing party. When such a fee-shifting circumstance is legally authorized, the party seeking a fee award must prove both the reasonableness and necessity of the requested attorney's fees. *Rohrmoos*

Venture v. UTSW DVA Healthcare, LLP, 578 S.W.3d 469, 484 (Tex. 2019).

§ 1.5:4 Engagement Agreements Detailing Fee Arrangements

Rule 1.04(c) states:

> When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, *preferably in writing*, before or within a reasonable time after commencing the representation.

Tex. Disciplinary Rules Prof'l Conduct R. 1.04(c) (emphasis added). Forms 1-8, 1-9, and 1-10 in this chapter are examples of engagement letters for real estate transactions.

§ 1.5:5 Charging for Time and Expenses

As implied in rule 1.04(c), the attorney's fee basis is established by an agreement between the attorney and the client. The attorney should, however, carefully outline the fee basis to avoid a client's misunderstanding later. For example, the attorney might advise the client that there will be a fee to recover time previously spent to develop a limited partnership form or to recover unbilled or unpaid time for research incurred on another matter.

§ 1.5:6 Record Retention and Destruction

Neither the rules nor Texas case law specify if, or how long, an attorney must retain client records. To resolve the ambiguity, some attorneys adopt a record retention and destruction policy. If the existence of a policy is disclosed to the client in either the engagement letter or the closing letter, the client has the opportunity to obtain the records and the attorney has some authority to dispose of the documents. See forms 1-8, 1-9, 1-10, and 1-14 in this chapter for an optional paragraph concerning retention and destruction of records.

§ 1.6 Representation of Client

§ 1.6:1 Duty to Keep Client Informed

Rule 1.03(a) requires an attorney to keep the client reasonably informed. In addition, the attorney has the duty to inform the client of relevant considerations and explain their legal significance to permit the client to make informed decisions. Tex. Disciplinary Rules Prof'l Conduct R. 1.03(b).

One way to meet these obligations is to routinely provide the client with copies of all pertinent correspondence, documents, and file memoranda; advise the client in writing of risks involved with the transaction, including the obvious; and document the business decisions made by the client.

§ 1.6:2 Confidentiality

An attorney may not knowingly reveal confidential information of a client or use such confidential information to the attorney's advantage or for the advantage of a third person. Tex. Disciplinary Rules Prof'l Conduct R. 1.05(b). The ethical duty to preserve a client's confidence is much broader than the attorney-client evidentiary privilege. This duty applies even if there is not yet an established attorney-client relationship—for instance, when a client comes in for an initial interview. *See* Tex. Disciplinary Rules Prof'l Conduct preamble ¶ 12. The obligation of confidentiality also continues after the termination of employment. Tex. Disciplinary Rules Prof'l Conduct R. 1.09(a)(2).

§ 1.6:3 Business Interests with Clients

Rule 1.08(a) provides that an attorney may not enter into a business transaction with a client unless (1) the transaction and the terms on which the attorney acquires the interest in the transaction are fair and reasonable to the client and are fully disclosed in a manner that can be reasonably understood by the client, (2) the client is given reasonable opportunity to seek the advice of independent counsel in the transaction, and (3) the client *consents in writing*. Tex. Disciplinary Rules Prof'l Conduct R. 1.08(a). Comment 2 to rule 1.08 indicates that the rule does not apply to standard commercial transactions between the attorney and the client for products or services the client generally markets to others, because the attorney has no advantage in dealing with the client.

In cases in which the attorney and client are both personally involved in a business transaction, malpractice insurance claims might be denied because the policies may exclude coverage under such circumstances.

See form 1-11 in this chapter for an example of a consent agreement for doing business with a client.

§ 1.6:4 Duty to Clarify Nonrepresentation

An attorney dealing on behalf of a client with a person not represented by an attorney may not state or imply that the attorney has no interest in the outcome of the matter. If the attorney believes an unrepresented person misunderstands the attorney's role, the attorney must correct this misunderstanding. Tex. Disciplinary Rules Prof'l Conduct R. 4.03. For example, an attorney might make a written nonrepresentation disclosure to a borrower when representing a lender. See form 1-12 in this chapter for an example of a nonrepresentation disclosure letter.

§ 1.6:5 Communication with Someone Represented by Counsel

An attorney may not communicate about the subject of the representation with someone the lawyer knows to be represented by counsel. Tex. Disciplinary Rules Prof'l Conduct R. 4.02. Likewise, the rules prohibit an attorney from encouraging a client to make such a communication. *See* Tex. Disciplinary Rules Prof'l Conduct R. 4.02 cmt. 2.

There are legally required exceptions to this rule, such as the sending of a foreclosure notice. *See* Tex. Prop. Code § 51.002.

§ 1.7 Issues Raised by Use of Technology

The Texas Disciplinary Rules of Professional Conduct do not specifically address issues raised by the use of technology in the practice of law. The ABA Model Rules of Professional Conduct provide some guidance on such issues, especially when there is no counterpart in the Texas rules.

§ 1.7:1 Confidentiality of Information

Rule 1.6(c) of the ABA Model Rules of Professional Conduct states: "A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client." Comment 18 to this rule states, in part, that—

> [t]he unauthorized access to, or the inadvertent or unauthorized disclosure of, information relating to the representation of a client does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the access or dis-

> closure. Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use).

§ 1.7:2 Responsibilities Regarding Nonlawyer Assistant

Rule 5.03 of the Texas Disciplinary Rules of Professional Conduct is similar to rule 5.3 of the ABA Model Rules of Professional Conduct. Comment 3 to ABA rule 5.3 recognizes that the use of nonlawyers outside the firm may include—

> sending client documents to a third party for printing or scanning, and using an Internet-based service to store client information. When using such services outside the firm, a lawyer must make reasonable efforts to ensure that the services are provided in a manner that is compatible with the lawyer's professional obligations.

Tex. Comm. on Prof'l Ethics, Op. 572 (2006), addresses the use of an independent contractor for copying services. *See* 69 Tex. B.J. 793–94 (2006).

§ 1.7:3 Respect for Rights of Third Parties

Rule 4.4(b) of the ABA Model Rules of Professional Conduct states: "A lawyer who receives a document or electronically stored information relating to the representation of the lawyer's client and knows or reasonably should know that the document or electronically stored information was inadvertently sent shall promptly notify the sender." Comments 2 and 3 to this rule state the following:

> [2] Paragraph (b) recognizes that lawyers sometimes receive a document or electronically stored information that was mistakenly sent or produced by opposing parties or their lawyers. A document or electronically stored information is inadvertently sent when it is accidentally transmitted, such as when an email or letter is misaddressed or a document or electronically stored information is accidentally included with information that was intentionally transmitted. If a lawyer knows or reasonably should know that such a document or electronically stored information was sent inadvertently, then this Rule requires the lawyer to promptly notify the sender in order to permit that person to take protective measures. Whether the lawyer is required to take additional steps, such as returning the document or electronically stored information, is a matter of law beyond the scope of these Rules, as is the question of whether the privileged status of a document or electronically stored information has been waived. Similarly, this Rule does not address the legal duties of a lawyer who receives a document or electronically stored information that the lawyer knows or reasonably should know may have been inappropriately obtained by the sending person. For purposes of this Rule, "document or electronically stored information" includes, in addition to paper documents, email and other

forms of electronically stored information, including embedded data (commonly referred to as "metadata"), that is subject to being read or put into readable form. Metadata in electronic documents creates an obligation under this Rule only if the receiving lawyer knows or reasonably should know that the metadata was inadvertently sent to the receiving lawyer.

[3] Some lawyers may choose to return a document or delete electronically stored information unread, for example, when the lawyer learns before receiving it that it was inadvertently sent. Where a lawyer is not required by applicable law to do so, the decision to voluntarily return such a document or delete electronically stored information is a matter of professional judgment ordinarily reserved to the lawyer. See Rules 1.2 ["Scope of Representation and Allocation of Authority Between Client and Lawyer"] and 1.4 ["Communications"].

Texas Disciplinary Rules of Professional Conduct rules 1.02 ("Scope and Objectives of Representation") and 1.03 ("Communication") are the comparable Texas rules referenced in comment 3 above.

§ 1.8 Terminating Attorney-Client Relationship

§ 1.8:1 Termination by Parties

A client may always terminate the attorney-client relationship. An attorney must return any unearned portion of the fee and all pertinent papers and property. Tex. Disciplinary Rules Prof'l Conduct R. 1.15(d) cmt. 4; Tex. Comm. on Prof'l Ethics, Op. 395 (1979). However, rule 1.15(d) specifically provides that an attorney may retain papers relating to the client to the extent permitted by other law, but only if such retention will not prejudice the client in the subject matter of the representation. *See* Tex. Comm. on Prof'l Ethics Op. 411 (1984).

An attorney also may terminate the relationship; however, the attorney has a duty to minimize any adverse effects to the client. Tex. Disciplinary Rules Prof'l Conduct R. 1.15(b), (d). It is a good practice for an attorney to send a disengagement letter to record the date of the termination of the attorney-client relationship. See form 1-13 in this chapter for an example of a disengagement letter.

Tex. Disciplinary Rules Prof'l Conduct R. 1.15(a) sets out the circumstances under which the attorney must terminate the relationship with the client. An attorney must withdraw if continued representation will result in a violation of one of the Texas Disciplinary Rules of Professional Conduct or another law or if the attorney's physical, mental, or psychological condition materially impairs the attorney's fitness to represent the client. The attorney must also withdraw when discharged. When terminating the attorney-client relationship before completing the work for which the client contracted, the attorney should review rule 1.15 to be sure that good cause for withdrawal exists.

Withdrawal is permissible under the circumstances listed in rule 1.15(b). The rule provides that an attorney may withdraw if the client fails substantially to fulfill an obligation to the attorney, including the obligation to pay the attorney's fee as agreed, *and* a reasonable warning has been given that the attorney will withdraw unless the obligation is fulfilled. Tex. Disciplinary Rules Prof'l Conduct R. 1.15(b)(5). See form 1-13 for an example of a letter terminating the attorney-client relationship because of nonpayment of fees. At least one court in dicta has stated that by accepting employment an attorney implicitly represents that the attor-

ney will see the task through to conclusion. *See Staples v. McKnight*, 763 S.W.2d 914 (Tex. App.—Dallas 1988, writ denied). By conditioning the commencement of work and continued performance on the payment of a fee, the attorney may avoid problems later.

§ 1.8:2 Termination Due to Other Considerations

The attorney-client relationship does not continue automatically once the purpose of the employment is completed. However, it is often difficult to determine when a matter is completed. Again, it is a good practice to send a disengagement letter to record the date of the completion of employment. See form 1-14 in this chapter for an example of a completion letter.

§ 1.9 Local Counsel Representation

In financing transactions involving multiple jurisdictions, due to either the location of the borrower or the location of collateral, the borrower is commonly required to provide opinions of local counsel. While all of the preceding rules apply in these situations, local counsel my have additional concerns, including the fact that they may be engaged by lead counsel, have little or no contact with the client, and have little or no knowledge of the overall transaction. Form 1-15, based on form 1-10, includes an additional provision in paragraph 1 that may be useful in a local counsel representation.

§ 1.10 Technological Competence

The Texas Supreme Court has amended the comment to rule 1.01, which addresses competent and diligent legal representation, to address technological competency. The revised comment indicates each lawyer "should strive to become and remain proficient and competent in the practice of law, *including the benefits and risks associated with relevant technology*." Tex. Disciplinary Rules Prof'l Conduct R. 1.01 & cmt. 8 (emphasis added). The comment is similar to a change made in the American Bar Association's model rule in 2012. See **https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_1_competence/comment_on_rule_1_1/**.

§ 1.11 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 "[p]rofessionalism 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* 735 (West 2018).

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 judge's 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 (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.

§ 1.12 Texas Lawyers' Assistance Program

The only approved peer assistance program to which lawyers may make reports under rule 8.03(c) is the Texas Lawyers' Assistance Program (TLAP). *See* Tex. Health & Safety Code § 467.001(1)(A); Board of Directors Meeting Minutes, Jan. 20–21, 1989, State Bar of Tex-as. 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 reporting 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 & 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 format), 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.

§ 1.13 Additional Resources

Anglin, Michael W. and Claude E. Ducloux. "Conflicts of Interest—Who's Your Client?" In *Essentials for Business Law: Practical Considerations, 2019*. Austin: State Bar of Texas, 2019.

Axelrad, Mary S. "Ethics & Pitfalls." In *Advanced Real Estate Strategies Course, 2017*. Austin: State Bar of Texas, 2017.

Dillard, D. Diane. "Conflicts of Interest: Entity Creation and Other Sticky Situations." In *Real Estate Law 101, 2019*. Austin: State Bar of Texas, 2019.

———. "Engagement Agreements: The Top 20 Country Countdown with Tips for Ethical Compliance." In *Real Estate Law 101, 2015*. Austin: State Bar of Texas, 2015.

———. "Engagement Letters (What Could Go Wrong?)." In *Advanced Real Estate Strategies Course, 2007*. Austin: State Bar of Texas, 2007.

———. "Shoes for the Shoemaker's Children: Practical Forms and Suggestions for Ethical Compliance and Malpractice Prevention." In *Real Estate Law 101, 2012*. Austin: State Bar of Texas, 2012.

Hanna, Jett. "Materials on Ethical and Malpractice Concerns in Real Estate Drafting." In *Advanced Real Estate Drafting Course, 2008*. Austin: State Bar of Texas, 2008.

Herring, Charles F., Jr. *Texas Legal Malpractice & Lawyer Discipline*. 17th ed. Texas Lawyer, 2018.

Jacobus, Charles J. "Ethics: Positional Conflicts for Real Estate Lawyers." In *Advanced Real Estate Law Course, 2009*. Austin: State Bar of Texas, 2009.

Jacobus, Charles J., and Douglas W. Becker. "The Ethical Complications of Fee Attorney Relationships." In *Advanced Real Estate Law Course, 2007*. Austin: State Bar of Texas, 2007.

Maloney Marilyn C. "The ABA ACREL ACMA Local Counsel Opinion Report." In *Advanced Real Estate Law Course, 2016*. Austin: State Bar of Texas, 2016.

———. "You Won That RFP, Now What? Ethics & Pitfalls." In *Advanced Real Estate Strategies Course, 2017*. Austin: State Bar of Texas, 2017.

McCarthy, Edmond R., Jr. "Dual Representation and Ex Parte Communications: Ethical Issues in Water Law and Related Regulatory Scenarios." In *Advanced Real Estate Law Course, 2014*. Austin: State Bar of Texas, 2014.

Nunley, J. Ken, and Kelly P. Rogers. "Malpractice—Tips from the Trenches." In *Advanced Real Estate Law Course, 2005*. Austin: State Bar of Texas, 2005.

Wallenstein, James H. "ABA/ACREL Real Estate Opinion Letter Guidelines." In *Advanced Real Estate Drafting Course, 2004*. Austin: State Bar of Texas, 2004.

———. "Provisions Often Negotiated in Mortgage Loan Opinion Letters." In *Advanced Real Estate Law Course, 2008*. Austin: State Bar of Texas, 2008.

Weinberg, Gregg S. and Sara Wolfe. "Making Sure Your Engagement, Closing Letters and Other Correspondence Are Drafted in a Manner to Explain to Your Client What You Are Not Doing for Them." In *Advanced Real Estate Drafting Course, 2019*. Austin: State Bar of Texas, 2019.

Weller, Philip D. "Drafting Advance Waivers of Conflicts of Interest." In *Advanced Real Estate Law Course, 2009*. Austin: State Bar of Texas, 2009.

Westerheim, Suzanne Raggio. "Ethical Considerations in Drafting Fee Arrangements." In *Advanced Real Estate Drafting Course, 2015*. Austin: State Bar of Texas, 2015.

White, Mark D. "Dances with Wolves and Legal Ethics." In *Real Estate Law 101, 2019*. Austin: State Bar of Texas, 2019.

[Reserved]

Form 1-15

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. See sections 1.5:4 and 1.5:5 in this chapter concerning the basic engagement agreement.

Letter Detailing Basic Engagement Agreement and Fee Agreement for Local Counsel in Financing Transaction

[**Date**]

[**Name and address of client**]

Re: Local counsel representation

[**Salutation**]

Thank you for asking me to represent you in the above-referenced matter. I consider it a privilege to do so. Please excuse the overly formal and detailed nature of this letter—it is intended to ensure that you know and understand the terms and conditions under which this firm will represent you.

1. We have been engaged by you solely to provide local Texas law advice, as requested by your lead counsel, [**name of lead counsel**] ("Lead Counsel"). We have not been involved in the negotiations regarding any loan, guaranty, or security documents. You have asked that we provide opinions on your behalf to [**name of lender**] ("Lender"), and you consent to our doing so. It is possible that, in the course of the review of forms of documents to be executed, we will be required to provide drafting comments to conform to Texas law. You consent to our doing so. You understand that such comments may be helpful to the Lender rather than to you. Our primary contact on your behalf will be the Lead Counsel. You authorize the Lead Counsel to direct us on your behalf concerning our representation and to

approve all actions to be taken on your behalf. Similarly, you authorize us to transmit our advice and any documentation to the Lead Counsel for its approval.

2. Our fees for legal services are based primarily on the hourly rates for each lawyer and legal assistant at the time the services are rendered. Our current rates are $[**amount**] per hour for [**name**], $[**amount**] per hour for associates or contract lawyers, and $[**amount**] per hour for legal assistants.

> Complete disclosure about the attorney's billing practices can avoid client misunderstandings later. For example, explain about travel time, multiple attorney conferences, research, billing for "forms" in the firm's form library, administrative overtime, etc. See sections 1.5:4 and 1.5:5 for additional information.

3. It is our policy to bill clients periodically for fees and out-of-pocket expenses. These bills will generally describe services performed and the expenses incurred. If we are confronted with unanticipated expenses, we may request the supplier to bill you directly for any third-party expenses.

4. Our statements are reasonably detailed, and consequently our clients do not usually have any questions about them. However, if you should ever have any question or comment, please do not hesitate to call us so that we can discuss the matter. Our hourly rates do not include any interest for slow payment. Because of this and the fact that we do not include a service charge for late payments, we must insist that our clients pay their bills promptly.

5. We require a [nonrefundable] retainer [when accepting work from new clients/ before beginning work on a new matter]. Accordingly, we ask that you remit to [us/and maintain with us during our representation] a retainer of $[**amount**]. [**Include as applicable:** We will place these funds in our trust account./The retainer will be applied to our final statement for fees and expenses or, at our discretion, to any past-due amounts./On the termination of our services, we will promptly refund the retainer, less any fees and expenses unpaid as of the date of our final bill.]

6. You agree that we are relieved from the responsibility of performing any further work should you fail to pay any statement for fees and expenses (including bills for expenses received from third parties) or for supplemental retainers within fifteen days of their receipt. In that event, you agree that we may move to withdraw as your counsel and that you will promptly execute any withdrawal motions to accomplish this.

7. You agree that this firm may retain papers relating to this matter to secure payment of any amount you owe us, to the extent permitted by law, but only if such retention will not prejudice your interests in the subject matter of the representation.

8. During our discussions about handling this matter, we may have provided you with certain estimates of the fees and expenses that will be required at certain stages of our representation. Such estimates are just that, and the fees and expenses required are ultimately a function of many conditions over which we have little or no control, particularly the difficulties we encounter during negotiations with other parties. The reason we submit our clients' bills shortly after the services are rendered is so they will have a means of monitoring and controlling their expenses. If you believe the expenses are mounting too rapidly, please contact us immediately so we can assist you in evaluating how they might be curtailed. If we do not hear from you, we assume that you approve of the overall level of activity in this matter.

Include the following if applicable.

9. The Supreme Court of Texas has adopted and promulgated the Texas Lawyer's Creed. Although compliance with the Creed is voluntary, we have decided to adhere to its provisions. Please review the attached Texas Lawyer's Creed, and if you have any questions, we will be glad to discuss them with you.

Continue with the following.

10. You may discharge us from this representation at any time. We will be free to withdraw at any time, with or without cause, subject to reasonable notice under the circum-

stances and to approval by any court that may become involved in your matter. We will be entitled to receive compensation from you for all services rendered and all disbursements made, under the provisions of this agreement, up to the time of withdrawal. Circumstances may arise that will require us to withdraw from representation under the Texas Disciplinary Rules of Professional Conduct or other applicable professional standards. In such circumstances, as well as in the instances referred to above, we will cooperate in the transfer of the matter to other counsel of your choice.

11. As is true with all legal services, we cannot and do not guarantee the results of our representation. We make no express warranties concerning this transaction, and disclaim any implied warranties concerning it.

12. Attorneys, like other professionals who advise on personal financial matters, are required by a federal law (the Gramm-Leach-Bliley Act) to inform their clients of their policies regarding privacy of client information. Because attorneys have been and continue to be bound by professional standards of confidentiality that are even more stringent than those required by this new law, we have always protected our clients' right to privacy. In the course of representing our clients, we receive all manner of significant personal financial information from them. As a client of the firm, you are advised that all information we receive from you will be held in confidence and not released to outside persons, except as agreed to by you or as required under applicable law. We retain records relating to professional services we provide to assist our clients with their professional needs and, in some cases, to comply with professional guidelines. To guard your nonpublic personal information, we maintain physical, electronic, and procedural safeguards that comply with our professional standards.

Include the following if applicable.

At the end of our representation, please let us know if you need any documents from our files. We will retain documents for [five years/a limited time] and then destroy them in accordance with our record-retention policy then in effect.

Continue with the following.

We believe this candid discussion should prevent any misunderstandings later. Please sign a copy of this letter in the space below, expressing your agreement to the terms and conditions set forth above.

Sincerely yours,

_____

[**Name of attorney**]

Enc.

ACCEPTED AND AGREED TO ON _____.

_____

[**Name of client**]
Date:

Include the following notice if notice is not otherwise provided as required by Tex. Gov't Code § 81.079. See section 1.1:2.

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."

Include the following if applicable.

The Texas Lawyer's Creed

I am a lawyer. I am entrusted by the People of Texas to preserve and improve our legal system. I am licensed by the Supreme Court of Texas. I must therefore abide by the Texas Disciplinary Rules of Professional Conduct, but I know that professionalism requires more than merely avoiding the violation of laws and rules. I am committed to this creed for no other reason than it is right.

Our Legal System

A lawyer owes to the administration of justice personal dignity, integrity, and independence. A lawyer should always adhere to the highest principles of professionalism.

1. I am passionately proud of my profession. Therefore, "My word is my bond."

2. I am responsible to assure that all persons have access to competent representation regardless of wealth or position in life.

3. I commit myself to an adequate and effective pro bono program.

4. I am obligated to educate my clients, the public, and other lawyers regarding the spirit and letter of this Creed.

5. I will always be conscious of my duty to the judicial system.

Lawyer to Client

A lawyer owes to a client allegiance, learning, skill, and industry. A lawyer shall employ all appropriate means to protect and advance the client's legitimate rights, claims, and objectives. A lawyer shall not be deterred by any real or imagined fear of judicial disfavor or public unpopularity, nor be influenced by mere self-interest.

1. I will advise my client of the contents of this Creed when undertaking representation.

2. I will endeavor to achieve my client's lawful objectives in legal transactions and in litigation as quickly and economically as possible.

3. I will be loyal and committed to my client's lawful objectives, but I will not permit that loyalty and commitment to interfere with my duty to provide objective and independent advice.

4. I will advise my client that civility and courtesy are expected and are not a sign of weakness.

5. I will advise my client of proper and expected behavior.

6. I will treat adverse parties and witnesses with fairness and due consideration. A client has no right to demand that I abuse anyone or indulge in any offensive conduct.

7. I will advise my client that we will not pursue conduct which is intended primarily to harass or drain the financial resources of the opposing party.

8. I will advise my client that we will not pursue tactics which are intended primarily for delay.

9. I will advise my client that we will not pursue any course of action which is without merit.

10. I will advise my client that I reserve the right to determine whether to grant accommodations to opposing counsel in all matters that do not adversely affect my client's lawful objectives. A client has no right to instruct me to refuse reasonable requests made by other counsel.

11. I will advise my client regarding the availability of mediation, arbitration, and other alternative methods of resolving and settling disputes.

Lawyer to Lawyer

A lawyer owes to opposing counsel, in the conduct of legal transactions and the pursuit of litigation, courtesy, candor, cooperation, and scrupulous observance of all agreements and mutual understandings. Ill feelings between clients shall not influence a lawyer's conduct, attitude, or demeanor toward opposing counsel. A lawyer shall not engage in unprofessional conduct in retaliation against other unprofessional conduct.

1. I will be courteous, civil, and prompt in oral and written communications.

2. I will not quarrel over matters of form or style, but I will concentrate on matters of substance.

3. I will identify for other counsel or parties all changes I have made in documents submitted for review.

4. I will attempt to prepare documents which correctly reflect the agreement of the parties. I will not include provisions which have not been agreed upon or omit provisions which are necessary to reflect the agreement of the parties.

5. I will notify opposing counsel, and, if appropriate, the Court or other persons, as soon as practicable, when hearings, depositions, meetings, conferences or closings are canceled.

6. I will agree to reasonable requests for extensions of time and for waiver of procedural formalities, provided legitimate objectives of my client will not be adversely affected.

7. I will not serve motions or pleadings in any manner that unfairly limits another party's opportunity to respond.

8. I will attempt to resolve by agreement my objections to matters contained in pleadings and discovery requests and responses.

9. I can disagree without being disagreeable. I recognize that effective representation does not require antagonistic or obnoxious behavior. I will neither encourage nor knowingly permit my client or anyone under my control to do anything which would be unethical or improper if done by me.

10. I will not, without good cause, attribute bad motives or unethical conduct to opposing counsel nor bring the profession into disrepute by unfounded accusations of impropriety. I will avoid disparaging personal remarks or acrimony towards opposing counsel, parties and witnesses. I will not be influenced by any ill feeling between clients. I will abstain from any allusion to personal peculiarities or idiosyncrasies of opposing counsel.

11. I will not take advantage, by causing any default or dismissal to be rendered, when I know the identity of an opposing counsel, without first inquiring about that counsel's intention to proceed.

12. I will promptly submit orders to the Court. I will deliver copies to opposing counsel before or contemporaneously with submission to the Court. I will promptly approve the form of orders which accurately reflect the substance of the rulings of the Court.

13. I will not attempt to gain an unfair advantage by sending the Court or its staff correspondence or copies of correspondence.

14. I will not arbitrarily schedule a deposition, court appearance, or hearing until a good faith effort has been made to schedule it by agreement.

15. I will readily stipulate to undisputed facts in order to avoid needless costs or inconvenience for any party.

16. I will refrain from excessive and abusive discovery.

17. I will comply with all reasonable discovery requests. I will not resist discovery requests which are not objectionable. I will not make objections nor give instructions to a witness for the purpose of delaying or obstructing the discovery process. I will encourage witnesses to respond to all deposition questions which are reasonably understandable. I will neither encourage nor permit my witness to quibble about words where their meaning is reasonably clear.

18. I will not seek Court intervention to obtain discovery which is clearly improper and not discoverable.

19. I will not seek sanctions or disqualification unless it is necessary for protection of my client's lawful objectives or is fully justified by the circumstances.

Lawyer and Judge

Lawyers and judges owe each other respect, diligence, candor, punctuality, and protection against unjust and improper criticism and attack. Lawyers and judges are equally responsible to protect the dignity and independence of the Court and the profession.

1. I will always recognize that the position of judge is the symbol of both the judicial system and administration of justice. I will refrain from conduct that degrades this symbol.

2. I will conduct myself in Court in a professional manner and demonstrate my respect for the Court and the law.

3. I will treat counsel, opposing parties, the Court, and members of the Court staff with courtesy and civility.

4. I will be punctual.

5. I will not engage in any conduct which offends the dignity and decorum of proceedings.

6. I will not knowingly misrepresent, mischaracterize, misquote or miscite facts or authorities to gain an advantage.

7. I will respect the rulings of the Court.

8. I will give the issues in controversy deliberate, impartial and studied analysis and consideration.

9. I will be considerate of the time constraints and pressures imposed upon the Court, Court staff and counsel in efforts to administer justice and resolve disputes.

[Reserved]

Chapter 2

Laws Affecting Real Estate

Chapter 2

Laws Affecting Real Estate

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

§ 2.1 Abandonment

The landlord's rights and obligations regarding personal property after a tenant abandons commercial leased premises are addressed in Tex. Prop. Code § 93.002(e). A landlord has a duty to mitigate damages if a tenant abandons leased premises. Tex. Prop. Code § 91.006. The general subject of unclaimed personal property and escheat is addressed in Tex. Prop. Code chs. 72–76. Please note that chapters 72 and 74 were revised effective 2019. See also the section titled "Escheat" below.

§ 2.2 Abstracts of Judgment

The Texas Property Code sets out the procedure for obtaining an abstract of judgment from the judge or justice of the peace who rendered the judgment or from the clerk of the court. Abstracts of judgment are recorded in the county's real property records. Tex. Prop. Code §§ 52.002–.003. See also the sections titled "Judgment Liens" and "Release of Lien by Attorney or Others" below.

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

§ 2.3 Acceleration of Note

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

§ 2.4 Acknowledgments

Texas law provides one form of ordinary certificate of acknowledgment and six short-form certificates of acknowledgment. Tex. Civ. Prac. & Rem. Code §§ 121.007–.008. A notary may sign on behalf of a disabled person in certain circumstances. Tex. Gov't Code § 406.0165. There are specific requirements for proof of instruments. Tex. Civ. Prac. & Rem. Code §§ 121.005, 121.009–.011. Instruments may be recorded in Texas real property records if they contain an acknowledgment, a jurat, or a proof. Tex. Prop. Code § 12.001. On the law of acknowledgments generally, see Tex. Civ. Prac. & Rem. Code §§ 121.001–.016. Instruments may be acknowledged using online notarization. An acknowledgment may be made by appearing in person before the notary or appearing by an interactive two-way audiovisual communication that meets the online notarization requirements. *See* Tex. Civ. Prac. & Rem. Code §§ 121.006, 121.016;

Tex. Gov't Code ch. 406, subch. C; 4 Tex. Admin. Code ch. 87. Forms of acknowledgments are included in chapter 3 in this manual. See also the section titled "Notarial Seals, Out-of-State" below.

§ 2.5 Ad Valorem Taxes

Both real and personal property are subject to ad valorem taxes in Texas. Tex. Tax Code § 11.01. Provisions for special assessments or exemptions that may apply to real property include those for a residence homestead (Tex. Tax Code §§ 11.13, 11.131, 11.135); charitable organizations improving property for low-income housing (Tex. Tax Code §§ 11.181–.1826); agricultural use (Tex. Const. art. VIII, §§ 1–d, 1–d–1; Tex. Tax Code §§ 23.41–.60); timber production (Tex. Const. art. VIII, § 1–d–1; Tex. Tax Code §§ 23.59, 23.71–.79); restricted timber use land (Tex. Tax Code §§ 23.9801–.9807); open-space scenic, recreational, or park use (Tex. Const. art. VIII, § 1–d–1; Tex. Tax Code §§ 23.59, 23.81–.87); mandatory school-tax home exemption (Tex. Const. art. VIII); and partially disabled and disabled veterans or their surviving spouses, surviving spouses of members of the armed services killed in action, and surviving spouses of first responders killed or fatally injured in the line of duty (Tex. Const. art. VIII, § 1–b). There is also a provision dealing with the separate taxation of tax parcels in condominium projects (Tex. Prop. Code § 82.005). The word *grant* or *convey* in a deed implies a covenant that the estate is free of encumbrances at the time of execution of the conveyance. Tex. Prop. Code § 5.023. "Encumbrance" includes a tax, an assessment, and a lien on real property. Tex. Prop. Code § 5.024.

Owners taxed at a reduced rate under the agricultural-use amendment (Tex. Const. art. VIII, § 1–d), the open-space amendment (Tex. Const. art. VIII, § 1–d–1), or the special appraisal provisions of subchapters B–H of chapter 23 of the Tax Code should be alert to the potential tax liability that accrues if the land use changes or title is transferred and must disclose the reduced rate to a potential buyer using the statutorily prescribed form. Tex. Prop. Code § 5.010. The county appraisal district office is required to maintain a list of properties potentially subject to this type of rollback of taxes. *See* Tex. Tax Code §§ 23.51–.79. Lenders should be aware of the prohibitions against certain waivers and indemnities relating to the agricultural or open-space use exemption, described in more detail in the section titled "Loan Documents" below. In certain circumstances, taxing authorities may have the ability to waive penalties and interest on property erroneously omitted from taxation or granted improper tax exemptions. *See* Tex. Tax Code § 33.011.

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

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

A tenant may contest a landlord's ad valorem tax assessment under certain circumstances. Tex. Tax Code §§ 41.413, 42.015. The property owner may have an obligation to send notices of appraised value to a tenant. Tex. Tax Code § 41.413(d).

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

§ 2.6 Adverse Possession

Texas has adverse possession periods of three, five, ten, and twenty-five years, depending on different factors. *See* Tex. Civ. Prac. & Rem. Code §§ 16.021–.034. There is a special provision for "cotenant heirs" that provides for a ten-year adverse possession period followed by a five-year "waiting" period after filing certain affidavits. Tex. Civ. Prac. & Rem. Code § 16.0265.

§ 2.7 Affidavits of Heirship

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

§ 2.8 Affordable Housing Investments

The Internal Revenue Code provides for credits against federal income tax for owners of qualified low-income rental housing projects. *See* 26 U.S.C. § 42. In Texas that program is administered by the Texas Department of Housing and Community Affairs under Tex. Gov't Code ch. 2306 and the rules found in 10 Tex. Admin. Code ch. 49. Under the National Affordable Housing Act of 1990, 42 U.S.C. §§ 12701–12898a, certain HUD funds are available for nonprofit and community development organizations to build or preserve low-income housing. Those projects must also satisfy the HUD program requirements found in 24 C.F.R. pts. 91, 92. Affordable housing constructed with federal or state funds must meet specified handicapped-accessible standards. Tex. Gov't Code § 2306.514. Tex. Gov't Code § 6711(g) provides for the allocation of housing tax credits in Fort Worth, Houston, Dallas, and San Antonio. A community land trust may be created to acquire and hold land for the benefit of developing and preserving long-term affordable housing in a municipality or county. Tex. Loc. Gov't Code ch. 373B.

§ 2.9 Agricultural Development Districts

The creation of agricultural development districts is authorized by chapter 60 of the Agriculture Code. Tex. Agric. Code ch. 60. Districts have the power of eminent domain and may

issue bonds (Tex. Agric. Code § 60.058) and levy taxes (Tex. Agric. Code ch. 60, subcs. E, F). See also the section titled "Disclosures and Notices" below.

§ 2.10 Agricultural Liens

Persons securing loans with agricultural products should be aware that the perfection and priority of agricultural liens may be subject to rules outside of chapter 9 of the Texas Uniform Commercial Code. For example, an agricultural lien granted under subchapter E of Texas Property Code chapter 70 has priority over certain prior liens if certain conditions are met. *See* Tex. Prop. Code § 70.4045. Similarly, the statutory trust created upon acceptance of commodities to which the Perishable Agricultural Commodities Act (PACA) applies may also have priority over certain previously filed UCC liens. *See* 7 U.S.C. § 499a–499s. The seller of commodities to which PACA applies may be in a position superior to all other creditors.

§ 2.11 Agricultural Use Exemption

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

§ 2.12 Aircraft Liens

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

§ 2.13 Alcoholic Beverages

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

§ 2.14 Alternative Dispute Resolution (ADR)

The Texas Alternate Methods of Dispute Resolution Act establishes alternative dispute resolution procedures, including mediation. Tex. Civ. Prac. & Rem. Code ch. 154. See the section titled "Arbitration" below.

§ 2.15 Americans with Disabilities Act and Related Statutes

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

Texas also has a state architectural-barriers statute that applies to certain commercial and residential facilities. Tex. Gov't Code ch. 469. Regulations promulgated under the statute are found at 16 Tex. Admin. Code ch. 68. The Human Resources Code permits guide trainers reasonable access to public facilities to train

assistance animals and prohibits the denial of access to public facilities, commercial properties, or housing for disabled persons, including those who use assistance animals. Tex. Hum. Res. Code § 121.003. Affordable housing constructed with federal or state funds must meet specified handicapped-accessible standards. Tex. Gov't Code § 2306.514.

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

A set of procedures has been adopted for persons pursuing claims of failure to comply with ADA and similar standards, including required notice, opportunity to cure, evidentiary hearings, and abatement of actions. Tex. Hum. Res. Code § 121.0041.

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

§ 2.16 Annexation

Annexation and disannexation of real property by municipalities are governed generally by Tex. Loc. Gov't Code chs. 42, 43. Chapter 43 was revised in 2019 to eliminate unilateral annexations. *See* Acts 2019, 86th Leg., R.S., ch. 155 (H.B. 347), eff. May 24, 2019. A municipality may contract with an owner of land that is located in the municipality's extraterritorial jurisdiction to guarantee the land's immunity from annexation for a period not to exceed forty-five years, including renewals or extensions. Tex. Loc. Gov't Code § 212.172.

§ 2.17 Antiquities

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

§ 2.18 Appraisers

Appraisers are governed by Tex. Occ. Code ch. 1103, the Texas Appraiser Licensing and Certification Act. The Broker's and Appraiser's Lien on Commercial Real Estate Act provides for a lien and procedures to foreclose the lien for commissions and fees due and payable on the sale or lease of commercial real estate (as defined in the Act). *See* Tex. Prop. Code ch. 62. An appraiser or other person who intentionally or knowingly makes a materially false or misleading written statement in providing an appraisal of real property for compensation commits a criminal offense punishable under Tex. Penal Code § 32.32(b–1).

Appraisal management companies are defined and regulated by Tex. Occ. Code ch. 1104.

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

Title XIV of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Pub. L. No.

111-203, 124 Stat. 1376) contains extensive appraisal reform measures. Appraisal requirements are set out in Regulation Z (Truth in Lending) and 12 C.F.R. § 1026.42 for consumer credit transactions secured by a consumer's principal residence. The regulations are intended to ensure that real estate appraisals used to support creditors' underwriting decisions are based on the appraisers' independent professional judgment, free of any influence or pressure exerted by parties to the transactions.

§ 2.19 Arbitration

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

§ 2.20 Architects

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

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

§ 2.21 Asbestos

See the section titled "Environmental Laws" below.

§ 2.22 Assignment of Rent

Assignment of rents to a lienholder is governed by Tex. Prop. Code ch. 64, commonly referred to as the Texas Assignment of Rents Act, or TARA. An enforceable security instrument creates an assignment of rents arising from the real property described in the instrument. Tex. Prop. Code § 64.051. An assignment of rents creates a security interest in accrued and unaccrued rents, regardless of whether the assignment is referred to as an absolute assignment. Tex. Prop. Code § 64.051(b). The Act provides methods of enforcement, by notice to the assignor (Tex. Prop. Code § 64.054) or by notice to tenants (Tex. Prop. Code § 64.055). A form of notice is provided. Tex. Prop. Code § 64.056.

§ 2.23 Assumed Names

The circumstances under which assumed names should be filed are addressed in the Assumed Business or Professional Name Act, Tex. Bus. & Com. Code ch. 71. The circumstances under which an entity is considered to have fraudu-

lently filed an assumed name and the penalties for doing so are addressed in Tex. Bus. & Com. Code § 71.203. See also the section titled "Fraudulent Filings" below.

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

§ 2.24 Astronomical Observatories

See the section titled "Outdoor Lighting" below.

§ 2.25 Automatic Teller Machines (ATMs)

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

§ 2.26 Bankruptcy

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

§ 2.27 Beaches

See the section titled "Coastal Properties" below.

§ 2.28 Beauty Shop Leases

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

§ 2.29 Billboards

See the section titled "Outdoor Signs" below.

§ 2.30 Blind Trusts and Undisclosed Beneficiaries

A conveyance by a person designated as trustee is valid, even if the identity of the beneficiary has not been disclosed; the beneficiary may not set aside the conveyance of the property. Tex. Prop. Code § 101.001. A governmental entity may not purchase real property held in trust or sell real property to a trustee until the trustee submits a copy of the trust agreement and identifies the true owner of the property to the governmental entity. Tex. Gov't Code ch. 2252, subch. D.

§ 2.31 Brokers

Real estate brokers and salespersons are regulated by the Texas Real Estate Commission under the provisions of the Real Estate License Act, Tex. Occ. Code ch. 1101. The Broker's and Appraiser's Lien on Commercial Real Estate Act provides for a lien and procedures to foreclose the lien for commissions and fees due and payable on the sale or lease of commercial real

estate (as defined in the Act). *See* Tex. Prop. Code ch. 62. See also the section titled "Disclosures and Notices" below.

§ 2.32 Brownfields Statute

See the section titled "Voluntary Cleanup Program" below.

§ 2.33 Building Codes

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

The National Electrical Code as it existed on May 1, 2001, was adopted by the Texas legislature as the municipal electrical construction code in Texas and applies to (1) all residential electrical construction applications and (2) commercial buildings in a municipality for which construction began after January 1, 2006. A municipality may establish procedures to adopt local amendments and to administer and enforce the code. Tex. Loc. Gov't Code § 214.214.

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

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

§ 2.34 Business Organizations Code

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

§ 2.35 Camping Resorts

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

§ 2.36 Cash Proceeds

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

§ 2.37 Cemeteries

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

§ 2.38 Certificates of Convenience and Necessity

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

§ 2.39 Certification of Trust

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

§ 2.40 Certified Mail

See the section titled "Registered Mail" below.

§ 2.41 Child Support Liens

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

§ 2.42 Choice of Law

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

§ 2.43 Coastal Properties

Two types of notices relating to coastal properties are required for real property transactions in the vicinity of coastal waters. First, persons entering into an executory contract to convey an interest in property located seaward of the Gulf Intracoastal Waterway must make the disclosure required by Tex. Nat. Res. Code § 61.025, either in the contract itself or in a notice delivered not less than ten days before the closing of the sale. With some exceptions, the notice must be provided to the purchaser or transferee in all conveyancing transactions, including nonjudicial foreclosure sales. *See* Tex. Att'y Gen. Op. No. JM-834 (1987). Second, if real property adjoins and abuts the tidally influenced waters of the state, the notice prescribed in Tex. Nat. Res. Code § 33.135 must be given in all written executory contracts. The statutory disclosure form prescribed by section 5.008(b) of the Texas Property Code also includes language regarding such coastal properties.

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

See also the section titled "Windstorm Inspection" below.

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

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

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

§ 2.44 Colonias

Colonias are housing developments in low-income regions, typically near the border between Texas and Mexico. The Texas Local Government Code contains subdivision platting requirements in counties located (1) within fifty miles of the international border regardless of the population of any city within the county or (2) within one hundred miles of the international border if a city located within the county has a population of more than 250,000. Tex. Loc. Gov't Code §§ 232.021–.043. See also Tex. Loc. Gov't Code §§ 232.071–.080 for alternate subdivision platting requirements applicable to certain other economically distressed areas. The Property Code contains restrictions on executory contracts (contracts for deed), a form of real estate transaction widely used in colonias. *See* Tex. Prop. Code §§ 5.061–.080. Colonia self-help centers are authorized in certain counties under Tex. Gov't Code §§ 2306.581–.590. See also the section titled "Contracts for Deed" below.

§ 2.45 Community Homes; Group Homes

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

§ 2.46 Community Property with Right of Survivorship

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

§ 2.47 Condemnation and Eminent Domain

Condemnation is the right to take private property for public use; property may not be taken, damaged, or destroyed for or applied to public use without just and adequate compensation and due process. *See* U.S. Const. amends. V, XIV, § 1; Tex. Const. art. I, §§ 17, 19. Condemnation actions are governed by chapter 21 of the Texas Property Code. Before a governmental entity with eminent domain authority begins negotiating with a property owner to acquire real property, the entity must provide a landowner's bill of rights statement provided by Tex. Gov't Code § 402.031. The landowner's bill of rights provides that the property owner has a right to (1) notice of the proposed acquisition of the owner's property; (2) a bona fide good-faith effort to negotiate by the entity proposing to acquire the property; (3) an assessment of damages to the owner that will result from the taking of the property; (4) a hearing under chapter 21 of the Texas Property Code, including a hearing on the assessment of damages; and (5) an appeal of a judgment in a condemnation proceeding, including an appeal of an assessment of damages. The attorney general will prepare a written statement that includes a bill of rights for a property owner whose real property may be acquired by a governmental or private entity through the use of the entity's eminent domain authority under chapter 21 of the Texas Property Code. A copy of the Texas Landowner's Bill of Rights can be found at **https://www.texasattorneygeneral.gov/files/agency/landowners_billofrights.pdf**.

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

See also the sections titled "Landowner's Bill of Rights" and "Private Property Rights" below.

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

authority in the past year. Failure to file a report may result in a civil penalty.

§ 2.48 Condominiums

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

The Texas Uniform Condominium Act (TUCA), Tex. Prop. Code ch. 82, governs the creation, operation, alteration, termination, and management of TUCA condominium projects created on or after January 1, 1994, but certain provisions of TUCA apply to those created before that date. Condominium projects created before January 1, 1994, are governed by portions of Tex. Prop. Code ch. 81 (the prior Condominium Act) and portions of TUCA, unless the owners of the project amend their declaration and submit it exclusively to the provisions of TUCA. *See* Tex. Prop. Code § 82.002. Tax certificates, receipts, or other statements evidencing payment of taxes or that taxes have not yet been calculated must be attached to a plat, replat, or amended plat or replat of a condominium before recording in accordance with Tex. Prop. Code § 82.051(g). The separate taxation of individual units of a condominium is addressed in Tex. Prop. Code § 82.005 and Tex. Tax Code § 25.09. Certain disclosures are required in a contract for sale of a condominium. Tex. Prop. Code §§ 82.156–.157. See chapter 24 in this manual.

§ 2.49 Confessions of Judgment

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

§ 2.50 Confidentiality Notice

See the section titled "Disclosures and Notices" below.

§ 2.51 Conspicuous Text

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

1. choice-of-law provisions designating another state and agreements to litigate or arbitrate in another state in contracts concerning goods valued at $50,000 or less (Tex. Bus. & Com. Code ch. 273);
2. Deceptive Trade Practices Act waivers (Tex. Bus. & Com. Code § 17.42);
3. the statutory statute-of-frauds notice for loans greater than $50,000 (Tex. Bus. & Com. Code § 26.02);
4. notices of cancellation for certain types of credit services agreements (Tex. Fin. Code § 393.202);
5. disclosures required in rental-purchase agreements (Tex. Bus. & Com. Code § 92.051(d));
6. certain language in homestead improvement contracts (Tex. Prop. Code § 41.007);
7. certain language in homestead lien affidavits (Tex. Prop. Code § 53.254);

8. certain notices relating to contracts for deed (Tex. Prop. Code §§ 5.062, 5.066, 5.074);

9. certain agreements between landlords and residential tenants concerning repairs (Tex. Prop. Code § 92.006);

10. certain notices in residential leases concerning the landlord's obligations to install safety devices (Tex. Prop. Code § 92.164);

11. certain notices in residential leases concerning the disabling of smoke alarms by tenants (Tex. Prop. Code § 92.2611);

12. various provisions in retail installment contracts (Tex. Fin. Code §§ 345.052, 345.081, 345.304);

13. home solicitation transaction cancellation notices (Tex. Bus. & Com. Code §§ 601.052–.053);

14. the business opportunity contract disclosure statement (Tex. Bus. & Com. Code § 51.151) (note that "business opportunity" does not include real estate syndications and certain other transactions (Tex. Bus. & Com. Code § 51.003(b)));

15. certain provisions of residential service contracts (Tex. Occ. Code § 1303.254);

16. liability for rollback taxes (Tex. Prop. Code § 5.010(a));

17. the confidentiality notice required by the Property Code (Tex. Prop. Code § 11.008); and

18. material changes to prior or existing property and casualty insurance policies (Tex. Ins. Code § 551.1055(c)).

§ 2.52 Construction Accounts

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

§ 2.53 Construction Contracts

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

§ 2.54 Construction Liability Claims on Public Projects

Construction defects in public buildings and public works are addressed in Tex. Gov't Code ch. 2272. *See* Acts 2019, 86th Leg., R.S., ch. 1287, § 1 (H.B. 1999), eff. June 14, 2019 (adding Tex. Gov't Code ch. 2272).

§ 2.55 Construction Payment Bond Claims

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

§ 2.56 Consumer Laws

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

1. the Deceptive Trade Practices–Consumer Protection Act (DTPA), Tex. Bus. & Com. Code §§ 17.41–.63 (including special provisions in section 17.42 limiting waivers of DTPA rights);

2. the Magnuson-Moss Warranty Act, 15 U.S.C. §§ 2301–2312 (applies to consumer products used for personal, family, or household purposes, including property intended to be attached to or installed in real property);

3. the Home Solicitation Transactions Act, Tex. Bus. & Com. Code ch. 601 (gives consumers the right to cancel a transaction involving real property);

4. the Real Estate License Act, Tex. Occ. Code ch. 1102 (requires the licensing of persons who inspect real property);

5. the Residential Service Company Act, Tex. Occ. Code ch. 1303 (regulates persons who sell residential service or maintenance contracts);

6. the Manufactured Housing Standards Act, Tex. Occ. Code ch. 1201 (requires the licensing of persons who install manufactured housing), Tex. Occ. Code ch. 1202 (regulates "industrialized housing" or modular homes);

7. the Truth in Lending Act, 15 U.S.C. §§ 1601–1667f, and its accompanying Regulation Z, 12 C.F.R. pt. 226 (requires certain consumer disclosures by creditors of the costs and terms of consumer credit and provides certain remedies for consumers, including the right of rescission of certain credit transactions secured by a lien on the consumer's principal dwelling); see also the section titled "Truth in Lending" below; and

8. the Real Estate Settlement Procedures Act, 12 U.S.C. §§ 2601–2617, and its accompanying Regulation X, 24 C.F.R. pt. 3500 (requires certain consumer disclosures for mortgage loan transactions secured by a lien on one-to-four family residential real property that otherwise meet the definition of a "federally related mortgage loan" set out in 24 C.F.R. § 3500.2 and also prohibits unlawful kickbacks, referral fees, and unearned fees in connection with federally related mortgage loans). See also the section titled "Real Estate Settlement Procedures Act (RESPA)" below.

§ 2.57 Contracts for Deed

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

The Real Estate Forms Committee has removed the instructions and explanations for residential contracts for deed. These transactions are heavily regulated, and in the majority of circumstances the risks and consequences of failure of compliance outweigh the usefulness of the transaction in light of the fact that the same result can be accomplished by a note, deed, and deed of trust.

§ 2.58 Copyrights

The U.S. copyright laws extend to visual arts and architectural works and prohibit modification or destruction of visual arts in certain circumstances. *See* 17 U.S.C. §§ 102, 106A. Owners of buildings may alter or destroy a building embodying an architectural work. 17 U.S.C. § 120(b).

§ 2.59 Corporations

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

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

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

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

§ 2.60 Covenants Not to Compete

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

§ 2.61 Criminal Record Checks of Employees

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

§ 2.62 Deceptive Trade Practices–Consumer Protection Act (DTPA)

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

§ 2.63 Deeds

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

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

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

The Texas Real Property Transfer on Death Act authorizes an individual to execute and record a transfer on death deed to make a revocable transfer of the transferor's interest in real property to one or more designated beneficiaries, including alternate beneficiaries, effective at the transferor's death. *See* Tex. Est. Code ch. 114. In the 86th legislative session, the statutory forms for the transfer on death deed and the revocation of transfer on death deed were removed from chapter 114 of the Texas Estates Code. Acts 2019, 86th Leg., R.S., ch. 337, § 3.2 (S.B. 874), eff. Sept. 1, 2019. Tex. Gov't Code § 22.020 directs the Texas Supreme Court to promulgate forms for creating and revoking a transfer on death deed. The Estates Code continues to authorize use of transfer on death deeds and revocation of transfer on death deeds but no longer prescribes statutory language. See section 5.11 in this manual.

§ 2.64 Deeds of Trust

Foreclosure of liens is addressed in Tex. Prop. Code ch. 51 and Tex. Bus. & Com. Code § 22.001. See also the separate discussion under "Foreclosure" below.

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

§ 2.65 Deficiency Litigation after Foreclosure

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

§ 2.66 Disaster Recovery Relief

The Texas Division of Emergency Management coordinates the state emergency management plan. Tex. Gov't Code ch. 418 lays out the responsibilities of the division.

§ 2.67 Disclaimer of Interest in Decedent's Estate

A person desiring to disclaim an interest in a decedent's estate must comply with Tex. Est. Code ch. 122.

§ 2.68 Disclosure of Interested Parties When Contracting with Governmental Entities

A governmental entity or state agency may not enter into a contract with a business entity if the contract requires a vote by the governing body of the governmental entity or state agency, the contract has a value of at least $1 million, or the contract is for services that would require a person to register as a lobbyist, unless the business entity submits a disclosure of interested parties to the governmental entity or state agency at the time the business entity submits the signed contract to the governmental entity or state agency. Tex. Gov't Code § 2252.908. The disclosure of

interested parties must be submitted on an electronic form prescribed by the Texas Ethics Commission. *See* 1 Tex. Admin. Code ch. 46. The required Form 1295 and filing instructions can be found on the Texas Ethics Commission website at **https://www.ethics.state.tx.us/whatsnew/FAQ_Form1295.html**. See also the section titled "Sale of Trust Property to Governmental Entities" below.

§ 2.69 Disclosures and Notices

Numerous statutory disclosure and notice requirements affect real estate transactions.

1. A seller of residential real property comprising not more than one dwelling unit must give the purchaser of the property a signed, written notice, substantially in statutory form, concerning the condition of the property, including known defects or malfunctions of building structural components and building materials; working condition of various systems, appliances, smoke detectors, and other enumerated items; and the existence of various undesirable conditions such as termite damage, lead-based paint, radon gas, and a single blockable main drain in a swimming pool or hot tub. The notice must be delivered on or before the effective date of any executory sales contract binding the purchaser and, if the seller fails to provide the notice by the effective date, the purchaser may rescind the contract for any reason within seven days after receiving the notice. Tex. Prop. Code § 5.008. The notice was revised effective September 1, 2019, to provide additional disclosures on previous flooding, previous water penetration, and flood risk. *See* Tex. Prop. Code § 5.008(b). See form 4-22 in this manual.
2. Real estate brokers have a number of disclosure obligations, including the nature of their principal-agent relationship, as well as any applicable intermediary status, to prospective buyers, sellers, landlords, and tenants; knowledge of latent defects; the advisability of obtaining a title policy; as well as nondisclosure requirements. Tex. Occ. Code §§ 1101.555–.559, 1101.651–.652; 22 Tex. Admin. Code chs. 535, 537.
3. A seller is obligated to make certain disclosures if the property is located in a water or utility district. Tex. Water Code §§ 49.452, 54.016(h)(4)(A). See form 4-18.
4. Sellers in certain municipalities must disclose the presence of restrictive covenants affecting the property. Tex. Loc. Gov't Code §§ 212.151–.157 (Enforcement of Land Use Restrictions Contained in Plats and Other Instruments). See form 4-11.
5. The presence of underground storage tanks must be disclosed to purchasers in accordance with 30 Tex. Admin. Code § 334.9. See form 4-10.
6. There are disclosure requirements in the Texas Timeshare Act, Tex. Prop. Code §§ 221.031–.036.
7. The Texas Membership Camping Resort Act has disclosure requirements. *See* Tex. Prop. Code § 222.006.
8. There are disclosures required by the Interstate Land Sales Full Disclosure Act, 15 U.S.C. §§ 1701–1720, and 24 C.F.R. pts. 1710–1720.
9. Disclosures concerning home insulation are required by 16 C.F.R. § 460.16. See form 4-6.
10. Disclosures concerning asbestos are required by 29 C.F.R. §§ 1910.1001

and 1926.1101. See the appropriate forms in chapters 25 and 26. See also form 4-8.

11. A seller of vacant land must include in the contract a certain bold-faced notice about potential rollback taxes. A number of exemptions apply, including an exemption if a separate paragraph in the contract addresses rollback tax liability. Tex. Prop. Code § 5.010. See form 4-14.

12. A seller of unimproved residential property must provide the buyer with a written disclosure of certain subsurface conditions, such as pipelines, in certain circumstances. This notice is not required if the seller is obligated under the contract to furnish a title insurance commitment and if the buyer is entitled to terminate if objections to the commitment are not cured before closing. Tex. Prop. Code § 5.013.

13. A seller of a single-family residence must give notice to a prospective buyer if the residence is subject to membership in a property owners association, restrictive covenants have been recorded, and an assessment lien may be foreclosed for failure to pay assessments. Tex. Prop. Code § 5.012. See form 23-9.

14. A seller must disclose that the land may be included in the extraterritorial jurisdiction of a municipality and thereby subject to annexation. Tex. Prop. Code § 5.011. See form 4-15.

15. Contractors are required to give the owner a disclosure statement before the owner executes a residential construction contract. Tex. Prop. Code § 53.255. See form 18-1.

16. Residential mortgage loan originators have certain disclosure obligations to residential mortgage loan applicants, including the nature of the relationship between the residential mortgage loan originator and the applicant, the duties the residential mortgage loan originator has to the applicant, and how the residential mortgage loan originator will be compensated, as well as the terms under which an interest rate lock-in fee will be refundable. Tex. Fin. Code §§ 156.004, 156.304. The Savings and Mortgage Lending Commissioner by rule has promulgated a standard form entitled "Residential Mortgage Loan Originator Discloser." 7 Tex. Admin. Code § 80.9.

17. A seller of unimproved real property located outside a municipality's jurisdiction must provide a statutory notice to a purchaser that the extension of water or sewer services may require additional expense and delay to obtain. Tex. Water Code § 13.257. See form 4-16.

18. Sellers of real property within an agricultural development district must give the purchaser written notice to that effect. Tex. Agric. Code § 60.063. The district must file a copy of the form for notice required by section 60.063 with the county clerk in each county in which all or part of the district is located. Tex. Agric. Code § 60.0631. The statute charges each agricultural district with the responsibility to prepare its own form.

19. Disclosures concerning home loans and high-cost home loans (loans with an interest rate of 12 percent or greater per year), including disclosures regarding individual or group credit life or disability insurance, are required by chapter 343 of the Finance

Code. Tex. Fin. Code ch. 343. See also section 10.14 in this manual.

20. Texas Property Code section 11.008 provides that an instrument transferring an interest in real property to or from an individual must include a statutorily described notice that appears on the top of the first page of the instrument in twelve-point boldfaced type or twelve-point uppercase letters and reads substantially as follows:

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

Tex. Prop. Code § 11.008(c). "Instrument" is defined, for purposes of this statute, as "a deed, deed of trust, or any other record recorded by a county clerk related to real property, including a mineral lease, a mechanic's lien, and the release of a mechanic's lien."

The validity of an instrument as between the parties to the instrument and the notice provided by the instrument is not affected by a party's failure to include the notice required under this section. Tex. Prop. Code § 11.008(d).

The county clerk may not under any circumstance reject an instrument presented for recording solely because the instrument fails to comply with this section. Other than the duty to redact an individual's social security number as required by Tex. Gov't Code § 552.146, the county clerk has no duty to ensure that an instrument presented for recording does not contain an individual's social security number. Tex. Prop. Code § 11.008(e).

21. A seller of residential property that is located in a public improvement district established under chapter 372 of the Local Government Code and that consists of not more than one dwelling unit must give notice to the purchaser that it will be obligated to pay assessments for an improvement project. The notice must be given before the effective date of the executory contract and must be substantially similar to the prescribed notice. If an executory contract is entered into without the notice having been given, the purchaser may, as its exclusive remedy, terminate the contract for any reason no later than the earlier of (1) the seventh day after the date the purchaser receives the notice or (2) the date the transfer occurs as provided by the executory contract. Tex. Prop. Code § 5.014. See form 4-5.

22. If all or part of a subdivision for which a plat is required under chapter 232 of the Local Government Code is located within a future transportation corridor identified in an agreement between the Texas Department of Transportation and a county under section 201.619 of the Transportation Code, each purchase contract or lease between the subdivider and a purchaser or lessee of land in the subdivision must contain a conspicuous statement that the land is located within the area of the alignment of a transportation project as shown in the final environmental decision document that is applicable to the future transportation corridor. Tex.

Loc. Gov't Code § 232.0033. See form 4-19.

23. With a number of exceptions, a seller of property that will be conveyed subject to a lien must make required disclosures to the prospective purchaser at least seven days before the earlier of the effective date of the conveyance or the execution of the contract for the conveyance. The failure to give the notice does not invalidate a conveyance, but the purchaser may pursue other remedies available unless the person required to give notice reasonably believes and takes any necessary action to ensure that each lien for which notice was not provided will be released on or before the thirtieth day after the date on which title to the property is transferred. Among the excepted transactions for which the disclosure is not required are those in which the purchaser obtains a title policy and those in which the seller has sold, or the purchaser has purchased, interests in real property four or more times during the preceding twelve months. Tex. Prop. Code § 5.016.

24. A person registered under the Residential Mortgage Loan Servicer Registration Act (Tex. Fin. Code ch. 158) and acting as a servicer of loans secured by a lien on residential real estate located in Texas must provide a statutory notice informing the borrower of each such residential mortgage loan that complaints about servicing of the loan should be sent to the Department of Savings and Mortgage Lending. Tex. Fin. Code § 158.101.

25. A person who sells property for which a certificate of mold remediation has been issued pursuant to section 1958.154 of the Texas Occupations Code must deliver to the purchaser copies of each certificate of mold remediation issued for the property with the preceding five years. Tex. Occ. Code § 1958.154.

26. A seller of commercial or residential property adjoining an impoundment of water, including a reservoir or lake constructed and maintained under chapter 11 of the Texas Water Code that has storage capacity of at least 5,000 acre-feet at the impoundment's normal operating level, must give to the purchaser notice of fluctuations for various reasons, including an entity lawfully exercising its right to the water stored in the impoundment or drought or flood conditions. Tex. Prop. Code § 5.019. See form 4-27.

27. Certain for-profit entities may record an affidavit identifying one or more individuals authorized to transfer an estate or interest in real property on behalf of the entity. Tex. Prop. Code § 12.019(c). Further limitations and requirements are contained in Tex. Prop. Code § 12.019.

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

§ 2.70 Discrimination

A restriction in a deed or other instrument affecting real property that prohibits the use,

sale, lease, or transfer on account of race, color, religion, or national origin is void and unenforceable. Tex. Prop. Code § 5.026. Municipalities may also adopt fair housing ordinances, which may have enforcement procedures and remedies that vary from state and federal law. Tex. Loc. Gov't Code § 214.903. The Texas Workforce Commission civil rights division has the authority to hear certain types of discrimination complaints. Tex. Lab. Code ch. 301. See also the sections titled "Americans with Disabilities Act and Related Statutes" above and "Equal Credit Opportunity" and "Fair Housing" below.

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

§ 2.71 Divorce

See the section titled "Family Law" below.

§ 2.72 Dodd-Frank Wall Street Reform and Consumer Protection Act

The Dodd-Frank Wall Street Reform and Consumer Protection Act, codified as amended in scattered sections of U.S.C. (Pub. L. No. 111-203, 124 Stat. 1376), is sweeping financial reform legislation intended in pertinent part to "protect consumers from abusive financial services practices" thought by Congress to have significantly contributed to the 2007-2009 national financial crisis. The Act, comprising some sixteen titles, was signed into law on July 21, 2010. It was extensively amended on May 28, 2018.

Titles IX (dealing with securitization of mortgage loans), X (establishing the Bureau of Consumer Financial Protection), and XIV (containing extensive amendments to the Truth in Lending Act, the Real Estate Settlement Procedures Act, and the Equal Credit Opportunity Act reforming residential mortgage origination, underwriting, appraisal, and servicing practices) are particularly pertinent to residential real estate finance transactions. See the discussion in chapter 12 in this manual.

§ 2.73 Dry Cleaners

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

§ 2.74 Due-on-Sale Clauses

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

§ 2.75 Durable Powers of Attorney

Durable powers of attorney are governed by Tex. Est. Code chs. 751–752. Unless a time limitation is specifically stated in the instrument creating it, the passage of time does not cause a durable power of attorney to lapse. Tex. Est. Code § 751.132(b). The durable power of attorney between spouses terminates on divorce or annulment except in certain situations. Tex. Est. Code § 751.132(a)(3). A court's appointment of a permanent guardian for the principal's estate terminates the durable power of attorney on the guardian's qualification. A court may suspend the powers of an agent under a durable power of attorney during the term of a temporary guardianship. Tex. Est. Code § 751.052.

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

Tex. Est. Code § 751.051 sets forth a statutory form of durable power of attorney. When using the statutory form, the principal will need to initial each specific power to be granted or initial the line to grant all powers. A durable power of attorney that confers authority with respect to real property empowers the agent to perform those acts described in Tex. Est. Code § 752.102. Durable powers of attorney used in real estate transactions must be recorded in the county or counties in which the real property is located not later than thirty days after the instrument signed by the agent is recorded. *See* Tex. Est. Code § 751.151. Several other important requirements for such powers of attorney are addressed in the statute. A form of durable power of attorney for use in real estate transactions incorporating the statutory requirements is included in chapter 26 in this manual.

§ 2.76 Easements, Pipeline

Unless expressly provided otherwise, pipeline easements created by grant or power of eminent domain for the benefit of a single common carrier pipeline for which the power of eminent domain is available are presumed to create an easement in favor of the common carrier pipeline that extends a width of fifty feet as to each pipeline laid under the easement before January 1, 1994. Tex. Nat. Res. Code § 111.0194. The presumption is rebuttable. Persons who acquire pipeline easements and rights-of-way for others must be registered, licensed, or exempt from licensing by the Real Estate License Act. A notice promulgated by the Texas Real Estate Commission must be delivered to the grantor of the easement before the easement is granted. Tex. Occ. Code § 1101.653.

§ 2.77 Economically Distressed Counties

See the section titled "Colonias" above.

§ 2.78 Economic Development

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

§ 2.79 Elderly Housing

See the section titled "Fair Housing" below.

§ 2.80 Electronic Commerce

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

§ 2.81 Electronic Filing of Documents

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

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

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

The Electronic Government Task Force has launched an Internet portal to provide access to electronic government services in Texas. It is found at **https://www.texas.gov**; it provides forms and applications from various agencies and access to filing and payment of sales tax. Authority for oversight by the TexasOnline Authority is provided in Tex. Gov't Code ch. 2054.

§ 2.82 Eminent Domain

See the section titled "Condemnation and Eminent Domain" above.

§ 2.83 Endangered Species Act

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

§ 2.84 Engineer's Liens against Real Estate

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

§ 2.85 Environmental Laws

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

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

Program Flexibility Act of 1996, 42 U.S.C. §§ 6901–6992k, relating primarily to active waste treatment, storage, or disposal facilities, including underground storage tanks (see also the section titled "Underground and Aboveground Storage Tanks" below);

3. the Federal Water Pollution Control Act, also known as the Clean Water Act, 33 U.S.C. §§ 1251–1387, governing, among other things, the regulation of wetlands, stormwater, and point-source water pollution (see also the sections titled "Stormwater Permits" and "Wetlands" below);

4. the federal Clean Air Act, 42 U.S.C. §§ 7401–7671q, requiring permits for many types of operations, regulating certain asbestos materials and emissions, and prohibiting certain types of chemicals, such as chlorofluorocarbons (CFCs), that deplete the ozone layer. The regulations dealing with CFCs are in 40 C.F.R. pt. 82. Related regulations include the asbestos-based National Emission Standards for Hazardous Air Pollutants at 40 C.F.R. pt. 61;

5. the Endangered Species Act, 16 U.S.C. §§ 1531–1544;

6. the Asbestos Hazard Emergency Response Act of 1986, 15 U.S.C. §§ 2641–2656, and regulations, 40 C.F.R. pt. 763;

7. asbestos regulations under the Occupational Safety and Health Act, 29 C.F.R. § 1910.1001 (general industry standard), and 29 C.F.R. § 1926.1101 (construction standard);

8. the Residential Lead-Based Paint Hazard Reduction Act of 1992, also known as Title X of the Housing and Community Development Act (42 U.S.C. §§ 4851–4856) (see the section titled "Lead-Based Paint Disclosures" below);

9. the Safe Drinking Water Act, 42 U.S.C. §§ 300f to 300j–26; and

10. the Toxic Substances Control Act, 15 U.S.C. §§ 2601–2695d, regulating polychlorinated biphenyls and other substances.

Important state environmental statutes and regulations include—

1. the Solid Waste Disposal Act, Tex. Health & Safety Code ch. 361 (concerns the disposal of hazardous and certain nonhazardous wastes), including the statute regulating developments over abandoned landfills, Tex. Health & Safety Code §§ 361.531–.539 (see the separate discussion of this statute under the section titled "Landfills" below), and the voluntary cleanup program (also known as a Brownfields statute), Tex. Health & Safety Code §§ 361.601–.613 (see the section titled "Voluntary Cleanup Program" below);

2. the Texas Clean Air Act, Tex. Health & Safety Code ch. 382, requiring air permits for many types of industrial and construction operations and regulating air emissions and various other hazardous substances and activities;

3. the Texas Hazardous Substances Spill Prevention and Control Act, Tex. Water Code §§ 26.261–.267;

4. the Texas Underground and Aboveground Storage Act, as amended, Tex. Water Code §§ 26.341–.367 (see also the section titled "Underground and Aboveground Storage Tanks" below);

5. the Coastal Public Lands Management Act of 1973, as amended, Tex. Nat.

Res. Code ch. 33, and regulations at 31 Tex. Admin. Code chs. 501–506 (see also the section titled "Coastal Properties" above);

6. the Texas Environmental, Health, and Safety Audit Privilege Act, Tex. Health & Safety Code ch. 1101;

7. the Texas Asbestos Health Protection Act, Tex. Occ. Code ch. 1954;

8. the Texas Railroad Commission's Operator Cleanup Program and regulations at 16 Tex. Admin. Code § 3.91; and

9. Tex. Agric. Code ch. 63, providing enhanced safety oversight and inspections of ammonium nitrate storage facilities by permitting entry by local or state fire authorities and providing enhanced storage requirements.

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

§ 2.86 Equal Credit Opportunity

The Equal Credit Opportunity Act, implemented by Regulation B, 12 C.F.R. § 202.16, provides a cause of action against a creditor who discriminates against an applicant for credit (1) on the basis of the applicant's race, color, religion, national origin, sex, marital status, or age (provided the applicant has the capacity to enter into a binding contract), (2) because all or part of the applicant's income derives from any public assistance program, or (3) because the applicant has in good faith exercised any right under the Consumer Credit Protection Act. *See* 15 U.S.C. §§ 1691–1691f. Regulation B also establishes rules for a creditor's collection, evaluation, and use of information in connection with a credit application and requires a creditor to notify applicants of action taken on their applications concerning the creditor's approval of, counteroffer to, or denial of credit generally within thirty days after receiving a completed application. Proper use of sample notification forms set out in Appendix C of Regulation B constitutes full compliance with various requirements of the Act. Effective July 21, 2011, model forms C1 through C5 were revised to include a notice that a credit score was used to make an adverse credit decision and to include certain information about credit scores to comply with amended content requirements of the Fair Credit Reporting Act. Notifications must be in writing and contain a statement of specific reasons for any adverse action taken on the credit application and a statutory notice set forth in section 701(a) of the Act. Creditors furthermore must provide consumers with a copy of any property appraisal report used to evaluate an application for credit that is to be secured by a lien on a dwelling. *See* 12 C.F.R. § 202.14.

§ 2.87 Equal Housing Opportunity

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

§ 2.88 Escheat

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

§ 2.89 Estate Tax Liens

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

§ 2.90 Eviction

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

.13. Tex. Prop. Code ch. 24 permits an owner of a multifamily residential property to be represented by a nonlawyer in the appeal of an eviction suit for nonpayment of rent. Tex. Prop. Code § 24.011.

§ 2.91 Excavators

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

§ 2.92 Exempt Property and Liens

See the section titled "Bankruptcy" above.

§ 2.93 Extraterritorial Jurisdiction

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

§ 2.94 Failed Depository Institutions

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

§ 2.95 Fair Credit Reporting Act

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

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

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

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

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

§ 2.96 Fair Debt Collection Practices

The federal Fair Debt Collection Practices Act (15 U.S.C. §§ 1692–1692p) and the Texas Debt Collection Practices Act (Tex. Fin. Code §§ 392.001–.404) regulate efforts to collect debts from consumers. Each act requires collection notices to contain information about the debt and how to dispute it. Attorneys are subject to most provisions of each act. However, an attorney collecting a debt on behalf of a client is not considered a "third-party debt collector" under the Texas Debt Collection Practices Act unless the attorney employs nonattorneys who regularly solicit debts for collection or make frequent contact with debtors to collect or adjust debts. Tex. Fin. Code § 392.001(7). Each act also prohibits types of communications that might be considered harassment. Creditors and debt collectors usually have the right to collect on a debt from the assets of a decedent's estate but, effective August 29, 2011, are prohibited from contacting relatives of a deceased debtor, other than a spouse or legal representative of the estate, who may lack either the authority to pay the debt from the decedent's estate or the legal obligation to pay the debt. *See* 76 Fed. Reg. 44,915 (July 27, 2011). Trustees and substitute trustees are not considered debt collectors. Tex. Prop. Code § 51.0075(b).

§ 2.97 Fair Housing

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

The Texas Fair Housing Act and the federal Fair Housing Act both prohibit housing that is limited specifically to the elderly and that excludes families and young children, unless certain min-

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

§ 2.98 Family Law

The Texas Family Code has several provisions that relate to real property transfers, including enforcement of a division of property (Tex. Fam. Code §§ 9.006–.014); right to future property (Tex. Fam. Code § 9.011); division of property following a decree of divorce (Tex. Fam. Code §§ 9.201–.205); the Uniform Premarital Agreement Act (Tex. Fam. Code §§ 4.001–.010); partition or exchange of community property (Tex. Fam. Code §§ 4.101–.106); rules of marital property liability (Tex. Fam. Code §§ 3.201–.203); homestead rights (Tex. Fam. Code §§ 5.001–.108); child support liens (Tex. Fam. Code §§ 157.311–.331); and prohibition by a temporary restraining order of the transfer, assignment, mortgage, encumbrance, or alienation of any real property of the parties to a dissolution of marriage without the prior authorization of the court (Tex. Fam. Code § 6.501(a)). The Texas Constitution also addresses the issue of separate and community property between spouses. Tex. Const. art. XVI, § 15. Tex. Fam. Code § 7.006(b) provides that a written agreement incident to divorce or annulment may be set out in the final decree or incorporated by reference, each of which will have equal effect and validity.

§ 2.99 Federal Lien Registration Act

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

§ 2.100 Federal Tax Liens

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

§ 2.101 Fences and Gates

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

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

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

§ 2.102 Financing Statement, Fraudulent Filing

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

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

§ 2.103 Fixtures

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

§ 2.104 Flood Insurance

The National Flood Insurance Act of 1968, the Flood Disaster Protection Act of 1973, and the National Flood Insurance Reform Act of 1994, 42 U.S.C. §§ 4001–4129, provide flood, mudslide, and flood-related erosion insurance protection to property owners. In specified flood-prone areas, local governments are required to enforce special land use and building restrictions to minimize flood damage. If a loan secured by improved real estate in such an area is made, increased, extended, or renewed by a federally insured or federally regulated lender, the buyer must be notified in writing of the flood hazards a reasonable time before closing. 42 U.S.C. § 4104a. Regulations implementing the flood insurance program are found at 44 C.F.R. pts. 59–78. *See also* Tex. Loc. Gov't Code § 561.001 (county's power affecting flood control); Tex. Loc. Gov't Code § 240.901 (participation in federal flood insurance policy); Tex. Water Code ch. 16, subch. I (Flood Control and Insurance Act).

§ 2.105 Forced Sale of Co-Owner's Interest

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

§ 2.106 Forcible Entry and Detainer

See the section titled "Eviction" above.

§ 2.107 Foreclosure

Nonjudicial foreclosure sales of real property are governed by Tex. Prop. Code §§ 51.001–.002, 51.0021, 51.0025, 51.0075, 51.009 and Tex. Bus. & Com. Code ch. 22 (applicable to residential real property). If a security agreement covers both real and personal property, the personal property may be foreclosed under the Uniform Commercial Code, or both the real and personal property may be foreclosed in accordance with the procedures applicable to the real property. Tex. Bus. & Com. Code § 9.604(a). Certain redemption rights apply to the foreclosure of a condominium unit for failure to pay assessments (*see* Tex. Prop. Code § 82.113(g)), to foreclosures by a property owners association (Tex. Prop. Code ch. 209), to tax foreclosures (Tex. Tax Code §§ 32.06, 34.21), and to foreclosures of property subject to a federal tax lien (26

U.S.C. § 7425(d)). See the section titled "Federal Tax Liens" above.

A trustee or substitute trustee conducting a sale of residential real property may contract with an attorney to administer or perform the trustee's or substitute trustee's functions, or with an auction company to arrange, manage, sponsor, or advertise a public sale. Tex. Bus. & Com. Code § 22.003.

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

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

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

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

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

See also the sections titled "Child Support Liens," "Coastal Properties," "Deficiency Litigation after Foreclosure," "Federal Lien Registration Act," and "Federal Tax Liens" above and "Hazardous Waste Liens" and "IRS Information Return (Foreclosures)" below.

§ 2.108 Foreclosure Limitations Concerning FDIC Interests

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

§ 2.109 Foreign Entities

Foreign entities are governed by the Texas Business Organizations Code.

§ 2.110 Foreign Ownership of Real Property

Numerous federal and state laws affect real estate conveyances involving foreigners. Tex. Prop. Code § 5.005 provides that aliens have the same real and personal property rights as United States citizens. Land owned by nonresident aliens or foreign governments may not be eligible under some circumstances for appraisal as open-space land or qualified timberland. Tex. Tax Code §§ 23.56, 23.77. The International Investment and Trade in Services Survey Act (22 U.S.C. §§ 3101–3108) and the Agricultural Foreign Investment Disclosure Act of 1978 (7 U.S.C. §§ 3501–3508) also affect these types of transactions. The Committee on Foreign Investment in the United States (CFIUS), formed in 1975, was given the power to review and block acquisitions of controlling interests in U.S. businesses by foreigners. CFIUS was amended by the Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA) to greatly expand CFIUS's jurisdiction. Among other things, FIRRMA gives CFIUS the power to review and block leases and acquisitions by foreigners of U.S. real estate located near air and maritime ports, military facilities, and other sensitive government properties. *See* FIRRMA, Pub. L. No. 115-232, 132 Stat. 1636 (2018). Statutes requiring financial institutions to keep records and reports on monetary transactions are at 31 U.S.C. §§ 5311–5332. Internal Revenue Service requirements for submitting returns, as applied to foreigners with "direct investments" in real property interests in the United States, are at 26 U.S.C. § 6039C. Anyone purchasing realty in the United States from a foreign individual or entity must, with few exceptions, withhold 10 percent of the sales price and report and pay it over to the IRS within twenty days of the date of transfer. *See* 26 U.S.C. § 1445; 26 C.F.R. §§ 1.1445–1 to –11T. A form of nonforeign affidavit addressing the requirements of section 1445 is included in chapter 26 of this manual.

See also the section titled "North American Free Trade Agreement (NAFTA)" below.

§ 2.111 Forfeiture Laws

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

§ 2.112 Franchising

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

§ 2.113 Fraudulent Filings

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

A person commits a criminal offense if he knowingly or intentionally signs and presents

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

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

§ 2.114 Fraudulent Representations and Promises

A person who makes a material false representation or false promise in a transaction involving real property is liable to the person defrauded for actual (and perhaps punitive) damages, attorney's fees, and court and other costs. Tex. Bus. & Com. Code § 27.01. A violation of section 27.01 that relates to the transfer of title to real estate is a false, misleading, or deceptive act or practice as defined by Tex. Bus. & Com. Code § 17.46(b), and any public remedy under Tex. Bus. & Com. Code ch. 17, subch. E, is available for a violation of that section.

§ 2.115 Fraudulent Transfers

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

§ 2.116 FTC Anti-Holder-in-Due-Course Rule

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

§ 2.117 Future Estates

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

§ 2.118 Gifts to Minors Act

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

§ 2.119 Good Faith and Fair Dealing

No statute or common law imposes a duty of good faith and fair dealing in contracts in Texas, *English v. Fischer*, 660 S.W.2d 521 (Tex. 1983), but contracts governed by the Uniform Commercial Code (UCC) must comply with the good-faith obligation of Tex. Bus. & Com. Code § 1.304. In addition, the obligation of good faith under the UCC cannot be disclaimed by agreement, but contracting parties can define the standards by which the performance of good faith is to be measured, as long as the standards are not manifestly unreasonable. Tex. Bus. & Com. Code § 1.302(b).

§ 2.120 Grantee's Address

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

§ 2.121 Group Homes

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

§ 2.122 Handguns

An individual may obtain a license to carry a handgun. Tex. Gov't Code ch. 411, subch. H. Handguns are prohibited as a matter of law for certain types of private and public properties, including schools (except for licensed holders at institutions of higher education), polling places, courts, government offices, racetracks, and secured areas of airports. Tex. Penal Code § 46.03. The statute does not affect the right of an employer to prohibit handguns on the premises of the business (Tex. Gov't Code § 411.203). Property owners associations are not allowed to include or enforce any policy that would prohibit or restrict any person who is otherwise authorized from lawfully possessing, transporting, or storing a firearm, any part of a firearm, or firearm ammunition, or prohibit or restrict the otherwise lawful discharge of a firearm. Tex. Prop. Code § 202.020. Signs indicating that handguns are prohibited on site are required for certain alcoholic beverage establishments, hospitals, and nursing homes. Tex. Gov't Code § 411.204. The signs required by this section must meet specific requirements of size, language, and location. Private property owners are allowed to prohibit the carrying of concealed or openly carried handguns on their property if they provide proper legal notice that entry on the property by a license holder with a concealed or openly carried handgun is forbidden. Notice may be given orally, in writing with a statutory warning, or by signage with the statutory warning in English and Spanish in block letters at least one inch in height displayed in a conspicuous manner clearly visible to the public. A person with a license to carry a handgun who enters a property with a firearm after receiving oral or written notice to leave or where the required signage is posted commits a criminal trespass. Exceptions and defenses to prosecution are contained in the statutes criminalizing the conduct. Tex. Penal Code §§ 30.06, 30.07.

§ 2.123 Handicapped Parking

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

§ 2.124 Hart-Scott-Rodino Antitrust Improvements Act

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

§ 2.125 Hazardous Waste Liens

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

§ 2.126 Historic Structures

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

§ 2.127 Home Equity Lending

The homestead may be used to secure "equity" loans, including equity loans with line-of-credit terms, reverse mortgages, and the conversion and refinancing of a personal property lien on a manufactured home. Tex. Const. art. XVI, § 50. Section 50(f) permits the refinancing of a home equity loan only with another equity loan, a reverse mortgage, or a new loan that satisfies the requirements of section 50(f)(2). Section 50(a)(6)(F) allows for a home equity line of credit with certain limitations. Equity loans may be made for any purpose and must meet a number of constitutional and statutory requirements. A lien that does not satisfy a definition under section 50 is not valid against the homestead, and there is no statute of limitations for bringing an action against a void lien. *Wood v. HSBC Bank USA, N.A.*, 505 S.W.3d 542 (Tex. 2016). Home equity documents for secondary mortgage loans are regulated by the Office of Consumer Credit Commissioner and must be in plain language. Tex. Fin. Code § 341.502. See also the section titled "Loan Documents" below.

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

§ 2.128 Home Improvement Contracts

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

§ 2.129 Home Mortgage Disclosure Act of 1975

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

§ 2.130 Home Solicitations

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

§ 2.131 Homesteads

Homestead rights are generally addressed in Tex. Prop. Code ch. 41, § 53.254, and Tex. Const. art. XVI, §§ 50, 51. A homestead can be encumbered only by a purchase-money lien, a lien for improvements (mechanic's lien contracts), equity loans, reverse mortgages, property taxes, owelty rights, the conversion and refinancing of a personal property lien on a manufactured home, and the refinance of a homestead lien, including a federal tax lien. The amount of land that may be claimed as homestead depends on whether it is urban or rural and, if rural, whether it is claimed by a family or a single person. *See* Tex. Prop. Code § 41.002. Absent unusual circumstances or a judicial declaration that one spouse is incapacitated, the consent of both spouses is required if a homestead is sold or encumbered, regardless of whether it is characterized as community or separate property. Tex. Fam. Code §§ 5.001–.102.

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

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

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

Federal laws may preempt these statutes.

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

§ 2.132 Hotel Occupancy Taxes

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

§ 2.133 House Trailers

See the section titled "Manufactured Housing" below.

§ 2.134 Impact Fees

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

§ 2.135 Implied Title Covenants

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

§ 2.136 Indemnity Agreements

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

§ 2.137 Innocent-Purchaser Defense

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

§ 2.138 Insurance Claims

A lender must either endorse an insurance claim payment concerning personal property or provide a written statement of the reason it refuses to endorse within fourteen business days after receiving a request for the endorsement. Tex. Ins. Code ch. 557. Tex. Ins. Code §§ 551.051–.056 address restrictions against cancellation and nonrenewal of commercial liability policies. Sellers of goods or services who reasonably expect to be paid wholly or partly from the proceeds of property insurance claims are prohibited from allowing or assisting the insured person's failure to pay the applicable insurance deductible. Tex. Bus. & Com. Code § 27.02. Insurers must provide disclosures on flood coverage to commercial and residential property insurance policyholders. Tex. Ins. Code § 2002.103. The Texas Windstorm Insurance Association (TWIA) has been extended until 2031 and Tex. Ins. Code § 2210.107(b), relating to a reporting requirement by TWIA to the Texas Department of Insurance, has been repealed.

§ 2.139 Interstate Land Sales Full Disclosure Act

The Interstate Land Sales Full Disclosure Act requires filings and disclosures in some circumstances if there are sales or leases of twenty-five

or more lots as part of a common promotional plan in interstate commerce or by use of the mail. *See* 15 U.S.C. §§ 1701–1720. Regulations promulgated under the Act can be found at 24 C.F.R. pts. 1710–1720.

§ 2.140 IRS Information Return (Foreclosures)

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

§ 2.141 Joint Tenancy with Right of Survivorship

A joint tenancy with the right of survivorship may be created by written agreement of property owners. Tex. Est. Code § 111.001. However, a joint tenancy between spouses concerning community property is governed by different statutory requirements. See the section titled "Community Property with Right of Survivorship" above. For both types of property on the death of any cotenant, the practitioner should determine if title companies will accept the result of the joint tenancy agreement or if court adjudication and confirmation of the result is necessary. Adjudication or confirmation of joint tenancy with right of survivorship in community property is discussed at Tex. Est. Code §§ 112.101–.106.

§ 2.142 Judgment Liens

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

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

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

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

§ 2.143 Landfills

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

§ 2.144 Landlord-Tenant Liens

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

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

§ 2.145 Landlord-Tenant Relationship

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

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

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

§ 2.146 Landowner Liability

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

§ 2.147 Landowner's Bill of Rights

The Landowner's Bill of Rights, prepared by the Office of the Attorney General of Texas, is a statement of the rights a real property owner has if condemnation of his real property is sought. The statement may be viewed at the Attorney General's website at **https://www2.texasattorneygeneral.gov/files/agency/landowners_billofrights.pdf**. The Texas Property Code requires a governmental or private entity with eminent domain authority to provide the Landowner's Bill of Rights statement to the property owner as part of the condemnation process. Tex. Prop. Code § 21.0112. See also the section titled "Condemnation and Eminent Domain" above.

§ 2.148 Landscape Architecture

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

§ 2.149 Lead-Based Paint Disclosures

In 1992, Congress adopted the Residential Lead-Based Paint Hazard Reduction Act, also known as Title X of the Housing and Community Development Act. The lead-based paint provisions are codified at 42 U.S.C. §§ 4851–4856 (the regulations are published in 40 C.F.R. pt. 745). Sellers and landlords must provide purchasers and tenants of residential properties constructed before 1978 with a "Lead Warning Statement," in the form provided in 42 U.S.C. § 4852d, in large type and on a separate sheet of paper from the contract. The required warning statements, prescribed in 40 C.F.R. § 745.113, are included in chapters 4 (for sales) and 25 (for leases) in this manual. The related state statute is found at Tex. Occ. Code ch. 1955. This law applies to all "child-occupied facilities," including day-care centers and preschool and kindergarten classrooms, occupied by the same child, six years of age or younger, for three hours or more, twice a week.

§ 2.150 Legal Incapacity

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

§ 2.151 Letters of Credit

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

§ 2.152 Libraries

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

§ 2.153 Life Tenants

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

§ 2.154 Limitations

An action to recover real property conveyed by an instrument containing certain technical defects must be brought within two years of the recordation of the instrument. Tex. Civ. Prac. & Rem. Code § 16.033(a). An action to foreclose a real property vendor's lien or deed-of-trust lien must be brought and a nonjudicial sale must be completed within four years after the cause of action accrues. Tex. Civ. Prac. & Rem. Code § 16.035. A suit to foreclose a mechanic's lien must be commenced within two years after the last day for filing the affidavit or one year after completion, termination, or abandonment of the work under the original contract, whichever is later. For a claim arising from a residential construction project, suit must be commenced within one year after the last day for filing the lien affidavit or within one year after completion, termination, or abandonment of the work under the original contract, whichever is later. Tex. Prop. Code § 53.158. A suit on a deficiency judgment after a real property foreclosure must be brought within two years of the foreclosure sale. Tex. Prop. Code § 51.003. A contractual limitations period shorter than two years is void, except in a contract relating to the sale or purchase of a business entity if the consideration involved is greater than $500,000. Tex. Civ. Prac. & Rem. Code § 16.070.

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

See also the section titled "Adverse Possession" above.

§ 2.155 Limited Liability Companies

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

§ 2.156 Limited Liability Partnerships

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

Foreign limited liability partnerships are governed by Tex. Bus. Orgs. Code § 152.901 and are subject to Tex. Bus. Orgs. Code § 2.101. Texas law does not define what constitutes "transacting business in Texas" for the purposes of the requirement of Tex. Bus. Orgs. Code § 152.905 that "[b]efore transacting business in this state, a foreign limited liability partnership must file an application for registration in accordance with this section and Chapters 4 and 9." Tex. Bus. Orgs. Code § 9.251, however, does contain a list of activities not constituting transacting business in Texas. *See also* Tex. Bus. Orgs. Code § 153.103. See the section titled "Foreign Entities" above.

§ 2.157 Liquidated Damages Clauses

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

§ 2.158 Lis Pendens

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

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

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

§ 2.159 Loan Documents

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

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

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

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

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

§ 2.160 Lockouts

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

§ 2.161 Lost or Found Property

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

§ 2.162 Low-Income Affordable Housing Tax Credits

See the section titled "Affordable Housing Investments" above.

§ 2.163 Manufactured Housing

The Texas Manufactured Housing Standards Act (TMHSA) regulates manufactured housing through the Texas Department of Housing and Community Affairs. Tex. Occ. Code ch. 1201. Title to manufactured homes, the perfection and release of manufactured housing liens, and the cancellation of manufactured housing titles are governed by the TMHSA. Both the TMHSA and the Texas Property Code address the question of when a manufactured home is personal property and when it is real property. Tex. Prop. Code § 2.001; Tex. Occ. Code §§ 1201.2055, 1201.2075, 1201.222. For a more extensive discussion of manufactured housing, see section 5.15:6 in this manual.

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

§ 2.164 Master Form Mortgage

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

§ 2.165 Mechanic's Liens

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

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

On public construction projects, a mechanic's lien cannot be established against public buildings, structures, or grounds, but subcontractors may have a lien on money, bonds, or warrants due the contractor for the improvements if the prime contract does not exceed $25,000 if with a governmental entity other than a municipality or joint board created under the Transportation Code or $50,000 if with a municipality or joint board. Tex. Prop. Code § 53.231. The McGregor Act, Tex. Gov't Code ch. 2253, establishes procedures for the protection of performance- and payment-bond beneficiaries who have a direct contractual relationship with the prime contractor or a subcontractor on a public construction project. The Miller Act, as amended by the Construction Industry Payment Act of 1999, pertains to bonding requirements for construction, alteration, or repair of federal works. 40 U.S.C. §§ 3131–3134.

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

§ 2.166 Military Installations

See the section titled "Outdoor Lighting" below.

§ 2.167 Military Personnel

The Servicemembers Civil Relief Act (formerly the Soldiers' and Sailors' Civil Relief Act) requires that, under some circumstances, enforcement of certain civil liabilities and legal proceedings, including foreclosures, be suspended while armed forces personnel are on active duty. 50 U.S.C. §§ 3901–4043. Delinquency dates for property taxes may also be extended. Tex. Tax Code § 31.02. Deferred delinquent tax that is not paid on or before the date the deferral period expires accrues interest and does not incur a penalty. Tex. Tax Code § 33.01(f).

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

Notices of special rights afforded servicemembers are required in suits to evict (Tex. Prop. Code § 24.0051(d)), in the sale of real property under a power of sale or other contractual lien (Tex. Prop. Code § 51.002(i)), and in the notice that must be provided before certain enforcement actions by property owners associations (Tex. Prop. Code § 209.006(b)). Leases that do not contain notice of a servicemember's right to terminate may lead to the release of liability for unpaid rent. Tex. Prop. Code § 92.017(g).

§ 2.168 Mineral Rights

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

§ 2.169 Mini-Storage Warehouses

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

§ 2.170 Minors

Minors do not have the legal capacity to enter into contracts. The age of majority is eighteen years. Tex. Civ. Prac. & Rem. Code §§ 129.001, 129.002. Marriage removes the disabilities of minority. Tex. Fam. Code § 1.104. Under certain circumstances, the disabilities can be judicially removed. Tex. Fam. Code ch. 31. Unless the disability is removed by marriage or by court decree, a guardian must be appointed under

terms of the Texas Estates Code to administer real property owned by the minor. Tex. Est. Code §§ 1001.001–.056. Under certain conditions, a parent may petition the court for an order to sell the minor's property instead of having a guardian appointed. Tex. Est. Code § 1351.001. A next friend may also manage property of a minor recovered in a lawsuit if the minor has no guardian. Tex. Prop. Code § 142.001. See also the sections titled "Legal Incapacity" above and "Uniform Transfers to Minors Act" below.

§ 2.171 Mobile Homes

See the section titled "Manufactured Housing" above.

§ 2.172 Mold Assessors and Remediators

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

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

§ 2.173 Money Laundering

See the section titled "Cash Proceeds" above.

§ 2.174 Mortgage Electronic Registration Systems (MERS)

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

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

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

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

§ 2.175 Mortgage Fraud

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

Lenders, mortgage bankers, and licensed mortgage brokers must provide all applicants for a home loan a written notice of penalties for making false or misleading written statements containing the promulgated language set out in section 343.105 of the Texas Finance Code, or substantially similar language, at the time of loan closing. See form 10-19 in this manual. The notice must be a separate document in at least a fourteen-point typeface. Borrowers must sign the notice and verify that all statements and representations contained in their written loan applications regarding their identity, employment, annual income, and intent to occupy the residential real property securing the home loan are true and correct as of the date of loan closing. The failure to provide the notice in compliance with the statute expressly does not affect the validity of the home loan or its enforceability by any holder.

§ 2.176 Mortgage Loan Originators

Use of the term *mortgage broker* has been discontinued for purposes of state licensing and registration of mortgage loan originators to conform to terminology established by the Texas Secure and Fair Enforcement for Mortgage Licensing Act of 2009. Tex. Fin. Code ch. 180. Companies engaged in or conducting the business of originating residential mortgage loans (mortgage companies) must be licensed under and comply with the Residential Mortgage Loan Company Licensing and Registration Act while individuals must be licensed under and comply with the Mortgage Banker Registration and Residential Mortgage Loan Originator License Act, administered by the Department of Savings and Mortgage Lending. Tex. Fin. Code chs. 156, 157. An applicant must designate an individual licensed as a residential mortgage loan originator under chapter 157 of the Texas Finance Code as the company's qualifying individual as required by sections 156.2041 through 156.2044 of the Texas Finance Code. A registered mortgage loan originator who does not hold certain listed licenses or a person licensed as a mortgage loan originator in another state may have the temporary authority to act as a mortgage loan originator for up to 120 days upon satisfaction of a number of requirements. Tex. Fin. Code § 180.0511; *see* Tex. Fin. Code § 180.051(a)(1).

An individual licensed under chapter 157 may not be licensed or act as a residential loan originator unless the individual enrolls in the Nationwide Mortgage Licensing System and Registry (or is sponsored by an appropriate entity), obtains a valid unique identifier under that system, and otherwise complies with the applicable requirements of chapter 180 of the Texas Finance Code and rules adopted thereunder by

the Texas Finance Commission to carry out the intent of the federal Secure and Fair Enforcement for Mortgage Licensing Act of 2008, 12 U.S.C. §§ 5101–5116.

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

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

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

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

§ 2.177 Municipal Utility Districts (MUDs)

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

§ 2.178 Naturally Occurring Radioactive Materials (NORM)

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

§ 2.179 Navigable Streams

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

§ 2.180 Nonprofit Corporations

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

§ 2.181 Non–Real Estate Taxes Affecting Real Estate

The purchaser of a business or stock of goods must withhold from the purchase price adequate funds to pay taxes that may be owed by the seller (for example, unpaid hotel, parking revenue, sales, and corporate franchise taxes of the seller) until the seller provides a receipt of payment from the comptroller. Tex. Tax Code § 111.020. See also the section titled "Hotel Occupancy Taxes" above.

§ 2.182 North American Free Trade Agreement (NAFTA)

Certain provisions of the North American Free Trade Agreement (NAFTA) may affect real property and finance transactions. The text of NAFTA is available on the NAFTA Secretariat's website at **https://www.nafta-sec-alena.org**. Article 1105 of NAFTA requires that each treaty party provide "fair and equitable treatment and full protection and security" to investments of investors from the other party countries. See also the North American Free Trade Agreement Implementation Act, Pub. L. No. 103-182, 107 Stat. 2057 (1993) (codified in scattered sections of U.S.C.). In September 2018, the United States, Mexico, and Canada reached an agreement to replace NAFTA with the United States–Mexico–Canada Agreement (USMCA). NAFTA will remain in force pending the ratification of the USMCA by all three governments. See also the section titled "Foreign Ownership of Real Property" above.

§ 2.183 Notarial Seals, Out-of-State

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

§ 2.184 Notaries Public

Notary qualifications and requirements are found in Tex. Gov't Code ch. 406. Notaries may not represent or imply that they are attorneys. Tex. Gov't Code § 406.017. The notary's book is public information and must be available for inspection at reasonable times. Tex. Gov't Code § 406.014(b). By administrative rule, however, notaries public may not record in the public record the identification number on the signer's identification card used. 1 Tex. Admin. Code § 87.40. Notaries may certify copies of documents not recordable in the public records and may take depositions. Tex. Gov't Code § 406.016. Notaries may authenticate a paper or tangible copy of an electronic record to enable recording. Tex. Prop. Code § 12.0013. The form of declaration of authenticity is set out in Tex. Prop. Code § 12.0013(e). Application of a printed seal by a notary public is not required on an electronically transmitted certificate of acknowledgment if the same information as contained in the seal is set forth. Tex. Civ. Prac. & Rem. Code § 121.004(d); Tex. Gov't Code § 406.013(d). See the section titled "Acknowledgments" above.

§ 2.185 Nuisance

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

§ 2.186 Open-Space Exemption

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

§ 2.187 Outdoor Lighting

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

Military Installations: Sections 240.032 and 240.0325 of the Texas Local Government Code authorize the commissioners court of a county with a population of more than one million that has at least five United States military bases and any county adjacent to that county that is within five miles of a United States Army installation, base, or camp, on request of the commanding officer, to adopt orders regulating the installation and use of outdoor lighting within five miles of the installation, base, or camp in unincorporated territory of the county. There are exceptions for installations in place before the effective date of the order for electric utilities, electric cooperatives, gas utilities, surface coal mining, telecommunications providers, and manufacturing facilities required by the Texas Commission on Environmental Quality to hold a permit and for tracts of land used as a single residence outside the boundaries of a private subdivision, tracts of land maintained for agricultural use, activity that takes place on a tract of land maintained for agricultural use, structures or related improvements located on a tract of land maintained for agricultural use, or a correctional facility operated by or under a contract with the Texas Department of Criminal Justice. Tex. Loc. Gov't Code §§ 240.032, 240.0325.

§ 2.188 Outdoor Signs

The Civil Practice and Remedies Code addresses the subject of trespass by outdoor signs in Tex. Civ. Prac. & Rem. Code §§ 80.001–.003. Municipalities are authorized to relocate, reconstruct, and remove signs under Tex. Loc. Gov't Code ch. 216. The owner of a sign may be entitled to be compensated for the costs associated with the relocation, reconstruction, or removal. Tex. Loc. Gov't Code § 216.003. However, a municipality cannot regulate a private landowner's right to put political signage on the landowner's property. Tex. Elec. Code § 259.003. The Texas Highway Commission regulates highway signs under Tex. Transp. Code chs. 391–395, while recognizing the authority of cities and counties to regulate highway signs in certain circumstances.

§ 2.189 Parking

A landlord who issues a parking permit to a residential tenant must issue the permit for a term that is coterminous with the tenant's lease term and may not terminate or suspend the permit until the date the tenant's right of possession ends. Tex. Prop. Code § 92.0132. A neighborhood may petition a county or municipality to post signs prohibiting the overnight parking of commercial vehicles by complying with Tex. Transp. Code § 545.307. See the section titled "Towing of Motor Vehicles" below.

§ 2.190 Parks and Recreational Projects

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

§ 2.191 Partition

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

§ 2.192 Partnerships

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

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

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

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

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

§ 2.193 Personal Property Leases

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

§ 2.194 Pest Control

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

§ 2.195 Pipeline Easements

See the section titled "Easements, Pipeline" above.

§ 2.196 Plats

See the section titled "Subdivisions" below.

§ 2.197 Powers of Attorney

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

§ 2.198 Private Mortgage Insurance Notice

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

§ 2.199 Private Property Rights

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

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

§ 2.200 Property Inspection

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

§ 2.201 Property Owners Associations

The Texas Residential Property Owners Protection Act applies to residential subdivisions that are subject to restrictions that authorize a property owners association to collect regular or special assessments and that require mandatory membership in the association. Tex. Prop. Code ch. 209. The Act also regulates the foreclosure of an assessment lien and provides a right of redemption after foreclosure. Tex. Prop. Code §§ 209.009–.011. In addition, the Property Code affords certain rights to property owners associations in cities or counties that meet various specified minimum population requirements to amend, extend, or supplement deed restrictions and to establish assessment lien mechanisms. Tex. Prop. Code chs. 201, 204–206. The statute also sets out certain other statutory powers of property owners associations. Property owners associations are subject to the state open meetings and open records laws in very limited circumstances. Tex. Gov't Code §§ 551.0015, 552.0036. Property owners associations are required to deliver a resale certificate to owners, purchasers of a property in a subdivision, or title companies on demand. The resale certificate must include information relevant to the specific property as well as to the subdivision as a whole. Tex. Prop. Code ch. 207. Property owners associations are prohibited from adopting or enforcing a restriction that would prohibit or regulate the occasional sale of lemonade or other nonalcoholic beverages by a person under the age of eighteen. Tex. Prop. Code § 202.020. Property owners associations are also not allowed to adopt or enforce a policy that would prohibit or restrict any person who is otherwise authorized from lawfully possessing, transporting, or storing a firearm, any part of a firearm, or firearm ammunition, or prohibit or restrict the otherwise lawful discharge of a firearm. Tex. Prop. Code

§ 202.020. (Note that the 86th legislature adopted two sections numbered as Tex. Prop. Code § 202.020.)

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

§ 2.202 Property Tax Consultants

Chapter 1152 of the Texas Occupations Code provides for the registration of property tax consultants. A property tax consultant is a person who performs or supervises the performance of property tax consulting services for compensation. Property tax consulting services means preparing for another person a rendition statement or property record, representing another person in a property tax protest, consulting or advising another person concerning the preparation of a rendition statement or property report or acting on behalf of another person in a protest under the Tax Code, negotiating or entering into an agreement with an appraisal district on behalf of another person, or acting as the agent of a property owner in connection with certain property tax matters. Tex. Occ. Code §§ 1152.001–.251.

§ 2.203 Property Tax Loans

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

§ 2.204 Racial Discrimination

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

§ 2.205 Real Estate Appraisers

See the section titled "Appraisers" above.

§ 2.206 Real Estate Investment Trusts (REITs)

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

§ 2.207 Real Estate License Act

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

§ 2.208 Real Estate Settlement Procedures Act (RESPA)

The Real Estate Settlement Procedures Act (RESPA), 12 U.S.C. §§ 2601–2617, and its implementing Regulation X, 12 C.F.R. pt. 1024, apply to mortgage loan transactions that are secured by a lien on residential real property designed principally for occupancy by one to

four families and that otherwise meet the definition of a "federally related mortgage loan" set out in 12 C.F.R. § 1024.2. Certain loans, such as business purpose loans and various construction loans with a term of less than two years, are exempt from coverage. 12 C.F.R. § 1024.5. The Bureau of Consumer Financial Protection (BCFP) has rulemaking and enforcement authority for RESPA and sets forth the requirements for the provision of clear and accurate disclosures to consumers. For most transactions subject to RESPA, The BCFP combined the disclosure requirements of RESPA and the Truth In Lending Act and its implementing Regulation Z into new forms (TILA-RESPA Integrated Disclosures or "TRID"). Under TRID, a loan estimate form must be provided at the time of application, and a closing disclosure form must be provided before and at consummation.

For home equity lines of credit or reverse mortgages, a good-faith estimate (GFE) must be provided at the time of application, and a HUD-1 settlement statement must be provided at consummation.

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

§ 2.209 Recording

The Property Code addresses the recording of instruments used in property transactions. *See* Tex. Prop. Code chs. 11–13. A document to be recorded may be either a paper document or a tangible copy of an electronic record that has been declared true and correct as provided in Tex. Prop. Code §§ 12.0011(b), 12.0013. A form of declaration of authenticity for recording an electronic record is provided in Tex. Prop. Code § 12.0013(e). The rerecording of instruments is permitted under the terms of Tex. Civ. Prac. & Rem. Code § 19.008 if the record was lost, destroyed, or removed and is effective from the date of original recordation. See also the section titled "Deeds" above.

§ 2.210 Record Retention

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

§ 2.211 Recreational Projects and Recreational Use

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

§ 2.212 Redemption Rights

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

erly issued by the United States may be recorded. Tex. Prop. Code § 12.011.

§ 2.213 Registered Mail

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

§ 2.214 Release of Lien by Affidavit

If a mortgagee holds a mortgage on one-to-four-family residential property, or on other real property where the original face amount of the debt is less than $1.5 million, and the mortgagee or its mortgage servicer fails to execute a release of the mortgage, an authorized officer of a title insurance company or a title insurance agent may execute and record an affidavit in a form substantially similar to the affidavit prescribed by Tex. Prop. Code § 12.017. An uncontroverted affidavit, executed and recorded as provided in the statute, operates as a release of the mortgage. Tex. Prop. Code § 12.017.

§ 2.215 Release of Lien by Attorney or Others

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

§ 2.216 Republic of Texas Liens

See the section titled "Fraudulent Filings" above.

§ 2.217 Residential Construction Liability

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

§ 2.218 Residential Rental Locators

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

§ 2.219 Restrictive Covenants

Any clause not in contravention of law may be inserted into an instrument of conveyance. Tex. Prop. Code § 5.022(c). Restrictive covenants that require the use of wood shingles for structures on residential properties or that are discriminatory on the basis of race, color, religion, or national origin are void. Tex. Prop. Code §§ 5.025, 5.026. Restrictive covenants that are at odds with certain water conservation initiatives are void. Tex. Prop. Code § 202.007. In an

action based on breach of a restrictive covenant, the prevailing party who asserted the action may recover attorney's fees in addition to the party's costs and claim. Tex. Prop. Code § 5.006.

The governing body of a municipality that does not have zoning ordinances or that has a population of 1.5 million or more may elect application of Tex. Loc. Gov't Code §§ 212.151–.157 ("Enforcement of Land Use Restrictions Contained in Plats and Other Instruments") for enforcement of restrictive covenants. The municipality may require any person who sells or conveys restricted property located within the municipality first to give the purchaser written notice of the restrictions and of the municipality's right to enforce them. Tex. Loc. Gov't Code § 212.155. A municipal utility district may enforce restrictive covenants. Tex. Water Code § 54.237.

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

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

§ 2.220 Reverse Mortgages

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

See the section titled "Home Equity Lending" above.

§ 2.221 Right of Rescission

In a credit transaction that involves a principal residence and that is subject to the Truth in Lending Act, the consumer may have a right to rescind the transaction within a certain period. The consumer must be notified of this right. 12 C.F.R. § 1026.23.

§ 2.222 Risk of Loss

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

§ 2.223 Roadway Forming County Boundary

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

§ 2.224 Rule against Perpetuities

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

§ 2.225 Sale of Trust Property to Governmental Entities

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

§ 2.226 Sculptures

See the section titled "Copyrights" above.

§ 2.227 Securities Acts

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

§ 2.228 Security Deposits

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

§ 2.229 Security Interests

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

§ 2.230 Self-Service Storage Facilities

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

§ 2.231 Seller's Disclosure of Property Condition

See the section titled "Disclosures and Notices" above.

§ 2.232 Sewer Service

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

Certain owners with property within a proposed service area will receive notice of new applications for certificates and amendments to existing certificate applications. Tex. Water Code § 13.246. Certain owners may "opt out" or exclude their property from the CCN application. Tex. Water Code § 13.246. Certain owners may petition the TCEQ for a release from a CCN if they can demonstrate that the certificate holder conditions the provision of service on the payment of costs not properly allocable directly to the petitioner's service request. Tex. Water Code § 13.254. Each certificate holder must record a map and a boundary description of the certificated area in the real property records of each applicable county. Tex. Water Code § 13.257.

§ 2.233 Sex Offenders

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

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

§ 2.234 Shopping Center Stores, Open on Sundays

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

§ 2.235 Smoke Alarms

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

§ 2.236 Soldiers' and Sailors' Civil Relief Act

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

§ 2.237 Special Districts

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

§ 2.238 State of Texas Leases

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

§ 2.239 Statute of Frauds

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

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

§ 2.240 Statute of Limitations

See the section titled "Limitations" above.

§ 2.241 Statutes of Repose

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

§ 2.242 Stormwater Permits

Construction sites of five acres or more must comply with the general stormwater permit requirements found in 57 Fed. Reg. 41,176–41,190 (1992). *See* 40 C.F.R. pt. 122. Construction sites of between one and five acres are addressed by the rules published in 64 Fed. Reg. 68,722 (1999). The general permits for industrial activities were published in 57 Fed. Reg. 41,236 (1992). A new multisector permit for industrial activities was published in 65 Fed. Reg. 64,746 (2000) as corrected in 66 Fed. Reg. 1675 and 16,233 (2001). Certain industrial and other uses may have other stormwater permit requirements under the National Pollutant Discharge Elimination System permit program under the Clean Water Act. Certain large metropolitan areas may implement stormwater permitting programs in compliance with the Clean Water Act. Tex. Loc. Gov't Code ch. 573. See the section titled "Environmental Laws" above.

§ 2.243 Streets and Roads

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

§ 2.244 Subdivisions

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

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

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

A subdivision plat, replat, or amended plat or replat may not be recorded unless (1) it is approved by the entity authorized to regulate subdivisions, (2) it has attached to it an original tax certificate from each taxing unit with jurisdiction over the tract indicating that no delinquent ad valorem taxes are owed on the tract, and (3) it has attached to it the documents required by Tex. Loc. Gov't Code § 212.0105 or Tex. Loc. Gov't Code § 232.023, if applicable. Tex. Prop. Code § 12.002. If the subdivision

plat, replat, or amended plat or replat is filed after September 1 of a year, the plat, replat, or amended plat or replat must also have attached to it a tax receipt from each taxing unit with jurisdiction over the tract indicating that taxes for the current year have been paid or a statement from the collector indicating that taxes for the current year have not been calculated. Tex. Prop. Code § 12.002(e). The tax collector is required, on request, to give the property owner or his agent a statement indicating that taxes for the current year have not been calculated. Tex. Tax Code § 31.075.

Note that tracts within the extraterritorial jurisdiction of a city may require approval from both the city and the county. *See* Tex. Loc. Gov't Code § 242.001. The cancellation and revision of certain subdivision plats are governed by Tex. Loc. Gov't Code §§ 212.013–.016, 232.008–.009. County-approved subdivision plats terminate on January 1 of the fifty-first year after the year approved if none of the platted land has been sold by that date. Tex. Loc. Gov't Code § 232.002(c).

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

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

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

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

§ 2.245 Subletting or Assignment

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

§ 2.246 Submetering

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

§ 2.247 Surety

Legal obligations between principals and sureties are governed by the provisions of Tex. Civ. Prac. & Rem. Code ch. 43. The Insurance Code governs construction payment bonds issued by surety companies. *See* Tex. Ins. Code §§ 3503.051–.057. Performance and payment bonds are governed by Tex. Gov't Code ch. 2253 and Tex. Prop. Code §§ 53.201–.239.

§ 2.248 Surveyors

Regulation and licensing of land surveyors are provided by the Board of Professional Engineers and Land Surveyors. Tex. Occ. Code ch. 1001. The Professional Land Surveying Practices Act is contained in Tex. Occ. Code ch. 1071. Regulations under the Act are in 22 Tex. Admin. Code chs. 661, 663, 664, 665.

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

§ 2.249 Survival of Representations and Warranties

The four-year statute of limitations applies to suits for misrepresentations and breaches of warranties. Tex. Civ. Prac. & Rem. Code § 16.004. Contracts that purport to limit the time in which to bring suit on the contract to less than two years are void. The provision does not apply to transactions relating to the sale or purchase of a business entity of more than $500,000. Tex. Civ. Prac. & Rem. Code § 16.070.

§ 2.250 Surviving Spouse of Mortgagor

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

§ 2.251 Swimming Pools and Spas

Pools in multifamily residential projects must have enclosures that comply with Tex. Health & Safety Code ch. 757. Municipalities also may adopt ordinances governing pool enclosures. Tex. Loc. Gov't Code § 214.101. Effective September 1, 2020, the International Swimming Pool and Spa Code, as it existed on May 1, 2019, has been adopted as a uniform code for use in municipalities in the state. The Code applies to all construction, alteration, remodeling, enlargement, and repair of swimming pools and spas in a municipality that elects to regulate pools or spas. A municipality may establish procedures for the adoption of local amendments to the Code. Tex. Loc. Gov't Code § 214.103.

§ 2.252 Taxes

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

§ 2.253 Telecommunications

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

§ 2.254 Terrorism Regulation

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

§ 2.255 Texas Department of Housing and Community Affairs

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

§ 2.256 Texas General Land Office

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

§ 2.257 Timber Production

See the section titled "Ad Valorem Taxes" above.

§ 2.258 Timeshares

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

§ 2.259 Title Insurance

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

§ 2.260 Towing of Motor Vehicles

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

§ 2.261 Trademark and Trade-Name Rights

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

§ 2.262 Transfer on Death Deed

The Texas Real Property Transfer on Death Act, Tex. Est. Code ch. 114, authorizes an individual to make a revocable transfer to one or more designated beneficiaries, including alternate beneficiaries, effective at the transferor's death, by executing and recording a transfer on death deed. During the transferor's lifetime, a transfer on death deed does not affect any right, title, or interest of the transferor in the property; vest any legal or equitable title in a designated beneficiary; or subject the property to the claims of creditors of any designated beneficiary. Notwithstanding the recording of a transfer on death deed, the transferor retains the right to transfer or encumber the property, any present or future homestead rights, and any present or future ad valorem tax exemptions to which the transferor is entitled. A transfer on death deed does not affect the rights of creditors of the transferor, secured or unsecured, nor does it trigger any due-on-sale clause. A transfer on death deed does not affect the eligibility for public assistance of either the transferor or any designated beneficiary. In the 86th legislative session, the statutory forms for the transfer on death deed

and the revocation of transfer on death deed were removed from chapter 114 of the Texas Estates Code. Acts 2019, 86th Leg., R.S., ch. 337, § 3.2 (S.B. 874), eff. Sept. 1, 2019. Tex. Gov't Code § 22.020 directs the Texas Supreme Court to promulgate forms for creating and revoking a transfer on death deed. The forms have yet to be promulgated. The Estates Code continues to authorize use of transfer on death deeds and revocation of transfer on death deeds but no longer prescribes statutory language. See section 5.11 in this manual.

§ 2.263 Transportation

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

§ 2.264 Trespass to Try Title

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

§ 2.265 Trust Code

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

§ 2.266 Truth in Lending

The Truth in Lending Act, 15 U.S.C. §§ 1601–1667f, and its implementing Regulation Z, 12 C.F.R. pt. 1026, promote the informed use of consumer credit by requiring disclosures about the terms and cost of credit transactions. The Act applies to individuals or businesses that regularly offer or extend credit to consumers, including mortgage credit secured by a lien on real property, if the credit is primarily for personal, family, or household purposes and is subject to a finance charge or payable by a written agreement in more than four installments. The Bureau of Consumer Financial Protection (BCFP) is the government agency with rulemaking and enforcement authority for the Act.

Creditors subject to the Act generally are persons who regularly extend consumer credit that is subject to a finance charge and to whom the credit obligation is initially payable. *See* 12 C.F.R. § 1026.2(a)(17). Creditors must make written disclosures for each credit transaction at the time of application, before consummation, and at consummation that reflect the terms of the actual legal obligation between the parties and show the calculated annual percentage rate, finance charge, and other material disclosures of the cost of credit within permitted tolerances for accuracy. Additional written disclosures are required at the time of application for variable rate transactions in which the annual percentage rate may increase after loan consummation. Certain credit transactions secured by a lien on a consumer's principal dwelling are subject to rescission, and creditors must provide consumers written notices of their rights of rescission of those transactions at consummation. Special disclosure rules and limitations on permitted terms

apply to certain home mortgage transactions secured by a consumer's principal dwelling in which the annual percentage rate or total points and fees charged the consumer exceed standards set out in the Act. Advertising rules intended to ensure that advertisements promoting credit provide accurate and balanced information about rates, payments, and other loan features apply to all home mortgage loans subject to the Act. Sample forms of various required consumer disclosures are illustrated in appendix H to Regulation Z. Creditors failing to comply with requirements of the Act may be subject to civil liability, administrative penalties, and, in the case of willful and knowing violations, criminal liability.

§ 2.267 Unauthorized Preparation of Real Estate Documents

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

§ 2.268 Unclaimed Property

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

§ 2.269 Underground and Aboveground Storage Tanks

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

§ 2.270 Underground Facility Damage Prevention and Safety Act

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

§ 2.271 Uniform Commercial Code

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

§ 2.272 Uniform Electronic Transactions Act

The Uniform Electronic Transactions Act, Tex. Bus. & Com. Code ch. 322, establishes the

enforceability of electronic records and signatures in electronic transactions.

§ 2.273 Uniform Principal and Income Act

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

§ 2.274 Uniform Transfers to Minors Act

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

§ 2.275 Uniform Unincorporated Nonprofit Association Act

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

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

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

§ 2.276 Uniform Vendor and Purchaser Risk Act

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

§ 2.277 Usury

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

§ 2.278 Utility District Disclosures

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

§ 2.279 Utility Submetering and Nonmetering

The Texas Water Code requires that multiunit facilities built after January 1, 2003, be submetered or individually metered and imposes certain requirements before conversion of an existing facility to submetering or allocated billing. Tex. Water Code §§ 13.502, 13.506. The Water Code also limits the right of certain con-

dominium managers and landlords of apartments, manufactured-home rental communities, and commercial multiple-use facilities to charge tenants for utility expenses without proper evidence to show how the utility expenses were calculated. These provisions also limit rent increases before the installation of submeters and provide tenants means of enforcement. Tex. Water Code §§ 13.501–.506.

Buildings with five or more dwelling units, including apartments and condominium units, constructed after 1997 must be separately metered or submetered for electricity. Tex. Util. Code § 184.012.

Utility disconnections by landlords are also limited under the provisions of Tex. Prop. Code § 92.008 (for residential tenancies) and Tex. Prop. Code § 93.002 (for commercial tenancies).

§ 2.280 Variable Interest Rates

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

§ 2.281 Vendor and Purchaser Risk Act

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

§ 2.282 Venue

Venue for "major transactions" (in which the consideration is more than $1 million) may be determined by the parties. Tex. Civ. Prac. & Rem. Code § 15.020. Venue for actions for the recovery of real property or an estate or interest in real property, for partition of real property, to remove encumbrances from the title to real property, for recovery of damages to real property, or to quiet title to real property is in the county in which all or a part of the property is located. Tex. Civ. Prac. & Rem. Code § 15.011. Venue for most suits between landlord and tenant is in the county in which all or part of the property is located. Tex. Civ. Prac. & Rem. Code § 15.0115. Venue for trust-related actions is governed by Tex. Prop. Code § 115.002. Venue provisions are addressed generally in chapter 15 of the Civil Practice and Remedies Code. The Property Code contains venue provisions for suits alleging a breach of fiduciary duty by a fiduciary or managerial agent of a charitable trust (Tex. Prop. Code § 123.005); actions to enforce rights or obligations under condominium association declarations, bylaws, or rules (Tex. Prop. Code § 82.008); condemnation proceedings (Tex. Prop. Code § 21.013); and partition actions (Tex. Prop. Code § 23.002).

§ 2.283 Vested Land Use Rights

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

and hearing procedures are required. Tex. Loc. Gov't Code §§ 212.131–.136. Certain types of regulations are exempt from the application of chapter 245. *See* Tex. Loc. Gov't Code § 245.004.

After annexing an area, a municipality may not prohibit a person from (1) continuing to use land in the area in the manner in which the land was being used on the date the annexation proceedings were instituted if the land use was legal at that time or (2) beginning to use land in the area in the manner that was planned for the land before the ninetieth day before the effective date of the annexation if certain conditions are met. Tex. Loc. Gov't Code § 43.002. These prohibitions also apply to municipalities incorporated after September 1, 2003. Tex. Loc. Gov't Code § 211.016. See also the section titled "Private Property Rights" above.

§ 2.284 Visual Arts

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

§ 2.285 Voluntary Cleanup Program

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

§ 2.286 Wage Liens

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

§ 2.287 Warehouseman's Liens

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

§ 2.288 Water

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

§ 2.289 Watercourse Forming County Boundary

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

§ 2.290 Water Service

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

§ 2.291 Water Wells

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

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

§ 2.292 Weeds

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

§ 2.293 Wetlands

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

§ 2.294 Wills and Estates

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

§ 2.295 Windstorm Inspection

Completed structures in coastal counties are required to comply with the state windstorm building specifications and inspection program to qualify for windstorm and hail insurance through the Texas Windstorm Insurance Association. This program is administered by the State Board of Insurance. See also the section titled "Building Codes" above.

§ 2.296 Wood Shingles

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

§ 2.297 Zoning

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

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

operations by a reasonably prudent operator are permitted. Tex. Nat. Res. Code § 81.0523.

§ 2.298 Additional Resources

Alcantara, Ramona Kantack, David H. Brock, Fred D. Cawyer, and Jack W. Hawthorne, III. "ADA Issues in Real Estate." In *Advanced Real Estate Law Course, 2017.* Austin: State Bar of Texas, 2017.

Alsup, J. Alton. "Preparation of Documents Affecting Title to Texas Real Property as the Unauthorized Practice of Law." In *Advanced Real Estate Law Course, 2008.* Austin: State Bar of Texas, 2008.

Anderson, Arthur J. "Government Takings: What the Government Can Do to Your Client." In *Advanced Real Estate Law Course, 2005.* Austin: State Bar of Texas, 2005.

———. "Zoning and Property Rights: When Does Zoning Become a Protected Property Interest?" In *Advanced Real Estate Law Course, 2001.* Austin: State Bar of Texas, 2001.

Barron, Paul, and Michael A. Berenson. *Federal Regulation of Real Estate and Mortgage Lending.* 4th ed. 3 vols. St. Paul, MN: West, 2004. Supplement 2016.

Craddock, Daniel K. "Construction Liens, Mechanics Liens, and Bonds: A Guide for Lenders and Developers." In *Mortgage Lending Institute, 2005.* Austin: University of Texas School of Law, 2005.

Dougherty, James L., Jr. "Overview of Local Land Use Regulation." In *Advanced Real Estate Strategies Course, 2008.* Austin: State Bar of Texas, 2008.

Haley, Steven C. "Texas Homestead Law." In *Advanced Real Estate Law Course, 2016.* Austin: State Bar of Texas, 2016.

Howell, Jay D., Jr., and David B. Brooks. *Property Taxes.* 4th ed. Texas Practice Series 21–21A. St. Paul, MN: West, 2001. Supplement 2016.

Jacobus, Charles J. *Texas Real Estate Law.* 11th ed. Cengage Learning, 2012.

Kurtz, Sheldon F., Herbert Hovenkamp, and Carol Necole Brown. *Cases and Materials on American Property Law.* 6th ed. American Casebook Series. St. Paul, MN: West 2012.

Leopold, Aloysius A. *Land Titles and Title Examination.* 3rd ed. Texas Practice Series 3–5A. St. Paul, MN: West, 2005. Supplement 2016.

———. *Marital Property and Homesteads.* Texas Practice Series 38–39. St. Paul, MN: West, 1993. Supplement 2016.

Lipstet, Ira A. "Texas Sales & Property Tax." In *Advanced Real Estate Law Course, 2007.* Austin: State Bar of Texas, 2007.

Malone, Linda A. *Environmental Regulation of Land Use.* St. Paul, MN: West, 2013. Supplement 2015.

McCarthy, Misty. "Rules and Regulations of Title XIV of the Dodd-Frank Act." In *Mortgage Lending Institute, 2013.* Austin: University of Texas School of Law, 2013.

Saegert, Jerry C. "Annotated Due Diligence Checklist with Sample Consultant Forms and Glossary of Terms." In *Advanced Real Estate Strategies Course, 2007.* Austin: State Bar of Texas, 2007.

Shelton, R. Walton. "Environmental Law 101." In *Advanced Real Estate Law Course, 2007.* Austin: State Bar of Texas, 2007.

Wolf, Michael Allan, ed. *Powell on Real Property.* Rev. ed. 17 vols. New York: Matthew Bender & Co., 2002. Supplemented.

Wren, Michael A. "Basics of Property Taxes for the Real Estate Lawyer." In *Real Estate Law 101, 2018*. Austin: State Bar of Texas, 2018.

[Reserved]

Chapter 3

Preparation, Execution, Proof, and Recording of Documents

Forms

[Reserved]

Chapter 3

Preparation, Execution, Proof, and Recording of Documents

Texas statutes require that a real property conveyance of an estate of more than one year must be in writing, subscribed, and delivered by the grantor or by the grantor's agent authorized in writing. Tex. Prop. Code § 5.021. The following comments and suggestions relate to the preparation of instruments and documents used in any conveyance of real property. The term *instrument* is used throughout this chapter in the dual contexts of its statutory definitions and references and also generically as other documents.

§ 3.1 Monetary Amount

No particular form is required for writing a monetary amount; it may be spelled out, written numerically, or both. Many attorneys prefer to write the amount in capital letters immediately followed by the numerical amount in parentheses—for example, ONE THOUSAND AND NO/100 DOLLARS ($1,000.00) or ONE THOUSAND, TWO HUNDRED FIFTY AND 10/100 DOLLARS ($1,250.10). If there is a variance between unambiguous written words and numbers, the written words control. *Guthrie v. National Homes Corp.*, 394 S.W.2d 494, 495 (Tex. 1965). *See also* Tex. Bus. & Com. Code § 3.114.

§ 3.2 Captions

Instruments have traditionally commenced with these captions, to indicate the county in which the instrument is to be recorded:

THE STATE OF TEXAS)
) KNOW ALL MEN BY THESE PRESENTS:
COUNTY OF _____) (OR INSTRUMENT HEADING)

These captions are not required in modern conveyancing documents and are omitted from the forms in this manual. Even though instruments no longer need a caption, certificates of acknowledgment, which are the written record of the acknowledgment ceremony made by the presiding officer and appended to many real estate instruments, require a caption showing where the acknowledgment ceremony occurred. Captions are therefore included in the certificate of acknowledgment forms contained in this manual. *See* Tex. Civ. Prac. & Rem. Code § 121.007.

§ 3.3 Dates in Instruments

When a transaction requires more than one instrument (such as a deed, a note, and a deed of trust, or a note and a mechanic's lien contract), all instruments should bear the same date. Conveyances can commence on a future date (Tex. Prop. Code § 5.041); thus, the effective date of an instrument can be different from the date of signing. Because instruments are adequately referred to by date, the expression "Executed this _____ day of _____" is unnecessary. Also, as a practical matter, all file copies should show the actual date of the original instrument to facilitate subsequent amendment of the instrument or reference to it in other instruments relating to the transaction. When the deed has been dated one date and acknowledged on another, absent evidence regarding the actual date of delivery of the deed, the presumption arises that delivery occurred on the date of the deed, not the date of the acknowledgment. *Bell v. Smith*, 532 S.W.2d 680, 685 (Tex. App.—Fort Worth 1976, no writ).

§ 3.4 Headings

Each instrument to be recorded should have a heading clearly identifying it at the top of the first page. Tex. Loc. Gov't Code § 191.007(c).

§ 3.5 Mailing Address of Grantee

The grantee's mailing address should be shown on instruments conveying an interest in real property, such as deeds, deeds of trust, assignments of leases, and transfers of liens. Preferably, the address should appear in the instrument; it may also be given in a separate, signed writing attached to the instrument. For failure to show the address, the county clerk may assess a penalty filing fee equal to the greater of $25 or twice the statutory recording fee. Tex. Prop. Code § 11.003.

Forms in this manual considered to be conveyances provide for the grantee's address. Some county clerks may require the grantee's address on other instruments as well.

§ 3.6 Preparer of Instrument

Although not required, including the preparer's name and address may be useful for the parties and the public generally. Additionally, any instrument being traditionally recorded by the original paper being physically presented to the county clerk's office should be labeled "Record and return to:" with the address of the designated recipient added. There is no need for that return instruction if the instrument is electronically filed in a county clerk's office with that capability.

§ 3.7 Property Description

§ 3.7:1 Specificity of Description

An accurate property description is essential to a valid conveyance. The property must be described with enough certainty that it can be readily identified from the description. The description should include the city, county, and state in which the property is located, and courses and distances in metes-and-bounds descriptions must be unambiguous. If a deed conveys only part of a tract of land and does not designate which part, for example, the description may be insufficient to convey title. *See De Martinez v. De Vidaurri*, 219 S.W.2d 823, 826 (Tex. App.—San Antonio 1949, writ ref'd n.r.e.). If the property has been depicted in a filed plat, the plat reference to the lot and block of the property should be used, along with the recording number of the plat.

§ 3.7:2 General Instructions

The property description can include references to other recorded instruments, such as other deeds, but to depend solely on this reference as the entire description poses the danger that it may not match the intended description exactly or that it may be inaccurate or invalid. Conversely, if the metes-and-bounds description of the property is defective, but reference is made to another recorded instrument that contains a proper legal description of the property, the conveyance will probably be enforceable. *Sorsby v. State*, 624 S.W.2d 227, 232 (Tex. App.—Houston [1st Dist.] 1981, no writ).

The property description should be identical in all instruments relating to the same transaction, such as a deed and a deed of trust.

If the description is too long to fit the space provided in the form, it may be attached to the instrument and incorporated in it by a simple statement in the space provided for the description. An example of typical language for this purpose is "Two hundred acres of the Travis tract, out of the Domingo Losoya Survey No. 4, Abstract No. 10, Sunshine County, Texas, more particularly described in Exhibit A attached to this deed and by this reference incorporated in it." This should be the identical language used as

the caption or "lead-in" on the description attached as an exhibit. In this case the attorney must make certain that the exhibit is actually attached and properly identified as the referenced exhibit.

The attorney should consider adding the phrase *more or less* to references to the quantity of property being conveyed. By doing this, the grantor may be relieved of liability arising from minor shortages. *See Wooten v. State*, 177 S.W.2d 56, 58 (Tex. 1944). This is the case whether the property has recently been surveyed or not, because there typically are minor variations between surveys concerning measurements and area computations.

If included in the body of the form, the description should be indented and set out in block form, to make it easily identifiable in the instrument.

§ 3.7:3 Description of Platted Property

Traditionally the lot, block, addition or subdivision numbers, and recording number of the plat designating the property are used for describing platted property. A typical description using lot, block, and addition numbers takes the form:

> Lot _____, Block _____, _____ Addition, [**city**], [**county**] County, Texas, according to the map or plat thereof recorded in Volume _____, Page _____, of the [Real Property Records/[**insert other words of similar import**]] of [**county**] County, Texas.

§ 3.7:4 Description by Metes and Bounds

Metes-and-bounds descriptions are the most common type used for property outside urban areas and for unplatted urban land. These descriptions have been a steady source of litigation. Metes-and-bounds descriptions, as well as other types of property descriptions, have been liberally construed by the courts. When obvious errors have occurred in a property description, courts will generally attempt to find and correct the error in order to give effect to the conveyance. *See Poitevent v. Scarborough*, 124 S.W. 87 (Tex. 1910). Calls of distance have been held to be the weakest, and calls of distance and quantity must yield to well-established corners. *Warren v. Swanzy*, 361 S.W.2d 479, 484 (Tex. App.—Beaumont 1962, writ ref'd n.r.e.). A missing call in a metes-and-bounds description may be supplied when the omitted call was the only logical one that would make the description close. *See Mansel v. Castles*, 55 S.W. 559 (Tex. 1900).

§ 3.7:5 Recording Reference

It is common to refer to recorded instruments in descriptions, subrogation clauses, releases, transfers, and the like. The reference consists of volume and page recording information or another particular numbering sequence of the appropriate county. From the earliest days, the particular records were named after the instruments themselves—that is, deed records, deed-of-trust records, mechanic's lien records, and so on—and the reference would be, for example: "recorded in Volume _____, Page _____, Deed of Trust Records of _____ County, Texas."

The Texas Local Government Code authorizes microfilming and electronic storage of public records by county clerks. *See* Tex. Loc. Gov't Code §§ 204.002, 205.002. Records are referred to by volume and page numbers in some counties, by film code numbers in other counties, and by county clerk file numbers or other means particular to specific microfilming or electronic storage systems in other counties. In counties employing microfilming, the clerk may consolidate the records (1) relating to real property and (2) relating to an individual, a business entity, or

a governmental agency other than a property record or court record into a single class known as "Official Public Records." See Tex. Loc. Gov't Code § 193.008.

An instrument recorded under the microfilm system may be referred to as: "recorded in Film Code No. _____ through _____ (or Volume _____, Page _____ or County Clerk File No. _____ or Instrument No. _____), Official Public Records of _____ County, Texas."

Section 11.007 of the Texas Property Code provides a uniform system of references to be used in every county whether a microfilm system is in effect or not. A reference in an instrument to the volume and page number, film code number, or county clerk file number of the "real property records" (or words of similar import) for a particular county is equivalent to a reference to deed records, deed-of-trust records, or other specific records to provide effective notice to all persons of the existence of the referenced instrument. Tex. Prop. Code § 11.007. Uniform references for all recorded instruments can be in the following manner: "recorded in Film Code No. _____ through _____ (or Volume _____, Page _____ or County Clerk File No. _____ or Instrument No. _____) of the Official Public Records of _____ County, Texas."

In various Texas counties there may be nonstatutory variations in indexing real property records, which the practitioner should identify before referring back to a previously recorded instrument in a new instrument.

§ 3.8 Signatures

§ 3.8:1 Beneath Signature Lines

If names are not legibly typed or printed under each signature, the county clerk may double the filing fee for every nonconforming page. Tex. Loc. Gov't Code § 191.007(e), (h). If there are no printed signature lines, they should be added below the text of the instrument, unless an instrument is promulgated by the Texas legislature and contains text below the proposed signature space. See, for example, the statutory durable power of attorney (Tex. Est. Code § 752.051) and the directive to physicians (Tex. Health & Safety Code § 166.032).

§ 3.8:2 Person with Physical Disability

If an individual who is physically unable to sign or to make a mark on an instrument presented for notarization so directs, a notary public may sign the individual's name, in the presence of a witness who has no legal or equitable interest in any property that is the subject of the document. The notary public must require identification of the witness in the same manner as from an acknowledging person under section 121.005 of the Texas Civil Practice and Remedies Code. The notary should then write the following beneath the signature: "Signature affixed by notary in the presence of (name of witness), a disinterested witness, under section 406.0165 of the Texas Government Code." Tex. Gov't Code § 406.0165(b).

§ 3.8:3 Signing with Mark

If the person signing cannot sign his or her name, but can only make a mark, an "X" should be marked in place of the signature, with the signatory's name typed beneath the mark, followed by ", his/her mark."

§ 3.8:4 Original Signatures for Paper Instruments

A paper instrument concerning real or personal property may not be recorded or serve as notice of the paper document unless the paper document contains an original signature or signatures that are acknowledged, sworn to with a proper jurat, or proved according to law. A paper document or instrument can instead be attached as an

exhibit to a paper affidavit or other instrument that has an original signature or signatures that are acknowledged, sworn to with a proper jurat, or proved according to law. An original signature is not required for an electronic instrument or other document that complies with chapter 15 of the Texas Property Code, chapter 195 of the Texas Local Government Code, chapter 43 of the Texas Business and Commerce Code, or other applicable law. A "paper document" means a document that is not electronically received by a county clerk. *See* Tex. Prop. Code § 12.0011.

§ 3.9 Names

The parties' names in the text of an instrument should be followed by their status—for example, "John J. Doe and Jane R. Doe, spouses." Use an individual's middle name or middle initial to help avoid confusion with other individuals with similar names. For a married woman or widow, a name such as "Mrs. John Doe" should never be used.

Ordinarily, titles showing a person's rank or profession, such as "Captain John J. Doe" or "John J. Doe, M.D.," should not be used unless they are part of the legal name. Use the labels "Sr." and "Jr." in appropriate instances to distinguish between the ancestor and the legally named "Jr."

Whenever possible, to maintain uniformity of names in the chain of title, all legal instruments to be filed should use precisely the same name for an individual as that used in instruments already recorded, or, if a name is incorrect, the correct name should be used and the correction should be explained in a note following the name. If the party's legal name changes between conveyances, the change should be explained in a note following the name. For example, if title has been conveyed to Helen J. Doe, a single woman, and she later conveys title as Helen D. Jones, the fact that she was formerly known as Helen J. Doe or was conveyed title as Helen J. Doe should be noted.

If the property being conveyed or encumbered is homestead property, the record title holder's spouse is required to join in any conveyance or encumbrance. *See* Tex. Fam. Code § 5.001.

If the grantor or grantee is a legal entity rather than a person, it should be specifically identified by type of entity and state of formation.

A description usually follows the name of a financial institution but may be unnecessary if the name adequately describes the institution—for example, "First National Bank of Sunshine," "Sunshine Federal Credit Union," or "Sunshine Federal Land Bank Association."

A deed by a corporation, if signed by an officer when recorded, constitutes prima facie evidence that execution was authorized by appropriate resolution of the board of directors; if the deed is executed by anyone other than an officer, it should be accompanied with a certified copy of the board of directors' resolution. Before August 28, 1989, the deed had to be executed by the president or a vice-president to constitute that prima facie evidence. Filing a certified copy of the appropriate resolution provides an additional safeguard to establish the validity of the corporate conveyance. Neither a corporate seal nor attestation by the corporate secretary is required in Texas, unless required by the bylaws of the corporation.

§ 3.10 Acknowledgments

§ 3.10:1 Necessity for Acknowledgment

Instruments may be recorded only if they have been acknowledged, proved, or sworn to according to law. *See* Tex. Prop. Code §§ 11.004(a)(1), 12.001, 12.0011. County clerks may record an instrument only if it contains original signatures

that are duly acknowledged, sworn to with a proper jurat, or otherwise proved in compliance with applicable law. The recordation of an instrument not duly acknowledged, otherwise proved, or sworn is a nullity and is not constructive notice of its contents. *See, e.g., Sanchez v. Telles*, 960 S.W.2d 762, 767 (Tex. App.—El Paso 1997, writ denied); *Reserve Petroleum Co. v. Hutcheson*, 254 S.W.2d 802, 806 (Tex. App.—Amarillo, 1952, writ ref'd n.r.e.).

Instruments may be acknowledged by an online notary public who has been authorized by the Texas secretary of state to perform online notarizations. *See* Tex. Gov't Code ch. 406, subch. C.

An instrument filed after September 1, 2007, containing a defective acknowledgment is considered lawfully recorded and is constructive notice of its contents after it has been of record for two years. Tex. Civ. Prac. & Rem. Code § 16.033(c).

Generally, the absence of an acknowledgment will not affect the validity of a deed, mortgage, or conveyance between the parties or affect the instrument as a conveyance. *See, e.g., Haile v. Holtzclaw*, 414 S.W.2d 916, 928 (Tex. 1967). However, by statute, certain instruments must include an acknowledgment. These include subdivision plats, powers of attorney, extensions of real estate lien debt, and management certificates by property owners associations. *See* Tex. Loc. Gov't Code § 212.004(c); Tex. Est. Code § 751.002; Tex. Civ. Prac. & Rem. Code § 16.036; Tex. Prop. Code § 209.004. Failure of the acknowledgment may render the instrument a nullity, even between the parties to the instrument.

§ 3.10:2 Distinguishing Acknowledgment and Certificate of Acknowledgment

Though used interchangeably, the terms *acknowledgment* and *certificate of acknowledgment* refer to two different concepts. An acknowledgment is the statutory ceremony in which a person who has executed an instrument appears before a competent officer and declares the instrument to be that person's act and deed. A certificate of acknowledgment is the written record of that proceeding made by the officer and appended to the instrument. To effect a valid acknowledgment, there must be both a valid ceremony of acknowledgment and a valid certificate of acknowledgment. *See* Tex. Civ. Prac. & Rem. Code § 121.004; *Punchard v. Masterson*, 101 S.W. 204 (Tex. 1907).

§ 3.10:3 Short-Form Certificate of Acknowledgment

Many practitioners prefer to use the short-form certificate of acknowledgment when the acknowledgment is taken in Texas and if the acknowledger is within one of the six categories of persons or entities specified by statute. Those categories are—

1. natural persons;
2. natural persons acting by attorneys-in-fact;
3. partnerships;
4. corporations;
5. public officers, trustees, executors, administrators, guardians, or other representative signers; and
6. limited liability companies.

Tex. Civ. Prac. & Rem. Code § 121.008.

§ 3.10:4 Ordinary (Long-Form) Certificate of Acknowledgment

The ordinary, or long-form, certificate should be used if instruments are to be executed outside Texas or in instances in which the acknowledger does not fall within one of the six categories for which short-form certificates may be used. Some practitioners have adapted various short-form certificates for use in Texas that do not fit the literal definition of the Texas Civil Practice and Remedies Code. *See* Tex. Civ. Prac. & Rem. Code § 121.008. The practitioner should use the long-form certificate in all instances in which the acknowledger is not within one of the classes specified by the statute.

§ 3.10:5 Electronic Certificate of Acknowledgment

The electronic notarial certificate should be used if the instrument acknowledgment is taken by an online notary public in accordance with Tex. Gov't Code ch. 406, subch. C.

§ 3.11 Requirements of Valid Ceremony of Acknowledgment

A valid ceremony of acknowledgment requires—

1. a competent officer to take the acknowledgment (*see* Tex. Civ. Prac. & Rem. Code § 121.001);
2. a personal appearance by the acknowledger before the officer (*see* Tex. Civ. Prac. & Rem. Code § 121.004(a));
3. the identification of the acknowledger by the officer (*see* Tex. Civ. Prac. & Rem. Code § 121.005); and
4. a statement by the acknowledger that the acknowledger has executed the instrument for the purposes and consideration stated in the instrument (*see* Tex. Civ. Prac. & Rem. Code § 121.004(a)).

There are additional requirements for electronic notarial certificates (*see* Tex. Gov't Code ch. 406, subch. C).

§ 3.11:1 Competent Officer to Take Acknowledgment

Acknowledgments Taken within Texas: Acknowledgments taken in Texas may be made before—

1. a notary public;
2. a clerk of a district court (or deputy district clerk);
3. a judge of a county court;
4. a clerk of a county court (or deputy county clerk);
5. a federal judge, justice, or magistrate; or
6. certain other public officers for specific statutory instruments.

28 U.S.C. §§ 459, 636(a)(2); Tex. Civ. Prac. & Rem. Code § 121.001(a).

Acknowledgments Taken outside Texas but inside United States or Its Territories: Acknowledgments taken outside Texas but inside the United States or its territories may be made before—

1. a notary public;
2. a clerk of a court of record having a seal;
3. a commissioner of deeds appointed under the laws of Texas; or
4. a federal judge, justice, or magistrate.

28 U.S.C. §§ 459, 636(a)(2); Tex. Civ. Prac. & Rem. Code § 121.001(b).

Acknowledgments Taken outside United States or Its Territories: Acknowledgments taken outside the United States or its territories may be made before—

1. a minister, commissioner, or chargé d'affaires of the United States who is a resident of and is accredited in the country in which the acknowledgment is taken;
2. a consul general, consul, vice-consul, commercial agent, vice-commercial agent, deputy consul, or consular agent of the United States who is a resident of the country in which the acknowledgment is taken; or
3. a notary public or other official authorized to administer oaths in the jurisdiction in which the acknowledgment or proof by affidavit is taken.

Tex. Civ. Prac. & Rem. Code § 121.001(c).

The preferred method of taking an acknowledgment outside the United States is to use a U.S. foreign service officer authorized in item 1 or 2 above. A form for acknowledgment by a foreign service officer of the United States is included as form 3-32 in this chapter.

If an acknowledgment is taken before a foreign notary public or any other official authorized to administer oaths in the jurisdiction in which the acknowledgment is taken as authorized in Texas Civil Practice and Remedies Code section 121.001(c)(3), it is advisable for the attorney to comply with the Hague Convention on Legalization of Foreign Public Documents, if the instrument is executed in a country that has adopted the Hague Convention, and to seek certification and authentication of the document through an embassy or consular office for a country that has not adopted it. For additional information, see **https://www.hcch.net**, **https://travel.state.gov**, and, more specifically, **https://travel.state.gov/content/travel/en/legal-considerations/judicial/authentication-of-documents.html**.

Acknowledgments Taken of Military Personnel and Their Spouses: A commissioned officer of the United States Armed Forces or of a United States Armed Forces auxiliary may take an acknowledgment of a written instrument of a member of the armed forces, a member of an armed forces auxiliary, or a member's spouse. Tex. Civ. Prac. & Rem. Code § 121.001(d). A form for a military acknowledgment is included as form 3-33.

Territorial Limitations on Officer's Authority: Texas notaries may take an acknowledgment anywhere in the state but not outside the boundaries of Texas. Tex. Gov't Code § 406.003.

Time Limitations on Officer's Authority: The term of a notary's appointment is four years. Tex. Gov't Code § 406.002. Reapplication may be made for successive terms. Tex. Gov't Code § 406.011. Texas law requires that the expiration date of the notary's commission appear as part of the notary's seal. *See* Tex. Gov't Code § 406.013(a).

The authority of other intrastate officers is limited to the terms of their offices.

Interested Officers Disqualified to Take Acknowledgment: A party to an instrument may not take an acknowledgment for that instrument because one who is financially or beneficially interested in a transaction is disqualified from taking an acknowledgment concerning the transaction. *Dyson Descendant Corp. v. Sonat Exploration Co.*, 861 S.W.2d 942, 948 (Tex. App.—Houston [1st Dist.] 1993, no writ).

A beneficiary or trustee of a trust may not take an acknowledgment of an instrument to which the trust is a party. Nor may a trustee of a deed of trust take an acknowledgment for that instru-

ment. *See Rothschild v. Dougher*, 20 S.W. 142 (Tex. 1892).

Generally, an agent of a party to an instrument is also disqualified to take an acknowledgment if that agency appears on the face of the instrument. To be disqualified, however, the agent must have discretionary authority to negotiate the terms of a particular transaction for the principal. *See Sample v. Irwin*, 45 Tex. 567 (1876); *Uvalde Rock Asphalt Co. v. Warren*, 59 S.W.2d 272 (Tex. App.—Galveston 1933), *aff'd*, 91 S.W.2d 321 (Tex. 1936). But if the agent is a mere salaried employee of a party to an instrument, the agent is not disqualified from taking an acknowledgment of that instrument. *Director, Dallas County Child Welfare v. Thompson*, 667 S.W.2d 282 (Tex. App.—Dallas 1984, no writ); *Anderson v. Pioneer Building & Loan Ass'n*, 163 S.W.2d 421, 425 (Tex. App.—Waco 1942, writ ref'd w.o.m.).

An officer or director of a corporation may not take an acknowledgment of an instrument to which the corporation is a party. A shareholder of a corporation is likewise disqualified if the corporation has one thousand or fewer stockholders and the officer taking the acknowledgment owns more than one-tenth of one percent of the issued and outstanding stock. Tex. Civ. Prac. & Rem. Code § 121.002(b).

Generally, an acknowledgment taken by an interested officer is void and may not be reformed or corrected. However, effect will be given to such an acknowledgment to protect an innocent purchaser who relies on the instrument as constructive notice and having no knowledge of the disqualifying interest of the officer. To render an acknowledgment ineffective by reason of a disqualifying interest of the notary, the officer's financial or beneficial interest must appear on the face of the instrument or be otherwise known to the party relying on the instrument. Constructive notice of the disqualifying interest may come from a prior recorded instrument. *See, e.g., Gulf Production Co. v. Continental Oil Co.*, 164 S.W.2d 488, 493–94 (Tex. 1942); *Dyson Descendant Corp.*, 861 S.W.2d at 948.

§ 3.11:2 Personal Appearance before Officer

An acknowledgment is invalid unless the acknowledger personally appears before the competent officer. Tex. Civ. Prac. & Rem. Code § 121.004(a). An acknowledgment taken over the telephone or otherwise made without personal contact with the acknowledger fails to satisfy the statutory requirements of an acknowledgment ceremony.

The acknowledger's appearance before the officer may be online. *See* Tex. Gov't Code § 406.110(a).

§ 3.11:3 Acknowledger Must Be Identified by Officer

An officer may not take an acknowledgment unless the officer knows the acknowledger or has satisfactory evidence that the acknowledging person is the same person who executed the instrument. Tex. Civ. Prac. & Rem. Code § 121.005(a).

The law does not prescribe the extent of acquaintance necessary for the acknowledger to be known to the officer. The acquaintance may be of one year or one hour. However, mere introduction by another may be insufficient for the acknowledger to be known to the officer.

Satisfactory evidence of the identity of an acknowledger not known to the officer may be made only by the oath of a credible witness personally known to the officer, by a current identification card or other document issued by the federal government or any state government that contains the photograph and signature of the acknowledging person, or, in the case of a deed or other instrument relating to a residential real

estate transaction, by a current passport issued by a foreign country. Tex. Civ. Prac. & Rem. Code § 121.005(a). The most common examples seen are driver's licenses and passports. However, the form provided in Texas Civil Practice and Remedies Code section 121.010 provides for identification only by personal knowledge or oath of a witness.

There are specific identity verification requirements in the instance of online notarizations. *See* Tex. Gov't Code § 406.110(b).

§ 3.11:4 Acknowledger Must Acknowledge Signature before Officer

An officer may not take a valid acknowledgment by simply sitting in mute observation of a person signing the instrument. To effect a valid ceremony of acknowledgment, the acknowledger must state to the officer that the acknowledger executed the instrument in the capacity and for the purposes and consideration stated in the instrument. The officer should treat the acknowledgment as a scripted ceremony and obtain from the acknowledger, as applicable, the following declarations.

1. Individual Acknowledgment. A natural person must acknowledge to the officer that the acknowledger executed the instrument for the purposes and consideration expressed in the instrument.

2. Attorney-in-Fact. An acknowledger executing an instrument as attorney-in-fact for a principal must acknowledge that the acknowledger executed the instrument as the act of the principal for the purposes and consideration expressed in the instrument.

3. Partnership. An acknowledger executing a document on behalf of a partnership must acknowledge that the acknowledger executed the instrument as the act of the partnership for the purposes and consideration expressed in the instrument.

4. Corporate Acknowledgment. A corporate officer or agent must acknowledge that the acknowledger executed the instrument in the capacity stated, as the act of the corporation, for the purposes and consideration expressed in the instrument.

5. Public Officer, Trustee, Executor or Administrator of an Estate, Guardian, or Other Representative Signer. An acknowledger executing a document as a public officer, trustee, executor or administrator of an estate, or guardian or in another representative capacity must acknowledge that the acknowledger executed the instrument by proper authority in the capacity stated and for the purposes and consideration expressed in the instrument.

6. Limited Liability Company Acknowledgment. A member, manager, authorized officer, or agent must acknowledge that the acknowledger executed the instrument in the capacity stated, as the act of the limited liability company, for the purposes and consideration expressed in the instrument.

Tex. Civ. Prac. & Rem. Code § 121.006(b).

§ 3.11:5 Online Notarization

There are now "notaries public" (Tex. Gov't Code ch. 406, subch. A) and "online notaries public" (Tex. Gov't Code ch. 406, subch. C). An online notary public is an officer commissioned as a traditional notary public who is also commissioned and authorized to perform online notarizations by using two-way video and audio conference technology in accordance with sub-

chapter C, chapter 406, of the Texas Government Code. To become an online notary public, a notary public must complete a separate electronic application, provide an e-mail address, and further certify that he or she will comply with the standards developed by the Texas secretary of state for online notaries. Tex. Gov't Code § 406.105.

Online Notarization Procedures: A Texas online notary public may perform an online notarization while physically located within the boundaries of Texas at the time of notarization. However, the signing party (or principal) may be located anywhere. Tex. Gov't Code § 406.110(a). Using two-way video and audio conference technology that meets the requirements of subchapter C, chapter 406, of the Texas Government Code, the online notary public shall verify the identity of the principal creating an electronic signature at the time the signature is taken. Tex. Gov't Code § 406.110(b).

In performing an online notarization, an online notary public affixes an electronic signature and electronic seal to an electronic notarial certificate that is capable of independent verification and renders any subsequent modifications evident. Tex. Gov't Code § 406.109(d). The electronic notarial certificate for an online notarization must include a notation that the notarization is an online notarization. Tex. Gov't Code § 406.110(d). Other requirements for the electronic notarial certificate are contained in Tex. Gov't Code § 406.101(4). An online notary public shall take reasonable steps to ensure that any registered device used to create an electronic signature is current and has not been revoked or terminated by the device's issuing or registering authority. Tex. Gov't Code § 406.109(a). In addition, an online notary public's electronic signature may be used only for performing online notarizations. If performing a notarization for a paper document with a signer who is physically present, the notary public would sign the notarial certificate in the traditional manner. Tex. Gov't Code § 406.109(c).

Fees: The online notary public may charge the same fees as a traditional notary authorized by Tex. Gov't Code § 406.024, and may charge an additional fee not to exceed $25 for performing an online notarization. Tex. Gov't Code § 406.111. The fee must be included in the electronic record for each online notarization. Tex. Gov't Code § 406.108(a).

Recordkeeping and Public Information: Texas also requires an online notary public to maintain a secure electronic record of electronic documents notarized by the officer. An online notary public shall record:

1. the date and time of each notarization;
2. the type of notarial act;
3. the type, the title, or a description of the electronic document or proceeding;
4. the printed name and address of each principal involved in the transaction or proceeding;
5. the evidence of identity of each principal involved in the transaction or proceeding in the form of:
    a. a statement that the person is personally known to the online notary public;
    b. a notation of the type of identification document provided to the online notary public;
    c. a record of the identity verification made under Tex. Gov't Code § 406.110, if applicable; or
    d. the following:
        i. the printed name and address of each credible witness swearing to or affirming the person's

identity; and

ii. for each credible witness not personally known to the online notary public, a description of the type of identification documents provided to the online notary public;

6. a recording of any video and audio conference that is the basis for satisfactory evidence of identity and a notation of the type of identification presented as evidence; and

7. the fee, if any, charged for the notarization.

Tex. Gov't Code § 406.108(a). As an additional requirement, an online notary shall take reasonable steps to maintain a backup for the required electronic record and protect the backup record from unauthorized use. Tex. Gov't Code § 406.108(b). The required electronic record shall be maintained for at least five years after the date of the transaction or proceeding. Tex. Gov't Code § 406.108(c). Finally, entries in the online notary's records are public information. An online notary public shall, on payment of all fees, provide a certified copy of any record in the notary public's records to any person requesting the copy. An online notary public shall keep the online notary public's electronic record, electronic signature, and electronic seal secure and under the online notary's exclusive control at all times. Tex. Gov't Code § 406.109(b).

§ 3.12 Requirements for Valid Certificate of Acknowledgment

A valid certificate of acknowledgment must—

1. be in English;

2. contain a caption showing where the acknowledgment was taken;

3. recite the official capacity of the officer taking the acknowledgment;

4. recite a personal appearance before the officer;

5. recite that the acknowledger was identified by the officer;

6. recite that the acknowledger acknowledged the instrument;

7. identify the acknowledger;

8. recite the date of the acknowledgment;

9. bear the signature of the officer; and

10. bear the official seal of the officer.

See sections 3.12:1 through 3.12:11 below for more detailed information. Online notarizations are controlled by subchapter C, chapter 406 of the Texas Government Code. See section 3.11:5 above.

The legislature has prescribed statutory forms for an ordinary (long-form) certificate of acknowledgment and for certain short-form certificates of acknowledgment. *See* Tex. Civ. Prac. & Rem. Code §§ 121.007, 121.008. The short-form certificates of acknowledgment are preferred for acknowledgments taken within Texas. Short-form certificates of acknowledgment should not be used for acknowledgments taken outside the state of Texas. This chapter includes examples of both ordinary and short-form certificates of acknowledgment. Short-form certificates of acknowledgment are shown in this chapter for acknowledgers falling within the classes identified in Texas Civil Practice and Remedies Code section 121.008.

Ordinary (long-form) certificates of acknowledgment are shown in this chapter for all acknowledgers, and a separate form is included as form 3-29 in this chapter. Electronic certificates of acknowledgment that meet minimum statutory requirements for use in online notarizations are included as forms 3-30 and 3-31.

Short-form certificates of acknowledgment do not require that the certificate state how the officer identified the acknowledger. In all other respects, short-form certificates of acknowledgment must contain all essential elements of a certificate of acknowledgment. For an ordinary, or long-form, certificate, it is necessary that the officer state in the certificate either that the officer personally knows the acknowledger or that evidence of a witness or an identification card or other document was used to identify the acknowledger. Tex. Civ. Prac. & Rem. Code § 121.005(b).

There are statutory requirements for the ordinary, or long-form, certificate of acknowledgment, and there are different statutory requirements for the short-form certificate of acknowledgment; in either case, substantial compliance with the statutory forms is all that is required. Literal compliance is not essential as long as, on balance, the certificate shows that substantially all things required by law to be done have been done. *See Williams v. Cruse*, 130 S.W.2d 908 (Tex. App.—Beaumont 1939, writ ref'd) (construing an ordinary certificate of acknowledgment).

§ 3.12:1 Certificate Must Be in English

The certificate of acknowledgment and the remainder of the instrument may not be recorded unless they are in English or comply with Tex. Prop. Code § 11.002. For those illiterate in English, no special form of certificate of acknowledgment is specified. However, prudence may dictate that an affidavit of interpreter be executed and attached to the instrument. An affidavit of interpreter is included as form 3-38 in this chapter.

An instrument acknowledged outside the United States or its territories in accordance with Texas Civil Practice and Remedies Code section 121.001(c)(3) that contains a certificate, stamp, or seal of a notary public or other official before whom the acknowledgment was taken or an apostille relating to the acknowledgment, any portion of which is not in English, may be recorded and operate as constructive notice from the date of filing if—

1. a correct English translation of any non-English portion of the certificate, stamp, seal, or apostille is recorded with the original instrument;
2. the accuracy of the translation is sworn to before an officer authorized to administer oaths; and
3. any apostille relating to the acknowledgment complies with the Hague Convention dated October 5, 1961, entitled "Convention Abolishing the Requirement of Legalisation for Foreign Public Documents," a copy of which can be obtained online at **https://www.hcch.net/**.

Tex. Prop. Code § 11.002(c).

§ 3.12:2 Certificate Must Identify Location of Acknowledgment

Each separate certificate of acknowledgment must bear a caption or other indication of where the acknowledgment was taken so that it can be determined that the officer taking the acknowledgment acted within the scope of the officer's geographic authority. Each separate certificate of acknowledgment must contain its own caption. *See* Tex. Civ. Prac. & Rem. Code §§ 121.007, 121.008.

§ 3.12:3 Certificate Must Recite Capacity of Officer

It is not enough that the officer taking the acknowledgment take it correctly within the officer's official capacity. The certificate of acknowledgment must recite the official capacity of the officer on the instrument. *See Gulf,*

Colorado & Santa Fe Railway Co. v. Carter, 24 S.W. 1083 (Tex. App.—Dallas 1893, no writ).

§ 3.12:4 Certificate Must Recite Personal Appearance by Acknowledger before Officer

The certificate of acknowledgment must state that the acknowledger made a personal appearance before the officer. Statutory short forms for certificates of acknowledgment accomplish this by stating that the acknowledgment was taken "before me." *See* Tex. Civ. Prac. & Rem. Code §§ 121.006–.008.

§ 3.12:5 Certificate Must Recite That Acknowledger Was Identified by Officer

For an ordinary, or long-form, certificate of acknowledgment, the certificate must recite how the officer identified the acknowledger by the accepted statutory methods. The certificate of acknowledgment must state that the acknowledger was—

1. known to the officer;
2. identified to the officer by the oath of a credible witness personally known to the officer;
3. identified by a current identification card or other document issued by the federal government or any state government that contains the photograph and signature of the acknowledging person; or
4. in the case of a deed or other instrument relating to a residential real estate transaction, identified by a current passport issued by a foreign country.

This requirement does not apply to short-form certificates of acknowledgment. Tex. Civ. Prac. & Rem. Code § 121.005.

§ 3.12:6 Certificate Must Recite That Signatory Acknowledged Instrument

The certificate of acknowledgment must recite that the signatory acknowledged the execution of the instrument. Failure to state this essential fact renders the certificate fatally defective. *See* Tex. Civ. Prac. & Rem. Code §§ 121.007, 121.008.

A long-form certificate of acknowledgment should contain all the components required for a valid ceremony of acknowledgment. See section 3.11 above.

Short-form certificates of acknowledgment require only an abbreviated statement of acknowledgment. Generally, each short-form certificate of acknowledgment requires only a statement that the instrument was "acknowledged." However, short-form certificates of acknowledgment for attorneys-in-fact, partnerships, corporations, and limited liability companies must additionally state that the instrument was acknowledged "on behalf of" the principal, partnership, corporation, or limited liability company. The short-form certificate of acknowledgment for a public officer, trustee, executor, administrator, guardian, or other representative signer must state that the instrument was acknowledged by the representative signer "as (title of representative) of (name of entity or person represented)." Tex. Civ. Prac. & Rem. Code § 121.008.

§ 3.12:7 Certificate Must Identify Acknowledger

The certificate of acknowledgment must show that the person acknowledging the instrument is the same person who signed it. A slight variance between the name of the person shown to have signed and the name of the person shown to have acknowledged the instrument may, but will not necessarily, invalidate the certificate. *See,*

e.g., *Cheek v. Herndon*, 17 S.W. 763 (Tex. 1891).

Pronouns may be employed in certificates of acknowledgment as a substitute for the name of the acknowledger given elsewhere in the certificate. As with the names for which they substitute, errors in the use of pronouns may, but will not necessarily, have the effect of invalidating the certificate. *Cheek*, 17 S.W. at 764.

§ 3.12:8 Certificate Must Recite Date of Acknowledgment

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

§ 3.12:9 Certificate Must Bear Signature of Officer

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

§ 3.12:10 Certificate Must Bear Official Seal of Officer

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

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

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

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

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

has been eliminated from short-form certificates of acknowledgment. *See* Tex. Civ. Prac. & Rem. Code § 121.008.

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

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

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

§ 3.13 Alternative Methods of Proving Instruments

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

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

§ 3.13:1 Proof by Jurat

Jurats are ordinarily used only for affidavits. However, since September 1, 1989, instruments that are only sworn to and not acknowledged or otherwise proved are eligible for recordation. *See* Tex. Prop. Code § 12.001. Affidavits recorded before September 1, 1989, must have been accompanied by an acknowledgment. Any affidavit recorded without an acknowledgment before that date may not constitute constructive notice.

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

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

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

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

Tex. Gov't Code § 602.002.

§ 3.13:2 Proof by Subscribing Witness

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

§ 3.13:3 Acknowledgment by Handwriting

In certain limited instances in which neither a standard acknowledgment nor an acknowledgment by witness is available, an instrument may be proved by an acknowledgment by handwrit-

ing. The execution of an instrument may be established for recording by proof of the handwriting of persons who signed the instrument only if—

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

2. the grantor and all the witnesses are not residents of Texas;

3. the residences of the grantor and the witnesses are unknown to the person seeking to prove the instrument and cannot be ascertained;

4. the witnesses have become legally incompetent to testify; or

5. the grantor of the instrument refuses to acknowledge the execution of the instrument and all the witnesses are dead, not residents of Texas, or legally incompetent or their places of residence are unknown.

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

§ 3.13:4 Proof by Suit

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

§ 3.13:5 Proof by Unsworn Declaration

Chapter 132 of the Texas Civil Practices and Remedies Code provides that an unsworn declaration made under penalty of perjury may be used in lieu of some declarations, verifications, certifications, oaths, or affidavits required by law to be taken before a notary public. Tex. Civ. Prac. & Rem. Code § 132.001. Under this statute it may be possible for an instrument to be proved by an unsworn declaration of either the signatories to the instrument, the subscribing witnesses, or persons authorized to give evidence of handwriting. To be effective, unsworn declarations must substantially comply with the statutory forms. Tex. Civ. Prac. & Rem. Code § 132.001(d)–(f). This statute does not apply to a lien required to be filed with a county clerk, an instrument concerning real or personal property required to be filed with a county clerk, or an oath of office or an oath required to be taken before a specified official other than a notary public. Tex. Civ. Prac. & Rem. Code § 132.001(b).

§ 3.14 Filing of Documents

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

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

Attorneys, licensed lenders, title companies, federal agencies and lenders, and state agencies may file documents electronically with county clerks. Tex. Loc. Gov't Code § 195.003. Rules for electronic filing have been adopted by the Texas State Library and Archives Commission and are found at 13 Tex. Admin. Code §§ 7.141–.145. *See* Tex. Loc. Gov't Code § 191.009. *See generally* Tex. Loc. Gov't Code ch. 195.

§ 3.15 Filing Fees

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

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

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

No additional fee may be charged for electronic filing. Tex. Loc. Gov't Code § 195.006. A county clerk may not impose requirements or fees for filing or recording a legal paper in addition to those prescribed by statute. Tex. Loc. Gov't Code § 191.007(a). Attorneys should consult, in advance, with the county clerk's office or website to determine applicable fee policies for the instrument(s) at issue.

§ 3.16 Confidentiality Notice

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

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

Tex. Prop. Code § 11.008(c).

An "instrument" is "a deed, deed of trust, or any other record recorded by a county clerk related to real property, including a mineral lease, a mechanic's lien, and the release of a mechanic's lien." Tex. Prop. Code § 11.008(a).

"The validity of an instrument as between the parties to the instrument and the notice provided by the instrument are not affected by a party's failure to include the notice required under Subsection (c)." Tex. Prop. Code § 11.008(d).

§ 3.17 Additional Resources

Hadaway, Nicole. "Online Notarizations and State Laws—When Can You Close Remotely?" In *Advanced Real Estate Law Course, 2019*. Austin: State Bar of Texas, 2019.

Haley, Steven C. "Material Alteration of Documents." In *Advanced Real Estate Law Course, 2009*. Austin: State Bar of Texas, 2009.

Johnson, James N. "Execution of Documents." In *Real Estate Law 101 Course, 2018*. Austin: State Bar of Texas, 2018.

Lewallen, Dawn. "eSignature Documents and Notarization: Drafting Considerations for eClosing Real Estate Transactions." In *Advanced Real Estate Drafting Course, 2018*. Austin: State Bar of Texas, 2018.

Melamed, Richard. "Plain Drafting of Real Estate Documents." In *Real Estate Law 101 Course, 2018*. Austin: State Bar of Texas, 2018.

Newsome, Kent. "Nine Rules for Drafting Shorter and Better Documents." In *Advanced Real Estate Drafting Course, 2019*. Austin: State Bar of Texas, 2019.

Schiess, Wayne. "Some Things Every Legal Drafter Should Know." In *Advanced Real Estate Drafting Course, 2007*. Austin: State Bar of Texas, 2007.

Tarver, Lewis T., Jr. "Writing for the Times." In *Advanced Real Estate Drafting Course, 2001*. Austin: State Bar of Texas, 2001.

Weller, Philip D. "Drafting 1.01." In *Advanced Real Estate Drafting Course, 2002*. Austin: State Bar of Texas, 2002.

———. "Perfect Notice." In *Advanced Real Estate Drafting Course, 2007*. Austin: State Bar of Texas, 2007.

Form 3-30

This form is based on sample language containing minimum statutory requirements provided by the Texas secretary of state at **https://www.sos.state.tx.us/statdoc/online-np-educational.shtml#sample**.

Electronic Certificate of Acknowledgment

[Long Form]

STATE OF TEXAS

COUNTY OF [**county**]

Before me, [**name of notary or other officer taking acknowledgment**], on this day personally appeared by means of an interactive two-way audio and video communication [**name of acknowledging party**], who [is known to me/proved to me on the oath of [**name of witness**]/ has provided satisfactory evidence of identity in accordance with chapter 406, Texas Government Code] to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that [he/she] executed the same for the purposes and consideration therein expressed. This notarial act was an online notarization.

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

[SEAL]

[Digital Certificate]

_____

[**Title of officer**]
My commission expires: [**date**]

[Reserved]

Form 3-31

This form is based on sample language containing minimum statutory requirements provided by the Texas secretary of state at **https://www.sos.state.tx.us/statdoc/online-np-educational.shtml#sample**.

Electronic Certificate of Acknowledgment

[Short Form]

STATE OF TEXAS

COUNTY OF [**county**]

This instrument was acknowledged before me by means of an interactive two-way audio and video communication on [**date**] by [**name[s] of person[s] acknowledging**]. This notarial act was an online notarization.

[SEAL]

[Digital Certificate]

[**Title of officer**]
My commission expires: [**date**]

[Reserved]

Form 3-32

Acknowledgment by Foreign Service Officer

[**Name of country**]

[**County and/or other political subdivision**]

[**City and/or other political subdivision**]

[**Name of foreign service office**]

Before me, [**name, rank, and title of foreign service officer**], of the United States of America at [**city and country**], duly commissioned and qualified and a resident of [**city and country**], on this day personally appeared [**name of acknowledger**], [known to me/proved to me on the oath of [**name of witness**]/proved to me through [**description of identity card or other document**]] to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that [he/she] executed the same for the purposes and consideration therein expressed.

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

[SEAL]

_____

[**Name, rank, and title of foreign service officer**]

[Reserved]

Form 3-33

Military Acknowledgment

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

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

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

[SEAL]

_____

[**Name, rank, branch, and serial number of officer**]

[Reserved]

Form 3-34

Statement of Subscribing Witness in Presence of Subscriber

STATE OF TEXAS

COUNTY OF [**county**]

Before me, [**name and title of officer taking proof**], on this day personally appeared [**name of subscribing witness**], [known to me/proved to me on the oath of [**name of witness**]] to be the person whose name is subscribed as a witness to the foregoing instrument of writing, and after being duly sworn by me, stated on oath that [he/she] saw [**name**], the [grantor/person who executed the foregoing instrument], subscribe the same and that [he/she] had signed the same as a witness at the request of the [grantor/person who executed same].

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

[SEAL]

_____

[**Title of officer**]
My commission expires: [**date**]

[Reserved]

Form 3-35

Statement of Subscribing Witness on Acknowledgment by Subscriber

STATE OF TEXAS

COUNTY OF [**county**]

Before me, [**name and title of officer**], on this day personally appeared [**name of subscribing witness**], [known to me/proved to me on the oath of [**name of witness**]] to be the person whose name is subscribed as a witness to the foregoing instrument of writing, and after being duly sworn by me, stated on oath that [**name**], the [grantor/person who executed the foregoing instrument], acknowledged in [his/her] presence that the [grantor/person who executed same] had executed the same for the purposes and consideration expressed therein and that [he/she] had signed the same as a witness at the request of the [grantor/person who executed same].

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

[SEAL]

_____

[**Title of officer**]
My commission expires: [**date**]

[Reserved]

Form 3-36

Acknowledgment of Signature Affixed at Direction of Person with Disability

STATE OF TEXAS

COUNTY OF [**county**]

Before me, [**name and title of officer**], on this day personally appeared [**name of person with disability**], a person having a physical impairment that impedes [his/her] ability to sign the foregoing instrument, [known to me/proved to me on the oath of [**name of witness**]/proved to me through [**description of identity card or other document**]] to be the person whose name is subscribed to the foregoing instrument and directed me to affix [his/her] signature to the foregoing instrument in the presence of [**name of disinterested witness**], a person having no legal or equitable interest in any real or personal property that is the subject of or is affected by the foregoing instrument and whose identity is [known to me/proved to me on the oath of [**name of witness**]/proved to me through [**description of identity card or other document**]], and [**name of person with disability**] directed me to execute the foregoing instrument on [his/her] behalf for the purposes and consideration therein expressed.

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

[SEAL]

_____

[**Title of officer**]
My commission expires: [**date**]

[Reserved]

Form 3-37

Jurat

SUBSCRIBED AND SWORN TO before me on _____ by [**name of affiant**].

_____
Notary Public, State of Texas

[Reserved]

Form 3-38

Affidavit of Interpreter

Date:

Affiant: [**name of interpreter**]

Date of Interpretation:

Item Interpreted: [**describe instrument interpreted**]

Affiant on oath swears that the following statements are true and are within the personal knowledge of Affiant:

"I, the undersigned interpreter, am well versed in and competent to speak the [Spanish/[**other language**]] and the English languages, and on the date of interpretation I gave a true and faithful interpretation of the item interpreted in [Spanish/[**other language**]], which is understood by [**name**]."

_____

[**Name of interpreter**]

Sworn to and subscribed before me on [**date**] by [**name of interpreter**].

[SEAL]

_____

[**Title of officer administering oath**]
My commission expires: [**date**]

[Reserved]

Chapter 4

Sales Contracts and Transaction Guide

Forms

[Reserved]

Chapter 4

Sales Contracts and Transaction Guide

§ 4.1 General Considerations

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

§ 4.2 Real Estate Sales Contract

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

§ 4.3 Introductory Paragraph: Offer and Acceptance

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

§ 4.4 Defined Terms

§ 4.4:1 Seller and Buyer

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

§ 4.4:2 Property

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

§ 4.4:3 Underwriter

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

§ 4.4:4 Escrow Agent

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

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

§ 4.4:5 Consideration

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

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

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

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

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

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

§ 4.4:6 Earnest Money

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

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

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

§ 4.4:8 County for Performance

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

§ 4.5 Deadlines

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

§ 4.6 Closing Documents

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

§ 4.6:1 Exhibit B—Representations; Environmental Matters

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

§ 4.6:2 Exhibit C—Seller's Records

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

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

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

§ 4.6:4 Exhibit E—Seller Financing Addendum

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

§ 4.7 Investment of Earnest Money

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

§ 4.8 Title and Survey

The contract incorporates the statutory notice that the Texas Real Estate License Act requires real estate brokers and real estate salespersons to give to a buyer, advising that the buyer should either have title examined by an attorney or obtain a title insurance policy. Tex. Occ. Code § 1101.652(b)(29). If a broker or salesperson is not involved, the paragraph may be deleted.

The contract requires that the seller provide to the buyer by the deadlines stated in the contract the title commitment, the survey, the UCC

search, and legible copies of each document referred to in these instruments.

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

§ 4.8:1 Review of Title Commitment

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

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

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

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

Schedule B: The attorney should review the following matters:

- Item 1, relating to covenants and restrictions, should be noted as either "Covenants, conditions, and restrictions (other than any restrictions indicating preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin) as set forth in [**recording data**] of the real property records of [**county**] County, Texas" or "Item 1 of schedule B is hereby deleted in its entirety."
- Item 2, relating to the standard survey exception, may be amended and partially deleted to read "any shortages in area" if a current survey approved by the title company is obtained. An additional 5 percent premium is charged to amend the owner policy for a residential transaction; an additional 15 percent premium is charged to amend the owner policy for a commercial transaction. No additional premium is required to amend the loan policy. The responsibility for paying the extra premium for the survey modification in the owner policy of title insurance is often negotiated between the parties, although the pertinent provision in the contract form provides for the extra premium to be paid by the buyer.
- Item 3, relating to homestead or community property or survivorship rights, and paragraph 4, relating to tidelines, lands comprising the shores and beds of waterways, lands beyond the line of the harbor or bulkhead lines, filled-in lands, artificial islands, statutory water rights, and areas extending from the line of mean low tide to the line of vegetation, apply only to the owner policy and cannot be deleted or amended.
- Paragraph 5, relating to property taxes, should be reviewed for the status of tax pay-

ments and the existence of rollback taxes. In the title policy, the exception for taxes should be restricted to taxes for the year in which the closing occurs (unless paid at or before closing), taxes for subsequent years, and rollback taxes for prior years.

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

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

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

§ 4.8:2 Review of Survey

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

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

- The survey should bear a recent date and should conform to, as applicable, ALTA or the required category and condition under the Texas Standards for the type of survey specified in the contract and location of the property.
- The certificate should be sealed and signed and should conform to any certificate specified in the contract.
- There should be a north compass bearing on the survey.
- The attorney should observe the system of reference used for the survey, locate the beginning point, and determine that it is monumented and locatable.
- The survey, particularly all course and distance notations, should be compared to the legal description either appearing on or attached to the survey. This description then should be compared to the one appearing in the contract and the title commitment or title opinion.
- All recorded easements appearing in the title commitment should be located and noted on the survey with the appropriate recording data. Conversely, the attorney should examine the survey for any matters (such as easements) not appearing in the title commitment.
- The survey should be examined for the location of improvements: Do improvements protrude onto adjoining property or easement areas; are there encroachments of improvements from adjoining property onto the property; are there building setback line violations?
- Any written notations on the survey, such as those relating to rights of parties in possession, should be reviewed to determine their effect on the property and its anticipated use.
- The property should have legal and adequate access to public streets or roads.
- The survey should show the existence and location of utilities.
- The surveyor's certificate should indicate the location of the floodplain, if applicable.

§ 4.8:3 Review of UCC Search

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

§ 4.9 Inspection Period

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

The contract provides for reasonable rules of entry and that the buyer will indemnify the seller for claims resulting from the buyer's inspection of the property. Except for the environmental indemnity stated in exhibit B in the contract, the indemnity provisions of the contract are not intended to shift risk from the indemnified party to the indemnitor for the indemnified party's own negligence. One consequence of this allocation of risk is that the indemnified party may not be able to recover the costs of defense from the indemnitor if the indemnified party is sued for the consequences of its alleged negligence. *See Fisk Electric Co. v. Constructors & Associates*, 888 S.W.2d 813 (Tex. 1994). The environmental indemnity shifts risk for the seller's own negligence from the seller to the buyer. It is unlikely, however, that the environmental indemnity will be effective to shift risk in the event of misrepresentation or fraud.

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

§ 4.10 Representations

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

In negotiating representations, the parties often consider issues such as whether the representations will be absolute or based on the seller's knowledge and belief; whether the representations will be based on the knowledge of the entity that is the seller or on the knowledge of specified individuals; whether the seller must perform further investigation to make the representations or may rely on its current knowledge, without further investigation; and whether and to what extent the representations will survive closing.

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

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

The following optional clauses are also provided:

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

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

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

It is common practice to include representations regarding the organization and authority of the parties in contracts but to defer the obligation to

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

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

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

§ 4.12 Termination

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

§ 4.13 Closing

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

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

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

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

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

§ 4.14 Default and Remedies

The contract provides that each party may elect one of the following remedies for the other's

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

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

§ 4.15 Assignment

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

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

Included in this chapter are four forms related to the assignment process. Form 4-28 is a short-form assignment by a buyer of its rights and obligations under the contract and is typically used as an assignment by the buyer to an entity controlled by the buyer. It can also be used in transactions not involving representations, warranties, and covenants between the buyer and the assignee. Form 4-29 is a long-form assignment that contains representations, warranties, and covenants between the buyer and the assignee. Form 4-30 is a form for consent by the seller, if consent is required by the contract. Form 4-31 is a contract for the sale by a buyer to an assignee of the buyer's rights under the contract. It allows the assignee time to investigate the property before paying the buyer for the assignment and before unconditionally depositing substitute earnest money with the title company. The inspection period under the contract should be long enough to allow the seller to step back in if the assignee elects to terminate its right to purchase the property.

§ 4.16 Closing Functions

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

§ 4.16:1 Payoff Information and Other Closing Expenses

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

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

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

§ 4.16:2 Prorations and Deposits

Unless otherwise provided in the contract, the buyer acquires both the monetary benefits and

burdens of the property. Prorations are generally based on the settlement or closing date.

Tax Prorations: Tax prorations may be based on the most current property tax information available to the closing agent. The tax proration serves as a bookkeeping adjustment on the closing statement between the seller and the buyer relating to taxes. If taxes have not been paid for the current year, this adjustment involves the seller's being charged on the closing statement with property taxes for the period the seller owned the property. The buyer is then responsible for actual payment of taxes. The buyer receives a corresponding credit of the seller's prorated amount. The contract requires that the seller and the buyer reprorate taxes when actual tax statements become available after closing.

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

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

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

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

§ 4.16:3 Preparation of Closing Documents

The closing agent may be expected to prepare several documents.

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

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

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

§ 4.16:4 Funding

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

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

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

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

The attorney for each buyer and lender should consider obtaining an insured closing service letter from the title insurance underwriter whose policies are to be issued. This letter indemnifies the lender for any fraudulent acts of the closing title insurance company or agency relating to the handling of closing funds. *See* forms T-50 and T-51, *Basic Manual of Rules, Rates and Forms for the Writing of Title Insurance in the State of Texas*. See **https://www.tdi.texas.gov/title/titlemm5.html**.

§ 4.16:5 Recording Documents

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

§ 4.16:6 Closing Instructions

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

§ 4.17 Additional Considerations

§ 4.17:1 Transactions Involving Foreign Persons

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

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

§ 4.17:2 Other Requirements

Before closing, the buyer should arrange for Causes of Loss—Special Form property insurance coverage, liability, flood, and similar types of insurance for any required mortgagee endorsements. The buyer and seller should

arrange for payment out of the closing proceeds of any accrued taxes even if the taxes will not be delinquent until after closing. The buyer should notify the tax appraisal district of any change in ownership.

§ 4.17:3 Closing Checklist

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

§ 4.17:4 Postclosing Considerations

After closing, recorded documents and relevant title insurance policies issued after closing should be reviewed for accuracy and compliance with the title commitment. The owner policy should be dated on or after the recording date of the deed conveying title to the buyer, and the mortgagee policy should be dated on or after the recording date of the deed of trust of the insured lien.

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

§ 4.18 Additional Resources

Barton, J. Cary. "Pitfalls of Statutory Notices—Or Lack Thereof." In *Advanced Real Estate Drafting Course, 2013*. Austin: State Bar of Texas, 2013.

Baucum, Michael, and Kathryn E. Allen. "As-Is Update: 'Prudential 2012.'" In *Advanced Real Estate Law Course, 2012*. Austin: State Bar of Texas, 2012.

Becker, Douglas W., and Arturo Machado. "Thorny FIRPTA Withholding Issues Involving Foreign Sellers of Real Estate." In *Advanced Real Estate Drafting Course, 2016*. Austin: State Bar of Texas, 2016.

Beyer, Gerry W. *Real Property*. 2nd ed. West's Texas Forms 13–15. St. Paul, MN: West, 2001. Supplement 2016.

Dysart, Sara E. "Seller Should Provide Accurate Statutory Notices Incident to the Sale of Real Property." In *Advanced Real Estate Law Course, 2015*. Austin: State Bar of Texas, 2015.

Howard, C. Elaine. "Miscellaneous Sections of a Contract." In *Advanced Real Estate Law Course, 2016*. Austin: State Bar of Texas, 2016.

Love, G. Roland. "Title and Survey Objection Letter, Instruction Letter: Guidelines and Solutions." In *Advanced Real Estate Law Course, 2019*. Austin: State Bar of Texas, 2019.

McPherson, Mark. "Statutory Notices: Incorporating a CLE Paper into Real Estate Sales Forms." In *Advanced Real Estate Drafting Course, 2018*. Austin: State Bar of Texas, 2018.

Mills, Ken. "Top Ten Issues When Negotiating Earnest Money Contracts." In *Advanced Real Estate Law Course, 2015*. Austin: State Bar of Texas, 2015.

Newsome, Kent. "Drafting ROFO/Option Agreements: Key Issues and Sample Forms." In *Advanced Real Estate Drafting Course, 2016*. Austin: State Bar of Texas, 2016.

———. "Rights of First Refusal: What They Are, What They Aren't, and What They Can Do to Your Deal." In *Advanced Real Estate Law Course, 2013*. Austin: State Bar of Texas, 2013.

Rider, Brian. "Allocation of Risks in Purchase Contracts for Improved Property (Risk Avoidance and Allocation Pre-Closing)." In *Advanced Real Estate Law Course, 2016*. Austin: State Bar of Texas, 2016.

Tomek, David W. "From Ridiculous 'Asks' to Meaningful Compromise: Drafting and Negotiating Selected Aspects of Earnest Money Contracts for Income-Producing Commercial Properties." In *Advanced Real Estate Drafting Course, 2013*. Austin: State Bar of Texas, 2013.

Weller, Philip D. "Drafting Confidentiality Agreements and Access Agreements." In *Advanced Real Estate Drafting Course, 2014*. Austin: State Bar of Texas, 2014.

Whelan, Thomas M. "Scattershooting at Contracts and Deeds Down at the Courthouse." In *Advanced Real Estate Drafting Course, 2019*. Austin: State Bar of Texas, 2019.

———. "Scattershooting While Wondering Whatever Happened at the Courthouse to Frequently Litigated Provisions in My Favorite Real Estate Sales Forms." In *Advanced Real Estate Drafting Course, 2015*. Austin: State Bar of Texas, 2015.

[Reserved]

2. Does the property have working smoke detectors installed in accordance with the smoke detector requirements of chapter 766, Health and Safety Code?*

___ Yes ___ No ___ Unknown. If the answer to this question is no or unknown, explain. (Attach additional sheets if necessary): _____

_____

_____

* Chapter 766 of the Health and Safety Code requires one-family or two-family dwellings to have working smoke detectors installed in accordance with the requirements of the building code in effect in the area in which the dwelling is located, including performance, location, and power source requirements. If you do not know the building code requirements in effect in your area, you may check unknown above or contact your local building official for more information. A buyer may require a seller to install smoke detectors for the hearing impaired if: (1) the buyer or a member of the buyer's family who will reside in the dwelling is hearing impaired; (2) the buyer gives the seller written evidence of the hearing impairment from a licensed physician; and (3) within ten days after the effective date, the buyer makes a written request for the seller to install smoke detectors for the hearing impaired and specifies the locations for installation. The parties may agree who will bear the cost of installing the smoke detectors and which brand of smoke detectors to install.

3. Are you (Seller) aware of any known defects/malfunctions in any of the following? Write Yes (Y) if you are aware; write No (N) if you are not aware.

____ Interior Walls	____ Ceilings	____ Floors
____ Exterior Walls	____ Doors	____ Windows
____ Roof	____ Foundation/Slab(s)	____ Basement
____ Walls/Fences	____ Driveways	____ Sidewalks

____ Plumbing/Sewers/ Septics ____ Electrical Systems ____ Lighting Fixtures

____ Other Structural Components (Describe): _____

_____

_____

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

_____

_____

_____

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

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

____ Active Termites (includes wood-destroying insects)

____ Termite or Wood Rot Damage Needing Repair

____ Previous Termite Damage

____ Previous Termite Treatment

____ Improper Drainage

____ Water Damage Not Due to a Flood Event

____ Landfill, Settling, Soil Movement, Fault Lines

____ Single Blockable Main Drain in Pool/Hot Tub/Spa*

____ Previous Structural or Roof Repair

____ Hazardous or Toxic Waste

____ Asbestos Components

____ Urea-Formaldehyde Insulation

____ Radon Gas

____ Lead Based Paint

____ Aluminum Wiring

____ Previous Fires

____ Unplatted Easements

____ Subsurface Structure or Pits

____ Previous Use of Premises for Manufacture of Methamphetamine

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

_____

_____

_____

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

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

_____

_____

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

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

____ Present flood insurance coverage

____ Previous flooding due to a failure or breach of a reservoir or a controlled or emergency release of water from a reservoir

____ Previous water penetration into a structure on the property due to a natural flood event

Write Yes (Y) if you are aware and check "wholly" or "partly" as applicable; write No (N) if you are not aware.

____ Located ( ) wholly ( ) partly in a 100-year floodplain (Special Flood Hazard Area–Zone A, V, A99, AE, AO, AH, VE, or AR)

____ Located ( ) wholly ( ) partly in a 500-year floodplain (Moderate Flood Hazard Area–Zone X (shaded))

____ Located ( ) wholly ( ) partly in a floodway

____ Located ( ) wholly ( ) partly in a flood pool

____ Located ( ) wholly ( ) partly in reservoir

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

_____

_____

*For purposes of this notice:

"100-year floodplain" means any area of land that (1) is identified on the flood insurance rate map as a special hazard area, which is designated as Zone A, V, A99, AE, AO, VE, or AR on the map; (2) has a 1 percent annual chance of flooding, which is considered to be a high risk of flooding; and (3) may include a regulatory floodway, flood pool, or reservoir.

"500-year floodplain" means any area of land that (1) is identified on the flood insurance rate map as a moderate flood hazard area, which is designated on the map as Zone X (shaded); and (2) has a two-tenths of 1 percent annual chance of flooding, which is considered to be a moderate risk of flooding.

"Flood pool" means the area adjacent to a reservoir that lies above the normal maximum operating level of the reservoir and that is subject to controlled inundation under the management of the U.S. Army Corps of Engineers.

"Flood insurance rate map" means the most recent flood hazard map published by the Federal Emergency Management Agency under the National Flood Insurance Act of 1968 (42 U.S.C. §§ 4001–4131).

"Floodway" means an area that is identified on the flood insurance rate map as a regulatory floodway, which includes the channel of a river or other watercourse and the adjacent land areas that must be reserved for the discharge of a base flood, also referred to as a 100-year flood, without cumulatively increasing the water surface elevation more than a designated height.

"Reservoir" means a water impoundment project operated by the U.S. Army Corps of Engineers that is intended to retain water or delay the runoff of water in a designated surface area of land.

Have you (Seller) ever filed a claim for flood damage to the property with any insurance provider, including the National Flood Insurance Program (NFIP)?* __ Yes __ No. If yes, explain. (Attach additional sheets if necessary): _____

_____

_____

*Homes in high-risk flood zones with mortgages from federally regulated or insured lenders are required to have flood insurance. Even when not required, the Federal Emergency Management Agency (FEMA) encourages homeowners in high-risk, moderate-risk, and low-risk flood zones to purchase flood insurance that covers the structure(s) and the personal property within the structure(s).

Have you (Seller) ever received assistance from FEMA or the U.S. Small Business Administration (SBA) for flood damage to the property? __ Yes __ No. If yes, explain. (Attach additional sheets if necessary): _____

_____

_____

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

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

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

____ Homeowners' Association or maintenance fees or assessments.

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

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

____ Any lawsuits directly or indirectly affecting the Property.

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

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

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

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

_____

_____

8. If the property is located in a coastal area that is seaward of the Gulf Intracoastal Waterway or within 1,000 feet of the mean high tide bordering the Gulf of Mexico, the property may be subject to the Open Beaches Act or the Dune Protection Act (chapter 61 or 63, Natural Resources Code, respectively) and a beachfront construction certificate or dune protection permit may be required for repairs or improvements. Contact the local government with ordinance authority over construction adjacent to public beaches for more information.

9. This property may be located near a military installation and may be affected by high noise or air installation compatible use zones or other operations. Information relating to high noise and compatible use zones is available in the most recent Air Installation Compatible Use Zone Study or Joint Land Use Study prepared for a military installation and may be accessed on the website of the military installation and of the county and any municipality in which the military installation is located.

_____
Signature of Seller

_____
Date

The undersigned purchaser hereby acknowledges receipt of the foregoing notice.

Signature of Buyer

Date

[Reserved]

Form 4-26

Right of First Refusal Agreement

Basic Information

Date:

Grantor:

Grantor's Address:

Grantee:

Grantee's Address:

Property:

Term:

A. Grant

A.1. Grantor grants to Grantee a right of first refusal to acquire the Property.

A.2. During the Term, if Grantor receives an offer for the sale or other transfer of the Property or any portion thereof or interest therein for any form of consideration that Grantor wishes to accept, Grantor agrees to notify Grantee in writing before accepting the offer. The notice will state the identity of the proposed transferee and the complete terms of the proposed transfer. If the proposed consideration for the transfer is other than cash, the notice will also state the cash equivalent reasonably determined by the Grantor for the noncash consideration.

A.3. Grantee will have the right to purchase the Property on the terms set forth in Grantor's notice by giving written notice to Grantor within [thirty/[**number**]] days following

the receipt of Grantor's notice. If Grantee affirmatively exercises such right, the Property will be transferred to Grantee, and Grantee will pay to Grantor the consideration on the terms set forth in the notice from Grantor.

A.4. If Grantee does not affirmatively exercise its right within the [thirty/[**number**]]-day period, Grantor may transfer the Property to the party and on the terms described in Grantor's notice to Grantee within the [180/[**number**]]-day period following the expiration of the [thirty/[**number**]]-day period. If a transfer is not consummated within the [180/[**number**]]-day period, Grantor may not transfer the Property without again complying with the provisions of this Agreement. If Grantor wishes to effect a transfer on terms that are less favorable to Grantor than those described in Grantor's notice, Grantor must repeat the process set forth in this Agreement by giving a new notice to Grantee setting forth the new terms. If Grantor timely consummates a transfer, this Agreement will automatically terminate when the Property is conveyed to the party named in Grantor's notice to Grantee.

A.5. If an offer received by Grantor calls for delivery of a promissory note or other deferred payment obligation, the promissory note or other deferred payment obligation of Grantee will be deemed equivalent to those offered.

A.6. If any offer provides for noncash consideration, Grantee disputes Grantor's determination of the value of the noncash consideration set forth in Grantor's notice, and Grantor and Grantee cannot resolve the dispute within five business days after Grantee gives notice of the dispute to Grantor, the matter will be submitted to binding arbitration in [**city**], Texas, under the Commercial Arbitration Rules of the American Arbitration Association by a single arbitrator, and the determination of such arbitrator shall be binding on both parties. The [thirty/[**number**]]-day period for exercise of Grantee's rights will be tolled during the period the arbitration proceeding is pending.

A.7. The rights granted in this Agreement expire at the end of the Term.

Form 4-28

Assignment of Real Estate Sales Contract
[Short Form]

Date:

Assignor:

Address:

Phone:

E-mail:

Type of entity:

Assignee:

Address:

Phone:

E-mail:

Type of entity:

Contract: Real Estate Sales Contract between [**name of seller**] ("Seller") and Assignee, as Buyer, escrowed under GF #[**number**] at the title company [**name of company**] as Escrow Agent.

Assignment: Assignor assigns to Assignee all of Assignor's right, title, and interest as Buyer in and to the Contract including the Earnest Money deposited in escrow with

Escrow Agent. Assignee assumes and agrees to perform Buyer's obligations under the Contract.

_____

[Name and title of assignor]

_____

[Name and title of assignee]

Form 4-29

Assignment of Real Estate Sales Contract
[Long Form]

Date:

Assignor:

Address:

Phone:

E-mail:

Type of entity:

Assignee:

Address:

Phone:

E-mail:

Type of entity:

Contract: Real Estate Sales Contract between Seller and Buyer, the Assignor, for sale of the Property to Buyer involving—

Seller:

Property: The land commonly known as [**describe property**] and more fully described in Exhibit A ("Land") [**include the following phrases as applicable:** , together with improvements to the Land ("Improvements"), the

leases associated with the Land and Improvements ("Leases"), and the personal property described in Exhibit A ("Personal Property")].

Earnest Money:

Escrow: [**title company name, GF #, address, and escrow officer contact information**]

Consideration:

[**Include if applicable:** Consent: This Assignment is conditioned on the consent of Seller.]

For the Consideration, Assignor and Assignee agree as follows:

A. Exhibits

The following are attached to and are a part of this Assignment:

Exhibit A—Real Estate Sales Contract

Exhibit B—Representations

Exhibit C—Records

B. Assignment and Assumption

B.1. Assignment. Assignor for the Consideration assigns to Assignee all of Assignor's right, title, and interest as Buyer in and to the Contract including the Earnest Money deposited in escrow with Escrow Agent.

B.2. Assumption. Assignee assumes and agrees to perform Buyer's obligations under the Contract [**include if applicable:** arising after the Date of this Assignment]. [**Include if applicable:** Assignee will indemnify, defend, and hold Assignor harmless from any loss, attorney's fees, expenses, or claims arising out of or related to Assignee's failure to perform any of

the obligations of Buyer under the Contract after the Date of this Assignment. Assignor will indemnify, defend, and hold Assignee harmless from any loss, attorney's fees, expenses, or claims arising out of or related to Assignor's failure to perform any of the obligations of Buyer under the Contract before the Date of this Assignment.] [**Include if applicable:** Assignee has reimbursed Assignor for an amount equal to the assigned Earnest Money.]

B.3. Records. To the extent that Assignor has possession or control of the items listed in Exhibit C, Assignor will deliver or make the items or copies of them available to Buyer within three business days after the Date.

C. Representations

C.1. Contract. Attached as Exhibit A is a true and correct copy of the Contract.

C.2. Representations. The representations stated in sections A. and C. of Exhibit B to this Assignment are true and correct as of the Date. A party to this Assignment who becomes aware that any of the representations of either party are not true and correct will promptly notify the other party. Unless a party notifies the other party to the contrary on or before the Closing Date, or a party has actual knowledge to the contrary as of the Closing Date, each party to this Assignment is entitled to presume that the representations of the other party in Exhibit B are true and correct as of the Closing Date under the Contract.

C.3. As Is, Where Is. The parties agree to the terms of section B. (As Is, Where Is) in Exhibit B.

D. Miscellaneous

D.1. Notices. Any notice required by or permitted under this Assignment must be in writing. Any notice required by this Assignment will be deemed to be given (whether received or not) the earlier of receipt or three business days after being deposited with the United States Postal Service, postage prepaid, certified mail, return receipt requested, and

addressed to the intended recipient at the address shown in this Assignment. Notice may also be given by regular mail, personal delivery, courier delivery, or e-mail and will be effective when received, provided that (a) any notice received on a Saturday, Sunday, or holiday will be deemed to have been received on the next day that is not a Saturday, Sunday, or holiday and (b) any notice received after 5:00 P.M. local time at the place of delivery on a day that is not a Saturday, Sunday, or holiday will be deemed to have been received on the next day that is not a Saturday, Sunday, or holiday. Any address for notice may be changed by not less than ten days' prior written notice given as provided herein. Copies of each notice must be given by one of these methods to the attorney of the party to whom notice is given.

D.2. Entire Agreement. This Assignment is the entire agreement of the parties concerning the assignment by Assignor of the sale of the Property by Seller. There are no representations, warranties, agreements, or promises of Assignor pertaining to the Property or the sale of the Property, and Assignee is not relying on any statements or representations of Assignor or any agent of Assignor that are not in this Assignment.

D.3. Amendment. This Assignment may be amended only by an instrument in writing signed by the parties.

D.4. Prohibition of Assignment. Assignee may not assign this Assignment, the Contract, Assignee's rights under this Assignment, or Buyer's rights under the Contract without Assignor's prior written consent, which Assignor has no obligation to grant and which, if granted, may be conditioned in any manner Assignor deems appropriate, and any attempted assignment without Assignor's consent is void. The consent by Assignor to any assignment by Assignee will not release Assignee of its obligations under this Assignment, and Assignee and its assignee will be jointly and severally liable for the performance of those obligations after any such assignment.

D.5. Survival. The provisions of this Assignment that expressly survive termination or Closing and other obligations of this Assignment that cannot be performed before termination of this Assignment or before Closing survive termination of this Assignment or Closing, and the legal doctrine of merger does not apply to these matters. The representations made by the parties as of Closing survive Closing.

D.6. Choice of Law; Venue. THIS ASSIGNMENT IS TO BE CONSTRUED UNDER THE LAWS OF THE STATE OF TEXAS, WITHOUT REGARD TO CHOICE-OF-LAW RULES OF ANY JURISDICTION. VENUE IS IN THE COUNTY FOR PERFORMANCE.

D.7. Waiver of Default. Default is not waived if the nondefaulting party fails to declare a default immediately or delays taking any action with respect to the default.

D.8. No Third-Party Beneficiaries. There are no third-party beneficiaries of this Assignment.

D.9. Severability. If a provision in this Assignment is unenforceable for any reason, to the extent the unenforceability does not destroy the basis of the bargain among the parties, the unenforceability does not affect any other provision of this Assignment, and this Assignment is to be construed as if the unenforceable provision is not a part of the Assignment.

D.10. Ambiguities Not to Be Construed against Party Who Drafted Assignment. The rule of construction that ambiguities in a document are construed against the party who drafted it does not apply in interpreting this Assignment.

D.11. No Special Relationship. The parties' relationship is an ordinary commercial relationship, and the parties do not intend to create the relationship of principal and agent, partners, joint venturers, or any other special relationship.

D.12. Counterparts. If this Assignment is executed in multiple counterparts, all

counterparts taken together constitute this Assignment. Copies of signatures to this Assignment are effective as original signatures.

D.13. Confidentiality. This Assignment, this transaction, and all information learned in the course of this transaction shall be kept confidential, except to the extent disclosure is required by law or court order or to enable third parties to advise or assist Assignee to investigate the Property or either party to close this transaction. Remedies for violations of this provision are limited to injunctions, and no damages or rescission may be sought or recovered as a result of any such violations.

D.14. Binding Effect. This Assignment binds, benefits, and may be enforced by the parties and their respective heirs, successors, and permitted assigns.

D.15. Waiver of Consumer Rights. ASSIGNEE WAIVES ITS RIGHTS UNDER THE TEXAS DECEPTIVE TRADE PRACTICES–CONSUMER PROTECTION ACT, SECTION 17.41 *ET SEQ.* OF THE TEXAS BUSINESS AND COMMERCE CODE, A LAW THAT GIVES CONSUMERS SPECIAL RIGHTS AND PROTECTIONS. AFTER CONSULTATION WITH AN ATTORNEY OF ITS OWN SELECTION, ASSIGNEE VOLUNTARILY CONSENTS TO THIS WAIVER.

D.16. Waiver of Jury Trial. Assignor and Assignee, each after consultation with an attorney of its own selection (which counsel was not directly or indirectly identified, suggested, or selected by the other party), both voluntarily waive a trial by jury of any issue arising in an action or proceeding between the parties or their successors, under or connected with this Assignment or its provisions. Assignor and Assignee acknowledge to each other that Assignor and Assignee are not in significantly disparate bargaining positions.

_____

[Name and title of assignor]
Date:

_____

[**Name and title of assignee**]
Date:

Exhibit A

Real Estate Sales Contract

Attach real estate sales contract.
See form 4-1 in this chapter.

Exhibit B

Representations

A. Assignor's Representations to Assignee

Assignor represents to Assignee that the following are true and correct as of the Date and will be true and correct on the Closing Date, unless Assignor has given Assignee notice of any changes before the Closing Date that such circumstances have changed due to causes not reasonably within Assignor's control.

A.1. Authority. Assignor is a [**specify type of organization**] duly organized, validly existing, and in good standing under the laws of the state of [Texas/[**state**]] with authority to perform its obligations under this Assignment. This Assignment is binding on Assignor.

A.2. Litigation. Assignor has not received written notice and has no actual knowledge of any litigation pending or threatened against the Property or Assignor that might adversely affect the Property or Assignor's ability to perform its obligations under this assignment [**include if applicable:** , except: [**specify**]].

A.3. Violation of Governmental Requirements. Assignor has not received written notice and has no actual knowledge of violation of any law, ordinance, regulation, restriction, or legal requirements affecting the Property or Seller's use of the Property [**include if applicable:** , except: [**specify**]].

A.4. Licenses, Permits, and Approvals. Assignor has not received written notice and has no actual knowledge that any license, permit, or approval necessary to use the Property in the manner in which it is currently being used has expired or will not be renewed on expiration or that any material condition will be imposed to use or renew the same [**include if applicable:** , except: [**specify**]].

A.5. Condemnation; Zoning; Land Use; Hazardous Materials. Assignor has not received written notice and has no actual knowledge of any condemnation, zoning, land-use, hazardous materials, or other proceedings affecting the Property or any written inquiries or notices by any governmental authority or third party with respect to condemnation, zoning, or other land-use regulations or the presence of hazardous materials affecting the Property [**include if applicable:** , except: [**specify**]].

A.6. Terrorist Organizations Lists. Assignor is not and Assignor has no actual knowledge that any of its partners, members, shareholders, owners, employees, officers, directors, representatives, or agents is a person or entity with whom U.S. persons or entities are restricted from doing business under regulations of the Office of Foreign Asset Control of the Department of the Treasury or under any statute, executive order, or other governmental action.

A.7. No Other Obligation to Sell the Property or Restriction against Sale. Assignor is not obligated to sell any of the Property to any person other than Assignee. Assignor's performance of this Assignment will not cause a breach of any other agreement or obligation to which Assignor is a party or by which Assignor or the Property is bound.

A.8. No Liens. On the Closing Date, the Property will be free and clear of all mechanic's and materialman's liens and other liens and encumbrances of any nature arising through Assignor.

A.9. Assignor's Records. Assignor's Records provided by Assignor to Assignee as provided in Exhibit C for Assignee's inspections will be true, correct, and complete copies of the records in Assignor's possession or control. Assignor's Records that were prepared by or under Assignor's supervision and control will be true, correct, and complete in all material respects. Unless Assignor notifies Assignee to the contrary at the time of delivery of Records

provided by Assignor to Assignee that were not prepared by or under Assignor's supervision and control, Assignor has no actual knowledge that such Records are not true, correct, and complete in any material respect.

A.10. No Other Representation. Except as stated above, Assignor makes no representation with respect to the Property.

A.11. No Warranty. Assignor has made no warranty in connection with this transaction.

B. "As Is, Where Is"

THIS ASSIGNMENT IS AN ARM'S-LENGTH AGREEMENT BETWEEN THE PARTIES. THE CONSIDERATION WAS BARGAINED ON THE BASIS OF AN "AS IS, WHERE IS" TRANSACTION AND REFLECTS THE AGREEMENT OF THE PARTIES THAT THERE ARE NO REPRESENTATIONS, DISCLOSURES, OR EXPRESS OR IMPLIED WARRANTIES, EXCEPT THE REPRESENTATIONS IN THIS ASSIGNMENT.

ASSIGNEE IS NOT RELYING ON ANY REPRESENTATIONS, DISCLOSURES, OR EXPRESS OR IMPLIED WARRANTIES OTHER THAN THOSE EXPRESSLY CONTAINED IN THIS ASSIGNMENT. ASSIGNEE IS NOT RELYING ON ANY INFORMATION REGARDING THE PROPERTY PROVIDED BY ANY PERSON, OTHER THAN ASSIGNEE'S OWN INSPECTION AND THE REPRESENTATIONS CONTAINED IN THIS ASSIGNMENT.

C. Assignee's Representations to Assignor

Assignee represents to Assignor that the following are true and correct as of the Date and will be true and correct on the Closing Date, unless Assignee has given Assignor notice of any changes before the Closing Date that such circumstances have changed due to causes not reasonably within Assignee's control.

C.1. Authority. Assignee is a [**specify type of organization**] duly organized, validly existing, and in good standing under the laws of the state of [Texas/[**state**]] with authority to perform its obligations under this Assignment. This Assignment is binding on Assignee. This Assignment is, and all documents required by this Assignment to be executed and delivered to Seller at Closing will be, duly authorized, executed, and delivered by Assignee.

C.2. Terrorist Organizations Lists. Assignee is not and Assignee has no actual knowledge that any of its partners, members, shareholders, owners, employees, officers, directors, representatives, or agents is a person or entity with whom U.S. persons or entities are restricted from doing business under regulations of the Office of Foreign Asset Control of the Department of the Treasury or under any statute, executive order, or other governmental action.

Exhibit C

Records

A. Seller's Records. The following records delivered by Seller to Assignor ("Seller's Records"):

List applicable seller's records.

B. Title and Survey Information. The following title and survey information delivered to Assignor ("Title and Survey Information"):

List applicable title and survey information.

C. Assignor's Records and Studies. The following records and studies obtained by Assignor other than those listed in paragraph A. ("Assignor's Records and Studies"):

List applicable records and studies.

[Reserved]

Form 4-30

Seller's Consent to Assignment

Date:

Seller:

Address:

Phone:

E-mail:

Type of entity:

Assignor:

Address:

Phone:

E-mail:

Type of entity:

Assignee:

Address:

Phone:

E-mail:

Type of entity:

Contract: Real Estate Sales Contract between Seller and Buyer for sale of the Property to Buyer involving—

Earnest Money:

Escrow: [**title company name, GF #, address, and escrow officer contact information**].

Consideration:

For the Consideration, Seller, Assignor, and Assignee agree as follows:

A. Exhibits

The following are attached to and are a part of this Assignment:

Exhibit A—Assignment of Real Estate Sales Contract

Exhibit B—Representations

Exhibit C—Records

B. Assignment, Assumption, and Consent

B.1. Assignment. Assignor and Assignee represent to Seller that a true, correct, and complete copy of the Assignment of Real Estate Sales Contract ("Assignment") executed by Assignor and Assignee is attached as Exhibit A. The Assignment sets forth the entire agreement between Assignor and Assignee.

B.2. Assumption. Assignee assumes and agrees to perform Buyer's obligations under the Contract.

B.3. Consent. Seller consents to the Assignment on the terms of this Consent. Seller's consent to the Assignment is not a consent to any other assignment. In addition to the Conditions of Closing set out in paragraph K.1. of the Contract, Seller will not be obligated to close the sale of the Property to Assignee unless Assignee has satisfied the following conditions, any of which may be waived by Seller in its discretion:

B.3.a. The representations of Assignee to Seller in this Consent are true and correct at Closing.

B.3.b. The representations of Assignor to Seller in this Consent are true and correct at Closing.

B.3.c. Assignee must have performed all covenants and agreements required to be performed by it at or before Closing.

Select one of the following.

The consent by Seller to this assignment by Assignor to Assignee does not release Assignor of its obligations under the Contract. Assignor and Assignee are jointly and severally liable to Seller for the performance of the obligations of Buyer under the Contract.

Or

The consent by Seller to this assignment by Assignor to Assignee releases Assignor of its obligations under the Contract except for Assignor's representations to Seller in this Consent.

Continue with the following.

C. Representations

C.1. Representations

C.1.a. Assignor. Assignor represents to Seller that its representations stated in sections A. and D. of Exhibit B to the Contract are true and correct as of the Date and will be true and correct on the Closing Date.

Assignor represents to Seller that the Records listed in Exhibit C and provided by Assignor to Assignee for Assignee's inspections are true, correct, and complete copies of the Records in Assignor's possession or control. Assignor's Records and Studies that were prepared by or under Assignor's supervision and control are true, correct, and complete in all material respects.

C.1.b. Assignee. Assignee represents to Seller that its representations stated in section A. of Exhibit B to this Consent are true and correct as of the Date and will be true and correct on the Closing Date.

C.1.c. Subsequent Notice. If Assignor or Assignee becomes aware that any of the representations of either Assignor or Assignee to Seller are not true and correct, it will promptly notify Seller. Unless Assignor or Assignee notifies Seller to the contrary on or before the Closing Date, or Seller has actual knowledge to the contrary as of the Closing Date, Seller is entitled to presume that the representations in this Consent are true and correct as of the Closing Date.

C.2. As Is, Where Is. Assignee agrees to the terms of section B. (As Is, Where Is) in Exhibit B to this Consent and in section B. to the Contract.

D. Insurance and Indemnity

D.1. Insurance. Assignee agrees to maintain the insurance set out in Exhibit C to the Contract through Closing.

D.2. Indemnity. ASSIGNEE WILL INDEMNIFY, DEFEND, AND HOLD SELLER HARMLESS FROM ANY LOSS, ATTORNEY'S FEES, EXPENSES, OR CLAIMS ("INDEMNIFIED LIABILITIES") ARISING OUT OF ASSIGNEE'S ACTS OR OMISSIONS AFTER THE DATE, INCLUDING INDEMNIFIED LIABILITIES CAUSED IN WHOLE OR IN PART BY THE NEGLIGENCE OF ASSIGNEE OR ITS EMPLOYEES OR CONTRACTORS, INCLUDING IF THE INDEMNIFIED LIABILITIES ARISE IN PART FROM THE NEGLIGENCE OF ASSIGNOR OR ITS EMPLOYEES. THIS INDEMNITY IS (a) INDEPENDENT OF A PARTY'S INSURANCE, (b) WILL NOT BE LIMITED BY DAMAGES PAID UNDER THE WORKERS' COMPENSATION ACT, AND (c) WILL SURVIVE THE CLOSING OR THE TERMINATION OF THE CONTRACT.

E. Miscellaneous

E.1. Notices. Any notice required by or permitted under this Consent must be in writing. Any notice required by this Consent will be deemed to be given (whether received or not) the earlier of receipt or three business days after being deposited with the United States Postal Service, postage prepaid, certified mail, return receipt requested, and addressed to the intended recipient at the address shown in this Consent. Notice may also be given by regular mail, personal delivery, courier delivery, or e-mail and will be effective when received, provided that (a) any notice received on a Saturday, Sunday, or holiday will be deemed to have been received on the next day that is not a Saturday, Sunday, or holiday and (b) any notice received after 5:00 P.M. local time at the place of delivery on a day that is not a Saturday, Sunday, or holiday will be deemed to have been received on the next day that is not a Saturday, Sunday, or holiday. Any address for notice may be changed by not less than ten days' prior written notice given as provided herein. Copies of each notice must be given by one of these methods to the attorney of the party to whom notice is given.

E.2. Entire Agreement. This Consent is the entire agreement of the parties concerning consent by Seller to the assignment by Assignor to Assignee. There are no representations, warranties, agreements, or promises pertaining to the Property or the sale of the

Property by Seller to Buyer, and Assignee is not relying on any statements or representations of Assignor, Seller, or any agent of Assignor or Seller that are not in the Contract, this Consent, or the Assignment.

E.3. Amendment. This Consent may be amended only by an instrument in writing signed by the parties.

E.4. Prohibition of Assignment. Assignee may not assign this Consent or the Contract or Assignee's rights under this Agreement or Buyer's rights under the Contract without Seller's prior written consent, which Seller has no obligation to grant and which, if granted, may be conditioned in any manner Seller deems appropriate, and any attempted assignment without Seller's consent is void. The consent by Seller to any assignment by Assignee will not release Assignor or Assignee of its obligations under this Consent, and Assignor, Assignee, and Assignee's assignee will be jointly and severally liable for the performance of Buyer's obligations after any such assignment.

E.5. Survival. The provisions of this Consent that expressly survive termination or Closing and other obligations of this Consent that cannot be performed before termination of this Consent or before Closing survive termination of this Consent or Closing, and the legal doctrine of merger does not apply to these matters. The representations made by the parties as of Closing survive Closing.

E.6. Choice of Law; Venue. THIS CONSENT IS TO BE CONSTRUED UNDER THE LAWS OF THE STATE OF TEXAS, WITHOUT REGARD TO CHOICE-OF-LAW RULES OF ANY JURISDICTION. VENUE IS IN THE COUNTY FOR PERFORMANCE.

E.7. Waiver of Default. Default is not waived if the nondefaulting party fails to declare a default immediately or delays taking any action with respect to the default.

E.8. No Third-Party Beneficiaries. There are no third-party beneficiaries of this Consent.

E.9. Severability. If a provision in this Consent is unenforceable for any reason, to the extent the unenforceability does not destroy the basis of the bargain among the parties, the unenforceability does not affect any other provision of this Consent, and this Consent is to be construed as if the unenforceable provision is not a part of the Consent.

E.10. Ambiguities Not to Be Construed against Party Who Drafted Consent. The rule of construction that ambiguities in a document are construed against the party who drafted it does not apply in interpreting this Consent.

E.11. No Special Relationship. The parties' relationship is an ordinary commercial relationship, and the parties do not intend to create the relationship of principal and agent, partners, joint venturers, or any other special relationship.

E.12. Counterparts. If this Consent is executed in multiple counterparts, all counterparts taken together constitute this Consent. Copies of signatures to this Consent are effective as original signatures.

E.13. Confidentiality. This Consent, this transaction, and all information learned in the course of this transaction shall be kept confidential, except to the extent disclosure is required by law or court order or to enable third parties to advise or assist Assignee to investigate the Property or either party to close this transaction. Remedies for violations of this provision are limited to injunctions, and no damages or rescission may be sought or recovered as a result of any such violations.

E.14. Binding Effect. This Consent binds, benefits, and may be enforced by the parties and their respective heirs, successors, and permitted assigns.

E.15. Waiver of Consumer Rights. ASSIGNEE WAIVES ITS RIGHTS UNDER THE TEXAS DECEPTIVE TRADE PRACTICES–CONSUMER PROTECTION ACT, SECTION 17.41 *ET SEQ.* OF THE TEXAS BUSINESS AND COMMERCE CODE, A LAW THAT GIVES CONSUMERS SPECIAL RIGHTS AND PROTECTIONS. AFTER CONSULTATION WITH AN ATTORNEY OF ITS OWN SELECTION, ASSIGNEE VOLUNTARILY CONSENTS TO THIS WAIVER.

E.16. Waiver of Jury Trial. Assignor and Assignee, each after consultation with an attorney of its own selection (which counsel was not directly or indirectly identified, suggested, or selected by the other party), both voluntarily waive a trial by jury of any issue arising in an action or proceeding between the parties or their successors, under or connected with this Consent or its provisions. Assignor and Assignee acknowledge to each other that Assignor and Assignee are not in significantly disparate bargaining positions.

_____

[Name and title of seller]
Date:

_____

[Name and title of assignor]
Date:

_____

[Name and title of assignee]
Date:

Exhibit A

Assignment of Real Estate Sales Contract

Attach assignment of real estate sales contract. See forms 4-28 and 4-29 in this chapter.

Exhibit B

Representations

A. Assignee's Representations to Seller:

Assignee represents to Seller that the following are true and correct as of the Date and will be true and correct on the Closing Date, unless Seller has given Assignee notice of any changes before the Closing Date that such circumstances have changed due to causes not reasonably within Assignee's control.

A.1. Authority. Assignee is a [**specify type of organization**] duly organized, validly existing, and in good standing under the laws of the state of [Texas/[**state**]] with authority to perform its obligations under this Assignment. This Consent and the Assignment are binding on Assignee.

A.2. Litigation. Assignee has not received written notice and has no actual knowledge of any litigation pending or threatened against the Property or Assignee that might adversely affect the Property or Assignee's ability to perform its obligations under this Assignment [**include if applicable:** , except: [**specify**]].

A.3. Violation of Governmental Requirements. Assignee has not received written notice and has no actual knowledge of violation of any law, ordinance, regulation, restriction, or legal requirements affecting the Property or Seller's use of the Property [**include if applicable:** , except: [**specify**]].

A.4. Licenses, Permits, and Approvals. Assignee has not received written notice and has no actual knowledge that any license, permit, or approval necessary to use the Property in the manner in which it is currently being used has expired or will not be renewed on expiration or that any material condition will be imposed to use or renew the same [**include if applicable:** , except: [**specify**]].

A.5. Condemnation; Zoning; Land Use; Hazardous Materials. Assignee has not received written notice and has no actual knowledge of any condemnation, zoning, land-use, hazardous materials, or other proceedings affecting the Property or any written inquiries or notices by any governmental authority or third party with respect to condemnation, zoning, or other land-use regulations or the presence of hazardous materials affecting the Property [**include if applicable:** , except: [**specify**]].

A.6. Terrorist Organizations Lists. Assignee is not and Assignee has no actual knowledge that any of its partners, members, shareholders, owners, employees, officers, directors, representatives, or agents is a person or entity with whom U.S. persons or entities are restricted from doing business under regulations of the Office of Foreign Asset Control of the Department of the Treasury or under any statute, executive order, or other governmental action.

A.7. No Other Obligation to Sell Property or Restriction against Sale. Assignee is not obligated to sell any of the Property to any person other than Assignee. Assignee's performance of this agreement will not cause a breach of any other agreement or obligation to which Assignee is a party or by which Assignee or the Property is bound.

A.8. No Liens. On the Closing Date, the Property will be free and clear of all mechanic's and materialman's liens and other liens and encumbrances of any nature arising through Assignee.

A.9. No Other Representation. Except as stated above or in the notices, statements, and certificates set forth in Exhibit D to the Contract, Seller makes no representation with respect to the Property.

A.10. No Warranty. Seller has made no warranty in connection with this transaction.

B. "As Is, Where Is"

THIS CONSENT, THE ASSIGNMENT, AND THE CONTRACT ARE AN ARM'S-LENGTH AGREEMENT BETWEEN THE PARTIES. THE CONSIDERATION WAS BARGAINED ON THE BASIS OF AN "AS IS, WHERE IS" TRANSACTION AND REFLECTS THE AGREEMENT OF THE PARTIES THAT THERE ARE NO REPRESENTATIONS, DISCLOSURES, OR EXPRESS OR IMPLIED WARRANTIES, EXCEPT THOSE IN THIS CONSENT OR THE CONTRACT.

ASSIGNEE IS NOT RELYING ON ANY REPRESENTATIONS, DISCLOSURES, OR EXPRESS OR IMPLIED WARRANTIES OTHER THAN THOSE EXPRESSLY CONTAINED IN THIS CONSENT. ASSIGNEE IS NOT RELYING ON ANY INFORMATION REGARDING THE PROPERTY PROVIDED BY ANY PERSON, OTHER THAN ASSIGNEE'S OWN INSPECTION AND THE REPRESENTATIONS AND WARRANTIES OF SELLER CONTAINED IN THIS CONSENT OR THE CONTRACT.

Exhibit C

Records

A. Seller's Records. Assignee acknowledges that the following records of Seller ("Seller's Records") have been delivered to Assignee:

List applicable seller's records.

B. Title and Survey Information. Assignee acknowledges that the following title and survey information have been delivered to Assignee ("Title and Survey Information"):

List applicable title and survey information.

C. Assignor's Records and Studies. Assignee acknowledges that the following records and studies ("Assignor's Records and Studies") have been delivered to Assignee:

List applicable records and studies.

[Reserved]

Form 4-31

Contract for Assignment of Real Estate Sales Contract

Execution by the first party to execute this Contract for Assignment of Real Estate Sales Contract ("Contract for Assignment") and delivery to the other party constitutes an offer to buy or sell Buyer's rights under the Real Estate Sales Contract ("Contract"). Unless accepted by the other party by execution of this Contract for Assignment and escrowed with the Title Company by the Deposit Deadline, the offer lapses and is void. This Contract for Assignment is effective upon escrow with the Title Company of this Contract for Assignment executed by Assignor and Assignee ("Date").

Deposit Deadline:

Assignor:

Address:

Phone:

E-mail:

Type of entity:

Assignor's Attorney:

Law firm:

Address:

Phone:

E-mail:

Assignee:

Address:

Phone:

E-mail:

Type of entity:

Assignee's Attorney:

Law firm:

Address:

Phone:

E-mail:

Assignee's Sales Agent:

Brokerage firm:

Address:

Phone:

E-mail:

Contract: Real Estate Sales Contract between Seller and Buyer, the Assignor, for sale of the Property to Buyer, a true, correct, and complete copy of which is attached hereto as Exhibit A, involving—

Seller:

Property: The land commonly known as [**describe property**] and more fully described in Exhibit A ("Land") [**include the following phrases that are applicable, tailoring punctuation and conjunctions as necessary:** , together with improvements to the Land ("Improvements"), the leases associated with the Land and Improvements ("Leases"), and the personal property described in Exhibit A ("Personal Property")].

Earnest Money:

Escrow: [**title company name, GF #, address, and escrow officer contact information**] ("Title Company")

Consideration:

Independent Consideration: Assignee is to pay $100 ("Independent Consideration") to Assignor within three business days of the execution by Assignor and Assignee and escrow of this Contract for Assignment with the Title Company as Escrow Agent for Assignor and Assignee. The Independent Consideration is consideration for Assignee's Termination Option.

Substitute Earnest Money: An amount equal to the Earnest Money under the Contract.

Assignment Fee:

Assignee's Liquidated Damages:

Assignor's Additional Liquidated Damages:

Consent: This Assignment is conditioned on the consent of Seller.

For the Consideration, Assignor and Assignee agree as follows:

A. Exhibits

The following are attached to and are a part of this Contract for Assignment:

Exhibit A—Real Estate Sales Contract

Exhibit B—Representations

Exhibit C—Records

Exhibit D—Assignment of Real Estate Sales Contract

Exhibit E—Assignee's Insurance

B. Assignment in Escrow

B.1. Assignment of Contract. Within five business days of the escrow by the parties of this Contract for Assignment, Assignor and Assignee are to execute and deliver to the Title Company the Assignment of Real Estate Sales Contract ("Assignment"), a form of which is attached as Exhibit D.

B.2. Substitute Earnest Money. Assignee is to deposit with Escrow Agent the Substitute Earnest Money within three business days of the escrow of this Contract for Assignment with Escrow Agent.

B.3. Assignment Fee. Assignee is to deposit with Escrow Agent the Assignment Fee within three business days of the escrow of this Contract for Assignment with Escrow Agent.

B.4. Escrow. The Assignment, Substitute Earnest Money, and Assignment Fee are to be held by Escrow Agent pending determination by Assignee of whether to exercise Assignee's Termination Option.

B.4.a. Assignment Effective Date. The "Assignment Effective Date" is the day after the expiration of the Inspection Period without Assignee having exercised the Termination Option. On the Assignment Effective Date, Escrow Agent is to do the following:

i. Deliver to Assignee the escrowed Assignment.

ii. Deliver to Assignor the Assignment Fee.

iii. Substitute the Substitute Earnest Money for the Earnest Money deposited by Assignor as Buyer under the Contract and send the monies deposited by Assignor as the Earnest Money to Assignor.

B.4.b. Termination. If Assignee exercises the Termination Option, Escrow Agent is to do the following:

i. Deliver to Assignor the escrowed Assignment.

ii. Send to Assignee the Assignment Fee and Substitute Earnest Money.

C. Inspection Period

C.1. Review of Records. Assignor will deliver to Assignee copies of the Records specified in Exhibit C, or otherwise make those records available for Assignee's review, within five business days of the deposit with Escrow Agent of the fully executed Contract for Assignment, the Substitute Earnest Money, and the Assignment Fee.

C.2. Entry onto Property. Assignee may enter the Property before expiration of the Inspection Period to inspect it at Assignee's cost and risk, subject to the following:

C.2.a. Insurance. Assignee must deliver evidence to Assignor that Assignee has commercial general liability insurance, with coverages specified in Exhibit E. Assignee must

deliver evidence to Seller that Assignee has insurance with coverages as required by the Contract.

C.2.b. Operations at Property. Assignee may not interfere in any material manner with existing operations or occupants of the Property.

C.2.c. Notice of Testing. Assignee must notify Assignor in advance of Assignee's plans to conduct tests so that Assignor may be present during the tests.

C.2.d. Restoration. If the Property is physically altered because of Assignee's inspections, Assignee must return the Property to its preinspection condition promptly after the alteration occurs.

C.2.e. Third-Party Reports. Assignee must deliver to Assignor copies of all inspection reports that Assignee prepares or receives from third-party consultants or contractors within three days after their preparation or receipt.

C.2.f. Rules. Assignee must abide by any other reasonable entry rules imposed by Seller, Assignor, or both.

C.2.g. Contract Protocols. Assignee must abide by the requirements of the Contract regarding entry on the Property.

C.3. Environmental Assessment. Assignee has the right to conduct environmental assessments of the Property. Assignor will provide, or will designate a person with knowledge of the use and condition of the Property to provide, information requested by Assignee or Assignee's agent or representative regarding the use and condition of the Property. Assignor will cooperate with Assignee in obtaining and providing to Assignee or its agent or representative information regarding the use and condition of the Property before Assignor's period of ownership to the extent that the information is within Assignor's possession or control.

C.4. Assignee's Right to Terminate. Assignee may terminate this Contract for Assignment for any reason by notifying Assignor of the termination before the end of the Inspection Period ("Termination Option"). If Assignee does not notify Assignor of Assignee's termination of the contract before the end of the Inspection Period, Assignee waives the right to terminate this Contract for Assignment pursuant to this provision.

C.5. Release. ASSIGNEE RELEASES SELLER AND ASSIGNOR AND THOSE PERSONS ACTING ON SELLER'S OR ASSIGNOR'S BEHALF FROM ALL CLAIMS AND CAUSES OF ACTION (INCLUDING CLAIMS FOR ATTORNEY'S FEES AND COURT AND OTHER COSTS) RESULTING FROM ASSIGNEE'S INVESTIGATION OF THE PROPERTY [**include if applicable:** , INCLUDING CLAIMS ARISING OUT OF SELLER'S OR ASSIGNOR'S NEGLIGENCE, BUT NOT SELLER'S OR ASSIGNOR'S GROSS NEGLIGENCE OR INTENTIONAL MISCONDUCT].

C.6. Performance of Contract

C.6.a. Assignor to Assignee

i. *Modifications to Contract.* Assignor agrees not to modify or in any way alter the terms of the Contract without the prior written consent of Assignee.

ii. *Release of Seller.* Assignor agrees not to waive, excuse, condone, or in any manner release or discharge Seller from the obligations, covenants, conditions, and agreements of Seller to be performed under the Contract.

iii. *Termination of Contract.* Assignor agrees not to terminate the Contract.

iv. *Performance of Contract.* Assignor agrees to abide faithfully by, perform, and discharge every material obligation, covenant, and agreement of the Contract to be performed by Buyer before the expiration of the Inspection Period and shall obtain Assignee's consent before exercising any elections or taking any actions.

v. *Forwarding Notices.* Assignor agrees to promptly send Assignee any notice or demand that Assignor receives from Seller.

vi. *Enforcement of Seller's Obligations.* Assignor agrees to vigorously enforce the obligations of Seller under the Contract.

vii. *Notice of Default by Assignor.* Assignor agrees to promptly notify Assignee of any notice of default by Assignor that Assignor receives.

viii. *Assignee Cure Rights.* Assignee is hereby given the right to undertake to cure any default by Assignor on the Contract.

ix. *Assignee's Dealing with Seller.* Assignor authorizes Assignee to contact Seller and the Title Company and obtain Seller's Records and Title and Survey Information. Assignee shall furnish Assignor a copy of any Seller's Records and Title and Survey Information it receives from Seller or the Title Company that have not already been furnished to Assignor.

C.6.b. Assignee to Assignor. Assignee agrees not to take actions or omit to take actions that will cause Assignor to default on the Contract.

C.7. Consent by Assignor to Assignment. Assignor and Assignee are to cooperate in seeking Seller's consent for Assignor to assign Buyer's rights under the Contract to Assignee.

D. Representations

D.1. Contract. Attached as Exhibit A is a true and correct copy of the Contract.

D.2. Representations. The representations stated in sections A. and C. of Exhibit B to this Contract for Assignment are true and correct as of the Date and must be true and correct as of the Assignment Effective Date. A party to this Consent for Assignment who

becomes aware that any of the representations of either party are not true and correct will promptly notify the other party. Unless a party notifies the other party to the contrary on or before the Assignment Effective Date, or a party has actual knowledge to the contrary as of the Assignment Effective Date, each party to this Contract for Assignment is entitled to presume that the representations of the other party in Exhibit B are true and correct as of the Assignment Effective Date.

D.3. As Is, Where Is. The parties agree to the terms of section B. (As Is, Where Is) in Exhibit B.

E. Insurance and Indemnity

E.1. Insurance. Assignee agrees to maintain the insurance set out in Exhibit E through Closing.

E.2. Indemnity. ASSIGNEE WILL INDEMNIFY, DEFEND, AND HOLD ASSIGNOR HARMLESS FROM ANY LOSS, ATTORNEY'S FEES, EXPENSES, OR CLAIMS ("INDEMNIFIED LIABILITIES") ARISING OUT OF ASSIGNEE'S ACTS OR OMISSIONS AFTER THE DATE, INCLUDING INDEMNIFIED LIABILITIES CAUSED IN WHOLE OR IN PART BY THE NEGLIGENCE OF ASSIGNEE OR ITS EMPLOYEES OR CONTRACTORS, INCLUDING IF THE INDEMNIFIED LIABILITIES ARISE IN PART FROM THE NEGLIGENCE OF ASSIGNOR OR ITS EMPLOYEES. THIS INDEMNITY IS (a) INDEPENDENT OF A PARTY'S INSURANCE, (b) WILL NOT BE LIMITED BY DAMAGES PAID UNDER THE WORKERS' COMPENSATION ACT, AND (c) WILL SURVIVE THE CLOSING OR THE TERMINATION OF THE CONTRACT.

F. Default and Remedies

F.1. Assignor's Defaults. If Assignor fails to perform its obligations under this Contract for Assignment or if Assignor's representations are not true and correct as of the Assignment Effective Date ("Assignor's Default"), Assignee's sole and exclusive remedy is

to terminate this Contract for Assignment by giving notice to Assignor and Escrow Agent on or before [**number**] days after the Inspection Period and have the Substitute Earnest Money and Assignment Fee returned to Assignee. If Assignor's Default occurs after Assignee has incurred costs to investigate the Property and Assignee terminates this Contract for Assignment in accordance with the previous sentence, Assignor will also pay to Assignee as liquidated damages the lesser of Assignee's actual out-of-pocket expenses incurred to investigate the Property after the Effective Date ("Assignee's Expenses") or the amount of Assignee's Liquidated Damages, within ten days after Assignor's receipt of an invoice from Assignee stating the amount of Assignee's Expenses accompanied by reasonable evidence of Assignee's Expenses.

F.2. Assignee's Default. If Assignee fails to perform any of its obligations under this Contract for Assignment ("Assignee's Default"), Assignor's sole and exclusive remedy is to terminate this Contract for Assignment by giving notice to Assignee and Escrow Agent and have the Assignment Fee, if not previously delivered by Escrow Agent to Assignor as provided in this Contract for Assignment, as liquidated damages. If Assignee's Default occurs after Assignor has incurred costs to perform its obligations under this Contract for Assignment and Assignor terminates this Contract for Assignment in accordance with the previous sentence, Assignee will also reimburse Assignor for the lesser of Assignor's actual out-of-pocket expenses incurred after the Effective Date to perform its obligations under this Contract for Assignment ("Assignor's Expenses") or the amount of Assignor's Additional Liquidated Damages, within ten days after Assignee's receipt of an invoice from Assignor stating the amount of Assignor's Expenses accompanied by reasonable evidence of Assignor's Expenses.

F.3. Assignee's Default; Remedies after Closing. If Assignee fails to perform any of its obligations under this Contract for Assignment that survive Closing, Assignor will have

all rights and remedies available at law or in equity unless otherwise provided by the Closing Documents.

F.4. Liquidated Damages. The parties agree that just compensation for the harm that would be caused by a default by either party cannot be accurately estimated or would be very difficult to accurately estimate and that Assignee's Liquidated Damages and Assumption Fee and Assignor's Additional Liquidated Damages are reasonable forecasts of just compensation to the nondefaulting party for the harm that would be caused by a default.

F.5. Attorney's Fees. If either party retains an attorney to enforce this Contract for Assignment, the party prevailing in litigation is entitled to recover reasonable attorney's fees and court and other costs.

G. Miscellaneous

G.1. Notices. Any notice required by or permitted under this Contract for Assignment must be in writing. Any notice required by this Contract for Assignment will be deemed to be given (whether received or not) the earlier of receipt or three business days after being deposited with the United States Postal Service, postage prepaid, certified mail, return receipt requested, and addressed to the intended recipient at the address shown in this contract. Notice may also be given by regular mail, personal delivery, courier delivery, or e-mail and will be effective when received, provided that (a) any notice received on a Saturday, Sunday, or holiday will be deemed to have been received on the next day that is not a Saturday, Sunday, or holiday and (b) any notice received after 5:00 P.M. local time at the place of delivery on a day that is not a Saturday, Sunday, or holiday will be deemed to have been received on the next day that is not a Saturday, Sunday, or holiday. Any address for notice may be changed by not less than ten days' prior written notice given as provided herein. Copies of each notice must be given by one of these methods to the attorney of the party to whom notice is given.

G.2. Entire Agreement. This Contract for Assignment is the entire agreement of the parties concerning the assignment by Assignee. There are no representations, warranties, agreements, or promises pertaining to the Property or the sale of the Property by Assignor to Buyer, and Assignee is not relying on any statements or representations of Buyer, Assignor, or any agent of Buyer or Seller that are not in the Contract or this Contract for Assignment.

G.3. Amendment. This Contract for Assignment may be amended only by an instrument in writing signed by the parties.

G.4. Prohibition of Assignment. Assignee may not assign this Contract for Assignment or the Contract or Assignee's rights under this Contract for Assignment or Buyer's rights under the Contract without Assignor's prior written consent, which Assignor has no obligation to grant and which, if granted, may be conditioned in any manner Assignor deems appropriate, and any attempted assignment without Assignor's consent is void. The consent by Assignor to any assignment by Assignee will not release Assignee of its obligations under this Agreement, and Assignee and its assignee will be jointly and severally liable for the performance of those obligations after any such assignment.

G.5. Survival. The provisions of this Contract for Assignment that expressly survive termination or Closing and other obligations of this Contract for Assignment that cannot be performed before termination of this Contract for Assignment or before Closing survive termination of this Contract for Assignment or Closing, and the legal doctrine of merger does not apply to these matters. The representations made by the parties as of Closing survive Closing.

G.6. Choice of Law; Venue. THIS CONTRACT FOR ASSIGNMENT IS TO BE CONSTRUED UNDER THE LAWS OF THE STATE OF TEXAS, WITHOUT REGARD TO CHOICE-OF-LAW RULES OF ANY JURISDICTION. VENUE IS IN THE COUNTY FOR PERFORMANCE.

G.7. Waiver of Default. Default is not waived if the nondefaulting party fails to declare a default immediately or delays taking any action with respect to the default.

G.8. No Third-Party Beneficiaries. There are no third-party beneficiaries of this Contract for Assignment.

G.9. Severability. If a provision in this Contract for Assignment is unenforceable for any reason, to the extent the unenforceability does not destroy the basis of the bargain among the parties, the unenforceability does not affect any other provision of this Contract for Assignment, and this Contract for Assignment is to be construed as if the unenforceable provision is not a part of the Contract for Assignment.

G.10. Ambiguities Not to Be Construed against Party Who Drafted Assignment. The rule of construction that ambiguities in a document are construed against the party who drafted it does not apply in interpreting this Contract for Assignment.

G.11. No Special Relationship. The parties' relationship is an ordinary commercial relationship, and the parties do not intend to create the relationship of principal and agent, partners, joint venturers, or any other special relationship.

G.12. Counterparts. If this Contract for Assignment is executed in multiple counterparts, all counterparts taken together constitute this Contract for Assignment. Copies of signatures to this Contract for Assignment are effective as original signatures.

G.13. Confidentiality. This Contract for Assignment, this transaction, and all information learned in the course of this transaction shall be kept confidential, except to the extent disclosure is required by law or court order or to enable third parties to advise or assist Assignee to investigate the Property or either party to close this transaction. Remedies for violations of this provision are limited to injunctions, and no damages or rescission may be sought or recovered as a result of any such violations.

G.14. Binding Effect. This Contract for Assignment binds, benefits, and may be enforced by the parties and their respective heirs, successors, and permitted assigns.

G.15. Waiver of Consumer Rights. ASSIGNEE WAIVES ITS RIGHTS UNDER THE TEXAS DECEPTIVE TRADE PRACTICES–CONSUMER PROTECTION ACT, SECTION 17.41 *ET SEQ.* OF THE TEXAS BUSINESS AND COMMERCE CODE, A LAW THAT GIVES CONSUMERS SPECIAL RIGHTS AND PROTECTIONS. AFTER CONSULTATION WITH AN ATTORNEY OF ITS OWN SELECTION, ASSIGNEE VOLUNTARILY CONSENTS TO THIS WAIVER.

G.16. Waiver of Jury Trial. Assignor and Assignee, each after consultation with an attorney of its own selection (which counsel was not directly or indirectly identified, suggested, or selected by the other party), both voluntarily waive a trial by jury of any issue arising in an action or proceeding between the parties or their successors, under or connected with this Contract for Assignment or its provisions. Assignor and Assignee acknowledge to each other that Assignor and Assignee are not in significantly disparate bargaining positions.

G.17. Broker's Commissions. Assignor and Assignee each indemnify and agree to defend and hold the other party harmless from any loss, attorney's fees, and court and other costs arising out of a claim by any person or entity claiming by, through, or under the indemnitor for a broker's or finder's fee or commission because of this transaction or this Contract for Assignment or the Contract, whether the claimant is disclosed to the indemnitee or not. At Closing under the Contract, each party will provide the other party with a release of broker's or appraiser's liens from all brokers or appraisers for which such party is responsible.

_____

[Name and title of assignor]
Date:

_____

[Name and title of assignee]
Date:

Exhibit A

Real Estate Sales Contract

Attach real estate sales contract. See form 4-1 in this chapter.

Exhibit B

Representations

A. Assignor's Representations to Assignee

Assignor represents to Assignee that the following are true and correct as of the Date and will be true and correct on the Assignment Effective Date, unless Assignor has given Assignee notice of any changes before the Assignment Effective Date that such circumstances have changed due to causes not reasonably within Assignor's control.

A.1. Authority. Assignor is a [**specify type of organization**] duly organized, validly existing, and in good standing under the laws of the state of [Texas/[**state**]] with authority to perform its obligations under this Assignment. This Assignment is binding on Assignor.

A.2. Litigation. Assignor has not received written notice and has no actual knowledge of any litigation pending or threatened against the Property or Assignor that might adversely affect the Property or Assignor's ability to perform its obligations under this Assignment [**include if applicable:** , except: [**specify**]].

A.3. Violation of Governmental Requirements. Assignor has not received written notice and has no actual knowledge of violation of any law, ordinance, regulation, restriction, or legal requirements affecting the Property or Seller's use of the Property [**include if applicable:** , except: [**specify**]].

A.4. Licenses, Permits, and Approvals. Assignor has not received written notice and has no actual knowledge that any license, permit, or approval necessary to use the Property in the manner in which it is currently being used has expired or will not be renewed on expiration or that any material condition will be imposed to use or renew the same [**include if applicable:** , except: [**specify**]].

A.5. Condemnation; Zoning; Land Use; Hazardous Materials. Assignor has not received written notice and has no actual knowledge of any condemnation, zoning, land-use, hazardous materials, or other proceedings affecting the Property or any written inquiries or notices by any governmental authority or third party with respect to condemnation, zoning, or other land-use regulations or the presence of hazardous materials affecting the Property [**include if applicable:** , except: [**specify**]].

A.6. Terrorist Organizations Lists. Assignor is not and Assignor has no actual knowledge that any of its partners, members, shareholders, owners, employees, officers, directors, representatives, or agents is a person or entity with whom U.S. persons or entities are restricted from doing business under regulations of the Office of Foreign Asset Control of the Department of the Treasury or under any statute, executive order, or other governmental action.

A.7. No Other Obligation to Sell Property or Restriction against Sale. Assignor is not obligated to sell any of the Property to any person other than Assignee. Assignor's performance of this Assignment will not cause a breach of any other agreement or obligation to which Assignor is a party or by which Assignor or the Property is bound.

A.8. No Liens. On the Assignment Effective Date, the Property will be free and clear of all mechanic's and materialman's liens and other liens and encumbrances of any nature arising through Assignor.

A.9. Assignor's Records. The records provided by Assignor to Assignee for Assignee's inspections will be true, correct, and complete copies of the records in Assignor's possession or control. The records that were prepared by or under Assignor's supervision and control will be true, correct, and complete in all material respects. Unless Assignor notifies Assignee to the contrary at the time of delivery of records provided by Assignor to Assignee

that were not prepared by or under Assignor's supervision and control, Assignor has no actual knowledge that such records are not true, correct, and complete in any material respect.

A.10. No Other Representation. Except as stated above or in the notices, statements, and certificates set forth in Exhibit D to the Contract, Assignor makes no representation with respect to the Property.

A.11. No Warranty. Assignor has made no warranty in connection with this transaction.

B. "As Is, Where Is"

THIS ASSIGNMENT IS AN ARM'S-LENGTH AGREEMENT BETWEEN THE PARTIES. THE CONSIDERATION WAS BARGAINED ON THE BASIS OF AN "AS IS, WHERE IS" TRANSACTION AND REFLECTS THE AGREEMENT OF THE PARTIES THAT THERE ARE NO REPRESENTATIONS, DISCLOSURES, OR EXPRESS OR IMPLIED WARRANTIES, EXCEPT THOSE IN THIS ASSIGNMENT.

ASSIGNEE IS NOT RELYING ON ANY REPRESENTATIONS, DISCLOSURES, OR EXPRESS OR IMPLIED WARRANTIES OTHER THAN THOSE EXPRESSLY CONTAINED IN THIS ASSIGNMENT. ASSIGNEE IS NOT RELYING ON ANY INFORMATION REGARDING THE PROPERTY PROVIDED BY ANY PERSON, OTHER THAN ASSIGNEE'S OWN INSPECTION AND THE REPRESENTATIONS AND WARRANTIES CONTAINED IN THIS ASSIGNMENT.

C. Assignee's Representations to Assignor

Assignee represents to Assignor that the following are true and correct as of the Date and will be true and correct on the Assignment Effective Date, unless Assignee has given Assignor notice of any changes before the Assignment Effective Date that such circumstances have changed due to causes not reasonably within Assignee's control.

C.1. Authority. Assignee is a [**specify type of organization**] duly organized, validly existing, and in good standing under the laws of the state of [Texas/[**state**]] with authority to perform its obligations under this Assignment. This Contract for Assignment is binding on Assignee. This Contract for Assignment is, and all documents required by this Contract for Assignment to be executed and delivered to Seller at Closing will be, duly authorized, executed, and delivered by Assignee.

C.2. Terrorist Organizations Lists. Assignee is not and Assignee has no actual knowledge that any of its partners, members, shareholders, owners, employees, officers, directors, representatives, or agents is a person or entity with whom U.S. persons or entities are restricted from doing business under regulations of the Office of Foreign Asset Control of the Department of the Treasury or under any statute, executive order, or other governmental action.

Exhibit C

Records

To the extent that Assignor has possession or control of the following items pertaining to and currently impacting the Property, Assignor will deliver or make the items or copies of them available to Buyer by [**date**]:

A. Seller's Records. The following records delivered by Seller to Assignor ("Seller's Records"):

List applicable seller's records.

B. Title and Survey Information. The following title and survey information delivered to Assignor:

List applicable title and survey information.

C. Assignor's Records and Studies. The following records and studies obtained by Seller other than those listed in A.:

List applicable records and studies.

Exhibit D

Assignment of Real Estate Sales Contract

Attach assignment of real estate sales contract. See forms 4-28 and 4-29 in this chapter.

Exhibit E

Assignee's Insurance

Specify insurance the assignee must maintain through the closing.

Chapter 5

Deeds, Bills of Sale, and Other Transfers

Forms

[Reserved]

unilateral attempt to add restrictive covenants to a deed. *Joe T. Garcia's Enterprises v. Snadon*, 751 S.W.2d 914, 916 (Tex. App.—Dallas 1988, writ denied).

As between the parties, a correction deed generally relates back to the date of the original incorrect deed. *Parker*, 353 S.W.2d at 956; *Buccaneer's Cove, Inc. v. Mainland Bank*, 831 S.W.2d 582, 584 (Tex. App.—Corpus Christi–Edinburg 1992, no writ). However, bankruptcy of an intervening bona fide purchaser for value will prevent the relation back. *See In re Jones*, 37 B.R. 969 (Bankr. N.D. Tex. 1984).

The consideration for the correction deed is the correction. *Tatum v. Blackstock*, 418 S.W.2d 269, 274 (Tex. App.—Waco 1967, writ ref'd n.r.e.). Although the correction deed is considered a replacement for the original deed, the original deed will be used to determine the intention of the parties; further, the original deed may continue to be controlling with respect to matters outside of the stated purpose of the correction deed. *Parker*, 353 S.W.2d at 956.

A party to a deed who knows of a mistake should immediately request a correction deed. *Barker v. Coastal Builders, Inc.*, 271 S.W.2d 798, 804 (Tex. 1954). Suits for reformation are subject to the four-year limitations period. Tex. Civ. Prac. & Rem. Code § 16.051; *Brown v. Havard*, 593 S.W.2d 939, 943 (Tex. 1980). The discovery rule, which might toll limitations, does not apply to a plainly evident mistake in an unambiguous deed. *Cosgrove v. Cade*, 468 S.W.3d 32, 36 (Tex. 2015). Certain technical defects in instruments will be cured by statute unless suit is brought within two years of recording. Tex. Civ. Prac. & Rem. Code § 16.033.

While a correction deed replaces and is a substitute for the original instrument, a correction deed is subject to the property interest of a creditor or a subsequent purchaser for valuable consideration without notice after the original instrument was properly recorded and before the correction deed is properly recorded. Tex. Prop. Code § 5.030(b), (c). A title search is suggested to determine whether any intervening creditors or bona fide purchasers exist.

Instruments that correct a conveyance of real property should comply with sections 5.027 through 5.031 of the Texas Property Code. Nonmaterial corrections are subject to section 5.028, and material corrections are subject to section 5.029.

Instruments that correct a material error must be, and instruments that correct a nonmaterial error may be, executed by each party to the conveyance or, if applicable, the parties' heirs, successors, or assigns. Tex. Prop. Code § 5.029(a). These instruments must be recorded. Tex. Prop. Code §§ 5.028(d)(1), 5.029(b)(2). Clause 5-9-5 may be inserted as the last paragraph in a restated deed executed by the original parties to the conveyance, or by their heirs, successors, or assigns, to correct a material or nonmaterial error.

A person who has personal knowledge of the relevant facts is authorized to execute a correction instrument to make a nonmaterial change that resulted from a clerical error, without the joinder of the original parties to the conveyance or their heirs, successors, or assigns. These changes include correction of an inaccurate or incorrect element in a legal description, including a distance, angle, direction, bearing, or chord, a reference to a plat or other plat information, and other matters set forth in the statute; an addition, correction, or clarification of a party's name or marital status; the date on which the conveyance was executed; the recording data for an instrument referenced in the correction instrument; or a fact relating to the acknowledgment or authentication of the original conveyance. Tex. Prop. Code § 5.028(a). A correction instrument executed by a person with knowledge of the relevant facts may also provide an

acknowledgment or authentication that was not included in the original conveyance.

A person who has personal knowledge of the relevant facts is authorized to execute a correction instrument to make a nonmaterial change that resulted from an inadvertent error, without the joinder of the original parties to the conveyance or their heirs, successors, or assigns. These changes include the addition, correction, or clarification of a legal description prepared in connection with the preparation of the original instrument but inadvertently omitted or an omitted call in a metes-and-bounds description that completes the legal description of the property. Tex. Prop. Code § 5.028(a–1).

The person executing the correction instrument must disclose in the instrument the basis for his knowledge of the relevant facts; send a copy of the correction instrument and notice by first class mail, e-mail, or other reasonable means to each party to the original conveyance and, if applicable, the parties' heirs, successors, and assigns; and record the correction instrument and evidence of notice. Tex. Prop. Code § 5.028(d)(2). Form 5-24 in this chapter is a form for making a nonmaterial correction by a person with knowledge of relevant facts.

In addition to nonmaterial corrections, including the corrections described by section 5.028 of the Property Code, the parties to the original transaction or their successors or assigns may execute a correction instrument to make a material correction to the recorded original instrument of conveyance. These material changes include adding a buyer's disclaimer of an interest in the property, a mortgagee's consent to or subordination to a recorded document, or land to a conveyance that correctly conveys other land; removing land from a conveyance that correctly conveys other land; and correcting a description of a lot or unit number or letter of property that is inaccurately identified as another lot or unit number or letter. Tex. Prop. Code § 5.029.

A correction instrument that complies with section 5.028 or 5.029 of the Property Code is (1) effective as of the effective date of the conveyance, (2) prima facie evidence of the facts stated in the correction instrument, and (3) notice to a subsequent buyer of the facts stated in the correction instrument. Tex. Prop. Code § 5.030.

Title companies may require a jurat as a prerequisite to acceptance.

See clause 5-9-5 and form 5-24 for correction deed language.

§ 5.9 Gift Deed

The essential elements of a gift made during a grantor's life are donative intent, delivery, and acceptance. *Gannon v. Baker*, 830 S.W.2d 706, 710 (Tex. App.—Houston [1st Dist.] 1992, writ denied).

If the grantor desires to make a gift, the commonly understood terminology to evidence the donative interest, although not true consideration, is a recitation of "love and affection" as the consideration. However, other words and phrases that accomplish the same purpose are appropriate, especially when "love and affection" are not the grantor's motivation to make the gift. See clauses 5-6-9 and 5-6-10 in this chapter. Further, the deed should be titled "Gift Deed."

An essential characteristic of a gift is the absence of consideration paid by the donee to the donor. A deed by gift that otherwise satisfies the requirements for an effective conveyance will vest title in the grantee to the same extent as a deed with valuable consideration. *Woodworth v. Cortez*, 660 S.W.2d 561, 564 (Tex. App.—San Antonio 1983, writ ref'd n.r.e.).

A gift is presumed if a parent purchases property in the name of a child. *Woodworth*, 660 S.W.2d at 564.

§ 5.10 Partition Deed

A partition is the act of dividing the undivided interests in property held by joint owners so each owns full title to a separate tract. The term *joint owner* includes ownership arrangements also sometimes known as tenants in common, cotenants, or joint tenants. Partitions may be either voluntary or involuntary. A voluntary partition is accomplished by a written instrument or deed. *Houston Oil Co. of Texas v. Kirkindall*, 145 S.W.2d 1074, 1077 (Tex. 1941); *Chandler v. Hartt*, 467 S.W.2d 629, 634 (Tex. App.—Tyler 1971, writ ref'd n.r.e.). An involuntary partition arises when a cotenant exercises the statutory right to compel a partition. *See* Tex. Prop. Code §§ 23.001–.004. If property is partitioned involuntarily, a nonexclusive access easement may be required in limited circumstances. *See* Tex. Prop. Code § 23.006. An express agreement among joint owners not to partition is enforceable. *Lichtenstein v. Lichtenstein Building Corp.*, 442 S.W.2d 765, 769 (Tex. App.—Corpus Christi–Edinburg 1969, no writ).

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

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

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

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

§ 5.11 Transfer on Death Deed

The Texas Real Property Transfer on Death Act authorizes an individual to execute and record a transfer on death deed to make a revocable transfer of the transferor's interest in real property to one or more designated beneficiaries, including alternate beneficiaries, effective at the transferor's death. *See* Tex. Est. Code ch. 114. In the 86th legislative session, the statutory forms for the transfer on death deed and the revocation of transfer on death deed were removed from chapter 114 of the Texas Estates Code. Acts 2019, 86th Leg., R.S., ch. 337, § 3.2 (S.B. 874), eff. Sept. 1, 2019. Tex. Gov't Code § 22.020 directs the Texas Supreme Court to promulgate forms for creating and revoking a transfer on death deed. The Estates Code continues to authorize use of transfer on death deeds and revocation of transfer on death deeds but no longer prescribes statutory language.

§ 5.11:1 Purpose and Effect

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

During the transferor's lifetime, a transfer on death deed does not affect any right, title, or interest of the transferor in the property, vest any legal or equitable title in a designated beneficiary, or subject the property to the claims of creditors of any designated beneficiary. Notwithstanding the recordation of a transfer on death deed, the transferor retains the right to transfer or encumber the property, any present or future homestead rights, and any present or future ad valorem tax exemptions to which the transferor is entitled. During the transferor's lifetime, a transfer on death deed does not affect the rights of creditors of the transferor, secured or unsecured, and does not trigger any "due on sale" clause. Upon the death of the transferor a secured creditor's rights are subject to the Texas Estates Code. A transfer on death deed does not affect the eligibility for public assistance of either the transferor or any designated beneficiary. Tex. Est. Code § 114.101.

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

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

§ 5.11:2 Requirements Generally; Exceptions

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

§ 5.11:3 Transferor Considerations

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

§ 5.11:4 Proper Recordation

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

§ 5.11:5 Caution—Existing Rights of Survivorship

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

§ 5.11:6 Revocation Generally

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

§ 5.11:7 Revocation—Subsequent Transfer on Death Deed

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

§ 5.11:8 Revocation—Subsequent Instrument of Revocation

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

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

§ 5.11:9 Revocation—Divorce

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

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

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

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

§ 5.11:11 Instructions for Completing Form

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

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

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

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

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

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

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

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

§ 5.12 Additional Clauses

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

§ 5.12:1 Waiver of Implied Liens

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

pose. If the parties exchanging property wish to waive the implied lien, the waiver in clause 5-6-7 may be used in the description of the consideration.

§ 5.12:2 Bill of Sale Combined

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

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

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

§ 5.12:3 "As Is" Conveyance

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

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

§ 5.12:4 Fee Simple Determinable

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

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

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

§ 5.12:5 Strips and Gores

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

Because of the strip and gore doctrine, a conveyance of land bounded by a public highway car-

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

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

When using the strips-and-gores provision, the attorney should review other provisions of the deed that describe the property, because the strips and gores are discussed separately from the property. One suggestion is to add "and all strips and gores and appurtenances thereto" to the references to the property, other than in the warranty clause. Another option is to include strips and gores as a defined term within the definition of the property, then except the strips and gores out of the warranty in the express exclusion of warranties provisions.

§ 5.12:6 Wraparound Lien

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

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

§ 5.12:7 Transfer of Escrow and Insurance Policy

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

If real property is transferred with the assumption of an existing lien debt or subject to a preexisting lien debt, regardless of whether the insurance and taxes are being prorated to the date of closing, it is customary for the seller to transfer the entire escrow fund to the buyer. It is generally considered simpler to prorate the escrow balance to the date of closing through the closing settlement statement, rather than have the buyer send money to the lender and expect the lender to reimburse the seller for that exact amount out of the escrow. The transfer of the escrow fund is usually included in the deed, although this is not required. Additionally, some lenders require the signing of a separate transfer form before the escrow will be transferred to the buyer. The more cautious approach would be to include the transfer both in the deed and in a separate document.

The transfer of escrow often includes a transfer of the insurance policy to the buyer, if the seller has agreed that the policy will be transferred. If the buyer will not assume the existing coverage, the seller should keep the policy in order to be entitled to the refund of unearned premiums when the buyer's replacement policy is substi-

tuted for the seller's policy coverage. Several aspects of insurance are regulated by statute, such as the fee for substitution of coverage and the kind of insurance binder a mortgage company must accept. The statutes governing prohibited practices relating to property insurance are found in chapter 549 of the Texas Insurance Code. *See* Tex. Ins. Code ch. 549. Unless the drafting attorney knows the agreement concerning the transfer of the insurance policy, it is suggested the deed include either nothing concerning the insurance or a statement that any transfer of insurance will be handled between the buyer and seller by separate instrument.

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

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

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

§ 5.12:9 Restrictive Covenants

To be enforceable, restrictive covenants imposed by grant must satisfy certain requirements: (1) there must be privity of estate between the parties to the contract; (2) the restrictive covenants must relate to something in existence, or assignees must be named if they are to be bound by the restrictive covenants; (3) the restrictive covenants must touch or concern the land (that is, enhance or benefit it) (*see Homsey v. University Gardens Racquet Club*, 730 S.W.2d 763, 764 (Tex. App.—El Paso 1987, writ ref'd n.r.e.)); and (4) the original contracting parties must intend that the restrictive covenant run with the land. *Billington v. Riffe*, 492 S.W.2d 343, 346 (Tex. App.—Amarillo 1973, no writ). Further, the restrictive covenant must furnish adequate notice to the property owner of the specific restriction sought to be enforced. *Davis v. Huey*, 620 S.W.2d 561, 566 (Tex. 1981).

The restrictive covenants should make clear which lands are benefited by the covenants and that the owners thereby have standing to enforce the restrictive covenants. See clauses 5-9-14 and 5-9-15 in this chapter.

§ 5.13 Additional Documents

§ 5.13:1 Acceptance of Deed

Acceptance is necessary for a deed to be effective. *Robert Burns Concrete Contractors, Inc. v. Norman*, 561 S.W.2d 614, 618 (Tex. Civ. App.—Tyler 1978, writ ref'd n.r.e.). Traditionally, the grantee's acceptance is implied. *Martin v. Uvalde Savings & Loan Ass'n*, 773 S.W.2d 808 (Tex. App.—San Antonio 1989, no writ). However, the parties may want written confirmation of the grantee's acceptance of the deed as to matters of form, substance, or both. Evidence of the grantee's acceptance may be needed to enforce the grantor's obligations under a deed, such as the promise to pay and the indemnity in the assumption or warranty deed. Confirmation can best be achieved by the grantee's signature on the deed, although a separate instrument may be used. See form 5-10 in this chapter.

§ 5.13:2 Deed in Lieu of Foreclosure

The term *deed in lieu of foreclosure* (or *deed in lieu*) describes a conveyance in which the con-

sideration given by the grantee typically is the cancellation of the debt owed by the borrower, the release of the borrower from liability on the secured debt, and, in some cases, the release and discharge of the liens securing the debt. The deed in lieu does not have the same effect on title as a trustee's deed in a nonjudicial foreclosure because the deed in lieu does not relate back to the date the deed of trust was filed for record to extinguish exceptions or encumbrances filed after the deed of trust. Instead, the grantee takes the property subject to whatever encumbrances and other exceptions have been imposed on the property before the deed in lieu is recorded, as is the case with any other deed. *Flag-Redfern Oil Co. v. Humble Exploration Co.*, 744 S.W.2d 6, 9 (Tex. 1987).

If a holder of a debt secured by a deed of trust accepts title by a deed in lieu and later discovers that an encumbrance that was unknown to the holder and not disclosed by the debtor existed before the deed in lieu, the holder has four years to void the deed in lieu; further, the lien is restored to its former priority, and the holder may proceed with a foreclosure under the deed of trust. *See* Tex. Prop. Code § 51.006.

See form 5-13 in this chapter for an example of a deed in lieu of foreclosure.

§ 5.13:3 Trustee's Deed in Nonjudicial Foreclosure

For commentary and a form, see section 14.6:4 and form 14-15 in this manual.

§ 5.13:4 Administration or Guardianship Deed

The Texas Estates Code governs the sale of property held by an estate. *See* Tex. Est. Code chs. 356, 1158. A court order is required for any sale of estate property unless otherwise provided by law. Tex. Est. Code §§ 356.001, 1158.001. Sales authorized by a will may be carried out by the executor without the need for a court order. Tex. Est. Code § 356.002. The administration or guardianship deed, form 5-14 in this chapter, is drafted to follow the format required by the Estates Code. *See* Tex. Est. Code §§ 356.557, 1158.557.

§ 5.13:5 Owelty of Partition Deed and Agreement

Owelty results from an unequal partition between joint owners of real property whether by court decree or contract. Because the tract partitioned does not lend itself to an equal division, the difference in value between the partitioned tracts is adjusted by payment from one joint owner to the other. This difference is known as owelty. Because owelty payments are in the nature of purchase money, a lien to secure a payment arises. Such a lien is a purchase-money lien and is valid against the homestead. *Sayers v. Pyland*, 161 S.W.2d 769, 772 (Tex. 1942).

In transactions in which one joint owner simply buys all of the interest of a fellow joint owner, the issue is less clear. Some decisions have determined that such a sale does not involve a true partition; therefore a lien securing the purchase may not encumber the entirety of the homestead. *In re Shults*, 97 B.R. 874 (Bankr. N.D. Tex. 1989). The Texas Constitution and the Texas Property Code provide that the homestead may be encumbered by "an owelty of partition imposed against the entirety of the property by a court order or by a written agreement of the parties to the partition, including a debt of one spouse in favor of the other spouse resulting from a division or an award of a family homestead in a divorce proceeding." Tex. Const. art. XVI, § 50(a)(3); Tex. Prop. Code § 41.001(b)(4). Even after this constitutional amendment, there has been question about whether the entirety of the homestead may be encumbered by an owelty lien in the absence of an actual partition in kind. Opinion predomi-

nates in favor of the validity of these liens to the extent that such liens are generally insurable encumbrances.

An owelty of partition transaction that is not based on a court order should be documented by both a deed and a separate written partition agreement (not by a purchase and sale agreement).

The owelty of partition deed, form 5-11 in this chapter, should refer either to the court order or to the separate agreement on which it is based. See form 5-12 for an owelty of partition agreement.

§ 5.13:6 Survivorship Agreement for Community and Noncommunity Property

Rights of survivorship will not be inferred from a joint tenancy in property that is not the community property of the tenants. Tex. Est. Code § 101.002. However, the joint tenants may agree in writing to implement rights of survivorship. Tex. Est. Code § 111.001. Spouses may agree between themselves that all or part of their community property, then existing or to be acquired, will be owned with rights of survivorship. Tex. Est. Code § 112.051.

Rights of survivorship in community property are treated differently from rights of survivorship in other property. *See* Tex. Est. Code §§ 111.002, 112.052. However, whether the property is community or not, the agreement must be in writing. In the case of community property, both spouses must sign the agreement. Tex. Est. Code § 112.052. For property that is not community, it is suggested that all joint tenants sign the writing for it to qualify as an agreement that satisfies the statute. *See* Tex. Est. Code § 111.001(a). The phrases *with right of survivorship*, *will become the property of the survivor*, *will vest in and belong to the surviving spouse*, or *will pass to the surviving spouse* are suggested for inclusion in the agreement.

Rights of survivorship do not affect the community status of property or the rights of the spouses concerning management, control, and disposition, unless the agreement so provides. Tex. Est. Code § 112.151. On the death of a spouse, a transfer resulting from the right of survivorship is not considered a testamentary transfer. Tex. Est. Code § 112.052. An agreement between spouses may be revoked in accordance with the agreement's terms. If no provision is made for revocation, the agreement may be revoked by a written instrument signed by both spouses or by a written instrument signed by one spouse and delivered to the other spouse. Tex. Est. Code § 112.054(b). The disposition of property by one or both spouses will also revoke the agreement as to that property if the disposition is not inconsistent with the terms of the agreement and applicable law. Tex. Est. Code § 112.054(c). Although an agreement between spouses creating rights of survivorship is effective without court adjudication, the surviving spouse may obtain such an adjudication by application to the court. *See* Tex. Est. Code §§ 112.053, 112.101. The agreement between spouses and any revocation should be recorded, and a copy provided to the personal representative of the deceased spouse's estate, to avoid the acquisition of good title by a buyer without actual notice of the agreement or the revocation under Tex. Est. Code §§ 112.201–.208. Community property subject to the sole or joint management, control, and disposition of a spouse during marriage continues to be subject to the liabilities of that spouse on death, regardless of the right of survivorship. *See* Tex. Est. Code §§ 112.251–.253.

See form 5-18 in this chapter for a survivorship agreement and form 5-19 for a survivorship agreement for community property.

§ 5.13:7 Community Interest Special Warranty Deed

The Texas Constitution and the Texas Family Code provide a method of converting title of real and personal property from separate to community property. *See* Tex. Const. art. XVI, § 15; Tex. Fam. Code §§ 4.201–.206. Before January 1, 2000, the effective date of these provisions, separate property could not be converted to community property because Texas is an inception of title state. The primary purpose of the community interest special warranty deed is to allow a surviving spouse, at the time of the other spouse's death, to obtain a nontaxable increase in the basis of the property for federal estate tax purposes. According to the Internal Revenue Code, all community property receives an increase in basis to the current market value at the death of the first spouse. *See* 26 U.S.C. § 1014(b)(6). Strict compliance with the provisions of the Family Code, including the use of bold-faced type, capital letters, or underlined warnings that must appear in the document, is necessary to convert the property to community property. *See* Tex. Fam. Code §§ 4.201–.206.

There are implications in this type of transaction for divorce, property management rights, and creditor claims, as described in section 4.205 of the Family Code. A separate agreement may be used to address personal-property or family-law issues. The form in this manual deals only with creating an effective conveyance of real property rights. See form 5-20 in this chapter for a community interest special warranty deed.

§ 5.13:8 Assignment and Assumption of Leases

The right to receive rent passes with title to real property, and the seller's tenant becomes the buyer's tenant as a matter of law. *Arredondo v. Mora*, 340 S.W.2d 322, 325 (Tex. App.—El Paso 1960, writ ref'd n.r.e.). Nevertheless, parties to a real estate sales contract often provide for a separate assignment and assumption agreement in which the seller assigns its rights in leases affecting the property and the buyer assumes the landlord's obligations under some or all of those leases. The assignment and assumption often contains indemnities by the parties covering their respective periods of responsibility for the landlord's obligations under the leases, including those for tenant improvements and brokerage commissions. The assignment and assumption of leases can be modified to include a general or special warranty of title. See form 5-21 in this chapter for an assignment and assumption of leases and form 5-22 for a notice of transfer of security deposit.

§ 5.14 General Considerations for Minerals

§ 5.14:1 Generally

Texas mineral law is complex and extensive, and a comprehensive review is beyond the scope of this manual. This commentary is intended to identify common conveyancing issues that arise in transactions in which the primary focus is the surface estate, not the mineral estate. Attorneys who are not experienced in mineral law are urged to exercise caution and seek appropriate counsel when mineral law issues arise.

In Texas, the mineral estate may be severed from the surface estate. The mineral estate is the dominant estate and has five essential attributes: the right to explore and develop (ingress and egress); the right to lease (the executive right); the right to receive bonus payments; the right to receive delay rentals; and the right to receive royalty. *Day & Co. v. Texland Petroleum, Inc.*, 786 S.W.2d 667 (Tex. 1990); *Altman v. Blake*, 712 S.W.2d 117, 118 (Tex. 1986). The mineral estate, and each of its five separate attributes, may be held in undivided interests.

Grants and reservations in Texas are commonly styled "oil, gas, and other minerals" or "all minerals in and under the land." Although the meanings of "oil" and "gas" are usually clear, adjudication has been required to determine what minerals are included in a conveyance of "minerals." The Supreme Court of Texas has held that "a severance of minerals in an oil, gas and other minerals clause includes all substances within the ordinary and natural meaning of the word, whether their presence or value is known at the time of severance." *Moser v. U.S. Steel Corp.*, 676 S.W.2d 99, 102 (Tex. 1984). The *Moser* decision confirmed the court's previous holdings that, as a matter of law, certain substances belong to the surface estate: building stone, limestone, caliche, surface shale, water, sand, gravel, and near-surface lignite, iron, and coal. *Moser*, 676 S.W.2d at 102.

According to the common-law "greatest possible estate" rule, a conveyance will pass all of the estate owned by the grantor at the time of the conveyance unless the instrument states reservations that limit the estate being conveyed. *Cockrell v. Texas Gulf Sulphur Co.*, 299 S.W.2d 672, 675 (Tex. 1956). Thus, a conveyance without a specific reservation of the minerals will convey the grantor's entire mineral estate. *Harris v. Currie*, 176 S.W.2d 302, 304 (Tex. 1943). A result of the "greatest possible estate" rule is found in the *Duhig* rule, which provides that an outstanding right in the mineral estate will be charged to the grantor's mineral estate reservation, unless a contrary intent is stated in the instrument. *See Duhig v. Peavy-Moore Lumber Co.*, 144 S.W.2d 878, 880 (Tex. 1940).

§ 5.14:2 Royalty

Royalty is the nonpossessory right to receive a cost-free share of production. It may be reserved in a lease or severed from the fee in a grant or reservation in a deed. An "overriding royalty" or "override" is carved out of the lessee's interest in the leasehold estate and, absent fraud, breach of fiduciary duty, or similar wrongdoing, terminates when the lease from which it was created terminates.

A royalty clause must be drafted carefully. For example, each of the following may have a different result: an undivided 1/8 royalty; an undivided 1/8 of the royalty; and an undivided 1/8 in a 1/8 royalty. *See, e.g., Winslow v. Acker*, 781 S.W.2d 322, 326–27 (Tex. App.—San Antonio 1989, writ denied); *Ray v. Truitt*, 751 S.W.2d 205, 207 (Tex. App.—El Paso 1988, no writ); *Tiller v. Tiller*, 685 S.W.2d 456, 458 (Tex. App.—Austin 1985, no writ); *Lane v. Elkins*, 441 S.W.2d 871, 874–75 (Tex. App.— Eastland 1969, writ ref'd n.r.e.).

§ 5.14:3 Surface Use

The right to develop the mineral estate includes the right to use the surface to the extent reasonably necessary for development purposes. *Sun Oil Co. v. Whitaker*, 483 S.W.2d 808, 810 (Tex. 1972).

The surface owner whose land is to be developed for mineral purposes should be aware of the line of Texas cases concerning surface damages that includes *Acker v. Guinn*, 464 S.W.2d 348 (Tex. 1971), *Reed v. Wylie*, 597 S.W.2d 743 (Tex. 1980), and *Moser v. U.S. Steel Corp.*, 676 S.W.2d 99 (Tex. 1984). In *Moser*, the Supreme Court of Texas confirmed that the mineral owner has the right to use the surface to develop the minerals, but within certain guidelines. For instruments executed before June 8, 1983, the mineral owner is liable for destruction of the surface only if the destruction is negligently inflicted, regardless of how the mineral is described in the severance. For instruments executed on or after June 8, 1983, however, the negligence rule applies only to minerals that are specifically conveyed or named in the instrument. If the mineral is not specifically conveyed or named in the instrument, the mineral owner must compensate the surface owner for surface

destruction, whether the result of negligence or not. *Moser*, 676 S.W.2d at 103. In addition, the mineral owner must accommodate the surface owner's use of the land to the extent described in *Getty Oil Co. v. Jones*, 470 S.W.2d 618 (Tex. 1971), and *Sun Oil Co.*, 483 S.W.2d at 810–11.

The surface owner may want to protect the surface by contractual restrictions on mineral operations. Such protections may include limitations on areas that may be used for mineral operations, such as designation of drill sites and pipeline and access easements; alternatively, the surface owner may contract with the mineral owner for a complete prohibition of use of the surface by the mineral owner (a surface-use waiver by the mineral owner).

§ 5.14:4 Existing Mineral Lease

There are special drafting considerations if the land being conveyed is subject to an existing mineral lease. For example, the grantor and the grantee should include in the deed their agreement on how to allocate the benefits of an undisputed existing lease between them.

§ 5.14:5 Life Tenant's Right to Consume Royalty

Whether the life tenant, as the owner of a life estate, is entitled to consume the royalty from mineral production on the property depends on the circumstances. If, at the inception of the life estate, there exists either mineral production or a mineral lease, the "open mine" doctrine entitles the life tenant to consume the royalties. *Thompson v. Thompson*, 236 S.W.2d 779, 786–87 (Tex. 1951); *Youngman v. Shular*, 281 S.W.2d 373, 375 (Tex. App.—San Antonio 1955), *aff'd*, 288 S.W.2d 495 (Tex. 1956). Otherwise, the life tenant is not entitled to consume the royalty and must account for it to the remainderman. *Swayne v. Lone Acre Oil Co.*, 86 S.W. 740, 742 (Tex. 1905).

§ 5.14:6 Special Problem Areas

Although a discussion of all areas of concern encountered with mineral interests is beyond the scope of this manual, special consideration should be given to—

- land subject to the Texas Relinquishment Act, where the minerals are owned by the state of Texas and the surface owner acts as the agent for the state in leasing them (*see* Tex. Nat. Res. Code §§ 52.171–.190);
- exploration by the owners of the right to develop the minerals without executing a mineral lease;
- discrimination by the owner of the executive right (right to lease) among the owners of the right to royalty, the right to delay rentals, and the right to bonus payments;
- ownership of mineral rights by more than one party; and
- severance of the mineral estate, limited by depth of the minerals or duration of the severance.

See clauses 5-7-8 through 5-7-14 in this chapter for reservation of minerals and clauses 5-8-34 through 5-8-36 for exceptions of minerals.

§ 5.15 General Considerations for Other Forms of Real Property

§ 5.15:1 Timber

The right to harvest growing timber with the accompanying ingress and egress rights together constitutes an interest in real property, which must be conveyed by deed. *Burkitt v. Wynne*, 132 S.W. 816 (Tex. App. 1910, writ ref'd). See clause 5-9-18 in this chapter.

§ 5.15:2 Easements

An easement is an interest in real property. *Settegast v. Foley Bros. Dry Goods Co.*, 270 S.W. 1014, 1016 (Tex. 1925). It gives the holder the right to use another's land for a specific purpose. *Lakeside Launches, Inc. v. Austin Yacht Club, Inc.*, 750 S.W.2d 868, 871 (Tex. App.—Austin 1988, writ denied). See clauses 5-7-1 through 5-7-4 and 5-8-14 through 5-8-25 in this chapter.

§ 5.15:3 Condominiums

A description of a condominium unit constitutes a sufficient legal description of the unit and all rights, obligations, and interests appurtenant to the unit if the description contains (1) the name of the condominium; (2) the recording data for the declaration, including any amendments, plats, and plans; (3) the county in which the condominium is located; and (4) the identifying number of the unit. Tex. Prop. Code § 82.054. This requirement from the Texas Uniform Condominium Act (Texas Property Code chapter 82) applies to all condominiums. Tex. Prop. Code § 82.002(c).

Some pre-1994 condominium regimes describe apartments by reference to a unit number and building letter. *See* Tex. Prop. Code § 81.102(a)(2). It is suggested that condominiums operating under the prior Condominium Act (Texas Property Code chapter 81) continue to include the building letter for description. As a practical matter, if condominiums recorded before January 1, 1994, use identifying numbers for apartments that are repeated in each of the buildings (for example, each building includes apartments 1 through 10), a reference to the building letter will be needed to distinguish between like-numbered apartments. See clause 5-8-13 in this chapter for an exception for use in a condominium deed and clause 5-9-3 for a condominium deed property description. See also chapter 24 in this manual for additional information on condominiums.

§ 5.15:4 Townhouse and Planned Unit Development Properties

The traditional townhouse project and planned unit developments (PUD) are similar in that both involve privately owned building sites with the common area owned by a separate association (usually a nonprofit corporation) whose members are the owners of the building sites. Easements are provided for access and utilities over the common area in both types of projects.

The description for a typical townhouse or lot within a PUD need not refer specifically to the common area if, as is customary, the common area is owned by the separate community association and ownership of the townhouses or lots in the PUD necessarily includes membership in the association and a pro rata ownership interest in the common area.

Deeds for either townhouses or PUD properties should except to the association restrictive covenants and the assessment lien. See clause 5-9-20 in this chapter for a property description and clause 5-9-21 for exceptions typical of a townhouse deed.

Townhouses generally involve building sites that are the outline or footprint of the separately owned townhouse unit's perimeter walls, whereas PUDs usually involve one conventional city lot per unit, including a yard and other city lot features. Because townhouses are usually more limited in space, the concept of limited common area is popular for townhouses. Limited common area involves limited access areas, such as screened patios, that are part of the common area but that usually no other owners may trespass on.

§ 5.15:5 Timeshare

A "timeshare estate" is an arrangement under which the purchaser receives the right to occupy a timeshare property and an estate interest in the real property. Tex. Prop. Code § 221.002(24). Once the timeshare plan is established, each timeshare interest may be separately conveyed or encumbered, and the title is recordable. Tex. Prop. Code § 221.012.

§ 5.15:6 Manufactured Housing

The Texas Department of Housing and Community Affairs (TDHCA) administers manufactured housing according to the Texas Manufactured Housing Standards Act. Tex. Occ. Code ch. 1201. Forms pertaining to manufactured housing can be obtained from the TDHCA. Regulations have been promulgated to administer and enforce the Act in title 10, chapter 80, of the Texas Administrative Code. Ownership of a manufactured home is evidenced by the filing of a statement of ownership issued by the TDHCA. Tex. Occ. Code §§ 1201.003(30)(A), 1201.205. At the sale or transfer of manufactured home, ownership does not pass or vest until a completed application for the issuance of a statement of ownership is filed with the TDHCA. Tex. Occ. Code § 1201.206(e).

A process exists that allows the owner of a manufactured home to elect to treat the home as real estate, making it a part of the real property. *See* Tex. Occ. Code §§ 1201.2055, 1201.2075, 1201.222; Tex. Prop. Code § 2.001(b).

The TDHCA is required to make available to the public through the department's website searchable and downloadable records regarding the ownership, liens, and installation of manufactured homes. Tex. Occ. Code §§ 1201.010, 1201.207(b).

The Texas Certificate of Title Act (Tex. Transp. Code ch. 501) governs "house trailers." The Act does not contain a mechanism for converting house trailers to real estate by affixing them to the real estate. House trailers are generally defined as trailers designed for human habitation, and they are treated differently from manufactured housing. *See* Tex. Transp. Code § 501.002(9); Tex. Occ. Code § 1201.003(12), (18), (20).

If the owner of the manufactured home has elected to treat the home as real property, a copy of the statement of ownership must be recorded in the real property records of the county where the manufactured home is located. Tex. Occ. Code § 1201.222; Tex. Prop. Code § 2.001(b).

Texas statutes address when a manufactured home is personal property and when it is real property. *See* Tex. Occ. Code § 1201.222; Tex. Prop. Code § 2.001(b). Ordinarily, a manufactured home is personal property. However, if the statement of ownership issued by the TDHCA reflects that the owner had elected to treat the home as real property and a certified copy of the statement of ownership has been recorded in the real property records of the county where the home is located, the manufactured home will be real property. Property Code chapter 63 clarifies the status of a lien on a manufactured home when it converts to real property. *See* Tex. Prop. Code ch. 63.

§ 5.16 Additional Resources

Baucum, Michael. "Special Warranty Deed Section." In *Advanced Real Estate Law Course, 2010.* Austin: State Bar of Texas, 2010.

Beitel, Jay G. "Owelty Liens and Deed Reservations and Exceptions." In *Advanced Real Estate Drafting Course, 2015.* Austin: State Bar of Texas, 2015.

Beyer, Gerry W. *Real Property*. 2nd ed. West's Texas Forms 13–15. St. Paul, MN: West, 2001. Supplement 2016.

Boykin, Stephen A. "So You Don't Own the Minerals." In *Advanced Real Estate Law Course, 2008*. Austin: State Bar of Texas, 2008.

———. "Texas Oil and Gas Leasing: A Primer." In *Advanced Real Estate Law Course, 2009*. Austin: State Bar of Texas, 2009.

Dysart, Sara E. "Reservation or Exception, What Is It Going to Be?" In *Advanced Real Estate Law Course, 2017*. Austin: State Bar of Texas, 2017.

Johnson, James N. "Modifying and Terminating Easements." In *Advanced Real Estate Drafting Course, 2008*. Austin: State Bar of Texas, 2008.

Jones, Jerry Frank. "Transfer on Death Deeds (TODDs)." In *Advanced Real Estate Drafting Course, 2016*. Austin: State Bar of Texas, 2016.

Koppenheffer, Julie, and Grant Ellis. "Conservation Easements." In *Advanced Real Estate Law Course, 2008*. Austin: State Bar of Texas, 2008.

Love, G. Roland. "Quitclaims—Texas and Beyond." In *Advanced Oil, Gas, & Energy Resources Law Course, 2016*. Austin: State Bar of Texas, 2016.

Lucksinger, Michael J. "Transfer on Death Deed, Lady Bird Deed, Survivorship Agreements." In *Advanced Real Estate Law Course, 2016*. Austin: State Bar of Texas, 2016.

Nickum, Ronald D. "The Role of Minerals in Real Estate Drafting: Ten Common Pitfalls Created by Mineral and Royalty Case Law." In *Advanced Real Estate Drafting Course, 2009*. Austin: State Bar of Texas, 2009.

Sheehan, Ty Hunter and Wesley Williams. "Conveyances—Recent Developments, Deeds, Reservations and Exceptions, and Things I Have to Look Up Every Four Years." In *Advanced Real Estate Law Course, 2019*. Austin: State Bar of Texas, 2019.

St. Claire, Frank A., and William V. Dorsaneo III. *Texas Real Estate Guide*. New York: Matthew Bender & Co., 2001.

Whelan, Thomas M. "Scattershooting While Wondering Whatever Happened at the Courthouse to Frequently Litigated Provisions in My Favorite Real Estate Sales Forms." In *Advanced Real Estate Drafting Course, 2015*. Austin: State Bar of Texas, 2015.

[Reserved]

Form 5-25

The Texas Real Property Transfer on Death Act authorizes an individual to transfer the individual's interest in real property to one or more beneficiaries effective at the transferor's death by a transfer on death deed. Tex. Est. Code § 114.051. To be effective, a transfer on death deed must be recorded before the transferor's death. Tex. Est. Code § 114.055. In the 86th legislative session, the statutory forms for the transfer on death deed and the revocation of transfer on death deed were removed from chapter 114 of the Texas Estates Code. Acts 2019, 86th Leg., R.S., ch. 337, § 3.2 (S.B. 874), eff. Sept. 1, 2019. Tex. Gov't Code § 22.020 directs the Texas Supreme Court to promulgate forms for creating and revoking a transfer on death deed. The Estates Code continues to authorize use of transfer on death deeds and revocation of transfer on death deeds but no longer prescribes statutory language.

Revocable Transfer on Death Deed

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

Date:

Transferor:

Transferor's Mailing Address:

Designated Beneficiary

Primary Beneficiary:

Primary Beneficiary's Mailing Address:

Include the following if applicable.

Designated Alternate Beneficiary

Alternate Beneficiary:

Alternate Beneficiary's Mailing Address:

Include the following if a prior transfer on death deed is being revoked in whole or in part.

Prior Transfer on Death Deed

Date:

Transferor:

Primary Beneficiary:

Alternate Beneficiary:

Recording Information:

Continue with the following.

Property (including any improvements):

Reservations from Transfer:

State "None" or, to create reservations of title, include the appropriate clauses from form 5-7.

Select one of the following alternative clauses.

Surviving Primary Beneficiary

Transferor, subject to the Reservations from Transfer, at Transferor's death, grants and conveys the Property to Primary Beneficiary, to have and hold forever, but if any Primary Beneficiary predeceases Transferor, Transferor, subject to the Reservations from Transfer, at Transferor's death, grants and conveys that deceased Primary Beneficiary's share in the Property to surviving Primary Beneficiary, to have and hold forever.

Or

Anti-Lapse, Descendants of Deceased Primary Beneficiary

Transferor, subject to the Reservations from Transfer, at Transferor's death, grants and conveys the Property to Primary Beneficiary, to have and hold forever, but if any Primary Beneficiary predeceases Transferor and was a descendant of either of Transferor's parents, Transferor, subject to the Reservations from Transfer, at Transferor's death, grants and conveys that deceased Primary Beneficiary's share to the surviving descendants of that Primary Beneficiary, to have and hold forever.

Continue with the following.

Select one of the following alternative clauses.

Anti-Lapse, Surviving Descendants of Primary Beneficiary

If Transferor is not survived by any Primary Beneficiary, Transferor, subject to the Reservations from Transfer, at Transferor's death, grants and conveys the Property to the surviving descendants of the deceased Primary Beneficiary if the deceased Primary Beneficiary is a descendant of the Transferor or either of Transferor's parents or to Alternative Beneficiary if the deceased Primary Beneficiary is not a descendant of the Transferor or either of Transferor's parents, to have and hold forever.

Or

Alternative Beneficiaries

If Transferor is not survived by any Primary Beneficiary, Transferor, subject to the Reservations from Transfer, at Transferor's death, grants and conveys the Property to Alternate Beneficiary, to have and hold forever.

If one or more alternative beneficiaries are designated, select one of the following alternative clauses.

Surviving Alternative Beneficiary

If any Alternative Beneficiary predeceases Transferor, Transferor, subject to the Reservations from Transfer, at Transferor's death, grants and conveys that deceased Primary Beneficiary's share in the Property to surviving Alternative Beneficiary.

Or

Anti-Lapse, Descendants of Deceased Alternative Beneficiary

If any Alternative Beneficiary predeceases Transferor and that deceased Alternative Beneficiary was a descendant of either of Transferor's parents, Transferor, subject to the Reservations from Transfer, at Transferor's death, grants and conveys that deceased Alternative Beneficiary's share in the Property to the surviving descendants of the deceased Alternative Beneficiary.

If a prior transfer on death deed is being revoked in whole or in part, select one of the following alternative clauses.

Revocation of Prior Transfer on Death Deed

Transferor revokes the Prior Transfer on Death Deed.

Or

Partial Revocation of Prior Transfer on Death Deed

Transferor revokes the Prior Transfer on Death Deed as to all Beneficiaries but only to the Property.

Continue with the following.

When the context requires, singular nouns and pronouns include the plural.

_____

[**Name of transferor**]

Include acknowledgment.

[Reserved]

Form 5-26

In the 86th legislative session, the statutory forms for the transfer on death deed and the revocation of transfer on death deed were removed from chapter 114 of the Texas Estates Code. Acts 2019, 86th Leg., R.S., ch. 337, § 3.2 (S.B. 874), eff. Sept. 1, 2019. Tex. Gov't Code § 22.020 directs the Texas Supreme Court to promulgate forms for creating and revoking a transfer on death deed. The Estates Code continues to authorize use of transfer on death deeds and revocation of transfer on death deeds but no longer prescribes statutory language.

Revocation of Transfer on Death Deed

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

Date:

Transferor:

Transferor's Mailing Address:

Prior Transfer on Death Deed

Date:

Transferor:

Primary Beneficiary:

Alternate Beneficiary:

Property:

Recording Information:

Transferor revokes the Prior Transfer on Death Deed in its entirety.

_____

[Name of transferor]

Include acknowledgment.

Form 5-27

In the 86th legislative session, the statutory forms for the transfer on death deed and the revocation of transfer on death deed were removed from chapter 114 of the Texas Estates Code. Acts 2019, 86th Leg., R.S., ch. 337, § 3.2 (S.B. 874), eff. Sept. 1, 2019. Tex. Gov't Code § 22.020 directs the Texas Supreme Court to promulgate forms for creating and revoking a transfer on death deed. The Estates Code continues to authorize use of transfer on death deeds and revocation of transfer on death deeds but no longer prescribes statutory language.

Partial Revocation of Transfer on Death Deed

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

Date:

Transferor:

Transferor's Mailing Address:

Prior Transfer on Death Deed

Date:

Transferor:

Primary Beneficiary:

Alternate Beneficiary:

Recording Information:

Revoked Property (including improvements):

Select one of the following. If revocation is to some designated beneficiaries, choose the first alternative clause below. If revocation is only of the described property, choose the second alternative clause.

Transferor revokes the Prior Transfer on Death Deed as to the transfer of the Revoked Property to [**names of revoked designated beneficiaries**].

Or

Transferor revokes the Prior Transfer on Death Deed as to the transfer of the Revoked Property to all Beneficiaries in the Prior Transfer on Death Deed.

_____

[**Name of transferor**]

Include acknowledgment.

Chapter 6

Promissory Notes

Forms

to the extent of the conflict. See clause 6-6-12 in this chapter.

§ 6.4:9 Choice of Law

A choice-of-law provision is found at clause 6-6-13 in this chapter.

§ 6.4:10 Fair Credit Reporting Act

Any financial institution that extends credit to an individual and regularly and in the ordinary course of business reports negative information to a credit bureau must give its individual customers a clear and conspicuous written notice about reporting negative information. *See* 15 U.S.C. § 6809. A financial institution complies with the notice requirement if the institution uses a model notice promulgated by the Board of Governors of the Federal Reserve System. There are two model notices: one that may be used before reporting negative information to a credit bureau and one that may be used after reporting negative information to a credit bureau. See clauses 14-7-2 and 14-7-3 in this manual for examples of these notices. If the financial institution chooses to give the notice in its initial loan documentation or related communication, the first form of notice should be given. The model form may be included with the note. This form of notice is found in clause 6-6-17. See the section titled "Fair Credit Reporting Act" in chapter 2.

§ 6.4:11 Spreading

The concept of spreading allows for the calculation of interest for usury purposes to be made over the stated term of the loan, rather than at any particular point in time during the loan. *See, e.g.*, Tex. Fin. Code § 302.001. In certain loans, this can mitigate the effect of fees and charges made or collected at the beginning of the loan term. Spreading is expressly authorized for commercial loans and for consumer loans secured by real property. Tex. Fin. Code §§ 302.101, 306.004. Spreading is not statutorily permitted for consumer loans not secured by real property. A form of spreading provision is included as clause 6-6-21 in this chapter.

§ 6.5 Additional Forms

§ 6.5:1 Deed of Trust and Security Agreement

If the note is secured by a lien on real estate, a deed of trust, described in chapter 8 in this manual, or a security agreement and financing statement, described in chapter 9, or both, will be necessary. The deed of trust creates a lien on real property and enables the holder to enforce the lien by nonjudicial foreclosure. A security agreement is necessary to create or secure a lien against personal property and enable the holder to enforce the lien. See chapter 9 for a discussion of security agreements. The note may also be secured by a mechanic's lien. See form 20-1 for a mechanic's lien contract.

§ 6.5:2 Notice to Cosigner

By using form 6-7 in this chapter the lender discloses to a cosigner of a note the obligations the cosigner is assuming and the resulting potential liability. For consumer loans, banks (excluding savings banks that are members of the Federal Home Loan Bank System) must inform a cosigner of a note of the cosigner's liability on the note before the cosigner becomes obligated. *See* 12 C.F.R. § 227.14. The cosigner's execution of a disclosure statement substantially similar to form 6-7, in a separate document or included in the note, is sufficient to comply with this regulation, which prohibits unfair or deceptive acts or practices. *See* Unfair or Deceptive Acts or Practices (Regulation AA), 12 C.F.R. §§ 227.1–.16. This regulation does not apply to real estate purchase-money loans but applies to other obligations secured by real estate.

§ 6.6 Additional Resources

Nolan, John M., and Edward A. Peterson. 1 *Texas Annotated Real Estate Forms: Promissory Note*. State Bar of Texas, 2015.

St. Claire, Frank A., and William V. Dorsaneo III. *Texas Real Estate Guide*. New York: Matthew Bender & Co., 2001.

Form 6-1

Promissory Note

Basic Information

Date:

Borrower:

Borrower's Mailing Address:

Lender:

Place for Payment:

Principal Amount:

Annual Interest Rate:

Maturity Date:

Annual Interest Rate on Matured, Unpaid Amounts:

Terms of Payment (principal and interest): [**Insert clause from form 6-2 in this chapter.**]

Security for Payment: [**Insert clause from form 6-5; if note is unsecured, write "None."**]

Other Security for Payment:

Promise to Pay

Borrower promises to pay to the order of Lender the Principal Amount plus interest at the Annual Interest Rate. This note is payable at the Place for Payment and according to the Terms of Payment. All unpaid amounts are due by the Maturity Date. If any amount is not

paid either when due under the Terms of Payment or on acceleration of maturity, Borrower promises to pay any unpaid amount plus interest from the date the payment was due to the date of payment at the Annual Interest Rate on Matured, Unpaid Amounts.

Defaults and Remedies

Select one of the following. For an unsecured note, use the first paragraph. For a secured note, use the second paragraph.

A default exists under this note if (1) Borrower defaults in the payment of this note or in the performance of any obligation in any instrument securing or collateral to this note; (2) (a) Borrower or (b) any other person liable on any part of this note (an "Other Obligated Party") fails to timely pay or perform any obligation or covenant in any written agreement between Lender and Borrower or any Other Obligated Party other than as described in (1) above; (3) any representation in this note or in any other written agreement between Lender and Borrower or any Other Obligated Party is materially false when made; (4) a receiver is appointed for Borrower or an Other Obligated Party; (5) a bankruptcy or insolvency proceeding is commenced by Borrower, a partnership of which Borrower is a general partner, or an Other Obligated Party; (6) (a) a bankruptcy or insolvency proceeding is commenced against Borrower, a partnership of which Borrower is a general partner, or an Other Obligated Party and (b) the proceeding continues without dismissal for sixty days, the party against whom the proceeding is commenced admits the material allegations of the petition against it, or an order for relief is entered; or (7) Borrower, a partnership of which Borrower is a general partner, or an Other Obligated Party is terminated, begins to wind up its affairs, or is authorized to terminate or wind up its affairs by its governing body or persons, or any event occurs or condition exists that permits the termination or winding up of the affairs of Borrower, a partnership of which Borrower is a general partner, or an Other Obligated Party.

Or

A default exists under this note if (1) Borrower defaults in the payment of this note or in the performance of any obligation in any instrument securing or collateral to this note; (2) (a) Borrower or (b) any other person liable on any part of this note (an "Other Obligated Party") fails to timely pay or perform any obligation or covenant in any written agreement between Lender and Borrower or any Other Obligated Party other than as described in (1) above; (3) any representation in this note or in any other written agreement between Lender and Borrower or any Other Obligated Party is materially false when made; (4) a receiver is appointed for Borrower or an Other Obligated Party or any property on which a lien or security interest is created as security (the "Collateral Security") for any part of this note; (5) any Collateral Security is assigned for the benefit of creditors; (6) a bankruptcy or insolvency proceeding is commenced by Borrower, a partnership of which Borrower is a general partner, or an Other Obligated Party; (7) (a) a bankruptcy or insolvency proceeding is commenced against Borrower, a partnership of which Borrower is a general partner, or an Other Obligated Party and (b) the proceeding continues without dismissal for sixty days, the party against whom the proceeding is commenced admits the material allegations of the petition against it, or an order for relief is entered; (8) Borrower, a partnership of which Borrower is a general partner, or an Other Obligated Party is terminated, begins to wind up its affairs, or is authorized to terminate or wind up its affairs by its governing body or persons, or any event occurs or condition exists that permits the termination or winding up of the affairs of Borrower, a partnership of which Borrower is a general partner, or an Other Obligated Party; or (9) any Collateral Security is impaired by loss, theft, damage, levy and execution, issuance of an official writ or order of seizure, or destruction, unless it is promptly replaced with collateral security of like kind and quality or restored to its former condition.

If the borrower desires to receive notice and opportunity to cure any default before the lender accelerates the debt, replace the following two paragraphs with clause 6-6-8. See section 6.4:5 in this chapter.

Upon the occurrence of a default under this note, Lender may declare the unpaid principal balance, earned interest, and any other amounts owed on the note immediately due, and may exercise all other rights and remedies available at law or in equity.

Waivers

Borrower waives, to the extent permitted by law, all (1) demand for payment, (2) presentation for payment, (3) notice of intention to accelerate maturity, (4) notice of acceleration of maturity, (5) protest, [and] (6) notice of protest [**include if applicable:** , and (7) rights under sections 51.003, 51.004, and 51.005 of the Texas Property Code] [**include if applicable:** , and [(7)/(8)] rights under section 17.001 and chapter 43 of the Texas Civil Practice and Remedies Code [and rule 31 of the Texas Rules of Civil Procedure]].

Attorney's Fees

> The following paragraph concerning attorney's fees should be replaced in its entirety with clause 6-6-14 for a loan under subchapter E of chapter 342 and replaced by clause 6-6-15 for a secondary mortgage loan subject to subchapter G of chapter 342. See section 6.2:7.

Borrower also promises to pay reasonable attorney's fees and court and other costs if an attorney is retained to collect or enforce the note. These expenses will bear interest from the date of advance at the Annual Interest Rate on Matured, Unpaid Amounts. Borrower will pay Lender these expenses and interest on demand at the Place for Payment. These expenses and interest will become part of the debt evidenced by the note and will be secured by any security for payment.

> Insert appropriate prepayment clause(s) from form 6-3 and, if appropriate, an application-of-prepayment clause from form 6-4.

Interest Calculation

Select one of the following.

Interest on the debt evidenced by this note is computed on a 365/365 basis; that is, by applying the ratio of the interest rate over a year of 365 days, multiplied by the outstanding Principal Amount, multiplied by the actual number of days the Principal Amount is outstanding, unless such calculation would result in a usurious rate, in which case interest shall be calculated on a per diem basis of a year of 365 or 366 days, as the case may be. All interest payable under this note is computed using this method.

Or

Interest on the debt evidenced by this note is computed on a 365/360 basis; that is, by applying the ratio of the interest rate over a year of 360 days, multiplied by the outstanding Principal Amount, multiplied by the actual number of days the Principal Amount is outstanding, unless such calculation would result in a usurious rate, in which case interest shall be calculated on a per diem basis of a year of 365 or 366 days, as the case may be. All interest payable under this note is computed using this method.

Usury Savings

Interest on the debt evidenced by this note will not exceed the maximum rate or amount of nonusurious interest that may be contracted for, taken, reserved, charged, or received under law. Any interest in excess of that maximum amount will be credited on the Principal Amount or, if the Principal Amount has been paid, refunded. On any acceleration or required or permitted prepayment, any excess interest will be canceled automatically as of the acceleration or prepayment or, if the excess interest has already been paid, credited on the Principal Amount or, if the Principal Amount has been paid, refunded. This provision overrides any conflicting provisions in this note and all other instruments concerning the debt.

If the parties wish to include spreading, insert clause 6-6-21. See section 6.4:11.

Other Clauses

Each Borrower is responsible for all obligations represented by this note.

When the context requires, singular nouns and pronouns include the plural.

If appropriate, include additional clauses, like those suggested in form 6-6.

_____

[Name of borrower]

If there is a guarantor and no separate guaranty, include clause 6-6-6 with the signature of the guarantor.

Chapter 7
Letters of Credit

Forms

[Reserved]

Chapter 7

Letters of Credit

§ 7.1 General Considerations for Letters of Credit in Real Estate Transactions

Developers, investors, buyers, sellers, lenders, landlords, and tenants may have need for letters of credit in real estate transactions. For instance, a tenant may furnish a letter of credit to its landlord as a portion of its security deposit; a letter of credit may be used to provide assurances that agreed-to joint venture investments will be funded; a letter of credit may be used to fund obligations for the purchase price for the acquisition of large tracts; a seller or landlord may use a letter of credit to secure construction or development obligations to a buyer or tenant; a letter of credit may be used to provide security for payment of bonds issued by tax-exempt entities for construction of low-cost housing or university or hospital facilities; a contractor may provide a letter of credit as security for completion of construction, performance of warranty obligations, and payment of subcontractors and suppliers; several builders party to a joint development agreement may provide letters of credit to an escrow agent to ensure payment of costs of roads, drainage, and other infrastructure; a letter of credit may provide security for the payment of indemnification obligations under a purchase and sale agreement; or the holder of a letter of credit may grant a security interest in the letter's proceeds to secure the holder's own loans for development of real estate projects.

§ 7.2 Definition

A letter of credit, whether documentary or standby, is an irrevocable, independent, and binding undertaking of a bank to make a payment to the beneficiary upon the presentation of certain documentation. It is not a guaranty or a surety bond, although in many cases it may serve the same function.

§ 7.3 Types

There are two primary types of letters of credit: the documentary credit and the standby credit.

Documentary letters of credit facilitate commerce within and among countries. For instance, a U.S. seller may be unwilling to ship goods to a buyer in another country based solely on the foreign buyer's agreement to pay. Not only would the seller bear the risk of nonpayment, but it also might be required to enforce its rights in the foreign country. The delivery to the seller of a letter of credit as a condition to shipment relieves the seller of those risks. On the other hand, a U.S. buyer of foreign goods may want assurance that goods nominally fulfilling requirements of a purchase order are shipped before it is obligated to pay for the goods. Typically, the documentary letter of credit is payable only on submission of documentation such as shipping receipts, bills of lading, invoices, freight receipts, evidence of insurance, and inspection certificates evidencing that the seller has complied with the sales contract. The parties expect the letter of credit to be the actual source of payment of the sales transaction. The parties expect to draw upon the letter of credit because it is the method by which the seller is to receive payment for the goods. No default or other action by the buyer is required as a condition for the draw.

Standby letters of credit provide a source of payment for underlying contractual payment or performance obligations, such as a loan, a lease, or an acquisition agreement. It is typical, although not required, that a standby letter of credit is drawn only if there is a problem with the transaction or the account party has in some way breached an obligation. For instance, a letter of credit issued to a regulatory agency to ensure environmental remediation may be called upon if the account party defaults in the payment of its obligations. If a letter of credit backs a bond, the letter of credit may be drawn upon only if the bond is called and the bonding agency is required to pay the obligee.

§ 7.4 Parties to a Letter-of-Credit Transaction

Letters of credit use specific terms to identify the various parties to a transaction.

Issuer: The issuer is the bank that issues the letter of credit and agrees to make the payment upon presentation of specified documents. This is the party upon whose creditworthiness the transaction depends. The issuer's obligation is a simple, unsecured, corporate undertaking and is not insured by the FDIC.

Account Party, Applicant, or Customer: The account party, applicant, or customer is the party who requests the issuance of the letter of credit. In a standby transaction, this is the borrower or other obligor who obtains credit or induces another to enter into a transaction or to take or refrain from taking action based on the letter of credit. The applicant is responsible for reimbursing the issuer if the letter of credit is drawn.

Beneficiary: The beneficiary is the party entitled to receive the benefits of the letter of credit. In a standby transaction, this may be the lender who requires the letter of credit as a condition to making a loan or the landlord who requires a security deposit.

Confirmer: The confirmer is a bank or other person that confirms the obligations of the issuer. This person, which may be known to the beneficiary or located in the beneficiary's jurisdiction, or which may have a stronger credit rating than the issuer, supplies additional credit or security to the beneficiary. The confirmer is independently responsible for honoring presentations under the issuer's letter of credit. The beneficiary essentially has two obligors: the issuer and the confirmer.

§ 7.5 Sources of Letter-of-Credit Law and Practice

Chapter 5 of the Texas Business and Commerce Code governs documentary and standby letters of credit. While this is the law that governs letter-of-credit transactions, additional conventions and practices may also apply to letters of credit. The two most likely to be selected in domestic letter-of-credit transactions are the UCP and the ISP98. For a letter of credit to be governed by one of these conventions, it must specifically state that it is governed by UCP or ISP98.

The International Chamber of Commerce has adopted Uniform Customs and Practice for Documentary Credits (UCP). This was first published in 1933 and was subsequently revised many times. The current revision, ICC Publication No. 600, was adopted in 2006. The UCP memorializes customs and practices of issuers of documentary letters of credit. It was also widely used to govern standby letters of credit before the adoption of ISP98.

The International Chamber of Commerce adopted International Standby Practices (ISP98) in 1998 specifically to standardize practices for standby letters of credit. Even though ISP98 is more closely aligned with standby letter-of-credit practice, some issuers continue to use

UCP for standby as well as for documentary letters of credit.

§ 7.6 Differences between ISP98 and UCP

There are many differences between ISP98 and UCP, including the absence of detailed provisions for insurance, shipping documents, and other trade-related concerns in ISP98. One difference is the effect on the letter of credit arising from an extended disruption in business because of weather and other force majeure events. ISP98 provides the following:

> If on the last business day for presentation the place for presentation stated in a standby is for any reason closed and presentation is not timely made because of the closure, then the last day for presentation is automatically extended to the day occurring thirty calendar days after the place for presentation re-opens for business, unless the standby otherwise provides.

Int'l Standby Prac. R. 314(a).

UCP articles 29 and 36 address closure in different fashions. Under article 29, if a presentation is due on any day when the bank is closed for any reason other than those set forth in article 36 (which governs force majeure issues), the presentation is extended to the first following banking day. Article 36 provides the following:

> A bank assumes no liability or responsibility for the consequences arising out of the interruption of its business by Acts of God, riots, civil commotions, insurrections, wars, acts of terrorism, or by any strikes or lockouts or any other causes beyond its control. A bank will not, upon resumption of its business, honour or negotiate under a credit that expired during such interruption of its business.

Uniform Customs and Prac. for Documentary Credits art. 36. Although article 36 would relieve the bank of the obligation to honor a draft due to closure for a force majeure event, many issuers routinely modify this rule.

An additional difference between ISP98 and UCP, discussed in greater detail in section 7.9:4 below, is that in the event of death, bankruptcy, and other similar changes in the identity of the beneficiary, ISP98 specifically provides for rights to a successor to make a drawing, while UCP does not.

§ 7.7 The Independence Principle

The essence of the letter-of-credit transaction is the independent undertaking of the issuing bank. This "independence" principle is one of the most cited aspects of letter-of-credit law.

ISP98 provides in rule 1.06(a) that a letter of credit is "an irrevocable, independent, documentary, and binding undertaking." Int'l Standby Prac. R. 1.06(a). Rule 1.06(c) stipulates that enforcement does not depend upon, among other conditions, either the "beneficiary's right to obtain payment from the applicant" or "the issuer's knowledge of performance or breach of any reimbursement agreement or underlying transaction." Int'l Standby Prac. R. 106(c)(ii), (iv). Thus, a dispute between applicant and beneficiary about whether conditions for payment have actually occurred will not authorize the issuer to refuse to honor a presentation that appears to comply with the requirements of the letter of credit.

UCP provides a similar provision in article 4 and provides the following:

> A credit by its nature is a separate transaction from the sale or other contract on which it may be based.

> Banks are in no way concerned with or bound by such contract, even if any reference whatsoever to it is included in the credit. Consequently, the undertaking of a bank to honour, to negotiate, or to fulfil any other obligation under the credit is not subject to claims or defences by the applicant resulting from its relationships with the issuing bank or the beneficiary.

Uniform Customs and Prac. for Documentary Credits art. 4.

This independence principle is the primary difference between a letter of credit and a guaranty or surety bond. With a guaranty or surety bond, the guarantor or surety company has no obligation until there is a default, and it would expect to investigate whether the conditions of its obligations had accrued, including whether there had been an actual default or failure of performance under the underlying contract. The opposite is true in the case of the letter of credit. The issuer examines only whether the conditions for draws have been met. It does not investigate any provisions of the underlying contract.

§ 7.8 Reimbursement

The issuer pays drafts drawn under the letter of credit from its assets. An issuer that has honored a presentation is entitled to be reimbursed by the applicant in immediately available funds not later than the date of its payment of funds. Tex. Bus. & Com. Code § 5.108(i)(1). This reimbursement obligation may be evidenced by a reimbursement agreement or a letter-of-credit application, or the applicant may agree that any amounts paid under the letter of credit will be considered advances under an existing revolving credit facility. The issuer may have required a guaranty and security in the property of the account party or guarantor. These requirements are typically made based on the issuer's underwriting of the credit of the account party.

§ 7.9 Drafting Considerations

Form 7-1 in this chapter is an example of a simple standby letter of credit. Other examples of standby letters of credit may be found at the Institute of International Banking Law & Practice website, **www.iiblp.org**. Typically, the issuing bank will prepare the letter of credit based on its internal policies and procedures. However, the applicant and the beneficiary may be able to request changes to address specific concerns or deal points, such as requirements that a letter of credit be furnished substantially in a form attached to a lease or credit agreement. Several basic points are described in this section.

§ 7.9:1 Revocable or Irrevocable

Texas law provides that a letter of credit is revocable only if it specifically states so. Tex. Bus. & Com. Code § 5.106(a). Under UCP, a letter of credit is deemed to be irrevocable unless it provides otherwise. ISP98 specifically provides in rule 1.06(a) that a standby letter of credit is irrevocable. Notwithstanding the strong support for irrevocable letters of credit in the law and banking conventions, letters of credit typically state specifically that they are irrevocable.

§ 7.9:2 Documentary Submissions

A letter of credit is drawn upon the submission of documents and certificates specified in the letter. A standby letter of credit does not provide that the beneficiary may draw upon an event of default under a lease, a credit agreement, or another agreement between the beneficiary and the applicant. Rather, it might provide that a draw would be paid upon submission of documents to the issuing bank, such as a certificate of the beneficiary that the applicant is in default under other agreements. With such a provision, the issuing bank is removed from the underlying transaction and fulfills its obligation upon the receipt of the specified documents.

§ 7.9:3 Transferable

A letter of credit can be transferred only if it states so. Tex. Bus. & Com. Code § 5.112; Int'l Standby Prac. R. 6.02(a); Uniform Customs and Prac. for Documentary Credits art. 48(b). If the beneficiary is the collateral agent for lenders under a secured credit facility or the trustee for bondholders under bonds and the parties wish to provide for transfer to a successor agent, the letter of credit would provide for this right. If a letter of credit is provided as security for a lessee's lease obligations, the lease may provide that if the lessor sells the property the lessee would consent to a transfer or would post a replacement letter of credit in favor of the new owner. If the parties wish to provide in the letter of credit itself for transfer to a subsequent owner, a clause to that effect could be included in the letter of credit.

§ 7.9:4 Successor Beneficiary

The successor of the beneficiary may submit draws. Tex. Bus. & Com. Code § 5.113. "Successor of a beneficiary" is a person "who succeeds to substantially all of the rights of a beneficiary by operation of law, including a corporation with or into which the beneficiary has been merged or consolidated, an administrator, an executor, a personal representative, a trustee in bankruptcy, a debtor in possession, a liquidator, and a receiver." Tex. Bus. & Com. Code § 5.102(a)(15). ISP98 rules 6.11 through 6.14 contain detailed provisions for presentations by "an heir, personal representative, liquidator, trustee, receiver, successor corporation, or similar person who claims to be designated by law to succeed to the interests of a beneficiary." Int'l Standby Prac. R. 6.11; *see* Int'l Standby Prac. R. 6.12–6.14. UCP does not directly address this issue. The beneficiary may not assign a single contract and a letter of credit securing payment and performance under chapter 5 of the Texas Business and Commerce Code and ISP98. However, a successor to the beneficiary may submit a draw that otherwise would have to be submitted by the originally named beneficiary.

§ 7.9:5 Expiration Date

Texas law provides that, unless otherwise stated, a letter of credit will expire one year after its stated date of issuance, and a letter of credit which states that it is perpetual expires five years after its date of issuance. Tex. Bus. & Com. Code § 5.106. Under UCP article 42, all letters of credit must contain expiration dates. Under ISP98 rule 9.01, a standby must either contain an expiration date "or permit the issuer to terminate the standby upon reasonable prior notice or payment." Int'l Standby Prac. R. 9.01. If the events that must be certified in connection with a draw have not occurred before the expiration date, the issuing bank is not obligated to extend the time for a draw.

To comply with their underwriting standards, including the ability to monitor the credit of the applicant, banks may issue letters of credit with a one-year expiration date with an "evergreen" renewal. Under these circumstances, the letter of credit typically provides that it will automatically renew for successive one-year periods unless the issuing bank advises the beneficiary within some period before expiration that the letter of credit will not be renewed for an additional year. In these cases, the letter of credit may provide that the beneficiary may draw down the full amount of the credit upon a certificate stating that the letter of credit is not being extended and that the beneficiary is entitled to draw the full amount. If so, the beneficiary and the applicant may address in the lease, credit agreement, or underlying document what will be done with the proceeds of that draw. The parties may intend that the proceeds be held in escrow, subject to a security interest to secure the obligations, or may be held only until the applicant is able to procure an acceptable alternate letter of credit.

Even in cases such as the evergreen, in which the issuing bank can decline to extend on any anniversary, many banks also prefer to include a final maturity date beyond which there will be no extensions. This allows the issuer to clear the expired letter of credit from its books without having to obtain evidence from the beneficiary that the letter of credit was cancelled or released.

§ 7.9:6 Submission of Certificates; Sight Draft

The types of certificates that may be required in connection with a draw are subject to negotiation between the applicant and the beneficiary to conform to the provisions of the underlying contract. While older letters of credit typically required submission of a sight draft, together with certificates, these are seldomly required in more recent credits. A sight draft is a draft payable on presentation to the bank that issued the letter of credit. Form 7-2 in this chapter is a simple sight draft for use if required under the particular letter of credit.

§ 7.9:7 Submission of Originals or Electronic Copies

The parties may consider whether the beneficiary must submit originally signed certificates or other documents for the draw or whether it would be authorized to submit electronic forms of certificates. Submission of originals can require more advance planning (and potential travel time if personal deliveries are made to reduce errors), particularly if the issuing bank is located in another state. Cases have generally provided that absent specific agreement to the contrary, original documents must be presented.

§ 7.9:8 Partial Draws

ISP98 rule 3.08 provides that a standby may be drawn in partial or successive draws unless it provides to the contrary. UCP article 31 allows partial drawings but does not stipulate whether this is the default rule or if it must be reflected in the terms of the letter of credit itself. Texas law is silent regarding partial draws. If the parties intend to allow the letter of credit to be drawn in successive draws, the letter should provide this right.

§ 7.9:9 Choice of Law

The parties may choose any jurisdiction's law to control a letter of credit, regardless of whether the jurisdiction bears any relation to the transaction. If no other jurisdiction's law is specified, a letter of credit issued by a Texas bank is governed by the Texas Business and Commerce Code and may also be governed by either ISP98 or UCP, if so stated in the letter of credit. Typically, the issuer will select the law of its main office or the law of a state in which it maintains a substantial commercial presence.

§ 7.10 Security Interests in Letters of Credit

Section 9.5:5 in this manual identifies the method by which a creditor may perfect a security interest in a letter of credit. Notwithstanding the ability to obtain a perfected security interest in the proceeds of the letter of credit, the secured creditor will be forced to rely on its debtor's compliance with the terms of the credit, such as submission of drafts and documents, in order to obtain proceeds. As a result, a security interest in this sort of collateral may be less desirable than a security interest in a deposit account or some other collateral that would not be so dependent on the actions of the obligor to realize its value.

§ 7.11 Additional Resources

Byrne, James E. *Standby & Demand Guarantee Practice: Understanding UCP600, ISP98 & URDG 758*. Montgomery Village, MD: Institute of International Banking Law & Practice, Inc., 2014.

Institute of International Banking Law & Practice, Inc. *International Standby Practices: ISP98*. New York: ICC Publishing, Inc., 2012.

International Chamber of Commerce. *ICC Uniform Customs and Practice for Documentary Credits: UCP 600.* New York: ICC Publishing, Inc., 2007.

Maloney, Marilyn C. "Letters of Credit in Real Estate Transactions." In *Advanced Real Estate Law Course, 2015*. Austin: State Bar of Texas, 2015.

[Reserved]

Form 7-1

Standby Letter of Credit

Irrevocable Standby Letter of Credit No. [**number**]

Beneficiary:

Address of Beneficiary:

We hereby issue our Irrevocable Standby Letter of Credit No. [**number**] (this "Letter of Credit") in your favor at the request and for the account of [**name of account party**] in the amount up to but not exceeding the aggregate sum of [**amount in words**] U.S. Dollars (U.S. $[**amount in numerals**]) effective immediately and expiring as set forth below.

Select one of the following.

This Letter of Credit is payable only in a single drawing.

Or

This Letter of Credit is payable in partial and multiple drawings.

Continue with the following.

This Letter of Credit is payable upon presentation of the following:

Select one or more of the following.

1. Your sight draft drawn on us.

2. A written sworn statement signed by a purportedly authorized officer of Beneficiary stating that it is entitled to the amount of U.S. $[**amount**] and that the amount is due and payable as a result of the account party's failure to perform its obligations under the terms of [**identify underlying instrument, e.g.,** the credit agreement].

3. The original of this Letter of Credit.

Include other conditions as applicable.

Continue with the following.

This Letter of Credit shall expire on [**date**].

Include the following if applicable.

It is a condition of this Letter of Credit that it shall be automatically extended without amendment for an additional period of [**extension period, e.g.,** one year] from the present or any future expiration date unless at least [**number**] days before that date we notify Beneficiary in writing at its above address by registered mail or courier services that we elect not to renew this Letter of Credit for the additional period. Upon receipt by Beneficiary of such notice Beneficiary may draw under this Letter of Credit before or on the then-current expiration date by presentation to us of the following:

Select one or more of the following.

1. Your sight draft drawn on us.

2. A written sworn statement signed by a purportedly authorized officer of Beneficiary stating that it is entitled to the amount of U.S. $[**amount**] and that the amount is due and payable as a result of our having given a notice of nonextension of this Letter of Credit.

3. The original of this Letter of Credit.

Include other conditions as applicable.

Select one of the following.

This Letter of Credit may not be transferred or assigned in whole or in part.

Or

This Letter of Credit may be transferred or assigned to [**successor, e.g.,** any successor agent under the credit agreement].

Continue with the following.

This Letter of Credit sets forth in full the terms of our undertaking, which shall not in any way be modified or amplified by reference to any document, instrument, or agreement referred to herein or to which this Letter of Credit relates, and any such reference shall not be deemed to incorporate herein by reference any document, instrument, or agreement.

This Letter of Credit shall be governed by the Uniform Commercial Code as enacted in the State of [Texas/[**state**]] on the date of its issuance and shall also, to the extent not inconsistent with that code, be governed by [International Standby Practices 1998, International Chamber of Commerce Publication No. 590 (ISP98)/Uniform Customs and Practice for Documentary Credits, International Chamber of Commerce Publication No. 600 (UCP)].

Include the following if applicable.

Notwithstanding article 36 of the UCP, if this Letter of Credit expires while we are closed for a reason beyond our control, we will honor a presentation under this Letter of Credit provided the presentation is made within thirty days of the resumption of our business.

Continue with the following.

[**Name of issuer**]

By _____
[**Name and title of officer or agent**]
Date:

[Reserved]

Form 7-2

Sight Draft

$[**Amount**]

[**Date**]

At Sight

Pay to the order of: [**name of beneficiary**]

[**Amount in words**] U.S. dollars (U.S. $[**amount in numerals**])

Value received and charged to the account of: [**name of account party**]

Drawn under Irrevocable Letter of Credit No. [**number**]

To: [**name and address of issuer of the letter of credit**]

[**Name of beneficiary**]

By _____
[**Name and title of officer or agent**]

[Reserved]

TEXAS REAL ESTATE FORMS MANUAL

Third Edition

Volume 2

A project of the
Real Estate Forms Committee
of the
State Bar of Texas

Austin 2017

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

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

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

International Standard Book Number: 978-1-938873-48-5
International Standard Book Number: 978-1-938873-60-7 (2018 Supplement)
International Standard Book Number: 978-1-938873-70-6 (2019 Supplement)
International Standard Book Number: 978-1-938873-78-2 (2020 Supplement)
Library of Congress Control Number: 2017936428

State Bar of Texas
Austin, Texas 78711

The authors and the State Bar of Texas gratefully acknowledge permission of the copyright holder and publisher to reprint the following materials: ACORD 25 "Certificate of Liability Insurance," ACORD 28 "Evidence of Commercial Property Insurance," and ACORD 45 "Additional Interest Schedule."

Printed in the United States of America

Third Edition, 2017

Contents

Chapter 8
Deeds of Trust

9. indicates whether the debtor is an individual or an organization;

10. if the debtor is an individual, indicates the debtor's surname; and

11. provides the mailing address of the secured party or its representative.

Tex. Bus. & Com. Code § 9.516(b)(3)(C), (4), (5).

The difference in legal effect between the absence from the deed of trust of any of the minimum requirements in items 1. through 7. above and the absence from the deed of trust of any of the requirements in items 8. through 11. above is that, in the former case, the deed of trust *will be ineffective* as a financing statement even if it is accepted for filing by the real estate filing office, whereas in the latter case the recorded deed of trust *will be effective* as a financing statement (as long as the requirements in items 1. through 7. are included). *See* Tex. Bus. & Com. Code § 9.520(c). If the deed of trust is to serve as a financing statement, the preparer should note the first boxed instruction in forms 8-1 and 8-2 in this chapter calling for the inclusion of the information set forth in items 8. through 11. above that is not already called for in those forms.

No filing fee is required beyond the regular fee charged for recording the deed of trust with respect to a deed of trust that is effective as a financing statement filed as a fixture filing or as a financing statement covering as-extracted collateral or timber to be cut. Tex. Bus. & Com. Code § 9.525(e). Unlike a regular financing statement (which is effective, if not continued, for only five years from the date of filing), a deed of trust that satisfies the above requirements is effective as a fixture filing, and as a financing statement covering as-extracted collateral or timber to be cut, "until the mortgage is released or satisfied of record or its effectiveness otherwise terminates as to the real property." Tex. Bus. & Com. Code § 9.515(g).

For other documents and commentary relating to security agreements and financing statements, see chapter 9 in this manual.

§ 8.11:2 Modifications and Clauses

If the deed of trust is to serve as a security agreement or as a security agreement and a financing statement, a heading to that effect should be added beneath or beside the "Deed of Trust" heading.

Chapter 9, as effective July 1, 2001, retains the requirement that a security agreement reasonably identify the collateral. *See* Tex. Bus. & Com. Code §§ 9.108(a), 9.203(b)(3)(A). Reasonable identification of collateral may be by specific listing, category, type, quantity, computational formula, or any other method under which the identity of the collateral is objectively determinable. Tex. Bus. & Com. Code § 9.108(b). In a security agreement, an "all assets" or "all personal property" description is, however, insufficient. Tex. Bus. & Com. Code § 9.108(c). Even though an "all assets" or "all personal property" collateral description is insufficient in a security agreement, an indication in a financing statement that the collateral is "all assets or all personal property" is sufficient. Tex. Bus. & Com. Code § 9.504. Accordingly, if a deed of trust is to be used as a security agreement as well as a financing statement, the deed of trust must reasonably identify the collateral. If, however, the deed of trust is to serve only as a financing statement, an "all assets or all personal property" description is sufficient.

If the collateral is not affixed to the real estate conveyed, it may be sufficiently described, for security agreement purposes, by adding to the legal description of the realty a phrase such as "and all inventory, equipment, and consumer goods on the property." If the collateral is affixed to the real estate, it may still be described, for security agreement purposes, by a phrase or sentence added to the legal description

of the realty. A description of fixtures, for example, might be "and all goods that are or will be fixtures and that are or will be located on the property."

To serve as a security agreement, the deed of trust must also clearly state that the borrower grants a security interest in the collateral to the lender. A clause such as 8-9-10 in this chapter should appear as a numbered paragraph under "General Provisions."

In addition, if the deed of trust is to secure a construction loan, to take advantage of the priority afforded construction lenders by revised section 9.334, the attorney should add the personal property description and construction mortgage clauses found at clauses 8-9-12 and 8-9-13, respectively. The attorney should also give serious consideration to preparing a construction loan agreement to deal with such issues as retainage, conditions for advances, and storage of supplies and materials.

§ 8.12 Additional Resources

Beyer, Gerry W. *Real Property.* 2nd ed. West's Texas Forms 13–15. St. Paul, MN: West, 2001. Supplement 2014.

Nolan, John M., Michael F. Alessio, and Edward A. Peterson. "Texas Annotated Deed of Trust." In *Advanced Real Estate Strategies Course, 2015*. Austin: State Bar of Texas, 2015.

St. Claire, Frank A., and William V. Dorsaneo III. *Texas Real Estate Guide*. New York: Matthew Bender & Co., 2001.

Chapter 9

Security Agreements

Forms

[Reserved]

ties intermediary acquires a certificated security for a customer, in this case for the secured party, the securities intermediary often credits the security to a securities account held by the securities intermediary for its customer. The securities intermediary usually will not retain possession of the certificated security but rather will transfer the certificated security to the securities intermediary's clearing corporation. The records of the securities intermediary will reflect the securities credited to its customer's account. The secured party in such a situation would have to rely on "control" (see section 9.5:5 below) as the method of maintaining the perfected status of its security interest, even if the security certificate was appropriately delivered to the securities intermediary to initially perfect the secured party's security interest by possession.

Chattel Paper: A security interest in tangible chattel paper may be perfected by possession. Tex. Bus. & Com. Code § 9.313(a). A security interest in electronic chattel paper may not be perfected by possession but may be perfected by control or filing. Tex. Bus. & Com. Code §§ 9.312(a), 9.314(a).

Other Collateral: Other collateral that may be perfected by the secured party's taking possession of the collateral includes goods and tangible negotiable documents. Tex. Bus. & Com. Code § 9.313(a).

Possession by Third Parties: A secured party desiring to perfect a security interest in collateral by possession when the collateral (other than a certificated security or goods covered by a document) is in the possession of a third party must obtain an authenticated record (for example, a signed writing) from the possessor of the collateral acknowledging that it is holding the collateral for the secured party. Tex. Bus. & Com. Code § 9.313(c)(1) (compare with Tex. Bus. & Com. Code §§ 8.106(a), (b), 8.301(a)(2) for certificated securities). The third party in possession of the collateral may not be the debtor or a lessee in the ordinary course from the debtor. Tex. Bus. & Com. Code § 9.313(c). If a secured party or a third party on behalf of the secured party has possession of collateral, possession is not relinquished if the collateral is delivered with appropriate instructions to a possible purchaser of the collateral (other than the debtor or an ordinary-course lessee of the collateral) for inspection or return. Tex. Bus. & Com. Code § 9.313(h).

§ 9.5:5 Perfection by Control

Perfection of a security interest by control applies to investment property, deposit accounts, electronic chattel paper, electronic documents, and letter-of-credit rights. Tex. Bus. & Com. Code §§ 7.106, 9.104–.107, 9.314(a).

Investment Property: A security interest in investment property may be perfected by control or filing. Tex. Bus. & Com. Code §§ 9.312(a), 9.314(a). A secured party that has control of investment property has priority over another secured party that perfects its security interest in the same property by filing a financing statement. Tex. Bus. & Com. Code § 9.328(1). Generally, chapter 9 defers to Texas UCC chapter 8 to set forth the requirements for control of investment property. Tex. Bus. & Com. Code § 9.106(a). Control of investment property includes delivery, with endorsement, of a certificated security to the secured party; an agreement by the issuer of an uncertificated security that the issuer will honor instructions from the secured party without further consent of the debtor; and an agreement by a bank, broker, or other securities intermediary holding a securities account or by a commodity intermediary that it will honor instructions from the secured party concerning the account without further consent of the debtor. Banks, brokers, and other securities intermediaries that regularly hold securities accounts for their customers typically require the use of their own form of a so-called control agreement. Control also includes registering a

security, a securities account, or a commodity account in the name of the secured party. If a secured party is the debtor's securities intermediary or commodity intermediary, the secured party automatically has control. Tex. Bus. & Com. Code §§ 8.106, 9.106.

Deposit Accounts: A secured party may perfect a security interest in a deposit account as original collateral only by obtaining control of the deposit account. Tex. Bus. & Com. Code §§ 9.312(b)(1), 9.314(a). Filing a financing statement does not perfect a security interest in a deposit account as original collateral. Tex. Bus. & Com. Code § 9.312 cmt. 5. A secured party has control of a deposit account if it is the depositary bank or if the deposit account is in the secured party's name. A secured party also has control if the depositary bank agrees to comply with instructions from the secured party concerning the deposit account without further consent from the debtor. Tex. Bus. & Com. Code § 9.104(a). Form 9-19 is a form of deposit account control agreement that restricts the ability of the debtor to use the account. Form 9-20 is a form of deposit account control agreement that allows the debtor to use the account before an event of default. Banks typically require the use of their own form of deposit account control agreement.

Electronic Chattel Paper: A security interest in electronic chattel paper may be perfected by filing or by control. Tex. Bus. & Com. Code §§ 9.312(a), 9.314(a).

The requirements for control of electronic chattel paper are in Tex. Bus. & Com. Code § 9.105.

Letter-of-Credit Rights: A secured party may perfect its security interest in a letter-of-credit right that is not a supporting obligation for other collateral only by obtaining control of the letter-of-credit right. Tex. Bus. & Com. Code §§ 9.312(b)(2), 9.314(a). A secured party has control of a letter-of-credit right if the issuer or nominated person has consented to an assignment of proceeds of the letter of credit under Texas Business and Commerce Code section 5.114(c). Tex. Bus. & Com. Code § 9.107.

Electronic Documents: A security interest in an electronic document of title may be perfected by filing or by control. Tex. Bus. & Com. Code §§ 9.312(a), 9.314(a). A secured party has control of an electronic document of title if a system employed for evidencing the transfer of interests in the electronic document reliably establishes the secured party as the person to which the electronic document was issued or transferred. Tex. Bus. & Com. Code § 7.106(a).

§ 9.5:6 Automatic Perfection

In some cases, a security interest is automatically perfected if it has attached; no additional action other than attachment is necessary to perfect the security interest. Tex. Bus. & Com. Code § 9.309.

Automatic Perfection: The security interests that are automatically perfected on attachment under chapter 9 are—

1. a purchase-money security interest in consumer goods;
2. a sale of payment intangibles and promissory notes;
3. an assignment of accounts that does not, alone or in conjunction with other assignments to the same assignee, transfer a significant part of the outstanding accounts of the assignor;
4. an assignment of payment intangibles that does not, alone or in conjunction with other assignments to the same assignee, transfer a significant part of the payment intangibles of the assignor;
5. a security interest arising under Texas UCC chapter 2, 2A, or 4;

6. a security interest in investment property created by a securities intermediary or commodity intermediary;

7. for a temporary period, a security interest in instruments, certificated securities, and negotiable documents;

8. an assignment of a health-care-insurance receivable to the health-care provider;

9. for a temporary period, a security interest in proceeds;

10. a sale by an individual of lottery winnings; and

11. a security interest in favor of an issuer or nominated person in documents presented to the issuer or nominated person for draw under a letter of credit.

Tex. Bus. & Com. Code §§ 9.309(1)–(8), (10), (11), (14), 9.312(e), 9.315(d). *See* Tex. Bus. & Com. Code § 5.118.

Supporting Obligation: If a security interest in an account, chattel paper, document, general intangible, instrument, or investment property is perfected, a security interest in a supporting obligation for that collateral is automatically perfected. Tex. Bus. & Com. Code §§ 9.203(f), 9.308(d). A supporting obligation is a letter-of-credit right or secondary obligation, such as a guaranty, that supports the payment or performance of an account, chattel paper, document, general intangible, instrument, or investment property. Tex. Bus. & Com. Code § 9.102(a)(78).

§ 9.5:7 Other Perfection Provisions under Chapter 9

The temporary automatic perfection periods for instruments, certificated securities, and negotiable documents is twenty days (Tex. Bus. & Com. Code § 9.312(e)), as is the temporary perfection period of a security interest in proceeds. Tex. Bus. & Com. Code § 9.315(d). A financing statement must be filed to perfect a security interest in a beneficiary's interest in a common-law trust. Tex. Bus. & Com. Code § 9.309(13). A security interest in titled-goods inventory held for sale or lease by a dealer in the business of selling goods of that kind is perfected by filing, not by notation of the security interest on the certificate of title. A security interest in titled-goods inventory held for sale or lease by a person in the business of leasing such goods is perfected by notation on the certificate of title and not by filing. Tex. Bus. & Com. Code § 9.311(d).

§ 9.5:8 Other Means of Perfection

Federal and state statutes may provide a means of perfecting a security interest in vessels, aircraft, intellectual property, and titled goods (such as motor vehicles that are not inventory of a dealer). Compliance with these forms of perfection constitutes perfection by filing under chapter 9. Tex. Bus. & Com. Code § 9.311(a), (b).

§ 9.6 Choice of Law

§ 9.6:1 Generally

Chapter 9 contains choice-of-law provisions that determine which jurisdiction's law governs attachment of a security interest, perfection of a security interest, and priority over another interest. If a dispute occurs in a UCC jurisdiction, the choice-of-law rules in chapter 9 of the forum jurisdiction determine which jurisdiction's laws the forum jurisdiction is required to apply. The choice-of-law rules in the UCC do not address which law a non-UCC jurisdiction would apply.

§ 9.6:2 Contract Choice of Law

If a security agreement specifies a governing law, and if the transaction has a reasonable relationship with the chosen jurisdiction, the forum jurisdiction should apply the law of the jurisdiction specified in the security agreement to determine the contractual rights and obligations of the debtor and the secured party. Tex. Bus. & Com. Code § 1.301(a). Regardless of the jurisdiction chosen by the parties to govern their rights and obligations, the secured party and the debtor by their contract may not vary the mandatory choice-of-law rules in chapter 9 concerning perfection and priority of a security interest. Tex. Bus. & Com. Code § 1.301(b). *See also* Tex. Bus. & Com. Code ch. 271.

§ 9.6:3 Perfection

General Rule—Location of Debtor: Except as noted below, the law of the jurisdiction in which the debtor is located governs perfection of a security interest in collateral. Tex. Bus. & Com. Code § 9.301(1). For a debtor with multistate operations, if a security interest in collateral is perfected by filing, the jurisdiction in which the debtor is located is the filing jurisdiction. Because of the importance of the location of the debtor to the choice-of-law rule, chapter 9 provides rules to determine a debtor's location.

Registered Organizations. A registered organization is one formed or organized in a state or the United States by the filing with, issuance of a public organic document by, or enactment of legislation by the state or the United States. Tex. Bus. & Com. Code § 9.102(a)(71) (defining "registered organization"); *see also* Tex. Bus. & Com. Code § 1.201(b)(25) (defining "organization"); Tex. Bus. & Com. Code § 9.102(a)(68–a) (defining "public organic record"); Tex. Bus. & Com. Code § 9.102(a)(77) (limiting the definition of "state" to jurisdictions in the United States and its territories and possessions). A registered organization that is organized under the law of a state is located in that state. Tex. Bus. & Com. Code § 9.307(e). For example, if a debtor is a corporation, limited liability company, or limited partnership organized under the laws of a particular state, the debtor is located in that state. *See* Tex. Bus. & Com. Code §§ 9.102 cmt. 11, 9.307 cmt. 4.

Other Debtors. If the debtor is an individual, the debtor is located at his residence. If the debtor is an organization but is not a registered organization, the debtor is located at the debtor's place of business if the debtor has only one place of business or at the debtor's chief executive office if the debtor has more than one place of business. Tex. Bus. & Com. Code § 9.307(b).

Foreign Debtors. If the debtor is located in a jurisdiction outside the United States and that jurisdiction does not provide for a public filing system for nonpossessory security interests for a secured party to prevail over a subsequent lien creditor, the debtor is deemed to be located in the District of Columbia. Tex. Bus. & Com. Code § 9.307(c).

Possessory Security Interests: If a security interest is perfected by possession, the law of the jurisdiction in which the collateral is located governs perfection (that is, the requirements of possession) and priority of that security interest. Tex. Bus. & Com. Code § 9.301(2).

Fixtures: If a security interest in fixtures is perfected by a fixture filing, the law of the jurisdiction in which the fixtures are located governs whether perfection has occurred and the priority of conflicting security interests. Tex. Bus. & Com. Code § 9.301(3)(A).

Titled Goods: If goods are covered by a certificate of title (defined in Tex. Bus. & Com. Code § 9.102(a)(10)) issued by a particular jurisdiction, the law of the certificate-issuing jurisdiction governs whether perfection occurs. Tex. Bus. & Com. Code § 9.303(c). An exception to this rule for certificate-of-title goods

applies if the goods are inventory. If titled goods are inventory, the law of the jurisdiction of the debtor's location determines whether a security interest is perfected. Tex. Bus. & Com. Code § 9.301. Under section 9.311(d), titled goods that are inventory of a person in the business of selling such goods are treated as ordinary goods for determining whether a security interest in such goods is perfected; a notation on a certificate of title for titled goods that are inventory of such a person is not necessary or effective to perfect a security interest. *See* Tex. Bus. & Com. Code § 9.303 cmt. 5.

Agricultural Liens: The law of the jurisdiction in which the farm products are located governs whether an agricultural lien on the farm products is perfected. Tex. Bus. & Com. Code § 9.302.

Investment Property: If a security interest in investment property is perfected by filing, the law of the jurisdiction in which the debtor is located governs perfection. Tex. Bus. & Com. Code § 9.305(c)(1). If a security interest in investment property collateral is perfected by a means other than filing, (1) if the collateral is a security certificate, the law of the jurisdiction in which the security certificate is located determines whether a security interest in the certificated security is perfected (Tex. Bus. & Com. Code § 9.305(a)(1)); (2) if the collateral is an uncertificated security, the law of the jurisdiction under which the issuer of the uncertificated security is organized governs perfection of a security interest in the uncertificated security or, if permitted by the law of that jurisdiction, the law of another jurisdiction specified by the issuer (Tex. Bus. & Com. Code § 8.110(d)); (3) if the collateral is a security account or a security entitlement, the agreement of the parties to the account or entitlement determines the jurisdiction governing perfection for the security account or security entitlement; if, however, the parties do not provide for a jurisdiction, the jurisdiction is determined by sections 8.110(e) and 9.305(a)(3) of the Texas Business and Commerce Code; and (4) if the collateral is a commodity account, the agreement of the parties to the account determines the jurisdiction governing perfection for the commodity account; if, however, the parties do not provide for a jurisdiction, the jurisdiction is determined by Tex. Bus. & Com. Code § 9.305(b).

Deposit Accounts: The law of the jurisdiction of the depositary bank governs perfection of a security interest in a deposit account. Tex. Bus. & Com. Code § 9.304(a). Chapter 9 contains rules for determining where a depositary bank is located. Tex. Bus. & Com. Code § 9.304(b). Those rules are similar to the rules for determining the location of a securities intermediary.

Letter-of-Credit Rights: The law of the jurisdiction of the issuer or nominated person of a letter of credit generally governs perfection of a security interest in a letter-of-credit right, other than a letter-of-credit right that is a supporting obligation. The issuer's or nominated person's jurisdiction is determined under section 5.116 of the Texas Business and Commerce Code. Tex. Bus. & Com. Code § 9.306. If the issuer's or nominated person's jurisdiction is not a state (defined in Tex. Bus. & Com. Code § 9.102(a)(77)), the law of the debtor's location determines perfection of a security interest in a letter-of-credit right. *See* Tex. Bus. & Com. Code § 9.306 cmts. 2, 3.

§ 9.6:4 Effect of Perfection or Nonperfection and Priority

The jurisdiction whose law governs the effect of perfection or nonperfection and priority of a security interest is sometimes different from the jurisdiction whose law governs perfection.

Tangible Negotiable Documents, Goods, Instruments, Money, and Tangible Chattel Paper: The jurisdiction whose law governs the effect of perfection or nonperfection and pri-

ority of a nonpossessory security interest (for example, one perfected by filing) is the jurisdiction in which the collateral is located. Tex. Bus. & Com. Code § 9.301(3)(C).

Certificated Securities: The jurisdiction whose law governs the effect of perfection or nonperfection and priority of a security interest in a certificated security is the jurisdiction in which the security certificate is located. Tex. Bus. & Com. Code § 9.305(a)(1).

Uncertificated Securities: The jurisdiction whose law governs the effect of perfection or nonperfection and priority of a security interest in an uncertificated security is the jurisdiction of the issuer of the uncertificated security. Tex. Bus. & Com. Code § 9.305(a)(2).

Security Entitlements, Security Accounts, Commodity Contracts, and Commodity Accounts: The jurisdiction whose law governs the effect of perfection or nonperfection and priority of a security interest in a security entitlement, security account, commodity contract, or commodity account is the jurisdiction of the securities intermediary or commodity intermediary. Tex. Bus. & Com. Code § 9.305(a)(3), (4).

Other Collateral: Otherwise, generally the jurisdiction whose law governs perfection of a security interest also governs the effect of perfection or nonperfection and priority of that security interest. See section 9.301(1) for accounts, commercial tort claims, and general intangibles; section 9.301(2) for possessory security interests; section 9.301(3)(A) for fixtures; section 9.301(3)(B) for timber to be cut; section 9.301(4) for as-extracted collateral; section 9.302 for farm products; section 9.303(c) for certificate-of-title goods that are not inventory; and section 9.304 for deposit accounts.

§ 9.7 Cautions

This chapter of the manual does not cover all the issues involved in complex secured transactions. Rather, this chapter provides forms and analysis to create, attach, and perfect a security interest in straightforward secured transactions.

Certain types of collateral are subject to statutes that require other steps for perfecting the security interest and are beyond the scope of this manual. *See* Tex. Bus. & Com. Code §§ 9.109(c), (d), 9.311(a). The following are examples.

Titled Vehicles. If the title to the collateral is created by a certificate of title, such as for a car, boat, or trailer, proper perfection is by registering the lien on the title.

Patents, Copyrights, and Trademarks. The federal patent office registers liens on patent, copyright, and trademark rights.

Ships and Aircraft. Federal statutes govern perfection requirements for large ships and aircraft.

Additionally, issues not applicable to other types of collateral arise if the collateral consists of fixtures or farm products.

§ 9.7:1 Fixtures

Goods are fixtures if they become so related to particular real estate that an interest in them arises under the real property law of the state in which the real property is situated. Tex. Bus. & Com. Code § 9.102(a)(41). Texas cases have generally held that personalty becomes a fixture if it is affixed to realty in such a manner that it cannot be removed without damage to the realty. The intent of the "annexing party" is a major factor in the determination. Building materials incorporated into realty are not fixtures. Tex. Bus. & Com. Code § 9.334(a).

If the secured party has a deed-of-trust lien on real property, the secured party does not need a separate security interest in the fixtures on that real property or a separate financing statement filed in the real property records. A recorded deed of trust creates and perfects a lien on the fixtures as an interest in real property if the deed of trust contains certain information. Tex. Bus. & Com. Code § 9.502(c). The deed of trust as a security agreement and financing statement is discussed at section 8.9 in this manual.

Fixtures have characteristics of both real and personal property. This dual nature accounts for the special treatment of fixtures in the security agreement and the financing statement. In the security agreement, forms 9-1 through 9-4 in this chapter, the debtor warrants that the collateral is not a fixture except as provided in the agreement. The debtor also covenants to give the secured party certain rights if the collateral becomes a fixture.

In priority conflicts involving fixtures, the parties competing with the secured party are those with real estate interests, such as a lien on the real property to which the goods are affixed. *See* Tex. Bus. & Com. Code § 9.334 cmt. 4. If fixtures were treated like other personalty and if the financing statements were filed with the secretary of state, parties with real estate interests would not learn of the security interest by a title search. Thus, a security agreement and financing statement covering fixtures must describe the real estate, and the financing statement must be filed in the real property records. Tex. Bus. & Com. Code § 9.502(b).

If there is any doubt about whether collateral is or may become a fixture, the secured party should file a Uniform Commercial Code fixture filing. Sections 9.5:3 above and 9.14:5 below discuss additional rules for filing.

§ 9.7:2 Farm Products and Agricultural Liens

Creating and perfecting a security interest in farm products collateral requires action under two separate and distinct systems. Creating and perfecting a security interest against competing creditors is governed by Texas Business and Commerce Code chapter 9. Perfection of that same security interest in farm products against buyers in the ordinary course of business requires compliance with the federal Food Security Act of 1985. 7 U.S.C. § 1631.

Perfection under chapter 9 is normally accomplished by the execution of a security agreement and the filing of an appropriate financing statement. In Texas, perfection against buyers in the ordinary course of business under 7 U.S.C. § 1631 (so-called "superperfection") requires the creditor to deliver notice of the security interest to the purchaser of the farm product at any time within one year before the sale occurs. To determine which potential buyers must receive this notice, the secured party may require the debtor to list likely purchasers of the farm products collateral (see form 9-7 in this chapter). Texas has no central filing system for farm products liens under the Food Security Act. To be effective, the superperfection prenotification notice must be delivered to the farm products buyer before the sale of the farm products. The notice remains effective for only one year after it is delivered. Secured creditors should exercise diligence to determine that their prenotification notices are timely delivered and remain effective. Farm products are not infrequently sold under forward contracts. The date of a sale under a forward contract may be ambiguous. Additionally, farm products are often warehoused after harvest for an extended period. A notice may expire during the period that farm products are warehoused. A new notice, with its new one-year effectiveness, may have to be delivered to the farm products buyer of warehoused farm products.

The required contents of a prenotification notice are unique to the Food Security Act and are much more extensive than the information contained in a financing statement. See the prenotification statement at form 9-6 for the contents of the notice.

In addition, the perfection and priority of agricultural liens may be subject to rules outside of chapter 9 of the Texas Uniform Commercial Code. For example, notwithstanding the provisions of chapter 9, an agricultural lien granted under subchapter E of Texas Property Code chapter 70 has priority over certain prior liens if certain conditions are met. *See* Tex. Prop. Code § 70.4045. Similarly, the statutory trust created upon acceptance of commodities to which the Perishable Agricultural Commodities Act applies may also have priority over certain previously filed UCC liens. *See* 7 U.S.C. §§ 499a–499s; *see, e.g., Bocchi Americas Associates, Inc. v. Commerce Fresh Marketing, Inc.*, 515 F.3d 383 (5th Cir. 2008).

§ 9.7:3 Federal Tax Liens

A federal tax lien notice covering all personal property of a debtor may be filed in an office that is different from the office in which a financing statement against the debtor is filed. All personal property of a taxpayer that is a corporation or partnership is deemed located where the principal place of the business is located; for other taxpayers, at the taxpayer's residence; and for a taxpayer located outside of the United States, in the District of Columbia. 26 U.S.C. § 6323(f)(2)(B). Under section 14.002 of the Texas Property Code, a notice of a federal tax lien should be filed in the office of the secretary of state for a corporation or partnership whose principal executive office is in Texas and, in all other cases, in the office of the county clerk in the county in which the person against whom the lien applies resides when the notice is filed. Tex. Prop. Code § 14.002.

As referenced in Texas Property Code section 14.002, "corporation" may refer to any entity taxed as a corporation for federal income tax purposes, and "partnership" may refer to any entity treated as a partnership for federal income tax purposes. A single-member limited liability company that does not elect to be taxed as a corporation for federal income tax purposes and is disregarded for federal income tax purposes may also be disregarded for purposes of federal tax lien notice filings. A notice of a federal tax lien filing may be made against such a limited liability company under the name of its single-member owner, and the federal tax lien may attach to the otherwise (for state law purposes) separate property of the limited liability company. Searches for outstanding liens against a debtor should also be made in the offices in which a federal tax lien notice may have been filed.

§ 9.8 Deed of Trust as Security Agreement and Financing Statement

In addition to creating a lien on the real property conveyed, the deed of trust can be modified to create a security interest in other collateral. See form 8-1 in this manual. See also section 8.11, which describes the use of a deed of trust as security agreement and financing statement.

§ 9.9 Instructions for Completing Security Agreement Forms

In the following instructions for completing the security agreement, forms 9-1 through 9-4 in this chapter, different classifications of collateral are considered separately if appropriate; otherwise, the remarks apply to all classifications of collateral. Form 9-1 is designed for use if the collateral is consumer goods or documents with respect to goods, equipment, or inventory. If addendum form 9-5 is attached, form 9-1 may also be used if the collateral is farm products. Form 9-2 is designed for use if the collateral is

accounts, chattel paper, general intangibles, or a commercial tort claim. Form 9-3 is designed for use if the collateral is instruments, including a promissory note, or investment property. Form 9-4 is designed for use if the collateral is a debtor's interest as a partner in a general or limited partnership or as a member in a limited liability company.

Parties and Name of Debtor: For general information about designation of parties and the name of the debtor, see sections 9.5:3 and 9.14:2 and chapter 3 in this manual.

Classification of Collateral: The secured party should list all classifications of the collateral subject to the security agreement. If the debtor and the secured party agree that the collateral is or may become a fixture, that fact should be noted in the classification, with language such as "equipment to become a fixture," and the security agreement should include a legal description of the real property. See section 9.3:3 above for a list of the classifications.

Collateral: Any description of personal property or real estate is sufficient, whether it is specific or not, if it reasonably identifies what is described. Tex. Bus. & Com. Code § 9.108. In a consumer transaction, however, a description by collateral type alone is not sufficient if the collateral is consumer goods, a security entitlement, a security account, or a commodity account. Tex. Bus. & Com. Code § 9.108(e). A description by type alone is also not sufficient for a commercial tort claim. Tex. Bus. & Com. Code § 9.108(e). Several examples of alternate clauses are included in the security agreement forms, but the attorney may use any description that meets the requirements of section 9.108. *See* Tex. Bus. & Com. Code § 9.108 cmt. 2.

Debtor's Representations Concerning Debtor and Locations: The security agreement forms have the debtor representing the location of the collateral, the location of the debtor's records concerning the collateral, and the location of the debtor. If a secured party has to enforce its security interest, the secured party will need to know where the collateral and records pertaining to the collateral are located. The debtor's location is important because under chapter 9 the filing jurisdiction generally depends on the location of the debtor. *See* Tex. Bus. & Com. Code § 9.301(1) and section 9.6:3 above. The filing jurisdiction under chapter 9 may be different from the jurisdiction in which the collateral is located. The security agreement may show the location where the debtor intends to keep the collateral and records concerning the collateral; the location of the debtor's place of business or chief executive office if the debtor has more than one place of business; if the debtor is an individual, the location of the debtor's place of business or chief executive office if the debtor has more than one place of business and the location of the debtor's residence; and, if the debtor is a registered organization, the jurisdiction in which the debtor is organized. For most purposes, a street address or other unambiguous location should be sufficient.

The remaining representations concerning the debtor deal with information needed to complete the financing statement form.

If the collateral is or will become timber to be cut, this part of the agreement should describe the land where the collateral is or will be located. Tex. Bus. & Com. Code § 9.203(b)(3)(A). The secured party should file a financing statement in the real property records to perfect its security interest in timber to be cut, as-extracted collateral, or fixtures. Tex. Bus. & Com. Code § 9.501(a)(1). Financing statements for these types of collateral require a description of the real property. Tex. Bus. & Com. Code § 9.502(b)(3). For general information about property descriptions, see section 3.7 in this manual.

Security agreement form 9-1 is drafted for consumer goods, equipment, or inventory. With

addendum form 9-5, form 9-1 can also provide coverage for farm products. By appropriately wording paragraph H.14., the parties may incorporate the addendum into the agreement. Use of the addendum for farm products to security agreement form 9-1 together with additional forms for listing of potential buyers, commission merchants, and selling agents (form 9-7) and the prenotification statement (form 9-6) allows compliance with the federal Food Security Act (7 U.S.C. § 1631).

There are two methods for documenting a security interest in a note secured by real property. One method, use of the security agreement, is discussed in the following paragraphs. The other method, use of the collateral transfer of note and lien, is discussed in section 9.18 below.

Use of security agreement form 9-3, with appropriate alternate clauses, will create a security interest in the note. Chapter 9 provides that it governs a security interest in a secured obligation (such as a note secured by real property) notwithstanding that the underlying collateral (for example, the real property) is not governed by chapter 9. Tex. Bus. & Com. Code § 9.109(b). Furthermore, if a security interest attaches under chapter 9 to a secured obligation, the security interest automatically attaches to the security interest, mortgage, or other lien that secures the secured obligation. Tex. Bus. & Com. Code § 9.203(g). Additionally, perfection of the security interest in the secured obligation automatically perfects a security interest in the security interest, mortgage, or other lien that secures the secured obligation. Tex. Bus. & Com. Code § 9.308(e). If the note is secured by real property, a properly completed transfer-of-lien form should be filed in the real property records of the county clerk in the county in which the real property is located. See form 9-1. The transfer of lien provides notice to anyone searching the real property records of the secured party's interest in the real property. If the note is secured by personal property, a properly completed UCC3 financing statement amendment (form 9-14) should be filed in the appropriate place for the type of collateral covered. The assignment provides notice to anyone searching the personal property records of the secured party's interest in the personal property. See section 9.12 below for further discussion.

A secured party may perfect its security interest in a note by either filing a financing statement or obtaining possession of the note. Tex. Bus. & Com. Code §§ 9.312(a), 9.313(a). A secured party that has possession of an instrument may have priority over a secured party that perfects its security interest in the instrument by filing. Tex. Bus. & Com. Code § 9.330(d). For the secured party to become a holder or a holder in due course of the note, with all the benefits that entails under chapter 3 of the Texas Business and Commerce Code, the payee or, if different, the current holder of the note must endorse the note to the secured party. Among the advantages of a secured party becoming a holder in due course of the note is that the secured party also becomes the person entitled to enforce the note. Tex. Bus. & Com. Code § 3.301. The note transferred may be endorsed as follows:

> [**Date of transfer**]
>
> Pay to the order of [**name of secured party**] as collateral in accordance with the security agreement dated [**date**].
>
> [**Name of payee/holder**]

Additionally, notice of the security interest may be given to the maker of the note to prevent a prepayment of the note to the payee.

§ 9.10 Additional Clauses

§ 9.10:1 After-Acquired Property

The Texas Business and Commerce Code authorizes and validates a security interest in after-

acquired property if the security agreement so provides. *See* Tex. Bus. & Com. Code § 9.204(a). The secured party may include the parenthetical language *whether now owned and all after-acquired collateral of the same classification* on forms 9-1 through 9-4 in this chapter, under the heading "Collateral," to include after-acquired property. No security interest attaches to after-acquired consumer goods (other than accessions) if they are given as additional security, unless the debtor acquires rights in the goods within ten days after the secured party gives value. Tex. Bus. & Com. Code § 9.204(b). Additionally, a security interest in a commercial tort claim attaches only to such a claim that exists when the security agreement is entered into and not to an after-acquired claim. Tex. Bus. & Com. Code § 9.204(b).

§ 9.10:2 Other Debt/Future Advances

The Texas Business and Commerce Code provides that a security interest secures future advances to the debtor if the security agreement so provides. *See* Tex. Bus. & Com. Code § 9.204(c). To secure future advances, include the appropriate optional language under the heading "Obligation" in forms 9-1 through 9-4 in this chapter or use a modified form of the all-indebtedness or other-indebtedness clauses in form 8-6 in this manual.

§ 9.10:3 Purchase-Money Security Interest

If the secured obligation is advanced as purchase money for the collateral, the security agreement should contain the appropriate clause from form 8-3 in this manual acknowledging the purchase-money security interest. Sections 9.317 and 9.324 contain special priority rules for purchase-money security interests. *See* Tex. Bus. & Com. Code §§ 9.317, 9.324. Section 9.103 contains rules for determining when a security interest is a purchase-money security interest. Tex. Bus. & Com. Code § 9.103.

§ 9.10:4 Attorney's Fee Provision

The attorney's fee provision in forms 9-1, 9-2, 9-3, and 9-4 in this chapter is in paragraph D.2. If the loan transaction to which the security agreement relates is governed by Texas Finance Code chapter 342, then section 502 of that chapter limits attorney's fees that may be charged and assessed to those assessed by a court. Tex. Fin. Code § 342.502(b)(2). A loan is governed by chapter 342 if it is made by a lender engaged in the business of making, arranging, or negotiating loans governed by that chapter; the interest rate exceeds 10 percent per year; the loan proceeds will be used for personal, family, or household use; and either the loan is not secured by a lien on real property or the loan is a secondary mortgage loan. Tex. Fin. Code § 342.005. See also the commentary on promissory notes at section 6.2:7 in this manual. If the related loan is governed by chapter 342, the attorney's fee clause should be modified as indicated.

§ 9.11 Additional Documents

For almost all transactions involving a security agreement, at least two other documents are necessary. The promissory note is described in chapter 6 in this manual, and the UCC1 financing statement, form 9-11, is described in section 9.13 below.

If a security agreement, like form 9-4, covers a debtor's interest as a partner in a general or limited partnership or as a member in a limited liability company, the secured party may need the consent of other partners, managers, or members, as applicable, to be able to create, attach, perfect, enforce, and foreclose its security interest. For entities formed under Texas law, a limited partnership agreement may restrict assignability of a partner's partnership interest in the limited partnership (*see* Tex. Bus. Orgs.

Code § 153.251); a general partnership does not have to give effect to a transfer or assignment of a partner's partnership interest that is prohibited by its partnership agreement (*see* Tex. Bus. Orgs. Code § 152.405); and the regulations of a limited liability company may restrict assignability of a member's membership interest in the limited liability company (*see* Tex. Bus. Orgs. Code § 101.108(a)).

Partnership agreements and regulations of limited liability companies frequently contain provisions prohibiting any assignment, including a grant of a security interest, of a partner's or member's interest in the applicable entity and stating that any such purported assignment or grant of a security interest is void. Sometimes assignment of an interest is permitted after obtaining consent. The requirements for consent may vary widely. The attorney for the secured party should review the applicable partnership agreement, limited liability company regulations, or comparable document for an entity formed under the laws of another jurisdiction to determine the assignability of the debtor's interest in the entity and what consents may be required. Restrictions on assignability of personal property as security for an obligation are disfavored under chapter 9.

Generally, the interest of a partner in a general or limited partnership or of a member in a limited liability company is a general intangible under chapter 9 and not a security, certificated or uncertificated, under chapter 8. *See* Tex. Bus. & Com. Code § 8.103(c). Under chapter 9, a term in an agreement relating to a general intangible that prohibits, restricts, or requires consent to the assignment or transfer of, or creation, attachment, or perfection of a security interest in, the general intangible is ineffective to impair the creation, attachment, or perfection of a security interest or to render such creation, attachment, or perfection a default or breach of the agreement. Tex. Bus. & Com. Code § 9.408(a). Section 9.408 does not, however, apply to an interest in a partnership or a limited liability company. Tex. Bus. & Com. Code § 9.408(e). Thus, restrictions on assignability in a partnership agreement, in regulations of a limited liability company, or in comparable documents for partnership or limited liability companies formed under laws of other states are effective to prevent the creation, attachment, or perfection of a security interest in a partner's or member's interest in the entity and to render such creation, attachment, or perfection a default under the partnership agreement, limited liability company agreement, or other comparable document if so provided in the entity's documents.

Moreover, even if a security interest is created, attached, and perfected in a person's interest in such an entity and there are anti-assignment provisions in the entity's organizational documents, neither the entity nor its partners or members owe any duty to the secured party and the secured party may not enforce its security interest. Tex. Bus. & Com. Code § 9.408(d). Depending on the bargaining position of the parties and more likely depending on the relative ownership interest of the debtor in the entity, the secured party may be able to obtain the consent by the entity or other owners of the entity to the creation, attachment, perfection, and enforcement of its security interest. The required consent should come from the persons whose consent is required under the organizational documents of the entity to an outright assignment of an owner's interest in the entity. In paragraph C.5. of security agreement form 9-4, the debtor represents that it has obtained the consent of all persons necessary to authorize the secured party to exercise its rights under the security agreement. This provision should be modified if such a consent is required under the organizational documents of the entity in which the debtor has an interest but is not obtained. A form of a consent is at form 9-10.

§ 9.12 Assignment of Security Interest

The secured party may assign the security interest created by the security agreement either before or after the interest is perfected, in accordance with section 9.514 of the Texas Business and Commerce Code.

If the financing statement is not filed before assignment of the security interest, the financing statement may show the assignment by giving the assignee's name and address. Tex. Bus. & Com. Code § 9.514. One way to show the assignment is to prepare a form UCC1Ad financing statement addendum (form 9-12 in this chapter) to the UCC1 financing statement (form 9-11) to reflect the assignee of the secured party. The financing statement addendum should be attached to and filed with the financing statement.

If the financing statement is filed before the assignment, the parties should prepare a form UCC3 financing statement amendment (form 9-14), including the financing statement's file number and date of filing, the assignor's name, and the assignee's name and address. The financing statement amendment should be filed in the same filing office or offices as the assigned original financing statement. Tex. Bus. & Com. Code § 9.514. See section 9.15:2 below for additional instructions concerning the UCC3 financing statement amendment.

The assigning secured party should endorse the note and deliver it, the original security agreement, and the filing officer's acknowledgment copy of the original financing statement to the assignee.

§ 9.13 Financing Statement and Other UCC Forms

§ 9.13:1 General Considerations

The UCC1 financing statement, form 9-11 in this chapter, perfects a security interest for most classifications of collateral if it is filed with either the secretary of state in Austin or the county clerk, depending on the classification. Tex. Bus. & Com. Code § 9.501(a). *See also* Tex. Bus. & Com. Code § 9.310(a). The security agreement establishes the secured party's rights against the debtor, but perfection of the security interest by filing a financing statement, obtaining possession of the collateral, or obtaining control of the collateral establishes the rights of the secured party against competing parties, such as other secured creditors. Tex. Bus. & Com. Code § 9.201(a). *See* Tex. Bus. & Com. Code § 9.308 cmt. 2.

Filing a financing statement will not perfect a security interest in certain classifications of collateral. See section 9.5 above for an explanation of the different methods of perfecting a security interest and the type of collateral that may be perfected under each method.

Another exception to the financing statement requirement is a purchase-money security interest in consumer goods, which is perfected automatically. Even though this automatic perfection protects the retailer's rights against the consumer, retailers selling expensive merchandise often file a financing statement to protect themselves in case a debtor sells to another consumer. Without a financing statement on file, the subsequent sale would destroy the retailer's interest in the collateral. Tex. Bus. & Com. Code §§ 9.309, 9.320(b).

See section 9.5:3 above for a discussion of the contents of a financing statement. The financing statement is not intended to describe the full agreement of the parties but rather to give public

notice of the security interest. *See* Tex. Bus. & Com. Code § 9.502 cmt. 2.

§ 9.13:2 Cautions

A financing statement is constructive notice to all parties of a secured party's rights in collateral. To give constructive notice of a security interest, the financing statement must be filed in the proper office. If there is doubt about the proper filing place, the attorney should file the financing statement in every place that might be appropriate. *See* Tex. Bus. & Com. Code § 9.501(a).

Certain types of collateral, such as motor vehicles and manufactured housing, are covered by other statutes and may require additional documentation, such as certificates of title. Other examples of such collateral include patents, trademarks, rolling stock, ships, and aircraft. *See* Tex. Bus. & Com. Code § 9.311(b).

§ 9.14 Instructions for Completing Form UCC1

§ 9.14:1 General Considerations

Nonstandard forms of financing statements should not be used in Texas. Texas filing offices may reject tendered written filings that are not on a standard form adopted by rule by the Texas secretary of state. Tex. Bus. & Com. Code § 9.5211.

See section 9.19 below for how to obtain a UCC1 and other financing statement forms. The attorney should review section 9.310(b) for a listing of collateral for which a financing statement is either unnecessary or ineffective in perfecting a security interest. See also section 9.5 above for a discussion of perfection of a security interest.

§ 9.14:2 Blocks 1, 2, and 3: Names of Debtor and Secured Party

For general information about designation of parties, see chapter 3 in this manual.

The debtor's correct name is crucial to the validity of the financing statement because records are indexed on that basis. The names of the debtor and of the secured party should appear on this form exactly as they appear on the security agreement. If the debtor is a registered organization, the debtor's name is the name stated to be the registered organization's name on the public organic record most recently filed with, issued by, or enacted by the debtor's jurisdiction of organization that states, amends, or restates the debtor's name. Tex. Bus. & Com. Code § 9.503(a)(1). For a Texas filing entity (as defined in Tex. Bus. Orgs. Code § 1.002(22)), this means that the debtor's name is the name stated to be the name of the filing entity on its certificate of formation or a restated certificate of formation and all amendments to an original or restated certificate of formation. Special rules apply for an entity that is a trust or a decedent's estate. Tex. Bus. & Com. Code § 9.503(a)(1), (2), (3), (f), (h). If the debtor is an individual, the financing statement must use the name of the debtor as shown on the most recently issued unexpired Texas driver's license or most recently issued unexpired Texas Department of Public Safety–issued identification certificate and indicate the debtor's surname. Tex. Bus. & Com. Code §§ 9.503(a)(4), (g), 9.516(b)(3). If the debtor does not have a driver's license or identification certificate, the financing statement must provide the individual name of the debtor or the surname and first personal name of the debtor. Tex. Bus. & Com. Code § 9.503(a)(5). A trade name is not a sufficient name of a debtor. Tex. Bus. & Com. Code § 9.503(c). Any name used for a debtor other than the correct name renders the financing statement insufficient and seriously misleading unless the name used is so similar to the debtor's correct name that a search

under the debtor's correct name, using the filing office's standard search logic, would disclose the filing with the incorrect name. Tex. Bus. & Com. Code § 9.506(c).

If the debtor's name changes and the change renders the original form seriously misleading, the secured party must file a UCC3 financing statement amendment (form 9-14 in this chapter) with the correct name within four months of the change to continue the security interest. Tex. Bus. & Com. Code § 9.507(c). A filing is seriously misleading if a search under the changed, now correct name, using the filing office's standard search logic, would not disclose the filing under the former, now incorrect, name. Tex. Bus. & Com. Code § 9.506(c).

§ 9.14:3 Block 4: Classification and Description of Collateral

For a general discussion of the significance of classification of collateral, see section 9.3:3 above.

The Texas Business and Commerce Code specifies that the description of collateral in the financing statement is sufficient if it "indicates the collateral covered by the financing statement." Tex. Bus. & Com. Code § 9.502(a)(3). A financing statement indicates the collateral covered if it contains a description of the collateral under section 9.108 or indicates that it covers all assets or all personal property. Tex. Bus. & Com. Code § 9.504.

A financing statement that correctly describes the original collateral continues perfection in after-acquired property, proceeds, and future advances without specific reference to these interests in the financing statement. If a financing statement is recorded and the general description in the financing statement shows that a security interest exists, any affected creditor should contact the secured party to determine if the security interest extends to such after-acquired property, proceeds, or future advances.

If the collateral is timber to be cut, fixtures, or as-extracted collateral, the description in the financing statement must include a description of both the collateral and the real property where it is located. Tex. Bus. & Com. Code § 9.502(b). The real property description must be "sufficient to give constructive notice of a mortgage under the law of this state if the description were contained in . . . a mortgage." Tex. Bus. & Com. Code § 9.502(b)(3). For a general discussion of property descriptions, see section 3.7 in this manual.

§ 9.14:4 Concluding the Form

Block 3 of the form designates the secured party or its assignee. If the financing statement has been filed before assignment of the interest, the assignor should prepare a written assignment and also complete a form UCC3 financing statement amendment (form 9-14 in this chapter) for each UCC1 on file. Tex. Bus. & Com. Code § 9.514(b). See section 9.12 above for further suggestions.

A financing statement may be filed without the debtor's signature on it if the debtor authorizes the filing. *See* Tex. Bus. & Com. Code § 9.509(a)(1). By entering into a security agreement a debtor automatically authorizes the filing of a financing statement covering the collateral described in the security agreement. Tex. Bus. & Com. Code § 9.509(b). If a secured party wants to file a financing statement before the debtor has entered into a security agreement, the secured party needs separate express authorization from the debtor. One way to evidence the debtor's authorization is to have the debtor sign the financing statement. However, the UCC1 financing statement standard form does not provide a space for the debtor's signature. Another way to evidence the debtor's authorization is to have the debtor sign a statement, to which a

copy of the completed form UCC1 is attached, authorizing the filing of the form.

§ 9.14:5 Filing

If Texas is the correct state in which to file a financing statement and no other statutory perfection rules apply, the proper office in which to file is determined by the classification of the collateral. Generally, the secretary of state's office in Austin is the proper place to file a financing statement.

Exceptions to this general rule involve collateral significantly related to real property. For timber to be cut or as-extracted collateral, or if the financing statement is filed as a fixture filing, the proper place to file is in the real property records of the county clerk in the county in which the related real property is located. However, if the secured party has a deed-of-trust lien on the real property and a security interest in the timber to be cut, as-extracted collateral, or fixtures, the secured party does not need to file a separate financing statement in the real property records, assuming that the deed of trust otherwise meets the requirements of a financing statement. Tex. Bus. & Com. Code § 9.502(b), (c).

The secretary of state accepts electronic filing of UCC financing statements through its website, **www.sos.state.tx.us/ucc/uccforms.shtml**.

A party in doubt about the proper place to file should file the statement in every possible place.

These rules apply only to Texas transactions. Filings may be required in other jurisdictions. See the discussion of perfection at section 9.6:3 above.

§ 9.15 Additional Documents

A typical security interest transaction requires a note, discussed in chapter 6 in this manual; a security agreement, forms 9-1 through 9-4 in this chapter; and a financing statement. Other documents that may be necessary include a form UCC1Ad financing statement addendum (form 9-12), a form UCC3 financing statement amendment (form 9-14), a form UCC3Ad financing statement amendment addendum (form 9-15), and a form UCC11 information request (form 9-16).

§ 9.15:1 Financing Statement Addendum

The form UCC1Ad financing statement addendum, form 9-12 in this chapter, serves several purposes.

The financing statement addendum may be used to identify an additional debtor, if there are more than two (the first two may be identified on the form UCC1 financing statement) (see item 11 of the form UCC1Ad); identify an additional secured party (see item 12 of the form); and reflect an assignment by the initial secured party to an assignee (see item 12 of the form). The form may also be used to indicate if the financing statement covers timber to be cut, as-extracted collateral, or fixtures (see item 13 of the form); if so the form provides space to include a description of the real estate (see item 14 of the form) and the name of the record owner (if the debtor does not have a record interest) (see item 15 of the form). The form also provides space for an expanded description of the collateral (see item 16 of the form). The form may be used to indicate whether the debtor is a trust, a trustee for property held in trust, a decedent's estate (see item 17 of the form), or a transmitting utility (see item 18 of the form) or to indicate whether the filing is for a manufactured housing transaction or a public finance transaction (see item 18 of the form).

The name of the first debtor, identified in item 1 on the form UCC1 financing statement, should be inserted in item 9 of the related financing

statement addendum to relate the financing statement addendum to the financing statement. The remaining items of the form should be completed only if appropriate.

The form UCC1Ad financing statement addendum should be attached to and filed with its related form UCC1 financing statement and not filed separately.

§ 9.15:2 Financing Statement Amendment

The form UCC3 financing statement amendment, form 9-14 in this chapter, serves several purposes, some of which are discussed in sections 9.9, 9.12, 9.14:2, and 9.14:4 above, in relation to the security agreement and financing statement.

The form provides for continuation of a security interest beyond the five-year duration of the original filing (Tex. Bus. & Com. Code § 9.515); assignment of a security interest if the assignment is made after the original financing statement is filed (Tex. Bus. & Com. Code § 9.514(b)); termination of a security interest, which is a required procedure for the secured party if "there is no obligation secured by the collateral covered by the financing statement and no commitment to make an advance, incur an obligation, or otherwise give value" (Tex. Bus. & Com. Code § 9.513(a)(1), (c)(1)); partial release of collateral; and amendment of the financing statement.

A separate form UCC3 should be used for each form UCC1 already filed, and each form UCC3 should relate to a particular financing statement by giving the financing statement's file number and, because the Texas secretary of state does not use a unique number system that distinguishes among filings made in different years, the date of filing. The form UCC3 does not provide a separate block for the filing date of the related initial financing statement. The date of filing should be inserted in block 1a after the initial financing statement file number. The form UCC3 financing statement amendment should be filed in the same filing office or offices as the original financing statement to which it relates.

If, after a financing statement is filed in the correct state, the jurisdiction of the location of the debtor changes (for example, for a registered organization, the debtor changes its jurisdiction of organization; or for an organization that is not a registered organization, the debtor changes the state in which its place of business is located or, if the debtor has more than one place of business, the state in which its chief executive office is located; or for an individual debtor, the debtor changes his state of residence), the original filing is effective for only four months after the move. Tex. Bus. & Com. Code § 9.316(a)(2). The financing statement becomes ineffective to continue a perfected security interest unless the secured party files a form UCC3 in the state in which the debtor has relocated within the four-month period. Tex. Bus. & Com. Code § 9.316(a), (b). A mere change of an address within a state of the location of the collateral, the location of a debtor's place of business or chief executive office, or the location of an individual's residence does not render an original filing ineffective.

If, after a financing statement is filed using the debtor's then-correct name, the debtor's name changes and the change renders the original filed financing statement seriously misleading, a UCC3 financing statement amendment with the changed, now correct name of the debtor must be filed within four months of the name change to continue the perfection by filing of the security interest. Tex. Bus. & Com. Code § 9.507(c). An original filing becomes seriously misleading if a search under the changed, now correct name, using the filing office's standard search logic, would not disclose the filing under the former, now incorrect name. Tex. Bus. & Com. Code § 9.506(c).

§ 9.15:3 Financing Statement Amendment Addendum

The form UCC3Ad financing statement amendment addendum, form 9-15 in this chapter, is used to indicate additional information that cannot be included in the spaces provided in the form UCC3 financing statement amendment, form 9-14. It should be attached to and filed with the related form UCC3 financing statement amendment and not filed separately.

§ 9.15:4 Financing Statement Search

The form UCC11 information request, form 9-18 in this chapter, is the device commonly used to search for records of other secured interests in the property that may have priority over the interest being created. *See* Tex. Bus. & Com. Code § 9.523(c). To expedite this process, the attorney may use a private service that can complete a search quickly or an online service that can immediately verify the existence of a financing statement.

Like form UCC1, form UCC11 provides adequate instructions on its reverse side for completing the form.

§ 9.16 Extension and Termination

Most financing statements are effective for five years, after which they automatically expire. Tex. Bus. & Com. Code § 9.515(a). A financing statement filed in connection with a manufactured-home transaction or a public-finance transaction that indicates that fact is effective for thirty years from the date it is filed. Tex. Bus. & Com. Code § 9.515(b). The secured party may file a form UCC3 financing statement amendment (form 9-14 in this chapter) as a continuation statement not earlier than six months before the termination date. See sections 9.15:2 and 9.15:3 above. Once a financing statement has expired, the previous priority position is gone and a refiling of the financing statement will be effective on the date of refiling. Tex. Bus. & Com. Code § 9.515(c). The secretary of state accepts electronic filing of continuation and termination financing statements through its website, **www.sos.state.tx.us/ucc/uccforms.shtml**.

If after a financing statement is filed there is no longer an obligation secured by the collateral covered by the financing statement and there is no commitment to make an advance, incur an obligation, or otherwise give value, a termination statement on form UCC3 should be filed. Tex. Bus. & Com. Code § 9.513(a), (c). When a termination statement is filed the related financing statement ceases to be effective. Tex. Bus. & Com. Code § 9.513(d).

§ 9.17 Prefiling Financing Statement

A financing statement may be filed at any time, even before the security agreement is made. Tex. Bus. & Com. Code § 9.502(d). To fully protect the secured party, a financing statement can be filed, and then, after the filing office confirms that the secured party has the desired priority position, the funds can be advanced. The debtor must authorize the secured party to file a financing statement before a security agreement is made. See sections 9.5:3 and 9.14:4 above.

§ 9.18 Collateral Transfer of Note and Lien

§ 9.18:1 General Considerations

In most secured transactions, the collateral (for example, the equipment) is the source of the security. However, in a transaction involving the pledge of a note secured by real property, the note itself may not be the primary source of security; the underlying real property may be the actual collateral. Therefore, the secured party and the attorney must carefully review the underlying transaction to understand the value

of the collateral. The title policy, deed of trust, survey, financial reports, engineering reports, appraisals, and environmental reports may contain critical information.

§ 9.18:2 Instructions for Completing Collateral Transfer of Note and Lien

Parties: For general information about designation of parties, see chapter 3 in this manual.

Collateral Note: The collateral transfer of note and lien, form 9-8 in this chapter, contains a sample description of the note being pledged to the secured party. The description must be drafted to cover the actual note.

Current Balance: The current balance is that of the underlying collateral note. It is part of the debtor's representations in the agreement.

Collateral Note Security: The form contains a sample description of the deed of trust on the underlying collateral note. The description must be drafted to cover the actual deed of trust and other collateral documents.

Property Description: For general information on property descriptions, see chapter 3.

Obligation: The agreement should identify the note that the collateral secures.

The subheading "Other obligation" is appropriate if the form secures an obligation other than a note, such as the performance of a guaranty or indemnity or performance under a lease agreement.

Collateral Note Payments: Two alternate example clauses are shown on the agreement.

§ 9.18:3 Perfection

The security interest may be perfected by possession or by filing a financing statement covering the collateral note. A secured party that perfects its security interest in a collateral note by possession has priority over a secured party that perfects its security interest in the collateral note by filing a financing statement.

§ 9.18:4 Recording

It is recommended that the secured party record the collateral transfer of note and lien as soon as possible in the real property records, to put all parties dealing with the real property on notice of the secured party's interest in the collateral note and the real property securing the collateral note. Merely recording the collateral transfer of note and lien in the real property records does not perfect the secured party's security interest if the secured party (or a third party on its behalf) does not obtain possession of the collateral note or file a financing statement covering the note.

§ 9.18:5 Endorsement

To obtain the rights of a holder and of a holder in due course under Texas Business and Commerce Code chapter 3, the secured party must secure the payee's (or, if different, the current holder's) endorsement on the collateral note. Among the advantages of a secured party becoming a holder in due course of the collateral note is that the secured party also becomes the person entitled to enforce the collateral note. Tex. Bus. & Com. Code § 3.301. The endorsement may read as follows:

> Pay to the order of [**name of secured party**] as collateral in accordance with collateral transfer of note and lien dated [**date**].

After the debt is repaid, the secured party should return the collateral note to the debtor. Additionally, either the secured party should endorse the collateral note to the debtor, or the debtor, on reacquiring the collateral note, may cancel its endorsement to the secured party. Tex. Bus. &

Com. Code § 3.207. If the collateral transfer of note and lien has been recorded, the secured party should sign a release of collateral transfer of note and lien (see form 10-21 in this manual), and that document should be recorded.

§ 9.18:6 Collateral Note Maker's Estoppel Certificate

As additional security for the loan, the secured party should consider requiring the collateral note maker to sign the certificate set forth as form 9-9 in this chapter.

§ 9.19 Obtaining UCC Forms

The UCC forms in this manual are available in a fill-in-the-blank format over the Internet from the Texas secretary of state at **www.sos.state.tx.us/ucc/uccforms.shtml**.

§ 9.20 Additional Resources

Collins, Susan E., and Paul Hodnefield. "UCC Update: Article 9." In *Advanced Business Law Course, 2007*. Austin: State Bar of Texas, 2007.

Kearney, Amy. "Uniform Commercial Code Impact on Real Estate." In *Advanced Real Estate Law Course, 2019*. Austin: State Bar of Texas, 2019.

Tarry, Stephen C. "Traps for the Unwary in Perfecting UCC Security Interests." In *Essentials of Business Law: Protecting Your Business Course, 2018*. Austin: State Bar of Texas, 2018.

Form 9-19

Deposit Account Control Agreement
[Blocked Account]

Basic Information

Date:

Customer:

Customer's Mailing Address:

Secured Party:

Secured Party's Mailing Address:

Depository Bank:

Depository Bank's Mailing Address:

Security Agreement:

A. Notice and Acknowledgment of Security Interest

Depository Bank confirms that Depository Bank has established account number [**number**] (the "Specified Deposit Account") in the name of Customer. Customer and Secured Party notify Depository Bank of, and Depository Bank acknowledges, the security interest granted by Customer to Secured Party pursuant to the Security Agreement in all of Customer's right, title, and interest in the Specified Deposit Account and the funds on deposit therein. Depository Bank, Customer, and Secured Party agree that Secured Party has control over the Specified Deposit Account.

B. Control of Specified Deposit Account

B.1. Depository Bank agrees, without further consent of Customer, to (a) comply with all instructions originated by Secured Party for the disposition of funds in the Specified Deposit Account (the "Instructions") and disregard any instructions from Customer for the Specified Deposit Account and dispositions of its funds and (b) otherwise deal with the Specified Deposit Account as directed by Secured Party.

B.2. Customer is not permitted to operate and transact business through the Specified Deposit Account, including the directing of the disposition of funds from the Specified Deposit Account. Additionally, Customer may not, without Secured Party's prior written consent, close the Specified Deposit Account.

B.3. Secured Party's power under this Agreement to give Depository Bank Instructions includes, without limitation, the power to give stop payment orders for any items being presented to the Specified Deposit Account for payment. Customer confirms that Depository Bank should follow the Instructions even if the result of following the Instructions is that Depository Bank dishonors items presented for payment from the Specified Deposit Account. Customer confirms that Depository Bank will have no liability to Customer for the wrongful dishonor of such items in following the Instructions.

C. Certain Other Agreements

C.1. Depository Bank will not be liable to Customer for complying with the Instructions even if Customer notifies Depository Bank that Secured Party is not legally entitled to issue the Instructions, unless Depository Bank takes the action after it is served with an injunction, restraining order, or other legal process enjoining it from doing so, issued by a court of competent jurisdiction, and had a reasonable opportunity to act on the injunction, restraining order, or other legal process. Depository Bank need not investigate whether

Secured Party is entitled, under the Security Agreement or any other agreement between Secured Party and Customer, to give the Instructions.

C.2. Depository Bank will have no responsibility or liability to Secured Party for complying with any order or instruction, whether oral or written, concerning the Specified Deposit Account, except to the extent such compliance would violate (a) section B. above or (b) written instructions or orders previously received from Secured Party, but only to the extent Depository Bank received such instruction before the third Business Day after Depository Bank receives a contrary Instruction from Secured Party. "Business Day" means any day on which Depository Bank is not authorized or required to close. Depository Bank will not have any liability to Customer or Secured Party for losses or liabilities resulting from any failure to comply with instructions relating to the Specified Deposit Account or delay in complying with such instructions if (a) compliance with such instructions would require Depository Bank to violate any then-existing injunction or order of any court of competent jurisdiction, including, without limitation, in any bankruptcy case under title 11 of the United States Code, or (b) the failure or delay is due to circumstances beyond Depository Bank's reasonable control.

C.3. If any conflict between this Agreement and any other agreement between Depository Bank and Customer arises, the terms of this Agreement will prevail.

D. Account Information

Customer instructs Depository Bank, and Depository Bank agrees, to furnish to Secured Party, upon request of Secured Party, bank statements for the Specified Deposit Account that are customarily provided to customers of Depository Bank at the times such statements are normally provided to customers of Depository Bank, through the normal method of transmission, including United States mail, with a copy to Customer, at Customer's expense. Customer instructs Depository Bank, and Depository Bank agrees, to make available

to Secured Party and Customer, upon request of Secured Party, copies of all daily debit and credit advices of the Specified Deposit Account and any other item reasonably requested by Secured Party. If Depository Bank receives any notice of a claim of a third party for the Specified Deposit Account or legal process of any kind relating to Customer, Depository Bank will make a reasonable effort to give notice to Secured Party and Customer of such legal process.

E. Governing Law

This Agreement will be construed according to Texas law, without regard to choice-of-law rules of any jurisdiction. Depository Bank agrees that Texas is Depository Bank's jurisdiction for all purposes.

F. Definitions; Rules of Construction

Any term defined in sections 1.101 to 9.709 of the Texas Business and Commerce Code and not defined in this Agreement has the meaning given to the term in the Code.

G. Returned Items; Fees and Expenses of Depository Bank

Depository Bank will not charge or debit, or exercise any right of offset or banker's lien against, the Specified Deposit Account except as provided in this section G. Depository Bank may charge the Specified Deposit Account for all customary and reasonable charges of Depository Bank resulting from the Specified Deposit Account, and Depository Bank may set off against the Specified Deposit Account for any items deposited in the Specified Deposit Account that are returned for any reason or otherwise not collected; for overdrafts on the Specified Deposit Account; and for all service charges, commissions, expenses, fees, and other items ordinarily chargeable to the Specified Deposit Account. Customer agrees to pay the amount of any customary fees and any returned item immediately upon demand to the extent that there are not sufficient funds in the Specified Deposit Account to cover such amount on the day of the debit. Secured Party agrees to reimburse Depository Bank for all

charges and fees for which there were insufficient funds in the Specified Deposit Account to satisfy the amount thereof as a result and to the extent of the funds that Depository Bank forwarded to Secured Party pursuant to the terms of this Agreement. The provisions of this section G. shall survive termination of this Agreement.

Signed on [**date**].

[**Name of customer**]

By: _____
[**Name and title of representative for customer**]

[**Name of depository bank**]

By: _____
[**Name and title of representative for depository bank**]

[**Name of secured party**]

By: _____
[**Name and title of representative for secured party**]

[Reserved]

Form 9-20

Deposit Account Control Agreement

[Operating Account]

Basic Information

Date:

Customer:

Customer's Mailing Address:

Secured Party:

Secured Party's Mailing Address:

Depository Bank:

Depository Bank's Mailing Address:

Security Agreement:

A. Notice and Acknowledgment of Security Interest

Depository Bank confirms that Depository Bank has established account number [**number**] (the "Specified Deposit Account") in the name of Customer. Customer and Secured Party notify Depository Bank of, and Depository Bank acknowledges, the security interest granted by Customer to Secured Party pursuant to the Security Agreement in all of Customer's right, title, and interest in the Specified Deposit Account and the funds on deposit therein. Depository Bank, Customer, and Secured Party agree that Secured Party has control over the Specified Deposit Account.

B. Control of Specified Deposit Account

B.1. Depository Bank agrees, without further consent of Customer, to (a) comply with all instructions originated by Secured Party for the disposition of funds in the Specified Deposit Account (the "Instructions") and disregard any instructions from Customer for the Specified Deposit Account and dispositions of its funds except as set forth in paragraph B.2. below and (b) otherwise deal with the Specified Deposit Account as directed by Secured Party.

B.2. Before the receipt of written notice (a "Default Notice") from Secured Party referencing the Security Agreement and stating that an "Event of Default" has occurred pursuant to the Security Agreement, Depository Bank may permit Customer to operate and transact business through the Specified Deposit Account, including making withdrawals from and writing checks on the Specified Deposit Account, provided that without Secured Party's written consent, Customer may not close the Specified Deposit Account.

B.3. Subject to paragraph B.4. below, after receipt by Depository Bank of a Default Notice (and until Depository Bank receives a written withdrawal of such notice), (a) Secured Party shall have exclusive dominion and control over the Specified Deposit Account, (b) neither Customer nor any person acting through or on behalf of Customer shall have any right to access or to withdrawal from the Specified Deposit Account, and (c) Depository Bank shall not comply with any instructions originated by Customer or any such person directing disposition of funds in the Specified Deposit Account.

B.4. Any Default Notice shall be in writing, shall refer to this Agreement, and shall include clear and specific instructions for the disposition of funds in the Specified Deposit Account. Depository Bank shall have a period not exceeding three Business Days following the date on which Depository Bank receives a Default Notice to act on such Default Notice.

Depository Bank may rely on a Default Notice notwithstanding any other or conflicting information it may receive from Customer. As used in this Agreement, the term "Business Day" means any day on which Depository Bank is not authorized or required to close.

B.5. Secured Party's power under this Agreement to give Depository Bank Instructions includes, without limitation, the power to give stop payment orders for any items being presented to the Specified Deposit Account for payment. Customer confirms that Depository Bank should follow the Instructions even if the result of following the Instructions is that Depository Bank dishonors items presented for payment from the Specified Deposit Account. Customer confirms that Depository Bank will have no liability to Customer for the wrongful dishonor of such items in following the Instructions.

C. Certain Other Agreements

C.1. Depository Bank will not be liable to Customer for complying with the Instructions even if Customer notifies Depository Bank that Secured Party is not legally entitled to issue the Instructions, unless Depository Bank takes the action after it is served with an injunction, restraining order, or other legal process enjoining it from doing so, issued by a court of competent jurisdiction, and had a reasonable opportunity to act on the injunction, restraining order, or other legal process. Depository Bank need not investigate whether Secured Party is entitled, under the Security Agreement or any other agreement between Secured Party and Customer, to give the Instructions.

C.2. Depository Bank will have no responsibility or liability to Secured Party for complying with any order or instruction, whether oral or written, concerning the Specified Deposit Account, except to the extent such compliance would violate (a) section B. above or (b) written instructions or orders previously received from Secured Party, but only to the extent Depository Bank received such instruction before the third Business Day after Depository Bank receives a contrary Instruction from Secured Party. Depository Bank will not have

any liability to Customer or Secured Party for losses or liabilities resulting from any failure to comply with instructions relating to the Specified Deposit Account or delay in complying with such instructions if (a) compliance with such instructions would require Depository Bank to violate any then-existing injunction or order of any court of competent jurisdiction, including, without limitation, in any bankruptcy case under title 11 of the United States Code, or (b) the failure or delay is due to circumstances beyond Depository Bank's reasonable control.

C.3. If any conflict between this Agreement and any other agreement between Depository Bank and Customer arises, the terms of this Agreement will prevail.

D. Account Information

Customer instructs Depository Bank, and Depository Bank agrees, to furnish to Secured Party, upon request of Secured Party, bank statements for the Specified Deposit Account that are customarily provided to customers of Depository Bank at the times such statements are normally provided to customers of Depository Bank, through the normal method of transmission, including United States mail, with a copy to Customer, at Customer's expense. Customer instructs Depository Bank, and Depository Bank agrees, to make available to Secured Party and Customer, upon request of Secured Party, copies of all daily debit and credit advices of the Specified Deposit Account and any other item reasonably requested by Secured Party. If Depository Bank receives any notice of a claim of a third party for the Specified Deposit Account or legal process of any kind relating to Customer, Depository Bank will make a reasonable effort to give notice to Secured Party and Customer of such legal process.

E. Governing Law

This Agreement will be construed according to Texas law, without regard to choice-of-law rules of any jurisdiction. Depository Bank agrees that Texas is Depository Bank's jurisdiction for all purposes.

F. Definitions; Rules of Construction

Any term defined in sections 1.101 to 9.709 of the Texas Business and Commerce Code and not defined in this Agreement has the meaning given to the term in the Code.

G. Returned Items; Fees and Expenses of Depository Bank

Depository Bank will not charge or debit, or exercise any right of offset or banker's lien against, the Specified Deposit Account except as provided in this section G. Depository Bank may charge the Specified Deposit Account for all customary and reasonable charges of Depository Bank resulting from the Specified Deposit Account, and Depository Bank may set off against the Specified Deposit Account for any items deposited in the Specified Deposit Account that are returned for any reason or otherwise not collected; for overdrafts on the Specified Deposit Account; and for all service charges, commissions, expenses, fees, and other items ordinarily chargeable to the Specified Deposit Account. Customer agrees to pay the amount of any customary fees and any returned item immediately upon demand to the extent that there are not sufficient funds in the Specified Deposit Account to cover such amount on the day of the debit. Secured Party agrees to reimburse Depository Bank for all charges and fees for which there were insufficient funds in the Specified Deposit Account to satisfy the amount thereof as a result and to the extent of the funds that Depository Bank forwarded to Secured Party pursuant to the terms of this Agreement. The provisions of this section G. shall survive termination of this Agreement.

Signed on **[date]**.

[Name of customer]

By: _____

[Name and title of representative for customer]

[Name of depository bank]

By: _____
[Name and title of representative for depository bank]

[Name of secured party]

By: _____
[Name and title of representative for secured party]

Chapter 10

Ancillary Loan Documents

Forms

[Reserved]

Chapter 10

Ancillary Loan Documents

§ 10.1 General Considerations for Transfer of Note and Lien

The transfer of note and lien, form 10-1 in this chapter, is used to transfer ownership of a note or other obligation and the lien securing it to another party. This type of transfer is a real property transaction not subject to the Uniform Commercial Code provisions governing secured transactions. The transfer instrument must be acknowledged and filed in the real property records of the county in which the land is located, or, like other documents concerning the conveyance of real property, it is void as to a creditor or subsequent purchaser for valuable consideration without notice. Tex. Prop. Code § 13.001(a).

The holder of the note must endorse it in favor of the transferee and deliver both the transfer instrument and the note to the transferee. Any special terms included in the transfer instrument, such as a negation of recourse or of representations or warranties, should also be noted in the endorsement on the note. An allonge may be used to reflect the endorsement. See form 10-25.

If the note and lien are being pledged as collateral, the transaction is subject to the Texas Uniform Commercial Code. The proper procedure for effecting a security interest is outlined in chapter 9 in this manual.

§ 10.1:1 Cautions for Transfer of Lien

The borrower must receive actual notice of the transfer of the note and lien. If the borrower continues to make payments to the prior holder and has not received actual notice, the transferee has no recourse against the borrower. Accordingly, the transferee should either notify the borrower of the transfer or make certain that the prior holder informs the borrower of the transfer.

§ 10.1:2 Instructions for Completing Transfer of Lien

Form 10-1 in this chapter is drafted with the assumption that the parties will not wish to show the actual consideration for the transfer. However, a description of the consideration could be added at any suitable place.

The note is frequently secured by two liens, such as a vendor's lien and a deed-of-trust lien. All liens should be listed, even if the attorney for the note holder making the transfer has access only to the recording information for the deed of trust. If recording information for all documents is available, it should be included, but a simple notation of a lien other than the one described by recording information is adequate.

For information about the property description, see section 3.7 in this manual.

§ 10.1:3 Additional Clauses: Negation of Recourse and Representations and Warranties

If the holder is being paid in full, the holder has the option to sign a release. The transferee, however, will most likely want a transfer instrument. In that case, the holder will not want to incur any liability beyond that which the holder would incur by signing a release. To do so, the holder will make the transfer without recourse. Merely making the transfer without recourse does not

negate the transfer warranties of Texas Business and Commerce Code section 3.416. *See* Tex. Bus. & Com. Code § 3.416 cmt. 3. To negate the transfer warranties, the words *without warranties* or other specific reference must be included in the transfer instrument. *See* Tex. Bus. & Com. Code § 3.416 cmt. 5. The words *without recourse against or without representation or warranty by* should be added to the endorsement of the note and a statement added to the transfer of note and lien to accomplish this purpose. There are some representations that the holder can make that will not result in liability beyond that of signing a release. First, the holder is the correct person to make the transfer, that is, the holder is the person entitled to enforce the note. Second, the payoff amount, the outstanding principal and interest, is correctly stated. Third, if true, the note is not overdue. This last representation helps the transferee obtain holder-in-due-course status. *See* Tex. Bus. & Com. Code § 3.302(a)(2)(C).

§ 10.1:4 Endorsement of Note

The note transferred should be endorsed and dated, and if the transfer is without recourse against or representation or warranty by the holder, except as stated, that fact should be noted:

> **[Date of transfer]**
>
> Pay to the order of [**name**] [without recourse against [and/or] without representation or warranty by, except as stated in a separate transfer of note and lien, [**name of holder**]].
>
> **[Signature of holder]**

Alternatively, the holder of the note may endorse the note in favor of the transferee by use of an allonge, form 10-25 in this chapter. As described in section 10.1 above, any special terms included in the transfer instrument, such as a negation of recourse or of representations or warranties, should also be noted in the allonge used to endorse the note. The holder of the note should affix the allonge to the note and deliver the transfer instrument together with the note and allonge to the transferee.

§ 10.1:5 Confidentiality Notice

Instruments transferring an interest in real property to or from an individual must contain the confidentiality notice required by Tex. Prop. Code § 11.008. An instrument is defined as "a deed, deed of trust, or any other record recorded by a county clerk related to real property, including a mineral lease, a mechanic's lien, and the release of a mechanic's lien." Tex. Prop. Code § 11.008(a). See section 3.16 in this manual.

§ 10.2 General Considerations for Release of Lien and Partial Release of Lien

Although payment of a debt extinguishes the liens that secure it even without a formal release, the lienholder has a duty to provide a written release. After paying the debt, the borrower may bring suit against a lienholder who refuses to provide a release and may recover actual damages incurred because of the refusal. *Bayless v. Strahan*, 182 S.W.2d 262 (Tex. App.—Amarillo 1944, writ ref'd w.o.m.).

The release should be filed in the real property records of the county in which the lien is recorded.

§ 10.2:1 Cautions for Partial Release

Only the portion of the property to be released from the lien should be described in the partial release, form 10-3 in this chapter.

If the lien instrument does not authorize partial releases, the lienholder is not required to grant a partial release. If the lienholder nevertheless agrees to a partial release, obtaining the written consent of any junior lienholder may be consid-

ered, although obtaining a junior lienholder's consent is not general practice.

If the note secured by the lien has makers or guarantors who are not grantors in the lien instrument, their written consent to the partial release is probably necessary unless the note or guaranty provides for their continuing liability after a partial release.

If the lien is insured by a mortgagee's title policy, an endorsement of the policy should be obtained. Title companies may require a premium for endorsement. Procedural Rule P-9.b(3), *Basic Manual of Rules, Rates and Forms for the Writing of Title Insurance in the State of Texas*.

§ 10.2:2 Instructions for Completing Release

Notes are frequently secured by more than one lien, such as a vendor's lien and deed-of-trust lien, and all of them should be included in the release. If recording information for all documents is available, it should be included under the heading "Note and Lien Are Described in the Following Documents." Even if some recording information is not available, all lien documents should be described as fully as possible.

For information about the property description, see section 3.7 in this manual.

§ 10.2:3 Instructions for Completing Partial Release

A partial release should include a description of all liens securing the note. If recording information for all documents is available, it should be included under the heading "Note and Lien Are Described in the Following Documents." Even if some recording information is not available, all lien documents should be described as fully as possible.

§ 10.2:4 Additional Clauses for Use with Partial Release

A partial release clause in a lien instrument or a prepayment clause in a note should state how any allowable prepayment will be applied. If those clauses do not adequately explain the application of a prepayment, a clause serving that purpose should be added to form 10-3 in this chapter after the sentence releasing the lien. The prepayment clauses suggested in form 6-3 in this manual may serve as appropriate models for drafting this type of clause.

§ 10.3 General Considerations for Modification and Extension Agreement

Form 10-4 in this chapter is appropriate for extending the time or manner of payment of a note secured by a deed-of-trust lien on property or for modifying the terms of the note. If instead the parties want to reinstate a note and pay it as originally written, they should use a different form. See the suggested reinstatement agreement at form 14-6 in this manual.

The legality of extensions and their effect on the statute of limitations are governed by Tex. Civ. Prac. & Rem. Code §§ 16.035–.037. The form expressly requires the obligor to assume payment of the note, even if the obligor was not the original borrower. This requirement accords with section 16.036, which provides that the extension of a note likewise extends the statute of limitations for foreclosure of a lien only if the extension is executed by the "party or parties primarily liable for a debt." Therefore a party who buys the property subject to the lien without assuming the note should not execute this extension form, for the party would become liable for payment of the note.

Many attorneys advise their clients to obtain written consent from all junior or inferior lien claimants and holders before agreeing to an

extension. Numerous cases, however, have held that junior lienholders who acquire their liens while the first lien and first-lien note are intact are bound by the terms of a valid extension agreement. *See Yates v. Darby*, 131 S.W.2d 95, 101 (Tex. 1939).

§ 10.3:1 Cautions for Modification and Extension Agreement

If a loan policy covers the interest of the note holder, it should be examined carefully. Policies written before March 1, 1983, limit the policy protection to the final maturity date of the note as originally written plus the applicable limitations period. There is also no loan policy endorsement available for increased value.

§ 10.3:2 Instructions for Completing Modification and Extension Agreement

The property description should match that on the note, if any, and the deed of trust.

The period of extension must be definite, or the extension will not be enforceable.

After being acknowledged, the form must be recorded in the county in which the land is located to provide notice to third parties.

If a party to a modification or extension agreement is an individual, the practitioner must include the confidentiality notice required by Tex. Prop. Code § 11.008. See section 3.16 in this manual.

§ 10.4 Assignment of Rent

Texas has adopted an assignment of rents act. *See* Tex. Prop. Code ch. 64. Under the act, an enforceable security instrument (meaning a deed of trust, mortgage, or other contract lien on an interest in real property) creates an assignment of rents arising from the real property, unless the security instrument provides otherwise or an assignment of rents is governed by article XVI, § 50(a)(6), (a)(7), or (a)(8) of the Texas Constitution (Texas home equity, reverse mortgage, or conversion of manufactured home liens). The assignment of rents is a security interest in all accrued and unaccrued rents, regardless of the form of the document creating the assignment of rents. Tex. Prop. Code § 64.051. The security interest is perfected upon recording the security instrument in the real property records of the county where any part of the real property is located. Tex. Prop. Code § 64.052.

The assignee may enforce an assignment of rents by giving notice to the assignor demanding that all rents accrued but not paid and unaccrued rents be sent to the assignee when collected by the assignor. An assignee may not enforce an assignment of rents by notice to the assignor if the property is a one-to-four-family residence that is the assignor's homestead on the date the security instrument was signed and the date of prospective enforcement. Tex. Prop. Code § 64.054. The assignee may also enforce an assignment of rents by giving notice, a form of which is included in the statute, to the tenant that all rents accrued but not paid and unaccrued rents be paid to the assignee when rent payments are due. After a tenant receives notice from an assignee to pay rents to the assignee, the tenant's obligation to pay rents is discharged by paying rents to the assignee. If a tenant is occupying the premises as his primary residence, the tenant's obligation to pay rents is also discharged by continuing to pay rents to the assignor/landlord. For other tenants, the obligation to pay rents is not discharged by continuing to pay rents to the assignor/landlord after receipt of the notice from the assignee. Tex. Prop. Code §§ 64.055, 64.056.

Unless otherwise agreed, an assignee that collects rents must apply the collected rents in a stipulated order. Tex. Prop. Code § 64.058. The order of application for collected rents is differ-

ent than the order of application of foreclosure proceeds under the Texas Property Code. Unless otherwise agreed, a subordinate creditor that enforces its assignment of rents and collects rents before receipt of a turnover notice from an assignee with priority is not obligated to turn over to the assignee with priority rents collected before receipt of the turnover demand. Tex. Prop. Code § 64.060. If an assignee's security interest in rents is perfected, the assignee's security interest attaches to identifiable proceeds and is perfected as to identifiable cash proceeds. Tex. Prop. Code § 64.061.

§ 10.5 Borrowing Resolutions

Form 10-6 in this chapter provides examples of resolutions authorizing an entity to guarantee a loan or borrow funds and mortgage real property as security for the loan. These resolutions may be incorporated into one of the certificates of resolutions included in chapter 26, forms 26-9 through 26-14. The requirements for meeting and voting for for-profit corporations are found in chapter 21 of the Business Organizations Code. *See* Tex. Bus. Orgs. Code §§ 21.411–.416. The requirements for meeting and voting for limited liability companies are found in chapter 101 of the Business Organizations Code. *See* Tex. Bus. Orgs. Code §§ 101.353–.358.

§ 10.6 Collection and Payment Agreement

Form 10-7 in this chapter may be used in wraparound loan transactions. See section 8.3 in this manual for commentary on wraparound loan transactions.

§ 10.7 Homestead Affidavits

Forms 10-8 and 10-9 in this chapter designate property as a rural homestead or urban homestead. Constitutional and statutory prohibitions against mortgaging or encumbering the homestead (except for purchase money, taxes, owelty of partition, refinance, improvements, home equity loans, reverse mortgages, or conversion of a manufactured home) and against one spouse's selling or abandoning the homestead without the consent of the other may limit the ability to borrow against or transfer the property. The voluntary designation of homestead in the real property records may free property that is not claimed as homestead from these limitations. A purchaser or lender for value without actual knowledge is entitled to conclusively rely on an affidavit that disclaims property as homestead or designates other property as the homestead of the affiant. Tex. Const. art. XVI, § 50(d). Both spouses should join in the designation of a homestead. Form 10-8 may be used by a lender making a loan to be secured by the borrower's nonhomestead property. See clauses 8-9-2 and 8-9-3 in this manual for homestead disclaimer and designation clauses suggested for use in a deed of trust. Form 10-9 is an example of an affidavit appropriate for loans to be secured by the borrower's homestead.

§ 10.8 Lender's Estoppel Certificate

A lender considering a loan to be secured by a subordinate lien on real property already encumbered by a prior lien often will require, as a condition to making the loan, that the borrower obtain an estoppel certificate from the prior lienholder. Form 10-10 in this chapter requires the prior lienholder to confirm important information regarding the prior lienholder's note and deed of trust. Some of the provisions of this form may have to be modified or deleted to obtain the prior lienholder's agreement to execute this form.

§ 10.9 Lienholder's Subordination to Oil, Gas, and Mineral Lease

Form 10-11 in this chapter is used if an oil, gas, and mineral lease is given on real property already encumbered by a deed-of-trust lien or

other lien. This form provides that the lease will not be affected by foreclosure of the lien if the lease is maintained according to its terms.

§ 10.10 Notice from Lender's Attorney to Borrower

Form 10-12 in this chapter is an example of a written disclosure confirming that the lender's attorney does not represent the borrower. As with all forms, this letter should be modified to reflect the specific details of the loan transaction. See section 1.6:4 in this manual for commentary regarding an attorney's communications with unrepresented parties.

§ 10.11 Subordination of Lien

Form 10-13 in this chapter is used if a new deed-of-trust lien is made superior to an existing deed-of-trust lien. The new lender typically requires the subordination of existing liens to the newly created lien.

§ 10.12 Notice of Final Agreement

Loans made by banks, savings and loan associations, and credit unions in excess of $50,000 must be in writing and be signed by the party to be bound or by that party's authorized representative. Tex. Bus. & Com. Code § 26.02(b). Written loan documents evidencing loans in excess of $50,000 may not be varied by oral agreements if the financial institution gives the obligor, on or before execution of the loan documents, a written notice stating substantially the following:

> This written loan agreement represents the final agreement between the parties and may not be contradicted by evidence of prior, contemporaneous, or subsequent oral agreements of the parties. There are no unwritten oral agreements between the parties.

The notice may be in a separate document signed by the obligor or incorporated into one or more of the loan documents and must be conspicuous. Form 10-14 in this chapter may be used by financial institutions to satisfy the requirements of section 26.02 of the Texas Business and Commerce Code.

§ 10.13 General Considerations for Guaranty

Form 10-15 in this chapter is an unconditional guaranty of payment. It allows the lender to pursue the guarantor without first pursuing the principal obligor on the default of the principal obligor. This form should be distinguished from a guaranty of collection, which requires the lender to use reasonable diligence to compel payment by the principal obligor before pursuing the guarantor. This form may be modified to become a limited guaranty by describing the guaranteed indebtedness as limited to a specific dollar amount or a specific percentage of the borrower's debt to the lender. Although this form contains several waivers by the guarantor of various defenses to the enforcement of a guaranty, many attorneys recommend that the guarantor's written consent be obtained at the time of any modification of the guaranteed indebtedness. If the guarantor is a corporation, the lender should require a specific resolution of the corporation's board of directors authorizing the execution of the guaranty and declaring that the guaranty may reasonably be expected to benefit the corporation. *See* Tex. Bus. Orgs. Code § 2.104(c).

In *Moayedi v. Interstate 35/Chisam Road, L.P.*, 438 S.W.3d 1, 6 (Tex. 2014), the Texas Supreme Court held that a guarantor may waive his right to offset under section 51.003 of the Texas Property Code.

§ 10.14 Home Loans

"Home loan" is defined as a loan that is made to one or more individuals for personal, family, or household purposes and secured in whole or part by either a manufactured home (as defined by Finance Code section 347.002), used or to be used as a borrower's principal residence, or real property improved by a dwelling designed for occupancy by four or fewer families and used or to be used as a borrower's principal residence. Tex. Fin. Code § 343.001(2). A lender, mortgage banker, or licensed mortgage broker must provide each applicant for a home loan with a notice of penalties for making false or misleading written statements. Tex. Fin. Code § 343.105. Form 10-19 in this chapter may be used to provide the statutorily required notice. As used in chapter 343 of the Finance Code, a home loan excludes a reverse mortgage or an "open-end account" as defined by Finance Code section 301.002. Tex. Fin. Code § 343.002(b). Two types of home loans are addressed in the statute: low-rate home loans and high-cost home loans.

§ 10.14:1 Low-Rate Home Loans

A low-rate home loan is a home loan that at its inception carries an interest rate two percentage points or more below the yield on treasury securities having comparable periods of maturity to the loan maturity, except that if the loan's interest rate is a discounted introductory rate or a rate that automatically steps up over time, the fully indexed rate or the fully stepped-up rate, as appropriate, is used instead of the rate at the loan's inception to determine if the loan is a low-rate home loan. Tex. Fin. Code § 343.101(a). A lender may not replace or consolidate a low-rate home loan directly made by a governmental or nonprofit lender before the seventh anniversary of the date of the loan unless the new or consolidated loan has a lower interest rate and requires payment of a lesser amount of points and fees than the original loan or is a restructure to avoid foreclosure. Tex. Fin. Code § 343.101(b). A restructure is defined as a change in the payment schedule or other terms of a home loan as a result of the borrower's default. Tex. Fin. Code § 343.001(3).

§ 10.14:2 High-Cost Home Loans

A high-cost home loan is a home loan that (1) is made to one or more individuals for personal, family, or household purposes; (2) is secured in whole or part by (a) a manufactured home (as defined by Tex. Fin. Code § 347.002) used or to be used as the borrower's principal residence or (b) real property improved by a dwelling designed for occupancy by four or fewer families and used or to be used as the borrower's principal residence; (3) has a principal amount equal to or less than one-half of the maximum conventional loan amount for first mortgages as established and adjusted by the Federal National Mortgage Association; (4) is not a reverse mortgage or an "open-end account" as defined by Tex. Fin. Code § 301.002; and (5) is a credit transaction described by 12 C.F.R. § 1026.32, except that the term includes a residential mortgage transaction, as defined by 12 C.F.R. § 1026.2, if the total loan amount is $20,000 or more and (a) the annual percentage rate exceeds the rate indicated in 12 C.F.R. § 1026.32(a)(1)(i) or (b) the total points and fees payable by the consumer at or before the loan closing will exceed the amount indicated in 12 C.F.R. § 1026.32(a)(1)(ii). Tex. Fin. Code § 343.201(1). Points and fees have the meaning assigned by 12 C.F.R. § 1026.32(b). Tex. Fin. Code § 343.201(2).

A high-cost home loan may not contain a provision for a scheduled payment that is more than twice as large as the average of earlier scheduled monthly payments unless the balloon payment becomes due not less than sixty months after the date of the loan. This prohibition does not apply if the payment schedule is adjusted to account for the seasonal or otherwise irregular income of

the borrower or if the loan is a bridge loan in connection with the acquisition or construction of a dwelling intended to become the borrower's principal dwelling. Tex. Fin. Code § 343.202.

A high-cost home loan may not provide for a payment schedule with regular periodic payments that cause the principal balance to increase except for any negative amortization as a consequence of a temporary forbearance, bridge loan, or restructure sought by the borrower. Tex. Fin. Code § 343.203. A high-cost home loan also may not contain a provision for a prepayment penalty. Tex. Fin. Code § 343.205.

A bridge loan under Finance Code chapter 343 refers to temporary or short-term financing that requires payment of only interest until the entire unpaid balance is due. Tex. Fin. Code § 343.001(1).

A high-cost home loan lender may also not engage in a pattern or practice of extending consumer credit based on the consumer's collateral without regard to an obligor's repayment ability, including an obligor's current and expected income, current obligations, employment status, and other financial resources, other than an obligor's equity in the dwelling that secures repayment of the loan. Tex. Fin. Code § 343.204(b). The term *obligor* as used in section 343.204(b) refers to all persons obligated to pay a high-cost home loan, including borrowers, cosigners, and guarantors. Tex. Fin. Code § 343.204(a).

§ 10.14:3 Credit Life, Disability, or Unemployment Insurance

Lenders must provide a statutory insurance disclosure to each home loan applicant, which must be made by hand delivery or mail not later than the third business day after the date the lender receives a home loan application. Tex. Fin. Code § 343.104. Form 10-16 in this chapter may be used to provide the statutorily required insurance disclosure.

§ 10.15 Certification of Trust

A person other than a beneficiary is not required to inquire into the extent of the trustee's powers or the propriety of the exercise of those powers if the person deals with the trustee in good faith and obtains a certification of trust. *See* Tex. Prop. Code § 114.081(b). Instead of providing a copy of a trust instrument to a third party, the trustee may provide a certification of trust that contains, among other things, representations about the power of the trustee to take actions on behalf of the trust. Any party without actual knowledge to the contrary may rely on the representations in the certification of trust in dealing with the trustee. A person who in good faith enters into a transaction relying on a certification of trust may enforce the transaction against the trust property as if the representations contained in the certification of trust are correct.

Form 10-20 in this chapter provides an example of a certification of trust. The statute allows a recipient of a certification of trust to require the trustee to furnish copies of the excerpts from the original trust instrument and later amendments to the trust instrument that designate the trustee and confer on the trustee the power to act in the pending transaction. *See* Tex. Prop. Code § 114.086(e). The statute does not provide protection to parties with knowledge contrary to the contents of the certification.

A person making a demand for the trust instrument in addition to a certification of trust or excerpts as provided by the statute is liable for damages if the court determines that the person did not act in good faith in making the demand. Tex. Prop. Code § 114.086(i).

§ 10.16 Subordination, Nondisturbance, and Attornment Agreement

A subordination, nondisturbance, and attornment agreement (SNDA) deals with the issues

of existing commercial tenants' and lienholders' rights as they relate to present and future financing. This agreement is an acknowledgment by a landlord, tenant, and lienholder of their respective rights and obligations, and it provides assurance to the parties that present rights and obligations will be preserved should the landlord default on its loan and the lender foreclose. The tenant agrees to continue to be a tenant of the landlord or purchaser on foreclosure, and the lienholder agrees not to foreclose the rights of the tenant on foreclosure of the lien. Form 25-16 in this manual provides an example of a simple SNDA. Language also may be incorporated in the lease agreement if the situation warrants its incorporation. When drafting an SNDA, the attorney may also need to address various other issues applicable to the different types of commercial properties.

§ 10.17 Assumption Agreement

Form 10-22 in this chapter is an example of an assumption agreement used to document a third party's assumption of an obligation to pay an indebtedness secured by a vendor's lien or deed-of-trust lien on real property. Alternative paragraphs are included to distinguish between an assumption of debt where the original borrower is released or not released from liability to pay the assumed indebtedness. If the original borrower is not released from liability to pay the assumed indebtedness, a practitioner should review sections 8.6 and 8.7 in this manual concerning the use and effect of a deed of trust to secure assumption.

§ 10.18 Lender's Rescission and Waiver of Acceleration of an Indebtedness Secured by a Lien on Real Property

A lender may use forms 10-23 and 10-24 in this chapter to rescind and waive the acceleration of an indebtedness secured by a lien on real property before the limitations period expires, following the requirements of section 16.038 of the Texas Civil Practice and Remedies Code, and to document the lender's compliance with the written notice requirement to the borrower.

§ 10.19 Other Loan Documents

For other forms in this manual related to loan transactions, see the following:

- mechanic's lien contract and related forms—chapter 20;
- reinstatement agreement—form 14-6; and
- closing instructions letters—forms 26-15 through 26-18.

[Reserved]

Form 10-1

Transfer of Note and Lien

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

Basic Information

Date:

Holder of Note and Lien ("Holder"):

Holder's Mailing Address:

Transferee:

Transferee's Mailing Address:

Note

Date:

Original principal amount:

Borrower:

Lender:

Unpaid principal and interest:

[Maturity date:]

Note and Lien Are Described in the Following Documents ("Lien Documents"): [**include recording information**]

Property (including any improvements):

Prior Lien(s): [**include recording information**]

Transfer of Note and Lien

Holder transfers the Note and the liens and security interests ("Lien") on the Property granted in the Lien Documents to Transferee.

[**Include if applicable:** This transfer is without recourse against [and/or] without representation or warranty by Holder, except that] Holder represents that Holder is the person entitled to enforce the Note [**include if applicable:** , the Note is not overdue,] and the unpaid principal and interest on the Note are correctly stated.

Holder expressly waives and releases all present and future rights to establish or enforce the liens described in this instrument as security for payment of any future or other indebtedness.

When the context requires, singular nouns and pronouns include the plural.

_____

[Name of holder]

Include acknowledgment.

Form 10-2

Release of Lien

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

Basic Information

Date:

Holder of Note and Lien:

Holder's Mailing Address:

Note

Date:

Original principal amount:

Borrower:

Lender:

[Maturity date:]

Note and Lien Are Described in the Following Documents ("Lien Documents"): [**include recording information**]

Property (including any improvements): [**include legal description of real property and personal property to be released**]

Release of Lien and Security Interests

Holder is the owner and holder of the Note and Lien.

Select one of the following.

Holder releases the Property from all liens and security interests held by Holder granted in the Lien Documents and any other instruments, including other instruments recorded in the official public records of the county where the Property is located.

Or

Holder releases the Property from all liens and security interests held by Holder granted in the Lien Documents.

Continue with the following.

When the context requires, singular nouns and pronouns include the plural.

_____

[Name of holder]

Include acknowledgment.

Form 10-3

Partial Release of Lien

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

Basic Information

Date:

Holder of Note and Lien:

Holder's Mailing Address:

Note

Date:

Original principal amount:

Borrower:

Lender:

[Maturity date:]

Note and Lien Are Described in the Following Documents: [**include recording information**]

Property (including any improvements) to Be Released from Lien ("Property"):

Partial Release of Lien

For value received, Holder of Note and Lien releases only the Property from the Lien and from all liens held by Holder of Note and Lien, without regard to how they were created or evidenced.

When the context requires, singular nouns and pronouns include the plural.

_____

[Name of holder]

Include acknowledgment.

Form 10-4

Modification and Extension Agreement

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

Basic Information

Date:

Holder of Note and Lien:

Holder's Mailing Address:

Obligor:

Obligor's Mailing Address:

Note

Date:

Original principal amount:

Borrower:

Lender:

[Maturity date:]

Unpaid Principal and Interest on Note:

Lien Documents: [**include recording information**]

Property (including any improvements):

Extended Maturity Date of Note:

Modified Terms:

Obligor's Covenants and Warranties

The Note is secured by liens against the Property. Whether Obligor is primarily liable on the Note or not, Obligor nevertheless agrees to pay the Note and comply with the obligations expressed in the Lien Documents.

For value received, Obligor renews the Note and promises to pay to the order of Holder of Note and Lien, according to the Modified Terms, the Unpaid Principal and Interest on Note. All unpaid amounts are due by the Extended Maturity Date of Note. Obligor also extends the liens described in the Lien Documents.

The Note and the Lien Documents continue as written, except as provided in this agreement.

Obligor warrants to Holder of Note and Lien that the Note and the Lien Documents, as modified, are valid and enforceable and represents that they are not subject to rights of offset, rescission, or other claims.

When the context requires, singular nouns and pronouns include the plural.

_____

[Name of obligor]

_____

[Name of holder]

Include acknowledgments.

Form 10-5

Assignment of Rent

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

Basic Information

Date:

Assignor:

Assignor's Mailing Address:

Assignee:

Assignee's Mailing Address:

Note

Date:

Original principal amount:

Borrower:

Lender:

Deed of Trust

Date:

Borrower:

Lender:

Trustee:

Property:

Current Leases: [**include recording information if available**]

Clauses and Covenants

For value received, as a supplement to the Deed of Trust, Assignor collaterally assigns to Assignee all current and future rent from the Property. Leases are not assigned.

A. Assignor's Representations:

Assignor represents the following:

A.1. This assignment is valid and enforceable.

A.2. The Current Leases are valid, have not been modified or amended except as stated, have not been previously assigned, and are subject to no security interests.

A.3. Without the prior written consent of Assignee, Assignor will not modify any material term in any lease covering the Property, exercise or forfeit any option in a lease, or accept payment of rent more than one month before its regular monthly payment date.

A.4. Assignor will perform all the obligations of the lessor in all leases covering the Property.

A.5. Assignor will promptly inform Assignee of all material events concerning the leases covering the Property.

A.6. Assignor will keep accurate records of all aspects of leases covering the Property and on request will make them available for Assignee's examination.

Form 10-9

Affidavit of Homestead

Date:

Affiant:

Affiant's Homestead Property ("Property"):

> For a rural homestead, indicate the number of acres designated, not to exceed 200 acres if the homestead of a family or 100 acres if the homestead of a single adult. If there is more than one survey, include the number of acres in each. For an urban homestead, indicate the number of acres designated, not to exceed 10 acres.

Current Record Title Holder of Affiant's Homestead Property:

Lender:

Lender's Address:

Affiant on oath swears that the following statements are true and are within the personal knowledge of Affiant:

1. My full legal name is [**full legal name of affiant**], and I am over the age of eighteen years.

2. I currently reside at [**current residence address**].

3. I acknowledge that Lender is taking a security interest in the Property and I will use and claim the Property as my homestead.

4. I acknowledge that I am obtaining a loan ("Loan") from Lender for a part of the purchase price of the Property.

5. I confirm that Lender has informed me that, as a condition of obtaining the Loan from Lender, I must occupy the Property as my primary residence after the closing so that the Property will constitute my homestead.

6. I also confirm that Lender has informed me that my failure to occupy the Property as my primary residence will impair Lender's security for the Loan and that Lender would not have made the Loan but for my representation and stated intention that the Property will be used as my homestead and residence.

7. I further confirm that I have been informed that, if I cease to occupy the Property as my residence, Lender may accelerate all amounts then due and owing to Lender with respect to the Loan and exercise all rights granted to Lender in the instruments evidencing and securing the Loan.

8. I understand that, if Lender accelerates the Loan in such circumstances, the entire loan balance will be immediately due and payable, and if I fail to pay the amounts due, Lender may institute collection proceedings against me, including, without limitation, nonjudicial foreclosure sale in accordance with the terms and conditions of the deed of trust encumbering the Property that I have executed to secure payment of the Loan.

_____

[Name of affiant]

SUBSCRIBED AND SWORN TO before me on _____ by **[name of affiant]**.

_____

Notary Public, State of Texas

Insurance Rider to Loan Agreement

Texas law prohibits additional insured coverage in a construction contract; in an agreement collateral to or affecting a construction contract, except that pertaining to a single family house, townhouse, duplex, or directly related land development; to a public works project of a municipality; or in other exceptions or exclusions set out in Texas Insurance Code chapter 151. *See* Tex. Ins. Code ch. 151. See section 17.2:4 in this manual.

Loan Agreement

Date:

Borrower:

Lender:

This insurance rider is part of the Loan Agreement.

Borrower's Required Insurance Coverages

Type of Insurance or Endorsement		Minimum Policy or Endorsement Limit	
General Liability Insurance Policy Required of Borrower:			
☐	Commercial general liability (occurrence basis)	Per occurrence:	$_____
		General aggregate:	$_____
		Products-completed operations aggregate:	$_____
		Personal and advertising injury:	$_____
		Damage to premises rented to you:	$_____
		Medical expense:	$_____

Required Endorsements to Borrower's General Liability Policy:

☐	Designated location(s) general aggregate limit	$_____
☐	Liquor liability	$_____
☐	_____	$_____

Include any other desired endorsements. See chapter 17.

Additional Liability Insurance Policies Required of Borrower:

☐	Workers' compensation	$500,000
☐	Employer's liability	$_____
☐	Business automobile liability	$_____
☐	Garage	$_____
☐	Crime (or fidelity)	$_____
☐	Innkeepers	$_____
☐	Excess liability	$_____
	Or	
☐	Umbrella liability (occurrence basis)	$_____

Commercial Property Insurance Policies Required of Borrower If No Construction Is Contemplated or, If Construction Is Contemplated, for the Period After Construction Is Completed:

☐	Causes of loss—special form	100 percent of replacement cost of the Property on an agreed-value basis

Required Endorsements to Borrower's Commercial Property Policy:

☐	Business income and additional expense	Sufficient limits to address reasonably anticipated business interruption losses for a period of ____months
☐	Boiler and machinery	$_____
☐	Flood (if Property is located within a 100-year floodplain (FEMA Flood Zone "A" or any subdesignation of Zone "A"))	$_____

☐	Earth movement	$_____
☐	Ordinance or law coverage	$_____
☐	Terrorism coverage	$_____
☐	Glass	Sufficient limits to cover plate glass
☐	Signs	Sufficient limits to cover exterior signage

Include any other desired endorsements. See chapter 17.

General Insurance Requirements

a. The commercial general liability policy must be endorsed to name Lender as an "additional insured" and must not be endorsed to exclude the partial, contributory, or comparative negligence of Lender from the definition of "insured contract."

b. Additional insured endorsements must not exclude coverage for the sole or contributory ordinary negligence of Lender.

c. Property insurance policies must contain waivers of subrogation of claims against Lender.

d. Certificates of insurance and copies of any additional insured and waiver of subrogation endorsements with respect to Borrower's insurance must be delivered by Borrower to Lender on the date of this agreement and at least [**number**] days before the expiration of the current policies.

e. Borrower may carry a business owner's insurance policy, commercial package insurance policy, or other package insurance policy rather than separate commercial property and general liability insurance policies described above, provided that such package policy contains the minimum insurance coverages, endorsements, and limits set forth in this agreement.

Include paragraph f., g., or h. as applicable.

f. If Borrower will employ a third-party manager for the Real Property, Borrower will require that the third-party manager carry the property and liability insurance policies described in Exhibit [**exhibit number/letter**] to this agreement.

And/Or

g. If all or a portion of the Property is to be constructed during the construction period, Borrower will maintain, in lieu of the commercial property insurance described above, the builder's risk insurance described in Exhibit [**exhibit number/letter**] and require that the general contractor and architect carry the liability insurance policies described in Exhibit [**exhibit number/letter**].

And/Or

h. Certificates of insurance and copies of any additional insured endorsements with respect to a third-party manager's, contractor's, subcontractor's, or architect's insurance must be delivered by Borrower to Lender before such party enters the Property and thereafter at least [**number**] days before the expiration of the policies.

Form 10-19

This notice must be provided on a separate document, be in at least fourteen-point type, and use the below or substantially similar language. Tex. Fin. Code § 343.105.

Notice of Penalties for Making False or Misleading Written Statement (Pursuant to Section 343.105, Texas Finance Code)

Warning: Intentionally or knowingly making a materially false or misleading written statement to obtain property or credit, including a mortgage loan, is a violation of Section 32.32, Texas Penal Code, and, depending on the amount of the loan or value of the property, is punishable by imprisonment for a term of 2 years to 99 years and a fine not to exceed $10,000.

[I/We], the undersigned home loan applicant(s), represent that [I/we] have received, read, and understand this notice of penalties for making a materially false or misleading written statement to obtain a home loan.

[I/We] represent that all statements and representations contained in [my/our] written home loan application, including statements or representations regarding [my/our] identity, employment, annual income, and intent to occupy the residential real property secured by the home loan, are true and correct as of the date of loan closing.

_____

[Name of borrower/loan applicant]

Repeat signature lines as necessary.

[Reserved]

Form 10-20

Certification of Trust

Basic Information

Date:

Trust:

Trustee:

Trustee's Mailing Address:

Repeat as necessary.

Settlor:

Repeat as necessary.

Include the following terms as applicable.

Note

Date:

Original principal amount:

Borrower:

Lender:

Deed of Trust

Date:

Grantor:

Beneficiary:

Recording information:

Property:

Buyer:

Continue with the following.

Terms of Certification

1. Trustee is a currently acting trustee of the Trust under an instrument executed on [**date**], and the Trust exists.

Select one of the following.

2. The Trust powers include at least all those trust powers granted a trustee by subchapter A, chapter 113, of the Texas Property Code.

Or

2. The Trust powers include the power to, and the Trustee is authorized to

Select as applicable.

borrow money in the amount of $[**amount**] from Lender to [purchase the Property/[**state other purpose or use of loan proceeds**]] and to enter into the Note, payable to the order of Lender [;/.]

And/Or

grant security interests in or liens on all or certain assets of the Trust, including entering into the Deed of Trust covering the Property and any necessary modifications, extensions, increases, and renewals of the Deed of Trust [;/.]

And/Or

enter into any assignments, pledges, mortgages, deeds of trust, security agreements, and other documents and instruments concerning the Property, or any real or personal property, or any interest therein, owned by the Trust that may be necessary or appropriate or required by Lender to evidence and secure the payment of the Note [;/.]

And/Or

contract for the issuance by Lender of letters of credit, to discount with Lender notes, acceptances, and evidences of indebtedness payable to or due the Trust, to endorse the same and execute any contracts and instruments for repayment thereof to Lender as Lender may require, to enter into foreign exchange transactions with or through Lender, and to enter into interest-rate hedging transactions with Lender in connection with the Note [;/.]

And/Or

execute deeds or other instruments of conveyance [;/.]

And/Or

enter into a guaranty guaranteeing [a portion of] the obligations of Borrower to Lender [;/.]

And/Or

[**state other purpose of certification**].

Select one of the following.

3. The Trust is irrevocable.

Or

3. The Trust is revocable, and the power to revoke the Trust is held by [**name**].

Continue with the following.

4. Under the terms of the Trust, [all/[**number**]] of the currently acting trustees are required to sign documents in order to exercise the powers of the trustees.

5. Title to the Trust assets should be taken in the following manner: [**describe**].

6. The Trust has not been revoked or modified or amended in any manner that would cause the representations contained in this Certification to be incorrect.

Trustee:

_____

[**Name of trustee**]

Repeat signature lines as necessary.

Form 10-21

Release of Collateral Transfer of Note and Lien

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

Basic Information

Date:

Secured Party:

Secured Party's Mailing Address:

Debtor:

Debtor's Mailing Address:

Collateral Note: $[**amount**] Note executed by [**maker**] and payable to the order of [**payee**] dated [**date**].

Collateral Note Security: Deed of Trust dated [**date**], recorded in [**recording data**].

Collateral Transfer of Note and Lien

Date:

Recorded: [**recording data**]

Purpose of Collateral Transfer of Note and Lien

In the Collateral Transfer of Note and Lien, Debtor granted to Secured Party a security interest in the Collateral Note and the Collateral Note Security, each as described in the Collateral Transfer of Note and Lien.

Release

Secured Party releases Secured Party's security interest in the Collateral Note and Collateral Note Security.

No Release of Underlying Collateral Note Debt and Collateral Note Security

Secured Party's release of its security interest in the Collateral Note and the Collateral Note Security does not affect or release (1) the indebtedness owing to Debtor on the Collateral Note and (2) the liens held by Debtor under the Collateral Note Security documents on the property described in those documents.

When the context requires, singular nouns and pronouns include the plural.

_____

[Name of secured party]

Include acknowledgment.

Form 10-25

Allonge

Basic Information

Date:

Holder of Note ("Holder"):

Holder's Mailing Address:

Transferee:

Transferee's Mailing Address:

Note

Date:

Original principal amount:

Borrower:

Lender:

Unpaid principal and interest:

[Maturity date:]

Transfer of Note

Reference is made to the Note. This Allonge is to be attached to and made a permanent part of the Note.

Pay the Note to the order of Transferee.

[**Include if applicable:** This transfer is without recourse against [and/or] without representation or warranty by Holder, except that] Holder represents that Holder is the person entitled to enforce the Note [**include if applicable:** , the Note is not overdue,] and the unpaid principal and interest on the Note are correctly stated.

When the context requires, singular nouns and pronouns include the plural.

_____

[Name of holder]

Chapter 11

Home Equity Loan Documents

I. Home Equity Loans Generally

II. Reverse Mortgage Loans

III. General Instructions for Completing Forms

IV. Additional Resources

[Reserved]

Chapter 11

Home Equity Loan Documents

I. Home Equity Loans Generally

§ 11.1 General Considerations

Article XVI, section 50, of the Texas Constitution allows a lien on homestead property to secure a home equity loan. In a departure from prior Texas practice, the validity of such a lien is generally not dependent on the use to which the loan proceeds are applied. Constitutional provisions authorizing home equity lending continue, however, to reflect a strong public policy solicitous of the homestead as the last shield against destitution. Home equity loans are authorized only on satisfaction of a number of significant constitutional safeguards and restrictions aimed at protecting homestead owners.

These restrictions are nonseverable and nonwaivable. Each must be satisfied to create a valid lien. Strict compliance with the requirements of the Texas Constitution is required. *See Toler v. Fertitta*, 67 S.W.2d 229, 230 (Tex. Comm'n App. 1934, holding approved).

Regulatory Commentary: Regulations and official commentary pertaining to home equity lending are available from the following different sources.

1. **Interpretive Rules of Finance Commission and Credit Union Commission:** The constitution authorizes the legislature to delegate the authority to issue interpretations of the home equity lending provisions of the constitution. *See* Tex. Const. art. XVI, § 50(u). The legislature, acting pursuant to this amendment, delegated interpretive authority over the home equity provisions to the Finance Commission of Texas and the Texas Credit Union Commission, which in turn have jointly issued interpretations of home equity lending law. *See* Tex. Fin. Code §§ 11.308, 15.413. The interpretive rules are codified in 7 Tex. Admin. Code ch. 153, which may be accessed at **http://texreg.sos.state.tx.us/public/readtac$ext.ViewTAC?tac_view=4&ti=7&pt=8&ch=153&rl=Y**. *See* 7 Tex. Admin. Code §§ 153.1–.96.

   Lenders authorized by the constitution to make home equity extensions of credit are afforded substantial protections when relying on these interpretations. No act or omission is deemed to violate a home equity constitutional provision if the act or omission conforms to an interpretation of the provision that is in effect at the time of the act or omission and made by a state agency to which the power of interpretation is delegated or by an appellate court of this state or the United States. Tex. Const. art. XVI, § 50(u). However, the validity of certain of the interpretations has been successfully attacked in *Texas Bankers Ass'n v. Ass'n of Community Organizations for Reform Now (ACORN)*, 303 S.W.3d 404 (Tex. App.—Austin 2010, pet. granted). As a result, 7 Tex. Admin. Code §§ 153.1(11), 153.5(3) (defin-

ing interest) and § 153.5(4), (6), (8), (9), (12) (incorporating that definition) have been held constitutionally invalid, and 7 Tex. Admin. Code §§ 153.13, 153.18, 153.20, 153.22, 153.84 have been revised by the commissions to rectify invalid provisions found by the lower court. The Supreme Court of Texas granted a petition for review of the decision to determine (1) whether deference to agency interpretations should be the standard for appellate review when state agencies, in this case the Finance Commission of Texas and the Credit Union Commission, have been delegated the authority to interpret constitutional home equity provisions by the constitution and statutes of this state; (2) whether the Finance Code's definition of "interest" was properly applied in agency interpretations for purposes of determining the constitutional 3 percent fee cap; and (3) whether agency interpretations should be upheld that allow the signing of an equity loan by power of attorney instead of a required signing by homeowners at locations specified by the constitution. On unopposed motion, the court also ordered ACORN dismissed as a party because of its intervening dissolution and ordered the style of the cause corrected to read *Finance Commission of Texas et al. v. Valerie Norwood et al.*, No. 10-0121, 54 Tex. Sup. Ct. J. 1077 (Tex. Feb. 25, 2011). In an opinion issued on June 21, 2013, the Texas Supreme Court decided (1) that agency interpretations are subject to the same standard of review as courts of appeals, which are reviewed, as a matter of law, *de novo*; (2) that the agency interpretation of the 3 percent fee cap, tying it to the meaning of the Finance Code definition of "interest," was invalid ("interest" as used in that provision means the amount determined by multiplying the loan principal by the interest rate); and (3) that execution of a power of attorney used in an equity loan transaction must occur only at the office of a lender, an attorney at law, or a title company. *Finance Commission of Texas v. Norwood*, 418 S.W.3d 566 (Tex. 2013). On January 24, 2014, on a motion for rehearing filed by the Texas Bankers Association, a supplemental opinion was issued to clarify that per diem interest and discount points were not subject to the 3 percent fee cap and to reaffirm the court's decision relating to the execution of a power of attorney used in an equity loan transaction. *Finance Commission of Texas*, 418 S.W.3d at 595–97.

2. **1998 OCCC Commentary:** On October 7, 1998, the Office of the Consumer Credit Commissioner (OCCC), the Texas Department of Banking, the Savings and Loan Department, and the Credit Union Department issued their joint Regulatory Commentary on Equity Lending Procedures to provide initial guidance to lenders and consumers concerning the regulatory views of the participating agencies. This regulatory commentary is referred to in this chapter as the "1998 OCCC Commentary." Though the 1998 OCCC Commentary has been supplanted by title 7, chapter 153, of the Texas Administrative Code (Home Equity Lending) (*see* 29 Tex. Reg. 84 (2004)), it retains vitality by helping practitioners understand home equity lending restrictions. The 1998 OCCC Commentary is accessible on the OCCC website at **http://occc.texas.gov**.

3. **Department of Insurance Procedural Rules:** The Texas Department of Insurance adopted title insurance coverages specifically for home equity loans along with accompanying procedural rules: (1) Equity Loan Mortgage Endorsement (T-42) and accompanying Procedural Rule P-44 and (2) Supplemental Coverage Equity Loan Mortgage Endorsement (T-42.1) and accompanying Procedural Rule P-47. These endorsements and procedural rules provide underwriting guidelines that interpret the constitutional requirements for a home equity lien.

Limitation of Chapter: The commentary and forms in this chapter are applicable to a first-lien home equity loan. Texas Finance Code chapter 342 imposes additional duties, prohibitions, and disclosure requirements in connection with secondary mortgage loans. Attorneys are cautioned that some forms in this chapter may require modification for use with a secondary mortgage loan transaction.

Model Forms and Regulations: Home equity loans regulated by the OCCC must be written in plain language designed to be easily understood by the average consumer and must be printed in an easily readable font and type size. Tex. Fin. Code § 341.502(a). The Finance Commission has adopted rules governing loan contracts subject to Texas Finance Code section 341.502, including model loan contracts that in certain cases may be required for use. *See* 7 Tex. Admin. Code ch. 90. Home equity loans that are regulated by the OCCC and therefore subject to these plain language and model form requirements include only loans that (1) provide for an interest rate exceeding 10 percent a year, (2) are extended primarily for personal, family, or household use, (3) are a secondary mortgage loan, and (4) are made by a person engaged in the business of making such loans licensed by the OCCC (other than a bank, savings and loan, or credit union). Tex. Fin. Code §§ 341.101–.103, 342.005; Tex. Att'y Gen. Op. No. JC-0513 (2002). These requirements do not apply to first-lien home equity loans or home equity loans made by traditional lenders.

§ 11.2 Home Equity Loans Closed before January 1, 2018

The rules governing home equity loans changed significantly on January 1, 2018. Where applicable, this chapter will identify provisions affected by the changes. The laws in effect at the time the home equity loan was closed govern the validity of the home equity loan. If an existing home equity loan is being analyzed for compliance, the closing date should be noted and the corresponding rules applied to the analysis. The January 1, 2018, changes are summarized below:

1. For home equity loans closed prior to January 1, 2018, closing costs should not exceed 3 percent of the loan amount. The January 1, 2018, amendments reduced the fee limitation to 2 percent but excluded some of the most expensive fees of a typical closing from the fees included in the limitation: appraisal fees, title fees, and survey fees. For a detailed analysis of which fees are included in the constitutional fee limitation, see section 11.6 below.

2. Prior to January 1, 2018, a home equity loan could not be secured by a homestead with an agricultural use tax exemption, unless the tract was used primarily for the production of milk. The 2018 amendments removed this restriction, and home equity loans closed on or after January 1, 2018, may be secured by homesteads with an agricultural use tax exemption.

3. Prior to January 1, 2018, if a new mortgage loan was made and any portion of the loan proceeds were used to

extinguish an existing home equity loan, the new loan had to be a home equity loan or a reverse mortgage. The 2018 amendments created a new procedure by which lenders may refinance an existing home equity loan with a conventional mortgage. Beginning January 1, 2018, a home equity loan may now be refinanced into a conventional loan if (a) at least one year has elapsed since the home equity loan was closed; (b) there is no advance of new money (except closing costs); (c) the new principal loan balance does not exceed 80 percent of the property's fair market value on the day of refinance; and (d) the owner is provided with a new disclosure twelve days before closing, advising owner of the risks of refinancing into a non–home equity loan.

4. For a home equity line of credit (HELOC) originated prior to January 1, 2018, there is a loan-to-value restriction on additional advances: no advances after the initial advance at closing may be made if the sum of all indebtedness secured by the homestead exceeds 50 percent of the fair market value of the property at the time the HELOC was closed. For HELOCs originated on or after January 1, 2018, the loan-to-value limit on additional advances is 80 percent.

§ 11.3 Authorized Lenders

The seven categories of lenders that may make home equity loans are—

1. a bank, savings and loan association, savings bank, or credit union doing business under Texas or federal law, including a subsidiary of a bank, savings and loan association, savings bank, or credit union;
2. a federally chartered lending instrumentality;
3. a person approved as a mortgagee by the United States government to make federally insured loans;
4. a person licensed to make regulated loans under Texas law;
5. a seller financing all or part of the homestead purchase;
6. a person related to the borrower within the second degree of affinity or consanguinity; or
7. a person regulated under Texas law as a mortgage banker or mortgage company.

Tex. Const. art. XVI, § 50(a)(6)(P). To qualify as a mortgage company under category 7 above, a lender must obtain a license under Texas Finance Code chapter 156, the Residential Mortgage Loan Company Licensing and Registration Act. To qualify as a mortgage banker under category 7 above, a lender must obtain a license under Texas Finance Code chapter 157, the Mortgage Banker Registration and Residential Mortgage Loan Originator License Act. 7 Tex. Admin. Code § 153.17(3).

§ 11.3:1 Financial Institutions

Some questions remain regarding the eligibility of a financial institution chartered in a foreign state to make a home equity loan. Such institutions are generally considered to be exempt from Texas usury law under 12 U.S.C. § 1831d. Such institutions may make loans to Texas residents under the usury laws of their home states. The 1998 OCCC Commentary recognizes that a financial institution chartered and doing business in a foreign state is not subject to licensure as a Texas-regulated lender but offers no direct opinion on whether such an institution would be recognized under the Texas Constitution as an

authorized home equity lender. 1998 OCCC Commentary, at 9.

§ 11.3:2 HUD-Approved Mortgagees

A person approved by the United States government as a mortgagee to make federally insured loans is an authorized home equity lender. The Department of Housing and Urban Development (HUD) approves lenders to make federally insured loans. Federal Housing Administration (FHA) and HUD direct endorsement or non-supervised mortgagees are eligible to make home equity loans. Correspondents to a HUD-approved mortgagee are not authorized to make home equity loans unless they qualify under another category of authorized lender. 7 Tex. Admin. Code § 153.17(2). Unless a HUD-approved mortgagee is also a bank, savings and loan association, or credit union, the mortgagee must obtain a license from the Office of Consumer Credit Commissioner to make junior-lien home equity loans. Tex. Fin. Code §§ 124.005, 339.005, 341.103–.104, 342.051.

§ 11.3:3 State-Regulated Lenders

A lender authorized under Texas Finance Code chapter 341 must still meet both constitutional and statutory qualifications to make a home equity loan. Generally, a nondepository lender that makes, negotiates, arranges, or transacts a secondary mortgage loan governed by Finance Code chapter 342 must comply with the licensing provisions of that chapter. *See* 7 Tex. Admin. Code § 153.17(1), (3). Residential mortgage loan originators licensed under chapter 156 of the Finance Code, federal and state banks, savings banks, and savings and loan associations are expressly exempt from the licensing requirements of chapter 342. *See* Tex. Fin. Code § 342.051(c)(1), (f). Exempt lenders are nevertheless thought to be subject to the substantive provisions of that chapter applicable to secondary mortgage loans. However, chapter 342 and other chapters of subtitle B, title 4, of the Finance Code do not apply to a credit union's extension of credit unless the agreement that evidences the transaction specifically provides otherwise. *See* Tex. Fin. Code § 124.005.

§ 11.3:4 Mortgage Banker or Mortgage Company

A person regulated by the state of Texas as a mortgage banker or mortgage company is authorized by the constitution to make a home equity loan. Tex. Const. art. XVI, § 50(a)(6)(P)(vi).

§ 11.3:5 Loans by Relatives

A person related to the borrower within the second degree of affinity or consanguinity may make a home equity loan. Tex. Const. art. XVI, § 50(a)(6)(P)(v). The Texas Government Code gives instructions for computing degrees of affinity and consanguinity. *See* Tex. Gov't Code §§ 573.021–.025. Individuals also are exempt under licensing and registration requirements of Texas Finance Code chapter 180 when offering or negotiating a residential mortgage loan with, or on behalf of, an immediate family member of the individual. *See* Tex. Fin. Code § 180.003(a)(2). An "immediate family member" for this purpose means the spouse, child, sibling, parent, grandparent, or grandchild of an individual. The term also includes a stepparent, stepchild, and step-sibling and a relationship established by adoption. *See* Tex. Fin. Code § 180.002(8).

§ 11.3:6 Redlining Restrictions

A lender otherwise authorized to make a home equity loan is ineligible to make such a loan if found by a federal regulatory agency to have engaged in the practice of refusing to make loans because the debtor resides or the property is located in a certain area. Tex. Const. art. XVI, § 50(a)(6)(P). No provision is made in the constitution to rehabilitate or requalify lenders who were once found to have done this.

§ 11.4 Restriction on Loan-to-Value Ratio

The principal amount of a home equity loan when added to the aggregate total of all other indebtedness secured by a lien against the homestead may not exceed 80 percent of the fair market value of the homestead on the date that the extension of credit is made. Tex. Const. art. XVI, § 50(a)(6)(B). For the purpose of this calculation, the principal amount of a home equity loan is the sum of cash advances and charges made at the inception of the loan to the extent that the charges are financed in the principal amount of the note. 7 Tex. Admin. Code § 153.3(1). The 80 percent limit applies to the principal balance of all outstanding debt secured by the homestead on the date that the extension of credit is made. 7 Tex. Admin. Code § 153.3(2). The principal amount of a home equity loan does not include interest accrued after the date that the extension of credit is made (other than any interest capitalized and added to the principal balance on the date that the extension of credit is made) or amounts advanced by the lender after closing as the result of default, including, for example, ad valorem taxes, hazard insurance premiums, and authorized collection costs, including attorney's fees. 7 Tex. Admin. Code § 153.3(3). With a closed-end multiple advance loan, the principal balance includes contractually obligated future advances not yet disbursed. 7 Tex. Admin. Code § 153.3(4).

Valuation: To establish the fair market value of the homestead, the lender and owner must sign a written acknowledgment establishing its value on the date that the loan is made. Tex. Const. art. XVI, § 50(a)(6)(Q)(ix). A lender or assignee for value may conclusively rely on the fair market value established by this written acknowledgment if that value is established by appraisal or evaluation prepared in accordance with any applicable state or federal requirement and the lender or assignee has no actual knowledge at the time that the loan is made that the fair market value established by the written acknowledgment is incorrect. Tex. Const. art. XVI, § 50(h). The appraisal or evaluation should be attached to the written acknowledgement of value executed by the borrower at closing. *See* Procedural Rule P-47, *Basic Manual of Rules, Rates and Forms for the Writing of Title Insurance in the State of Texas*.

Federal banking regulators have issued regulations establishing the minimum criteria for valuations of real estate. An "appraisal" by a state certified or licensed appraiser is generally required for transactions valued at more than $250,000. An "evaluation" is required for transactions of $250,000 and less. *See* 12 C.F.R. §§ 34.43(a), (b), 225.63(a), (b), 323.3(a), (b), 564.3(a), (b).

Federal Financial Institutions Examination Council Interagency Appraisal Evaluation Guidelines issued by federal banking regulators provide further specifications for an evaluation. The evaluation must (1) be written; (2) include the preparer's name, address, signature, and date of the evaluation; (3) describe the collateral, its condition, and its current and projected use; (4) describe the source of information used in the analysis; (5) describe the analysis and supporting information; and (6) provide an estimate of the real estate's market value, with any limiting conditions. Interagency Appraisal and Evaluation Guidelines in Commercial Real Estate and Construction Lending, Comptroller's Handbook, Appendix E (Comptroller of the Currency, November 1995), available at **https://www.occ.gov/publications/publications-by-type/comptrollers-handbook/index-comptrollers-handbook.html**. Qualifying evaluations and appraisals may be performed by lender employees or agents as long as the appraiser or evaluator is independent from the loan decision. Home equity loans made by FDIC-insured institutions must be supported by an appraisal or evaluation complying with these federal requirements.

In some cases, constitutional restrictions against additional collateral for home equity loans may require the partition, subdivision, and replatting of a tract into separate homestead and nonhomestead parcels. The proper apportioning of value between the homestead tract and the nonhomestead tract is essential to compliance with loan-to-value limits. This apportionment of value should take into account that the partitioned unsecured tract may have critical value to the homestead because it provides access to a public street or, conversely, it may have no value save in conjunction with the disposition of the entire property. *See In re Tinsley*, 217 B.R. 188 (Bankr. N.D. Tex. 1997).

§ 11.5 Restrictions on Open-End Credit

A home equity loan must be for a definite original principal amount. The credit may not be in the form of an open-end account that may be debited from time to time or from which credit may be extended from time to time *unless* the open-end account qualifies as a home equity line of credit. Tex. Const. art. XVI, § 50(a)(6)(F).

The 1998 OCCC Commentary provides that open-end credit is defined by Tex. Rev. Civ. Stat. art. 5069–1B.002(14) (since codified as Tex. Fin. Code § 301.002(a)(14)) as an account under a written contract between a creditor and an obligor in connection with which—

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

2. interest may be charged from time to time on an outstanding unpaid balance; and

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

1998 OCCC Commentary, at 5.

The 1998 OCCC Commentary provides that amounts advanced by the lender after closing as a result of default for ad valorem taxes, hazard insurance premiums, and authorized collection costs, including reasonable attorney's fees, are not contemplated repeated transactions that render the loan an open-end account. 1998 OCCC Commentary, at 5.

Home Equity Line of Credit (HELOC): A home equity loan may be of the open-end account type if it qualifies as a home equity line of credit or HELOC. Tex. Const. art. XVI, § 50(a)(6)(F). A HELOC is a form of open-end account that may be debited from time to time, under which credit may be extended from time to time, and under which the borrower requests advances, repays money, and reborrows money. 7 Tex. Admin. Code § 153.82. To qualify as a HELOC, a home equity loan must meet eight additional constitutional requirements:

1. Borrower-Requested Advances. With a HELOC, credit may be extended to the borrower from time to time. However, any advances must be borrower-requested. Tex. Const. art. XVI, § 50(t)(1). Only a borrower named in the HELOC may request an advance. An owner may request an advance only if also named as a borrower. A HELOC may contain provisions that restrict which borrowers may request an advance or may require that all borrowers consent to the advance. 7 Tex. Admin. Code § 153.82.

2. Minimum Advances. No single debit or advance on a HELOC may be for less than $4,000. Tex. Const. art. XVI, § 50(t)(2).

3. Restriction against Credit/Debit Cards or Preprinted Checks Not Solicited by Borrower. Advances on a HELOC may not be made by credit card, debit card, or similar device or by preprinted check unsolicited by a borrower. Tex. Const. art. XVI, § 50(t)(3). A borrower may from time to time specifically request preprinted checks for use in obtaining a HELOC advance but may not request the lender to periodically send preprinted checks to the borrower. A borrower may use a check reorder form, which may be included with preprinted checks, as a means of requesting a specific number of preprinted checks. 7 Tex. Admin. Code § 153.84(2).

   A lender may offer one or more nonprohibited devices or methods for a borrower to request a HELOC loan advance. 7 Tex. Admin. Code § 153.84(1). The request may be made in person, but this is not required. 7 Tex. Admin. Code § 153.84(3). Permissible advance requests may be made by contacting the lender directly, by telephonic fund transfers, and by electronic fund transfers. Examples of devices to obtain a HELOC advance that are not "prohibited similar devices" to those specifically prohibited by the constitution include prearranged drafts, preprinted checks requested by the borrower, or written transfer instructions. 7 Tex. Admin. Code § 153.84(1).

4. Restriction on Fees. The restriction on closing expenses generally applicable to home equity loans is equally applicable to HELOCs. All such fees must be charged or collected only at the time of the initial extension of credit. No fee may be charged or collected in connection with any subsequent debit or advance. Tex. Const. art. XVI, § 50(t)(4). For the purpose of this restriction, the date of the initial extension of credit is the closing date of the HELOC. 7 Tex. Admin. Code § 153.85(b).

5. Restriction on Loan-to-Value Ratio. The 80 percent restriction on loan-to-value generally applicable to home equity loans also applies to HELOCs. The maximum principal amount that may be extended under the line of credit, when added to the aggregate total of the outstanding principal balances of all indebtedness secured by the homestead on the date of the extension of credit, may not exceed the 80 percent loan-to-value limit. Tex. Const. art. XVI, § 50(t)(5). The maximum principal amount that may be outstanding on a HELOC at any time is determined as of the date of loan closing and does not change during the term of the HELOC. 7 Tex. Admin. Code § 153.86(3). The following amounts, when added together, must be equal to or less than 80 percent of the fair market value of the property: (1) the amount of the advance; (2) the principal amount of the HELOC at the time of the advance; and (3) the principal balance outstanding on all other debts secured by the homestead calculated as of the date of closing of the HELOC. 7 Tex. Admin. Code § 153.86(1), (4).

6. Loan-to-Value Limit on Additional Advances. For HELOCs closed before January 1, 2018, no additional advances may be made if the total principal amount outstanding exceeds an amount equal to 50 percent of the fair market value of the homestead as determined on the date of the original extension of credit. Tex. Const. art.

XVI, § 50(t)(6) (repealed Jan. 1, 2018); 7 Tex. Admin. Code § 153.87, *repealed by* 43 Tex. Reg. 1839, 1839 (2018). To calculate the total principal amount outstanding for the purposes of determining the 50 percent threshold, the following amounts are added: (1) the principal amount of the HELOC at the time of the proposed advance and (2) the principal balance outstanding on all other debts secured by the homestead calculated as of the date of closing of the HELOC. 7 Tex. Admin. Code § 153.86(1), (4). If the total principal amount of the HELOC exceeds the 50 percent limitation but then is paid down to an amount equal to or less than 50 percent of the fair market value, subsequent advances are permitted subject to all other HELOC restrictions (for example, minimum advance limit and loan-to-value limit). For HELOCs closed on or after January 1, 2018, an 80 percent loan-to-value restriction applies to additional advances. Tex. Const. art. XVI, § 50(t)(5); 7 Tex. Admin. Code § 153.86.

7. Restriction against Unilateral Lender Amendments. A lender or holder of a HELOC may not unilaterally amend the extension of credit. Tex. Const. art. XVI, § 50(t)(7).

8. Restriction on Amortization. A HELOC must be repayable in regular periodic installments. The installments must be repayable not more often than every fourteen days and not less often than monthly. The installments must commence not later than two months from the date of the extension of credit. During the period in the loan term during which the borrower may request advances, the amount of each installment must be at least equal to the accrued interest on the loan. During the period in the loan term after which the borrower may not request additional advances, the amount of the installments must be substantially equal and sufficient to retire the indebtedness over the remaining term of the loan. Tex. Const. art. XVI, § 50(t)(8).

While installments on a HELOC are required to begin not later than two months from the date of the extension of credit, this does not apply when no advance is made at the time of closing. If no advance is made at closing, the repayment period is not required to begin until after the first advance. 7 Tex. Admin. Code § 153.88(b). While HELOC borrowers cannot be *required* to make loan installments more frequently than every fourteen days, this does not prohibit a borrower from voluntarily making payments on a schedule that is more frequent than that required by the lender. 7 Tex. Admin. Code § 153.88(c).

§ 11.6 Restriction on Fees

For home equity loans closed on or after January 1, 2018, closing expenses, other than interest or bona fide discount points used to buy down the interest rate, may not exceed 2 percent of the original principal amount of the loan. Loan closing expenses subject to this restriction include any fees paid to anyone to originate, evaluate, maintain, record, insure, or service the extension of credit, excluding fees for:

(i) an appraisal performed by a third party appraiser;

(ii) a property survey performed by a state registered or licensed surveyor;

(iii) a state base premium for a mortgagee policy of title insurance with endorsements established in accordance with state law; or

(iv) a title examination report if its cost is less than the state base premium for a mortgagee policy of title insurance without endorsements established in accordance with state law.

Tex. Const. art. XVI, § 50(a)(6)(E).

For home equity loans closed before January 1, 2018, closing expenses, other than interest, may not exceed 3 percent of the original principal amount of the loan. Appraisal fees, survey fees, title insurance premiums, and title search fees are included in the 3 percent loan fee calculation.

The 2 percent (3 percent for pre-2018 loans) fee limit applies only to charges, other than interest, that are required by the lender to be paid by the borrower or the borrower's spouse at the inception of the loan. Charges after loan closing for such matters as contractually permitted force-placed insurance premiums, returned check fees, late fees, and debt collection and foreclosure costs are subsequent events that are not subject to the fee limitation. *See* 7 Tex. Admin. Code § 153.5(19).

§ 11.6:1 Interest

Interest is specifically excluded from the fee limitation. Tex. Const. art. XVI, § 50(a)(6)(E). "Interest" had been interpreted by the Texas Finance Commission and Credit Union Commission in 2004 for purposes of the fee limitation to mean interest as defined by Tex. Fin. Code § 301.002(a)(4) and as interpreted by Texas courts. *See* 7 Tex. Admin. Code §§ 153.1(11), 153.5(3). Finance Code section 301.002, which is located in the subtitle of the Code governing usury, defines interest in pertinent part as "compensation for the use, forbearance, or detention of money." *See* Tex. Fin. Code § 301.002(a)(4). However, the supreme court invalidated this broad interpretation of interest as contrary to the intent and meaning of the constitution in *Finance Commission of Texas v. Norwood*, 418 S.W.3d 566 (Tex. 2013). The case reached the supreme court on petition for review of *Texas Bankers Ass'n v. Ass'n of Community Organizations for Reform Now (ACORN)*, 303 S.W.3d 404 (Tex. App.—Austin 2010, pet. granted), which was so styled and popularly referred to as the "ACORN" case before the supreme court ordered ACORN to be dismissed as a party because of its intervening dissolution and the style of the cause corrected to read *Finance Commission of Texas et al. v. Valerie Norwood et al.*, No. 10-0121, 54 Tex. Sup. Ct. J. 1077 (Tex. Feb. 25, 2011).

By adopting a definition of interest that is tied to a statute that can be amended by the legislature from time to time, the supreme court found that the commission's interpretation "utterly defeats the clear purpose of constitutionalizing it, which was to place the [fee] limitation beyond the Legislature's power to change without ratification by the voters." *Finance Commission of Texas*, 418 S.W.3d at 587. Moreover, the supreme court found implausible that the legislature intended that the same definition of interest that applies to and strengthens the consumer protections of usury would be applied to determining the constitutional fee limitation, which it weakens, although both are intended as consumer protections. Instead, the court adopted what it characterized as a narrower and "well-understood meaning of 'interest': the amount equal to the loan principal multiplied by the interest rate." *Finance Commission of Texas*, 418 S.W.3d at 587. The court concluded that "consistent with the [legislative] history, purpose, and text of Section 50(a)(6)(E), 'interest' as used in that provision means the amount determined by multiplying the loan principal by the interest rate." *Finance Commission of Texas*, 418 S.W.3d at 588. The court noted, however, that "this narrower definition of interest does not limit the amount a lender can charge for a loan, but instead limits only what part of the total

charge can be paid in front-end fees rather than interest paid over time." *Finance Commission of Texas*, 418 S.W.3d at 588 n.104.

Per diem interest and discount points are considered "interest" and not subject to the constitutional fee limitation. *Finance Commission of Texas*, 418 S.W.3d at 596; 7 Tex. Admin. Code § 153.1(11). Discount points, to be excluded from the fee limitation, must truly correspond to a reduced interest rate. 7 Tex. Admin. Code § 153.5(3)(B).

§ 11.6:2 Voluntary Optional Fees

Optional charges not required by the lender but paid at the sole discretion of the borrower are not fees subject to the fee limitation. 7 Tex. Admin. Code § 153.5(1). If the borrower chooses to pay premiums for certain insurance coverage (for example, credit life, credit accident, or health insurance coverage), the premiums are excluded from the fee limitation. 7 Tex. Admin. Code § 153.5(2) If the lender required these same coverages, the premiums would be included in the fee limitation.

§ 11.6:3 Fees to Originate

Fees to originate a home equity loan are subject to the fee limitation. 7 Tex. Admin. Code § 153.5(6). Fees required to be paid by the borrower to third parties for separate and additional consideration for activities relating to originating the loan are fees subject to the limit. Attorney's fees for document preparation and broker's fees are considered fees to originate a loan. However, charges for loan origination that third parties absorb and do not require the borrower or borrower's spouse to pay are not fees subject to the limit. 7 Tex. Admin. Code § 153.5(7).

§ 11.6:4 Fees Absorbed by Lender

Charges that the lender absorbs that might otherwise be paid by the borrower or borrower's spouse are not fees subject to the limitation. 7 Tex. Admin. Code § 153.5(5).

§ 11.6:5 Fees to Evaluate

Fees to evaluate the credit decision for a home equity loan are subject to the fee limitation. This includes fees collected to cover the expenses of a credit report, flood zone determination, tax certificate, or inspection. 7 Tex. Admin. Code § 153.5(8).

For home equity loans closed on or after January 1, 2018, appraisal fees, survey fees, and title report fees are excluded from the 2 percent fee limit. Tex. Const. art. XVI, § 50(a)(6)(E)(i)–(iv). For home equity loans closed before January 1, 2018, appraisal fees, survey fees, and title report fees are included in the 3 percent fee limit.

§ 11.6:6 Fees to Maintain

Fees to maintain a home equity loan are subject to the fee limitation. Fees paid at the inception of the loan as compensation for performing a service for the life of the loan (for example, flood zone determination fee or tax service fee) are subject to the limit. Also included in the limit are fees to maintain the loan customarily paid at the inception of the home equity loan but deferred for later payment. 7 Tex. Admin. Code § 153.5(9).

§ 11.6:7 Fees to Record

Fees paid to public officials and others for the purposes of recording public documents evidencing the lien are fees subject to the fee limit. 7 Tex. Admin. Code § 153.5(10).

§ 11.6:8 Fees to Insure

For home equity loans closed on or after January 1, 2018, a mortgagee's title insurance premium with endorsements is excluded from the 2 percent fee limit. Tex. Const. art. XVI, § 50(a)(6)(E)(iii).

For home equity loans closed before January 1, 2018, premiums to insure a home equity loan (for example, title insurance) are fees subject to the 3 percent limit.

Premiums that the borrower or borrower's spouse are required to pay to purchase homeowner's insurance are not fees subject to the fee limitation. This includes fire and extended coverage insurance and flood insurance. Though the failure to maintain insurance is generally an event of default on the home equity loan, it is not a condition to the extension of the credit. A lender may collect and escrow premiums for this insurance and include the premium in the periodic payment amount or principal amount. If the lender sells insurance to the borrower, the lender must also comply with all applicable law concerning the sale of insurance in connection with a mortgage loan. 7 Tex. Admin. Code § 153.5(20).

§ 11.6:9 Fees to Service

Any fee charged to or paid by an owner at the inception of the loan transaction to service a home equity loan is a fee subject to the fee limitation. Also, subject to the limit are fees to service a loan customarily paid at the inception of the home equity loan but deferred for later payment. 7 Tex. Admin. Code § 153.5(12).

§ 11.6:10 Escrow Funds

A lender may provide escrow services in a home equity loan transaction. Funds deposited by the borrower into the escrow account for the payment of taxes, insurance premiums, maintenance or homeowner's association assessments, or similar purposes remain the property of the borrower and are not considered fees subject to the fee limitation. However, a lender must not contract for a right of offset against escrow funds. This would result in a violation of prohibitions against additional collateral. 7 Tex. Admin. Code § 153.5(18).

§ 11.6:11 Fees to Subdivide or Replat

In some situations constitutional restrictions against additional collateral for a home equity loan may require the subdivision or replatting of a tract into separate homestead and nonhomestead parcels. Fannie Mae policy for the purchase of home equity loans suggests that all lender-required costs incurred by the borrower to resurvey, subdivide, or replat the property are fees subject to the fee limitation. Fannie Mae Lender Letter LL02-98 (May 28, 1998).

§ 11.6:12 Subsequent Events

The fee limitation applies only to fees contracted for or paid by an owner or owner's spouse at the inception of the loan. If the owner fails to perform covenants in the credit documents resulting in the lender's later assessment of costs to the owner, such postclosing costs are not subject to the limit. Examples of these costs include lender-acquired homeowner's insurance, late charges, returned check fees, collection costs, and foreclosure costs. 7 Tex. Admin. Code § 153.5(19). However, if the loan is subsequently modified, the original loan and its subsequent modification are regarded as a single transaction for purposes of calculating the fee limitation (that is, any fees paid in connection with the loan modification when added to fees charged at loan closing cannot exceed the applicable fee limitation). A modification for this purpose occurs when one or more terms of the loan are amended by written agreement between the lender and owner in which the original promissory note is not satisfied and replaced

with a new debt instrument. *See* 7 Tex. Admin. Code § 153.14(2)(D).

§ 11.6:13 Secondary Mortgage Loans

A secondary mortgage loan as defined by Tex. Fin. Code § 342.001(4) is subject to certain statutory fee limitations. *See* Tex. Fin. Code §§ 342.307, 342.308, 342.502. A home equity loan also constituting a secondary mortgage loan must comply with both the constitutional and statutory fee limitations. 7 Tex. Admin. Code § 153.5(13).

§ 11.7 Restriction against Recourse Debt

A home equity loan must be a nonrecourse loan with no personal liability against the owner or the owner's spouse. Tex. Const. art. XVI, § 50(a)(6)(C). The lender may look to recover only against the homestead property and not pursue a deficiency judgment against any owner or any owner's spouse. 7 Tex. Admin. Code § 153.4(2). If the owner or the spouse of the owner cosigns the home equity loan or consents to the home equity lien, the loan must not give the lender personal recourse against either the owner or the spouse. 7 Tex. Admin. Code § 153.4(1).

Fraud: The lender may have recourse against the owner or owner's spouse if the owner or spouse obtains the extension of credit by actual fraud. Tex. Const. art. XVI, § 50(a)(6)(C). Actual fraud requires a showing of dishonesty of purpose or intentional breach of duty that is designed to injure another or to gain an undue or unconscientious advantage. 7 Tex. Admin. Code § 153.4(3).

§ 11.8 Restriction against Prepayment Penalties

Home equity loans must be capable of being paid in advance without penalty or other charge. Tex. Const. art. XVI, § 50(a)(6)(G). A lockout provision in a loan contract prohibiting a buyer from paying early is considered a prepayment penalty. 7 Tex. Admin. Code § 153.7(2).

There is no express constitutional prohibition against note provisions applying principal prepayment to the last of the principal payments becoming due or providing that any partial prepayment would not alter the amount or timing of scheduled monthly payments. 1998 OCCC Commentary, at 5.

§ 11.9 Restriction against Additional Collateral

The homestead is the only collateral that may secure a home equity loan. The constitution expressly prohibits the credit from being secured by any other real or personal property. *See* Tex. Const. art. XVI, § 50(a)(6)(H).

§ 11.9:1 Incidental Collateral

A lender and an owner may enter into an agreement whereby a lender may acquire a security interest in items "incidental" to the homestead collateral. Items not considered additional real or personal property collateral are—

1. escrow funds for the payment of taxes and insurances;
2. an undivided interest in a condominium unit, a planned unit development, or the right to use and enjoy certain property owned by an association;
3. insurance proceeds related to the homestead;
4. condemnation proceeds;
5. fixtures; or
6. easements necessary or beneficial to the use of the homestead including

access easements for ingress and egress.

7 Tex. Admin. Code § 153.8(1).

§ 11.9:2 Guaranty

A guaranty or obligation of a cosigner or surety is considered additional collateral not permissible in connection with a home equity loan. A guaranty of a home equity loan is also deemed inconsistent with Tex. Const. art. XVI, § 50(a)(6)(C) (prohibition against personal recourse). 7 Tex. Admin. Code § 153.8(2). This prohibition against guaranties prevents borrowers from obtaining a home equity loan through the U.S. Department of Veterans Affairs cash-out refinance program, which provides a guaranty by the federal government. Tex. Att'y Gen. Op. No. KP-0183 (2018).

§ 11.9:3 Cross-Collateral Provisions

If the borrower has other loans with the home equity lender secured by nonhomestead property (for example, a loan to purchase a car or boat), the security documents on these other loans may sometimes provide that this other collateral secures all debt of the borrower with that lender. Such a cross-collateral provision violates the constitutional prohibition against other collateral for a home equity loan. 7 Tex. Admin. Code § 153.8(4).

§ 11.9:4 Right of Offset

A contractual right of offset is prohibited additional collateral to a home equity loan. 7 Tex. Admin. Code § 153.8(3).

§ 11.9:5 Undivided Interest in Tenancy in Common

A debtor's undivided interest in a tenancy in common will sustain a homestead claim. *See Laster v. First Huntsville Properties Co.*, 826 S.W.2d 125, 131 (Tex. 1991).

§ 11.9:6 Homestead Exceeding Maximum

An urban homestead consists of not more than ten contiguous acres of land located in a city, town, or village, together with improvements thereon. Rural homesteads may be up to one hundred acres for single adults and two hundred acres for a family. Tex. Const. art. XVI, §§ 50, 51; Tex. Prop. Code § 41.002. For a homestead established on a tract that exceeds the maximum allowable land area, the excess is considered additional real property, which may not secure a home equity loan. 7 Tex. Admin. Code § 153.8(5).

The inclusion of nonhomestead acreage may invalidate a home equity lien. Tex. Const. art. XVI, § 50(a)(6)(H). Procedural Rule P-47 requires as a condition to insuring a home equity lien against invalidity for inclusion of additional collateral that each owner execute an affidavit stating that (1) all the property is the homestead of the owner and owner's spouse; (2) no portion of the property is nonhomestead; and (3) the owner and spouse claim no other property as homestead except as described in the affidavit. Procedural Rule P-47, *Basic Manual of Rules, Rates and Forms for the Writing of Title Insurance in the State of Texas.*

There is no provision in Tex. Const. art. XVI, § 50, upholding the validity of a home equity lien if the collateral includes only de minimus acreage in excess of the maximum acreage. Procedural Rule P-47 requires, as a condition to insuring against invalidity for inclusion of excess acreage, that the insured obtain a surveyor's certificate or letter stating the exact acreage or square footage of the collateral or that a computation of the acreage be made by a software program designed to compute acreage

and generate drawings of land from the entry of boundary description calls.

§ 11.9:7 Options to Purchase

If the home equity lien extends to the maximum permitted acreage, lenders may risk invalidating the lien by taking an option to purchase an adjacent property deemed necessary to realize full value for the collateral. Fannie Mae policy for the purchase of home equity loans prohibits the lender taking such an option on adjacent acreage under circumstances in which such an interest could be construed as additional collateral. Fannie Mae Lender Letter LL02-98 (May 28, 1998).

§ 11.9:8 Distinguishing Rural and Urban Homestead

A home equity loan secured by property exceeding ten acres must be secured by a rural homestead. The proper classification of the homestead as rural or urban in certain cases is critical to the validity of the home equity lien.

Whether a homestead is urban or rural is a question of fact. The Texas legislature in 1999 enacted a detailed test for classifying homesteads as urban or rural. Tex. Prop. Code § 41.002(c). If a homestead does not meet the statutory definition of urban, it is classified as rural. The statute is the exclusive vehicle for distinguishing between rural and urban homesteads. *In re Bouchie*, 324 F.3d 780 (5th Cir. 2003).

A homestead is considered to be urban if, at the time the designation is made, the property is—

(1) located within the limits of a municipality or its extraterritorial jurisdiction or a platted subdivision; and

(2) served by police protection, paid or volunteer fire protection, and at least three of the following services provided by a municipality or under contract to a municipality:

(A) electric;

(B) natural gas;

(C) sewer;

(D) storm sewer; and

(E) water.

Tex. Prop. Code § 41.002(c).

§ 11.9:9 Distinguishing Family and Single Adult Homestead

A rural single adult homestead is limited to one hundred acres. A rural family homestead may include up to two hundred acres. Tex. Const. art. XVI, §§ 50, 51; Tex. Prop. Code § 41.002. Thus, a home equity loan secured by property exceeding one hundred acres may be secured by a family rural homestead only. The proper classification of the property in such cases as a family or single adult homestead is critical to the validity of the home equity lien.

No definition of the word *family* is supplied by the constitution. Case authorities provide that a family consists of (1) a group of people having the social status of a family living subject to one domestic government; (2) with the head of the family legally or morally obligated to support at least one other family member; and (3) a corresponding dependence by the other family members for this support. *NCNB Texas National Bank v. Carpenter*, 849 S.W.2d 875, 879–80 (Tex. App.—Fort Worth 1993, no writ).

A married person with a living spouse can have only a family homestead interest. The spouses in a marriage together enjoy the benefits of the family homestead exemption. The constitution gives each spouse a separate and undivided possessory interest in the homestead, which may be lost only by death or abandonment and may not be compromised by either his heirs or the other

spouse. Abandonment by one spouse of his homestead interest does not affect the character of the property as family homestead or the protection of the family homestead from judgment creditors as long as the other spouse occupies the property as a home. *Salomon v. Lesay*, 369 S.W.3d 540 (Tex. App.—Houston [1st Dist.] 2012, no pet.).

§ 11.10 Restriction on Number of Home Equity Loans

There may be only one home equity loan or reverse mortgage on the owner's homestead at any given time regardless of the aggregate total outstanding debt against the homestead. There is no corresponding restriction on the number of purchase-money, improvement, tax, or owelty liens on the same homestead. Tex. Const. art. XVI, § 50(a)(6)(K); 7 Tex. Admin. Code § 153.10(1). If the property ceases to be the homestead of the owner, the lender may treat a previous home equity lien as a nonhomestead lien for the purposes of this restriction. 7 Tex. Admin. Code § 153.10(2).

§ 11.11 Restriction on Frequency of Home Equity Loans

Home equity loans cannot be closed more frequently than one year after the closing date of the last such loan made on the same property. Tex. Const. art. XVI, § 50(a)(6)(M)(iii). A home equity loan cannot be refinanced until the expiration of one year after its original closing date. 7 Tex. Admin. Code § 153.14(1)(A). A new home equity loan cannot be made before the expiration of one year even if the previous home equity loan has been paid in full. 7 Tex. Admin. Code § 153.14(1)(B).

Effect of State of Emergency: A home equity loan may be closed before the first anniversary date of a prior home equity loan on the same property if the owner on oath requests an earlier closing due to a state of emergency that (1) has been declared by the President of the United States or governor as provided by law and (2) applies to the area where the homestead is located. Tex. Const. art. XVI, § 50(a)(6)(M)(iii).

Modification of Home Equity Loans: A home equity loan may be modified before the expiration of one year from the date of the original closing. A modification is a transaction in which one or more terms of the home equity loan are modified but the note is not satisfied and replaced. 7 Tex. Admin. Code § 153.14(2). Any modification of a home equity loan must be agreed to in writing by both the borrower and lender unless the law otherwise requires. An example of a modification that is not required to be in writing is the modification required under the Servicemembers Civil Relief Act. 7 Tex. Admin. Code § 153.14(2)(A). Any modification of a home equity loan may not include the advance of additional funds nor include new terms that would not have been permitted by applicable law on the date of the original loan closing. 7 Tex. Admin. Code § 153.14(2)(B), (2)(C). Any fees paid by the borrower for the modification are fees subject to the fee limitation. 7 Tex. Admin. Code § 153.14(2)(D).

§ 11.12 Restriction on Amortization of Home Equity Loans

No balloon payments are allowed with closed-end home equity loans. The loan must be scheduled to be repaid in substantially equal periodic installments. The installments must be payable not more often than every fourteen days or any less often than monthly. The installments must begin no later than two months from closing. Each installment payment must equal or exceed the amount of accrued interest on the note as of the date of that installment and contribute to the repayment of some amount of principal. A home equity loan may not contain a "negative amortization" feature, in which scheduled payments in the early years of the loan are in an amount less

than the accruing interest and the resulting interest deficits are capitalized into the loan principal. Tex. Const. art. XVI, § 50(a)(6)(L); 7 Tex. Admin. Code §§ 153.11, 153.16(2).

There are special amortization rules for home equity loans qualifying as a home equity line of credit. *See* Tex. Const. art. XVI, § 50(a)(6)(L)(ii). See section 11.5 above.

§ 11.12:1 Subsequent Events

The constitutional restriction on amortization does not preclude a lender's recovery of amounts made necessary by the borrower's failure to perform loan covenants such as taxes, adverse liens, insurance premiums, collections costs, and similar items. 7 Tex. Admin. Code § 153.11(4).

§ 11.12:2 Prepaid Interest

Scheduled periodic payments must begin no later than two months from the date that the extension of credit is made. This effectively limits prepaid interest to a maximum of one period's interest (first scheduled periodic payment would include interest in arrears for the preceding period). Tex. Const. art. XVI, § 50(a)(6)(L). Nothing in this provision limits or otherwise affects a lender's ability to charge or collect mortgage discount points with a corresponding interest rate reduction.

§ 11.13 Restriction on Interest

Interest on a home equity loan may be for any fixed or variable rate authorized by statute. Tex. Const. art. XVI, § 50(a)(6)(O).

§ 11.13:1 Variable Rate Notes

A home equity loan may be made on a variable interest rate tied to an external index. 7 Tex. Admin. Code § 153.16(3). If a variable interest rate is used, payment adjustments must be regularly made in amounts sufficient to fully amortize the outstanding loan balance in substantially equal successive payments between interest rate adjustments. 7 Tex. Admin. Code § 153.16(4)(A). The scheduled payment amount between each payment change date should be substantially equal and the amount of the payment should equal or exceed the amount of interest scheduled to accrue between each payment date and retire a portion of the principal. 7 Tex. Admin. Code § 153.16(4)(B). A home equity loan may contain an adjustable rate of interest that provides a maximum fixed interest rate pursuant to a schedule of stepped or tiered rates or provides a lower initial interest rate through the use of a discounted rate at the beginning of the loan. 7 Tex. Admin. Code § 153.16(5).

§ 11.13:2 Interest Rate

Interest rates on home equity loans must comply with all applicable constitutional and statutory provisions. 7 Tex. Admin. Code § 153.16(1). Tex. Const. art. XVI, § 11, permits interest rates of 10 percent or less on credit transactions unless alternative interest rates are specified by the legislature by statute. Interest rates of first-lien mortgages are nominally controlled by Tex. Fin. Code tit. 4, subtit. A. However, Congress by the enactment of the Depository Institutions Deregulation and Monetary Control Act of 1980 (12 U.S.C. § 1735f–7a) and the Alternative Mortgage Transaction Parity Act (12 U.S.C. §§ 3801–3806) preempted state interest rate limitations on first-lien residential mortgage loans. Secondary mortgage loans that exceed the constitutional rate of 10 percent are controlled by Texas Finance Code chapter 342, subchapter G. Chapter 124 of the Code and federal law provide for maximum rates on certain loans by credit unions. *See* 7 Tex. Admin. Code § 153.16(1).

§ 11.14 Restriction on Basis for Acceleration

The maturity of a home equity loan may not be accelerated because of a decrease in the market value of the homestead or the owner's default under some other indebtedness not secured by a prior valid encumbrance against the homestead. Tex. Const. art. XVI, § 50(a)(6)(J).

§ 11.14:1 Decrease in Value

The constitution does not prohibit the acceleration of a home equity loan because of a default by the owner of covenants contained in the loan, including covenants not to commit waste or remove property that indirectly bears on the market value of the homestead. 7 Tex. Admin. Code § 153.9(1).

§ 11.14:2 Cross-Default

A home equity loan can contain a cross-default provision only if the lien associated with the home equity loan is subordinate to the lien that is referenced by the cross-default clause. 7 Tex. Admin. Code § 153.9(2).

§ 11.15 Restriction against Confession of Judgment or Waiver of Citation

A home equity borrower may not be required to sign any confession of judgment or power of attorney allowing a confession of judgment or appearance for the debtor by a third party in a judicial proceeding. Tex. Const. art. XVI, § 50(a)(6)(Q)(iv); Tex. Civ. Prac. & Rem. Code § 30.001.

§ 11.16 Restriction against Assignment of Wages

A borrower may not be required to make an assignment of wages as security for a home equity loan. Tex. Const. art. XVI, § 50(a)(6)(Q)(ii).

§ 11.17 Restriction against Same Creditor Payoffs

A lender may not require a borrower to apply the loan proceeds of a home equity loan to pay off any other extension of credit by that same lender except one already validly secured by the homestead. Tex. Const. art. XVI, § 50(a)(6)(Q)(i). This provision precludes a creditor from demanding a security interest in the debtor's homestead as a condition for granting a forbearance, rearrangement, or recasting of an indebtedness not already secured by the homestead.

§ 11.17:1 Required Payment of Debt Secured by Homestead

A lender may require a debt secured by the homestead to be paid by the proceeds of a home equity loan. 7 Tex. Admin. Code § 153.18(2).

§ 11.17:2 Payoffs of Other Creditors

An owner is generally entitled to use the loan proceeds of a home equity loan for any lawful purpose at the owner's discretion. The lender may require that the loan proceeds be used to pay off, prepay, or reduce existing debt to another lender (for example, if underwriting guidelines based on earnings require that the debtor's monthly obligations be reduced to qualify for a loan). *See* 7 Tex. Admin. Code § 153.18(2).

§ 11.17:3 Other Restrictions Prohibited

Other than requiring loan proceeds to be paid on debt secured by the homestead or requiring payment of debt to another lender, the home equity lender may not otherwise specify or restrict the

use of the loan proceeds. 7 Tex. Admin. Code § 153.18(1).

§ 11.17:4 Voluntary Payoffs to Same Creditor

The constitution prohibits the home equity lender only from *requiring* the debtor to pay off existing nonhomestead debt to that same lender. An owner is not precluded from voluntarily paying off existing nonhomestead debt to the home equity lender. 7 Tex. Admin. Code § 153.18.

§ 11.18 Required Preloan Disclosures

§ 11.18:1 Twelve-Day Disclosure for Home Equity Loans

The Texas Constitution requires a preloan disclosure specifying certain restrictions on home equity lending. Tex. Const. art. XVI, § 50(g). The required disclosure is reproduced as form 11-1 in this chapter. The text of the preloan disclosure is intended as a summary of the borrower's rights under the constitution. In case of any conflict between the substantive provisions of Tex. Const. art. XVI, § 50, and the text of the preloan disclosure, the substantive provisions are controlling. A lender may supplement the consumer disclosure to clarify any discrepancies or inconsistencies. Tex. Const. art. XVI, § 50(g); 7 Tex. Admin. Code § 153.51(2).

A home equity loan may not be closed before the twelfth calendar day after the later of the date that the borrower submits a loan application to the lender or the date that the lender provides all owners with a preloan disclosure in a separate instrument. Tex. Const. art. XVI, § 50(g); 7 Tex. Admin. Code §§ 153.12, 153.51. One copy of the required consumer disclosure may be provided to married owners. 7 Tex. Admin. Code § 153.12.

If the discussions with the borrower are conducted primarily in a language other than English, the lender must provide the borrower with an additional copy of the notice, before the loan closing, that is translated in the written language in which the discussions were conducted. Tex. Const. art. XVI, § 50(g). The Office of the Consumer Credit Commissioner has provided a Spanish language translation of the notice on its website at **http://occc.texas.gov**.

If the owner has executed a power of attorney in the manner described by title 7, section 153.15(2), of the Texas Administrative Code, then the lender may provide the consumer disclosure to the attorney-in-fact instead of providing it to the owner. 7 Tex. Admin. Code § 153.51(5).

Computation of Time: In computing the expiration of the twelve-day cooling-off period, the date that the disclosure is made is not counted. The twelve-day cooling-off period commences on the day after the lender provides the required preloan disclosure. The loan may be closed at any time on the twelfth day of the notice period. 7 Tex. Admin. Code § 153.12. The lender may establish verifiable procedures to ensure that the owner receives the required notice within the required time frame. 7 Tex. Admin. Code § 153.51(3).

The constitution does not prohibit the required notice being delivered by mail. Government regulations adopted a "mailbox rule." If a lender mails the notice to the borrower, a reasonable period of time should be allowed for delivery. A three-calendar-day period not including Sundays and federal legal public holidays constitutes a rebuttable presumption for sufficient mailing and delivery. 7 Tex. Admin. Code § 153.51(1).

The required notice should be delivered to each owner and each owner's spouse. If delivery is on different dates, the twelve-day cooling-off period should be calculated from the last delivered notice.

Loan Application: An application is sufficient if submitted to an agent acting on behalf of a lender. 7 Tex. Admin. Code § 153.12(1). An application may be taken orally or electronically. It does not have to be in writing. 7 Tex. Admin. Code § 153.12(2).

§ 11.18:2 One-Day Disclosure

A home equity loan must not be closed until one business day after the owner of the homestead receives a copy of the final loan application, if not previously provided, and a final itemized disclosure of the actual fees, points, interest, costs, and charges that will be charged at closing. Tex. Const. art. XVI, § 50(a)(6)(M)(ii). The home equity loan may be closed at any time during normal business hours on the next business day following the calendar day on which the borrower receives the one-day preloan disclosure or any date thereafter. 7 Tex. Admin. Code § 153.13(6). A lender may satisfy this disclosure requirement by delivery to the borrower of a properly completed closing disclosure for a closed-end home equity loan. 7 Tex. Admin. Code § 153.13(3)(A). For an HELOC, a lender may satisfy this disclosure requirement by delivery to the borrower of a properly completed account-opening disclosure under Regulation Z. 12 C.F.R. § 1026.6(a).

§ 11.18:3 Bona Fide Emergency

If a bona fide emergency or other good cause exists and the lender obtains the written consent of the owner, the lender may provide the documentation to the owner or the lender may modify previously provided documentation on the day of closing. Tex. Const. art. XVI, § 50(a)(6)(M)(ii). The bona fide emergency must occur before the closing date. A home equity loan secured by a homestead in an area designated by the Federal Emergency Management Agency (FEMA) as a disaster area is an example of a bona fide emergency if the homestead is damaged during FEMA's declared incident period. 7 Tex. Admin. Code § 153.13(4).

§ 11.18:4 Other Good Cause

A condition that would cause the owner "financial impact or an adverse consequence" is an example of other good cause that would allow the required one-day preloan disclosure to be given or modified on the day of closing. 7 Tex. Admin. Code § 153.13(5)(A)(i). Another example of good cause occurs when the modified disclosure contains only a de minimus variance from the prior disclosure. To qualify as a de minimus variance, one or more of the actual disclosed fees, costs, points, and charges must be less than the initial preloan disclosure or, if greater than the amounts given in the initial preloan disclosure, not vary by the greater of $100 or 0.125 percent of the principal amount of the home equity loan at closing. 7 Tex. Admin. Code § 153.13(5)(B)(i).

§ 11.19 Borrower's Right of Rescission

The homestead owner or the owner's spouse may rescind a home equity loan transaction without penalty or charge within three days after the date that the extension of credit is made. Tex. Const. art. XVI, § 50(a)(6)(Q)(viii). The borrower's spouse has this right of rescission even if the spouse has no record title to or community property interest in the homestead. 7 Tex. Admin. Code § 153.25(1). Funding of a home equity loan should be delayed until after the expiration of the rescission period.

§ 11.19:1 Calculation of Rescission Period

The rescission period begins at closing (the signing of the loan documents) and continues for three calendar days. If the third calendar day falls on a Sunday or federal legal public holiday, the right of rescission is extended to the next

calendar day that is not a Sunday or a federal legal public holiday. 7 Tex. Admin. Code § 153.25(2). Loan proceeds may be disbursed on the day following the expiration of the rescission period.

§ 11.19:2 Truth in Lending Act

A home equity loan transaction may be subject to the provisions of the Truth in Lending Act and Regulation Z, which permit the borrower three business days to rescind a mortgage loan in applicable transactions. For a complete discussion of right of rescission procedures under the Truth in Lending Act and Regulation Z, see chapter 12 in this manual. A lender's compliance with the right of rescission procedures of the Truth in Lending Act and Regulation Z will satisfy the requirements of the constitution for a home equity loan if the notices are given to all owners of the homestead and to each spouse of an owner. 7 Tex. Admin. Code § 153.25(3).

§ 11.20 Requirements for Loan Documents

§ 11.20:1 Written Contract Required

A home equity lien must be a voluntary lien created under a written agreement. Tex. Const. art. XVI, § 50(a)(6)(A).

Plain Language and Font Requirements: A home equity loan contract for a home equity loan regulated by the Office of the Consumer Credit Commissioner (OCCC) must be written in plain language designed to be easily understood by the average consumer and must be printed in an easily readable font and type size. See the discussion in section 11.1 above.

Model Forms: In addition to requiring plain-language contracts, the Finance Code empowers the Finance Commission to adopt rules governing loan contracts subject to that section and to adopt model loan contracts. Tex. Fin. Code § 341.502(b). A lender may use either a model contract or its own nonstandard contract if the nonstandard contract has been submitted to, but not disapproved by, the OCCC. See the discussion in section 11.1 above.

§ 11.20:2 Required Loan Conditions

The constitution states that a home equity loan is an extension of credit made on specified conditions. Some of the conditions are self-actuating. *See* Tex. Const. art. XVI, § 50(a)(6)(Q). Tex. Const. art. XVI, § 50(a)(6)(Q)(vi), requires that "the security instruments securing the extension of credit contain a disclosure that the extension of credit is the type of credit defined by Section 50(a)(6), Article XVI, Texas Constitution." Practitioners differ as to whether the remaining conditions listed at Tex. Const. art. XVI, § 50(a)(6)(Q), must be included in the home equity loan documents. The home equity extension of credit, form 11-2 in this chapter, includes the conditions. In the absence of definitive authority on this question, the attorney is cautioned to exercise professional judgment regarding the inclusion of these conditions. If the conditions are included in the home equity extension of credit, the conditions may affect the negotiability of the instrument under chapter 3 of the Texas Business and Commerce Code. However, there is some dated authority that a nonrecourse note is by its very nature nonnegotiable. *Hinckley v. Eggers*, 587 S.W.2d 448, 450 (Tex. App.—Dallas 1979, writ ref'd n.r.e.).

§ 11.20:3 Required Disclosure

The security documents for a home equity loan must disclose that the credit is an equity loan subject to Tex. Const. art. XVI, § 50(a)(6). This disclosure should appear in the mortgage instrument bold-faced, capitalized, underlined, or otherwise conspicuously set out from the surrounding material. 1998 OCCC Commentary, at 10.

§ 11.20:4 Restriction against Blanks Left in Instruments

The borrower in a home equity loan transaction may not sign any instrument in which blanks for substantive terms of agreement are left to be filled in. Tex. Const. art. XVI, § 50(a)(6)(Q)(iii). The prohibited blanks refer to loan contract terms and not signature blocks that must be signed to execute the document. 7 Tex. Admin. Code § 153.20. No guidance is provided regarding blanks for recording information unknown at the time of closing.

The constitution does not specify the instruments to which this restriction applies. Procedural Rule P-47 requires, as a condition to insuring a home equity lien against invalidity for impermissible blanks, that no such blanks appear in (1) the written acknowledgement of the fair market value, (2) the insured mortgage, (3) the promissory note, or (4) any affidavits of compliance with Tex. Const. art. XVI, § 50(a)(6). *See* Procedural Rule P-47, *Basic Manual of Rules, Rates and Forms for the Writing of Title Insurance in the State of Texas*.

§ 11.20:5 Required Copies

The borrower at closing must receive a copy of the final loan application and all executed documents signed by the borrower at closing and related to the extension of credit. Tex. Const. art. XVI, § 50(a)(6)(Q)(v). It is not required that signed copies be provided as long as the copies accurately reflect the documents that the borrower actually signed at closing. *Pelt v. U.S. Trust N.A.*, 359 F.3d 764, 768 (5th Cir. 2004).

Except for the requirement that the borrower receive a copy of the final loan application, the constitution does not require the lender to provide copies of documents signed by the borrower before closing but related to the extension of credit. *See* 7 Tex. Admin. Code § 153.22.

§ 11.20:6 Required Signatories

A written instrument creating a home equity lien must be signed by each owner and each owner's spouse (regardless of whether the spouse claims ownership or other interest in the property or is liable on the debt). Tex. Const. art. XVI, § 50(a)(6)(A). A spouse or owner who is not a maker of the note may consent to the lien by signing a written consent to the mortgage instrument. The consent may be included in the mortgage instrument or a separate document. 7 Tex. Admin. Code § 153.2(2).

A lender, at the lender's option, may require each owner and each owner's spouse to consent to the home equity loan. This is in addition to the consent required for the lien. 7 Tex. Admin. Code § 153.2(3).

A trustee may sell or encumber a homestead property for which the trustee holds title in a "qualifying trust" without the joinder of either spouse with a beneficial interest in the trust unless expressly prohibited by the instrument or court order creating the trust. A married person who transfers homestead property to the trustee of a qualifying trust, however, must comply with the requirements relating to the joinder of the person's spouse as provided by chapter 5 of the Texas Family Code. Tex. Prop. Code § 41.0021.

§ 11.20:7 Junior-Lien Requirements

If a home equity loan is subordinate to another lien on the property, the loan may also be governed by Texas Finance Code chapter 342 unless the interest rate is 10 percent per year or less. *See* Tex. Fin. Code §§ 342.001(4), 342.005. The loan documents must comply with the requirements applicable to secondary mortgage loans. 1998 OCCC Commentary, at 4–5. If the mortgagee has a license from the Office of Consumer Credit Commissioner, both the home equity extension of credit (promissory note) (form 11-2 in this chapter) and deed of trust (home equity

loan) (form 11-3) must contain the name, mailing address, and telephone number of the OCCC. Tex. Fin. Code § 14.104. See clause 8-9-24 in this manual for an example of such a disclosure. Additionally, the printed language in the home equity extension of credit and the deed of trust must be modified slightly. In the deed of trust, in paragraph B.4., the phrase "in a form acceptable to Lender" must be struck so that the obligation reads "maintain an insurance policy that . . . ." This change is necessary because Finance Code sections 342.404, 342.405, and 342.413 prohibit a lender from approving the selection of insurance. *See* Tex. Fin. Code §§ 342.404, 342.405, 342.413. Also, Finance Code section 342.404 provides that if insurance is required in connection with a loan made under that chapter, the lender must furnish the borrower a statement like clause 11-4-8, which may be added to the home equity deed of trust as a numbered paragraph under "General Provisions." *See* Tex. Fin. Code § 342.404.

The same chapter imposes other requirements if the mortgagee sells or procures insurance related to the loan at a rate not fixed or approved by the State Board of Insurance. *See* Tex. Fin. Code § 342.405.

Finance Code section 342.307 limits the enforcement fees that may be included in secondary mortgage loan documents. To comply with this section for a home equity loan that is also a secondary mortgage loan, in the home equity extension of credit (promissory note) (form 11-2), the alternative indicated attorney's fee provision should be used. In the deed of trust (form 11-3), in paragraph E.10., after the words "the hands of an attorney" add "who is not an employee of Lender."

If the prior lien instrument contains a due-on-sale clause, the home equity deed of trust may violate the due-on-sale clause.

§ 11.20:8 Home Loans

A home equity loan may also be subject to the requirements of Texas Finance Code chapter 343, regulating certain types of "home loans." See section 10.14 in this manual.

§ 11.21 Restriction on Place of Closing

A home equity loan may be closed only at the offices of the lender, an attorney at law, or a title company. Tex. Const. art. XVI, § 50(a)(6)(N). The place of closing must be the permanent physical address of the office or branch office of the lender, attorney, or title company so that the closing occurs in an authorized physical location other than the homestead. 7 Tex. Admin. Code § 153.15(1). This provision is intended to protect homeowners from coercive conduct in an equity loan closing conducted at the "kitchen table" of one's home.

"Closing" as construed by the Texas Supreme Court in *Finance Commission of Texas v. Norwood*, 418 S.W.3d 566 (Tex. 2013), is a process that includes not just the final action of executing documents and funding the loan but also the initial action of obtaining required consents. Accordingly, the supreme court concluded that a homeowner's executing a required consent or a power of attorney is part of the closing process and also must occur only at one of the locations authorized by Tex. Const. art. XVI, § 50(a)(6)(N). *Finance Commission of Texas*, 418 S.W.3d at 588; *see also* 7 Tex. Admin. Code § 153.15(3). The court further concluded that the commission's interpretations of section 50(a)(6)(N) (which in part authorized a lender to accept a properly executed power of attorney allowing the attorney-in-fact to execute loan documents on behalf of the homeowner or to receive consents of the homeowner required under section 50(a)(6)(A) by mail or other delivery of the homeowner's signature) contradict the intent and purpose of the text of the provision

and are therefore invalid. *Finance Commission of Texas*, 418 S.W.3d at 588–89. Although Fannie Mae generally allows a duly appointed attorney-in-fact to sign the security instrument or note on the borrower's behalf when certain conditions are met, its Selling Guide has been updated with respect to loans purchased on or after February 1, 2014, to prohibit the use of a power of attorney in cash-out refinance transactions and other transactions in connection with Texas section 50(a)(6) mortgage loans. See Fannie Mae, Selling Guide Announcement SEL-2013-08 (Oct. 22, 2013).

§ 11.21:1 Offices of Lender

A home equity loan may not be closed in the offices of a mere loan broker. To qualify as a lender, the party must advance funds directly to the borrower or be identified as the payee of the note. 7 Tex. Admin. Code § 153.15.

§ 11.21:2 Offices of Title Company

The offices of a title company include the leased or owned Texas office location of a title insurance company or (1) a direct operation, (2) a title insurance agent, or (3) an attorney conducting the attorney's business in the name of the title insurance company, direct operation, or title insurance agent (if the attorney or the attorney's bona fide employees are escrow officers under Tex. Ins. Code § 2501.003(4)). Procedural Rule P-44, *Basic Manual of Rules, Rates and Forms for the Writing of Title Insurance in the State of Texas*. The phrase *title company* refers to an agent of a title insurance company. A company merely performing title abstractions is not within the definition of a title company. *Rooms With A View, Inc. v. Private National Mortgage Ass'n, Inc.*, 7 S.W.3d 840, 846–47 (Tex. App.—Austin 1999, pet. denied).

§ 11.22 Restriction on Release or Transfer of Note

Within a reasonable time after repayment of a home equity loan, the lender must cancel and return the promissory note to the borrower and deliver in a recordable form a release of lien. If the loan is being refinanced, a lender may deliver an endorsement and assignment of the lien. Tex. Const. art. XVI, § 50(a)(6)(Q)(vii). The lender is required to provide these copies without charge. 7 Tex. Admin. Code § 153.24(1). The lender is not required, however, to record or pay for the recording of the release of lien. 7 Tex. Admin. Code § 153.24(2). Thirty days is a reasonable time for the lender to perform the duties required by this section. 7 Tex. Admin. Code § 153.24(3). An affidavit of lost note or imaged note, or equivalent, may be returned to the owner in lieu of the original note if the original note has been lost or imaged. 7 Tex. Admin. Code § 153.24(4).

§ 11.23 Restriction on Refinancing

The refinancing of a debt, any portion of which is secured by a home equity lien, may be made only by an extension of credit meeting all of the constitutional requirements of a home equity loan or reverse mortgage, unless the refinancing meets all of the following conditions of Tex. Const. art. XVI, § 50(f)(2):

1. One-Year Prohibition. The refinance is not closed before the first anniversary of the date the extension of credit was closed. Tex. Const. art. XVI, § 50(f)(2)(A).
2. Prohibition on Additional Funds. The refinanced extension of credit does not include the advance of any additional funds other than (a) funds advanced to refinance a debt described by Tex. Const. art. XVI, § 50(a)(1)–(7); or (b) actual costs and reserves required by the lender to refinance the debt.

3. Eighty Percent Loan-to-Value Limitation. The refinance is of a principal amount that, when added to the aggregate total of all indebtedness secured by the homestead, does not exceed 80 percent of the fair market value of the homestead on the date of the refinance.

4. Twelve-Day Notice. The lender provides the owner the notice contained in form 11-8 of this chapter within three business days of loan application and at least twelve days before the refinance is closed. Tex. Const. art. XVI, § 50(f)(2)(D).

5. Affidavit of Compliance. An affidavit executed by the owner or the owner's spouse acknowledging that the requirements of Tex. Const. art. XVI, § 50(f)(2) have been met conclusively establishes that the requirements of Tex. Const. art. XVI, § 50(a)(4) have been met. See form 11-9 for a sample affidavit.

Additionally, any refinance of a debt against homestead to secure a debt for purchase money, taxes, owelty of partition, federal tax lien, or improvements that includes the advance of additional funds may not be secured by a valid lien against the homestead unless (1) the additional funds advanced are to pay taxes, an owelty of partition, or improvements, (2) the new loan is made as a home equity loan or reverse mortgage, or (3) the additional funds are for reasonable costs necessary to refinance such debt. Tex. Const. art. XVI, § 50(e); *see* 7 Tex. Admin. Code § 153.41.

§ 11.24 Forfeiture Provision

Constitutional provisions for home equity lending contain a forfeiture provision for loans failing to meet constitutional requirements. If a lender or holder fails to comply with the lender's or holder's constitutionally mandated obligations within sixty days after notice of the violation by the borrower, the lender or holder forfeits all principal and interest on the note. Tex. Const. art. XVI, § 50(a)(6)(Q)(x). Only a violation of a constitutionally mandated provision in the extension of credit will trigger a forfeiture. *Vincent v. Bank of America*, 109 S.W.3d 856 (Tex. App.—Dallas 2003, no pet.) (citing an earlier version of Tex. Const. art. XVI, § 50(a)(6)(Q)(x)).

§ 11.25 Cure Provisions

If a lender fails to comply with constitutional restrictions on home equity lending, the lender may avoid a forfeiture of all principal and interest and enforce an otherwise invalid lien by timely curing the failure in the manner specified by the Texas Constitution. Constitutional curative measures are equally available to cure lender noncompliance in an original home equity loan or in the refinance of a home equity loan. Tex. Const. art. XVI, § 50(a)(6)(Q)(x); 7 Tex. Admin. Code § 153.95(a); *In re Adams*, 307 B.R. 549, 553–54 (Bankr. N.D. Tex. 2004). Cure procedures are specific to certain identified home equity lending violations.

§ 11.25:1 Violation of Restriction on Fees, Restriction on Prepayment Penalties, or Restriction on Interest

In the event of a violation of the constitutional restrictions found at Tex. Const. art. XVI, § 50(a)(6)(E) (restriction on fees), Tex. Const. art. XVI, § 50(a)(6)(G) (restriction on prepayment penalties), or Tex. Const. art. XVI, § 50(a)(6)(O) (restriction on interest), the lender may cure the violation by refunding the borrower the amount of any overcharge. *See* Tex. Const. art. XVI, § 50(a)(6)(Q)(x)(a). The cure is effective when the lender credits the borrower's account with a refund, places the refund in the mail or other delivery carrier, or delivers the refund in person. A cure may also be made using

any other delivery method agreed to by the borrower in writing after the lender receives notice of the lender's failure to comply. 7 Tex. Admin. Code § 153.94(a).

§ 11.25:2 Violation of Restriction on Loan-to-Value Ratio

In the event of a violation of the constitutional restriction found at Tex. Const. art. XVI, § 50(a)(6)(B) (restriction on loan-to-value ratio), the lender may cure the violation by sending the borrower written acknowledgment that the lien is valid only to the extent that the loan amount does not exceed the loan-to-value restriction. *See* Tex. Const. art. XVI, § 50(a)(6)(Q)(x)(b). The cure is effective when the lender places the acknowledgment in the mail or other delivery carrier or delivers the acknowledgment in person. A cure may also be made using any other delivery method that the borrower agrees to in writing after the lender receives notice of the lender's failure to comply. 7 Tex. Admin. Code § 153.94(a).

§ 11.25:3 Violation of Restriction against Additional Collateral or Restriction on Qualifying Agricultural Homestead (for Pre-2018 Loans)

In the event of a violation of the constitutional restrictions found at Tex. Const. art. XVI, § 50(a)(6)(H) (restriction against additional collateral), or Tex. Const. art. XVI, § 50(a)(6)(I) (restriction on qualifying agricultural homestead), the lender may cure the violation by sending the borrower an acknowledgment that the home equity loan is not secured by the prohibited additional collateral or nonqualifying agricultural property (for pre-2018 loans). *See* Tex. Const. art. XVI, § 50(a)(6)(Q)(x)(b). The cure is effective when the lender places the acknowledgment in the mail or other delivery carrier or delivers the acknowledgment in person. A cure may also be made using any other delivery method that the borrower agrees to in writing after the lender receives notice of the lender's failure to comply. 7 Tex. Admin. Code § 153.94(a).

§ 11.25:4 Violation of Restriction against Prohibited Amount, Percentage, Term, or Other Provision

In the event of a violation involving some other prohibited amount, percentage, term, or other provision, the lender may cure the violation by sending written notice to the borrower amending the prohibited provision and adjusting the account of the borrower to ensure that the borrower is not required to pay more than an amount permitted by the constitution or that the borrower is not subject to any other term or provision prohibited by the constitution. *See* Tex. Const. art. XVI, § 50(a)(6)(Q)(x)(c). The cure is effective when the lender makes the necessary adjustment to the borrower's account and places the required notice in the mail or other delivery carrier or personally delivers the notice to the borrower. A cure may also be made using any other delivery method agreed to by the borrower in writing after the lender receives notice of the lender's failure to comply. 7 Tex. Admin. Code § 153.94(a).

§ 11.25:5 Violation of Requirement for Delivery of Documents

In the event of a violation of the constitutional restriction found at Tex. Const. art. XVI, § 50(a)(6)(Q)(v) (requirement for delivery to the borrower of copies of all documents signed by the borrower), the lender may cure the violation by delivering the required documents to the borrower. *See* Tex. Const. art. XVI, § 50(a)(6)(Q)(x)(d). The cure is effective when the lender delivers the required documents by placing them in the mail or other delivery carrier or by personally delivering the documents to the borrower. A cure may also be made using any

other delivery method agreed to by the borrower in writing after the lender receives notice of the lender's failure to comply. 7 Tex. Admin. Code § 153.94(a).

§ 11.25:6 Violation of Requirement for Acknowledgment of Fair Market Value of Homestead

In the event of a violation of the constitutional restriction found at Tex. Const. art. XVI, § 50(a)(6)(Q)(ix) (requirement that lender and borrower sign a written acknowledgment of the fair market value of the homestead), the lender may cure the violation by obtaining the appropriate signatures on the required acknowledgment of fair market value. *See* Tex. Const. art. XVI, § 50(a)(6)(Q)(x)(d).

§ 11.25:7 Violation of Restriction on Number of Home Equity Loans

In the event of a violation of the restriction found at Tex. Const. art. XVI, § 50(a)(6)(K) (antistacking provision allowing only one home equity loan on a homestead at a time), the lender may cure the violation by sending the borrower a written acknowledgment that the accrual of interest and all of the borrower's obligations under the extension of credit are abated while any prior lien remains secured by the homestead. *See* Tex. Const. art. XVI, § 50(a)(6)(Q)(x)(e). The cure is effective when the lender places the acknowledgment in the mail or other delivery carrier or personally delivers the acknowledgment to the debtor. A cure may also be made using any other delivery method agreed to by the borrower in writing after the lender receives notice of the lender's failure to comply. 7 Tex. Admin. Code § 153.94(a).

§ 11.25:8 "Catch-All" Cure Provision

In the event of a violation of constitutional restrictions on home equity lending that cannot be cured by any of the above cure provisions, the lender may cure the violation by refunding or crediting the borrower $1,000 and offering to refinance the extension of credit for the borrower for the remaining term at no cost to the borrower, on the same terms, including interest, as the original extension of credit together with any modifications necessary to comply with the constitution. *See* Tex. Const. art. XVI, § 50(a)(6)(Q)(x)(f). The lender must make a $1,000 refund or give a $1,000 credit. 7 Tex. Admin. Code § 153.96(b)(1). Additionally, the lender must either modify or refinance. If modification is elected, the modification may be made without completing the requirements of a refinance. If a refinance is elected, the refinance must meet all constitutional requirements for a home equity loan. 7 Tex. Admin. Code § 153.96(b).

The catch-all cure provision presupposes the debtor's compliance and cooperation with the lender's attempted cure. The debtor may not block the lender's cure by the debtor's refusal to cooperate. The cure protection afforded the lender is complete on the refund or credit of the $1,000 and the timely delivery of an offer to modify or refinance. 7 Tex. Admin. Code § 153.96; *In re Adams*, 307 B.R. 549, 560 (Bankr. N.D. Tex. 2004). The offer to modify or refinance is delivered by placing the offer in the mail or with other delivery carriers or by personal delivery to the borrower. 7 Tex. Admin. Code § 153.96(a)(2). After the borrower accepts an offer to modify or refinance, the lender or holder must complete, or make a good-faith effort to complete, the modification or refinance with a reasonable time not to exceed ninety days. 7 Tex. Admin. Code § 153.96(d).

§ 11.25:9 Noncurable Violations

Any violation of Tex. Const. art. XVI, § 50(a)(6)(P) (prohibition against home equity loans made by an unauthorized lender), or Tex. Const. art. XVI, § 50(a)(6)(A) (requirement that home equity liens be created by written agreement with the consent of each owner and each owner's spouse), are noncurable and result in the forfeiture of all principal and interest on the home equity loan. An exception to this rule applies in the case in which one spouse fails to consent by signature to the home equity loan but subsequently does consent. *See* Tex. Const. art. XVI, § 50(a)(6)(Q)(xi).

§ 11.25:10 Burden of Proof to Show Cure

The lender bears the burden of showing the lender's compliance with any cure provision relied on by the lender to cure a violation. 7 Tex. Admin. Code §§ 153.94(b), 153.96(c).

§ 11.25:11 Timeliness of Cure

To timely cure a violation of a home equity lending restriction, the lender must comply with the cure provisions within sixty days after the lender is notified of the violation by the borrower. Tex. Const. art. XVI, § 50(a)(6)(Q)(x). The sixty-day cure period begins the day after the lender or holder receives the borrower's notification to the lender or holder. If the borrower mails the notification to the lender or holder, a rebuttable presumption arises that the delivery date is the date indicated on the certified mail receipt or other carrier-delivery receipt signed by the lender or holder. This does not preclude other methods of delivering the notification. However, with other methods of delivery, the borrower has the burden of proving delivery. *See* 7 Tex. Admin. Code §§ 153.92, 153.93. After the commencement of the sixty-day cure period, all calendar days are counted up to day sixty. If day sixty falls on a Sunday or a federal legal public holiday, the cure period is extended to include the next day that is not a Sunday or a federal legal public holiday. 7 Tex. Admin. Code § 153.92(a). If a borrower provides inadequate notice of the alleged violation, the sixty-day cure period does not begin to run. 7 Tex. Admin. Code § 153.92(b).

If a lender or holder appropriately cures the violation before receiving notice of the violation from the borrower, the cure is as effective as if the lender or holder had timely cured the violation after receiving notice from the borrower. 7 Tex. Admin. Code § 153.95(b).

§ 11.25:12 Requirements for Borrower's Notification of Lender's Failure to Comply

The borrower notifies the lender or holder of an alleged failure to comply with an obligation by taking reasonable steps to give notice of the failure. The notification must include an identification of the borrower, an identification of the loan, and a description of the alleged failure to comply. The notice need not cite the section of the constitution allegedly violated. 7 Tex. Admin. Code § 153.91.

To designate a point of contact for receipt of notice of failure to comply, the lender or holder may make at closing a reasonably conspicuous designation in writing of a location where the borrower may deliver written or oral notice of violation of home equity restrictions. The designation may include a mailing address, a physical address, telephone number, e-mail, or other point of contact. The lender or holder may change this point of contact by conspicuous written notice to the borrower. The change is effective when sent by the lender or holder. 7 Tex. Admin. Code § 153.93.

§ 11.25:13 Statute of Limitations

The Texas Supreme Court ruled in 2016 that the four-year residual limitations period of Tex. Civ. Prac. & Rem. Code § 16.051 does not apply to constitutional infirmities under Tex. Const. art. XVI, § 50(a)(6). *Wood v. HSBC Bank USA, N.A.*, 505 S.W.3d 542 (Tex. 2016). Consequently, a borrower may bring an action against his home equity lender for constitutional violations at any time during the life of the loan if the lender fails to correct the alleged defects after notification of the defect. This Texas Supreme Court decision reversed the precedent set in *Priester v. JP Morgan Chase Bank*, 708 F.3d 667 (5th Cir. 2013), which applied the four-year residual limitations period to home equity loan violations.

§ 11.26 Nonseverability Provision

Home equity lending is authorized only on condition that none of the constitutional restrictions ever be preempted by federal law. To this end, Tex. Const. art. XVI, § 50(j), contains a "poison pill" provision that all home equity provisions are nonseverable and that none would have been enacted without the other. If any home equity provision is held to be preempted by federal law, all home equity lending provisions are rendered invalid. In such a case, a savings provision upholds the validity of home equity loans made before the decision holding any aspect of home equity lending preempted by federal law. Tex. Const. art. XVI, § 50(j).

§ 11.27 Truth in Lending

A home equity loan may be subject to the Truth in Lending Act and its accompanying Regulation Z. See the discussion of this subject in section 11.19:2 above and chapter 12 in this manual.

[Sections 11.28 through 11.30 are reserved for expansion.]

II. Reverse Mortgage Loans

§ 11.31 Overview

Reverse mortgage loans secured on Texas homestead properties were first authorized by constitutional amendment effective January 1, 1998. Tex. Const. art. XVI, § 50(a)(7), authorizes reverse mortgages, and Tex. Const. art. XVI, § 50(k)–(r), (v), defines and governs them. There are currently no enabling statutes that implement these constitutional provisions or interpretive rule making, although the power to interpret constitutional reverse mortgage provisions has been expressly delegated to the Texas Finance Commission and the Texas Credit Union Commission. *See* Tex. Fin. Code §§ 11.308, 15.413.

Reverse mortgages are a type of home equity loan for which only senior homeowners, age sixty-two or older, are eligible. Tex. Const. art. XVI, § 50(k)(2). The loans are meant to provide senior homeowners the resources needed to remain in their homes for their remaining lives, if they so desire, by converting their home equity into annuity-like periodic payments, or advances, to the homeowners for life (referred to as a "tenure" option) or, if preferred, a term of years (referred to as a "term" option) that may be used to pay for housing costs, medical care,

and other costs of living. A homeowner under a reverse mortgage may also elect to receive a single advance at loan settlement (referred to as a "lump sum" option) or multiple unscheduled advances under a line of credit. Tex. Const. art. XVI, § 50(p).

A reverse mortgage is a nonrecourse obligation generally based on an owner's equity in the owner's homestead property, and the owner is not required to demonstrate general creditworthiness or a source of income or other assets with which to repay the loan. Any Texas resident age sixty-two or older who owns and occupies as a principal dwelling a single-family home, a qualified condominium unit or townhouse, or a permanently attached and qualified manufactured home in which there is sufficient appraised home equity should qualify for a reverse mortgage. *See* Tex. Const. art. XVI, § 50(k)(2), (k)(4). Home equity means the appraised market value of the homestead property minus the outstanding balance of all mortgages and liens secured on the homestead property. *See* Tex. Const. art. XVI, § 50(a)(6)(B).

An owner generally is not obligated to make any repayments of principal or interest during the term of a reverse mortgage as long as the owner continues to occupy the home as a principal residence and keeps property tax and insurance payments current. Tex. Const. art. XVI, § 50(k)(6). Advances made to a homestead owner under a reverse mortgage accrue interest, including interest on interest, until the occurrence of a maturity event, when the full loan balance of principal and interest is repaid to the lender in one final lump-sum payment, typically from sales proceeds when the homestead property is sold by the owner or by the owner's estate after the owner dies. Maturity events are strictly limited by the constitution. A reverse mortgage generally cannot be called due and payable until (1) the homeowner sells or transfers the homestead property; (2) the homeowner permanently abandons the property for twelve consecutive months without obtaining the lender's prior approval or, if the loan is used for the purchase of a homestead property, the borrower fails to timely occupy the homestead property as the borrower's principal residence within a specified period after loan closing stipulated in the written loan agreement; or (3) the homeowner (or, if married, the last of the homeowners) dies. Tex. Const. art. XVI, § 50(k)(6)(A)–(C). The lender in some cases may, however, call the loan due if discovering the owner has committed actual fraud in obtaining the loan; has defaulted on contractual obligations in the deed of trust to repair and maintain, pay taxes and assessments on, or insure the homestead property; or has failed to maintain the lender's first-lien priority on the homestead property. Tex. Const. art. XVI, § 50(k)(6)(D).

Texas procedural rules provide the authority for title insurance companies to insure the validity of reverse mortgage liens and for lenders to foreclose reverse mortgage liens under conditions permitted by the Texas Constitution. Specifically, the Texas Commissioner of Insurance has adopted a reverse mortgage endorsement (T-43) to the standard mortgagee's form of title insurance policy in Procedural Rule P-45, and the Supreme Court of Texas has adopted revisions to rules 735 and 736 of the Texas Rules of Civil Procedure to provide for an expedited procedure for foreclosing reverse mortgage loans requiring a court order as a condition to foreclosure. *See* Tex. R. Civ. P. 735–736; Procedural Rule P-45, *Basic Manual of Rules, Rates and Forms for the Writing of Title Insurance in the State of Texas*.

Although the Texas reverse mortgage is a particular type of home equity loan, it is important to note that the numerous conditions imposed on home equity loans under section 50(a)(6) described in part I. of this chapter are inapplicable to reverse mortgages authorized by section

50(a)(7). The limitations under section 50(a)(6), for example, restricting the permitted loan-to-value ratio (80 percent) and fees and charges (3 percent) and imposing cooling off and rescission rights and numerous other conditions, are not carried over to the reverse mortgage provisions. Reverse mortgages nevertheless have their own subset of consumer protections spelled out in subsections 50(k)–(p) and 50(v), all of which must be strictly observed to create a valid and enforceable lien on a homestead property.

§ 11.32 Consensual Homestead Lien by Senior Homeowner and Spouse

A reverse mortgage loan may be made only to, and only with the consent of, a person who is, or whose spouse is, sixty-two years of age or older. It may be secured by only a voluntary lien on the owner's homestead property created by a written agreement between the lender, each owner of the homestead property, and the spouse of each owner. Each owner's spouse must consent to the lien securing a reverse mortgage regardless of whether the spouse claims an ownership interest in the property or is an applicant for, or obligor on, the debt. Any homestead property, urban or rural, is eligible as security for a reverse mortgage (with no disqualifying exception for homestead property designated for agricultural use for property tax purposes, unlike Tex. Const. art. XVI, § 50(a)(6), home equity loans). Tex. Const. art. XVI, § 50(k)(1), (k)(2).

§ 11.33 Nonrecourse Debt

A reverse mortgage must be made without recourse for personal liability against any owner or the spouse of any owner. Tex. Const. art. XVI, § 50(k)(3). A reverse mortgage is typically repaid from sales proceeds on the sale of the homestead property by the borrower or the sale by the borrower's estate after the borrower, or the last of the borrowers, dies. If a reverse mortgage is not paid when due, the lender or note holder must look to recovery against the homestead property under its security interest as its exclusive remedy. The homeowner, therefore, will never owe more than the loan balance or the value of the homestead property, whichever is less, and no assets other than the homestead property may be used to repay the debt. Neither the borrower's estate nor the heirs of the estate have any liability for any deficiency that may result from the sale of the homestead property. Tex. Const. art. XVI, § 50(k)(3).

§ 11.34 Advances Based on Equity in Homestead

Advances under a reverse mortgage must be based on the equity in the owner's homestead property or the equity the owner will invest when purchasing a homestead property that the borrower will occupy as a principal residence. Tex. Const. art. XVI, § 50(k), was amended effective January 1, 2014, to authorize a reverse mortgage to be used to finance the purchase of a Texas homestead, and thereby to qualify Texas homeowners for the first time to participate in the Federal Housing Administration's "HECM for Purchase" loan program. *See* Tex. S.J. Res. 18, 83d Leg., R.S., 2013 Tex. Gen. Laws Pamph. 3, at A-7. Owners are not disqualified for a reverse mortgage because they lack income or other assets for repaying the loan. Tex. Const. art. XVI, § 50(k)(4). For purposes of determining eligibility under any state statute relating to payments, allowances, benefits, or services on a "means-tested" basis (including expressly supplemental security income, low-income energy assistance, property tax relief, medical assistance, and general assistance), reverse mortgage advances made to the borrower are considered loan proceeds and not income, and undisbursed funds under a reverse mortgage loan are considered equity in the home and not loan proceeds. Tex. Const. art. XVI, § 50(o).

§ 11.35 No Repayment Until Maturity Event Occurs; Grounds for Foreclosure

The borrower must have no legal obligation to repay a reverse mortgage, or any portion of its principal or interest, until the loan balance is due on the occurrence of one of the following maturity events: (1) the last surviving borrower dies, (2) the homestead property is sold or transferred, or (3) all borrowers cease occupying the homestead property as their principal residence for twelve consecutive months (without the lender's prior written approval) or, if the loan is used for the purchase of a homestead property, the borrower fails to timely occupy the homestead property as the borrower's principal residence within a specified period after loan closing stipulated in the written agreement creating the lien on the property. The lender may also require payment of all principal and interest if the borrower commits actual fraud in connection with the loan; defaults on an obligation provided for in the loan documents to repair and maintain, pay taxes and assessments on, or insure the homestead property; or fails to maintain the priority of the lender's lien on the homestead property. Tex. Const. art. XVI, § 50(k)(6)(A)–(D).

A reverse mortgage debt may be accelerated and declared due and payable only after the occurrence of one of the foregoing constitutional grounds for foreclosure, notice by the lender to the borrower of a claimed ground for foreclosure, and an opportunity for the borrower to remedy the claimed ground for foreclosure in the manner and within a period stipulated by the Texas Constitution. The lender must first give written notice to the borrower that one of these grounds for foreclosure exists and give the borrower an opportunity to cure the ground for foreclosure. Notice must be given in the same manner provided for a notice by mail related to the foreclosure of liens for home equity loans under section 50(a)(6). The owner must be given at least thirty days to either (1) remedy the condition creating the ground for foreclosure, (2) pay the reverse mortgage debt secured by the homestead property from proceeds of the sale of the homestead property or from any other sources, or (3) convey the homestead property to the lender by deed in lieu of foreclosure. A cure period of only twenty days must be given the owner if the claimed ground for foreclosure is a failure of the borrower to maintain the priority of the reverse mortgage lien under section 50(k)(6)(D)(iii). Tex. Const. art. XVI, § 50(k)(10).

§ 11.36 Permitted Uses of Loan Funds

Proceeds from a reverse mortgage may be used by senior homeowners for any purpose, although most often loan proceeds are regarded as a supplement to Social Security benefits and pension payments and used by homeowners to maintain their homes in a good state of repair, pay property taxes and insurance when due, and defray medical and other ordinary costs of living. Significantly, advances under a reverse mortgage are not taxable as income and generally do not affect senior homeowners' eligibility for Social Security or Medicare benefits. *See* Tex. Const. art. XVI, § 50(o). (However, senior homeowners electing a lump-sum advance of proceeds should seek counseling regarding their continued eligibility for Medicaid benefits if retaining the advance as a liquid asset.)

§ 11.37 Foreclosure under Power of Sale and by Court Order

Foreclosure based on either of the grounds set out in Tex. Const. art. XVI, § 50(k)(6)(A), (k)(6)(B), that all borrowers have died or that the homestead property securing the loan has been sold or otherwise transferred, may be carried out under the power of sale contained in the deed of trust securing the loan and the requirements of section 51.002 of the Texas Property

Code, pertaining to contractual liens. Tex. Const. art. XVI, § 50(k)(11).

If the foreclosure is for any other ground, however, a reverse mortgage lien may be foreclosed on only by court order pursuant to rules 735 and 736 of the Texas Rules of Civil Procedure. Tex. Const. art. XVI, § 50(k)(11). Rule 735 provides several judicial foreclosure options for a lender foreclosing a reverse mortgage on grounds other than under section 50(k)(6)(A) or (B). Under rule 735, the lender may file (1) a suit seeking judicial foreclosure, (2) a suit or counterclaim seeking a final judgment that includes an order allowing foreclosure under the security instrument, or (3) an application for an order allowing foreclosure under rule 736 pertaining to expedited foreclosure proceedings. Tex. R. Civ. P. 735. Under the expedited procedures of rule 736, a lender may file a verified application in the district court of the county in which the homestead property is located seeking a court order allowing a foreclosure in accordance with the power of sale under the security instrument and section 51.002 of the Property Code. Under the rule, if no response is timely made, the court must grant the application without further notice or hearing if the application complies in form and content with the requirements of the rule and a copy of the notice and certificate of service has then been on file with the clerk of the court for at least ten days. If a response is made, however, a hearing on the application must be set promptly after reasonable notice to the parties and, in any case, not later than ten business days after a request for hearing by either party. The rule calls for a streamlined hearing in which no discovery is allowed and the court's action in granting or denying the order may not be appealed. On hearing, if the court determines that the applicant has proved that a valid debt exists that is secured by a valid lien on the homestead property created under Texas Constitution, article XVI, section 50(a)(7), the court must grant the application and issue an order to proceed with foreclosure pursuant to the power of sale. Tex. R. Civ. P. 736.

A four-year limitations period applies to actions to foreclose a reverse mortgage lien on a homestead property once a ground for foreclosure has occurred. On the expiration of the four-year limitations period, the real property lien and a power of sale to enforce it become void. *See* Tex. Civ. Prac. & Rem. Code § 16.035(a), (d). Practitioners are cautioned that the accrual date for such an action is not the date that the reverse mortgage debt is accelerated and declared due and payable, but instead the lender's cause of action to enforce a reverse mortgage lien accrues when one or more of the constitutional conditions to foreclosure has occurred. If the ground for foreclosure is the death of the last surviving borrower, the cause of action accrues on the date of that death—a fact that could be undiscovered by the lender for some extended period of time. *See Financial Freedom Senior Funding Corp. v. Horrocks*, 294 S.W.3d 749 (Tex. App.—Houston [14th Dist.] 2009, no pet.).

§ 11.38 No Closing until Delivery of Twelve-Day Consumer Notice and Certification of Required Counseling

A reverse mortgage may not be closed before the twelfth calendar day after the date the lender provides to the prospective borrower a statutory notice on a separate instrument, which the lender or originator and the borrower must sign for the notice to take effect. See form 11-7 in this chapter for the text of the notice.

Furthermore, a reverse mortgage may not be closed until the prospective borrower and the spouse of the prospective borrower attest in writing that the prospective borrower and the spouse of the prospective borrower received counseling regarding the advisability and availability of reverse mortgages and other financial

alternatives that was completed not earlier than the 180th day nor later than the fifth day before the date the extension of credit is closed. *See* Tex. Const. art. XVI, § 50(k)(8), (k)(9).

§ 11.39 Advances According to Authorized Payment Plan (Including Line-of-Credit Method)

The proceeds of a reverse mortgage must be disbursed to the borrower in one or more payments of principal, generally referred to as advances, according to an agreed payment plan. The total loan obligation, generally referred to as the balance, is the sum of all advances due at loan maturity (including any amounts advanced to cover closing and other costs) plus accrued interest, including interest on interest, and other finance charges, such as mortgage insurance premiums and servicing fees. Line-of-credit advances under a Texas reverse mortgage were first authorized effective November 8, 2005. Tex. S.J. Res. 7, 79th Leg., R.S., 2005 Tex. Gen. Laws Pamph. 1, at A-1. As amended, Tex. Const. art. XVI, § 50(p), expressly permits a line-of-credit method of advances in which an initial advance may be made at any time and future advances may be made at times and in amounts requested by the borrower until the credit limit established by the loan documents is reached (and, thereafter, subsequent advances may be made at times and in amounts requested by the borrower to the extent that the outstanding balance is repaid). Tex. Const. art. XVI, § 50(p)(2)–(4).

In addition, if the borrower fails to timely pay any of the following for which the borrower is obligated under the loan documents, the lender may at any time, to the extent necessary to protect the lender's interest in or the value of the homestead property, advance amounts on behalf of the borrower to pay (1) property taxes, (2) assessments, (3) insurance, (4) costs of repairs and maintenance (when performed by persons who are not employed by or affiliated with the lender), or (5) any lien that has or may obtain priority over the reverse mortgage lien. Tex. Const. art. XVI, § 50(p)(6).

§ 11.40 Prohibitions against Use of Credit Cards and Similar Devices, Transaction Fees, and Unilateral Amendments of Terms

A reverse mortgage must provide that (1) an owner may not use a credit card, debit card, preprinted solicitation check, or similar device to obtain an advance; (2) a lender may not charge a transaction fee after closing solely in connection with any debit or advance; and (3) a lender or holder of the reverse mortgage may not unilaterally amend the terms of the extension of credit. Tex. Const. art. XVI, § 50(v).

§ 11.41 Future Advances; Priority of Lien

Advances made and to be made in the future under a recorded reverse mortgage, and interest on those advances, have lien priority over any subsequently filed lien. Therefore, future advances under a reverse mortgage recorded in the real property records of the county in which the homestead property is located will have lien priority over any other lien filed for record after the reverse mortgage instrument has been recorded. Tex. Const. art. XVI, § 50(*l*).

§ 11.42 Interest; Shared Appreciation

Interest may be charged on a reverse mortgage loan at any fixed or adjustable rate that the parties may agree on (and which, if secured by other than a first lien, does not exceed the maximum lawful rate under the Texas Finance Code), and interest may accrue and be compounded during the term of the loan according to the terms of the loan agreement. Furthermore, inter-

est expressly may be contingent on appreciation in the fair market value of the homestead property, apparently allowing for lenders to charge "equity share" fees based on the appreciation of appraised value of the homestead when the loan matures. Tex. Const. art. XVI, § 50(m).

§ 11.43 Reducing or Failing to Make Advances; Forfeiture

If an adjustable rate of interest is charged, the lender under a reverse mortgage is expressly prohibited from reducing the amount or number of advances made to the borrower because of an adjustment in the interest rate. Tex. Const. art. XVI, § 50(k)(5). The lender is obligated to make loan advances as required by the loan documents under the penalty of forfeiture. If the lender fails for any reason to make loan advances according to the terms of the loan documents and, after notice from the borrower, fails to cure the default as required in the loan documents, the constitution provides that the lender forfeits all principal and interest on the reverse mortgage. This forfeiture provision does not apply, however, when a governmental agency, such as the Federal Housing Administration under its Home Equity Conversion Mortgage reverse mortgage insurance, takes an assignment of the loan to cure the default. Tex. Const. art. XVI, § 50(k)(7).

§ 11.44 Preemptive Authority

Texas reverse mortgage law as authorized and effected by the constitution expressly supersedes any statutes, including the Texas Property Code, that purport to limit encumbrances that may be fixed on homestead property. Furthermore, a reverse mortgage may be made without regard to any other conflicting state law, including any purported limitations on future advances; any requirement that a maximum loan amount be stated in the reverse mortgage loan documents or that a percentage of reverse mortgage proceeds be advanced before the assignment of the reverse mortgage; or any prohibition on balloon payments, compound interest or interest on interest, or contracting for, charging, or receiving any rate of interest authorized by Texas law. Tex. Const. art. XVI, § 50(q).

§ 11.45 Title Insurance Considerations

The Texas Reverse Mortgage Endorsement (T-43) and Procedural Rule P-45, *Basic Manual of Rules, Rates and Forms for the Writing of Title Insurance in the State of Texas*, insure against claims of lien invalidity of a covered reverse mortgage arising out of a lender's failure to satisfy certain of the constitutional conditions. *See* Procedural Rule P-45, *Basic Manual of Rules, Rates and Forms for the Writing of Title Insurance in the State of Texas.*

The Texas Reverse Mortgage Endorsement (T-43) to the Mortgagee Policy of Title Insurance (T-2) excludes from coverage any loss or damage based on usury or on any consumer credit protection or truth-in-lending law or violation of any subsections of Tex. Const. art. XVI, § 50(k)(3)–(11), (m), (p), (v), and any regulatory or statutory requirements for a mortgage made pursuant to Tex. Const. art. XVI, § 50(a)(7), *except as expressly provided in paragraph 3 of the endorsement.* Form T-43, in paragraphs 1 and 2, insures the validity of future advances made under a reverse mortgage, with certain exceptions, up to the outstanding aggregate amount of loan proceeds actually disbursed and the amount of its unpaid, accrued interest as of the time a loss occurs under the policy. In paragraph 3, form T-43 expressly insures against loss sustained by the lender under the mortgagee policy because of invalidity or unenforceability of the reverse mortgage lien by reason of any of the following: (1) the failure of the insured mortgage to be created under a written agreement with the consent of each owner of the insured homestead property and each owner's spouse; (2) the failure of the insured mortgage to

be made to a person who is, or whose spouse is, sixty-two years of age or older; (3) the failure of the written document purporting to be made pursuant to Tex. Const. art. XVI, § 50(k)(8), to be executed by the homeowner on the date that the insured mortgage and promissory note it secures are executed by the owner (provided that the policy does not insure that the document itself complies with section 50(k)(8)); and (4) the failure of the title company or its agents to furnish the homeowner a copy of written notice purporting to be made pursuant to Tex. Const. art. XVI, § 50(k)(9), on the date that the owner executed the insured mortgage and promissory note it secures (provided that the policy does not insure that the written document itself complies with section 50(k)(9)).

While attachment of the T-43 endorsement to any mortgagee policy of title insurance issued in connection with a reverse mortgage loan is mandatory, under Procedural Rule P-45 the issuing agency may delete any of these four subdivisions of paragraph 3 if it does not consider the additional risk insurable and must delete all four subdivisions if the promissory note and the insured mortgage instrument for the loan are not executed by the borrower at the office of the title company. Furthermore, the insuring agency must delete the second subdivision of paragraph 3 if the age of the owner or spouse is not verifiable "with government issued photographic identification" furnished the title agency and must delete the second and fourth subdivisions if the related documents furnished by the insured are not executed by the homeowner at the office of the title company on the date that the insured mortgage and promissory note it secures are executed. Procedural Rule P-45, *Basic Manual of Rules, Rates and Forms for the Writing of Title Insurance in the State of Texas.*

§ 11.46 Truth-in-Lending Disclosure Considerations

Reverse mortgage loans are subject to the federal Truth in Lending Act, 15 U.S.C. §§ 1601–1667f, and its Regulation Z, 12 C.F.R. pt. 1026. In addition to other consumer disclosures required under the Truth in Lending Act, the lender in a reverse mortgage is required to provide the borrower written disclosures under 12 C.F.R. § 1026.33 of the total annual loan cost of credit in the form of appendix K, paragraph (d), of Regulation Z. Generally referred to as the "Total Annual Loan Cost Rate Disclosure," or "TALC," this disclosure contains (1) a statement that the borrower is not obligated to complete the transaction merely because the borrower has received the disclosures or has signed an application for a reverse mortgage loan; (2) a good-faith projection of the total cost of the credit expressed as a table of "Total Annual Loan Cost Rates," using that term, that reflects (a) costs and charges to the borrower, (b) payments (advances) to, or for the benefit of, the borrower, (c) additional compensation to the lender (such as shared appreciation the lender is entitled to), (d) any limitations on the borrower's liability (such as nonrecourse limits), (e) assumed appreciation rates for the dwelling securing the loan at rates of 0 percent, 4 percent, and 8 percent, and (f) assumed loan periods, alternatively, of two years, the actuarial life expectancy of the borrower (or youngest of the borrowers), and that same life expectancy multiplied by a factor of 1.4 and rounded to the nearest full year (and, at the option of the borrower, that same actuarial life expectancy multiplied by a factor of 0.5 and rounded to the nearest full year); (3) an itemization of loan terms, charges, the age of the youngest borrower, and the appraised property value; and (4) an explanation of the total annual loan cost rates as provided in the model form. 12 C.F.R. § 1026.33, pt. 1026 app. K(d).

§ 11.47 Federal Home Equity Conversion Mortgage (HECM) Loan Program

More than 90 percent of all reverse mortgage loan originations nationwide are made under the Home Equity Conversion Mortgage (HECM) program insured by the Federal Housing Administration (FHA) under the Department of Housing and Urban Development (HUD). The HECM program in Texas is regulated by HUD Handbook 4235.1 Rev-1, as supplemented and amended from time to time, and mortgagee letters ML 00-09 and ML 00-10, each dated March 8, 2000; ML 00-34, dated August 30, 2000 (supplementing ML 00-09); ML 00-39, dated November 7, 2000 (supplementing ML 00-09, ML 00-10, and ML 00-34); and ML 06-06, dated March 17, 2006 (in part replacing the guidance set out in ML 00-09, ML 00-34, and ML 00-39). Regulations for the HECM program are codified in 24 C.F.R. pt. 206. Effective January 1, 2014, Tex. Const. art. XVI, § 50(k), was amended to authorize a reverse mortgage also to be used to finance the purchase of a Texas homestead. Texas homeowners are now able to participate in the FHA's "HECM for Purchase" loan program for the first time. *See* Tex. S.J. Res. 18, 83d Leg., R.S., 2013 Tex. Gen. Laws Pamph. 3, at A-7.

Model forms set out in full and attached to ML 00-39 replaced earlier versions of Texas model forms published in ML 00-09 and ML 00-34, which at that time constituted the only forms approved by HUD for use to document an HECM loan in Texas. These model forms included Texas forms of a home equity conversion loan agreement, an adjustable rate deed of trust, an adjustable rate note, an adjustable rate second deed of trust, an adjustable rate second note, and a repair rider. With the adoption of the 2005 constitutional amendment authorizing line-of-credit advances under a Texas reverse mortgage loan, however, HUD chose not to publish revised model forms and instead imposed on approved mortgagees the obligation, in consultation with their attorneys, to adapt all forms to ensure compliance with FHA requirements and the Texas Constitution and statutes. These requirements are set forth in ML 06-06, issued March 17, 2006, which authorizes Texas borrowers to choose a line-of-credit payment option, a modified tenure option (a combination of tenure and line-of-credit payment options), or a modified term option (a combination of term and line-of-credit payment options) and provides guidance regarding such matters as the adaptation and preparation of the form of loan documents, including the repair rider, the timing of loan closings and disbursements by the lender, the conditions under which the loan may be accelerated under applicable Texas law, and procedures to be followed under Texas law to conduct foreclosures. ML 06-06 expressly replaces guidance previously issued in ML 00-09, ML 00-34, and ML 00-39 on the same topics.

Model Texas forms were set out as attachments to HUD ML 00-39, dated November 7, 2000, with such adaptations by counsel as may be necessary to conform the instruments to state or local requirements. When adapting these model forms to Texas law and practices, counsel must consult the footnotes to each model form regarding state-specific modifications; instructions in chapter 6 to Handbook 4235.1 Rev-3; Handbook 4165.1 Rev-1 Chg-3, issued November 30, 1995, regarding model mortgage and note forms; ML 97-15; ML 00-09 regarding Texas modifications of the loan agreement form and repair rider; and ML 06-06 regarding line-of-credit terms and other provisions of the 2005 constitutional amendment.

[Sections 11.48 through 11.50 are reserved for expansion.]

III. General Instructions for Completing Forms

§ 11.51 Introduction

For information about completing forms generally, see chapter 3 in this manual. In most forms the information that the attorney must provide is listed at the beginning of the form. Of course, the attorney may add other specific provisions, references, exhibits, and riders as necessary for each specific transaction.

The forms in this chapter are applicable to a first-lien home equity loan. Tex. Fin. Code ch. 342 imposes additional duties, prohibitions, and disclosure requirements in connection with secondary mortgage loans. Attorneys are cautioned that some forms in this chapter may require modification for use with a secondary mortgage loan transaction.

A home equity loan transaction may require documentation in addition to that provided by this chapter. For example, a "loan agreement" as defined in Texas Business and Commerce Code section 26.02 requires the notice prescribed therein. Form 10-14 in this manual, notice of final agreement, may be modified for use in a home equity transaction. Each transaction is unique, and the practitioner must use individual judgment in ensuring that all required documentation has been adequately prepared.

A home equity loan transaction must be closed at the offices of the lender, an attorney at law, or a title company. Tex. Const. art. XVI, § 50(a)(6)(N). The owner may not be required to sign any instrument in which blanks are left to be filled in. Tex. Const. art. XVI, § 50(a)(6)(Q)(iii). The lender must provide copies of all instruments related to the loan to the homestead owner at the time of closing. Tex. Const. art. XVI, § 50(a)(6)(Q)(v).

§ 11.52 Instructions for Completing Notice Concerning Extensions of Credit

The notice concerning extensions of credit (form 11-1 in this chapter) defined by section 50(a)(6), article XVI, of the Texas Constitution is the preloan disclosure required to be given to the homestead owner under Tex. Const. art. XVI, § 50(g). The home equity loan cannot be closed until the twelfth day after the notice is given. If discussions with the borrower are conducted primarily in a language other than English, the lender must provide the owner with an additional copy of the notice translated into the written language in which discussions were conducted. The Office of the Consumer Credit Commissioner has provided a Spanish language translation of the notice on its website at **http://occc.texas.gov**. No foreign-language translations of forms are included in this manual.

§ 11.53 Instructions for Completing Home Equity Extension of Credit (Promissory Note)

The form for the home equity extension of credit (form 11-2 in this chapter) is principally adapted from form 6-1 (promissory note) in this manual and is redesignated to conform with the terminology used in Tex. Const. art. XVI, § 50(a)(6). The attorney is referred to chapter 6 in this manual for general commentary and instructions for completing promissory notes.

Note that the extension of credit makes no provision for late charges. The attorney is referred to section 6.4:3 and the clauses referenced therein for commentary and instructions on late charges.

As reflected in the "Terms of Payment" paragraph, the home equity extension of credit must be repaid in substantially equal successive peri-

odic installments. Tex. Const. art. XVI, § 50(a)(6)(L). The installments must begin not later than two months from the date of the instrument. Each installment must equal or exceed the amount of accrued interest as of the date of the scheduled installment.

The home equity extension of credit can be converted for a variable rate of interest by deleting the heading for "Annual Interest Rate" and modifying the heading "Terms of Payment" to read "Terms of Payment, Including Variable Interest Rate on Unpaid Principal." A variable rate interest clause appears at clause 6-2-18.

The security for payment for a home equity extension of credit is fixed by Tex. Const. art. XVI, § 50(a)(6)(A), (a)(6)(H). The home equity extension of credit may be secured only by a lien on the borrower's homestead. Additional collateral is prohibited. The home equity extension of credit has no provision referring to a guaranty or guarantor. A guaranty is construed as prohibited additional collateral.

As required by Tex. Const. art. XVI, § 50(a)(6)(C), the home equity extension of credit is a nonrecourse obligation. In addition, the home equity extension of credit contains many other limitations and restrictions unique to home equity lending and required by Tex. Const. art. XVI, § 50(a)(6). These restrictions are discussed in detail in the commentary in this chapter. A lender forfeits all principal and interest if the lender fails to cure a failure to comply with constitutional restrictions on home equity lending after sixty days' notice of the violation given by the borrower. Tex. Const. art. XVI, § 50(a)(6)(Q)(x). These cure provisions are discussed in detail in section 11.25 above.

If the lender of a home equity extension of credit has a license from the Office of Consumer Credit Commissioner, the home equity extension of credit must contain the name, mailing address, and telephone number of the OCCC. Tex. Fin. Code § 14.104. Additionally, if the home equity loan is a secondary mortgage loan, the alternative attorney's fee provision should be used. See section 8.4 for a discussion of secondary mortgage loans and see the discussion in section 11.20:7 above concerning alternative provisions.

§ 11.54 Instructions for Completing Deed of Trust (Home Equity Loan)

The form for the deed of trust (form 11-3 in this chapter) is adapted from form 8-1 in this manual. The attorney is referred to chapter 8 for general commentary and instructions for completing deeds of trust.

A lien securing a home equity loan may be foreclosed only after court order. Tex. Const. art. XVI, § 50(a)(6)(D). The power of sale of the deed of trust (home equity loan) is conditioned on the lender obtaining a court order allowing foreclosure under any proceeding authorized by the Texas Rules of Civil Procedure and other applicable law.

A question remains whether the assignment of rents in a deed of trust securing a home equity loan constitutes prohibited additional collateral under Tex. Const. art. XVI, § 50(a)(6)(H). The deed of trust (home equity loan) does not contain an assignment of rents clause. In the absence of definitive authority on this question, the attorney is cautioned to exercise professional judgment regarding this provision.

If the home equity extension of credit is a junior lien and if the lender is a bank, savings and loan association, credit union, or lender with a license from the Office of Consumer Credit Commissioner, the deed of trust (home equity) should be modified as discussed in section 11.20:7 above to comply with requirements applicable to secondary mortgage loans governed by Texas Finance Code chapter 342.

The deed of trust (home equity loan) also contains a notice of confidentiality rights as required by Tex. Prop. Code § 11.008(b). See section 3.16 in this manual.

§ 11.55 Instructions for Completing Home Equity Certificate and Agreement

The home equity certificate and agreement contains a written acknowledgment of the fair market value of the homestead as required by Tex. Const. art. XVI, § 50(a)(6)(Q)(ix). The acknowledgment of value is necessary to assure compliance with the 80 percent loan-to-value restriction of Tex. Const. art. XVI, § 50(a)(6)(B). The acknowledgment is conclusive evidence of the fair market value of the homestead if the acknowledgment is made under the conditions set out at Tex. Const. art. XVI, § 50(h). To comply with restrictions against additional collateral, the home equity compliance certificate and agreement (form 11-5 in this chapter) contains a waiver by the lender of cross-collateral provisions contained in other debt instruments. In addition, the form contains other representations and warranties to be made by the borrower at closing, evidencing compliance with certain constitutional requirements for creating a valid home equity lien.

The home equity certificate and agreement must be signed on the date that the extension of credit is made. Tex. Const. art. XVI, § 50(a)(6)(Q)(ix).

§ 11.56 Instructions for Completing Election Regarding Right of Rescission

The election regarding right of rescission (form 11-6 in this chapter) confirms the borrower's election to rescind or decline to rescind the home equity extension of credit under Tex. Const. art. XVI, § 50(a)(6)(Q)(viii). For married couples, a separate notice of right of rescission should be given by each spouse. Funding of the home equity loan should be delayed until the rescission period has expired.

§ 11.57 Instructions for Completing Notice Concerning Refinance of Existing Home Equity Loan

The notice concerning refinance of an existing home equity loan (form 11-8 in this chapter) is the preloan disclosure required to be given to the homestead owner under Tex. Const. art. XVI, § 50(f)(2), when an existing home equity loan will be refinanced into a conventional mortgage. The refinance disclosure must be given not later than the third business day after the date the owner submits the loan application and at least twelve days before the refinance is closed. The refinance disclosure must be given to all owners within the prescribed time limits. One copy of the refinance disclosure may be provided to married owners. 7 Tex. Admin. Code § 153.45(4).

§ 11.58 Instructions for Completing Affidavit of Compliance

The affidavit of compliance (form 11-9 in this chapter), if signed by the owner or owner's spouse, provides conclusive proof that all requirements of Tex. Const. art. XVI, § 50(f)(2), have been met. The affidavit of compliance should be signed by the owner or owner's spouse at closing.

[Sections 11.59 and 11.60 are reserved for expansion.]

IV. Additional Resources

§ 11.61 Additional Resources

Alsup, J. Alton. "Documenting Compliance with the New Texas Home Equity Reform Amendment." In *Advanced Real Estate Drafting Course, 2005*. Austin: State Bar of Texas, 2005.

———. "Lines of Credit under Texas Home Equity and Reverse Mortgage Law." In *Advanced Real Estate Law Course, 2006*. Austin: State Bar of Texas, 2006.

Baggett, W. Mike. "Foreclosure Update Including Foreclosing Home Equity Loans." In *Advanced Real Estate Strategies Course, 2008*. Austin: State Bar of Texas, 2008.

Baird, Morton W. II, and Michael F. Baird. "Issues in Home Equity Financing." In *Advanced Real Estate Law Course, 2015*. Austin: State Bar of Texas, 2015.

Bastian, G. Tommy. "Home Equity Lending—Updates and Issues." In *Advanced Real Estate Law Course, 2018*. Austin: State Bar of Texas, 2018.

Beyer, Gerry W. *Real Property*. 2nd ed. West's Texas Forms 13–15. St. Paul, MN: West, 2001. Supplement 2014.

Cockerell, Perry. "Developments in Texas Home Equity Litigation in Bankruptcy Court." In *Advanced Real Estate Law Course, 2016*. Austin: State Bar of Texas, 2016.

St. Claire, Frank A., and William V. Dorsaneo III. *Texas Real Estate Guide*. New York: Matthew Bender & Co., 2001.

Vandergriff, Connie J. "How to Cure Home Equity Loans." In *Advanced Real Estate Drafting Course, 2018*. Austin: State Bar of Texas, 2018.

[Reserved]

Form 11-1

Notice Concerning Extensions of Credit

NOTICE CONCERNING EXTENSIONS OF CREDIT DEFINED BY SECTION 50(a)(6), ARTICLE XVI, TEXAS CONSTITUTION:

SECTION 50(a)(6), ARTICLE XVI, OF THE TEXAS CONSTITUTION ALLOWS CERTAIN LOANS TO BE SECURED AGAINST THE EQUITY IN YOUR HOME. SUCH LOANS ARE COMMONLY KNOWN AS EQUITY LOANS. IF YOU DO NOT REPAY THE LOAN OR IF YOU FAIL TO MEET THE TERMS OF THE LOAN, THE LENDER MAY FORECLOSE AND SELL YOUR HOME. THE CONSTITUTION PROVIDES THAT:

(A) THE LOAN MUST BE VOLUNTARILY CREATED WITH THE CONSENT OF EACH OWNER OF YOUR HOME AND EACH OWNER'S SPOUSE;

(B) THE PRINCIPAL LOAN AMOUNT AT THE TIME THE LOAN IS MADE MUST NOT EXCEED AN AMOUNT THAT, WHEN ADDED TO THE PRINCIPAL BALANCES OF ALL OTHER LIENS AGAINST YOUR HOME, IS MORE THAN 80 PERCENT OF THE FAIR MARKET VALUE OF YOUR HOME;

(C) THE LOAN MUST BE WITHOUT RECOURSE FOR PERSONAL LIABILITY AGAINST YOU AND YOUR SPOUSE UNLESS YOU OR YOUR SPOUSE OBTAINED THIS EXTENSION OF CREDIT BY ACTUAL FRAUD;

(D) THE LIEN SECURING THE LOAN MAY BE FORECLOSED UPON ONLY WITH A COURT ORDER;

(E) FEES AND CHARGES TO MAKE THE LOAN MAY NOT EXCEED 2 PERCENT OF THE LOAN AMOUNT, EXCEPT FOR A FEE OR CHARGE FOR AN APPRAISAL PERFORMED BY A THIRD-PARTY APPRAISER, A PROPERTY SURVEY PERFORMED BY A STATE-REGISTERED OR LICENSED

SURVEYOR, A STATE BASE PREMIUM FOR A MORTGAGEE POLICY OF TITLE INSURANCE WITH ENDORSEMENTS, OR A TITLE EXAMINATION REPORT;

(F) THE LOAN MAY NOT BE AN OPEN-END ACCOUNT THAT MAY BE DEBITED FROM TIME TO TIME OR UNDER WHICH CREDIT MAY BE EXTENDED FROM TIME TO TIME UNLESS IT IS A HOME EQUITY LINE OF CREDIT;

(G) YOU MAY PREPAY THE LOAN WITHOUT PENALTY OR CHARGE;

(H) NO ADDITIONAL COLLATERAL MAY BE SECURITY FOR THE LOAN;

(I) (REPEALED);

(J) YOU ARE NOT REQUIRED TO REPAY THE LOAN EARLIER THAN AGREED SOLELY BECAUSE THE FAIR MARKET VALUE OF YOUR HOME DECREASES OR BECAUSE YOU DEFAULT ON ANOTHER LOAN THAT IS NOT SECURED BY YOUR HOME;

(K) ONLY ONE LOAN DESCRIBED BY SECTION 50(a)(6), ARTICLE XVI, OF THE TEXAS CONSTITUTION MAY BE SECURED WITH YOUR HOME AT ANY GIVEN TIME;

(L) THE LOAN MUST BE SCHEDULED TO BE REPAID IN PAYMENTS THAT EQUAL OR EXCEED THE AMOUNT OF ACCRUED INTEREST FOR EACH PAYMENT PERIOD;

(M) THE LOAN MAY NOT CLOSE BEFORE 12 DAYS AFTER YOU SUBMIT A LOAN APPLICATION TO THE LENDER OR BEFORE 12 DAYS AFTER YOU RECEIVE THIS NOTICE, WHICHEVER DATE IS LATER AND MAY NOT WITHOUT YOUR CONSENT CLOSE BEFORE ONE BUSINESS DAY AFTER THE DATE ON WHICH YOU RECEIVE A COPY OF YOUR LOAN APPLICATION IF NOT PREVIOUSLY PROVIDED AND A FINAL ITEMIZED DISCLOSURE OF THE ACTUAL FEES, POINTS, INTERESTS, COSTS, AND CHARGES THAT WILL BE CHARGED AT CLOSING; AND IF YOUR HOME WAS SECURITY FOR THE SAME TYPE OF LOAN WITHIN THE PAST YEAR, A NEW LOAN SECURED BY THE SAME PROPERTY MAY NOT CLOSE BEFORE ONE YEAR HAS PASSED FROM THE CLOSING

DATE OF THE OTHER LOAN, UNLESS ON OATH YOU REQUEST AN EARLIER CLOSING DATE DUE TO A DECLARED STATE OF EMERGENCY;

(N) THE LOAN MAY CLOSE ONLY AT THE OFFICE OF THE LENDER, TITLE COMPANY, OR AN ATTORNEY AT LAW;

(O) THE LENDER MAY CHARGE ANY FIXED OR VARIABLE RATE OF INTEREST AUTHORIZED BY STATUTE;

(P) ONLY A LAWFULLY AUTHORIZED LENDER MAY MAKE LOANS DESCRIBED BY SECTION 50(a)(6), ARTICLE XVI, OF THE TEXAS CONSTITUTION;

(Q) LOANS DESCRIBED BY SECTION 50(a)(6), ARTICLE XVI, OF THE TEXAS CONSTITUTION MUST:

(1) NOT REQUIRE YOU TO APPLY THE PROCEEDS TO ANOTHER DEBT EXCEPT A DEBT THAT IS SECURED BY YOUR HOME OR OWED TO ANOTHER LENDER;

(2) NOT REQUIRE THAT YOU ASSIGN WAGES AS SECURITY;

(3) NOT REQUIRE THAT YOU EXECUTE INSTRUMENTS WHICH HAVE BLANKS FOR SUBSTANTIVE TERMS OF AGREEMENT LEFT TO BE FILLED IN;

(4) NOT REQUIRE THAT YOU SIGN A CONFESSION OF JUDGMENT OR POWER OF ATTORNEY TO ANOTHER PERSON TO CONFESS JUDGMENT OR APPEAR IN A LEGAL PROCEEDING ON YOUR BEHALF;

(5) PROVIDE THAT YOU RECEIVE A COPY OF YOUR FINAL LOAN APPLICATION AND ALL EXECUTED DOCUMENTS YOU SIGN AT CLOSING;

(6) PROVIDE THAT THE SECURITY INSTRUMENTS CONTAIN A DISCLOSURE THAT THIS LOAN IS A LOAN DEFINED BY SECTION 50(a)(6), ARTICLE XVI, OF THE TEXAS CONSTITUTION;

(7) PROVIDE THAT WHEN THE LOAN IS PAID IN FULL, THE LENDER WILL SIGN AND GIVE YOU A RELEASE OF LIEN OR AN ASSIGNMENT OF THE LIEN, WHICHEVER IS APPROPRIATE;

(8) PROVIDE THAT YOU MAY, WITHIN 3 DAYS AFTER CLOSING, RESCIND THE LOAN WITHOUT PENALTY OR CHARGE;

(9) PROVIDE THAT YOU AND THE LENDER ACKNOWLEDGE THE FAIR MARKET VALUE OF YOUR HOME ON THE DATE THE LOAN CLOSES; AND

(10) PROVIDE THAT THE LENDER WILL FORFEIT ALL PRINCIPAL AND INTEREST IF THE LENDER FAILS TO COMPLY WITH THE LENDER'S OBLIGATIONS UNLESS THE LENDER CURES THE FAILURE TO COMPLY AS PROVIDED BY SECTION 50(a)(6)(Q)(x), ARTICLE XVI, OF THE TEXAS CONSTITUTION; AND

(R) IF THE LOAN IS A HOME EQUITY LINE OF CREDIT:

(1) YOU MAY REQUEST ADVANCES, REPAY MONEY, AND REBORROW MONEY UNDER THE LINE OF CREDIT;

(2) EACH ADVANCE UNDER THE LINE OF CREDIT MUST BE IN AN AMOUNT OF AT LEAST $4,000;

(3) YOU MAY NOT USE A CREDIT CARD, DEBIT CARD, OR SIMILAR DEVICE, OR PREPRINTED CHECK THAT YOU DID NOT SOLICIT, TO OBTAIN ADVANCES UNDER THE LINE OF CREDIT;

(4) ANY FEES THE LENDER CHARGES MAY BE CHARGED AND COLLECTED ONLY AT THE TIME THE LINE OF CREDIT IS ESTABLISHED AND THE LENDER MAY NOT CHARGE A FEE IN CONNECTION WITH ANY ADVANCE;

(5) THE MAXIMUM PRINCIPAL AMOUNT THAT MAY BE EXTENDED, WHEN ADDED TO ALL OTHER DEBTS SECURED BY YOUR HOME, MAY NOT EXCEED 80 PERCENT OF THE FAIR MARKET VALUE OF YOUR HOME ON THE DATE THE LINE OF CREDIT IS ESTABLISHED;

(6) IF THE PRINCIPAL BALANCE UNDER THE LINE OF CREDIT AT ANY TIME EXCEEDS 80 PERCENT OF THE FAIR MARKET VALUE OF YOUR HOME, AS DETERMINED ON THE DATE THE LINE OF CREDIT IS ESTABLISHED, YOU MAY NOT CONTINUE TO REQUEST ADVANCES UNDER THE LINE OF CREDIT UNTIL THE BALANCE IS LESS THAN 80 PERCENT OF THE FAIR MARKET VALUE; AND

(7) THE LENDER MAY NOT UNILATERALLY AMEND THE TERMS OF THE LINE OF CREDIT.

THIS NOTICE IS ONLY A SUMMARY OF YOUR RIGHTS UNDER THE TEXAS CONSTITUTION. YOUR RIGHTS ARE GOVERNED BY SECTION 50, ARTICLE XVI, OF THE TEXAS CONSTITUTION, AND NOT BY THIS NOTICE.

I have received a copy of this notice concerning extensions of credit defined by section 50(a)(6), article XVI, of the Texas Constitution.

_____

[Name of borrower]
Date:

[Reserved]

Form 11-4

Additional Clauses for Deeds of Trust (Home Equity Loan)

Refinance and Extension of Existing Texas Home Equity Deed of Trust

Clause 11-4-1

The Note secured by this Security Instrument is given to refinance and extend the amount left owing and unpaid by Grantor upon that one certain Promissory Note in the original principal amount of [**amount**] DOLLARS ($[**amount**]), which is dated [**date**], executed by [**name**], and payable to the order of [**name**], secured by a Texas Home Equity Security Instrument from [**name**] to [**name**], dated [**date**] and recorded in [**recording data**] of the real property records of [**county**] County, Texas against the Property. Lender is subrogated to all rights and remedies of the holder of the obligations. The lien is hereby refinanced, extended and continued in full force and effect to secure the payment of the Note secured by this Security Instrument. The lien is a lien described in section 50(a)(4), article 16, of the Texas Constitution.

Extension of Mechanic's Lien Contract and Security for Cash Advanced

Clause 11-4-2

The Home Equity Extension of Credit renews and extends the balance of [**amount**] DOLLARS ($[**amount**]) that Grantor owes on a prior note in the original principal amount of [**amount**] DOLLARS ($[**amount**]), which is dated [**date**], executed by [**name**], and payable to the order of [**name**]. The prior note is secured by a mechanic's lien contract creating a lien on the Property, dated [**date**] and recorded in [**recording data**] of the real property records of [**county**] County, Texas. [**Include if applicable:** The prior note and the lien securing it

have been transferred to Lender.] The Home Equity Extension of Credit also represents [**amount**] DOLLARS ($[**amount**]) in cash that Lender advanced to Grantor on [**date**] at Grantor's request. Grantor acknowledges that the lien securing the prior note is valid, that it subsists against the Property, and that by this deed of trust it is renewed and extended in full force until the Home Equity Extension of Credit is paid.

To Pay Ad Valorem Taxes and Security for Cash Advanced

Clause 11-4-3

The Home Equity Extension of Credit represents [**amount**] DOLLARS ($[**amount**]) in cash that, at Grantor's request, Lender advanced to pay the following taxes [**include if applicable:** , including penalties, interest, and collection expenses,] assessed and owed on the Property, which Grantor now owns: [**amount**] DOLLARS ($[**amount**]) to [**county**] County in payment of taxes for the years [**specify**]; and [**amount**] DOLLARS ($[**amount**]) to the city of [**city**] in payment of taxes for the years [**specify**]. The Home Equity Extension of Credit also represents [**amount**] DOLLARS ($[**amount**]) in cash that Lender advanced to Grantor on [**date**] at Grantor's request.

To Pay Income Taxes and Security for Cash Advanced

Clause 11-4-4

The Home Equity Extension of Credit includes [**amount**] DOLLARS ($[**amount**]) that, at Grantor's request, Lender advanced to the United States Internal Revenue Service to discharge federal tax lien number [**number**], which is recorded in [**recording data**] of the federal tax lien records of [**county**] County, Texas. Grantor acknowledges this federal tax lien to be valid and sub-

sisting, and the same is renewed and extended by this deed of trust until the Home Equity Extension of Credit is fully paid. This Home Equity Extension of Credit also represents [**amount**] DOLLARS ($[**amount**]) in cash that Lender advanced to Grantor on [**date**] at Grantor's request.

Tax and Insurance Reserve or Escrow Account

Clause 11-4-5

Grantor agrees to make an initial deposit in a reasonable amount to be determined by Lender and then make periodic payments to a fund for taxes and insurance premiums on the Property. Periodic payments will be made on the payment dates specified in the Home Equity Extension of Credit, and each payment will be in an amount that Lender estimates will be sufficient to pay taxes and insurance premiums. The fund will accrue no interest, and Lender will hold it without bond in escrow and use it to pay the taxes and insurance premiums. If Grantor has complied with the requirements of this paragraph, Lender must pay taxes before [the end of the calendar year/delinquency]. Grantor agrees to make additional deposits on demand if the fund is ever insufficient for its purpose. If an excess accumulates in the fund, Lender may either credit it to future periodic deposits until the excess is exhausted or refund it to Grantor. When Grantor makes the final payment on the Home Equity Extension of Credit, Lender will credit to that payment the whole amount then in the fund [**include if applicable:** or, at Lender's option, refund it after the Home Equity Extension of Credit is paid]. If this deed of trust is foreclosed, any balance in the fund over that needed to pay taxes, including taxes accruing but not yet payable, and to pay insurance premiums will be paid under section D., "Trustee's Rights and Duties." [**Include if applicable:** If the Property is transferred, any balance then in the fund will still be subject to the provisions of this

paragraph and will inure to the benefit of the transferee.] Deposits to the fund described in this paragraph are in addition to the periodic payments provided for in the Home Equity Extension of Credit.

Assignment of Insurance Policies

Clause 11-4-6

If the Property is transferred by foreclosure, the transferee will acquire title to all insurance policies on the Property.

Evidence of Payment of Taxes

Clause 11-4-7

Clause 11-4-7 should not be used if the escrow clause at 11-4-5 is used.

Grantor agrees to furnish on Lender's request evidence satisfactory to Lender that all taxes and assessments on the Property have been paid when due.

Consumer Credit Insurance Notice

Clause 11-4-8

GRANTOR MAY FURNISH ANY INSURANCE REQUIRED BY THIS DEED OF TRUST EITHER THROUGH EXISTING POLICIES OWNED OR CONTROLLED BY GRANTOR OR THROUGH EQUIVALENT COVERAGE FROM ANY INSURANCE COMPANY AUTHORIZED TO TRANSACT BUSINESS IN TEXAS.

Due-on-Sale Clause

Clause 11-4-9

If Grantor transfers any part of the Property without Lender's prior written consent, Lender may declare the debt secured by this deed of trust immediately payable and invoke any remedies provided in this deed of trust for default. If the Property is residential real property containing less than five dwelling units or a residential manufactured home occupied by Grantor, exceptions to this provision are limited to (a) a subordinate lien or encumbrance that does not transfer rights of occupancy of the Property; (b) creation of a purchase-money security interest for household appliances; (c) transfer by devise, descent, or operation of law on the death of a co-Grantor; (d) grant of a leasehold interest of three years or less without an option to purchase; (e) transfer to a spouse or children of Grantor or between co-Grantors; (f) transfer to a relative of Grantor on Grantor's death; and (g) transfer to an inter vivos trust in which Grantor is or remains a beneficiary and occupant of the Property.

Subordinate Lien Clauses

Clause 11-4-10

The lien created by this deed of trust is subordinate to the lien securing payment of a note, and any renewals, extensions, and modifications thereof, in the original principal amount of [**amount**] DOLLARS ($[**amount**]), which is dated [**date**], executed by [**name**], payable to the order of [**name**], and more fully described in a deed of trust recorded in [**recording data**] of the real property records of [**county**] County, Texas. If default occurs in payment of any part of principal or interest of that $[**amount**] note or in observance of any cov-

enants of the deed of trust securing it, the entire debt secured by this deed of trust will immediately become payable at the option of Lender.

Or

Clause 11-4-11

If Grantor fails to pay any part of principal or interest secured by a prior lien or liens on the Property when it becomes payable or defaults on any prior lien instrument, the entire debt secured by this deed of trust will immediately become payable at the option of Lender.

Form 11-5

Home Equity Compliance Certificate and Agreement

Basic Information

Date:

Borrower:

[Borrower's Spouse:]

Borrower's Mailing Address:

[Borrower's Spouse's Mailing Address:]

Lender:

Lender's Mailing Address:

Home Equity Extension of Credit (Promissory Note)

Date:

Original principal amount:

Maturity date:

Property (including any improvements):

Fair Market Value of the Property:

A. Agreement of Parties

A.1. Borrower and Lender acknowledge and agree on the Fair Market Value of the Property and have signed a written acknowledgment of the Fair Market Value of Property on the date the Home Equity Extension of Credit is made.

A.2. The Home Equity Extension of Credit is not secured by any additional real or personal property other than the Property. Any provision contained in any other agreement between the Parties or any third party that gives Lender a security interest in any personal or real property other than the Property will not apply to the Home Equity Extension of Credit.

B. Representation and Warranties of Borrower

Borrower represents and warrants the following:

B.1. The Fair Market Value of the Property is an accurate value estimate based on an appraisal or evaluation not disputed by Borrower.

B.2. The original principal amount of the Home Equity Extension of Credit, when added to the aggregate total of the outstanding principal balances of any other indebtedness secured by valid encumbrances of record against the Property, does not exceed 80 percent of the Fair Market Value of the Property.

B.3. Borrower has not been required to pay, in addition to any interest, fees to any person that are necessary to originate, evaluate, maintain, record, insure, or service the Home Equity Extension of Credit that exceed, in the aggregate, 3 percent of the original principal amount of the Home Equity Extension of Credit.

B.4. The lien securing the Home Equity Extension of Credit is a voluntary lien on the Property created with the consent of all owners and their spouses.

B.5. The Home Equity Extension of Credit is not secured by any additional property other than the collateral.

Select one of the following.

B.6. The Home Equity Extension of Credit is the only debt secured by the Property.

Or

B.6. The Home Equity Extension of Credit is the only loan made pursuant to section 50(a)(6) of article 16 of the Texas Constitution and the only debt secured by the Property except the debts and liens described in the following documents: [**specify**].

Continue with the following.

B.7. The closing of the Home Equity Extension of Credit did not occur before the twelfth day after the later of the date that Borrower submitted a loan application to Lender for the Home Equity Extension of Credit or the date that Lender provided Borrower a copy of a notice concerning the Home Equity Extension of Credit making all disclosures required by section 50(g), article XVI, of the Texas Constitution.

Select one of the following.

B.8. The closing of the Home Equity Extension of Credit did not occur before one business day after the date that Borrower received a copy of the loan application if not previously provided and a final itemized disclosure of the actual fees, points, interest, costs, and charges that were charged at closing.

Or

B.8. Borrower understands that under the Texas Constitution this home equity loan may not be closed before one business day after the date that Borrower receives a copy of the loan application if not previously provided and a final itemized disclosure of actual fees, points, interest, costs, and charges to be charged at the closing of the loan unless Borrower

consents in writing for this information to be originally given or modified on the date of closing because of the existence of a bona fide emergency or other good cause. Borrower acknowledges the existence of a bona fide emergency or other good cause being [**specify nature of bona fide emergency or other good cause; see 7 Tex. Admin. Code § 153.13**] and consents to Lender providing a final itemized disclosure of actual fees, points, interest, costs, and charges to be charged on the loan on the loan closing date.

Select one of the following.

B.9. The closing of the Home Equity Extension of Credit did not occur before the first anniversary of the closing date of any other home equity extension of credit made under section 50(a)(6), article XVI, of the Texas Constitution and secured by part or all of the Property.

Or

B.9. Borrower requests a closing of the Home Equity Extension of Credit before the first anniversary of the closing date of any other extension of credit made under section 50(a)(6), article XVI, of the Texas Constitution and secured by part or all of the property due to an emergency that has been declared by the President of the United States or the governor as provided by law and that applies to the area where the property is located.

Continue with the following.

B.10. The closing of the Home Equity Extension of Credit has taken place at the office of Lender, an attorney at law, or a title company.

Select one of the following.

B.11. Borrower has not been required to apply the proceeds of the Home Equity Extension of Credit to repay another debt.

Or

B.11. Borrower has not been required to apply the proceeds of the Home Equity Extension of Credit to repay another debt except debt to another lender.

Or

B.11. Borrower has not been required to apply the proceeds of the Home Equity Extension of Credit to repay another debt except debt secured by the Property.

Or

B.11. Borrower has not been required to apply the proceeds of the Home Equity Extension of Credit to repay another debt except debt to another lender and debt secured by the Property.

Continue with the following.

B.12. Borrower has not assigned wages as security for the Home Equity Extension of Credit or signed a confession of judgment or power of attorney to Lender or anyone to confess judgment or appear for Borrower in a judicial proceeding.

B.13. Borrower has not signed any instrument relating to the Home Equity Extension of Credit in which blanks relating to substantive terms of the agreement were left to be filled in.

B.14. Borrower has received, as of the time the Home Equity Extension of Credit was made, a copy of the loan application and all executed documents signed by Borrower at closing related to the Home Equity Extension of Credit.

B.15. All of the Property is the homestead of Borrower. No portion of the Property is nonhomestead.

Select one of the following.

B.16. The Home Equity Extension of Credit is not a form of open-end account that may be debited from time to time or under which credit may be extended from time to time.

Or

B.16. The Home Equity Extension of Credit is a home equity line of credit constituting an open-end account that may be debited from time to time and under which credit may be extended from time to time subject to the restrictions found at Tex. Const. art. XVI, § 50(t).

Continue with the following.

B.17. Borrower has been advised that Borrower may, within three days after the Home Equity Extension of Credit is made, rescind the Home Equity Extension of Credit without penalty or charge. [**Include if applicable:** Borrower's Spouse has been advised that Borrower's Spouse may, within three days after the Home Equity Extension of Credit is made, rescind the Home Equity Extension of Credit without penalty or charge.]

B.18. Borrower understands and agrees that Lender is relying on the truth and accuracy of each of the representations and warranties in this Certificate and Agreement. Borrower acknowledges that Lender would not make the Home Equity Extension of Credit if any of the representations and warranties were not true and accurate.

_____

[**Name of borrower**]

SUBSCRIBED AND SWORN TO before me on _____ by [**name of affiant**].

_____

Notary Public, State of Texas

Include the following if applicable.

_____

[**Name of borrower's spouse**]

SUBSCRIBED AND SWORN TO before me on _____ by [**name of affiant**].

_____
Notary Public, State of Texas

Continue with the following.

_____
[**Name of lender**]

SUBSCRIBED AND SWORN TO before me on _____ by [**name of affiant**].

_____
Notary Public, State of Texas

[Reserved]

Form 11-8

Notice Concerning Refinance of Existing Home Equity Loan to Non–Home Equity Loan under Section 50(f)(2), Article XVI, Texas Constitution

YOUR EXISTING LOAN THAT YOU DESIRE TO REFINANCE IS A HOME EQUITY LOAN. YOU MAY HAVE THE OPTION TO REFINANCE YOUR HOME EQUITY LOAN AS EITHER A HOME EQUITY LOAN OR AS A NON–HOME EQUITY LOAN, IF OFFERED BY YOUR LENDER.

HOME EQUITY LOANS HAVE IMPORTANT CONSUMER PROTECTIONS. A LENDER MAY ONLY FORECLOSE A HOME EQUITY LOAN BASED ON A COURT ORDER. A HOME EQUITY LOAN MUST BE WITHOUT RECOURSE FOR PERSONAL LIABILITY AGAINST YOU AND YOUR SPOUSE.

IF YOU HAVE APPLIED TO REFINANCE YOUR EXISTING HOME EQUITY LOAN AS A NON–HOME EQUITY LOAN, YOU WILL LOSE CERTAIN CONSUMER PROTECTIONS. A NON–HOME EQUITY REFINANCED LOAN:

(1) WILL PERMIT THE LENDER TO FORECLOSE WITHOUT A COURT ORDER;

(2) WILL BE WITH RECOURSE FOR PERSONAL LIABILITY AGAINST YOU AND YOUR SPOUSE; AND

(3) MAY ALSO CONTAIN OTHER TERMS OR CONDITIONS THAT MAY NOT BE PERMITTED IN A TRADITIONAL HOME EQUITY LOAN.

BEFORE YOU REFINANCE YOUR EXISTING HOME EQUITY LOAN TO MAKE IT A NON–HOME EQUITY LOAN, YOU SHOULD MAKE SURE YOU UNDERSTAND THAT YOU ARE WAIVING IMPORTANT PROTECTIONS THAT HOME EQUITY LOANS PROVIDE UNDER THE LAW AND SHOULD CONSIDER CONSULTING WITH AN ATTORNEY OF YOUR CHOOSING REGARDING THESE PROTECTIONS.

YOU MAY WISH TO ASK YOUR LENDER TO REFINANCE YOUR LOAN AS A HOME EQUITY LOAN. HOWEVER, A HOME EQUITY LOAN MAY HAVE A HIGHER INTEREST RATE AND CLOSING COSTS THAN A NON–HOME EQUITY LOAN.

Form 11-9

Affidavit of Compliance (Pursuant to Section 50(f)(2), Article XVI, Texas Constitution)

Date:

Affiant[s]: [**name of owner**] [**include if applicable:**, [**name of owner's spouse**]]

Lender:

Home Equity Loan: [**include recording information**]

Property:

Affiant[s] on oath swear[s] that the following statements are true and within the personal knowledge of Affiant[s]:

1. I am a borrower named in the Note or the owner or spouse of any owner of the Property described in the Deed of Trust (which term includes any riders thereto), both dated [**date**], evidencing and securing a debt payable to the Lender and providing for a lien pursuant to section 50(a)(4), article XVI, of the Texas Constitution upon and against the Property (the "Loan").

2. The Loan is secured by homestead property as defined under applicable Texas law.

3. All of the following conditions are met in connection with the Loan:

   a. The Property is not the subject of a Home Equity Loan that was closed within one year before the date of this Affidavit.

   b. The Loan does not include the advance of any additional funds, other than:

i. funds advanced to refinance a valid debt described by sections 50(a)(1) through (a)(7), article XVI, of the Texas Constitution; or

ii. actual costs and reserves required Lender to refinance the debt.

4. The principal amount of the Loan when added to the aggregate total of the outstanding principal balances of all other indebtedness secured by valid encumbrances of record against the Property does not exceed 80 percent of the fair market value of the Property on the date the Loan is made.

5. Lender provided me with the written notice required by section 50(f)(2)(D), article XVI, of the Texas Constitution not later than the third business day after the date I submitted my loan application to Lender and at least twelve days before the date the Loan is closed.

_____

[**Name of owner**]

SUBSCRIBED AND SWORN TO before me on _____ by [**name of affiant**].

_____

Notary Public, State of Texas

Include the following if applicable.

_____

[**Name of owner's spouse**]

SUBSCRIBED AND SWORN TO before me on _____ by [**name of affiant**].

_____

Notary Public, State of Texas

Include the following if applicable.

_____

[Name of nonborrowing owner]

SUBSCRIBED AND SWORN TO before me on _____ by **[name of affiant]**.

_____

Notary Public, State of Texas

Include the following if applicable.

_____

[Name of nonborrowing owner's spouse]

SUBSCRIBED AND SWORN TO before me on _____ by **[name of affiant]**.

_____

Notary Public, State of Texas

[Reserved]

Chapter 12

Federal Consumer Disclosure Documents

I. Truth-in-Lending Disclosure Documents

II. RESPA Consumer Disclosure Documents

Forms

Chapter 12

Federal Consumer Disclosure Documents

Note: The Bureau of Consumer Financial Protection (BCFP) was created by the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act") (Pub. L. No. 111-203, 124 Stat. 1376) in 2010 to administer and enforce federal consumer finance law. All rulemaking and enforcement authority for the Real Estate Settlement Procedures Act (RESPA and Regulation X), the Truth in Lending Act and Regulation Z, the Equal Credit Opportunity Act and Regulation B, the Home Mortgage Disclosure Act and Regulation C, and other federal statutes regulating consumer finance was transferred to, and consolidated within, the BCFP.

The BCFP has integrated mortgage disclosure forms that consumers receive under the Truth in Lending Act and RESPA when applying for and closing on a home mortgage loan into a single set of disclosures as required by Title X of the Dodd-Frank Act.

The full text of the Dodd-Frank Act may be accessed at **https://www.govinfo.gov/content/pkg/PLAW-111publ203/pdf/PLAW-111publ203.pdf**. On May 2, 2018, the BCFP issued its fourth amendment to the Integrated Disclosure and Truth In Lending rules, accessible at **https://www.consumerfinance.gov/policy-compliance/rulemaking/final-rules/federal-mortgage-disclosure-requirements-under-truth-lending-act-regulation-z/**.

I. Truth-in-Lending Disclosure Documents

§ 12.1 Overview of the Truth in Lending Act and Regulation Z

§ 12.1:1 Source of Authority

The federal Truth in Lending Act, 15 U.S.C. §§ 1601–1667f, requires a creditor extending consumer credit, including mortgage credit secured by a dwelling, to make meaningful disclosures of actual credit terms that enable the consumer to more readily compare those terms with the terms of competitors and make an informed decision regarding the use and costs of credit. The Act is implemented by Regulation Z (12 C.F.R. pt. 1026), which is an official interpretive rule adopted and published by the BCFP, and the official staff interpretations of Regulation Z (12 C.F.R. pt. 1026, supp. I), which the BCFP staff updates and publishes annually. Reliance on and good-faith compliance with Regulation Z and the official staff interpretations afford creditors protection from civil liability and administrative penalties for failure to comply with disclosure and other requirements imposed on creditors under the Act. *See* 15 U.S.C. § 1640(f). Closed-end credit, including traditional mortgage loans, is regulated under subpart C of Regulation Z, 12 C.F.R. §§ 1026.17–.24.

§ 12.1:2 Coverage

Generally, the Act covers any credit transaction in which a creditor offers or extends a consumer credit at or below a threshold amount adjusted on January 1 each year that is primarily for personal, family, or household purposes and for which a finance charge is made in connection with the credit or, by written agreement, the credit is to be repaid in more than four installments. 12 C.F.R. § 1026.3(b). The threshold amount in 2015 was $54,600 and will adjust in tandem with the annual percentage increase in the Consumer Price Index in effect on June 1 of the preceding year. *See* Official Interpretation to 12 C.F.R. § 1026.3(b), Comment 3(b)-1. As discussed below, the Act also covers most consumer credit transactions secured by real property (or by personal property, such as a mobile home, used or intended to be used as the borrower's principal dwelling) regardless of the loan amount. For the Act to apply in any case, the creditor must be a person (including a natural person or a corporate or other business organization) who regularly extends credit of this type, which generally means that the person has extended credit more than twenty-five times in the preceding calendar year or more than five times for transactions secured by a dwelling during the preceding or current calendar year, and the consumer must be a natural person. *See* 15 U.S.C. § 1603.

For the purposes of providing disclosures under the TILA-RESPA Integrated Disclosures Rule (TRID), the rule applies to most closed-end consumer credit transactions secured by real property but does not apply to home equity lines of credit, reverse mortgages, or chattel-dwelling loans such as mobile homes or other dwellings that are not attached to real property. 12 C.F.R. § 1026.19. Loans made by a person or entity not considered to be a creditor are not covered by the rule. 12 C.F.R. § 1026.2(a)(17). Certain transactions, such as down payment assistance loans, have a partial exemption. 12 C.F.R. § 1026.3(h). Construction-only loans and loans secured by vacant land or by twenty-five or more acres are not subject to RESPA but are still subject to the disclosure requirements of TRID. *See* 12 C.F.R. §§ 1024.5, 1026.19. Credit extended to land trusts or trusts for tax or estate planning purposes is also covered. Official Interpretation to 12 C.F.R. § 1026.3(a), Comment 3(a)-10.

§ 12.1:3 Required Consumer Disclosures

Written disclosures must be made for each credit transaction subject to the Act before consummation; must reflect the terms of the actual legal obligation between the parties; and must show the calculated annual percentage rate (APR), finance charge, amount financed, payment schedule, and total of payments and other material disclosures of the cost of credit within permitted tolerances for accuracy. Creditors must disclose information germane to a loan transaction, including the loan details, payment schedule, loan fees, cash to close, service providers, escrows, and relevant state law provisions. All of this information must be provided in a dynamic format, such that the form changes with changes in the loan data and contains only provisions that reflect the terms of the loan transaction. Creditors are further required to ensure that the disclosures are clearly and conspicuously in writing in a form that the consumer can keep. 12 C.F.R. §§ 1026.17, 1026.18.

The initial disclosure is referred to as the loan estimate (LE); the final disclosure is referred to as the closing disclosure (CD). For loan transactions not subject to the new disclosure requirements (home equity lines of credit, reverse mortgages, mortgages secured by mobile homes, mortgages secured by dwellings (other than cooperative units) not attached to real property), the initial and final TIL disclosure statements, good-faith estimate, and HUD-1, as applicable, are still used. 12 C.F.R. § 1026.19(e), (f). The following consumer disclosures, as applicable, are required under the Act and Regulation Z.

Early Disclosures: Creditors must make early disclosures to the consumer within three business days after loan application and at least seven business days before loan closing. *See* 12 C.F.R. § 1026.19(e)(1)(iii). The disclosures must be made before the consumer pays any fee other than a bona fide and reasonable fee for obtaining credit history. *See* 12 C.F.R. § 1026.19(e)(2)(i)(B).

Correction Disclosures: Creditors are permitted to provide a revised LE only if there is a "changed circumstance" defined as (1) an extraordinary event beyond the control of any interested party or other unexpected event specific to the consumer or transaction; (2) information specific to the consumer or transaction that the creditor relied on when providing the disclosures that was inaccurate or changed after the disclosures were provided; or (3) new information specific to the consumer or transaction that the creditor did not rely on when providing the original disclosures. 12 C.F.R. § 1026.19(e)(3)(iv)(A). Revised CDs must be received no later than three days before loan consummation if the disclosed APR becomes inaccurate, the loan product changes, or a prepayment penalty is added; for any other changes, the creditor must ensure receipt of the revised CD at or before loan consummation. 12 C.F.R. § 1026.19(f)(2)(i). If a subsequent event causes the disclosure of the APR to be inaccurate outside of permitted tolerances, the creditor must make a correction disclosure of the APR and all other changed terms at least three business days before loan consummation. *See* 12 C.F.R. § 1026.19(a)(2)(ii).

Final Disclosures: Creditors must ensure that the borrower receives a final CD no later than three business days before loan consummation. *See* 12 C.F.R. § 1026.19(f).

Notice of Right of Rescission: If a security interest is or will be retained or acquired in the consumer's principal dwelling in connection with a mortgage loan, the Act provides the consumer a right to rescind the loan transaction within three business days. The consumer may exercise the right to rescind until midnight of the third business day after loan consummation, delivery of notice of right of rescission, or deliv-

ery of the material disclosures, whichever occurs last. Certain loan transactions, including a loan to finance the purchase or initial construction of the consumer's principal dwelling, are exempt from the right of rescission. *See* 12 C.F.R. § 1026.23(f). Certain required disclosures, such as the amount of the finance charge, the amount financed, and the APR, are regarded as *material* disclosures and must be provided to the consumer before the prescribed three-business-day rescission period begins to run. The failure to timely provide these material disclosures within prescribed tolerances for accuracy not only subjects the creditor to substantial liability under the Act for administrative penalties and costs, restitution, and civil damages but may also have the legal effect of extending the rescission period for up to three years after loan closing. *See* 12 C.F.R. § 1026.23(a)(3). The content and model form of the required rescission notice is set out in 12 C.F.R. § 1026.23(b)(1), (b)(2) and appendix H to Regulation Z.

Variable-Rate Loan Disclosures: Special disclosure requirements apply to variable-rate transactions secured by a principal dwelling under 12 C.F.R. § 1026.19(b), requiring (1) delivery to the consumer at the time of loan application of detailed written adjustable-rate mortgage loan program disclosures and a preprinted disclosure booklet titled Consumer Handbook on Adjustable Rate Mortgages, published by the BCFP, and (2) a loan program disclosure for each variable-rate program for which the consumer expresses an interest, with periodic written disclosures of adjustments made to the interest rate in a variable-rate transaction subject to section 1026.19(b). *See* 12 C.F.R. § 1026.20(c). Home equity lines of credit and other open-end credit secured by residential dwellings require written disclosures and are subject to substantive rules under subpart B, 12 C.F.R. §§ 1026.5–.13.

Loan Assumption Disclosures: A creditor must provide a consumer new written disclosures when the consumer assumes an existing residential mortgage obligation with the written consent of the creditor and the creditor agrees to accept that consumer as the principal obligor. *See* 12 C.F.R. § 1026.20(b).

Mortgage Loan Sale Disclosure: Creditors that purchase or accept the sale and assignment of a whole loan secured by a consumer's principal dwelling on or after May 29, 2009, must provide the borrower obligated under the loan a written notice within thirty days after the sale or assignment containing information identifying the new creditor, the date of transfer of the loan, the location where the transfer of the loan is recorded, and other relevant information about the creditor. 12 C.F.R. § 1026.39.

HOEPA and Higher-Priced Loan Disclosures: Special rules regarding high-rate, high-cost loans (generally referred to as "Section 32," or Home Ownership and Equity Protection Act (HOEPA) loans) are set out under subpart E, 12 C.F.R. §§ 1026.31, 1026.32, 1026.34. Creditors making HOEPA loans must furnish consumers a written disclosure meeting the requirements of section 1026.32(c) at least three business days before loan consummation and abide by certain substantive terms of that section. Special rules effective October 1, 2009, regarding a new category of higher-priced mortgage loans (HPMLs) are also set out in 12 C.F.R. § 1026.35. The Home Ownership and Equity Protection Act is codified at 15 U.S.C. § 1639.

Reverse Mortgage Loan Disclosures: Creditors making reverse mortgage loans subject to 12 C.F.R. § 1026.33(a) must provide consumers an additional written disclosure of the "total annual loan cost of credit" (generally referred to as the "TALC" disclosure) in content set out in 12 C.F.R. § 1026.33(b) and substantially in the model form found in 12 C.F.R. pt. 1026 app. K(d).

§ 12.1:4 Certain Consumer Protection Provisions

Regulation Z contains various substantive provisions intended to protect consumers from certain unfair, deceptive, and abusive practices of originators and servicers of home mortgage loans. *See* 73 Fed. Reg. 44,522 (July 30, 2008).

Prohibited Deceptive Advertising: Advertising rules targeting deceptive and misleading practices apply to all consumer credit transactions secured by dwellings. Advertisements occurring on or after October 1, 2009, that promote mortgage credit secured by a dwelling are regulated by extensive new advertising rules set out in amendments to 12 C.F.R. §§ 1026.16, 1026.24 (open- and closed-end credits, respectively). The rules are intended to ensure that advertisements for credit clearly and conspicuously provide accurate and balanced information about rates, monthly payments, and other loan features and that several deceptive and misleading advertising practices are banned. The advertising regulations apply to any advertisement (including promotional materials accompanying applications) in any medium promoting a credit transaction secured by a dwelling (except radio and television advertisements, to which new alternative regulations apply).

Unfair or deceptive acts and practices in home mortgage advertising are also regulated by a final rule of the Federal Trade Commission (FTC) for business entities under its regulatory jurisdiction, including "nondepository covered persons" such as independent mortgage bankers and brokers. *See* 76 Fed. Reg. 43,826 (July 22, 2011); 16 C.F.R. pt. 321. The regulations prohibit any misrepresentation in any commercial communication regarding any term or feature of any mortgage credit product and impose certain recordkeeping requirements. Rulemaking authority of the FTC was transferred to the BCFP on July 21, 2011, pursuant to Title X of the Dodd-Frank Act, but the FTC, the BCFP, and any state's attorney general or other authorized state officer have statutory authority to bring enforcement actions and seek civil penalties under these deceptive advertising regulations.

Prohibited Coercion of Appraisers: Creditors, mortgage brokers, and their affiliates are prohibited from coercing, influencing, or otherwise encouraging an appraiser to misstate or misrepresent the value of a consumer's principal dwelling securing a covered loan. Any creditor who knows at or before a loan closing of a violation of these anticoercion regulations is prohibited from extending credit based on such an appraisal unless the creditor documents that it has acted with reasonable diligence to determine that the appraisal does not materially misstate or misrepresent the value of the appraised property. *See* 12 C.F.R. § 1026.42.

Prohibited Servicing Practices: Mortgage servicers of loans secured by principal dwellings are prohibited from (1) failing to timely credit payments as of the date of receipt, with certain exceptions, (2) imposing a late charge on a consumer in connection with the receipt of a payment when the only delinquency is attributable to a late fee or delinquency charge assessed on an earlier payment (and the current payment is otherwise a full payment made on or before its due date or within an applicable grace period), and (3) failing to provide an accurate payoff statement within a reasonable time after receiving a request for it by a consumer (or a person acting on behalf of a consumer). *See* 12 C.F.R. § 1026.36(c).

Prohibited Steering and Certain Loan Originator Compensation Practices: Effective for closed-end loans secured by a dwelling for which creditors receive the application on or after April 1, 2011, amendments to 12 C.F.R. § 1026.36 prohibit three certain loan originator compensation practices:

1. *Compensation Based on Loan Terms.* Mortgage brokers and other loan originators are prohibited from charging or receiving compensation based on any terms and conditions of the loan transaction other than the loan amount. This has the effect of prohibiting creditors from paying so-called yield-spread premiums to mortgage brokers (that is, compensation based on spreads in the interest rate) although paying a fee based on a fixed percentage of the loan amount is authorized. "Compensation," for purposes of the rule, means all amounts paid to and retained by the mortgage broker or other loan originator from salaries, commissions, annual or periodic bonuses, incentive compensation, or awards of merchandise, services, trips, or similar prizes but does not include fees charged to the consumer that are passed through by the loan originator to third-party providers to pay for services such as a property appraisal and a consumer credit report.

2. *Receiving Compensation from Both the Creditor and Consumer.* Mortgage brokers and other loan originators are prohibited from directly receiving compensation from both the creditor, or any other person, and the consumer in the same loan transaction. That is to say, if any loan originator receives compensation directly from a consumer in a loan transaction, neither the creditor nor any other person may provide any compensation to the loan originator, directly or indirectly, in connection with that same loan transaction.

3. *Steering Consumer to Loan Not in Consumer's Interest for Greater Compensation.* Mortgage brokers and other loan originators are prohibited from steering consumers to consummate a loan not in the consumer's interest in order to receive greater compensation from the creditor for the loan than for other loan transactions that the loan originator offered or could have offered the consumer and for which the consumer likely could have qualified. "Steering" for this purpose means advising, counseling, or otherwise influencing a consumer to accept and actually consummate a particular loan transaction. "Safe harbor" procedures are set out in the C.F.R. that may be relied on to assure compliance under which the consumer must be presented with various loan options from a significant number of creditors to choose from.

The new rule applies to all loan originators, including mortgage brokers and loan officers employed by mortgage brokers, mortgage bankers, and financial institutions that, for compensation, arrange, negotiate, or otherwise obtain a consumer loan for another person. Managers, administrative staff, and other employees of such loan originators who do not engage in these activities (and whose compensation is not based on where any particular loan is originated) are not considered loan originators. The rule also applies to creditors who close transactions that are table funded (that is, closings in which the creditor named as payee on the promissory note does not actually fund the loan from its own resources or a bona fide warehouse line of credit for which it is obligated, but instead obtains funding by another party who is immediately assigned the loan). 12 C.F.R. § 1026.36(d), (e).

Prohibited Practices Applicable to HOEPA and HPML Loans: Certain consumer protections apply only to so-called high-rate, high-cost loans ("Section 32" or HOEPA loans), which bear interest rates or fees above a certain percentage or amount described in 12 C.F.R. § 1026.32 and a new category of HPMLs, which

bear interest rates above standards described in 12 C.F.R. § 1026.35.

1. *Prohibited Lending without Regard to Repayment Ability.* Creditors are prohibited from extending credit for HOEPA loans or HPMLs to any consumer based on the value of the consumer's collateral without regard to the consumer's ability as of the date of consummation to repay the loan from sources other than the collateral itself. Creditors are required to verify each borrower's income and assets relied on in underwriting the loan and are prohibited from relying on stated amounts of income, including expected income, or assets unless the creditor verifies such amounts according to standards set out in the rules. *See* 12 C.F.R. §§ 1026.34(a)(4), 1026.35.

2. *Restrictions on Prepayment Penalties.* HOEPA loans and HPMLs may provide for a prepayment penalty only if (1) the penalty is otherwise permitted by state or other applicable law; (2) the source of prepayment funds is not a refinancing by the same creditor or its affiliate; (3) the prepayment penalty will not apply after the two-year period following loan consummation; and (4) the amount of the periodic payment of principal, interest, or both does not change during the four-year period following loan consummation. HOEPA loans have one additional condition not applicable to HPMLs: the consumer's total monthly debt payments (including amounts owed under the mortgage loan) may not exceed 50 percent of the consumer's gross monthly income as of the date of loan consummation and as verified under the standards set out in the regulations. *See* 12 C.F.R. §§ 1026.32(d)(6), 1026.35.

3. *Mandatory Escrow Accounts.* Before consummating a first-lien HPML, the creditor must establish, and thereafter maintain, an escrow account to collect reserves from the consumer for the payment of property taxes and premiums for mortgage-related insurance required by the creditor. The creditor or loan servicer may permit a consumer to cancel the mandatory escrow account if the consumer requests cancellation in a dated written request received by the creditor no earlier than 365 days after loan consummation. Mandatory escrow account regulations apply to covered loans for which applications are received on or after April 1, 2010, or, if such loans are secured by manufactured housing, October 1, 2010. *See* 12 C.F.R. § 1026.35(b).

§ 12.2 General Considerations

This chapter discusses four of the forms designed to comply with the consumer disclosure requirements applicable to closed-end credit under the Truth in Lending Act and Regulation Z. The following forms are the model forms in appendix H of Regulation Z:

- loan estimate (fixed-rate loan) (from app. H-24(B)) (available at **https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/cfpb_kbyo_guide-to-loan-estimate-and-closing-disclosure-forms_v2.0.pdf**);
- closing disclosure (fixed-rate loan) (from app. H-25(B)) (available at **https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/cfpb_kbyo_guide-to-loan-estimate-and-closing-disclosure-forms_v2.0.pdf**);

- truth-in-lending (sale) disclosure statement (from app. H-1);
- truth-in-lending (loan) disclosure statement (from app. H-2);
- notice of right of rescission (general) (from app. H, clause H-8) (form 12-1 in this chapter); and
- notice of right of rescission (refinancing) (from app. H, clause H-9) (form 12-2).

The forms may require modification to comply with federal and state consumer laws.

Regulation Z, a complex set of rules, mandates making certain disclosures at specified times to any person who obtains consumer credit from a creditor. "Consumer credit" means credit offered or extended to a consumer primarily for personal, family, or household purposes. A "creditor" is the person to whom a consumer credit obligation is initially payable. A creditor must give the consumer (the borrower) truth-in-lending disclosures in a consumer credit transaction if the creditor regularly extends consumer credit that is subject to a finance charge or that is payable by written agreement in more than four installments, not including a down payment, and to whom the obligation is initially payable. A person "regularly extends consumer credit" only if credit is extended in the current or preceding calendar year more than twenty-five times for general transactions or more than five times for transactions secured by dwellings. 12 C.F.R. § 1026.2. A credit transaction, other than one secured by real property or personal property used as the principal dwelling of the consumer, is exempt from Regulation Z if the total amount financed in the transaction exceeds the threshold amount. 12 C.F.R. § 1026.3(b).

By these definitions, most entities providing credit for home equity financing transactions or for building or improving homes are subject to the requirements of Regulation Z. Chapter 20 in this manual describes transactions involving mechanic's liens and suggests which of those transactions require use of these forms.

For a description of home equity financing transactions, see chapter 11.

§ 12.2:1 Disclosure Statements

General requirements for the disclosure statements applicable to closed-end credit are set forth in 12 C.F.R. §§ 1026.17, 1026.18. Among other requirements, the disclosures must be made "clearly and conspicuously in writing, in a form that the consumer may keep." They must be segregated from other information, and they "shall not contain any information not directly related to the disclosures required under § 1026.18 or § 1026.47." 12 C.F.R. § 1026.17(a). These disclosures may be provided to the consumer in electronic form, subject to compliance with the consumer consent and other applicable provisions of the Electronic Signatures in Global and National Commerce Act (E-Sign Act). 15 U.S.C. §§ 7001–7031.

If the creditor is the seller, the (sale) disclosure is used.

Generally, disclosures must be made before the transaction is consummated, but certain transactions involving residential mortgages, mail or telephone orders, or a series of sales have different timing requirements. 12 C.F.R. § 1026.17(b). Disclosures for most residential mortgage transactions, for example, must be given at the time of loan application or delivered or placed in the mail not later than three business days after the creditor receives the consumer's written loan application. Redisclosure may be required before loan consummation if there is a changed circumstance, if the disclosed annual percentage rate terms change before loan settlement, or if a subsequent event makes disclosed terms inaccurate. 12 C.F.R. §§ 1026.17(f), 1026.19(a).

§ 12.2:2 Notices of Right of Rescission

The two notices of right of rescission, forms 12-1 and 12-2 in this chapter, differ only to the extent that one applies to original financing and the other to refinancing. A refinancing involves the satisfaction of one financing transaction with a new financing transaction by the same lender and borrower. 12 C.F.R. § 1026.20(a). In either case the notice provides a cooling-off period of three business days after a person obtains credit involving a lien against the person's principal dwelling. During this period the homeowner may rescind the transaction.

Regulations governing the right to rescind appear at 12 C.F.R. § 1026.23, and forms 12-1 and 12-2 are drafted in accordance with that section.

Creditors subject to truth-in-lending requirements should provide the appropriate notice of right of rescission, form 12-1 or 12-2, if a transaction creates a lien or other security interest in a consumer's principal dwelling, except when the transaction finances the acquisition or initial construction of the dwelling. 12 C.F.R. § 1026.23. Typical transactions requiring this form are a refinancing of a residential mortgage transaction by a new creditor, a home equity extension of credit, and a home improvement loan secured by a mechanic's lien. A consumer's principal dwelling may be an ordinary residence, a condominium, a cooperative unit, a mobile home, or a trailer. A person may have only one principal dwelling, and it may or may not be attached to real property. *See* 12 C.F.R. § 1026.2(a)(19).

All persons who have ownership interests in the dwelling used as security and who use it as their principal dwelling may be entitled to rescind the transaction. 12 C.F.R. § 1026.23(a).

Transactions exempt from the right of rescission and this notice requirement are described in 12 C.F.R. § 1026.23(f). A refinancing by the same creditor of an extension of credit already secured by the consumer's principal dwelling is subject to the right of rescission only to the extent that the new loan amount exceeds the sum of the unpaid principal balance and accrued finance charges of the existing extension of credit and closing costs related to the refinancing transaction. Certain other transactions are also exempt from the right of rescission, including a residential mortgage transaction to finance the acquisition or initial construction of a principal residence. 12 C.F.R. § 1026.23(f).

§ 12.2:3 References

Regulation Z requires strict compliance, and even minor errors or omissions in drafting truth-in-lending documents may lead to administrative enforcement actions, statutory penalties, and individual and class actions for civil liability against creditors. *See* 15 U.S.C. § 1640. Accordingly, attorneys should consult Regulation Z itself, especially the sections addressing these forms (12 C.F.R. §§ 1026.17–.24), for aid in drafting the documents. Section 1026.18 establishes contents for the disclosure statements, and section 1026.23 governs the right of rescission. Regulation Z is published in title 12 of the Code of Federal Regulations, part 1026.

The official commentary to Regulation Z offers additional useful information; commentaries are issued periodically by officials in the BCFP, and they are published in several places. One generally accessible source for these interpretations is CCH Incorporated's *Consumer Credit Guide*, which may be ordered online at **http://business.cch.com/creditRegulation**. Another source is available online at **https://www.fdic.gov/regulations/laws/rules/6500-100.html**.

§ 12.3 Cautions

The disclosure statements must be completed in compliance with 12 C.F.R. § 1026.18. That sec-

tion provides, among many other requirements, that if the consumer wishes to have an itemization of the amount financed, the itemization must be given in a separate writing.

For the notices of right of rescission, the creditor should observe certain cautions during the three-business-day cooling-off period: other than money in escrow, no funds should be disbursed; no improvements to the property should be made; no service related to the transaction should be provided to the consumer; and no goods or materials for construction should be delivered to the property. If the consumer rescinds the transaction, within twenty calendar days the creditor must return any money or property received from the consumer. 12 C.F.R. § 1026.23(d).

Any disclosure statements required at consummation, including notices of the right of rescission, and other documents related to the transaction should be signed or delivered to the consumer at loan settlement. The creditor must provide each consumer entitled to rescind two copies of the notice of the right to rescind. A consumer may exercise the right to rescind until midnight of the third business day following the last to occur of loan consummation, delivery of the material disclosures, or delivery of the notices of the right of rescission. A consumer may rescind by written notice to the creditor, which is effective when mailed, sent by other means, or delivered to the creditor. The creditor must delay disbursing funds and otherwise performing under the extension of credit until the rescission period has expired and the creditor is reasonably satisfied that the consumer has not rescinded. Failure of the creditor to deliver required notices or statements can subject the creditor to statutory penalties and civil liability for damages and have the further legal effect of extending the period during which the consumer may rescind the transaction for up to three years after the date of consummation. 12 C.F.R. § 1026.23(a).

§ 12.4 Instructions for Completing Disclosure Statements

Attorneys completing the disclosure statements should follow closely the instructions in 12 C.F.R. § 1026.18 and should also consult the more detailed instructions promulgated by the BCFP (see section 12.2:3 above).

Disclosures not relevant to the transaction may be omitted; for example, the total sale price may be omitted in a loan transaction.

The creditor must be identified at least by name, but this disclosure may appear apart from the other disclosures. When a transaction involves multiple creditors, any one of them may make the disclosures, but the disclosing creditor must be identified. 12 C.F.R. §§ 1026.17(d), 1026.18(a).

The annual percentage rate is determined by methods set forth in 12 C.F.R. § 1026.22. The BCFP provides other useful aids for this calculation, including appendix J of Regulation Z and annual percentage rate tables available from the Board.

"Finance charge" is defined in 12 C.F.R. § 1026.4, which offers several examples and lists certain charges excluded from the finance charge. Calculating this charge is central to the disclosure statements, so it should be done with great care. Generally, any charge payable directly or indirectly by the consumer that is imposed directly or indirectly by the creditor as an incident to or condition of the extension of credit constitutes a finance charge unless the charge is expressly excluded under 12 C.F.R. § 1026.4. Most notable among the exclusions are charges of a type that would be payable in a comparable cash transaction and the "real estate related fees" enumerated in 12 C.F.R. § 1026.4(c)(7).

Section 1026.4 also excludes some insurance premiums under certain conditions. Many credi-

tors find this exclusion highly desirable. Premiums for credit life, accident, health, or loss-of-income insurance may be excluded under the following conditions: the creditor does not require such coverage and discloses that fact; the creditor discloses the premium for the initial term of insurance coverage; and the consumer signs or initials an affirmative written request for the insurance after receiving the required disclosures. Premiums for insurance against loss of or damage to property or against liability arising from the ownership or use of property may be excluded under the following conditions: the coverage may be obtained from a person of the consumer's choice, and that fact is disclosed; and if it is obtained from or through the creditor, the creditor discloses the premium for the initial term of coverage.

Determination of the amount financed under 12 C.F.R. § 1026.18(b) requires determining the principal loan amount or cash price less any down payment, adding other amounts financed except the finance charge, and subtracting any prepaid finance charge. The creditor may include other items in this amount, such as rebates or loan premiums.

If the consumer wants an itemization of the amount financed or if the creditor prefers to supply one as a matter of course, it must be provided in a separate document at the same time as other disclosures required by section 1026.18. A model for this disclosure appears in appendix H-3 of Regulation Z.

In the late-payment disclosure, the creditor must reveal any charge that may be imposed before maturity due to a late payment, other than a deferral or extension charge. 12 C.F.R. § 1026.18(*l*). If the creditor merely continues to assess interest at the rate charged before default, that fact need not be disclosed.

For a home equity extension of credit (see chapter 11 in this manual), the description of the security should be inserted as "your home."

Regulation Z requires that the disclosure statement include an appropriate version of the assumption policy model clause when the transaction involves a residential mortgage. 12 C.F.R. § 1026.18(q). A "residential mortgage transaction" is defined as a transaction in which a "consensual security interest is created or retained in the consumer's principal dwelling to finance the acquisition or initial construction of that dwelling." 12 C.F.R. § 1026.2(a)(24). For this type of transaction, the appropriate form of this model clause (H-6), which can be found at appendix H of Regulation Z, should be added to the disclosure statement.

Appendix H of Regulation Z offers other model clauses that may be suitable for the disclosure statements: variable rate (H-4), demand feature (H-5), and required deposit (H-7).

The truth-in-lending disclosure statements are designed for simple, fixed-interest-rate transactions. If a variable-interest-rate transaction is involved, the disclosure statement forms in this manual must be revised to include variable-interest-rate disclosures. Additionally, if the interest rate on a loan secured by a consumer's principal dwelling, such as a home equity extension of credit or credit for building or improving a consumer's home, may increase after funding and the term of the credit exceeds one year, variable-interest-rate disclosures in addition to those contained in the truth-in-lending disclosure statement must be given by the creditor to the borrower at the earlier of the time the borrower either receives the loan application form or pays a nonrefundable fee. *See* 12 C.F.R. § 1026.19(b). These variable-rate mortgage loan disclosures are extensive and include twelve features of the variable-rate loan program that must be disclosed. The disclosures would thus be unique to any specific loan program offered by a creditor, and it would be impractical for this manual to provide a model variable-rate mortgage loan disclosure form. If a variable-rate credit secured by the consumer's principal

dwelling is desired, the attorney should be sure that the creditor has given appropriate variable-rate disclosures to the borrower.

The other information required in the disclosure statements should be provided in careful accordance with the guidelines of 12 C.F.R. § 1026.18 and the BCFP's commentary on that section.

§ 12.5 Instructions for Completing Notices of Right of Rescission

The attorney should be careful to use the appropriate model form for the notice of right of rescission. The refinancing notice of right of rescission (form 12-2 in this chapter) should be used only for refinancings by the same creditor. See section 12.2:2 above. The general form (form 12-1) should be used in other consumer credit transactions requiring the notice.

The date of the transaction is the date the consumer initially becomes obligated, either by signing a note or retail installment contract (home improvement) or by assuming a contractual obligation, whichever is first.

The creditor's name and mailing address must be provided.

The date of the end of the rescission period must be stated accurately; it is the third business day following the date of the transaction specified on the form. A definition of "business day" is given in 12 C.F.R. § 1026.2(a)(6).

Finally, the consumer should sign the form to acknowledge its receipt.

§ 12.6 Additional Documents

For other documents related to mechanic's lien transactions that may require a disclosure statement and notice of right of rescission, see chapter 20 in this manual.

§ 12.7 Other Comments

Regulation Z requires that creditors give consumers the disclosure statements "in a form that the consumer may keep." 12 C.F.R. § 1026.17(a). Also, the creditor must retain evidence of compliance, such as by keeping a copy of the executed form showing the consumer's acknowledgment of receiving it, for two years after the date disclosures are required to be made or action is required to be taken. 12 C.F.R. § 1026.25. The form need not be filed or recorded.

Each consumer entitled to rescission must be provided two copies of the notice of right of rescission, one for potential use in canceling the transaction and one for recordkeeping. Each person whose ownership interest in the dwelling is subject to the security interest and who also uses it as his or her principal dwelling should receive two copies of the notice (one copy to each if the notice is provided in electronic form in accordance with the consumer consent and other applicable provisions of the E-Sign Act). As with the disclosure statement, the creditor should also keep a copy of the executed form for two years.

During the three-business-day rescission period provided by the notice, the creditor may accrue finance charges on the amount loaned.

Consumers may waive the right to rescind by providing a signed, dated statement that the loan is necessary to cope with a bona fide personal financial emergency. The waiver form must describe the emergency and specifically waive the right to rescind. Printed or otherwise standard waiver forms generally may not be used for this purpose, and everyone entitled to rescind must sign the waiver. 12 C.F.R. § 1026.23(e).

The borrower may not be charged for the preparation of truth-in-lending documents. If an attorney for the lender prepares truth-in-lending documents, the lender should pay any fee for

that service separately and may not charge or pass through to the borrower (as part of loan settlement or closing costs or otherwise) that fee. 12 U.S.C. § 2610.

[Sections 12.8 through 12.10 are reserved for expansion.]

II. RESPA Consumer Disclosure Documents

§ 12.11 Overview of the Real Estate Settlement Procedures Act

§ 12.11:1 Source of Authority

The Real Estate Settlement Procedures Act of 1974 (RESPA), 12 U.S.C. §§ 2601–2617, is a federal consumer disclosure and protection statute intended to ensure consumers are provided greater and more timely information on the nature and costs of the settlement process and are protected from unnecessarily high settlement charges caused by abusive settlement practices, such as kickbacks or referral fees that tend to increase the costs of settlement services.

RESPA was implemented by Regulation X, 12 C.F.R. pt. 1024, which was an official interpretive rule adopted and published by the Department of Housing and Urban Development (HUD) under its previously congressionally delegated authority to interpret and implement the statute. The Bureau of Consumer Financial Protection (BCFP) has enforcement authority. The BCFP reissued its regulation of these statutes under 12 C.F.R. pt. 1024. Regulation X provides "reliance on rule" protections to lenders and other settlement service providers. No provision of Regulation X imposing liability will apply to any act done or omitted in good-faith compliance with Regulation X or any other official HUD rule, regulation, or interpretation, even if after the act or omission has occurred the rule, regulation, or interpretation is amended, rescinded, or determined by judicial or other means to be invalid for any reason. *See* 12 U.S.C. § 2617(b).

§ 12.11:2 Coverage

RESPA applies to all *federally related mortgage loans*, a term broadly defined by regulation in 12 C.F.R. § 1024.5(a) to include virtually any mortgage loan made by a creditor in the United States that is secured by a lien on a one- to four-family residential dwelling. Certain loans, such as business purpose loans, loans secured by vacant land, and temporary financing, such as a construction loan, with a term of less than two years that is not convertible to permanent financing, are exempt from coverage. See the exemptions at 12 C.F.R. § 1024.5(b).

§ 12.11:3 Consumer Disclosures

Generally, RESPA requires that loan originators provide written disclosures to loan applicants and borrowers at various stages of loan origination, settlement, and servicing of a federally related mortgage loan. The rules regulating the form, content, and timing of these required consumer disclosures and certain other key provisions are summarized below.

Loan Estimate: A loan originator, either the lender or the mortgage broker, of a federally related mortgage loan must provide a loan applicant a loan estimate (LE) within three business days after receiving an application (or information sufficient to complete an application). The lender or mortgage broker must provide the LE by hand delivery or by placing the LE in the mail within the three-business-day period. The LE is an estimate of all fees and charges a borrower is likely to incur at loan closing that must

be accurate within narrow permitted tolerances; the applicant can comparison shop estimated costs among competing lenders and brokers. "Application," for this purpose, is defined in 12 C.F.R. § 1024.2(b). The form, content, and timing of a standardized LE disclosure must comply with the requirements of 12 C.F.R. § 1025.7 and appendix C, as amended.

Special Information Booklets: A mortgage lender or mortgage broker must provide loan applicants a preprinted special information booklet within three business days after receiving a loan application (unless the application is declined or withdrawn within that three-day period) consisting as applicable of either *Your Home Loan Toolkit—A Step-by-Step Guide* (accessible at **https://files.consumerfinance.gov/f/201503_cfpb_your-home-loan-toolkit-web.pdf**), in the case of closed-end credits to purchase a home, or *When Your Home is On the Line: What You Should Know about Home Equity Lines of Credit* (Consumer Financial Protection Bureau), in the case of open-end credit plans. *See* 12 C.F.R. §§ 1024.6, 1026.19(g).

Escrow Account Notices: When escrow accounts are established and maintained by the lender to reserve for property tax and insurance premium payments, the lender or loan servicer must provide the borrower an initial escrow account statement at loan settlement (or within forty-five days after settlement), and thereafter the servicer must provide the borrower an annual escrow account statement within thirty days after the end of each account computation year (which need not be a calendar year). The initial notice must itemize the amounts of the required initial deposit to the account to be collected from the borrower at loan settlement, the monthly deposits to be collected from the borrower during the twelve months thereafter, and the amounts and timing of payments from the account for that twelve-month computation year. RESPA, section 10, substantively regulates the maximum amount, including any cushion, that a mortgage lender may require the borrower to reserve in an escrow account and the method of analyzing and accounting for escrow balances, including any surpluses, shortages, and deficiencies that may occur. *See* 12 C.F.R. § 1024.17. The form and content of the initial and annual escrow account statements must comply with the requirements of sections 1024.17(h) and 1024.17(i), respectively, and the Public Guidance Documents referenced therein.

Loan Servicing Transfer Notices: Mortgage lenders, mortgage brokers who anticipate using table funding (that is, closings in which the note is made payable to the mortgage broker and the loan proceeds are advanced by an investor on contemporaneous assignment of the note and security instrument), and dealers of manufactured homes who anticipate a first-lien dealer loan must provide loan applicants a servicing disclosure statement at the time of application or within three business days after submission of an application that indicates whether the servicing of the loan may be assigned, sold, or transferred at any time while the loan is outstanding. The form, content, and timing of the servicing disclosure statement must generally conform to the model format set out in appendix MS-1 to Regulation X, 12 C.F.R. pt. 1024. *See* 12 C.F.R. § 1024.33(b). The term *servicing* generally refers to such contract administration services as collecting scheduled monthly or other periodic payments from the borrower, remitting principal and interest payments to the holder of the loan, disbursing property tax and insurance premium payments from escrow accounts when due, maintaining accounting and business records of account activity, and providing notices and reports required by law or the terms of the mortgage contract. The term *servicer* generally refers to the entity or other person responsible for performing servicing. These terms are defined in 12 C.F.R. § 1024.2.

A written notice of transfer also must be provided to the borrower on the actual assignment,

sale, or transfer of servicing by the transferor servicer at least fifteen days before the effective date of the transfer and by the transferee servicer not later than fifteen days after the effective date. A combined written notice of transfer by the transferor and transferee given at loan settlement also satisfies these timing requirements. The notice of transfer must include such information as the effective date of the transfer of servicing; the date on which the transferor servicer will cease accepting payments on the loan and the date the transferee servicer will begin to accept the payments; the names, addresses, and toll-free numbers of the transferor and transferee servicers where inquiries regarding the servicing transfer may be directed; a statement of the borrower's rights regarding complaint resolution; and other content as set out in appendix MS-2 to Regulation X, 12 C.F.R. pt. 1024. A late fee may not be charged for any misdirected payments by a borrower during the sixty-day period beginning on the effective date of the transfer, and misdirected payments may not be treated as late for credit reporting or other purposes. *See* 12 C.F.R. § 1024.33(c).

Affiliated Business Arrangement Disclosure Statement: Any mortgage lender, mortgage broker, real estate broker, or other person or entity in a position to refer settlement service business that refers a borrower or other person to an affiliated business to perform a settlement service must provide the borrower or other person to whom the referral is made a written affiliated business arrangement disclosure statement. The disclosure statement must generally be in the format of appendix D to Regulation X, 12 C.F.R. pt. 1024. The statement must describe the nature of the relationship between the person making the referral and the referred settlement service provider, set out the estimated charge or range of charges by the provider for the settlement services, and disclose that the borrower or other person is not required to use the referred service provider and is free to "shop around" for the best services and rates that may be available from other service providers. An affiliated business arrangement exists when a person or entity in a position to refer settlement service business, or an associate of such a person, has an affiliate relationship with, or a direct or beneficial interest of more than 1 percent in, a provider of settlement services and directly or indirectly refers such settlement service business to that provider (or affirmatively influences the selection of that affiliated provider). The disclosure statement must be on a sheet of paper separate from other disclosures and be provided at the time the referral is made. If a lender makes the referral to a borrower, the disclosure may be provided at the time the good-faith estimate disclosure is provided to the borrower. *See* 12 C.F.R. § 1024.15.

§ 12.11:4 Prohibition against Kickbacks and Unearned Fees

RESPA, section 8, prohibits kickbacks, referral fees, and unearned fees in connection with federally related mortgage loans. 12 U.S.C. § 2607. Specifically, section 8, as interpreted by Regulation X, provides that "[n]o person shall give and no person shall accept any fee, kickback or other *thing of value* pursuant to any agreement or *understanding*, oral or otherwise, that business incident to or part of a *settlement service* involving a federally related mortgage loan shall be *referred* to any person." 12 C.F.R. § 1024.14(b) (emphasis added). Payment of a fee or other thing of value in consideration of a referral of a settlement service or an agreement to split or pay a portion of a fee charged for the performance of a settlement service with a person referring the business, other than for the reasonable value of services actually performed by the person accepting the payment, is a violation of section 8. A violation implicates both the party giving and the party receiving the unlawful kickback, referral fee, or other thing of value. Moreover, against the weight of judicial authority, the BCFP construes section 8 to prohibit unearned fees even when the fee is not split

between two parties, including a charge by any person for which no or nominal services are performed or for which duplicative fees are charged. Section 8 violations are rife with enforcement actions by the BCFP and civil litigation under private rights of action, including class action.

Practitioners are cautioned that section 8 violations are most often inferred from specific facts, and careful analysis of all relevant facts is often required to determine if a violation has occurred. Key elements of the offense are broadly construed. A "referral," for example, includes any oral or written action directed to the borrower or other person that has the effect of affirmatively influencing the person's selection of a particular provider of a settlement service for which the person will be charged. 12 C.F.R. § 1024.14(f). An "understanding" need not be written or oral, but may be inferred from a practice, pattern, or course of conduct. 12 C.F.R. § 1024.14(e). Moreover, a "thing of value" does not require a transfer of money and may be any of a number of seemingly unrelated benefits to the party making a referral: discounts, credits, equity adjustments, deferred rents, debt reduction or forgiveness, free promotions and advertising, assumption of business expenses, expense-paid travel and vacations, and any other imaginable benefit. 12 C.F.R. § 1024.14(d).

Section 8, however, expressly permits payment to attorneys, title agents, or other settlement service providers for goods or facilities actually furnished or services actually performed; fee splits between real estate agents and real estate brokers pursuant to cooperative brokerage agreements; and compensation by an employer to its own employees for referrals either to the employer or to an affiliated business. *See* 12 C.F.R. § 1024.14(g)(1).

Referrals of borrowers or other persons to affiliates to perform settlement services are permitted under strict guidelines for affiliated business arrangements set out in 12 C.F.R. § 1024.15, which requires that written disclosure of the business arrangement is timely made in the form of an affiliated business arrangement disclosure statement described above, that the borrower or other person is not required to use any particular provider of the service, and that the only thing of value that is received from the arrangement is a bona fide return on the ownership interest the referring party may have in the affiliate or a franchise relationship. A prohibited "required use" for this purpose is defined in 12 C.F.R. § 1024.2.

Caution: HUD published an "Advanced Notice of Proposed Rulemaking" in the Federal Register on June 3, 2010, at 75 Fed. Reg. 31,334 to strengthen and clarify the RESPA, section 8, prohibition against the "required use" of affiliated settlement service providers, examining in particular the practice of homebuilders' conditioning construction discounts or discounted upgrades on the use of the homebuilder's affiliated mortgage lender.

HUD's Statement of Policy 1996-2 Regarding Sham Controlled Business Arrangements, 61 Fed. Reg. 29,258 (June 7, 1996), provides guidance on the affiliated business arrangement exemption to section 8 prohibitions against referral fees. According to the policy statement, Congress did not intend this exemption to promote disguised referral fee payments through sham arrangements or shell entities for which there is no bona fide business purpose. By definition, for this exemption to apply, the person or entity receiving the referral must be a bona fide provider of settlement services. If the person or entity is not, considering particular factors enumerated in the policy statement, the arrangement would not qualify for the exemption even if the three safe harbor conditions of 12 C.F.R. § 1024.15 are otherwise met.

HUD's Statement of Policy 1996-3, Rental of Office Space, Lock-outs, and Retaliation, 61

Fed. Reg. 29,264 (June 7, 1996), also addresses the application of section 8 to the practice of settlement service providers (such as mortgage lenders) leasing desks or office space at real estate brokerage offices in anticipation of loan referrals. This practice is permitted only if the general market value of the desk rental or other arrangement is paid by the settlement service provider. The "general market value" for this purpose, which also may include an appropriate portion of the cost for related office services actually provided under the arrangement (such as secretarial service, utilities, telephone, and other office equipment), means the rental amount that a *non–settlement service provider* (that is, one who would not be renting in anticipation of referrals) would pay for the same amount of space and services in the same or a comparable building.

HUD's interpretive rule published June 25, 2010, in the Federal Register at 75 Fed. Reg. 36,271 addressed the application of section 8 to payments by home warranty companies to real estate brokers and agents for services performed in connection with home sales transactions in which a home warranty is sold to the purchaser. HUD concluded that a broker or agent may not be compensated by a home warranty company for marketing services directed to particular homebuyers or sellers and deemed any payments by a home warranty company to a broker or agent to be lawful only if services are actually performed by the broker or agent, are not nominal and are necessary and distinct from the primary services performed by the real estate broker or agent in the same transaction, and are services for which there is no duplicative charge. For example, conducting actual inspections of items to be covered by the home warranty to identify preexisting conditions, recording serial numbers of the items, documenting the condition of the items by taking photographs, and preparing a report to the home warranty company of findings may be compensable services. Any payment for compensable services nevertheless must reasonably relate in amount to the value of services actually performed.

Persons violating section 8, on conviction, may be fined not more than $10,000, imprisoned for not more than one year, or both. Any person violating section 8 provisions also is jointly and severally liable to the person or persons charged for the settlement service involved in the violation in an amount equal to three times the amount of any charge paid for the service. In any private action brought under section 8, the court may award court costs and reasonable attorney's fees to the prevailing party. *See* 12 U.S.C. § 2607(d); 12 C.F.R. § 1024.14(a). Violations may also be grounds for disbarment, suspension, or ineligibility of lenders participating in federally insured or guaranteed loan programs or for enforcement actions by federal or state agencies having supervisory authority over lenders. 12 C.F.R. § 1024.14.

§ 12.11:5 Prohibition against Required Use of Particular Title Company

RESPA, section 9, provides that no seller of property that will be purchased with the assistance of a federally related mortgage loan may require that, as a condition of selling the property, title insurance covering the property must be purchased by the buyer from any particular title company. 12 U.S.C. § 2608. This provision is thought by some practitioners to be inapplicable to Texas practice, in which the seller customarily purchases and pays the premium for the owner's title insurance policy. An offer of a discounted package or of discounts or rebates for the purchase of multiple settlement services as an inducement to the buyer to use a particular title company may be permitted without violating this prohibition against a required use. See the definition of "required use" at 12 C.F.R. § 1024.2. Any seller who violates section 9 is liable to the buyer in an amount equal to three

times all charges paid for the title insurance. *See* 12 U.S.C. § 2608; 12 C.F.R. § 1024.14.

§ 12.11:6 Prohibition against Charging for Preparation of Regulatory Disclosures

RESPA, section 12, provides that no fee or charge may be imposed or charged by a lender of a federally related mortgage loan, or by the servicer of the loan, for the preparation and distribution to the borrower or other person of a HUD-1 or HUD-1A settlement statement; escrow account notices and statements required by RESPA, section 10; or statements required by the Truth in Lending Act. *See* 12 U.S.C. § 2610; 12 C.F.R. § 1024.12.

§ 12.11:7 Prohibition against Collecting Excessive Escrow Deposits

RESPA, section 10, substantively limits the amounts that a lender of a federally related mortgage loan may require the borrower to deposit in any escrow account established by the lender to ensure timely payment of property taxes, insurance premiums, or other property charges. 12 U.S.C. § 2609. When establishing the account, typically at loan closing, the lender may require an initial deposit equal to the proportion of total annual costs reasonably anticipated to be paid from the account for the period beginning with the date on which the costs were last paid (or the date on which each of the costs would have been paid under the normal lending practices of the lender and local custom) and ending on the due date of the first installment payment under the mortgage loan plus an additional reserve (for unanticipated disbursements) of no more than one-sixth of the total of all such costs to be paid from the escrow account over the ensuing twelve-month period (that is, a two-month cushion). Thereafter, a lender may not require the borrower to deposit in any such escrow account in any month a sum greater than one-twelfth of the total of the estimated taxes, insurance premiums, and other charges that are reasonably anticipated to be paid from the account during the ensuing twelve months plus a cushion of no more than one-sixth of the monthly amount. If a lender conducts an account analysis, however, and determines there is or will be a deficiency in the escrow account, the lender may require the borrower to make additional monthly deposits to the account to avoid or eliminate the deficiency, subject to substantive and procedural rules set out in Regulation X, 12 C.F.R. § 1024.17(f). Violations of section 10 of RESPA are subject to civil penalties set out in 12 U.S.C. § 2609(d).

§ 12.12 Upcharges Prohibited

The amount stated on the HUD-1 or HUD-1A settlement statement for any itemized settlement service must not exceed the amount actually received by the settlement service provider for that service (unless the charge is an average charge in accordance with 12 C.F.R. § 1024.8(b)(2)). Third-party fees disclosed on the good-faith estimate (GFE) may not exceed the estimated amounts to be paid the third-party settlement service providers, and such fees reported on the HUD-1 may not exceed the amounts actually paid to such third parties. Thus, even earned markups that were permitted based on the value of actual services performed by the lender or mortgage broker in connection with services principally performed by third parties now appear to be prohibited.

§ 12.13 Additional Resources

Bureau of Consumer Financial Protection, *TILA-RESPA Integrated Disclosure—Guide to the Loan Estimate and Closing Disclosure Forms*, **https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/cfpb_kbyo_guide-loan-estimate-and-closing-disclosure-forms_v2.0.pdf**.

Hall, Kenneth F. *Mortgage and Consumer Loan and Lease Disclosure Handbook*. 2015–2016 ed. Thomson Reuters, 2015.

[Reserved]

Chapter 13

Residential Contracts for Deed

The Real Estate Forms Committee has removed the chapter on residential contracts for deed. These transactions are heavily regulated, and in the majority of circumstances the risks and consequences of failure of compliance outweigh the usefulness of the transaction in light of the fact that the same result can be accomplished by a note, deed, and deed of trust. *See, e.g., Morton v. Nguyen*, 369 S.W.3d 659 (Tex. App.—Houston [14th Dist.] 2012), *rev'd in part*, 412 S.W.3d 506 (Tex. 2013).

Contracts for deed, sometimes referred to as "installment land contracts" or "rent-to-own" financing arrangements, are legal and have been used and litigated in Texas for seller-financed property sales for more than a hundred years. *See Taber v. Dallas Co.*, 106 S.W. 332 (Tex. 1908). Contracts for deed are now, however, characterized by Texas Property Code section 5.062 as "executory contracts," transactions that are incomplete or unfinished in a material respect, namely, the delivery of the deed.

The restrictions of the statute do not apply to a contract that provides for the seller to deliver a deed within 180 days, to commercial transactions, or to transactions in which the buyer is not going to use the property as his principal residence. *See* Tex. Prop. Code § 5.062.

The Code was amended in 1995, 2001, and 2005 to remedy what were perceived as seller abuses of contracts for deed, for example, collecting a large down payment and then, if the buyer fell behind, using the eviction process to repossess the property as if the buyer were no more than a tenant.

Because of this history, burdensome consumer protection rules and restrictions now apply, including the following: These contracts must now be recorded. A thorough financial disclosure and detailed calculations must be given to the buyer at closing. The seller must provide the buyer with a current survey and copies of documents from the chain of title. Many precontract and preclosing disclosures are required for which there are no standard forms. Certain statutory language must be included in the contract, or it can be canceled and rescinded by the buyer at any time, and the buyer will be entitled to a full refund of all sums paid to the seller. The seller must provide the buyer with tax and insurance information and copies of policies. Buyers also have a right to convert to a deed, note, and deed of trust. And the seller must provide a detailed accounting statement every January. *See* Tex. Prop. Code §§ 5.063–.085.

Failing to comply with the statutory requirements may constitute a deceptive trade practice and result in treble damages. Additionally, the seller can be assessed penalties of $250 per day for each day after January 31st that the annual accounting statement is not delivered. There are restrictions and prohibitions against selling under an executory contract if there is a mortgage on the property. *See* Tex. Prop. Code §§ 5.069, 5.070, 5.072, 5.077, 5.078, 5.085.

Accordingly, contracts for deed have fallen into disuse, which was exactly the legislature's intent.

Note that even if a seller is willing to endure the various restrictions, risks, and potential liability involved in selling the property under a contract for deed, the federal Secure and Fair Enforcement for Mortgage Licensing Act of 2008 licensing requirements may still apply. See the sections titled "Dodd-

Frank Wall Street Reform and Consumer Protection Act" and "Mortgage Loan Originators" in chapter 2 of this manual.

The 2005 amendment to the Code expanded the definition of "executory contract" to include lease-option agreements. *See* Tex. Prop. Code § 5.0621. Clever draftsmanship will not avoid section 5.061. The courts look to substance over form in interpreting these transactions.

For these reasons, before advising a client to sell property under an executory contract, all circumstances and alternatives should be thoroughly evaluated.

Chapter 14

Foreclosure Documents

Chapter 14

Foreclosure Documents

The Real Estate Forms Committee would like to acknowledge the contribution of G. Tommy Bastian and his work on the new rules for home equity foreclosures. Please see G. Tommy Bastian, *Expedited Foreclosure Home Equity, Home Equity Line of Credit, Reverse Mortgage, and Tax Lien Transfer and Property Tax Loan Forms for the New Supreme Court Rules*, *in* State Bar of Tex. Prof. Dev. Program, Advanced Real Estate Drafting Course ch. 15, 16–20, 27–30 (2012).

§ 14.1 General Considerations

This chapter summarizes the nonjudicial foreclosure process for real and personal property. The forms in this chapter are drafted specifically for the loan documents in this manual. Foreclosure by a mortgage servicer on behalf of a mortgagee requires a special notice of sale. See form 14-13 in this chapter. The attorney is cautioned that these letters and documents are provided as examples only and should not be used as standard forms. As each foreclosure is unique and requires careful consideration, the attorney must tailor the forms to fit the facts of the case. A complete analysis of Texas foreclosure law is beyond the scope of this manual.

For a thorough discussion of Texas foreclosure law, with additional forms and examples, see William H. Locke, Jr., Ralph Martin Novak, Jr. & G. Tommy Bastian, eds., *Texas Foreclosure Manual*, State Bar of Texas (3rd ed. 2014 & Supp. 2018). See also section 14.12 for related bibliographical material.

§ 14.2 Real Estate Foreclosures

§ 14.2:1 General

A real property foreclosure must be conducted by a trustee or substitute trustee in strict compliance with Tex. Prop. Code §§ 51.0001, 51.002, 51.0021, 51.0025, 51.0074, 51.0075, 51.009, 51.015 and with any requirements set out in the deed of trust. A trustee or substitute trustee foreclosing on residential real estate should also satisfy any applicable requirements of chapter 22 of the Texas Business and Commerce Code.

The attorney must carefully review all loan documents to determine if additional notices, postings, or procedures apply to the foreclosure. For example, the prior version of the foreclosure statute required posting the foreclosure notice in three public places. That language was incorporated into many old deed-of-trust forms. Even though the law no longer requires these postings, if the deed of trust includes the language, the postings must be made. *Harwath v. Hudson*, 654 S.W.2d 851, 854 (Tex. App.—Dallas 1983, writ ref'd n.r.e.).

Many deed-of-trust forms have a foreclosure section that essentially tracks the language of section 51.002 of the Property Code. Sections 51.0001, 51.0021, 51.0025, 51.0075, and 51.009 regulate foreclosures by mortgage servicers. Section 51.0075(f) allows the foreclosure purchaser and the trustee or substitute trustee to agree on a reasonable time after acceptance of the bid within which to deliver the purchase price; otherwise, the purchase price is payable without delay after acceptance of the bid. The deed of trust and security agreement forms in this manual do not repeat the statutory language but instead require the mortgagee or mortgage servicer to foreclose in accordance with the law then in effect.

§ 14.2:2 Statutory Requirements

In Texas, a nonjudicial foreclosure sale must be conducted by a trustee or substitute trustee on the first Tuesday of a month or, if the first Tuesday of the month occurs on January 1 or July 4, on the first Wednesday of the month, in the county in which part or all of the real estate is located. Tex. Prop. Code § 51.002. The sale must take place at the county courthouse in the county in which the property is located unless the commissioner's court designates another public place within a reasonable proximity to the county courthouse. Tex. Prop. Code § 51.002(h). The commissioner's court designation of sales location must be recorded in the real property records of that county, but will not be effective before the ninetieth day after the designation is recorded. Tex. Prop. Code § 51.002(h). A designation by a commissioner's court is not a ground for challenging or invalidating any sale. Tex. Prop. Code § 51.002(h). If the first Tuesday falls on a courthouse holiday in any month other than January or July, the sale may still be conducted. *Koehler v. Pioneer American Insurance Co.*, 425 S.W.2d 889, 891 (Tex. App.—Fort Worth 1968, no writ). The holding in *Koehler* is not applicable to the months of January and July. Tex. Prop. Code § 51.002(a–1). Because deed of trust terms are strictly construed, the holding in *Harwath v. Hudson*, 654 S.W.2d 851 (Tex. App.—Dallas 1983, writ ref'd n.r.e.), should be considered when a deed of trust includes language restricting a foreclosure sale to the first Tuesday of the month if a trustee or substitute trustee intends to conduct a first Wednesday foreclosure sale. If the deed of trust covers property that lies in two or more counties, the notice should provide where the sale is to take place. The notice must be posted in all counties in which the real property is located. Tex. Prop. Code § 51.002(b). If the deed of trust covers multiple properties located in different counties, all properties can be foreclosed in one sale, even if the tracts are not contiguous. *Bateman v. Carter-Jones Drilling Co.*, 290 S.W.2d 366, 370 (Tex. App.—Texarkana 1956, writ ref'd n.r.e.); *Dall v. Lindsey*, 237 S.W.2d 1006, 1009–10 (Tex. App.—Amarillo 1951, writ ref'd n.r.e.); *see also Lewis v. Dainwood*, 130 S.W.2d 456, 457 (Tex. App.—San Antonio 1939, writ ref'd).

Section 51.0001 of the Texas Property Code recognizes the effects of the national Mortgage Electronic Registration System and the securitization of mortgages. This section added definitions of "book entry system," "debtor's last known address," "mortgage servicer," "mortgagee," "mortgagor," "security instrument," "substitute trustee," and "trustee."

Section 51.002(b) of the Property Code has three requirements for a foreclosure sale: (1) the mortgage servicer must give written notice of the sale to all debtors obligated to pay the debt, (2) the notice of the sale must be posted at the county courthouse of each county in which the property is located designating the county in which the property will be sold, and (3) a notice of the sale must be filed with the county clerk of each county in which the property is located. These steps must be completed at least twenty-one days before the sale date. Tex. Prop. Code § 51.002(b). However, if the courthouse or county clerk's office is closed because of inclement weather, natural disaster, or other act of God, the notices required by section 51.002(b) may be posted or filed up to forty-eight hours after the courthouse or county clerk's office reopens for business. Tex. Prop. Code § 51.002(b–1).

Additionally, the Property Code requires the mortgage servicer to give at least twenty days' notice of default before posting the property for foreclosure if the property is the debtor's residence. Tex. Prop. Code § 51.002(d).

Property Code section 51.002 requires the mortgage servicer to serve written notice of the sale on "each debtor who, according to the records of the mortgage servicer of the debt, is obligated to

pay the debt." *See* Tex. Prop. Code § 51.002(b)(3). Although a guarantor has been held not to be such a debtor, many attorneys elect to send a notice of the foreclosure sale to a guarantor in the same manner as sent to the debtor. *See Long v. NCNB—Texas National Bank*, 882 S.W.2d 861, 866 (Tex. App.—Corpus Christi–Edinburg 1994, no writ; *Bishop v. National Loan Investors, L.P.*, 915 S.W.2d 241, 245 (Tex. App.—Fort Worth 1995, writ denied).

The notice must designate the county in which the property will be sold. Tex. Prop. Code § 51.002(b)(1). If no area has been designated for foreclosure sales by the county commissioner's court, the notice of sale must designate the area where the sale is to take place. Tex. Prop. Code § 51.002(a). The notice of sale also must state the earliest time at which the sale will begin and the names and street addresses for the trustees or substitute trustees. Tex. Prop. Code §§ 51.002(b), 51.0075(e). The notice must also include conspicuous language regarding the rights of members of the armed forces. Tex. Prop. Code § 51.002(i). Beyond these requirements (and the disclosure required if a mortgage servicer is administering the foreclosure sale on behalf of the mortgagee that is discussed below in this section) there is little statutory or judicial guidance concerning the content of the notice.

The sale must take place between the hours of 10:00 A.M. and 4:00 P.M. on the first Tuesday of a month or, if the first Tuesday of the month occurs on January 1 or July 4, on the first Wednesday of the month. The sale must begin at the time stated in the notice of sale or not later than three hours after the time listed in the notice of sale. Tex. Prop. Code § 51.002(a), (c); Tex. Civ. Prac. & Rem. Code § 34.041.

The sale must be a public auction with the trustee announcing the property to those gathered at the courthouse and offering the property for sale to the highest bidder for cash. Often the mortgagee is the only bidder. Section 51.0075(f) of the Property Code allows the foreclosure purchaser and the trustee or substitute trustee to agree on a reasonable time after acceptance of the bid within which to deliver the purchase price; otherwise, the purchase price is payable without delay after acceptance of the bid. Most trustees will accept, and some may prefer, the cash bid in the form of a cashier's check or a certified check.

A mortgage servicer may administer a foreclosure for a mortgagee if two requirements are met. First, there must be an agreement between the mortgagee and mortgage servicer granting the mortgage servicer the right to service the mortgage. Second, the notice of sale must disclose that the mortgage servicer is representing the mortgagee servicing agreement, the name of the mortgagee, and the address of the mortgagee or the mortgage servicer authorized to service the mortgage. Tex. Prop. Code § 51.0025. Trustees or substitute trustees can set reasonable conditions for conducting the public sale if the conditions are announced before the bidding is opened for the first sale of the day. Tex. Prop. Code § 51.0075(a). A purchaser at the foreclosure sale acquires the property "AS IS" without any express or implied warranties except warranties of title from the mortgagor, but the foreclosing lender does not. *Sandel v. Burney*, 714 S.W.2d 40 (Tex. App.—San Antonio 1986, no writ). The purchase is made at the purchaser's own risk. Tex. Prop. Code § 51.009(1). A purchaser at foreclosure is not a consumer. Tex. Prop. Code § 51.009(2).

§ 14.2:3 Suit for Deficiency—Real Property

A person liable on the debt, including a guarantor, may introduce evidence of the fair market value of the property as of the date of the foreclosure sale. Tex. Prop. Code §§ 51.003, 51.005. The attorney should discuss these rights with the mortgagee-client before foreclosure to decide if a deficiency is likely and if so whether it would

be prudent to obtain an appraisal to document fair market value and if a judicial foreclosure is a better alternative.

The rights granted to an obligor, including a guarantor, in sections 51.003 and 51.005 may be waived. *See LaSalle Bank N.A. v. Sleutel*, 289 F.3d 837, 841–42 (5th Cir. 2002); *Segal v. Emmes Capital, L.L.C.*, 155 S.W.3d 267, 279–80 (Tex. App.—Houston [1st Dist.] 2004, pet. dismissed).

§ 14.2:4 Residential Property

If the property is used as the borrower's residence, the mortgagee or mortgage servicer must allow the borrower at least twenty days to cure the default before accelerating the maturity of the debt and giving the twenty-one-day foreclosure notice. Tex. Prop. Code § 51.002(d). The delinquent payment of ad valorem taxes may not be considered a default under a deed of trust or other contract lien if the owner of the residence has entered into an installment agreement for the payment of such taxes under section 33.02 of the Texas Tax Code. Tex. Prop. Code § 51.0011.

A trustee or substitute trustee conducting a residential real property foreclosure may contract with an attorney to advise the trustee or substitute trustee and to administer or perform any of the trustee's or substitute trustee's functions or responsibilities under the deed of trust and chapter 51 of the Texas Property Code. Tex. Bus. & Com. Code § 22.003. The trustee or substitute trustee may also contract with an auction company to arrange, manage, sponsor, or advertise a residential real property foreclosure sale. Tex. Bus. & Com. Code § 22.003.

For residential real property foreclosures, a trustee or substitute trustee must also satisfy any applicable requirements of sections 22.004, 22.005, and 22.006 of the Texas Business and Commerce Code. If the successful bidder is not the mortgagee or the mortgage servicer, the trustee or substitute trustee must obtain the name, address, and other required information on certain parties submitting the highest and best bid. Tex. Bus. & Com. Code § 22.004. The trustee or substitute trustee must also provide the winning bidder a receipt for the sale proceeds tendered, deliver or record the deed, and account for and distribute the sale proceeds, including maintaining the sale proceeds in a separate account, and maintaining a written record of all deposits and disbursements from the account. Tex. Bus. & Com. Code §§ 22.005, 22.006.

A trustee or substitute trustee conducting a residential real property foreclosure may recover (1) the trustee's or substitute trustee's reasonable actual costs, (2) reasonable attorney's fees incurred by the trustee or substitute trustee, (3) reasonable trustee's or substitute trustee's fees, and (4) the trustee's or substitute trustee's reasonable attorney's fees in a suit based on a claim related to the sale if the suit is found to be groundless, in each instance payable from the sale proceeds in excess of the amount owed on the indebtedness secured by the residential real property. Tex. Bus. & Com. Code § 22.006. Certain trustee's or substitute trustee's fees and expenses in a residential real property foreclosure are presumed to be reasonable if they do not exceed the amounts provided by law. Tex. Bus. & Com. Code § 22.006.

§ 14.2:5 Federal Interests

If the federal government has a property interest that would be extinguished through foreclosure, including a security interest, lien, or mortgage, the government's consent may be required to eliminate that interest; the government has a one-year right of redemption for certain liens eliminated by foreclosure of a superior lien without its consent. 12 U.S.C. § 1825(b)(2); 28 U.S.C. § 2410(c).

Before foreclosure, the federal tax lien records of the county in which the real property is located should be examined. If personal property secures the loan, the federal tax lien records of the secretary of state's office or other appropriate office should also be examined. *See* 26 U.S.C. § 6323(f)(1)(A). If the property is encumbered by an inferior federal tax lien filed more than thirty days before the scheduled foreclosure sale, the mortgagee or mortgage servicer must give a special notice to the Internal Revenue Service at least twenty-five days in advance of the sale. *See* 26 U.S.C. § 7425(b), (c). The Internal Revenue Code provides that unless a proper notice is given, a foreclosure sale will not affect the subordinate tax lien. In the case of real property, the IRS has a 120-day right of redemption following the sale, provided a proper notice was given. 26 U.S.C. § 7425(d).

§ 14.2:6 Beachfront Property

If the property is located seaward of the Gulf Intracoastal Waterway, as defined in Tex. Nat. Res. Code § 61.025, the purchaser should receive the statutory notice specified by that section. *See* Tex. Att'y Gen. Op. No. JM-834 (1987). See also the section titled "Coastal Properties" in chapter 2 of this manual.

§ 14.2:7 Personal Property Included in Deed of Trust

If the deed of trust includes a security agreement for personal property, the real property foreclosure sale can include the personal property in which a security interest is granted in the deed of trust as part of the foreclosure. *See* Tex. Bus. & Com. Code § 9.604(a). If personal property is sold in connection with the foreclosure sale of real property, the commercially reasonable standard of the Texas Business and Commerce Code does not govern the sale. *Huddleston v. TCB-Dallas*, 756 S.W.2d 343 (Tex. App.—Dallas 1988, writ denied).

§ 14.2:8 Deed in Lieu of Foreclosure

The Supreme Court of Texas has ruled that there is no such thing as a "deed in lieu of foreclosure." *Flag-Redfern Oil Co. v. Humble Exploration Co.*, 744 S.W.2d 6, 8 (Tex. 1987). The supreme court held that a deed in lieu of foreclosure is merely a conveyance by the borrower as a payment for the debt and that, because the deed does not have the effect of a lien foreclosure, the deed does not extinguish any subordinate liens. Deeds in lieu of foreclosure are, however, recognized by statute in Texas. Tex. Prop. Code § 51.006. A creditor who accepts a deed in lieu of foreclosure may void that deed within four years of accepting it if the debtor fails to disclose a lien before executing the deed and the creditor has no personal knowledge of the undisclosed lien. Tex. Prop. Code § 51.006(b). Some borrowers prefer to execute a deed in lieu of foreclosure to avoid the publicity associated with a public foreclosure. Before advising a client about a deed-in-lieu transaction, the attorney should review the law on this subject. See the articles listed in section 14.12 below. For an example of a deed in lieu of foreclosure, see form 5-13 in this manual.

§ 14.2:9 Home Equity Loan Lien Foreclosure

Tex. Const. art. XVI, § 50(a)(6), authorizes a voluntary lien on a Texas homestead for a home equity loan. (See chapter 11 in this manual for a discussion of home equity loans.) A lien on a Texas homestead securing the payment of a home equity loan may be foreclosed only by court order. Tex. Const. art. XVI, § 50(a)(6)(D). Article XVI, section 50(r), directs the Texas Supreme Court to promulgate rules of civil procedure for an expedited court order, and, acting pursuant to that authority, the Texas Supreme Court adopted rules 735 and 736 of the Texas Rules of Civil Procedure. The court approved forms for expedited foreclosure proceedings on February 10, 2014 (Misc. Docket No. 14-9047,

Feb. 10, 2014). The forms may be found at **www.txcourts.gov/media/847145/expedited-foreclosure-forms-for-website.pdf**. Although rules 735 and 736 do require a judicial order before proceeding with the foreclosure of a home equity loan lien, those rules do not otherwise change existing Texas real property foreclosure law. *See* Tex. R. Civ. P. 735.2. The right of a lender to foreclose a home equity loan lien therefore remains conditioned on an underlying default on the home equity loan. (See forms 14-30 and 14-31 in this chapter for a notice of default and notice of acceleration letters on a home equity loan.)

Rules 735 and 736 were substantially amended effective January 1, 2012.

Rule 736 provides the procedure for obtaining a court order to allow foreclosure of a lien containing a power of sale in a security instrument securing a home equity loan. Tex. R. Civ. P. 735.1. Forms 14-32 through 14-37 are some of the forms promulgated by the supreme court. In addition, the practitioner should review section 14.4:5 below for additional information on consumer debt collection activities.

Rule 736 establishes an expedited judicial procedure for obtaining a court order that allows a lender to proceed with the foreclosure of a home equity loan lien. Under the rule, a lender files an application (see form 14-32) in any court with appropriate jurisdiction in any county where all or any part of the real property is located, including probate courts. Tex. R. Civ. P. 736.1(a). The required contents of the application were changed when the rule was amended and are set out in detail in Tex. R. Civ. P. 736.1(d).

The process for service of a rule 736 application changed effective January 1, 2012. Under the previous rule, the applicant or applicant's attorney mailed the application to the obligor and obligor's attorney. The new rule requires the clerk of the court to prepare and serve a citation by both certified and regular mail for each respondent named in the application. A citation addressed to "the occupant of the property" must also be issued. Tex. R. Civ. P. 736.3(a), (b). Other requirements for service by the clerk of the court may be found in Tex. R. Civ. P. 736.3.

A response to an application for a court order permitting the lender to proceed with the foreclosure of a home equity loan lien is due on the first Monday following the expiration of thirty-eight days from the date the citation was placed in the custody of the United States Postal Service. Tex. R. Civ. P. 736.5(b).

The response must be signed in accordance with rule 57 and may be in the form of a general denial under rule 92, except that the respondent must affirmatively plead the defenses relied on as set out in rule 736.5(c)(1)–(5). Tex. R. Civ. P. 736.5(c). The response may not state an independent claim for relief, and the court is required to strike any such claim without a hearing. Tex. R. Civ. P. 736.5(d).

The court must not conduct a hearing unless a response is filed. Tex. R. Civ. P. 736.6.

No discovery is permitted in a proceeding governed by rule 736, and the only issue to be determined is whether a party may obtain an order to proceed with foreclosure under applicable law and the terms of the loan agreement, contract, or lien sought to be foreclosed. Tex. R. Civ. P. 735.2, 736.4.

An order under rule 736 is without prejudice and has no res judicata, collateral estoppel, estoppel by judgment, or other effect in any other judicial proceeding. Tex. R. Civ. P. 736.9.

If no response to the application is filed by the due date, the petitioner may file a motion and proposed order to obtain a default order. A default order must be granted by the court no later than thirty days after a motion is filed and served in accordance with the rules. The return

of service must be on file with the clerk of the court for at least ten days before the court may grant the application. Tex. R. Civ. P. 736.7. The granting or denial of the application is not an appealable order. Tex. R. Civ. P. 736.8(c).

An order (see form 14-37) granting an application that allows a lender to proceed with foreclosure of a home equity loan lien must describe—

1. the material facts establishing the basis for foreclosure,
2. the property to be foreclosed by commonly known mailing address and legal description,
3. the name and last known address of each respondent subject to the order, and
4. the recording or indexing information of each lien to be foreclosed.

Tex. R. Civ. P. 736.8(b).

A proceeding under rule 736 is automatically stayed if a respondent files a separate, original proceeding in a court of competent jurisdiction that puts in issue any matter relating to the foreclosure before 5:00 P.M. on the Monday before the scheduled foreclosure sale. Tex. R. Civ. P. 736.11(a). A stayed proceeding is to be dismissed if no order has been granted. If an order has been signed, the court must vacate the rule 736 order. Tex. R. Civ. P. 736.11(c).

§ 14.2:10 Property Owned by Military Servicemember

Property Code section 51.015 (1) prohibits any nonjudicial foreclosure of a dwelling owned by military personnel on active duty or within nine months after their active duty concludes; (2) provides that a court may, during the same active duty period and the nine months subsequent, either (a) stay a proceeding to judicially foreclose or enforce a mortgage lien or (b) modify the terms of any such mortgage, as necessary to preserve the interests of the parties; (3) authorizes the court to also issue similar orders of stay or take other actions to protect dependents of active duty personnel and third-party guarantors of the loan obligation; and (4) imposes a criminal penalty (class A misdemeanor) on any person who knowingly causes a foreclosure or seizure of property protected as set forth above. A borrower or guarantor may voluntarily waive these protections by written agreement contained in an instrument separate from the loan obligation. Tex. Prop. Code § 51.015. Property Code section 51.015 includes many of the same protections for military servicemembers as does the federal Servicemember's Civil Relief Act.

§ 14.3 Personal Property Foreclosures

The foreclosure rules for personal property secured transactions are found at Tex. Bus. & Com. Code §§ 9.601–.628. There are four ways to foreclose a security interest in personal property collateral: as part of a real property foreclosure; by public disposition; by private disposition; and through strict foreclosure, accepting the property with or without a claim for a deficiency. Without foreclosing, a secured party may also collect amounts owed on collateral and enforce obligations of persons obligated on collateral.

A detailed discussion of the rules of personal property foreclosure is beyond the scope of this manual. Attorneys are encouraged to review the relevant provisions of chapter 9 of the Texas Business and Commerce Code and applicable case law before foreclosing a security interest in personal property.

A disposition of personal property collateral must be commercially reasonable, whether the disposition is public or private. Tex. Bus. & Com. Code § 9.610(b). This requirement cannot be waived or varied. Tex. Bus. & Com. Code § 9.602(7). The term *commercially reasonable*

is a term of art, the meaning of which has been heavily litigated. The attorney should review the relevant case law on the particular type of personal property being disposed of to properly advise the client. Section 9.627 of the Code also gives guidelines for determining if conduct was commercially reasonable. Tex. Bus. & Com. Code § 9.627.

§ 14.3:1 Real Estate Foreclosure

If the security agreement covers both real and personal property, the secured party may elect to foreclose both under the real property laws. In that event, chapter 9 rules do not apply. Tex. Bus. & Com. Code § 9.604(a). For a discussion of the real property foreclosure rules, see section 14.2 above.

§ 14.3:2 Public Disposition vs. Private Disposition

The law of public and private foreclosure disposition of personal property collateral is found at Tex. Bus. & Com. Code §§ 9.610–.619, 9.623–.628. A disposition includes a sale, lease, or license of personal property collateral. A public disposition is not defined in the Texas Uniform Commercial Code. The official comment to section 9.610 states that although "public disposition" is not defined, it is one at which the price is determined after the public has had a meaningful opportunity for competitive bidding. In other words, a "public disposition" is a disposition at an auction open to the public. "Meaningful opportunity" is meant to imply that some form of advertisement or public notice must precede the sale (or other disposition) and that the public must have access to the sale or disposition. Tex. Bus. & Com. Code § 9.610 cmt. 7.

Conversely, although a private disposition also is not defined in the Texas UCC, some commentators believe that a "private disposition" is any disposition that is not a "public disposition."

A public-sale foreclosure or other public disposition of personal property collateral is more difficult for the secured party because every aspect of the disposition must be commercially reasonable. Tex. Bus. & Com. Code § 9.610(b). Unlike a real estate foreclosure, for which a courthouse public auction is authorized, a public auction disposition of personal property collateral is appropriate only if that method of disposition is commercially reasonable for the collateral involved. With the existence of Internet auction sites, many types of personal property are sold at an Internet public auction. However, there may be some types of personal property for which a public auction disposition is not commercially reasonable. The manner of disposition must be commercially reasonable. A public auction disposition must be conducted fairly. Adequate advertising should precede the disposition to solicit potential bidders. Merely advertising in a local newspaper may not be "commercially reasonable," particularly if a potential buyer for the property would ordinarily look elsewhere for advertisements offering that type of property for sale. The time and place of the public auction must be commercially reasonable. If there is a usual place or market for a public auction disposition of property of the type involved that is reasonably available, the collateral should be disposed of there. Tex. Bus. & Com. Code § 2.706(d)(2). "[I]f such 'usual' place or market is not reasonably available, a duly advertised public [disposition] may be held at another place if it is one which prospective bidders may reasonably be expected to attend, as distinguished from a place where there is no demand whatsoever for [property] of the kind." Tex. Bus. & Com. Code § 2.706 cmt. 9. The collateral should be available for reasonable inspection by prospective bidders, either at the public auction disposition or at another place made known to the bidders. Tex. Bus. & Com. Code § 2.706(d)(3). In a transaction, other than a consumer transaction, if a secured party's compliance with the provisions of chapter 9 is placed in issue, the secured party has the burden of establishing that

its collection, enforcement, or disposition of the collateral complied with the statutory requirements. Tex. Bus. & Com. Code § 9.626(a)(2). A secured party should consider how it will establish that all aspects of its public auction disposition of collateral meet the commercially reasonable requirement before deciding to proceed in that manner. A secured party may elect to conduct a private disposition. A private disposition may offer lower transaction costs to the secured party. A private disposition must be an arm's-length transaction.

There are two primary distinctions between a public disposition and a private disposition of personal property collateral. First, the secured party may purchase the collateral at a public disposition but generally may not do so at a private disposition. Tex. Bus. & Com. Code § 9.610(c). Second, the debtor is entitled to notification of "the time and place" of a public disposition but is merely entitled to notification of "the time after which" a private disposition is to be made. Tex. Bus. & Com. Code § 9.613(1)(E).

§ 14.3:3 Rules for Foreclosure

The property may be sold or otherwise disposed of as a unit or in parcels and at any time and place and on any terms. Tex. Bus. & Com. Code § 9.610(b). However, every aspect of the disposition must be commercially reasonable. Tex. Bus. & Com. Code § 9.610(b). The obligation of the secured party to proceed in a commercially reasonable manner may not be waived by the debtor. Tex. Bus. & Com. Code § 9.602(7).

Except as described below, the secured party must send a proper notification of disposition of collateral to the debtor and to any secondary obligor. Additionally, if the collateral is other than consumer goods, notice must be sent to any other person from whom the secured party has received, before the notification date, notification of a claim of an interest in the collateral and to any other secured party that has filed a financing statement that meets the requirements set out in section 9.611(c)(3)(B) or that has complied with certificate of title or other title registration laws. Tex. Bus. & Com. Code § 9.611(c). Thus, for a disposition of collateral other than consumer goods, the foreclosing secured party has the duty of conducting a Uniform Commercial Code financing statement search to discover other potential secured parties and to notify any that are discovered. The attorney advising the secured party should carefully review section 9.611 and its comments to determine the filing offices to search and the period within which the search should be conducted. In a transaction other than a consumer transaction, a proper notification sent after default and ten or more days before the earliest time of disposition is deemed to be reasonable. Tex. Bus. & Com. Code § 9.612(b). The secured party need not give notice of disposition of the collateral if the property is perishable, threatens to decline speedily in value, or sells on a recognized market (such as a publicly listed stock). Tex. Bus. & Com. Code § 9.611(d). The debtor or a secondary obligor may waive its rights, but not the rights of other parties, to receive a notice of disposition of collateral by written waiver signed after default. Tex. Bus. & Com. Code § 9.624.

The contents of a proper notice of disposition of collateral are set forth in section 9.613 for collateral other than consumer goods and in section 9.614 for consumer goods collateral. Those sections also include model forms, which when completed are deemed to provide sufficient information concerning the disposition. The debtor may not waive, or agree that the secured party may vary from, the notification requirements of those sections. *See* Tex. Bus. & Com. Code § 9.602(7). Notices to consumers must also comply with the federal Fair Debt Collection Practices Act (15 U.S.C. §§ 1692–1692p) and the Texas Debt Collection Act (Tex. Fin. Code §§ 392.001–.404).

The secured party may buy personal property collateral at a public disposition. Tex. Bus. & Com. Code § 9.610(c)(1). The secured party may buy personal property collateral at a private disposition only if the property is of a kind that is customarily sold on a recognized market or is the subject of widely distributed standard price quotations. Tex. Bus. & Com. Code § 9.610(c)(2).

If a foreclosing secured party does not comply with section 9.601 *et seq.*, a court may order or restrain collection, enforcement, or disposition of collateral on appropriate terms and conditions. Tex. Bus. & Com. Code § 9.625(a). This section also sets out the damages for which a secured party may be liable, including minimum penalties in consumer transactions and nonconsumer transactions. *See* Tex. Bus. & Com. Code § 9.625(b)–(g).

A contract for sale, lease, license, or other disposition of personal property as a result of a foreclosure includes the warranties relating to title, possession, quiet enjoyment, and the like that by operation of law accompany a voluntary disposition of like-kind property. Tex. Bus. & Com. Code § 9.610(d). These warranties may be disclaimed or modified. The manner and the approved language for disclaiming or modifying warranties are set out in Tex. Bus. & Com. Code § 9.610(e), (f).

§ 14.3:4 Strict Foreclosure

The law of strict foreclosure is found at Tex. Bus. & Com. Code §§ 9.620–.622. The secured party may accept personal property collateral in full or partial satisfaction of the secured obligation only under the circumstances set forth in section 9.620. A secured party may not accept collateral in partial satisfaction of a secured obligation in a consumer transaction. Tex. Bus. & Com. Code § 9.620(g).

A secured party that wants to accept personal property collateral in full or partial satisfaction of a secured obligation in a nonconsumer transaction must obtain the debtor's consent. The secured party must send its proposal to do so to any person from whom the secured party has received, before the debtor consented to the acceptance, a notice of a claim of interest in the collateral and to any other secured party or lienholder that has a perfected security interest in the collateral either because of a filed financing statement that meets the requirements of section 9.621(a)(2) or because of compliance with certificate of title or other title registration laws. Tex. Bus. & Com. Code § 9.621(a). If the secured party proposes to accept the collateral in partial satisfaction of the secured obligation, the secured party must also notify any secondary obligor. Tex. Bus. & Com. Code § 9.621(b). A secured party that proposes to accept personal property collateral in full or partial satisfaction of a secured obligation thus has a duty to conduct a UCC financing statement search to discover other potential secured parties and to notify those that have filed a proper financing statement of the secured party's proposal. Moreover, a secured party that accepts personal property collateral is liable to another secured party that should have been notified, but was not, for any loss resulting from the failure of the enforcing secured party to notify the other secured party. Tex. Bus. & Com. Code § 9.625(b). The debtor may consent to the acceptance of collateral in partial satisfaction of the secured obligation only by a record authenticated after default. The debtor may consent to acceptance of collateral in full satisfaction of the secured obligation by authenticating a record (for example, signing a writing) after default or by failing to object to a properly sent proposal within twenty days after the proposal is sent. Tex. Bus. & Com. Code § 9.620(c)(2).

The secured party may not use strict foreclosure if—

1. the debtor does not consent (Tex. Bus. & Com. Code § 9.620(a)(1));
2. the secured party timely receives objection in writing from a party entitled to notice of the proposed strict foreclosure (Tex. Bus. & Com. Code § 9.620(a)(2));
3. the secured party is foreclosing a security interest in consumer goods and the debtor is in possession of the goods (Tex. Bus. & Com. Code § 9.620(a)(3));
4. the secured party is foreclosing a security interest in consumer goods and the debtor has paid more than 60 percent of the principal amount of the obligation (Tex. Bus. & Com. Code § 9.620(e)); or
5. in a consumer transaction, the secured party does not propose to satisfy the secured obligation in full (Tex. Bus. & Com. Code § 9.620(g)).

After default, the debtor may waive or modify limitations 1., 3., and 4. by an authenticated agreement. Tex. Bus. & Com. Code §§ 9.620(a)(4), 9.624(b).

§ 14.3:5 Suit for Deficiency—Personal Property

The procedure for determining a deficiency or surplus is found in Tex. Bus. & Com. Code §§ 9.615, 9.626.

In a consumer goods transaction in which either the debtor is entitled to a surplus or a consumer obligor is liable for a deficiency, the secured party must send a written explanation of the surplus or deficiency. If a surplus exists, the secured party must send an explanation of the surplus before or when the secured party accounts to the debtor and pays any surplus or within fourteen days of the debtor's request for an explanation, whichever comes first. If a deficiency exists, the secured party must send an explanation of the deficiency when the secured party first makes written demand for the deficiency or within fourteen days of the debtor's request for an explanation, whichever comes first. Tex. Bus. & Com. Code § 9.616(b). A debtor or consumer obligor is entitled without charge to one response to a request for an explanation of the surplus or deficiency during any six-month period in which the secured party does not send one. The secured party may require payment of a charge not exceeding $25 for each additional response. Tex. Bus. & Com. Code § 9.616(e).

The rules for an action to collect a deficiency other than in a consumer transaction are set forth in section 9.626. This section provides for the determination of the deficiency when the secured party fails to comply with the procedures set forth in section 9.601 *et seq.* Under this section, the liability of a debtor or a secondary obligor for a deficiency is limited to an amount by which the sum of the secured obligation, expenses, and attorney's fees exceeds the greater of the proceeds the secured party realized or the amount the proceeds would have been if the secured party had proceeded in compliance with those provisions. Tex. Bus. & Com. Code § 9.626(a). A court may not infer from section 9.626 the nature of the proper rule in consumer transactions and may continue to apply existing principles. Tex. Bus. & Com. Code § 9.626(b). *See Greathouse v. Charter National Bank—Southwest*, 851 S.W.2d 173 (Tex. 1992); *Tanenbaum v. Economics Laboratory, Inc.*, 628 S.W.2d 769 (Tex. 1982).

§ 14.3:6 Cautions

The lender's rights are governed by subchapter F of article 9 of the Uniform Commercial Code (Tex. Bus. & Com. Code §§ 9.601–.628) and the security agreement. Certain provisions, noted in Tex. Bus. & Com. Code § 9.602, cannot be altered by the parties. Before exercising any

contractual right under the security agreement, the attorney should review these subchapters.

§ 14.3:7 Secured Party's Collection Rights—Accounts, Intangibles, and Instruments

After default, or earlier if agreed, the secured party may notify an account debtor or other person obligated on collateral, such as the maker of a Business and Commerce Code chapter 3 negotiable instrument, to make payment or otherwise render performance directly to the secured party. Tex. Bus. & Com. Code § 9.607(a). This remedy may enhance the secured party's recovery because payments on the collateral would otherwise be paid to the debtor. This procedure requires no prior notice to the debtor. *Cullen Frost Bank v. Dallas Sportswear Co.*, 730 S.W.2d 668, 669–70 (Tex. 1987). If a debtor or secondary obligor will be liable for a deficiency, a secured party must proceed in a commercially reasonable manner in collecting or enforcing the obligation of an account debtor or other person obligated on collateral. Tex. Bus. & Com. Code § 9.607(c).

§ 14.3:8 Right of Possession

After default, unless otherwise agreed, the secured party may take possession of tangible personal property collateral. Tex. Bus. & Com. Code § 9.609. The repossession must not breach the peace. This nonjudicial self-help remedy is useful in allowing the secured party to obtain possession without delay.

§ 14.3:9 Right of Redemption

A debtor, any secondary obligor, or any junior secured party or lienholder may redeem the collateral from the secured party at any time before (1) the secured party has collected the collateral under section 9.607, (2) the secured party has disposed of the collateral or entered into a contract to dispose of the collateral under section 9.610; or (3) the secured party has accepted the collateral in full or partial satisfaction of the obligation under section 9.622. *See* Tex. Bus. & Com. Code §§ 9.607, 9.610, 9.622. To redeem the collateral, a person must fulfill all obligations secured by the collateral and pay certain expenses and attorney's fees. Tex. Bus. & Com. Code § 9.623(b).

§ 14.3:10 Secured Party's Liability

If a secured party has not complied with section 9.601 *et seq.*, a court may order or restrain collection, enforcement, or disposition of collateral. Tex. Bus. & Com. Code § 9.625(a). Further, a secured party is liable for damages in the amount of any loss caused by a failure to comply with Texas Business and Commerce Code chapter 9. Tex. Bus. & Com. Code § 9.625(b). In addition, certain violations of chapter 9 render a noncomplying secured party liable for statutory minimum penalties. Tex. Bus. & Com. Code § 9.625(e), (f).

Chapter 9 requires the secured party's collection and enforcement rights to be exercised in a commercially reasonable manner. Evidence that a better price could have been obtained under a different foreclosure proceeding does not of itself establish that the sale was commercially unreasonable. A sale under judicial approval is deemed to be commercially reasonable, but the UCC does not require a secured party to seek such approval. *See* Tex. Bus. & Com. Code § 9.627.

§ 14.4 Foreclosure Documents

§ 14.4:1 Foreclosure Documents Applicable to Real Property and Personal Property

The appropriate forms to use in any foreclosure depend on the facts of the specific situation. The forms in this chapter are examples of foreclosure documents to be used with the forms in this

manual, without modification of their principal terms. Use of modified State Bar forms or other forms could significantly change the foreclosure document requirements.

Sections 14.4:2 through 14.10 below provide a chronological analysis of the foreclosure process and references to forms for compliance.

§ 14.4:2 Document Review

The attorney should review with the client all the loan documents for the transaction. In transactions that cover long time periods, there may be modification agreements that would affect the foreclosure process. For example, a subordinate creditor may have obtained an agreement from the first secured creditor to receive a special notice of default or foreclosure. The attorney should verify with the client that no such agreements exist.

§ 14.4:3 Statute of Limitations

The attorney should confirm that the statute of limitations has not barred any right to relief. A sale of real property under a power of sale contained in a deed of trust must be made not later than four years after the day the cause of action accrues. Tex. Civ. Prac. & Rem. Code § 16.035(b). However, a mortgage servicer may foreclose a security interest in personal property collateral notwithstanding that there is a limitations defense to the debt. *Miller, Hiersche, Martens & Hayward, P.C. v. Bent Tree National Bank*, 894 S.W.2d 828, 830 (Tex. App.—Dallas 1995, no writ).

§ 14.4:4 Current Title, Abstract, and Tax Searches

The attorney should verify current information about the collateral and its ownership. Because tax liens are accorded priority over most other claims, the client must know the amounts of any delinquent taxes to be able to decide if the foreclosure is economically feasible. *See* Tex. Tax Code § 32.05.

The attorney should advise the client that title insurance coverage may be available. The limited preforeclosure policy (form T-98) is issued in connection with a mortgage in default to the named mortgagee or its assignee, a loan servicer, a trustee, or an attorney and insures as to matters recorded since the mortgage, including involuntary liens such as federal tax liens. See Procedural Rule P-43, *Basic Manual of Rules, Rates and Forms for the Writing of Title Insurance in the State of Texas*, available at **www.tdi.texas.gov/title/titlem4g.html#P-43**.

§ 14.4:5 Consumer Transactions

Fair Debt Collection Practices Act Notice: The forms in this chapter are drafted for use in nonconsumer transactions, to which federal and state fair debt collection acts do not apply. The Texas Property Code provides that a trustee or a substitute trustee is not a debt collector under Texas law. Tex. Prop. Code § 51.0075(b). If, however, the attorney wishes to try to adapt these forms for a consumer transaction, the notice contained in clause 14-7-1 in this chapter should be incorporated in the first correspondence the attorney has with the consumer. Additional modifications to the forms also may be required. Case law is unclear, and there is no Fifth Circuit authority on what additional collection efforts, if any, may be made during the thirty-day period during which the consumer may request debt verification. Nothing may be included with the notice that negates the notice or would lead an unsophisticated person to misunderstand the right to contest the debt. *Chauncey v. JDR Recovery Corp.*, 118 F.3d 516, 519 (7th Cir. 1997) (demand that payment be received within thirty days or "a decision to pursue other avenues to collect the amount due will be made" found to contradict notice); *Terran v. Kaplan*, 109 F.3d 1428, 1434 (9th Cir. 1997) (statement that "[u]nless an immediate tele-

phone call is made . . . we may find it necessary to recommend to our client that they proceed with legal action" held not a demand for payment and thus not contradictory or overshadowing). The safest course of action would be to send only the notice found in clause 14-7-1 and wait thirty days before making any other collection efforts. The attorney, as a debt collector under the federal and state acts, can be personally liable to the consumer for failure to comply with the acts and should review this area of the law with care. See the section titled "Fair Debt Collection Practices" in chapter 2 of this manual and the materials in section 14.12.

Fair Credit Reporting Act: Any financial institution that extends credit to an individual and regularly and in the ordinary course of business reports negative information to a credit bureau must give its individual customers a clear and conspicuous written notice about reporting negative information. A financial institution complies with the notice requirement if the institution uses a model notice promulgated by the Board of Governors of the Federal Reserve System. There are two model notices, one that may be used before reporting negative information to a credit bureau and one that may be used after reporting negative information to a credit bureau. If the financial institution did not include the notice in its initial loan documentation or related communication, the notice should be given with the first correspondence concerning the foreclosure. 15 U.S.C. § 1681s–2(a)(7); 12 C.F.R. pt. 222. The model forms of notice are found in clauses 14-7-2 and 14-7-3. See the section titled "Fair Credit Reporting Act" in chapter 2.

§ 14.5 Notices

All foreclosure notices must be sent by certified mail and should be sent return receipt requested. For real estate foreclosures, the notice must be addressed to the debtor at the debtor's last known address. Tex. Prop. Code § 51.002(e). For personal property foreclosures, the notice should be sent to the address specified in the security agreement or other agreement or, if none, to any address reasonable under the circumstances. Tex. Bus. & Com. Code § 1.201(b)(36). For foreclosure of a debt secured by a debtor's residence there is a presumption that the residential address is to be used for notice unless the debtor notifies the mortgage servicer otherwise. Tex. Prop. Code § 51.0001(2)(A). For all other debts the notices are sent to the last known address of the debtor as shown by the records of the mortgage servicer. Tex. Prop. Code § 51.0001(2)(B). If there is doubt about the proper address, it is good practice to send the notice to each address in the file. If two borrowers reside at the same address, the attorney may wish to send the letter separately to each person at the address. Some attorneys also send a copy of the letter to each party by first-class mail to attempt actual delivery if the certified mail is not accepted by the borrower. That attempt should be noted on the letter.

The mortgage servicer must give at least twenty days' notice of default before posting the property for foreclosure if the property is the debtor's residence. Tex. Prop. Code § 51.002(d). See the notice of default and intent to accelerate, form 14-4 in this chapter.

A debtor is required to inform the mortgage servicer of any change of address of the debtor. Tex. Prop. Code § 51.0021. Form 14-2 is a "Notice of Change of Debtor's Address" to comply with this requirement.

§ 14.5:1 Letter to Reinstate Default Provisions

If the mortgagee has not insisted on strict performance of the loan documents in the past, the mortgagee should advise the borrower of its decision to strictly enforce the agreements in the future. *Dhanani Investments, Inc. v. Second*

Master Bilt Homes, Inc., 650 S.W.2d 220, 222 (Tex. App.—Fort Worth 1983, no writ). See form 14-1 in this chapter.

§ 14.5:2 Notice of Maturity and Demand for Payment

If the note has matured by its own terms, the mortgagee or mortgage servicer should demand payment. See form 14-3 in this chapter.

§ 14.5:3 Notice of Default and Intent to Accelerate

The notices of default and of intent to accelerate are waived in the promissory note form (see form 6-1 in this manual). However, Texas courts deem acceleration a harsh remedy. *Shumway v. Horizon Credit Corp.*, 801 S.W.2d 890, 892–93 (Tex. 1991). Even if notices of default and of intent to accelerate have been expressly waived, many attorneys elect to send this notice, viewing the waiver more as a safeguard to protect the mortgagee from the complications of minor technicalities than as a license to foreclose on borrowers without notice or demand. See form 14-4 in this chapter.

§ 14.5:4 Notice of Acceleration

The notice of acceleration is used if the mortgagee or mortgage servicer gives notice of intent to accelerate and the borrower fails to cure the default. See form 14-5 in this chapter.

§ 14.5:5 Reinstatement Agreement

Sometimes the mortgagee and the borrower will agree to continue the payment terms of the note after acceleration. However, once the maturity of a note is accelerated, limitations on the entire debt will begin to run. A reinstatement agreement should rescind the acceleration and reinstate the payment provisions in the note. See form 14-6 in this chapter.

§ 14.5:6 Affidavit of Posting and Filing

The affidavit of posting and filing is not required by law, but it serves to document where and when the notice was distributed and will normally be required by title companies. See form 14-8 in this chapter. If a newspaper or other public advertisement is used, the company publishing the notice should provide an affidavit of the publication, and the attorney should provide a copy of the page for the client's file. Some attorneys prefer to use a certificate form instead of an affidavit.

§ 14.5:7 Affidavit of Mailing

The affidavit of mailing is not required by law, but it serves to document legal notice mailing compliance and will normally be required by title companies. See form 14-9 in this chapter. Such an affidavit, completed and signed by a person knowledgeable of the facts, is prima facie evidence of service. Tex. Prop. Code § 51.002(e). Some attorneys prefer to use a certificate form instead of an affidavit.

§ 14.6 Foreclosure Documents Unique to Real Property

§ 14.6:1 Appointment of Substitute Trustee

Forms 14-10 and 14-11 in this chapter may be used if the mortgagee or mortgage servicer wishes for someone other than the trustee named in the deed of trust to act. The appointment may also be made in the notice of trustee's sale. See section 14.6:2 below. If required by the deed of trust, the appointment of substitute trustee must be recorded in the real property records before posting the notice of foreclosure.

§ 14.6:2 Notice of Trustee's Sale

Form 14-12 in this chapter has been adapted to include personal property that may be covered by the deed of trust and that the mortgagee may wish to foreclose on with the foreclosure of the real property. See section 14.2:7 above. Note that, once appointed, the substitute trustee is the trustee under the deed of trust and is referred to as such rather than as the substitute trustee.

The appointment or authorization of a trustee or substitute trustee made in a notice of sale is effective as of the date of the notice if the notice—

1. complies with sections 51.002 and 51.0075(e) of the Texas Property Code;
2. is signed by an attorney or agent of the mortgagee or mortgage servicer; and
3. contains a statement in all capital letters, bold-faced type, to read as follows:

   THIS INSTRUMENT APPOINTS THE SUBSTITUTE TRUSTEE(S) IDENTIFIED TO SELL THE PROPERTY DESCRIBED IN THE SECURITY INSTRUMENT IDENTIFIED IN THIS NOTICE OF SALE. THE PERSON SIGNING THIS NOTICE IS THE ATTORNEY OR AUTHORIZED AGENT OF THE MORTGAGEE OR MORTGAGE SERVICER.

See Tex. Prop. Code § 51.0076. Form 14-13 allows a mortgage servicer to administer a foreclosure under Tex. Prop. Code § 51.0025.

§ 14.6:3 Agenda of Public Sale

Forms 14-14 and 14-15 in this chapter, although not required by law, serve to document the sale.

§ 14.6:4 Trustee's Deed

Form 14-16 in this chapter has been adapted to include personal property that may be covered by the deed of trust and that the mortgagee may wish to foreclose on with the foreclosure of the real property. See section 14.2:7 above. Note that, once appointed, the substitute trustee is the trustee under the deed of trust and is referred to as such rather than as the substitute trustee.

Deeds transferring an interest to or from an individual, including a trustee, must contain the confidentiality notice required by Tex. Prop. Code § 11.008. See section 3.16 in this manual.

§ 14.6:5 Foreclosure Affidavit

Form 14-17 in this chapter, although not required by law, serves to document the legal requirements of the sale. Title companies will normally require an affidavit from the trustee attesting to these matters. This form may be used as a stand-alone document or may be attached to the trustee's deed. It may also be used in conjunction with the affidavit of posting and filing (form 14-8) and the affidavit of mailing (form 14-9) with the appropriate modifications.

§ 14.6:6 Notice and Affidavit of Advancement

If the mortgagee advances funds to cure a default under the deed of trust to secure assumption or a similar form used to secure performance, the mortgagee should use the notice of advancement (form 14-18 in this chapter) and the affidavit of advancement (form 14-19) to protect its rights and put parties on notice of the payment.

§ 14.6:7 IRS Notice Letter

If the property is subject to an Internal Revenue Service lien, the notification letter at form 14-20

in this chapter may be used. See section 14.2:5 above for information about the IRS lien.

§ 14.6:8 Rescission of Nonjudicial Foreclosure Sale

Texas Property Code section 51.016 provides a nonexclusive method for rescission of a nonjudicial foreclosure sale of residential real property, as defined in section 51.016(a). *See* Tex. Prop. Code § 51.016. Not later than the fifteenth day after the date of a foreclosure sale, a mortgagee, trustee, or substitute trustee may rescind the sale if one or more of these statutory reasons listed in section 51.016(b) exists:

1. the statutory requirements for the sale were not satisfied;
2. the default leading to the sale was cured before the sale;
3. a receivership or dependent probate administration involving the property was pending at the time of sale;
4. a condition specified in the conditions of sale prescribed by the trustee or substitute trustee before the sale and made available in writing to prospective bidders at the sale was not met;
5. the mortgagee or mortgage servicer and the debtor agreed before the sale to cancel the sale based on an enforceable written agreement by the debtor to cure the default; or
6. at the time of the sale, a court-ordered or automatic stay of the sale imposed in a bankruptcy case filed by a person with an interest in the property was in effect.

Tex. Prop. Code § 51.016(b).

The party rescinding the sale must serve written notice of rescission on the purchaser and each debtor obligated to pay the debt that describes the reason for the rescission and includes recording information for any affected trustee's deed. Tex. Prop. Code § 51.016(c)(1). See form 14-40 in this chapter. This notice must be served by certified mail in the county where all or a part of the property is located. Tex. Prop. Code § 51.016(c)(2), (d). The rescinding mortgagee, trustee, or substitute trustee shall record in the real property records of the county in which the written notice of rescission is filed an affidavit stating the date the bid amount was returned together with the certified mail, electronic or wire transfer, or courier service delivery tracking information. Tex. Prop. Code § 51.016(f). See form 14-41. This affidavit is prima facie evidence of the return of the bid amount. Tex. Prop. Code § 51.016(g). A completed rescission restores the mortgagee and debtor to their respective title, rights, and obligations under the instrument relating to the foreclosed property that existed immediately before the sale. Tex. Prop. Code § 51.016(h). No action challenging the effectiveness of a rescission under this section may be commenced, unless filed on or before the thirtieth calendar day after the notices of rescission are filed for recording. Tex. Prop. Code § 51.016(j). A rescission under this section is not effective as to a creditor or subsequent good-faith purchaser for value. Tex. Prop. Code § 51.016(i). Damages in a suit challenging the effectiveness of the rescission or resulting from the rescission are substantially limited to the amount of the bid price. *See* Tex. Prop. Code § 51.016(k), (*l*). Specific performance is not available. Tex. Prop. Code § 51.016(k).

§ 14.7 Foreclosure Documents for Public Disposition of Personal Property

§ 14.7:1 Waiver of Right to Notice after Default

A debtor or secondary obligor may waive its rights (but not the rights of other parties) to notice of a public disposition of personal property collateral, but the waiver must be signed

after the default has occurred. Tex. Bus. & Com. Code § 9.624(a). See form 14-21 in this chapter for a waiver.

§ 14.7:2 Notice of Public Disposition

The posted notice of public sale can be used for public posting and advertisement of the sale. The attorney should consider advising the client about the requirements of a commercially reasonable sale and the risks associated with it. See form 14-23 in this chapter for a notice of public sale.

Texas Business and Commerce Code section 9.613 sets forth an approved form for notice of public or private disposition of personal property collateral other than consumer goods. *See* Tex. Bus. & Com. Code § 9.613. The approved form for notification of public or private disposition of personal property collateral that consists of consumer goods is set out in section 9.614. *See* Tex. Bus. & Com. Code § 9.614. Notice must be sent to the debtor, any secondary obligor, and, if the collateral is other than consumer goods, any other person from whom the secured party has received, before the notification date, an authenticated claim of interest in the collateral, and any other secured party or lienholder described in section 9.611(c)(3)(B), (c)(3)(C). *See* Tex. Bus. & Com. Code § 9.611(c). See form 14-28 for a notice if the collateral is consumer goods and form 14-29 for a notice if the collateral is not consumer goods.

§ 14.7:3 Agenda of Public Sale

The agenda of public sale is not required by the Uniform Commercial Code, but it serves to document that the sale was completed. See form 14-24 in this chapter.

§ 14.7:4 Bill of Sale

The bill of sale evidences the transfer of ownership of the personal property to the successful bidder. See form 14-25 in this chapter. If applicable, a disclaimer of warranties should be included. To disclaim warranties, the attorney must use language similar to that provided in Tex. Bus. & Com. Code § 9.610(f).

§ 14.8 Strict Foreclosure of Personal Property

§ 14.8:1 Notice of Strict Foreclosure

The notice of strict foreclosure notifies the debtor and others required to be notified of the secured party's proposal to accept personal property collateral in satisfaction of the debt. *See* Tex. Bus. & Com. Code §§ 9.620–.622. See form 14-26 in this chapter for a notice of strict foreclosure.

§ 14.8:2 Consent to Strict Foreclosure

The debtor must consent to the secured party's proposal to accept the collateral in satisfaction of the debt. Tex. Bus. & Com. Code § 9.620(a)(1), (c). The consent may be an express consent made by the debtor agreeing to the secured party's proposal in a writing signed after default. Tex. Bus. & Com. Code § 9.620(c)(1), (c)(2). See form 14-22 in this chapter for a consent form.

§ 14.8:3 Objection to Strict Foreclosure

A letter of objection notifies the secured party of a person's objection to the secured party's proposal to accept the collateral in satisfaction of the debt. See form 14-27 in this chapter. The letter may be sent by any person to whom the secured party sent its proposal to accept the collateral. To be effective, the objection letter must be received by the secured party within twenty days after the date the secured party sends its proposal. Tex. Bus. & Com. Code § 9.620(c)(2)(C), (d)(1), (d)(2)(A).

§ 14.9 Private Disposition of Personal Property

§ 14.9:1 Waiver of Notice after Default

A debtor or secondary obligor may waive its rights (but not the rights of other parties) to notice of a private disposition of personal property collateral, but the waiver must be signed after the default has occurred. Tex. Bus. & Com. Code § 9.624(a). See form 14-21 in this chapter for a waiver.

§ 14.9:2 Notice of Private Disposition

Texas Business and Commerce Code section 9.613 sets forth an approved form for notice of public or private disposition of personal property collateral other than consumer goods. *See* Tex. Bus. & Com. Code § 9.613. The approved form for notification of public or private disposition of personal property collateral that consists of consumer goods is set out in Tex. Bus. & Com. Code § 9.614. Notice must be sent to the debtor, any secondary obligor, and, if the collateral is other than consumer goods, any other person from whom the secured party has received, before the notification date, an authenticated claim of interest in the collateral, and any other secured party or lienholder described in section 9.611(c)(3)(B), (c)(3)(C). Tex. Bus. & Com. Code § 9.611(c). See form 14-28 in this chapter for a notice if the collateral is consumer goods and form 14-29 for a notice if the collateral is not consumer goods.

§ 14.9:3 Memorandum of Private Sale

The agenda of private sale is not required by the Uniform Commercial Code, but it serves to document that the sale was completed. See form 14-30 in this chapter.

§ 14.9:4 Bill of Sale

The bill of sale evidences the transfer of ownership of the personal property to the buyer at the private foreclosure sale. See form 14-25 in this chapter. If applicable, a disclaimer of warranties should be included. To disclaim warranties, the attorney must use language similar to that provided in Tex. Bus. & Com. Code § 9.610(f).

§ 14.10 Security Interest Included in Deed of Trust

If the deed of trust contains the security interest covering personal property, the lienholder may foreclose the personal property lien with the real property foreclosure. Tex. Bus. & Com. Code § 9.604(a).

§ 14.11 Collateral Transfer of Note and Lien Foreclosure

The collateral transfer of note and lien form creates a security interest in an instrument, the collateral promissory note. The foreclosure of the collateral note under a collateral transfer is governed by the Texas Business and Commerce Code rather than by the Texas Property Code. *See* Tex. Bus. & Com. Code §§ 9.601–.628. The secured party may select any procedure applicable to the situation: strict foreclosure, public disposition, or private disposition. Without foreclosing on the collateral note, the secured party may collect and enforce the collateral note, including, if the collateral note is in default, accelerating the collateral note and exercising any foreclosure remedy contained in the underlying deed of trust. See the collateral transfer of note and lien, form 9-8 in this manual.

§ 14.12 Additional Resources

Austin, Judd A., Jr. "HOA Collections and Foreclosures: New Statutes & New Rules." In *Advanced Real Estate Drafting Course, 2012*. Austin: State Bar of Texas, 2012.

Ayers, R. Glen. "Mortgage Foreclosure in an Age of Securization: Missing Original Notes and Other Problems for Creditors." In *Advanced Real Estate Law Course, 2009*. Austin: State Bar of Texas, 2009.

Bastian, G. Tommy. "Expedited Foreclosure Home Equity, Home Equity Line of Credit, Reverse Mortgage, and Tax Lien Transfer and Property Tax Loan Forms for the New Supreme Court Rules." In *Advanced Real Estate Drafting Course, 2012*. Austin: State Bar of Texas, 2012.

———. "Foreclosure of Farm and Ranch Real Property." In *Advanced Real Estate Strategies Course, 2008*. Austin: State Bar of Texas, 2008.

———. "How Securitization Changed Residential Foreclosures." In *Advanced Real Estate Law Course, 2010*. Austin: State Bar of Texas, 2010.

———. "Rule 735 and 736 Foreclosures: Tax Lien Transfers." In *Advanced Real Estate Law Course, 2009*. Austin: State Bar of Texas, 2009.

———. "Rule 736 Promulgated Forms." In *Advanced Real Estate Drafting Course, 2014*. Austin: State Bar of Texas, 2014.

———. "Texas Foreclosures: Myths and Reality." In *Advanced Real Estate Law Course, 2011*. Austin: State Bar of Texas, 2011.

Baucum, Michael. "Alternatives to Foreclosure—Ideas and Forms." In *Advanced Real Estate Drafting Course, 2015*. Austin: State Bar of Texas, 2015.

Biel, Frederick J. "Commercial Foreclosures: Selected Documentation and Procedural Issues." In *Advanced Real Estate Strategies Course, 2010*. Austin: State Bar of Texas, 2010.

———. "Servicing, Foreclosing, and Re-Selling Non-Securitized Single Family Residential Real Estate Secured Notes." In *Advanced Real Estate Law Course, 2011*. Austin: State Bar of Texas, 2011.

———. "UCC Related Foreclosure Matters—Commercial Reasonableness and Its Impact on Deficiency and Surplus Claims under Chapter 9." In *Advanced Real Estate Law Course, 2013*. Austin: State Bar of Texas, 2013.

Burns, Randolph L. "Looking at a Receivership Issue? Here's What You Need to Know." In *Advanced Real Estate Law Course, 2012*. Austin: State Bar of Texas, 2012.

Derber, David P. "Personal Property Foreclosures." In *Advanced Real Estate Strategies Course, 2010*. Austin: State Bar of Texas, 2010.

Doggett, Mary Belan, and Yanira M. Reyes. "Foreclosure of Transferred Ad Valorem Tax Liens." In *Advanced Real Estate Law Course, 2012*. Austin: State Bar of Texas, 2012.

Dysart, Sara E. "Attorney Acting as Substitute Trustee in a Non-Judicial Foreclosure Sale." In *Advanced Real Estate Strategies Course, 2008*. Austin: State Bar of Texas, 2008.

———. "Planning for Defaults, Workouts, and Foreclosures." In *Advanced Real Estate Strategies Course, 2010*. Austin: State Bar of Texas, 2010.

———. "Workouts, Deeds in Lieu and Foreclosure." In *State Bar College "Summer School" Course, 2010*. Austin: State Bar of Texas, 2010.

Grantham, Terry L. "The Trustee's Role in Foreclosures: 'Ten Things Every Foreclosure Trustee Needs to Know.'" In *Advanced*

Real Estate Law Course, 2009. Austin: State Bar of Texas, 2009.

Guzman, Leann D. "Sales, Purchases, and Redemption of Tax-Foreclosed Property." In *Advanced Real Estate Law Course, 2012*. Austin: State Bar of Texas, 2012.

Howard, C. Elaine. "Problems with Foreclosures: A Legal Analysis of Current Events." In *7th Annual John Huffaker Agricultural Law Course, 2013*. Austin: State Bar of Texas, 2013.

Locke, William H., Jr., Ralph Martin Novak, Jr., and G. Tommy Bastian, eds. *Texas Foreclosure Manual*. 3rd ed. Austin: State Bar of Texas, 2014. Supplement 2015.

Tomek, David W. "Real Property Foreclosures: Legal Considerations, Documentation, and Notable Recent Developments." In *5th Annual John Huffaker Agricultural Law Course, 2011*. Austin: State Bar of Texas, 2011.

Wilbanks, Erwin. "Common Errors in Foreclosure." In *Advanced Real Estate Law Course, 2010*. Austin: State Bar of Texas, 2010.

[Reserved]

Form 14-15

Note: On the first sale of the day by a trustee or a substitute trustee an announcement of the reasonable conditions for conducting the public sale may be made pursuant to Tex. Prop. Code § 51.0075(a). Tex. Prop. Code § 51.0075(f) was amended in 2009 to allow the foreclosure purchaser and the trustee or substitute trustee to agree on a reasonable time after acceptance of the bid within which to deliver the purchase price; otherwise, the purchase price is payable without delay after acceptance of the bid.

Agenda of Public Foreclosure Sale of Residential Real Property

[**county**] County, Texas, [**date**]

I am [**name of trustee**], Trustee under the Deed of Trust recorded in [**recording data**] of the real property records of [**county**] County, Texas. [**Name of mortgagee or mortgage servicer**] has instructed me to sell, at public auction, the property described in the Deed of Trust,

Include one or both of the following.

together with the personal property that is subject to the security interest granted in the Deed of Trust[.]

And/Or

but not including any property previously released from the Deed of Trust, including but not limited to the property described in Exhibit [**exhibit letter/number**] attached hereto.

Continue with the following.

This is to be an "AS IS" sale. This sale will be conducted subject to the right of rescission contained in section 51.016 of the Texas Property Code.

The property is [**read legal description or offer a copy for review. If appropriate, provide beachfront notice. See TREC form no. 33-2 at https://www.trec.texas.gov/forms/addendum-coastal-area-property**].

[**Include if applicable:** THERE WILL BE NO WARRANTY RELATING TO TITLE, POSSESSION, QUIET ENJOYMENT, OR THE LIKE FOR THE PERSONAL PROPERTY IN THIS DISPOSITION.]

I now call for cash bids on the property. Each bidder will please state his or her name, for whom the bid is being made, and the amount of each bid made. [**Include if applicable:** All bidders must execute an acknowledgment of receipt of the beachfront notice in order to bid.]

Bids in the order made:

1. Name:

   Representing:

   Amount bid:

Repeat above information as needed.

Are there any further bids?

Include the following information, as required by Tex. Bus. & Com. Code § 22.004, for the winning bidder other than the mortgagee or mortgage servicer.

Bidder submitting the highest and best bid:

Name:

Address:

Telephone number:

E-mail address:

Taxpayer identification number:

Bidder's principal (if bidder is acting as an agent):

Name of individual or organization:

Name of organization's contact person:

Address:

Telephone number:

E-mail address:

Grantee in deed:

Name:

Address:

Party tendering payment of highest and best bid:

Name:

Address:

Telephone number:

E-mail address:

Government-issued photo identification: [attach copy]

Select one of the following.

If the bidder has requested, and the trustee agrees to grant the bidder, a reasonable time to obtain the amount of the bid, select the following.

Hearing no further bids, this sale is adjourned until _____, at which time this sale will reconvene at this location if the bidder has not delivered cash to me, as Trustee, in the

amount of the bidder's bid; provided, however, that if the bidder delivers the cash bid, the property will be sold to the bidder without further notice, and this sale will be concluded.

The time for reconvening the sale must allow time to complete the sale by 4:00 P.M. and bidding on behalf of the beneficiary should commence at its minimum bid. If the sale is reconvened, this agenda should be reread in full.

If the bidder has not requested time to obtain the amount of the bid, select the following.

Hearing no further bids, the property is sold to _____, who made the highest and best bid.

This concludes the sale.

Continue with the following.

_____

[Name of trustee]

Form 14-16

Trustee's Deed [with Bill of Sale]

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

Date:

Trustee:

Deed of Trust

Date:

Grantor:

Mortgagee:

Recording information:

Property: [**Insert property description and include the following if applicable:** , including all personal property secured by the security agreement included in the Deed of Trust.]

Note

Date:

Principal amount:

Borrower:

Mortgagee:

Date of Sale (first Tuesday of month):

Time of Sale:

Place of Sale:

Buyer:

Buyer's Mailing Address:

[Amount of Sale:]

A default existed under the Deed of Trust and Mortgagee or its agent directed Trustee to enforce the trust.

Notices stating the time, place, and terms of sale of the Property were posted and filed and [**include if applicable:** as shown by the affidavit attached to this deed and incorporated in it by this reference] Mortgagee either personally or by agent served notice of the sale to each debtor, as required by section 51.002 of the Texas Property Code. In accordance with that statute and the Deed of Trust, Trustee sold the Property to Buyer, who was the highest bidder at the public auction [**include if the amount of sale is completed:** , for the Amount of Sale]. The sale was made on the Date of Sale, began at the Time of Sale or not later than three hours thereafter, and was concluded by 4:00 P.M.

Trustee, subject to any prior liens, the right of rescission contained in section 51.016 of the Texas Property Code, and other exceptions to conveyance and warranty in the Deed of Trust and for the [bid price/Amount of Sale] paid by Buyer as consideration, grants, sells, and conveys the Property to Buyer, "AS IS," together with all and singular the rights and appurtenances thereto in any way belonging, to have and to hold it to Buyer and Buyer's heirs, successors, and assigns forever. Trustee binds Grantor and Grantor's heirs and successors to warrant and forever defend all and singular the Property to Buyer and Buyer's heirs, succes-

sors, and assigns against every person whomsoever lawfully claiming or to claim the same or any part thereof, except as to the prior liens and other exceptions to conveyance and warranty in the Deed of Trust.

Include the following if applicable.

TRUSTEE HAS NOT MADE, AND DOES NOT MAKE, ANY REPRESENTATION, EXPRESS OR IMPLIED, WITH RESPECT TO THE PERSONAL PROPERTY, AND THE PERSONAL PROPERTY IS SOLD TO BUYER "AS IS, WHERE IS, AND WITH ALL FAULTS." THERE IS NO WARRANTY RELATING TO TITLE, POSSESSION, QUIET ENJOYMENT, OR THE LIKE IN THIS DISPOSITION OF PERSONAL PROPERTY.

Continue with the following.

_____

[Name of trustee]

Include acknowledgment.

[Reserved]

Form 14-17

Foreclosure Affidavit

Date:

Affiant:

If the affidavit is to be attached to the trustee's deed and has been incorporated by reference, the following may be omitted.

Deed of Trust

Date:

Grantor:

Mortgagee:

Recording information:

Property: [**Insert property description and include the following if applicable:** , including all personal property secured by the security agreement included in the Deed of Trust.]

Continue with the following.

Affiant on oath swears that the following statements are true and are within the personal knowledge of Affiant:

1. This affidavit is made with respect to the foreclosure of the Deed of Trust that occurred on [**date**].

2. Attached to this affidavit is a copy of the Notice of Trustee's Sale, file-stamped by the county clerk's office.

3. The trustee's sale took place on [**date**] at approximately [**time**] at the place at the courthouse designated in the notice [**include if applicable:** , being the area designated by the county commissioner's court for foreclosure sales].

Select one of the following.

4. Attached to this affidavit is a copy of the letter sent to each debtor obligated to pay the debt at the address required under the Texas Property Code.

Or

4. At least twenty-one days before the trustee's sale, Affiant, either personally or by agent, served notice of the sale on each debtor, at the address for that debtor as shown by Mortgagee's records, who [is/are]: [**list name[s] and address[es]**].

Continue with the following.

The [notice[s]/letter[s]] [was/were] served on [**date**] by certified mail, postage prepaid, properly addressed to each debtor listed above at the address[es] stated.

5. To the best of Affiant's knowledge, the debtor[s] [was/were] alive on the date of the trustee's sale.

Select one of the following.

6. [**Name of grantor**] is a servicemember in military service, as those terms are defined in 50 U.S.C. § 3911; however, the obligation described in the mortgage originated after [**name**] began military service on [**date**].

Or

6. [**Name of grantor**] is a servicemember in military service, as those terms are defined in 50 U.S.C. § 3911, and the obligation described in the mortgage originated before [**name**] began military service on [**date**]. However, [**name**], during [his/her] military service,

executed and delivered a written waiver of rights and protections provided by 50 U.S.C. §§ 3901–4043, and a copy of the waiver is attached to this affidavit.

Or

6. [**Name of grantor**] was not a servicemember in military service, as those terms are defined in 50 U.S.C. § 3911, or at any time within ninety days preceding the date of the trustee's sale.

Include the following if applicable.

7. Attached to this affidavit is a copy of the notice sent to the Internal Revenue Service regarding the tax liens described therein.

Continue with the following.

_____

[**Name of affiant**]

SUBSCRIBED AND SWORN TO before me on _____ by [**name of affiant**].

_____

Notary Public, State of Texas

[Reserved]

Form 14-18

Notice of Advancement and Demand for Payment

[**Date**]

[**Name and address of borrower**]

See section 14.5 in this chapter.

Re: [**describe note and loan documents**]

[**Salutation**]

This letter is to give you notice of default under the referenced loan documents. This default consists of your failure to pay the loan that you assumed and agreed to pay. The mortgagee has paid $[**amount**] to [**name of mortgage company**].

Demand is made for the immediate payment of $[**amount**], with interest as allowed by the deed of trust. Unless the default is cured by [**date**], the mortgagee intends to foreclose its lien under the loan documents.

Include clause 14-7-1 if this is the first correspondence from the attorney to a debtor who is a consumer. See section 14.4:5.

If you have any questions, please consult your legal counsel.

Sincerely yours,

_____

[**Name of attorney**]

Certified Mail No. [**number**]
Return Receipt Requested
c: [**name of borrower**], by first-class mail

[Reserved]

Form 14-19

Affidavit of Advancement

Date:

Affiant:

Deed of Trust to Secure Assumption

Date:

Grantor:

Grantor's address:

Mortgagee:

Mortgagee's address:

Trustee:

Trustee's address:

Recording information:

Property:

Amount Advanced:

Affiant on oath swears that the following statements are true and are within the personal knowledge of Affiant:

Affiant is Mortgagee in the Deed of Trust to Secure Assumption. Grantor has defaulted in the performance of the loan assumed, and Affiant has advanced the Amount Advanced to

cure the default. Affiant has given notice of the advancement to Grantor and has demanded to be reimbursed.

_____

[**Name of affiant**]

SUBSCRIBED AND SWORN TO before me on _____ by [**name of affiant**].

_____

Notary Public, State of Texas

Form 14-20

IRS Notice Letter

[**Date**]

District Director
Internal Revenue Service
[**Address**]
Attention: Technical Support Group Manager

Re: Notice of nonjudicial foreclosure sale on property
Taxpayer:

[**Salutation**]

This letter is notice as required under section 7425 of the Internal Revenue Code and Treasury Regulations section 301.7425–3(a) that property encumbered by a deed-of-trust lien granted by [**name of borrower**] is being nonjudicially foreclosed pursuant to the authority granted in the deed of trust. [**Name of mortgagee**], holder of the deed-of-trust lien, gives notice of the proposed nonjudicial sale of the property.

1. *Name and Address of Creditor.* The name and address of the person for whom this notice is submitted is [**name of mortgagee**]. This creditor is the current owner and holder of the deed of trust and the promissory note[s] secured by it, which are described as follows: [**describe deed of trust and promissory note[s]**].

2. *Tax Lien Descriptions.* A copy of each of the following notices of federal tax lien potentially affecting the property to be sold is enclosed:

Place filed: [**county**] County, Texas

Date filed:

Recording data:

Tax amount:

Taxpayer:

Repeat above information as needed.

3. *Description and Location of Property.* A detailed description, including location of the property affected by this notice, is [**include property description and any other relevant data**].

The street address of the property is [**address**].

4. *Date, Time, and Place of Foreclosure Sale.* The date, time, place, and terms of the proposed sale are as follows:

Date:

Time: Between the hours of 10:00 A.M. and 4:00 P.M. and to begin no earlier than [**time**] and no later than three hours thereafter.

Place:

Terms: To the highest bidder for cash.

5. *Debt.* The approximate amount of the principal obligation, including interest, secured by the lien sought to be enforced and a description of the other expenses (such as legal expenses and selling costs) that may be charged against the sale proceeds are as follows:

Principal balance:

Interest through [**date**]:

Daily accrual:

Legal and sale expenses: Estimated range of expenses is from $[**amount**] to $[**amount**].

Include the following if applicable.

6. *Property within District.* The property within your district is referred to in the mortgagee title policy held by [**name of mortgagee**], which covers the tract and related improvements and which has been included if available.

Continue with the following.

7. *Acknowledgment of Notice Requested.* Please acknowledge receipt of this notice by returning a file-stamped copy of this letter in the enclosed envelope. If you have any questions, please do not hesitate to call.

Sincerely yours,

_____

[**Name of attorney**]

c: [**name of client**]

[Reserved]

Form 14-21

Waiver of Rights after Default

Date:

Security Agreement

Date:

Lender (Secured Party):

Debtor:

Collateral:

Note

Date:

Amount:

Borrower (Obligor):

[Secondary Obligor:]

[Debtor/Secondary Obligor] acknowledges that a default exists under the Note and the Security Agreement. [Debtor/Secondary Obligor] waives all further notices of disposition of the collateral, pursuant to section 9.624(a) of the Texas Business and Commerce Code.

Include the following if a waiver of disposition of consumer goods collateral is desired. See section 14.3:4 in this chapter for requirements for using a waiver.

Further, [Debtor/Secondary Obligor] waives the right to require Secured Party to dispose of the collateral within ninety days pursuant to section 9.620(e) of the Texas Business and Commerce Code.

Include the following if a waiver of the right to redeem the collateral is desired. Note: This waiver may not be used in a consumer goods transaction.

[Debtor/Secondary Obligor] acknowledges that the collateral is not consumer goods and waives its right to redeem the collateral.

Continue with the following.

_____

[Name of debtor or secondary obligor]

Form 14-22

Debtor's Consent to Acceptance of Collateral

Date:

Security Agreement

Date:

Lender (Secured Party):

Debtor:

Collateral:

Note

Date:

Amount:

Borrower (Obligor):

[Secondary Obligor:]

[Debtor/Secondary Obligor] acknowledges receipt of a proposal from Lender to accept the collateral in [full/partial] satisfaction of the obligation. [Debtor/Secondary Obligor] consents to the acceptance of the collateral as proposed by Lender.

[Debtor/Secondary Obligor] acknowledges that a default has occurred under the Note and the Security Agreement [./and/,] [**include if the collateral is consumer goods:** that Debtor is not in possession of the collateral at this time[./, and]] [**include if applicable:** that 60 percent of the cash price has not been paid in a consumer purchase-money transaction or 60 percent of

the principal amount of the obligation has not been paid in a consumer non-purchase-money transaction]. [**If 60 percent of the cash price has been paid in a consumer purchase-money transaction or 60 percent of the principal amount of the obligation has been paid in a consumer non-purchase-money transaction, include:** Further, [Debtor/Secondary Obligor] waives its right to require disposition of the collateral within ninety days pursuant to section 9.620(e) of the Texas Business and Commerce Code.]

_____

[**Name of debtor or secondary obligor**]

Form 14-23

[Posted] Notice of Public Sale

Date:

Security Agreement

Date:

Debtor:

Lender (Secured Party):

Collateral:

Note

Date:

Amount:

Borrower (Obligor):

Lender (Secured Party):

[Secondary Obligor:]

Date of Sale:

Place of Sale:

Time of Sale:

A default exists under the Security Agreement. Secured Party will sell the Collateral at public auction to the highest bidder for cash at the Place of Sale on the Date of Sale to satisfy the debt secured by the Security Agreement. The sale will begin at the Time of Sale.

[**Include if applicable:** THERE WILL BE NO WARRANTY RELATING TO TITLE, POSSESSION, QUIET ENJOYMENT, OR THE LIKE FOR THE PERSONAL PROPERTY IN THIS DISPOSITION.]

_____

[**Name of lender**]

Form 14-24

Agenda of Public Foreclosure Sale Held on [date] [Personal Property]

I am [**name**], [**title**]. [**Name of debtor**] signed a security agreement in favor of [**name of lender**], the lender, granting a security interest in [**describe collateral**], the property in this sale. The lender has authorized me to sell the property at public auction. The property is [**read itemized list of property or offer a copy for review**]. [**Include if applicable:** THERE WILL BE NO WARRANTY RELATING TO TITLE, POSSESSION, QUIET ENJOYMENT, OR THE LIKE FOR THE PERSONAL PROPERTY IN THIS DISPOSITION.]

I now call for cash bids on the property. Each bidder will please state his or her name, for whom the bid is being made, and the amount of each bid made.

Bids in the order made:

1. Name:

   Representing:

   Amount bid:

Repeat above information as needed.

Are there any further bids?

If the successful bidder is not the lender, continue with the following.

Does the bidder require time to obtain cash in the amount of its bid?

If the answer is "yes," continue with the following.

Hearing no further bids, this sale is adjourned until _____, at which time this sale will reconvene at this location if the bidder has not delivered cash to me in the amount of the bidder's bid; provided, however, that if the bidder delivers the cash bid, the property will be sold to the bidder without further notice, and this sale will be concluded.

If the sale is reconvened, this agenda should be reread in full.

If the answer is "no" or if the successful bidder is the lender, continue with the following.

Hearing no further bids, the property is sold to _____, who made the highest and best bid.

This concludes the sale.

Continue with the following.

_____

[Name of trustee]

Form 14-25

Bill of Sale

Date:

Security Agreement

Date:

Debtor:

Lender (Secured Party):

Property:

Note

Date:

Amount:

Borrower (Obligor):

Lender (Secured Party):

Date of Sale:

Place of Sale:

Time of Sale:

Buyer:

A default occurred under the Security Agreement. Notices stating the time, place, and terms of sale of the property were sent to Debtor, any secondary obligor, and other persons to whom Lender is required to send such notice by the laws of the state of Texas. At the foreclosure sale for the Property, Lender accepted Buyer's bid, which was the highest bid.

Lender, subject to the prior liens and other exceptions to conveyance and warranty in the Security Agreement and for the amount of sale paid by Buyer as consideration, sells and conveys the Property to Buyer.

Include the following if applicable.

LENDER HAS NOT MADE, AND DOES NOT MAKE, ANY REPRESENTATION, EXPRESS OR IMPLIED, WITH RESPECT TO THE PROPERTY, AND THE PROPERTY IS SOLD TO BUYER "AS IS, WHERE IS, AND WITH ALL FAULTS." [**Include if applicable:** THERE IS NO WARRANTY RELATING TO TITLE, POSSESSION, QUIET ENJOYMENT, OR THE LIKE IN THIS DISPOSITION OF PERSONAL PROPERTY.]

Continue with the following.

_____

[**Name of lender**]

Form 14-26

Notice of Strict Foreclosure

[**Date**]

[**Name and address of borrower**]

Re: [**describe property, note, and loan documents**]

[**Salutation**]

This letter is to give you notice that [**name of lender**], the lender, proposes to accept the Property described above in [full/partial] satisfaction of the obligations under the note and security agreement, as provided in sections 9.620 through 9.622 of the Texas Business and Commerce Code. This proposal is [unconditional/subject only to the condition that any property not in the possession of the lender be preserved and maintained].

If the lender receives within twenty-one days from the date of this letter your written objection to this proposal, the lender will dispose of the Property at either a public or a private disposition or will undertake to collect from or enforce an obligation of any person obligated on the Property, as allowed by law.

Include the following if applicable.

A copy of this letter has been sent to the secured party[ies], lienholder[s], or other persons below, as required by law.

Continue with the following.

If you have any questions, please consult your legal counsel.

Sincerely yours,

_____

[**Name of attorney**]

Certified Mail No. [**number**]
Return Receipt Requested
c: [**name of borrower**], by first-class mail
[c: [**name[s] of secured party[ies] and other persons required by Tex. Bus. & Com. Code §§ 9.620–.621**]]

Form 14-27

Objection to Proposal to Accept Collateral in [Full/Partial] Satisfaction of Obligation

[Date]

[Name and address of lender]

Security Agreement

Date:

Debtor:

Lender (Secured Party):

Collateral:

Note

Date:

Amount:

Borrower (Obligor):

[Secondary Obligor:]

Lender (Secured Party):

[Salutation]

This letter is to notify you of an objection to your proposal to accept the collateral dated [date of lender's proposal].

_____

[Name of debtor or person objecting]

Form 14-28

This form is for use in consumer goods transactions.

Notice of Our Plan to Sell Property

[**Date**]

[**Name and address of borrower**]
[**Name and address of any obligor who is also a debtor**]

Re: [**describe property, note, and loan documents**]

[**Salutation**]

We have your [**describe collateral**] because you broke promises in our agreement.

Select one of the following. Include the first paragraph for a public disposition. Include the second paragraph for a private disposition.

We will sell [**describe collateral**] at public sale. A sale could include a lease or license. The sale will be held on [**date**] at [**time**] at [**place**]. You may attend the sale and bring bidders if you want.

Or

We will sell [**describe collateral**] at private sale sometime after [**date**]. A sale could include a lease or license.

Continue with the following.

The money that we get from the sale (after paying our costs) will reduce the amount you owe. If we get less money than you owe, you [will/will not] still owe us the difference. If we get more money than you owe, you will get the extra money, unless we must pay it to someone else.

You can get the property back at any time before we sell it by paying us the full amount you owe (not just the past-due payments), including our expenses. To learn the exact amount you must pay, call us at [**telephone number**]. If you want us to explain to you in writing how we have figured the amount that you owe us, you may call us at [**telephone number**] [**include if applicable:** or write us at [**address of secured party**]] and request a written explanation. [**Include if applicable:** We will charge you $[**amount**] for the explanation if we sent you another written explanation of the amount you owe us within the last six months.]

If you need more information about the sale, call us at [**telephone number**] or write us at [**address of secured party**].

[**Include if applicable:** We are sending this notice to the following people who have an interest in [**describe collateral**] or who owe money under your agreement: [**list names of all other debtors and obligors, if any**].]

_____

[**Name of lender**]

Form 14-29

This form is for use in transactions other than those for consumer goods.

Notification of Disposition of Collateral

[**Date**]

[**Name and address of debtor, obligor, or other person to whom the notice is sent**]
[**Name, address, and telephone number of secured party**]
[**Include only if debtor is not an addressee:** Name[s] of Debtor[s]: [**name[s]**]]

Select one of the following. Include the first paragraph for a public disposition. Include the second paragraph for a private disposition.

We will [sell/lease/license] the [**describe collateral**] [**include if applicable:** to the highest qualified bidder] in public on [**date**] at [**time**] at [**place**].

Or

We will [sell/lease/license] the [**describe collateral**] privately sometime after [**date**].

Continue with the following.

You are entitled to an accounting of the unpaid indebtedness secured by the property that we intend to [sell/lease/license] [**include if applicable:** for a charge of $[**amount**]]. You may request an account by calling us at [**telephone number**].

_____
[**Name of lender**]

Certified Mail No. [**number**]
Return Receipt Requested
c: [**name of debtor**], by first-class mail

[Reserved]

Form 14-30

Memorandum of Private Foreclosure Sale Held on [date]

I am [**name**], [**title**]. [**Name of debtor**] signed a security agreement in favor of [**name of lender**], the lender, granting a security interest in [**describe collateral**], the property in this sale. The lender has given notice to Debtor and any secondary obligor that after [**date**] the property would be sold at a private sale. The property is [**read itemized list of property or offer a copy for review**]. [**Include if applicable:** THERE WILL BE NO WARRANTY RELATING TO TITLE, POSSESSION, QUIET ENJOYMENT, OR THE LIKE FOR THE PERSONAL PROPERTY IN THIS DISPOSITION.]

I now call for cash bids on the property. Each bidder will please state his or her name, for whom the bid is being made, and the amount of each bid made.

1. Name:

   Representing:

   Amount bid:

Repeat above information as needed.

Are there any further bids?

If the successful bidder is not the lender, continue with the following.

Does the bidder require time to obtain cash in the amount of its bid?

If the answer is "yes," continue with the following.

Hearing no further bids, this sale is adjourned until _____, at which time this sale will reconvene at this location if the bidder has not delivered cash to me in the amount of

the bidder's bid; provided, however, that if the bidder delivers the cash bid, the property will be sold to the bidder without further notice, and this sale will be concluded.

If the sale is reconvened, this agenda should be reread in full.

If the answer is "no" or if the successful bidder is the lender, continue with the following.

Hearing no further bids, the property is sold to _____, who made the highest and best bid.

This concludes the sale.

Continue with the following.

_____

[**Name of person conducting sale**]

Form 14-31

Notice of Default

[Home Equity Loan]

[**Date**]

[**Name and address of borrower**]

Re: [**describe note and loan documents**]

[**Salutation**]

This letter is to give you notice of default under the referenced loan documents on your Texas Constitution article XVI, section 50(a)(6), home equity loan. This default consists of [**describe default; if the default is monetary, include the amount in default and the name of the mortgagee.**]. I am attempting to collect this indebtedness, and any information obtained will be used for that purpose. This letter is being sent to your attention in accordance with state and federal law.

You are notified that if the default is not cured within twenty days from the date of posting of this letter, the mortgagee will enforce its rights under the loan documents. Specifically, the mortgagee will accelerate the maturity of your home equity note and declare due and payable the unpaid principal balance, together with accrued but unpaid interest and fees and expenses allowed by law. If the amount due is not timely paid, the mortgagee will seek a court order allowing the mortgagee to foreclose the lien you granted on your homestead under the loan documents in accordance with Texas Constitution article XVI, section 50(a)(6), and rules 735 and 736 of the Texas Rules of Civil Procedure.

In accordance with federal laws regarding fair debt collections, unless you, within thirty days after receipt of this notice, dispute the validity of the debt set forth above, or any portion thereof, the indebtedness will be assumed to be valid. If you notify the undersigned in writing

within the thirty-day period that the indebtedness, or any portion thereof, is disputed, I will obtain a verification of the indebtedness, and I will mail you that verification. If within the same thirty-day period you request in writing the name and address of the original mortgagee, and if the original mortgagee is different from the current lender, I will furnish you with that information. Federal laws do not require that I wait until the end of the thirty-day period before taking action to collect the debt. If, however, you have requested verification of the debt or the name and address of the original mortgagee within the thirty-day period, I will cease collection activities until the requested information has been mailed to you.

If you have any questions, please consult your legal counsel.

Sincerely yours,

_____

[**Name of attorney**]

Certified Mail No. [**number**]
Return Receipt Requested
c: [**name of borrower**], by first-class mail

Form 14-32

Notice of Acceleration

[Home Equity Loan]

[**Date**]

[**Name and address of borrower**]

Re: [**describe note and loan documents**]

[**Salutation**]

By letter dated [**date of letter**], I notified you of a default under the referenced loan documents on your Texas Constitution article XVI, section 50(a)(6), home equity loan. I am attempting to collect this indebtedness, and any information obtained will be used for that purpose.

Because the default on your home equity note has not been cured, the mortgagee has accelerated the maturity of your note, declaring all unpaid principal, together with accrued but unpaid interest and fees and expenses allowed by law, immediately due and payable. The mortgagee will now seek a court order allowing the mortgagee to foreclose the lien you granted on your homestead under the loan documents in accordance with Texas Constitution article XVI, section 50(a)(6), and rules 735 and 736 of the Texas Rules of Civil Procedure.

If you have any questions, please consult your legal counsel.

Sincerely yours,

_____

[**Name of attorney**]

Certified Mail No. [**number**]
Return Receipt Requested
c: [**name of borrower**], by first-class mail

[Reserved]

Form 14-33

The Texas Supreme Court approved forms for expedited foreclosure proceedings on February 10, 2014. The forms may be found on the court's website, **www.txcourts.gov/media/847145/expedited-foreclosure-forms-for-website.pdf**. The form below is a reproduction of the form in the order.

Cause No.: _____

In Re: Order for Foreclosure Concerning _____ **[*property address*] Under Tex. R. Civ. P. 736**	§	**In the** _____ **[*type of court, e.g., district, county, or probate*] Court**
Petitioner:	§	_____ **County, Texas**
_____	§	
Respondent(s):	§	
_____	§	_____ **[*court designation*]**

Application for an Expedited Order Under Rule 736 on a Home Equity, Reverse Mortgage, or Home Equity Line of Credit Loan

1. Petitioner is _____, whose last known address is _____.

2. Respondent is _____, whose last known address is _____.

3. The property encumbered by the _____ [*loan agreement, contract, or lien*] sought to be foreclosed is commonly known as _____ [*street address of the property*] with the following legal description:

_____
[*legal description of the property*]

4. Petitioner alleges:

A. The type of lien sought to be foreclosed is a _____ [*see liens described in Texas Rule of Civil Procedure 735.1(a)*] under _____ [*state the statutory or constitutional authority for the lien*]. The lien is indexed at _____ [*volume/page, instrument number, or clerk's file number*] and recorded in the real property records of _____ County, Texas.

B. Petitioner has authority to seek foreclosure of the lien because _____.

C. The name of each Respondent obligated to pay the underlying debt or obligation evidenced by the _____ [*loan agreement, contract, or lien*] encumbering the property sought to be foreclosed is _____.

D. The name of each Respondent who is a mortgagor of the lien instrument sought to be foreclosed, but who is not a maker or assumer of the underlying debt, is _____.

E. As of _____ [*a date that is no more than sixty days prior to the date that the application is filed*]:

(i) [*If the default is monetary.*] _____ [*number and frequency of payments (e.g., monthly)*] have not been paid. The amount required to cure the default is _____. According to Petitioner's records, all lawful offsets, payments, and credits have been applied to the account in default.

(ii) [*If the lien secures a reverse mortgage or the default is nonmonetary.*] The facts creating the default and Petitioner's authority to enforce the lien are _____.

(iii) The total amount to pay off the _____ [*loan agreement, contract, or lien*] is _____.

F. Notice to cure the default has been sent by certified mail to each Respondent who is obligated to pay the underlying debt or obligation. The opportunity to cure has expired.

G. Before this application was filed, any other action required to initiate a foreclosure proceeding by Texas law or the _____ [*loan agreement, contract, or lien*] sought to be foreclosed was performed.

5. **Legal action is not being sought against the occupant of the property unless the occupant is named as a Respondent in this application.**

6. **If Petitioner obtains a court order, Petitioner will proceed with foreclosure of the property in accordance with applicable law and the terms of the _____ [*loan agreement, contract, or lien*] sought to be foreclosed.**

7. The following documents are attached to this application:

A. An affidavit or declaration of material facts describing the basis for foreclosure.

B. The _____ [*note, original recorded lien, or other documentation*] establishing the lien.

C. [*If the lien has been assigned.*] The current assignment of the lien recorded in the real property records of the county where the property is located.

D. A copy of each default notice required to be mailed to any Respondent under Texas law and the _____ [*loan agreement, contract, or lien*] sought to be foreclosed, and the _____ [*USPS Tracking report, return receipt, or other proof*] demonstrating that a notice was sent by certified mail before this application was filed.

8. **Assert and protect your rights as a member of the armed forces of the United States. If you or your spouse is serving on active military duty, including active military duty as a member of the Texas National Guard or the National Guard of another state or as a member of a reserve component of the armed forces of the United States, please send written notice of the active duty military service to Petitioner or Petitioner's attorney immediately.**

9. *Prayer for Relief:* Petitioner seeks an expedited order under Rule 736 so that it may proceed with foreclosure in accordance with applicable law and terms of the _____ [*loan agreement, contract, or lien*] sought to be foreclosed.

_____
[*Petitioner's signature block*]

Form 14-34

The Texas Supreme Court approved forms for expedited foreclosure proceedings on February 10, 2014. The forms may be found on the court's website, **www.txcourts.gov/media/847145/expedited-foreclosure-forms-for-website.pdf**. The form below is a reproduction of the form in the order.

Cause No. _____

In Re: Order for Foreclosure Concerning _____ [*property address*] Under Tex. R. Civ. P. 736	§	**In the _____ [*type of court, e.g., district, county, or probate*] Court**
Petitioner:	§	**_____ County, Texas**
_____	§	
Respondent(s):	§	
_____	§	_____ [*court designation*]

Affidavit in Support of Petitioner's Application for an Expedited Order Under Rule 736

State of Texas

County of _____

Before me, the undersigned notary, on this day personally appeared _____ [*name of affiant*], and stated under oath:

1. My name is _____ [*first, middle, and last name*]. I am an adult and of sound mind.

2. I am _____ [*job title or position*] of _____ [*name of affiant's employer*], whose address is _____ [*street address, city, state, and zip code*]. My affidavit concerns the account of _____ [*name of each person who is obligated for the underlying debt or lien sought to be foreclosed*] ("Obligor"). _____. [*Explain the relationship between the affiant or the affiant's employer and Petitioner (e.g., affiant's employer is the agent for loan service*

administration for Petitioner) and the connection or role of the affiant or the affiant's employer with respect to the servicing or foreclosure of Obligor's account (e.g., mortgagee or mortgage servicer).]

3. I have read and understand the purpose of the application to which my affidavit is attached and adopt by reference the statements made in it. I am the authorized agent or representative of Petitioner with respect to Obligor's account, and in that capacity, I am authorized to make this affidavit on Petitioner's behalf. My testimony is based on my experience, my knowledge of the usual business practices of _____ [*affiant's employer*] and the servicing industry in general, my job responsibilities, and the servicing records for Obligor's account.
4. Through my job responsibilities, I have access to and have reviewed the servicing records and data for Obligor's account, including electronic and computer generated records and data compilations. The records attached to the application are the original records or exact duplicates of the original records kept in the servicing file for Obligor's account.
5. Based on the regular practices of _____ [*affiant's employer*] and the servicing industry in general, these records:
    a. were made at or near the time of each act, event, or condition set forth in the records;
    b. were made by, or from information transmitted by, a person engaged in the servicing of Obligor's account who had actual knowledge of the acts, events, or conditions recorded; and
    c. are the kind of records that are kept in the regular course of servicing loan agreements.
6. It is the regular practice of businesses engaged in the servicing of loan agreements or other contracts requiring the collection of money to keep accurate records on debits and credits to an account, an account's balance, the collateral securing the right to the

lienholder's right to repayment, and efforts to enforce the underlying debt if the Obligor has defaulted. These records are relied upon for accuracy by all persons engaged in the servicing and enforcement of a loan agreement. There is no indication that the servicing records for Obligor's account are untrustworthy.

7. Based on the servicing records for Obligor's account, _____. [*State all facts demonstrating the basis for foreclosure, including, if applicable, the number of unpaid scheduled payments, the amounts required to cure the default and payoff the loan, and the credits and offsets that have been applied to Obligor's account. Describe proof (e.g., USPS Tracking report, return receipt, or other proof) that Obligor was given notice of the default by certified mail.*]
8. I sign this affidavit based on the personal knowledge that I have obtained by reviewing the servicing records for Obligor's account. The statements made in the application and my affidavit are true and correct as of the date stated.

Signed this _____ day of _____, 20__

_____
[*printed name and title of affiant*]

_____
[*signature of affiant*]

Signed under oath before me on _____, 20___.

[*notary's seal*]

_____
Notary Public in and for the State of Texas

My commission expires: _____.

[Reserved]

Form 14-35

The Texas Supreme Court approved forms for expedited foreclosure proceedings on February 10, 2014. The forms may be found on the court's website, **www.txcourts.gov/media/847145/expedited-foreclosure-forms-for-website.pdf**. The form below is a reproduction of the form in the order.

Cause No. _____

In Re: Order for Foreclosure Concerning _____ [*property address*] Under Tex. R. Civ. P. 736	§	**In the _____ [*type of court, e.g., district, county, or probate*] Court**
Petitioner:	§	**_____ County, Texas**
_____	§	
Respondent(s):	§	
_____	§	**____ [*court designation*]**

Declaration in Support of Petitioner's Application for an Expedited Order Under Rule 736

I, _____ [*name*], declare:

1. My name is _____ [*first, middle, and last name*]. I am an adult and of sound mind.
2. I am _____ [*job title or position*] of _____ [*name of declarant's employer*], whose address is _____ [*street address, city, state, and zip code*]. My declaration concerns the account of _____ [*name of each person who is obligated for the underlying debt or lien sought to be foreclosed*] ("Obligor"). _____. [*Explain the relationship between the declarant or the declarant's employer and Petitioner (e.g., declarant's employer is the agent for loan service administration for Petitioner) and the connection or role of the declarant or the declarant's employer with respect to the servicing or foreclosure of Obligor's account (e.g., mortgagee or mortgage servicer).*]

3. I have read and understand the purpose of the application to which my declaration is attached and adopt by reference the statements made in it. I am the authorized agent or representative of Petitioner with respect to Obligor's account, and in that capacity, I am authorized to make this declaration on Petitioner's behalf. My testimony is based on my experience, my knowledge of the usual business practices of _____ [*declarant's employer*] and the servicing industry in general, my job responsibilities, and the servicing records for Obligor's account.
4. Through my job responsibilities, I have access to and have reviewed the servicing records and data for Obligor's account, including electronic and computer generated records and data compilations. The records attached to the application are the original records or exact duplicates of the original records kept in the servicing file for Obligor's account.
5. Based on the regular practices of _____ [*declarant's employer*] and the servicing industry in general, these records:
   a. were made at or near the time of each act, event, or condition set forth in the records;
   b. were made by, or from information transmitted by, a person engaged in the servicing of Obligor's account who had actual knowledge of the acts, events, or conditions recorded; and
   c. are the kind of records that are kept in the regular course of servicing loan agreements.
6. It is the regular practice of businesses engaged in the servicing of loan agreements or other contracts requiring the collection of money to keep accurate records on debits and credits to an account, an account's balance, the collateral securing the right to the lienholder's right to repayment, and efforts to enforce the underlying debt if the Obligor has defaulted. These records are relied upon for accuracy by all persons engaged in the servicing and enforcement of a loan agreement. There is no indication that the servicing records for Obligor's account are untrustworthy.

7. Based on the servicing records for Obligor's account, _____. [*State all facts demonstrating the basis for foreclosure, including, if applicable, the number of unpaid scheduled payments, the amounts required to cure the default and payoff the loan, and the credits and offsets that have been applied to Obligor's account. Describe proof (e.g., USPS Tracking report, return receipt, or other proof) that Obligor was given notice of the default by certified mail.*]
8. I sign this declaration based on the personal knowledge that I have obtained by reviewing the servicing records for Obligor's account. The statements made in the application and my declaration are true and correct as of the date stated.

JURAT

My name is _____ [*first, middle, and last*], my date of birth is _____, and my address is _____ [*street, city, state, zip code, and country*]. I declare under penalty of perjury that the foregoing is true and correct.

Executed on the ____ day of _____ [*month*], _____ [*year*].

_____
[*signature of declarant*]

[Reserved]

Form 14-36

The Texas Supreme Court approved forms for expedited foreclosure proceedings on February 10, 2014. The forms may be found on the court's website, **www.txcourts.gov/media/847145/expedited-foreclosure-forms-for-website.pdf**. The form below is a reproduction of the form in the order.

Cause No. _____

In Re: Order for Foreclosure Concerning _____ [*property address*] Under Tex. R. Civ. P. 736	§	**In the _____ [*type of court, e.g., district, county, or probate*] Court**
Petitioner:	§	**_____ County, Texas**
_____	§	
Respondent(s):	§	
_____	§	**_____ [*court designation*]**

Military Status Affidavit

State of Texas

County of _____

Before me, the undersigned notary, on this day personally appeared _____ [*name of affiant*], and stated under oath:

1. My name is _____ [*first, middle, and last name*]. I am an adult and of sound mind.

2. Respondent's name is _____.

3. I am _____ [*job title or position*] of _____ [*name of the affiant's employer*]. _____. [*Explain relationship between affiant's employer and Petitioner.*] I have personal knowledge of the facts set forth in this affidavit. These facts are true and correct.

4. [*Choose one*]

   a. I know that Respondent is **not** currently in the military because I asked the U.S. Department of Defense to check its Defense Manpower Data Center (DMDC) database. DMDC notified me that Respondent is not on active duty in any of the armed forces. I attach a true copy of the DMDC verification. [*You can print a copy of the DMDC verification from this web address: https://www.dmdc.osd.mil/appj/scra/scraHome.do.*]

   b. I know that Respondent is **not** currently in the military because _____. [*State facts that would render a person ineligible for military service, such as being in prison or having a serious disability.*]

   c. I am unable to determine if Respondent is in military service.

   d. Respondent is in the military now.

5. [*If Respondent was previously in the military.*] Respondent's period of military service ended more than ____ months before this proceeding was filed.

_____
[*signature of affiant*]

Signed under oath before me on _____, 20___.

[*notary's seal*]

_____
Notary Public in and for the State of Texas

My commission expires: _____.

Form 14-37

The Texas Supreme Court approved forms for expedited foreclosure proceedings on February 10, 2014. The forms may be found on the court's website, **www.txcourts.gov/media/847145/expedited-foreclosure-forms-for-website.pdf**. The form below is a reproduction of the form in the order.

Cause No. _____

In Re: Order for Foreclosure Concerning _____ [*property address*] Under Tex. R. Civ. P. 736	§	**In the _____ [*type of court, e.g., district, county, or probate*] Court**
Petitioner:	§	**_____ County, Texas**
_____	§	
Respondent(s):	§	
_____	§	**_____ [*court designation*]**

Military Status Declaration

I, _____ [*name*], declare:

1. My name is _____ [*first, middle, and last name*]. I am an adult and of sound mind.

2. Respondent's name is _____.

3. I am _____ [*job title or position*] of _____ [*name of the declarant's employer*]. _____. [*Explain relationship between declarant's employer and Petitioner.*] I have personal knowledge of the facts set forth in this affidavit. These facts are true and correct.

4. [*Choose one*]

    e. I know that Respondent is **not** currently in the military because I asked the U.S. Department of Defense to check its Defense Manpower Data Center (DMDC) database. DMDC notified me that Respondent is not on active duty in any of the

armed forces. I attach a true copy of the DMDC verification. [*You can print a copy of the DMDC verification from this web address: https://www.dmdc.osd.mil/appj/scra/scraHome.do.*]

f. I know that Respondent is **not** currently in the military because _____. [*State facts that would render a person ineligible for military service, such as being in prison or having a serious disability.*]

g. I am unable to determine if Respondent is in military service.

h. Respondent is in the military now.

5. [*If Respondent was previously in the military.*] Respondent's period of military service ended more than ____ months before this proceeding was filed.

JURAT

My name is _____ [*first, middle, and last*], my date of birth is _____, and my address is _____ [*street, city, state, zip code, and country*]. I declare under penalty of perjury that the foregoing is true and correct.

Executed on the ____ day of _____ [*month*], _____ [*year*].

_____
[*signature of declarant*]

Form 14-38

The Texas Supreme Court approved forms for expedited foreclosure proceedings on February 10, 2014. The forms may be found on the court's website, **www.txcourts.gov/media/847145/expedited-foreclosure-forms-for-website.pdf**. The form below is a reproduction of the form in the order.

Cause No.: _____

In Re: Order for Foreclosure Concerning _____ [*property address*] **Under Tex. R. Civ. P. 736**	§	**In the** _____ [*type of court, e.g., district, county, or probate*] **Court**
Petitioner:	§	_____ **County, Texas**
_____	§	
Respondent(s):	§	
_____	§	_____ [*court designation*]

Default Order

1. On this day, the Court considered Petitioner's motion for a default order granting its application for an expedited order under Rule 736. Petitioner's application complies with the requirements of Texas Rule of Civil Procedure 736.1.
2. The name and last known address of each Respondent subject to this order is _____. Each Respondent was properly served with the citation, but none filed a response within the time required by law. The return of service for each Respondent has been on file with the court for at least ten days.
3. The property that is the subject of this foreclosure proceeding is commonly known as _____ [*street address of the property*] with the following legal description:

_____
[*legal description of the property*]

4. The lien to be foreclosed is indexed or recorded at _____ [*volume/page, instrument number, or clerk's file number*] and recorded in the real property records of _____ County, Texas.
5. The material facts establishing Respondent's default are alleged in Petitioner's application and the supporting _____ [*affidavit or declaration*]. Those facts are adopted by the court and incorporated by reference in this order.
6. Based on the _____ [*affidavit or declaration*] of Petitioner, no Respondent subject to this order is protected from foreclosure by the Servicemembers Civil Relief Act, 50 U.S.C. App. § 501 *et seq.*
7. Therefore, the Court grants Petitioner's motion for a default order under Texas Rules of Civil Procedure 736.7 and 736.8. Petitioner may proceed with foreclosure of the property described above in accordance with applicable law and the _____ [*loan agreement, contract, or lien*] sought to be foreclosed.
8. This order is not subject to a motion for rehearing, a new trial, a bill of review, or an appeal. Any challenge to this order must be made in a separate, original proceeding filed in accordance with Texas Rule of Civil Procedure 736.11.

SIGNED this _____ day of _____, 20__.

_____
JUDGE PRESIDING

Form 14-39

Demand to Pay Proceeds of Rent

[**Date**]

[**Name and address of borrower**]

Re: [**describe note and loan documents**]

[**Salutation**]

A default exists under the referenced loan documents.

Demand is made for the payment of the proceeds of all accrued but unpaid rent as of the date you receive this letter and all rent that accrues after you receive this letter in accordance with the Texas Property Code. Payment of the proceeds should be made to [**name of mortgagee and address for payments**]. The tenant[s] will be instructed to pay all rents to the mortgagee until further notice, in accordance with [the deed of trust/[**specify instrument**]] and the Texas Property Code.

> Include clause 14-7-1 in this chapter if this is the first correspondence from the attorney to a debtor who is a consumer. See section 14.4:5.

If you have any questions, please consult your legal counsel.

Sincerely yours,

_____

[**Name of attorney**]

Certified Mail No. [**number**]
Return Receipt Requested
c: [**name of borrower**], by first-class mail

[Reserved]

Form 14-40

Notice of Rescission of Trustee's Sale

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

Date:

[Trustee/Substitute Trustee]:

[Trustee/Substitute Trustee]'s Address:

Repeat as necessary for multiple trustees.

Debtor[s]:

[Debtor's/Debtors'] Address[es]:

Buyer[s]:

[Buyer's/Buyers'] Address[es]:

Note

Date:

Principal amount:

Borrower:

Mortgagee:

Trustee's Deed

Date:

Trustee:

Buyer:

Recording information:

Property: [**Insert property description and include the following if applicable:** , including all personal property secured by the security agreement included in the Deed of Trust.]

County:

Date of Sale (first Tuesday of month):

Time of Sale:

Place of Sale: [**Designate county location where sale will take place (may be other than courthouse)**]

Notice is given that on the Date of Sale, Trustee[s] offered the Property for sale at public auction at the Place of Sale, to the highest bidder for cash, "AS IS." The sale was struck off at the Time of Sale to Buyer[s].

The foreclosure sale is rescinded by the Trustee[s] because one or more of the statutory reasons listed below exist:

1. the statutory requirements for the sale were not satisfied;

2. the default leading to the sale was cured before the sale;

3. a receivership or dependent probate administration involving the Property was pending at the Time of Sale;

4. a condition specified in the conditions of sale prescribed by the Trustee[s] or Substitute Trustee[s] before the sale and made available in writing to prospective bidders at the sale was not met;

5. the Mortgagee or mortgage servicer and the Debtor[s] agreed before the sale to cancel the sale based on an enforceable written agreement by the Debtor[s] to cure the default; or

6. at the Time of Sale, a court-ordered or automatic stay of the sale imposed in a bankruptcy case filed by a person with an interest in the Property was in effect.

_____

[**Name of trustee**]

Repeat signature line as necessary.

[Reserved]

Form 14-41

Affidavit of Return of Bid Amount

Date:

Affiant:

Trustee's Deed

Date:

Trustee:

Buyer:

Recording information:

Property: [**Insert property description and include the following if applicable:** , including all personal property secured by the security agreement included in the Deed of Trust.]

Tracking Information: [**certified mail, electronic or wire transfer, or delivery service tracking information**]

Affiant on oath swears that the following statements are true and are within the personal knowledge of Affiant:

1. This affidavit is made with respect to the rescission of a foreclosure sale evidenced by the Trustee's Deed.

2. On the date shown above, the bid amount for the Trustee's Deed was returned to the Buyer by the method shown in the Tracking Information.

_____

[**Name of affiant**]

SUBSCRIBED AND SWORN TO before me on _____ by [**name of affiant**].

_____

Notary Public, State of Texas

TEXAS REAL ESTATE FORMS MANUAL

Third Edition

Volume 3

A project of the
Real Estate Forms Committee
of the
State Bar of Texas

Austin 2017

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

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

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

International Standard Book Number: 978-1-938873-48-5
International Standard Book Number: 978-1-938873-60-7 (2018 Supplement)
International Standard Book Number: 978-1-938873-70-6 (2019 Supplement)
International Standard Book Number: 978-1-938873-78-2 (2020 Supplement)
Library of Congress Control Number: 2017936428

State Bar of Texas
Austin, Texas 78711

The authors and the State Bar of Texas gratefully acknowledge permission of the copyright holder and publisher to reprint the following materials: ACORD 25 "Certificate of Liability Insurance," ACORD 28 "Evidence of Commercial Property Insurance," and ACORD 45 "Additional Interest Schedule."

Printed in the United States of America

Third Edition, 2017

Contents

Chapter 16

Water Rights Conveyancing Documents

I. Overview of Water Law

II. Groundwater Transaction Guide for Sale of Groundwater Rights for On-Site Production

III. Groundwater Transaction Guide for Sale of Permitted Groundwater Rights for Off-Site Production

IV. Surface Water Rights Transaction Guide

V. Water Rights Lien Documents

VI. Additional Resources

Forms

Chapter 16

Water Rights Conveyancing Documents

I. Overview of Water Law

§ 16.1 Introduction

Texas real estate transactions increasingly involve issues of water resources and supply. These issues affect the use and valuation of the land. In addition, transactions involving the purchase or lease of existing water rights (surface or groundwater) are becoming increasingly common. Surface water in Texas is owned by the state, but groundwater is privately owned. While both are interests in real property, the law applicable to surface water and groundwater is different. The issues in transactions involving the same are different too. This chapter provides an overview of Texas water law and some basic forms for the sale, lease or assignment, permitting, and mortgage of surface water and groundwater rights. For additional in-depth discussion of Texas surface water law, see Mary K. Sahs, ed., *Essentials of Texas Water Resources*, pt. B, "Surface Water," State Bar of Texas (6th ed. 2020).

Surface water is the property of the state. Once surface water has been appropriated, and the permittee has perfected the appropriation, the holder of the water right has superior title to all the world except the State. *See, e.g., Texas Water Rights Commission v. Wright*, 464 S.W.2d 642 (Tex. 1971); *South Texas Water Co. v. Bieri*, 247 S.W.2d 268 (Tex. App.—Galveston 1952, writ ref'd n.r.e.) (state owns the corpus of the water, appropriator owns a usufructory right). The permittee's rights, and the transfer or conveyance of those rights, are subject to the prior appropriation doctrine and the police powers of the Texas Commission on Environmental Quality (TCEQ). *See Texas Commission on Environmental Quality v. Texas Farm Bureau*, 460 S.W.3d 264, 266 (Tex. App.—Corpus Christi–Edinburg 2015, pet. denied); Tex. Water Code § 5.013, ch. 11; 30 Tex. Admin. Code chs. 295, 297.

Groundwater in place under the land is the property of the owner of the surface estate. Tex. Water Code § 36.002(a); *see, e.g., Coyote Lake Ranch, LLC v. City of Lubbock*, 498 S.W.3d 53, 58 (Tex. 2016); *Edwards Aquifer Authority v. Day*, 369 S.W.3d 814, 817, 831 (Tex. 2012); *Edwards Aquifer Authority v. Bragg*, 421 S.W.3d 118, 137–38 (Tex. App.—San Antonio 2013, pet. denied); *City of Del Rio v. Clayton Sam Colt Hamilton Trust*, 269 S.W.3d 613 (Tex. App.—San Antonio 2008, pet. denied). Groundwater production, as well as its sale or lease, may be regulated by a local groundwater conservation district generally operating pursuant to chapter 36 of the Texas Water Code and, if applicable, its respective enabling legislation. *See* Tex. Water Code ch. 36. These local districts are the state's preferred method of groundwater management to provide some regulation of the withdrawal and use of groundwater within their jurisdictions. *See Day*, 369 S.W.3d at 817, 835 & n.119; Tex. Water Code § 36.0015; *cf. Sipriano v. Great Spring Waters of America, Inc.*, 1 S.W.3d 75, 81 (Tex. 1999) (Hecht, J., concurring) ("Actually, such districts are not just the preferred method of groundwater management, they are the only method presently available."). For additional in-depth discussion of Texas groundwater law see Mary K. Sahs, ed., *Essentials of Texas Water Resources*, pt. A, ch. 5, and

pt. C, "Groundwater," State Bar of Texas (6th ed. 2020).

As of September 30, 2018, one hundred confirmed groundwater districts were operating across Texas. Thus, parties to real estate transactions must carefully consider whether they are dealing with issues of surface water rights, groundwater rights, or both, and they must also consider which regulatory entities have jurisdiction over those rights.

The TCEQ and the Texas Water Development Board (TWDB) are the two state agencies principally involved in the implementation of Texas's surface water laws and policies. The TWDB serves as the state's financier for major water projects. The regulation of water and sewer utilities, including the responsibility for rate and other economic regulation, and the jurisdiction over certain water supply and sewer service corporations, is under the Public Utility Commission of Texas. The TCEQ's jurisdiction includes water rights, water pollution and water quality, wholesale water rates, dam safety, the regulation of public sewer and drinking water systems, and limited groundwater district formation and supervision. The TCEQ is the adjudicatory body for all contested surface water rights cases and has substantive and procedural rulemaking authority. *See* Tex. Water Code § 5.013.

The TWDB is the state agency with authority for the planning of and financial assistance for water development projects. *See generally* Tex. Water Code chs. 15, 16. The TWDB makes loan and grant programs available to qualifying local governments and utilities for water supply development projects and for water quality purposes. *See generally* Tex. Water Code ch. 15; 31 Tex. Admin. Code chs. 355, 363, 367, 372, 375, 384. The TWDB is responsible for the development of the state water plan and coordination with the regional planning groups and groundwater management areas. *See generally* Tex. Water Code ch. 16, §§ 36.108–.1086; 31 Tex. Admin. Code chs. 355–358. The agency also has limited supervisory authority over groundwater district management plans, joint planning, and the development of desired future conditions for the state's groundwater resources. *See* Tex. Water Code §§ 36.108–.1086; 31 Tex. Admin. Code ch. 356.

§ 16.2 Groundwater

§ 16.2:1 Definition

Groundwater is water occurring under the surface of land, including percolating water or artesian water. *See generally* Tex. Water Code §§ 35.002(5), 36.001(5). The underflow of a surface water river or stream or the underground flow of water in confined channels is not groundwater. *See* Tex. Water Code § 11.021(a). Groundwater is presumed to be percolating unless it is proven to be otherwise. *Texas Co. v. Burkett*, 296 S.W. 273, 278 (Tex. 1927); *Denis v. Kickapoo Land Co.*, 771 S.W.2d 235, 237 (Tex. App.—Austin 1989, writ denied); *Pecos County WCID No. 1 v. Williams*, 271 S.W.2d 503, 506 (Tex. App.—El Paso 1954, writ ref'd n.r.e.). The Texas Water Code defines "groundwater" as water percolating below the surface of the earth. *See* Tex. Water Code §§ 35.002(5), 36.001(5).

Artesian water is groundwater confined under pressure by an impermeable geological layer, capable of flowing "above the first impervious stratum below the surface of the ground" when properly cased in a well. *See* Tex. Water Code § 11.201. The only significant difference between the legal treatment of percolating water and artesian water is that there are statutory provisions prohibiting the waste of artesian water and relating to artesian water produced from wells in the Edwards Aquifer. *See* Tex. Water Code § 11.202(d)–(e).

Underflow is that portion of a surface watercourse that flows through sand and gravel

deposits beneath the surface of the bed or banks of a stream. Underflow is surface water and is the property of the state. Tex. Water Code § 11.021(a). The laws governing the allocation and use of surface water apply to underflow. *Burkett*, 296 S.W. at 277; *Denis*, 771 S.W.2d at 237; *see* Tex. Water Code § 11.021.

Water "confined to underground streams with definite channels" means a subsurface watercourse that has all the characteristics of a surface watercourse, including a bed, banks that form a channel, and a current of water. *Denis*, 771 S.W.2d at 237. Ownership rights for this type of subsurface watercourse are the same as for surface water. Tex. Water Code § 11.021(a); *see Edwards Aquifer Authority v. Day*, 369 S.W.3d 814, 822 & n.28 (Tex. 2012). Whether subsurface water is the underground flow of water in a defined subterranean channel or percolating groundwater is a determination that must be made on a case-by-case basis. *Burkett*, 296 S.W. at 277; *Denis*, 771 S.W.2d at 237.

§ 16.2:2 Ownership: "Rule of Capture," Theory of Absolute Ownership of Groundwater in Place, and Common-Law and Regulatory Use Restrictions

In 1904, the Texas Supreme Court applied the English common-law rule of capture to groundwater and held that the owner of land could pump unlimited quantities of water from under his land, regardless of whether his action drained water from under his neighbor's land. *Houston & T.C. Railway Co. v. East*, 81 S.W. 279 (Tex. 1904) (the "*East* case"). Under common law, a landowner could use groundwater at a location other than his land and sell groundwater that he captured below the surface of his land for off-site use by a third party. *Texas Co. v. Burkett*, 296 S.W. 273 (Tex. 1927). Texas courts subsequently upheld the right of a landowner to capture and use groundwater even when doing so affects surface water supplies. *Denis v. Kickapoo Land Co.*, 771 S.W.2d 235, 233–37 (Tex. App.—Austin 1989, writ denied). *Pecos County WCID No. 1 v. Williams*, 271 S.W.2d 503 (Tex. App.—El Paso 1954, writ ref'd n.r.e.). The supreme court has declined to overrule the holding of *East*, finding that the common-law rule of capture does not preclude ownership in place, and that duty has been delegated to the Texas legislature. *Sipriano v. Great Spring Waters of America, Inc.*, 1 S.W.3d 75, 79 (Tex. 1999); *City of Corpus Christi v. City of Pleasanton*, 276 S.W.2d 798, 803 (Tex. 1955); Tex. Const. art. XVI, § 59. In *Edwards Aquifer Authority v. Day*, 369 S.W.3d 814, 827–33 (Tex. 2012), the supreme court reaffirmed the proposition in response to the State of Texas and the Edwards Aquifer Authority challenge to this well-established rule.

There are only two significant limitations at common law on the landowner's right to capture and use groundwater: (1) the landowner cannot capture and use groundwater maliciously for the purpose of injuring a neighbor or in a manner that constitutes wanton and willful waste (*City of Corpus Christi*, 276 S.W.2d 798); and (2) the landowner may be liable for damages if he negligently pumps groundwater in a manner that causes subsidence of neighboring land (*Friendswood Development Co. v. Smith-Southwest Industries, Inc.*, 576 S.W.2d 21 (Tex. 1978)). These limitations are recognized in section 36.002 of the Texas Water Code. Tex. Water Code § 36.002(b)(1); *see Day*, 369 S.W.3d at 832.

In recent years, Texas courts have relied on the state's more developed oil and gas jurisprudence to address issues regarding the nature and extent of a landowner's ownership interest in groundwater under his land. *See, e.g., Coyote Lake Ranch, LLC v. City of Lubbock*, 498 S.W.3d 53, 58 (Tex. 2016); *Day*, 369 S.W.3d at 817, 831; *Edwards Aquifer Authority v. Bragg*, 421 S.W.3d 118, 137–38 (Tex. App.—San Antonio

2013, pet. denied); *City of Del Rio v. Clayton Sam Colt Hamilton Trust*, 269 S.W.3d 613 (Tex. App.—San Antonio 2008, pet. denied). These questions have included not only whether a landowner owns groundwater in place under his land or actually vests only when the landowner has captured the groundwater by producing it and putting it to a beneficial use but also whether the landowner's interest in the groundwater is a vested right that would enable the landowner to challenge groundwater regulation by a governmental authority as an unconstitutional taking of the landowner's ownership of groundwater. The courts have also relied on oil and gas precedents to determine issues related to reservations of groundwater in place and conflicts between the severed dominant groundwater estate and servient surface estate.

In *City of Del Rio*, the trust, which was the owner of a large ranch, sold a fifteen-acre portion of the ranch to the city of Del Rio. In the sale the trust reserved the rights to all groundwater under the land but expressly surrendered any right to use the surface estate of the fifteen acres to access and develop the reserved groundwater rights. *City of Del Rio*, 269 S.W.3d at 615. The trust had never produced groundwater from the fifteen-acre tract. After the sale, the city drilled a well on the land for the production of groundwater for its municipal water supply. The trust sued the city on the grounds that the trust was the owner of the groundwater due to its reservation. The city, using an interpretation of the "rule of capture" as a theory of ownership, rather than a defense to liability for the pumping and use of groundwater in place, argued that the landowner's interest in the groundwater under his land is not a vested right but vests only when the landowner has "captured" the groundwater by pumping it and using it. Under this argument, because the trust had never produced groundwater from the fifteen-acre tract, the trust did not have an ownership interest in the groundwater that could be reserved in the deed, and therefore the city owned the groundwater under the fifteen acres. The court rejected the city's argument, holding instead that "under the absolute ownership theory, the Trust was entitled to sever the groundwater from the surface estate by reservation." *City of Del Rio*, 269 S.W.3d at 617. The court reasoned that the trust could access the groundwater from an adjacent tract of land without the need to access the surface estate of the fifteen-acre tract. *City of Del Rio*, 269 S.W.3d at 618–19. The Texas Supreme Court denied the city's petition for review.

In *Edwards Aquifer Authority v. Day*, the landowners sued the Edwards Aquifer Authority (EAA) on the grounds that the EAA's denial of the landowners' permit applications constituted a regulatory taking of the landowners' vested rights in the groundwater. The Texas Supreme Court affirmed many aspects of the EAA's final order regarding the permit applications at issue but remanded the case to the trial court for further proceedings on the taking claim. The supreme court affirmed the court of appeals' key holding, stating that "land ownership includes an interest in groundwater in place that cannot be taken for public use without adequate compensation." *Day*, 369 S.W.3d at 817. The court ruled that prior decisions neither recognized nor precluded ownership in place. The court noted that it had held oil and gas in place to be owned by the landowner long ago, and concluded "we find no reason to treat groundwater differently." *Day*, 369 S.W.3d at 823.

In a subsequent case, *Bragg*, 421 S.W.3d at 137–38, the court relied on the supreme court's ruling in *Day* that groundwater rights in place are vested rights, constitutionally protected from a government taking, including a regulatory taking resulting from the permitting decisions of groundwater conservation districts (GCDs), without just compensation. The Texas Supreme Court denied the Edwards Aquifer Authority's petition for review.

In 2016, the supreme court again relied on Texas oil and gas precedents in *Coyote Lake Ranch*. The court held that the groundwater estate was by necessity the "dominant estate" when severed from the surface estate. *Coyote Lake Ranch*, 498 S.W.3d at 64. Relying on the rationale adopted by the court for the mineral estate, the supreme court also held that the accommodation doctrine applied in conflicts between the superior groundwater estate and the servient surface estate that are not expressly addressed in the agreements between the parties. *Coyote Lake Ranch*, 498 S.W.3d at 64.

The Texas legislature amended section 36.002 of the Water Code to address the issue of ownership of groundwater in place and the authority of GCDs to regulate the pumping and use of groundwater. To some extent this section, as amended, codifies the existing case law. *See Day*, 369 S.W.3d at 842.

Section 36.002(a) states that the "legislature recognizes that a landowner owns the groundwater below the surface of the landowner's land as real property." Section 36.002(b) provides that this ownership interest entitles the landowner to drill for and produce the groundwater "subject to" the authority of GCDs to limit or prohibit drilling and to regulate production as described in section 36.002(d). Section 36.002(b–1) also recognizes landowners' common law rights but provides that the "groundwater ownership and rights described by this section [do not] entitle a landowner . . . to the right to capture a specific amount of groundwater below the surface of the landowner's land." Tex. Water Code § 36.002 (b–1). While the term *vested right* is never used in the statute, section 36.002(c) expressly states that nothing in the Water Code "shall be construed as granting the authority to deprive or divest a landowner . . . of the groundwater ownership and rights described by this section." Tex. Water Code § 36.002.

The common-law rule of capture in Texas, as adopted by the supreme court in the 1904 *East* case is being eroded. GCDs, where they exist, have the authority to adopt regulations that require permits for drilling wells and pumping groundwater and that impose limitations on a landowner's ability to produce groundwater and to export it outside the district. Tex. Water Code §§ 36.001(1), 36.101, 36.113, 36.116, 36.122. Restrictive covenants that prohibit a landowner's drilling of water wells have been held to be enforceable against the right of a landowner to access its groundwater. *See Dyegard Land Partnership v. Hoover*, 39 S.W.3d 300 (Tex. App.—Fort Worth 2001, no pet.). For more in-depth discussion of restrictive covenants affecting real property see chapter 23 in this manual.

§ 16.2:3 Groundwater Conservation Districts and Groundwater Management

The state has the power to impose reasonable regulations on real property, including groundwater, to protect the public health and welfare, as part of its police powers. In addition, the Conservation Amendment (article XVI, section 59, of the Texas Constitution) declares the right and duty of the state to conserve and develop its natural resources and gives the legislature authority and duty to pass all laws appropriate to these conservation goals. *See* Tex. Const. art. XVI, § 59; *City of Corpus Christi v. City of Pleasanton*, 276 S.W.2d 798, 803 (Tex. 1955). The legislature has emphasized that groundwater conservation districts (GCDs) are the state's preferred method of groundwater management. Tex. Water Code § 36.0015; *see Edwards Aquifer Authority v. Day*, 369 S.W.3d 814, 835 & n.119 (Tex. 2012); *Sipriano v. Great Spring Waters of America, Inc.*, 1 S.W.3d 75, 79 & n.33 (Tex. 1999). For more in-depth discussion of restrictive covenants affecting real property see Mary K. Sahs, ed., *Essentials of Texas Water*

Resources, chs. 5 and 16, State Bar of Texas (6th ed. 2020).

GCDs may be created by special legislation or by the TCEQ on petition of landowners within the proposed district. *See* Tex. Water Code §§ 36.013–.021. Chapter 36 of the Texas Water Code sets out the main regulatory powers of general-law GCDs. Legislatively created GCDs may have powers and authority that differ from those of general-law districts. To the extent of any conflict between an individual GCD's enabling legislation and the provisions of chapter 36, the provisions of the individual GCD's special legislation controls. Tex. Water Code § 36.052(a). Although the legislation creating most districts follows closely the provisions of chapter 36, the enabling legislation of a legislatively created district must be reviewed to determine the scope of its jurisdiction and authority.

The Texas legislature has created several special-purpose districts that operate similar to GCDs but which are distinct, including the Edwards Aquifer Authority, the Harris-Galveston Subsidence District, and the Fort Bend Subsidence District. The enabling legislation of the latter two districts, originally established as special-law GCDs, was amended in 2003 to address the particularized purpose of regulating groundwater to prevent subsidence. Tex. Spec. Dist. Code §§ 8801.003, 8834.003. These districts focus on specific purposes other than simply regulating groundwater production. The regulatory requirements for transferring groundwater rights within the EAA and these subsidence districts are unique, making it important for attorneys to understand the substantive and procedural rules of each district.

Generally, most GCDs have the authority to incur debt, levy taxes, charge for services, obtain easements, and condemn property. *See* Tex. Water Code §§ 36.101–.124. Districts may impose fees to cover administrative acts of the district and production fees on pumping authorized in the district. Tex. Water Code § 36.205. A GCD may impose additional fees for exporting water out of the district but may not impose more restrictive permit conditions on transporters than the GCD imposes on existing in-district users. *See* Tex. Water Code § 36.122. A seller of residential real property must disclose whether the seller is aware (actual knowledge, without any duty of investigation) of any portion of the property being located within a GCD or subsidence district. *See* Tex. Prop. Code § 5.008(b)(9).

Each GCD has the power to implement its statutory authority through rulemaking and permitting. *See* Tex. Water Code §§ 36.101, 36.113, 36.1131, 36.117, 36.122. District rules may include well spacing and regulation of groundwater production by well production limits, including limits based on acreage or tract size, rate of production limits, or "managed depletion" (an approach that aims to control the amount and rate of depletion districtwide over the long term). *See* Tex. Water Code § 36.116. Within certain constraints, a GCD may also regulate groundwater production in a manner designed to preserve "historic or existing use." Tex. Water Code § 36.116(b).

If land is within a GCD or a subsidence district, it is important to review the regulations of the district to determine any requirements and limitations on the landowner's ability to access and produce groundwater. All wells must be permitted, unless they are exempted by statute or the GCD's rules. Tex. Water Code §§ 36.113, 36.117. Wells used solely for domestic and livestock purposes, wells used for oil and gas production or surface mining activities, and wells existing at the time of the creation of the district are generally exempt from the permitting process. *See* Tex. Water Code § 36.117. Exempt wells may be required to be registered with the district, may have production report filing requirements, and may be subject to the payment of export fees. *See* Tex. Water Code § 36.117.

Information and maps of groundwater conservation districts are available on the TWDB website at **www.twdb.texas.gov** and the TCEQ website at **https://www.tceq.texas.gov**. Copies of district rules and district management plans generally must be obtained from the individual conservation district. Contact information for GCDs may be available on the Texas Alliance of Groundwater Districts website at **https://www.texasgroundwater.org**.

Landowners also should be aware of the tools for groundwater management implemented by the Texas legislature, as these processes and their results can affect the regulation of groundwater in a specific area of the state. Each GCD is required to develop a comprehensive management plan that addresses various management goals, includes specific performance standards, details actions and procedures to carry out the plan, and includes estimates of various aspects of the groundwater resources within the district. *See* Tex. Water Code § 36.1071(e). However, GCDs do not follow aquifer boundaries, and more than one district may have jurisdiction over a single aquifer. The TWDB must designate "groundwater management areas" for aquifers across the state to promote coordination among GCDs. *See* Tex. Water Code § 35.004; *cf.* Tex. Water Code § 36.002(13) (defining "management area"). GCDs within a groundwater management area sharing jurisdiction over the same aquifer are required to engage in a joint planning process to determine "desired future conditions" (as adopted by the district under Water Code section 36.108) for the aquifer on a five-year recurring basis. Tex. Water Code § 36.1071(a)(8).

The TCEQ has statutory authority to designate a "priority groundwater management area" if the area is currently experiencing critical groundwater problems or is anticipated to experience them within the next twenty-five years. Critical groundwater problems contemplated by the statute include shortages or contamination of groundwater supplies and land subsidence caused by the withdrawal of groundwater. Tex. Water Code § 35.007(a). Once an area is designated a priority groundwater management area, the landowners within the area may (1) create one or more general-law GCDs, (2) have the area annexed to an adjoining GCD, or (3) create one or more GCDs through the legislative process. Tex. Water Code § 35.012(a).

§ 16.3 Practical Considerations for Conveying Groundwater Rights

§ 16.3:1 Severability and Marketing of Groundwater Rights

In *Edwards Aquifer Authority v. Day*, 369 S.W.3d 814 (Tex. 2012), the Texas Supreme Court determined that groundwater rights may be severed from the surface estate and leased or sold to a party other than the owner of the surface estate. The supreme court held in *Coyote Lake Ranch, LLC v. City of Lubbock*, 498 S.W.3d 53, 64 (Tex. 2016), that general groundwater rights were the "dominant estate" to be treated similarly to severed mineral rights. Groundwater currently is the favored source of water for water marketers, but the purchase or lease of groundwater rights presents its own challenges, not the least of which is navigating the various regulatory regimes used by different groundwater conservation districts (GCDs). Even if the real estate or groundwater rights being considered are located outside of a GCD or priority groundwater management area, due consideration should be given to the potential for creation of a groundwater conservation district in the future.

§ 16.3:2 GCD Permitting

Groundwater permitting by a local groundwater conservation district (GCD) is affected, in part, by the district's rules and management plan.

When evaluating a prospective lease or purchase of groundwater rights from property within a GCD, the permitting implications of the transaction must be carefully considered. For example:

- Is the purchase or lease only of the groundwater rights in place or production rights, or is it also of existing permitted rights?
- Are there any existing permits, such as production or drilling permits, that can be transferred to the purchaser? If so, do the permits need to be amended to meet the purchaser's needs?
- What permits or permit amendments, if any, will the buyer need for his intended use of the groundwater, and what are the district's applicable permitting requirements?
- How and when in the closing process should the transfer of the groundwater rights and any existing permits be completed?
- Do the district's permitting requirements allow for the purchaser's desired objective?
- Are the district's water use or export fees prohibitive?
- Do the district's rules affect the relative advantage of well-field design or amount of contiguous acreage included in the permit?

Whether there is likely to be opposition to the buyer's intended use of the groundwater by landowners sharing the same aquifer, other permit holders, or interested organizations, and whether past permitting decisions of the GCD indicate that there may be difficulty in obtaining the required permits is an important part of the purchaser's due diligence. This is particularly important in areas in which there has been an increase of permitting of groundwater rights for development and transportation for use outside of the GCD. In these areas opposition may lead to contested hearings or litigation. At least one GCD refused to grant in full the requested operating and transport permits, even though the application was uncontested and the GCD staff recommended approval. *See Forestar (USA) Real Estate Group, Inc. v. Lost Pines Groundwater Conservation District*, No. 15369, 335th Dist. Ct., Lee County, Tex., filed March 14, 2014 (this case eventually settled by issuance of a smaller permit); *but see* Tex. Water Code § 36.4051(d) (allowing an applicant to seek a contested case hearing following such a decision). In another instance, a water marketer's plan to produce and transport groundwater from land not subject to a GCD, and thus not subject to production limits, was opposed by neighboring landowners who feared that the magnitude of the production would cause their wells to fail. The Texas legislature took action to give an existing GCD jurisdiction over the aquifer from which the groundwater would be produced and regulatory authority over the area previously located outside of any GCD. *See* Tex. Spec. Dist. Code §§ 8802.0035, 8802.1045.

§ 16.3:3 Other Due Diligence

Other issues a purchaser or lessee of groundwater rights should consider are the following:

- What types of legal or technical (for example, hydrogeological or well-field design) advice are necessary before closing, and should the closing be conditioned on the results of such analysis?
- What method of pricing the groundwater rights is most appropriate for the transaction? For example, should pricing be based on the amount of available or permitted production, a flat price per acre, or a hydrogeological analysis estimating the saturated thickness of groundwater under the surface?
- To what extent, if any, will groundwater rights, or the right to use some portion of the conveyed groundwater, be reserved to the owner of the surface estate?

- What types of easement rights will be required to make use of the groundwater rights?
- What existing uses are being made of the surface (for example, agricultural or oil and gas production) that might affect the purchaser's development of the groundwater rights?
- Can the water be transported to its place of use or need? Are existing infrastructure, right-of-way, and easements available?
- What is the native quality of the groundwater?
- What is the condition of any infrastructure or groundwater production, treatment, or storage facilities to be conveyed?
- What are the terms and conditions in any existing permits authorizing production or export of groundwater?
- Does the area where the groundwater rights are located have any subsidence history?

§ 16.4 Surface Water

Surface water in Texas is owned by the state, subject to the appropriation of a right to use the water. Transactions for the purchase of appropriated rights to use surface water are quite common. Individuals and entities enter into water supply contracts to meet their needs for municipal, industrial, agricultural, or other water uses. Because most stream segments in Texas are already fully appropriated or even overappropriated, the market relating to existing water rights is necessarily dynamic. This section of the chapter addresses the nature of surface water rights under Texas law, the requirements for obtaining a new or amended surface water right from the TCEQ, and some practical considerations in surface water rights transactions.

Surface water owned by the state is defined in Texas Water Code section 11.021(a), which reads as follows:

> The water of the ordinary flow, underflow, and tides of every flowing river, natural stream, and lake, and of every bay or arm of the Gulf of Mexico, and the storm water, floodwater, and rainwater of every river, natural stream, canyon, ravine, depression, and watershed in the state is the property of the state.

Tex. Water Code § 11.021(a).

Navigable streams include watercourses that are navigable in fact or meet the statutory definition in Texas Natural Resources Code section 21.001(3). Section 21.001(3) defines a "navigable stream" as one retaining an average width of thirty feet from the mouth, measured from cut bank to cut bank. Tex. Nat. Res. Code § 21.001(3). The state holds the waters of navigable streams in trust for the public, and therefore such streams are subject to appropriation. *In re Adjudication of the Water Rights of Upper Guadalupe Segment of Guadalupe River Basin*, 642 S.W.2d 438, 444 (Tex. 1982). The state also owns the riverbed—the lands underlying navigable streams. *See State v. Bradford*, 50 S.W.2d 1065, 1069 (Tex. 1932).

Under some circumstances, the landowner may have more or different rights to surface water that are exempt from state permitting requirements.

Domestic and Livestock Exemption: The use of water for domestic and livestock purposes is generally exempt from state water rights administration. Without obtaining a permit, a person may construct a dam or reservoir up to two hundred acre-feet in capacity for domestic and livestock purposes on his own property. Tex. Water Code § 11.142; *see* 30 Tex. Admin. Code chs. 295, 297.

Diffused Surface Water: Diffused surface water is water on the surface of the land, such as rainfall runoff, that has not yet entered a watercourse. A watercourse is a channel, with a well-defined bed and banks, in which water flows as a stream and has a permanent source of supply. *Hoefs v. Short*, 273 S.W. 785 (Tex. 1925). Diffused surface water is the property of the owner of the soil until it enters a watercourse, at which point diffused surface water is transformed legally to public property (state water or riparian water). *Turner v. Big Lake Oil Co.*, 96 S.W.2d 221 (Tex. 1936); *Motl v. Boyd*, 286 S.W. 458 (Tex. 1926).

Developed Water: "Developed water" refers to water augmenting the natural streamflow that has been made available to the receiving watercourse through artificial means, such as imported surface water or groundwater pumped to the surface, including treated wastewater effluent. Generally water that is legally reduced to possession and still under the physical control of the owner of an artificial conveyance system is subject to sale or further use by the owner of the system, as long as the water does not escape his control and rejoin a watercourse. *See Guelker v. Hidalgo County WCID No. 6*, 269 S.W.2d 551 (Tex. App.—San Antonio 1954, writ ref'd n.r.e.); *cf.* Tex. Water Code § 11.042 (bed and banks authorization).

§ 16.5 General Types of Surface Water Rights

§ 16.5:1 Appropriative Water Rights

In Texas, the appropriation doctrine has developed over more than a century of legislation. The water right, documented in the form of a permit, certificate of adjudication, or certified filing, is a "usufruct" or right of use. The appropriative use is precisely defined, with the state authorizing the use of water in a specific amount, by diversion from a watercourse at a definite location, for a particular purpose, and for a use within a particular area or tract of land. It is unlawful to willfully take, divert, impound, or appropriate state water for any purpose without first complying with all applicable requirements of chapter 11 of the Water Code. Tex. Water Code §§ 11.081, 11.121; *but see* Tex. Water Code §§ 11.142–.143. Violators are also subject to civil and administrative penalties. *See* Tex. Water Code §§ 11.082, 11.0842–.0843.

Under the prior appropriation doctrine, seniority, or "first in time, first in right," each water right is assigned a specific priority date. During times of shortage, this system determines the allocation of water among appropriators by use of relative priority dates. Tex. Water Code § 11.027; *cf.* Tex. Water Code §§ 11.023–.024. Senior rights holders are entitled to fully exercise their rights before those holding junior rights receive any water. The TCEQ promulgated rules in 2012 attempting to circumvent the prior appropriation system by exempting junior water rights from suspension or adjustment "based on public health, safety, and welfare concerns." 30 Tex. Admin. Code § 36.5(c); *see* Tex. Water Code § 11.053. These rules were challenged by the Texas Farm Bureau and individual landowners as contravening the prior appropriation doctrine prescribed by section 11.027. The court found the TCEQ's rulemaking, pursuant to section 11.053, ignored the prior appropriation doctrine codified in section 11.027 and concluded that the rules exceeded the TCEQ's authority. *See Texas Commission on Environmental Quality v. Texas Farm Bureau*, 460 S.W.3d 264 (Tex. App.—Corpus Christi–Edinburg 2015, pet. denied). The TCEQ has filed notice of intention to review the chapter containing the challenged rules. TCEQ, Notice of Intention to Review, 44 Tex. Reg. 5153, 5153 (2019). Texas's prior appropriation seniority system does not apply to water in the Rio Grande River Basin below Lake Amistad. *See* Tex. Water Code § 11.3271. There, the type of water right (for example, municipal, industrial, Class A irrigation, Class B irrigation) governs who is enti-

tled to water during times of shortage. Beneficial use is another principle concept in the appropriation doctrine. *See* Tex. Water Code §§ 11.023–.024. A permit authorizing use of state water under the appropriative system is a license. To the extent the appropriator actually puts the water to beneficial use, the appropriation is perfected and becomes a vested property right. *See* Tex. Water Code §§ 11.025–.026.

Even within the framework of appropriative rights, there are various limitations on a landowner's rights to use surface water, including the following.

Damage to Other Property: No person may divert or impound the natural flow of surface water in the state in a manner that damages the property of another because of the overflow of the diverted or impounded water. Tex. Water Code § 11.086(a). If property is injured by such a diversion or impoundment, the owner of the injured property may recover damages from the liable party. Tex. Water Code § 11.086(b).

Eminent Domain for Municipal Use: Section 11.033 of the Texas Water Code provides that municipalities and other governmental agencies can exercise the power of eminent domain to acquire water or property devoted to uses other than municipal and domestic purposes. Although this eminent domain provision has not been repealed or amended, the Texas Property Code imposes various additional requirements on condemnation of water rights by municipalities and provides for separate valuation of groundwater rights in excess of the market value of the fee simple estate. *See* Tex. Prop. Code §§ 21.0121, 21.0421.

Cancellation of Water Rights: Although a perfected water right is considered a vested property right, with notice and hearing the TCEQ may cancel a water right in whole or in part based on ten years of nonuse immediately before the cancellation proceeding. *See* Tex. Water Code §§ 11.172, 11.173(a); *Texas Water Rights Commission v. Wright*, 464 S.W.2d 642 (Tex. 1971). There are now certain statutory exemptions from cancellation, including exemptions for water rights dedicated to certain conservation programs, and the TCEQ may find "justified nonuse" in cases in which the water right is being made available for private marketing or reserved for environmental use. *See* Tex. Water Code §§ 11.173(b), 11.177(b).

§ 16.5:2 Riparian Rights

A riparian water right is a right recognized at common law that entitles the owner of property adjacent to a watercourse to make "reasonable" use of the normal flow of the stream. This right is not quantified. A riparian property owner may impound and use any amount of water that is reasonably necessary for any reasonable purpose; however, the owner may not unreasonably interfere with the use of water by others. A riparian landowner may sell the water for use off-site of the riparian property, provided that the off-site use does not prejudice other riparian water users. Riparian rights holders may separate, by express conveyance, their riparian water rights from the riparian land. *See Watkins Land Co. v. Clements*, 86 S.W. 733 (Tex. 1905). On rivers for which the state has completed the water rights adjudication process, the distinction between riparian rights and appropriative rights has been removed, and riparian rights have been converted into appropriative rights for all practical purposes.

§ 16.5:3 Civil-Law Water Rights

Before the Republic of Texas adopted the common law, land grants from the sovereign were governed by civil law—either of Mexico or of Spain. These laws therefore determine the water rights relating to property originally granted from the sovereign under civil law. If a civil-law grant expressly includes a grant of water with the land, there is a legally recognizable water right. If the water right was not expressly

granted, it is presumed that the sovereign retained the water rights when it made the land grant, and thus those water rights ultimately pass to the state of Texas. *See State v. Valmont Plantations*, 346 S.W.2d 853 (Tex. App.—San Antonio 1961), *opinion adopted*, 355 S.W.2d 502 (Tex. 1962). Like riparian rights, civil-law water rights are subject to the water rights adjudication process and thus have been quantified and merged with appropriative rights through that process.

§ 16.6 Water Rights Adjudication and Administration

The Texas Water Rights Adjudication Act provides the mechanism for the state to quantify and compile the various sorts of water rights, such as civil-law water rights, riparian water rights, certified filings, and permits. *See* Tex. Water Code §§ 11.301–.341. The final decree in each water rights adjudication is final and conclusive as to all existing and prior rights and claims to the water rights in the adjudicated stream or segment and is binding on all claimants to water rights outside that stream or segment. Tex. Water Code § 11.322(d). This statute is the exclusive means by which water rights may be recognized in Texas, and thus courts cannot recognize equitable water rights based on good-faith prior use. *In re Adjudication of Water Rights of Brazos III Segment of Brazos River Basin*, 746 S.W.2d 207 (Tex. 1988). Nearly all of the general stream adjudications for Texas have been completed.

For river basins in which a watermaster program has been established, the TCEQ administers adjudicated water rights through a watermaster and a watermaster advisory committee appointed for each water division. *See* Tex. Water Code §§ 11.326, 11.3261. Watermaster programs are intended to ensure compliance with water rights by monitoring stream flows, reservoir levels, and water use. The watermaster divides the water of the streams (or other sources of supply) in the division based on the adjudicated water rights. Tex. Water Code § 11.327(a). The watermaster also regulates controlling works and diversion works in times of shortage to protect existing water rights, prevent waste, and prevent practices in excess of adjudicated rights. Tex. Water Code § 11.327(b). Currently, there are watermaster programs only for South Texas, the Rio Grande, the Concho River, and the Brazos River. *See* 30 Tex. Admin. Code chs. 303, 304. More information on watermaster programs, including a map of the locations, can be found on the TCEQ website at **https://www.tceq.texas.gov**.

An attorney representing a purchaser or lender acquiring an interest in water rights that are subject to a watermaster program should become familiar with the applicable statutory and program provisions at Tex. Water Code §§ 11.325–.3291, 30 Tex. Admin. Code §§ 304.1–.63 (Watermaster Operations), and the TCEQ website. Water rights in the Rio Grande below Lake Amistad are allocated on an account basis based on the use of the water, such as municipal and irrigation, instead of on a seniority basis, with priority being given to municipal use. *See* 30 Tex. Admin. Code ch. 303. If, in any given month, surplus water is identified over the water needed for municipal use, the water is allocated to the other accounts, such as irrigation. In purchasing water rights, the buyer should determine whether an allocation has been made to the seller, and if so the purchase contract should address how the water allocation will be divided between the parties at closing. The cost of administration of water rights by watermasters is allocated among the adjudicated water rights holders, and assessments are made by the TCEQ. In general, no water may be diverted, taken, or stored by or delivered to a person while he is delinquent in the payment of his assessed costs. *See* Tex. Water Code §§ 11.329, 11.455. Purchasers should determine the amount of assessments that have been made against a seller and the payment status as part of their due dili-

gence. The purchase contract should address the manner in which these assessments will be allocated at closing, if appropriate.

Attorneys dealing with water rights within the Rio Grande should be aware of recording requirements applicable to the Rio Grande watermaster in addition to those presented in section 11.136 of the Texas Water Code. There are two subsections (j) to section 11.3271 of the Texas Water Code adopted by the legislature in 2003 that have never been reconciled. *See* Tex. Water Code § 11.3271. Under one subsection (j), the watermaster with jurisdiction over the Rio Grande is made the official recorder for all instruments, including deeds, deeds of trust, financing statements, security agreements, and liens that the TCEQ authorizes or requires to be filed in connection with a water right relating to water in the lower, middle, or upper basin of the Rio Grande and that are subject to a permit, certified filing, or certificate of adjudication, and the filing will have the same legal effect as filing under other law for the same type of instrument. Under the other subsection (j), the watermaster is required to maintain a central repository that includes certified copies of all instruments, including deeds, deeds of trust, and liens that the TCEQ requires to be filed in connection with the same type of water rights as are described in the first-referenced subsection (j), and it is expressly stated that on and after September 1, 2003, a lien against a water right shall not be effective against third parties unless a certified copy of the instrument is filed with the watermaster and all requirements under other law are met. It would be prudent when conveying rights or interests in water rights in the Rio Grande to record a duplicate set of original documents with the Texas watermaster, as well as in the real property records of the county or counties in which the documents are otherwise authorized to be recorded, and to also file a certified copy of the documents recorded in the county real property records (at least with regard to liens) with the watermaster.

§ 16.7 Obtaining Surface Water Rights

A person desiring to appropriate surface water must obtain a permit from the TCEQ. *See* Tex. Water Code §§ 11.022, 11.121. The permit or amendment may be granted only if—after the proper application is filed, the required fees are paid, and notice and hearing are held—the applicant shows that (1) unappropriated water is available in the source of supply; (2) the proposed appropriation is intended for a beneficial use, does not impair existing water rights or vested riparian rights, is not detrimental to the public welfare, considers various environmental and water quality assessments required by statute, and addresses a water supply need in a manner consistent with the state water plan and the relevant approved regional plan or plans; and (3) reasonable diligence will be used to avoid waste and achieve water conservation. Tex. Water Code § 11.134(b). Each of these requirements is discussed briefly below. The TCEQ also issues several types of more restrictive permits, such as seasonal permits, temporary permits, and emergency permits. Tex. Water Code §§ 11.137–.139.

§ 16.7:1 Availability of Unappropriated Water

"Unappropriated water" must be available in the source of supply for a permit to be granted. Tex. Water Code § 11.134(b)(2). The Texas Supreme Court has held "unappropriated water" to mean the amount of water remaining available for appropriation within a river basin after taking into account complete satisfaction of all existing uncanceled permits and filings valued at their recorded levels. *Lower Colorado River Authority v. Texas Department of Water Resources*, 689 S.W.2d 873 (Tex. 1984). The TCEQ's water availability models, sometimes referred to as "WAMs," for each river basin in the state and the TCEQ's regulatory criteria determine how frequently water must be available to support a

finding that unappropriated water is available for appropriation.

§ 16.7:2 Beneficial Use

The Texas Water Code recognizes various purposes for which state water may be appropriated, stored, or diverted and ranks those uses by preference for permit issuance: domestic and municipal, agricultural and industrial, mining, hydroelectric power, navigation, recreation, public parks, game preserves, recharge into certain aquifers, and "any other beneficial use." Tex. Water Code §§ 11.023(a), (b), 11.024. The TCEQ may grant a water right application only if the proposed appropriation "is intended for a beneficial use." Tex. Water Code § 11.134(b)(3)(A).

§ 16.7:3 Nonimpairment of Existing Water Rights

The TCEQ may grant a water right (or amendment) application only if the proposed appropriation does not impair existing water rights or vested riparian rights. Tex. Water Code § 11.134(b)(3)(B). To the extent the proposed appropriation would impair water availability for existing downstream rights, the commission may include restrictions on the diversion and use of water in the new permit. Examples of such restrictions include minimum streamflow, maximum diversion rates, and seasonal restrictions intended to protect both water rights holders and the environment.

§ 16.7:4 Public Welfare

The TCEQ may grant a water right only if it finds that it would not be "detrimental to the public welfare." Tex. Water Code § 11.134(b)(3)(C). Under the commission's rules, this very broad requirement includes consideration of environmental, social, and economic impacts of the proposed appropriation. *See* 30 Tex. Admin. Code ch. 297; *cf. Railroad Commission of Texas v. Texas Citizens for a Safe Future & Clean Water*, 336 S.W.3d 619 (Tex. 2011) (TCEQ must consider public welfare factors related to its authority in water rights permitting).

§ 16.7:5 Conservation and Drought Contingency Requirements

The TCEQ may grant a water right application only if the applicant has provided evidence that reasonable diligence will be used to avoid waste and achieve "water conservation," as that term is defined by Tex. Water Code § 11.002(8)(B). Tex. Water Code § 11.134(b)(4); *see* 30 Tex. Admin. Code ch. 288. With few types of exceptions, such as applications for emergency use, temporary use, or to impound water solely for in-place use, an applicant for new or amended water rights must submit a water conservation plan and adopt reasonable conservation measures, with varying criteria for such plans depending on the water use. *See* Tex. Water Code § 11.1271. In addition to developing conservation plans, wholesale and retail public water suppliers and irrigation districts must develop and submit drought contingency plans, relating to their water rights, to be implemented during periods of water shortages and drought. Tex. Water Code § 11.1272(a); *see generally* 30 Tex. Admin. Code ch. 288.

§ 16.7:6 Other Requirements

The TCEQ may grant an application for a water right or amendment only if the proposed appropriation addresses a water supply need in a manner consistent with the state water plan and any relevant approved regional water plan, unless the commission waives this consistency requirement. Tex. Water Code §§ 11.134(b)(3)(E), 11.1501. Information regarding each of the sixteen regional water plans can be found on the "Planning" page of the TWDB's website, **www.twdb.texas.gov**.

Various other statutory provisions require the TCEQ to consider the environmental and conservation impact of water rights applications, including the effects, if any, of the issuance of the permit on groundwater or groundwater recharge (Tex. Water Code § 11.151); the effects, if any, on the bays and estuaries of Texas (Tex. Water Code § 11.147(b)); and permit conditions necessary to maintain existing instream uses, the water quality of the river or stream to which the permit would apply (Tex. Water Code §§ 11.147(d), 11.150), and fish and wildlife habitats (Tex. Water Code §§ 11.147(e), 11.152).

The Texas Parks and Wildlife Department also has significant authority relating to certain environmental aspects of water rights applications. The TCEQ must send a copy of every water rights permit application to the department, which is entitled to participate in hearings on such applications. Information and evidence presented by the department must be considered by the TCEQ in making a final decision on a water rights application. Tex. Water Code § 11.147(f).

A prospective buyer or seller of water rights as part of a real estate transaction must take special note if the water is intended to be taken or diverted from one watershed or river basin to another, because special TCEQ authorization must be obtained before any such "interbasin transfers." *See* Tex. Water Code § 11.085. There are criminal penalties for taking or diverting water in violation of this statute. *See* Tex. Water Code § 11.085(q), (r). The legislature has sought to balance the interests of the basin of origin and the receiving basin. *See* Tex. Water Code § 11.085(k)–(*l*); *San Antonio v. Texas Water Commission*, 407 S.W.2d 752 (Tex. 1966). Because newly authorized interbasin transfers have junior priority to all other water rights granted before the filing of a transfer application, the feasibility of an interbasin transfer from existing water rights can be severely limited. *See* Tex. Water Code § 11.085(s). There are five narrow exceptions to the limitations imposed by section 11.085, which should be reviewed. *See* Tex. Water Code § 11.085(v).

§ 16.8 Practical Considerations for Conveying Surface Water Rights

§ 16.8:1 Severability and Marketing of Surface Water Rights

Water rights may or may not be appurtenant to a specific tract of land. State-owned surface water rights, arising from either permit or certificate of adjudication, may be transferred as an easement that passes with title to the land or may be transferred separately from the land. Tex. Water Code § 11.040(a); *Strayhorn v. Jones*, 300 S.W.2d 623, 634 (Tex. 1957). In general, title to private water rights will pass automatically with title to the land unless the water rights have been previously sold or conveyed to some third party or are specifically reserved by the grantor. *See Graham v. Kuzmich*, 876 S.W.2d 446 (Tex. App.—Corpus Christi–Edinburg 1994, no writ); *Fleming Foundation v. Texaco, Inc.*, 337 S.W.2d 846, 850 (Tex. App.—Amarillo 1960, writ ref'd n.r.e.); *see generally* 30 Tex. Admin. Code § 297.81. See the discussion at sections 16.5:1 and 16.5:2 above distinguishing private water rights from state water.

For marketing of surface water rights in Texas, there are significant restrictions on interbasin transfers, as discussed at section 16.7:6 above. Within a river basin, water transfers and marketing by regional suppliers such as river authorities are relatively straightforward. Difficulties may arise, however, when these transactions require amendment of an existing water rights permit, particularly if there are potential issues of impairment of existing senior water rights or environmental impacts. Nonetheless, there is an active market for surface water rights in some parts of Texas, particularly in the Rio Grande Valley. It should be noted that the transfer of

water rights in the Rio Grande Valley is governed by TCEQ rules that are unique to the Rio Grande basin and administered by the Rio Grande watermaster. *See* 30 Tex. Admin. Code ch. 303. Practitioners should fully understand those rules before beginning negotiations for the sale or purchase of surface water rights in that area.

§ 16.8:2 TCEQ Permitting

In cases in which an applicant is seeking a new or amended water right, the requirements outlined generally at sections 16.7 through 16.7:6 above will govern the substantive and procedural aspects of the TCEQ's consideration of the application. Even in cases of transactions to sell or lease existing water rights, however, there may be commission requirements that must be satisfied, which could include the following:

- Do the TCEQ rules require actual amendments of the water right as a result of the transaction (for example, diversion point, place, or purpose of use)?
- If so, will notice and hearing be required? If so, is there any potential for opposition from other interests within the basin?
- Must the contract or the deed for the transaction be submitted to the TCEQ for its records?
- Do any special rules or procedures apply (for example, for transactions within the jurisdiction of a watermaster program)?

§ 16.8:3 Other Due Diligence

Among the other issues that the purchaser or lessee of surface water rights should consider are the following:

- What types of legal or technical advice are necessary before closing on the transaction, and how should the closing be conditioned on the results of such analysis?
- How much water is needed for the proposed project, in terms of firm yield requirements over the relevant time period?
- Are the existing rights valid and properly perfected?
- Can the relative priority of the water right be determined through examination of county deed records and the TCEQ's records?
- What do the TCEQ's records of existing water rights in the stream segment or basin reveal that might impact the desirability of the transaction?
- What types of easement rights will be required to make use of the surface water rights?
- Can the water be transported to its place of use or need?

§ 16.8:4 Transfer and Recording of Permits

Transfers of ownership of surface water rights must be reported to the TCEQ. *See* Tex. Water Code § 11.122. The change of ownership form, TCEQ Form 10204, may be downloaded from the commission's website, **https://www.tceq.texas.gov**. This form initiates the transfer process at the TCEQ, which is not complete until an approval letter, amended certificate of adjudication, or amended permit is issued to the new owner.

The permit or amended permit must be recorded with the county clerk of the county or counties in which the appropriation will be made. Tex. Water Code § 11.136. This would include at least the county or counties in which the point of diversion is located. In most cases, a certificate of adjudication or amendment must be similarly recorded in each applicable county. *See* Tex. Water Code § 11.324. For more discussion on recordation, see part IV. in this chapter.

[Sections 16.9 and 16.10 are reserved for expansion.]

II. Groundwater Transaction Guide for Sale of Groundwater Rights for On-Site Production

§ 16.11 Sale of Groundwater Rights in Place for On-Site Production

The rights to explore for, drill for, produce, and transport groundwater can be sold under a contract of sale and conveyed by deed and easement agreement. These rights can also be leased under a groundwater lease. (But see section 16.1 above for a discussion of ownership of groundwater rights.) This part of this chapter applies to the sale and conveyance of groundwater rights for on-site production, that is, to a transaction in which the groundwater is intended to be produced from wells located on the seller's land. It does not cover the sale or conveyance of permitted groundwater for off-site production, which is addressed in part III. in this chapter, nor does it apply to the sale of surface water rights, which are addressed in part IV. Financing documents for use in transactions in which the groundwater rights, easement rights, and permit, if any, constitute the collateral, are discussed in part V.

The forms discussed in this part of the chapter are for general use. Users should be aware that modifications may be required for specific transactions. For all groundwater sales, it is imperative that the attorneys involved in the transaction identify the regulatory agencies with jurisdiction over the groundwater rights (referred to collectively in this transaction guide as the "groundwater authority") and obtain copies of all rules and regulations pertaining to groundwater as early in the transaction as possible. The rules may contain requirements that have an important bearing on the transaction, such as minimum acreage requirements for production, limitations on production, and requirements for the issuance and transfer of permits. It may be necessary for the practitioner to make modifications to the forms based on the rules of the groundwater authority. Forms 16-1, 16-2, and 16-3 in this chapter, as described in this part of the chapter, are not generally used in the sale of groundwater rights subject to the rules of the Edwards Aquifer Authority.

§ 16.12 Groundwater Rights Sales Contract, Deed, Easement, and Related Forms; Place for Recordation

If the seller is the owner of both the surface and groundwater estates in the land and is selling the groundwater and the right to use the surface estate for drilling, production, and transportation of groundwater on-site, the groundwater sales contract, form 16-1 in this chapter, should be used in the transaction. If the seller owns only groundwater rights that have already been severed from the land, together with easement rights to use the surface of the land for drilling, production, and transportation, the groundwater sales contract may be used if appropriately modified. At closing, the deed would describe both the groundwater rights and the easement rights. If the seller acquired the easement rights through a separate easement agreement, the deed would reference the recorded easement agreement. Alternatively, a separate assignment of easement rights could be used.

If the groundwater is subject to regulation by a groundwater authority, the attorney should determine whether the seller has obtained a groundwater permit. If so, the information regarding the permit should be set out in the contract, and the seller should request a transfer of the permit from the groundwater authority as

part of the sale transaction. See section 16.17:5 below regarding permits.

All recordable documents should be recorded in the county or counties in which the land from which the groundwater and easement rights are obtained is located. Many groundwater districts do not require the recording of the permits issued in connection with groundwater rights for on-site production. If a groundwater permit is issued to the buyer in a form that may be recorded, the permit should be recorded in the real property records in the same county or counties as the deed is recorded. See part III. in this chapter.

The contract anticipates that a memorandum of contract will be recorded in the real property records when the contract is signed. The memorandum will put the public on notice of the buyer's contract rights in the event there is a significant period of time between signing the contract and closing. See form 16-16.

The basic sales documents include the following:

1. Groundwater Rights Sales Contract (form 16-1).
2. Groundwater Rights Warranty Deed (form 16-2).
3. Blanket Easement Agreement for Groundwater Rights (form 16-3).
4. Permit Transfer Request (form 16-12) or a transfer form promulgated or approved by the groundwater authority if a permit has been issued to the seller or another form promulgated by the groundwater authority, if it has a particular form for transfer. In the absence of a form promulgated by the groundwater authority, the applicant may choose to use the detailed application template included as form 16-26 in this chapter.
5. Partial Release of Lien (On-Site) (form 16-8) if the seller has an existing lien on the land and only the groundwater rights are being released from the lien at closing.
6. Release of Lien (form 10-2 in this manual) if the seller's entire lien will be released at closing.
7. Lienholder Consent and Subordination to Easement Agreement (form 16-7) if the seller has an existing lien on both the surface estate and groundwater, which will not be released as to the surface estate at closing.
8. Bill of Sale (form 5-16 in this manual) if personal property will be conveyed at closing and a more detailed description is required than the description in the deed.
9. Form UCC3 (form 9-14 in this manual), a form promulgated by the Texas secretary of state, if there is a security interest that covers or that could be construed to cover the groundwater rights, the permit, or personal property to be conveyed at closing.
10. Assignment and Assumption of Lease (form 16-14) if there is an existing lease of the groundwater.
11. Lessee Estoppel Certificate (form 16-15) used to assure the buyer that the groundwater lease is valid and is not in default and that the lessee understands the lease is being assigned.
12. Affidavit of Debts and Liens [and Indemnity] (form 16-13) (if this form is not being provided by a title company) used to provide additional protection to the buyer, especially in instances in which no title insurance will be obtained or title insurance is not available.

13. Loan documents required by the lender.

The groundwater deed, easement, and other recordable documents should be recorded in the real property records of the county or counties in which the land is located. If the buyer has applied for a new or amended production permit from a groundwater conservation district, the permit, when issued, may not be in recordable form. While it has generally not been the practice to record these types of production permits in the real property records, recording is recommended. If the permit is not issued in a recordable form, the permittee may seek to record it as an exhibit to another recordable instrument such as an affidavit or memorandum of permit duly authorized.

§ 16.13 General Considerations

The groundwater rights sales contract for on-site production, form 16-1 in this chapter, is drafted as a neutral form of contract, intending to favor neither the buyer nor the seller. For each contract, the basic elements of the transaction are, in general, stated in the sections to be completed at the beginning of the form. Some provisions, however, are required to be completed throughout the contract. The general terms that follow in the form may be used for many transactions. However, the sale of groundwater rights is an emerging area of law, and there are no well-established terms of sale. Contracts for the purchase and sale of groundwater rights are diverse, and additional drafting may be necessary to tailor the forms to the transaction.

§ 16.14 Special Surface Use Considerations

In the sale of groundwater rights in which the groundwater will be produced using the surface estate, it is possible for the deed to convey not only an interest in the groundwater but also easement rights in the surface of the land for exploration, drilling, production, and transportation of groundwater. However, it is advisable to use a separate easement or surface use agreement to describe in detail the easement rights that the owner of the groundwater estate will have in the surface estate. The parties may also want to provide for payment terms and use restrictions that are too detailed to include in the deed. Although form 16-1 in this chapter and the groundwater warranty deed, form 16-2, provide for the sale and conveyance of groundwater rights, which include surface use rights, these provisions are intended as safeguards to ensure that surface use rights are included in the sale and conveyance. It is recommended that the optional provision for the execution of a separate easement or surface use agreement at closing be used. This additional level of effort may avoid the subsequent development of disputes creating a necessity for the courts to apply the accommodation to resolve the issues. *See Coyote Lake Ranch, LLC v. City of Lubbock*, 498 S.W.3d 53, 64 (Tex. 2016).

§ 16.15 Groundwater Rights Sales Contract

The following sections describe the provisions and terms of form 16-1 in this chapter and include considerations for the attorney in drafting or reviewing a contract, assisting the client during investigation of the groundwater rights, and closing the transaction. This commentary is organized in the same order as the sections of the contract.

§ 16.16 Introductory Paragraph: Offer and Acceptance

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

§ 16.17 Defined Terms

§ 16.17:1 Seller and Buyer

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

§ 16.17:2 Title Company/Escrow Agent

Title insurance to insure title to severed groundwater rights in Texas is not generally offered by title insurance underwriters in Texas, although currently there is at least one insurer that offers title insurance for water rights. The contract designates a title company or escrow agent to act as the escrow and closing agent to address the situation in which the property will close through a title insurance company and the situation when it will not. The title company or escrow agent will be responsible for closing the transaction and receiving and disbursing funds under the terms of the contract.

It is advisable to have a written escrow agreement between the title company or escrow agent, the buyer, and the seller that defines the rights and duties of the title company or escrow agent. Form 4-2 in this manual is an escrow agent receipt and escrow agreement. It can be modified for use with an escrow agent other than a title company. The escrow agent should be responsible for getting signed at closing the affidavit of debts and liens (form 16-13), the settlement statement, and similar documents typically provided by a title company.

§ 16.17:3 Surveyor

This section of the contract should be completed if a surveyor has been designated for the transaction. See section 16.21:3 below regarding survey requirements.

§ 16.17:4 Groundwater Authority

If the real property is located within a groundwater conservation district or other groundwater authority, the authority should be identified. It is imperative that the buyer's attorney consult the rules of the groundwater authority to determine all restrictions on the use and production of groundwater, requirements for sale of groundwater, and rules regarding the issuance or transfer of a permit. Generally, copies of the rules can be obtained only from the groundwater authority. The buyer's attorney should also obtain, and personally review, copies of all documents maintained by the groundwater authority pertaining to the groundwater being sold. The attorney should note all relevant information from the file, such as yearly allocations, if applicable, and should determine the feasibility of meeting all conditions of the groundwater authority's approval of the sale within the buyer's required time frame.

§ 16.17:5 Seller's Permit

It is important for the buyer to determine whether the seller has a production or other permit issued by a groundwater authority in connection with the groundwater, whether the permit will allow the use of the groundwater contemplated by the buyer, and what requirements the groundwater authority imposes for the transfer, amendment, or issuance of a permit. If the seller has been issued a permit, the permit information should be set out in the contract and a copy of the permit and all amendments provided to the buyer as part of the seller's records. If there is an existing permit, the buyer generally will want to obtain a transfer of the seller's per-

mit, and the seller should be required to submit a request for transfer of the permit in connection with the sale transaction. If the buyer needs a modification to the permit, such as a change in the type of groundwater use permitted, the buyer can file the appropriate documentation for a request with the groundwater authority, with any transfer of the permit and change in permit terms taking effect after closing. Because the rules and procedures for groundwater authorities vary, the attorney should contact the groundwater authority to obtain information on the forms and procedures required by the specific groundwater authority. In many instances the local groundwater district will not have a form specific to the desired purpose. Form 16-26 in this chapter is an example of an application to the groundwater authority to transfer permits in the absence of a form promulgated by the authority.

Paragraph G.5. of form 16-1 addresses the buyer's right to evaluate the seller's permit during the inspection period and contains an optional paragraph if the purchase of the groundwater is contingent on the buyer's ability to obtain required permits.

§ 16.17:6 Earnest Money

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

§ 16.17:7 Independent Consideration

If the buyer terminates the contract before the end of the inspection period, and the buyer is otherwise entitled to have the earnest money returned, the contract provides that a stated amount should not be returned to the buyer but should be paid to the seller, because that amount is the independent consideration to the seller for the buyer's right to terminate the contract.

§ 16.17:8 Real Property

The real property is the land from which the groundwater is to be sold and is described in exhibit A. Any fixtures and personal property to be conveyed with the groundwater rights at closing also should be described in exhibit A. The contract should describe the real and personal property with legal specificity. If the property is not described sufficiently, the contract may be unenforceable because of vagueness. See chapter 3 in this manual for a discussion of property descriptions. Attention should also be given to the conveyance of appurtenant rights, such as permits, licenses, access easements, access to utilities, and similar rights. Because it is not clear whether some types of property, such as the components of a well, are personal property or fixtures, if wells or similar items are being conveyed at closing, it is advisable to treat them as both real and personal property in the conveyance documents.

§ 16.17:9 Groundwater Defined

The definition of groundwater is derived in part from *Pecos County WCID No. 1 v. Williams*, 271 S.W.2d 503, 505–06 (Tex. App.—El Paso 1954, writ ref'd n.r.e.).

§ 16.17:10 Groundwater Rights

The contract defines groundwater rights to include the right to use the surface of the land for the exploration, drilling, and production and any governmental licenses or permits to so use the groundwater.

§ 16.17:11 Reserved Groundwater

If the seller intends to reserve ownership of or the right to use groundwater, the reserved rights should be described with specificity, including any limitation on the purpose or place of use of the groundwater or the quantity of groundwater that may be pumped. In general, it is customary

for the seller to retain a right of usage to accommodate the seller's needs, without retention of an undivided ownership interest in the groundwater. Form 16-1 reserves the seller's right to use groundwater. The form should be amended if the parties intend for the seller to reserve an undivided interest in the groundwater and should specify the percentage interest reserved. The reservation should be carefully drafted to protect the buyer's rights in the groundwater without unnecessarily curtailing the surface owner's right to use its property. If the buyer is acquiring the groundwater for commercial use, the buyer will want to prohibit the seller from using the reserved groundwater for commercial uses or production, as well as enhanced or secondary recovery methodology. The restriction on the seller's use may include restrictions on using groundwater for oil and gas exploration or production. The seller's water production may be limited in various ways, as by specifying the amount of groundwater that can be produced from the real property on a per-year or other basis or by limiting the number of seller's wells that may be maintained in operation on the real property at any one time. The parties may wish to specify whose right to the groundwater is paramount in the event of an extreme drought or production limitations. The following is a sample reservation provision for a deed:

> Grantor reserves for itself and Grantor's successors and assigns the right to utilize Groundwater, at no cost, solely for domestic and livestock use on the Real Property. The term *domestic and livestock use* means use of the Groundwater on the Real Property solely for household uses by Grantor, Grantor's employees, and their respective families for the watering of domestic and grazing animals and for Grantor's limited oil and gas use permitted by this deed. The right to utilize Reserved Groundwater includes the right to drill, use, and operate domestic-type wells or windmills but does not include the right to drill, use, or operate any industrial-type or irrigation-type wells on the Real Property or to use Groundwater for the creation or maintenance of ponds. No Reserved Groundwater may be used for the operation of crop irrigation, feedyard purposes, dairy operations, confined animal feeding operations, mining operations, or other industrial or commercial purposes, except that Grantor will have the right to use one existing well, or to drill and use one well, for each oil and gas well drilled as reasonably necessary during the drilling, completion, recompletion, reworking, remediation, and revegetation process (but not for water flooding and secondary recovery operations). After these processes have been completed, Grantor will have the right to use these wells for domestic and livestock purposes subject to the limitations set forth in this deed. The aggregate number of wells for the production of Reserved Groundwater existing at any time on the Real Property may not exceed, on the average, one well per **[number]** acres. If at any time Grantor fails to pump all the Reserved Groundwater to which Grantor is entitled, Grantee will have the right to pump all Groundwater not pumped by the Grantor without additional consideration or compensation.

The parties may wish to provide that the seller's right to use groundwater will terminate if water sufficient to meet the seller's needs becomes available to the property from some other source, such as a public water supply system, or from other land owned by the seller. If the seller reserves the right to use groundwater for domestic purposes, the parties may wish to specify, or

otherwise limit, the number of households that may use the groundwater for such purposes, the number of wells used for such purposes, or the total volume per year that can be pumped for such purposes.

§ 16.17:12 Hydrogeological Testing

Paragraph G.3. of form 16-1 authorizes the buyer to perform hydrogeological testing during the inspection period to determine the quality of the groundwater, to estimate the quantity of the groundwater, to establish well locations, and to form the basis for establishing the purchase price of the groundwater as described in section 16.17:13 below.

§ 16.17:13 Purchase Price

There is no standard method of determining the purchase price for groundwater rights. For example, the purchase price may be based on a dollar amount per acre of land from which the groundwater rights will be obtained, on a dollar amount per acre-foot permitted, on a dollar amount per acre-foot per acre allocated, or on the value of the groundwater rights as determined by an appraiser. The field of groundwater rights appraisal is still evolving. In areas where there are numerous groundwater sales or leases, it is possible to obtain an appraisal of groundwater rights based on comparable sales. In areas where there are few sales or lease transactions or where the water quantity or quality is highly variable, it may be difficult to obtain a reliable appraisal of groundwater rights without obtaining hydrogeological information on the groundwater. Where groundwater is obtained over a large area that may exhibit variability in water quality, volume, or sustainability, the calculation of the purchase price in the contract may be based on an estimate of these variables as determined by a hydrogeological study, so that the purchase price for groundwater in lands with a higher quality or greater volume of groundwater will be higher than the purchase price for groundwater in lands with lower quality or less sustainable groundwater.

Exhibit I may be used if the parties agree to seller financing of the purchase. If obtaining third-party financing is a condition to the buyer's obligations, that fact and the terms of the complying financing should be addressed in the contract. See chapters 6 and 8 in this manual for further discussion of financing.

§ 16.17:14 Buyer's and Seller's Liquidated Damages

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

§ 16.17:15 Title Commitment and Title Information

Only a few underwriters in Texas offer title insurance for severed groundwater rights. If the seller is not required to provide a title commitment, or if a title commitment is not available for the groundwater rights, the contract should require the seller to provide the buyer with an abstract of title. The contract provides that the buyer may have the abstract of title reviewed by an attorney of the buyer's choice, at the expense of the seller or buyer as specified in the contract. If the buyer obtains an abstract of title, the buyer should have it reviewed by an attorney who is experienced in land titles and knowledgeable about groundwater rights.

§ 16.17:16 Title Documents

In addition to traditional title instruments, such as deeds, leases, and easements, the contract defines title documents to include the seller's permit and instruments affecting title to the groundwater and the real property referenced in the title commitment or title information, survey, or UCC search or to be provided as part of

the seller's records. Title documents may include probate records, marital records, and birth and death certificates. Under paragraph F.7. of the contract, title objections can be made on the basis of the title documents. This provides the buyer with the ability to make objections to title based on the seller's permit or unrecorded documents provided as part of the seller's records.

§ 16.18 Deadlines

Section A of the contract groups most of the deadlines for ease of reference and provides two alternate ways to determine most of the deadlines: either a stated date or a specified number of days after the effective date of the contract or another specific date. The contract provides that time is of the essence. The contract provides that closing will occur a certain number of days after the expiration of the inspection period, but closing may also be specified to occur a certain number of days following a different event or on a certain date. The closing date may also be specified as "on or before" a certain date or event.

§ 16.19 Closing Documents

Section B of the contract lists the documents to be signed and delivered to close the transaction and serves as a checklist to prepare for closing. Section C contains a number of exhibits. The attorney should choose the specific exhibits appropriate for the sale.

§ 16.19:1 Exhibit B—Representations; Environmental Matters

Exhibit B contains the parties' representations. These items are always negotiated by the parties and will vary from transaction to transaction.

§ 16.19:2 Exhibit C—Seller's Records

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

§ 16.19:3 Exhibit D—Notices, Statements, and Certificates

Exhibit D lists notices, statements, and certificates required by federal and state law and regulations to be delivered when common real estate contracts are executed. The items applicable to a specific transaction should be selected. See chapter 2 in this manual for brief discussions of each law and regulation and for references to other laws and regulations that require notices, statements, and certificates for less common transactions. Some of the statutory provisions would appear to include the sale of groundwater, simply because they apply to a sale or conveyance of real property, and no exemption is made for the sale of groundwater.

§ 16.19:4 Exhibit E—Permits

Copies of the seller's permits should be attached to the contract as an exhibit. If copies cannot be attached for some reason, they should be described with specificity, including any permit numbers.

§ 16.19:5 Exhibit F—Leases and Contracts to Be Terminated

This exhibit lists the seller's leases and contracts affecting the real property or groundwater that will be terminated at or before closing.

§ 16.19:6 Exhibit G—Leases and Contracts Not to Be Terminated

This exhibit lists the seller's leases and contracts affecting the real property or groundwater that will be assumed by the buyer or taken subject to.

§ 16.19:7 Exhibit I—Seller Financing

Exhibit I contains seller-financing terms.

§ 16.19:8 Exhibit J—Easement Agreement

The deed conveying the groundwater should grant basic surface use rights for access to, and development of, the groundwater. Forms 16-1 and 16-2 in this chapter accomplish this by defining "Groundwater Rights" to include these basic surface use rights. It is advisable, however, that the parties agree on more extensive surface use rights and surface use restrictions for both the surface owner and the groundwater rights owner and set out these rights and restrictions in a separate easement agreement. The owner of the groundwater estate has easement rights implied by law to use as much of the surface estate as is reasonably necessary to produce groundwater. *Coyote Lake Ranch, LLC v. City of Lubbock*, 498 S.W.3d 53 (Tex. 2016). However, many issues can arise when the surface owner and the groundwater rights owner both use the surface estate for their respective purposes, and it is important for the parties to consider and agree on specific terms that will establish their respective rights, priorities, and limitations with regard to the use of the surface estate. It is advisable for these terms to be set out in a separate easement or surface use agreement, rather than in the deed, so that they can be described in detail, along with indemnifications and other terms that are not customary in deeds. Failure to detail the rights and obligations of the parties may result in the application of the accommodation doctrine. *Coyote Lake Ranch*, 498 S.W.3d at 64.

The easement documents included in this chapter consist of a blanket easement agreement for surface use (form 16-3), with three optional addenda that impose surface use restrictions (form 16-6, surface use restrictions addendum), require payments for use of the surface estate (form 16-5, surface damage payment addendum), and require the groundwater rights owner to limit its use of the surface estate to specific locations over time (form 16-4, easement location addendum). In light of the Texas Supreme Court's decision in *Coyote Lake Ranch*, attorneys using the easement forms should modify them as necessary to detail the respective surface use rights of the parties. Consideration should be given to incorporating into the easement documents the concept that the owners of the surface and groundwater estates will each make reasonable accommodations to the other in the use of the surface estate. Any obligation to make accommodations should be expressly stated, and the action required to fulfill this obligation should be clearly set out. The court's analysis of when the accommodation doctrine applies, discussed below, can be used as a template in drafting this language.

In *Coyote Lake Ranch*, the court held that the owner of the groundwater estate has implied easements for access and use over the surface estate as reasonably necessary to develop the groundwater and that these easements are dominant to the surface use rights of the surface owner. Despite the broad surface use rights granted to the city, the court found that the language in the deed did not address all of the surface use issues raised by the ranch owner. The court held that when the documents creating the surface use rights do not fully address questions on surface use, the accommodation doctrine can be applied to limit the surface use by the owner of the groundwater estate.

Under the *Coyote Lake Ranch* holding, to successfully assert a claim that the accommodation doctrine applies, the surface owner must prove that—

1. the groundwater rights owner's use completely precludes or substantially impairs the existing use; and
2. there is no reasonable alternative method available to the surface owner by which the existing use can be continued; and
3. there are alternative reasonable, customary, and industry-accepted methods available to the groundwater rights owner that will allow recovery of the groundwater and also allow the surface owner to continue the existing use.

Coyote Lake Ranch, 498 S.W.3d at 64. The court's decision in this case underscores the importance of drafting surface use rights in a manner that is clear and unambiguous about the nature and extent of the authorized use.

Form 16-3 includes the grant of a 150-foot-wide sanitary control easement around each groundwater well as required by the TCEQ for wells that are part of a municipal water supply system. *See* 30 Tex. Admin. Code §§ 290.38(75), 290.41(c). The purpose of the easement is to create an area around each well in which uses that could adversely affect the quality of the groundwater are prohibited. The requirement for a sanitary control easement is included in the form because a grantee acquiring groundwater for domestic and livestock use may want this protection for its well. The blanket easement agreement also contains a provision requiring the grantor to execute a separate sanitary control easement in the form promulgated by the TCEQ at the grantee's request. The TCEQ easement form requires the specific location of the well and easement to be identified. The grantee may not know the location of future wells at the time it acquires the easement, but the grantee can have the separate sanitary control easement executed when the location of each well is established. TCEQ Form 20698 (Sanitary Control Easement) can be obtained from the TCEQ website at **https://www.tceq.texas.gov**.

§ 16.19:9 Exhibit K—Memorandum of Contract

If it is anticipated that there may be a significant amount of time between the date the contract is signed and the date of closing, it is advisable to have the memorandum of contract signed and recorded in the real property records to provide notice to the public of the buyer's contract rights. See form 16-16 in this chapter.

§ 16.19:10 Exhibit L—Notice of Termination of Contract

If the memorandum of contract is used, the parties should execute the notice of termination of contract form at the same time and deliver it to the title company or escrow agent for recordation in the event the contract is terminated before closing. See form 16-17 in this chapter.

§ 16.20 Investment of Earnest Money

The contract provides that the buyer may direct the title company or escrow agent to invest the earnest money in an interest-bearing account in a federally insured financial institution. If the earnest money is to be invested, the title company will require the buyer's tax identification or Social Security number so that accrued interest may be reported to the Internal Revenue Service.

§ 16.21 Title and Survey

The contract incorporates the statutory notice that the Texas Real Estate License Act requires real estate brokers and real estate salespersons to

give to a buyer, advising that the buyer should either have title examined by an attorney or obtain a title insurance policy, if available. *See* Tex. Occ. Code § 1101.652(b)(29). If a broker or salesperson is not involved, the paragraph may be deleted.

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

The contract follows a typical procedure under which the buyer reviews the title commitment or title information, the survey, the seller's permit, the documents provided by the seller, and the UCC search and notifies the seller of any objections. After notice, the seller may elect to cure the buyer's objections but is not required to do so. If the seller does not agree to cure, the buyer may either proceed to close the transaction and accept the groundwater rights subject to the uncured matters or terminate the contract. However, the seller is obligated to resolve all items listed on Schedule C of the title commitment at or before closing and to cure title matters that arise by, through, or under the seller after the contract is signed.

Attorneys reviewing title should look for contracts or for provisions in existing oil and gas leases that allow injection or disposal into or onto the land of saltwater or other substances that can adversely affect the quality of the groundwater. In the absence of a limitation or restriction in the deed or lease, owners of the mineral estate, including oil and gas lessees, can use as much of the groundwater as is reasonably necessary to produce minerals, including using groundwater for hydraulic fracturing ("fracking"). *See Sun Oil Co. v. Whitaker*, 483 S.W.2d 808 (Tex. 1972); *Fleming Foundation v. Texaco, Inc.*, 337 S.W.2d 846 (Tex. App.—Amarillo 1960, writ ref'd n.r.e.).

It is unlikely that the seller will be able to modify or terminate existing oil and gas leases, so it is important to evaluate their effect on the groundwater estate. If the surface owner is also the owner of the mineral estate, the buyer can negotiate restrictions on the mineral estate limiting the use of groundwater for fracking and other forms of enhanced and secondary recovery, such as prohibiting the injection or disposal of saltwater and other substances in or on the land. Such negotiations could eliminate or limit these practices in future leases and contracts.

§ 16.21:1 Review of Title Commitment

The contract provides that the condition of title will be established by either a title commitment or an abstract of title, as agreed to by the buyer and the seller. If an abstract of title is furnished, the buyer may have the abstract of title reviewed by an attorney and obtain the attorney's written opinion of the abstract of title. The benefit of obtaining title insurance, if available, over an attorney's opinion of title is that title insurers are required to maintain reserves to cover claims that are greater than the malpractice coverage maintained by most law firms. Consequently, there is an increased likelihood of recovery if an error is made by the title company in its determination of title.

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

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

The attorney should confirm that the commitment is signed and that the issuance date is not more than ninety days before the closing. Otherwise, a new or revised commitment should be ordered.

Schedule A: The attorney should confirm that the proposed insured parties are correctly named, the amounts of insurance are correctly stated, and the correct estate is insured. The commitment should list two estates to be insured, the fee ownership of the groundwater estate, and the buyer's easement estate. Record title should be vested in the seller. The attorney should confirm that the property description is correct and conforms to the description in the contract and in the survey (if applicable).

Schedule B: The attorney should review the following matters:

- Item 1, relating to covenants and restrictions, should be noted as either "Covenants, conditions, and restrictions (other than any restrictions indicating preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin) as set forth in [**recording data**] of the real property records of [**county**] County, Texas" or "Item 1 of Schedule B is hereby deleted in its entirety."
- Item 2, relating to the standard survey exception, may be amended and partially deleted to read "any shortages in area" if a current survey approved by the title company is obtained. An additional 5 percent premium is charged to amend the owner policy for a residential transaction; an additional 15 percent premium is charged to amend the owner policy for a commercial transaction. No additional premium is required to amend the mortgagee policy. The responsibility for paying the extra premium for the survey modification in the owner policy of title insurance is often negotiated between the parties, although the pertinent provision in the contract form provides for the extra premium to be paid by the buyer.
- Item 3, relating to homestead or community property or survivorship rights, and item 4, relating to tidelines, lands comprising the shores and beds of waterways, lands beyond the line of the harbor or bulkhead lines, filled-in lands, artificial islands, statutory water rights, and areas extending from the line of mean low tide to the line of vegetation, apply only to the owner policy and cannot be deleted or amended.
- Item 5, relating to property taxes, should be reviewed for the status of tax payments and the existence of rollback taxes.
- Item 6, relating to the terms and conditions of the documents creating the insured's interest in the land, cannot be revised. The referenced documents should, however, be reviewed.
- Item 7, relating to materialman's and mechanic's liens, applies only to the mortgagee policies on interim construction loans and may be deleted if satisfactory evidence that the paragraph does not apply is furnished to the title company.
- Item 8, relating to subordinate liens and leases, applies only to the mortgagee policy.
- Item 9, relating to existing liens, should show only liens permitted by the contract. Copies of all lien documents should be reviewed with regard to due-on-sale provisions; dragnet clauses relating to other debt; condemnation provisions; notice, cure, and default provisions; and subordinate financing. A superior lienholder's estoppel agreement should be obtained from any lienholder whose note and lien are being either assumed or taken "subject to."

All other special exceptions, such as easements, mineral interests, leases, or matters shown on a current survey, should be carefully reviewed to

determine if they affect the buyer's groundwater rights. The commitment should indicate whether these exceptions apply to the groundwater estate, the easement estate, or both. If the real property consists of more than one tract of land, the commitment should specify which items apply to which tract or tracts.

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

The *Basic Manual of Rules, Rates and Forms for the Writing of Title Insurance in the State of Texas* should be consulted for information on the various types of policies and endorsements that are available and their respective costs.

§ 16.21:2 Review of Abstract of Title

If the seller is obligated to provide an abstract of title, the contract provides that the buyer may have the abstract of title reviewed by an attorney at either the buyer's or seller's expense, as specified in the contract. If the condition of title is to be determined based on an abstract of title, the buyer should have the abstract of title reviewed by an attorney experienced in land title examination and knowledgeable about groundwater rights, and should obtain a written opinion of title in time to make title objections within the deadline specified in section A of the contract.

The abstract of title required by the contract covers the period from the first conveyance from the sovereignty to the present. It is possible to obtain an abstractor's certificate from a title or abstract company that covers a shorter period and may contain a conclusion by the abstractor as to the identity of the current record owner of property, the existence of any outstanding liens, and other title encumbrances affecting the real property. While this information is useful, it is not a satisfactory substitute for an abstract of title as specified in the contract and an attorney's opinion of title. Often, the title or abstract company preparing the abstractor's certificate or abstract of title will limit liability for error to the amount charged for the certificate or abstract.

§ 16.21:3 Review of Survey

The seller is required to provide copies of any existing surveys under exhibit C (seller's records). The contract allows the buyer to require the seller to provide a new survey of the real property, at the seller's expense, as specified in the contract. The required survey category should be set out in the contract in the indicated place under the block for information on the surveyor. Different types of surveys and survey certifications are available, depending on the nature of the property and the requirements of the parties. An excellent resource on surveys is the *Manual of Practice for Land Surveying in the State of Texas*, published by the Texas Society of Professional Surveyors, which may be contacted at **www.tsps.org**. It describes the various categories and conditions for surveys in Texas, the level of accuracy required for each category of survey, matters to be depicted on the survey, and the nature of certificates.

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

- The survey should bear a recent date and should conform to the required category and condition for the type of survey specified in the contract and location of the property.
- The certificate should be sealed and signed and should conform to any certificate specified in the contract.
- There should be a north compass bearing on the survey.
- The attorney should observe the system of reference used for the survey, locate the beginning point, and determine that it is monumented and locatable.
- The survey, particularly all course and distance notations, should be compared to the legal description either appearing on or attached to the survey. This description then should be compared to the one appearing in the contract and the title commitment or title opinion.

If a more extensive survey, such as a land title survey, is obtained, the attorney should also keep the following points in mind:

- All recorded easements appearing in the title commitment or title opinion should be located and noted on the survey with the appropriate recording data, and blanket easements should be noted in the surveyor's notes. The surveyor should also note any items shown in Schedule B that the surveyor determines do not affect the real property. Conversely, the attorney should examine the survey for any matters (such as easements) not appearing in the title commitment or title opinion.
- The survey should be examined for the location of improvements. The attorney should determine if the improvements protrude onto adjoining property or easement areas, if there are encroachments of improvements from adjoining property onto the property, and if there are building setback line violations.
- The survey should be examined for the depiction of overhead lines, roadways, or other uses of the property that are not within an easement area covered by a recorded easement, as these may indicate the existence of prescriptive easement rights. Any written notations on the survey, such as those relating to rights of parties in possession, should be reviewed to determine their effects on the property and its anticipated use.
- The property should have legal and adequate access to public streets or roads.
- The survey should show the existence and location of utilities.
- The surveyor's certificate should indicate the location of the floodplain, if applicable.

§ 16.21:4 Review of UCC Search

The contract includes provisions for the conveyance of personal property and fixtures and requires that the seller furnish UCC searches of the UCC records of the Texas secretary of state and the UCC records of any other appropriate state. It should be remembered that groundwater permits, wells, and other property may fall within broad collateral descriptions such as "equipment" and "general intangibles" in security agreements and financing statements.

§ 16.22 Inspection Period

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

The contract provides for reasonable rules of entry and that the buyer will indemnify the seller

for claims resulting from the buyer's inspection of the property. Except for the environmental indemnity stated in exhibit B (if used), the indemnity provisions of the contract are not intended to shift risk from the indemnified party to the indemnitor for the indemnified party's own negligence. One consequence of this allocation of risk is that the indemnified party may not be able to recover the costs of defense from the indemnitor if the indemnified party is sued for the consequences of its alleged negligence. *See Fisk Electric Co. v. Constructors & Associates*, 888 S.W.2d 813 (Tex. 1994). The environmental indemnity, if used, shifts risk for the seller's own negligence from the seller to the buyer. It is unlikely, however, that the environmental indemnity will be effective to shift risk in the event of misrepresentation or fraud.

It is prudent for the purchaser of groundwater rights to be produced on site, whether or not previously severed, to obtain an environmental site assessment on the land overlying the groundwater that meets the requirements of the "all appropriate inquiries" rule under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. §§ 9601–9675, in order to secure protection as an "innocent landowner" from strict liability for groundwater contamination. While there is no case law in which the owner of a groundwater right has been held strictly liable for groundwater contamination as a result of his ownership of the groundwater right, the owner of a mineral estate has been held to be an "owner" under CERCLA because it is the owner of a fee simple estate separate from the surface estate. *See City of Grass Valley v. Newmont Mining Corp.*, No. 2:04-cv-00149-GEB-DAD, 2007 WL 4287603 (E.D. Cal. Dec. 4, 2007) (also cited in *Halliburton Energy Services, Inc. v. NL Industries*, 648 F. Supp. 2d 840, 896–97 (S.D. Tex. 2009)). An owner of a groundwater rights estate would, under the court's reasoning in *Edwards Aquifer Authority v. Day*, 369 S.W.3d 814 (Tex. 2012), be the owner of a fee simple estate separate from the surface estate and could, therefore, be held to have strict liability for groundwater contamination. *See* William D. Dugat, *All Appropriate Inquiries in Connection with Groundwater Purchases*, *in* The Changing Face of Water Rights in Texas, State Bar of Texas (2015).

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

§ 16.23 Representations and Warranties

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

In negotiating representations, the parties should specify whether representations are to be absolute or based on the seller's knowledge and belief; whether the representations will be based

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

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

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

The following optional clauses are also provided:

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

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

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

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

§ 16.24 Condition of Property until Closing; Cooperation; No Recording

The parties' signing of the contract obligates them concerning maintenance and operation of the property, casualty damage, condemnation, claims, governmental proceedings, permits, licenses, and inspections. The contract also sets out the parties' agreement not to record the contract. Oil and gas leases may be of concern to the buyer of groundwater, because the lessee has the right to use groundwater in connection with its operations whether that right is stated in the lease or not. In addition, oil and gas leases may expressly allow the lessee to use significant amounts of groundwater for flooding or secondary recovery operations or may permit activities that could contaminate the groundwater, such as the injection or disposal of saltwater onto the

real property. Paragraph I.2. of the contract contains provisions that restrict the ability of the seller to enter into oil and gas leases before and after closing.

§ 16.25 Termination

The contract provides for disposition of the earnest money after termination and for posttermination obligations in certain events. If the memorandum of contract is used, the title company or escrow agent should record the notice of termination of contract if the contract is terminated before closing. See form 16-17 in this chapter.

§ 16.26 Closing

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

The contract allocates closing obligations and transaction costs between the parties.

The contract provides that the buyer acquires possession of the property at closing. The parties may agree, however, on earlier or later possession by the buyer. If the buyer takes possession before closing, a groundwater lease may be appropriate.

Although it is not common, a seller or buyer may be represented by a real estate broker in a groundwater transaction. Real estate brokers and real estate salespersons must have a written commission agreement to enforce payment of a real estate commission. The commission may be payable on contract execution, when the contract closes, or as otherwise agreed by the parties. The contract provides that the commission agreement is a separate document between the broker and the party responsible for paying the commission. For applicable forms, see forms 26-29 through 26-31 in this manual. Alternately, the contract may include the commission agreement or restate its key terms. The parties indemnify each other against claims by brokers and finders arising by, through, or under the indemnifying party. The contract may state that there are no brokers, but there is no requirement to do so.

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

§ 16.27 Default and Remedies

The contract provides that the buyer may elect one of the following remedies for the seller's default: termination (with disposition of the earnest money and payment of additional liquidated damages to the nondefaulting party) or specific performance. In addition, the buyer may terminate if the seller's representations are not true and correct or if a warranty set forth in the contract is breached. The parties may be entitled to payment of actual damages and perhaps of consequential damages if the untruth or breach is first discovered after closing. The contract is drafted to limit the parties' remedies, but remedies are often negotiated.

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

§ 16.28 Assignment

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

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

§ 16.29 Closing Functions

The party handling the closing (the title company or escrow agent) commonly attends to the matters discussed in the following sections.

§ 16.29:1 Payoff Information and Other Closing Expenses

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

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

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

§ 16.29:2 Ad Valorem Taxes and Groundwater Authority Fees

Currently groundwater is not assessed and taxed independently from the surface estate for ad valorem tax purposes. Consequently, the contract does not provide for a proration of ad valorem property taxes at closing, but it does require that the taxes be paid in full at closing by the seller, if they are due and payable at the time of closing. Under current law, the sale of the groundwater rights, at least when the buyer retains sufficient reserved groundwater to enable it to continue its existing use of the real property, would not appear to trigger the assessment of rollback taxes. Consequently, the contract provides that if the real property has been, or at any time after closing is, the subject of special valuation and reduced tax assessments pursuant to the provisions of chapter 23, subchapter D, of the Texas Tax Code, the seller will be responsible for the payment of any such taxes, penalties, and interest, including rollback taxes. If the seller is not reserving sufficient groundwater to continue the seller's existing use of the real property, the parties should consider modifying this provision.

After closing, the seller will continue to pay all ad valorem taxes and assessments due in connection with the real property before delinquency, except that if ad valorem taxes are ever assessed separately against the buyer's groundwater rights after closing, the buyer will be responsible for paying such taxes and assessments if the buyer is obligated to pay such taxes under applicable law. After closing, the buyer will be responsible for paying all fees, assessments, taxes, and charges of any kind imposed by the groundwater authority or any successor authority in connection with the buyer's use of the groundwater, and the seller will be obligated to pay such taxes and assessments with regard to the reserved groundwater, if any. The provisions regarding taxes should be set out in the deed and

easement agreement signed by the parties at closing.

§ 16.29:3 Preparation of Closing Documents

The closing agent may be expected to prepare several documents.

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

Affidavits: Affidavits concerning debts and liens, parties in possession, identity of the parties, leases, and the parties' marital status will likely be required at closing by the title company, escrow agent, or a party's attorney.

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

§ 16.29:4 Funding

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

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

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

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

In a lending transaction, the attorney for the lender should consider obtaining an insured closing service letter from the title insurance underwriter, if title insurance is available, whose policies are to be issued. This letter indemnifies the lender for any fraudulent acts of the closing title insurance company relating to the handling of closing funds. See forms T-50 and T-51 of the *Basic Manual of Rules, Rates and Forms for the Writing of Title Insurance in the State of Texas.* See **https://www.tdi.texas.gov/title/titlemm5.html**.

§ 16.29:5 Recording Documents

The title company or escrow agent is responsible for recording documents intended to be recorded. This responsibility extends to the recording of releases or transfers of liens for notes paid at closing. Each document should be checked before recording to ensure that it is properly executed and notarized, the exhibits referred to in the document are attached, and the name and address of the person to whom the

document is to be returned after recording is included.

§ 16.29:6 Closing Instructions

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

§ 16.30 Additional Considerations

§ 16.30:1 Transactions Involving Foreign Persons

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

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

§ 16.30:2 Closing Checklist

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

§ 16.30:3 Postclosing Considerations

After closing, recorded documents and relevant title insurance policies issued after closing should be reviewed for accuracy and compliance with the title commitment. The owner policy should be dated on or after the recording date of the deed conveying title to the buyer, and the mortgagee policy should be dated on or after the recording date of the deed of trust of the insured lien.

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

[Sections 16.31 through 16.40 are reserved for expansion.]

III. Groundwater Transaction Guide for Sale of Permitted Groundwater Rights for Off-Site Production

§ 16.41 Sale of Permitted Groundwater Rights for Production Off-Site

The rights to produce and transport groundwater can be sold under a contract of sale and conveyed by deed and easement agreement. These rights can also be leased under a groundwater lease. (But see section 16.1 above for a discussion of ownership of groundwater rights.) This

part of this chapter applies to the sale and conveyance of permitted groundwater rights for off-site production. The sale or conveyance of groundwater for on-site production is addressed in part II. of this chapter. The sale and conveyance of surface water rights is addressed in part IV. Financing documents for use in transactions in which the groundwater rights and permit constitute the collateral are discussed in part V.

The forms discussed in this part of this chapter are for general use. Users should be aware that modifications may be required for specific transactions. For all groundwater sales, it is imperative that attorneys involved in the transaction identify the regulatory agencies with jurisdiction over the groundwater rights (referred to collectively in this transaction guide as the "groundwater authority") and obtain copies of all rules and regulations pertaining to groundwater as early in the transaction as possible. The rules may contain requirements that have an important bearing on the transaction, such as minimum acreage requirements for production, limitations on production, and requirements for the issuance and transfer of permits. It may be necessary for the practitioner to make modifications to the forms based on the rules of the groundwater authority. The forms require significant modifications for use in the sale of groundwater subject to the rules of the Edwards Aquifer Authority.

§ 16.42 Groundwater Rights Sales Contract, Deed, and Related Forms; Place for Recordation

Whether the seller is the owner of both the surface and groundwater estates in the land or is the owner only of groundwater pursuant to ownership of all or part of a permit for production of groundwater, if the seller is selling the permitted groundwater for production at a location other than the land from which the original permit was derived, only the groundwater sales contract, form 16-9 in this chapter, should be used in the transaction. Specifically, in some groundwater authorities, notably the Edwards Aquifer Authority (EAA), a purchaser may buy all or a portion of the unrestricted right to produce groundwater pursuant to the terms of a permit issued by the EAA and then elect to withdraw the water from a location different from the original permit location as long as the new location is within the jurisdiction of the EAA. Form 16-9 specifically contemplates a transaction in which a groundwater authority has issued a permit for the production of groundwater, and the groundwater, through the mechanism of the permit, is what is being sold. The production of the groundwater will occur at a well location other than the land set forth in the permit. The new location for production will be designated by the buyer at some point in the transfer mechanism with the groundwater authority. With these types of transactions, it is never contemplated that the buyer will actually produce groundwater on the land owned by the seller, and, in fact, the contract and the subsequent deed prohibit the buyer from having access to the land owned by the seller.

For transactions entered into after September 1, 2019, the Texas legislature has created additional mechanisms for the transfer of groundwater permitted by the EAA for irrigation purposes on "historically irrigated land." *See* Acts 2019, 86th Leg., R.S., ch. 904, § 1 (H.B. 3656), eff. Sept. 1, 2019 (amending § 1.34 of the Edwards Aquifer Authority Act, Acts 1993, 73d Leg., R.S., ch. 626, § 1.34 (S.B. 1477), eff. Sept. 1, 1993). Previously, a holder of a permit for irrigation was not authorized to lease more than 50 percent of the irrigation rights initially permitted. House Bill 3656 sets out conditions under which a permit holder may seek approval from the EAA to sell or lease the remaining water rights for historically irrigated land and adds new definitions for the terms *developed land*, *historically irrigated land*, and *land no longer practicable to farm*.

In order to sever all or a portion of the remaining water rights, the permit holder must demonstrate to the satisfaction of the EAA, based on rules adopted by the EAA to implement House Bill 3656, (1) that the historically irrigated land has become developed land or is no longer practicable to farm, and/or (2) that the land cannot be developed because of its topography or location within a floodplain.

Subject to approval by the EAA, the permit holder may sever the water rights in proportion to the part of the land that meets such requirements. The approval of a severance of water rights affected by House Bill 3656 is subject to a contested case hearing in accordance with EAA rules. House Bill 3656 expressly prohibits the EAA from adopting rules that would expand either the type of land that is considered to be "developed land" or "land no longer considered practicable to farm."

House Bill 3656 also authorizes the EAA to adopt rules that would allow a permit holder to lease all or part of the water rights for use in irrigation granted in the initial permit to another person for irrigating land, whether or not the land to be irrigated is the same land to which the original permit was granted, so long as the land is within the boundaries of the EAA's jurisdiction.

All recordable documents, including the new permit when issued, should be recorded in the county or counties in which the land from which the groundwater and permit rights were originally obtained is located. In addition, if a new withdrawal location is selected in a different county, all of the same documents, including the new permit, should also be recorded in that county. For example, if the original permit was derived from land in Medina County, but the new withdrawal location is to be in Bexar County, all documentation should be recorded in both Medina and Bexar counties. Although not required, deeds, deeds of trust, and other recordable documents may, in addition, be filed in any county in which land from which the permit is derived is located. This may include land that was at one time owned or leased by the permit holder or the holder's predecessor in title. This serves as a means of giving actual notice of the groundwater rights and liens to persons looking in the real property records of these counties.

The basic sales documents include the following:

1. Groundwater Rights Sales Contract (Off-Site) (form 16-9).
2. Groundwater Rights Warranty Deed (Off-Site) (form 16-10).
3. Permit Transfer Request (forms 16-12 and 16-26) or a transfer form promulgated or approved by the groundwater authority or another form promulgated by the groundwater authority, if it has a particular form for transfer.
4. Partial Release of Lien (form 16-11) if the seller has an existing lien on the land and only the groundwater rights are being released from the lien at closing.
5. Release of Lien (form 10-2 in this manual) if the seller's entire lien will be released at closing.
6. Form UCC3 (form 9-14 in this manual), a form promulgated by the Texas secretary of state, if there is a security interest that covers or that could be construed to cover the groundwater or the permit to be conveyed at closing.
7. Assignment and Assumption of Lease (form 16-14) if there is an existing lease of the groundwater.
8. Lessee Estoppel Certificate (form 16-15) used to assure the buyer that the groundwater lease is valid and not

in default and that the lessee understands the lease is being assigned.

9. Affidavit of Debts and Liens [and Indemnity] (form 16-13) (if this form is not being provided by a title company) used to provide additional protection to the buyer, especially in instances in which no title insurance will be obtained or title insurance is not available.

10. Loan documents required by the lender.

§ 16.43 General Considerations

The groundwater rights sales contract, form 16-9 in this chapter, is drafted as a neutral form of contract, intending to favor neither the buyer nor the seller. For each contract, the basic elements of the transaction are, in general, stated in the sections to be completed at the beginning of the form. Some provisions, however, are required to be completed throughout the contract. The general terms that follow in the form may be used for many transactions. However, the sale of groundwater is an emerging area of law, and there are no well-established terms of sale. Contracts for the purchase and sale of groundwater are diverse, and additional drafting may be necessary. The following commentary is organized in the same order as the sections of the contract.

§ 16.44 Introductory Paragraph: Offer and Acceptance

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

§ 16.45 Defined Terms

§ 16.45:1 Seller and Buyer

There are sections for the names of and other information concerning the seller, the buyer, and their attorneys. Proper identification of the parties is important, and the seller and buyer should be identified as fully as possible. Capacity and authority should be considered, especially if a party is not an individual acting on his own behalf. See chapter 3 in this manual for a discussion of party designations. It should be noted that if the owner of the real property and the owner of the permit are not the same party, the attorney for the buyer must make certain that both parties sign all closing documents. Most groundwater authorities will not mediate ownership of groundwater rights.

§ 16.45:2 Title Company or Escrow Agent

Title insurance to insure title to groundwater rights in Texas is not generally offered by title insurance underwriters in Texas, although currently there is at least one insurer that offers title insurance for water rights. To the extent it is available, the title insurance product is a variation of a title policy on the real property. In many ways, it may not provide the parties with the complete coverage and closing details they are used to receiving in a land closing and title policy. For that reason, many sales of groundwater, in particular permitted groundwater transactions, are completed through the use of a title opinion based on information prepared by a title company. Nonetheless, the contract designates a title company or escrow agent to act as the escrow and closing agent in order to address either option. The title company or escrow agent is responsible for closing the transaction and receiving and disbursing funds under the terms of the contract. If a title opinion is provided as evidence of title to the groundwater rights, it should be reviewed by an attorney who is

knowledgeable about land titles and groundwater rights.

It is advisable to have a written escrow agreement between the title company or escrow agent, the buyer, and the seller that defines the rights and duties of the title company or escrow agent. Form 4-2 in this manual is an escrow agent receipt and escrow agreement. It can be modified for use with an escrow agent other than a title company.

§ 16.45:3 Surveyor

A survey is rarely used in the sale of permitted groundwater, as the underlying issue is not the location of the real property but rather the chain of title related to the real property and the permit. If there is a need for a survey, a section could be drafted for the contract.

§ 16.45:4 Groundwater Authority

Generally, for a groundwater transaction involving a permit, the real property is located within a groundwater conservation district or other groundwater authority, and the authority should be identified. It is imperative that the buyer's attorney consult the rules of the groundwater authority to determine all restrictions on the use and production of groundwater, requirements for sale of groundwater, and rules regarding the issuance or transfer of a permit. Generally, copies of the rules can be obtained only from the groundwater authority. The buyer's attorney should also obtain, and personally review, copies of all documents maintained by the groundwater authority pertaining to the groundwater and permit being sold. The attorney should note all relevant information from the file, such as yearly allocations, if applicable, and should determine the feasibility of meeting all conditions of the groundwater authority's approval of the sale within the buyer's required time frame.

§ 16.45:5 Seller's Permit

It is important for the buyer to determine the status of the seller's permit issued by the groundwater authority in connection with the groundwater and what the groundwater authority requires for the transfer of the permit. Cooperation by the seller in the transfer of the permit should be set out in the contract and is paramount to the buyer's efforts to obtain approval of the transfer. All permit information should be set out in the contract. The contract should address the timing of the filing of application to transfer the permit to the buyer and whether approval of the groundwater authority is a condition of closing. Form 16-26 in this chapter is an example of an application to the groundwater authority to transfer permits in the absence of a form promulgated by the authority.

§ 16.45:6 Earnest Money

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

§ 16.45:7 Independent Consideration

If the buyer terminates the contract before the end of the inspection period and the buyer is otherwise entitled to have the earnest money returned, the contract provides that a stated amount should not be returned to the buyer but should be paid to the seller, because that amount is the independent consideration to the seller for the buyer's right to terminate the contract.

§ 16.45:8 Real Property

The real property is the land from which the groundwater or permit is to be sold and is described in exhibit A of the contract. The contract should describe the real and personal property with legal specificity. If the property is not described sufficiently, the contract may be unen-

forceable because of vagueness. See chapter 3 in this manual for a discussion of property descriptions. Attention also should be given to the conveyance of appurtenant rights, such as permits, licenses, and similar rights.

§ 16.45:9 Groundwater Defined

The definition of groundwater is derived in part from *Pecos County WCID No. 1 v. Williams*, 271 S.W.2d 503, 505–06 (Tex. App.—El Paso 1954, writ ref'd n.r.e.).

§ 16.45:10 Groundwater Rights

The contract defines groundwater rights to include the right to withdraw a stated quantity of groundwater from a specific aquifer as described in the permit (the "groundwater") and all rights and interests relating to the groundwater, including—

> all of the real and personal property rights, appurtenances, authorities, licenses, consents, and contracts, if any, relating to or pertaining to the Groundwater, which will also include all common-law property rights in and to the Groundwater as well as those rights or interests that now or in the future may be useful or necessary to withdraw or otherwise beneficially use the Groundwater Rights . . . .

§ 16.45:11 Reserved Groundwater

Generally, the seller will retain ownership of some permitted rights; however, a specific reservation is not usually required, as the description of the groundwater will specify what number of acre-feet of water will be sold out of the permit. In addition, if the permit being transferred is that of an irrigation groundwater right, in some groundwater districts, there is a certain required acre-feet of groundwater that cannot be severed or sold from the real property. In the case of the Edwards Aquifer Authority (EAA), one acre-foot of irrigation groundwater is known as the base water and, with a few specific exceptions, cannot be sold from the real property from which it derived. The EAA's rules related to the reservation of one acre-foot of irrigation groundwater and the permit holder's ability to secure authorizations from the EAA to transfer those rights, either by sale or lease, were challenged by several landowners, the Uvalde County Underground Water Conservation District, the city of Uvalde, and Uvalde County in *Uvalde County Underground Water Conservation District v. Edwards Aquifer Authority*, No. 2018-01-31972-CV (38th Dist. Ct., Uvalde County, Tex. Nov. 2, 2018). In response to the litigation, House Bills 1479, 3644, and 3656 were considered by the Texas legislature during the 86th legislative session. House Bill 3656 passed and became effective September 1, 2019.

For transactions entered into after September 1, 2019, the Texas legislature has created additional mechanisms for the transfer of groundwater permitted by the EAA for irrigation purposes on "historically irrigated land." *See* Acts 2019, 86th Leg., R.S., ch. 904, § 1 (H.B. 3656), eff. Sept. 1, 2019 (amending § 1.34 of the Edwards Aquifer Authority Act, Acts 1993, 73d Leg., R.S., ch. 626, § 1.34 (S.B. 1477), eff. Sept. 1, 1993). Previously, a holder of a permit for irrigation was not authorized to lease more than 50 percent of the irrigation rights initially permitted. House Bill 3656 sets out conditions under which a permit holder may seek approval from the EAA to sell or lease the remaining water rights for historically irrigated land. See section 16.42 above for an in-depth discussion of the requirements.

§ 16.45:12 Purchase Price

There is no standard method of determining the purchase price for groundwater rights; however, in the case of permitted groundwater, the sales have been based most often on a price per acre-

foot of water. Variations on this model include pricing on a per-acre-foot-permitted basis or a per-acre-foot-per-acre allocation. The field of groundwater rights appraisal is still evolving. In areas in which there are numerous groundwater sales, such as the Edwards Aquifer, it is possible to obtain an appraisal of groundwater rights based on comparable sales. The contract provides for the purchase price based on a stated price per acre of groundwater being purchased. The buyer will be paying for the groundwater under each acre of land, based on a stated price per acre, regardless of how much or how little water is actually under the land. Exhibit E of the contract may be used if the parties agree to seller financing of the purchase. If obtaining third-party financing is a condition to the buyer's obligations, that fact and the terms of the complying financing should be addressed in the contract. See chapters 6 and 8 in this manual for further discussion of financing.

§ 16.45:13 Buyer's and Seller's Liquidated Damages

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

§ 16.45:14 Title Commitment and Title Information

Title insurance may not be available to insure title to groundwater rights, but even if available, the parties may agree not to procure title insurance. If the seller is not required to provide a title commitment, the contract requires the seller to provide the buyer with title information. The contract provides that the buyer may have the title information reviewed by an attorney of the buyer's choice, at the expense of the seller or buyer as specified in the contract. If the buyer obtains title information, the buyer should have it reviewed by an attorney who is experienced in land titles and knowledgeable about groundwater rights.

§ 16.45:15 Title Documents

The contract defines title documents to include the seller's "Permit and instruments affecting title to the Groundwater and the Real Property" referenced in the title commitment or title information and UCC search. These documents are to be provided as part of the seller's records. Under paragraph F.6. of the contract, title objections can be made on the basis of the title documents. This provides the buyer with the ability to make objections to title based on the seller's permit or unrecorded documents provided as part of the seller's records.

§ 16.46 Deadlines

Section A of the contract contains most of the deadlines, grouped for ease of reference, and provides two alternate ways to determine most of the deadlines: either a stated date or a specified number of days after the effective date of the contract or another specific date. The contract provides that time is of the essence and that closing will occur a certain number of days after the expiration of the inspection period, but closing may also be specified to occur a certain number of days following a different event or on a certain date. The closing date may also be specified as "on or before" a certain date or event.

§ 16.47 Closing Documents

Section B of the contract lists the documents to be signed and delivered to close the transaction and serves as a checklist to prepare for closing. Section C contains a number of exhibits. The attorney should choose the specific exhibits appropriate for the sale.

§ 16.47:1 Exhibit B—Representations; Environmental Matters

Exhibit B contains the parties' representations. These items are always negotiated by the parties and will vary from transaction to transaction.

§ 16.47:2 Exhibit C—Seller's Records

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

§ 16.47:3 Exhibit D—Notices, Statements, and Certificates

Exhibit D lists notices, statements, and certificates required by federal and state law and regulations to be delivered when common real estate contracts are executed. The items applicable to a specific transaction should be selected. See chapter 2 in this manual for brief discussions of laws and regulations that require notices, statements, and certificates. Some of the statutory provisions would appear to include the sale of groundwater, simply because they apply to a sale or conveyance of real property, and no exemption is made for the sale of groundwater.

§ 16.47:4 Exhibit E—Seller Financing

Exhibit E contains seller-financing terms.

§ 16.47:5 Exhibit F—Memorandum of Contract

If it is anticipated that there may be a significant amount of time between the date the contract is signed and the date of closing, it is advisable to have the memorandum of contract signed and recorded in the real property records to provide notice of the buyer's contract rights. See form 16-16 in this chapter.

§ 16.47:6 Exhibit G—Notice of Termination of Contract

If the memorandum of contract is used, the parties should execute the notice of termination of contract form at the same time and deliver it to the title company or escrow agent for recordation in the event the contract is terminated before closing. See form 16-17 in this chapter.

§ 16.48 Investment of Earnest Money

The contract provides that the buyer may direct the title company or escrow agent to invest the earnest money in an interest-bearing account in a federally insured financial institution. If the earnest money is to be invested, the title company will require the buyer's tax identification or Social Security number so that accrued interest may be reported to the Internal Revenue Service.

§ 16.49 Title

The contract incorporates the statutory notice that the Texas Real Estate License Act requires real estate brokers and real estate salespersons to give to a buyer, advising that the buyer should either have the title examined by an attorney or obtain a title insurance policy, if available. Tex. Occ. Code § 1101.652(b)(29). If a broker or salesperson is not involved, the paragraph may be deleted.

The contract requires that the seller provide to the buyer the title commitment or title information, the UCC search, and legible copies of each document referred to in these instruments by the deadlines stated in the contract. The contract follows a typical procedure under which the buyer reviews the title commitment or title information, the seller's permit, the documents provided by the seller, and the UCC search and notifies the seller of any objections. After notice, the seller may elect to cure the buyer's objections but is not required to do so. If the seller does not

agree to cure, the buyer may either proceed to close the transaction and accept the groundwater subject to the uncured matters or terminate the contract. However, the seller is obligated to resolve all items listed on Schedule C of the title commitment at or before closing and to cure title matters that arise by, through, or under the seller after the contract is signed.

§ 16.49:1 Review of Title Commitment

The contract provides that the condition of title will be established by either a title commitment or title information, as agreed to by the buyer and the seller. If title information is furnished, the buyer may have the title information reviewed by an attorney and obtain the attorney's written opinion of the title information. The benefit of obtaining title insurance, if such insurance is available, over an attorney's opinion of title is that title insurers are required to maintain reserves to cover claims that are greater than the malpractice coverage maintained by most law firms. Consequently, there is an increased likelihood of recovery if an error is made by the title company in its determination of title. See also section 16.21:1 above.

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

The attorney should review the signature and effective date of the commitment. The attorney should confirm that the commitment is signed, and the issuance date is not more than ninety days before the closing. Otherwise, a new or revised commitment should be ordered.

Schedule A: The attorney should confirm that the proposed insured parties are correctly named, the amounts of insurance are correctly stated, and the correct estate is insured, including the correct number of acre-feet of groundwater and the correct reference to the permit. Record title should be vested in the seller. The attorney should confirm that the property description is correct and conforms to the description in the contract.

Schedule B: The attorney should review the following matters:

- Item 1, relating to covenants and restrictions, should be noted as either "Covenants, conditions, and restrictions (other than any restrictions indicating preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin) as set forth in [**recording data**] of the real property records of [**county**] County, Texas" or "Item 1 of Schedule B is hereby deleted in its entirety."
- Item 3, relating to homestead or community property or survivorship rights, should be reviewed to verify ownership right.
- Item 5, relating to property taxes, should be reviewed for the status of tax payments and the existence of rollback taxes.
- Item 6, relating to the terms and conditions of the documents creating the insured's interest in the land, cannot be revised. The referenced documents should, however, be reviewed.
- Item 7, relating to materialman's and mechanic's liens, applies only to the mortgagee policies on interim construction loans and may be deleted if satisfactory evidence that the paragraph does not apply is furnished to the title company.
- Item 8, relating to subordinate liens and leases, applies only to a mortgagee policy

and may not be applicable for every water transaction.

- Item 9, relating to existing liens, should show only liens permitted by the contract. Copies of all lien documents should be reviewed with regard to due-on-sale provisions; dragnet clauses relating to other debt; condemnation provisions; notice, cure, and default provisions; and subordinate financing. A superior lienholder's estoppel agreement should be obtained from any lienholder whose note and lien are being either assumed or taken "subject to."

All other special exceptions should be carefully reviewed to determine if they affect the buyer's groundwater rights. If there is more than one set of groundwater rights being insured, the commitment should specify which exceptions apply to which set of groundwater rights.

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

The *Basic Manual of Rules, Rates and Forms for the Writing of Title Insurance in the State of Texas* should be consulted for information on the various types of policies and endorsements that are available and their respective costs.

§ 16.49:2 Review of Abstract of Title or Title Information

If the seller is obligated to provide an abstract of title or title information, the contract provides that the buyer may have the abstract of title or title information reviewed by an attorney at either the buyer's or seller's expense, as specified in the contract. If the condition of title is to be determined based on an abstract of title or title information, the buyer should have it reviewed by an attorney experienced in land title examination and knowledgeable about groundwater rights, and should obtain a written opinion of title in time to make title objections within the deadline specified in section A. of the contract.

The abstract of title required by the contract covers the period from the first conveyance from the sovereignty to the present. It is possible to obtain an abstractor's certificate from a title or abstract company that covers a shorter period and may contain a conclusion by the abstractor as to the identity of the current record owner of property, the existence of any outstanding liens, and other title encumbrances affecting the real property. While this information is useful, it is not a satisfactory substitute for an abstract of title or title information as specified in the contract and an attorney's opinion of title. Often, the title or abstract company preparing the abstractor's certificate or abstract of title will limit liability for error to the amount charged for the certificate or abstract.

§ 16.49:3 Review of Survey

A survey is not required for a transaction involving off-site production.

§ 16.49:4 Review of UCC Search

The contract includes provisions that require the seller to furnish searches of the UCC records of the Texas secretary of state and the UCC records of any other appropriate state. Groundwater permits, wells, and other property may fall within broad collateral descriptions such as "equipment" and "general intangibles" in security agreements and financing statements.

§ 16.50 Inspection Period

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

The contract provides for reasonable rules of entry and that the buyer will indemnify the seller for claims resulting from the buyer's inspection of the property, although in the case of the purchase of permitted groundwater to be produced from another location, the need to visually inspect the real property is rare. Generally, inspection periods in these types of contracts are used more as a feasibility period, allowing the buyer time to evaluate the overall purchase of the groundwater rather than inspect the actual property.

Except for the environmental indemnity stated in exhibit B (if used), the indemnity provisions of the contract are not intended to shift risk from the indemnified party to the indemnitor for the indemnified party's own negligence. One consequence of this allocation of risk is that the indemnified party may not be able to recover the costs of defense from the indemnitor if the indemnified party is sued for the consequences of its alleged negligence. *See Fisk Electric Co. v. Constructors & Associates*, 888 S.W.2d 813 (Tex. 1994). The environmental indemnity, if used, shifts risk for the seller's own negligence from the seller to the buyer. It is unlikely, however, that the environmental indemnity will be effective to shift risk in the event of misrepresentation or fraud.

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

§ 16.51 Representations and Warranties

Representations and warranties are negotiated by the parties with specific reference to the transaction. They may include such matters as ownership of the real property and groundwater, organization of the parties, authority to execute the contract and close the transaction, condition of title, pending litigation and claims that may ripen into litigation, pending or threatened condemnation or other taking, disclaimer of representations (for example, "as is" language), compliance with all laws, status of leases, payment of ad valorem taxes, and status of debt to be assumed or taken "subject to."

In negotiating representations, the parties should specify whether representations are to be absolute or based on the seller's knowledge and belief; whether the representations will be based on the knowledge of the entity that is the seller or on the knowledge of specified individuals; whether the seller must perform further investigation to make the representations or may rely on its current knowledge, without further investigation; and whether and to what extent the representations will survive closing.

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

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

The following optional clauses are also provided:

- The buyer agrees to accept the property in its "as is, where is" condition, investigate the property on the buyer's own behalf, and not rely on information or representations attributable to the seller, except to the extent stated in the contract.
- The buyer waives its rights under the Texas Deceptive Trade Practices–Consumer Protection Act.

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

The contract provides that the parties' representations are true and correct when made and must be true and correct at closing, or the buyer may terminate the contract. Termination of the contract may not be a satisfactory remedy for the buyer, in which case other remedies could be negotiated, such as a reduction in the sales price.

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

§ 16.52 Condition of Property until Closing; Cooperation; No Recording

The parties' signing of the contract obligates them concerning the groundwater, condemnation, claims, governmental proceedings, permits, licenses, and inspections. The contract also sets out the parties' agreement not to record the contract.

§ 16.53 Termination

The contract provides for disposition of the earnest money after termination and for posttermination obligations in certain events. If the memorandum of contract is used, the title company or escrow agent should record the notice of termination of contract if the contract is terminated before closing. See form 16-17 in this chapter.

§ 16.54 Closing

The contract provides that, unless the parties agree otherwise before closing, certain closing documents will use the forms contained in the current edition of the *Texas Real Estate Forms*

Manual. This approach defers the time and expense of negotiating the closing documents until after the contract is signed, while providing certainty if the parties do not otherwise negotiate closing documents. Alternately, the closing documents can be negotiated before the contract is signed and, if so, should be attached as exhibits to the contract.

The contract allocates closing obligations and transaction costs between the parties.

The contract provides that the buyer acquires possession of the groundwater at closing; however, the groundwater authority may not actually approve the transfer of the permit until weeks after closing. For this reason, the continued cooperation of the seller, if necessary, is required should there be any impediment at the office of the groundwater authority.

If closing is performed by an escrow agent, the escrow agent should be responsible for getting the affidavit of debts and liens (form 16-13 in this chapter), the settlement statement, and similar documents typically provided by a title company, signed at closing.

Although it is not common, a seller or buyer may be represented by a real estate broker in a groundwater transaction. Real estate brokers and real estate salespersons must have a written commission agreement to enforce payment of a real estate commission. The commission may be payable on contract execution, when the contract closes, or as otherwise agreed by the parties. The contract provides that the commission agreement is a separate document between the broker and the party responsible for paying the commission. For applicable forms, see forms 26-29 through 26-31 in this manual. Alternately, the contract may include the commission agreement or restate its key terms. The parties indemnify each other against claims by brokers and finders arising by, through, or under the indemnifying party. The contract may state that there are no brokers, but there is no requirement to do so.

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

§ 16.55 Default and Remedies

The contract provides that each party may elect one of the following remedies for the other's default: termination (with disposition of the earnest money and payment of additional liquidated damages to the nondefaulting party) or specific performance. In addition, the buyer may terminate if the seller's representations are not true and correct or if a warranty set forth in the contract is breached, and as noted earlier, if termination is not a satisfactory remedy for the buyer, other remedies such as a reduction in the purchase price can be negotiated and included in the contract. The parties may be entitled to payment of actual damages and perhaps of consequential damages if the untruth or breach is first discovered after closing. The contract is drafted to limit the parties' remedies, but remedies are often negotiated.

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

§ 16.56 Assignment

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

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

§ 16.57 Closing Functions

The party handling the closing (the title company or escrow agent) commonly attends to the matters discussed in the following sections.

§ 16.57:1 Payoff Information and Other Closing Expenses

Written request should be made to each lienholder for the lienholder's written payoff statement. The lienholder should be requested, through an authorized representative, to state the remaining principal balance due on the note, the accrued interest as of a certain date, a per diem amount of interest, and whether the lienholder will credit the amount held in the escrow account, if one exists, to the total due or, alternatively, refund the amount directly to the borrower. Closing must occur and payment be made to the lienholder before the release of lien will be signed. In many cases, when only permitted groundwater is being sold, the lender will provide only a partial release and the amount of the payoff will be determined by a lender formula related to the value of the permitted water compared with the remaining value of the mortgaged asset.

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

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

§ 16.57:2 Ad Valorem Taxes and Groundwater Authority Fees

Currently groundwater is not assessed and taxed independently from the surface estate for ad valorem tax purposes. Consequently, the contract does not provide for a proration of ad valorem property taxes at closing, but it does require that the taxes be paid in full at closing by the seller, if they are due and payable at the time of closing. The sale of the groundwater, at least when the buyer retains sufficient reserved groundwater to enable it to continue its existing use of the real property, would not appear to trigger the assessment of rollback taxes. Consequently, the contract provides that if the real property has been, or at any time after closing is, the subject of special valuation and reduced tax assessments pursuant to the provisions of chapter 23, subchapter D, of the Texas Tax Code, the seller will be responsible for the payment of any such taxes, penalties, and interest, including rollback taxes. If the seller is not reserving sufficient groundwater to continue the seller's existing use of the real property, the parties should consider modifying this provision.

After closing, the seller will continue to pay all ad valorem taxes and assessments due in connection with the real property before delinquency. However, if ad valorem taxes are assessed separately against the buyer's groundwater rights after closing, the buyer will be responsible for paying such taxes and assessments if the buyer is obligated to pay such taxes under applicable law. After closing, the buyer will be responsible for paying all fees, assessments, taxes, and charges of any kind imposed by the groundwater authority or any successor authority in connection with the buyer's use of the groundwater; the seller will be obligated to pay such taxes and assessments with regard to the reserved groundwater, if any. The provisions regarding taxes should be set out in the groundwater deed signed by the parties at closing.

§ 16.57:3 Preparation of Closing Documents

The closing agent may be expected to prepare several documents.

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

Affidavits: Affidavits concerning debts and liens, parties in possession, identity of the parties, leases, and the parties' marital status will likely be required at closing by the title company, escrow agent, or a party's attorney.

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

§ 16.57:4 Funding

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

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

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

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

In a lending transaction, the attorney for the lender should consider obtaining an insured closing service letter from the title insurance underwriter, if title insurance is available, whose policies are to be issued. This letter indemnifies the lender for any fraudulent acts of the closing title insurance company relating to the handling of closing funds. See forms T-50 and T-51 of the *Basic Manual of Rules, Rates and Forms for the Writing of Title Insurance in the State of Texas*. See **https://www.tdi.texas.gov/title/titlemm5.html**.

§ 16.57:5 Recording Documents

The title company or escrow agent is responsible for recording documents intended to be recorded. This responsibility extends to the recording of releases or transfers of liens for notes paid at closing. Each document should be checked before recording to ensure that exhibits referred to in the document are attached and the name and address of the person to whom the document is to be returned after recording is included. The deed and other recordable documents should be recorded in the county or counties in which the groundwater is permitted to be withdrawn.

§ 16.57:6 Closing Instructions

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

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

§ 16.58 Additional Considerations

§ 16.58:1 Transactions Involving Foreign Persons

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

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

§ 16.58:2 Closing Checklist

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

§ 16.58:3 Postclosing Considerations

After closing, if a title policy has been obtained, recorded documents and relevant title insurance policies issued after closing should be reviewed for accuracy and compliance with the title commitment. The owner policy should be dated on or after the recording date of the deed conveying title to the buyer, and the mortgagee policy should be dated on or after the recording date of the deed of trust of the insured lien.

An original or title company's certified copy of each executed document relating to the closing should be provided to the seller and the buyer or the borrower by their attorneys. Generally, the party benefiting from a document receives the original, and the other parties receive copies. If no title company is involved in the transaction, the closing agent should perform this task.

[Sections 16.59 and 16.60 are reserved for expansion.]

IV. Surface Water Rights Transaction Guide

§ 16.61 Sale of Surface Water Rights

This part of the chapter applies to the sale and conveyance of surface water evidenced by a permit or certificate of adjudication. It does not cover the sale or conveyance of groundwater rights, which is covered in parts II. and III. of this chapter.

Surface water in Texas is generally owned by the state. One may obtain a right to use the state's surface water under the state's statutory appropriation process. Under this process, the state may grant precisely defined surface water rights, evidenced by a permit or certificate of adjudication. The surface water rights consist of the right to use water in a specific amount, from

a specified body of water, by diversion at a definite location or locations ("point of diversion") for a specified use.

If the surface water is authorized for use in connection with an identified tract of land (as in the case of water permitted for irrigating a specific tract of land), the water right is considered "appurtenant" to that land unless the water right is held by a water corporation or governmental entity authorized to supply water to others. 30 Tex. Admin. Code § 297.81. If land subject to an appurtenant surface water right is conveyed, the water right passes with the conveyance of title to the land, unless the water right has been expressly reserved or excepted or the water right has been granted for the irrigation of land not owned by the applicant. 30 Tex. Admin. Code § 297.81. Once a surface water right has been put to beneficial use according to its terms, the right is "perfected" and becomes a vested property interest. Tex. Water Code §§ 11.025–.026.

The forms contained in this chapter are for general use. The forms conveying surface water rights assume that the water rights to be conveyed have already been appropriated, as is the case with most surface water rights in Texas. Surface water rights that are the subject of a proposed transfer will therefore be represented by either a permit or a certificate of adjudication. The term *permit* refers to the document the Texas Commission on Environmental Quality (TCEQ) or its predecessor water authority issued when the surface water right was first appropriated. If the applicable river basin or stream segment has not been adjudicated, or if a new water right is recognized following the conclusion of adjudication proceedings, the document evidencing the water right will usually be a TCEQ permit. The surface water rights, whether evidenced by a permit or a certificate of adjudication, are real property. See sections 16.5:1 through 16.5:3 above.

Adjudication occurs when existing water rights (whether represented by permit, certified filing, or riparian rights) for a particular river basin or stream segment are subjected to administrative and judicial proceedings that recognize ownership of water rights and determine the quantities, priority dates, and other terms and conditions of each of the water rights from that river basin or stream segment. *See generally* Tex. Water Code §§ 11.301–.324. At the conclusion of the adjudication process, the recognized holders of then-existing water rights are issued certificates of adjudication to show what rights have been adjudicated to them in that proceeding. Thereafter, that certificate of adjudication is the document evidencing the owner's surface water rights and is required to be recorded with the county clerk of each county in which the appropriation is made. Tex. Water Code § 11.324. Most stream adjudications in Texas were concluded in the 1970s and 1980s. The Upper Rio Grande adjudication was completed in 2007.

Thus, new (or any postadjudication) surface water rights issued by the TCEQ are in the form of a water rights permit. As with certificates of adjudication, the law requires the permit to be recorded with the county clerk of the county in which the appropriation is to be made. Tex. Water Code § 11.136. An existing certificate of adjudication is amended, when necessary, through the same TCEQ process as for water rights permits. The processes for obtaining a permit for previously unappropriated surface water rights and for adjudicating water rights in Texas are beyond the scope of this chapter.

As early in the surface water transaction as possible, it is imperative that the attorneys involved (1) examine the permit or certificate of adjudication evidencing the water rights, including all amendments to it; (2) identify the regulatory agencies with jurisdiction over the surface water rights (referred to collectively in this part of the chapter as the "water authority"); (3) obtain copies of all rules and regulations pertaining to the

surface water rights; and (4) obtain a title report or title commitment on any appurtenant land to determine whether the surface water rights have been previously severed or whether there are liens on the land that may affect the water rights. The rules and regulations for surface water rights transactions may vary depending on the river basin involved in the transaction. *See* 30 Tex. Admin. Code chs. 281, 288, 295, 297–299, 303, 304. If the transaction involves an interbasin transfer, there are other statutory and regulatory implications affecting the water rights, which are beyond the scope of this chapter. *See* Tex. Water Code § 11.085; 30 Tex. Admin. Code §§ 295.13, 295.155, 295.177, 297.1, 297.18.

The TCEQ is the water authority that has jurisdiction over all surface water rights transactions in Texas, including the issuance, amendment, cancellation, and transfer of water rights permits. *See* Tex. Water Code §§ 5.011–.013; Tex. Water Code ch. 11. For river basins in which a watermaster has been appointed, the TCEQ administers adjudicated water rights through a watermaster and a watermaster advisory committee appointed for each water division. *See* Tex. Water Code §§ 11.326, 11.3261. *See generally* 30 Tex. Admin. Code chs. 303, 304. The watermaster divides the water of the streams (or other sources of supply) in the division based on the adjudicated water rights. Tex. Water Code § 11.327(a). The watermaster also regulates controlling works and diversion works in times of shortage to protect existing water rights, prevent waste, and prevent practices in excess of adjudicated rights. Tex. Water Code § 11.327(b). Currently, there are watermaster programs for South Texas, the Rio Grande, the Concho River, and the Brazos River.

More information regarding the watermaster programs can be found on the TCEQ's website at **https://www.tceq.texas.gov**.

An attorney representing a purchaser or lender acquiring an interest in water rights that are subject to a watermaster program should become familiar with the applicable statutory and program provisions at Tex. Water Code §§ 11.325–.3291, 30 Tex. Admin. Code chs. 303, 304 (Watermaster Operations), and the TCEQ website. Water rights in the Rio Grande below Lake Amistad are allocated on an account basis based on the use of the water, such as municipal and irrigation, instead of on a seniority basis, with priority being given to municipal use. If, in any given month, surplus water is identified over the water needed for municipal use, the water is allocated to the other accounts, such as irrigation. In purchasing water rights, the buyer should determine whether an allocation has been made to the seller, and if so, the purchase contract should address how the water allocation will be divided between the parties at closing. The cost of administration of water rights by watermasters is allocated among the adjudicated water rights holders, and assessments are made by the TCEQ. In general, no water may be diverted, taken, or stored by or delivered to a person while he is delinquent in the payment of his assessed costs. *See* Tex. Water Code §§ 11.329, 11.455. Purchasers should determine the amount of assessments that have been made against a seller and the payment status as part of their due diligence. The purchase contract should address the manner in which these assessments will be allocated at closing, if appropriate.

§ 16.62 Surface Water Rights Sales Contract and Related Forms; Place for Recordation

The surface water rights sales contract, form 16-18 in this chapter, represents an approach to the sale of surface water rights under which a conditional closing of the transaction first occurs, pending the required water authority's prior approval of the transaction. Once the water authority (that is, the TCEQ) has approved the

change in ownership and any amendments to the permit or certificate of adjudication sought by the buyer or required by the TCEQ, there is a final closing of the transaction. Alternatives to this "conditional closing followed by a final closing" approach include granting the buyer an option to purchase the water rights, or leasing the water rights to the buyer, pending TCEQ approval; however, the water right must be used in accordance with the terms of the permit or certificate of adjudication until such time as the TCEQ has granted any necessary amendments to the permit/certificate of adjudication.

The basic sales documents include the following:

1. Surface Water Rights Sales Contract (form 16-18).
2. TCEQ Change of Ownership Form (Form TCEQ-10204), plus any additional applications, forms, and supplemental materials necessary to obtain the amendments to the permit or certificate of adjudication to accommodate the buyer's intended use of the water rights.
3. Surface Water Rights Conveyance—Conditional (form 16-19). Frequently, this is the only conveyance document used by the parties, as they deem the conditional conveyance final once the stated condition—TCEQ approval of necessary amendments—has occurred.
4. TCEQ Amendment to Permit or Certificate of Adjudication, or letter amendment (Form TCEQ-10201).
5. Surface Water Rights Conveyance—Unconditional (form 16-20).

In addition, the release of lien (form 10-2) or partial release of lien (form 10-3) in this manual, bill of sale (form 5-16), assignment and assumption of lease (form 5-21), and other forms may need to be adapted for use in connection with the transaction.

Although many attorneys rely on the files maintained by the TCEQ to determine ownership of surface water rights, rather than the real property records, recordation of surface water rights documents in the county real property records is still a legal requirement. *See* Tex. Water Code § 11.136. The attorney for the buyer of a surface water right should be aware that the buyer is responsible for making sure that the certificate of adjudication, permit, or any amendments, the surface water conveyance document, and other recordable real property documents are recorded with the county clerk of the appropriate county or counties. *See* Tex. Water Code § 11.136. In some instances, there can be uncertainty as to which of two or more locations is the correct place for recordation. If there is uncertainty, it is advisable to record the document in all the locations.

The Texas Water Code states that the TCEQ is required to transfer the certificate of adjudication or permit for recordation to the county clerk of the county in which appropriation is made. Tex. Water Code §§ 11.136, 11.324. In practice, however, the TCEQ does not do this. Instead the TCEQ sends the certificate of adjudication, permit, or amendment to the applicant for recordation along with a card. The applicant must send the document and card to the county clerk of the proper county or counties for recordation. In general, the certificate, permit, or amendment should be recorded in each county in which the points of diversion are located. If the water right is appurtenant to land, the certificate, permit, or amendment should also be recorded in the county or counties in which the water is used (that is, where the land is located). If a TCEQ amendment issued in connection with the transfer changed the land to which the water right is appurtenant to a different county, the conveyance document should be recorded in both counties. The county clerk is required to index the

document by the name of the applicant and the stream or source of the water supply. Tex. Water Code §§ 11.136, 11.324. The county clerk should fill out the card with the recording information and send it to the TCEQ. It is incumbent on the attorney to make sure the county clerk records the documents and provides the information to the TCEQ. The attorney should also obtain the recording information for the attorney's own records. The attorney should ensure that proper postage is added to the card provided by the TCEQ for completion and return mailing by the county clerk(s). This will increase the likelihood of the card's being returned to the TCEQ.

It is important to identify the county or counties in which the documents affecting the surface water rights should be recorded to ensure that the public is put on constructive notice. Section 297.83 of the TCEQ regulations states that the "written instrument evidencing a water right ownership transfer shall be recorded in the office of the county clerk," but does not specify in which county clerk's office the instrument should be recorded. *See* 30 Tex. Admin. Code § 297.83. *See generally* Tex. Water Code § 11.136. As a rule, a surface water right conveyance document should be recorded in the real property records of each county in which the points of diversion and places of use are located. In addition, if the surface water rights are appurtenant to land (and there is no proposed amendment to change the land to which the surface water rights are appurtenant), the conveyance documents should also be recorded in the real property records of each county in which the land is located. If, however, the sale transaction contemplates an amendment that changes the land to which the surface water rights are appurtenant, only the final surface water rights conveyance—unconditional form should be recorded in each county in which the land is located. Recordation of the initial surface water rights conveyance—conditional document, before the TCEQ approved the amendment changing the land to which the surface water rights are appurtenant, could cloud the records and titles if the TCEQ did not approve the requested amendment.

As an added precaution, it is advisable to record the final documents in the real property records of each county in which the water is used, if different from the county or counties in which the points of diversion are located. It is helpful to have duplicate originals of the conveyance document executed for this purpose. Deeds of trust, leases, and other real estate documents pertaining to the surface water rights should be recorded in the same counties as the conveyance document.

The law requires an owner of a surface water right to promptly inform the executive director of the TCEQ of any transfer of water right or change of the owner's address. *See* Tex. Water Code § 11.122; 30 Tex. Admin. Code § 297.82. Persons seeking to transfer surface water rights must file with the TCEQ executive director certified copies or photocopies of the recorded instruments establishing the complete chain of title between the owners of record and the new owner, along with the change of ownership form and the required fee. 30 Tex. Admin. Code § 297.83.

If the surface water rights are subject to the jurisdiction of a watermaster, the TCEQ Watermaster Operations Rules require the new owner to promptly inform the TCEQ executive director of the change of ownership and provide the appropriate ownership documents. 30 Tex. Admin. Code §§ 303.44, 304.43. If the new ownership record is not complete, the executive director will inform the alleged owner by letter of the required submission. For a sixty-day period following the date of that letter, the watermaster will honor "declarations of intent" by the alleged owner in accordance with the water right; after that, however, no such declaration will be honored until the executive director

informs the watermaster of the approved change in ownership. 30 Tex. Admin. Code § 304.43.

Because the place for recordation of surface water rights documents is somewhat unusual, there may be some benefit in recording duplicate originals of the conveyance document in additional county records, in order to provide actual notice of the buyer's surface water rights to any person who may consult these records. As examples, additional locations may include Travis County (where the TCEQ main administrative office is located) and, if the water rights are subject to regulation by a watermaster, the county in which the administrative office of the watermaster is located.

Attorneys dealing with water rights where a watermaster is located should be aware of recording requirements. *See generally* 30 Tex. Admin. Code chs. 303, 304. This is particularly true for water rights subject to the jurisdiction of the Rio Grande watermaster. There are two subsections (j) to section 11.3271 of the Texas Water Code adopted by the legislature in 2003 that have never been reconciled. *See* Tex. Water Code § 11.3271. Under one subsection (j), the watermaster with jurisdiction over the Rio Grande is made the official recorder for all instruments, including deeds, deeds of trust, financing statements, security agreements, and liens that the TCEQ authorizes or requires to be filed in connection with a water right relating to water in the lower, middle, or upper basin of the Rio Grande and that are subject to a permit, certified filing, or certificate of adjudication, and the filing will have the same legal effect as filing under other law for the same type of instrument. Under the other subsection (j), the watermaster is required to maintain a central repository that includes certified copies of all instruments, including deeds, deeds of trust, and liens that the TCEQ requires to be filed in connection with the same type of water rights as are described in the first-referenced subsection (j), and it is expressly stated that on and after September 1, 2003, a lien against a water right shall not be effective against third parties unless a certified copy of the instrument is filed with the watermaster and all requirements under other law are met. It would be prudent when conveying rights or interests in water rights in the Rio Grande to record a duplicate set of original documents with the Texas watermaster, as well as in the real property records of the county or counties in which the documents are otherwise authorized to be recorded, and to also file a certified copy of the documents recorded in the county real property records (at least with regard to liens) with the watermaster.

§ 16.63 General Considerations

The surface water rights sales contract, form 16-18 in this chapter, is drafted as a neutral form of contract, intending to favor neither the buyer nor the seller. For each contract, the basic elements of the transaction are, in general, stated in the sections to be completed at the beginning of the form. Some provisions, however, are required to be completed throughout the contract. The general terms that follow in the form may be used for many transactions. However, the sale of surface water rights is an emerging area of law, and there are no well-established terms of sale. The terms in contracts for the purchase and sale of surface water rights are diverse and heavily negotiated. Additional drafting may be necessary to tailor the forms to the transaction.

§ 16.64 Surface Water Rights Sales Contract

The following sections describe the provisions and terms of form 16-18 in this chapter and include considerations for the attorney in drafting or reviewing a contract, assisting the client during investigation of the surface water rights, and closing the transaction. This commentary is organized in the same order as the sections of the contract.

§ 16.65 Introductory Paragraph: Offer and Acceptance

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

§ 16.66 Defined Terms

§ 16.66:1 Seller and Buyer

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

§ 16.66:2 Title Company or Escrow Agent

Title insurance to insure title to surface water rights in Texas is no longer generally offered by Texas title insurance underwriters, and it is uncertain whether it will be available in the future. Even if available, parties may choose not to obtain title insurance or to close the transaction through a title company. The contract designates a title company or escrow agent to act as the escrow and closing agent in order to address either option. The title company or escrow agent will be responsible for closing the transaction and receiving and disbursing funds under the terms of the contract.

It is advisable to have a written escrow agreement between the title company or escrow agent, the buyer, and the seller that defines the rights and duties of the title company or escrow agent. Form 4-2 in this manual is an escrow agent receipt and escrow agreement. It can be modified for use with an escrow agent other than a title company.

In surface water transactions in which no appurtenant land is being transferred, the parties generally do not provide for a survey. The form provides optional language, however, if there is appurtenant land to be surveyed.

§ 16.66:3 Water Authority

The water rights authorities with jurisdiction over the subject surface water rights will include, at a minimum, the TCEQ. There may also be a watermaster appointed for the river basin and division in which the water rights are located. See section 16.6 above.

§ 16.66:4 Permit or Certificate of Adjudication

Permits and certificates of adjudication have a TCEQ number designation and establish the priority date of the water rights. In addition, the permit or certificate of adjudication, as it may have been previously amended, will describe the water rights authorized in the particular river basin and stream, including any rights of diversion, use, or storage. Diversion and use rights will include, at a minimum, the following details: (1) quantity, expressed in terms of a right to divert a certain number of acre-feet of water, often also limited to a certain rate of diversion (expressed in gallons per minute or cubic feet per second), from a particular watercourse; (2) the current ownership; (3) the place of use; (4) the purpose of use (for example, municipal, irrigation, industrial, recreational); and (5) the precise location of the point or points of diversion. Depending on the river basin from which the water rights are derived, there may be further descriptions. For example, Rio Grande Valley water rights are further described by class (for example, "Class B Water Rights"), a designation relating to the priority and use of the water rights. The permit or certificate of adjudi-

cation will also identify any other special terms or conditions defining the water rights or affecting the owner's exercise of those rights (for example, streamflow restriction requirements or other environmental or conservation requirements).

§ 16.66:5 Buyer's Intended Use of Water Rights

The description of the buyer's intended use (purpose and place of use) of the water rights is important for purposes of determining what amendments to the permit or certificate of adjudication must be obtained from the TCEQ and any other applicable water authority, such as a watermaster, before the transfer of the water rights. The approval process can be both costly and lengthy, particularly if the buyer's intended use requires amendments to the permit or certificate beyond ownership of the water rights, and especially if these amendments are contested by the TCEQ staff, by other water rights holders in the basin, or by other affected parties.

The statement of the buyer's intended use also affects the parties' rights in the event of condemnation before conveyance of the water rights.

§ 16.66:6 Water Rights

The description of the water rights to be conveyed will be based on the permit or certificate of adjudication, amended as needed to accommodate the buyer's intended use, including the rights of diversion, use, or storage set out in the permit or certificate of adjudication, as described in section 16.61 above. Surface water rights may be conveyed in whole or in part, like land. The contract should clearly indicate if only portions of the water rights are being conveyed. The parties can contract for the sale and purchase of all or a portion of (1) the number of acre-feet authorized to be diverted, (2) the diversion rate, (3) storage capacity, or (4) storage reservoirs authorized by the water right. Accordingly, the parties should be specific regarding components of the water right to be sold.

§ 16.66:7 Appurtenant Land

The surface water rights to be sold may be appurtenant to specific land. The description of any appurtenant land is important, regardless of whether the appurtenant land is also to be purchased by the buyer. There may be liens on the appurtenant land that, absent language in the lien documents to the contrary, attach to the water rights. A description of the appurtenant land is therefore important to the buyer's due diligence inquiries, the title investigation, and the determination of the need for lien releases, subordination agreements, or other documents required at closing.

If the water rights permit authorizes the irrigation of specific land, it generally will be appurtenant to the land, unless the water right is owned by a water supply corporation, water district, river authority, or governmental entity authorized to supply water to others. 30 Tex. Admin. Code § 297.81(b). If the buyer intends to use the water on land other than as specified in the permit or certificate of adjudication, an amendment to the permit or certificate of adjudication must be obtained before use. The land to which the water rights are appurtenant may not be the land from which the water is diverted. The permit or certificate of adjudication, or other water authority records, will identify the land authorized to be irrigated ("place of use") to which the permit or certificate of adjudication is appurtenant. Under current TCEQ rules, conveyance of the land to which water rights are appurtenant conveys the water rights, unless the conveyance specifically reserves or excepts the water rights, or the water right has been granted for the irrigation of land not owned by the applicant. 30 Tex. Admin. Code § 297.81(a).

If the water rights are appurtenant to land and the land is not also being conveyed to the buyer, the attorney should verify that the water rights can be severed from the land under applicable statutory, regulatory, and case law. *See Herrmann v. Lindsey*, 136 S.W.3d 286 (Tex. App.—San Antonio 2004, no pet.). If the appurtenant land is also being purchased by the buyer, the drafter can adapt the additional provisions in the forms in chapter 4 in this manual. If the buyer will purchase a portion of the land and a portion of the water rights with which to irrigate the land, the parties should expressly describe in the contract the specific allocation of the water rights to the specific tract of land.

In addition, any fixtures and personal property to be conveyed with the land or the surface water rights should be described in the applicable contract forms. Contract provisions discussed in section 16.21:4 above, providing for UCC searches, should be inserted into the contract form if fixtures or personal property are included in the transaction.

§ 16.66:8 Reserved Surface Water Rights

The seller of surface water rights may retain ownership of some permitted rights; however, a specific reservation is not usually required, as the description of the surface water will specify the number of acre-feet of water that will be sold out of the certificate of adjudication.

In instances in which surface water rights are appurtenant to land, however, if the seller is selling the land and some portion of the water rights, the conveyance of the land and unsevered surface water rights will be by deed, and the seller should expressly state in the contract and the deed the acre-feet of surface water rights that will be severed from the land and retained by the seller. After closing, the seller will generally need to file an application with the TCEQ either to change the designated land on which the severed agricultural or irrigation water rights may be used and the point of diversion or to change the use of the severed water rights from agricultural or irrigation to some other permitted use and to obtain approval of a new point of diversion.

If the water right is being purchased independently of the appurtenant land, and the parties agree that the buyer will have certain use rights on the appurtenant land, such as the right to use the same diversion point(s) or to use storage facilities located at the land, the parties will need to address these property rights in the contract by providing for the seller to grant or convey an easement, a license, a lease, or another property interest at closing.

§ 16.66:9 Earnest Money

The amount of earnest money is negotiable and depends on several factors, including the purchase price, the type of financing, and the relative financial strengths of the parties. Additional factors unique to surface water rights transactions include the required prior approval from the TCEQ and any other applicable water authority, and a generally longer due diligence period.

The parties therefore often provide for more than one earnest money deposit, either over a period of time or based on certain events. In the description of the initial and each additional earnest money deposit inserted into the form, the drafter needs to specify the time when each earnest money deposit is to be made and whether each earnest money deposit is refundable or nonrefundable, in relation to the occurrence of events as the parties proceed towards conditional and final closing of the transaction.

§ 16.66:10 Independent Consideration

If the buyer terminates the contract before the end of the inspection period and the buyer is

otherwise entitled to have the earnest money returned, the contract provides that a stated amount should not be returned to the buyer but should be paid to the seller, because that amount is the independent consideration to the seller for the buyer's right to terminate the contract.

§ 16.66:11 Purchase Price

There is no standard method of determining the purchase price for surface water rights. For further discussion on this topic, the attorney may want to consult Martyn C. Glen, *message URL-Valuation of Water Rights*, *in* The Changing Face of Water Rights in Texas, State Bar of Texas (2004). Exhibit F may be used if the parties agree to seller financing of the purchase. If obtaining third-party financing is a condition to the buyer's obligations, that fact and the terms of the complying financing should be addressed in the contract. See part V. in this chapter and chapters 6 and 8 in this manual for further discussions of financing.

§ 16.66:12 Buyer's and Seller's Liquidated Damages

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

§ 16.66:13 Title Commitment/Title Information

Title insurance to insure title to surface water rights in Texas is no longer generally offered by Texas title insurance underwriters, and it is uncertain whether it will be available in the future. If title insurance is not available, or if the parties agree not to procure title insurance, the contract may instead call for an opinion of counsel to be provided as evidence of title. In that event, certain title information, on which the buyer's title inspection is to be based, is to be delivered to the buyer.

§ 16.66:14 Title Documents

The contract defines title documents to include the permit or certificate of adjudication and instruments affecting title to the surface water rights and the real property referenced in the title commitment or title information. Under paragraph G.2. of the contract, the buyer can terminate the contract on the basis of the title commitment and title documents or the seller's failure to cure the buyer's objections to matters disclosed therein. This provides the buyer with the ability to make objections to title based on the permit or certificate of adjudication or unrecorded documents provided as part of the seller's records.

In addition to checking these documents, the buyer should also review (1) the annual water use reports the seller has filed with the TCEQ, (2) the priority of the seller's water rights relative to other water rights in the same source of supply, and (3) the TCEQ's current records and any applicable TCEQ or watermaster rules reflecting any loss of water rights or priority as a result of the seller's nonuse.

An attorney representing a purchaser or lender acquiring an interest in water rights that are subject to a watermaster program should become familiar with the applicable statutory and program provisions at Tex. Water Code §§ 11.325–.3291, 30 Tex. Admin. Code chs. 303, 304 (Watermaster Operations), and the TCEQ website. Water rights in the Rio Grande below Lake Amistad are allocated on an account basis based on the use of the water, such as municipal and irrigation, instead of on a seniority basis, with priority being given to municipal use. If, in any given month, surplus water is identified over the water needed for municipal use, the water is allocated to the other accounts, such as irrigation. In purchasing water rights, the buyer should determine whether an allocation has been made to the seller, and if so, the purchase contract should address how the water allocation

will be divided between the parties at closing. The cost of administration of water rights by watermasters is allocated among the adjudicated water rights holders, and assessments are made by the TCEQ. In general, no water may be diverted, taken, or stored by or delivered to a person while he is delinquent in the payment of his assessed costs. *See* Tex. Water Code §§ 11.329, 11.455. Purchasers should determine the amount of assessments that have been made against a seller and the payment status as part of their due diligence. The purchase contract should address the manner in which these assessments will be allocated at closing, if appropriate.

§ 16.67 Deadlines

Section A of the contract groups most of the deadlines for ease of reference. Most of the deadlines are stated in terms of a specified number of days after the effective date of the contract or another specific date. The contract provides that time is of the essence; however, final closing cannot occur until such time as the TCEQ and any other applicable water authority has approved the change in ownership and any other amendments to the permit or certificate of adjudication representing the water rights.

§ 16.68 Closing Documents

Section B of the contract lists the documents to be signed and delivered to close the transaction. Paragraph B.1. lists the documents for the conditional closing (before the TCEQ or other water authority approval of the transaction). The parties might consider adding to the list of documents for the conditional closing a power of attorney appointing the buyer as agent of the seller to pursue the necessary proceedings with the TCEQ for approval of the sale and any amendments to the certificate of adjudication or permit. Paragraph B.2. lists the documents for the final closing. Form 16-20 in this chapter is for conveyance of the surface water rights once the TCEQ has approved the change of ownership and any other amendments to the permit or certificate of adjudication. The parties sometimes do not provide for or sign a final unconditional conveyance document, instead relying on the TCEQ's issuance of an amendment to the certificate or permit as satisfying the condition stated in the earlier conditional conveyance document. Both paragraphs B.1. and B.2. in the contract serve as checklists to prepare for closing.

Section C contains a number of exhibits. The attorney should choose the specific exhibits appropriate for the sale.

§ 16.68:1 Exhibit C—Representations; Environmental Matters

Exhibit C contains the parties' representations. These items are always negotiated by the parties and will vary from transaction to transaction. Exhibit C is offered as a checklist; however, not all items will necessarily apply to a sale of surface water rights, and the buyer may want to seek additional representations or warranties with respect to water quality, environmental matters, and the like.

§ 16.68:2 Exhibit D—Seller's Records

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

§ 16.68:3 Exhibit E—Notices, Statements, and Certificates

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

ments, and certificates. Some of the statutory provisions would appear to include the sale of surface water rights, simply because they apply to a sale or conveyance of real property, and no exemption is made for the sale of surface water rights.

§ 16.68:4 Exhibit F—Seller Financing

Exhibit F contains seller-financing terms.

§ 16.69 Investment of Earnest Money

The contract provides that the buyer may direct the title company or escrow agent to invest the earnest money in an interest-bearing account in a federally insured financial institution. If the earnest money is to be invested, the title company will require the buyer's tax identification or Social Security number so that accrued interest may be reported to the Internal Revenue Service.

§ 16.70 Title

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

The contract follows a typical procedure in which the buyer reviews the title commitment or title information, with the permit or certificate of adjudication and the documents provided by the seller. The buyer's review is done during the inspection period. The buyer then has a right to terminate the contract based on the buyer's review or can notify the seller of any objections. After notice, the seller may elect to cure the buyer's objections but is not required to do so. If the seller does not agree to cure, the buyer may either proceed to close the transaction and accept the surface water rights subject to the uncured matters or terminate the contract. However, the seller is obligated to resolve all items listed on Schedule C of the title commitment at or before closing and to cure title matters that arise by, through, or under the seller after the contract is signed.

The contract provides that the condition of title will be established by either a title commitment or an abstract of title, as agreed to by the buyer and the seller. If an abstract of title is furnished, the buyer may have the abstract of title reviewed by an attorney and obtain the attorney's written opinion of the abstract of title. The benefit of obtaining title insurance over an attorney's opinion of title is that title insurers are required to maintain reserves to cover claims that are greater than the malpractice coverage maintained by most law firms. Consequently, there is an increased likelihood of recovery if an error is made by the title company in its determination of title.

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

The attorney should review the signature and effective date of the commitment. The attorney should confirm that the commitment is signed and the issuance date is not more than ninety days before the closing. Otherwise, a new or revised commitment should be ordered.

Schedule A: The attorney should confirm that the proposed insured parties are correctly named, the amounts of insurance are correctly stated, and the correct estate is insured. Record title should be vested in the seller. The attorney also should confirm that the property description

is correct and conforms to the description in the contract.

Schedule B: The attorney should review the following matters:

- Item 1, relating to covenants and restrictions, should be noted as either "Covenants, conditions, and restrictions (other than any restrictions indicating preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin) as set forth in [**recording data**] of the real property records of [**county**] County, Texas" or "Item 1 of Schedule B is hereby deleted in its entirety."
- Item 2 is the standard, preprinted survey exception. It generally would not apply to a transaction involving only surface water rights. If the surface water rights are being conveyed along with land, this exception may be amended and partially deleted to read "any shortages in area" if a current survey approved by the title company is obtained. An additional 5 percent premium is charged to amend the owner policy for a residential transaction; an additional 15 percent premium is charged to amend the owner policy for a commercial transaction. No additional premium is required to amend the mortgagee policy. The responsibility for paying the extra premium for the survey modification in the owner policy of title insurance is often negotiated between the parties, although the pertinent provision in the contract form provides for the extra premium to be paid by the buyer.
- Standard preprinted exceptions item 3 (relating to homestead or community property or survivorship rights) and item 4 (relating to tidelines, lands comprising the shores and beds of waterways, lands beyond the line of the harbor or bulkhead lines, filled-in lands, artificial islands, statutory water rights, and areas extending from the line of mean low tide to the line of vegetation) apply only to the owner policy and cannot be deleted or amended.
- Item 5, relating to property taxes, can be reviewed for the status of tax payments and the existence of rollback taxes; however, taxes generally are not involved in a transaction involving only surface water rights.
- Item 6, relating to the terms and conditions of the documents creating the insured's interest in the land, cannot be revised. The referenced documents should, however, be reviewed.
- Item 7, relating to materialman's and mechanic's liens, applies only to the mortgagee policies on interim construction loans and may be deleted if satisfactory evidence that the paragraph does not apply is furnished to the title company. This exception would not generally apply to a transaction involving only surface water rights.
- Item 8, relating to subordinate liens and leases, applies only to the mortgagee policy.
- Item 9, relating to existing liens, should show only liens permitted by the contract. Copies of all lien documents should be reviewed with regard to due-on-sale provisions; dragnet clauses relating to other debt; condemnation provisions; notice, cure, and default provisions; and subordinate financing. A superior lienholder's estoppel agreement should be obtained from any lienholder whose note and lien are being either assumed or taken "subject to."

All other special exceptions should be carefully reviewed to determine if and how they affect the buyer's surface water rights.

Schedule C: The attorney should ensure that the seller has complied with the contract by curing and effectively removing all matters appearing on Schedule C at or before closing. Schedule C matters may require obtaining releases of liens, settling specific claims or lawsuits affect-

ing title to the water rights, furnishing evidence of good standing and authority (corporate resolution or partnership agreement), and obtaining proof of property settlement and divorce, proof of heirship or probate of a particular estate, or evidence relating to a bankruptcy. From the buyer's perspective, curative matters appearing on Schedule C should be attended to by either the seller or the title company. The contract requires that the seller resolve all Schedule C items before closing, but if that provision is not used, the buyer should object to all Schedule C items in the commitment to ensure that they are not added to Schedule B of the title policy.

The *Basic Manual of Rules, Rates and Forms for the Writing of Title Insurance in the State of Texas* should be consulted for information on the various types of policies and endorsements that are available and their respective costs.

§ 16.71 Inspection Period

The inspection period is intended to give the buyer the opportunity to investigate the surface water rights and real property and decide whether to close the transaction. The contract provides that the buyer may terminate the contract at any time before the end of the inspection period for any reason and have the earnest money returned. The inspection is based on the seller's records and information in either the title commitment and documents referenced therein, if the parties have provided for title insurance, or the title information as defined.

§ 16.72 Representations and Warranties

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

In negotiating representations, the parties should specify whether representations are to be absolute or based on the seller's knowledge and belief; whether the representations will be based on the knowledge of the entity that is the seller or on the knowledge of specified individuals; whether the seller must perform further investigation to make the representations or may rely on its current knowledge, without further investigation; and whether and to what extent the representations will survive closing.

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

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

certificates required by law and regulation), or in the closing documents.

The following optional clauses are also provided:

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

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

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

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

§ 16.73 Conveyance of Water Rights—Conditional; Application for Approval; Cooperation; Condition of Water Rights until Final Closing; Memorandum/No Recording of Contract

The parties' signing of the contract and the expiration of the inspection period without the buyer's termination of the contract obligates the seller to conditionally convey the water rights to the buyer, pending the TCEQ's and any other required water authority's approval of the change in ownership and any amendments necessary to accommodate the buyer's intended use. It also obligates the parties to pursue and cooperate in the water authority approval process, to maintain and operate the water rights in a certain manner pending the approval process, and to proceed in a certain fashion in the event of condemnation or claims affecting the water rights. The contract also sets out the parties' agreement not to record the contract; however, given the sometimes lengthy duration involved in obtaining water authority approval, the buyer may want to record a memorandum of the contract in the public records. See form 16-16 in this chapter.

Form 16-19 is a proposed form of conditional conveyance to be signed by the parties at the initial, conditional closing on the contract. The surface water rights are not deemed transferred, however, until the TCEQ (and any other applicable water authority) has approved the change in ownership and any amendments to the certificate or permit. The parties often do not execute a second unconditional conveyance document (form 16-20); rather, once the condition (TCEQ approval) has been satisfied through issuance of the amended certificate or permit, the conveyance is treated as final.

§ 16.74 Conditions of Contract and Termination

The contract provides for disposition of the earnest money if the TCEQ does not approve the transfer of ownership and any other amendments sought by the buyer by a specific date and after any other termination of the contract. It also provides for posttermination obligations. It is possible that the TCEQ's approval of a transfer may be overturned on judicial review, and the parties may want to provide how the sale is affected if judicial review is sought by a protestant.

§ 16.75 Final Closing

Once the TCEQ has approved the transaction and issued any necessary amendments to the permit or certificate of adjudication, the parties proceed to the final closing. The contract allocates closing obligations and transaction costs between the parties. In the case of irrigation surface water rights, the water rights will become appurtenant to the land approved for the "place of use" in the amended certificate or permit. To facilitate title examinations, the parties may want to describe this appurtenant property in an unconditional conveyance document signed at the final closing (form 16-20 in this chapter). The parties do not want to describe this property as appurtenant in the initial, conditional conveyance document (form 16-19), because of the risk that the TCEQ or other applicable water authority may not approve the transaction. There may be a cloud on the title to the water rights if the water rights were described as appurtenant to property in the initial conditional conveyance but not later approved as appurtenant to property by the applicable water authority.

§ 16.76 Default and Remedies

The contract provides that the buyer may elect one of the following remedies for the seller's default: termination (with disposition of the earnest money and payment of additional liquidated damages to the nondefaulting party) or specific performance. In addition, the buyer may terminate if the seller's representations are not true and correct or if a warranty set forth in the contract is breached. The parties may be entitled to payment of actual damages and perhaps of consequential damages if the untruth or breach is first discovered after closing. The contract is drafted to limit the parties' remedies, but remedies are often negotiated.

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

§ 16.77 Assignment

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

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

§ 16.78 Closing Functions

The party handling the closing (the title company or escrow agent) commonly attends to the matters discussed in the following sections.

§ 16.78:1 Payoff Information and Other Closing Expenses

Written request should be made to each lienholder for the lienholder's written payoff statement. The lienholder should be requested through an authorized representative to state the remaining principal balance due on the note, the accrued interest as of a certain date, a per diem amount of interest, and whether the lienholder will credit the amount held in the escrow account, if one exists, to the total due or, alterna-

tively, refund the amount directly to the borrower. Closing must occur and payment be made to the lienholder before the release of lien will be signed.

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

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

§ 16.78:2 Ad Valorem Taxes

Currently surface water rights are not assessed and taxed independently from the surface estate for ad valorem tax purposes. Consequently, the contract does not provide for a proration of ad valorem property taxes at closing, but it does require that the taxes be paid in full at closing by the seller if they are due and payable at the time of closing.

§ 16.78:3 Closing Documents

The closing agent may be expected to prepare or provide several documents.

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

Affidavits: Affidavits concerning debts and liens, parties in possession, identity of the parties, leases, and the parties' marital status will likely be required at closing by the title company, escrow agent, or a party's attorney.

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

§ 16.78:4 Funding

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

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

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

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

If title insurance is obtained through a title agent or fee attorney, the attorney for the lender and buyer should consider obtaining an insured closing service letter from the title insurance underwriter whose policies are to be issued. This letter indemnifies the lender or buyer for certain wrongful acts of the title agent or fee attorney relating to the handling of closing funds. See forms T-50 and T-51 of the *Basic Manual of Rules, Rates and Forms for the Writing of Title Insurance in the State of Texas*. See **https://www.tdi.texas.gov/title/titlemm5.html**.

§ 16.78:5 Recording Documents

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

Section 297.83 of the Texas Commission on Environmental Quality regulations currently provides only that the "written instrument evidencing a water right ownership transfer shall be recorded in the office of the county clerk." 30 Tex. Admin. Code § 297.83. It does not specify in which county clerk's office the instrument should be recorded. To assure notice to all persons in affected counties, the parties may want to prepare several duplicate originals to be filed in Travis County (where the TCEQ is located) and in each of the counties (1) from which the water is appropriated (that is, diverted), (2) in which the water is used, (3) in which any of the appurtenant land is located, and (4) in which the watermaster is located.

Attorneys dealing with water rights within a watermaster operation should be aware of the notice and recording requirements applicable to watermaster operations. *See generally* 30 Tex. Admin. Code chs. 303, 304. This is particularly true for the Rio Grande watermaster. There are two subsections (j) to section 11.3271 of the Texas Water Code adopted by the legislature in 2003 that have never been reconciled. *See* Tex. Water Code § 11.3271. Under one subsection (j), the watermaster with jurisdiction over the Rio Grande is made the official recorder for all instruments, including deeds, deeds of trust, financing statements, security agreements, and liens that the TCEQ authorizes or requires to be filed in connection with a water right relating to water in the lower, middle, or upper basin of the Rio Grande and that are subject to a permit, certified filing, or certificate of adjudication, and the filing will have the same legal effect as filing under other law for the same type of instrument. Under the other subsection (j), the watermaster is required to maintain a central repository that includes certified copies of all instruments, including deeds, deeds of trust, and liens that the TCEQ requires to be filed in connection with the same type of water rights as are described in the first-referenced subsection (j), and it is expressly stated that on and after September 1, 2003, a lien against a water right shall not be effective against third parties unless a certified copy of the instrument is filed with the watermaster and all requirements under other law are met. It would be prudent when conveying rights or interests in water rights in the Rio Grande to record a duplicate set of original documents with the Texas watermaster, as well as in the real property records of the county or counties in which the documents are otherwise authorized to be recorded, and to also file a certified copy of the documents recorded in the county real property records (at least with regard to liens) with the watermaster.

§ 16.78:6 Closing Instructions

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

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

§ 16.79 Additional Considerations

§ 16.79:1 Transactions Involving Foreign Persons

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

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

§ 16.79:2 Closing Checklist

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

§ 16.79:3 Postclosing Considerations

After closing, recorded documents and relevant title insurance policies issued after closing should be reviewed for accuracy and compliance with the title commitment. The owner policy should be dated on or after the recording date of the deed conveying title to the buyer, and the mortgagee policy should be dated on or after the recording date of the deed of trust of the insured lien.

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

If the transaction fails to close, but the TCEQ and any other water authority have approved the transfer or any amendments to the permit or certificate of adjudication, the parties can ask the TCEQ and any other water authority to delete the amendment to the permit or certificate of adjudication.

[Section 16.80 is reserved for expansion.]

V. Water Rights Lien Documents

§ 16.81 General Considerations

The lien forms contained in this chapter may be used, with appropriate modification, for either groundwater rights or surface water rights transactions.

To address both the real and the personal property characteristics of water rights, it is advis-

able to incorporate both deed-of-trust provisions and security agreement provisions in loan documents. This can be done in one or more documents, depending on the transaction. The water rights deed of trust (form 16-21 in this chapter) is an adaptation to water rights of the basic deed of trust (form 8-1 in this manual). The water rights security agreement (form 16-22) is an adaptation of form 9-2, the basic form for security agreement found in chapter 9. Depending on the nature and use of the water rights being pledged, and the other collateral associated with those water rights, the additional clauses and forms from chapters 8 and 9 should be added to the basic forms appearing in this chapter. These additional clauses from chapters 8 and 9 are thus referenced in this chapter and should be inserted into the form 16-21 and form 16-22, as appropriate.

In any transaction, the pledged water rights may have both real and personal property characteristics. For example, surface water rights are real property, requiring use of a deed of trust. Once the water is transported for use, however, the water may become personal property. In addition, the permit or certificate of adjudication evidencing the surface water rights may constitute a separate property right. It is not clear under existing case law whether the permit or certificate of adjudication would constitute an interest in real property, similar to a license or land development permit, or whether it would be considered personal property in the nature of a general intangible. Consequently it is advisable to use both a deed of trust and a security agreement with financing statements in loans secured by groundwater or surface water rights, to ensure that the lender has a lien on all real and personal property. The separate security agreement (form 16-22, adapted from the basic form for security interests in personalty) may be used if there is other purely personal property that secures the loan. Form 16-21 (which includes the additional security agreement language of clause 8-9-10) may be used to create both the real property lien and a personal property security interest in a single deed of trust document when there is no other personal property.

In other types of transactions, for example, groundwater rights completely severed from real property and represented by only permits (as described in part III. of this chapter) or groundwater rights for on-site production and for which a groundwater permit may have been issued (as described in part II.), the groundwater rights are real property, the produced water may be personal property, and the permit itself may be either an interest in real property or a general intangible under the Texas Uniform Commercial Code.

If a facility such as a well or pipeline is included in the collateral, this property may constitute either a fixture or equipment. Consequently, it is advisable to describe this type of facility in the deed of trust and security agreement and to file financing statements as both a fixture filing and a personal property filing.

In loan transactions in which water rights, permits, or facilities are used as collateral, the attorney drafting the loan documents will want to consider the importance of including in the loan documents a UCC article 9 security agreement, UCC financing statements, and a deed of trust to address both the real and the personal property aspects of water rights. The places for recording the deed of trust and financing statements are discussed in section 16.81:4 below.

In addition to using a deed of trust and security agreement, the attorney should consider using other documents to more fully protect the lender's lien rights, particularly in instances in which the water rights are subject to the jurisdiction of a water authority (for example, the TCEQ, a watermaster, or a groundwater district authority). Persons dealing with water rights, including the water authority itself, may not check the real property records or the UCC lien records (particularly those in another state)

before taking action in connection with the water rights. They instead may look solely at the information filed in the water authority's records. There is currently no mechanism for recording liens in the records of any water authority. Furthermore, there is no statutory or case law that clearly requires a water authority to consult real property records or UCC lien records, or to acknowledge the rights of a lender, before authorizing a modification, termination, or transfer of a permit.

Consequently, the owner of the water rights pledged as collateral may adversely affect the value of those water rights to the lender by obtaining a change in the permitted use of the water rights or transferring the permit in whole or in part to another person without the lender's knowledge. The lender may then have a difficult time reestablishing its rights in the collateral. In order to put the water authority, and persons checking the water authority's records, on actual notice of the lender's lien on the water rights, the attorney may want to file a form for notice of lender's rights in the records of the water authority. The attorney may also want to have the owner of the water rights give written instructions to the water authority directing it not to take any action with regard to the permit or certificate of adjudication without the written authorization of the lender. Because there is no formal mechanism for filing such notice or instructions with a water authority, it is possible that the water authority may reject such a filing or refuse to comply with the instructions. Nevertheless, the lender will be in a better position to assert its rights against the water authority or a person who obtained a transfer of the permit or certificate, if such notice or instructions were delivered to the water authority, to be placed in the records pertaining to the permit or certificate for the pledged water rights. One or more of the following forms may be used: memorandum of groundwater loan (form 16-23), notice of the lender's interest in water rights (form 16-24), and the permittee's instruction letter to water authority (form 16-25).

§ 16.81:1 Groundwater vs. Surface Water

Form 16-21 and form 16-22 in this chapter are designed for establishing a lien on or security interest in either groundwater or surface water rights. The forms contain suggested alternative clauses to describe the type of water rights being encumbered as security and categories of additional property associated with the water rights that might also serve as collateral for the loan.

§ 16.81:2 Deed of Trust

A deed of trust is a mortgage on real property with a power of sale. Although a deed of trust by its literal terms conveys the real property in trust to the trustee, its actual effect under Texas law is to create a lien against the property to secure a debt of the grantor of the lien to the beneficiary of the lien. This chapter provides one basic water rights deed of trust form (form 16-21), which is an adaptation to water rights of form 8-1 in this manual. If the borrower is assuming obligations under the seller's existing loan for which the water rights serve as collateral, similar adaptations can be made to the deed of trust to secure assumption (form 8-2). If a leasehold interest in the water rights is collateral for the loan, the leasehold deed of trust (form 8-10) can be revised. As discussed in this chapter and chapter 8, the forms may be adapted to a variety of situations.

A description of collateral in the deed of trust should be inserted for each category of property intended as collateral. In the water rights category, the description will include such identifying information from the permit or certificate of adjudication as the TCEQ or other water authority number designation, priority date, amendments, water rights authorized (including any rights of diversion, use, or storage), quantity,

particular watercourse or aquifer from which the water rights come, ownership, place of use, purpose of use (for example, municipal, irrigation, industrial, recreational), and point of diversion. Also, if adapting form 8-10 for a leasehold deed of trust on the water rights, note that the description of the property in the leasehold deed of trust should be of the leasehold interest of the lessee granting the deed-of-trust lien.

In the case of irrigation surface water rights, the water rights will be appurtenant to the land designated as the "place of use" in the certificate or permit. If the land to which the water rights are appurtenant is also intended as collateral for the loan, the description of that land should be inserted in the definition of "appurtenant land." If the land from which the water is diverted or on which it is to be used is not intended as collateral for the loan, the land should be described here as the "surface estate."

The deed of trust for water rights contains security agreement and financing statement language. This security agreement language, in addition to addressing the personal property aspects of water rights, can also be used to create a security agreement in any fixtures associated with the real estate and water rights. For drafting instructions and guidance in using a deed of trust with a security agreement, see sections 8.11 and 9.8.

There are a number of other considerations in using a deed-of-trust form, depending on the nature of the loan transaction and related collateral. The attorney can consult chapter 8 to determine whether and to what extent these additional considerations apply, and find additional guidance for completing and modifying the provisions of form 16-21 to reflect the dynamics in the loan transaction.

§ 16.81:3 Security Agreement

Chapter 9 of the Texas Business and Commerce Code, titled "Secured Transactions," governs consensual, contractual security interests in personal property and fixtures that secure payment or performance of an obligation. Tex. Bus. & Com. Code § 9.109(a)(1). Almost all water rights in Texas are evidenced by a permit or a certificate of adjudication. Because a permit or certificate of adjudication resembles a general intangible, form 16-22 in this chapter, for creating a security interest in water rights, is an adaptation of form 9-2, the security agreement found in chapter 9 in this manual.

If water rights are considered real property, an argument can be made that the secured transactions provisions of chapter 9 of the Business and Commerce Code do not apply to liens or security interests in water rights. Chapter 9 contains a real property interest exclusion. With an exception for fixtures, the creation or transfer of an interest in or a lien on real property, including a lease or rents, as defined by section 64.001 of the Property Code, is not governed by chapter 9. Tex. Bus. & Com. Code § 9.109(d)(11). By comparison, however, the definition of "account" under chapter 9 explicitly includes rights to payment for property (real or personal) sold. Tex. Bus. & Com. Code § 9.102(a)(2). In addition, security interests in farm products are governed by chapter 9, and specifically include supplies produced or used in farming operations, including aquatic farming operations. *See* Tex. Bus. & Com. Code § 9.102(a)(34), (a)(35).

To eliminate the risks associated with water rights collateral being classified as either exclusively real or exclusively personal property to which different rules may apply, a lender may ask the debtor to provide both a deed of trust and a security agreement. Although the deed of trust (form 16-21) contains security agreement language that may be sufficient to create a lien on the personal property aspect of water rights, the

additional provisions in the security agreement (form 16-22) may provide greater clarity and guidance regarding the parties' rights and obligations, particularly if related collateral for the loan has strictly personal property characteristics.

The rules for creating and perfecting a security interest are complex. Accordingly, in the context of any particular transaction, the attorney should consult chapter 9, giving due consideration to all of the types of collateral involved in the loan transaction. The rules relating to classification and definitions of collateral, creation, attachment, perfection, priority, choice of law, and other issues will vary, depending on the transaction. Chapter 9 contains instructions that will provide guidance in completing and modifying form 16-22 and additional clauses that should be considered. Because of the complexity of the rules for creating and perfecting a security interest, the attorney should also consult the statutory text, the official comments, secondary sources, and any relevant case law.

§ 16.81:4 Attachment, Perfection, and Recording

There are currently no express rules governing attachment and perfection of a security interest in water rights. For other types of collateral, there are four basic methods of perfecting an attached security interest, although as few as one of those methods may be effective, depending on the specific category of collateral. Those methods include (1) a properly completed financing statement (*see* Tex. Bus. & Com. Code § 9.102(a)(39)) filed in the appropriate UCC filing offices, (2) possession of the collateral in the secured party, (3) the secured party's control of the collateral, and (4) in a few cases, automatic perfection on attachment of a security interest. If there are alternative methods of perfection, one secured party may obtain priority over another secured party, depending on the method used to perfect. For guidance on the various methods of attachment and perfection, consult sections 9.4 and 9.5 in this manual.

The lender should record the deed of trust in the place for recordation of the deed or conveyance documents described in section 16.12 above (groundwater rights for production on-site), in section 16.42 (permitted groundwater rights for production off-site), and in section 16.62 (surface water rights), as applicable. Given the ambiguities surrounding attachment and perfection of a security interest in water rights, and the different locations from which surface water rights or permitted groundwater rights may originate or be used, a lender may want to use as many means as it can to make sure persons are put on actual and constructive notice of the lender's lien rights and security interests. Consequently, note should be taken of the additional alternative places for recording documents described in sections 16.42, 16.62, and 16.78:5.

Attorneys dealing with water rights within a watermaster operation should be aware of the notice and recording requirements applicable to watermaster operations. *See generally* 30 Tex. Admin. Code chs. 303, 304. This is particularly true for the Rip Grande watermaster. There are two subsections (j) to section 11.3271 of the Texas Water Code adopted by the legislature in 2003 that have never been reconciled. *See* Tex. Water Code § 11.3271. Under one subsection (j), the watermaster with jurisdiction over the Rio Grande is made the official recorder for all instruments, including deeds, deeds of trust, financing statements, security agreements, and liens that the TCEQ authorizes or requires to be filed in connection with a water right relating to water in the lower, middle, or upper basin of the Rio Grande and that are subject to a permit, certified filing, or certificate of adjudication, and the filing will have the same legal effect as filing under other law for the same type of instrument. Under the other subsection (j), the watermaster is required to maintain a central repository that includes certified copies of all instruments,

including deeds, deeds of trust, and liens that the TCEQ requires to be filed in connection with the same type of water rights as are described in the first-referenced subsection (j), and it is expressly stated that on and after September 1, 2003, a lien against a water right shall not be effective against third parties unless a certified copy of the instrument is filed with the watermaster and all requirements under other law are met. It would be prudent when conveying rights or interests in water rights in the Rio Grande to record a duplicate set of original documents with the Texas watermaster, as well as in the real property records of the county or counties in which the documents are otherwise authorized to be recorded, and to also file a certified copy of the documents recorded in the county real property records (at least with regard to liens) with the watermaster.

Because water rights, permits, and facilities have both real and personal property characteristics, financing statements used in the loan transaction should be treated as applying to both fixtures and personal property and should be recorded in the appropriate locations as provided by the Uniform Commercial Code (title 1 of the Texas Business and Commerce Code). If applicable law requires the financing statement to be filed with the secretary of state of a state other than Texas (for example, in the state of the debtor's location), the lender may still want to file an additional financing statement with the Texas secretary of state, to provide actual notice of the security interest to persons who check for filings in Texas. The UCC forms are available in a fill-in-the-blank format over the Internet from the Texas secretary of state at **www.sos.state.tx.us/ucc/uccforms.shtml**. For guidance in filling out the UCC forms, consult sections 9.13 through 9.17 in this manual.

[Sections 16.82 through 16.89 are reserved for expansion.]

VI. Additional Resources

§ 16.90 Additional Resources

Bradbury, James D. "Surface Water Markets Including Valuation." In *Changing Face of Water Rights in Texas, 2017*. Austin: State Bar of Texas, 2017.

Caroom, Douglas C. and Susan M. Maxwell. "Overview of Texas Water Rights and Water Development." In *Texas Water Law Institute, 2009*. Austin: University of Texas School of Law, 2009.

Cheney, Denise. "Water Documents: Real Estate Forms Manual." In *Changing Face of Water Rights in Texas, 2017*. Austin: State Bar of Texas, 2017.

Cheney, Denise, and Ramona Kantack Alcantara. "Basic Water Transaction Forms." In *Changing Face of Water Rights in Texas, 2009*. Austin: State Bar of Texas, 2009.

Dugat, William D. "All Appropriate Inquiries in Connection with Groundwater Purchases." In *Changing Face of Water Rights in Texas, 2015*. Austin: State Bar of Texas, 2015.

Glen, Martyn C. "Valuation of Water Rights." In *Changing Face of Water Rights in Texas, 2004*. Austin: State Bar of Texas, 2004.

Jolley, Grady B. "Forms and Transactional Issues in Private Sales of Groundwater and Water Rights." In *Changing Face of*

Water Rights in Texas, 2007. Austin: State Bar of Texas, 2007.

———. "Water Reuse as a Tool in Real Estate Development Opportunities and Challenges." In *Changing Face of Water Rights Advanced Course, 2010*. Austin: State Bar of Texas, 2010.

Jolley, Grady B., and Rhonda G. Jolley. "Water—Can It be Severed?" In *Advanced Real Estate Law Course, 2010*. Austin: State Bar of Texas, 2010.

Jolley, Grady B., and Edmond R. McCarthy, Jr. "Water Is Not Just for Diluting the Banker's Good Scotch: Lending on Water Development Collateral." In *Mortgage Lending Institute, 2016*. Austin: University of Texas School of Law, 2016.

Jolley, Rhonda G. "Water Rights: Methods of Conveyancing and Documentation." In *Real Estate Law Boot Camp, 2008*. Austin: State Bar of Texas, 2008.

———. "Who Owns the Groundwater? State? Landowner? No One?" In *Advanced Real Estate Law Course, 2009*. Austin: State Bar of Texas, 2009.

McCarthy, Edmond R., Jr. "Templates of Issues In Buying and Selling Surface Water Rights." In *Changing Face of Water Rights in Texas, 2016*. Austin: State Bar of Texas, 2016.

Routh, James H., Jr. "Groundwater Conveyancing (Sale and Lease) from the Landowner's Perspective." In *Changing Face of Water Rights in Texas, 2005*. Austin: State Bar of Texas, 2005.

Ruttenberg, Frank Z. "Basics of Groundwater Transfer Agreements." In *Advanced Real Estate Law Course, 2010*. Austin: State Bar of Texas, 2010.

———. "Due Diligence." In *Changing Face of Water Rights in Texas, 2008*. Austin: State Bar of Texas, 2008.

———. "Water Law Transfer Agreements." In *Changing Face of Water Rights Advanced Course, 2010*. Austin: State Bar of Texas, 2010.

———. "Water Rights in Texas." In *Advanced Real Estate Law Course, 2008*. Austin: State Bar of Texas, 2008.

Sahs, Mary K., ed. *Essentials of Texas Water Resources*. 6th ed. Austin: State Bar of Texas, 2020.

Sherman, Lynn, and Edmond R. McCarthy, Jr. "'Marketing' Your Water—Tips for Selling or Leasing Groundwater & Surface Water Rights." In *Changing Face of Water Rights In Texas, 2015*. Austin: State Bar of Texas, 2015.

[Reserved]

Form 16-8

Partial Release of Lien

[Water Rights On-Site Production]

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

Date:

Holder of Note and Lien:

Holder's Mailing Address:

Owner of Groundwater Rights:

Owner's Mailing Address:

Note

Date:

Original principal amount:

Borrower:

Lender:

Note and Lien Are Described in the Following Documents: [**include recording information**]

"Groundwater" means all of the underground water, percolating water, artesian water, and any other water from any and all depths and reservoirs, formations, depths and horizons beneath the surface of the Real Property, excluding underflow or flow in a defined subterranean channel.

"Reserved Groundwater" means the right of the Borrower to use Groundwater in, on, and under the Real Property as more fully set out and described in the Groundwater Rights Warranty Deed from Borrower to Owner of Groundwater Rights of even date, recorded in the county or counties where the Real Property is located.

"Real Property" means the following: [**describe real property**].

"Property to Be Released from Lien" means all the Groundwater now or in the future located in, on, or under the Real Property, excepting and excluding the Reserved Groundwater, together with all associated rights related to the Groundwater, including but not limited to the right to capture, explore for, drill for, develop, withdraw, produce, transport, or otherwise beneficially use the Groundwater; the nonexclusive right to use as much of the surface of the Real Property as is reasonably necessary for the exercise of the associated rights, including the right of ingress and egress; and all permits, licenses, or other governmental authorizations relating to any of the foregoing, including rights under any permit issued by the applicable governmental authority.

For value received, Holder of Note and Lien releases only the Property to Be Released from Lien and from all liens held by Holder of Note and Lien, without regard to how they were created or evidenced.

When the context requires, singular nouns and pronouns include the plural.

_____

[**Name of lienholder**]

By:

_____

[**Name of representative**]

_____

[**Title**]

Include acknowledgment.

[Reserved]

Form 16-11

Partial Release of Lien

[Water Rights Off-Site Production]

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

Date:

Holder of Note and Lien:

Holder's Mailing Address:

Owner of Groundwater Rights:

Owner's Mailing Address:

Note

Date:

Original principal amount:

Borrower:

Lender:

Note and Lien Are Described in the Following Documents: [**include recording information**]

Real Property: [**describe real property from which groundwater rights will be obtained**]

Groundwater Rights: Seller's perpetual right to withdraw up to [**number**] acre-feet per year of [**name**] Aquifer permitted [irrigation/industrial/[and/or] municipal] groundwater (the

"Groundwater") relating to the Real Property. The Groundwater Rights include all of the real and personal property rights, appurtenances, hereditaments, licenses, and contracts, if any, related to or pertaining to the Groundwater, including Permit[s] No[s]. [**number[s]**] [**include if recorded:** , recorded in Volume [**number**], Page [**number**], of the Official Public Records of [**county**] County, Texas] (the "Permit"), as amended or modified, as applicable, insofar as it pertains to the Groundwater Rights, including, but not limited to—

1. all of the real and personal property rights, appurtenances, authorities, licenses, consents, and contracts, if any, relating to or pertaining to the Groundwater, which will also include all common-law property rights in and to the Groundwater as well as those rights or interests that now or in the future may be useful or necessary to withdraw or otherwise beneficially use the Groundwater Rights (the "Appurtenant Rights");

2. all permit rights (including the right in and to the Permit that relates to the Groundwater Rights) allowing for possession, withdrawal, or use of the Groundwater (the "Permit Rights"); and

3. all other rights to withdraw and beneficially use the Groundwater, Appurtenant Rights, Permit, or Permit Rights, together with all modifications, amendments, renewals, extensions, or successor or substitute permits relating to any of the above-described items.

Property to Be Released from Lien: the Groundwater Rights.

For value received, Holder of Note and Lien releases only the Groundwater Rights from Lien and from all liens held by Holder of Note and Lien, without regard to how they were created or evidenced.

When the context requires, singular nouns and pronouns include the plural.

_____

[Name of lienholder]

By:

_____

[Name of representative]

_____

[Title]

Include acknowledgment.

[Reserved]

Form 16-14

Assignment and Assumption of Lease

[Water Rights]

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

Date:

Assignor:

Assignor's Mailing Address:

Assignee:

Assignee's Mailing Address:

[Real Property:]

Water Rights:

Lease

Date:

Lessor:

Lessor's Address:

Lessee:

Lessee's Address:

Amendments:

Consideration:

Assignor is conveying the Water Rights to Assignee by warranty deed dated this date.

Assignor, for the Consideration and subject to the Reservations from Conveyance and the Exceptions to Conveyance and Warranty in the warranty deed, to the extent they affect the Lease, assigns to Assignee all of Assignor's right, title, and interest in and to the Lease. Assignor binds Assignor and Assignor's heirs and successors to warrant and forever defend all and singular Lessor's interest in the Lease to Assignee and Assignee's heirs, successors, and assigns against every person whomsoever lawfully claiming or to claim the same or any part thereof [**include if applicable:** when the claim is by, through, or under Assignor but not otherwise], except as to the Reservations from Conveyance and the Exceptions to Conveyance and Warranty in the warranty deed, to the extent they affect the Lease.

Assignee assumes and agrees to perform Lessor's obligations under the Lease arising after this date. The obligation to repay security and prepaid rental deposits to Lessee under the Lease is limited to the amount of cash delivered or credited by Assignor to Assignee with respect to security and prepaid rental deposits. Assignee will indemnify, defend, and hold Assignor harmless from any loss, attorney's fees, expenses, or claims arising out of or related to Assignee's failure to perform any of the obligations of Lessor under the Lease after this date.

Assignor will indemnify, defend, and hold Assignee harmless from any loss, attorney's fees, expenses, or claims arising out of or related to Assignor's failure to perform any of the obligations of Lessor under the Lease before this date.

When the context requires, singular nouns and pronouns include the plural.

_____

[Name of assignor]

[Name of assignee]

Include acknowledgments. Attach exhibits.

[Reserved]

Form 16-24

Notice of Lender's Interest in Water Rights and Permit

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

Date:

Borrower:

Borrower's Mailing Address:

Lender:

Lender's Mailing Address and Contact Information:

Loan officer:

Phone:

E-mail:

Date of Loan:

Loan No.:

[Real Property:]

Water Rights, including any Permit[s] now existing or hereafter issued:

All persons dealing with the Water Rights or the Permit[s] issued in connection with the Water Rights are hereby notified of Lender's interest in the Water Rights and Permit[s].

Lender has made a loan to Borrower secured by a lien and a security interest in Borrower's Water Rights and Permit[s]. Under the terms of the loan documents—

1. If Borrower defaults on the loan, Lender has the right to foreclose on its security interest in the Water Rights and to sell or acquire the Water Rights.

2. Lender's prior written consent is required for a sale or conveyance of any interest in the Water Rights and assignment of all or any portion of the Permit[s].

3. Lender's prior written consent is required for the issuance of [a] Permit[s] for the Water Rights and Lender must sign the application for issuance of [a] Permit[s].

4. Lender's prior written consent is required for a modification of the Water Rights or the Permit[s] and Lender must sign the application for modification of the Water Rights or the Permit[s].

If a Release of Lender's security interest in the Water Rights and Permit[s] does not appear in these records, then any person dealing with the Water Rights or the Permit[s] should assume that Lender still has a lien and security interest in the Water Rights and the Permit[s], even if Borrower has conveyed its interest in the Water Rights or assigned or modified the Permit[s]. You may contact Lender to determine whether the security interest has been released.

Borrower:

By _____
Printed Name:

Lender:

By _____
Printed Name:
Title:

Include acknowledgments.

[Reserved]

Form 16-25

Permittee's Instruction Letter to Water Authority

[**Date**]

[**Name and address of water authority**]

Re: Lender's Consent Required for a Transfer, Termination, or Modification of Permit No. [**number**]

[**Salutation**]

I am the owner of the water rights described in Permit No. [**number**] (the "Permit") and the holder of the Permit. I have obtained a loan from [**name**] ("Lender") in the original principal amount of $[**amount**], which is secured by a [first-lien] deed of trust and security interest in the water rights and Permit. Under these loan documents, as long as the loan is outstanding, Lender's consent is required for a transfer, termination, or modification of the water rights and Permit.

You are hereby directed not to authorize or approve a transfer, termination, or modification of the Permit unless the [**name of water authority**] has received the written consent of Lender to the transfer or modification or a copy of a written release of the lien and security interest. The consent may be evidenced by the signature of Lender on the application for transfer, termination, or modification submitted to you or by separate written authorization signed by Lender. Alternatively, no consent will be required if you receive a copy of a release or partial release of the lien and security interest in the water rights and Permit signed by Lender.

Questions regarding this matter should be directed to Lender at the following address:

[**Name of lender**]

[**Contact person**]

[**Address**]

Re: [**loan number**]

Phone:

E-mail:

Please include a copy of this letter with your file and records on the water rights and Permit.

Thank you for your cooperation.

Sincerely,

_____

[**Name of permittee**]

Form 16-26

[Name of district] Groundwater Conservation District Application of [name of applicant] for Transfer of Ownership of Wells and Operating [and Transport] Permits Owned by [name of permittee]

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

Pursuant to rule[s] [**number[s]**] of the [**name of district**] Groundwater Conservation District ("District") as amended, [**name of applicant**] ("Applicant"), as New Owner, and [**name of permittee**] ("Permittee"), as Current Owner, file this Application to Transfer the Ownership of Permittee's Permits for Nonexempt Wells described herein and, in support thereof, provide the following information.

A. Ownership of Wells

Applicant would provide the following information as required by District rule [**number**] for the transfer of the ownership of [**number**] nonexempt wells in [**county**] County, Texas, from Permittee as Current Owner to Applicant as New Owner.

The [**number**] wells are authorized by the following Operating Permits granted by the District to Permittee for nonexempt wells approved on [**date of board approval**] and issued on [**issuance date[s] on permits**] (the "Operating Permits") and assigned District well numbers [**authority's assigned well numbers**]. A copy of each of the Operating Permits is attached to this document in Exhibit A.

Applicant and Permittee have a contract for the sale and purchase of the [Groundwater and] associated Operating Permits sought to be transferred pursuant to this Application and more fully described in sections B. and C. below. That sale and purchase includes the existing

[**number**] wells described above. A copy of the assignment and bill of sale for conveyance of the wells to Applicant to be executed and delivered at Closing is attached to this document in Exhibit B. Closing of the contract is contingent on the District's approval of this Application.

B. Operating Permits

Applicant would provide the following information as required by District rule [**number**] for the transfer of the following [**number**] Operating Permits for nonexempt wells assigned District well numbers [**authority's assigned well numbers**]. A copy of each Operating Permit is attached to this document in Exhibit A.

*B.1. District Rule [**number**]*

B.1.a. Name, Address, and Telephone Number of Applicant

Name: [**name of applicant**] [**include if applicant is a business:** , attn: [**name of contact person**], its [**title of contact person**]]

Address:

Telephone number:

B.1.b. Name, Address, and Telephone Number of Current Permittee

Name: [**name of permittee**]

Address:

Telephone number:

B.1.c. Copy of Assignment Transferring Operating Permits to Proposed Transferee

A copy of the written assignment transferring ownership of the Operating Permits from Permittee to Applicant is attached as Exhibit C.

*B.1.d. Transfer Application Fee, If Established under District Rule [**number**]*

Pursuant to the District fee schedule contemplated by District rule [**number**], and after confirming with the District general manager, the District is not currently charging a transfer application fee pursuant to the adopted District rules.

*B.2. District Rule [**number**]*

Applicant would state that pursuant to District rule [**number**], Applicant has never had a permit issued by the District and therefore has never been out of compliance with the terms and conditions of any other District permits issued to Applicant. Applicant would also state that it has complied with the terms and conditions of the District rules and chapter 36 of the Texas Water Code. Applicant has never had any enforcement action imposed by the District.

Applicant would further state pursuant to District rule [**number**] that it has the financial and managerial capabilities necessary to comply with the terms and conditions of the Operating [and Transport] Permits to be transferred.

Applicant further states that upon transfer of the Operating [and Transport] Permits, District permit numbers [**authority's assigned permit numbers**] will fully comply with the terms and conditions of the Operating [and Transport] Permits, the rules of the District, its enabling legislation, and chapter 36 of the Texas Water Code.

Applicant affirms that it has been and remains in compliance with the District's rules and the terms and conditions of its Operating [and Transport] Permits and that it has paid current all fees due and owing to the District and filed all applicable reports.

Include the following if applicable.

C. Transport Permits

Applicant would provide the following information as required by District rule [**number**] for the transfer of the following [**number**] Transport Permits for nonexempt wells approved on [**date**] and issued on [**issuance date[s] on permits**] (the "Transport Permits") assigned District well numbers [**authority's assigned well numbers**]. A copy of each Transport Permit is attached to this document in Exhibit D.

A copy of the assignment transferring the Transport Permits from Applicant to Permittee is attached as Exhibit C.

Pursuant to District rule [**number**], Applicant would request that the Transport Permits be processed with the application for the transfer of Operating Permits as discussed above.

Continue with the following.

D. Requested Action by [name of district]

Applicant and Permittee represent that the information provided in this Application is true and correct to the best of their knowledge and therefore respectfully request that the District approve the transfer and the ownership of the wells and the Operating [and Transport] Permits currently held by Permittee to Applicant, subject to the delivery of the executed conveyancing documents to the District's general manager.

[**Name of permittee**]

By _____
[**Name and title**]

[**Name of applicant**]

By _____
[**Name and title**]

Include acknowledgments.

Exhibit A

Operating Permits Currently Owned by [name of permittee] to Be Transferred to [name of applicant]

Attach copies of the operating permits.

Exhibit B

Assignment and Bill of Sale from [name of permittee] to [name of applicant] Dated [date]

Attach copies of the assignment and bill of sale for the conveyance of the ownership of the wells.

Exhibit C

Assignment of Operating [and Transport] Permits from [name of permittee] to [name of applicant] Dated [date]

Attach a copy of the assignment transferring the ownership of the operating permits and, if applicable, the transport permits.

Exhibit D

Transport Permits Currently Owned by [name of permittee] to Be Transferred to [name of applicant]

Attach copies of the transport permits.

Chapter 17

Risk Allocation: Indemnity, Waiver, and Insurance

Chapter 17

Risk Allocation: Indemnity, Waiver, and Insurance

§ 17.1 Risk Allocation Methods and Definitions

Indemnity: An indemnity is a promise to safeguard and hold another party harmless against a liability. An indemnity creates a potential cause of action for the indemnitee against the indemnitor. *Dresser Industries, Inc. v. Page Petroleum, Inc.*, 853 S.W.2d 505, 508 (Tex. 1993).

Waiver: A waiver is an agreement not to hold another party responsible for a liability. A waiver operates to bar any right of action on the released matter. *Hart v. Traders & General Insurance Co.*, 189 S.W.2d 493, 494 (Tex. 1945). Waivers are sometimes referred to as "releases."

Insurance: Insurance is a contract under which a company in the business of insuring against losses undertakes for a specified period of time to defend a party against, and compensate the party for, loss arising from a specified risk in consideration for the payment of a premium by the insured party.

Transfers of Risk: One strategy employed by a party in a transaction to minimize exposure to losses is to transfer identified risks to one or more of the following parties:

1. the party on the other side of the transaction through the use of contractual indemnities and waivers (and if the damages or injuries are of the type covered by the indemnitor's commercial general liability insurance policy and the indemnity is an insured contract, as the term is defined in the indemnitor's commercial general liability insurance policy, the risks may also be transferred to the general liability carrier of the indemnitor to the extent of coverage);
2. a third party through a guaranty of payment or performance;
3. an insurance company or corporate surety by purchasing insurance or bonds (provided the risks are insurable or bondable); or
4. an insurance company or corporate surety by becoming a loss payee, additional insured, or beneficiary, as applicable, under an insurance policy or a bond purchased by another party (provided the risks are insurable or bondable).

§ 17.2 Indemnities and Waivers

§ 17.2:1 Types of Indemnities and Waivers

Insurance professionals sometimes describe indemnities as being "limited," "intermediate," or "broad."

1. A limited indemnity clause imposes liability on the indemnitor only to the extent of the indemnitor's fault or negligence and is the most favorable type of indemnity clause for an indemnitor.
2. Under an intermediate indemnity clause, the indemnitor assumes all liability except for the sole negligence of the indemnitee.

3. A broad-form indemnity clause imposes the entire risk of loss on the indemnitor, including the sole negligence of the indemnitee, and is the most favorable type of indemnity clause for an indemnitee.

§ 17.2:2 Drafting Considerations for Indemnities and Waivers

1. Does the party giving the indemnity or waiver have the authority or capacity to enter into the indemnity or waiver? (See section 17.2:3 below.)
2. What is the creditworthiness of the indemnitor? Is a guaranty, a surety bond, or insurance necessary?
3. Should persons other than the contracting parties (for example, shareholders, directors, officers, employees, contractors, or subcontractors) benefit from the indemnity or waiver?
4. Will liabilities arising out of the acts or omissions of persons other than the party giving the indemnity or waiver (for example, employees, agents, and contractors) be subject to the indemnity or waiver?
5. Is the recovery against the party giving the indemnity or waiver limited as to amount, ability to seek a deficiency judgment, or source of funds to pay damages?
6. What risks are covered by the indemnity or waiver?
7. Is the indemnity or waiver consistent with insurance coverages carried by the parties, both as to amounts and risks insured? To what degree are the indemnified risks covered by the indemnitee's available insurance? To what degree is the amount of indemnified risk covered by the indemnitee's available insurance?
8. Is the obligation to defend and the entire cost of defense included in the indemnity? If so, will the beneficiary of the indemnity be entitled to separate counsel of its choosing?
9. Are there any types of damages (for example, punitive or consequential) that are excluded?
10. Are there any limitations as to the time period the indemnity or waiver will be in effect or the time period for making a claim under the indemnity or waiver?
11. Do any anti-indemnity statutes apply? (See section 17.2:4 below.)
12. Is compliance with the fair notice doctrine necessary? (See section 17.2:5 below.)

§ 17.2:3 Indemnities by Cities and Counties Prohibited

The Texas Constitution states that no debt for any purpose may be incurred by any city or county unless provision is made at the time of creating the debt for levying and collecting a sufficient tax to repay the debt. *See* Tex. Const. art. XI, §§ 5, 7. Because an indemnity is by its nature uncertain as to the timing and amount of the liability that could be incurred, an indemnity by a city or county is invalid. *See T. & N.O.R.R. Co. v. Galveston County*, 169 S.W.2d 713 (Tex. 1943).

§ 17.2:4 Anti-Indemnity Laws

With some exceptions, Texas Insurance Code chapter 151 prohibits broad-form and intermediate indemnities in construction contracts and requirements in a construction contract for insurance policies or endorsements that cover broad-form or intermediate indemnities. Under

Tex. Ins. Code § 151.102, an indemnity in a construction contract, or in an agreement collateral to or affecting a construction contract, is void and unenforceable to the extent that it requires an indemnitor to indemnify a party, including a third party, against a claim caused by the negligence or fault, violation of a law, or breach of contract of the indemnitee, its agent or employee, or any third party under the control or supervision of the indemnitee, other than the indemnitor or its agent, employee, or subcontractor of any tier. Under Tex. Ins. Code § 151.104, a provision in a construction contract that requires the purchase of additional insured coverage or any coverage endorsement or provision within an insurance policy providing additional insured coverage is void and unenforceable to the extent that it requires coverage that is prohibited under Tex. Ins. Code § 151.102.

The definition of a "construction contract" contained in Tex. Ins. Code § 151.001(5) is extremely broad, including any "contract, subcontract, or agreement . . . made by an owner . . . for the design, construction, alteration, renovation, remodeling, repair, or maintenance of . . . a building, structure, appurtenance, or other improvement to or on . . . real property." Whether the definition covers a lease that contemplates leasehold improvements or contains provisions regarding repairs, maintenance, or alterations is, at best, unclear.

Among the exceptions under Insurance Code chapter 151 are the following:

1. There is a broad exception for any provision in a construction contract that requires a party to indemnify, hold harmless, or defend another party to the construction contract or a third party against a claim for the bodily injury or death of an employee of the indemnitor, its agent, or its subcontractor of any tier (that is, so-called third-party-over actions). Tex. Ins. Code § 151.103.
2. Indemnity provisions contained in loan and financing documents other than construction contracts to which the contractor and owner's lender are parties. Tex. Ins. Code § 151.105(3).
3. An indemnity provision in a construction contract, or in an agreement collateral to or affecting a construction contract, pertaining to a single family house, townhouse, duplex, or directly related land development, or to a public works project of a municipality. Tex. Ins. Code § 151.105(10).

Texas law also prohibits certain indemnities by a contractor with respect to an architect's negligence and certain indemnities by an architect with respect to an owner's negligence. *See* Tex. Civ. Prac. & Rem. Code § 130.002.

§ 17.2:5 Fair Notice Doctrine

Even if no anti-indemnity statute applies, when an indemnity, release, or waiver provision seeks to shift the risk of one party's future negligence or other fault to the other party, Texas imposes a fair notice requirement before enforcing that agreement. *Dresser Industries, Inc. v. Page Petroleum, Inc.*, 853 S.W.2d 505, 508 (Tex. 1993). The fair notice requirements are set out as the express negligence doctrine and the conspicuousness requirement. *Storage & Processors, Inc. v. Reyes*, 134 S.W.3d 190, 192 (Tex. 2004). The fair notice requirement is a rule of contract interpretation and is therefore determinable as a matter of law. *Fisk Electric Co. v. Constructors & Associates*, 888 S.W.2d 813, 814 (Tex. 1994).

Express Negligence Rule: If the parties to a contract want to indemnify one of the parties against its own negligence, the parties must express their intent in specific terms within the four corners of the contract. *Ethyl Corp. v. Dan-*

iel Construction Co., 725 S.W.2d 705, 707–08 (Tex. 1987). This same rule applies to releases. *Dresser Industries, Inc.*, 853 S.W.2d 505. There is no specific required language to use to comply with the express negligence doctrine in Texas, other than use of the terms *negligence* or *fault*, but a good example to follow states: "TENANT WILL RELEASE, DEFEND, AND INDEMNIFY LANDLORD [AND ANY OTHER INDEMNITEES] FROM ANY CLAIM OR LOSS EVEN THOUGH CAUSED IN WHOLE OR IN PART BY THE NEGLIGENCE (WHETHER SOLE, JOINT, OR CONCURRENT), STRICT LIABILITY, OR OTHER LEGAL FAULT OF LANDLORD [OR ANY OTHER INDEMNITEES]." Whether a release or indemnity for gross negligence is enforceable is unclear, but any release or indemnity intended to apply to gross negligence may need to specifically mention gross negligence to meet the express negligence test. *Van Voris v. Team Chop Shop, LLC*, 402 S.W.3d 915 (Tex. App.—Dallas 2013, no pet.).

Conspicuousness Rule: The indemnity, release, or waiver provision indemnifying or releasing a party from its own negligence must be conspicuous (for example, a separate indemnity and waiver provision in contrasting, capitalized, or colored type with a clear and informative heading). *Dresser Industries, Inc.*, 853 S.W.2d at 510–11.

Extensions of Fair Notice Doctrine: The fair notice doctrine has also been held to apply to indemnities or waivers—for strict liability (*Houston Lighting & Power Co. v. Atchison, Topeka & Santa Fe Railway Co.*, 890 S.W.2d 455, 459 (Tex. 1994)) and of a third party by a subscribing employer notwithstanding the exclusive recovery (or one action) rule under the Workers' Compensation Act (*Enserch Corp. v. Parker*, 794 S.W.2d 2, 9 (Tex. 1990)).

§ 17.3 Overview of Insurance Policies

§ 17.3:1 Categories of Insurance

Property Policies: Property insurance is "first party" insurance that compensates the named insured for property that has been lost, damaged, or destroyed. Examples of property insurance policies are commercial property, builder's risk, terrorism, and business income insurance. (See section 17.4 below.)

Liability Policies: Liability insurance is "third party" insurance that compensates a third party injured by the actions or omissions of an insured. Examples of liability insurance are commercial general, business auto, workers' compensation, liquor liability, and pollution insurance. (See section 17.5 below.)

Package Coverage Policies: Package coverage policies cover both property risks and liability risks. An example of a package coverage insurance policy is homeowner's insurance. (See section 17.4:4 below.)

§ 17.3:2 Lines of Insurance

Personal lines of insurance are for individuals and families—for example, homeowner's insurance and renter's insurance. Commercial lines of insurance cover businesses—for example, commercial property insurance, commercial general liability insurance, and business owner's policies.

§ 17.3:3 Policy Forms

Insurance Services Office, Inc., commonly known in the insurance industry as ISO, drafts insurance forms that are used either verbatim or with modifications in all fifty states. (The National Board of Fire Underwriters, the organization to which many real estate documents still refer, merged with the American Insurance

Association in 1966 and ceased to exist as a separate entity. In 1971 the American Insurance Association merged with twenty-nine other ratings agencies to create ISO.) Although ISO forms are dominant, other forms in the marketplace may be (1) "manuscripted," that is, drafted by an insurance company (and which may be similar to or less broad than the ISO equivalent); (2) promulgated by the Texas Department of Insurance (for example, the Homeowner's A, B, and C coverages); or (3) drafted by a competitor of ISO (for example, the American Association of Insurance Services).

Another set of property insurance forms, known as inland marine forms or floaters, evolved to insure property being transported by canal barges and later railroads and trucks. Today, inland marine is used primarily for "property which is mobile by nature and for which there is no fixed situs; and . . . instruments of communication or transportation such as bridges, tunnels, piers or television antennas" (State of New York Insurance Department, Circular Letter No. 22 (2000), August 11, 2000). In addition, inland marine forms are used in the construction area and for specialized coverages such as jewelry and computer data. Inland marine forms are generally manuscripted.

§ 17.4 Property Insurance

§ 17.4:1 Terminology and Structure

Commercial property insurance is the property insurance form used in most commercial settings. The phrase *fire and extended coverage insurance* was the name of a named-peril property insurance policy that is no longer available, and the phrase *casualty insurance* is incorrect if used to describe property insurance. Unlike commercial liability insurance and residential insurance, there is no standard commercial property policy form. Each commercial property insurer has its own policy form. To some extent, commercial property insurers may employ property insurance policy language provided by ISO.

An ISO commercial property insurance policy is not a single form. Rather, an ISO commercial property insurance policy is made up of six different forms:

1. Common policy conditions (ISO Form IL 00 17)—describes the conditions applicable to all insurance policies.
2. Commercial property conditions (ISO Form CP 10 90)—describes the conditions applicable only to commercial property policies.
3. ISO Form CP 00 10, entitled "Building and Personal Property Coverage Form"—describes the property being covered.
4. Declarations and schedules provide specifics such as the name of the insured, location of property, and coverage amounts.
5. A causes of loss form (ISO Forms CP 10 10, CP 10 20, or CP 10 30)—determines whether the policy will be a named peril policy or an all risks policy (see section 17.4:2 below).
6. Any necessary coverage forms or endorsements describing additional property covered, additional limits, and optional coverages (see sections 17.4:3 and 17.4:5 below).

As a general rule, commercial property insurance is used to cover completed buildings, and builder's risk insurance is used to cover buildings under construction or, in some cases, under extensive renovation. No bright line exists as to when builder's risk insurance should be used rather than commercial property insurance. Builder's risk policies have several important advantages over commercial property policies with respect to coverage for buildings under

construction, such as coverage for property stored offsite and property in transit.

§ 17.4:2 Forms of Commercial Property Policies

Historically, property insurance was written on either a named-peril basis, which insured against property damage arising from causes of loss expressly enumerated in the policy, or an all-risks basis, which insured against property damage arising from all causes of loss except those that were expressly excluded by the policy. The insurance industry has now abandoned use of the words *risk* and *peril* and instead uses the term *cause of loss*.

Basic and Broad (Named-Peril) Forms: Two named-peril commercial property insurance policies are currently available: causes of loss—basic form and causes of loss—broad form. The basic form (ISO Form CP 10 10) covers the following causes of loss: fire, lightning, explosion, windstorm or hail, smoke, aircraft or vehicle collision, riot or civil commotion, vandalism, sprinkler leakage, sinkhole collapse, and volcanic action. The broad form (ISO Form CP 10 20) covers all the causes of loss covered by the basic form plus falling objects; weight of snow, ice, or sleet; water damage from leaking appliances; and collapse from specified causes.

Special (All-Risks) Form: The correct terminology for commercial property insurance currently written on an all-risks basis is causes of loss—special form (ISO Form CP 10 30), which was formerly known as "all-risk."

Leased Property: The ISO commercial property policy insures a commercial tenant's use interest in leasehold improvements and betterments. The ISO Building and Personal Property Coverage Form (ISO Form CP 00 10) states that it provides coverage for business personal property including "[y]our use interest as tenant in improvements and betterments" and defines "improvements and betterments" as "fixtures, alterations, installations or additions: (a) [m]ade a part of the building or structure you occupy but do not own; and (b) [y]ou acquired or made at your expense but cannot legally remove." If insurance coverage is desired for building standard improvements or improvements made by a previous tenant, coverage is to be by ISO Form CP 14 01 09 17 (entitled "Scheduled Building Property Tenant's Policy") and ISO Form CP 14 02 09 17 (entitled "Unscheduled Building Property Tenant's Policy").

See "Loss Payee and Mortgagee Clauses" in section 17.4:3 below for a discussion of a commercial landlord's interest as a loss payee by endorsement to a property policy maintained by a tenant insuring a building owned by the landlord (ISO Form CP 12 18 06 07) and section 17.6:5 for a discussion of a commercial landlord's interest as an additional insured on a property policy maintained by a tenant insuring the building (ISO Form CP 12 19 06 07).

§ 17.4:3 Specialized Coverages

Separate property policies or endorsements are available to fill the gaps created under standard forms of commercial property insurance policies.

Equipment Breakdown: Equipment breakdown (formerly boiler and machinery) coverage (for example, ISO Endorsement Form BM 00 20) insures against property losses caused by the explosion of pressure vessels and sudden and accidental, mechanical or electrical breakdown of covered machinery. Coverage for the resulting loss of business income may be added.

Builder's Risk: Because of the higher likelihood of property loss during construction, a specialized form of property insurance called builder's risk is used during the construction of a building in lieu of commercial property insurance.

Although ISO has promulgated a builder's risk form (ISO Form CP 00 20), most builder's risk policies are written on manuscripted inland marine forms. ISO builder's risk insurance forms are available on a basic, broad, or special causes of loss basis, but the inland marine forms that are more commonly used may, depending on the insurer, have broader or narrower coverage than their ISO counterparts. Among the causes of loss that may not be covered by a builder's risk policy without endorsement are collapse resulting from design error and damage resulting from freezing, flood, and earthquake.

Builder's risk property insurance is available in nonreporting (commonly known as "completed value") or reporting forms. Under a completed value form, coverage is automatically increased as construction occurs. A reporting form will not cover the increased value until the increase is reported to the insurance carrier, usually on a monthly basis.

A builder's risk policy can cover most of the property used in or incidental to the construction even if the property is stored off-site or in transit, but may not cover the following unless the policy is specifically endorsed: landscaping, temporary structures such as scaffolding, construction trailers, site work, underground structures such as footings, equipment used to construct the building, and business income.

Many extensions of coverage are available under builder's risk insurance policies. Because builder's risk policies forms are generally manuscripted, these extensions may be included within the basic coverage of some policies but must be added by endorsement to other policies. Most extensions or endorsements have a "sublimit," which is less than the full policy limit but the maximum amount recoverable with respect to the extension or endorsement. The following are some of the extensions of coverage or endorsements that are available for builder's risk policies:

1. Contract penalties—covers contractual penalties to the insured's customers incurred as a result of a delay of completion date.

2. Collapse—covers damage or loss from collapse of the structure caused by certain causes of loss, generally including defective materials and faulty design, plans, or workmanship (but not the cost of correcting the defective workmanship or faultily designed work).

3. Debris removal—covers the cost of removing debris resulting from a covered cause of loss in excess of the limit of proceeds for debris removal contained in basic coverage. Many builder's risk policies cover this risk but with a sublimit. In such cases, the sublimit can be increased by endorsement.

4. Expediting expense—covers additional expenses necessarily incurred to complete construction on schedule after the occurrence of a covered cause of loss.

5. Pollutant cleanup—covers the cost of removing pollutants released by a covered cause of loss.

6. Preservation of property—covers the cost of removing covered property from the premises to preserve the property from loss after a covered cause of loss has occurred.

7. Soft costs (sometimes called "extra expenses")—covers necessary expenses incurred as a result of a delay of completion date, such as interest on the construction loan, real estate taxes, architectural and engineering supervisory costs, costs to renegotiate leases, brokerage commissions, and legal and accounting costs

(*caveat:* coverage varies from policy to policy).

8. Testing—covers damage or loss from testing of boilers or other pressure vessels, air-conditioning systems, and mechanical or electrical machines or devices.

9. Loss of rents—covers the loss of rents caused by the delay of completion.

Because builder's risk property policies typically cease coverage if any portion of the structure is occupied for purposes other than testing, a phased project may require an endorsement to permit a certain level of occupancy.

Business Income: Business income coverage (ISO Endorsement Form CP 00 32) insures against loss of earnings resulting from the insured's inability to operate a business after the occurrence of a covered cause of loss. This type of coverage was formerly known as "business interruption" insurance. Business income and extra expense coverage (ISO Endorsement Form CP 00 30) also insure against extraordinary additional expenses resulting from the insured's inability to operate a business after the occurrence of a covered cause of loss. If desired, business extra expense coverage can be obtained by itself.

Rental value coverage insures against loss of rents (including abatement of rentals under leases) resulting from the insured's inability to operate a building after the occurrence of a covered cause of loss. Rental value coverage is available under both business income endorsement forms (ISO Forms CP 00 30 and CP 00 32) but is not included unless specified in the declaration to the policy.

All of the ISO commercial property causes of loss forms (ISO Forms CP 10 10, CP 10 20, and CP 10 30) exclude coverage for business income loss caused by "the failure of power or other utility services . . . if the failure occurs outside of a covered building." ISO Form CP 15 45, entitled "Off-Premises Services—Time Element," is an endorsement to a business income coverage form (with or without extra expense coverage) that provides coverage for the loss of income arising from off-premises utility service disruption.

ISO Form CP 15 08, entitled "Business Income from Dependent Properties—Broad Form," is an endorsement to a business income coverage form (with or without extra expense coverage) that provides coverage for loss of income (and extra expenses incurred, if applicable) because of damage to another company's facility. For example, a San Antonio–based automobile manufacturer depends on parts from an automobile parts facility located in Beaumont. If the Beaumont plant were damaged and rendered inoperable by a hurricane, the San Antonio manufacturer would incur losses even though the automobile manufacturer's plant is unharmed.

Crime (or Fidelity): This coverage protects the insured against loss of property (generally money, securities, and inventory) resulting from the types of crime enumerated in the policy. Among the crimes for which crime insurance is available are computer fraud, social engineering fraud, employee dishonesty, embezzlement, extortion, forgery, premises theft, premises burglary, safe burglary, wire transfer fraud, counterfeiting, and off-premises robbery.

Earth Movement or Earthquake: Earth movement or earthquake coverage insures against property losses caused by earth movement, including earthquake shocks and volcanic eruptions. Earth movement coverage is broader than earthquake coverage. Earthquake coverage, for instance, does not cover mudslides.

Flood: Flood coverage insures against property losses caused by rising waters, backup of storm sewers, and storm surges. Flood coverage is necessary because all three of the ISO com-

mercial property insurance causes of loss forms (ISO Forms CP 10 10, CP 10 20, and CP 10 30) expressly exclude coverage for floods and many other types of water damage.

The National Flood Insurance Act of 1968 (42 U.S.C. §§ 4001–4131) (NFIP) created a program to make available flood insurance for property owners in flood-prone areas. Regulations implementing the NFIP are found at 44 C.F.R. pts. 59–78. *See also* Tex. Loc. Gov't Code § 240.901 (participation in federal flood insurance program); Tex. Water Code §§ 16.311–.324 (Flood Control and Insurance Act). The Flood Disaster Protection Act of 1973 mandated that federally regulated lending institutions could not "make, increase, extend, or renew any loan secured by improved real estate or a mobile home located or to be located in an area that has been identified . . . as an area having special flood hazards and in which flood insurance has been made available" under the NFIP without flood insurance in an amount equal to the lesser of the loan amount or the available coverage. 42 U.S.C. § 4012a(b)(1).

NFIP insurance has several drawbacks:

1. The maximum coverage limits are $500,000 for a building and $500,000 for contents.
2. The policy pays only direct physical loss by or from flood and does not pay indirect damages such as loss of income.
3. In most cases, NFIP insurance pays only actual cash value, not replacement cost.
4. Coverage is not available without a thirty-day wait, except when obtaining new financing.

The NFIP must be extended by Congress from time to time. As of the publication date of this supplement, the NFIP has been extended until September 30, 2020.

See section 17.4:5 below.

Private flood insurance coverage is also available. Coverage under a commercial property policy can be expanded with ISO Endorsement Form CP 10 65. Form CP 10 65 also has several drawbacks:

1. The endorsement does not cover underground water flows or seepage.
2. The endorsement excludes coverage for flooding within a wait period of seventy-two hours after the inception date of the endorsement, damage to land (including excavations, grading, filling, or backfilling), removal of mud and earth deposited by flooding, and loss or damage caused by sewer backup or overflow unless the backup or overflow occurs within seventy-two hours after the flood recedes.
3. A commercial property policy endorsed for flood coverage usually contains a very high deductible with respect to properties located in a special flood hazard area shown on flood insurance rate maps produced by the Federal Emergency Management Agency.
4. A commercial property insurance policy endorsed for flood coverage for flooding usually contains a sublimit with respect to the amount of coverage available for flood damage (a sublimit limits the amount of coverage available to cover a specific type of loss to an amount smaller than the policy limit).

Glass: Before 2000, coverage was excluded or limited in commercial property insurance policies for damage to plate glass. Glass coverage was obtained through so-called "plate glass insurance," issued as a separate coverage form. The exclusions and limitations were removed

from ISO forms CP 10 10, CP 10 20, and CP 10 30 in 2000.

Loss Payee and Mortgagee Clauses: A loss payee is a party named in a loss payee endorsement. A loss payee clause is referred to as an open clause if the loss payee under the loss payable clause has no independent right to enforce the policy but is simply a recipient of payments when the insured becomes entitled to collect under the policy. The drawback of an open clause is that the action or inaction of the insured can defeat the right of a loss payee to collect (for example, the insured may make a misrepresentation, fail to pay premiums, or fail to report a loss timely). On the other hand, a closed clause creates a separate contract between the insurer and the loss payee or mortgagee and contains language to the effect that the act or neglect of the insured will not invalidate the policy. A closed loss payee clause is also referred to as a mortgagee clause. It provides special protections to the mortgage holder that generally include payment for covered loss that will be made to the mortgage holder, not to the insured or to the insured and the mortgagee; coverage applies for the benefit of the mortgagee even if the insured's claim is denied because of the insured's acts, subject to a couple of basic requirements. The mortgagee will receive written notice of policy cancellation by the insurer.

Standard mortgage holder protection for buildings or structures only (but not the business personal property) is built into the current ISO Building and Personal Property Coverage Form (ISO Form CP 00 10).

The current edition of ISO Endorsement Form CP 12 18, entitled "Loss Payable Provisions," uses four different descriptions to describe the loss payee: "Loss Payable," "Lender Loss Payable," "Contract of Sale," and "Building Owner Loss Payable." It is critical for a mortgagee to pick the right category. If "Loss Payable" is chosen in the schedule to the endorsement, the provision becomes an open clause, and the interest of the loss payee is protected only if the named insured chooses to enforce the protection. However, if "Lender Loss Payable" is chosen in the schedule, the provision becomes a closed clause and protects a lender loss payee the same way as a mortgage holder is protected by the standard mortgagee clause in the building and personal property coverage form, with an important difference: under ISO Endorsement Form CP 12 18, the mortgagee protection applies to both the building and the business personal property associated with the building.

Form CP 12 18 may also be used by a landlord to create a "Building Owner Loss Payable" and establish privity between the landlord and the tenant's property carrier with respect to insurance proceeds payable because of the loss of the landlord's property.

Signs: This coverage (ISO Form CM 00 28) insures against damage to signs resulting from windstorm, vandalism, or vehicle damage.

Terrorism: Terrorism insurance protects the insured against losses arising from terrorist activities that are excluded from commercial property policies.

Until 2002, damage or loss from terrorism was not expressly excluded by ISO's commercial property insurance policy forms. Following the attacks of September 11, 2001, ISO introduced several exclusions for losses caused by terrorism. In November 2002, the federal government enacted the Terrorism Risk Insurance Act of 2002 (TRIA) requiring all U.S. commercial property insurers to offer coverage for losses caused by international terrorism and creating a reinsurance program for this coverage with a total annual limit of $100 billion. TRIA was extended in 2005 and reauthorized in 2015, in a modified form, through December 31, 2020. In December 2019, TRIA was reauthorized through December 2027. As originally enacted,

TRIA applied to violent acts causing damage in excess of $5 million in the United States (or aircraft or U.S.-flagged vessels), committed by a party acting on behalf of a foreign person or interest, and certified as terrorism by the secretary of the U.S. Treasury. The 2007 reauthorization deleted the requirement that an act of terrorism be committed by someone acting on behalf of a foreign person or interest to be certified as an act of terrorism. However, the insurer is not required under TRIA to provide terrorism coverage if the insured rejects the coverage in writing or if the insured does not pay the premium for the terrorism coverage. TRIA does not set the premiums for terrorism coverage. *See* 15 U.S.C. § 6701 note (Terrorism Risk Insurance Act of 2002, Pub. L. No. 107-297, 116 Stat. 2322, as amended by Terrorism Risk Insurance Extension Act of 2005, Pub. L. No. 109-144, 119 Stat. 2660, the Terrorism Risk Insurance Program Reauthorization Act of 2007, Pub. L. No. 110-160, 121 Stat. 1839, and the Terrorism Risk Insurance Program Reauthorization Act of 2015, Pub. L. No. 114-1, 129 Stat. 3). *See also* 31 C.F.R. pt. 50.

§ 17.4:4 Residential or Farm Property Insurance

Homeowner's Insurance: Homeowner's insurance is available to the owner of an owner-occupied dwelling. Homeowner's insurance is a package coverage insurance policy covering both property claims, such as loss of or injury to the dwelling and to the insured's personal property, and some personal liability claims. A homeowner's insurance policy also covers some living expenses incurred as a result of temporary displacement because of damage to a dwelling. See **https://www.tdi.texas.gov/pubs/consumer/cb025.html** for an explanation of homeowner's insurance coverage, enhancements, and exclusions.

Most homeowner's policies may be written on forms generated by the Texas Department of Insurance (TDI) (HO-A, HO-B, and HO-C) or forms generated by ISO (HO 00 02, HO 00 03, and HO 00 05). There are also numerous unregulated company-specific forms. See **https://www.tdi.texas.gov/orders/co020741.html** for a discussion of the state-approved homeowner's forms in Texas.

The property coverage under homeowner's insurance policies varies as follows:

1. TDI Form HO-A and ISO Form HO 00 02—named-cause of loss basis (see section 17.4:2 above) for both the dwelling and its contents;

2. TDI Form HO-B and ISO Form HO 00 03—risk of direct physical loss basis (see section 17.4:2 above) for the dwelling and a named-peril basis for its contents; and

3. TDI Form HO-C and ISO Form HO 00 05—all-risks basis for both the dwelling and its contents.

The amount collected for loss of or injury varies as follows under the various forms:

1. TDI Form HO-A—actual cash value (see section 17.4:5 below) for both the dwelling and its contents;

2. ISO Form HO 00 05—replacement cost (see section 17.4:5 below) for both the dwelling and its contents; and

3. TDI Forms HO-B and HO-C and ISO Forms HO 00 02 and HO 00 03—replacement cost for the dwelling and actual cash value for its contents. (All four forms can be endorsed to cover replacement cost for the contents.)

Condominium Insurance: A condominium has two sets of insurance, one covering the condominium association and another covering the individual unit owners.

The condominium association's insurance requirements are set forth in Tex. Prop. Code § 82.111. Tex. Prop. Code § 82.111(a) requires that the condominium association maintain separate commercial property and commercial general liability policies. A commonly used condominium association property coverage form, ISO Form CP 00 17, entitled "Condominium Association Coverage Form," is nearly identical to its commercial property insurance coverage counterpart, ISO Form CP 00 10, except that the definition of business personal property is limited to the personal property owned by the association or indivisibly by all unit owners and other property for which the association is responsible under the declaration. Tex. Prop. Code § 82.111(d) also requires that the unit owners be named as insureds under the association's policies, that the association's insurers waive subrogation as to the unit owners, and that the association's policies are primary to a unit owner's policies if there is duplicate coverage.

Individual unit owners purchase the equivalent of homeowners coverage for their individual units known as "condominium unit owners" policies. Like homeowners insurance, unit owners insurance is a package coverage insurance policy covering both property claims with respect to the unit interior and the insured's personal property and liability claims. Unit owners policies may be written on TDI forms HO-B-CON and HO-C-CON and ISO Form HO 00 06.

The property coverage under unit owners insurance policies varies as follows:

1. TDI Form HO-B-CON and ISO Form HO 00 06—named-cause of loss basis (see section 17.4:2 above) for both the unit interior and its contents (all risks coverage is available for both dwelling and contents under ISO Form HO 00 06 by endorsement); and
2. TDI Form HO-C-CON—all-risks basis for both the unit interior and its contents.

The amount collected for loss of or injury varies as follows under the various forms:

1. TDI Form HO-C-CON—replacement cost (see section 17.4:5 below) for both the dwelling and its contents; and
2. TDI Form HO-B-CON and ISO Form HO 00 06—replacement cost for the dwelling and actual cash value for its contents. (Both forms can be endorsed to cover replacement cost for the contents.)

Tenant's Insurance: Tenant homeowner's insurance (commonly known as tenant's or renter's insurance) is available to tenants of residential property. Tenant's insurance is a package coverage insurance policy that covers the property insurance causes of loss of injury to or loss of the tenant's personal property and the liability insurance cause of loss of bodily injury to third parties. The property portion of tenant's insurance is available in either a named-cause of loss version called broad form or, for a higher premium, an all-risks version called comprehensive form (see section 17.4:2 above). The amount collected for property loss under tenant's insurance is limited to actual cash value, unless the insured has purchased an endorsement increasing coverage to replacement cost (see section 17.4:5 below). The risks of injury to or loss of the dwelling, unit, or apartment are generally covered by the landlord's property insurance policy on the dwelling, but tenant's insurance may cover some damage to the dwelling, unit, or apartment caused by the tenant if the tenant is liable for the damage under the lease. Tenant's insurance also covers some living expenses incurred as a result of temporary displacement from the dwelling, unit, or apartment because of damage.

Farm and Ranch Insurance: Farm owner's (sometimes called farmowner's) insurance is available to individuals who own and occupy property meeting the definition of a farm or ranch and who do not elect to be insured by a farm mutual insurance company (in Texas, farm mutual insurance companies cannot write liability insurance). Farm owner's insurance is a package coverage insurance policy that covers the property insurance causes of loss of injury to or loss of farm dwellings, outbuildings, and personal property and the liability insurance causes of loss of bodily injury to third parties.

If a farmer or rancher is not an individual or is purchasing his property insurance from a farm mutual company, the farmer or rancher must purchase separate property and liability insurance policies. In a farm or ranch context, the equivalent of a commercial property insurance policy is typically called a farm and ranch insurance policy, and the equivalent of a general liability insurance policy is typically called a farm liability policy. In some situations liability insurance is provided through a commercial general liability policy properly endorsed to cover farm or ranch operations.

Farm or ranch operations can be covered by personal lines or commercial lines of insurance depending on the magnitude of the farming operation. Typically, an insurance company will set a threshold of gross income from farm or ranch activities or number of acres farmed or number of cattle grazed to differentiate between a personal line farm policy and a commercial line farm policy.

Caveat: The activities of a farm tenant may impact the size of the operation for insurance purposes. Assume, for example, a gentleman farmer (typically, a person with a country home and a few horses or other farm animals) whose level of farming or ranching activity does not rise to a commercial level insures the property in question under a homeowner's insurance policy, a personal lines coverage. The gentleman farmer then leases out surplus acreage to a farmer whose level of activity on the leased property is attributed to the gentleman farmer for insurance purposes. When a claim is made against both the owner and tenant because of an injury arising out of the operation of the tenant, the owner may discover that he is not covered because personal lines policies exclude from coverage losses arising out of operations covered under commercial lines policies.

§ 17.4:5 Amount of Proceeds

The discussion in this section covers terminology used in commercial property and business owner's policies. These concepts may vary under homeowner's or farm and ranch policies.

Actual Cash Value: Actual cash value means an amount equal to the difference between the cost of replacing property with property of like kind and quality at the time of loss and the amount of physical (not book) depreciation of the property. Unless a commercial property policy is properly endorsed, the insured is entitled only to actual cash value. Actual cash value will be paid whether or not the property is replaced or restored.

Replacement Cost: Replacement cost is the cost of repairing or replacing insured property at the time of the occurrence of the loss, without reduction for loss of value through depreciation. Replacement cost will not be paid until the property is replaced or restored with property of like kind.

Agreed Value: Agreed value is an agreed valuation method that can be used with either actual cash value or replacement cost. The named insured and insurance company agree to the amount of the actual cash value or replacement cost for the insured property (less the applicable deductible) before the policy is written. Agreed value is desirable because it elimi-

nates coinsurance. An agreed value endorsement usually requires annual agreement between the insurer and named insured.

Coinsurance: Coinsurance is a method by which an insurance company penalizes its insured for underinsuring below a minimum percentage of the replacement cost of a property at the time of loss (usually 80 percent if the policy is written for a single property and 90 percent if the policy covers more than one property). If coinsurance applies, the insurer will pay only an amount (subject to the policy limit and less any applicable deductible or self-insured retention) equal to the product obtained by multiplying the amount of the loss by a fraction having as its numerator the amount of coverage the insured actually carried and as its denominator the minimum amount of coverage the insured should have carried.

Ordinance or Law Coverage: The valuation methods discussed above focus on the cost of replacing the existing structure without consideration to changes in laws or codes. Additional coverage under the Standard Building and Personal Coverage Form (ISO Form CP 00 10) is available up to the lesser of $10,000 or 5 percent of the value of the damaged building as of the time of the loss. Larger amounts can be covered by an ordinance or law coverage endorsement (ISO Endorsement Form CP 04 05).

Debris Removal: The commercial property insurance policy limit includes debris removal costs resulting from a covered loss, but the recovery is limited to 25 percent of the sum of the paid loss plus the deductible. An additional limit of $10,000 is made available by the current edition of the ISO commercial property policy for debris removal if (1) the amount payable under the policy to reconstruct or repair plus the amount payable under the policy for debris removal exceeds the entire policy limit or (2) the cost of debris removal exceeds 25 percent of the sum of the paid loss plus deductible. Higher limits for debris removal are strongly recommended and can be purchased by adding ISO Endorsement Form CP 04 15, entitled "Debris Removal Additional Limit of Insurance."

§ 17.5 Liability Insurance

§ 17.5:1 Claims-Made vs. Occurrence-Basis Liability Policies

Claims-Made: In theory, a claims-made liability policy covers any claim actually made during the policy term, regardless of when the injury or damage that gave rise to the claim occurred, but in reality the claims-made policy probably excludes claims arising from injuries or damages that occurred before the inception of the policy term (known as prior acts). For an additional premium, a claims-made policy can sometimes be modified to cover prior acts. Unless renewed on a similar form with retroactive coverage or with a coverage extension known as extended reporting period or tail coverage, all coverage ends when the claims-made policy expires. Defense is frequently included within the policy limits of claims-made policies and reduces the amount available to compensate an injured party for a loss. Claims-made policies are usually manuscripted.

Occurrence-Basis: An occurrence-basis liability policy covers claims for injuries or damages caused by an occurrence, but only if the injury or damage actually occurs during the policy period, regardless of when the claim is made (subject, of course, to statutes of limitation applicable to the claim). ISO Form CG 00 01 defines an occurrence as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." Defense is provided as an additional benefit under ISO occurrence-basis commercial general liability forms and does not reduce the limits available to pay for a loss, except for the defense of indemnitees if certain conditions are not met.

§ 17.5:2 Standard Form of General Liability Policies

Comprehensive General Liability: "Comprehensive general liability insurance" is, in fact, much less comprehensive in coverage than "commercial general liability insurance," has not been widely used since 1986, and should not be specified in real estate or other transaction documents.

Commercial General Liability: Commercial general liability insurance is the prevalent form of liability insurance in a commercial real estate context and has three coverages:

1. Coverage A—bodily injury (including death, disease, and illness) and physical injury to tangible property (including loss of use).
2. Coverage B—personal and advertising injury (including false arrest, detention or imprisonment, malicious prosecution, wrongful eviction or entry, slander, or libel, publication violating a person's right of privacy, using another's advertising idea, and copyright infringement).
3. Coverage C—medical payments.

Limits: The standard ISO commercial general liability policy form contains six policy limits: (1) each occurrence limit, (2) general aggregate limit, (3) products-completed operations aggregate limit, (4) personal and advertising injury limit, (5) damage to premises rented limit (formerly "fire damage limit"), and (6) medical expense limit.

A general aggregate limit is the maximum amount that a commercial liability insurance company will pay for all losses incurred during any one policy period except for bodily injury and property damage covered by the products-completed operations aggregate. ISO Form CG 25 04, entitled "Designated Location(s) General Aggregate Limit," an endorsement to a commercial general liability policy covering multiple properties, applies the general aggregate limit separately to each location but only with respect to bodily injury, property damage, and medical expenses. ISO Form CG 25 03, entitled "Designated Construction Project(s) General Aggregate Limit," an endorsement to a contractor's commercial general liability policy covering multiple projects, applies the general aggregate limit separately to each project but only with respect to bodily injury, property damage, and medical expenses.

Contractual Liability: Several exclusions apply to Coverage A and Coverage B under a commercial general liability insurance policy: willful misconduct, liquor liability, workers' compensation, employer's liability, pollution, aircraft, auto or watercraft, mobile equipment, war, damage to property, damage to product, damage to impaired property not physically injured, recall of products, and work or property, subject to the exception for damage to premises rented. However, the exclusion most often referenced in a real estate transaction is contractual liability.

The term *contractual liability* in the insurance context generally refers to claims that arise out of liability for the actions of others, rather than out of the actions of an insured, that has been contractually assumed by the insured. Coverage A excludes liability assumed under contracts but has an exception to this exclusion for liability assumed in a contract or agreement that is an insured contract. The definition of "insured contract" includes most indemnities that cover the tort liability of another party; however, a contractual assumption of another person's contractual liability is not covered under the typical definition of "insured contract." If, for example, a contractor agrees to indemnify the owner for its potential tort liability to an injured employee, the contractor would have insurance coverage for its indemnity obligation; if, however, the

contractor agreed to indemnify the owner for the owner's contractual indemnity to the owner's representative, the contractor's indemnity might be enforceable but would not be covered under the contractor's standard commercial general liability policy. In addition, the insured contract exception cannot expand the scope of the commercial general liability policy beyond the coverage provided or the limits of liability that have been purchased. If, for example, the policy excludes coverage for property damage and bodily injury caused by pollutants, an indemnity for property damage and bodily injury caused by pollutants will not be covered by the policy even if the indemnity is contained in an insured contract. Coverage B of the ISO form of commercial general liability policy also contains an exclusion for liability assumed in contracts but does not contain the insured contract exception. Coverage is typically available by the addition of ISO Form CG 22 74, entitled "Limited Contractual Liability Coverage for Personal or Advertising Injury," or, in some cases, by the deletion of the contractual liability exclusion.

§ 17.5:3 Business Auto

Business auto insurance (ISO Form CA 00 01) is a form of insurance covering liability arising out of the operation of automobiles by the insured and the ownership, maintenance, or use of mobile equipment subject to compulsory insurance or financial responsibility laws or other motor vehicle insurance laws. Landlords and mortgagees may require business auto insurance to cover potential liability arising from vehicular accidents occurring in project parking lots (commercial general liability policies expressly exclude coverage for injuries and damages arising from the operation of autos) and from the loading or unloading of goods from vehicles not being performed by certain types of mobile equipment such as forklifts.

§ 17.5:4 Workers' Compensation Insurance

Workers' compensation insurance is a statutory program that imposes strict liability on employers for injuries to employees occurring while the employees are acting in the scope of employment but limits the exposure of employers to a schedule of maximum recoveries. Tex. Lab. Code ch. 406. Landlords and lenders may wish to require tenants and borrowers to carry workers' compensation insurance to reduce the possibility that the tenant or borrower suffers an economically disastrous judgment because of an employee injury. If an employee of a tenant receives an award from a workers' compensation policy in a situation in which the landlord is also negligent, the employee is less likely to sue the landlord.

§ 17.5:5 Employer's Liability Insurance

Employer's liability insurance supplements workers' compensation insurance by covering an employee for bodily injury occurring while in the scope of his or her employment if the injury is not covered by workers' compensation insurance. Unlike workers' compensation, the injured party must prove that the employer owed a duty to the injured party, that the employer breached the duty, and that the breach was the proximate cause of the injury. Employer's liability policies have defined each occurrence and aggregate limits, and these limits may be expanded by an umbrella or excess liability policy.

§ 17.5:6 Liquor Liability Insurance

Liquor liability insurance covers liability for bodily injury or property damage arising from (1) causing or contributing to the intoxication of any person, (2) furnishing alcoholic beverages to a person under the legal drinking age or under the influence of alcohol, or (3) violating any law relating to the sale, gift, distribution, or use of

alcoholic beverages. Coverage applies only if the insured is involved in (1) manufacturing, selling, or distributing alcoholic beverages; (2) serving or furnishing alcoholic beverages for a charge; or (3) serving or furnishing alcoholic beverages for no charge, if a license is required for such activity. Insurance is available on an occurrence basis (ISO Form CG 00 33), on a claims-made basis (ISO Form CG 00 34), and on an aggregate per location basis (ISO Form CG 25 14).

§ 17.5:7 Innkeeper's Liability

Innkeeper's liability insurance protects motel and hotel operators from liability arising from the safekeeping of the property of guests.

§ 17.5:8 Garage Liability

Garage liability insurance (ISO Form CA 00 05) protects garage and parking lot operators from liability arising from garage operations, automobile physical damage, and uninsured or underinsured motorists. Ten different levels of coverage are generally available, ranging from the broad category of "any auto" to the narrow category of "specifically described autos." Garagekeeper's liability insurance protects garage operators against only direct damage or legal liability for damage to vehicles in the care, custody, or control of the garage operator (for example, if the named insured provides valet service). Although garagekeeper's liability insurance is available as separate coverage, garage liability insurance is broader coverage and includes garagekeeper's coverage.

§ 17.5:9 Umbrella or Excess Liability

Both umbrella and excess liability policies provide additional protection against catastrophic liability claims by increasing the policy limits of primary coverages.

Excess Liability: An excess liability policy relies on the primary policy for the insuring agreement and exclusions and provides coverage only in excess of the scheduled primary liability policies. The coverage is usually not broader than the primary policies.

Umbrella: An umbrella liability policy has its own insuring agreement and exclusions and usually serves three functions: (1) providing additional limits of liability over limits provided by the primary liability policies, (2) providing "drop down" coverage (that is, the umbrella coverage becomes primary) if the limits of the primary policy are exhausted, and (3) affording coverage for claims not covered by primary policies (to the extent not excluded by the umbrella liability policy). Because both an umbrella policy and the primary policy have their own insuring sections, differences may arise between coverages, especially if the two policies have been issued by different companies. To ensure that no gap in coverage is created, the umbrella liability policy should contain an affirmative statement that the umbrella policy follows the form of the primary policy or at least provides coverage that is no less broad than the underlying policy. Use of labels to identify a policy as an excess liability policy or an umbrella policy is problematic in today's insurance market. Most policies identified as an umbrella policy are really a form of excess liability policy, and there are few policies that are purely an excess policy.

Primary Liability: Both umbrella and excess liability policies contain a schedule of the primary liability policies over which umbrella or excess liability coverage is to be provided. This schedule may require that the primary coverage limits be unimpaired on inception of the umbrella or excess liability coverage, in which case the umbrella or excess liability coverage policies and their primary policies may need to have the same inception date.

§ 17.5:10 Hunting Lease Liability

An individual may be able to purchase an endorsement under the individual's homeowner's insurance policy extending personal liability coverage to a hunting lease. The availability and cost of this type of endorsement may vary with different insurance carriers. Although most forms of homeowner's insurance currently do not exclude bodily injuries caused by firearms, an individual should confirm that his homeowner's insurance policy does not contain an exclusion for hunting accidents before seeking to extend coverage to the premises under a hunting lease. An individual should also consider whether the personal liability limits under his homeowner's insurance policy are adequate to cover a hunting accident.

Hunting lease insurance, which covers hunting accidents, is also available from specialized insurance carriers, often through organizations such as hunting clubs and the National Rifle Association.

If the tenant under a hunting lease is a business entity, the tenant will probably be unable to extend its commercial liability policy to cover hunting accidents at the hunting lease and will need to purchase a hunting lease insurance policy.

§ 17.6 Additional Insured Status and Forms

§ 17.6:1 Usage

An additional insured is a party that is provided coverage as an insured under a policy by an additional insured endorsement. (Note that the correct terminology is "additional insured," not "additional named insured.") Except as discussed in sections 17.6:4 through 17.6:7 below, the status of additional insured is always used with reference to liability policies. An additional insured party is not responsible for payment of the policy premium, but a small administrative charge may be required to issue the endorsement. The policy premium is not adjusted for an additional insured's loss history.

With some exceptions, most notably coverage for bodily injury or death of an employee, Texas law prohibits a requirement in a construction contract for an additional insured endorsement covering a broad-form or intermediate indemnity. See section 17.2:4 above.

§ 17.6:2 Coverage

Many real estate attorneys believe that if a person or entity is an additional insured under the liability insurance of another person, the additional insured is afforded all the benefits of the other person's insurance policy; but in reality, protection is provided to the additional insured party only to the extent stipulated in the additional insured endorsement. Numerous additional insured endorsement forms exist for different situations with varying degrees of coverage. Many additional insured endorsements explicitly or by implication exclude coverage for the sole or contributory negligence of the additional insured and limit or deny coverage to specific types of operations or locations.

§ 17.6:3 Additional Insured Endorsement Forms

Additional insured endorsement forms contain a granting clause stating that the party listed or described in the endorsement is to be included as an insured under the policy followed by restrictions introduced by the phrase *but only with respect to*. Granting clauses in additional insured endorsements do not typically cover partners, employees, agents, and other parties related to the party named as additional insured unless language to that effect is added or a contractual requirement to that effect is picked up by the wording of the endorsement. Although ISO publishes more than thirty different addi-

tional insured endorsement forms, individual insurance companies are increasingly using manuscripted forms that differ greatly in coverages and clarity. Hence, the type of additional insured endorsement required must be stipulated by ISO designation (including title, form number, and edition date) or, at a minimum, described in terms of the desired coverage.

The additional insured endorsements discussed below are standard forms promulgated by ISO. Note that the words *you* and *your* used in the forms quoted below refer to the named insured, not the additional insured.

In 2004, the ISO 20 10 additional insured form was amended to exclude coverage for the additional insured's sole negligence by adding a requirement that the claim be caused "in whole or in part" by the acts or omissions of the named insured. This change arguably eliminated from coverage liability attributable to the additional insured's sole negligence.

Then, in April 2013, the additional insured endorsement forms entitled "Additional Insured—Owners, Lessees or Contractors—Scheduled Person or Organization" (ISO Form CG 20 10 04 13) and "Additional Insured—Managers or Lessors of Premises" (ISO Form CG 20 11 04 13), as well as several others, were amended to add three significant additional limitations. First, coverage is restricted to the extent permitted by law. While the apparent intent was to incorporate statutes such as Tex. Ins. Code § 151.104, voiding a contractual provision requiring an additional insured endorsement to the extent that the provision requires coverage for an indemnity prohibited under Tex. Ins. Code § 151.102, the prohibition, if applicable, would presumably apply without this language. Second, coverage cannot be broader than the coverage required by the provision contained in the underlying contract, which is often limited to the indemnity obligations assumed by the named insured. Here, the intent is to prevent coverage from exceeding what is required by the contract, so it is important for the contract to properly describe the scope of coverage required. Third, the dollar amount of coverage under the additional insured endorsement is limited to the lesser of the policy limit or the dollar limit of coverage required by the underlying contract. For this reason, insurance provisions in contracts often state that the policy limits set forth in the contract are minimum coverages and are not intended to limit the total amount the party should carry. However, note some manuscript endorsements may include endorsements that limit coverage to the lesser of the policy limit or the "minimum" limits of coverage required by the underlying contract. The party seeking additional insured coverage should specify in the contract that the limits of insurance are just minimums and should specifically require that additional insured status be provided to the full limits of any liability policies. In any event, named insureds may wish to avoid restrictive additional insured endorsements, because the named insured's contractual obligation to provide additional insured coverage may be broader than the scope of the coverage of the available additional insured endorsement. On the other hand, the named insured may not want to provide additional insured coverage for risks that are assumed by or are the obligation of the additional insured. If so, both the contract and the policy should limit the additional insured coverage to the risks contractually assumed by the named insured.

In late 2019, ISO amended many of its additional insured endorsement forms, including the CG 20 10 and the CG 20 11. The changes made to these additional insured endorsement forms are not material to an understanding of the three limitations introduced in 2013. The following provisions from ISO endorsement CG 20 10 04 13 and CG 20 11 04 13 illustrate the three limitations introduced in 2013 (the first and second by paragraphs 1 and 2 below and the third by paragraph C below):

However:

1. The insurance afforded to such additional insured only applies to the extent permitted by law; and

2. If coverage provided to the additional insured is required by a contract or agreement, the insurance afforded to such additional insured will not be broader than that which you are required by the contract or agreement to provide for such additional insured.

...

C. With respect to the insurance afforded to these additional insureds, the following is added to Section III – Limits of Insurance:

If coverage provided to the additional insured is required by a contract or agreement, the most we will pay on behalf of the additional insured is the amount of insurance:

1. Required by the contract or agreement; or

2. Available under the applicable Limits of Insurance shown in the Declarations;

whichever is less.

This endorsement shall not increase the applicable Limits of Insurance shown in the Declarations.

ISO Form CG 20 10 04 13.

Owners, Lessees, or Contractors: The additional insured endorsement form entitled "Additional Insured—Owners, Lessees or Contractors—Scheduled Person or Organization" (ISO Form CG 20 10 04 13, quoted in part below) is commonly used in construction situations. The named insured (the "you" and "your" referenced in the endorsement) provides additional insured coverage to the person or persons identified in the endorsement's schedule, for instance an owner, a lessee, or a general contractor (or other person upstream of the named insured). The endorsement has three drawbacks: (1) it covers only the named insured's ongoing operations—that is, the additional insured is not covered for bodily injury or property damage occurring after completion or abandonment of the work; (2) it excludes from coverage injuries or damage caused by the sole negligence (but not the contributory negligence) of the additional insured, since the endorsement requires that the injury or damage be partially or totally caused by the named insured; and (3) it substitutes the word *caused* for the phrase *arising out of* used in editions before 2004 in order to eliminate coverage for losses or injuries occurring because of contractors' operations but not necessarily because of contractors' actions.

A. Section II—Who Is An Insured is amended to include as an additional insured the person(s) or organization(s) shown in the Schedule, but only with respect to liability for "bodily injury", "property damage" or "personal and advertising injury" caused in whole or in part by:

1. Your acts or omissions; or

2. The acts or omissions of those acting on your behalf;

in the performance of your ongoing operations for the additional insured(s) at the location(s) designated above.

ISO Form CG 20 10 04 13; ISO Form CG 20 10 12 19.

Coverage for completed operations can be obtained by using ISO Form CG 20 10 in tandem with ISO Form CG 20 37 12 19 entitled

"Additional Insured—Owners, Lessees, or Contractors—Completed Operations."

Managers or Lessors of Premises: The additional insured endorsement form entitled "Additional Insured—Managers or Lessors of Premises" (ISO Form CG 20 11 04 13, quoted in part below) is commonly used in lease situations and does not exclude the sole or contributory negligence of the additional insured. Coverage is tied to the lease's definition of "premises." Thus, if a lease defines "premises" in a way that excludes adjacent driveways or corridors, the landlord may not be an additional insured with respect to bodily injuries and property damage occurring in loading areas serving the premises.

> **A. Section II—Who Is An Insured** is amended to include as an insured the person(s) or organization(s) shown in the Schedule but only with respect to liability arising out of the ownership, maintenance or use of that part of the premises leased to you and shown in the Schedule and subject to the following additional exclusions:
>
> This insurance does not apply to:
>
> 1. Any "occurrence" which takes place after you cease to be a tenant in that premises.
>
> 2. Structural alterations, new construction or demolition operations performed by or on behalf of the person or organization shown in the Schedule.

ISO Form CG 20 11 04 13. A major change by ISO to this endorsement was made effective December 2019. The coverage trigger in paragraph A was revised to read as follows:

> **A. Section II—Who Is An Insured** is amended to include as an insured the person(s) or organization(s) shown in the Schedule, but only with respect to liability for "bodily injury", "property damage" or "personal and advertising injury" caused, in whole or in part, by you or those acting on your behalf in connection with the ownership, maintenance or use of that part of the premises leased to you and shown in the Schedule and subject to the following additional exclusions . . . .

ISO Form CG 20 11 12 19. ISO eliminated the "arising out of" language previously included in the CG 20 11. The CG 20 11 is now in line with the revisions made in 2004 to the CG 20 10 additional insured endorsement form to limit the coverage trigger for additional insured protection to liability "caused, in whole or in part, by" the named insured and by those acting on its behalf. Arguably, this change eliminates additional insured protection for the landlord and managers for their sole negligence.

§ 17.6:4 Additional Insured as Its Interest May Appear

The beneficiary of a property insurance policy must have an "insurable interest" in the insured property, that is, a lawful, substantial, and enforceable interest in the safety or preservation of the subject matter of the insurance. Examples of parties having insurable interests in a building are the owner and the mortgagee. The owner is the named insured under a property policy, and a lender's interest would be protected with a lender loss payable or other mortgagee clause endorsement. In the context of builder's risk policies the terminology "additional insureds as their interests may appear" has often been used to attempt to protect parties other than the named insured and mortgagee. If the owner of a building under construction procured a builder's risk policy, the owner would be the named insured and the contractor and subcontractors would be named as additional insureds as their

interests may appear. In theory, if the building were destroyed before completion, the contractor and subcontractors would be entitled to the portion of the insurance proceeds attributable to the portion of the completed construction for which the contractor and subcontractors had not been paid at the time the destruction occurred, and the insurance company would not be able to sue its "insureds" to recover its loss. However, the phrase has led to confusion in litigation and to unintended consequences. Risk managers now advise against the use of "additional insureds as their interests may appear" in builder's risk policies and suggest instead that (1) all parties be named as insureds under the builder's risk policy, without reference to the phrase "additional insureds as their interests may appear"; (2) mutual waivers of subrogation be included in the construction contracts and subcontracts; and (3) the parties confirm that the policy permits the waivers of subrogation. If there are coverages that are not intended to benefit all parties (such as a third-party liability extension that is not intended to benefit the contractor), that issue may need to be addressed in the policy and the applicable contracts.

§ 17.6:5 Additional Insured Status for Landlords in Property Proceeds

ISO Form CP 12 19, entitled "Additional Insured—Building Owner," provides that the building owner identified in the endorsement is a "Named Insured" with respect to the coverage provided under the tenant's property policy "for physical loss or damage to the building(s) described in the Schedule" to the endorsement.

§ 17.6:6 Additional Insured Status for Landlords in Rental Value

ISO Form CP 15 03, entitled "Business Income—Landlord as Additional Insured (Rental Value)," names the landlord as an additional insured with respect to that portion of proceeds payable under a business income endorsement representing the amount of rent payable under the lease. The remainder of the business income proceeds are payable to the tenant, that is, the named insured. In addition, the insurer commits to provide advance notice in writing of cancellation to the additional insured. This endorsement is especially useful in an absolutely net lease transaction.

§ 17.6:7 Requirement that Coverage Be Primary and Noncontributory

If a party that is named as additional insured expects such coverage to be primary and noncontributory to the additional insured's existing insurance coverage, the policy providing additional insured coverage must be endorsed to that effect. All policies have "other insurance" clauses that govern how overlapping insurance policies are required to share coverage. Some such clauses say a particular policy will be excess to any other policy, while some "other insurance" clauses provide for sharing duplicate coverage pro rata. When the issue arises because the named insured has two policies that provide overlapping coverage, these "other insurance" clauses make sense—the named insured is covered in any event, and the loss is shared by the overlapping insurers in accordance with the policy provisions. However, if a party has its own insurance but also requires that it be an additional insured on another party's policy, it could be argued that the "other insurance" clauses should not apply and that the coverage obtained from the counterparty's policy should be primary. In the absence of an endorsement, however, this may not be the result; the courts may split coverage between a party's own insurance and its coverage as an additional insured. In addition, if the "other insurance" clause is a strong excess clause, the additional insured coverage might be rendered completely inapplicable depending on the amount of the claim and the limits of the respective policies. This result

can be avoided by contractually requiring that coverage provided to the additional insured shall be primary and noncontributory to any other policy providing coverage to any additional insured, at least to the extent of the risks and liabilities assumed by the counterparty. ISO Form CG 20 01 04 13 is an example of such an endorsement, stating:

> This insurance is primary to and will not seek contribution from any other insurance available to an additional insured under your policy provided that:
>
> **(1)** The additional insured is a Named Insured under such other insurance; and
>
> **(2)** You have agreed in writing in a contract or agreement that this insurance would be primary and would not seek contribution from any other insurance available to the additional insured.

ISO Form CG 20 01 04 13.

However, the above endorsement applies only to policies in which the additional insured is a named insured, and the additional insured and the counterparty will both want to determine the existence of any such restrictions and whether any such restrictions are acceptable to them.

§ 17.7 Waivers of Subrogation

§ 17.7:1 Application

An insurance company is subrogated to the rights of its insured against third parties to the extent of a loss paid by the insurance company. However, the parties to a business transaction may prefer not to endanger their business relationship with potentially expensive, stressful, and time-consuming litigation conducted by an insurance company in the name of one party against the other party. Hence, each insured may require its insurance company to waive its right of subrogation to the insured's rights against the other party. If the named insured does not want to waive subrogation for risks that it did not intend, the contract can limit the scope of the waiver to the risks assumed by the named insured.

§ 17.7:2 Components of Waiver of Subrogation

A waiver of subrogation provision should have two components: a covenant by the insured to obtain the waiver of subrogation from its insurer and a release by the insured with respect to the liability that is covered by the insurance policy for which the waiver is sought. The purpose of the release is to protect the beneficiary of the waiver if the party agreeing to obtain the waiver fails to purchase insurance or if the loss exceeds the scope or limit of the insurance policy.

A waiver of subrogation should also state affirmatively which party is to be responsible for any deductible or self-insured retention under the policy in question.

§ 17.7:3 Availability

The current ISO edition of "Commercial Property Conditions" form (ISO Form CP 00 90) used in conjunction with an ISO commercial property insurance policy contains the following waiver of subrogation:

> If any person or organization to or for whom we make payment under this Coverage Part has rights to recover damages from another, those rights are transferred to us to the extent of our payment. That person or organization must do everything necessary to secure our rights and must do nothing *after loss* to impair them. *But you may waive your rights against another party in writing:*

1. *Prior to a loss* to your Covered Property or Covered Income.

2. *After a loss* to your Covered Property or Covered Income only if, at time of loss, that party is one of the following:

   a. Someone insured by this insurance;

   b. A business firm:

      (1) Owned or controlled by you; or

      (2) That owns or controls you; or

   c. Your tenant.

This will not restrict your insurance.

ISO Form CP 00 90 07 88 (emphasis added).

The ISO form of commercial general liability policy (ISO Form CG 00 01) states "The insured must do nothing after loss to impair" the insurance company's right of recovery. Most insurance professionals believe that the implication of the language is that a waiver of subrogation given by the named insured before the occurrence is permissible.

Waivers of subrogation are also available for workers' compensation, employer's liability, and builder's risk policies but are not provided absent a request.

§ 17.7:4 Fair Notice Doctrine Compliance

A provision that requires one party to release the liability of the other party even if the other party is negligent must comply with the fair notice doctrine under Texas law. See section 17.2:5 above. However, a provision requiring the insurer to waive subrogation has never been held to be subject to the fair notice doctrine.

§ 17.8 Deductible vs. Self-Insured Retention

Both a deductible and a self-insured retention (SIR) require the insured to pay the first dollars of a loss. However, the potential that a third-party claimant will not be compensated under a liability policy with an SIR is substantially greater than that under a policy with a deductible. When a deductible exists under a liability policy, the insurance company keeps control of the adjustment process, defends the insured, typically pays the claim to the third party, and thereafter charges the insured for the deductible. If an SIR exists, the insured controls the adjustment process to the extent of its SIR (unless the insured has contracted with a third party to administer the process) and the liability insurer has no duty to defend the insured or pay the claim to the third party until the SIR is exhausted.

§ 17.9 Quality of Insurance

A.M. Best's analysis of property and casualty insurance companies is generally the standard cited in real estate transaction documents. Best assigns a "Financial Strength Rating" to insurance carriers. If a company is below Best's minimum asset threshold or if sufficient information is not available or is not submitted or if the insurer so requests, Best may elect not to assign a Financial Strength Rating to an insurance company. Reports are available from the A.M. Best web site (**www.ambest.com**) at no cost.

The components of a Best's financial strength rating are the following:

1. *Rating*—A company is assigned one of sixteen "Best's Ratings." Each rating is composed of a letter (A to D) with or without plus or minus signs. A++ is the highest rating and D is the lowest.

2. *Financial Size Category*—A rated company is also assigned one of fifteen Financial Size Categories on the basis of its capital, surplus, and conditional reserve funds from which losses are paid. The Financial Size categories are referred to as "Classes" and described with capital roman numerals. Class I (up to $1 million) is the smallest and Class XV ($2 billion or more) is the largest.

3. *Outlook*—An Outlook indicates the potential future direction of the company's rating over a designated period of twelve to thirty-six months. Outlooks can be "positive," "negative," or "stable."

Property and casualty insurance companies that are not rated are designated "NR-1" through "NR-5" based on the reason for which Best did not rate the company.

The desired quality of insurance companies should be specified with a combination of both Best's Rating and Financial Size Category. Most mortgagees require a minimum Best's financial strength rating of "A" (Excellent) and a financial size category of "Class X" ($500 million to $750 million).

§ 17.10 Evidencing the Existence of Coverage

The most common method for evidencing the existence of insurance coverage is to obtain a certificate of liability insurance or evidence of personal or commercial property insurance issued by an insurance broker. The standard forms of certificates of liability insurance and evidence of property insurance are published by the Association for Cooperative Operations Research and Development (ACORD), an insurance industry trade association.

§ 17.10:1 ACORD 25 "Certificate of Liability Insurance"

The 2016 edition of the ACORD 25 certificate (form 17-1 in this chapter) combines all disclaimers contained in previous editions into two disclaimers located at the top of the certificate:

> THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AFFIRMATIVELY OR NEGATIVELY AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW. THIS CERTIFICATE OF INSURANCE DOES NOT CONSTITUTE A CONTRACT BETWEEN THE ISSUING INSURER(S), AUTHORIZED REPRESENTATIVE OR PRODUCER, AND THE CERTIFICATE HOLDER.
>
> IMPORTANT: If the certificate holder is an ADDITIONAL INSURED, the policy(ies) must have ADDITIONAL INSURED provisions or be endorsed. If SUBROGATION IS WAIVED, subject to the terms and conditions of the policy, certain policies may require an endorsement. A statement on this certificate does not confer rights to the certificate holder in lieu of such endorsement(s).

The disclaimers address several matters:

1. The certificate is issued as a matter of information only.

2. The certificate confers no rights on the certificate holder.

3. The certificate does not create a contract between the certificate holder and the insurer or the insurance broker.
4. The certificate does not amend, extend, or alter the coverage afforded by the enumerated policies.
5. If the certificate contains a statement that an insurance policy has been endorsed to include an additional insured or to include a waiver of subrogation, but the endorsements were not, in fact, issued, the holder of the certificate has no rights against the insurer or broker.

An ACORD 25 certificate is expressly made subject to "all the terms, exclusions and conditions" of the policies listed therein, notwithstanding any requirement in any contract pursuant to which the certificate was issued. The certificate holder is also made aware that the policy limits shown in the certificate may have been reduced by paid claims.

An ACORD 25 certificate requires the issuing company to deliver notice only in the event of cancellation of the policies before the expiration date "in accordance with the policy provisions."

The ACORD 25 certificate is designed to be used with liability policies. To use the form for property policies, information must be inserted into the "DESCRIPTION OF OPERATIONS / LOCATIONS / VEHICLES" space, which appears below the workers' compensation blank.

§ 17.10:2 ACORD 28 "Evidence of Commercial Property Insurance"

The 2016 edition of the ACORD 28 certificate (form 17-2 in this chapter) summarizes and states coverage under a commercial lines property policy (for example, a commercial property policy) to a mortgagee, additional insured, or loss payee and is designed to comply with the requirements of current lending practices. ACORD 25 and 28 have similar disclaimers. (See section 17.10:1 above for a discussion of the disclaimers.) ACORD 28 requires the issuing company to deliver notice only in the event of cancellation of the policies before the expiration date "in accordance with the policy provisions."

§ 17.10:3 Practical Considerations

According to risk managers, the vast majority of certificates of insurance are incorrectly completed. Hence, the forms should be reviewed for accuracy.

Insurance certificates are subject to fraud. A red flag is a certificate that is provided directly from the party that is supposedly insured rather than a third-party insurance agent. The recipient of a certificate may wish to consider (1) contacting the issuing insurance agency to confirm its existence, (2) contacting the insurance carrier to confirm the existence of the coverage, and (3) requiring copies of all endorsements dealing with additional insureds, loss payees, mortgagees, and waivers of subrogation.

§ 17.10:4 Alteration, Modification, Disclaimers, and Notice

Texas has joined a large number of states that have enacted laws to prevent modification of the provisions of ACORD forms. Tex. Ins. Code § 1811.052(b) provides that "[a] person may not execute, issue, or require the issuance of a certificate of insurance for risks located in this state, unless the certificate of insurance form has been filed with and approved by the [Texas Department of Insurance]." Under Tex. Ins. Code § 1811.103, a standard certificate of insurance form promulgated by ACORD or ISO is deemed approved when filed with the Texas Department of Insurance, unless the standard form violates certain parameters contained in Tex. Ins. Code

§ 1811.102. The effect of approval of a certificate form by the Department is that a certificate confirms only that the referenced policy has been issued. Any certificate in violation of Texas Insurance Code chapter 1811 "is void and has no effect." Tex. Ins. Code § 1811.156.

Tex. Ins. Code § 1811.053 prohibits any alteration or modification of a certificate of insurance form approved the Texas Department of Insurance unless the alteration or modification is approved by the Department. In addition, Tex. Ins. Code § 1811.051 forbids an agent from issuing a certificate of insurance that alters, amends, or extends the coverage or terms and conditions provided by the referenced insurance policy. "A certificate of insurance may not contain a reference to a legal or insurance requirement contained in a contract other than the underlying contract of insurance, including a contract for construction or services." Tex. Ins. Code § 1811.154.

In the parameters for an acceptable form, Tex. Ins. Code § 1811.101 adopts many of the disclaimers contained in ACORD forms: "for information purposes only"; the certificate "does not confer any rights or obligations other than the rights and obligations conveyed by the policy"; the certificate does not convey a contractual right to a certificate holder; and "the terms of the policy control over the terms of the certificate."

Tex. Ins. Code § 1811.155(b) prohibits any alteration in a certificate of the notice provisions of a referenced insurance policy. Under Tex. Ins. Code § 1811.155(a), a certificate can require notice to a person only if the person is named in the policy or endorsement and the policy or endorsement (or law) requires notice to be provided.

§ 17.11 Examples of Insurance Requirements

Forms contained in chapters 8 (Deeds of Trust), 10 (Ancillary Loan Documents), 19 (Commercial Construction Contract Documents), and 25 (Leases) in this manual include insurance requirements and provisions that offer examples of the principles discussed in this chapter.

§ 17.12 Additional Resources

Almy, John. "Protective Safeguards Endorsements." In *Advanced Real Estate Law Course, 2019*. Austin: State Bar of Texas, 2019.

Brady, Timothy J. and Jeffrey L. Brady. "Properly Insuring Your Communities Do's and Don'ts." In *Handling Your First (or Next) POA Client: Basics of Representing Condominium and Homeowners Associations, 2019*. Austin: State Bar of Texas, 2019.

Comiskey, Charles E. "Insurance Gaps: In the Eye of the Beholder." In *Advanced Real Estate Law Course, 2014*. Austin: State Bar of Texas, 2014.

Johnston, Aaron, Jr. "Insurance and Indemnity in Real Estate Transactions (Drafting Insurance Requirements for Leases/Developments/Whatever)." In *Advanced Real Estate Drafting Course, 2016*. Austin: State Bar of Texas, 2016.

———. "Property and Liability Insurance and Indemnities in Real Estate Transactions." In *Handling Your First (or Next) Commercial Real Estate Lease, 2015*. Austin: State Bar of Texas, 2015.

Johnston, Aaron, Jr., and Charles E. Comiskey. "Property and Liability Insurance and Indemnity in Real Estate Transactions." Chap. 11 in *Commercial Real Estate Transactions Handbook*, 4th ed., edited by

Mark A. Senn. New York: Aspen Publishers, 2013.

Locke, William H., Jr. "Drafting Indemnities (and Their Relationship to Insurance)." In *Advanced Real Estate Drafting Course, 2017.* Austin: State Bar of Texas, 2017.

———. "Texas Risk Management Manual—Chapter 1: Risk Management 101." In *Advanced Real Estate Law Course, 2018.* Austin: State Bar of Texas, 2018.

_____. "Texas Risk Management Manual—Chapter 2: Indemnity 201." In *Advanced Real Estate Law Course, 2018.* Austin: State Bar of Texas, 2018.

_____. "Texas Risk Management Manual—Chapter 3: Insurance 201." In *Advanced Real Estate Law Course, 2018.* Austin: State Bar of Texas, 2018.

_____. "Texas Risk Management Manual—Chapter 4: Waiver of Subrogation 201." In *Advanced Real Estate Law Course, 2018.* Austin: State Bar of Texas, 2018.

_____. "Texas Risk Management Manual—Chapter 5: Forms and Commentary." In *Advanced Real Estate Law Course, 2018.* Austin: State Bar of Texas, 2018.

_____. "Three Scofflaws Are on the Loose, but There Is a New Sheriff in Town (the Good, the Bad and the Ugly of CGL Endorsements—and the Solution)." In *Advanced Real Estate Law Course, 2017.* Austin: State Bar of Texas, 2017.

Locke, William H., Jr., and Charles E. Comiskey. "11 Things You Wish You Had Known About Commercial Project Insurance." In *Advanced Real Estate Law Course, 2013.* Austin: State Bar of Texas, 2013.

Locke, William H., Jr., Charles Comiskey, and Elizabeth A. Lowe. "Insurance for Real Estate Lawyers." In *Advanced Real Estate Law Course, 2015.* Austin: State Bar of Texas, 2015.

Malecki, Donald S., and Jack P. Gibson. *The Additional Insured Book.* 7th ed. Dallas: International Risk Management Institute, Inc., 2013. Online edition.

McLaurin, Jason C. "An Overview of Business Interruption Insurance." In *Advanced Insurance Law Course, 2018.* Austin: State Bar of Texas, 2018.

Melendi, Stephen A. "Priority of Coverage or: Who Picks Up the Tab at the End of the Night." In *Advanced Insurance Law Course, 2017.* Austin: State Bar of Texas, 2017.

Nettles, Larry W. "Environmental Indemnity and Liability Allocation Agreements—Evaluating and Negotiating About the Risks." In *Advanced Real Estate Drafting Course, 2010.* Austin: State Bar of Texas, 2010.

Robinson, Linda G., and Jack P. Gibson. *Commercial Property Insurance.* Dallas: International Risk Management Institute, Inc., 2009. Online edition.

Woodward, W. Jeffrey, Richard J. Scislowski, Maureen C. McLendon, and Jack P. Gibson. *Commercial Liability Insurance.* Dallas: International Risk Management Institute, Inc., 2010. Online edition.

Chapter 18

Residential Construction Contract Documents

Forms

Chapter 18

Residential Construction Contract Documents

§ 18.1 General Considerations

The principal functions of a residential construction contract are to establish the terms of the construction agreement, such as price, description of the project, commencement and completion dates, warranties, and allocation of responsibilities, and to create a system for building, approving, and paying for the construction.

The Texas Constitution provides several consumer protection provisions relating to construction on homestead property. For a lien for the construction of improvements to be created against homestead property there must be a written contract. For remodeling or renovations the constitution requires a written application for extension of credit be submitted by the homeowners at least five days before executing the contract, unless the work is acknowledged to be necessary for the immediate repair of conditions that materially affect the health or safety of the residents of the homestead. In addition to this five-day application period, the owner has a three-day right of rescission following execution of the contract. For renovation or repair projects, the contract must also be executed at the office of the third-party lender extending credit for the work and material, the office of an attorney at law, or a title company office. Tex. Const. art. XVI, § 50(a)(5). See chapter 20 in this manual for a detailed discussion of these requirements. Forms 20-6 and 20-7 are closing certificates used to confirm compliance with these requirements.

This chapter contains a residential construction contract (form 18-4). Designed as a basic form, the contract specifies construction costs, a description of the property on which the new improvements are to be situated, a description of the plans and specifications for the project, and a completion date for the work.

Each transaction should be examined to determine if additional provisions are necessary. If form 18-4 is used to document a transaction in which the construction costs are financed, a comprehensive review of chapter 20 in this manual is needed. The attorney may also wish to consider including additional provisions, which are beyond the scope of this chapter, relating to such matters as work delays, responsibility for soil condition and design, loan commitment requirements, late charges, and delay damages.

§ 18.2 Cautions

§ 18.2:1 Construction Trust Fund Statute

The Texas Construction Trust Fund Act (Texas Property Code sections 162.001–.033) states that contractors agreeing to do more than $5,000 worth of work must put the owner's funds for each such job in a "construction account" at a financial institution. Tex. Prop. Code § 162.006. The general contractor becomes a trustee for the funds received from the owner for the benefit of the subcontractors and suppliers on the project. Tex. Prop. Code § 162.003. The builder's profit on a cost-plus contract is not considered a trust fund. Tex. Prop. Code § 162.001(c). Misuse of trust funds of $500 or more with intent to defraud is a third-degree felony. Failure to establish or maintain a construction account in violation of sections 162.006 or 162.007 is a class A misdemeanor. Making a false affidavit that the contractor has paid the project bills is a class A

misdemeanor with a possible penalty of up to one year in jail, a $4,000 fine, or both, and personal liability for loss or damage resulting from a false statement. Tex. Prop. Code §§ 53.085(d), (e), 162.032.

The attorney should also be familiar with the law of involuntary mechanic's liens. See chapter 21 in this manual.

§ 18.2:2 Texas Residential Construction Liability Act

The Texas Residential Construction Liability Act (RCLA), Texas Property Code chapter 27, controls key aspects of residential construction regarding defect claims. Analysis of the provisions of the RCLA is beyond the scope of this manual, although an overview of the RCLA is included below because of its applicability to certain requirements in residential construction contract documents.

RCLA Applicability and Notice: The RCLA applies to construction defect disputes involving a residence, which the RCLA defines as "the real property and improvements for a single-family house, duplex, triplex, or quadruplex or a unit and the common elements in a multiunit residential structure in which title to the individual units is transferred to the owners under a condominium or cooperative system." Tex. Prop. Code § 27.001(7).

Notices Required in Contract: Contracts for home or residential construction must contain the statutory notices prescribed by the RCLA. The notice is included in form 18-4 in this chapter.

Dispute Resolution Requirements: Residential construction defect disputes are addressed by the RCLA. The RCLA requires owner claimants to complete several conditions precedent before filing suit or arbitration based on most residential construction defect claims. Certain limited types of claims are exempt from the RCLA dispute resolution process, including claims solely for personal injury, wrongful death, or property damage; cases of builder wrongful abandonment of the project; real estate fraud claims under chapter 27 of the Texas Business and Commerce Code; and violations of the Trust Fund Act (Property Code chapter 162). Tex. Prop. Code § 27.002.

The dispute process includes several steps, including advance notice to builders, opportunity for builder inspection of the claimed defects, disclosure to the builder of expert reports, and builder offers to repair. Tex. Prop. Code § 27.004.

§ 18.2:3 Construction Anti-Indemnity Statute

Chapter 151 of the Texas Insurance Code prohibits an indemnity in a construction contract, or in an agreement collateral to or affecting a construction contract, to the extent that it requires an indemnitor to indemnify a party, including a third party, against a claim caused by the negligence or fault, violation of a law, or breach of contract of the indemnitee, its agent or employee, or any third party under the control or supervision of the indemnitee, other than the indemnitor or its agent, employee, or subcontractor of any tier. A provision in a construction contract that requires the purchase of additional insured coverage is void to the extent that it requires coverage that is prohibited under subchapter C of chapter 151. This subchapter does not apply to an indemnity provision in a construction contract, or an agreement collateral to or affecting a construction contract, pertaining to a single-family house, townhouse, duplex, or directly related land development, or to a public works project of a municipality. Tex. Ins. Code § 151.105(10).

§ 18.3 Precommencement

§ 18.3:1 Homestead and Mechanic's Liens

Texas homesteads are exempt from forced sale except for the enforcement of purchase-money liens, property tax liens, an owelty of partition, the refinancing of a federal tax lien, mechanic's and materialman's liens, "home equity" or second-lien financing, a reverse mortgage, and the conversion and refinance of a personal property lien secured by a manufactured home to a lien on real property. A contract for new improvements or improvements to an existing home that create a mechanic's and materialman's lien against the homestead must be in writing, made before material is furnished or labor performed, signed by both husband and wife if the homestead is a family one, and compliant with other conditions provided in the Texas Constitution. Tex. Const. art. XVI, § 50; Tex. Prop. Code § 53.254. The contract must also contain the notice required by Tex. Prop. Code § 41.007. The residential construction contract, used alone, does not create a mechanic's lien. For a more complete discussion of lien and financing issues, see chapter 20 in this manual.

§ 18.3:2 Contract Price

Three basic price structures are used in construction contracts.

Lump sum or *stipulated sum* is the simplest type of contract price. The contractor reviews the plans and specifications for the project and contractually agrees on a fixed price for the work. Unless the parties agree to change this stipulated amount, this will be the amount paid by the owner.

A *unit price* contract establishes a price for a given unit of work (for example, $13 per square yard of asphalt paving).

A *cost-plus* arrangement establishes the price to the owner based on the actual cost of the work plus a certain percentage of profit for the contractor. In cost-plus, guaranteed-maximum construction contracts the contractor guarantees that the cost to the owner will not exceed a maximum price.

§ 18.3:3 Cautions

Commencement of construction before the contract is executed invalidates a mechanic's lien on a homestead. Tex. Prop. Code § 53.254(b).

Giving owners an allowance is standard practice in residential construction. Both parties should take care to ensure products chosen by the owners are within the amount allowed by the contract. For instance, if an allowance provides for $1,000 for a refrigerator and an owner selects a refrigerator that costs $1,300, the owner has exceeded the allowed amount and owes the contractor an additional $300. If the owner decides to use a previously purchased refrigerator, the contractor owes the owner a credit of $1,000. Careful documentation of amounts spent can prevent future disputes.

Changes to the scope of a project should be documented through the use of a change order, form 18-6 in this chapter. Whether a contractual mechanic's lien extends to such changes depends on the agreement of the parties as expressed in the original construction contract.

Without an agreement to the contrary, there is no contractual lien for partial performance on a homestead. The contract must be substantially performed. *Fidelity Savings & Loan Ass'n v. Baldwin*, 416 S.W.2d 482, 483 (Tex. App.—Beaumont 1967, writ ref'd n.r.e.).

Sales taxes are the responsibility of the owner unless the contract provides for a lump-sum price, in which case the cost is the responsibility of the contractor as the consumer. Tex. Tax Code

§ 151.056. If the contractor manufactures or produces and also places ready-mix concrete into the property, the concrete must be separately billed, with tax on the materials paid by the owner. Tex. Tax Code § 151.056(g).

Workers' compensation laws apply to employer-employee relationships but not to independent contractors. Tex. Lab. Code §§ 406.121–.123.

The Texas Home Solicitations Transaction Act may apply if the consumer's obligation is entered into at a location other than the contractor's place of business. If the Act applies, additional notices are required. Tex. Bus. & Com. Code §§ 601.002, 601.051–.053. The statutory notice of cancellation is included in the residential construction contract (form 18-4 in this chapter).

In unincorporated areas of certain counties, a builder's failure to provide the notice indicating all inspections of a new residential construction of a single-family house or duplex showed compliance with applicable building code standards constitutes a criminal offense. The builder has an affirmative defense if the builder's failure to submit the notice is the result of the failure of the person who performed the inspection to provide appropriate documentation to the builder to submit to the county. Tex. Loc. Gov't Code §§ 233.154–.155.

§ 18.3:4 Owner Liability to Mechanic's Lien Claimants and Owner Retainage

The perfection of involuntary mechanic's liens is covered in chapter 21 in this manual. Before contracting for residential construction, owners should become familiar with their potential liability for mechanic's liens. Owner liability for properly noticed and filed subcontractor and supplier mechanic's liens is the sum of two amounts described in Tex. Prop. Code § 53.084. First, an owner is liable for the 10 percent statutory retainage owners are required to withhold from payments to the original contractor on every construction project. Tex. Prop. Code §§ 53.101–.103; *Page v. Structural Wood Components*, 102 S.W.3d 720 (Tex. 2003). In addition, an owner is liable for "fund trapping," which means "trapping" or withholding remaining contract funds otherwise owed to the original contractor. This is required when the owner receives a mechanic's lien notice letter containing language telling the owner to withhold payment from the contractor for the claim amount. Tex. Prop. Code § 53.056(b), (d). If an owner receives a lien notice letter containing the required fund-trap warning and fails to withhold payment from the contractor, the owner is personally liable and the owner's property is subject to a lien for amounts paid after receipt of the notice. This fund-trapping liability is in addition to the owner's liability for the 10 percent statutory retainage. Consequently, to protect the owner in case involuntary mechanic's liens are asserted, the owner must do two things: (1) retain 10 percent of the adjusted original contract price throughout the duration of the project and for the time after completion provided for lien claimants to file mechanic's liens and (2) withhold the proper amount of undisbursed funds ("trapped funds") from the contractor if lien notices are received from subcontractors or suppliers. Tex. Prop. Code §§ 53.081, 53.084, 53.101. If an owner fails to withhold the statutory retainage, the owner is nevertheless liable for the amount that should have been withheld. Tex. Prop. Code § 53.103(a).

Time for Withholding Statutory 10 Percent Retainage: Owners, to protect themselves from mechanic's lien claimant liability, should withhold payment of statutory retainage for at least the time allowed for claimants to file lien affidavits. Tex. Prop. Code § 53.057. This period of time is discussed in chapter 21 in this manual. However, an outline of the applicable time limits is provided below.

The retainage provisions affecting first- and second-tier claimants were amended by the 2011 Texas legislature. Owners must withhold retainage until the earliest of the following:

1. The lien filing date provided by Tex. Prop. Code § 53.052, which is the fifteenth day of the third month following the last month of work or delivery by the claimant. (See the chart at section 21.9:2 in this manual.)

2. The fortieth day after the date stated in the affidavit of completion for the original contract, but only if the owner sent the claimant notice of the affidavit. This affidavit of completion is provided for in Tex. Prop. Code § 53.106, which allows, but does not require, the owner to file such an affidavit stating the date of final completion for the project. See form 18-7. Notice of filing and a copy of the affidavit must be sent to claimants making a written request for one or to claimants who have sent out owner lien notices. However, regardless of whether a claimant makes a request for such affidavit or sends a lien notice, if the affidavit is not sent to a claimant, then the forty-day deadline described in this section does not apply to that claimant. The affidavit is prima facie evidence of the actual final completion date for the project if it is sent to claimants as required.

3. The thirtieth day after the day the owner sends written notice to the claimant demanding that the claimant file its mechanic's lien affidavit. The notice must contain a legal description of the project property and the owner's name and address, and it must specify that the lien affidavit must be filed within thirty days of the date the notice was sent. The "demand to file a lien" section of the Texas Property Code, Tex. Prop. Code § 53.057(g), provides that this notice is effective only for the amount of contractual retainage earned by the claimant as of the day notice was sent.

Owner Failure to Withhold 10 Percent Retainage: If the owner fails to withhold statutory retainage, then the claimants are entitled to perfect their claims by notice and affidavit within the longer deadlines described above (i.e., the fifteenth day of the third month following the last month of work or delivery). No thirty-day or forty-day deadlines, under Tex. Prop. Code § 53.057(f), are applicable if the owner fails to withhold the statutory retainage.

Summary of Owner Retainage Withholding Period on Residential Projects: In summary, for residential projects, owners are liable to hold retainage for the longer lien-filing period provided by Tex. Prop. Code § 53.052, meaning the fifteenth day of the third month following the last month of work or delivery completing the project. See the chart at section 21.9:2 in this manual. If an owner wants to shorten this time, he must send one of the applicable notices described above: either filing and sending an affidavit of completion (form 18-7) or sending notice to claimants demanding that they file their lien affidavits. Because the effect of the thirty-day notice to file lien is limited to the accrued amount of the claimant's retainage, this notice is of limited use. Therefore, residential owners should consider the affidavit of completion process if they want to shorten the retainage withholding period. Owners are cautioned that only those suppliers and subcontractors who are sent the affidavit of completion are subject to the forty-day deadline. A second-tier supplier-claimant, delivering material at the end of the project and not known to the owner, will not receive an affidavit of completion, and therefore that claimant's lien will not be cut off by the forty-day deadline.

§ 18.3:5 Other Considerations

Both property and liability insurance should be obtained by the contractor to insure the project, and the cost should be factored into the contract price.

Water and electricity should be provided to the lot line by the owner. If not, the contract should allocate the additional cost of obtaining service.

A survey should be performed before the commencement of construction, at the owner's cost.

The Federal Trade Commission requires insulation installers and new home sellers to supply information on the efficacy of the home insulation products they sell. *See* 16 C.F.R. pt. 460. The residential construction contract, form 18-4 in this chapter, includes a section for providing the required insulation disclosure data.

Independent contractor status of the contractor reduces the risk of owner liability. *Exxon Corp. v. Quinn*, 726 S.W.2d 17, 19–20 (Tex. 1987). To help preserve the contractor's independent contractor status, the owner's control over the performance of the work should be limited.

Responsibility for the foundation is one of the most important risk allocation issues in a construction contract. Usually, the party who has the most control over the design of the foundation bears the responsibility for its performance.

If a contract that provides for the construction of new improvements to real property located in Texas contains a provision making the contract or any conflict arising under the contract subject to the laws of another state, to litigation in the courts of another state, or to arbitration in another state, that provision is voidable by the party obligated to perform the construction. Tex. Bus. & Com. Code §§ 272.001–.002.

§ 18.4 Commencement

Commencement of construction is required under the residential construction contract, form 18-4 in this chapter, to begin within thirty days from the contract date. The inception date of a statutory mechanic's lien is the date that construction begins or materials are first delivered. Tex. Prop. Code § 53.124. This date may be established by filing an affidavit of commencement, form 18-5.

§ 18.5 Postcommencement

In the residential construction contract, form 18-4 in this chapter, delays caused by unforeseen circumstances extend the completion date. Delays caused by either party can be made the subject of monetary penalties. The price of the project may be adjusted for concealed conditions.

The contractor agrees to clean up the property following completion. The owner walk-through is intended to produce a "punch list" of items the owner wants completed or corrected by the contractor. Acceptance of work occurs only after inspection and approval by the owner. Evidence of completion must be provided by the contractor to the owner. Substantial completion occurs when a certificate of occupancy is issued. If no certificate of occupancy is required, substantial completion occurs when all improvements are sufficiently complete, in accordance with the construction contract documents, so that the owner may use or occupy the improvements for the intended purpose. If the owner moves into the improvements, the improvements will be deemed to be substantially complete.

Change orders occur only on agreement by the owner and the contractor. This agreement may be documented by form 18-6.

§ 18.6 Warranties

Alternative express warranty provisions are included in form 18-4 in this chapter, in paragraph E.1.e. Texas law implies a warranty of "good and workmanlike" construction, which can be disclaimed. Also, a warranty of "habitability" is implied, which cannot be disclaimed. *See Centex Homes v. Buecher*, 95 S.W.3d 266 (Tex. 2002); *Melody Home Manufacturing v. Barnes*, 741 S.W.2d 349 (Tex. 1987); *Gupta v. Ritter Homes, Inc.*, 646 S.W.2d 168 (Tex. 1983); *March v. Thiery*, 729 S.W.2d 889 (Tex. App.—Corpus Christi–Edinburg 1987, no writ). In *Centex Homes*, the Texas Supreme Court held that—

> the implied warranty of good workmanship may be disclaimed by the parties when their agreement provides for the manner, performance, or quality of the desired construction. We further hold that the warranty of habitability may not be disclaimed generally. This latter implied warranty, however, only extends to defects that render the property so defective that it is unsuitable for its intended use as a home.

Centex Homes, 95 S.W.3d at 274–75.

One of the alternative express warranties provided in form 18-4 refers to the Texas Residential Construction Commission (TRCC) warranties. These TRCC warranties provide detailed quality standards for residential construction. Although the TRCC was abolished effective September 1, 2009, the warranty standards previously developed by the TRCC may still be incorporated by reference. The TRCC warranties are available online at **www.texasinspector.com/files/TRCC-Standards-of-Performance.pdf**.

§ 18.7 Instructions for Completing Forms

§ 18.7:1 Contractor's Disclosure Statement for Residential Construction Contracts

Form 18-1 in this chapter is mandated by the Texas Property Code. This statement must be delivered to the owner before the execution of the construction contract. Tex. Prop. Code § 53.255.

§ 18.7:2 Contractor's List of Subcontractors and Suppliers

Before beginning work on a project the original contractor must furnish to the owner a written list with the name, address, and telephone number of each subcontractor and supplier that the general contractor intends to use. See form 18-2 in this chapter. This list must be updated within fifteen days of the addition or deletion of a subcontractor or supplier unless the owner signs a written waiver of the right to an updated list. Tex. Prop. Code § 53.256(a). Specific language for the written waiver is given in Tex. Prop. Code § 53.256(d). To use the first alternative for payment of project retainage, described in form 18-4, paragraph 3.f. of exhibit A, the contractor must list all subcontractors and suppliers of any tier involved with the project, timely update this list, and furnish a final updated list on or before the date of final completion. See also the optional paragraph C.1.c. in form 18-4. The owner should recognize that if this alternative is selected and an affidavit of completion is not sent to a claimant for any reason, including that the owner was not made aware of the claimant, then the owner will be liable to that claimant for the claimant's share of statutory retainage even though the owner may have already paid the retainage.

§ 18.7:3 Contractor's Disbursement Disclosure for Residential Construction

As a prerequisite to obtaining an advance of funds in a residential construction project, the general contractor is required to provide the owner with a signed statement listing the bills paid and to be paid. See form 18-3 in this chapter. If the lender is funding an advance directly to the contractor and not through the owner, that lender must provide the owner a lender's disbursement statement and the contractor's disbursement statement used to apply for the advance. Tex. Prop. Code § 53.258.

§ 18.7:4 Residential Construction Contract

Form 18-4 in this chapter is a contract for the construction of a residence without an architect. The contract assumes a project in which the ultimate homeowner holds title to the land before the commencement of construction. Under the contract, the construction process and the duties and obligations of the parties are divided into distinct preconstruction, construction, and postconstruction stages. The principal functions of the contract are to establish the terms of the construction agreement, such as price, description of the project, commencement and completion dates, allocation of responsibilities, and so forth, and to create a system for building, approving, and paying for the construction.

§ 18.7:5 Affidavit of Commencement

The owner and the original contractor may jointly execute and file an affidavit of commencement with the county clerk of the county in which the land is located. Tex. Prop. Code § 53.124(c). See form 18-5 in this chapter. An affidavit of commencement is prima facie evidence of the date of the commencement of construction and fixes the date of inception of the involuntary mechanic's liens filed relating to the construction. Tex. Prop. Code § 53.124(d).

The affidavit should be executed and recorded within thirty days after the date of actual commencement of construction or delivery of materials. Tex. Prop. Code § 53.124(c). The owner and the original contractor should not execute this affidavit at the closing of the construction loan lest a delay in recording cause the affidavit to reflect a commencement date before the recording date. The owner and the contractor should execute and record the affidavit promptly after the construction loan documents have been filed and construction has actually commenced.

§ 18.7:6 Change Order

Form 18-6 in this chapter documents amendments to the residential construction contract that may change the plans and specifications, adjust the contract amount, or alter the completion date.

§ 18.7:7 Affidavit of Completion

The owner may file an affidavit of completion with the county clerk of the county in which the property is located. See form 18-7 in this chapter. Completion is defined not as "substantial completion" as used in the contract but as "the actual completion of the work, including any extras or change orders reasonably required or contemplated under the original contract, other than warranty work or replacement or repair of the work performed under the contract." Tex. Prop. Code § 53.001(15). An affidavit of completion meeting the requirements of section 53.106 constitutes prima facie evidence of the date of completion. Tex. Prop. Code § 53.106(d).

The affidavit should be filed on or before the tenth day after the completion of the work. If the affidavit is filed following the tenth day after the date of completion, the date of completion is

presumed to be the date of actual filing. Tex. Prop. Code § 53.106(d).

The owner must send a copy, by certified mail, return receipt requested, or registered mail, to the original contractor not later than the date the affidavit is filed and to each claimant who has sent the owner a notice of lien liability not later than the date the affidavit is filed or the tenth day after the date the owner receives notice. Tex. Prop. Code § 53.106(b). The owner must also furnish a copy of the affidavit to any person who furnished materials or labor for the construction and requests a copy. The affidavit must be furnished not later than the tenth day after the date the request is received or ten days after the date the affidavit is filed, whichever is later. Tex. Prop. Code § 53.106(c).

§ 18.7:8 Lien Waiver

Forms 18-8 through 18-11 in this chapter are statutory forms required for lien and bond claim waivers to document final or interim acknowledgment of payments. The forms must be used verbatim, in lieu of any other form of lien release associated with construction payments. However, if a mechanic's lien affidavit has already been filed in the real estate records, the form of release does not have to conform to forms 18-8 through 18-11. Tex. Prop. Code §§ 53.281–.287. Blanket advance releases of all mechanic's lien rights of the contractor should be enforceable, if expressly stated in the residential construction contract and if the contract is executed before commencement of any work. Tex. Prop. Code § 53.282(a)(3).

§ 18.7:9 Bills-Paid Affidavit

The contractor, on request by the owner and as a condition of payment to the contractor, must provide the owner an affidavit stating that all of the contractor's subcontractors, laborers, and materialmen have been paid or identifying those not paid. See form 18-12 in this chapter. The affidavit may include representations regarding bills to be paid with the funds received and indemnity provisions. Tex. Prop. Code § 53.085.

A bills-paid affidavit must be signed by the general contractor as a condition for final payment. Tex. Prop. Code § 53.259.

There are significant penalties, both civil and criminal, for the making of false affidavits. The penalties may include a $4,000 fine, confinement in jail for a period not to exceed one year, or both, and personal liability of the person signing the affidavit for any loss or damage resulting from the false statement. Tex. Prop. Code §§ 53.085(d), (e), 53.259(c), (d).

§ 18.8 Additional Resources

Beyer, Gerry W. *Real Property.* 2nd ed. West's Texas Forms 13–15. St. Paul, MN: West, 2001. Supplement 2016.

Bush, Robert L. Russell, James W. Rudnicki, and Kathryn L. Koons. "Drafting Issues in Residential Construction Contracts." In *Residential Real Estate Construction Law Course, 2008.* Austin: State Bar of Texas, 2008.

McQuality, Mark S. "Texas Residential Construction Claims: It Was Time for Change." In *Advanced Consumer and Commercial Law Course, 2009.* Austin: State Bar of Texas, 2009.

St. Claire, Frank A., and William V. Dorsaneo III. *Texas Real Estate Guide.* New York: Matthew Bender & Co., 2001.

Texas Residential Construction Commission. "Limited Statutory Warranty and Building and Performance Standards," effective June 1, 2005.

Walthall, Thomas J., Jr., and R. Wes Johnson. "Construction Contract Clauses & Retainage and Contingent Payment." In

Advanced Real Estate Drafting Course, 2009. Austin: State Bar of Texas, 2009.

Form 18-4

Residential Construction Contract

Basic Information

Date:

Owner:

Owner's Mailing Address:

Contractor:

Contractor's Mailing Address:

Property

Address:

Legal description:

Project Description:

A. Construction Terms

A.1. Allowance Items:

Flooring:	$[**amount**]	[**retailer**]
Light fixtures:	$[**amount**]	[**retailer**]
Wall coverings:	$[**amount**]	[**retailer**]

Appliances:	$[**amount**]	[**retailer**]
Plumbing fixtures:	$[**amount**]	[**retailer**]
Other:	$[**amount**]	[**retailer**]

A.2. Contract Sum:

> A residential construction contract may include more than one method of calculating the contract sum. Select one or more of the following as applicable. Attach exhibit A (payment schedule) if applicable.

Stipulated sum: [**dollars**] DOLLARS ($[**amount**])

And/Or

Unit price: [**dollars**] DOLLARS ($[**amount**]) per [**unit of work, e.g.,** square yard of asphalt paving]

And/Or

Cost-plus basis: costs plus [**percent**] percent ([**percent**]%) of "costs" as defined in Exhibit [**exhibit letter/number**] [**include if applicable:** but not to exceed a guaranteed maximum of [**dollars**] DOLLARS ($[**amount**])].

Continue with the following.

A.3. F.T.C. Insulation Disclosure Data: The following data reflect characteristics of insulation according to data from the manufacturer:

Ceilings:	Type:	Thickness:	R-Value:
Exterior walls:	Type:	Thickness:	R-Value:
Other:	Type:	Thickness:	R-Value:

All stated R-values are based on information provided by the manufacturer of this insulation.

B. Definitions

B.1. "Commencement Date" means the date on which the building permit is issued for Contractor to construct the Improvements.

B.2. "Completion Date" means the date of Substantial Completion and notice to Owner, but not later than [**date**], unless extended by the terms of the Contract Documents, force majeure delays, or other delays not within Contractor's control.

B.3. "Concealed Conditions" means preexisting physical conditions situated below the surface of the ground, or concealed or unknown conditions in an existing structure, at variance with the conditions indicated in the Contract Documents or differing materially from those ordinarily encountered and generally recognized as inherent in Work of the character provided for in the Contract Documents.

B.4. "Contract Documents" means this residential construction contract, the Plans, warranty documents, and any other documents governing the Work (collectively, the "Contract").

B.5. "Improvements" means the improvements to be constructed on the Property according to the Plans, including [**describe, e.g.,** a single-family residence].

B.6. "Payment Deadline" means 2:00 P.M. on the third business day after Contractor's request for payment is received by [Owner/Owner's lender/[**specify**]].

B.7. "Plans" means all design plans and specifications for the Improvements (dated and initialed by Owner and Contractor).

B.8. "Scope of Work" means the Work covered by the Contract Documents.

B.9. "Substantial Completion" or "Substantially Complete" means the stage when a certificate of occupancy is issued, or if no certificate is required, when all Improvements are sufficiently complete, in accordance with the Contract Documents, so that Owner may use or occupy the Improvements for the intended purpose. If Owner moves into the Improvements, the Improvements will be deemed to be substantially complete.

B.10. The "Work" means the physical activities, materials, and equipment relating to the construction of the Improvements.

C. Precommencement Matters

C.1. Contractor agrees to—

a. Provide Owner a copy of the Builder's Risk Insurance Policy for the Property with a coverage amount equal to or greater than the Contract Sum.

b. Obtain Contractor's risk insurance coverage for casualty loss and public liability in reasonable amounts, to protect Contractor and Owner.

Include the following if applicable. The list of subcontractors and suppliers is required for early release of retainage, as described in the first alternative within paragraph 3.f. of exhibit A.

c. Provide Owner with a written list of all subcontractors and suppliers of any tier furnishing labor, material, equipment, or other improvements for the project. The list will include each subcontractor's or supplier's name, address, and telephone number and will be updated within fifteen days of any addition or deletion of a subcontractor or supplier. A final list will be provided to Owner on or before final completion of the project.

d. If Contractor provides the Plans, Contractor will deliver to Owner two copies of the Plans. Contractor hereby assigns to Owner the right to use the

Plans for the purpose of completing the Improvements if Contractor fails to do so in accordance with the terms of the Contract Documents.

C.2. Owner agrees to—

a. Furnish to Contractor reasonable proof acceptable to Contractor that Owner has the ability to pay to Contractor the full Contract Sum.

b. Provide water and electricity to the property line.

C.3. The following are stipulated:

a. *Change Orders*

i. Contractor is under no duty to make any changes in the Plans requested by Owner until a change order is signed by Contractor and Owner.

ii. Owner and Contractor must sign a written change order. An e-mail exchange between Owner and Contractor in which the changes are discussed and acknowledged by the parties will also satisfy this requirement.

iii. When Contractor receives a written request for any change from Owner, Contractor will present Owner with a proposal for the changes including any additional price, markup, and extensions to the projected Completion Date.

iv. Upon Owner's acceptance, the change order will become an amendment to the Contract Documents, and the terms of the change order shall control if any conflict exists between it and the Contract Docu-

ments. A signature or e-mail affirmation from any one Owner is sufficient to bind all Owners.

v. Failure of Owner to approve Contractor's proposal for changes within five days after receipt shall constitute a rejection of the proposal. Owner shall pay for all agreed-upon change orders to the extent they increase the Contract Sum to Contractor in cash within five business days after Owner's acceptance of the proposal.

vi. Contractor will not be obligated to proceed with any Work until all amounts have been paid pursuant to a change order. Contractor has no obligation to stop Work while change orders are being negotiated.

b. *Plans.* If Owner furnishes the Plans, Owner warrants the sufficiency of the Plans and Contractor may reasonably rely on the accuracy of the Plans. Contractor disclaims all liability for any errors or omissions in Plans furnished by Owner. Contractor is prohibited from using the Plans on any other property. If Contractor furnishes the Plans, Contractor warrants the Plans are in substantial compliance with all applicable laws [**include if applicable:** and any other standards adopted by the parties]. Plans and any supplements to the Plans prepared by Contractor will be the property of Contractor and may not be used by Owner on any other property. Owner agrees that as long as construction of the Improvements is in compliance with the Contract Documents, minor deviations will be accepted.

c. *Consumer Products.* "Consumer Products," as defined by the Federal Trade Commission, are excluded from Contractor's warranty only to the extent individual manufacturers' warranties are passed through Contractor and assigned to Owner, with a copy received by Owner. Contractor assigns

and passes through to Owner the manufacturers' warranties on all appliances and equipment. In the case of passed-through and received manufacturers' warranties on Consumer Products, Owner's recourse is directly to the manufacturer, and Contractor will have no responsibility for them, except for problems relating to Contractor's installation and hookup of the items.

d. *Consult Your Attorney.* This is intended to be a legally binding contract. READ IT CAREFULLY. If you do not understand the effect of any part of the Contract Documents, consult your attorney BEFORE signing.

e. *F.T.C. Insulation Disclosure.* The F.T.C. Insulation Disclosure Data are provided in accordance with the Federal Trade Commission regulation at 16 C.F.R. pt. 460.

D. After Completion of Precommencement Matters

D.1. Contractor agrees to—

a. Obtain a building permit and commence the Work within thirty days after Owner has completed all of Owner's obligations under the Precommencement Matters and file an affidavit of commencement in the real property records of the county in which the Property is located.

b. Comply with all regulations and restrictions imposed by local, state, and federal agencies.

c. Diligently prosecute the Work to completion and substantially complete the Work according to the Plans by the Completion Date.

d. Pay all valid bills and charges to Contractor for material or labor relating to the Improvements.

e. Keep the Property free from claims of liens for labor or material arising directly through Contractor, except that Contractor may reasonably dispute any claim.

f. Include in the Improvements insulation with the characteristics set forth above in the F.T.C. Insulation Disclosure Data.

D.2. Contractor agrees not to delay the work.

D.3. Owner agrees to—

a. Pay to Contractor the Contract Sum, disbursed according to the [Contract terms/payment schedule], no later than the Payment Deadline.

b. Promptly pay to the seller of the Allowance Items all charges in excess of the allowances.

c. Make selection of Allowance Items within ten days after receipt of notice from Contractor; otherwise, Contractor may make the selections or extend the time for Owner to make the selections, in which case Owner will pay any charges related to the delay and Contractor is entitled to extend the Completion Date.

d. Deliver to Contractor, within three business days of Contractor's draw request, written notice of Work not accepted, with specific reasons and reasonable requirements stated for causing the Work to be accepted.

D.4. Owner agrees not to—

a. Communicate directly with laborers about the Work.

b. Delay or interfere with the progress of the Work.

D.5. Contractor and Owner agree that—

a. If Owner, at any time before or during the progress of the Work, wants any modifications made to the Plans ("Changed Work"), Owner will request in writing that Contractor undertake the Changed Work. If Contractor agrees to do the Changed Work, Contractor may submit to Owner an estimate of the cost of the Changed Work and an extension of the Completion Date to reflect the additional time required for completing it. If a preapproved written change order is not obtained, Contractor may submit to Owner the notice of change order and extension of time in writing, and the failure of Owner to make written objection within ten days of the notice is conclusively deemed approval by Owner. The Contract Sum and the Completion Date will automatically adjust to incorporate any change orders.

b. Should Contractor encounter Concealed Conditions, the Contract Sum will be equitably adjusted by change order on claim by either party made within twenty days after notice by Contractor to Owner of the Concealed Conditions.

c. Contractor occupies the status of an independent contractor, as that term is defined in the construction industry.

d. Unless otherwise specifically provided, reference to any equipment, material, article, or patented process by trade name, make, or catalog number is regarded as establishing a standard of quality and is not construed as limiting competition. Contractor may, at Contractor's option, use any equip-

ment, material, article, or patented process that is substantially equal to that named.

e. Contractor has the right to subcontract any part or all of the Work.

E. After Substantial Completion

E.1. Contractor agrees to—

a. Remove debris and surplus materials occasioned by the Work.

b. Notify Owner on Substantial Completion of the Work and file an affidavit of completion in the real property records of the county in which the Property is located.

c. Deliver possession of the Improvements to Owner on the day following the later of Substantial Completion or final payment to Contractor of the Contract Sum.

d. Release the Work and Property from all claims, including claims of subcontractors and materialmen, on receipt of final payment.

Select one of the following. Use the second paragraph to reference the Texas Residential Construction Commission warranty standards.

e. Contractor warrants its labor and materials against construction defects and warrants that its construction services have been performed in a good and workmanlike manner and that the materials are adequate for their intended purposes. These warranties extend for a period of one year after substantial completion. Owner must give notice of the defect within this one-year warranty period, and contractor has up to six months to correct the defect. The

giving of this express warranty is not intended to, and does not, negate implied warranties.

Or

e. Contractor warrants that its performance of work on the project meets the residential construction warranties adopted by the Texas Residential Construction Commission. The warranties will extend for the following periods after substantial completion:

i. one year for workmanship and materials;

ii. two years for plumbing, electrical, heating, and air-conditioning delivery systems; and

iii. ten years for major structural components of the Improvements.

THESE EXPRESS WARRANTIES ARE GIVEN IN LIEU OF THE IMPLIED WARRANTY OF GOOD AND WORKMANLIKE CONSTRUCTION, WHICH IS DISCLAIMED.

Continue with the following.

E.2. Owner agrees to—

a. Pay to Contractor the final payment of the Contract Sum, including all amounts due under the Contract Documents, according to Exhibit A.

b. Sign and file for record within five days after Substantial Completion a notice of substantial completion and acceptance.

E.3. Owner and Contractor agree that Owner's acceptance of possession will be conclusively presumed to constitute Owner's acceptance of the Improvements as Substantially Complete and inhabitable.

F. Default and Termination

F.1. Building Permit. If a building permit has not been issued within ten business days of completion of all Precommencement Matters, Owner may terminate this Contract by written notice within ten business days and recover out-of-pocket costs from Contractor; otherwise, Owner must give Contractor ten days' written notice and opportunity to cure before terminating this Contract.

F.2. Precommencement Matters. If the Precommencement Matters have not been completed within thirty days from the Contract Date, Owner or Contractor may unilaterally terminate this Contract by written notice within forty days from the Contract Date, in which case this Contract will terminate, and the performing party is entitled to recover reasonable out-of-pocket costs from the nonperforming party.

F.3. Owner's Default. Each of the following constitutes a material breach of this Contract by Owner: (a) failing to fully and timely perform any covenant of Owner under this Contract; (b) making any representation to Contractor found to be materially false, misleading, or erroneous; and (c) substantially breaching any of Owner's obligations under this Contract.

F.4. Contractor's Default. Each of the following constitutes a material breach of this Contract by Contractor: (a) delaying the Work such that the progress of the Substantial Completion of the Improvements falls more than thirty days behind the time shown for completion of the Work; (b) failing to fully and timely perform any covenant of Contractor under this Contract; (c) making any representation to Owner found to be materially false, misleading, or erroneous; and (d) substantially breaching any of Contractor's obligations under this Contract or required by applicable law.

F.5. Remedies. If one party defaults, and the default is not cured within ten days of written notice specifically describing the default, this Contract may be terminated by written notice from the nondefaulting party to the defaulting party.

Include the following if desired, modifying if needed to reflect the appropriate price structure.

In the event of such termination, the following formula is agreed on as a reasonable and fair way to assess the actual damages, without the expense and delay associated with other forms of dispute resolution:

a. *Damages to Contractor.* If termination resulted from an act of default of Owner, Owner will pay to Contractor, within thirty days of written notice from Contractor, an amount equal to all amounts due and owing at the time of the termination, including payment for Changed Work, plus [**percent**] percent of the remaining Contract Sum to compensate Contractor for the lost profit and for the difficulty and burden of locating other work for the Contractor's subcontractors to prevent hardship on them and the loss of loyalty resulting from such hardship.

b. *Damages to Owner.* If termination resulted from an act of default of Contractor, damages recoverable by Owner from Contractor will be in accordance with Texas Property Code chapter 27 (the Residential Construction Liability Act), if applicable. If the Residential Construction Liability Act does not apply, Contractor will pay to Owner, in addition to actual damages, consequential damages, which are liquidated in an amount equal to two months' interest on Owner's interim construction loan (based on the assumption, whether true or not, that there exists such a loan and that it is fully disbursed and in an amount equal to the Contract Sum) to compensate Owner for the time and expense associated with obtaining

another contractor to complete the Work. It is agreed by the parties that this liquidated amount is a reasonable estimate of the consequential damages actually incurred by Owner. Payment by Contractor will be delivered to Owner on the earlier of (i) payment of all amounts due to Contractor, with a right of offset to Owner for unpaid damages under this section; (ii) completion of construction of the Improvements; or (iii) the expiration of thirty days from written notice from Owner.

Continue with the following.

G. Miscellaneous Provisions

G.1. Agreement of Parties. The Contract Documents, including any of their exhibits and attachments, are the entire agreement of the parties. There are no representations, agreements, or promises between the parties, and neither party is relying on any statements or representations of any agent of the other party, that are not in those documents.

G.2. Amendment of Contract. This Contract may be amended only by an instrument in writing signed by the parties.

G.3. Attorney's Fees. If either party retains an attorney to enforce this Contract, the party prevailing in litigation is entitled to recover reasonable attorney's fees, court and other costs, and related expenses.

G.4. Binding Effect. This Contract binds, benefits, and may be enforced by the parties and their respective representatives, successors in interest, and, if permitted, their assigns.

G.5. Counterparts. If this Contract is executed in multiple counterparts, all counterparts taken together will constitute this Contract.

G.6. Choice of Law. This contract is to be construed under the laws of the state of Texas, without regard to choice-of-laws in any jurisdiction.

G.7. Venue. Venue is in the county or counties in which the Property is located.

G.8. Notices. Any notice required or permitted under this Contract must be in writing. Any notice required by this Contract will be deemed to be given (whether received or not) the earlier of receipt or three business days after being deposited with the United States Postal Service, postage prepaid, certified mail, return receipt requested, and addressed to the intended recipient at the address shown in this Contract. Notice may also be given by regular mail, personal delivery, courier delivery, or e-mail and will be effective when received. Any address for notice may be changed by written notice given as provided herein.

G.9. Time. Time is of the essence. Unless otherwise specified, all references to days mean calendar days. Business days exclude all Saturdays, Sundays, and national holidays. If the date for performance of any obligation falls on a Saturday, Sunday, or national holiday, that obligation is performable on the next business day.

G.10. Real Estate Broker's Fees. There are no contracts with any real estate broker or other party in connection with this Contract to whom any fees are due and payable unless specified in a separate commission agreement between the real estate broker and the party responsible for paying the commission.

G.11. When the context requires, singular nouns and pronouns include the plural.

Include the following if the contract calls for renovation or repair of existing homestead improvements and a lien for financing the improvements is contemplated. See section 20.1:1 in this manual.

G.12. Repair or Renovation Construction. If the Scope of Work includes repair or renovation of existing improvements, the following provisions apply. Contractor and Owner

certify and represent that they are aware of and have complied with the following legal rights and obligations:

a. *Rescission.* Owner may rescind this contract (and any other proposals, contracts, or agreements with Contractor regarding the repair or renovation of existing improvements) without penalty or charge within three days after the execution of the contract by all parties. See the "Notice of Cancellation" form below.

b. *Place of Signing Contract.* Owner acknowledges that this contract was signed at one of the following offices and not elsewhere: (i) the office of a third-party lender making an extension of credit for the Work and material to be furnished; (ii) the office of an attorney at law; or (iii) the office of a title company.

c. *Five-Day Waiting Period.* This contract and any other contract signed in connection with the repair and renovation Work mentioned in this contract have not been executed by Owner or Owner's spouse before the fifth day after Owner made written application for an extension of credit for the Work and material contemplated.

Include the following if applicable.

G.13. Special Provisions. [**Specify.**]

G.14. Notices

The following notice is required by Tex. Prop. Code § 41.007. This notice must appear in a minimum of ten-point bold-faced type or equivalent "next to" the owner's signature line. Tex. Prop. Code § 41.007(a).

IMPORTANT NOTICE: You and your contractor are responsible for meeting the terms and conditions of this contract. If you sign this contract and you fail to meet the terms and conditions of this contract, you may lose your legal ownership rights in your Improvements. KNOW YOUR RIGHTS AND DUTIES UNDER THE LAW.

The following notice is required by Tex. Prop. Code § 27.007.

RESIDENTIAL CONSTRUCTION LIABILITY ACT (RCLA) NOTICE

This contract is subject to Chapter 27 of the Texas Property Code. The provisions of that chapter may affect your right to recover damages arising from a construction defect. If you have a complaint concerning a construction defect and that defect has not been corrected as may be required by law or by contract, you must provide the notice required by Chapter 27 of the Texas Property Code to the contractor by certified mail, return receipt requested, not later than the 60th day before the date you file suit to recover damages in a court of law or initiate arbitration. The notice must refer to Chapter 27 of the Texas Property Code and must describe the construction defect. If requested by the contractor, you must provide the contractor an opportunity to inspect and cure the defect as provided by Section 27.004 of the Texas Property Code.

YOU, THE OWNER, MAY CANCEL THIS TRANSACTION AT ANY TIME BEFORE MIDNIGHT OF THE THIRD BUSINESS DAY AFTER THE DATE OF THIS TRANSACTION. SEE THE ATTACHED NOTICE OF CANCELLATION FORM FOR AN EXPLANATION OF THIS RIGHT.

_____

[Name of owner]

If the owner is married, both spouses must sign the contract.

_____

[Name of contractor]

If the notice of the owner's right to cancel is included, attach completed duplicate copies of the following notice of cancellation.

The notice of right to cancel, if required, must appear "in immediate proximity to" the owner's signature in a minimum of ten-point bold-faced type. Tex. Bus. & Com. Code § 601.052; 16 C.F.R. § 429.1(a).

A notice concerning the purchaser's three-day right of rescission under a contract to purchase real property must be given if (1) the seller or the seller's agent solicits the sale at a place other than the seller's place of business; (2) the purchaser submits the purchase contract to the seller or the seller's agent at a place other than the seller's place of business; and (3) the consideration payable under the purchase contract exceeds $100; unless either (1) the purchaser is represented by a licensed attorney; (2) the transaction is negotiated by a licensed real estate broker; or (3) the transaction is negotiated at a place other than the purchaser's residence by the person who owns the property, as described in Tex. Bus. & Com. Code ch. 601.

The notice of cancellation form must be easily detachable from the contract to which it is attached, must be in the same language as the contract, and must contain the following information and statements. Tex. Bus. & Com. Code § 601.053.

Notice of Cancellation

[Date]

YOU MAY CANCEL THIS TRANSACTION, WITHOUT ANY PENALTY OR OBLIGATION, WITHIN THREE BUSINESS DAYS FROM THE ABOVE DATE.

IF YOU CANCEL, ANY PROPERTY TRADED IN, ANY PAYMENTS MADE BY YOU UNDER THE CONTRACT OR SALE, AND ANY NEGOTIABLE INSTRUMENT EXECUTED BY YOU WILL BE RETURNED WITHIN TEN BUSINESS DAYS FOLLOWING RECEIPT BY THE MERCHANT OF YOUR CANCELLATION NOTICE, AND ANY SECURITY INTEREST ARISING OUT OF THE TRANSACTION WILL BE CANCELED.

IF YOU CANCEL YOU MUST MAKE AVAILABLE TO THE MERCHANT AT YOUR RESIDENCE, IN SUBSTANTIALLY AS GOOD CONDITION AS WHEN RECEIVED, ANY GOODS DELIVERED TO YOU UNDER THIS CONTRACT OR SALE; OR YOU MAY IF YOU WISH, COMPLY WITH

THE INSTRUCTIONS OF THE MERCHANT REGARDING THE RETURN SHIPMENT OF THE GOODS AT THE MERCHANT'S EXPENSE AND RISK.

IF YOU DO NOT AGREE TO RETURN THE GOODS TO THE MERCHANT OR IF THE MERCHANT DOES NOT PICK THEM UP WITHIN TWENTY DAYS OF THE DATE OF YOUR NOTICE OF CANCELLATION, YOU MAY RETAIN OR DISPOSE OF THE GOODS WITHOUT ANY FURTHER OBLIGATION.

TO CANCEL THIS TRANSACTION, MAIL OR DELIVER A SIGNED AND DATED COPY OF THIS CANCELLATION NOTICE OR ANY OTHER WRITTEN NOTICE, OR SEND A TELEGRAM, TO [name of merchant], AT [address of merchant's place of business] NOT LATER THAN MIDNIGHT OF [date].

I HEREBY CANCEL THIS TRANSACTION.

Dated: _____.

_____

[Name of purchaser]

Include any attachments.

Exhibit A

Payment Schedule

The Contract Sum will be paid by Owner to Contractor as follows:

1. *Retainage.* Ten percent of all draws, including 10 percent of all change orders or other modifications to the contract price, will be withheld by Owner to be paid at the time of the Retainage Draw described below.

2. *Precommencement.* Owner has deposited with Contractor the sum of $[**amount**], which will be credited to Owner on the [initial/final/[**describe other**]] draw.

Select one of the following.

3. *Interim Draws.* Owner will pay to Contractor the following portions of the Contract Sum according to the following schedule:

a. Draw No. 1 for $[**amount**]: After foundation poured

b. Draw No. 2 for $[**amount**]: Roof work begins

c. Draw No. 3 for $[**amount**]: Interior trim work begins

d. Draw No. 4 for $[**amount**]: Interior painting begins

e. Draw No. 5 for $[**amount**]: Substantial Completion

f. Retainage Draw for remaining unpaid 10 percent withheld from each draw, change order, or other modification to the contract price: [**select one of the following:** If Contractor has complied with paragraph C.1.c. under "Precommencement Matters" by timely providing Owner with the updated written list of subcontractors and suppliers of any tier and Contractor has verified the list

as accurate as of final completion, Owner will prepare, file, and send an affidavit of completion within ten days of the date of project final completion. Retainage will then be released to Contractor the fiftieth day after the date of final completion as stated in the affidavit, provided no unreleased mechanic's liens have been filed by that time./Retainage will be paid to Contractor on the last business day of the third month following the month of final completion of the project, provided no unreleased mechanic's liens have been filed by that time.]

g. Other Draws: In addition to the draws provided for above, Contractor will also make the following draws on the Contract Sum:

$[**amount**] for [**specify**]

$[**amount**] for [**specify**]

$[**amount**] for [**specify**]

Or

3. *Interim Draws.* Owner will pay to Contractor the following portions of the Contract Sum according to the following schedule: [**describe schedule for interim draws, including retainage draw**].

Exhibit B

Allowance Schedule

Allowance Item	Budgeted Cost

Chapter 19

Commercial Construction Contract Documents

[Reserved]

Chapter 19

Commercial Construction Contract Documents

Note: The State Bar of Texas Real Estate Forms Committee is grateful to Charles Comiskey, senior vice president of Brady Chapman Holland & Associates, Inc., an insurance brokerage firm with offices in Houston, Texas, and president of RiskTech, Inc., a risk management consulting firm in Houston, Texas, for his assistance in preparing exhibit D to forms 19-1 and 19-2 in this chapter.

§ 19.1 Nature of Contract

Form 19-1 and 19-2 in this chapter are intended to be used for commercial construction projects that are designed by an architect with participation by the architect's engineering consultant(s). The term *Architect/Engineer* as used in the contract designates the design professional for the project.

§ 19.2 Architect and Engineering Services

The statutes applicable to architects and engineers govern the types of design and professional services that may be provided by each. Some professional services may be performed by either an architect or an engineer, including the preparation of site plans and the depiction of building systems. *See, e.g.*, Tex. Occ. Code §§ 1001.0031(d), (e), 1051.0016(b), (c). Certain plans and specifications may be prepared only by a licensed architect or a licensed engineer. *See* Tex. Occ. Code §§ 1001.0031(c), 1051.703. Some projects may be designed by persons who are not licensed architects or engineers. *See, e.g.*, Tex. Occ. Code §§ 1051.606, 1001.056–.057.

§ 19.3 Role of Architect/Engineer

The commercial construction contract (forms 19-1 and 19-2 in this chapter) designates the Architect/Engineer (A/E) as the owner's representative and anticipates that the A/E will provide design services before construction and contract administration services during the construction phase. As part of the contract administration services, the A/E will, among other duties, carry out the following: give the notice to proceed, approve payment applications from the contractor, respond to submittals and requests for clarification, review the contractor's construction schedule, determine whether delay is excused, approve or make reasonable objection to proposed subcontractors, review the contractor's draw requests for payment, determine whether the project is substantially complete, prepare the list of correction items required (punch list) for final completion, determine whether to recommend the owner's final payment, and receive information and documents on behalf of the owner, such as lien releases and affidavits of bills paid. The A/E is designated in the contract as the initial decision maker for claims made by the owner or the contractor.

The contract administration services specified in the contract are typical of those in industry-standard forms, such as American Institute of Architects construction contracts. However, the A/E is not a party to the construction contract. Therefore, the terms of the architect's contract should be made consistent with the A/E provisions in forms 19-1 and 19-2. Alternatively, the architect's contract can be drafted to incorporate the provisions of forms 19-1 and 19-2 by reference in describing the A/E's obligations.

§ 19.4 Contract Price

§ 19.4:1 Guaranteed Maximum Price

Form 19-1 provides for its contract price to be the sum of the actual cost of the work, plus the contractor's fee, but not to exceed a stated guaranteed maximum price (GMP). Section F. of the contract specifies the types of construction costs that are reimbursable as the cost of the work. Paragraph F.5. requires the contractor to provide a schedule of values for the owner's approval. The approved schedule of values will be used to determine progress payments, as provided in section J. The contract price, allowances, contractor's contingency, owner's contingency, and the amount of liquidated damages, if required by the owner, are to be set out in exhibit C of the contract.

§ 19.4:2 Stipulated Sum

Form 19-2 provides for its contract price to be a fixed price (the stipulated sum). As with form 19-1, this form of construction contract sets out in Section F. the types of construction costs that are included within the stipulated sum. This is done to illustrate the type of construction costs included, for example, demolition costs, to permit the parties to confirm the scope of the work. Paragraph F.4. requires the contractor to provide a schedule of values for the components of the work. The schedule of values will be useful for the A/E and owner to confirm the progress of construction and in approving progress payments. Exhibit C of form 19-2 sets out the contract price and permits the parties to establish allowances and liquidated damages for unexcused construction delay.

§ 19.5 Retainage

The contract provides for 10 percent retainage to be withheld in accordance with the provisions of chapter 53 of the Texas Property Code.

§ 19.6 Payment and Performance Bonds

The owner may require the contractor to provide payment and performance bonds by designating the requirement on exhibit D of the contract.

§ 19.7 Risk Management

§ 19.7:1 Insurance

The insurance requirements for the owner; contractor; and, if applicable, subcontractors are to be set out in exhibit D, which contains sample insurance requirements. See the discussion of types of insurance and their use in construction projects in chapter 17 in this manual.

§ 19.7:2 Indemnity

The contracts contain at section R. two indemnities: the first is for claims other than employee claims, which is a "limited-form indemnity," and the second is for employee claims, which is a "broad-form indemnity" as limited by chapter 151 of the Texas Insurance Code. See the discussion of these concepts in chapter 17 in this manual.

§ 19.8 Default and Remedies

Sections M. and N. contain the default and remedies provisions. Paragraph N.7. also includes a waiver of consequential damages as an optional provision. Before selecting the liquidated damages option or determining the liquidated damages amount, the practitioner should consider the enforceability of such clauses. *See Phillips v. Phillips*, 820 S.W.2d 785, 789 (Tex. 1991); *Garden Ridge, L.P. v. Advance International, Inc.*, 403 S.W.3d 432, 440 (Tex. App.—Houston [14th Dist.] 2013, pet. denied). In *Garden Ridge, L.P.*, the court described the test set out in *Phillips* as follows:

> "The test for determining whether a provision is valid and enforceable as liquidated damages is (1) if the damages for the prospective breach of the contract are difficult to measure; and (2) the stipulated damages are a reasonable estimate of actual damages." *Chan v. Montebello Dev. Co.*, No. 14-06-00936-CV, 2008 WL 2986379, at *3 (Tex. App.—Houston [14th Dist.] July 31, 2008, pet. denied) (citing *Phillips*, 820 S.W.2d at 788). Further, we stated:
>
> > In order to meet this burden, the party asserting the defense is required to prove the amount of the other parties' actual damages, if any, to show that the liquidated damages are not an approximation of the stipulated sum. If the liquidated damages are shown to be disproportionate to the actual damages, then the liquidated damages must be declared a penalty. . . .
>
> *Id.* at *3–4 (citations omitted).

Garden Ridge, L.P., 403 S.W.3d at 440.

Also, liquidated damages must be in lieu of and not coupled with or in addition to actual damages. A contract provision that "fixes liquidated damages without excluding additional liability for actual damages is not a reasonable forecast of just compensation and therefore a penalty." *Phillips*, 820 S.W.2d at 789.

Paragraph J.10. authorizes the owner to withhold payment based on conditions that could result in loss or damages to the owner as long as the conditions remain uncured. The practitioner should consult the provisions of chapter 28 of the Texas Property Code, requiring prompt payment to contractors and subcontractors.

§ 19.9 Warranties

The contractor's warranties are set out in section P. In addition to the customary one-year warranty against defects in labor and materials, section P expressly provides a ten-year warranty on structural components, including the foundation.

§ 19.10 Choice of Law and Venue

If a contract that provides for the construction of new improvements to real property located in Texas contains a provision making the contract or any conflict arising under the contract subject to the laws of another state, to litigation in the courts of another state, or to arbitration in another state, that provision is voidable by the party obligated to perform the construction. Tex. Bus. & Com. Code §§ 272.001–.002.

[Reserved]

Form 19-1

Commercial Construction Contract
[Guaranteed Maximum Price]

Basic Information

Effective Date:

Owner:

Address:

Phone:

E-mail:

Architect/Engineer ("Owner Rep"):

Address:

Phone:

E-mail:

Contractor:

Contractor's Representative for Project:

Address:

Phone:

E-mail:

Lender:

Address:

Phone:

E-mail:

Project: [**include general description of improvements to be constructed**]

Project Site: [**state physical address of site and attach legal description as identified in exhibit A**]

Contract Price: [**the sum of the costs of construction, contractor's contingency, owner's contingency, and contractor's fee as identified in exhibit C**]

Guaranteed Maximum Price:

Substantial Completion Date:

Insurance and Bond Requirements: [**see exhibit D**]

Plans: [**specifications and drawings as identified in exhibit B**]

Owner and Contractor agree to the following terms and conditions.

A. Definitions

A.1. "Allowance" means a dollar amount specified to be used for portions of the Work that have not been fully defined in the Plans or where a range of options is available for Owner's selection.

A.2. "Applicable Law" means all federal, state, and local laws, rules, and regulations applicable to the Project, the Work, or the Contractor, as indicated by the context.

A.3. "Bid" means a response to a request for bids. The term includes proposals submitted in response to a request for proposals.

A.4. "Business Day" means a day other than a Saturday, Sunday, or national holiday. As used in this Contract, the term "days" means calendar days. All periods are measured in calendar days unless business days are specified.

A.5. "Change Order" means a description of changes in the Work, and any increase or decrease in the Guaranteed Maximum Price and extension or reduction of Contract Time resulting from such changes, that has been signed by Owner and Contractor.

A.6. "Claim" means a demand or assertion by one of the parties seeking, as a matter of right, payment of money or other relief with respect to the terms of the Construction Documents, and also includes other disputes and matters in question between Owner and Contractor arising out of or relating to the Construction Documents.

A.7. "Commencement Date" means the date on which a written notice to proceed is delivered by Owner Rep to Contractor.

A.8. "Concealed Conditions" means physical conditions in existence on the Effective Date located beneath the surface of the ground, or concealed or unknown conditions in an existing structure, that are at variance with the conditions indicated in the Construction Documents or are substantially different from those conditions shown in the Construction Documents and that Contractor could not have discovered by the exercise of reasonable diligence.

A.9. "Conditions to Final Payment" means the conditions required by this Contract that must be satisfied by Contractor or waived by Owner in writing for Owner to be obligated to make the Final Payment to Contractor.

A.10. "Construction Documents" mean the documents identified in paragraph B.1.

A.11. "Contractor's Contingency" means the amount identified in Exhibit C that is for Contractor's exclusive use in connection with unanticipated increases to the Costs of Construction. The Contractor's Contingency is not intended to be used to cover increases to the Costs of Construction due to changes in the Scope of Work resulting from errors in the Owner Information or changes to the Scope of Work requested by Owner.

A.12. "Contract Time" means the period provided in this Contract for reaching Substantial Completion, and, if specified, the period for achieving Final Completion.

A.13. "Cost Savings" means the amount equal to the Guaranteed Maximum Price less the total amount paid by Owner to Contractor under this Contract. It does not include savings that result from Owner's failure to use all of the Owner's Contingency or to fully use an Allowance or trade discounts, or from Owner's decisions during construction to use less costly materials than called for in the Plans and Specifications, or to reduce the Scope of Work.

A.14. "Drawings" means the graphic and pictorial portions of the Construction Documents showing the design, location, and dimensions of the Work.

A.15. "Excused Delay" means a delay in Contractor's performance under the terms of this Contract due to acts of God, strikes, lockouts, labor shortages, labor restrictions by any governmental authority, civil riot, floods, abnormal adverse weather conditions that exceed [**number**] days, unavoidable casualties, or any cause beyond the control of Contractor, a Subcontractor, or a Supplier of any tier, that could not have been avoided using reasonable diligence. "Excused Delay" does not include delay resulting from negligence, default, or any condition not constituting an Excused Delay.

A.16. "Final Completion" means all the Work required by the Plans has been completed, all punch list items from the Substantial Completion review have been completed, and all Conditions to Final Payment have been satisfied.

A.17. "Governmental Approvals" means all approvals required by governmental entities with jurisdiction over the Property or Improvements for the Project to be used for its intended purpose, including, if applicable, a Certificate of Occupancy.

A.18. "Improvements" means the buildings, structures, landscaping, and other improvements to be constructed on the Property by Contractor according to the Construction Documents.

A.19. "Liquidated Damages" means an estimate of the amount of damages, as shown on Exhibit C, that Owner is likely to incur as a result of the failure of the Project to be Substantially Complete by the Substantial Completion Date due to Contractor's Unexcused Delay.

A.20. "Major Subcontractor" or "Major Sub-subcontractor" or "Major Supplier" means a Subcontractor, Sub-subcontractor, or Supplier whose contract price exceeds 10 percent of the Costs of Construction, or other amount agreed on by Owner and Contractor.

A.21. "Owner Information" means the survey of the Property or Project Site, reports from Owner's consultants, Property restrictions, and other information provided by Owner with its request for Bids for the use of bidders in preparing their Bids. The term does not include Plans and Specifications.

A.22. "Owner's Contingency" means the amount identified in Exhibit C that is for Owner's exclusive use in connection with the Project. The Owner's Contingency may be used by Owner to cover increases in the Costs of Construction resulting from errors in the Owner Information and changes in the Scope of Work.

A.23. "Plans" means the Drawings and Specifications approved by Owner and Contractor identified in Exhibit B and any amendments made after the Effective Date.

A.24. "Project Site" means the area(s) within the Property where the Improvements will be constructed.

A.25. "Property" means the real property described in Exhibit A.

A.26. "Retainage" means Owner's statutory 10 percent retainage required under chapter 53 of the Texas Property Code.

A.27. Scope of Work" means the Work covered by the Construction Documents.

A.28. "Specifications" means a detailed description of the building components and materials and installation requirements prepared by the Architect/Engineer for the Project.

A.29. "Subcontractor" means a person who contracts directly with Contractor to perform a portion of the Work for the Project.

A.30. "Substantial Completion" or "Substantially Complete" means that the Improvements have reached the stage at which they are usable for the purposes intended, all Governmental Approvals have been obtained, and only minor or cosmetic Work remains to be completed.

A.31. "Sub-subcontractor" means a person who contracts directly with a Subcontractor or Sub-subcontractor to perform a portion of the Work for the Project.

A.32. "Supplier" means a person who contracts with Owner, Contractor, a Subcontractor, or a Sub-subcontractor to furnish materials or equipment for the Project.

A.33. "Warranty Documents" means the written warranties on equipment, materials, labor, or the Work provided by Contractor, a Subcontractor, or a Supplier of any tier or a manufacturer.

A.34. "Work" means the labor, coordination, management, materials, equipment, and other materials and services required to construct the Project.

Terms not defined in this Contract or in the other Construction Documents have the meanings ascribed to them by common usage.

B. Construction Documents

B.1. Construction Documents. This Commercial Construction Contract between Owner and Contractor consists of the following Construction Documents:

Drawings:

Specifications:

Addenda to this Contract:

Change Orders:

Warranty Documents:

Approved Construction Schedule:

This Contract and its Exhibits:

Owner's Request for Bids/Proposals:

Contractor's Bid/Proposal and Bid Qualifications and Exclusions:

B.2. Resolving Ambiguity or Conflict in Construction Documents. If there is an ambiguity or conflict, the Construction Documents are to control in the following order: (1) Change Orders, (2) Addenda, (3) this Contract, (4) Drawings, (5) Specifications, (6) Schedule, (7) Warranty Documents, (8) Owner's Request for bids/Proposals, and then (9) Contractor's Bid/Proposal and Bid Qualifications and Exclusions.

C. The Work

C.1. Scope of Work. Contractor will furnish all Work necessary to construct the Project as stated in, or reasonably inferable from, the Construction Documents.

C.2. Interpretation of Construction Documents by Owner Rep. Owner Rep will reasonably interpret the Construction Documents in accordance with the intention of the parties as expressed in the Construction Documents. Owner Rep will take into consideration industry and trade custom and usage only in the case of ambiguity in or conflict between the Construction Documents. Contractor will follow Owner Rep's interpretation. Contractor may make a Claim if Contractor disputes the interpretation.

C.3. Conditions Reviewed by Contractor. Contractor represents to Owner that it has made an inspection of the Property and the conditions existing at and in the vicinity of the Project Site, has determined normal weather conditions for the Project Site, has reviewed the Construction Documents and the Owner Information, and agrees to construct the Project for the Contract Price and within the Contract Time. Time is of the essence of this Contract.

C.4. Field Confirmations. Before proceeding with the Work, Contractor will field check and verify all dimensions, grades, lines, levels, or other conditions or limitations at the Property to avoid construction or drainage errors.

C.5. Reporting Discovered Nonconformity. Contractor has reported to Owner Rep all errors or omissions detected in the Plans and Owner Information before the Effective Date and will promptly report to Owner Rep any errors or omissions detected in the Owner Information after the Effective Date. Adjustments in the Contract Time and Contract Price may be made by Change Order resulting from errors or omissions that were detected and timely reported to Owner Rep.

C.6. Reporting Concealed Conditions. Contractor will promptly notify Owner Rep if Contractor encounters Concealed Conditions. Contractor will provide Owner with an estimate of any additional costs and impact to the Construction Schedule resulting from the Concealed Conditions. Contractor and Owner will execute a Change Order for any agreed-on changes to the Work.

D. Contractor Obligations. Contractor agrees to perform its obligations under the Construction Documents, including the following:

D.1. Work. Perform the Work in a good and workmanlike manner, free from defects in labor and materials, and in accordance with the Construction Documents and Applicable Law.

D.2. Schedules and Bonds. Provide Owner Rep with the following within ten days after the Effective Date and before the commencement of the Work:

a. *Construction Schedule.* Construction Schedule as described in paragraph G.1.

b. *Schedule of Values.* Schedule of Values as described in paragraph F.5.

c. *Bonds.* Performance and payment bonds and insurance required under Exhibit D.

D.3. Cooperation. Cooperate with any contractor or supplier engaged by Owner to perform Work at the Project Site to minimize delay and disruption to the Project.

D.4. Subcontract Compliance. Comply with the terms of its subcontracts.

D.5. Subcontractor Payments. Pay Subcontractors and Suppliers within seven days after receipt from Owner of payment for their Work.

D.6. Subcontractor List. Provide and periodically update a list of Subcontractors as described in paragraph H.5.

D.7. Reporting Errors and Omissions. Promptly report errors or omissions in the Plans and Owner Information to Owner Rep.

D.8. As-Built Drawings. Maintain as-built drawings at the Project Site as described in subparagraph J.6.c.xii.

E. Owner Obligations. Owner agrees to perform its obligations under the Construction Documents, including the following:

E.1. Access. Provide Contractor with timely access to the Project Site.

E.2. Utility Connections. Provide utility connections necessary for the Work to the Property line, unless utility extension is part of the Work.

E.3. Supervision of Owner Rep. Require Owner Rep to respond to submissions, including shop drawings, Draw Requests, and requests for clarification, in a timely manner so as not to cause undue delay to the Project.

E.4. Timely Decisions. Make decisions on Allowances, changes, selections, and other decisions in a timely manner so as not to cause undue delay.

E.5. Timely Payments. Make timely payments of amounts owed to Contractor in accordance with section J.

E.6. Cooperation. Require third-party contractors and vendors performing Work at the Project Site to cooperate with Contractor and to be liable for damages caused to Contractor's Work.

F. Contract Price

F.1. Determination. The Contract Price is the sum of the (a) Costs of Construction, (b) Contractor's Contingency, (c) Owner's Contingency, and (d) Contractor's Fee, provided that the Contract Price shall not exceed the Guaranteed Maximum Price. The Contract Price includes the Allowances shown on Exhibit C. The Guaranteed Maximum Price may be changed only by Change Order.

F.2. Costs of Construction. The Costs of Construction include the following actual costs:

a. *Subcontract Prices.* The price of approved subcontracts.

b. *Contractor's Labor.* The cost of Contractor's direct labor for performance of the Work, whether on-site or at fabrication shops off-site assembling or manufacturing materials to be installed on the Project. The wages paid must not be materially higher than the standard paid for similar work by other contractors in the location of the Project.

c. *Contractor's Supervision.* Contractor's superintendent, Project management, and administrative staff on-site devoting full time and attention to managing the Project. Off-site Project managers' costs will be paid upon written agreement with Owner based on their time devoted to the Project.

d. *Fringe Benefits.* The cost of standard labor fringe benefits for Contractor's Labor and Contractor's Supervision for on-site personnel. Fringe Benefits means costs for Contractor's Labor and Contractor's Supervision for on-site personnel in addition to wages for the employer's required contributions for employment taxes, insurance, and other employer labor cost required by applicable labor agreement or by law. Fringe Benefits also includes employer

contributions for qualified retirement plans, health insurance, and paid leave, provided such costs are standard in the industry and are based on wages or salaries included in the Costs of Construction. However, the Costs of Construction will not include employee profit sharing or bonuses (except qualified retirement plans).

e. *Materials/Equipment.* Materials and equipment installed as a part of the Project as specified in the Construction Documents, including freight for delivery to the Project, a reasonable standard allowance for waste, and sales or use taxes paid by Contractor unless Owner has furnished Contractor with a certificate of exemption from the payment of such taxes. Unreturned excess materials are owned by Owner.

f. *Construction Equipment Costs.* Costs for machinery, equipment, tools, and temporary structures and outbuildings on the Project. These costs will be at standard rental rates for the location of the Project, whether owned by or rented by Contractor.

g. *Demolition and Site Clearing.* The cost of clearing the site and demolition and removal of existing structures and vegetation required for performance of the Work.

h. *Site Office.* Office supplies, copy charges, delivery charges, and other reasonable direct costs of maintaining a job site office.

i. *Bonds and Insurance Premiums.* The percentage of Contractor's insurance premiums allocated to this Project for the insurance required in this Contract and the cost of providing any required payment and performance bonds.

j. *Building Permit.* Fees for the building permit, licenses, and inspections by governmental authorities required for the Work.

k. *Royalties/Licenses.* Costs of use of designs, products, or processes required by the Construction Documents as part of the Work.

l. *General Conditions.* Reasonable job site costs incurred in performing the Work, including costs such as for utilities not paid by Owner, a job site trailer if needed due to the scope of construction, temporary restrooms used at the site, on-site security, construction fencing, and site cleanup ("General Conditions").

F.3. Exclusions. Costs not included in paragraph F.2., including those specifically listed below, are excluded from the Costs of Construction:

a. *Certain Personnel.* Contractor management and other employees or personnel not located full-time on the Project site, unless Owner's advance written approval is obtained.

b. *Principal Office.* Contractor's principal office overhead.

c. *General Overhead.* Contractor's general overhead including costs of borrowing.

d. *Costs over GMP.* Costs and expenses of any kind that, when added to the rest of the Costs of Construction and Contractor's Fee would be in excess of the Guaranteed Maximum Price, as adjusted by Change Order.

e. *Correction Costs.* Costs to correct Work to bring it into conformance with the Construction Documents.

F.4. Discounts. Owner will be notified if material or equipment price discounts are available for advance cash payments. If so notified, and if Owner advances the funds for such purchases, Owner is entitled to the associated discount.

F.5. Schedule of Values. Contractor will prepare a Schedule of Values. The Schedule of Values must be approved in writing by Owner Rep before commencement. The Schedule of Values will apportion the Guaranteed Maximum Price between each constituent element of the Work.

F.6. Entitlement to Savings. Upon Final Payment by Owner to Contractor and provided Contractor is not in default of this Contract, Owner shall pay Contractor the percentage of Cost Savings, if any, shown on Exhibit C, provided that Owner retains the right to withhold payment for any outstanding Claims related to the Project in an amount reasonably determined by Owner to protect Owner from liability.

F.7. Allowances. Contractor shall include in the Contract Price the Allowances shown in Exhibit C. Items covered by Allowances shall be supplied for such amounts and by such persons or entities as Owner may direct, but Contractor is not required to employ persons or entities to whom Contractor has reasonable objection. Unless otherwise provided in the Construction Documents, the following guidelines apply:

a. *Materials and Equipment Less Discounts.* Allowances shall cover the cost to Contractor of materials and equipment delivered at the site and all required taxes, less applicable trade discounts.

b. *Unloading and Handling Costs.* Contractor's costs for unloading and handling at the site, labor, installation costs, overhead, profit, and other expenses contemplated for stated Allowances amounts shall be included in the Costs of Construction but not in the Allowances.

c. *Change Orders.* Whenever costs are more than or less than Allowances, the Guaranteed Maximum Price shall be modified by Change Order. The amount of the Change Order shall reflect the difference between actual costs and the Allowances.

d. *Prompt Selection by Owner.* Owner shall select materials and equipment under an Allowance with reasonable promptness.

G. Contract Time

G.1. Construction Schedule. Contractor will promptly prepare and submit to Owner Rep for approval a Construction Schedule, using the critical path method, detailing how Substantial Completion will be achieved by the Substantial Completion Date. Contractor will periodically revise and resubmit the Construction Schedule to Owner Rep upon change orders, Excused Delays, or other events that cause the critical path or the Substantial Completion Date to change.

G.2. Risk of Loss before Final Completion. If the Work is damaged or destroyed before its final completion, Contractor will bear the risk of loss and will diligently proceed with restoration or replacement and completion of the Work.

G.3. Acceleration of Work. If there is a delay in the Work that is not an Excused Delay, and in the determination of Owner Rep the Work will not reach Substantial Completion by the Substantial Completion Date, Owner Rep may direct Contractor to accelerate the Work at no cost to Owner by means of overtime, additional crews, additional shifts, or resequencing of the Work to achieve Substantial Completion by the Substantial Completion Date.

G.4. Owner Suspension or Delay in Work Commencement. Owner may, with or without cause, by written directive, require Contractor to suspend or delay commencement of the Work in whole or in part for a length of time as desired by Owner. The Guaranteed Maxi-

mum Price and Contract Time are to be equitably adjusted for increases in the Costs of Construction and for the time caused by such delay or suspension under this paragraph. However, no such equitable adjustment shall be made if Owner has the right to order delay or suspension of the Work under another provision of the Construction Documents or if an Unexcused Delay by Contractor would have caused such suspension or delay.

H. Subcontracts

H.1. Subcontracting. Contractor may subcontract all or any part of the Work.

H.2. Terms. Subcontracts with Subcontractors and Suppliers must meet the following requirements:

a. *Writing.* Be in writing.

b. *Assumption of Obligations.* Require the Subcontractor to assume toward Contractor all of the obligations and responsibilities that Contractor owes to Owner under the Construction Documents.

c. *Consistent with Contract.* Be consistent with the terms of this Contract.

d. *Terms of Contract Applicable to Subcontractors.* Require compliance with the terms of this Contract applicable to Subcontractors, including requirements for insurance and lien waivers.

e. *Contingent Assignment to Owner.* Require that the Subcontractor provide a copy of the subcontract to Owner if Contractor's right to perform under this Contract has been terminated.

f. *Subcontracts Assignable to Owner and Contractor's Surety.* Be assignable to Owner or to Contractor's surety for the Project on the same terms.

g. *Subcontractor's Obligations Not Assignable.* Prohibit assignment of the Subcontractor's obligations.

H.3. Delivery of Pertinent Portion of Construction Documents. Contractor will provide each Subcontractor with a copy of the Construction Documents, or a copy of the portions to which Subcontractor will be bound, before entering into subcontracts.

H.4. Owner's Review of Subcontractors and Subcontractors' Bids. Owner may require Contractor to provide Bids from Major Subcontractors, Major Sub-subcontractors, and Major Suppliers. Owner, Owner Rep, and Contractor will review the Bids and agree on selection. Contractor will not use a subcontractor or supplier to whom Owner has a reasonable objection. Contractor will not be required to enter into a subcontract or other agreement if Contractor reasonably objects to use of such subcontractor or supplier. If Owner requires Contractor to use a specific subcontractor or supplier instead of the subcontractor or supplier recommended by Contractor who has submitted a lower Bid, the Guaranteed Maximum Price will be increased by the additional amount of the Bid from Owner's required subcontractor or supplier.

H.5. Directory. Contractor will provide Owner Rep with a written list of all its Subcontractors and Suppliers, and the Major Sub-subcontractors and Major Suppliers of any tier, with the address and telephone number of each. An updated list will be provided to Owner Rep within fifteen days after any change. A final list will be provided to Owner Rep on or before the date of Final Completion of the Project.

H.6. Owner's Objection to Any Subcontractor. Contractor will not use any Subcontractor to whom Owner or Owner Rep has a reasonable objection. If the replacement of the Subcontractor due to Owner's objection results in an increase in cost over the Contractor's anticipated total Costs of Construction, reasonable adjustment to the Guaranteed Maximum Price will be made by Change Order.

H.7. Owner May Confirm Payments to Subcontractors and Sub-subcontractors. Owner has the right to contact any Subcontractor or Sub-subcontractor to obtain information on payments made by Contractor under the subcontract and to obtain lien waivers and bills-paid affidavits.

I. Contingent Assignment of Subcontracts

I.1. Events Triggering Assignment. Each subcontract is assigned by Contractor to Owner and the surety under a performance bond provided by Contractor, contingent on the occurrence of all of the following:

a. *Contractor Default.* Contractor is in default under the Construction Documents.

b. *Termination of Contractor.* Owner has terminated Contractor under this Contract pursuant to paragraph N.3. or section O.

c. *Assumption of Subcontract.* Owner has notified Contractor and the Subcontractor in writing that it assumes the subcontract or that it has made demand on the surety and the surety has so notified the Subcontractor.

I.2. Contacting Subcontractors and Suppliers. Owner and the surety have the right to contact any Subcontractor or Supplier to obtain a copy of the subcontract, to determine if Contractor is in default under the Subcontract, and to confirm or negotiate the terms for assumption.

I.3. Results of Assumption. Assumption by Owner results in the following:

a. *Equitable Adjustment of Subcontract Price.* If the Work has been suspended for more than thirty days, the Subcontract price will be equitably

adjusted for increases in cost caused by the suspension; contractor will be liable for the additional Costs of Construction.

b. *Replacement Contractor.* Owner may assign a subcontract that it has assumed to a replacement contractor but will remain liable for the obligations under the subcontract.

c. *Continued Liability of Contractor.* Contractor will remain liable to Owner and the Subcontractor or Supplier for any unpaid amounts due to the Subcontractor or Supplier, and for any increases in the Costs of Construction described in paragraph F.2., even if the increase does not result in the total Contract Price exceeding the Guaranteed Maximum Price.

J. Payment

J.1. Progress Draws and Final Payment. The Contract Price is payable through Progress Draws and Final Payment as described in this section. Owner will have the right to withhold Retainage from each Progress Draw. Retainage due to Contractor will be included in the Final Payment.

J.2. Progress Payments. On or before the twenty-fifth day of each month after the commencement of Construction (the "Draw Date"), Contractor will assemble and present to Owner Rep a Draw Request for payment for conforming Work performed since the previous Draw Date. The amount of each Draw will be computed as follows, in the following order of operations:

a. *Assigned Percentage of Completion.* For each item in the Schedule of Values ("Scheduled Value Item") the Contractor will assign a percentage for the conforming Work accomplished through the Draw Date.

b. *Draw Individual Scheduled Amount.* Multiply each item on the Schedule of Values by its assigned percentage of completion ("Draw Individual Scheduled Value Amount").

c. *Costs of Construction for Each Scheduled Value Item.* Determine the Costs of Construction for the Draw period, separate such Costs of Construction by Scheduled Value Item, and calculate the subtotal of the Costs of Construction for each Scheduled Value Item.

d. *Lesser Of.* Compare each Draw Individual Scheduled Value Amount with the assembled Costs of Construction for each item in the Schedule of Values and include the lesser of the two figures in the amount of the Draw Request.

e. *Sum of Lesser Amounts.* The total Draw will be the sum of the lesser of the two figures for each Scheduled Value.

f. *Contractor's Fee.* Calculate Contractor's Fee earned through the Draw Date by multiplying the Contractor's Fee percentage by the total calculated in subparagraph e. above.

g. *Deduct Retainage.* Deduct Retainage from the sum of subparagraphs e. and f. above.

h. *Deduct Previous Payments to Contractor.* Deduct payments previously made to Contractor.

i. *Deduct Paid by Owner to Contractor's Suppliers and Subcontractors.* Deduct amounts paid by Owner to Contractor's suppliers or subcontractors.

j. *Deduct Amounts Authorized to Be Withheld.* Deduct amounts that Owner Rep has determined to withhold as provided in paragraph J.10.

J.3. Supporting Documents. Each Progress Draw Request must include the following supporting documents:

a. *Records.* The receipts, invoices, delivery tickets, subcontractor draws, and other documentation reasonably required by Owner Rep substantiating the Costs of Construction for the Draw Period for which payment is sought.

b. *Contractor's Bills-Paid Affidavit.* Bills-Paid Affidavit by Contractor in the form attached as Exhibit E.

c. *Subcontractors' Bills-Paid Affidavits.* Bills-Paid Affidavit by each Subcontractor in the form attached as Exhibit F.

d. *Contractor's Conditional Partial Release.* Contractor's Conditional Partial Release in the form attached as Exhibit G.

e. *Contractor's Unconditional Partial Release.* Contractor's Unconditional Partial Release in the form attached as Exhibit H.

f. *Subcontractors' Conditional Partial Releases.* Subcontractor's Conditional Partial Release from each Subcontractor to be paid from the Draw in the form attached as Exhibit G.

g. *Subcontractors' Unconditional Partial Releases.* Subcontractor's Unconditional Partial Release from each Subcontractor for which Contractor received payment as a part of the prior month's Progress Draw in the form attached as Exhibit H.

J.4. Payment of Undisputed Items. Owner Rep will review the Draw Request and advise Owner whether to pay it in full or in part. Contractor will promptly provide any additional documentation reasonably requested and answer any questions on the Draw Request.

Owner Rep will promptly notify Contractor of any disputed items in the Draw Request. Owner will have thirty days after the later of (a) the Draw Date or (b) the date that Owner Rep received the Draw Request and required documentation, to pay undisputed items. Undisputed items not paid when due will bear interest until paid at the rate specified in the Texas Prompt Payment Act, Texas Property Code chapter 28.

J.5. Claims for Payment Disputes. Either party may make a Claim in connection with a payment dispute.

J.6. Final Payment. Final payment will be made according to the following job inspection and closeout process, and is subject to the conditions precedent to final payment, as follows:

a. *Substantial Completion; Final Completion.* When Contractor determines that the Work has progressed to the point of reaching Substantial Completion, Contractor will give written notice to Owner Rep, and Owner Rep will promptly inspect the Work. If Owner Rep determines that the Work is Substantially Complete, Owner Rep will issue a certificate of substantial completion and prepare a punch list for Work that needs to be completed along with an agreed-on time for completion. If Owner Rep determines that the Work is not acceptable or is not Substantially Complete, Owner Rep will prepare a written list of Work that needs to be remedied or completed to achieve Substantial Completion. Contractor shall perform the Work to achieve Final Completion of the Work, including completion of all punch list items, within thirty days after receipt of Owner Rep's list or within an agreed-on period for completion. Owner Rep will determine the dates for Substantial and Final Completion.

b. *Final Draw.* Upon Owner Rep's written acknowledgement that the punch list has been completed, Contractor will submit a Final Draw Request. The amount of the final draw ("Final Payment") will be the balance of the Contract Price, after deducting amounts paid by Owner to Suppliers, Subcontractors, and Sub-subcontractors, amounts for unreleased mechanic's liens, amounts withheld by Owner pursuant to paragraph J.10., and previous payments to Contractor.

c. *Conditions Precedent to Final Payment.* The following are Conditions Precedent to Final Payment:

i. *Final Draw Request.* Receipt and approval by Owner, upon recommendation of Owner Rep, of a Final Draw Request.

ii. *List of Subcontractors and Suppliers.* Receipt by Owner Rep of Contractor's final and accurate list of Subcontractors and Suppliers in compliance with paragraph H.5.

iii. *Conditional Final Releases.* Executed and acknowledged Conditional Final Releases from Contractor and all Subcontractors, in the form attached as Exhibit I. The amounts contained in these Releases must match amounts stated as owed in the Final Bills-Paid Affidavits.

iv. *Final Bills-Paid Affidavits.* Executed and acknowledged Final Bills-Paid Affidavits from Contractor, Subcontractors, and Suppliers, in the forms attached as Exhibits J and K.

v. *Subcontractors' Unconditional Partial and Final Releases.* Unconditional Partial Releases (Exhibit H) and Unconditional Final Releases (Exhibit L) from Subcontractors who have been previously paid.

vi. *Suppliers' and Sub-subcontactors' Unconditional Partial and Final Releases for Amounts Previously Paid.* Unconditional Partial Releases (Exhibit H) and Unconditional Final Releases (Exhibit L) from Suppliers and Sub-subcontractors of all tiers who have been previously paid.

vii. *Suppliers' and Sub-subcontactors' Conditional Final Releases for Amounts Not Previously Paid.* Conditional Final Releases from all Subcontractors, Sub-subcontractors, and Suppliers of all tiers who have not been previously paid, in the form attached as Exhibit I.

viii. *Release of All Filed Mechanic's Liens.* Receipt by Owner Rep of executed, acknowledged releases of all filed mechanic's liens against the Project, or Contractor will provide satisfactory evidence that Contractor has bonded around such lien claims pursuant to chapter 53 of the Texas Property Code.

ix. *Bond to Pay Claims.* If a Subcontractor or Supplier of any tier refuses to provide a Conditional or Unconditional Release for the applicable amount stated in the Bills-Paid Affidavits, or if there is otherwise a dispute about payment, satisfactory evidence that Contractor has bonded around such lien claims pursuant to chapter 53 of the Texas Property Code or has provided other arrangements accepted by Owner in writing as sufficient to secure indemnity from such lien or claim.

x. *Subcontractors', Sub-subcontractors', and Suppliers' Conditional Final Releases.* Conditional Final Releases from each Subcontractor, Sub-subcontractor, or Supplier from whom Owner has received a notification of nonpayment or the right to assert a claim, unless Contractor has provided Owner with satisfactory evidence that Contractor has bonded

around such a lien claim pursuant to chapter 53 of the Texas Property Code or has provided other arrangements accepted by Owner in writing as sufficient to secure indemnity from such lien or claim.

xi. *Warranty Documents.* Contractor has assigned and delivered to Owner all required warranty documents required that have been assigned to Owner.

xii. *As-Built Drawings.* As-built drawings have been delivered to Owner Rep.

xiii. *Owner Manuals and Training Completed.* All Owner Manuals and keys have been delivered to Owner Rep, and Project control/security and other systems checkout and training contemplated by the Construction Documents has been performed.

J.7. Date of Final Payment. The Final Payment, including release of all Retainage payable to Contractor, is due within fifty days after the Conditions Precedent to Final Payment have been satisfied or waived by Owner in writing.

J.8. Filing Affidavit of Final Completion. Owner will file in the real property records of each county in which the Project is located and provide notice to Contractor of its Affidavit of Final Completion within three Business Days after both of the following have occurred: (a) the Conditions Precedent to Final Payment have been met, and (b) Owner Rep has received Contractor's Final Draw Request.

J.9. Resolution of Lien Claims. Any notice of lien claims or lien affidavits filed after notice and recordation of the Owner Affidavit will be resolved by Contractor and Owner

Rep in accordance with one of the methods described in subparagraph J.6.c.viii., ix., or x. above, at Owner's sole discretion.

J.10. Withholding Payment. Owner has the right to withhold from payments otherwise due to Contractor amounts deemed reasonably necessary, on advice from Owner Rep, to protect Owner from damage or liability due to any of the following:

a. *Defects.* Uncorrected defective work.

b. *Overruns.* Reasonable evidence that the Contract Price will exceed the Guaranteed Maximum Price before Final Completion.

c. *Injuries or Property Damages.* Claims of injury or property damage to Owner, a third party, or another contractor.

d. *Delays.* Reasonable evidence that Substantial Completion will not be reached according to the Construction Schedule, as revised.

e. *Work Defaults.* Repeated failure by Contractor to perform the Work according to the Construction Documents.

f. *Mechanic's Liens.* Mechanic's liens filed or noticed on the Project not removed by Contractor's furnishing a bond acceptable to Owner pursuant to chapter 53 of the Texas Property Code or other Contractor arrangements accepted by Owner in writing as sufficient to secure indemnity from such lien or claim.

When the basis for withholding has been resolved, Owner will promptly pay to Contractor any amounts not needed to protect Owner from damage or liability.

J.11. Owner Payment to Subcontractors. Owner will promptly notify Contractor if Owner receives a notice of nonpayment from a Subcontractor or Supplier of any tier. If Con-

tractor does not provide Owner Rep with an Unconditional Release for the amount owed, or satisfactory evidence that Contractor has bonded around the claim within fifteen days after notification, Owner may make payment by joint check to Contractor and the claimant, unless a payment bond has been provided for the Project.

J.12. Acceptance of Final Payment. Final Payment will be deemed accepted by Contractor when the check has been deposited or wire transfer received. Acceptance of Final Payment by Contractor constitutes a waiver of all claims by Contractor not previously received in writing by Owner Rep.

K. Change Orders and Required Changes

K.1. Guaranteed Maximum Price and Contract Time. Owner, without invalidating the Contract, may order changes in the Work. All changes will be made by written Change Order, signed by Owner and Contractor, that states the adjustment in the Guaranteed Maximum Price and the Contract Time.

K.2. Contractor to Proceed. If Owner and Contractor cannot agree on the adjustment to the Guaranteed Maximum Price, Owner may require Contractor to proceed with the Work by written Required Change signed by Owner. The Guaranteed Maximum Price will be adjusted on a time and materials basis.

L. Claims

L.1. Contractor's Claims. Contractor's Claims for extensions of time or changes to the Guaranteed Maximum Price must be submitted to Owner Rep in writing within seven days after the date when the events giving rise to the Claim occurred. Within fourteen days after the submission of such Claim, Contractor will furnish Owner Rep with Contractor's calculations of additional time needed to complete the Work and, if applicable, the anticipated increase to the Costs of Construction and documentation supporting Contractor's Claim. Con-

tractor will furnish additional information in support of such Claims as reasonably required by Owner or Owner Rep. Contractor will proceed with the Work during the pendency of any such Claims.

L.2. Material Breaches. Notwithstanding anything to the contrary in the Construction Documents, Contractor agrees that it will not attempt in any way to recover or pursue a Claim for delay if Contractor or a Subcontractor, Sub-subcontractor, or Supplier to Contractor has, before the claimed Delay, materially breached any contractual duty or obligation in the Construction Documents, or any duty or obligation at common law or created by statute, to the extent such breach causes, affects, or otherwise contributes to such delay, and such breach remains uncured at the time a Claim accrues.

L.3. Owner Claims. Owner agrees to notify Contractor of any Claim, including Claims for Unexcused Delay and defects in the Work, within five Business Days after Owner becomes aware of the basis for the Claim.

L.4. Initial Decision Maker Process. All Claims arising under this Contract will be first submitted to Owner Rep as the Initial Decision Maker. Owner Rep's decision is a condition precedent to proceeding with mediation, as provided for in paragraph L.5. Owner Rep will issue a decision within thirty days after receiving the Claim and supporting documentation. Owner Rep may extend the initial decision deadline for up to an additional thirty days in order to receive supporting documentation and data and replies from the opposing party. If Owner Rep is unable to render a decision within the allotted period, or if either party is dissatisfied with the decision, either party may request mediation.

L.5. Mediation. If the dispute is not resolved by the decision of the Initial Decision Maker, either party may request mediation of the dispute using a neutral mediator to be agreed on by the parties. Contractor will continue to perform the Work during the pendency of mediation.

L.6. Litigation. If a resolution is not reached through mediation, either party may pursue litigation.

M. Material Breach

M.1. Owner's Default. Each of the following constitutes a material breach of this Contract by Owner:

a. *Time Defaults.* Failure to timely render or otherwise furnish responses, decisions, or selections according to the Construction Documents.

b. *Payment Defaults.* Failure to comply with Owner's payment obligations under the Construction Documents.

c. *Substantial Breach.* Substantial breach of any of Owner's obligations under this Contract.

M.2. Contractor's Default. Each of the following constitutes a material breach of this Contract by Contractor:

a. *Work Commencement Default.* Failure by Contractor to commence the Work in accordance with the provisions of this Contract.

b. *Work Prosecution Default.* Failure by Contractor to prosecute the Work to completion in a diligent, efficient, timely, workmanlike, skillful, and careful manner and in strict accordance with the provisions of the Contract.

c. *Time Defaults.* Failure by Contractor to use an adequate number of qualified personnel or adequate amount of equipment to complete the Work without causing Unexcused Delay.

d. *Performance Defaults.* Contractor's persistent failure to perform any of its material obligations under the Contract.

e. *Payment Defaults.* Contractor's persistent failure to make prompt payments when due to its Subcontractors and Suppliers, unless Contractor has a bona fide dispute with any such Subcontractor or Supplier.

f. *Bankrupt.* Contractor creates any situation or state of facts that would authorize or permit an involuntary petition in bankruptcy to be filed against Contractor.

g. *Breach of Timely Completion.* Contractor has not met, or in Owner Rep's and Owner's reasonable opinion, based on the schedules required by the Construction Documents, will not meet the dates of Substantial Completion set forth in the Construction Documents.

N. Remedies

N.1. Owner Remedies

a. *Owner's Right to Suspend Work.* If Contractor fails, after notice to correct Work that is defective or not in conformance with the requirements of the Construction Documents, or repeatedly fails to perform the Work in accordance with the Construction Documents, Owner or Owner Rep may issue a written notice to Contractor to suspend the Work, in whole or part, until Contractor cures the reasons for issuance of the suspension notice. Owner's right in this section does not create a duty by Owner to suspend work for the benefit of Contractor or Subcontractors of any tier.

b. *Owner Cure.* If Contractor is in default and does not within ten Business Days after receipt of Owner's or Owner Rep's written notice to commence

and continue diligent, continuous effort to correct the default, Owner may cure such default and withhold payment from Contractor for the reasonable cost and expenses incurred for Owner's cure. If insufficient amounts remain to be paid to Contractor, Contractor must pay Owner the reasonable costs and expenses to cure in excess of the remaining funds to be paid to Contractor.

N.2. Contractor Remedies. Contractor will give written notice to Owner or Owner Rep if Owner is in material breach of Owner obligations under the Construction Documents. The notice will state the specific items of Owner default and notify Owner that Owner must cure the items within ten Business Days of receipt of the notice or Contractor may suspend Work until Owner's material breach is cured or corrected. Contractor may terminate the Contract in accordance with paragraph N.3. if suspension of the Work by Contractor under this section continues without Owner cure for thirty or more days.

N.3. Termination. If one party defaults and the default is not cured by exercise of the remedies specified in paragraph N.1. or N.2., upon an additional ten Business Days' prior written notice specifically describing the default, and provided the defaulting party has not commenced diligent, good-faith, continuous, and effective action to cure the default within the ten-day period, this Contract may be terminated by an additional written notice from the nondefaulting party to the defaulting party. If there is such a termination, the following formula is agreed on as a reasonable and fair way to assess the actual damages, without the expense and delay associated with other forms of dispute resolution:

a. *Damages to Contractor.* If termination resulted from an act of default of Owner, Owner will pay to Contractor, within thirty days after written notice from Contractor, an amount equal to all amounts due and owing for the Work performed in accordance with the Construction Documents at the time of the termination, plus 10 percent of the remaining Guaranteed Maximum Price to compensate Contractor for the lost profit.

b. *Damages to Owner.* If termination resulted from an act of default of Contractor, Owner may do any of the following:

i. *Take Over Work.* Use all materials, equipment, tools, and construction equipment owned by Contractor and occupy the Project site.

ii. *Accept Subcontracts and Supplier Agreements.* Accept assignment of Subcontracts and assume, in Owner's sole discretions, any agreements with Suppliers and Sub-subcontractors.

iii. *Costs to Complete.* Finish the Work as expeditiously as reasonably possible provided the costs for completion and correction of the Work are reasonable and necessary. If requested, Owner will furnish Contractor a statement of costs in correcting and completing the Work, along with reasonable documentation of such costs. If Owner terminates according to this paragraph, no further payments will be due Contractor until final completion is reached. If, at that time, Owner's costs to complete and correct the Work exceed the unpaid balance of the Guaranteed Maximum Price, Contractor will pay the difference to Owner upon written demand.

iv. *Liquidated Damages.* Assess liquidated damages if Substantial Completion has not been achieved as provided in Exhibit C.

c. *Recourse to Performance Bond.* Upon the occurrence of a Contractor default, Owner may make demand on the surety to perform its obligations under a Performance Bond provided for the Project.

N.4. Damages for Contractor's Unexcused Delay. If the Work is not Substantially Complete by the Substantial Completion Date due to Contractor's Unexcused Delay, Owner may assess liquidated damages as provided in Exhibit C.

N.5. Excused Delay. If it is determined that Contractor has been delayed by an Excused Delay, the time to complete the Work will be extended by one day for each day of an Excused Delay. This extension of the Contract Time will be Contractor's sole remedy for an Excused Delay, and no monetary damage or other compensation is due Contractor for such delay.

N.6. Damages for Owner's Delay. If it is determined that Contractor has been delayed by an Excused Delay, the time to complete the Work will be extended by one day for each day of an Excused Delay. This extension of the Contract Time will be Contractor's sole remedy for an Excused Delay, unless the delay is due to acts of Owner constituting unreasonable interference with Contractor's ability to perform the Work that continues after notice of the interference is given by Contractor. The exercise by Owner of any right provided by this Contract, including suspension of Work, does not constitute unreasonable interference with Contractor's ability to perform the Work. Contractor will be entitled to the General Conditions and other direct Costs of Construction described in paragraph F.2. for each day of delay due to Owner's interference.

N.7. Waiver of Consequential Damages. Except as provided in this section N., Owner and Contractor each waive the right to recover consequential damages in a suit or action brought against the other arising out of a default under the Construction Documents, regardless of whether the claim for recovery is based in contract or tort.

O. Owner's Right to Terminate for Convenience. Owner has the right to terminate this Contract for Owner's convenience by giving Contractor thirty days' prior written notice

of termination. Upon such termination, Contractor will be entitled to payment as described in subparagraph N.3.a.

P. Warranties

P.1. Express Warranty. Contractor warrants to Owner that labor, materials, and equipment furnished under the Contract will be new and of high quality and will be free from defects and that all Work will be performed in a good and workmanlike manner and will conform to the Construction Documents. Work will be considered defective if it does not conform to the Construction Documents.

P.2. Ten-Year Structural Component Warranty. Contractor additionally expressly warrants all structural components of the Project, including the foundation, for ten years following Substantial Completion.

P.3. One-Year Callback and Correction of Work. For a period of one year following Substantial Completion, Contractor will repair or replace any defective Work at no charge if Owner provides written notice to Contractor of a warranty claim during the one-year warranty period.

P.4. Assignment of Third-Party Warranties. Contractor hereby assigns all equipment, roofing, and other vendor warranties to Owner and will deliver all manuals, books, instructions, and warranty policy documentation to Owner as part of the Conditions to Final Payment.

P.5. Cumulative of Other Warranties and Remedies. The warranties set forth in this section P. are cumulative of, and in addition to, all other warranties or remedies available at law or by this Contract and can be assigned by Owner.

Q. Safety

Q.1. Construction Means, Methods, Techniques, Sequences, and Procedures. Owner will not have control over or charge of and will not be responsible for construction means, methods, techniques, sequences, or procedures used or for safety precautions and programs in connection with the Work, since these are solely Contractor's responsibility.

Q.2. Compliance with Applicable Laws. Contractor shall give notices and comply with applicable laws, ordinances, rules, regulations, and lawful orders of public authorities bearing on safety of persons and property and their protection from damage, injury, or loss.

Q.3. Remedy Contractor-Caused Property Damage. Contractor shall promptly remedy damage and loss to property at the site, or off-site, if caused in whole or in part by Contractor, a Subcontractor, or anyone directly or indirectly employed by any of them or by anyone for whose acts they may be liable and for which Contractor is responsible.

Q.4. Reasonable Precautions and Reasonable Protection. As between Contractor and Owner, Contractor shall be responsible for all safety at the Project Site, including safety of personnel, material, and the Work. Contractor shall be responsible for providing any security necessary to prevent damage or loss to materials, equipment, the Improvements, and other property in the vicinity of the Project until Final Completion.

R. Indemnity

R.1. Claims Other than Employee Claims. TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW, CONTRACTOR SHALL INDEMNIFY, DEFEND, AND HOLD HARMLESS LENDER, OWNER, OWNER'S MEMBERS, MANAGERS, PARTNERS, AFFILIATED COMPANIES OF OWNER, AND ANY PARTNER, AND THEIR RESPECTIVE OFFICERS, DIRECTORS, SHAREHOLDERS, EMPLOYEES, AND AGENTS (COLLECTIVELY, THE "INDEMNITEES") FROM ALL CLAIMS, SUITS, ACTIONS, PROCEEDINGS, DAMAGES, LOSSES, AND EXPENSES WHATSOEVER, INCLUDING ATTORNEY'S

FEES, CONNECTED WITH PERFORMANCE OF THIS CONTRACT OR THE CONSTRUCTION CONTEMPLATED BY THIS CONTRACT TO THE EXTENT CAUSED BY THE BREACH OF CONTRACT, NEGLIGENCE, OR OTHER ACT OR OMISSION OF CONTRACTOR, ITS SUBCONTRACTORS, SUB-SUBCONTRACTORS OF ANY TIER, OR ANYONE DIRECTLY OR INDIRECTLY EMPLOYED BY THEM OR ANYONE FOR WHOSE ACTS THEY MAY BE LIABLE.

Include the following employee claims indemnity paragraph if applicable.

R.2. Employee Claims. IN ADDITION, REGARDING CLAIMS FOR THE BODILY INJURY OR DEATH OF AN EMPLOYEE OF CONTRACTOR, ITS AGENT(S), OR ITS SUBCONTRACTORS OF ANY TIER (HEREINAFTER REFERRED TO AS "EMPLOYEE CLAIM" OR "EMPLOYEE CLAIMS"), CONTRACTOR WILL INDEMNIFY, DEFEND, AND HOLD HARMLESS INDEMNITEES FROM ALL SUCH EMPLOYEE CLAIMS, SUITS, ACTIONS, PROCEEDINGS, DAMAGES, LOSSES, AND EXPENSES WHATSOEVER CONNECTED WITH PERFORMANCE OF THIS CONTRACT, INCLUDING SUCH EMPLOYEE CLAIMS, DAMAGES, LOSSES, OR EXPENSES ACTUALLY OR ALLEGEDLY ARISING IN WHOLE OR IN PART FROM THE NEGLIGENCE OF INDEMNITEES. IT IS THE EXPRESSED INTENT OF CONTRACTOR AND OWNER THAT IN THE CASE OF AN EMPLOYEE CLAIM, THE INDEMNITY PROVIDED FOR IN THIS SECTION IS AN INDEMNITY EXTENDED BY CONTRACTOR TO INDEMNIFY AND PROTECT INDEMNITEES FROM THE CONSEQUENCES OF INDEMNITEES' OWN NEGLIGENCE WHETHER OR NOT THAT NEGLIGENCE IS THE SOLE OR CONTRIBUTING CAUSE OF THE RESULTANT EMPLOYEE CLAIMS. CONTRACTOR FURTHER AGREES IN THIS CONNECTION TO DEFEND AT ITS OWN EXPENSE INDEMNITEES FROM ANY CLAIMS OR LITIGATION IN CONNECTION WITH ANY SUCH EMPLOYEE CLAIMS.

Continue with the following.

[*R.2./R.3.*] *Limitations.* In claims against any person or entity indemnified under this section by an employee of Contractor, a Subcontractor, or anyone directly or indirectly employed by them or anyone for whose acts they may be liable, the indemnification obliga-

tion under this agreement shall not be limited by a limitation on amount or type of damages, compensation, or benefits payable by or for Contractor or a Subcontractor under workers' compensation acts, disability benefit acts, or other employee benefit acts.

S. Miscellaneous

S.1. Effect of Invalid Provision. Should any clause in this Contract be found invalid by a court of law, the remainder of the Contract shall not be affected thereby, and all other provisions of this Contract shall remain valid and enforceable.

S.2. Entire Agreement; Modification. The Construction Documents contain the entire agreement between the parties for the construction of the Project and cannot be modified except by written Change Order or modification.

S.3. Nonassignment. This Contract shall not be assigned by Contractor without the written consent of Owner. This limitation shall not apply to Contractor's right to retain Subcontractors for the prosecution of portions of the Work in the normal course of its construction business.

S.4. Execution of Other Documents; Further Action. Each party shall, on demand, execute or obtain such other documents or instruments and corrective filings or instruments and use all commercially reasonable efforts to do or cause such other things as may be reasonably necessary or desirable to effect the provisions and purposes of this Contract.

S.5. Fees and Expenses of Actions. If any litigation (an "Action") is commenced, including an Action for declaratory relief, to enforce or interpret the terms of this Contract, or any document or instrument executed in connection with or pursuant to this Contract, or involving any controversy or Claim between or among the parties to this Contract, whether sounding in contract, tort, or statute, whether through arbitration, probate, bankruptcy, receivership, or other judicial or administrative proceeding, the prevailing party in such Action (the

"Prevailing Party") shall be entitled to recover reasonable attorney's fees, paralegal costs, expert witness and consulting expert fees and costs, and other expenses, costs, and necessary disbursements incurred by the Prevailing Party in the investigation, preparation, pursuit, or defense of any claim asserted by any party in such Action in addition to any other relief to which the Prevailing Party may be otherwise entitled, at law or hereunder, in the amount determined by the fact finder(s) or the court.

S.6. Gender and Number. Unless otherwise required by context, the genders shall include each other and the singular shall include the plural and the plural the singular.

S.7. Headings. Headings, tables of contents, captions, titles, and marginal notations are for convenience only and shall not limit or restrict the interpretation or construction of the passage(s) to which such headings, tables of contents, captions, titles, and notations may relate.

S.8. Notices. Any notice to be given or to be served on any party hereto, in connection with this instrument, must be in writing and may be given in person or by courier, overnight delivery service, e-mail, or certified or registered mail. Such notice shall be deemed to have been given and received when actually received, in the case of hand delivery, overnight delivery service, or express mail; when a certified or registered letter containing such notice, properly addressed, with postage prepaid, is deposited in the United States mail; and, if given by e-mail, when received by the party to whom it is addressed. Notice shall be given to Owner, Owner Rep, and Contractor at the addresses set forth at the beginning of this Contract. Any party hereto may at any time by giving five days' written notice to the other party hereto designate any other address, phone number, or e-mail address in substitution of the address, phone number, or e-mail address set forth at the beginning of this Contract to which such notice shall be given. Owner Rep must be copied on any notice given to Owner.

S.9. Schedules, Addenda, Exhibits, and Attachments. All schedules, addenda, exhibits, and attachments and other documents or items identified as being attached hereto (the "Exhibits") shall be a part of this Contract for all purposes. Exhibits may be changed from time to time as the parties may agree. When Exhibits are changed, they shall be redrafted in accordance with agreed changes, dated as of the effective date of such changes, and signed by the parties. Copies of changed Exhibits shall be furnished to each party, and such changed Exhibits shall become a part of this Contract for all purposes. An Exhibit that has been changed shall cease to be a part of this Contract, and the most recently dated Exhibit, signed by all parties, shall govern.

S.10. Third-Party Beneficiaries; None Created. Nothing express or implied in this Contract is intended to confer, nor shall anything herein confer, on any person other than the parties hereto and the respective successors or assigns of the parties hereto, any rights, remedies, obligations, or liabilities whatsoever.

S.11. Waiver. No waiver of any term of this Contract shall be valid unless it is in writing and signed by both parties. The failure of any party at any time or times to require performance of any provision hereof shall in no manner affect the right to enforce the provision. No waiver by any party of any condition contained in this Contract, or of the breach of any term, provision, representation, warranty, or covenant contained in this Contract, in any one or more instances, shall be deemed to be or construed as a further or continuing waiver of any such condition or breach or as a waiver of any other condition or of the breach of any other term, provision, representation, warranty, or covenant.

S.12. Lender Cooperation. Contractor agrees to cooperate, and cause its Subcontractors to cooperate, with the reasonable requirements of any Lender that Owner may elect to obtain financing from, including the requirement that Contractor subordinate, and cause its Subcontractors to subordinate, any lien they may have by statute against the Property to the lien of the Lender.

S.13. Independent Contractor. Contractor occupies the status of an independent contractor, as that term is defined in the construction industry.

_____

[**Name of owner**]

_____

[**Name of contractor**]

Exhibit A

Project Site Legal Description

Attach project site legal description.

Exhibit B

Plans and Specifications

1. Specifications:

List the specifications or refer to an exhibit attached to this contract.

Section	Title	Date	Pages

2. Drawings:

List the drawings or refer to an exhibit attached to this contract.

Number	Title	Date

3. Addenda including Supplemental Conditions, if any:

Number	Date	Pages

Addenda relating to bidding/proposal requirements are not part of the Construction Documents unless the bidding/proposal documents are also listed as Construction Documents in paragraph B.1. of this Contract.

Exhibit C

Contract Price; Guaranteed Maximum Price; Allocation of Savings; Liquidated Damages

The Contract Price for the Project is the sum of the following amounts:

Costs of Construction, including—

Allowance for [**specify**]	$[**amount**]
Allowance for [**specify**]	$[**amount**]
Contractor's Contingency:	$[**amount**]
Owner's Contingency:	$[**amount**]
Contractor's Fee:	$[**amount**]
Total Contract Price:	$[**amount**]

Total Contract Price not to exceed $[**amount**], the Guaranteed Maximum Price

Cost Savings (as defined in section A.) shall be allocated between Owner and Contractor as follows:

Owner: [**percent**]%

Contractor: [**percent**]%

Check if applicable:

☐ Liquidated Damages

Owner has the right to assess Liquidated Damages in the amount of $[**amount**] per day for each day after the Substantial Completion Date that Substantial Completion has not been achieved due to Contractor's Unexcused Delay. Owner has the right to withhold Liquidated Damages from the amounts due to Contractor. Owner and Contractor stipulate that the damages for the prospective breach of the Contract are difficult to measure and the Liquidated Damages amount is a reasonable estimate of actual damages.

Exhibit D

Insurance and Bond Requirements

Exhibit - Bond and Insurance Requirements

This Exhibit (the "**Insurance Specifications**") is attached as an Exhibit as part of the Agreement. In the event of conflict between any of the following Insurance Specifications with any provision in the Agreement, these Insurance Specifications control, amend and supplement the conflicting provision.

A. Specifications, Coverages, Limits & Other Requirements

No.	Specifications	Coverages, Limits and Other Requirements		
A. LIABILITY INSURANCE				
§ 1.	**Commercial General Liability.** To the extent permitted by law, Contractor is to maintain commercial general liability ("**CGL**") insurance and, if necessary, commercial umbrella/excess insurance (see **Spec. 4** below), issued on an occurrence basis meeting at least the following specifications.			
§ 1.1	**Minimum Limits**	The limits of coverage shall not be less than the following amounts:		
		a.	$__,000,000	Per Occurrence
		b.	$__,000,000	General Aggregate
		c.	$__,000,000	Products and Completed Operations Aggregate
		d.	$__,000,000	Personal and Advertising Injury
§ 1.2	**General Aggregate**	The General Aggregate shall apply separately to this Project.		
§ 1.3	**Post-Completion Coverage**	Contractor agrees to maintain Products-Completed Operations coverage with respect to the Work performed under the Agreement in identical coverage, form and amount, including required endorsements, for the full term of the Statute of Repose following Date of Substantial Completion of the Work. Contractor shall provide written representation to Owner stating Work completion date.		
§ 1.4	**Form**	This insurance is to be issued on an ISO CG 00 01 and shall coverage liability arising from premises, ongoing and completed operations, hire of Subcontractors (independent contractors coverage), and incidental design liability arising from the contractor's construction means and methods.		
§ 1.5	**Insured Contracts**	Coverage shall include but not be limited to liability assumed by Contractor under the Agreement to which this Exhibit is attached, including the tort liability of another assumed in a business contract, and shall include unmodified Separation of Insureds coverage.		
§ 1.6	**Additional Insureds**	Additional insured status shall be provided in favor of Owner Parties and such other personas as are designed by Owner to Contractor to be additional insureds on a combination of ISO forms CG 20 10 10 01 and CG 20 37 10 01.		
§ 1.7	**Primary and Noncontributory**	This insurance shall be endorsed to provide primary and noncontributing liability coverage by ISO CG 20 01 04 13. It is the specific intent of the parties to the Agreement that all insurance required herein shall be primary to and shall seek no contribution from all insurance held by Owner Parties, with Owner Parties' insurance being excess, secondary and noncontributing.		
§ 1.8	**Waiver of Subrogation**	This insurance is to be endorsed with an ISO CG 24 04 05 09 Waiver of Transfer of Rights of Recovery Against Others Endorsement, or equivalent, to include a waiver of subrogation by insurer as to the Owner Parties and such other persons as are designated by Owner to Contractor as additional insureds.		
§ 1.9	**Electronic Data**	This insurance is to include an Electronic Data Liability Endorsement ISO CG 04 37 with coverage to the full limits of the policy.		
§ 1.10	**Notice**	This insurance is to contain a provision for 30 days' prior written notice by insurance carrier to Owner required for cancellation or material change.		

§ 1.11	**Personal Injury Contractual Liability**	The personal injury contractual liability exclusion shall be deleted.	
§ 1.13	**Certificate of Insurance**	A copy of the required Endorsements along with the Schedule of Forms and Endorsements page of the policy listing the required Endorsements as issued modifications to the policy shall be attached to the Certificate of Insurance provided by Contractor to Owner as Certificate Holder at the following address: _____.	
§ 1.12	**Prohibitions**	The following exclusions/limitations or their equivalents are **not** permitted:	
		a.	Contractual Liability Limitation ISO CG 21 39.
		b.	Amendment of Insured Contract Definition ISO CG 24 26.
		c.	Limitation of Coverage to Designated Premises or Project ISO CG 21 44.
		d.	Exclusion-Damage to Work Performed by Subcontractors On Your Behalf ISO CG 22 94 or CG 22 95.
		e.	Exclusion-Explosion, Collapse and Underground Property Damage Hazard ISO CG 21 42 or CG 21 43.
		f.	Any classification limitation.
		g.	Any construction defect completed operations exclusion.
		h.	Any endorsement modifying the employer's liability exclusion or deleting the exception to it.
		i.	Any endorsement modifying or deleting explosion, collapse or underground coverage.
		j.	Any habitational or residential exclusion.
		k.	Any insured vs. insured exclusion except named insured vs. named insured.
		l.	Any punitive, exemplary or multiplied damages exclusion.
		m.	Any subsidence exclusion.
§ 2.	**Business Auto Liability.** Contractor is to maintain business auto insurance meeting at least the following specifications.		
§ 2.1	**Minimum Limits**	The limits of liability shall be no less than $ __,000,000 per accident.	
§ 2.2	**Form**	This insurance is to be issued on the current edition of the ISO CA 00 01	
§ 2.3	**Scope**	This insurance is to coverage damages because of bodily injury or property damages caused by an accident and resulting from the ownership, maintenance or use of any auto, including owned, hired and non-owned autos.	
§ 2.4	**Additional Insureds**	Additional insured status shall be provided in favor of Owner Parties and such other persons as are designated by Owner to Contractor as additional insureds, on ISO CA 20 48 10 13.	
§ 2.5	**Waiver of Subrogation**	This insurance is to include a waiver of subrogation by insurer as to the Owner Parties and such other persons as are designated by Owner to Contractor on ISO CA 04 44 10 13.	

§ 3.	**Workers' Compensation and Employer's Liability.** Contractor is to maintain workers' compensation and employer's liability insurance meeting at least the following specifications.			
§ 3.1	**Workers' Compensation Limits**	The minimum limits of this insurance shall be no less than the statutory limits.		
§ 3.2	**Employer's Liability Limits**	The minimum limits of this insurance shall be no less than $__,000,000 each accident and disease.		
§ 3.3	**Territory**	The state in which the Work is to be performed must be listed under Item 3.A. on the Information Page of the policy.		
§ 3.4	**Scope**	This insurance is to cover liability arising out the Contractor's employment of workers and anyone for whom the contractor may be liability for workers' compensation claims. Worker's compensation insurance is required and no "alternative" form of insurance is permitted.		
§ 3.5	**Prohibitions**	Employees leased through a Professional Employment Organization ("**PEO**") are not permitted.		
§ 3.6	**Stop Gap**	Stop Gap coverage must be provided if Work is to be performed in a monopolistic state, listing the state in which Work is to be performed.		
§ 3.7	**USL&H**	United States Longshoremen and Harborworkers ("**USL&H**") coverage must be provided where such exposure exists listing the state in which Work is to be performed.		
§ 3.8	**Waiver of Subrogation**	This insurance is to include a waiver of subrogation by insurer as to the Owner Parties and such other persons as are designated by Owner to Contractor, on form WC 42 03 04.		
§ 4.	**Excess Liability.** To the extent permitted by law, if any of the required coverages are to be maintained by and through excess liability insurance, Contractor is to maintain excess liability insurance meeting at least the following specifications.			
§ 4.1	**Scope**	This insurance shall be excess over and be no less broad than all coverages and conditions described above. The policy limits required herein may be provided by a combination of primary and excess policies, but in no event shall the total limits of liability available for any one occurrence or accident by less than the amount required herein.		
§ 4.2	**Concurrency**	Such coverage shall have the same inception date as the commercial general liability and employer's liability coverages.		
§ 4.3	**Primary**	This insurance shall be primary and non-contributing liability coverage. It is the specific intent of the parties to the Agreement that all insurance held by the Owner Parties shall be excess, secondary and non-contributory.		
§ 4.4	**Drop Down Coverage**	Drop-down coverage shall be provided for reduction and/or exhaustion of underlying aggregate limits.		
§ 4.5	**Defense Costs**	This insurance is to include a duty to defend any insured.		
§ 4.6	**Waiver of Subrogation**	This insurance is to include a waiver of subrogation by insurer as to the Owner Parties and such other persons as are designated by Owner to Contractor.		
§ 4.7	**Notice**	This insurance shall be endorsed to provide a 30 days' notice of cancellation to Owner.		
§ 5.	**Professional Liability.** Contractor is to maintain Professional Liability insurance meeting at least the following specifications.			
§ 5.1	**Minimum Limits**	Limits of coverage shall be no less than:		
		a.	$ __,000,000	Each Loss
		b.	$ __,000,000	Annual Aggregate
		If a combined Contractor's Pollution Liability and Professional Liability policy is utilized, the limits shall be $__,000,000 Each Loss and Annual Aggregate.		

§ 5.2	**Scope**	Such insurance shall cover all services rendered by the Contractor and its Subcontractors under the Agreement, including but not limited to design or design/build services.		
§ 5.3	**Retroactive Date**	Any retroactive date must be effective prior to beginning of services for the Owner.		
§ 5.4	**Prohibitions**	This insurance is not permitted to include any type of exclusion or limitation of coverage applicable to claims arising from:		
		a.	Bodily injury or property damage where coverage is provided in behalf of design professionals or design/build contractors;	
		b.	Habitational or residential operations;	
		c.	Mold or microbial matter and fungus or biological substance; or	
		d.	Punitive, exemplary or multiplied damages.	
		A professional liability endorsement to a general liability policy is not acceptable.		
§ 5.5	**Term**	Policies written on a claims-made basis shall be maintained for at least __ years beyond termination of the Agreement. The purchase of an extended discovery period or an extended reporting period on a claims-made policy will not be sufficient to meet the terms of this provision.		
§ 5.6	**Waiver of Subrogation**	Contractor shall cause this insurance to be endorsed to waive all rights of subrogation in favor of Owner Parties.		
§ 5.7	**Notice**	This insurance shall be endorsed to provide a 30 days' notice of cancellation to Owner.		
§ 6.	**Pollution Liability.** Contractor is to maintain Contractor's Pollution Liability insurance meeting at least the following specifications.			
§ 6.1	**Minimum Limits**	Limits of coverage shall be no less than:		
		a.	$,000,000	Each Loss
		b.	$,000,000	Annual Aggregate
		If a combined Contractor's Pollution Liability and Professional Liability policy is utilized, the limits shall be $__,000,000 Each Loss and Annual Aggregate.		
§ 6.2	**Scope**	The policy must provide coverage for:		
		a.	The full scope of the named insured's operations (on-going and completed) as described within the scope of work for the Agreement.	
		b.	Loss arising from pollutants including but not limited to fungus, bacteria, biological substances, mold, microbial matter, asbestos, lead, silica and contaminated drywall.	
		c.	Third party liability for bodily injury, property damage, clean up expenses, and defense arising from the operations.	
		d.	Diminution of value and natural resources damages;	
		e.	Contractual liability.	
		f.	Claims arising from owned and non-owned disposal sites utilized in the performance of the Agreement.	

		Coverage extensions to the General Liability insurance policy without a separate insurance agreement for Contractors Pollution Liability insurance will not fulfill this requirement	
§ 6.3	**Additional Insured and Primary and Noncontributory**	The policy must insure contractual liability, name Owner Parties as additional insureds and such other personas as are designed by Owner to Contractor to be additional insureds, and be primary and noncontributory to all coverage available to the additional insureds.	
§ 6.4	**Retroactive Date**	If coverage is provided on a claims made basis, coverage will at least be retroactive to the earlier of the date of the Agreement or the commencement of contractor services relation to the Work.	
§ 6.5	**Prohibitions**	This insurance is not permitted to include any type of exclusion or limitation of coverage applicable to claims arising from:	
		a.	Insured vs. insured actions. However, exclusion for claims made between insured within the same economic family are acceptable.
		b.	Impaired property that has not been physically injured.
		c.	Materials supplied or handled by the named insured. However, exclusions for the sale and manufacture of products are allowed. Exclusionary language pertaining to materials supplied by the insured shall be reviewed by the certificate holder for approval.
		d.	Property damage to the work performed by the contractor.
		e.	Faulty workmanship as it relates to clean up costs.
		f.	Punitive, exemplary or multiplied damages.
		g.	Work performed by Subcontractors.
		h.	Contractual liability incurred as a result of an injury to an employee of the insured.
§ 6.6	**Term**	Completed operations coverage shall be maintained for a minimum of __ years after the completion of Work. (The extended reporting period on a claims-made based policy does not fulfill this requirement). Contractor's pollution liability insurance policies insuring a specific job shall have completed operations coverage for at least the duration of the Work plus __ years.	
§ 7.	**Subcontractor's Insurance.**		
§ 7.1	**Coverage**	Contractor shall cause each first tier subcontractor employed by Contractor to purchase and maintain insurance of the types listed above; provided, however, Employers Liability Limits on such subcontractors are not to be less than $500,000 each Accident or Disease, and such subcontractors' excess policy limit shall be no less than $1,000,000.	
§ 7.2	**Additional Insureds**	This insurance is to be endorsed with an ISO CG 20 10 07 04, or equivalent form, Additional Insured Endorsement listing the Owner Parties and such other persons as are designated by Owner to Contractor, as additional insureds.	
§ 7.3	**Waiver of Subrogation**	This insurance is to be endorsed with an ISO CG 29 88 10 93 Waiver of Transfer of Rights of Recovery Against Others Endorsement, or equivalent, to include a waiver of subrogation by insurer as to the Owner Parties, and such other persons as are designated by Owner to Contractor, as additional insureds.	
§ 7.4	**Evidence of Insurance**	Contractor shall provide Owner certificates of insurance as to each subcontractor performing Work prior to the subcontractor's entry on the Property certified to Owner as Certificate Holder at the following address: _____.	
B.	**PROPERTY INSURANCE**		
§ 1.	**Builder's Risk.** Contractor is to maintain builder's risk insurance meeting at least the following specifications; but at Owner's option, Owner may in lieu of Contractor maintaining builder's risk insurance, Owner may obtain and maintain the builder's risk insurance. If		

	Owner obtains the builder's risk insurance, the Contract Price is to be reduced by the amount of the premium and any Contractor markup cost that otherwise was included within the Contract Price.			
§ 1.1	**Amount**	Limits of coverage are to be the initial Contract Price as increased by amount of subsequent modification of the Contract Price. Coverage shall be provided in amount equal at all times to the full replacement value and cost of debris removal for any single occurrence.		
§ 1.2	**Covered Property**	Such insurance shall cover:		
		a.	All structures under construction, including retaining walls, paved surfaces and roadways, bridges, glass, foundations, footings, underground pipes and wiring, excavations, grading, backfilling or filling.	
		b.	All temporary structures (e.g., fencing, scaffolding, cribbing, false work, forms, site lighting, temporary utilities and buildings) located at the site.	
		c.	All property including materials and supplies on site for installation.	
		d.	All property including materials and supplies at other locations but intended for use at the site.	
		e.	All property including materials and supplies in transit to the site for installation by all means of transportation other than ocean transit.	
		f.	Other property for which an insured is liable regarding the project.	
§ 1.3	**Insureds**	Insureds shall include:		
		a.	Owner, Contractor, and all Loss Payees and Mortgagees as Named Insureds; and	
		b.	Subcontractors of all tiers.	
§ 1.4	**Deductibles**	Deductibles shall not exceed:		
		a.	All risks of direct damage, per Occurrence, except	$10,000
		b.	Delayed opening waiting period	5 days
		c.	Earthquake and earthquake sprinkler leakage, per Occurrence	$50,000
		d.	Flood, per Occurrence or excess of maximum available through National Flood Insurance Program	$50,000
§ 1.5	**Form**	Coverage shall be at least as broad as an unmodified ISO Special Causes of Loss form and shall include coverage for theft, collapse, flood and earthquake. All exclusions must be pre-approved by Owner. This insurance is to be written on a Completed Value, non-reporting form basis and shall be primary to any other insurance coverage available to the named insureds, with that other insurance being excess, secondary and noncontributing.		
§ 1.6	**Prohibition**	No protective safeguard warranty is permitted.		
§ 1.7	**Coverage and Minimum Sublimits**	Coverage		Minimum Sublimit

		a.	Additional expenses due to delay in completion of project (where applicable)	$_____
		b.	Agreed Value	Included without sublimit
		c.	Damage arising from error, omission or deficiency in construction methods, design, specifications, workmanship or materials, including collapse and ensuing loss	Included without sublimit
		d.	Debris removal additional limit	Included without sublimit
		e.	Earthquake and earthquake sprinkler leakage	$1,000,000
		f.	Flood, per Occurrence, excess of maximum available through National Flood Insurance Program	$1,000,000
		g.	Freezing	Included without sublimit
		h.	Mechanical breakdown including hot and cold testing (where applicable)	Included without sublimit
		i.	Occupancy pre-completion	Included
		j.	Ordinance or law	Included without sublimit
		k.	Pollutant clean-up and removal	$1,000,000
		l.	Preservation of property	Included without sublimit
		m.	Replacement cost	Included without sublimit
		n.	Theft	Included without sublimit
§ 1.8	**Occupancy**	The termination of coverage provision shall be endorsed to permit occupancy of the coverage property being constructed.		
§ 1.9	**Term and Termination**	This insurance shall be maintained in effect, unless otherwise provided for in the Agreement, until the earliest of the following dates:		
		a.	The date on which all persons and organizations who are insureds under the policy agree that it shall be terminated;	
		b.	The date of final payment, as provided for in the Agreement; or	
		c.	The date on which the insurable interests in the Covered Property of all insureds other than Contractor have ceased.	

§ 1.10	**Waiver of Subrogation**	This insurance shall include a waiver of subrogation by insurer as to the insureds.
§ 1.11	**Notice**	This insurance shall be endorsed to provide 30 days' notice of cancellation to Owner.
§ 2.	**Contractor's Equipment.**	
§ 2.1	**Amount**	Contractor shall obtain and maintain property insurance on Contractor's equipment and personal property insured to 100% of its replacement cost. This insurance will have an equipment floater.
§ 2.2	**Waiver of Subrogation**	This insurance will be endorsed to waive subrogation in favor of Owner Parties.
C. BONDS		
§ 1.	**General**	Contractor is required to arrange and furnish separate performance and payment bonds, each for the full amount of the Guaranteed Maximum Price plus Contractor's Fee guaranteeing the faithful performance of all of the provision of the Agreement as well as payment to all persons for labor and material used in the performance of the Agreement. The bonds shall be executed by a surety company acceptable to Owner, on a form acceptable to Owner, and shall become a part of the Agreement. Owner may withhold payments on account until such time as said bonds have been furnished and accepted. No change, alteration or modification in the terms and conditions of the Agreement, or in the terms or manner of payment shall in any way exonerate or release, in whole or in part, any surety on any bond furnished on behalf of Contractor. The cost of the bonds is included in the Contract Price.
§ 2.	**Payment Bond**	The Payment Bond is to conform to the following requirements.
§ 2.1	**Form**	The Payment Bond is to be in statutory form. The AIA form is not acceptable.
§ 2.2	**Coverage**	The Payment Bond is to include coverage for consequential and delay damages due to Contractor's default.
§ 2.3	**Rating**	The issuer must be at least *a* Best's Key Rating Guide A/VII company and listed on the United States Department of the Treasury's List of Acceptable Sureties and Reinsurers (the "T" list) and duly licensed and authorized to issue surety bonds in Texas..
§ 2.4	**Term**	The Payment Bond is to be in effect for the period required by the Texas Property Code.
§ 2.5	**Multiple Obligees**	The Payment Bond is to name as additional obligees such persons as designated by the Owne, including its lender.
§ 2.6	**Recorded**	The Payment Bond and all required attachments (issuer's agent's power of attorney and memorandum of the Agreement) is to be recorded in the County's Official Public Records.
§ 3.	**Performance Bond**	The Performance Bond is to conform to the following requirements.
§ 3.1	**Form**	The Performance Bond is to be on the AIA form or equivalent. The Performance Bond is to cover Contractor's express warranty and obligations to correct defective Work arising under the Agreement.
§ 3.2	**Rating**	The issuer must be at least a Best's Key Rating Guide A/VII company and listed on the United States Department of the Treasury's List of Acceptable Sureties and Reinsurers (the "T" list) and duly licensed and authorized to issue surety bonds in Texas.
§ 3.3	**Extended Coverages**	The Performance Bond is to cover risk of contract penalties and delay damages.
§ 3.4	**Term**	The Performance Bond is to be in effect for a period of not less than one year following Final Completion.
§ 3.5	**Multiple Obligees**	The Performance Bond is to name as additional obligees such persons as designated by Owner including its lender.

B. GENERAL INSURANCE REQUIREMENTS

1. **Definitions.** For purposes of this Exhibit:

a. Agreement. "**Agreement**" means the Commercial Construction Contract – Guaranteed Maximum Price executed by Owner and Contractor.

b. Owner Parties. "**Owner Parties**" means (a) _____ ("**Owner**"), (b) the project manager, (c) any lender whose loan is secured by a lien against the Property, (d) their respective shareholders, members, partners, joint venturers, affiliates, subsidiaries, successors and assigns, (e) any directors, officers, employees, or agents of such persons or entities, and (f) others as required by the Agreement.

c. Contractor. "**Contractor**" means _____ and Subcontractors of any tier.

d. ISO. "**ISO**" means Insurance Services Office.

2. **Policies.**

a. Insurer Qualifications. All insurance required to be maintained by Contractor must be issued by carriers having a Best's Rating of A or better, and a Best's Financial Size Category of VIII, or better, and/or Standard & Poor Insurance Solvency Review A-, or better, and authorized to engage in the business of insurance in the State in which the Improvements are located.

b. No Waiver. Failure of Owner to demand such certificates or other evidence of full compliance with these insurance requirements or failure of Owner to identify a deficiency from evidence that is provided shall not be construed as a waiver of Contractor's obligation to maintain such insurance. Commencement of Work without provision of the required certificate of insurance, evidence of insurance and/or required endorsements, or without compliance with any other provision of this Contract, shall not constitute a waiver by any Owner Party of any rights. The Owner shall have the right, but not the obligation, of prohibiting the Contractor or any Subcontractor from performing any Work until such certificate of insurance, evidence of insurance and/or required endorsements are received and approved by the Owner.

c. Delivery Deadlines. Contractor shall provide Owner within 10 days of Owner's request with certified copies of all insurance policies. Renewal policies, if necessary, shall be delivered to the Owner prior to the expiration of the previous policy.

d. Waiver of Subrogation. All policies maintained by Contractor, whether required herein or not, shall contain a waiver of subrogation in favor of the Owner Parties.

e. Notice. All policies maintained by Contractor shall provide for 30 days' prior written notice of cancellation to Owner.

f. Compliance With Laws. If any insurance requirements are deemed to violate any law, statute or ordinance, the insurance requirements shall be reformed to provide the maximum amount of protection to Owner as allowed under the law.

3. **Limits, Deductibles and Retentions.**

a. Coverage Limits. The limits of liability may be provided by a single policy of insurance or by a combination of primary and excess policies, but in no event shall the total limits of liability available for any one Occurrence or accident be less than the amount required herein.

b. Deductible and Retention Limits. No deductible or self-insured retention shall exceed $_____ without the prior written approval of the Owner, except as otherwise specified herein. All deductibles and retentions shall be paid by, assumed by, for the account of, and at the Contractor's sole risk. The Contractor shall not be reimbursed for same.

c. Policy Limits. "**Limits**" set out in these specifications are the minimum dollar amount of insured coverage for the risk or peril specified. If Contractor or its contractors maintain greater limits, then these specifications shall not limit the amount of recovery available to Owner and Owner the limits specified below as the minimum limits are increased to the greater limits.

d. Post Completion Coverage. With respect to the insurance to be maintained after final payment to Contractor, an additional certificate evidencing such coverage shall be provided to Owner with final application for payment if the prior certificate has expired, and thereafter upon renewal or replacement of such insurance until the expiration of the time period for which such insurance must be maintained.

e. Use of the Owner's Equipment. The Contractor, its agents, employees, Subcontractors or suppliers shall use the Owner's equipment only with express written permission of the Owner's designated representative and in accordance with the Owner's terms and condition for such use. If the Contractor or any of its agents, employees, Subcontractors or suppliers utilize any of the Owner's equipment for any purpose, including machinery, tools, scaffolding, hoists, lifts or similar items owned, leased or under the control of the Owner, the Contractor shall defend, indemnify and be liable to the Owner Parties for any and all loss or damage which may arise from such use.

4. **Forms.**

a. Approved Revisions and Substitutions. If the forms of policies, endorsements, certificates, or evidence of insurance required by these specifications are superseded or discontinued, Owner will have the right to require other equivalent forms.

b. Approved Forms. Any policy or endorsement forms other than a form specified in this Exhibit must be approved in advance by Owner.

c. Compliance with Laws. If any additional insured requirements are deemed to violate any law, statute or ordinance, the additional insured requirements, including any additional insured policy provision or endorsements procured pursuant to the Agreement, shall be reformed to provide the maximum amount of protection to the Owner Parties as allowed under the law.

5. Evidence of Insurance. Insurance must be evidenced as follows:

a. Form. Liability insurance: ACORD™ Form 25 Certificates of Liability Insurance for liability coverages. Property Insurance: ACORD™ Form 28 Evidence of Commercial Property Insurance for property coverages.

b. Delivery Deadlines. Evidence to be delivered to Owner prior to entry on the Property and thereafter at least 30 days prior to the expiration of current policies or on replacement of each certified coverage and within 10 days of Owner's request for an updated certificate.

c. Certificate Requirements. Certificates must:

(1) Insured. State the insured's name and address.

(2) Insurer. State the name of each insurance company affording each coverage, policy number of each coverage, policy dates of each coverage, all coverage limits and sublimits, if any, by type of coverage, and show the signature of the authorized representative signing the certificate on behalf of the insurer.

(3) Additional Insured Status and Subrogation Waiver. Specify the additional insured status and waivers of subrogation as required by these specifications.

(4) Primary Status. State the primary and non-contributing status required herein.

(5) Deductibles and Self-Insured Retentions Stated. State the amounts of all deductibles and self-insured retentions.

(6) Copy of Endorsements and Policy Declaration Page. Be accompanied by certified copies of all required endorsements and policy declaration page reflecting issuance of the endorsements.

(7) Notices. Be accompanied by insurer certified copy of notice of cancellation endorsement providing that 30 days' notice of cancellation and material change will be sent to the certificate holder.

(8) Certificate Holder. Be addressed to the Owner as the certificate holder and show Owner's correct address. A separate certificate is to be addressed and delivered to Owner's lender.

(9) Producer. State the producer of the certificate with correct address and phone number listed.

(10) Authorized Representative. Be executed by a duly authorized representative of the insurers.

d. Suspension. Owner shall have the right, but not the obligation, of suspending Contractor's services, without an increase in the sum payable by Owner to Contractor due to such suspension, until such certificates or other evidence that the required insurance has been placed in compliance with these requirements is received and approved by Owner.

6. Contractor Insurance Representations to Owner Parties.

a. Minimum Requirements. The insurance coverages required herein (1) represent Owner Parties' minimum requirements and are not to be construed to void or limit the Contractor's indemnity obligations as contained in the Agreement nor represent in any manner a determination of the insurance coverages the Contractor should or should not maintain for its own protection; and (2) are being, or have been, obtained by the Contractor in support of the Contractor's liability and indemnity obligations under this Contract. Irrespective of the requirements as to insurance to be carried as provided for herein, the insolvency, bankruptcy or failure of any insurance company carrying insurance of the Contractor, or the failure of any insurance company to pay claims accruing, shall not be held to affect, negate or waive any of the provisions of the Agreement.

b. Defaults. Failure to obtain and maintain the required insurance shall constitute a material breach of, and default under, the Agreement. If the Contractor shall fail to remedy such breach within five business days after notice by the Owner, the Contractor will be liable for any and all costs, liabilities, damages and penalties resulting to the Owner Parties from such breach, unless a written waiver of the specific insurance requirement is provided to the Contractor by the Owner. In the event of any failure by the Contractor to comply with the provisions of this Contract, the Owner may, without in any way compromising or waiving any right or remedy at law or in equity, on notice to the Contractor, purchase such insurance, at the Contractor's expense, provided that the Owner shall have no obligation to do so and if the Owner shall do so, the Contractor shall not be relieved of or excused from the obligation to obtain and maintain such insurance amounts and coverages.

c. Survival. This Exhibit is an independent contract provision and shall survive the termination or expiration of the Agreement.

9. RELEASE AND WAIVER. TO THE EXTENT PERMITTED BY LAW, EACH OF CONTRACTOR AND OWNER (THE "**RELEASING PARTY**") RELEASES AND WAIVES ANY CLAIMS IT MAY HAVE AGAINST THE OTHER PARTY OR ITS PARTNERS, OFFICERS, DIRECTORS, EMPLOYEES OR AGENTS (THE "**RELEASED PERSONS**") FOR BUSINESS INTERRUPTION OR DAMAGE TO PROPERTY SUSTAINED BY THE RELEASING PARTY AS THE RESULT OF ANY ACT OR OMISSION OF THE RELEASED PERSON IN ANY WAY CONNECTED WITH ANY LOSS COVERED BY INSURANCE, WHETHER REQUIRED HEREIN OR NOT, OR WHICH SHOULD HAVE BEEN COVERED BY INSURANCE REQUIRED HEREIN, INCLUDING THE DEDUCTIBLE AND UNINSURED

PORTION THEREOF, MAINTAINED OR REQUIRED TO BE MAINTAINED BY THE RELEASING PARTY PURSUANT TO THE AGREEMENT. THE WAIVER OF CLAIMS CONTAINED IN THIS SECTION (A) WILL SURVIVE THE COMPLETION OF THE WORK OR THE TERMINATION OF THE AGREEMENT AND (B) WILL APPLY **EVEN IF THE LOSS IS CAUSED IN WHOLE OR IN PART BY THE ORDINARY NEGLIGENCE OR STRICT LIABILITY OF THE RELEASED PERSONS** BUT WILL NOT APPLY TO THE EXTENT A LOSS OF DAMAGE IS CAUSED BY THE GROSS NEGLIGENCE OR WILLFUL MISCONDUCT OF THE RELEASED PERSONS.

10. Insurance Requirements of Contractor's Subcontractors.

a. Coverage. Insurance similar to that required of the Contractor shall be provided by all Subcontractors (or provided by the Contractor on behalf of Subcontractors) to cover operations performed under any subcontract agreement. The Contractor shall be held responsible for any modification in these insurance requirements as they apply to Subcontractors. The Contractor shall maintain certificates of insurance from all Subcontractors containing provisions similar to those listed herein (modified to recognize that the certificate is from Subcontractor) enumerating, among other things, the waivers of subrogation, additional Insured status, and primary liability as required herein, and make them available to the Owner upon request.

b. ALLOCATION OF RISK. THE CONTRACTOR IS FULLY RESPONSIBLE FOR LOSS AND DAMAGE TO ITS PROPERTY ON THE SITE, INCLUDING TOOLS AND EQUIPMENT, AND SHALL TAKE NECESSARY PRECAUTIONS TO PREVENT DAMAGE TO OR VANDALISM, THEFT, BURGLARY, PILFERAGE AND UNEXPLAINED DISAPPEARANCE OF PROPERTY. ANY INSURANCE COVERING THE CONTRACTOR'S OR ITS SUBCONTRACTOR'S PROPERTY SHALL BE THE CONTRACTOR'S AND ITS SUBCONTRACTOR'S SOLE AND COMPLETE MEANS OR RECOVERY FOR ANY SUCH LOSS. TO THE EXTENT ANY LOSS IS NOT COVERED BY SAID INSURANCE OR SUBJECT TO ANY DEDUCTIBLE OR CO-INSURANCE, THE CONTRACTOR SHALL NOT BE REIMBURSED FOR SAME. SHOULD THE CONTRACTOR OR ITS SUBCONTRACTORS CHOOSE TO SELF-INSURE THIS RISK, IT IS EXPRESSLY AGREED THAT THE CONTRACTOR HEREBY WAIVES, AND SHALL CAUSE ITS SUBCONTRACTORS TO WAIVE, ANY CLAIM FOR DAMAGE OR LOSS TO SAID PROPERTY IN FAVOR OF THE OWNER PARTIES.

Exhibit E

Contractor Bills-Paid Affidavit

Basic Information

Date:

Owner:

Owner's Mailing Address:

Contractor:

Contractor's Mailing Address:

Affiant: [**include relationship to contractor**]

Affiant's Mailing Address:

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.

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.

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

Exhibit F

Subcontractor Bills-Paid Affidavit

Basic Information

Date:

Owner:

Owner's Mailing Address:

Subcontractor:

Subcontractor's Mailing Address:

Contractor:

Contractor's Mailing Address:

Affiant: [**include relationship to subcontractor**]

Affiant's Mailing Address:

Property: [**include legal description**]

Improvements:

Affiant swears individually and on behalf of Subcontractor 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 Subcontractor.

2. Affiant understands that Owner and Contractor have required this affidavit as a condition of payment for labor or materials used in construction of the Improvements.

3. Subcontractor has paid each of Subcontractor's subcontractors, laborers, and materialmen in full for all labor and materials provided to Owner or Contractor or to Subcontractor 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.

Subcontractor warrants and represents that the following specified bills or classes of bills will be paid by Subcontractor from the funds paid to Subcontractor by Contractor or Owner in reliance on this affidavit:

Name of payee or description of class:

Amount:

Repeat above information as needed.

Include the following if applicable.

Subcontractor agrees to indemnify and hold Owner and Contractor 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

Exhibit G

This waiver and release is based on the form found in Tex. Prop. Code § 53.284(b). If a contractor (or other potential lien claimant) is required to execute a waiver and release in exchange for or to induce 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 read as follows.

Conditional Partial Release During Construction

Project:

Job No.:

On receipt by the signer of this document of a check from [**name of maker of check**] in the sum of $[**amount**] payable to [**name[s] of payee[s] 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 [**name of owner**] located at [**specify location**] to the following extent: [**specify job description**].

This release covers a progress payment for all labor, services, equipment, or materials furnished to the property or to [**name of person with whom signer contracted**] as indicated in the attached statement[s] or progress payment request[s], except for unpaid retention, pending modifications and changes, or other items furnished.

Before any recipient of this document relies on this document, the recipient should verify evidence of payment to the signer.

The signer warrants that the signer has already paid or will use the funds received from this progress payment to promptly pay in full all of the signer's laborers, subcontractors, materialmen, and suppliers for all work, materials, equipment, or services provided for or to the above-referenced project in regard to the attached statement[s] or progress payment request[s].

_____

Date

[Company name]

By _____

[Name and title]

Exhibit H

This waiver and release is based on the form found in Tex. Prop. Code § 53.284(c). If a contractor (or other potential lien 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 read as follows. The waiver and release must include the notice at the top of the document.

Unconditional Partial Release During Construction

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.

Project:

Job No.:

The signer of this document has been paid and has received a progress payment in the sum of $[**amount**] for all labor, services, equipment, or materials furnished to the property or to [**name of person with whom signer contracted**] on the property of [**name of owner**] located at [**specify location**] to the following extent: [**specify job description**]. The signer therefore waives and releases any mechanic's lien right, any right arising from a payment bond that complies with a state or federal statute, any common-law payment bond right, any claim for payment, and any rights under any similar ordinance, rule, or statute related to claim or payment rights for persons in the signer's position that the signer has on the above-referenced project to the following extent:

This release covers a progress payment for all labor, services, equipment, or materials furnished to the property or to [**name of 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 _____
[Name and title]

Exhibit I

This waiver and release is based on the form found in Tex. Prop. Code § 53.284(d). If a contractor (or other potential lien claimant) is required to execute a waiver and release in exchange for or to induce 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 read as follows.

Conditional Final Release

Project:

Job No.:

On receipt by the signer of this document of a check from [**name of maker of check**] in the sum of $[**amount**] payable to [**name[s] of payee[s] 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 [**name of owner**] located at [**specify location**] to the following extent: [**specify job description**].

This release covers the final payment to the signer for all labor, services, equipment, or materials furnished to the property or to [**name of person with whom signer contracted**].

Before any recipient of this document relies on this document, the recipient should verify evidence of payment to the signer.

The signer warrants that the signer has already paid or will use the funds received from this final payment to promptly pay in full all of the signer's laborers, subcontractors, material-

men, and suppliers for all work, materials, equipment, or services provided for or to the above-referenced project up to the date of this waiver and release.

_____
Date

[**Company name**]

By _____
[**Name and title**]

Exhibit J

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.

Contractor [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.

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.

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

Exhibit K

This form may be used as written by a subcontractor or supplier under Tex. Prop. Code § 53.085.

Subcontractor [Final] Bills-Paid Affidavit

Date:

Owner:

Owner's Mailing Address: [**include county**]

Subcontractor:

Subcontractor's Mailing Address: [**include county**]

Contractor:

Contractor's Mailing Address: [**include county**]

Affiant: [**include relationship to subcontractor**]

Affiant's Mailing Address: [**include county**]

Property: [**include legal description**]

Improvements:

Affiant swears individually and on behalf of Subcontractor 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 Subcontractor.

2. Affiant understands that Owner and Contractor have required this affidavit as a condition of payment for labor or materials used in construction of the Improvements.

3. Subcontractor has paid each of Subcontractor's suppliers and sub-subcontractors, laborers, and materialmen in full for all labor and materials provided to Owner or Contractor or to Subcontractor for construction of the Improvements, excepting only the amounts owed to the persons identified below:

List all sub-subcontractors, suppliers, laborers, and materialmen and amounts owed to each. If there are no unpaid sub-subcontractors, suppiers, laborers, or materialmen, state "None."

Name:

Address:

Telephone number:

Amount owed:

Repeat above information as needed.

Include the following if applicable.

Subcontractor warrants and represents that the following specified bills or classes of bills will be paid by Subcontractor from the funds paid to Subcontractor by Contractor or Owner in reliance on this affidavit:

Name of payee or description of class:

Amount:

Repeat above information as needed.

Include the following if applicable.

Subcontractor 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

Exhibit L

This waiver and release is based on the form found in Tex. Prop. Code § 53.284(e). If a contractor (or other potential lien 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 read as follows. The waiver and release must include the notice at the top of the document.

Unconditional Release on Final Payment

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.

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 [**name of person with whom signer contracted**] on the property of [**name of owner**] located at [**specify location**] to the following extent: [**specify 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, 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 _____

[**Name and title**]

[Reserved]

Form 19-2

Commercial Construction Contract
[Stipulated Sum]

Basic Information

Effective Date:

Owner:

Address:

Phone:

E-mail:

Architect/Engineer ("Owner Rep"):

Address:

Phone:

E-mail:

Contractor:

Contractor's Representative for Project:

Address:

Phone:

E-mail:

Lender:

Address:

Phone:

E-mail:

Project: [**include general description of improvements to be constructed**]

Project Site: [**state physical address of site and attach legal description as identified in exhibit A**]

Contract Price:

Substantial Completion Date:

Insurance and Bond Requirements: [**see exhibit D**]

Plans: [**specifications and drawings as identified in exhibit B**]

Owner and Contractor agree to the following terms and conditions.

A. Definitions

A.1. "Allowance" means a dollar amount specified to be used for portions of the Work that have not been fully defined in the Plans or where a range of options is available for Owner's selection.

A.2. "Applicable Law" means all federal, state, and local laws, rules, and regulations applicable to the Project, the Work, or the Contractor, as indicated by the context.

A.3. "Bid" means a response to a request for bids. The term includes proposals submitted in response to a request for proposals.

A.4. "Business Day" means a day other than a Saturday, Sunday, or national holiday. As used in this Contract, the term "days" means calendar days. All periods are measured in calendar days unless business days are specified.

A.5. "Change Order" means a description of changes in the Work, and any increase or decrease in the Contract Price and extension or reduction of Contract Time resulting from such changes, that has been signed by Owner and Contractor.

A.6. "Claim" means a demand or assertion by one of the parties seeking, as a matter of right, payment of money or other relief with respect to the terms of the Construction Documents, and also includes other disputes and matters in question between Owner and Contractor arising out of or relating to the Construction Documents.

A.7. "Commencement Date" means the date on which a written notice to proceed is delivered by Owner Rep to Contractor.

A.8. "Concealed Conditions" means physical conditions in existence on the Effective Date located beneath the surface of the ground, or concealed or unknown conditions in an existing structure, that are at variance with the conditions indicated in the Construction Documents or are substantially different from those conditions shown in the Construction Documents and that Contractor could not have discovered by the exercise of reasonable diligence.

A.9. "Conditions to Final Payment" means the conditions required by this Contract that must be satisfied by Contractor or waived by Owner in writing for Owner to be obligated to make the Final Payment to Contractor.

A.10. "Construction Documents" mean the documents identified in paragraph B.1.

A.11. "Contractor's Contingency" means the amount identified in Exhibit C that is for Contractor's exclusive use in connection with unanticipated increases to the Costs of Construction. The Contractor's Contingency is not intended to be used to cover increases to the

Costs of Construction due to changes in the Scope of Work resulting from errors in the Owner Information or changes to the Scope of Work.

A.12. "Contract Time" means the period provided in this Contract for reaching Substantial Completion, and, if specified, the period for achieving Final Completion.

A.13. "Drawings" means the graphic and pictorial portions of the Construction Documents showing the design, location, and dimensions of the Work.

A.14. "Excused Delay" means a delay in Contractor's performance under the terms of this Contract due to acts of God, strikes, lockouts, labor shortages, labor restrictions by any governmental authority, civil riot, floods, abnormal adverse weather conditions that exceed [**number**] days, unavoidable casualties, or any cause beyond the control of Contractor, a Subcontractor, or a Supplier of any tier, that could not have been avoided using reasonable diligence. "Excused Delay" does not include delay resulting from negligence, default, or any condition not constituting an Excused Delay.

A.15. "Final Completion" means all the Work required by the Plans has been completed, all punch list items from the Substantial Completion review have been completed, and all Conditions to Final Payment have been satisfied.

A.16. "Governmental Approvals" means all approvals required by governmental entities with jurisdiction over the Property or Improvements for the Project to be used for its intended purpose, including, if applicable, a Certificate of Occupancy.

A.17. "Improvements" means the buildings, structures, landscaping, and other improvements to be constructed on the Property by Contractor according to the Construction Documents.

A.18. "Liquidated Damages" means an estimate of the amount of damages, as shown on Exhibit C, that Owner is likely to incur as a result of the failure of the Project to be Sub-

stantially Complete by the Substantial Completion Date due to Contractor's Unexcused Delay.

A.19. "Major Subcontractor" or "Major Sub-subcontractor" or "Major Supplier" means a Subcontractor, Sub-subcontractor, or Supplier whose contract price exceeds 10 percent of the Costs of Construction, or other amount agreed on by Owner and Contractor.

A.20. "Owner Information" means the survey of the Property or Project Site, reports from Owner's consultants, Property restrictions, and other information provided by Owner with its request for Bids for the use of bidders in preparing their Bids. The term does not include Plans and Specifications.

A.21. "Owner's Contingency" means the amount identified in Exhibit C that is for Owner's exclusive use in connection with the Project. The Owner's Contingency may be used by Owner to cover increases in the Costs of Construction resulting from errors in the Owner Information and changes in the Scope of Work.

A.22. "Plans" means the Drawings and Specifications approved by Owner and Contractor identified in Exhibit B and any amendments made after the Effective Date.

A.23. "Project Site" means the area(s) within the Property where the Improvements will be constructed.

A.24. "Property" means the real property described in Exhibit A.

A.25. "Retainage" means Owner's statutory 10 percent retainage required under chapter 53 of the Texas Property Code.

A.26. Scope of Work" means the Work covered by the Construction Documents.

A.27. "Specifications" means a detailed description of the building components and materials and installation requirements prepared by the Architect/Engineer for the Project.

A.28. "Subcontractor" means a person who contracts directly with Contractor to perform a portion of the Work for the Project.

A.29. "Substantial Completion" or "Substantially Complete" means that the Improvements have reached the stage at which they are usable for the purposes intended, all Governmental Approvals have been obtained, and only minor or cosmetic Work remains to be completed.

A.30. "Sub-subcontractor" means a person who contracts directly with a Subcontractor or Sub-subcontractor to perform a portion of the Work for the Project.

A.31. "Supplier" means a person who contracts with Owner, Contractor, a Subcontractor, or a Sub-subcontractor to furnish materials or equipment for the Project.

A.32. "Warranty Documents" means the written warranties on equipment, materials, labor, or the Work provided by Contractor, a Subcontractor, or a Supplier of any tier or a manufacturer.

A.33. "Work" means the labor, coordination, management, materials, equipment, and other materials and services required to construct the Project.

Terms not defined in this Contract or in the other Construction Documents have the meanings ascribed to them by common usage.

B. Construction Documents

B.1. Construction Documents. This Commercial Construction Contract between Owner and Contractor consists of the following Construction Documents:

Drawings:

Specifications:

Addenda to this Contract:

Change Orders:

Warranty Documents:

Approved Construction Schedule:

This Contract and its Exhibits:

Owner's Request for Bids/Proposals:

Contractor's Bid/Proposal and Bid Qualifications and Exclusions:

B.2. Resolving Ambiguity or Conflict in Construction Documents. If there is an ambiguity or conflict, the Construction Documents are to control in the following order: (1) Change Orders, (2) Addenda, (3) this Contract, (4) Drawings, (5) Specifications, (6) Schedule, and then (7) Warranty Documents.

C. The Work

C.1. Scope of Work. Contractor will furnish all Work necessary to construct the Project as stated in, or reasonably inferable from, the Construction Documents.

C.2. Interpretation of Construction Documents by Owner Rep. Owner Rep will reasonably interpret the Construction Documents in accordance with the intention of the parties as expressed in the Construction Documents. Owner Rep will take into consideration industry and trade custom and usage only in the case of ambiguity in or conflict between the Construction Documents. Contractor will follow Owner Rep's interpretation. Contractor may make a Claim if Contractor disputes the interpretation.

C.3. Conditions Reviewed by Contractor. Contractor represents to Owner that it has made an inspection of the Property and the conditions existing at and in the vicinity of the

Project Site, has determined normal weather conditions for the Project Site, has reviewed the Construction Documents and the Owner Information, and agrees to construct the Project for the Contract Price and within the Contract Time. Time is of the essence of this Contract.

C.4. Field Confirmations. Before proceeding with the Work, Contractor will field check and verify all dimensions, grades, lines, levels, or other conditions or limitations at the Property to avoid construction or drainage errors.

C.5. Reporting Discovered Nonconformity. Contractor has reported to Owner Rep all errors or omissions detected in the Plans and Owner Information before the Effective Date and will promptly report to Owner Rep any errors or omissions detected in the Owner Information after the Effective Date. Adjustments in the Contract Time and Contract Price may be made by Change Order resulting from errors or omissions that were detected and timely reported to Owner Rep.

C.6. Reporting Concealed Conditions. Contractor will promptly notify Owner Rep if Contractor encounters Concealed Conditions. Contractor will provide Owner with an estimate of any additional costs and impact to the Construction Schedule resulting from the Concealed Conditions. Contractor and Owner will execute a Change Order for any agreed-on changes to the Work.

D. Contractor Obligations. Contractor agrees to perform its obligations under the Construction Documents, including the following:

D.1. Work. Perform the Work in a good and workmanlike manner, free from defects in labor and materials, and in accordance with the Construction Documents and Applicable Law.

D.2. Schedules and Bonds. Provide Owner Rep with the following within ten days after the Effective Date and before the commencement of the Work:

a. *Construction Schedule.* Construction Schedule as described in paragraph G.1.

b. *Schedule of Values.* Schedule of Values as described in paragraph F.4.

c. *Bonds.* Performance and payment bonds and insurance required under Exhibit D.

D.3. Cooperation. Cooperate with any contractor or supplier engaged by Owner to perform Work at the Project Site to minimize delay and disruption to the Project.

D.4. Subcontract Compliance. Comply with the terms of its subcontracts.

D.5. Subcontractor Payments. Pay Subcontractors and Suppliers within seven days after receipt from Owner of payment for their Work.

D.6. Subcontractor List. Provide and periodically update a list of Subcontractors as described in paragraph H.5.

D.7. Reporting Errors and Omissions. Promptly report errors or omissions in the Plans and Owner Information to Owner Rep.

D.8. As-Built Drawings. Maintain as-built drawings at the Project Site as described in subparagraph J.6.c.xii.

E. Owner Obligations. Owner agrees to perform its obligations under the Construction Documents, including the following:

E.1. Access. Provide Contractor with timely access to the Project Site.

E.2. Utility Connections. Provide utility connections necessary for the Work to the Property line, unless utility extension is part of the Work.

E.3. Supervision of Owner Rep. Require Owner Rep to respond to submissions, including shop drawings, Draw Requests, and requests for clarification, in a timely manner so as not to cause undue delay to the Project.

E.4. Timely Decisions. Make decisions on Allowances, changes, selections, and other decisions in a timely manner so as not to cause undue delay.

E.5. Timely Payments. Make timely payments of amounts owed to Contractor in accordance with section J.

E.6. Cooperation. Require third-party contractors and vendors performing Work at the Project Site to cooperate with Contractor and to be liable for damages caused to Contractor's Work.

F. Contract Price

F.1. Determination. The Contract Price is shown on Exhibit C. The Contract Price includes the Allowances shown on Exhibit C.

F.2. Included in Contract Price. The Contract Price includes all costs of the Work ("Costs of Construction") including but not limited to the following:

a. *Subcontract Prices.* The price of all subcontracts.

b. *Contractor's Labor.* The cost of Contractor's direct labor for performance of the Work, whether on-site or at fabrication shops off-site assembling or manufacturing materials to be installed on the Project.

c. *Contractor's Supervision.* Contractor's superintendent, Project management, and administrative staff on-site devoting full time and attention to managing the Project. Off-site Project managers' costs will be paid upon written agreement with Owner based on their time devoted to the Project.

d. *Fringe Benefits.* The cost of standard labor fringe benefits for Contractor's Labor and Contractor's Supervision for on-site personnel. Fringe Benefits means costs for Contractor's Labor and Contractor's Supervision for on-site personnel in addition to wages for the employer's required contributions for employment taxes, insurance, and other employer labor cost required by applicable labor agreement or by law. Fringe Benefits also includes employer contributions for qualified retirement plans, health insurance, and paid leave.

e. *Materials/Equipment.* Materials and equipment installed as a part of the Project as specified in the Construction Documents, including freight for delivery to the Project, an allowance for waste, and sales or use taxes paid by Contractor unless Owner has furnished Contractor with a certificate of exemption from the payment of such taxes. Unreturned excess materials are owned by Owner.

f. *Construction Equipment Costs.* Costs for machinery, equipment, tools, and temporary structures and outbuildings on the Project.

g. *Demolition and Site Clearing.* The cost of clearing the site and demolition and removal of existing structures and vegetation required for performance of the Work.

h. *Site Office.* Office supplies, copy charges, delivery charges, and other direct costs of maintaining a job site office.

i. *Bonds and Insurance Premiums.* The percentage of Contractor's insurance premiums allocated to this Project for the insurance required in this Contract and the cost of providing any required payment and performance bonds.

j. *Building Permit.* Fees for the building permit, licenses, and inspections by governmental authorities required for the Work.

k. *Royalties/Licenses.* Costs of use of designs, products, or processes required by the Construction Documents as part of the Work.

l. *General Conditions.* Job site costs incurred in performing the Work, including costs such as for utilities not paid by Owner, a job site trailer if needed due to the scope of construction, temporary restrooms used at the site, on-site security, construction fencing, and site cleanup ("General Conditions").

F.3. Discounts. Owner will be notified if material or equipment price discounts are available for advance cash payments. If so notified, and if Owner advances the funds for such purchases, Owner is entitled to the associated discount.

F.4. Schedule of Values. Contractor will prepare a Schedule of Values. The Schedule of Values must be approved in writing by Owner Rep before commencement. The Schedule of Values will apportion the Contract Price between each constituent element of the Work.

F.5. Allowances. Contractor shall include in the Contract Price the Allowances shown in Exhibit C. Items covered by Allowances shall be supplied for such amounts and by such persons or entities as Owner may direct, but Contractor is not required to employ persons or entities to whom Contractor has reasonable objection. Unless otherwise provided in the Construction Documents, the following guidelines apply:

a. *Materials and Equipment Less Discounts.* Allowances shall cover the cost to Contractor of materials and equipment delivered at the site and all required taxes, less applicable trade discounts.

b. *Unloading and Handling Costs.* Contractor's costs for unloading and handling at the site, labor, installation costs, overhead, profit, and other direct expenses contemplated for stated Allowances items.

c. *Change Orders.* Whenever costs are more than or less than Allowances, the Contract Price shall be modified by Change Order. The amount of the Change Order shall reflect the difference between actual costs and the Allowances.

d. *Prompt Selection by Owner.* Owner shall select materials and equipment under an Allowance with reasonable promptness.

G. Contract Time

G.1. Construction Schedule. Contractor will promptly prepare and submit to Owner Rep for approval a Construction Schedule, using the critical path method, detailing how Substantial Completion will be achieved by the Substantial Completion Date. Contractor will periodically revise and resubmit the Construction Schedule to Owner Rep upon change orders, Excused Delays, or other events that cause the critical path or the Substantial Completion Date to change.

G.2. Risk of Loss before Final Completion. If the Work is damaged or destroyed before its final completion, Contractor will bear the risk of loss and will diligently proceed with restoration or replacement and completion of the Work.

G.3. Acceleration of Work. If there is a delay in the Work that is not an Excused Delay, and in the determination of Owner Rep the Work will not reach Substantial Comple-

tion by the Substantial Completion Date, Owner Rep may direct Contractor to accelerate the Work at no cost to Owner by means of overtime, additional crews, additional shifts, or resequencing of the Work to achieve Substantial Completion by the Substantial Completion Date.

G.4. Owner Suspension or Delay in Work Commencement. Owner may, with or without cause, by written directive, require Contractor to suspend or delay commencement of the Work in whole or in part for a length of time as desired by Owner. The Contract Price and Contract Time are to be equitably adjusted for increases in the Costs of Construction and for the time caused by such delay or suspension under this paragraph. However, no such equitable adjustment shall be made if Owner has the right to order delay or suspension of the Work under another provision of the Construction Documents or if an Unexcused Delay by Contractor would have caused such suspension or delay.

H. Subcontracts

H.1. Subcontracting. Contractor may subcontract all or any part of the Work.

H.2. Terms. Subcontracts with Subcontractors and Suppliers must meet the following requirements:

a. *Writing.* Be in writing.

b. *Assumption of Obligations.* Require the Subcontractor to assume toward Contractor all of the obligations and responsibilities that Contractor owes to Owner under the Construction Documents.

c. *Consistent with Contract.* Be consistent with the terms of this Contract.

d. *Terms of Contract Applicable to Subcontractors.* Require compliance with the terms of this Contract applicable to Subcontractors, including requirements for insurance and lien waivers.

e. *Contingent Assignment to Owner.* Require that the Subcontractor provide a copy of the subcontract to Owner if Contractor's right to perform under this Contract has been terminated.

f. *Subcontracts Assignable to Owner and Contractor's Surety.* Be assignable to Owner or to Contractor's surety for the Project on the same terms.

g. *Subcontractor's Obligations Not Assignable.* Prohibit assignment of the Subcontractor's obligations.

H.3. Delivery of Pertinent Portion of Construction Documents. Contractor will provide each Subcontractor with a copy of the Construction Documents, or a copy of the portions to which Subcontractor will be bound, before entering into subcontracts.

H.4. Owner's Review of Subcontractors and Subcontractors' Bids. Owner may require Contractor to provide Bids from Major Subcontractors, Major Sub-subcontractors, and Major Suppliers. Owner, Owner Rep, and Contractor will review the Bids and agree on selection. Contractor will not use a subcontractor or supplier to whom Owner has a reasonable objection. Contractor will not be required to enter into a subcontract or other agreement if Contractor reasonably objects to use of such subcontractor or supplier. If Owner requires Contractor to use a specific subcontractor or supplier instead of the subcontractor or supplier recommended by Contractor who has submitted a lower Bid, the Contract Price will be increased by the additional amount of the Bid from Owner's required subcontractor or supplier.

H.5. Directory. Contractor will provide Owner Rep with a written list of all its Subcontractors and Suppliers, and the Major Sub-subcontractors and Major Suppliers of any tier, with the address and telephone number of each. An updated list will be provided to Owner Rep within fifteen days after any change. A final list will be provided to Owner Rep on or before the date of Final Completion of the Project.

H.6. Owner's Objection to Any Subcontractor. Contractor will not use any Subcontractor to whom Owner or Owner Rep has a reasonable objection. If the replacement of the Subcontractor due to Owner's objection results in an increase in cost over the Contractor's anticipated total Costs of Construction, reasonable adjustment to the Contract Price will be made by Change Order.

H.7. Owner May Confirm Payments to Subcontractors and Sub-subcontractors. Owner has the right to contact any Subcontractor or Sub-subcontractor to obtain information on payments made by Contractor under the subcontract and to obtain lien waivers and bills-paid affidavits.

I. Contingent Assignment of Subcontracts

I.1. Events Triggering Assignment. Each subcontract is assigned by Contractor to Owner and the surety under a performance bond provided by Contractor, contingent on the occurrence of all of the following:

a. *Contractor Default.* Contractor is in default under the Construction Documents.

b. *Termination of Contractor.* Owner has terminated Contractor under this Contract pursuant to paragraph N.3. or section O.

c. *Assumption of Subcontract.* Owner has notified Contractor and the Subcontractor in writing that it assumes the subcontract or that it has made demand on the surety and the surety has so notified the Subcontractor.

I.2. Contacting Subcontractors and Suppliers. Owner and the surety have the right to contact any Subcontractor or Supplier to obtain a copy of the subcontract, to determine if Contractor is in default under the Subcontract, and to confirm or negotiate the terms for assumption.

I.3. Results of Assumption. Assumption by Owner results in the following:

a. *Equitable Adjustment of Subcontract Price.* If the Work has been suspended for more than thirty days, the Subcontract price will be equitably adjusted for increases in cost caused by the suspension; contractor will be liable for the additional Costs of Construction.

b. *Replacement Contractor.* Owner may assign a subcontract that it has assumed to a replacement contractor but will remain liable for the obligations under the subcontract.

c. *Continued Liability of Contractor.* Contractor will remain liable to Owner and the Subcontractor or Supplier for any unpaid amounts due to the Subcontractor or Supplier, and for any increases in the Costs of Construction described in paragraph F.2.

J. Payment

J.1. Progress Draws and Final Payment. The Contract Price is payable through Progress Draws and Final Payment as described in this section. Owner will have the right to withhold Retainage from each Progress Draw. Retainage due to Contractor will be included in the Final Payment.

J.2. Progress Payments. On or before the twenty-fifth day of each month after the commencement of Construction (the "Draw Date"), Contractor will assemble and present to Owner Rep a Draw Request for payment for conforming Work performed since the previous Draw Date. The amount of each Draw will be computed as follows, in the following order of operations:

a. *Assigned Percentage of Completion.* For each item in the Schedule of Values ("Scheduled Value Item") the Contractor will assign a percentage for the conforming Work accomplished through the Draw Date.

b. *Draw Individual Scheduled Amount.* Multiply each item on the Schedule of Values by its assigned percentage of completion ("Draw Individual Scheduled Value Amount").

c. *Costs of Construction for Each Scheduled Value Item.* Determine the Costs of Construction for the Draw period, separate such Costs of Construction by Scheduled Value Item, and calculate the subtotal of the Costs of Construction for each Scheduled Value Item.

d. *Lesser Of.* Compare each Draw Individual Scheduled Value Amount with the assembled Costs of Construction for each item in the Schedule of Values and include the lesser of the two figures in the amount of the Draw Request.

e. *Sum of Lesser Amounts.* The total Draw will be the sum of the lesser of the two figures for each Scheduled Value.

f. *Deduct Retainage.* Deduct Retainage from the total calculated in subparagraph e. above.

g. *Deduct Previous Payments to Contractor.* Deduct payments previously made by Owner to Contractor.

h. *Deduct Paid by Owner to Contractor's Suppliers and Subcontractors.* Deduct amounts paid by Owner to Contractor's suppliers or subcontractors.

i. *Deduct Amounts Authorized to Be Withheld.* Deduct amounts that Owner Rep has determined to withhold as provided in paragraph J.10.

J.3. Supporting Documents. Each Progress Draw Request must include the following supporting documents:

a. *Records.* The receipts, invoices, delivery tickets, subcontractor draws, and other documentation reasonably required by Owner Rep substantiating the Costs of Construction for the Draw Period for which payment is sought.

b. *Contractor's Bills-Paid Affidavit.* Bills-Paid Affidavit by Contractor in the form attached as Exhibit E.

c. *Subcontractors' Bills-Paid Affidavits.* Bills-Paid Affidavit by each Subcontractor in the form attached as Exhibit F.

d. *Contractor's Conditional Partial Release.* Contractor's Conditional Partial Release in the form attached as Exhibit G.

e. *Contractor's Unconditional Partial Release.* Contractor's Unconditional Partial Release in the form attached as Exhibit H.

f. *Subcontractors' Conditional Partial Releases.* Subcontractor's Conditional Partial Release from each Subcontractor to be paid from the Draw in the form attached as Exhibit G.

g. *Subcontractors' Unconditional Partial Releases.* Subcontractor's Unconditional Partial Release from each Subcontractor for which Contractor received payment as a part of the prior month's Progress Draw in the form attached as Exhibit H.

J.4. Payment of Undisputed Items. Owner Rep will review the Draw Request and advise Owner whether to pay it in full or in part. Contractor will promptly provide any additional documentation reasonably requested and answer any questions on the Draw Request.

Owner Rep will promptly notify Contractor of any disputed items in the Draw Request. Owner will have thirty days after the later of (a) the Draw Date or (b) the date that Owner Rep received the Draw Request and required documentation, to pay undisputed items. Undisputed items not paid when due will bear interest until paid at the rate specified in the Texas Prompt Payment Act, Texas Property Code chapter 28.

J.5. Claims for Payment Disputes. Either party may make a Claim in connection with a payment dispute.

J.6. Final Payment. Final payment will be made according to the following job inspection and closeout process, and is subject to the conditions precedent to final payment, as follows:

a. *Substantial Completion; Final Completion.* When Contractor determines that the Work has progressed to the point of reaching Substantial Completion, Contractor will give written notice to Owner Rep, and Owner Rep will promptly inspect the Work. If Owner Rep determines that the Work is Substantially Complete, Owner Rep will issue a certificate of substantial completion and prepare a punch list for Work that needs to be completed along with an agreed-on time for completion. If Owner Rep determines that the Work is not acceptable or is not Substantially Complete, Owner Rep will prepare a written list of Work that needs to be remedied or completed to achieve Substantial Completion. Contractor shall perform the Work to achieve Final Completion of the Work, including completion of all punch list items, within thirty days after receipt of Owner Rep's list or within an agreed-on period for completion. Owner Rep will determine the dates for Substantial and Final Completion.

b. *Final Draw.* Upon Owner Rep's written acknowledgement that the punch list has been completed, Contractor will submit a Final Draw Request. The amount of the final draw ("Final Payment") will be the balance of the Contract Price, after deducting amounts paid by Owner to Suppliers, Subcontractors, and Sub-subcontractors, amounts for unreleased mechanic's liens, amounts withheld by Owner pursuant to paragraph J.10., and previous payments to Contractor.

c. *Conditions Precedent to Final Payment.* The following are Conditions Precedent to Final Payment:

i. *Final Draw Request.* Receipt and approval by Owner, upon recommendation of Owner Rep, of a Final Draw Request.

ii. *List of Subcontractors and Suppliers.* Receipt by Owner Rep of Contractor's final and accurate list of Subcontractors and Suppliers in compliance with paragraph H.5.

iii. *Conditional Final Releases.* Executed and acknowledged Conditional Final Releases from Contractor and all Subcontractors, in the form attached as Exhibit I. The amounts contained in these Releases must match amounts stated as owed in the Final Bills-Paid Affidavits.

iv. *Final Bills-Paid Affidavits.* Executed and acknowledged Final Bills-Paid Affidavits from Contractor, Subcontractors, and Suppliers, in the forms attached as Exhibits J and K.

v. *Subcontractors' Unconditional Partial and Final Releases.* Unconditional Partial Releases (Exhibit H) and Unconditional Final Releases (Exhibit L) from Subcontractors who have been previously paid.

vi. *Suppliers' and Sub-subcontactors' Unconditional Partial and Final Releases for Amounts Previously Paid.* Unconditional Partial Releases (Exhibit H) and Unconditional Final Releases (Exhibit L) from Suppliers and Sub-subcontractors of all tiers who have been previously paid.

vii. *Suppliers' and Sub-subcontactors' Conditional Final Releases for Amounts Not Previously Paid.* Conditional Final Releases from all Subcontractors, Sub-subcontractors, and Suppliers of all tiers who have not been previously paid, in the form attached as Exhibit I.

viii. *Release of All Filed Mechanic's Liens.* Receipt by Owner Rep of executed, acknowledged releases of all filed mechanic's liens against the Project, or Contractor will provide satisfactory evidence that Contractor has bonded around such lien claims pursuant to chapter 53 of the Texas Property Code.

ix. *Bond to Pay Claims.* If a Subcontractor or Supplier of any tier refuses to provide a Conditional or Unconditional Release for the applicable amount stated in the Bills-Paid Affidavits, or if there is otherwise a dispute about payment, satisfactory evidence that Contractor has bonded around such lien claims pursuant to chapter 53 of the Texas Property Code or has provided other arrangements accepted by Owner in writing as sufficient to secure indemnity from such lien or claim.

x. *Subcontractors', Sub-subcontractors', and Suppliers' Conditional Final Releases.* Conditional Final Releases from each Subcontractor, Sub-subcontractor, or Supplier from whom Owner has received a notification of nonpayment or the right to assert a claim, unless Contractor has provided Owner with satisfactory evidence that Contractor has bonded

around such a lien claim pursuant to chapter 53 of the Texas Property Code or has provided other arrangements accepted by Owner in writing as sufficient to secure indemnity from such lien or claim.

xi. *Warranty Documents.* Contractor has assigned and delivered to Owner all required warranty documents required that have been assigned to Owner.

xii. *As-Built Drawings.* As-built drawings have been delivered to Owner Rep.

xiii. *Owner Manuals and Training Completed.* All Owner Manuals and keys have been delivered to Owner Rep, and Project control/security and other systems checkout and training contemplated by the Construction Documents has been performed.

J.7. Date of Final Payment. The Final Payment, including release of all Retainage payable to Contractor, is due within fifty days after the Conditions Precedent to Final Payment have been satisfied or waived by Owner in writing.

J.8. Filing Affidavit of Final Completion. Owner will file in the real property records of each county in which the Project is located and provide notice to Contractor of its Affidavit of Final Completion within three Business Days after both of the following have occurred: (a) the Conditions Precedent to Final Payment have been met, and (b) Owner Rep has received Contractor's Final Draw Request.

J.9. Resolution of Lien Claims. Any notice of lien claims or lien affidavits filed after notice and recordation of the Owner Affidavit will be resolved by Contractor and Owner

Rep in accordance with one of the methods described in subparagraph J.6.c.viii., ix., or x. above, at Owner's sole discretion.

J.10. Withholding Payment. Owner has the right to withhold from payments otherwise due to Contractor amounts deemed reasonably necessary, on advice from Owner Rep, to protect Owner from damage or liability due to any of the following:

a. *Defects.* Uncorrected defective work.

b. *Overruns.* Reasonable evidence that the cost to complete will exceed the balance of the Contract Price.

c. *Injuries or Property Damages.* Claims of injury or property damage to Owner, a third party, or another contractor.

d. *Delays.* Reasonable evidence that Substantial Completion will not be reached according to the Construction Schedule, as revised.

e. *Work Defaults.* Repeated failure by Contractor to perform the Work according to the Construction Documents.

f. *Mechanic's Liens.* Mechanic's liens filed or noticed on the Project not removed by Contractor's furnishing a bond acceptable to Owner pursuant to chapter 53 of the Texas Property Code or other Contractor arrangements accepted by Owner in writing as sufficient to secure indemnity from such lien or claim.

When the basis for withholding has been resolved, Owner will promptly pay to Contractor any amounts not needed to protect Owner from damage or liability.

J.11. Owner Payment to Subcontractors. Owner will promptly notify Contractor if Owner receives a notice of nonpayment from a Subcontractor or Supplier of any tier. If Con-

tractor does not provide Owner Rep with an Unconditional Release for the amount owed, or satisfactory evidence that Contractor has bonded around the claim within fifteen days after notification, Owner may make payment by joint check to Contractor and the claimant, unless a payment bond has been provided for the Project.

J.12. Acceptance of Final Payment. Final Payment will be deemed accepted by Contractor when the check has been deposited or wire transfer received. Acceptance of Final Payment by Contractor constitutes a waiver of all claims by Contractor not previously received in writing by Owner Rep.

K. Change Orders and Required Changes

K.1. Contract Price and Contract Time. Owner, without invalidating the Contract, may order changes in the Work. All changes will be made by written Change Order, signed by Owner and Contractor, that states the adjustment in the Contract Price and the Contract Time.

K.2. Contractor to Proceed. If Owner and Contractor cannot agree on the adjustment to the Contract Price, Owner may require Contractor to proceed with the Work by written Required Change signed by Owner. The Contract Price will be adjusted on a time and materials basis.

L. Claims

L.1. Contractor's Claims. Contractor's Claims for extensions of time or changes to the Contract Price must be submitted to Owner Rep in writing within seven days after the date when the events giving rise to the Claim occurred. Within fourteen days after the submission of such Claim, Contractor will furnish Owner Rep with Contractor's calculations of additional time needed to complete the Work and, if applicable, the anticipated increase to the Costs of Construction and documentation supporting Contractor's Claim. Contractor will fur-

nish additional information in support of such Claims as reasonably required by Owner or Owner Rep. Contractor will proceed with the Work during the pendency of any such Claims.

L.2. Material Breaches. Notwithstanding anything to the contrary in the Construction Documents, Contractor agrees that it will not attempt in any way to recover or pursue a Claim for delay if Contractor or a Subcontractor, Sub-subcontractor, or Supplier to Contractor has, before the claimed Delay, materially breached any contractual duty or obligation in the Construction Documents, or any duty or obligation at common law or created by statute, to the extent such breach causes, affects, or otherwise contributes to such delay, and such breach remains uncured at the time a Claim accrues.

L.3. Owner Claims. Owner agrees to notify Contractor of any Claim, including Claims for Unexcused Delay and defects in the Work, within five Business Days after Owner becomes aware of the basis for the Claim.

L.4. Initial Decision Maker Process. All Claims arising under this Contract will be first submitted to Owner Rep as the Initial Decision Maker. Owner Rep's decision is a condition precedent to proceeding with mediation, as provided for in paragraph L.5. Owner Rep will issue a decision within thirty days after receiving the Claim and supporting documentation. Owner Rep may extend the initial decision deadline for up to an additional thirty days in order to receive supporting documentation and data and replies from the opposing party. If Owner Rep is unable to render a decision within the allotted period, or if either party is dissatisfied with the decision, either party may request mediation.

L.5. Mediation. If the dispute is not resolved by the decision of the Initial Decision Maker, either party may request mediation of the dispute using a neutral mediator to be agreed on by the parties. Contractor will continue to perform the Work during the pendency of mediation.

L.6. Litigation. If a resolution is not reached through mediation, either party may pursue litigation.

M. Material Breach

M.1. Owner's Default. Each of the following constitutes a material breach of this Contract by Owner:

a. *Time Defaults.* Failure to timely render or otherwise furnish responses, decisions, or selections according to the Construction Documents.

b. *Payment Defaults.* Failure to comply with Owner's payment obligations under the Construction Documents.

c. *Substantial Breach.* Substantial breach of any of Owner's obligations under this Contract.

M.2. Contractor's Default. Each of the following constitutes a material breach of this Contract by Contractor:

a. *Work Commencement Default.* Failure by Contractor to commence the Work in accordance with the provisions of this Contract.

b. *Work Prosecution Default.* Failure by Contractor to prosecute the Work to completion in a diligent, efficient, timely, workmanlike, skillful, and careful manner and in strict accordance with the provisions of the Contract.

c. *Time Defaults.* Failure by Contractor to use an adequate number of qualified personnel or adequate amount of equipment to complete the Work without causing Unexcused Delay.

d. *Performance Defaults.* Contractor's persistent failure to perform any of its material obligations under the Contract.

e. *Payment Defaults.* Contractor's persistent failure to make prompt payments when due to its Subcontractors and Suppliers, unless Contractor has a bona fide dispute with any such Subcontractor or Supplier.

f. *Bankrupt.* Contractor creates any situation or state of facts that would authorize or permit an involuntary petition in bankruptcy to be filed against Contractor.

g. *Breach of Timely Completion.* Contractor has not met, or in Owner Rep's and Owner's reasonable opinion, based on the schedules required by the Construction Documents, will not meet the dates of Substantial Completion set forth in the Construction Documents.

N. Remedies

N.1. Owner Remedies

a. *Owner's Right to Suspend Work.* If Contractor fails, after notice to correct Work that is defective or not in conformance with the requirements of the Construction Documents, or repeatedly fails to perform the Work in accordance with the Construction Documents, Owner or Owner Rep may issue a written notice to Contractor to suspend the Work, in whole or part, until Contractor cures the reasons for issuance of the suspension notice. Owner's right in this section does not create a duty by Owner to suspend work for the benefit of Contractor or Subcontractors of any tier.

b. *Owner Cure.* If Contractor is in default and does not within ten Business Days after receipt of Owner's or Owner Rep's written notice to commence

and continue diligent, continuous effort to correct the default, Owner may cure such default and withhold payment from Contractor for the reasonable cost and expenses incurred for Owner's cure. If insufficient amounts remain to be paid to Contractor, Contractor must pay Owner the reasonable costs and expenses to cure in excess of the remaining funds to be paid to Contractor.

N.2. Contractor Remedies. Contractor will give written notice to Owner or Owner Rep if Owner is in material breach of Owner obligations under the Construction Documents. The notice will state the specific items of Owner default and notify Owner that Owner must cure the items within ten Business Days of receipt of the notice or Contractor may suspend Work until Owner's material breach is cured or corrected. Contractor may terminate the Contract in accordance with paragraph N.3. if suspension of the Work by Contractor under this section continues without Owner cure for thirty or more days.

N.3. Termination. If one party defaults and the default is not cured by exercise of the remedies specified in paragraph N.1. or N.2., upon an additional ten Business Days' prior written notice specifically describing the default, and provided the defaulting party has not commenced diligent, good-faith, continuous, and effective action to cure the default within the ten-day period, this Contract may be terminated by an additional written notice from the nondefaulting party to the defaulting party. If there is such a termination, the following formula is agreed on as a reasonable and fair way to assess the actual damages, without the expense and delay associated with other forms of dispute resolution:

a. *Damages to Contractor.* If termination resulted from an act of default of Owner, Owner will pay to Contractor, within thirty days after written notice from Contractor, an amount equal to all amounts due and owing for the Work performed in accordance with the Construction Documents at the time of the termination, plus 10 percent of the remaining Contract Price to compensate Contractor for the lost profit.

b. *Damages to Owner.* If termination resulted from an act of default of Contractor, Owner may do any of the following:

i. *Take Over Work.* Use all materials, equipment, tools, and construction equipment owned by Contractor and occupy the Project site.

ii. *Accept Subcontracts and Supplier Agreements.* Accept assignment of Subcontracts and assume, in Owner's sole discretions, any agreements with Suppliers and Sub-subcontractors.

iii. *Costs to Complete.* Finish the Work as expeditiously as reasonably possible provided the costs for completion and correction of the Work are reasonable and necessary. If requested, Owner will furnish Contractor a statement of costs in correcting and completing the Work, along with reasonable documentation of such costs. If Owner terminates according to this paragraph, no further payments will be due Contractor until final completion is reached. If, at that time, Owner's costs to complete and correct the Work exceed the unpaid balance of the Contract Price, Contractor will pay the difference to Owner upon written demand.

iv. *Liquidated Damages.* Assess liquidated damages if Substantial Completion has not been achieved as provided in Exhibit C.

c. *Recourse to Performance Bond.* Upon the occurrence of a Contractor default, Owner may make demand on the surety to perform its obligations under a Performance Bond provided for the Project.

N.4. Damages for Contractor's Unexcused Delay. If the Work is not Substantially Complete by the Substantial Completion Date due to Contractor's Unexcused Delay, Owner may assess liquidated damages as provided in Exhibit C.

N.5. Excused Delay. If it is determined that Contractor has been delayed by an Excused Delay, the time to complete the Work will be extended by one day for each day of an Excused Delay. This extension of the Contract Time will be Contractor's sole remedy for an Excused Delay, and no monetary damage or other compensation is due Contractor for such delay.

N.6. Damages for Owner's Delay. If it is determined that Contractor has been delayed by an Excused Delay, the time to complete the Work will be extended by one day for each day of an Excused Delay. This extension of the Contract Time will be Contractor's sole remedy for an Excused Delay, unless the delay is due to acts of Owner constituting unreasonable interference with Contractor's ability to perform the Work that continues after notice of the interference is given by Contractor. The exercise by Owner of any right provided by this Contract, including suspension of Work, does not constitute unreasonable interference with Contractor's ability to perform the Work. Contractor will be entitled to the General Conditions and other direct Costs of Construction described in paragraph F.2. for each day of delay due to Owner's interference.

Include the following if applicable.

N.7. Waiver of Consequential Damages. Except as provided in this section N., Owner and Contractor each waive the right to recover consequential damages in a suit or action brought against the other arising out of a default under the Construction Documents, regardless of whether the claim for recovery is based in contract or tort.

Continue with the following.

O. Owner's Right to Terminate for Convenience. Owner has the right to terminate this Contract for Owner's convenience by giving Contractor thirty days' prior written notice of termination. Upon such termination, Contractor will be entitled to payment as described in subparagraph N.3.a.

P. Warranties

P.1. Express Warranty. Contractor warrants to Owner that labor, materials, and equipment furnished under the Contract will be new and of high quality and will be free from defects and that all Work will be performed in a good and workmanlike manner and will conform to the Construction Documents. Work will be considered defective if it does not conform to the Construction Documents.

P.2. Ten-Year Structural Component Warranty. Contractor additionally expressly warrants all structural components of the Project, including the foundation, for ten years following Substantial Completion.

P.3. One-Year Callback and Correction of Work. For a period of one year following Substantial Completion, Contractor will repair or replace any defective Work at no charge if Owner provides written notice to Contractor of a warranty claim during the one-year period. Nothing contained in this paragraph P.3. shall be construed to establish a period of limitations for other obligations Contractor has under the Construction Documents. Establishment of the one-year period for correction of Work relates only to the specific obligation of Contractor to correct the Work and has no relationship to the time within which the obligation to comply with the Construction Documents may be sought to be enforced nor to the time within which proceedings may be commenced to establish Contractor's liability for Contractor's obligations other than specifically to correct the Work.

P.4. Assignment of Third-Party Warranties. Contractor hereby assigns all equipment, roofing, and other vendor warranties to Owner and will deliver all manuals, books, instructions, and warranty policy documentation to Owner as part of the Conditions to Final Payment.

P.5. Cumulative of Other Warranties and Remedies. The warranties set forth in this section P. are cumulative of, and in addition to, all other warranties or remedies available at law or by this Contract, including implied warranties, and can be assigned by Owner.

Q. Safety

Q.1. Construction Means, Methods, Techniques, Sequences, and Procedures. Owner will not have control over or charge of and will not be responsible for construction means, methods, techniques, sequences, or procedures used or for safety precautions and programs in connection with the Work, since these are solely Contractor's responsibility.

Q.2. Compliance with Applicable Laws. Contractor shall give notices and comply with applicable laws, ordinances, rules, regulations, and lawful orders of public authorities bearing on safety of persons and property and their protection from damage, injury, or loss.

Q.3. Remedy Contractor-Caused Property Damage. Contractor shall promptly remedy damage and loss to property at the site, or off-site, if caused in whole or in part by Contractor, a Subcontractor, or anyone directly or indirectly employed by any of them or by anyone for whose acts they may be liable and for which Contractor is responsible.

Q.4. Reasonable Precautions and Reasonable Protection. As between Contractor and Owner, Contractor shall be responsible for all safety at the Project Site, including safety of personnel, material, and the Work. Contractor shall be responsible for providing any security necessary to prevent damage or loss to materials, equipment, the Improvements, and other property in the vicinity of the Project until Final Completion.

R. Indemnity

R.1. Claims Other than Employee Claims. TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW, CONTRACTOR SHALL INDEMNIFY, DEFEND, AND HOLD HARMLESS LENDER, OWNER, OWNER'S MEMBERS, MANAGERS, PARTNERS, AFFILIATED COMPANIES OF OWNER,

AND ANY PARTNER, AND THEIR RESPECTIVE OFFICERS, DIRECTORS, SHAREHOLDERS, EMPLOYEES, AND AGENTS (COLLECTIVELY, THE "INDEMNITEES") FROM ALL CLAIMS, SUITS, ACTIONS, PROCEEDINGS, DAMAGES, LOSSES, AND EXPENSES WHATSOEVER, INCLUDING ATTORNEY'S FEES, CONNECTED WITH PERFORMANCE OF THIS CONTRACT OR THE CONSTRUCTION CONTEMPLATED BY THIS CONTRACT TO THE EXTENT CAUSED IN WHOLE OR IN PART BY THE BREACH OF CONTRACT, NEGLIGENCE, OR OTHER ACT OR OMISSION OF CONTRACTOR, ITS SUBCONTRACTORS, SUB-SUBCONTRACTORS OF ANY TIER, OR ANYONE DIRECTLY OR INDIRECTLY EMPLOYED BY THEM OR ANYONE FOR WHOSE ACTS THEY MAY BE LIABLE, BUT NOT TO THE EXTENT CAUSED IN WHOLE OR IN PART BY THE ACT OR OMISSION, INCLUDING NEGLIGENCE, OF AN INDEMNITEE.

Include the following employee claims indemnity paragraph if applicable.

R.2. Employee Claims. IN ADDITION, REGARDING CLAIMS FOR THE BODILY INJURY OR DEATH OF AN EMPLOYEE OF CONTRACTOR, ITS AGENT(S), OR ITS SUBCONTRACTORS OF ANY TIER (HEREINAFTER REFERRED TO AS "EMPLOYEE CLAIM" OR "EMPLOYEE CLAIMS"), CONTRACTOR WILL INDEMNIFY, DEFEND, AND HOLD HARMLESS INDEMNITEES FROM ALL SUCH EMPLOYEE CLAIMS, SUITS, ACTIONS, PROCEEDINGS, DAMAGES, LOSSES, AND EXPENSES WHATSOEVER CONNECTED WITH PERFORMANCE OF THIS CONTRACT, INCLUDING SUCH EMPLOYEE CLAIMS, DAMAGES, LOSSES, OR EXPENSES ACTUALLY OR ALLEGEDLY ARISING IN WHOLE OR IN PART FROM THE NEGLIGENCE OF INDEMNITEES. IT IS THE EXPRESSED INTENT OF CONTRACTOR AND OWNER THAT IN THE CASE OF AN EMPLOYEE CLAIM, THE INDEMNITY PROVIDED FOR IN THIS SECTION IS AN INDEMNITY EXTENDED BY CONTRACTOR TO INDEMNIFY AND PROTECT INDEMNITEES FROM THE CONSEQUENCES OF INDEMNITEES' OWN NEGLIGENCE WHETHER OR NOT THAT NEGLIGENCE IS THE SOLE OR CONTRIBUTING CAUSE OF THE RESULTANT EMPLOYEE CLAIMS. CONTRACTOR FURTHER AGREES IN THIS CONNECTION TO DEFEND AT ITS OWN EXPENSE INDEMNITEES FROM ANY CLAIMS OR LITIGATION IN CONNECTION WITH ANY SUCH EMPLOYEE CLAIMS.

Continue with the following.

[*R.2./R.3.*] *Limitations.* In claims against any person or entity indemnified under this section by an employee of Contractor, a Subcontractor, or anyone directly or indirectly employed by them or anyone for whose acts they may be liable, the indemnification obligation under this agreement shall not be limited by a limitation on amount or type of damages, compensation, or benefits payable by or for Contractor or a Subcontractor under workers' compensation acts, disability benefit acts, or other employee benefit acts. The indemnity in this section R. survives the completion of the Work or termination of this Contract. It is the intent of the parties to this Contract not to violate the provisions of chapter 151 of the Texas Insurance Code. In the event the provisions of this Contract violate the provisions of chapter 151 of the Texas Insurance Code, this Contract is revised to limit this Contract to comply with chapter 151 of the Texas Insurance Code.

S. Insurance and Bonds

S.1. Contractor's Insurance and Bonds. Contractor shall purchase and maintain insurance and bonds of the types and limits, containing the endorsements, and in compliance with the terms and conditions as specified for Contractor to obtain, maintain, and comply with in Exhibit D (Insurance and Bond Requirements) of this Contract or elsewhere in the Construction Documents.

S.2. Owner's Insurance. Owner shall purchase and maintain insurance and bonds of the types and limits, containing the endorsements, and subject to the terms and conditions as specified for Owner to obtain, maintain, and comply with in Exhibit D (Insurance and Bond Requirements) of this Contract or elsewhere in the Construction Documents.

T. Miscellaneous

T.1. Effect of Invalid Provision. Should any clause in this Contract be found invalid by a court of law, the remainder of the Contract shall not be affected thereby, and all other provisions of this Contract shall remain valid and enforceable.

T.2. Entire Agreement; Modification. The Construction Documents contain the entire agreement between the parties for the construction of the Project and cannot be modified except by written Change Order or modification.

T.3. Nonassignment. This Contract shall not be assigned by Contractor without the written consent of Owner. This limitation shall not apply to Contractor's right to retain Subcontractors for the prosecution of portions of the Work in the normal course of its construction business.

T.4. Execution of Other Documents; Further Action. Each party shall, on demand, execute or obtain such other documents or instruments and corrective filings or instruments and use all commercially reasonable efforts to do or cause such other things as may be reasonably necessary or desirable to effect the provisions and purposes of this Contract.

T.5. Fees and Expenses of Actions. If any litigation (an "Action") is commenced, including an Action for declaratory relief, to enforce or interpret the terms of this Contract, or any document or instrument executed in connection with or pursuant to this Contract, or involving any controversy or Claim between or among the parties to this Contract, whether sounding in contract, tort, or statute, whether through arbitration, probate, bankruptcy, receivership, or other judicial or administrative proceeding, the prevailing party in such Action (the "Prevailing Party") shall be entitled to recover reasonable attorney's fees, paralegal costs, expert witness and consulting expert fees and costs, and other expenses, costs, and necessary disbursements incurred by the Prevailing Party in the investigation, preparation, pursuit, or defense of any claim asserted by any party in such Action in addition to any other relief to

which the Prevailing Party may be otherwise entitled, at law or hereunder, in the amount determined by the fact finder(s) or the court.

T.6. Gender and Number. Unless otherwise required by context, the genders shall include each other and the singular shall include the plural and the plural the singular.

T.7. Headings. Headings, tables of contents, captions, titles, and marginal notations are for convenience only and shall not limit or restrict the interpretation or construction of the passage(s) to which such headings, tables of contents, captions, titles, and notations may relate.

T.8. Notices. Any notice to be given or to be served on any party hereto, in connection with this instrument, must be in writing and may be given in person or by courier, overnight delivery service, e-mail, or certified or registered mail. Such notice shall be deemed to have been given and received when actually received, in the case of hand delivery, overnight delivery service, or express mail; when a certified or registered letter containing such notice, properly addressed, with postage prepaid, is deposited in the United States mail; and, if given by e-mail, when received by the party to whom it is addressed. Notice shall be given to Owner, Owner Rep, and Contractor at the addresses set forth at the beginning of this Contract. Any party hereto may at any time by giving five days' written notice to the other party hereto designate any other address, phone number, or e-mail address in substitution of the address, phone number, or e-mail address set forth at the beginning of this Contract to which such notice shall be given. Owner Rep must be copied on any notice given to Owner.

T.9. Schedules, Addenda, Exhibits, and Attachments. All schedules, addenda, exhibits, and attachments and other documents or items identified as being attached hereto (the "Exhibits") shall be a part of this Contract for all purposes. Exhibits may be changed from time to time as the parties may agree. When Exhibits are changed, they shall be redrafted in accordance with agreed changes, dated as of the effective date of such changes, and signed by

the parties. Copies of changed Exhibits shall be furnished to each party, and such changed Exhibits shall become a part of this Contract for all purposes. An Exhibit that has been changed shall cease to be a part of this Contract, and the most recently dated Exhibit, signed by all parties, shall govern.

T.10. Third-Party Beneficiaries; None Created. Nothing express or implied in this Contract is intended to confer, nor shall anything herein confer, on any person other than the parties hereto and the respective successors or assigns of the parties hereto, any rights, remedies, obligations, or liabilities whatsoever.

T.11. Waiver. No waiver of any term of this Contract shall be valid unless it is in writing and signed by both parties. The failure of any party at any time or times to require performance of any provision hereof shall in no manner affect the right to enforce the provision. No waiver by any party of any condition contained in this Contract, or of the breach of any term, provision, representation, warranty, or covenant contained in this Contract, in any one or more instances, shall be deemed to be or construed as a further or continuing waiver of any such condition or breach or as a waiver of any other condition or of the breach of any other term, provision, representation, warranty, or covenant.

T.12. Lender Cooperation. Contractor agrees to cooperate, and cause its Subcontractors to cooperate, with the reasonable requirements of any Lender that Owner may elect to obtain financing from, including the requirement that Contractor subordinate, and cause its Subcontractors to subordinate, any lien they may have by statute against the Property to the lien of the Lender.

T.13. Independent Contractor. Contractor occupies the status of an independent contractor, as that term is defined in the construction industry.

_____

[Name of owner]

_____

[Name of contractor]

Exhibit A

Project Site Legal Description

Attach project site legal description.

Exhibit B

Plans and Specifications

1. Specifications:

List the specifications or refer to an exhibit attached to this contract.

Section	Title	Date	Pages

2. Drawings:

List the drawings or refer to an exhibit attached to this contract.

Number	Title	Date

3. Addenda including Supplemental Conditions, if any:

Number	Date	Pages

Addenda relating to bidding/proposal requirements are not part of the Construction Documents unless the bidding/proposal documents are also listed as Construction Documents in paragraph B.1. of this Contract.

Exhibit C

Contract Price; Liquidated Damages

The Contract Price for the Project is $[**amount**].

The Contract Price includes the following Allowances:

Allowance for [**specify**]	$[**amount**]
Allowance for [**specify**]	$[**amount**]

Check if applicable:

☐ Liquidated Damages

Owner has the right to assess Liquidated Damages in the amount of $[**amount**] per day for each day after the Substantial Completion Date that Substantial Completion has not been achieved due to Contractor's Unexcused Delay. Owner has the right to withhold Liquidated Damages from the amounts due to Contractor. Owner and Contractor stipulate that the damages for the prospective breach of the Contract are difficult to measure and the Liquidated Damages amount is a reasonable estimate of actual damages.

Exhibit D

Insurance and Bond Requirements

Exhibit - Bond and Insurance Requirements

This Exhibit (the "**Insurance Specifications**") is attached as an Exhibit as part of the Agreement. In the event of conflict between any of the following Insurance Specifications with any provision in the Agreement, these Insurance Specifications control, amend and supplement the conflicting provision.

A. Specifications, Coverages, Limits & Other Requirements

No.	Specifications	Coverages, Limits and Other Requirements		
A. LIABILITY INSURANCE				
§ 1.	**Commercial General Liability.** To the extent permitted by law, Contractor is to maintain commercial general liability ("**CGL**") insurance and, if necessary, commercial umbrella/excess insurance (see **Spec. 4** below), issued on an occurrence basis meeting at least the following specifications.			
§ 1.1	**Minimum Limits**	The limits of coverage shall not be less than the following amounts:		
		a.	$__,000,000	Per Occurrence
		b.	$__,000,000	General Aggregate
		c.	$__,000,000	Products and Completed Operations Aggregate
		d.	$__,000,000	Personal and Advertising Injury
§ 1.2	**General Aggregate**	The General Aggregate shall apply separately to this Project.		
§ 1.3	**Post-Completion Coverage**	Contractor agrees to maintain Products-Completed Operations coverage with respect to the Work performed under the Agreement in identical coverage, form and amount, including required endorsements, for the full term of the Statute of Repose following Date of Substantial Completion of the Work. Contractor shall provide written representation to Owner stating Work completion date.		
§ 1.4	**Form**	This insurance is to be issued on an ISO CG 00 01 and shall coverage liability arising from premises, ongoing and completed operations, hire of Subcontractors (independent contractors coverage), and incidental design liability arising from the contractor's construction means and methods.		
§ 1.5	**Insured Contracts**	Coverage shall include but not be limited to liability assumed by Contractor under the Agreement to which this Exhibit is attached, including the tort liability of another assumed in a business contract, and shall include unmodified Separation of Insureds coverage.		
§ 1.6	**Additional Insureds**	Additional insured status shall be provided in favor of Owner Parties and such other personas as are designed by Owner to Contractor to be additional insureds on a combination of ISO forms CG 20 10 10 01 and CG 20 37 10 01.		
§ 1.7	**Primary and Noncontributory**	This insurance shall be endorsed to provide primary and noncontributing liability coverage by ISO CG 20 01 04 13. It is the specific intent of the parties to the Agreement that all insurance required herein shall be primary to and shall seek no contribution from all insurance held by Owner Parties, with Owner Parties' insurance being excess, secondary and noncontributing.		
§ 1.8	**Waiver of Subrogation**	This insurance is to be endorsed with an ISO CG 24 04 05 09 Waiver of Transfer of Rights of Recovery Against Others Endorsement, or equivalent, to include a waiver of subrogation by insurer as to the Owner Parties and such other persons as are designated by Owner to Contractor as additional insureds.		
§ 1.9	**Electronic Data**	This insurance is to include an Electronic Data Liability Endorsement ISO CG 04 37 with coverage to the full limits of the policy.		
§ 1.10	**Notice**	This insurance is to contain a provision for 30 days' prior written notice by insurance carrier to Owner required for cancellation or material change.		

§ 1.11	**Personal Injury Contractual Liability**	The personal injury contractual liability exclusion shall be deleted.	
§ 1.13	**Certificate of Insurance**	A copy of the required Endorsements along with the Schedule of Forms and Endorsements page of the policy listing the required Endorsements as issued modifications to the policy shall be attached to the Certificate of Insurance provided by Contractor to Owner as Certificate Holder at the following address: _____.	
§ 1.12	**Prohibitions**	The following exclusions/limitations or their equivalents are **not** permitted:	
		a.	Contractual Liability Limitation ISO CG 21 39.
		b.	Amendment of Insured Contract Definition ISO CG 24 26.
		c.	Limitation of Coverage to Designated Premises or Project ISO CG 21 44.
		d.	Exclusion-Damage to Work Performed by Subcontractors On Your Behalf ISO CG 22 94 or CG 22 95.
		e.	Exclusion-Explosion, Collapse and Underground Property Damage Hazard ISO CG 21 42 or CG 21 43.
		f.	Any classification limitation.
		g.	Any construction defect completed operations exclusion.
		h.	Any endorsement modifying the employer's liability exclusion or deleting the exception to it.
		i.	Any endorsement modifying or deleting explosion, collapse or underground coverage.
		j.	Any habitational or residential exclusion.
		k.	Any insured vs. insured exclusion except named insured vs. named insured.
		l.	Any punitive, exemplary or multiplied damages exclusion.
		m.	Any subsidence exclusion.
§ 2.	**Business Auto Liability.** Contractor is to maintain business auto insurance meeting at least the following specifications.		
§ 2.1	**Minimum Limits**	The limits of liability shall be no less than $ __,000,000 per accident.	
§ 2.2	**Form**	This insurance is to be issued on the current edition of the ISO CA 00 01	
§ 2.3	**Scope**	This insurance is to coverage damages because of bodily injury or property damages caused by an accident and resulting from the ownership, maintenance or use of any auto, including owned, hired and non-owned autos.	
§ 2.4	**Additional Insureds**	Additional insured status shall be provided in favor of Owner Parties and such other persons as are designated by Owner to Contractor as additional insureds, on ISO CA 20 48 10 13.	
§ 2.5	**Waiver of Subrogation**	This insurance is to include a waiver of subrogation by insurer as to the Owner Parties and such other persons as are designated by Owner to Contractor on ISO CA 04 44 10 13.	

§ 3.	**Workers' Compensation and Employer's Liability.** Contractor is to maintain workers' compensation and employer's liability insurance meeting at least the following specifications.			
§ 3.1	**Workers' Compensation Limits**	The minimum limits of this insurance shall be no less than the statutory limits.		
§ 3.2	**Employer's Liability Limits**	The minimum limits of this insurance shall be no less than $__,000,000 each accident and disease.		
§ 3.3	**Territory**	The state in which the Work is to be performed must be listed under Item 3.A. on the Information Page of the policy.		
§ 3.4	**Scope**	This insurance is to cover liability arising out the Contractor's employment of workers and anyone for whom the contractor may be liability for workers' compensation claims. Worker's compensation insurance is required and no "alternative" form of insurance is permitted.		
§ 3.5	**Prohibitions**	Employees leased through a Professional Employment Organization ("**PEO**") are not permitted.		
§ 3.6	**Stop Gap**	Stop Gap coverage must be provided if Work is to be performed in a monopolistic state, listing the state in which Work is to be performed.		
§ 3.7	**USL&H**	United States Longshoremen and Harborworkers ("**USL&H**") coverage must be provided where such exposure exists listing the state in which Work is to be performed.		
§ 3.8	**Waiver of Subrogation**	This insurance is to include a waiver of subrogation by insurer as to the Owner Parties and such other persons as are designated by Owner to Contractor, on form WC 42 03 04.		
§ 4.	**Excess Liability.** To the extent permitted by law, if any of the required coverages are to be maintained by and through excess liability insurance, Contractor is to maintain excess liability insurance meeting at least the following specifications.			
§ 4.1	**Scope**	This insurance shall be excess over and be no less broad than all coverages and conditions described above. The policy limits required herein may be provided by a combination of primary and excess policies, but in no event shall the total limits of liability available for any one occurrence or accident by less than the amount required herein.		
§ 4.2	**Concurrency**	Such coverage shall have the same inception date as the commercial general liability and employer's liability coverages.		
§ 4.3	**Primary**	This insurance shall be primary and non-contributing liability coverage. It is the specific intent of the parties to the Agreement that all insurance held by the Owner Parties shall be excess, secondary and non-contributory.		
§ 4.4	**Drop Down Coverage**	Drop-down coverage shall be provided for reduction and/or exhaustion of underlying aggregate limits.		
§ 4.5	**Defense Costs**	This insurance is to include a duty to defend any insured.		
§ 4.6	**Waiver of Subrogation**	This insurance is to include a waiver of subrogation by insurer as to the Owner Parties and such other persons as are designated by Owner to Contractor.		
§ 4.7	**Notice**	This insurance shall be endorsed to provide a 30 days' notice of cancellation to Owner.		
§ 5.	**Professional Liability.** Contractor is to maintain Professional Liability insurance meeting at least the following specifications.			
§ 5.1	**Minimum Limits**	Limits of coverage shall be no less than:		
		a.	$ __,000,000	Each Loss
		b.	$ __,000,000	Annual Aggregate
		If a combined Contractor's Pollution Liability and Professional Liability policy is utilized, the limits shall be $__,000,000 Each Loss and Annual Aggregate.		

§ 5.2	**Scope**	Such insurance shall cover all services rendered by the Contractor and its Subcontractors under the Agreement, including but not limited to design or design/build services.		
§ 5.3	**Retroactive Date**	Any retroactive date must be effective prior to beginning of services for the Owner.		
§ 5.4	**Prohibitions**	This insurance is not permitted to include any type of exclusion or limitation of coverage applicable to claims arising from:		
		a.	Bodily injury or property damage where coverage is provided in behalf of design professionals or design/build contractors;	
		b.	Habitational or residential operations;	
		c.	Mold or microbial matter and fungus or biological substance; or	
		d.	Punitive, exemplary or multiplied damages.	
		A professional liability endorsement to a general liability policy is not acceptable.		
§ 5.5	**Term**	Policies written on a claims-made basis shall be maintained for at least __ years beyond termination of the Agreement. The purchase of an extended discovery period or an extended reporting period on a claims-made policy will not be sufficient to meet the terms of this provision.		
§ 5.6	**Waiver of Subrogation**	Contractor shall cause this insurance to be endorsed to waive all rights of subrogation in favor of Owner Parties.		
§ 5.7	**Notice**	This insurance shall be endorsed to provide a 30 days' notice of cancellation to Owner.		
§ 6.	**Pollution Liability.** Contractor is to maintain Contractor's Pollution Liability insurance meeting at least the following specifications.			
§ 6.1	**Minimum Limits**	Limits of coverage shall be no less than:		
		a.	$,000,000	Each Loss
		b.	$,000,000	Annual Aggregate
		If a combined Contractor's Pollution Liability and Professional Liability policy is utilized, the limits shall be $__,000,000 Each Loss and Annual Aggregate.		
§ 6.2	**Scope**	The policy must provide coverage for:		
		a.	The full scope of the named insured's operations (on-going and completed) as described within the scope of work for the Agreement.	
		b.	Loss arising from pollutants including but not limited to fungus, bacteria, biological substances, mold, microbial matter, asbestos, lead, silica and contaminated drywall.	
		c.	Third party liability for bodily injury, property damage, clean up expenses, and defense arising from the operations.	
		d.	Diminution of value and natural resources damages;	
		e.	Contractual liability.	
		f.	Claims arising from owned and non-owned disposal sites utilized in the performance of the Agreement.	

		Coverage extensions to the General Liability insurance policy without a separate insurance agreement for Contractors Pollution Liability insurance will not fulfill this requirement	
§ 6.3	**Additional Insured and Primary and Noncontributory**	The policy must insure contractual liability, name Owner Parties as additional insureds and such other personas as are designed by Owner to Contractor to be additional insureds, and be primary and noncontributory to all coverage available to the additional insureds.	
§ 6.4	**Retroactive Date**	If coverage is provided on a claims made basis, coverage will at least be retroactive to the earlier of the date of the Agreement or the commencement of contractor services relation to the Work.	
§ 6.5	**Prohibitions**	This insurance is not permitted to include any type of exclusion or limitation of coverage applicable to claims arising from:	
		a.	Insured vs. insured actions. However, exclusion for claims made between insured within the same economic family are acceptable.
		b.	Impaired property that has not been physically injured.
		c.	Materials supplied or handled by the named insured. However, exclusions for the sale and manufacture of products are allowed. Exclusionary language pertaining to materials supplied by the insured shall be reviewed by the certificate holder for approval.
		d.	Property damage to the work performed by the contractor.
		e.	Faulty workmanship as it relates to clean up costs.
		f.	Punitive, exemplary or multiplied damages.
		g.	Work performed by Subcontractors.
		h.	Contractual liability incurred as a result of an injury to an employee of the insured.
§ 6.6	**Term**	Completed operations coverage shall be maintained for a minimum of __ years after the completion of Work. (The extended reporting period on a claims-made based policy does not fulfill this requirement). Contractor's pollution liability insurance policies insuring a specific job shall have completed operations coverage for at least the duration of the Work plus __ years.	
§ 7.	**Subcontractor's Insurance.**		
§ 7.1	**Coverage**	Contractor shall cause each first tier subcontractor employed by Contractor to purchase and maintain insurance of the types listed above; provided, however, Employers Liability Limits on such subcontractors are not to be less than $500,000 each Accident or Disease, and such subcontractors' excess policy limit shall be no less than $1,000,000.	
§ 7.2	**Additional Insureds**	This insurance is to be endorsed with an ISO CG 20 10 07 04, or equivalent form, Additional Insured Endorsement listing the Owner Parties and such other persons as are designated by Owner to Contractor, as additional insureds.	
§ 7.3	**Waiver of Subrogation**	This insurance is to be endorsed with an ISO CG 29 88 10 93 Waiver of Transfer of Rights of Recovery Against Others Endorsement, or equivalent, to include a waiver of subrogation by insurer as to the Owner Parties, and such other persons as are designated by Owner to Contractor, as additional insureds.	
§ 7.4	**Evidence of Insurance**	Contractor shall provide Owner certificates of insurance as to each subcontractor performing Work prior to the subcontractor's entry on the Property certified to Owner as Certificate Holder at the following address: _____.	
B.	**PROPERTY INSURANCE**		
§ 1.	**Builder's Risk.** Contractor is to maintain builder's risk insurance meeting at least the following specifications; but at Owner's option, Owner may in lieu of Contractor maintaining builder's risk insurance, Owner may obtain and maintain the builder's risk insurance. If		

	Owner obtains the builder's risk insurance, the Contract Price is to be reduced by the amount of the premium and any Contractor markup cost that otherwise was included within the Contract Price.			
§ 1.1	**Amount**	Limits of coverage are to be the initial Contract Price as increased by amount of subsequent modification of the Contract Price. Coverage shall be provided in amount equal at all times to the full replacement value and cost of debris removal for any single occurrence.		
§ 1.2	**Covered Property**	Such insurance shall cover:		
		a.	All structures under construction, including retaining walls, paved surfaces and roadways, bridges, glass, foundations, footings, underground pipes and wiring, excavations, grading, backfilling or filling.	
		b.	All temporary structures (e.g., fencing, scaffolding, cribbing, false work, forms, site lighting, temporary utilities and buildings) located at the site.	
		c.	All property including materials and supplies on site for installation.	
		d.	All property including materials and supplies at other locations but intended for use at the site.	
		e.	All property including materials and supplies in transit to the site for installation by all means of transportation other than ocean transit.	
		f.	Other property for which an insured is liable regarding the project.	
§ 1.3	**Insureds**	Insureds shall include:		
		a.	Owner, Contractor, and all Loss Payees and Mortgagees as Named Insureds; and	
		b.	Subcontractors of all tiers.	
§ 1.4	**Deductibles**	Deductibles shall not exceed:		
		a.	All risks of direct damage, per Occurrence, except	$10,000
		b.	Delayed opening waiting period	5 days
		c.	Earthquake and earthquake sprinkler leakage, per Occurrence	$50,000
		d.	Flood, per Occurrence or excess of maximum available through National Flood Insurance Program	$50,000
§ 1.5	**Form**	Coverage shall be at least as broad as an unmodified ISO Special Causes of Loss form and shall include coverage for theft, collapse, flood and earthquake. All exclusions must be pre-approved by Owner. This insurance is to be written on a Completed Value, non-reporting form basis and shall be primary to any other insurance coverage available to the named insureds, with that other insurance being excess, secondary and noncontributing.		
§ 1.6	**Prohibition**	No protective safeguard warranty is permitted.		
§ 1.7	**Coverage and Minimum Sublimits**	Coverage		Minimum Sublimit

		a.	Additional expenses due to delay in completion of project (where applicable)	$_____
		b.	Agreed Value	Included without sublimit
		c.	Damage arising from error, omission or deficiency in construction methods, design, specifications, workmanship or materials, including collapse and ensuing loss	Included without sublimit
		d.	Debris removal additional limit	Included without sublimit
		e.	Earthquake and earthquake sprinkler leakage	$1,000,000
		f.	Flood, per Occurrence, excess of maximum available through National Flood Insurance Program	$1,000,000
		g.	Freezing	Included without sublimit
		h.	Mechanical breakdown including hot and cold testing (where applicable)	Included without sublimit
		i.	Occupancy pre-completion	Included
		j.	Ordinance or law	Included without sublimit
		k.	Pollutant clean-up and removal	$1,000,000
		l.	Preservation of property	Included without sublimit
		m.	Replacement cost	Included without sublimit
		n.	Theft	Included without sublimit
§ 1.8	**Occupancy**	The termination of coverage provision shall be endorsed to permit occupancy of the coverage property being constructed.		
§ 1.9	**Term and Termination**	This insurance shall be maintained in effect, unless otherwise provided for in the Agreement, until the earliest of the following dates:		
		a.	The date on which all persons and organizations who are insureds under the policy agree that it shall be terminated;	
		b.	The date of final payment, as provided for in the Agreement; or	
		c.	The date on which the insurable interests in the Covered Property of all insureds other than Contractor have ceased.	

§ 1.10	**Waiver of Subrogation**	This insurance shall include a waiver of subrogation by insurer as to the insureds.
§ 1.11	**Notice**	This insurance shall be endorsed to provide 30 days' notice of cancellation to Owner.
§ 2.	**Contractor's Equipment.**	
§ 2.1	**Amount**	Contractor shall obtain and maintain property insurance on Contractor's equipment and personal property insured to 100% of its replacement cost. This insurance will have an equipment floater.
§ 2.2	**Waiver of Subrogation**	This insurance will be endorsed to waive subrogation in favor of Owner Parties.
C. BONDS		
§ 1.	**General**	Contractor is required to arrange and furnish separate performance and payment bonds, each for the full amount of the Guaranteed Maximum Price plus Contractor's Fee guaranteeing the faithful performance of all of the provision of the Agreement as well as payment to all persons for labor and material used in the performance of the Agreement. The bonds shall be executed by a surety company acceptable to Owner, on a form acceptable to Owner, and shall become a part of the Agreement. Owner may withhold payments on account until such time as said bonds have been furnished and accepted. No change, alteration or modification in the terms and conditions of the Agreement, or in the terms or manner of payment shall in any way exonerate or release, in whole or in part, any surety on any bond furnished on behalf of Contractor. The cost of the bonds is included in the Contract Price.
§ 2.	**Payment Bond**	The Payment Bond is to conform to the following requirements.
§ 2.1	**Form**	The Payment Bond is to be in statutory form. The AIA form is not acceptable.
§ 2.2	**Coverage**	The Payment Bond is to include coverage for consequential and delay damages due to Contractor's default.
§ 2.3	**Rating**	The issuer must be at least *a* Best's Key Rating Guide A/VII company and listed on the United States Department of the Treasury's List of Acceptable Sureties and Reinsurers (the "T" list) and duly licensed and authorized to issue surety bonds in Texas..
§ 2.4	**Term**	The Payment Bond is to be in effect for the period required by the Texas Property Code.
§ 2.5	**Multiple Obligees**	The Payment Bond is to name as additional obligees such persons as designated by the Owne, including its lender.
§ 2.6	**Recorded**	The Payment Bond and all required attachments (issuer's agent's power of attorney and memorandum of the Agreement) is to be recorded in the County's Official Public Records.
§ 3.	**Performance Bond**	The Performance Bond is to conform to the following requirements.
§ 3.1	**Form**	The Performance Bond is to be on the AIA form or equivalent. The Performance Bond is to cover Contractor's express warranty and obligations to correct defective Work arising under the Agreement.
§ 3.2	**Rating**	The issuer must be at least a Best's Key Rating Guide A/VII company and listed on the United States Department of the Treasury's List of Acceptable Sureties and Reinsurers (the "T" list) and duly licensed and authorized to issue surety bonds in Texas.
§ 3.3	**Extended Coverages**	The Performance Bond is to cover risk of contract penalties and delay damages.
§ 3.4	**Term**	The Performance Bond is to be in effect for a period of not less than one year following Final Completion.
§ 3.5	**Multiple Obligees**	The Performance Bond is to name as additional obligees such persons as designated by Owner including its lender.

B. GENERAL INSURANCE REQUIREMENTS

1. **Definitions.** For purposes of this Exhibit:

a. Agreement. "**Agreement**" means the Commercial Construction Contract – Guaranteed Maximum Price executed by Owner and Contractor.

b. Owner Parties. "**Owner Parties**" means (a) _____ ("**Owner**"), (b) the project manager, (c) any lender whose loan is secured by a lien against the Property, (d) their respective shareholders, members, partners, joint venturers, affiliates, subsidiaries, successors and assigns, (e) any directors, officers, employees, or agents of such persons or entities, and (f) others as required by the Agreement.

c. Contractor. "**Contractor**" means _____ and Subcontractors of any tier.

d. ISO. "**ISO**" means Insurance Services Office.

2. **Policies.**

a. Insurer Qualifications. All insurance required to be maintained by Contractor must be issued by carriers having a Best's Rating of A or better, and a Best's Financial Size Category of VIII, or better, and/or Standard & Poor Insurance Solvency Review A-, or better, and authorized to engage in the business of insurance in the State in which the Improvements are located.

b. No Waiver. Failure of Owner to demand such certificates or other evidence of full compliance with these insurance requirements or failure of Owner to identify a deficiency from evidence that is provided shall not be construed as a waiver of Contractor's obligation to maintain such insurance. Commencement of Work without provision of the required certificate of insurance, evidence of insurance and/or required endorsements, or without compliance with any other provision of this Contract, shall not constitute a waiver by any Owner Party of any rights. The Owner shall have the right, but not the obligation, of prohibiting the Contractor or any Subcontractor from performing any Work until such certificate of insurance, evidence of insurance and/or required endorsements are received and approved by the Owner.

c. Delivery Deadlines. Contractor shall provide Owner within 10 days of Owner's request with certified copies of all insurance policies. Renewal policies, if necessary, shall be delivered to the Owner prior to the expiration of the previous policy.

d. Waiver of Subrogation. All policies maintained by Contractor, whether required herein or not, shall contain a waiver of subrogation in favor of the Owner Parties.

e. Notice. All policies maintained by Contractor shall provide for 30 days' prior written notice of cancellation to Owner.

f. Compliance With Laws. If any insurance requirements are deemed to violate any law, statute or ordinance, the insurance requirements shall be reformed to provide the maximum amount of protection to Owner as allowed under the law.

3. **Limits, Deductibles and Retentions.**

a. Coverage Limits. The limits of liability may be provided by a single policy of insurance or by a combination of primary and excess policies, but in no event shall the total limits of liability available for any one Occurrence or accident be less than the amount required herein.

b. Deductible and Retention Limits. No deductible or self-insured retention shall exceed $_____ without the prior written approval of the Owner, except as otherwise specified herein. All deductibles and retentions shall be paid by, assumed by, for the account of, and at the Contractor's sole risk. The Contractor shall not be reimbursed for same.

c. Policy Limits. "**Limits**" set out in these specifications are the minimum dollar amount of insured coverage for the risk or peril specified. If Contractor or its contractors maintain greater limits, then these specifications shall not limit the amount of recovery available to Owner and Owner the limits specified below as the minimum limits are increased to the greater limits.

d. Post Completion Coverage. With respect to the insurance to be maintained after final payment to Contractor, an additional certificate evidencing such coverage shall be provided to Owner with final application for payment if the prior certificate has expired, and thereafter upon renewal or replacement of such insurance until the expiration of the time period for which such insurance must be maintained.

e. Use of the Owner's Equipment. The Contractor, its agents, employees, Subcontractors or suppliers shall use the Owner's equipment only with express written permission of the Owner's designated representative and in accordance with the Owner's terms and condition for such use. If the Contractor or any of its agents, employees, Subcontractors or suppliers utilize any of the Owner's equipment for any purpose, including machinery, tools, scaffolding, hoists, lifts or similar items owned, leased or under the control of the Owner, the Contractor shall defend, indemnify and be liable to the Owner Parties for any and all loss or damage which may arise from such use.

4. **Forms.**

a. Approved Revisions and Substitutions. If the forms of policies, endorsements, certificates, or evidence of insurance required by these specifications are superseded or discontinued, Owner will have the right to require other equivalent forms.

b. Approved Forms. Any policy or endorsement forms other than a form specified in this Exhibit must be approved in advance by Owner.

c. Compliance with Laws. If any additional insured requirements are deemed to violate any law, statute or ordinance, the additional insured requirements, including any additional insured policy provision or endorsements procured pursuant to the Agreement, shall be reformed to provide the maximum amount of protection to the Owner Parties as allowed under the law.

5. **Evidence of Insurance.** Insurance must be evidenced as follows:

a. Form. Liability insurance: ACORD™ Form 25 Certificates of Liability Insurance for liability coverages. Property Insurance: ACORD™ Form 28 Evidence of Commercial Property Insurance for property coverages.

b. Delivery Deadlines. Evidence to be delivered to Owner prior to entry on the Property and thereafter at least 30 days prior to the expiration of current policies or on replacement of each certified coverage and within 10 days of Owner's request for an updated certificate.

c. Certificate Requirements. Certificates must:

(1) Insured. State the insured's name and address.

(2) Insurer. State the name of each insurance company affording each coverage, policy number of each coverage, policy dates of each coverage, all coverage limits and sublimits, if any, by type of coverage, and show the signature of the authorized representative signing the certificate on behalf of the insurer.

(3) Additional Insured Status and Subrogation Waiver. Specify the additional insured status and waivers of subrogation as required by these specifications.

(4) Primary Status. State the primary and non-contributing status required herein.

(5) Deductibles and Self-Insured Retentions Stated. State the amounts of all deductibles and self-insured retentions.

(6) Copy of Endorsements and Policy Declaration Page. Be accompanied by certified copies of all required endorsements and policy declaration page reflecting issuance of the endorsements.

(7) Notices. Be accompanied by insurer certified copy of notice of cancellation endorsement providing that 30 days' notice of cancellation and material change will be sent to the certificate holder.

(8) Certificate Holder. Be addressed to the Owner as the certificate holder and show Owner's correct address. A separate certificate is to be addressed and delivered to Owner's lender.

(9) Producer. State the producer of the certificate with correct address and phone number listed.

(10) Authorized Representative. Be executed by a duly authorized representative of the insurers.

d. Suspension. Owner shall have the right, but not the obligation, of suspending Contractor's services, without an increase in the sum payable by Owner to Contractor due to such suspension, until such certificates or other evidence that the required insurance has been placed in compliance with these requirements is received and approved by Owner.

6. **Contractor Insurance Representations to Owner Parties.**

a. Minimum Requirements. The insurance coverages required herein (1) represent Owner Parties' minimum requirements and are not to be construed to void or limit the Contractor's indemnity obligations as contained in the Agreement nor represent in any manner a determination of the insurance coverages the Contractor should or should not maintain for its own protection; and (2) are being, or have been, obtained by the Contractor in support of the Contractor's liability and indemnity obligations under this Contract. Irrespective of the requirements as to insurance to be carried as provided for herein, the insolvency, bankruptcy or failure of any insurance company carrying insurance of the Contractor, or the failure of any insurance company to pay claims accruing, shall not be held to affect, negate or waive any of the provisions of the Agreement.

b. Defaults. Failure to obtain and maintain the required insurance shall constitute a material breach of, and default under, the Agreement. If the Contractor shall fail to remedy such breach within five business days after notice by the Owner, the Contractor will be liable for any and all costs, liabilities, damages and penalties resulting to the Owner Parties from such breach, unless a written waiver of the specific insurance requirement is provided to the Contractor by the Owner. In the event of any failure by the Contractor to comply with the provisions of this Contract, the Owner may, without in any way compromising or waiving any right or remedy at law or in equity, on notice to the Contractor, purchase such insurance, at the Contractor's expense, provided that the Owner shall have no obligation to do so and if the Owner shall do so, the Contractor shall not be relieved of or excused from the obligation to obtain and maintain such insurance amounts and coverages.

c. Survival. This Exhibit is an independent contract provision and shall survive the termination or expiration of the Agreement.

9. **RELEASE AND WAIVER.** TO THE EXTENT PERMITTED BY LAW, EACH OF CONTRACTOR AND OWNER (THE "**RELEASING PARTY**") RELEASES AND WAIVES ANY CLAIMS IT MAY HAVE AGAINST THE OTHER PARTY OR ITS PARTNERS, OFFICERS, DIRECTORS, EMPLOYEES OR AGENTS (THE "**RELEASED PERSONS**") FOR BUSINESS INTERRUPTION OR DAMAGE TO PROPERTY SUSTAINED BY THE RELEASING PARTY AS THE RESULT OF ANY ACT OR OMISSION OF THE RELEASED PERSON IN ANY WAY CONNECTED WITH ANY LOSS COVERED BY INSURANCE, WHETHER REQUIRED HEREIN OR NOT, OR WHICH SHOULD HAVE BEEN COVERED BY INSURANCE REQUIRED HEREIN, INCLUDING THE DEDUCTIBLE AND UNINSURED

PORTION THEREOF, MAINTAINED OR REQUIRED TO BE MAINTAINED BY THE RELEASING PARTY PURSUANT TO THE AGREEMENT. THE WAIVER OF CLAIMS CONTAINED IN THIS SECTION (A) WILL SURVIVE THE COMPLETION OF THE WORK OR THE TERMINATION OF THE AGREEMENT AND (B) WILL APPLY **EVEN IF THE LOSS IS CAUSED IN WHOLE OR IN PART BY THE ORDINARY NEGLIGENCE OR STRICT LIABILITY OF THE RELEASED PERSONS** BUT WILL NOT APPLY TO THE EXTENT A LOSS OF DAMAGE IS CAUSED BY THE GROSS NEGLIGENCE OR WILLFUL MISCONDUCT OF THE RELEASED PERSONS.

10. Insurance Requirements of Contractor's Subcontractors.

a. Coverage. Insurance similar to that required of the Contractor shall be provided by all Subcontractors (or provided by the Contractor on behalf of Subcontractors) to cover operations performed under any subcontract agreement. The Contractor shall be held responsible for any modification in these insurance requirements as they apply to Subcontractors. The Contractor shall maintain certificates of insurance from all Subcontractors containing provisions similar to those listed herein (modified to recognize that the certificate is from Subcontractor) enumerating, among other things, the waivers of subrogation, additional Insured status, and primary liability as required herein, and make them available to the Owner upon request.

b. ALLOCATION OF RISK. THE CONTRACTOR IS FULLY RESPONSIBLE FOR LOSS AND DAMAGE TO ITS PROPERTY ON THE SITE, INCLUDING TOOLS AND EQUIPMENT, AND SHALL TAKE NECESSARY PRECAUTIONS TO PREVENT DAMAGE TO OR VANDALISM, THEFT, BURGLARY, PILFERAGE AND UNEXPLAINED DISAPPEARANCE OF PROPERTY. ANY INSURANCE COVERING THE CONTRACTOR'S OR ITS SUBCONTRACTOR'S PROPERTY SHALL BE THE CONTRACTOR'S AND ITS SUBCONTRACTOR'S SOLE AND COMPLETE MEANS OR RECOVERY FOR ANY SUCH LOSS. TO THE EXTENT ANY LOSS IS NOT COVERED BY SAID INSURANCE OR SUBJECT TO ANY DEDUCTIBLE OR CO-INSURANCE, THE CONTRACTOR SHALL NOT BE REIMBURSED FOR SAME. SHOULD THE CONTRACTOR OR ITS SUBCONTRACTORS CHOOSE TO SELF-INSURE THIS RISK, IT IS EXPRESSLY AGREED THAT THE CONTRACTOR HEREBY WAIVES, AND SHALL CAUSE ITS SUBCONTRACTORS TO WAIVE, ANY CLAIM FOR DAMAGE OR LOSS TO SAID PROPERTY IN FAVOR OF THE OWNER PARTIES.

Exhibit E

Contractor Bills-Paid Affidavit

Basic Information

Date:

Owner:

Owner's Mailing Address:

Contractor:

Contractor's Mailing Address:

Affiant: [**include relationship to contractor**]

Affiant's Mailing Address:

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.

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.

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

Exhibit F

Subcontractor Bills-Paid Affidavit

Basic Information

Date:

Owner:

Owner's Mailing Address:

Subcontractor:

Subcontractor's Mailing Address:

Contractor:

Contractor's Mailing Address:

Affiant: [**include relationship to subcontractor**]

Affiant's Mailing Address:

Property: [**include legal description**]

Improvements:

Affiant swears individually and on behalf of Subcontractor 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 Subcontractor.

2. Affiant understands that Owner and Contractor have required this affidavit as a condition of payment for labor or materials used in construction of the Improvements.

3. Subcontractor has paid each of Subcontractor's subcontractors, laborers, and materialmen in full for all labor and materials provided to Owner or Contractor or to Subcontractor 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.

Subcontractor warrants and represents that the following specified bills or classes of bills will be paid by Subcontractor from the funds paid to Subcontractor by Contractor or Owner in reliance on this affidavit:

Name of payee or description of class:

Amount:

Repeat above information as needed.

Include the following if applicable.

Subcontractor agrees to indemnify and hold Owner and Contractor 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

Exhibit G

This waiver and release is based on the form found in Tex. Prop. Code § 53.284(b). If a contractor (or other potential lien claimant) is required to execute a waiver and release in exchange for or to induce 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 read as follows.

Conditional Partial Release During Construction

Project:

Job No.:

On receipt by the signer of this document of a check from [**name of maker of check**] in the sum of $[**amount**] payable to [**name[s] of payee[s] 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 [**name of owner**] located at [**specify location**] to the following extent: [**specify job description**].

This release covers a progress payment for all labor, services, equipment, or materials furnished to the property or to [**name of person with whom signer contracted**] as indicated in the attached statement[s] or progress payment request[s], except for unpaid retention, pending modifications and changes, or other items furnished.

Before any recipient of this document relies on this document, the recipient should verify evidence of payment to the signer.

The signer warrants that the signer has already paid or will use the funds received from this progress payment to promptly pay in full all of the signer's laborers, subcontractors, materialmen, and suppliers for all work, materials, equipment, or services provided for or to the above-referenced project in regard to the attached statement[s] or progress payment request[s].

_____

Date

[**Company name**]

By _____

[**Name and title**]

Exhibit H

This waiver and release is based on the form found in Tex. Prop. Code § 53.284(c). If a contractor (or other potential lien 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 read as follows. The waiver and release must include the notice at the top of the document.

Unconditional Partial Release During Construction

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.

Project:

Job No.:

The signer of this document has been paid and has received a progress payment in the sum of $[**amount**] for all labor, services, equipment, or materials furnished to the property or to [**name of person with whom signer contracted**] on the property of [**name of owner**] located at [**specify location**] to the following extent: [**specify job description**]. The signer therefore waives and releases any mechanic's lien right, any right arising from a payment bond that complies with a state or federal statute, any common-law payment bond right, any claim for payment, and any rights under any similar ordinance, rule, or statute related to claim or payment rights for persons in the signer's position that the signer has on the above-referenced project to the following extent:

This release covers a progress payment for all labor, services, equipment, or materials furnished to the property or to [**name of 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 _____
[**Name and title**]

Exhibit I

This waiver and release is based on the form found in Tex. Prop. Code § 53.284(d). If a contractor (or other potential lien claimant) is required to execute a waiver and release in exchange for or to induce 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 read as follows.

Conditional Final Release

Project:

Job No.:

On receipt by the signer of this document of a check from [**name of maker of check**] in the sum of $[**amount**] payable to [**name[s] of payee[s] 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 [**name of owner**] located at [**specify location**] to the following extent: [**specify job description**].

This release covers the final payment to the signer for all labor, services, equipment, or materials furnished to the property or to [**name of person with whom signer contracted**].

Before any recipient of this document relies on this document, the recipient should verify evidence of payment to the signer.

The signer warrants that the signer has already paid or will use the funds received from this final payment to promptly pay in full all of the signer's laborers, subcontractors, material-

men, and suppliers for all work, materials, equipment, or services provided for or to the above-referenced project up to the date of this waiver and release.

_____
Date

[**Company name**]

By _____
[**Name and title**]

Exhibit J

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.

Contractor [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.

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.

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

Exhibit K

This form may be used as written by a subcontractor or supplier under Tex. Prop. Code § 53.085.

Subcontractor [Final] Bills-Paid Affidavit

Date:

Owner:

Owner's Mailing Address: [**include county**]

Subcontractor:

Subcontractor's Mailing Address: [**include county**]

Contractor:

Contractor's Mailing Address: [**include county**]

Affiant: [**include relationship to subcontractor**]

Affiant's Mailing Address: [**include county**]

Property: [**include legal description**]

Improvements:

Affiant swears individually and on behalf of Subcontractor 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 Subcontractor.

2. Affiant understands that Owner and Contractor have required this affidavit as a condition of payment for labor or materials used in construction of the Improvements.

3. Subcontractor has paid each of Subcontractor's suppliers and sub-subcontractors, laborers, and materialmen in full for all labor and materials provided to Owner or Contractor or to Subcontractor for construction of the Improvements, excepting only the amounts owed to the persons identified below:

List all sub-subcontractors, suppliers, laborers, and materialmen and amounts owed to each. If there are no unpaid sub-subcontractors, suppiers, laborers, or materialmen, state "None."

Name:

Address:

Telephone number:

Amount owed:

Repeat above information as needed.

Include the following if applicable.

Subcontractor warrants and represents that the following specified bills or classes of bills will be paid by Subcontractor from the funds paid to Subcontractor by Contractor or Owner in reliance on this affidavit:

Name of payee or description of class:

Amount:

Repeat above information as needed.

Include the following if applicable.

Subcontractor 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

Exhibit L

This waiver and release is based on the form found in Tex. Prop. Code § 53.284(e). If a contractor (or other potential lien 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 read as follows. The waiver and release must include the notice at the top of the document.

Unconditional Release on Final Payment

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.

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 [**name of person with whom signer contracted**] on the property of [**name of owner**] located at [**specify location**] to the following extent: [**specify 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, 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 _____

[**Name and title**]

[Reserved]

Chapter 20

Contractual Mechanic's Lien Documents

Forms

Chapter 20

Contractual Mechanic's Lien Documents

§ 20.1 General Considerations

§ 20.1:1 Use of Forms

This chapter outlines common transactions for the creation and documentation of mechanic's liens on homesteads.

The Texas Constitution distinguishes between "work and material used in constructing new improvements" and "work and material used to repair or renovate existing improvements" on homestead property. Several requirements are added if the contractor or lender is obtaining a lien for repair or renovation of a homestead. *See* Tex. Const. art. XVI, § 50(a)(5)(A)–(D). This chapter contains forms suggested for use in new construction projects and for repair or renovation construction. The forms include a mechanic's lien contract (form 20-1), a mechanic's lien note (form 20-2), and closing certificates (forms 20-6 and 20-7), which confirm owner compliance with the homestead requirements for transactions involving new construction or renovation or repair of existing homesteads.

Section 20.6 below suggests other forms that may be necessary in various transactions, and chapter 12 in this manual discusses truth-in-lending notices and disclosure statements, which are required in several kinds of transactions. Chapter 18 contains a residential construction contract form. The forms and procedures contained in chapter 18 must be reviewed to ensure compliance with the terms of the residential construction contract, the loan disclosure requirements, and the closing procedure requirements of sections 53.255 through 53.260 of the Texas Property Code, although failure to follow these requirements for residential contracts might not invalidate the lien securing the residential construction loan. *See* Tex. Prop. Code §§ 53.255(c), 53.256(c), 53.257(c), 53.258(e). The residential construction contract (form 18-4) should be referenced in the mechanic's lien contract (form 20-1). The residential construction contract addresses many construction contract terms not addressed by the mechanic's lien contract.

The forms in this chapter are designed to function interdependently to create and document liens arising from the credit financing of building a home located on homestead property. The choice of which forms to use and which optional provisions to include in the forms for a given transaction depends on several factors, such as which party is extending credit, who owns the property, whether the project is for construction of a new residence or is for renovation or repair of an existing homestead, and whether the lien is primary or subordinate. The mechanic's lien note, form 20-2, should not be used without the supporting documents suggested in this chapter.

If the construction loan does not affect homestead property, attorneys usually use the deed of trust (see chapter 8) and note (see chapter 6) instead of the mechanic's lien documents.

If the mechanic's lien contract is used for new improvements to a homestead, the property owner may not be able to refinance any payments made to the contractor or any amount owed to the contractor (other than with a home equity loan) if construction begins before appropriate documentation is executed, acknowledged, and filed. If the owner intends to finance

or refinance any part of the consideration, the appropriate documents and procedures prescribed in this chapter must be implemented before construction begins. Tex. Const. art. XVI, § 50(a)(5); Tex. Prop. Code § 53.254.

Caution: Only fixed-rate, simple interest may be charged in transactions using these forms. Mechanic's lien transactions face the cumulative and complex restrictions imposed by federal and state consumer protection laws, Texas homestead laws, and the Texas Finance Code. See sections 20.1:2 and 20.1:3 below. For this reason, transactions documented by the forms in this chapter must not use add-on interest or variable interest rates, either of which would require significant revision of the documents.

§ 20.1:2 Homestead Considerations

The Texas homestead exemption generally does not preclude a contractual lien for improvements from attaching to the homestead. However, contractors, laborers, and materialmen must create such a lien in strict compliance with constitutional, statutory, and regulatory formalities. *Kendall Builders, Inc. v. Chesson*, 149 S.W.3d 796, 807 (Tex. App.—Austin 2004, pet. denied).

Source of Requirements for Contractual Liens for Improvements: The basic requirements for all contractual liens for improvements to the homestead are found at Tex. Const. art. XVI, § 50(a)(5). These constitutional requirements are in certain cases supplemented by additional requirements found at Tex. Prop. Code §§ 41.001, 53.254. Additionally, the Texas Finance Commission has issued regulations interpreting these constitutional and statutory formalities found at 7 Tex. Admin. Code ch. 152.

The formalities necessary for a valid contractual lien for improvements against the homestead are different depending on whether the contract is for new improvements or for repairs or renovations to existing improvements. Tex. Const. art. XVI, § 50(a)(5). Additionally, statutory requirements differ depending on whether the property improved is a business or residential homestead. *See* Tex. Prop. Code § 53.251(a). Practitioners must be attentive to these variables when drafting a contractual lien for improvements made to the homestead.

Contract in Writing: All contractual liens for improvements to the homestead must be created by a contract in writing between the general contractor and the homestead owner. Tex. Const. art. XVI, § 50(a)(5). The contract must create direct privity between the contractor and the homestead owner. Tex. Att'y Gen. Op. No. JC-0386 (2001). The contract must be bona fide. A sham contract under which the putative contractor receives no consideration or performs no services will not create a valid lien against the homestead. *See In re Jeter*, 48 B.R. 404, 408 (Bankr. N.D. Tex. 1985).

Contract Must Set Forth Terms of Agreement: A contractual lien for improvements to a residential homestead must set forth the terms of the agreement between the owner and the contractor. This requirement is not applicable to improvements made to a business homestead. Tex. Prop. Code §§ 41.001(b)(3), 53.254(a). The written contract between the owner and the contractor must at a minimum recite (1) the principal amount of the loan, (2) the interest rate, (3) the date that the final payment is due, (4) a description of the property, (5) a general description of the materials to be supplied or labor performed, and (6) that a lien is granted to secure payment. *In re Burnett*, 120 B.R. 839, 841–42 (Bankr. N.D. Tex. 1990). The contract need only provide the general nature of the improvements. It is not necessary that the contract contain a detailed itemized statement of the work performed or materials furnished. *Gomez v. Riddle*, 334 S.W.2d 197, 200 (Tex. App.—San Antonio 1960, no writ).

Contract Must Be Executed before Commencement of Work: A contractual lien for improvements to a homestead must be executed before the contractor furnishes any materials or performs any labor. Tex. Prop. Code §§ 41.001(b)(3), 53.254(b).

Contract Must Be Executed by Both Spouses: Generally, in the case of a family homestead, a contractual lien for improvements must be executed by both spouses in the manner required for the sale or conveyance of the homestead. Tex. Const. art. XVI, § 50(a)(5)(A); Tex. Prop. Code §§ 41.001(b)(3), 53.254(c). This joinder requirement apparently does not apply to new improvements made to a business homestead. *See Spradlin v. Jim Walter Homes*, 34 S.W.3d 578, 580–81 (Tex. 2000). *See also* Tex. Prop. Code §§ 41.001(b)(3), 53.251(a), 53.254(c).

Required Five-Day Waiting Period: If the extension of credit is to secure the repair or renovation of existing improvements to the homestead, whether with a contractor or third-party lender, the owner must complete a credit application for the extension of credit, and a five-day waiting period must expire between the date that the homeowner makes application for the extension of credit and the date that the contractual lien is executed. Any lien instrument executed before the expiration of the five-day waiting period is invalid. Tex. Const. art. XVI, § 50(a)(5)(B). To count the five days, the day after the application for the extension of credit is made is day one. If the fifth calendar day falls on a Sunday or a federal legal public holiday, the contractual lien may not be executed until the next calendar day that is not a Sunday or a federal legal public holiday. 7 Tex. Admin. Code § 152.9.

The five-day waiting period is not required if the work or materials are necessary to complete immediate repairs to conditions on the homestead property that materially affect the health and safety of the owner or person residing in the homestead and the owner acknowledges this exigency in writing. Tex. Const. art. XVI, § 50(a)(5)(B). This written acknowledgment must at a minimum (1) describe the conditions of the homestead property, (2) describe how the conditions of the homestead property affect the health and safety of the owner or person residing in the homestead, and (3) state that the owner is waiving the five-day waiting period required by Tex. Const. art. XVI, § 50(a)(5)(B). Printed forms for this purpose are prohibited. 7 Tex. Admin. Code § 152.13.

Required Preclosing Disclosures: When the owner obtains third-party financing for the construction of improvements to a residential homestead, the lender must deliver to the owner all documentation relating to the closing of the loan not later than one business day before the date of the closing. If a bona fide emergency or other good cause exists and the lender obtains the written consent of the owner, the lender may provide the documentation or modify previously provided documentation on the date of closing. Tex. Prop. Code § 53.257(a).

In addition, the lender must deliver to the owner before the date of closing the extensive statutory disclosure specified at Tex. Prop. Code § 53.255. If a bona fide emergency or other good cause exists and the lender obtains the written consent of the owner, the lender may provide the required statutory disclosure at closing. The lender must retain a signed and dated copy of this disclosure with the closing documents for the loan. Tex. Prop. Code § 53.257(b).

A failure by the lender or contractor to provide these disclosures does not invalidate the lien. Tex. Prop. Code §§ 53.255(c), 53.257(c).

Right of Rescission: A contract for work or materials for repairs or renovations to existing homestead improvements must provide that the contract may be rescinded by the owner or the owner's spouse without penalty within three cal-

endar days after execution of the contract by the parties. Tex. Const. art. XVI, § 50(a)(5)(C). To count the three days, the day after the contract is executed is day one. If the third calendar day falls on a Sunday or a federal legal public holiday, the right of rescission is extended to the next calendar day that is not a Sunday or a federal legal public holiday. 7 Tex. Admin. Code § 152.11.

The three-day right of rescission is not required if the work or materials are necessary to complete immediate repairs to conditions on the homestead property that materially affect the health and safety of the owner or person residing in the homestead and the owner of the homestead acknowledges this exigency in writing. Tex. Const. art. XVI, § 50(a)(5)(C). This written acknowledgment and waiver must at a minimum (1) describe the conditions of the homestead property, (2) describe how the condition of the homestead property affects the health and safety of the owner or person residing in the homestead, and (3) state that the owner is waiving the three-day right of rescission. Printed forms for this purpose are prohibited. 7 Tex. Admin. Code § 152.13.

Restriction on Place of Closing: A contractual lien for improvements to repair or renovate existing improvements on the homestead must be executed in the offices of a third-party lender making the extension of credit, an attorney at law, or a title company. Tex. Const. art. XVI, § 50(a)(5)(D). There is no exception to this requirement for exigent circumstances as with the five-day waiting period or right of rescission.

Required Disclosures: A contract for improving an existing residential homestead must contain the following conspicuous disclosure next to the owner's signature line:

> IMPORTANT NOTICE: You and your contractor are responsible for meeting the terms and conditions of this contract. If you sign this contract and you fail to meet the terms and conditions of this contract, you may lose your legal ownership rights in your home. KNOW YOUR RIGHTS AND DUTIES UNDER THE LAW.

Failure to include the notice constitutes an actionable violation of the Texas Deceptive Trade Practices Act. Tex. Prop. Code § 41.007.

§ 20.1:3 Usury Laws and Regulations

The usury statutes and regulations that apply to a loan vary with the type of loan and lender. Regardless of the structure of the transaction, the creditor must comply with the Truth in Lending Act, 15 U.S.C. §§ 1601–1667f.

Third-Party Lenders and First Liens: State usury law has been preempted by federal statute for first liens on residential real property. This preemption eliminates the rate ceiling for this type of loan for most creditors, including all federally insured financial institutions and other creditors that make or invest in residential real property loans aggregating more than $1 million per year. 12 U.S.C. §§ 1735f–7, 1735f–7a; *Seiter v. Veytia*, 756 S.W.2d 303 (Tex. 1988). *See also* Tex. Fin. Code § 302.103 (late charges are interest for purpose of federal preemption). Other third-party lenders may rely on Code section 302.001 as the usury law.

Texas usury law is located primarily in title 4 of the Texas Finance Code. The maximum legal interest rate, except as otherwise fixed by law, is set at 10 percent. Tex. Fin. Code § 302.001. Floating interest rate ceilings for written contracts are established by chapter 303 of the Code. Tex. Fin. Code ch. 303.

Contractor–Creditors and First Liens: A contractor–creditor may be limited to Code section 302.001 as the applicable usury law for a complete structure.

§ 20.1:4 Other Consumer Protection Laws

Federal Disclosure Laws and Regulations: Federal consumer credit laws require disclosures designed to allow informed decision making. The most important of these are the Truth in Lending Act, 15 U.S.C. §§ 1601–1667f, and Federal Reserve Board Regulation Z, 12 C.F.R. pt. 226, both of which require certain creditors to disclose loan terms and rights of rescission to potential borrowers. See chapter 12 in this manual for forms and further discussion.

Other federal consumer protection laws that might affect mechanic's lien transactions include—

1. The Real Estate Settlement Procedures Act, 12 U.S.C. §§ 2601–2617, and Housing and Urban Development Regulation X, 24 C.F.R. pt. 3500, both of which apply primarily to closings for purchases of residential property designed for occupancy by one to four families involving federally related mortgage loans.
2. The Federal Trade Commission anti-holder-in-due-course rule, 16 C.F.R. pt. 433. A prescribed notice must be included in the instrument evidencing the debt if the contractor either (a) receives the proceeds of a loan made to the owner by a third-party creditor for the acquisition of goods or services by sale or lease and either refers customers to the third-party creditor or is affiliated with the third-party creditor by common control, contract, or business arrangement; or (b) extends credit to the owner in connection with a "credit sale" under the Truth in Lending Act or Regulation Z. 16 C.F.R. §§ 433.1(d), (e), (i), 433.2.

   The contractor and the third-party creditor have a referral relationship if the contractor cooperates with the third-party creditor to channel customers to the third-party creditor on a continuing basis. A referral relationship may arise from a pattern of cooperative activity directly related to the arranging of financing. To fall within the rule, the contractor and the third-party creditor must be engaged in cooperative or concerted activity conducted to channel consumers to the third-party creditor, and this conduct must occur on a continuing basis. Once a referral relationship is established, the instruments evidencing debts owed to the third-party creditor arising out of referrals from the contractor must include the prescribed notice. However, a referral relationship does not include situations in which the contractor merely suggests credit sources to its customers or sends its customers to a third-party creditor without the express or implied agreement of the creditor or without any concerted or cooperative activity between the contractor and the creditor.

   The contractor and the third-party creditor may be affiliated by common control. For example, common control exists if two companies are owned by a holding company or by substantially the same individuals or if one is a subsidiary of the other. The contractor and the third-party creditor may also be affiliated by a contract or business arrangement, which includes any agreement (oral or written), understanding, procedure, course of dealing, or arrangement between the contractor and the creditor to engage in cooperative or concerted activity in connection with the contractor's sale to customers or the financing thereof. However, the creditor can issue checks

payable jointly to the contractor and the owner, and the creditor can cooperate with the contractor to perfect the mechanic's lien without creating an affiliation by contract or other arrangement under the FTC rule.

If the contractor and the third-party creditor are not affiliated by common control or by a contract or business arrangement and if the contractor does not refer customers to the third-party creditor, FTC notices are not required and may be deleted from the forms. Federal Trade Commission Statement of Enforcement Policy, 41 Fed. Reg. 34,594 (1976).

3. Right of Rescission. The contractor may need to comply with the Federal Trade Commission rule on cooling-off periods for door-to-door sales. Exceptions exist if the agreement is entered into at the contractor's place of business or under prior negotiations during a visit by the owner to the contractor's fixed, permanent business establishment, at which the contractor's services are offered for sale on a continual basis. 16 C.F.R. pt. 429.

4. The Federal Trade Commission rule on credit practices, 16 C.F.R. pt. 444.

Texas Consumer Protection Law: The Texas Constitution provides several consumer protection provisions related to construction on homestead property. These requirements are described in this chapter specifically in section 20.1:2 above. Forms 20-6 and 20-7 in this chapter are certificates of closing used to confirm compliance with these requirements.

Texas Consumer Protection Laws for Home Solicitations: The Texas Home Solicitations Transaction Act may apply if the consumer's obligation is entered into at a location other than the contractor's place of business. If the Act applies, additional notices are required. Tex. Bus. & Com. Code ch. 601. See the notice of cancellation attached to the mechanic's lien contract (form 20-1).

Texas Finance Code Chapter 343—Home Loan Requirements: In addition to the foregoing, the transactions described in this chapter may be subject to the disclosure and other requirements of chapter 343 of the Texas Finance Code. See sections 10.14 through 10.14:3 in this manual.

Confidentiality Notice: Instruments, meaning "a deed, deed of trust, or any other record recorded by a county clerk related to real property, including a mineral lease, a mechanic's lien, and the release of a mechanic's lien," transferring an interest in real property to or from an individual must include the confidentiality notice required by Tex. Prop. Code § 11.008. See section 3.16 in this manual.

Texas Mechanic's Lien Claims: The perfection of involuntary mechanic's liens is covered in chapter 21 in this manual. Before contracting for residential construction, owners should become familiar with their potential liability for mechanic's liens. Mechanic's lien liability and related procedures are outlined for owners in section 18.3:4.

§ 20.2 Procedures for Various Fact Situations

This section describes typical construction projects on homesteads. Procedures are given for new construction and for repair or renovation construction projects.

§ 20.2:1 First Lien to Third-Party Lender to Secure Interim and Permanent Financing

The owner has title to the real property on which the contractor is building a home or repairing or

renovating an existing home, and the third-party lender obtains a first lien to secure both interim and permanent construction financing. See section 20.2:2 below for the procedure to be followed if the third-party lender is not providing interim construction financing.

Along with the forms suggested below, other forms used to document the construction process and establish the parties' rights may be found in chapter 18 in this manual. Chapter 18 also offers suggestions for completing those forms.

Following are the steps to create and document the mechanic's lien.

1. For repair or renovation construction projects, all the owners (both spouses) must sign a written application for extension of credit at least five days before signing the mechanic's lien contract. Tex. Const. art. XVI, § 50(a)(5)(B).

2. The contractor delivers the required disclosure statement (form 18-1) and the list of subcontractors and suppliers (form 18-2) to the owners. *See* Tex. Prop. Code §§ 53.255, 53.256. Also, a third-party lender is required to give the disclosure in form 18-1 under section 53.257(a) of the Texas Property Code and must deliver all documentation related to the loan not later than one business day before the date of the closing. Tex. Prop. Code § 53.257.

3. The contractor, the owner, and the owner's spouse sign the mechanic's lien contract. For repair or renovation construction, this contract must be signed only at the offices of the third-party lender, a lawyer, or a title company. Tex. Const. art. XVI, § 50(a)(5)(D).

4. A certificate of closing is signed. Form 20-6 in this chapter is for new construction projects, and form 20-7 is for repair or renovation projects.

5. The owner executes the mechanic's lien note payable to the contractor; the note should bear no interest and be payable in a single payment on completion of construction. The contractor thus is not a creditor under the federal Truth in Lending Act because no finance charge is involved and the obligation is payable in four or fewer installments. 15 U.S.C. § 1602(f).

   Because the mechanic's lien note payable to the contractor bears no interest and is payable in a single installment, there is no retail installment transaction under Texas Finance Code chapter 345, and that chapter does not apply. Tex. Fin. Code § 345.001(7).

   The contractor must comply with the FTC anti-holder-in-due-course rule if the contractor has a referral relationship or affiliation with the third-party lender. 16 C.F.R. pt. 433. (See section 20.1:4 above for additional discussion.) The FTC anti-holder-in-due-course notice should be included in the mechanic's lien note payable to the third-party creditor and may also be included in the mechanic's lien contract and the mechanic's lien note payable to the contractor. If no referral relationship or affiliation exists, the notice may be deleted from these documents.

6. The contractor gives the required notices under the FTC rule on cooling-off periods for door-to-door sales (unless an exception exists). In addition, for renovation or repair construction, a three-day right to rescind following execution of the mechanic's

lien contract by all parties is required unless the project is for immediate repairs to conditions on the homestead property that materially affect the health or safety of the owner and the owner of the homestead acknowledges such in writing. Tex. Const. art. XVI, § 50(a)(5)(C). The contractor then waits to be sure the foregoing rights of cancellation or rescission are not exercised. The owner executes the election regarding right of rescission (form 20-8) and checks the box indicating the owner's election *not* to rescind the contract.

7. The contractor endorses the mechanic's lien note to the third-party lender and assigns the lien with a transfer of lien, which is filed with the county clerk of the county in which the property is located. See section 10.1 and form 10-1.

8. The third-party lender renews and extends the mechanic's lien note by having the owner execute a note payable to the third-party lender; it bears interest and is payable as agreed between the owner and the third-party lender.

   Only fixed-rate, simple interest may be charged in transactions using the forms in this chapter. If fixed interest rates are used, the adjustable-rate mortgage regulations do not apply. These forms are not designed for use with loans subject to the adjustable-rate mortgage regulations and must be significantly revised if used for that purpose.

9. The third-party lender extends the lien with the deed of trust executed by the owner, naming the trustee chosen by the third-party lender. The deed of trust is filed with the county clerk of the county in which the property is located. See chapter 8.

10. The third-party lender is a truth-in-lending creditor and must give the owner a truth-in-lending (loan) disclosure form and a right-of-rescission form. *See* 12 C.F.R. § 226.23. See chapter 12 for forms and further discussion.

11. Construction begins. The affidavit of commencement is executed (see form 18-5). Normally, the third-party lender then advances funds in stages as the construction is completed, according to terms of the mechanic's lien contract and any incorporated residential construction contract. In some cases the lender will require its own construction loan agreement providing interim payments or draws. The owner pays interest to the third-party lender only on amounts advanced during construction and normally begins making payments on the principal of the renewal note only after completion of the construction.

    A disbursement disclosure may be found at form 18-3. See section 18.7:3 for discussion of the balance of the construction process, including descriptions of change orders, affidavits of completion, and the all-bills-paid affidavits.

12. On final completion, the contractor executes the affidavit of completion and indemnity (form 20-3), and the owner executes the affidavit of acceptance (form 20-4). The owner has the option of executing and filing the affidavit of completion (form 18-7) (see sections 18.3:4 and 18.7:7).

§ 20.2:2 First Lien to Contractor; No Interim Financing; Permanent Financing by Third-Party Lender

The owner has title to the real property on which the contractor is building a home or repairing or renovating an existing home, and the third-party lender obtains a first lien to secure permanent financing. The third-party lender is not providing interim construction financing. See section 20.2:1 above for the procedure to be followed if the third-party lender also provides interim construction financing.

Along with the forms suggested below, other forms used to document the construction process and establish the parties' rights may be found in chapter 18 in this manual. Chapter 18 also offers suggestions for completing those forms.

Following are the steps to create and document the mechanic's lien.

1. For repair or renovation construction projects, all the owners (both spouses) must sign a written application for extension of credit at least five days before signing the mechanic's lien contract. Tex. Const. art. XVI, § 50(a)(5)(B).

2. The contractor delivers the required disclosure statement (form 18-1) and the list of subcontractors and suppliers (form 18-2) to the owners. *See* Tex. Prop. Code §§ 53.255, 53.256.

3. The contractor, the owner, and the owner's spouse sign the mechanic's lien contract. For repair or renovation construction, this contract must be signed only at the offices of the third-party lender, a lawyer, or a title company. Tex. Const. art. XVI, § 50(a)(5)(D).

4. A certificate of closing is signed. Form 20-6 is for new construction projects, and form 20-7 is for repair or renovation projects.

5. The owner executes the mechanic's lien note payable to the contractor; the note should bear no interest and be payable in a single payment on completion of construction. The contractor thus is not a creditor under the federal Truth in Lending Act because no finance charge is involved and the obligation is payable in four or fewer installments. 15 U.S.C. § 1602(f).

   Because the mechanic's lien note payable to the contractor bears no interest and is payable in a single installment, there is no retail installment transaction under Texas Finance Code chapter 345, and that chapter does not apply. Tex. Fin. Code § 345.001(7).

   The contractor must comply with the FTC anti-holder-in-due-course rule if the contractor has a referral relationship or affiliation with the third-party lender. 16 C.F.R. pt. 433. The FTC anti-holder-in-due-course notice should be retained in the mechanic's lien note if the contractor has a referral relationship or affiliation with the third-party lender. 16 C.F.R. pt. 433. (See section 20.1:4 above for additional discussion.) Otherwise the notice may be deleted.

6. The contractor gives the required notices under the FTC rule on cooling-off periods for door-to-door sales (unless an exception exists). In addition, for renovation or repair construction, a three-day right to rescind following execution of the mechanic's lien contract by all parties is required unless the project is for immediate repairs to conditions on the homestead

property that materially affect the health or safety of the owner and the owner of the homestead acknowledges such in writing. Tex. Const. art. XVI, § 50(a)(5)(C). The contractor then waits to be sure the foregoing rights of cancellation or rescission are not exercised. The owner executes the election regarding right of rescission (form 20-8) and checks the box indicating the owner's election *not* to rescind the contract.

7. Construction begins and the affidavit of commencement (form 18-5) is executed. Construction must then be completed before the next step in this procedure.

8. The contractor executes the affidavit of completion and indemnity (form 20-3), and the owner executes the affidavit of acceptance (form 20-4). The owner has the option of executing and filing the affidavit of completion (form 18-7) (see sections 18.3:4 and 18.7:7).

9. The contractor endorses the mechanic's lien note to the third-party lender and assigns the lien with a transfer of lien, which is filed with the county clerk of the county in which the property is located. See section 10.1 and form 10-1.

10. The third-party lender renews and extends the mechanic's lien note by having the owner execute another note payable to the third-party lender; it bears interest and is payable as agreed between the owner and the third-party lender.

§ 20.2:3 Second Lien to Third-Party Lender to Secure Interim and Permanent Financing

The owner has title to the real property on which the contractor is building a home or repairing or renovating an existing home, and the third-party lender obtains a second lien to secure both interim and permanent construction financing.

Along with the forms suggested below, other forms used to document the construction process and establish the parties' rights may be found in chapter 18 in this manual. Chapter 18 also offers suggestions for completing those forms.

Following are the steps to create and document the mechanic's lien.

1. For repair or renovation construction projects, all the owners (both spouses) must sign a written application for extension of credit at least five days before signing the mechanic's lien contract. Tex. Const. art. XVI, § 50(a)(5)(B).

2. The contractor delivers the required disclosure statement (form 18-1) and the list of subcontractors and suppliers (form 18-2) to the owners. *See* Tex. Prop. Code §§ 53.255, 53.256. Also, a third-party lender is required to give the disclosure in form 18-1 under section 53.257(a) of the Texas Property Code and must deliver all documentation related to the loan not later than one business day before the date of the closing. Tex. Prop. Code § 53.257.

3. The contractor, the owner, and the owner's spouse sign the mechanic's lien contract. See form 20-1 in this chapter. Additional clauses 20-5-9, 20-5-10, and 20-5-11 are added to the mechanic's lien contract as part of the general provisions, section F. If a resi-

dential construction contract is to be executed, see form 18-4. If the project is for repair or renovation of an existing homestead, the contract must be signed only at the offices of the third-party lender, a lawyer, or a title company. Tex. Const. art. XVI, § 50(a)(5)(D).

4. A certificate of closing is signed. Form 20-6 is for new construction projects, and form 20-7 is for repair or renovation projects.

5. The owner executes the mechanic's lien note payable to the contractor; the note should bear no interest and be payable in a single payment on completion of construction. The contractor thus is not a creditor under the federal Truth in Lending Act because no finance charge is involved and the obligation is payable in four or fewer installments. 15 U.S.C. § 1602(f).

   Under Texas homestead laws, when the contractor and the owner sign the mechanic's lien contract and the owner executes the mechanic's lien note payable to the contractor, an obligation is established in favor of the contractor and is secured by a mechanic's lien. Tex. Prop. Code § 53.254.

   Because the mechanic's lien note payable to the contractor bears no interest and is payable in a single installment, there is no retail installment transaction under Texas Finance Code chapter 345, and that chapter does not apply. Tex. Fin. Code § 345.001(7).

   The contractor must comply with the FTC anti-holder-in-due-course rule if the contractor has a referral relationship or affiliation with the third-party lender. 16 C.F.R. pt. 433. (See section 20.1:4 above for additional discussion.) The FTC anti-holder-in-due-course notice should be included in the mechanic's lien note payable to the third-party creditor and may also be included in the mechanic's lien contract and the mechanic's lien note payable to the contractor. If no referral relationship or affiliation exists, the notice may be deleted from these documents.

6. The contractor gives the required notices under the FTC rule on cooling-off periods for door-to-door sales (unless an exception exists). For renovation or repair construction projects, a three-day right to rescind following execution of the mechanic's lien contract by all parties is required unless the project is for immediate repair to conditions on the homestead property that materially affect the health or safety of the owner and the owner of the homestead acknowledges such in writing. Tex. Const. art. XVI, § 50(a)(5)(C). The contractor then waits to be sure the right of cancellation is not exercised and otherwise complies with the rule, unless an exception exists and the FTC rule does not apply. See section 20.1:4. The owner executes the election regarding right of rescission (form 20-8) and checks the box indicating the owner's election *not* to rescind the contract.

7. The contractor endorses the mechanic's lien note to the third-party lender and assigns the lien with a transfer of lien, which is filed with the county clerk of the county in which the property is located. See section 10.1 and form 10-1.

8. The third-party lender renews and extends the mechanic's lien note by having the owner execute a note payable to the third-party lender; it bears

interest and is payable as agreed between the owner and the third-party lender. Only fixed-rate, simple interest may be charged in transactions using the forms in this chapter. If fixed interest rates are used, the adjustable-rate mortgage regulations do not apply. These forms are not designed for use with loans subject to the adjustable-rate mortgage regulations and must be significantly revised if used for that purpose.

9. The third-party lender extends the lien with the deed of trust executed by the owner, naming the trustee chosen by the third-party lender. The deed of trust is filed with the county clerk of the county in which the property is located. See chapter 8.

10. The third-party lender may be a truth-in-lending creditor and may be required to give the owner the truth-in-lending (loan) disclosure form. *See* 12 C.F.R. § 226.23. See chapter 12 for forms and further discussion.

11. Construction begins. The affidavit of commencement is executed (see form 18-5). Ordinarily, the third-party lender then advances funds in stages as the construction is completed, according to terms of the mechanic's lien contract and any incorporated residential construction contract. In some cases the lender will require its own construction loan agreement providing interim payments or draws. The owner pays interest to the third-party lender only on amounts advanced during construction and usually begins making payments on the principal of the renewal note only after completion of the construction.

    During construction additional forms are used. A disbursement disclosure may be found at form 18-3. See section 18.7:3 for discussion. Other forms used during construction are change-order forms, affidavits of completion, and all-bills-paid affidavits. These forms are included in chapter 18.

12. On final completion, the contractor executes the affidavit of completion and indemnity (form 20-3), and the owner executes the affidavit of acceptance (form 20-4). The owner has the option of executing and filing the affidavit of completion (form 18-7) (see sections 18.3:4 and 18.7:7).

Precautions for Subordinate Mechanic's Lien Contracts: Subordinate lien financing involves a number of considerations for all the parties involved: the borrower, the prior lender, and the subordinate lender. The borrower should ascertain that the creation of a subordinate lien will not be a default under the prior deed of trust, as subordinate encumbrances are expressly prohibited in many deeds of trust. The prior lender may have concerns about the ability of the borrower to service both the superior and subordinate lien debts. If the borrower should default on the subordinate lien debt and the subordinate lender should foreclose, the borrower, although still liable on the debt, will no longer be the owner of the property, and the incentive to repay the senior loan will obviously be diminished.

The party at greatest risk in subordinate lien financing transactions is the subordinate lender. Foreclosure of a superior lien extinguishes all subordinate liens. *See Exchange Savings & Loan Ass'n v. Monocrete Proprietary, Ltd.*, 629 S.W.2d 34 (Tex. 1982). In Texas, unlike many other jurisdictions, a subordinate lienholder is not entitled by law to notice of default on the prior lien debt or notice of foreclosure proceedings. The subordinate lienholder is likewise not entitled to share in the foreclosure proceeds, unless there is an excess after payment of costs

and expenses in connection with the foreclosure and satisfaction of the prior lien debt. The subordinate lienholder may therefore want to obtain the prior lienholder's agreement to provide notice of any default by the borrower under the first-lien note and deed of trust and the opportunity to cure such default or require the borrower to provide continuing proof that payments on the prior lien debt have been made.

A subordinate lien transaction may be subject to chapter 342 of the Texas Finance Code if the property is a dwelling designed for occupancy by four or fewer families and the interest rate exceeds 10 percent per year. Tex. Fin. Code §§ 342.001(4), 342.005. Chapter 342 applies to a secondary mortgage loan made by a person in the business of making, arranging, or negotiating those types of loans. Tex. Fin. Code § 342.005. The chapter does not apply to a secondary mortgage loan made by a seller of property to secure all or part of the unpaid purchase price. Tex. Fin. Code § 342.006. If a lender is in the business of making, arranging, or negotiating secondary mortgage loans, the lender must obtain a license from the Office of Consumer Credit Commissioner (OCCC) unless the lender is a bank, savings bank, savings and loan association, credit union, or a residential mortgage loan originator licensed under chapter 156. Tex. Fin. Code §§ 124.005, 339.004, 341.103–.104, 342.051. Unless exempt under section 180.003, an individual who acts as a residential mortgage loan originator in the making, transacting, or negotiating of a secondary mortgage loan subject to chapter 342 must be individually licensed under chapter 342, be enrolled with the Nationwide Mortgage Licensing System and Registry as required by section 180.052, and comply with other applicable requirements of the Texas Secure and Fair Enforcement of Mortgage Licensing Act of 2009. Tex. Fin. Code ch. 180. Chapter 342 loans are highly specialized and regulated, and thus if a subordinate lien transaction is subject to chapter 342, the attorney must carefully review the chapter to make sure all requirements have been met. Texas Finance Code section 341.502 provides that "[a] contract for a loan under Chapter 342, a retail installment transaction under Chapter 348, or a home equity loan regulated by the Office of Consumer Credit Commissioner must be . . . written in plain language designed to be easily understood by the average consumer . . . ." Tex. Fin. Code § 341.502(a). The Finance Commission of Texas is authorized to adopt model contracts for loans subject to that section. A lender may not use a contract other than a model contract unless the lender has submitted the contract to the OCCC for its approval. If the OCCC issues an order disapproving a submitted contract, the lender may not use the contract after the order takes effect. Tex. Fin. Code § 341.502. Plain-language model contracts and related rules for chapter 342, subchapter G, second-lien home improvement contracts are codified at 7 Tex. Admin. Code §§ 90.601–.604.

The attorney general of Texas has determined that section 341.502(a) is applicable only to those loan transactions for which the consumer credit commissioner is the appointed regulating official and has no application to loan transactions subject to the regulatory authority of the banking commissioner, the savings and mortgage lending commissioner, the credit union commissioner, and federal regulatory officials. Tex. Att'y Gen. Op. No. JC-0513 (2002).

Banks, savings and loan associations, and credit unions accordingly are not required to comply with the section 341.502 "plain language" contract requirements or to obtain a license to engage in the business of making subordinate lien loans subject to chapter 342. Tex. Fin. Code § 342.051(c)(1). These institutional lenders nevertheless are thought to be subject to other substantive law provisions of chapter 342, including, for example, the limitations of that chapter on the collection of authorized fees and charges, as enforced by the policies of their

respective regulatory agencies. *See* Tex. Fin. Code §§ 342.308, 342.502.

Before using the forms in this chapter for a loan subject to chapter 342 of the Texas Finance Code, the attorney should determine whether the lender is subject to the plain-language model contract provisions of Code section 341.502. The forms in this chapter have not been submitted to or approved by the OCCC.

If the attorney decides that the forms contained in this chapter may nevertheless be used for a loan regulated by chapter 342, the forms still must be modified to comply with the requirements of that chapter. For example, the secondary mortgage loan documents for a loan made by a licensed lender must contain the name, mailing address, and telephone number of the OCCC. Tex. Fin. Code § 14.104. See clause 8-9-24. Neither the mechanic's lien contract forms nor the note forms in this manual contain that information. The attorney should include that information in both the mechanic's lien contract form and the note form when documenting a secondary mortgage loan if the lender has a license from the OCCC. Additionally, if a subordinate lien transaction is subject to chapter 342, the printed language in the mechanic's lien contract must be modified slightly. In paragraph B.6., the phrase "in a form acceptable to Contractor or its transferees" must be struck so that the obligation reads "maintain at Owner's sole cost and expense insurance policies containing the following coverages . . . ." This change is necessary because Finance Code sections 342.404 through 342.405 and 342.413 prohibit a lender from approving the selection of insurance. *See* Tex. Fin. Code §§ 342.404, 342.405, 342.413. Also, Finance Code section 342.404 provides that when insurance is required in connection with a loan made under that chapter, the lender must furnish the borrower a statement like the one in clause 20-5-9, which may be added to the mechanic's lien contract as a numbered paragraph under "General Provisions." Tex. Fin. Code § 342.404.

The same chapter imposes other requirements if the lender sells or procures insurance related to the loan at a rate not fixed or approved by the State Board of Insurance. *See* Tex. Fin. Code § 342.405.

Finance Code section 342.307 limits the enforcement fees that may be included in secondary mortgage loan documents. To comply with this section, the attorney's fee provisions in the note, form 6-1, and the mechanic's lien contract should be modified if used in transactions subject to chapter 342 of the Finance Code. *See* Tex. Fin. Code § 342.307. In the note, the third paragraph, concerning attorney's fees, should be replaced with clause 6-6-15. See section 6.2:7.

An institutional third-party lender may be required to provide the borrower a truth-in-lending disclosure (loan) form. An example of this form is included in chapter 12.

It is essential that a subordinate deed of trust contain terms and provisions identifying the prior lien and obligating the borrower to keep the prior note and deed of trust current and not in default. Clauses 20-5-10 and 20-5-11 may be used for this purpose. The parties may wish to attempt to obtain an estoppel letter or intercreditor agreement from the prior lienholder. An example of such an instrument may be found at form 10-10.

§ 20.3 Cautions

§ 20.3:1 No Variable Interest Rate Loans

The forms in this chapter are designed for use with loans charging simple interest rates only; they must be carefully revised for use with adjustable-rate mortgages. Variable rates, balloon payments, and variable payment schedules

require truth-in-lending disclosures and additional disclosures under the Texas Credit Title and Texas Finance Code.

The mechanic's lien note, form 20-2 in this chapter, makes no provision for credit life insurance.

See section 20.7 below for suggestions if one spouse will not become liable on the debt secured by the mechanic's lien contract.

§ 20.3:2 No Out-of-State Venue or Choice of Law

If a contract that provides for the construction of new improvements to real property located in Texas contains a provision making the contract or any conflict arising under the contract subject to the laws of another state, to litigation in the courts of another state, or to arbitration in another state, that provision is voidable by the party obligated to perform the construction. Tex. Bus. & Com. Code §§ 272.001–.002.

§ 20.3:3 Prompt Payment Act

Texas Property Code chapter 28 provides that an owner has thirty-five days from the date the owner receives a written request for payment from a contractor to pay the invoiced amount (less the retainage required by law) if the work covered was properly performed or materials delivered are suitably stored. Tex. Prop. Code § 28.002. Unpaid bills earn interest at the rate of 1.5 percent per month. Tex. Prop. Code § 28.004. Exceptions to this requirement are—

1. if there is a good-faith dispute about the amount owed (including a good-faith dispute about whether the work was done properly), no more than 110 percent of the amount in dispute may be withheld, Tex. Prop. Code § 28.003; or
2. if the lender does not fund the owner for a reason that is not the fault of the owner. *See* Tex. Prop. Code § 28.008.

§ 20.3:4 Construction Trust Fund Statute

Texas Property Code section 162.001 is generally referred to as the "Construction Trust Fund Statute." This statute, among other provisions, states that loan receipts are trust funds if they are borrowed by an owner for the purpose of improving specific real property in Texas and are secured in whole or in part by a lien on the property. Tex. Prop. Code § 162.001(b). The owner is designated as a trustee of loan funds the owner receives. Tex. Prop. Code § 162.002. As trustee, the owner is obligated to the "beneficiaries" of the construction trust funds, including the contractor, subcontractors, mechanics, and laborers on the project. Tex. Prop. Code § 162.003(a). The owner is also a beneficiary. Tex. Prop. Code § 162.003(b). A trustee who intentionally, knowingly, or with intent to defraud directly or indirectly diverts construction trust funds without first paying the current and past-due obligations on the project has misapplied the trust funds. Tex. Prop. Code § 162.031. Criminal penalties apply to such diversion. *See* Tex. Prop. Code § 162.032. Also, diversion constitutes the basis for a civil action against the trustee. *See Tacon Mechanical Contractors v. Grant Sheet Metal, Inc.*, 889 S.W.2d 666 (Tex. App.—Houston [14th Dist.] 1994, writ denied).

§ 20.3:5 Texas Finance Code Chapter 343

A residential construction loan may be subject to the home loan disclosure and other requirements of chapter 343 of the Texas Finance Code. See sections 10.14 through 10.14:3 in this manual.

§ 20.4 Instructions for Completing Forms

§ 20.4:1 Generally

Chapter 3 of this manual offers useful information about designations of parties, property descriptions, and other matters generally related to completing the forms.

§ 20.4:2 Mechanic's Lien Contract

The mechanic's lien contract, form 20-1 in this chapter, closely resembles the deed of trust; reference to chapter 8 in this manual may be useful for completing the contract. For remarks about prior liens, see section 8.2:4. For discussion about other exceptions to conveyance and warranty, see section 5.2:7.

The mechanic's lien contract must be executed before the construction begins and must be filed with the county clerk of the county in which the property is located. Tex. Prop. Code § 53.254. In case of repair or renovation construction the contract must contain, and the parties must comply with, optional section G. See Tex. Const. art. XVI, § 50(a)(5)(A)–(D), and the explanation at section 20.1:1 above. Also in this case, the owners must be provided the election regarding right of rescission (see form 20-8).

The residential construction contract provides details about description of the work, schedules for completion, changes, termination of the contractor, and other matters. See form 18-4 for applicable clauses.

A force majeure and "time is of the essence" clause may be included in the additional provisions following paragraph F.13. of the mechanic's lien contract form. An example of such a clause appears as clause 20-5-2.

The contract contains the anti-holder-in-due-course notice required by the Federal Trade Commission for consumer credit contracts made in connection with the sale or lease of goods or services to consumers for personal, family, or household use. *See* 16 C.F.R. pt. 433. For transactions not covered by this FTC regulation, the notice may be deleted.

The contract contains the right-of-cancellation notice required by Tex. Bus. & Com. Code ch. 601 and 16 C.F.R. § 429.1. For transactions not covered by those provisions, the notice may be deleted. Section G. of the contract contains the right of rescission required by Tex. Const. art. XVI, § 50(a)(5)(C), applicable to repair or renovation construction. These notices and cancellation forms may be deleted if an exception exists or if the sections are not applicable.

RCLA Notice Required: The notice statement required by the Texas Residential Construction Liability Act (RCLA, Tex. Prop. Code ch. 27) is included at the end of the contract, above the owner signatures. *See* Tex. Prop. Code § 27.007.

The RCLA notice is required in addition to the Tex. Prop. Code § 41.007 notice.

§ 20.4:3 Mechanic's Lien Note

The mechanic's lien note, form 20-2 in this chapter, is similar to the note discussed in chapter 6, which suggests payment clauses and other clauses that may also be appropriate for this note.

The mechanic's lien note should not be used alone. Interdependent uses of the forms are suggested in section 20.2 above.

Payment clauses should be drafted in accordance with the provision for statutory retainage contained in the mechanic's lien contract in paragraph D.4.:

> Notwithstanding anything to the contrary in this contract, during progress

> of the Construction, Owner may retain the amounts required by sections 53.101 and 53.081 of the Texas Property Code. Retainage will be withheld until the last business day of the third month after the month of final completion of the project, unless otherwise provided in the residential construction contract between the parties.

The mechanic's lien note contains the anti-holder-in-due-course notice required by the Federal Trade Commission for consumer credit contracts made in connection with the sale or lease of goods or services to consumers for personal, family, or household use. *See* 16 C.F.R. pt. 433. For transactions not covered by this FTC regulation, the notice may be deleted. The notice appears on the last page of the mechanic's lien note immediately preceding the signature line.

Often the note is drafted to become due on completion of construction. Alternatively, the parties may prefer to specify that partial payments are due on completion of distinct phases of construction. Installment payments may cause the Truth in Lending Act to apply. See chapter 12. Examples of both types of payment clauses appear in form 20-5.

§ 20.5 Additional Clauses

The mechanic's lien contract, form 20-1 in this chapter, may include additional clauses concerning contract price. See form 20-5 for examples of these clauses.

If payment is based on costs, the attorney should include a carefully drafted definition of costs in the contract.

For transactions subject to chapter 345 of the Texas Finance Code, the "cost-plus" clauses (20-5-6 and 20-5-7) are not appropriate. See section 20.1:3 above.

If payment will be based on the cost of labor and material plus a fixed fee, not to exceed a certain amount, use clause 20-5-6. If payment will be based on the cost of labor and material plus a percentage of the cost, not to exceed a certain amount, use clause 20-5-7.

If the contractor's profit is calculated by fixed fee or percentage and the parties do not wish to limit the total cost, the examples suggested in clauses 20-5-6 and 20-5-7 could be modified by omitting the sentence limiting total contract price. However, this practice is discouraged because a contract that does not limit total costs to a certain amount arguably may not create a valid lien against a homestead, because it might not satisfy the constitutional requirement for a complete precommencement contract that includes the price.

§ 20.6 Additional Documents

Chapter 12 in this manual contains documents that may be required for mechanic's lien transactions in accordance with the Truth in Lending Act and its accompanying regulations. Chapter 12 also offers suggestions for completing those forms.

In mechanic's lien transactions the owner and the contractor should either execute a detailed construction contract like form 18-4 in this manual, describing plans and specifications for the construction, or include those details in the mechanic's lien contract. The American Institute of Architects' standard form is also commonly used for this purpose if a separate contract is desired. Any separate contract used for this purpose should be incorporated by reference in the mechanic's lien contract.

Other forms used to document the construction process and establish the parties' rights may be found in chapter 18. Chapter 18 also offers suggestions for completing those forms.

If the mechanic's lien is subordinate to a prior lien, the lender ordinarily requires as a condition of the loan that the holder of the prior lien sign a third-party estoppel agreement. An example of this agreement appears as form 10-10.

If a cosigner, guarantor, or the like is not the spouse of the loan applicant and will not benefit from the credit transaction, federal regulations require creditors to provide a specified notice for consumer credit transactions other than the purchase of real property. The notice, which must be given as a separate statement to each cosigner, guarantor, or the like, may be found at form 6-7.

The transaction described in section 20.2:2 above suggests the use of an affidavit of completion of construction and indemnity as part of the procedure. A model for this purpose is provided as form 20-3 in this chapter and is accompanied with a form for the owner's affidavit of acceptance of the construction, form 20-4.

§ 20.7 Required Signatures

If the spouse of the owner of record of the homestead subject to the mechanic's lien will not become liable on the underlying debt, the transaction must be structured accordingly. To avoid becoming liable on the debt, the spouse may execute only the lien instrument (mechanic's lien contract or deed of trust), not the mechanic's lien note.

If a homestead is the separate property of one spouse, both spouses must sign and acknowledge the mechanic's lien contract to create a valid mechanic's lien, but only the spouse liable on the debt need sign the note. In this case, a clause like clause 20-5-8 in this chapter should be added to the general provisions section of the mechanic's lien contract.

Although creditors often prefer that both spouses sign the note, regulations accompanying the Equal Credit Opportunity Act generally prohibit creditors from requiring an applicant's spouse to cosign or guarantee a note if the applicant is creditworthy. 12 C.F.R. § 202.7(d). Even if not liable on the debt secured by the lien on the property, a spouse may sign the instrument creating the lien if state law requires the signatures of both spouses; this compliance with state law does not violate the Equal Credit Opportunity Act.

A creditor may request a cosigner, guarantor, or the like on an extension of credit if the applicant does not meet the creditor's creditworthiness standard for individual credit. However, the creditor may not specify that the applicant's spouse be the cosigner or guarantor. Under some conditions creditors must provide cosigners a notice warning them of their liabilities. See section 6.5:2 and form 6-7.

§ 20.8 Foreclosure

Foreclosure of the voluntary contract lien granted in a mechanic's lien contract is similar to foreclosure under a deed of trust. See chapter 14 in this manual for foreclosure instruments that may be adapted for use in foreclosing a mechanic's lien.

§ 20.9 Additional Resources

Beyer, Gerry W. *Real Property*. 2nd ed. West's Texas Forms 13–15. St. Paul, MN: West, 2001. Supplement 2016.

Melamed, Richard. "Mechanic's Liens on Homesteads." In *Advanced Real Estate Drafting Course, 2005*. Austin: State Bar of Texas, 2005.

Myers, Thomas W. "Mechanic's Liens: What's in Your Tool Box?" In *Advanced Real Estate Law Course, 2007*. Austin: State Bar of Texas, 2007.

St. Claire, Frank A., and William V. Dorsaneo III. *Texas Real Estate Guide*. New York: Matthew Bender & Co., 2001.

Walthall, Thomas J., Jr. "Annotated Mechanic's Liens." In *Real Estate Law Boot Camp, 2008*. Austin: State Bar of Texas, 2008.

———. "Texas Mechanic's Liens and Construction Payment Issues." In *Advanced Real Estate Law Course, 2008*. Austin: State Bar of Texas, 2008.

[Reserved]

Chapter 21

Involuntary Mechanic's Lien Documents

Forms

§ 21.11 Additional Resources

Beyer, Gerry W. *Real Property*. 2nd ed. West's Texas Forms 13–15. St. Paul, MN: West, 2001. Supplement 2016.

Flores, J. Paulo. "Mechanic's Liens—How to Deal with Invalid Liens." In *Residential Real Estate Construction Law Course, 2007*. Austin: State Bar of Texas, 2007.

St. Claire, Frank A., and William V. Dorsaneo III. *Texas Real Estate Guide*. New York: Matthew Bender & Co., 2001.

Walthall, Thomas J., Jr. "Mechanic's Lien 'Removables': Representing the Contractor in Default Situations." In *Advanced Real Estate Law Course, 2009*. Austin: State Bar of Texas, 2009.

[Reserved]

Form 21-13

Release of Mechanic's and Materialman's Lien

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

Basic Information

Date:

Claimant:

Property:

Claimant has on or about [**date**] attempted to assert a mechanic's and materialman's lien on the Property [**include if applicable:** by affidavit filed in [**recording data**] of the real property records of [**county**] County, Texas].

The owner of the Property, [**name of owner**], has reached an agreement with Claimant for the release of the lien against the Property.

Claimant hereby releases the Property from the mechanic's and materialman's lien in consideration of good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged.

_____

[**Name of claimant**]

Include acknowledgment.

[Reserved]

Form 21-14

Partial Release of Mechanic's and Materialman's Lien

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

Basic Information

Date:

Claimant:

Property:

Project: [**describe project**]

Claimant filed its affidavit claiming a mechanic's and materialman's lien on the Property on [**date**].

The lien was asserted by Claimant for its [labor/materials/labor and materials] generally described as [**describe, e.g.,** specially fabricated and installed plumbing, heating, ventilating, and air-conditioning duct work, equipment, and allied systems] furnished for the Project located on the Property.

The described [labor/materials/labor and materials] were furnished by Claimant for construction of the Project under [a contract/an agreement] with [**name of original contractor**], as original contractor for the Project.

An agreement has been reached for a partial release of the lien claim against the Property.

Claimant hereby releases $[**amount**] of its mechanic's and materialman's lien against the Property but specifically preserves the balance of its lien in the amount of $[**amount**].

_____

[**Name of claimant**]

Include acknowledgment.

TEXAS REAL ESTATE FORMS MANUAL

Third Edition

Volume 4

A project of the
Real Estate Forms Committee
of the
State Bar of Texas

Austin 2017

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

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

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

International Standard Book Number: 978-1-938873-48-5
International Standard Book Number: 978-1-938873-60-7 (2018 Supplement)
International Standard Book Number: 978-1-938873-70-6 (2019 Supplement)
International Standard Book Number: 978-1-938873-78-2 (2020 Supplement)
Library of Congress Control Number: 2017936428

The authors and the State Bar of Texas gratefully acknowledge permission of the copyright holder and publisher to reprint the following materials: ACORD 25 "Certificate of Liability Insurance," ACORD 28 "Evidence of Commercial Property Insurance," and ACORD 45 "Additional Interest Schedule."

Printed in the United States of America

Third Edition, 2017

Contents

Chapter 23

Restrictive Covenants and Property Owners Associations

Chapter 23

Restrictive Covenants and Property Owners Associations

§ 23.1 General Considerations

§ 23.1:1 Restrictive Covenants

"Restrictive covenant" means "any covenant, condition, or restriction contained in a dedicatory instrument, whether mandatory, prohibitive, permissive, or administrative." Tex. Prop. Code § 202.001(4). A restrictive covenant is a private way to regulate or control the use of real property by contract. This type of regulation and control is based on the fundamental "right of parties to contract with relation to property as they see fit, provided they do not contravene public policy and their contracts are not otherwise illegal." *Curlee v. Walker*, 244 S.W. 497, 498 (1922). Restrictive covenants are subject to general common-law rules of contracts. *Pilarcik v. Emmons*, 966 S.W.2d 474, 478 (Tex. 1998).

Under common law, restrictive covenants can be adopted as part of a general plan for the development of a tract of land to make it more attractive for residential or commercial purposes by reason of the covenants imposed on each of the separate lots sold. The development plan that includes restrictive covenants forms an inducement to each purchaser to buy a lot in the development, and it may be assumed that the purchaser pays an enhanced price for the property purchased. The development plan, including restrictive covenants, enters into and becomes a part of the consideration for the purchase of a lot. The purchaser of a lot submits to a burden on his own land because a like burden imposed on his neighbor's lot will be beneficial to both lots. The covenant or agreement between the original owner and each purchaser is therefore mutual. *Curlee*, 244 S.W. at 498.

The most common reason for imposing restrictive covenants on property is to enhance the value of the property as part of a development scheme. For example, by subdividing property on the edge of a town that is zoned for agriculture into separate smaller lots, and by imposing restrictive covenants so the purchasers of the lots know how the use of nearby lots will be restricted, the value of the property as a whole will be substantially enhanced. A development project subject to restrictive covenants can be for residential use only, commercial use only, or a combination of the two. The forms in this chapter are for residential projects only.

Based on the common-law rules and the statutory definitions, restrictive covenants can be imposed or applied to property in a variety of ways. One of the most common ways to impose restrictive covenants on property is for the owner of the land to file with the county clerk a document known as a declaration, which describes the restrictive covenants to which the property is subject. A declaration regarding property is similar to the declaration of a living trust. Both documents declare that certain described property will be owned by the owner subject to the described covenants.

The filing of the declaration on real property with the county clerk is constructive notice to the public that the property described in the declaration is subject to the restrictive covenants stated. Once a declaration of restrictive covenants is filed regarding the described property, the covenants are continuing obligations for the use of the property from that time forward, through each sale of the property, until canceled or modified by the owner. These ongoing restrictions on the use of land are called "cove-

nants running with the land." Purchasers are charged with notice of the terms of deeds that form an essential link in their chain of ownership and with knowledge of the provisions and contents of other recorded instruments. *Cooksey v. Sinder*, 682 S.W.2d 252, 253 (Tex. 1984).

A restrictive covenant is a contract subject to the same rules of construction and interpretation as any other contract. *Davis v. Canyon Creek Estates Homeowners Ass'n*, 350 S.W.3d 301, 313 (Tex. App.—San Antonio 2011, pet. denied). Once restrictive covenants are imposed on a property, they are contractual obligations among all future owners of subdivided parts of the property. An owner's noncompliance with a restrictive covenant is a breach of contract as to all the other owners of lots subdivided from the same property to which the declaration applies. Therefore, each owner has a right to enforce the restrictive covenants in a development or subdivision by filing suit against an owner who violates a restrictive covenant. *Anderson v. New Property Owners' Ass'n of Newport*, 122 S.W.3d 378, 384 (Tex. App.—Texarkana 2003, pet. denied). However, placing the burden on individual owners for the enforcement of restrictive covenants, while generally allowed by common law and by the terms of declarations, is not usually practical.

§ 23.1:2 Declarations and Other Dedicatory Instruments

"Dedicatory instrument" means—

> each document governing the establishment, maintenance, or operation of a residential subdivision, planned unit development, condominium or townhouse regime, or any similar planned development. The term includes a declaration or similar instrument subjecting real property to:
>
> (A) restrictive covenants, bylaws, or similar instruments governing the administration or operation of a property owners' association;
>
> (B) properly adopted rules and regulations of the property owners' association; or
>
> (C) all lawful amendments to the covenants, bylaws, instruments, rules, or regulations.

Tex. Prop. Code § 202.001(1).

To be effective, a dedicatory instrument—whether from a property owners association or an original declarant—must be filed in the real property records of each county in which the property to which the dedicatory instruments relate is located. Tex. Prop. Code § 202.006. This requirement covers bylaws or similar instruments governing the administration or operation of a property owners association, properly adopted rules and regulations of the property owners association, and all lawful amendments to the covenants, bylaws, instruments, rules, or regulations.

A provision for amendment of a declaration cannot require a vote of more than 67 percent of the total votes of members of the property owners association entitled to vote on the proposed amendment. Tex. Prop. Code § 209.0041. If the declaration contains a lower percentage, the percentage in the declaration controls. Tex. Prop. Code § 209.0041. If the declaration is silent as to voting rights for an amendment, the declaration may be amended by a vote of owners owning 67 percent of the lots subject to the declaration. Tex. Prop. Code § 209.0041. Section 209.0041 prevails over any conflicting provisions in title 11 of the Texas Property Code. See, however, Property Code section 201.006

concerning the requirements for a petition to amend restrictions, with significantly different requirements. Tex. Prop. Code § 201.006.

§ 23.1:3 Limitations of Covenants and Restrictions

The Telecommunications Act of 1996 protects the rights of property owners to use satellite dishes. *See* 47 U.S.C. §§ 151–341. With a few exceptions, any homeowner may install a satellite dish of a size of one meter or smaller in diameter. While property owners associations may encourage that dishes be placed as inconspicuously as possible, the dish must be allowed to be placed where it may receive a usable signal. Additionally, many property owners associations have restrictive covenants prohibiting a homeowner from installing an OTA (Over-the-Air) rooftop antenna. These restrictions are not enforceable, except in some instances. For example, the antenna may be installed at any location unless it imposes on common property. Also, the antenna must be of a design to receive local, not long-distance, signals and must not extend any higher than twelve feet above the top roofline of the home, unless an exception is granted by the property owners association due to extenuating terrestrial interference. See the Federal Communications Commission Rule, available at **https://www.fcc.gov/media/over-air-reception-devices-rule**.

Federal and state fair housing acts will limit certain types of residential restrictions concerning age and occupancy limitations. See the section titled "Fair Housing" in chapter 2 of this manual.

With some exceptions noted in the statute, a provision in a dedicatory instrument is void and unenforceable if it prohibits or restricts a property owner from (1) implementing measures promoting solid-waste composting of vegetation, including grass clippings, leaves, or brush, or leaving grass clippings uncollected on grass; (2) installing rain barrels or a rainwater harvesting system; (3) implementing efficient irrigation systems, including underground drip or other drip systems; or (4) using drought-resistant landscaping or water-conserving natural turf. Tex. Prop. Code § 202.007.

A property owners association is limited on how it can enforce restrictions of political signs in a subdivision. Tex. Prop. Code § 202.009.

With certain exceptions listed in the statute, a provision in a dedicatory instrument that prohibits or restricts a property owner from installing a solar energy device is void. Tex. Prop. Code § 202.010.

With certain specified exceptions, a property owners association is prohibited from adopting or enforcing a restrictive covenant limiting the display of the American flag beyond those limitations to time, place, and manner necessary to protect a substantial interest of the association. Freedom to Display the American Flag Act of 2005, Pub. L. No. 109-243, 120 Stat. 572 (2006) (found at 4 U.S.C. § 5 note). Tex. Prop. Code § 202.012 limits a property owners association's ability to prohibit or regulate flagpoles and flag displays.

Restrictions requiring wood shingle roofs are void. Tex. Prop. Code § 5.025. A property owners association may not include or enforce a provision in a dedicatory instrument that prohibits or restricts a property owner who is otherwise authorized to install shingles on the roof of the owner's property from installing shingles that meet the specifications listed in the statute. Tex. Prop. Code § 202.011.

With specified exceptions, a property owners association may not enforce or adopt a restrictive covenant that prohibits a property owner or resident from displaying or affixing on the entry to the owner's or resident's dwelling one or more religious items, the display of which is

motivated by the owner's or resident's sincere religious belief. Tex. Prop. Code § 202.018.

A property owners association is limited on the extent to which it can adopt and enforce restrictions on standby electric generators. Tex. Prop. Code § 202.019.

A property owners association is prevented from including or enforcing a provision in a dedicatory instrument that limits a person from lawfully possessing, transporting, or storing a firearm, any part of a firearm, or firearm ammunition, or from lawfully discharging a firearm. Tex. Prop. Code § 202.020.

A property owners association is prevented from restricting a minor from the occasional sale of lemonade or other nonalcoholic beverages. Tex. Prop. Code § 202.020.

§ 23.2 Property Owners Association

A property owners association, which is composed of all owners of lots in a subdivision or development, enforces restrictive covenants on behalf of the association and all the owners who are in compliance. A property owners association means—

> an incorporated or unincorporated association owned by or whose members consist primarily of the owners of the property covered by the dedicatory instrument and through which the owners, or the board of directors or similar governing body, manage or regulate the residential subdivision, planned unit development, condominium or townhouse regime, or similar planned development.

Tex. Prop. Code § 202.001(2).

The practitioner should consider using a nonprofit association, which is an unincorporated organization. The members and management of a nonprofit association are shielded from personal liability under Tex. Bus. Orgs. Code § 252.006. A nonprofit association requires no certificate of formation or periodic reports. Failure of a corporation to file periodic reports (every four years in the case of a nonprofit; annually in the case of a for-profit) with the secretary of state may result in the forfeiture of the corporation's existence.

Property owners associations are regulated by federal, state, and local law, and they are subject to federal income taxation. They do not qualify as charitable organizations under Internal Revenue Code section 501(c)(3). Associations may qualify for special tax treatment under 26 U.S.C. § 528. All entities organized in Texas must comply with the Texas Business Organizations Code. *See* Tex. Bus. Orgs. Code ch. 402. Texas Property Code chapter 202 applies to all restrictive covenants and property owners associations. Chapter 209 of the Property Code applies to all residential property owners associations subject to a declaration that authorizes the property owners association to collect regular or special assessments on all or a majority of the property in the subdivision. Certain provisions of these chapters do not apply to a property owners association that is subject to Texas Government Code chapter 552. *See* Tex. Gov't Code § 552.0036. Property Code chapter 209 does not apply to condominiums governed by chapter 82 of the Property Code. *See* Tex. Prop. Code § 209.003(d).

Certain chapters of the Property Code have specific requirements not applicable generally to property owners associations in counties having defined characteristics. To determine if these specific requirements apply, see chapters 201, 203, 204, 205, 206, 208, 210, 211, 212 and 215 of the Property Code.

The Texas Residential Property Owners Protection Act is chapter 209 of the Property Code. It applies to residential subdivisions (other than

condominiums governed by Tex. Prop. Code ch. 82) that are subject to restrictive covenants authorizing a property owners association to collect regular or special assessments and requiring mandatory membership in the association. Tex. Prop. Code § 209.003. In addition, the Property Code affords certain rights to property owners associations in cities or counties that meet various specified minimum population requirements to amend, extend, or supplement deed restrictions and to establish assessment lien mechanisms. Tex. Prop. Code chs. 201, 204–206.

A property owners association must record a management certificate in each county in which any portion of the residential subdivision is located and must record an amended management certificate within thirty days of the amendment. Tex. Prop. Code § 209.004. See form 23-7 in this chapter. All property owners associations must record a current management certificate on or before January 1, 2014, or rerecord the current management certificate if the previous recording was done before September 1, 2013. This requirement is to facilitate the county clerks' indexing of management certificates, which, before September 1, 2013, did not have a clear, statutorily mandated system. Tex. Prop. Code § 209.004(a–1). Thus, a property owners association should record or rerecord its current management certificates even if it missed the January 1, 2014, deadline. If either the property owners association has, or its management company maintains on behalf of the association, a publicly accessible website, then the dedicatory instruments related to the subdivision and the association must be posted on that website. Tex. Prop. Code § 207.006.

Despite any contrary provision in a dedicatory instrument or in other laws not specifically applicable to a property owners association, a property owners association must make the books and records of the association, including financial records, open to and reasonably available for examination and copying by an owner or a person designated in a writing signed by the owner as the owner's agent, attorney, or certified public accountant. Tex. Prop. Code § 209.005(a), (c).

The procedure for an owner to examine and copy an association's records is set out in Tex. Prop. Code § 209.005. In addition, the property owners association must adopt a records production and copying policy that prescribes the costs the association will charge for the compilation, production, and reproduction of requested records. That policy must be recorded in the real property records. The association cannot assess any charges if they are not recorded. Tex. Prop. Code § 209.005(i). See form 23-12 for an example of a records production and copying policy.

A property owners association composed of more than fourteen lots must also adopt and comply with a document retention policy meeting certain defined requirements. Tex. Prop. Code § 209.005(m). The documentation retention policy must be recorded as a dedicatory instrument. Tex. Prop. Code § 209.005(i).

§ 23.2:1 Governance of Property Owners Associations

The governance of property owners associations, including meetings and voting procedures for members, is subject to common-law rules, the terms of the dedicatory instruments, the Texas Business Organizations Code, and the Texas Property Code.

Mandatory, statutory provisions about members voting apply to property owners associations and supersede contrary provisions in a dedicatory instrument. *See* Tex. Prop. Code §§ 209.0057–.0059, 209.00592–.00594.

The board of directors of a property owners association must call an annual meeting of the members. If a board does not call an annual

meeting of the association members, any owner may demand that a meeting of the association members be called not later than the thirtieth day after the date of the owner's demand. *See* Tex. Prop. Code § 209.014.

Mandatory, statutory provisions for board of director qualifications and meetings apply to property owners associations and supersede contrary provisions in a dedicatory instrument. *See* Tex. Prop. Code §§ 209.0051, 209.00591. Regular and special board meetings must be open to owners, subject to the right of the board to adjourn a board meeting and reconvene in closed executive session to consider certain specified matters. Written minutes of the meetings must be kept and made available to owners. Members must be given notice of the date, hour, place, and general subject of a regular or special board meeting, including a general description of any matter to be brought up for deliberation in executive session. *See* Tex. Prop. Code § 209.0051.

There are mandatory and permissive statutory provisions for how a property owners association gives notice to owners and the content of the notice. These provisions vary depending on factors such as type and location of meetings, action taken or to be taken with or without a meeting, voting methods, use of electronic communication, and size of the association. *See, e.g.*, Tex. Prop. Code §§ 209.0042, 209.0051, 209.0056, 209.00593, 209.006.

§ 23.2:2 Enforcement of Covenants and Rules and Collection of Assessments

Before a property owners association may suspend an owner's right to use a common area, file a suit against an owner other than a suit to collect a regular or special assessment or foreclose under an association's lien, charge an owner for property damage, or levy a fine for a violation of the restrictions or bylaws or rules of the association, the association or its agent must give written notice to the owner by certified mail with certain required information. Tex. Prop. Code § 209.006. A reasonable time for the owner to cure a violation must be given if the violation is curable and does not materially affect the health or safety of an ordinary resident. Tex. Prop. Code § 209.006. The statute contains examples of curable and uncurable violations.

A property owners association may not hold an owner liable for fees of a collection agent retained by the property owners association unless the association first provides written notice with required information to the owner by certified mail. Tex. Prop. Code § 209.0064. A property owners association may collect from an owner reimbursement of reasonable attorney's fees and other reasonable costs incurred relating to collecting amounts due to the association for enforcing restrictions or the bylaws or rules of the association only if the owner is provided a written notice that attorney's fees and costs will be charged to the owner if the delinquency or violation continues after a date certain. Tex. Prop. Code § 209.008.

A property owners association composed of more than fourteen lots must adopt reasonable guidelines to establish an alternative payment schedule by which an owner may make partial payments to the property owners association for delinquent regular or special assessments or any other amount owed to the association without accruing additional monetary penalties. The guidelines must allow at least three months to pay the assessment. The guidelines are not considered a dedicatory instrument but must be recorded in the real property records. Tex. Prop. Code § 209.0062.

A property owners association whose dedicatory instruments grant a right to foreclose on assessment liens is deemed to have any power of sale required to exercise the foreclosure right under Tex. Prop. Code § 209.0092. The Texas Resi-

dential Property Owners Protection Act regulates the foreclosure of an assessment lien and provides a right of redemption after foreclosure. *See* Tex. Prop. Code §§ 209.009–.011. Generally, judicial foreclosure of an owner's lot is required, and nonjudicial foreclosure is not allowed, unless the owner waives the right to require a judicial foreclosure after default. Tex. Prop. Code § 209.0092. A judicial foreclosure required by Tex. Prop. Code § 209.0092 must be conducted according to Texas Rules of Civil Procedure 735 and 736. Tex. Prop. Code § 209.0092(b). *See* Tex. R. Civ. P. 735, 736.

A property owners association may not conduct a nonjudicial foreclosure or commence a judicial foreclosure action related to the association's assessment lien on an owner's lot unless the association provides written notice to any holder of an inferior or subordinate deed-of-trust lien of record on the lot of (1) the total amount of the delinquency giving rise to the foreclosure and (2) the lienholder's opportunity to cure the delinquency before the sixty-first day after the receipt of the notice. The notice must be sent by certified mail to the address for the inferior or subordinate lienholder shown in the deed records relating to the lot. Tex. Prop. Code § 209.0091.

Not later than the thirtieth day after a judicial or nonjudicial foreclosure sale of an owner's lot, a property owners association must send to the lot owner, each lienholder of record according to the most recently filed deed of trust, and any transferee or assignee of that deed of trust, a written notice stating the date and time the sale occurred and informing them of the right of the lot owner and lienholder to redeem the lot under section 209.011 of the Texas Property Code. Tex. Prop. Code § 209.010–.011. See form 23-19 in this chapter for an example of a notice.

Not later than the thirtieth day after the property owners association sends notice under Tex. Prop. Code § 209.010, the association must record an affidavit under Tex. Prop. Code § 209.010(c) in the real property records where the property is located, stating the date on which notice was sent and containing a legal description of the lot foreclosed. See form 23-18 for an example of an affidavit. If the lot owner or lienholder sends a written request to redeem the property before the expiration of the redemption period, the redemption period is extended until the tenth day after the date the association and any third-party purchaser at the foreclosure provides written notice to the redeeming party of the amounts that must be paid to redeem the property. Tex. Prop. Code § 209.011(m).

If the redemption period (including any extensions) expires without redemption of the property, the association or third-party foreclosure purchaser must record an affidavit in the real property records in which the property is located, stating that the lot owner or lienholder did not redeem the property. Tex. Prop. Code § 209.011(n). See form 23-20 for an example of an affidavit.

§ 23.2:3 Resale Certificates

Texas Property Code chapter 207 applies to residential subdivisions with a property owners association that is entitled to levy regular or special assessments. Tex. Prop. Code §§ 207.001(6), 207.002. Within ten business days after a written request, a residential property owners association is required to deliver a resale certificate to the requesting owner, title company, purchaser, or their respective agents. The resale certificate must be prepared no earlier than the sixtieth day before it is delivered and must include specific information about the property and the subdivision as a whole. Tex. Prop. Code § 207.003. See form 23-10 in this chapter for an example of a resale certificate. The property owners association may require evidence of the requester's authority to order a resale certificate and payment of a fee for having

provided the resale certificate. Tex. Prop. Code § 207.003.

§ 23.3 Instructions for Completing Declaration of Restrictive Covenants and Other Dedicatory Instruments

§ 23.3:1 General Information

See chapter 3 in this manual for general information about designations of parties, addresses, property descriptions, and execution and acknowledgment of documents.

§ 23.3:2 Scope of Declaration of Restrictive Covenants

Form 23-1 in this chapter is drafted for use with a single-family residential subdivision whose owners are members of a property owners association, and form 23-2 is drafted for use with a residential subdivision that does not include a property owners association.

§ 23.3:3 Use and Activities

The use and activities in section C. of forms 23-1 (the declaration of restrictive covenants for a subdivision with a property owners association) and 23-2 (the declaration for a subdivision without a property owners association) in this chapter should be tailored to address a declarant's desired permitted use of the property and prohibited activities, or those that a declarant wants to regulate on the property. The forms list as examples various activities typically prohibited in subdivisions restricted to residential use.

A declaration usually restricts the types of buildings that can be constructed on a lot in the subdivision. Such restrictions can include the size, construction materials, location on the lot, and so forth. The declaration also usually restricts how the lot owner can use the buildings and the lot. The drafter must be specific with the restrictions for buildings and use. For example, restricting buildings to only single-family residences does not limit a building to use by only a single family. Nor does restricting single-family residence buildings to use for only residence purposes limit a building to use by only a single family. *Tarr v. Timberwood Park Owners Ass'n, Inc.*, 556 S.W.3d 274 (Tex. 2018).

Unless the declaration prohibits rental of units, condominium owners associations or managers may encounter enforcement problems when an owner rents the property to a third party. Insertion of provisions such as the following in the declaration or the association's rules can minimize these enforcement problems:

- requiring that owners provide tenants with the declaration and rules;
- requiring owners to use rental agreements that impose on tenants the obligation to comply with the dedicatory instruments, with consequences for tenants' violation of the declaration or rules;
- making owners responsible for any fines or other consequences if tenants violate the declaration or rules; and
- requiring owners to give the association or management information about rentals, including contact information for tenants and copies of the rental agreements (form 23-21 in this chapter can be used for this purpose).

Some declarations prohibit short-term rentals because of the unique problems they pose. "Short-term rental" means the rental of all or part of a residential property for less than thirty consecutive days. Tex. Tax Code §§ 156.001(b), 156.101. Short-term rentals are subject to sales and hotel taxes and, often, additional local ordinances. Promulgating association rules that require owners to comply with all applicable laws, with fines or other consequences in the

event the owners do not comply, can provide an association with an enforcement tool in those situations.

§ 23.3:4 Construction and Maintenance Standards

The construction and maintenance standards in section D. of forms 23-1 and 23-2 in this chapter should be tailored to address a declarant's desired construction and maintenance standards for the property. In addition, several construction options need to be selected by a declarant in section D. of both declarations, such as maximum height restrictions, minimum floor area, time to complete repairs or for rebuilding of improvements, and time to complete installation of landscaping.

§ 23.3:5 Association

Section E. of form 23-1 in this chapter includes a property owners association that has two classes of membership. Class A members are all property owners except the declarant, and each Class A member has one vote. The declarant is designated a Class B member with special voting rights as specified in the bylaws of the association. Paragraph E.3.b. of form 23-1 allows a declarant to select the date on which Class B member rights are to be converted to Class A member rights.

§ 23.3:6 Architectural Control Committee

Section F. of form 23-1 in this chapter includes an architectural control committee (ACC) established to assist the association in ensuring that permitted improvements and landscaping conform to the dedicatory instruments. A declarant must select the number of members comprising the ACC and the number of days that a property owner or the ACC has to act on various matters brought before the ACC.

§ 23.3:7 Assessments

Section G. of form 23-1 in this chapter authorizes the association to impose and collect regular and special assessments, and a lien is created on each owner's property to secure an owner's payment of the assessments. The amount of the initial regular assessment, the timing for payment of regular assessments, and the manner in which the owners approve special assessments all need to be completed in this section.

§ 23.3:8 Remedial Rights

If a declarant desires to impose a late charge or interest on delinquent assessments, the amount and interest rate should be completed in section H. of form 23-1 in this chapter.

§ 23.3:9 Dedication or Conveyance of Common Areas

Paragraph I.d. of form 23-1 in this chapter requires a declarant to select the number of votes necessary to dedicate or convey common areas owned by the association.

§ 23.3:10 Term of Declaration

Paragraph J. of form 23-1 in this chapter and paragraph E. of form 23-2 both allow a developer to select the period of time the restrictive covenants will remain in effect and, if the restrictive covenants terminate on a specific date, how the property owners may continue the restrictive covenants.

§ 23.3:11 Annexation of Additional Property

Paragraph J. of form 23-1 in this chapter and paragraph E. of form 23-2 both allow for annexation of additional property into the declaration. A declarant needs to determine the percentage of owners needed to annex additional property into the declaration.

§ 23.3:12 Bylaws

Form 23-4 in this chapter is a set of bylaws for the property owners association. The bylaws can be adapted to either an unincorporated association or a corporation. If the property owners association is an unincorporated nonprofit association, consult chapter 252 of the Texas Business Organizations Code. For a nonprofit corporation, consult chapter 22 of the Business Organizations Code.

§ 23.3:13 Rules

Form 23-5 in this chapter is a form that can be used in promulgating rules for the property owners association and the use of any common areas. The rules and penalties for violation (to be inserted in sections A. and B. of the form), promulgated by the association, will be unique to each subdivision. The enforcement provisions (contained in section C. of the form) are based on the requirements in section 209.006 of the Texas Property Code.

§ 23.4 Management Agreement

A person who performs residential property management services for a single-family residential property must be licensed as a broker. Tex. Occ. Code ch. 1101. Among the many acts that can make one a "broker" for purposes of the Occupations Code, and thus require the person to be licensed, is "control[ling] the acceptance or deposit of rent from a resident of a single-family residential real property unit," in expectation of receiving a commission or other valuable consideration. Tex. Occ. Code § 1101.002(1)(A)(x). Control means the authority to either (1) pay for services related to management of the property out of the rent collected, (2) determine where to deposit the rent, or (3) sign checks or withdraw money from a trust account. 22 Tex. Admin. Code § 535.4(h). Tex. Admin. Code § 535.4(i) states that in addition to other types of property, a condominium unit or townhome is a single-family residential real property unit for purposes of Tex. Admin. Code § 535.4(h). An association that hires an unlicensed manager to assist in managing the association's affairs can use form 23-22 in this chapter to prohibit activities for which a broker's license is required.

§ 23.5 Additional Resources

Austin, Judd A., Jr. "HOA Collections and Foreclosures: New Statutes & New Rules." In *Advanced Real Estate Drafting Course, 2012*. Austin: State Bar of Texas, 2012.

Barker, Rick L., and Brady Ortego. "Laws Affecting the Drafting of HOA Documents." In *Advanced Real Estate Drafting Course, 2015*. Austin: State Bar of Texas, 2015.

Brown, Clinton F. "Texas Property Owners Association Case Law—Significant Cases." In *Advanced Property Owners Association Law Course, 2018*. Austin: State Bar of Texas, 2018.

Brown, Clinton F., and Mia B. Lorick. "A New Dawn for Short-Term Rentals: The Texas Supreme Court's Opinion on POA Regulation and Probable Legislation." In *Advanced Real Estate Law Course, 2018*. Austin: State Bar of Texas, 2018.

Burton, Robert D. "Drafting Community Rules." In *Advanced Property Owners Association Law Course, 2018*. Austin: State Bar of Texas, 2018.

Burton, Robert D., and Sharon Reuler. "Legislative Update 2015: Condos & Owners Associations." In *Legislative Update 2015: Condos & Owners Associations, 2015*. Austin: State Bar of Texas, 2015.

Cagle, Gregory S. "POA Board Governance: Governance of the Unruly by the Uninitiated." In *Advanced Property Owners*

Association Law Course, 2018. Austin: State Bar of Texas, 2018.

Conoly, David Z. "Drafting Bylaws for HOAs: Condominiums & Subdivisions." In *Advanced Real Estate Drafting Course, 2014*. Austin: State Bar of Texas, 2014.

———. "HOA Foreclosure Demand Letters." In *Handling Your First (or Next) HOA Assessment Lien Foreclosure for Condos and Subdivisions, 2014*. Austin: State Bar of Texas, 2014.

Farine, Trisha Taylor. "Amending POA Governing Documents." In *Advanced Property Owners Association Law Course, 2018*. Austin: State Bar of Texas, 2018.

Hailey, Roy D. "Property Owners Associations Are Nonprofits Too!" In *Governance of Nonprofit Organizations, 2013*. Austin: State Bar of Texas, 2013.

Hailey, Roy D., Sipra Boyd, and Clinton F. Brown. "2006–2013 Supplement to Survey of Texas Case Law Affecting Property Owners Associations." In *Advanced Real Estate Law Course, 2014*. Austin: State Bar of Texas, 2014.

Hailey, Roy D., and Sharon Reuler. "Flagpoles, Condos, Turf & More: An Overview of 2013 State Law Changes for Texas Property Owners Associations." In *2013 POA Legislative Update: Condos & Owners Associations, 2013*. Austin: State Bar of Texas, 2013.

Jackson, Rosemary B. "A Basic Overview of Laws Affecting Property Owners Associations and Condominiums." In *Real Estate Law 101, 2018*. Austin: State Bar of Texas, 2018.

———. "Architectural Guidelines for POAs." In *Advanced Real Estate Drafting Course, 2015*. Austin: State Bar of Texas, 2015.

———. "Drafting Covenants, Conditions and Restrictions under the New Laws for Property Owners Associations." In *Advanced Real Estate Drafting Course, 2013*. Austin: State Bar of Texas, 2013.

———. "Established Subdivisions without Mandatory HOAs—Adding HOAs 'After the Fact.'" In *Advanced Real Estate Law Course, 2011*. Austin: State Bar of Texas, 2011.

———. "Governing Documents for Property Owners Associations: Distinguishing Roles for Declarations, Rules and Bylaws." In *Advanced Real Estate Law Course, 2016*. Austin: State Bar of Texas, 2016.

Katine, Mitchell. "Types of Homeowner Association Debts and Liens." In *Handling Your First (or Next) HOA Assessment Lien Foreclosure for Condos and Subdivisions, 2014*. Austin: State Bar of Texas, 2014.

Lorick, Mia B. "Leasing Rules, Regulations, and Restrictions for POAs." In *Advanced Property Owners Association Law Course, 2018*. Austin: State Bar of Texas, 2018.

Maddox, Margaret R., and Christopher J. Archambault. "Covenant Enforcement by POA's: 'The ABC's of DRV's.'" In *Advanced Property Owners Association Law Course, 2018*. Austin: State Bar of Texas, 2018.

Markel, Marc D. "The Standard of Care in Texas for Property Owners' Associations." In *Advanced Property Owners Association Law Course, 2018*. Austin: State Bar of Texas, 2018.

Markel, Marc D., and Paul Gaines. "Checklists and Forms for Statutory Compliance by Single Family Homeowner Associations and Condominium Associations." In

Advanced Real Estate Drafting Course, 2018. Austin: State Bar of Texas, 2018.

Markel, Marc D., and Brady E. Ortego. "Foreclosures by Property Owners' Associations." In *Advanced Real Estate Law Course, 2017*. Austin: State Bar of Texas, 2017.

Reuler, Sharon. "2018 Overview of Texas POA Statutes: Statutes Pertaining to Common Interest Developments and Their Property Owners Associations." In *Advanced Property Owners Association Law Course, 2018*. Austin: State Bar of Texas, 2018.

Reuler, Sharon, and Roy D. Hailey. "Texas HOA Law Highlights: FAQs about Homeowner Associations in Subdivisions & Condos." In *Real Estate Law 101 Course, 2018*. Austin: State Bar of Texas, 2018.

Valdes, Alex. "Federal & State Laws That Modify POA Documents." In *Advanced Property Owners Association Law Course, 2018*. Austin: State Bar of Texas, 2018.

Weinberg, William R. "Green Building Issues in Residential Covenants, Conditions and Restrictions." In *Advanced Real Estate Strategies Course, 2009*. Austin: State Bar of Texas, 2009.

Wilson, Reid C. "Amending/Modifying Restrictive Covenants." In *Advanced Real Estate Strategies Course, 2008*. Austin: State Bar of Texas, 2008.

———. "Restrictive Covenants: Modifying and Updating." In *Advanced Real Estate Law Course, 2014*. Austin: State Bar of Texas, 2014.

Form 23-1

This form is provided as an example only. The attorney should tailor the provisions of the form to address the specific standards of the association.

Declaration of Restrictive Covenants of the [name of subdivision] Subdivision

[with Property Owners Association]

Basic Information

Date:

Declarant:

Declarant's Address:

Property Owners Association: [**name**], a Texas nonprofit [corporation/association]

Property Owners Association's Address:

Property:

Definitions

"ACC" means the Architectural Control Committee established in this Declaration.

"Assessment" means any amount due to the Property Owners Association by an Owner or levied against an Owner by the Property Owners Association under this Declaration.

"Board" means the Board of Directors of the Property Owners Association.

"Bylaws" means the Bylaws of the Property Owners Association adopted by the Board.

"Common Area" means all property within the Subdivision not designated as a Lot on the Plat and that has not been accepted for maintenance by the applicable governmental body. Declarant will convey the Common Area to the Property Owners Association.

"Covenants" means the covenants, conditions, and restrictions contained in this Declaration.

"Declarant" means [**name**], [a/an] [individual/[Texas/[**state of formation**]] limited partnership/corporation/limited liability company] and any successor that acquires all unimproved Lots owned by Declarant for the purpose of development and is named as successor in a recorded document.

"Dedicatory Instruments" means this Declaration and the [certificate of formation,] Bylaws, rules of the Property Owners Association, and standards of the ACC, as amended.

"Easements" means Easements within the Property for utilities, drainage, and other purposes as shown on the Plat or of record.

"Lot" means each tract of land designated as a lot on the Plat, excluding lots that are part of the Common Area.

"Member" means Owner.

"Owner" means every record Owner of a fee interest in a Lot.

"Plat" means the Plat of the Property recorded in [**recording data**] of the real property records of [**county**] County, Texas, and any replat of or amendment to the Plat made in accordance with this Declaration.

"Renting" means granting the right to occupy and use a Residence or Structure in exchange for consideration.

"Residence" means a detached building designed for and used as a dwelling by a Single Family and constructed on one or more Lots.

"Short Term Renting" means granting the right to occupy and use a Residence or Structure in exchange for consideration for a period of time less than [**number**] days.

"Single Family" means a group of individuals related by blood, adoption, or marriage or a number of unrelated roommates not exceeding the number of bedrooms in a Residence.

"Structure" means any improvement on a Lot (other than a Residence), including a sidewalk, driveway, fence, wall, tennis court, swimming pool, outbuilding, or recreational equipment.

"Subdivision" means the Property covered by the Plat and any additional property made subject to this Declaration.

"Vehicle" means any automobile, truck, motorcycle, boat, trailer, or other wheeled conveyance, whether self-propelled or towed.

Clauses and Covenants

A. Imposition of Covenants

1. Declarant imposes the Covenants on the Subdivision. All Owners and other occupants of the Lots by their acceptance of their deeds, leases, or occupancy of any Lot agree that the Subdivision is subject to the Covenants.

2. The Covenants are necessary and desirable to establish a uniform plan for the development and use of the Subdivision for the benefit of all Owners. The Covenants run with the land and bind all Owners, occupants, and any other person holding an interest in a Lot.

3. Each Owner and occupant of a Lot agrees to comply with the Dedicatory Instruments and agrees that failure to comply may subject him to a fine, an action for amounts due to the Property Owners Association, damages, or injunctive relief.

B. Plat and Easements

1. The Plat, Easements, and all matters shown of record affecting the Property are part of this Declaration and are incorporated by reference.

2. An Owner may use that portion of a Lot lying in an Easement for any purpose that does not interfere with the purpose of the Easement or damage any facilities. Owners do not own any utility facilities located in an Easement.

3. Neither Declarant nor any Easement holder is liable for damage to landscaping or a Structure in an Easement.

4. Declarant and each Easement holder may install, maintain, and connect facilities in the Easements.

C. Use and Activities

1. *Permitted Use.* A Lot may be used only for an approved Residence and approved Structures for Single Family residential use [**include to permit Short Term Renting:** , including Short Term Renting in compliance with applicable law].

2. *Prohibited Activities.* Prohibited activities are—

a. any activity that is otherwise prohibited by the Dedicatory Instruments;

b. any illegal activity;

c. any nuisance, noxious, or offensive activity;

d. any dumping of rubbish;

e. any storage of—

i. building materials except during the construction or renovation of a Residence or a Structure;

ii. vehicles, except vehicles in a garage or Structure or operable automobiles on a driveway; or

iii. unsightly objects unless completely shielded by a Structure;

f. any exploration for or extraction of minerals;

g. any keeping or raising of animals, livestock, or poultry, except for common domesticated household pets, such as dogs and cats, not to exceed **[number]** confined to a fenced yard or within the Residence;

h. any commercial or professional activity except reasonable home office use;

i. the Renting of a portion of a Residence or Structure;

j. the drying of clothes in a manner that is visible from any street;

k. the display of any sign except—

i. one not more than five square feet, advertising the Lot for sale or rent or advertising a garage or yard sale; and

ii. political signage not prohibited by law or the Dedicatory Instruments;

l. installing a mobile home, manufactured home, manufactured housing, motor home, or house trailer on a Lot;

m. moving a previously constructed house onto a Lot;

n. interfering with a drainage pattern without ACC approval;

o. hunting and shooting;

p. occupying a Structure that does not comply with the construction standards of a Residence; and

q. [**insert any additional restrictions, e.g.,** Short Term Renting; allowing a renter, guest, or other person who is a registered sex offender to reside at the Property; using the Property in a timeshare program; any income-producing activity.]

D. Construction and Maintenance Standards

1. *Lots*

a. *Consolidation of Lots.* An Owner of adjoining Lots, with ACC approval, may consolidate those Lots into one site for the construction of a Residence.

b. *Subdivision Prohibited.* No Lot may be further subdivided.

c. *Easements.* No easement in a Lot may be granted without ACC approval.

d. *Maintenance.* Each Owner must keep the Lot, all landscaping, the Residence, and all Structures in a neat, well-maintained, and attractive condition.

2. *Residences and Structures*

a. *Aesthetic Compatibility.* All Residences and Structures must be aesthetically compatible with the Subdivision, as determined by the ACC.

b. *Maximum Height.* The maximum height of a Residence is [**number**] [feet above grade/stories].

c. *Required Area.* The total area of a Residence, exclusive of porches, garages, or carports, must be at least [**number**] square feet.

d. *Location on Lot.* No Residence or Structure may be located in violation of the setback lines shown on the Plat. Each Residence must face the front Lot line. All Structures must be located behind the front wall of the Residence. All outbuildings, except garages, must not be visible from any street.

e. *Garages.* Each Residence must have at least a two-car garage accessed by a driveway. The garage may be a separate structure.

f. *Damaged or Destroyed Residences and Structures.* Any Residence or Structure that is damaged must be repaired within [**number**] days (or within a period approved by the ACC) and the Lot restored to a clean, orderly, and attractive condition. Any Residence or Structure that is damaged to the extent that repairs are not practicable must be demolished and removed within [**number**] days and the Lot restored to a clean and attractive condition.

g. *Fences, Walls, and Hedges.* No fence, wall, or hedge may be located forward of the front wall line of the Residence, except for trellises and decorative fences that are approved by the ACC.

h. *Traffic Sight Lines.* No landscaping that obstructs traffic sight lines may be placed on any Lot.

i. *Sidewalks.* When the Residence is constructed, the Lot must be improved with sidewalks connecting with the sidewalks on adjacent Lots.

j. *Landscaping.* Landscaping must be installed within [**number**] days after occupancy. The minimum landscaping is specified in the standards of the ACC.

3. *Building Materials for Residences and Structures*

a. *Roofs.* Only [composition/tile/metal] roofs may be used on Residences and Structures, unless otherwise approved by the ACC. All roof stacks must be painted to match the roof color.

b. *Air Conditioning.* Window- or wall-type air conditioners may not be used in a Residence.

c. *Exterior Walls.* All Residences must have at least [**percent**] percent of their exterior walls, including exposed foundation, of stone or brick, minus windows and doors, unless otherwise approved by the ACC.

d. *Color Changes.* No change to the color of the exterior walls, trim, or roof of a Residence will be permitted, unless otherwise approved by the ACC.

e. *Driveways and Sidewalks.* All driveways and sidewalks must be surfaced with concrete, unless otherwise approved by the ACC. Driveways and sidewalks may not be surfaced with dirt, gravel, shell, or crushed rock.

f. *Lot Identification.* Lot address numbers and name identification must be aesthetically compatible with the Subdivision.

E. Property Owners Association

Select one of the following.

1. *Establishment and Governance.* The Property Owners Association is established by filing its certificate of formation and is governed by the certificate, the Declaration, and the Bylaws. The Property Owners Association has the powers of a nonprofit corporation and a property owners association under the Texas Business Organizations Code, the Texas Property Code, and the Dedicatory Instruments.

Or

1. *Establishment and Governance.* The filing of this Declaration establishes the Property Owners Association as an unincorporated nonprofit association that is governed by this Declaration and the Bylaws. The Property Owners Association has the powers of an unincorporated nonprofit association and a property owners association for the Subdivision under the Texas Business Organizations Code, the Texas Property Code, and the Dedicatory Instruments.

Continue with the following.

2. *Rules.* The Board may adopt rules that do not conflict with law or the other Dedicatory Instruments. On request, Owners will be provided a copy of any rules.

3. *Membership and Voting Rights.* Every Owner is a Member of the Property Owners Association. Membership is appurtenant to and may not be separated from ownership of a Lot. The Property Owners Association has two classes of voting Members:

a. *Class A.* Class A Members are all Owners, other than Declarant. Class A Members have one vote per Lot. When more than one person is an Owner, each is a Class A Member, but only one vote may be cast for a Lot.

b. *Class B.* The Class B Member is Declarant and has the number of votes for each Lot owned specified in the Bylaws. The Class B Membership ceases and converts to Class A Membership on the earlier of—

i. when the Class A Members' votes exceed the total of Class B Member's votes or

ii. **[date]**.

F. ACC

1. *Establishment*

a. *Purpose.* The ACC is established as a committee of the Property Owners Association to assist the Property Owners Association in ensuring that all Residences, Structures, and landscaping within the Subdivision are aesthetically compatible and conform to the Dedicatory Instruments.

b. *Members.* The ACC consists of at least **[number]** persons appointed by the Board. The Board may remove or replace an ACC member at any time.

c. *Term.* ACC members serve until replaced by the Board or they resign.

d. *Standards.* Subject to Board approval, the ACC may adopt standards that do not conflict with the other Dedicatory Instruments to carry out its purpose. These standards are not effective unless recorded with the county clerk. On request, Owners will be provided a copy of any standards.

2. *Plan Review*

a. *Required Review by ACC.* No Residence or Structure may be erected on any Lot, or the exterior altered, unless plans, specifications, and any other documents requested by the ACC have been submitted to and approved by the ACC. The plans and specifications must show exterior design, height, building materials, color scheme, location of the Residence and Structures

depicted horizontally and vertically, and the general plan of landscaping, all in the form and detail the ACC may require.

b. *Procedures*

i. *Complete Submission.* Within [**number**] days after the submission of plans and specifications by an Owner, the ACC must notify the submitting Owner of any other documents or information required by the ACC. In the absence of timely notice from the ACC requesting additional documents or other information, the submission is deemed complete.

ii. *Deemed Approval.* If the ACC fails to give notice of disapproval of the plans and specifications to the submitting Owner within [**number**] days after complete submission, the submitted plans and specifications are deemed approved.

c. *Appeal.* An Owner may appeal any action of the ACC to the Board. The appealing Owner must give written notice of the appeal to the Board, and if the appeal is by an Owner who is not the submitting Owner, the appealing Owner must also give written notice to the submitting Owner within [**number**] days after the ACC's action. The Board shall determine the appeal within [**number**] days after timely notice of appeal is given. The determination by the Board is final.

d. *Records.* The ACC will maintain written records of all requests submitted to it and of all actions taken. The Board will maintain written records of all appeals of ACC actions and all determinations made. Any Owner may inspect the records of the ACC and Board, but no Owner may inspect or copy the interior floor plan or security system design of any other Owner.

e. *No Liability.* The Property Owners Association, the Board, the ACC, and their members will not be liable to any person submitting requests for approval or to any Owner by reason of any action, failure to act, approval, disapproval, or failure to approve or disapprove any request.

G. Assessments

1. *Authority.* The Property Owners Association may levy Assessments to promote the recreation, health, safety, and welfare of the residents in the Subdivision, to fund operating expenses of the Property Owners Association, and to improve and maintain the Common Areas.

2. *Personal Obligation.* An Assessment is a personal obligation of each Owner when the Assessment accrues.

3. *Creation of Lien.* Assessments are secured by a continuing vendor's lien on each Lot, which lien is reserved by Declarant and hereby assigned to the Property Owners Association. By acceptance of a deed to a Lot, each Owner grants the lien, together with the power of sale, to the Property Owners Association to secure Assessments.

4. *Commencement.* A Lot becomes subject to Assessments on conveyance of the Lot by Declarant.

5. *Regular Assessments*

a. *Rate.* Regular Assessments are levied annually by the Board to fund the anticipated operating and maintenance expenses of the Property Owners Association. Until changed by the Board, the Regular Assessment is $[**amount**] per [Lot/acre].

b. *Changes to Regular Assessments.* Regular Assessments may be changed annually by the Board. Written notice of the Regular Assessment will be sent to every Owner at least thirty days before its effective date.

c. *Collections.* Regular Assessments will be collected [annually/ semiannually/monthly] in advance, payable on the [first/tenth/[**other**]] day of the [month/year] and on [the same day of each succeeding [month/year]/the [first/tenth/[**other**]] day of [**month**] of each year].

6. *Special Assessments.* In addition to the Regular Assessments, the Board may levy Special Assessments for the purpose of funding the cost of any construction, reconstruction, repair, or replacement of any capital improvement on the Common Area or for any other purpose benefiting the Subdivision but requiring funds exceeding those available from the Regular Assessments. Special Assessments must be approved by the Members. Written notice of the terms of the Special Assessment will be sent to every Owner.

7. *Approval of Special Assessments.* Any Special Assessment must be approved by a [majority/two-thirds] vote at a meeting of the Members in accordance with the Bylaws.

8. *Fines.* The Board may levy a fine against an Owner for a violation of the Dedicatory Instruments as permitted by law.

9. *Subordination of Lien to Mortgages.* The lien granted and reserved to the Property Owners Association is subordinate to any lien granted by an Owner against a Lot not prohibited by the Texas Constitution. The foreclosure of a superior lien extinguishes the Property Owners Association's lien as to Assessments due before the foreclosure.

10. *Delinquent Assessments.* Any Assessment not paid within [**number**] days after it is due is delinquent.

H. Remedial Rights

1. *Late Charges and Interest.* A late charge of [$[**amount**]/[**percent**] percent of the delinquent amount] is assessed for delinquent payments. Delinquent Assessments accrue interest at the rate of [**percent**] percent per year. The Board may change the late charge and the interest rate.

2. *Costs, Attorney's Fees, and Expenses.* If the Property Owners Association complies with all applicable notice requirements, an Owner is liable to the Property Owners Association for all costs and reasonable attorney's fees incurred by the Property Owners Association in collecting delinquent Assessments, foreclosing the Property Owners Association's lien, and enforcing the Dedicatory Instruments.

3. *Judicial Enforcement.* The Property Owners Association may bring an action against an Owner to collect delinquent Assessments, foreclose the Property Owners Association's lien, or enforce or enjoin a violation of the Dedicatory Instruments. An Owner may bring an action against another Owner to enforce or enjoin a violation of the Dedicatory Instruments.

4. *Remedy of Violations.* The Property Owners Association may levy a fine against an Owner for a violation of the Dedicatory Instruments.

5. *Suspension of Rights.* If an Owner violates the Dedicatory Instruments, the Property Owners Association may suspend the Owner's rights under the Dedicatory Instruments in accordance with law.

6. *Damage to Property.* An Owner is liable to the Property Owners Association for damage to Common Areas caused by the Owner or the Owner's family, guests, agents, independent contractors, and invitees in accordance with law.

I. Common Area

1. *Common Area Easements.* Each Owner has an easement in and to the Common Area, subject to the right of the Property Owners Association to—

a. charge reasonable admission and other fees for the use of recreational facilities situated on the Common Area, and if an Owner does not pay these fees, the Owner may not use the recreational facilities;

b. suspend an Owner's rights to use a Common Area under the Dedicatory Instruments;

c. grant an easement approved by the Board over the Common Area for utility, drainage, or other purposes; and

d. dedicate or convey any of the Common Area for public purposes, on approval by a vote of [a majority/two-thirds] of the Members at a meeting in accordance with the Bylaws.

2. *Permitted Users.* An Owner's right to use and enjoy the Common Area extends to the Owner's family, guests, agents, and invitees, subject to the Dedicatory Instruments.

3. *Unauthorized Improvements in Common Area.* An Owner may not erect or alter any Structure on, or clear, landscape, or disturb, any Common Area except as approved by the Board.

J. General Provisions

Select one of the following.

1. *Term.* This Declaration runs with the land and is binding in perpetuity.

Or

1. *Term.* This Declaration runs with the land and is binding for a term of [**number**] years. The term may be extended for [successive terms of [**number**] years each by [**percent**] percent of the Members at a meeting in accordance with the Bylaws within [**number**] months before the end of a term/an initial term of [**number**] years]. [**Include if applicable:** Thereafter this Declaration automatically continues for successive terms of [**number**] years each, unless within [**number**] months before the end of a term [**percent**] percent of the Members at a meeting in accordance with the Bylaws elect not to extend the term.] An instrument reflecting the extension will be signed by the Property Owners Association and recorded.

Continue with the following.

2. *No Waiver.* Failure by the Property Owners Association or an Owner to enforce the Dedicatory Instruments is not a waiver.

3. *Corrections.* The Board may correct typographical or grammatical errors, ambiguities, or inconsistencies contained in this Declaration, provided that any correction must not impair or affect a vested property right of any Owner.

4. *Amendment.* This Declaration may be amended at any time by vote of [**percent (cannot exceed sixty-seven)**] percent of Owners entitled to vote on the amendment. An instrument containing the approved amendment will be signed by the Property Owners Association and recorded.

5. *Conflict.* This Declaration controls over the other Dedicatory Instruments.

6. *Severability.* If a provision of this Declaration is unenforceable for any reason, to the extent the unenforceability does not destroy the basis of the bargain among the parties, the unenforceability does not affect any other provision of this Declaration, and this Declaration is to be construed as if the unenforceable provision is not a part of the Declaration.

7. *Notices.* All notices must be in writing and must be given as required or permitted by the Dedicatory Instruments or by law. Notice by mail is deemed delivered (whether actually received or not) when properly deposited with the United States Postal Service, addressed (a) to a Member, at the Member's last known address according to the Property Owners Association's records, and (b) to the Property Owners Association, the Board, the ACC, or a managing agent at the Property Owners Association's principal office or another address designated in a notice to the Members. Unless otherwise required by law or the Dedicatory Instruments, actual notice, however delivered, is sufficient.

8. *Annexation of Additional Property.* On written approval of the Board and not less than [**percent**] percent of the Members at a meeting in accordance with the Bylaws, the owner of any property who desires to subject the property to this Declaration may record an annexation agreement that will impose this Declaration and the Covenants on that property.

_____
[**Name of declarant**]

By _____
[**Name and title**]

Include acknowledgment.

After recording, please return to:
[**name and address of declarant or attorney**]

[Reserved]

Form 23-2

Declaration of Restrictive Covenants of the [name of subdivision] Subdivision

[without Property Owners Association]

Basic Information

Date:

Declarant:

Declarant's Address:

Property:

Definitions

"Covenants" means the covenants, conditions, and restrictions contained in this Declaration.

"Declarant" means [**name**], [a/an] [individual/[Texas/[**state of formation**]] limited partnership/corporation/limited liability company] and any successor that acquires all unimproved Lots owned by Declarant for the purpose of development and is named as successor in a recorded document.

"Easements" means Easements within the Property for utilities, drainage, and other purposes as shown on the Plat or of record.

"Lot" means each tract of land designated as a lot on the Plat.

"Owner" means every record Owner of a fee interest in a Lot.

"Plat" means the Plat of the Property recorded in [**recording data**] of the real property records of [**county**] County, Texas, and any replat of or amendment to the Plat made in accordance with this Declaration.

"Renting" means granting the right to occupy and use a Residence or Structure in exchange for the payment of money.

"Residence" means a detached building designed for and used as a dwelling by a Single Family and constructed on one or more Lots.

"Single Family" means a group of individuals related by blood, adoption, or marriage or a number of unrelated roommates not exceeding the number of bedrooms in a Residence.

"Structure" means any improvement on a Lot (other than a Residence), including a fence, wall, tennis court, swimming pool, outbuilding, or recreational equipment.

"Subdivision" means the Property covered by the Plat and any additional property made subject to this Declaration.

"Vehicle" means any automobile, truck, motorcycle, boat, trailer, or other wheeled conveyance, whether self-propelled or towed.

Clauses and Covenants

A. Imposition of Covenants

1. Declarant imposes the Covenants on the Subdivision. All Owners and other occupants of the Lots by their acceptance of their deeds, leases, or occupancy of any Lot agree that the Subdivision is subject to the Covenants.

2. The Covenants are necessary and desirable to establish a uniform plan for the development and use of the Subdivision for the benefit of all Owners. The Covenants run with the land and bind all Owners, occupants, and any other person holding an interest in a Lot.

3. Each Owner and occupant of a Lot agrees to comply with this Declaration and agrees that failure to comply may subject him to a fine, damages, or injunctive relief.

B. Plat and Easements

1. The Plat, Easements, and all matters shown of record affecting the Property are part of this Declaration and are incorporated by reference.

2. An Owner may use that portion of a Lot lying in an Easement for any purpose that does not interfere with the purpose of the Easement or damage any facilities. Owners do not own any utility facilities located in an Easement.

3. Neither Declarant nor any Easement holder is liable for damage to landscaping or a Structure in an Easement.

4. Declarant and each Easement holder may install, maintain, and connect facilities in the Easements.

C. Use and Activities

1. *Permitted Use.* A Lot may be used only for an approved Residence and approved Structures for use by a Single Family.

2. *Prohibited Activities.* Prohibited activities are—

a. any activity that is otherwise prohibited by this Declaration;

b. any illegal activity;

c. any nuisance or noxious or offensive activity;

d. any dumping of rubbish;

e. any storage of—

i. building materials except during the construction or renovation of a Residence or a Structure;

ii. vehicles, except vehicles in a garage or Structure or operable automobiles on a driveway; or

iii. unsightly objects unless completely shielded by a Structure;

f. any exploration for or extraction of minerals;

g. any keeping or raising of animals, livestock, or poultry, except for common domesticated household pets, such as dogs and cats, not to exceed [**number**] confined to a fenced yard or within the Residence;

h. any commercial or professional activity except reasonable home office use;

i. the renting of a portion of a Residence or Structure;

j. the drying of clothes in a manner that is visible from any street;

k. the display of any sign except—

i. one not more than five square feet, advertising the Lot for sale or rent or advertising a garage or yard sale; and

ii. political signage not prohibited by law;

l. installing a mobile home, manufactured home, manufactured housing, motor home, or house trailer on a Lot;

m. moving a previously constructed house onto a Lot;

n. interfering with a drainage pattern or the natural flow of surface water;

o. hunting and shooting;

p. occupying a Structure that does not comply with the construction standards of a Residence; and

q. [**insert any additional restrictions, e.g.,** renting a Residence or Structure for less than thirty consecutive days or allowing a renter, guest, or other person who is a registered sex offender to reside at the Property.]

D. Construction and Maintenance Standards

1. *Lots*

a. *Consolidation of Lots.* An Owner of adjoining Lots may consolidate those Lots into one site for the construction of a Residence.

b. *Subdivision Prohibited.* No Lot may be further subdivided.

c. *Easements.* No easement in a Lot may be granted.

d. *Maintenance.* Each Owner must keep the Lot, all landscaping, the Residence, and all Structures in a neat, well-maintained, and attractive condition.

2. *Residences and Structures*

a. *Aesthetic Compatibility.* All Residences, Structures, and Landscaping must be aesthetically compatible with the Subdivision.

b. *Maximum Height.* The maximum height of a Residence is [**number**] [feet above grade/stories].

c. *Required Area.* The total area of a Residence, exclusive of porches, garages, or carports, must be at least [**number**] square feet.

d. *Location on Lot.* No Residence or Structure may be located in violation of the setback lines shown on the Plat. Each Residence must face the front Lot line. All Structures must be located behind the front wall of the Residence. All outbuildings, except garages, must not be visible from any street.

e. *Garages.* Each Residence must have at least a two-car garage accessed by a driveway. The garage may be a separate structure.

f. *Damaged or Destroyed Residences and Structures.* Any Residence or Structure that is damaged must be repaired within [**number**] days and the Lot restored to a clean, orderly, and attractive condition. Any Residence or Structure that is damaged to the extent that repairs are not practicable must be demolished and removed within [**number**] days and the Lot restored to a clean and attractive condition.

g. *Fences, Walls, and Hedges.* No fence, wall, or hedge may be located forward of the front wall line of the Residence, except for trellises and decorative fences.

h. *Antennas.* No antenna, satellite dish, or associated wires may be visible from the street or be located behind the back setback line of any Lot.

i. *Traffic Sight Lines.* No landscaping that obstructs traffic sight lines may be placed on any Lot.

j. *Sidewalks.* When the Residence is constructed, the Lot must be improved with sidewalks connecting with the sidewalks on adjacent Lots.

k. *Landscaping.* Landscaping must be installed within [**number**] days after occupancy.

3. *Building Materials for Residences and Structures*

a. *Roofs.* Only [composition/tile/metal] may be used on Residences and Structures. All roof stacks must be painted to match the roof color.

b. *Air Conditioning.* Window- or wall-type air conditioners may not be used in a Residence.

c. *Exterior Walls.* All Residences must have at least [**percent**] percent of their exterior walls, including exposed foundation, of stone or brick, minus windows and doors.

d. *Driveways and Sidewalks.* All driveways and sidewalks must be surfaced with concrete or asphalt.

e. *Lot Identification.* Lot address numbers and name identification must be aesthetically compatible with the Subdivision.

E. General Provisions

Select one of the following.

1. *Term.* This Declaration runs with the land and is binding in perpetuity.

Or

1. *Term.* This Declaration runs with the land and is binding for a term of [**number**] years. The term may be extended for [successive terms of [**number**] years each by the affirma-

tive vote of [**percent**] percent of the Owners within [**number**] months before the end of a term/ an initial term of [**number**] years]. [**Include if applicable:** Thereafter this Declaration automatically continues for successive terms of [**number**] years each, unless within [**number**] months before the end of a term [**percent**] percent of the Owners vote not to extend the term.]

Continue with the following.

2. *No Waiver.* Failure by an Owner to enforce this Declaration is not a waiver.

3. *Corrections.* Declarant may correct typographical or grammatical errors, ambiguities, or inconsistencies contained in this Declaration, provided that any correction must not impair or affect a vested property right of any Owner.

4. *Amendment.* This Declaration may be amended at any time by the affirmative vote of [**percent**] percent of the Owners.

5. *Severability.* If a provision of this Declaration is unenforceable for any reason, to the extent the unenforceability does not destroy the basis of the bargain among the parties, the unenforceability does not affect any other provision of this Declaration, and this Declaration is to be construed as if the unenforceable provision is not a part of the Declaration.

6. *Notices.* Any notice required or permitted by this Declaration must be given in writing by certified mail, return receipt requested. Unless otherwise required by law or this Declaration, actual notice, however delivered, is sufficient.

7. *Annexation of Additional Property.* On written approval of Declarant and not less than [**percent**] percent of the Owners, the owner of any property who desires to subject the property to this Declaration may record an annexation agreement that will impose this Declaration and the Covenants on that property.

8. *Presuit Mediation.* As a condition precedent to the commencement of a legal proceeding to enforce this Declaration, the Owners will mediate the dispute in good faith.

Include the following if applicable.

9. *Association.* The Owners of **[percent]** of Lots in the Subdivision may authorize the formation of an association of Owners ("Association") by signing and acknowledging a statement containing (a) the proposed Association's name and type of entity and (b) the names and addresses of the initial directors. The Association will be governed by this Declaration, its Certificate of Formation, if any, and its bylaws and rules adopted by its board of directors (collectively, "Dedicatory Instruments").

If an Association is formed, every Owner will be a member and agrees to comply with the Dedicatory Instruments with the same consequences for failure to comply as are contained in this Declaration for failure to comply with it. Membership in the Association is appurtenant to and may not be separated from ownership of a Lot. If more than one person is an Owner of a Lot, only one vote may be cast for the Lot. The Association will have the powers of a Texas [nonprofit corporation/unincorporated nonprofit association] and a property owners association for the Subdivision under the Texas Business Organizations Code, the Texas Property Code, and the Dedicatory Instruments. The Association may levy assessments to pay the expenses of its formation; to promote the recreation, health, safety, and welfare of Owners in the Subdivision; to fund its operating expenses; and to improve and maintain any common areas. An assessment is a personal obligation of each Owner when the assessment accrues. Assessments are secured by a continuing vendor's lien on each Lot, and the lien is reserved by the Declarant and assigned to the Association. By acceptance of a deed to a Lot, each Owner grants a lien, together with the power of sale, to the Association to secure assessments. The lien granted and reserved to the Association is subordinate to any lien granted by an Owner against a Lot not prohibited by the Texas Constitution. The foreclosure of a superior lien extinguishes the Association's lien as to assessments due before the foreclosure. The bylaws or the rules of the Association establish when assessments are due, how assessment amounts may be changed, and the Association's rights to collect assessments. Regular assessments

[will be equal for all Lots/will be based on the size of each Lot, rounded to the nearest one-tenth of an acre]. The bylaws and rules may also specify the Association's remedial rights to charge late fees for late payment of assessments; enforce compliance with the Dedicatory Instruments; and assess an Owner for attorney's fees and costs arising out of enforcement actions, foreclosure of the Association's lien, or suspension of an Owner's rights, including voting rights, for a delinquency in paying an assessment or other violations of the Dedicatory Instruments.

_____

[**Name of declarant**]

Include acknowledgment.

After recording, please return to:
[**name and address of declarant or attorney**]

Form 23-3

Certificate of Formation of [name of corporation], a Texas Nonprofit Corporation

1. *Name.* The name of the corporation is [**name**].

2. *Type of Filing Entity.* The type of filing entity being formed is a nonprofit corporation.

3. *Purpose.* The purpose for which the filing entity is formed is to be the property owners association under the Declaration of Restrictive Covenants of the [**name**] subdivision.

4. *Period of Duration.* The period of duration of the filing entity is perpetual.

5. *Initial Registered Office.* The street address of the initial registered office of the filing entity and the name of its initial registered agent at that address are:

Name: [**name of registered agent**]

Address: [**address, city, state**]

6. *Organizer.* The name and address of the organizer for the filing entity are:

Name: [**name of organizer**]

Address: [**address, city, state**]

7. *Members.* The filing entity will be composed of Members.

8. *Initial Board of Directors.* The number of directors constituting the initial board of directors is [**number**], and their names and addresses are:

Name: [**name**]

Address: [**address, city, state**]

Repeat as necessary.

9. *Meetings.* Any action that may be taken at a Members or board of directors meeting may be taken without a meeting by written consent setting forth the action taken signed by a sufficient number of Members or of the board of directors as would be necessary to take that action at a meeting.

Signed on [**date**].

_____

[**Name of organizer**]

Form 23-4

Bylaws of [name of property owners association] [, Inc.]

Basic Information

Property Owners Association: [**name**], [established by the certificate of formation filed with the secretary of state of Texas on [**date**] under file number [**number**]/a Texas nonprofit association, which is an unincorporated organization].

Principal Office: [**address, city**], Texas. The Property Owners Association may have other offices.

Declaration: The Declaration of Restrictive Covenants of the [**name of subdivision**] Subdivision, recorded in the real property records of [**county**] County, Texas.

Definitions: Capitalized terms used but not defined herein have the meaning set forth in the Declaration.

Voting Members: Members entitled to vote or their proxies.

A. Members

A.1. Membership. Every Owner is a Member of the Property Owners Association. Membership is appurtenant to and may not be separated from ownership of a Lot. The Property Owners Association has two classes of voting Members:

A.1.a. Class A. Class A Members are all Owners, other than Declarant. Class A Members have one vote per Lot. When more than one person is an Owner, each is a Class A Member, but only one vote may be cast for a Lot.

A.1.b. Class B. The Class B Member is Declarant and has [**number**] votes for each Lot owned. The Class B membership ceases and converts to Class A membership on the earlier of—

i. when the Class A Members' votes exceed the total of Class B Member's votes; or

ii. the date specified in the Declaration.

A.2. Place of Meeting. Members meetings will be held at the Property Owners Association's Principal Office or at another place designated by the Board.

A.3. Annual Meetings. The first Members meeting will be held within [**number**] months after the formation of the Property Owners Association. Subsequent regular annual Members meetings will be held on [**describe meeting date taking into consideration when dues are payable, e.g.,** the first Sunday in June].

A.4. Special Meetings. The president may call special meetings. The president must call a special meeting if directed by the Board or by a petition signed by [**percent**] percent of the Class A Voting Members.

A.5. Notice of Meetings, Election, and Vote. Written notice stating the place, day, and hour of each Members meeting, other than a reconvened meeting, must be given to each Member not less than ten nor more than sixty days before the meeting. For voting not at a meeting, notice must be given not later than the twentieth day before the latest day on which a ballot may be submitted to be counted. The special Members meeting notices must also state the meeting's purpose, and no business may be conducted except as stated in the notice. Notice to a Member must state the purpose of an association-wide election or vote and is deemed given when hand delivered or mailed. If mailed, notice is deemed given (whether

actually received or not) when deposited with the United States Postal Service, postage pre-paid.

A.6. Waiver of Notice. A Member may, in writing, waive notice of a meeting. Attendance at a meeting is a waiver of notice of the meeting, unless the Member objects to lack of notice when the meeting is called to order.

A.7. Quorum. A majority of the Voting Members is a quorum. If a Members meeting cannot be held because a quorum is not present, either in person, by proxy, by absentee ballot, or by electronic ballot, a majority of the Voting Members who are present may adjourn the meeting. At the reconvened meeting, [**percent**] percent of the Voting Members is a quorum. If a quorum is not present, a majority of the Voting Members who are present may adjourn the meeting. At the second reconvened meeting, a majority of the Board is a quorum. Written notice of the place, date, and hour of each reconvened meeting must be given to each Member not more than [**number**] nor less than [**number**] days before the reconvened meeting.

A.8. Majority Vote. Voting by Members may be at a meeting or outside of a meeting. Voting must be as required by law. Votes representing more than 50 percent of the Voting Members present at a meeting at which a quorum is present are a majority vote.

A.9. Voting Methods. Voting Members may, at the option of the Board, vote in person, by proxy, by absentee ballot, by electronic ballot, or by any other process approved by the Board. A Member must be allowed to vote by absentee ballot or proxy, but the Board is not required to provide a Member with more than one voting method.

A.10. Conduct of Meetings. The president will preside over Members meetings. The secretary will keep minutes of the meetings and will record in a minutes book the votes of the members.

B. Board

B.1. Governing Body; Composition. The affairs of the Property Owners Association are governed by the Board. Each director has one vote. The initial Board is composed of the directors appointed in the certificate of formation. Each director must be a Member or, in the case of an entity Member, a person designated in writing to the secretary.

B.2. Qualifications.

B.2.a. Member. Each director must be a Member or, in the case of an entity Member, a person designated in writing by either proxy or a resolution to the secretary of the Property Owners Association.

B.2.b. Felony or Crime Involving Moral Turpitude. If the Board is presented with written, documented evidence from a database or other record maintained by a governmental law enforcement authority that a director was convicted of a felony or crime involving moral turpitude not more than twenty years before the date the Board is presented with the evidence, that director is immediately ineligible to serve on the Board, automatically considered removed from the Board, and prohibited from future service on the Board.

Include the following if applicable. Section B.2.c. is mandatory for a property owners association with ten or more residences.

B.2.c. Cohabitation of Directors. A Member may not serve on the Board if the Member cohabits at the same primary residence with a director. This section does not apply during the Property Owners Association's development period to affect the eligibility to serve on the Board of:

i. a Member who cohabits with a developer or Declarant of the Subdivision; or

ii. the developer or Declarant.

Continue with the following.

B.3. Number of Directors. The Board consists of not less than three nor more than [**number**] directors. Within those limits, the Board may change the number of directors. No decrease may shorten the term of a director.

B.4. Term of Office. The initial directors serve until the first annual meeting of Members.

Select one of the following.

The terms of directors will be staggered. At least one-third of the Board will be elected each year. The initial Board will determine the initial term, not to exceed three years, of each director. At the expiration of the initial term of a director, each successor will have a term of [**number**] years.

Or

Successor directors will have a term of one year.

Continue with the following.

Directors may serve consecutive terms.

B.5. Election. At the first annual meeting of Members, the Voting Members will elect directors to succeed the initial directors. At subsequent annual Members meetings, successors for each director whose term is expiring will be elected. Cumulative voting is prohibited. The candidate or candidates receiving the most votes will be elected. The directors elected by the Voting Members will hold office until their respective successors have been elected.

B.6. Removal of Directors and Vacancies

B.6.a. Removal by Members. Any director may be removed, with or without cause, by a majority of the Voting Members. Any director whose removal is sought will be given notice of the proposed removal.

B.6.b. Removal by Board. Any director may be removed at a Board meeting if the director—

i. failed to attend [**number**] consecutive Board meetings; or

ii. failed to attend [**percent**] percent of Board meetings within one year.

B.6.c. Vacancies. A director's position becomes vacant if the director dies, becomes incapacitated, resigns, or is no longer a Member.

B.6.d. Successors. If a director is removed or a vacancy exists, a successor will be elected by the remaining directors for the remainder of the term.

B.7. Compensation. Directors will not receive compensation. A director may be reimbursed for expenses approved by the Board.

B.8. Powers. The Board has all powers necessary to administer the Property Owners Association's affairs.

B.9. Management. The Board may employ a managing agent. Declarant, or an affiliate of Declarant, may be the managing agent.

B.10. Accounts and Reports. Accounting and controls must conform to good accounting practices. Accounts will not be commingled with accounts of other persons. The following financial reports will be prepared at least annually:

B.10.a. An income statement reflecting all income and expense activity for the preceding period.

B.10.b. A statement reflecting all cash receipts and disbursements for the preceding period.

B.10.c. A variance report reflecting the status of all accounts in an "actual" versus "approved" budget format.

B.10.d. A balance sheet as of the last day of the preceding period.

B.10.e. A delinquency report listing all Owners who are delinquent by more than [**number**] days in paying any Assessment and describing the status of any action to collect those delinquent Assessments.

B.11. Borrowing. The Board may borrow money to maintain, repair, or restore the Common Area without the approval of the Members. If approved in advance by the Members in the same manner as approving a Special Assessment, the Board may borrow money for any other purpose.

B.12. Rights of Association. With respect to the Common Area, and in accordance with the Declaration, the Property Owners Association will have the right to contract with any person for the performance of various duties and functions. Such agreements require the approval of the Board.

B.13. Enforcement Procedures

B.13.a. Notice. Before the Board may (i) suspend an Owner's right to use a Common Area, (ii) file a suit against an Owner other than a suit to collect any Assessment, (iii) foreclose the Property Owners Association's lien, (iv) charge an Owner for property damage, or (v) levy a fine for a violation of the Dedicatory Instruments, the Property Owners Association or its agent must give written notice to the Owner as required or permitted by law. The notice must describe the violation or property damage that is the basis for the suspension action, charge, or fine and state any amount due the Property Owners Association from the Owner. The notice must also (i) inform the Owner that if the violation is curable and does not pose a threat to public health or safety, which means it could not materially affect the health or safety of an ordinary resident, the Owner is entitled to a reasonable period to cure the violation and avoid the fine or suspension unless the Owner was given notice and a reasonable opportunity to cure a similar violation within the preceding six months; (ii) indicate that the Owner may request a hearing in accordance with Texas Property Code section 209.007 on or before the thirtieth day after the date the notice was mailed to the Owner; (iii) state that the Owner may have special rights if the Owner is serving on active military duty, and (iv) state the date by which the Owner must cure a curable violation that does not pose a threat to public health and safety.

B.13.b. Hearing. If the Owner is entitled to an opportunity to cure the violation, the Owner has the right to submit a written request for a hearing to discuss and verify facts and resolve the matter in issue before a committee appointed by the Board or before the Board if the Board does not appoint a committee. If a hearing is to be held before a committee, the notice must state that the Owner has the right to appeal the committee's decision to the Board by written notice to the Board.

The Property Owners Association must hold a hearing under this section not later than the thirtieth day after the date the Board receives the Owner's request for a hearing and must

notify the Owner of the date, time, and place of the hearing not later than the tenth day before the date of the hearing. The Board or the Owner may request a postponement, and, if requested, a postponement will be granted for a period of not more than ten days. Additional postponements may be granted by agreement of the parties. The Owner or the Property Owners Association may make an audio recording of the meeting.

The hearing will be held in executive session affording the alleged violator a reasonable opportunity to be heard. Before any sanction hereunder becomes effective, proof of proper notice will be placed in the minutes of the meeting. Such proof will be deemed adequate if a copy of the notice, together with a statement of the date and manner of delivery, is entered by the officer, director, or agent who delivered the notice. The notice requirement will be satisfied if the alleged violator appears at the meeting. The minutes of the meeting will contain a written statement of the results of the hearing and the sanction, if any, imposed. The Board may, but will not be obligated to, suspend any proposed sanction if the violation is cured within a [**number**]-day period. Such suspension will not constitute a waiver of the right to sanction violations of the same or other provisions and rules by any person.

B.13.c. Appeal. Following hearing before a committee, if any, the violator will have the right to appeal the decision to the Board. To perfect this right, a written notice of appeal must be received by the managing agent, if any, president, or secretary within [**number**] days after the hearing date.

B.13.d. Changes in Law. The Board may change the enforcement procedures set out in this section to comply with changes in law.

C. Board Meetings

C.1. Meetings. Except as permitted by law, all regular and special meetings of the Board must be open to the Owners. Except for a meeting held by electronic or telephonic means, a Board meeting must be held in a county in which all or part of the property in the

subdivision is located or in a county adjacent to that county. A Board meeting may be held by electronic or telephonic means, provided all Owners and Board Members have access to the communication at the meeting as required by law.

C.2. Notice. Owners and Board Members must be given notice of the date, hour, place, and general subject of a regular or special Board meeting, including a general description of any matter to be brought up for deliberation in executive session. Notice must be given as required by law.

C.3. Waiver of Notice. The actions of the Board at any meeting are valid if (a) a quorum is present and (b) either proper notice of the meeting was given to each director or a written waiver of notice is given by any director who did not receive proper notice of the meeting. Proper notice of a meeting will be deemed given to any director who attends the meeting without protesting before or at its commencement about the lack of proper notice.

C.4. Quorum of Board. At all meetings, a majority of the Board will constitute a quorum, and the votes of a majority of the directors present at a meeting at which a quorum is present constitutes the decision of the Board. If the Board cannot act because a quorum is not present, a majority of the directors who are present may adjourn the meeting to a date not less than [**number**] nor more than [**number**] days from the date the original meeting was called. At the reconvened meeting, if a quorum is present, any business that may have been transacted at the meeting originally called may be transacted without further notice.

C.5. Conduct of Meetings. The president will preside at Board meetings. The secretary will keep minutes of the meetings and will record in a minute book the votes of the directors. The Board meeting will be conducted as required by law.

C.6. Proxies. Directors may vote by written proxy.

D. Officers

D.1. Officers. The officers of the Property Owners Association are a president, vice president, secretary, and treasurer, to be elected from the Members. The Board may appoint other officers having the authority and duties prescribed by the Board. Any two or more offices may be held by the same person, except the offices of president and secretary.

D.2. Election, Term of Office, and Vacancies. Officers will be elected annually by the Board at the first meeting of the Board following each annual meeting of the Voting Members. A vacancy in any office may be filled by the Board for the unexpired portion of the term.

D.3. Removal. The Board may remove any officer whenever, in the Board's judgment, the interests of the Property Owners Association will be served thereby.

D.4. Powers and Duties. Officers have such powers and duties as are generally associated with their respective offices and as may be specifically conferred by the Board. The president is the chief executive officer of the Property Owners Association. The treasurer has primary responsibility for the preparation of the budget and financial reports and may delegate all or part of the preparation and notification duties to a finance committee, management agent, or both.

D.5. Resignation. Any officer may resign at any time by giving written notice to the Board, the president, or the secretary. Resignation takes effect on the date of the receipt of the notice or at any later time specified in the notice.

E. Committees

The Board may establish committees by resolution and authorize the committees to perform the duties described in the resolution.

F. Miscellaneous

F.1. Fiscal Year. The Board may establish the Property Owners Association's fiscal year by resolution. In the absence of a Board resolution determining otherwise, the Property Owners Association's fiscal year is a calendar year.

F.2. Rules for Meeting. The Board may adopt rules for the conduct of meetings of Members, Board, and committees.

F.3. Conflict. The Declaration controls over these Bylaws.

F.4. Inspection of Books and Records

F.4.a. Inspection by Member. After a written request to the Property Owners Association, a Member may examine and copy, in person or by agent, any Property Owners Association books and records relevant to that purpose. The Board may establish rules concerning the (i) written request; (ii) hours, days of the week, and place; and (iii) payment of costs related to a Member's inspection and copying of books and records.

F.4.b. Inspection by Director. A director has the right, at any reasonable time, and at the Property Owners Association's expense, to (i) examine and copy the Property Owners Association's books and records at the Property Owners Association's Principal Office and (ii) inspect the Property Owners Association's properties.

F.5. Notices. Any notice required or permitted by the Dedicatory Instruments must be in writing. Notices regarding enforcement actions must be given as required or as permitted by law. All other notices may be given by regular mail. Notice by mail is deemed delivered (whether actually received or not) when properly deposited with the United States Postal Service, addressed to (a) a Member at the Member's last known address according to the Property Owners Association's records and (b) the Property Owners Association, the Board, or a managing agent at the Property Owners Association's Principal Office or another address desig-

nated in a notice to the Members. Unless otherwise required by law or the Dedicatory Instruments, actual notice, however delivered, is sufficient.

F.6. Amendment. These Bylaws may be amended at any time by the vote of [**percent**] percent of the Voting Members in the Property Owners Association. This provision will not be construed as limiting the Board's power to amend the enforcement procedures to comply with changes in law.

[**Name of association**]

By _____
[Name and title]

Include acknowledgments.

[Reserved]

Form 23-10

Note: If a written request for an update to the resale certificate is received within 180 days after the date a resale certificate is issued, the property owners association shall deliver the updated information within seven business days to the party requesting the original resale certificate. Tex. Prop. Code § 207.003(f), (g).

Required Information [Issued on [date]] Applicable to the Property Including Resale Certificate
(Texas Property Code Section 207.003)

Date:	[**date**]
Property (including any common areas assigned to the Property):	[**address, city**], [**county**] County, Texas
Subdivision:	[**name and legal description**]
Property Owners Association:	[**name of association**]
Property Owners Association's address:	[**address, city, state**] [**telephone**] [**fax**]
Managing agent of Subdivision:	[**name of managing agent**]
Managing agent's address:	[**address, city, state**] [**telephone**] [**fax**]
Current regular assessment:	$[**amount**] per [**time period, e.g.**, month]

Special assessment(s) due after the date of [this updated] resale certificate:	$[**amount**] payable as follows: [**specify time-frame for paying and purpose of special assessment[s]**]
Total amounts due and unpaid to Property Owners Association:	$[**amount**]
Capital expenditures approved by Property Owners Association for current fiscal year:	$[**amount**]
Reserves for capital expenditures:	$[**amount**]
Unsatisfied judgments against Property Owners Association:	$[**amount**]
Administrative transfer fee:	$[**amount**] payable to: [**specify**]
Other fees for change of ownership:	$[**amount**] to [**name**] for [**specify**]

There [are/are not any] suits pending against the Property Owners Association. [**Include if applicable:** The style and cause number of each pending suit are: [**describe any pending suits**].]

The Property Owners Association's board has [no] actual knowledge of conditions on the Property in violation of the restrictions applying to the Subdivision or the bylaws or rules of the Property Owners Association. [**Include if applicable:** Known violations are: [**list any known violations**].]

The Property [is/is not] subject to a right of first refusal or other restraint contained in the restrictions or restrictive covenants that restricts the owner's right to transfer the owner's property.

The Property Owners Association [has/has not] received notice from any governmental authority regarding health or building code violations with respect to the Property or any common areas or common facilities owned or leased by the Property Owners Association. [**Include if applicable:** A summary or copy of each notice is attached.]

The restrictions on the Lot [do/do not] allow foreclosure of the Property Owners Association's lien on the Property for failure to pay assessments.

Required Attachments:

1. Restrictions
2. Rules
3. Bylaws
4. Articles of Incorporation/Certificate of Formation
5. Current Balance Sheet
6. Current Operating Budget
7. Certificate of Insurance Concerning Property and Liability Insurance for Common Areas and Facilities
8. Any Governmental Notices of Health or Housing Code Violations

Notice: This Subdivision information may change at any time.

[Name of property owners association]

By _____

[Name and title]
[Mailing address]
[E-mail]

Form 23-15

This form may be used to comply with the requirements of Tex. Prop. Code § 209.0064. The notice should be sent to the owner by certified mail, return receipt requested.

Notice of Collection Agent Fees

Basic Information

Date:

Property Owners Association:

Property Owners Association's Address:

Property:

Owner: [**name and address**]

Delinquent Amounts: [**specify each delinquent amount by category and amount**]

Total Amount Required to Make Account Current:

You are delinquent in payment of the Delinquent Amounts.

To avoid having your account turned over to a collection agent you must, within thirty days of receipt of this notice, either (1) pay the Total Amount Required to Make Account Current or (2) sign and return to the Property Owners Association the enclosed alternative payment plan agreement.

If you fail to cure the delinquency, you will be charged for all fees that the Property Owners Association must pay its collection agent related to your account and for all reason-

able attorney's fees and other reasonable costs incurred by the Property Owners Association relating to collecting amounts that you owe the Property Owners Association.

PLEASE CONTACT US FOR INITIAL VERIFICATION OF THE DEBT, AND WE WILL PROVIDE COPIES OF STATEMENTS OF YOUR ACCOUNT. UNLESS YOU DISPUTE THE VALIDITY OF THE ABOVE REFERENCED DEBT, OR ANY PORTION THEREOF, WITHIN THIRTY DAYS AFTER RECEIPT OF THIS NOTICE, THE DEBT WILL BE ASSUMED TO BE VALID. IF YOU DO NOTIFY US IN WRITING WITHIN THE THIRTY-DAY PERIOD THAT THE DEBT, OR ANY PORTION THEREOF, IS DISPUTED, WE WILL OBTAIN AN ADDITIONAL VERIFICATION OF THE DEBT AND WILL MAIL A COPY OF THAT ADDITIONAL VERIFICATION TO YOU. THE CURRENT CREDITOR IS THE ORIGINAL CREDITOR.

THIS THIRTY-DAY VERIFICATION PERIOD DOES *NOT* ALTER THE EARLIER STATED DEADLINES.

ASSERT AND PROTECT YOUR RIGHTS AS A MEMBER OF THE ARMED FORCES OF THE UNITED STATES. IF YOU OR YOUR SPOUSE IS SERVING ON ACTIVE MILITARY DUTY, INCLUDING ACTIVE MILITARY DUTY AS A MEMBER OF THE TEXAS NATIONAL GUARD OR THE NATIONAL GUARD OF ANOTHER STATE OR AS A MEMBER OF A RESERVE COMPONENT FOR THE ARMED FORCES OF THE UNITED STATES, PLEASE SEND WRITTEN NOTICE OF THE ACTIVE DUTY MILITARY SERVICE TO THE SENDER OF THIS NOTICE IMMEDIATELY.

[Name of property owners association]

By _____
[Name and title]

Certified Mail No. **[number]**
Return Receipt Requested

Attach the alternative payment plan agreement. See form 23-14 in this chapter.

However, you are not eligible to use an alternative payment plan if you failed to honor the terms of a previous Alternative Payment Plan Agreement within the last two years.

If you do not request a hearing and you (1) fail to cure the violation or delinquency by the Date By Which Violation or Delinquency Must Be Cured or (2) sign an Alternative Payment Plan Agreement, if eligible, and fail to pay the Amount Due to Property Owners Association pursuant to that plan, the Property Owners Association may—

1. suspend your right to use a common area;

2. file a suit against you;

3. charge you for property damage;

4. levy a fine for a violation of the declaration, bylaws, or rules of the Property Owners Association;

5. collect reimbursement of reasonable attorney's fees and other reasonable costs incurred by the Property Owners Association relating to collecting amounts, including damages, due the Property Owners Association or for enforcing restrictions in the declaration, bylaws, or rules of the Property Owners Association; and

6. take other enforcement action against you in accordance with the declaration, bylaws, and rules of the Property Owners Association and Texas law.

PLEASE CONTACT US FOR INITIAL VERIFICATION OF THE DEBT, AND WE WILL PROVIDE COPIES OF STATEMENTS OF YOUR ACCOUNT. UNLESS YOU DISPUTE THE VALIDITY OF THE ABOVE REFERENCED DEBT, OR ANY PORTION THEREOF, WITHIN THIRTY DAYS AFTER RECEIPT OF THIS NOTICE, THE DEBT WILL BE ASSUMED TO BE VALID. IF YOU DO NOTIFY US IN WRITING WITHIN THE THIRTY-DAY PERIOD THAT THE DEBT, OR ANY PORTION THEREOF, IS DISPUTED, WE WILL OBTAIN AN ADDITIONAL VERIFICATION OF THE DEBT AND WILL MAIL A COPY OF

THAT ADDITIONAL VERIFICATION TO YOU. THE CURRENT CREDITOR IS THE ORIGINAL CREDITOR.

THIS THIRTY-DAY VERIFICATION PERIOD DOES *NOT* ALTER THE EARLIER STATED DEADLINES.

ASSERT AND PROTECT YOUR RIGHTS AS A MEMBER OF THE ARMED FORCES OF THE UNITED STATES. IF YOU OR YOUR SPOUSE IS SERVING ON ACTIVE MILITARY DUTY, INCLUDING ACTIVE MILITARY DUTY AS A MEMBER OF THE TEXAS NATIONAL GUARD OR THE NATIONAL GUARD OF ANOTHER STATE OR AS A MEMBER OF A RESERVE COMPONENT FOR THE ARMED FORCES OF THE UNITED STATES, PLEASE SEND WRITTEN NOTICE OF THE ACTIVE DUTY MILITARY SERVICE TO THE SENDER OF THIS NOTICE IMMEDIATELY.

[Name of property owners association]

By _____
[Name and title]

Certified Mail No. **[number]**
Return Receipt Requested

Attach the guidelines for alternative payment plans. See form 23-13 in this chapter.

Form 23-21

Owner Notification to Association of Rental Information

Date:

Property Owner:

Address:

Phone:

E-mail:

Repeat above information for each additional owner.

Address of Rented Property:

Owner's Rental Property Management Company:

Address:

Phone:

E-mail:

Tenant:

Phone:

Motor vehicle

Year, make, and model:

License plate number:

Repeat above information for each additional tenant or vehicle.

Rental Agreement Commencement Date:

Rental Agreement Termination Date:

Attach copy of lease or rental agreement.

Form 23-22

This form can be used for property owners association managers who are not licensed real estate brokers providing property management services under Texas Occupations Code chapter 1101.

Association Management Agreement

Basic Information

Date:

Property Owners Association:

Property Owners Association's Address:

Property Owners Association Manager:

Property Owners Association Manager's Address:

Subdivision/Condominium Complex:

Single-Family Residential Real Property: A single-family home or a unit in a condominium, cooperative, row home, or townhome. Single-Family Residential Real Property does not include a duplex, triplex, or fourplex unless the unit is owned as a condominium, cooperative, row home, or townhome.

A. Services

A.1. Property Owners Association Manager will provide the following association management services [on-site] for the Property Owners Association only as authorized by the Property Owners Association board of directors. The services include contracting and paying for maintenance, repair, replacement, and other services incidental to the management of the

Property Owners Association and the common areas of the Subdivision/Condominium Complex as set forth in the governing documents for the Property Owners Association.

A.2. Unless Property Owners Association Manager is or becomes licensed as a broker under the Texas Occupations Code, Property Owners Association Manager—

A.2.a. will not engage in any activity for which a license is required under Texas Occupations Code, chapter 1101, and Texas Administrative Code rules promulgated by the Texas Real Estate Commission; and

A.2.b. will not control the acceptance or deposit of rent for Single-Family Residential Real Property located in the Subdivision/Condominium Complex. "Control the acceptance or deposit of rent" includes any one or more of the following activities:

i. use the rent to pay for services related to management of the property;

ii. determine where to deposit the rent; or

iii. sign checks or withdraw money from a trust account.

B. Term (Months)

Insert the term of the property owners association management agreement in months.

C. Compensation (Monthly)

Insert the monthly compensation for the property owners association manager.

Insert additional terms if applicable.

[Name of association]

By _____

[Name and title of association officer or agent]

By _____

[**Name of association manager**], Property Owners Association Manager

[Reserved]

Chapter 24
Condominium Documents

Forms

Chapter 24

Condominium Documents

§ 24.1 General Considerations

§ 24.1:1 Definition and Creation of a Condominium and Its Owners Association

A condominium is a form of real property ownership in which portions of the real property are designated for separate ownership or occupancy (the "units") and the remainder is designated for common ownership or occupancy solely by the owners of the units. Real property is a condominium only if one or more of the common elements (for use by all the unit owners) are directly owned in undivided interests by the unit owners. Real property is not a condominium if all of the common elements are owned by a legal entity separate from the unit owners, such as a corporation or property owners association, even if the separate legal entity is owned by the unit owners. Tex. Prop. Code § 82.003(a)(8).

Condominiums are established through filing, in the real property records of the county in which the property is located, a declaration imposing restrictive covenants on the property comprising the condominium regime. Tex. Prop. Code § 82.051. The declaration must contain statutorily prescribed information. Tex. Prop. Code § 82.055. The declaration defines the boundaries of the units and operates to subdivide the property into separate condominium units and common areas or elements. Tex. Prop. Code § 82.052. It is not uncommon for condominium developers to presell condominium units before construction of the condominium building and thus before the boundaries of the units are defined by an as-built survey. In 2013, the Texas legislature amended the definition in Tex. Prop. Code § 82.003(a)(11) to eliminate the word *recorded* with reference to the declaration but left section 82.051 (requiring recording to establish a condominium) unchanged.

The provisions of the declaration and bylaws are severable. *See* Tex. Prop. Code § 82.053. These bylaws are for a condominium owners association that will take over management of the condominium regime from the declarant. The declaration also typically includes rules affecting the property and owners in the condominium regime.

A condominium owners association for a condominium formed after January 1, 1994, must be a Texas corporation. Tex. Prop. Code § 82.101. These owners associations are typically nonprofit corporations, although section 82.101 allows them to be for-profit corporations. The Texas Business Organizations Code provides for the formation of both nonprofit and for-profit corporations. Form 24-3 in this chapter is a certificate of formation for a condominium owners association.

§ 24.1:2 Applicable Law

The Uniform Condominium Act, chapter 82 of the Texas Property Code, governs all condominiums with declarations recorded on or after January 1, 1994. The Act also applies to condominiums formed before that date if the owners vote to have chapter 82 apply or if a declaration or amendment of declaration recorded before January 1, 1994, states that chapter 82 will apply. *See* Tex. Prop. Code § 82.002(a). Portions of the Act apply to all condominiums; however, certain rights cannot be limited for owners of

condominiums created before 1994. *See* Tex. Prop. Code § 82.002(b)–(d). Condominiums created before January 1, 1994, are otherwise governed by chapter 81 of the Property Code.

Property Code chapter 202, governing construction and enforcement of restrictive covenants, also applies to condominiums. Section 202.002(a) states that the chapter "applies to all restrictive covenants." "Restrictive covenant" is defined to mean any covenant, condition, or restriction in a dedicatory instrument, and a "dedicatory instrument" means all governing instruments of planned developments, explicitly including condominiums. *See* Tex. Prop. Code § 202.001(1), (4). "Dedicatory instrument" as it relates to condominiums is defined in Tex. Prop. Code § 82.003(a)(11–a), which does not specifically require recording. Under chapter 202, however, a dedicatory instrument has no effect until it is recorded in the public records. Tex. Prop. Code § 202.006(b). In many instances, the provisions of the statutes applicable to condominiums differ substantially from those that apply to noncondominium residential subdivisions. *See* Tex. Prop. Code § 209.003(d).

In addition to provisions in chapter 82 of the Property Code, the Texas Business Organizations Code governs the formation and operation of the condominium owners association. *See* Tex. Bus. Orgs. Code ch. 21 (for-profit corporations), ch. 22 (nonprofit corporations).

Condominium owners associations are subject to federal income taxation. They do not qualify as charitable organizations under Internal Revenue Code section 501(c)(3). Associations may qualify for special tax treatment under 26 U.S.C. § 528.

§ 24.1:3 Foreclosure of Assessment Lien

An assessment levied by a condominium owners association is a personal obligation of the unit owner and is also secured by a continuing lien on the unit, on rents, and on insurance proceeds relating to the unit. *See* Tex. Prop. Code § 82.113(a). For purposes of this section, "assessment" includes regular and special assessments, dues, fees, late fees, fines, collection costs, attorney's fees, "and any other amount due to the association by the unit owner or levied against the unit by the association . . . . " Tex. Prop. Code § 82.113(a). The lien for assessments is created by the recording of the declaration, and no other recordation of a lien or notice of lien is required. Tex. Prop. Code § 82.113(c). The association's lien for assessments has priority over other liens, except for liens for real property taxes or other governmental assessments, liens recorded before the declaration was recorded, first vendor's liens or first deed-of-trust liens recorded before the assessment becomes delinquent, and under certain circumstances, liens on improvements. *See* Tex. Prop. Code § 82.113(b).

By acquiring a unit, an owner grants the association a power of sale. That power of sale is exercised pursuant to Texas Property Code section 51.002 unless the declaration provides otherwise. Tex. Prop. Code § 82.113(d). The association may not foreclose a lien for assessments consisting only of fines. Tex. Prop. Code § 82.113(e). The association may not foreclose during a person's active military service or nine months thereafter without complying with Tex. Prop. Code § 51.015. A notice of foreclosure sale must include the military service language in Tex. Prop. Code § 51.002(i). The initial communication with the owner to collect delinquent assessments before exercising the right of foreclosure also should include language required under federal and state fair debt collection practices laws. A unit owner may not petition a court to set aside a sale solely because the price at foreclosure was insufficient to fully satisfy the owner's debt. The association may purchase the unit at foreclosure.

The redemption rights of condominium owners are set out in Tex. Prop. Code § 82.113(g). The Texas Residential Property Owners Protection Act, chapter 209 of the Property Code, does not apply to condominiums. Tex. Prop. Code § 209.003(d). *See Duarte v. Disanti*, 292 S.W.3d 733, 736 (Tex. App.—Dallas 2009, no pet.) (it was "the legislature's clear intent to have different redemption rights for residential subdivisions than for condominiums").

At any time before a nonjudicial foreclosure sale, the unit owner may avoid foreclosure by paying "all amounts due the association." Tex. Prop. Code § 82.113(j). The association is not prohibited from taking a deed in lieu of foreclosure or from filing suit to recover a money judgment. Tex. Prop. Code § 82.113(i).

If an owner defaults on obligations to the association, the association may notify other lienholders of its intent to foreclose and must notify any holder of a recorded lien or a duly perfected mechanic's lien if the lienholder has given the association a written request of notification. Tex. Prop. Code § 82.113(h), (m). Foreclosure of a tax lien under chapter 32 of the Texas Tax Code does not discharge the association's lien for amounts due the association after the date of foreclosure of the tax lien. Tex. Prop. Code § 82.113(*l*).

§ 24.2 General Instructions for Completing Forms

For general information about completing the forms in this chapter, see chapter 3 in this manual. In most forms, the information that the attorney must provide is listed at the beginning of the form. Of course, the attorney may add other specific provisions and references to exhibits and riders at the end of the form.

For general information about designation of parties, addresses, property descriptions, and execution and acknowledgment of documents, see chapter 3.

§ 24.3 General Considerations for Declaration

The required contents for a condominium declaration are set out in Tex. Prop. Code § 82.055.

§ 24.3:1 Definitions

The definition of "assessment" used in the declaration, form 24-1 in this chapter, is based on that used in Tex. Prop. Code § 82.113(a).

The definition of "residential purposes" is derived from Tex. Prop. Code § 82.003(a)(21).

The definition of "common elements" is based on Tex. Prop. Code § 82.003(a)(5). In each condominium, there will likely be portions that should be designated as "limited common elements." The consequence of such a designation is important, not only to limit use of those elements but also to determine responsibility for their maintenance, repair, or replacement, and the costs thereof. The drafter should carefully review Texas Property Code sections 82.052, 82.058, 82.107, and 82.112(d) when determining which aspects of a condominium should be designated as limited common elements as opposed to common elements.

The declaration defines the plat as including the plans. Property Code section 82.003(a) makes a distinction between plan and plat as follows:

> (18) "Plan" means a dimensional drawing that is recordable in the real property records or the condominium plat records and that horizontally and vertically identifies or describes units and common elements that are contained in buildings.
>
> (19) "Plat" means a survey recordable in the real property records or

> the condominium plat records and containing the information required by Section 82.059. As used in this chapter, "plat" does not have the same meaning as "plat" in Chapter 212 or 232, Local Government Code, or other statutes dealing with municipal or county regulation of property development.

Tex. Prop. Code § 82.003(a)(18), (a)(19).

§ 24.3:2 Restrictions on Use, Occupancy, or Alienation

Texas Property Code section 82.055(9) requires a declaration to set out any restrictions on use, occupancy, or alienation of the units. Section C. of the declaration, form 24-1 in this chapter, has examples of use and occupancy restrictions. Because changing the "use restrictions on a unit" in a declaration requires 100 percent of the votes in the association (Tex. Prop. Code § 82.067(e)), it will be difficult if not impossible to amend the use restrictions once the declarant loses control of the condominium regime. The use restrictions thus require careful consideration. Examples of restraints on alienation are provided in paragraph D.8. of form 24-1. The practitioner will need to consider what conditions or activities are to be prohibited. The nature and extent of the limitations will depend on the declarant's purpose and expectations for the condominium. In addition, lenders may require that restrictions be incorporated to protect their interests and the security of mortgages.

Certain restrictions are prohibited or regulated, including restrictions concerning firearms (Tex. Prop. Code § 202.020); rain barrels and xeriscaping (Tex. Prop. Code § 202.007); solar energy devices (Tex. Prop. Code § 202.010); roof shingles (Tex. Prop. Code § 202.011); flags and flagpoles (Tex. Prop. Code § 202.012); religious items (Tex. Prop. Code § 202.018); standby electric generators (Tex. Prop. Code § 202.019); and speed feedback signs (Tex. Transp. Code § 430.002). The owner or developer must determine whether and to what extent rentals are permitted. Allowing rentals in residential condominiums can adversely affect the ability of owners to obtain mortgages. Some lenders will not finance a condominium loan unless a certain percentage of units in the condominium regime are owner-occupied.

If the declarant wants to restrict or regulate rentals, restricting the units to "residential" use will not suffice. Rental of a property for residential use does not transform the use of the property into a business or commercial use. *Tarr v. Timberwood Park Owners Ass'n, Inc.*, 556 S.W.3d 274 (Tex. 2018). Any prohibition against rentals must explicitly be stated in the declaration. *Tarr*, 556 S.W.3d at 291. The declarant may want to consider not placing rental restrictions in the section of the declaration titled "use restrictions," given the requirement for approval from "100 percent of the votes in the association" for a change in any "use restrictions." Tex. Prop. Code § 82.067(e). Careful consideration must also be given to the context in which the phrase "single family" appears in a declaration. The supreme court in *Tarr* determined that "single family" refers to a type of structure, not who can occupy the property. *Tarr*, 556 S.W.3d at 287. The declarant therefore may also want to define the term "single family" if used in the declaration.

Unless the declaration prohibits rental of units, condominium owners associations or managers may encounter enforcement problems when an owner rents the property to a third party. Insertion of provisions such as the following in the declaration or the association's rules can minimize these enforcement problems:

- requiring that owners provide tenants with the declaration and rules;
- requiring owners to use rental agreements that impose on tenants the obligation to comply with the dedicatory instruments,

with consequences for tenants' violation of the declaration or rules;

- making owners responsible for any fines or other consequences if tenants violate the declaration or rules; and
- requiring owners to give the association or management information about rentals, including contact information for tenants and copies of the rental agreements (form 24-14 in this chapter can be used for this purpose).

Some declarations prohibit short-term rentals because of the unique problems they pose. "Short-term rental" means the rental of all or part of a residential property for less than thirty consecutive days. Tex. Tax Code §§ 156.001(b), 156.101. Short-term rentals are subject to sales and hotel taxes and, often, additional local ordinances. Promulgating association rules that require owners to comply with all applicable laws, with fines or other consequences in the event the owners do not comply, can provide an association with an enforcement tool in those situations.

§ 24.3:3 Units and Common Elements

Texas Property Code sections 82.052 and 82.055(4) allow the declaration to define the boundaries of a unit other than as set forth in paragraphs D.3. and D.4. of the declaration, form 24-1 in this chapter.

The declaration is required to contain a description of limited common elements other than those described in Texas Property Code section 82.052(2) and (4). Tex. Prop. Code § 82.055(6). Examples of limited common elements as set out in the statute include chutes, flues, ducts, wires, bearing walls, and other fixtures partially within and partially outside the designated boundaries of a unit and that serve only that unit. Tex. Prop. Code § 82.052(2). Items such as windows, exterior doors, shutters, awnings, window boxes, doorsteps, porches, balconies, and patios designed to serve a single unit but located outside the unit's boundaries are also limited common elements. Tex. Prop. Code § 82.052(4). The declaration must also contain a description of property that may be allocated subsequently as limited common elements. Tex. Prop. Code § 82.055(7).

§ 24.3:4 Assignment of Association Income

Unless a dedicatory instrument requires a vote of the association members to borrow money or to assign the association's right to future income or lien rights, Tex. Prop. Code § 82.102(f) gives the association's board of directors the power to borrow money and assign as collateral for the loan the association's right to future income and lien rights. If a vote of the members is required, (1) the board can provide for electronic voting, absentee ballot, proxy at a meeting, or written consent, and (2) at least 67 percent of all voting interests must vote in favor of the action, unless a dedicatory instrument provides for a lower threshold.

Form 24-12 in this chapter is a unanimous consent in lieu of a directors' meeting to approve a loan under Tex. Prop. Code § 82.102(f) after any required members' vote under section 82.102(g) has approved the loan. Chapter 6 in this manual contains forms and clauses for the promissory note. Form 24-13 is a security agreement and transfer of lien to secure the loan.

§ 24.3:5 Assessments and Late Charges

Texas Property Code section 82.112 provides that an expense for maintenance, repair, or replacement of a limited common element must be assessed as if it were a general common element expense except as otherwise provided by the declaration or Tex. Prop. Code § 82.107.

Late charges are governed by Tex. Prop. Code §§ 82.102(a)(12), 82.112(c), 82.117(1). The creation of liens and foreclosure for failure to pay assessments is addressed in Tex. Prop. Code § 82.113. Form 24-15 in this chapter can be used for making an initial demand for payment of delinquent assessments before the association exercises its right to foreclose. That form includes the language required by the federal and state fair debt collection practices laws and the military service language required in the notice of foreclosure under Tex. Prop. Code § 51.002(i). Redemption rights for condominium owners after foreclosure of an association's lien for assessments are governed by Tex. Prop. Code § 82.113(g).

Among the powers granted to the association by the Uniform Condominium Act is the power to impose charges for use of the common elements. *See* Tex. Prop. Code § 82.102(a)(11). Paragraph H.2. of the declaration, form 24-1 in this chapter, concerns fees for use of specified common elements and is optional. The purpose of this section is to expressly authorize such charges and to provide a procedure to the association.

§ 24.3:6 Voting Rights

The declaration may provide for different allocations of votes on particular specified matters or class voting on specified issues; however, units may not constitute a class merely because they are owned by a declarant. Tex. Prop. Code § 82.057(c), (d).

The formulas used to establish the allocations of interests must be stated in the declaration. *See* Tex. Prop. Code §§ 82.055(8), (16), 82.057(a), (c). Attention should be given to section 82.057(c), which permits special provisions relating to voting rights.

If any unit is restricted exclusively to residential purposes, the approval of at least 80 percent of the members is required to terminate the condominium under section 82.068(a) of the Texas Property Code.

§ 24.3:7 Amendment of Declaration

Tex. Prop. Code § 82.055(11) requires the declaration to contain the method of its amendment. By statute an amendment to a declaration may be made—

1. by written ballot that states the exact wording or substance of the amendment and that specifies the date by which a ballot must be received to be counted;
2. at a meeting of the members of the association after written notice of the meeting has been delivered to an owner of each unit stating that a purpose of the meeting is to consider an amendment to the declaration; or
3. by any method permitted by the declaration.

Tex. Prop. Code § 82.067(a).

The drafter may merely reference the two specific methods described in Tex. Prop. Code § 82.067(a) or may include additional methods. Some thought should be given to taking advantage of technological advances in order to accommodate different sizes and types of anticipated membership populations. For example, written ballots might be submitted electronically, rather than only by mail.

§ 24.3:8 Development Rights

The right to create additional units is a development right. *See* Tex. Prop. Code § 82.003(a)(12)(B). The Uniform Condominium Act requires all condominium declarations to include a statement of the maximum number of units that the declarant reserves the right to cre-

ate. *See* Tex. Prop. Code § 82.055(5). If any development right is to be reserved by the declarant, the declaration (form 24-1 in this chapter) will require substantial modification.

§ 24.3:9 Special Declarant Rights

Tex. Prop. Code § 82.055(14), (15) requires not only a description of development rights and other special declarant rights but also clear identification of the particular real property to which such rights apply and time limits within which such rights must be exercised. Unless special declarant rights are expressly reserved in the declaration, they do not arise under the Uniform Condominium Act. If development rights are reserved, the declaration (form 24-1 in this chapter) will require substantial modification. *See* Tex. Prop. Code §§ 82.003(a)(12), (a)(22), 82.055(14). Examples of special declarant rights include:

1. The right to complete or make improvements indicated on the plats and plans. *See* Tex. Prop. Code §§ 82.003(a)(22)(A), 82.059.
2. The right to maintain sales and other offices and models and condominium advertising signs on the condominium. *See* Tex. Prop. Code §§ 82.003(a)(22)(D), 82.065.
3. Rights of easement through the common elements for the discharge of declarant's obligations. *See* Tex. Prop. Code §§ 82.003(a)(22)(E), 82.066.
4. The right to appoint or remove officers or directors. *See* Tex. Prop. Code §§ 82.003(a)(22)(F), 82.103(c).

§ 24.4 General Considerations for Bylaws

Form 24-4 in this chapter is a proposed set of bylaws for a condominium owners association. The form can be modified consistent with applicable law, found primarily in the Texas Business Organizations Code and the Texas Property Code.

The Business Organizations Code provides that bylaws may contain provisions for the "regulation and management" of corporate affairs that are consistent with law and the corporation's certificate of formation. Tex. Bus. Orgs. Code § 21.057(b) (for-profit corporation), § 22.102(b) (nonprofit corporation).

Section 82.106 of the Property Code mandates that the bylaws contain specified provisions governing the "administration and operation of the condominium." It also provides for "other matters the association considers desirable, necessary or appropriate" subject to the declaration. Section 81.202 of the Property Code (applying to condominiums formed before January 1, 1994) states that the "bylaws of a condominium regime govern the administration of the buildings that comprise the regime." Thus, it is not unusual, particularly for associations formed before January 1, 1994, to see provisions in bylaws that go beyond corporate governance.

§ 24.5 General Considerations for Rules

Form 24-11 in this chapter can be used in promulgating rules for the condominium owners association and the use of any common areas. The rules and penalties for violation (to be inserted in sections A. and B. of the form) will be unique to each condominium regime. The enforcement provisions (contained in section C. of the form) are based on the requirements in section 82.102(d) of the Texas Property Code.

§ 24.6 Additional Forms

§ 24.6:1 Condominium Information Statement

Before offering to the public the sale of any interest in a condominium, a declarant (as well as certain other persons in the business of selling real property) must prepare and provide a condominium information statement to prospective purchasers. Tex. Prop. Code § 82.152. The requirements for the condominium information statement are found in Tex. Prop. Code § 82.153. These include—

1. the name and principal address of the declarant and of the condominium;
2. a general description of the condominium that includes the types and maximum number of units;
3. the minimum and maximum number of additional units that may be included in the condominium;
4. a brief description of any development rights reserved by a declarant and of any conditions relating to those rights;
5. copies of the declaration, articles of incorporation, bylaws, any rules of the association and their amendments, and copies of leases and contracts, other than loan documents, required by the declarant to be signed by purchasers at closing;
6. a projected or pro forma budget for the association for the first fiscal year of the association that conforms to Texas Property Code section 82.153(a)(6) and (b);
7. a general description of each lien, lease, or encumbrance affecting title to the condominium after conveyance by the declarant;
8. a copy of each written warranty provided by the declarant;
9. a description of any unsatisfied judgments against the association and any pending suits to which the association is a party or that are material to the land title and construction of the condominium of which a declarant has actual knowledge;
10. a general description of the insurance coverage provided for the benefit of unit owners; and
11. current or expected fees or charges to be paid by unit owners for the use of the common elements and other facilities related to the condominium.

Form 24-2 in this chapter is based on the above requirements. Special disclosures are required for condominiums located in whole or in part in a municipality with a population of more than 1.9 million. *See* Tex. Prop. Code § 82.153(a)(12).

§ 24.6:2 Management Certificate

Texas Property Code section 82.116 requires a management certificate to be recorded in each county in which the condominium is located. If any changes in information occur, the association is required to file a new management certificate not later than thirty days after the date the association has notice of the change. *See* Tex. Prop. Code § 82.116(b). In addition, all condominium owners associations must record a current management certificate on or before January 1, 2014, or rerecord the current management certificate if the previous recording was done before September 1, 2013. This requirement is to facilitate the county clerks' indexing of management certificates, which, before September 1, 2013, did not have a clear, statutorily mandated system. Tex. Prop. Code § 82.116(a–1). Thus, a condominium owners association should record or rerecord its current

management certificates even if it missed the January 1, 2014, deadline. Form 24-5 in this chapter, the management certificate, may be used to comply with these requirements.

§ 24.6:3 Resale Certificate and Acknowledgment of Receipt

A unit owner, other than a declarant, who intends to sell a unit must provide a purchaser with a current copy of the declaration, bylaws, any association rules, and a resale certificate. The resale certificate, required under chapter 82 of the Texas Property Code, must be prepared not earlier than three months before the date of delivery. The resale certificate must be issued by the association and contain the disclosures specified in Tex. Prop. Code § 82.157. The resale certificate and other provisions in chapter 207 of the Property Code do not apply to condominiums. Tex. Prop. Code § 207.002(b).

Form 24-6 in this chapter, the resale certificate, may be used to comply with the requirements of Tex. Prop. Code § 82.157.

If the seller fails to deliver to the purchaser copies of the declaration, bylaws, and association rules as required by Tex. Prop. Code § 82.157 before the purchaser executes the contract, or if the contract does not contain an underlined or bold-faced provision acknowledging the purchaser's receipt of those documents and recommending that the purchaser read the documents before executing the contract, the purchaser has the right to cancel the contract before the sixth day after the date the seller delivers those documents to the purchaser. *See* Tex. Prop. Code § 82.156. Form 24-8, the acknowledgment of receipt of condominium documents, may be used to document compliance with Tex. Prop. Code § 82.157 or may be modified to use as additional clauses in a sales contract.

§ 24.6:4 Record of Unit

An association is required to keep certain records, including information concerning each unit owner. The unit owner, within thirty days after acquiring an interest, must provide—

1. the unit owner's mailing address, telephone number, and driver's license number, if any;
2. the name and address of the holder of any lien against the unit and any loan number;
3. the name and telephone number of any person occupying the unit other than the unit owner; and
4. the name, address, and telephone number of any person managing the unit as agent of the unit owner.

Tex. Prop. Code § 82.114(e).

This information must be updated no later than thirty days after the date the owner has notice of any change in the required information. Tex. Prop. Code § 82.114(f). Form 24-10 in this chapter, the record of unit, may be used to comply with those requirements.

§ 24.6:5 Management Agreement

A person who performs residential property management services for a single-family residential property must be licensed as a broker. Tex. Occ. Code ch. 1101. Among the many acts that can make one a "broker" for purposes of the Occupations Code, and thus requiring the person to be licensed, is "control[ling] the acceptance or deposit of rent from a resident of a single-family residential real property unit," in expectation of receiving a commission or other valuable consideration. Tex. Occ. Code § 1101.002(1)(A)(x). Control means the authority to either (1) pay for services related to management of the property out of the rent collected, (2) determine where to deposit the rent, or (3)

sign checks or withdraw money from a trust account. 22 Tex. Admin. Code § 535.4(h). Tex. Admin. Code § 535.4(i) states that in addition to other types of property, a condominium unit or townhome is a single-family residential real property unit for purposes of Tex. Admin. Code § 535.4(h). An association that hires an unlicensed manager to assist in managing the association's affairs can use form 24-16 in this chapter to prohibit activities for which a broker's license is required.

§ 24.7 Additional Resources

Barker, Rick L., and Brady Ortego. "Laws Affecting the Drafting of HOA Documents." In *Advanced Real Estate Drafting Course, 2015*, Austin: State Bar of Texas, 2015.

Brown, Clinton F. "Texas Property Owners Association Case Law—Significant Cases." In *Advanced Property Owners Association Law Course, 2018*. Austin: State Bar of Texas, 2018.

Brown, Clinton F., and Mia B. Lorick. "A New Dawn for Short-Term Rentals: The Texas Supreme Court's Opinion on POA Regulation and Probable Legislation." In *Advanced Real Estate Law Course, 2018*. Austin: State Bar of Texas, 2018.

Burton, Robert D. "Drafting Community Rules." In *Advanced Property Owners Association Law Course, 2018*. Austin: State Bar of Texas, 2018.

Burton, Robert D., and Preston A. Patten. "Leasehold Condominiums." In *Advanced Real Estate Law Course, 2018*. Austin: State Bar of Texas, 2018.

Burton, Robert D., and Sharon Reuler. "Legislative Update 2015: Condos & Owners Associations." In *Legislative Update 2015: Condos & Owners Associations, 2015*. Austin: State Bar of Texas, 2015.

Cagle, Gregory S. "POA Board Governance: Governance of the Unruly by the Uninitiated." In *Advanced Property Owners Association Law Course, 2018*. Austin: State Bar of Texas, 2018.

Conoly, David Z. "Drafting Bylaws for HOAs: Condominiums & Subdivisions." In *Advanced Real Estate Drafting Course, 2014*. Austin: State Bar of Texas, 2014.

———. "HOA Foreclosure Demand Letters." In *Handling Your First (or Next) HOA Assessment Lien Foreclosure for Condos and Subdivisions, 2014*. Austin: State Bar of Texas, 2014.

Farine, Trisha Taylor. "Amending POA Governing Documents." In *Advanced Property Owners Association Law Course, 2018*. Austin: State Bar of Texas, 2018.

Hailey, Roy D., Sipra Boyd, and Clinton F. Brown. "2006–2013 Supplement to Survey of Texas Case Law Affecting Property Owners Associations." In *Advanced Real Estate Law Course, 2014*. Austin: State Bar of Texas, 2014.

Hailey, Roy D., and Sharon Reuler. "Flagpoles, Condos, Turf & More: An Overview of 2013 State Law Changes for Texas Property Owners Associations." In *2013 POA Legislative Update: Condos & Owners Associations, 2013*. Austin: State Bar of Texas, 2013.

Jackson, Rosemary B. "A Basic Overview of Laws Affecting Property Owners Associations and Condominiums." In *Real Estate Law 101, 2018*. Austin: State Bar of Texas, 2018.

———. "Governing Documents for Property Owners Associations: Distinguishing

Roles for Declarations, Rules and Bylaws." In *Advanced Real Estate Law Course, 2016*. Austin: State Bar of Texas, 2016.

Katine, Mitchell. "Types of Homeowner Association Debts and Liens." In *Handling Your First (or Next) HOA Assessment Lien Foreclosure for Condos and Subdivisions, 2014*. Austin: State Bar of Texas, 2014.

Kerr, Kevin. "Condominium Board Procedures Manual." In *Advanced Real Estate Drafting Course, 2011*. Austin: State Bar of Texas, 2011.

Lorick, Mia B. "Leasing Rules, Regulations, and Restrictions for POAs." In *Advanced Property Owners Association Law Course, 2018*. Austin: State Bar of Texas, 2018.

Markel, Marc D. "The Standard of Care in Texas for Property Owners' Associations." In *Advanced Property Owners Association Law Course, 2018*. Austin: State Bar of Texas, 2018.

Markel, Marc D., and Paul Gaines. "Checklists and Forms for Statutory Compliance by Single Family Homeowner Associations and Condominium Associations." In *Advanced Real Estate Drafting Course, 2018*. Austin: State Bar of Texas, 2018.

Markel, Marc D., and Brady E. Ortego. "Foreclosures by Property Owners' Associations." In *Advanced Real Estate Law Course, 2017*. Austin: State Bar of Texas, 2017.

Reuler, Sharon. "2018 Overview of Texas POA Statutes: Statutes Pertaining to Common Interest Developments and Their Property Owners Associations." In *Advanced Property Owners Association Law Course, 2018*. Austin: State Bar of Texas, 2018.

Reuler, Sharon, and Roy D. Hailey. "Texas HOA Law Highlights: FAQs about Homeowner Associations in Subdivisions & Condos." In *Real Estate Law 101 Course, 2018*. Austin: State Bar of Texas, 2018.

Valdes, Alex. "Federal & State Laws That Modify POA Documents." In *Advanced Property Owners Association Law Course, 2018*. Austin: State Bar of Texas, 2018.

Wilson, Reid C. "Terminating & Repurposing Condominiums: Death and Rebirth of Obsolete Projects." In *Advanced Property Owners Association Law Course, 2018*. Austin: State Bar of Texas, 2018.

[Reserved]

Form 24-1

Declaration of [name of condominium], a Condominium

Basic Information

Date:

Declarant:

Declarant's Address:

Association: [**name**], a Texas [for-profit/nonprofit] corporation

Association's Address:

Property: [**include legal description**] [**include county**], including the following easements and licenses appurtenant to, included in, or to which the condominium is or may become subject [**include recording data for easements and licenses**]

Plat/Plan: [attached hereto as Exhibit [**exhibit number/letter**]/recorded at [**recording data**]]

[Reservations from Declaration:]

[Property Subject to Development Right of Withdrawal: [**include legal description**]]

Definitions

"Act" means chapter 82 of the Texas Property Code, as amended, and any successor law, known as the Texas Uniform Condominium Act.

"Assessment" means regular and special assessments, dues, fees, charges, interest, late fees, fines, collection costs, attorney's fees, and any other amount due to the association by the Owner or levied against the Unit by the Association.

"Board" means the Board of Directors of the Association.

"Bylaws" means the Bylaws of the Association adopted by the Board. The initial Bylaws are attached as Exhibit **[exhibit number/letter]**.

"Certificate of Formation" means the Association's certificate of formation.

"Common Elements" means all portions of the Condominium other than the Units and includes both General and Limited Common Elements. The Common Elements are directly owned by the Condominium Unit Owners in undivided interests.

"Common Expenses" means expenditures made by or financial liabilities of the Association, together with any allocations to reserves.

"Condominium" means the Property covered by the Plat and any additional property that is subject to this Declaration.

"Covenants" means the covenants, conditions, and restrictions contained in this Declaration.

"Declarant" means the person or persons identified as Declarant in the Basic Information or who reserves or succeeds to any special declarant right.

"Declarant Control Period" means the period of time during which Declarant can appoint a majority of the Board members and officers as provided in paragraph E.2.

"Dedicatory Instruments" means this Declaration and the Certificate of Formation, Bylaws, and Rules, as amended.

"Development Rights" means a right or combination of rights reserved by the Declarant set forth in paragraph L.3.

"General Common Elements" means common elements that are not Limited Common Elements.

"Limited Common Elements" means a portion of the Common Elements allocated by the Declaration or by the Act for the exclusive use of one or more but less than all of the Units, including [**include as applicable and consider expressly excluding any of the following items that are not intended as limited common elements:** shutters, awnings, window boxes, doorsteps, stoops, porches, balconies, patios, and exterior doors and windows or other fixtures designed to serve one or more but less than all of the Units, but located outside the boundaries of the Unit(s)]. [**Include any additional building features that are to be characterized or expressly excluded as limited common elements.**]

"Member" means Owner.

"Owner" means every record Owner of a fee interest in a Unit.

"Plat" means the Plat and any plans for the Condominium [recorded in [**recording data**] of the real property records of [**county**] County, Texas/recorded with this Declaration as Exhibit [**exhibit number/letter**]] and any replat of or amendment to the Plat made in accordance with this Declaration.

"Residential Purposes" means recreational or dwelling purposes or both.

"Rules" means the Rules related to the Condominium adopted by the Board that do not conflict with law or the Dedicatory Instruments. On request, an Owner will be provided a copy of the Rules.

Include the following if applicable.

"Single Family" means a group of individuals related by blood, adoption, or marriage or a number of unrelated roommates not exceeding the number of bedrooms in a Unit.

Continue with the following.

"Special Declarant Rights" means a right or combination of rights reserved by the Declarant set forth in paragraph L.1.

"Unit" means a physical portion of the Condominium designated for separate ownership, the boundaries of which are described by the Declaration.

Each capitalized term not otherwise defined in this Declaration has the meaning specified in the Act.

Clauses and Covenants

A. Imposition of and Agreement to the Covenants

A.1. Declarant imposes the Covenants on the Property and subjects the Property to a condominium form of ownership in accordance with the provisions of the Act [**include if applicable:** , subject to the Reservations from Declaration]. The Covenants run with the land and bind all Owners, occupants, and any other person holding an interest in a Unit.

A.2. All Owners and other occupants of the Units by their acceptance of their deeds, leases, or by occupancy of any Unit agree that the Condominium is subject to the Covenants. Each Owner, each occupant of a Unit, and the Association agree to comply with the Dedicatory Instruments and to be subject to an action arising out of or related to the Dedicatory Instruments for declaratory judgment, damages, or for injunctive relief.

B. Plat

B.1. The Plat is part of this Declaration and is incorporated by reference.

B.2. To the extent that a Unit or Common Element encroaches on another Unit or Common Element, a valid easement for the encroachment exists. The easement does not

relieve an Owner of liability in case of willful misconduct or relieve Declarant or any other person of liability for failure to adhere to the Plat.

C. Regulated Activities

C.1. Permitted Purposes. A Unit [shall/shall not] be utilized [only] for Residential Purposes [by a Single Family]. [**Include if applicable:** A Unit shall be used only for [office/ warehouse/industrial/other nonresidential] purposes.]

C.2. Prohibited Activities and Occupancy Restrictions. Subject to the Special Declarant Rights, the following use restrictions apply to all Units and to the Common Elements:

Select from the following as applicable.

a. any activity that is otherwise prohibited by the Dedicatory Instruments;

b. any illegal activity;

c. any nuisance, noxious, or offensive activity;

d. any dumping of trash or rubbish, except in approved locations and in an approved manner;

e. any storage of—

i. building materials except during the construction or renovation of a Unit or

ii. vehicles, except vehicles in a garage or operable automobiles on a driveway or in a parking space;

f. any keeping or raising of animals, except for common domesticated household pets, such as dogs and cats, not to exceed [**number**] confined to the Unit;

g. any commercial or professional activity except reasonable home office activity;

h. the drying of clothes outside of a Unit;

i. the display of any sign except—

i. one not more than five square feet, advertising the Unit for sale or rent and

ii. political signage not prohibited by law or the Dedicatory Instruments;

Determine whether and to what extent rentals are permitted and draft appropriate prohibitions.

[j. the renting of a portion of a Unit;]

[j./k.] [**Insert any additional restrictions, e.g.,** renting a residence or structure for less than thirty consecutive days or allowing a renter, guest, or other person who is a registered sex offender to reside at the Property.]

D. Units

D.1. Number of Units. The number of Units in the Condominium is as shown on Exhibit [**exhibit number/letter**]. [**Include as applicable:** Declarant reserves no rights to create additional Units./Declarant reserves the right to create [**number**] additional Units as shown in section L./Declarant reserves the right to withdraw [**number**] Units as shown in section L.]

D.2. Identification of Units. The identification number of each Unit is shown on Exhibit [**exhibit number/letter**] and on the Plat.

D.3. Unit Boundaries. The boundaries of each Unit are the walls, floors, and ceilings of the Unit. The boundaries of each Unit are located as shown on the Plat and are more particularly described in paragraph D.4.

D.4. Parts of Unit. A Unit includes all lath, furring, wallboard, plasterboard, plaster, paneling, tiles, wallpaper, paint, finished flooring, and any other materials constituting part of the finished surfaces that are a part of a Unit, and the spaces, interior partitions, and other fixtures and improvements within the boundaries of a Unit are a part of the Unit. A Unit also includes [**include any additional things that represent part of a unit**]. A Unit does not include any chute, flue, duct, wire, conduit, bearing wall, bearing column, or any other fixture that is partially within and partially outside the designated boundaries of a Unit, of which the portion serving only that Unit is a Limited Common Element allocated solely to that Unit and of which the portion serving more than one Unit or the Common Elements is a part of the General Common Elements.

D.5. No Subdivision or Consolidation of Units. No Unit will be subdivided or consolidated with another Unit (unless approved by the Board).

D.6. No Structural Modification of Unit without Board Approval. No structural modifications or alterations will be made in a Unit unless plans, specifications, and any other documents requested by the Board are submitted to and approved by the Board in accordance with the Rules. The Association, the Board, and their members will not be liable to any person submitting requests for approval or to any Owner by reason of any action, failure to act, approval, disapproval, or failure to approve or disapprove any request. Any structural modification made to a Unit (a) without Board approval, (b) not in conformity with the Board approval, or (c) without the required permit from the applicable entity are unauthorized modi-

fications. The Board may require the Owner to restore the Unit, at the Owner's expense, to the condition before the unauthorized modifications were made.

D.7. Maintenance. Each Unit will be maintained by its Owner.

Include D.8. if there are restrictions on alienation. The following are examples.

D.8. Restrictions on Transfer

A Unit may not be conveyed pursuant to a time-sharing arrangement.

A Unit may not be leased or rented for a term of less than [**number**] days.

All leases and rental agreements shall be in writing and subject to the reasonable requirements of the Board.

If an Owner receives an acceptable purchase offer for a Unit, the Owner must first offer to sell the Unit to the Association for the same price and terms as the offer received. The Owner will give the Board written notice of the price and terms of the offer received and the name and address of the person making such offer. If, within ten days from the date the Board receives the Owner's notice, the Board fails to give the Owner notice that the Association elects to purchase the Unit, the Owner may sell the Unit to the person(s) making the offer. In such case, the Board will certify in writing, duly acknowledged and in recordable form, that the Association has declined to purchase the Unit. The Board may waive the provisions of this paragraph for any Unit. Any mortgagee of any Unit that acquires title to a Unit is exempt from this "right of first refusal."

Continue with the following.

E. Association

E.1. Establishment and Governance. The Association is established by filing its Certificate of Formation and is governed by the Dedicatory Instruments. The Association, acting through the Board, will administer and manage the Condominium in accordance with the Dedicatory Instruments. The Association has the powers (a) of a [for-profit/nonprofit] corporation under the Texas Business Organizations Code, (b) of a condominium association under the Act, and (c) stated in the Dedicatory Instruments, respectively as amended. All acts of the Association must be by and through the Board, except as otherwise provided by the Declaration or Bylaws or by law.

E.2. Declarant Control. Declarant has all the powers reserved in section 82.103(c) of the Act to appoint and remove officers and members of the Board until the 120th day after conveyance of 50 percent of the Units that may be created to Owners other than Declarant, at which time not less than one-third of the Board members must be elected by Owners other than Declarant. Not later than the 120th day after conveyance of 75 percent of the Units to Owners other than Declarant, the Declarant Control Period terminates, and all the Board and Association officers shall be elected by the Owners as provided in the Bylaws.

E.3. Membership and Voting Rights. Every Owner is a Member of the Association. Membership is appurtenant to and may not be separated from ownership of a Unit. On termination of the Declarant Control Period, the Members have the voting rights provided in the Bylaws.

E.4. Assignment of Future Income. The Association may assign its future income, including its rights to receive Common Expenses assessments, [in accordance with section 82.102 of the Act/only by the affirmative vote of Unit Owners of Units to which at least [**number**] of the votes in the Association are allocated].

F. Assessments

F.1. Authority. The Association will charge Assessments as provided in the Act.

F.2. Personal Obligation. An Assessment is a personal obligation of each Owner when the Assessment accrues.

F.3. Creation of Lien. Assessments are secured by a continuing lien on each Unit as provided in section 82.113 of the Act. By acceptance of a deed to a Unit, each Owner grants the lien, together with the power of sale, to the Association to secure Assessments.

F.4. Commencement. A Unit becomes subject to Assessments as provided in the Act.

F.5. Regular Assessments

F.5.a. Rate. Regular assessments will be charged by the Board to fund the budgeted Common Expenses.

F.5.b. Changes to Regular Assessments. Regular assessments may be changed by the Board. Written notice of the regular assessment will be sent to every Owner at least thirty days before its effective date.

F.5.c. Collections. Regular assessments will be collected [annually/semiannually/monthly] in advance, payable on the [first/tenth/[**other**]] day of the [month/year] and on [the same day of each succeeding [month/year]/the [first/tenth/[**other**]] day of [**month**] of each year].

Include the following if applicable.

F.5.d. Expenses for Maintenance, Repair, or Replacement of Limited Common Elements. Expenses for the maintenance, repair, or replacement of a Limited Common Ele-

ment shall be assessed to the Owner(s) whose Unit(s) benefit from the Limited Common Element.

Continue with the following.

F.6. Special Assessments. In addition to the regular assessments, the Board may charge special assessments for the purpose of funding the cost of any construction, reconstruction, repair, or replacement of any capital improvement on the Common Elements or for any other purpose benefiting the Condominium but requiring funds exceeding those available from the regular assessments. Written notice of the terms of the special assessment will be sent to every Owner. Any special assessment must be approved by a [majority/two-thirds] vote at a meeting of the Members in accordance with the Bylaws.

F.7. Subordination of Lien to Mortgages. The lien granted and reserved to the Association is subordinate to the liens described in section 82.113(b) of the Act.

F.8. Delinquent Assessments. Any Assessment not paid within [**number**] days after it is due is delinquent.

G. Remedial Rights

G.1. Late Charges and Interest. Owners will pay the Association a late charge of [$[**amount**]/[**percent**] percent of the delinquent amount] for Delinquent Assessments. Owners will pay the Association interest at the rate of [**percent**] percent per year on Delinquent Assessments from the delinquent date until the date paid. The Board may change the late charge and the interest rate; however, the interest rate may not exceed the maximum permitted by law.

G.2. Costs, Attorney's Fees, and Expenses. The prevailing party in any legal proceeding among the Association, an Owner, or an occupant of a Unit related to the Dedicatory Instruments is entitled to recover reasonable attorney's fees and all costs of such proceeding

incurred by the prevailing party. A prevailing party is the party who successfully prosecutes the action or successfully defends against it, prevailing on the main issue, even though not to the extent of its original contention.

G.3. Nonjudicial Foreclosure of Lien. The Association may foreclose the Association's lien against a Unit in accordance with section 82.113 of the Act.

G.4. Judicial Action. The Association may sue an Owner and an occupant of a Unit to enforce the Dedicatory Instruments for damages for breach of the Dedicatory Instruments, for injunctive relief regarding the Dedicatory Instruments, and to foreclose the Association's lien on a Unit. An Owner and an occupant of a Unit may sue the Association, any Owner, and any occupant of a Unit to enforce the Dedicatory Instruments, for injunctive relief regarding the Dedicatory Instruments, and for damages for breach of the Dedicatory Instruments.

G.5. Remedy of Violations. The Association may access an Owner's Unit to remedy a violation of the Dedicatory Instruments.

G.6. Suspension of Voting. An Owner delinquent in payment of any Assessment may not vote.

G.7. Suspension of Other Rights. If an Owner violates the Dedicatory Instruments, the Association may suspend the Owner's rights under the Dedicatory Instruments in accordance with law until the violation is cured.

G.8. Damage to Property or Violation of Dedicatory Instruments. An Owner is liable to the Association (a) for damage to Common Areas caused by the Owner or the Owner's family, guests, agents, independent contractors, and invitees ("Owner Affiliates"), and (b) for violations of the Dedicatory Instruments by the Owner or Owner Affiliates, in accordance with law.

H. Limited Common Elements

H.1. Allocation of Reserved Limited Common Elements

H.1.a. Limited Common Elements are marked on the Plat and include [**include as applicable:** vehicle parking areas, storage areas, and others].

H.1.b. To the extent the Limited Common Elements are not allocated to a Unit by the Declaration, Declarant reserves the right to allocate the Limited Common Elements for the exclusive use of one or more Units (i) by making the allocation in a recorded instrument, (ii) in the deed to the Unit(s) to which the Limited Common Element is ancillary, or (iii) by recording an appropriate amendment to this Declaration.

> The following paragraph is optional. Unless the declaration contains a similar provision, a reallocation of limited common elements can be undertaken only by an amendment to the declaration.

H.2. Allocation of Specified Common Elements. The Board may designate parts of the Common Elements from time to time for use by less than all of the Owners or by nonowners for specified periods of time or by only those persons paying fees or satisfying other reasonable conditions for use as may be established by the Board. Any such designation by the Board shall not be a sale or disposition of such portions of the Common Elements.

I. Allocated Interests

I.1. Allocated Interests. The Owners' respective undivided interest in the Common Elements, the Owners' respective Common Expense liability, and the Owners' respective votes in the Association allocated to each Unit are set forth in Exhibit [**exhibit number/ letter**].

I.2. Determination of Allocated Interests. The interests allocated to each Unit have been calculated as follows:

a. the undivided interest in Common Elements, on the basis of [**include the method of calculation used**];

b. the percentage of liability for Common Expenses, on the basis of [**include the method of calculation used**]; and

c. the number of votes in the Association, on the basis of [**include the method of calculation used**].

J. Amendment of Declaration

The Declaration may be amended by consent of Owners to which at least [67 percent of the votes (or higher for residential condominiums)/[**smaller percentage**] percent of the votes (if all units are restricted to nonresidential use)] in the Association are allocated—

1. by written ballot that states the exact wording or substance of the amendment and that specifies the date by which a ballot must be received to be counted;

2. at a meeting of the Members of the Association after written notice of the meeting has been delivered to an Owner of each Unit stating that a purpose of the meeting is to consider an amendment to the Declaration;

3. by unanimous written consent of the Owners; or

4. [**other method**].

K. Reconstruction after Loss

On a casualty to any portion of the Condominium for which insurance is required, the Association must promptly repair or replace that portion unless (1) the Condominium is terminated, (2) repair or replacement would be illegal under any state or local health or safety statute or ordinance, or (3) at least 80 percent of the Owners, including each Owner of a Unit or

assigned Limited Common Element that will not be rebuilt or repaired, vote to not rebuild. Each unit owner may vote (in person or by proxy at a meeting; electronically or by written ballot in the absence of a meeting) regardless of whether the owner's unit or limited common element has been damaged or destroyed. Costs will be assessed and paid as provided in section 82.111 of the Act. [**Specify alternative provisions if desired and if all units are restricted to nonresidential use, as the provisions of section 82.111 of the Act may then be varied or waived.**]

L. Special Declarant Rights and Development Rights

L.1. Special Declarant Rights. The Declarant reserves the following Special Declarant Rights:

a. The right to complete or make improvements indicated on the Plats and Plans.

b. The right to maintain sales offices, management offices, leasing offices, and models in Units or on the Common Elements, but only [**include limits in number, size, location, and relocation**].

c. The right to maintain signs on the Condominium to advertise the Condominium.

d. The right to use, and to permit others to use, easements through the Common Elements as may be reasonably necessary for the purpose of discharging the Declarant's obligations under the Act and this Declaration.

e. The right to appoint or remove any officer of the Association or any director under paragraph E.2. or section 82.003(a)(22)(F) or 82.103(c) of the Act.

L.2. Limitations on Special Declarant Rights. Unless sooner terminated by a recorded instrument signed by the Declarant, any Special Declarant Right may be exercised by the Declarant [until [**date**]/for the period of time specified in the Act].

> If development rights are reserved, this form will require substantial modification. *See* Tex. Prop. Code §§ 82.003(a)(12), 82.003(a)(22)(B), 82.055(14).

L.3. Development Rights. The Declarant reserves the following development rights: [**specify rights reserved**].

M. General Provisions

M.1. Term. The Condominium may be terminated—

a. by a taking of all of the Units by condemnation; or

> Select one of the following.

b. by the approval of 100 percent of the votes in the Association and each holder of a deed of trust or vendor's lien on a Unit.

> Or
>
> **Caution:** The number may not be less than 80 percent if any unit in the condominium regime is residential.

b. by the approval of at least [**percent**] percent of the Members of the Association and each holder of a deed of trust or vendor's lien on a Unit.

M.2. No Waiver. Failure by the Association or an Owner to enforce the Dedicatory Instruments is not a waiver.

M.3. Corrections. The Board may correct typographical or grammatical errors, ambiguities, or inconsistencies contained in this Declaration, provided that any correction must not impair or affect a vested property right of any Owner.

M.4. Conflict. This Declaration controls over the other Dedicatory Instruments.

M.5. Severability. If a provision of this Declaration is unenforceable for any reason, to the extent the unenforceability does not destroy the basis of the bargain among the parties, the unenforceability does not affect any other provision of this Declaration, and this Declaration is to be construed as if the unenforceable provision is not a part of the Declaration.

M.6. Notices. Any notice required or permitted by the Dedicatory Instruments must be in writing. To the extent required by law, notices regarding remedial rights must be given by certified mail, return receipt requested. All other notices may be given by regular mail. Notice is deemed delivered (whether actually received or not) when properly deposited with the United States Postal Service, addressed to a Member at the Member's last known address according to the Association's records and the Association, the Board, or a managing agent at the Association's principal office or another address designated in a notice to the Members. Unless otherwise required by law or the Dedicatory Instruments, actual notice, however delivered, is sufficient.

_____

[Name of declarant]

Include acknowledgment.

After recording, please return to:
[name and address of declarant or attorney]

[Reserved]

assigned to the Unit, or any other portion of the Condominium. [**Include if applicable:** A summary or copy of each notice is attached.]

Include the following if applicable.

The remaining term of any leasehold estate that affects the condominium is [**description of remaining term**], and the provisions governing an extension or renewal of the lease are as follows: [**Describe provisions.**]

Continue with the following.

A copy of the following documents is attached:

1. Current Operating Budget
2. Current Balance Sheet
3. Declaration
4. Rules
5. Bylaws
6. Articles of Incorporation/Certificate of Formation

[**Name of association**]

By _____
[**Name and title**]

[Reserved]

Form 24-14

Owner Notification to Association of Rental Information

Date:

Property Owner:

Address:

Phone:

E-mail:

Repeat above information for each additional owner.

Address of Rented Property:

Owner's Rental Property Management Company:

Address:

Phone:

E-mail:

Tenant:

Phone:

Motor vehicle

Year, make, and model:

License plate number:

Repeat above information for each additional tenant or vehicle.

Rental Agreement Commencement Date:

Rental Agreement Termination Date:

Attach copy of lease or rental agreement.

Form 24-15

This notice should be sent to the owner in the manner required by the condominium governing documents.

Demand for Payment of Assessments

Basic Information

Date:

Condominium Owners Association:

Condominium Owners Association's Address:

Property:

Amount Currently Due to Condominium Owners Association:

Date by Which Assessment Delinquency Must Be Cured:

Additional Attorney's Fee If Amount Currently Due to Condominium Owners Association Is Not Paid by Date by Which Delinquency Must Be Cured:

Owner:

Owner's Address:

"You" and "your" in this notice refers to Owner.

Notice

The Condominium Owners Association has levied assessments against you and your unit that are secured by a continuing lien on the unit and on rents and insurance proceeds you

receive relating to the unit. Under Texas Property Code section 82.113, the "assessments" secured by this lien and that you owe mean the following:

Select the following unless the declaration provides otherwise.

- _____ regular and special assessments
- _____ dues
- _____ fees
- _____ charges
- _____ interest
- _____ late fees
- _____ fines
- _____ collection costs
- _____ attorney's fees
- _____ other amount due to the Condominium Owners Association

Additional assessments continue to accrue. Please call our office to confirm the exact payoff amount when you are prepared to pay. Partial payments received will be applied toward the assessment debt but will not stop foreclosure proceedings or extend any deadlines. To stop foreclosure proceedings you must pay this debt in full.

[**Include the following if applicable:** THIS FIRM HAS BEEN RETAINED TO COLLECT A DEBT, AND ANY INFORMATION OBTAINED WILL BE USED FOR THAT PURPOSE.]

You have the right to bring a court action if you claim that you are not in default, or if you believe that you have any other defense to this demand for payment or to the foreclosure of the lien securing repayment of the above referenced assessment debt.

Continue with the following.

PLEASE CONTACT US FOR INITIAL VERIFICATION OF THE DEBT, AND WE WILL PROVIDE COPIES OF STATEMENTS OF YOUR ACCOUNT. UNLESS YOU DISPUTE THE VALIDITY OF THE ABOVE REFERENCED DEBT, OR ANY PORTION THEREOF, WITHIN THIRTY DAYS AFTER RECEIPT OF THIS NOTICE, THE DEBT WILL BE ASSUMED TO BE VALID. IF YOU DO NOTIFY US IN WRITING WITHIN THE THIRTY-DAY PERIOD THAT THE DEBT, OR ANY PORTION THEREOF, IS DISPUTED, WE WILL OBTAIN AN ADDITIONAL VERIFICATION OF THE DEBT AND WILL MAIL A COPY OF THAT ADDITIONAL VERIFICATION TO YOU. THE CURRENT CREDITOR IS THE ORIGINAL CREDITOR.

THIS THIRTY-DAY VERIFICATION PERIOD DOES *NOT* ALTER THE EARLIER STATED DEADLINES.

ASSERT AND PROTECT YOUR RIGHTS AS A MEMBER OF THE ARMED FORCES OF THE UNITED STATES. IF YOU OR YOUR SPOUSE IS SERVING ON ACTIVE MILITARY DUTY, INCLUDING ACTIVE MILITARY DUTY AS A MEMBER OF THE TEXAS NATIONAL GUARD OR THE NATIONAL GUARD OF ANOTHER STATE OR AS A MEMBER OF A RESERVE COMPONENT FOR THE ARMED FORCES OF THE UNITED STATES, PLEASE SEND WRITTEN NOTICE OF THE ACTIVE DUTY MILITARY SERVICE TO THE SENDER OF THIS NOTICE IMMEDIATELY.

[Name of association or collecting attorney/ agent]

By _____

[Name and title]

[Reserved]

Form 24-16

This form can be used for condominium owners association managers who are not licensed real estate brokers providing property management services under Texas Occupations Code chapter 1101.

Association Management Agreement

Basic Information

Date:

Condominium Owners Association:

Condominium Owners Association's Address:

Condominium Owners Association Manager:

Condominium Owners Association Manager's Address:

Subdivision/Condominium Complex:

Single-Family Residential Real Property: A single-family home or a unit in a condominium, cooperative, row home, or townhome. Single-Family Residential Real Property does not include a duplex, triplex, or fourplex unless the unit is owned as a condominium, cooperative, row home, or townhome.

A. Services

A.1. Condominium Owners Association Manager will provide the following association management services [on-site] for the Condominium Owners Association only as authorized by the Condominium Owners Association board of directors. The services include contracting and paying for maintenance, repair, replacement, and other services incidental to the management of the Condominium Owners Association and the common areas of the Sub-

division/Condominium Complex as set forth in the governing documents for the Condominium Owners Association.

A.2. Unless Condominium Owners Association Manager is or becomes licensed as a broker under the Texas Occupations Code, Condominium Owners Association Manager—

A.2.a. will not engage in any activity for which a license is required under Texas Occupations Code, chapter 1101, and Texas Administrative Code rules promulgated by the Texas Real Estate Commission; and

A.2.b. will not control the acceptance or deposit of rent for Single-Family Residential Real Property located in the Subdivision/Condominium Complex. "Control the acceptance or deposit of rent" includes any one or more of the following activities:

i. use the rent to pay for services related to management of the property;

ii. determine where to deposit the rent; or

iii. sign checks or withdraw money from a trust account.

B. Term (Months)

Insert the term of the condominium owners association management agreement in months.

C. Compensation (Monthly)

Insert the monthly compensation for the condominium owners association manager.

Insert additional terms if applicable.

[Name of association]

By _____

[Name and title of association officer or agent]

By _____

[**Name of association manager**], Condominium Owners Association Manager

[Reserved]

Form 24-17

This form may be used to comply with the requirements of Tex. Prop. Code § 82.113(g). This affidavit must be recorded in the real property records of the county in which the property is located. *See* Tex. Prop. Code § 202.006.

Affidavit of Redemption

Basic Information

Date:

Property Address:

Property Legal Description:

Property Owners Association:

Property Owners Association's Address:

Include if applicable.

Third Party Purchaser:

Third Party Purchaser's Address:

Continue with the following.

Former Property Owner:

Former Property Owner's Address:

Lienholder:

Lienholder's Address:

If there is more than one lienholder, repeat above information for each additional lienholder.

Redeeming Party:

Redeeming Party's Address:

Date of Redemption:

Date of Foreclosure:

Affiant:

Statement

Affiant on oath swears that the following statements are true and are within the personal knowledge of Affiant:

1. This affidavit is made with respect to the foreclosure of the lien held by the Property Owners Association on the Property on the Date of Foreclosure.

2. I am the [Former Property Owner/Lienholder].

3. I fully redeemed the Property on the Date of Redemption in compliance with section 82.113 of the Texas Property Code.

_____

[Name of affiant]

SUBSCRIBED AND SWORN TO before me on _____ by **[name of affiant]**.

_____

Notary Public, State of Texas

Chapter 25

Leases

Forms

Chapter 25

Leases

§ 25.1 General Considerations

The basic lease form (form 25-1 in this chapter) contains the minimal terms necessary for a lease. Although the form could be used as written in appropriate circumstances, its primary purpose is as a drafting tool, a core lease from which to draft for the particular situation. This lease has been adapted for use in various circumstances. Form 25-5 is a residential lease form derived from the basic lease form but containing the necessary modifications to convert the basic lease into a residential lease. The basic lease has also been adapted for use as a retail lease (form 25-2), an office lease (form 25-3), an industrial lease (form 25-6), and a manufactured-home community lease (form 25-11).

§ 25.1:1 Definition of a Lease

A lease is a conveyance of real property for a designated period of time with a reversionary interest in the lessor. Over time, the newer concepts of contract law have crept into use with the older property law, and the lease has become a hybrid of a conveyance and a contract between the landlord and the tenant. The landlord-tenant relationship is governed by title 8 of the Texas Property Code as well as by other statutes and a large body of case law. Title 8 of the Texas Property Code is divided into four chapters: chapter 91 (Provisions Generally Applicable to Landlords and Tenants), chapter 92 (Residential Tenancies), chapter 93 (Commercial Tenancies), and chapter 94 (Manufactured Home Tenancies).

§ 25.1:2 Statute of Frauds

If the term of the lease is more than one year, the lease is unenforceable unless it is in writing and signed by the party to be charged with its covenants. Tex. Bus. & Com. Code § 26.01; Tex. Prop. Code § 5.021. Certain provisions of the Property Code require that the lease be signed by both parties for the lease to serve as an exception to the statutory provisions. *See, e.g.*, Tex. Prop. Code § 91.001(e)(1). Other provisions of the Property Code may not be waived by the lease. *See, e.g.*, Tex. Prop. Code § 92.008(g). Manufactured-home community leases must be in writing and signed by both the landlord and the tenant. Tex. Prop. Code § 94.053(a).

§ 25.1:3 Caution: Property Description

As a general rule a lease must contain, within itself or by reference to some other existing writing, the means or data by which the premises to be leased may be identified with reasonable certainty. *Hebisen v. Nassau Development Co.*, 754 S.W.2d 345, 351 (Tex. App.—Houston [14th Dist.] 1988, writ denied), *overruled on other grounds by Formosa Plastics Corp. v. Presidio Engineers & Contractors, Inc.*, 960 S.W.2d 41 (Tex. 1998). The rule for leases is derived from the general rule for sales and conveyance of real estate. *See, e.g., Pick v. Bartel*, 659 S.W.2d 636, 637 (Tex. 1983); *Morrow v. Shotwell*, 477 S.W.2d 538, 539 (Tex. 1972). A manufactured-home community lease agreement must contain the address or number of the manufactured-home lot. Tex. Prop. Code § 94.053(c)(1).

If the lease agreement contains no adequate description of the leased premises, it is unenforceable. If the leased premises are identified only by a suite number or a diagram on an attached exhibit, such as a schematic of an undesignated floor of the building or project of which the leased premises are a part, the lease may be unenforceable. Sometimes the schematic of the undesignated floor shows a certain section by crosshatches, but if there is no metes-and-bounds or lot and block number from a plat description of the entire project there is no legal description of the leased premises. *See, e.g., River Road Neighborhood Ass'n v. South Texas Sports*, 720 S.W.2d 551 (Tex. App.—San Antonio 1986, writ dism'd); *Lubel v. J.H. Uptmore & Associates*, 680 S.W.2d 518 (Tex. App.—San Antonio 1984, no writ). There is an exception where a street address or a commonly known name may be a sufficient property description if there is no confusion. *Apex Financial Corp. v. Garza*, 155 S.W.3d 230, 237 (Tex. App.—Dallas 2004, pet. denied); *TLC Hospitality, LLC v. Pillar Income Asset Management, Inc.*, 570 S.W.3d 749, 767 (Tex. App.—Tyler 2018, pet. denied). The best practice is to use a lot and block number from a plat map or a metes-and-bounds description.

§ 25.1:4 Cautions: Risk Allocation

Indemnities and Waivers: The indemnity provisions of the multitenant building or project lease forms are designed to protect the respective parties from their own ordinary negligence (but not gross negligence or willful misconduct) on a geographic basis; that is, the tenant indemnifies the landlord for any damage or injury occurring within the premises, whether or not the ordinary negligence of the landlord is a cause of the damage or injury, and the landlord indemnifies the tenant for any damage or injury occurring within the common areas, whether or not the ordinary negligence of the tenant is a cause of the damage or injury. The waiver of subrogation provision contained in the multitenant building or project lease forms releases both parties from liability for property damage and loss of revenues up to the limits of the property insurance coverages required to be carried under the lease, notwithstanding the ordinary negligence of the party causing the property damage or loss of revenues. The indemnity and waiver provisions are designed to comply with the two-pronged "fair notice doctrine" under Texas case law: (1) the "express negligence rule" set forth in *Ethyl Corp. v. Daniel Construction Co.*, 725 S.W.2d 705 (Tex. 1987), and (2) the "conspicuousness rule" enunciated in *Dresser Industries, Inc. v. Page Petroleum, Inc.*, 853 S.W.2d 505 (Tex. 1993).

Insurance: It is critical that the parties consult with their insurance professionals to determine the exact insurance coverages to be included on the insurance addendum incorporated into the lease form or, if applicable, the separate insurance addendum (forms 25-35 and 25-36 in this chapter) and that the attorneys tailor the indemnity and casualty provisions in response to the actual insurance policies that will be carried by the parties.

Rebuilding Obligations: The restoration obligations of the parties after a casualty are tied to the description of "Tenant's Rebuilding Obligations" contained in the Basic Terms of the lease. The tenant is expected to restore those leasehold improvements described in "Tenant's Rebuilding Obligations" in addition to replacing its personal property (including inventory, furniture, trade fixtures, and equipment). Because the tenant should carry property insurance to cover its restoration obligations, a detailed description is imperative. See clauses 25-13-8, 25-13-9, and 25-13-10. The landlord's restoration obligations are defined in terms of the portions of the premises that the tenant is not required to rebuild.

For example, the tenant may be receiving the space in shell condition and be responsible for the initial construction of all leasehold improve-

ments. The parties may decide that the tenant will restore all of the leasehold improvements inside the shell if the premises are destroyed. At the other extreme, the tenant may be receiving the premises with existing leasehold improvements, and the parties may decide that the landlord should restore all leasehold improvements after a casualty. Obviously the possibilities are infinite and depend on the economic underpinnings of the transaction as well as the relative sophistication of the parties. However, the question must be asked at the outset of the transaction so that both parties are clear about the allocation of the risk for restoration and that adequate property insurance is obtained.

§ 25.1:5 Fair Credit Reporting Act

The Fair Credit Reporting Act, 15 U.S.C. §§ 1681–1681x, applies to landlords who use consumer reports in screening prospective tenants. If the landlord takes adverse action based in whole or in part on a consumer report, the landlord is required to provide the prospective tenant with a notice of adverse action meeting the requirements of section 1681m of the Act. 15 U.S.C. § 1681m(a)(1). A consumer report includes a credit report from a credit bureau or from a tenant-screening service. *See* 15 U.S.C. § 1681(d). Adverse action includes a denial of the application or a requirement for a deposit, a higher deposit, or higher rent than would have been required of other tenants. *See* 15 U.S.C. § 1681(k).

Landlords who furnish information regarding a tenant to a credit reporting agency must comply with the duties set out in section 1681s–2 of the Act, including the duty to furnish correct information, to correct and update information, and to investigate disputed information. *See* 15 U.S.C. § 1681s–2.

§ 25.1:6 Condemnation

The lease forms in this chapter provide that a lease will terminate if, as a result of condemnation or conveyance in lieu thereof, the premises cannot be used for the purposes provided by the lease. They also provide that the tenant is not entitled to any proceeds from the condemnation except for relocation benefits or awards that are available to the tenant but that do not reduce the award or proceeds payable to the landlord. The federal government provides relocation benefits, moving expenses, and similar payments to persons relocated as a result of condemnation under the federal Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. §§ 4601–4655. The state of Texas and local governments are authorized to provide similar payments as part of the cost of acquisition of the real property. *See* Tex. Prop. Code § 21.046. Under Texas law, however, if a lease provides that the lease terminates on condemnation, the tenant is not entitled to any condemnation proceeds because the tenant no longer has a compensable leasehold interest. *Motiva Enterprises, LLC v. McCrabb*, 248 S.W.3d 211 (Tex. App.—Houston [1st Dist.] 2007, pet. denied). Consequently, it is possible that a condemnor could find that a tenant who is not a party to the condemnation proceeding is not eligible for relocation or other benefits or awards.

§ 25.2 General Instructions for Completing Forms

For information about completing the forms generally, see chapter 3 in this manual. In most forms, the information that the attorney must provide is listed at the beginning of the form. Of course the attorney may add other specific provisions and references to exhibits and riders at the end of the form.

For general information about designation of parties, see section 3.9. Information relevant to some conveyances, such as those involving

homestead property, is not relevant to a lease and need not be included with the party designations.

§ 25.3 General Considerations for Retail Lease

The retail lease, form 25-2 in this chapter, is an adaptation of the basic lease including provisions tailored to leasing retail space in a shopping center. The modifications deal with the specifics associated with a typical retail business operation, including provisions concerning trade name, description of the shopping center, payment of percentage rental, and pass-through of common area maintenance charges. To provide for payment of percentage rental, a definition of gross sales is added, as is a covenant for operating a business within the premises so as to maximize gross sales. The definition of "gross sales" used in this lease is basic, and the attorney should consider whether some amendment or amplification is appropriate for the situation at hand. Other specific provisions apply to the landlord and the tenant concerning various operational and maintenance issues. The attorney may desire to include more specific provisions dealing with such matters as parking and signage, which may be proper subjects for inclusion in the rules and regulations exhibit. In this lease, the percentage rent is due on the tenth of the month, rather than the first, to give the tenant time to close its books for the previous month and to compute percentage rent.

§ 25.4 General Considerations for Office Lease

The office lease, form 25-3 in this chapter, is an adaptation of the basic lease containing specific provisions tailored to a commercial office tenancy. The variations are provisions for passing through operating expenses, a fairly common practice in leasing office space; for parking rights; and for rights to use common areas. The lease is also more specific about the services required to be provided by the landlord, again with a view toward comporting with what is typical industry practice. Form 25-4 provides a rider for parking facilities.

§ 25.5 General Considerations for Residential Lease

The residential lease, form 25-5 in this chapter, is an adaptation of the basic lease tailored to a residential tenancy. The form is designed for simple residential tenancies such as a lease of a home or a townhouse unit. It is not particularly suited for use with a multifamily project with on-site management. It varies from the basic lease in providing specific provisions relating to residential occupancy, such as the landlord's duty to maintain the premises to comply with applicable law.

§ 25.5:1 Rent Payment by Check and Late Fee

If the landlord wants to require payment by check or other traceable means of payment, a residential lease must state so in writing. Tex. Prop. Code § 92.011(a). This clause appears as paragraph B.1.*l.* in the "Tenant's Obligations" section of the residential lease but may be omitted if the parties desire. See form 25-5 in this chapter. If the landlord collects a fee for late payment of rent, notice of the fee must be included in the lease and the fee must be reasonable. Tex. Prop. Code § 92.019.

§ 25.5:2 Right to Terminate Residential Leases in Certain Circumstances

Residential tenants have special statutory rights to terminate leases under certain circumstances. A tenant may terminate his rights and obligations under a residential lease, vacate the residence, and avoid liability for future rent (1) if the tenant or an occupant of the dwelling unit is a victim of family violence or (2) if the tenant is

a victim of sexual assault or the parent or guardian of a victim of sexual assault, indecency with a child, sexual performance by a child, continual sexual abuse of a child, or any attempt to commit any of the foregoing offenses under section 21.02 of the Texas Penal Code. The Texas Property Code imposes specific prerequisites, documentation, and deadlines for a tenant to exercise these statutory rights of early termination. Tex. Prop. Code §§ 92.016, 92.0161. The Property Code requires specific language in the residential lease advising the tenant of these remedies. For circumstances involving family violence, the relevant statutorily provided lease provision reads, "Tenants may have special statutory rights to terminate the lease early in certain situations involving family violence or a military deployment or transfer." *See* Tex. Prop. Code § 92.017(g). For circumstances involving sexual violence, the relevant statutorily provided lease provision reads, "Tenants may have special statutory rights to terminate the lease early in certain situations involving sexual assault or sexual abuse." *See* Tex. Prop. Code § 92.0161(g). Paragraph D.20. of the residential lease, form 25-5 in this chapter, combines these two advisories. If the advisories are not in the residential lease, the tenant, if he follows the procedural requirements, may not only terminate the lease and avoid paying future rent, but will also not be liable for delinquent unpaid rent.

If a tenant who is the sole occupant of a dwelling dies before the expiration of the lease, a representative of the estate of the tenant may terminate the tenant's rights and obligations under the lease, vacate the residence, and avoid liability for future rent. Tex. Prop. Code § 92.0162.

A tenant who is a servicemember or dependent of a servicemember similarly may terminate a lease, vacate the dwelling, and avoid liability for future rent if the tenant enters the military service after executing a residential lease or, if the tenant was a servicemember at the time of execution, the tenant receives orders for a permanent change of station or deployment with a military unit for a period of ninety days or more. Tex. Prop. Code § 92.017(b). The relevant statutorily provided lease provision reads, "Tenants may have special statutory rights to terminate the lease early in certain situations involving family violence or military deployment or transfer." *See* Tex. Prop. Code § 92.017(g). Specific notice and delivery requirements are set forth in the statute. The right to terminate in the case of family violence may not be waived, but the right of a servicemember or a dependent may be waived in certain circumstances specified in the Property Code. Additionally, if the residential lease form does not contain a specific notice provision, the vacating tenant may also avoid liability for delinquent unpaid rent. Form 25-5 contains this provision.

Form 25-5 also contains the required provisions regarding landlord liabilities and tenant remedies for repair of conditions that materially affect the physical health and safety of an ordinary tenant as authorized by Property Code sections 92.056–.0563. Tex. Prop. Code § 92.056(g) requires a lease to "contain language in underlined or bold print that informs the tenant of the remedies available under this section [§ 92.056] and Section 92.0561." If these provisions or substantially equivalent language is not in the lease, the tenant who terminates a lease under these sections is released from all liability for any delinquent, unpaid rent owed to the landlord by the tenant on the effective date of the lease termination. *See* Tex. Prop. Code §§ 92.056, 92.0561.

§ 25.5:3 Caution: Residential Lease

Texas Property Code provisions and case law applicable to residential tenancies vary in significant ways from the law applicable to commercial tenancies. The attorney should carefully review chapter 92 of the Property Code. No attempt has been made to cover all aspects of or

duties relating to a residential situation. For example, a residential landlord has a duty to install smoke alarms. *See* Tex. Prop. Code § 92.255. The liability of a guarantor of a residential lease is subject to certain limitations. *See* Tex. Prop. Code § 92.021. A residential landlord is subject to restrictions on the right to lock out a tenant for nonpayment of rent that are not applicable to the commercial landlord. *Compare* Tex. Prop. Code § 92.0081, *with* Tex. Prop. Code §§ 93.002–.003. Also, the law concerning interruptions of utilities in residential tenancies differs from that for commercial tenancies. *Compare* Tex. Prop. Code §§ 92.008, 92.0091, 92.301, *with* Tex. Prop. Code § 93.002.

§ 25.6 General Considerations for Industrial Lease

The industrial lease, form 25-6 in this chapter, is an adaptation of the basic lease including clauses necessary to convert the basic lease to an industrial lease. The industrial lease has more similarities to the retail lease than other lease forms minus, of course, percentage rental, covenant of continuous operations, and common area maintenance provisions. The main additions to the industrial lease deal with the tenant's obligation to pay for industrial waste introduced into the sanitary sewer system; to maintain dilution tanks, grease traps, and so forth; and to share in the joint maintenance of rail services, if any. Attorneys using the industrial lease as a drafting form might also consider using the asbestos disclosure notice, form 25-31, particularly if the building was constructed before 1981.

§ 25.7 General Considerations for Hunting, Agricultural, and Grazing Leases

The hunting lease, form 25-7 in this chapter, is an adaptation of the basic lease tailored for the use of agricultural land for hunting. There is a technical distinction between a hunting lease, which is a license or profit à prendre, and a lease that conveys an interest in real property. *See Digby v. Hatley*, 574 S.W.2d 186 (Tex. App.—San Antonio 1978, no writ). In most transactions this distinction is not significant, and the form uses the common term *lease* rather than draw attention to the distinction. This form applies to the surface only. If improvements on the premises are to be available for the tenant's use, additions must be made to describe and provide for that use.

The agricultural lease, form 25-8, is an adaptation of the basic lease for growing crops. The rent clause is different, and the obligations of the tenant and the landlord have been modified slightly to take into account this different use.

The grazing lease, form 25-9, is an adaptation of the basic lease for grazing. It differs only slightly from the basic lease.

The agricultural lease and the grazing lease both contain clauses granting a contractual landlord's lien in the tenant's crops and livestock located on the leased premises. Complete perfection of a security interest in farm products requires compliance with both article 9 of the Texas Business and Commerce Code and the federal Food Security Act of 1985. See section 9.7:2 and accompanying forms in chapter 9 in this manual.

§ 25.7:1 Instructions for Completing Hunting Lease

A list of persons authorized to hunt on the premises should be contained in an exhibit to the hunting lease. This list may be specific (for example, "Bob Smith, Ed Jones") or more general (for example, "Martha Stuart and four guests" or "six guns").

§ 25.7:2 Caution: Hunting Lease

There are many laws that regulate the taking of game and the recreational use of land of which parties to hunting leases should be aware. As

with the other forms in the manual, no attempt has been made to reiterate the duties imposed by statute and case law. In particular, the attorney should carefully review Texas Parks and Wildlife Code chapter 43, subchapter D, which governs hunting lease licenses. For a general discussion of this topic, see the articles cited in section 25.13 below. See also the section titled "Landowner Liability" in chapter 2 of this manual referring to chapter 75 of the Texas Civil Practice and Remedies Code.

§ 25.8 General Considerations for Manufactured-Home Community Lease

The manufactured-home community lease, form 25-11 in this chapter, is an adaptation of the basic lease tailored to a manufactured-home community tenancy. It varies from the basic lease by providing specific provisions necessitated by the enactment of Texas Property Code chapter 94. Chapter 94 governs the landlord-tenant relationship in manufactured-home communities in which four or more lots are offered for lease for the purpose of the tenant's placing on the landlord's property a manufactured home that is not owned by the landlord. Tex. Prop. Code § 94.002. *See also* Tex. Prop. Code § 94.001. This legislation regulates the form and content of the lease agreement (Tex. Prop. Code §§ 94.051–.057), security deposits (Tex. Prop. Code §§ 94.101–.109), the landlord's warranty of suitability and duty to maintain and repair (Tex. Prop. Code §§ 94.151–.162), and other aspects of the landlord-tenant relationship in manufactured-home community tenancies.

§ 25.8:1 Disclosures at Time of Application

At the time a landlord receives an application from a prospective tenant of a lot in a manufactured-home community, the landlord must provide a copy of the proposed lease, the rules of the manufactured-home community, and a separate statutory notice of the tenant's legal right to a six-month initial lease term and sixty days' notice of nonrenewal or, in the case of a change in land use of the manufactured-home community, 180 days' notice of nonrenewal. Tex. Prop. Code § 94.051. Form 25-12 in this chapter gives the statutorily required notice.

§ 25.8:2 Manufactured-Home Community Rules

Manufactured-home communities may adopt written rules, which are considered part of the lease agreement, establishing the policies and regulations of the manufactured-home community, including regulations relating to use, occupancy, quiet enjoyment, and health, safety, and welfare of tenants of the manufactured-home community. Tex. Prop. Code § 94.008.

§ 25.8:3 Cash Rent Payment

Unless the manufactured-home community lease requires payment of rent by check or other traceable means, a landlord must accept and give receipts for cash rental payments. Tex. Prop. Code § 94.007. A clause requiring payment of rent by traceable means appears as paragraph B.1.m. of the manufactured-home community lease (form 25-11 in this chapter) but may be omitted if the parties desire.

§ 25.8:4 Disclosure of Ownership and Management

The landlord must disclose the name and address of the record title holder of the leased lot in the manufactured-home community and the names and addresses of any off-site property managers. Tex. Prop. Code § 94.010(a). The disclosure may be contained in the lease agreement, in the rules, in a notice continuously posted in the community or the manager's office, or in writing, delivered within seven days of the landlord's receipt of a written request for the information. Tex. Prop. Code § 94.010(b).

§ 25.8:5 Minimum Initial Lease Term

Manufactured-home community landlords are required to offer prospective tenants an initial lease term of at least six months, but the parties may agree to a shorter or longer initial lease term if requested by the tenant. Tex. Prop. Code § 94.052(a).

§ 25.8:6 Landlord's Notice to Vacate or Offer to Renew

Manufactured-home community landlords are required to provide a tenant with a notice to vacate the leased premises or an offer to renew the lease at least sixty days before the expiration of the lease. Tex. Prop. Code § 94.055(a). If the landlord offers to renew the lease, the renewal offer must notify the tenant of any changes in the current lease terms and include a statement notifying the tenant that the tenant's failure to timely reject the renewal offer will result in the automatic renewal of the lease as modified by the terms contained in the landlord's renewal offer beginning on the first day after the expiration of the current lease. Tex. Prop. Code § 94.055(b). To avoid the automatic renewal of the lease as modified by the terms contained in the renewal offer, the tenant *must* notify the landlord not later than the thirtieth day before the date the current lease term expires that the tenant rejects the landlord's renewal offer and intends to vacate the leased premises on expiration of the current lease term. Tex. Prop. Code § 94.055(c). This statutory provision is a noted departure from the well-established common-law principle that silence does not bind a party to a contract.

§ 25.8:7 Notice of Nonrenewal

Regardless of the term of a manufactured-home community lease, a landlord must give a tenant at least sixty days' prior written notice if the landlord is not going to renew the lease or, in the case of a change in land use, 180 days' notice of nonrenewal. Tex. Prop. Code §§ 94.051, 94.052(b).

§ 25.8:8 Landlord's Maintenance Obligations

A manufactured-home community landlord is required to maintain all common areas, utility lines not maintained by a public utility or political subdivision, roads, mailboxes, and garbage collection and to repair or remedy any condition materially affecting the physical health and safety of an ordinary tenant of the manufactured-home community. Tex. Prop. Code § 94.152. The landlord must make a diligent effort to repair or remedy such a condition after a written request specifying the condition to be repaired is given to the landlord by a tenant who is not delinquent in the payment of rent at the time the notice is given. Tex. Prop. Code § 94.153(b). A manufactured-home community landlord has no duty to maintain or repair a condition present in or on a tenant's manufactured home. Tex. Prop. Code § 94.153(a).

§ 25.8:9 Eviction Procedures

Unlike with other types of tenancies, a manufactured-home community landlord may prevent a tenant from entering the tenant's manufactured-home lot, evict a tenant, or require removal of the tenant's manufactured home from the lot only after obtaining a writ of possession. Tex. Prop. Code § 94.203(a). The writ of possession cannot issue before the expiration of thirty days after the date of the judgment granting possession if the tenant has paid the rent due for that thirty-day period. Tex. Prop. Code § 94.203(d).

§ 25.8:10 Caution: Manufactured-Home Community Lease

The Texas Property Code provisions applicable to manufactured-home community tenancies vary in significant ways from the law applicable

to either residential or commercial tenancies. The attorney should carefully review chapter 94 of the Property Code because the rights, duties, and liabilities of the parties under chapter 94 cannot be waived. *See* Tex. Prop. Code § 94.003. No attempt has been made in this manual to cover all aspects of or duties relating to the landlord-tenant relationship in a manufactured-home community. Appropriate modifications are required if the attorney elects to use the manufactured-home community lease for transactions not governed by chapter 94.

§ 25.9 General Considerations for Commercial Lease

Commercial leases are considered by the legislature to be quite different from residential leases and manufactured-home community leases. Chapter 92 of the Texas Property Code contains the statutes concerned with residential leases, and chapter 94 contains the statutes concerned with manufactured-home community leases, whereas chapter 93 deals with commercial leases. Chapters 92 and 94 impart an air of legislative protectionism for the residential tenant, with numerous restrictions on the landlord; chapter 93 has a more laissez-faire policy and allows the parties to contract as they see fit. The drafter using the *Texas Real Estate Forms Manual* should be aware of these three Property Code chapters (as well as chapter 91, which deals with all tenancies) and should realize that the numerous legislative restrictions on a residential or manufactured-home community landlord do not apply to a commercial landlord.

§ 25.9:1 Broker Lien in Commercial Lease

The Broker's and Appraiser's Lien on Commercial Real Estate Act, chapter 62 of the Texas Property Code, gives brokers a lien by reason of the sale or lease of real property. Section 62.021 sets forth the prerequisites for a broker to acquire a lien. *See* Tex. Prop. Code § 62.021. Section 62.021 gives the broker a lien against the landlord's property for the commission on the lease if—

1. the broker earned the commission (pursuant to a written commission agreement (*see* Tex. Prop. Code § 62.003(4))), and
2. the broker recorded a notice of the lien (*see* Tex. Prop. Code § 62.024).

Tex. Prop. Code § 62.021(a). The commission agreement must disclose the right of the broker to claim a lien. Tex. Prop. Code § 62.021(e).

Section 62.022(b)(2) automatically waives the broker's lien in a commercial lease if the broker's commission agreement is included as a provision in the lease. Tex. Prop. Code § 62.022(b)(2). For this reason, the drafter may wish to include the real estate commission rider, form 25-32 in this chapter, as part of the lease. The drafter, however, should be careful to consider what effect renewal options might have on the real estate commission rider.

§ 25.9:2 Security Deposit in Commercial Lease

A landlord is liable for failure to return a tenant's security deposit within sixty days after the date the tenant surrenders possession of the premises and provides a forwarding address to the landlord or landlord's agent. Tex. Prop. Code § 93.005(a). If a landlord retains all or part of the security deposit, the landlord must provide the tenant with an itemized list of deductions. Tex. Prop. Code § 93.006(c). There is a presumption of bad faith on the part of the landlord if the security deposit is not returned to the tenant or if the landlord fails to provide the tenant with an itemized list of deductions on or before sixty days after the date the tenant surrenders possession. Tex. Prop. Code § 93.011(d). *See also* Tex. Prop. Code §§ 93.004–.011. The lease forms in this chapter have an agreement by

the landlord to return the security deposit within sixty days.

§ 25.9:3 Assessment of Charges in Commercial Lease

Texas Property Code section 93.012 deals with assessment of charges by a commercial landlord against a commercial tenant. Section 93.012(a) reads as follows:

> A landlord may not assess a charge, excluding a charge for rent or physical damage to the leased premises, to a tenant unless the amount of the charge or the method by which the charge is to be computed is stated in the lease, an exhibit or attachment that is part of the lease, or an amendment to the lease.

Tex. Prop. Code § 93.012(a). Most commercial landlords assess charges against the tenant on a regular basis for things such as extra keys; overtime heating, ventilating, and air conditioning; proportionate utilities and taxes; proportionate common-area expenses; and estimated operating expenses. Because Tex. Prop. Code § 93.012 requires either the amount of the charge or the method by which the charge is to be computed to be stated in the lease, the drafter may wish to add language covering most of the expected expenses to be assessed and a statement that the charge to be assessed will be the landlord's actual cost. The lease forms in this chapter provide for assessment of charges to the tenant, but the method by which the charge is calculated is stated (for example, "Tenant's pro rata share" of utility charges, common-area maintenance, taxes and insurance, and so forth). However, commercial landlords who assess to tenants charges other than rent for which the amount or method of computation is not specified in the lease, should be aware of section 93.012 of the Property Code.

§ 25.10 Environmental Considerations for Leases

Attorneys drafting leases should be aware of environmental statutes dealing with hazardous materials and waste, such as the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), as amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA), 42 U.S.C. §§ 9601–9675; the Resource Conservation Recovery Act (RCRA), as amended by the Hazardous and Solid Waste Amendments of 1984 and the Land Disposal Program Flexibility Act of 1996, 42 U.S.C. §§ 6901–6992k; and the Toxic Substances Control Act, 15 U.S.C. §§ 2601–2692. These environmental statutes, along with similar state statutes, may impose cleanup costs at the termination of a lease term on the "owner" or "operator" (landlord or tenant) of the "facility" (leased premises).

Landlords must provide tenants of residential property constructed before 1978 with a "Lead Warning Statement." 42 U.S.C. §§ 4851b(27), 4852d. See the section titled "Lead-Based Paint Disclosures" in chapter 2 of this manual. The disclosure form appears as form 25-30 in this chapter.

Federal law requires building and facility owners (landlords) to notify tenants of public and commercial buildings of the presence, location, and quantity of asbestos-containing materials or presumed asbestos-containing materials in tenant-occupied areas. This notice must be either in writing or in a personal communication before any demolition, construction, alteration, repair, maintenance, or renovation of structures, substrates, or portions thereof. *See* 29 C.F.R. §§ 1910.1001, 1926.1101. See form 25-31 for the disclosure.

§ 25.11 Additional Clauses

Additional clauses that may be useful in lease transactions, such as arbitration, landlord's lien subordination, and expansion rights, appear in form 25-13 in this chapter.

§ 25.11:1 Subordination of Landlord's Lien

If the tenant's lender requires a first lien over the statutory landlord's lien found in chapter 54 of the Texas Property Code and the security interest granted in the lease, insert clause 25-13-1 in this chapter. Form 25-24 (landlord's lien waiver) also may be used for this purpose. Form 25-18 (subordination of landlord's lien) may be used to authorize removal of secured property in the event of tenant's default as borrower.

§ 25.11:2 Base Rent Adjustment

In a commercial lease, there is frequently a provision for adjusting the base rent. The landlord and tenant may agree to scheduled, specific, periodic increases or to adjustments based on the Consumer Price Index; in the latter case, the attorney may insert the inflation adjustment clause found at 25-13-2 in this chapter.

§ 25.11:3 Expansion Option

If the landlord wants to grant the tenant the right to lease additional space, insert clause 25-13-4 in this chapter and attach the expansion space rider at form 25-14.

§ 25.11:4 Extension Option

If the landlord wants to grant the tenant the right to extend the lease term, insert clause 25-13-5 in this chapter and attach the extension option rider at form 25-15.

§ 25.11:5 Tenant's Right to Protest Appraised Value

If a property owner does not file a valuation protest, a tenant who is contractually obligated to reimburse the owner for property taxes is entitled to pursue an administrative protest before the appraisal review board. Tex. Tax Code § 41.413(b). A property owner is required to send a tenant obligated to pay taxes a copy of any notice of the appraised value of the property not later than the tenth day after the property owner receives the notice. The requirement to provide notice of appraised value does not apply if the property owner and the tenant agree in the lease to waive the requirement or agree that the tenant will not protest the appraised value of the property. Tex. Tax Code § 41.413(d). A tenant contractually obligated to reimburse a landlord for taxes imposed on the property may also appeal an appraisal review board order determining a protest brought by the tenant. Tex. Tax Code § 42.015. The statutory language is fairly vague, but it seems apparent that any tenant who, pursuant to its lease, is obligated to reimburse a landlord for real property taxes is entitled to exercise these rights and in so doing may request the appraisal review board to issue subpoenas to the landlord to provide relevant information and documentation regarding value. This, in turn, may require the landlord to disclose information, such as the rent roll for the property, that the landlord may wish to keep confidential. In addition, multitenant situations could result in unwieldy protests. The landlord who wishes to avoid these possibilities should consider including in the lease a provision like clause 25-13-6 in this chapter.

§ 25.11:6 Margin Tax

Chapter 171 of the Tax Code applies the Texas "margin tax" to most businesses, including limited partnerships previously exempt from the franchise tax. General partnerships, sole proprietorships, and businesses that do not meet the

annual revenue minimum continue to be exempt. Landlords and tenants might negotiate any of the following treatments of the margin tax: (1) an express carve-out of the margin tax from real property taxes (tenant position), (2) reliance on the landlord's general right to pass through the margin tax as a tax imposed in lieu of real property taxes (landlord position), or (3) the landlord's right to pass through the margin tax as a tax in lieu of real estate taxes, but limiting the pass-through amount based on a formula or a cap (compromise position).

§ 25.12 Additional Forms

Additional forms that may be useful in lease transactions, such as an assignment, guaranty, and tenant estoppel certificate, are found at forms 25-16 through 25-21 in this chapter.

§ 25.12:1 Subordination, Attornment, and Nondisturbance Agreement

If the landlord's lender requires a first or prior lien on the landlord's estate and a lease has been executed, use the subordination, attornment, and nondisturbance agreement at form 25-16 in this chapter to subordinate the lease but still protect the tenant's rights following a foreclosure.

§ 25.12:2 Tenant's Subordination to Deed-of-Trust Lien

A lender may require that an existing lease be subordinated to its new lien. Foreclosure of the lien will then extinguish the lease. Form 25-17 in this chapter may be used to subordinate the lease.

§ 25.12:3 Tenant's Acceptance Letter

If the landlord requires the tenant to acknowledge that the premises are satisfactory, especially if the lease requires any improvements as a condition to the beginning of the lease, use the tenant's acceptance letter at form 25-20 in this chapter. It is recommended that this form be used to establish the commencement date with certainty.

§ 25.12:4 Landlord's Lien Waiver

By using form 25-24 in this chapter, the owner of real property waives statutory and contractual landlord's liens on any of the lessee's personal property subject to the security interests of a third-party lender. Clause 25-13-1 also may be used for this purpose.

§ 25.12:5 Lockout Notice

The lockout notice, form 25-27 in this chapter, is to be posted at the premises. *See* Tex. Prop. Code § 93.002. It is for use with commercial leases only. Do not use it with residential leases, which are governed by Tex. Prop. Code § 92.0081.

§ 25.12:6 Notice of Change of Locks

Form 25-28 in this chapter is used if the lease does not contain language superseding Tex. Prop. Code § 93.002. The letter is to be given by the owner or property manager and is for use with commercial leases only. Do not use it for residential leases. *See* Tex. Prop. Code § 92.0081.

§ 25.12:7 Tenant Improvements Rider to Lease or Work Letter

Form 25-29 in this chapter may be used with the basic lease, the retail lease, the office lease, or the industrial lease if the parties wish to provide for construction of tenant improvements to the leased premises. The work letter provides a general outline for a description of the work and the allocation of responsibility for preparation of plans, performance of work, and payment of any

allowances or other amounts by the landlord. The form also requires the contractor to maintain insurance and sets out the effect of construction delays on the commencement date of the lease.

§ 25.12:8 Lead-Based Paint Hazards Disclosure

Form 25-30 in this chapter is based on the sample disclosure format for target housing rentals and leases issued by the Environmental Protection Agency and the Department of Housing and Urban Development. *See* 61 Fed. Reg. 9074 (1996); *see also* 40 C.F.R. § 745.113. The rule does not require the use of any specific format as long as all the required elements are included in the disclosure. See the section titled "Lead-Based Paint Disclosures" in chapter 2 of this manual for additional information.

§ 25.12:9 Asbestos Disclosure

Form 25-31 in this chapter is for disclosure of asbestos-containing material or presumed asbestos-containing material by commercial building or facility owners. The Occupational Safety and Health Administration rules require commercial building or facility owners to notify tenants of the presence of asbestos-containing materials or, if the building was constructed before 1981, of presumed asbestos-containing materials. *See* 29 C.F.R. §§ 1910.1001, 1926.1011. The rules do not require the use of any specific format.

§ 25.12:10 Modification of Lease

The modification of lease, form 25-33 in this chapter, is used to document changes to the lease during the lease term.

§ 25.12:11 Termination of Lease

The termination of lease, form 25-34 in this chapter, is used if the parties agree to terminate the lease before the end of the lease term.

§ 25.13 Additional Resources

Bliss, Robert Harms. "Drafting Defaults and Remedies Clauses in a Commercial Lease." In *Advanced Real Estate Drafting Course, 2016*. Austin: State Bar of Texas, 2016.

———. "Eviction Jurisdictional Wars: District Courts and Justice Courts on 'Jurisdiction' v. 'Title.'" In *Advanced Real Estate Law Course, 2015*. Austin: State Bar of Texas, 2015.

———. "Landlord Remedies and Tenant Defenses." In *Advanced Real Estate Strategies Course, 2019*. Austin: State Bar of Texas, 2019.

Boyd, Sipra S. "Analyzing Leasing Rules, Regulations and Restrictions for Condominium Associations." In *Advanced Real Estate Drafting Course, 2015*. Austin: State Bar of Texas, 2015.

Brown, Clinton F., and Mia B. Lorick. "A New Dawn for Short-Term Rentals: The Texas Supreme Court's Opinion on POA Regulation and Probable Legislation." In *Advanced Real Estate Law Course, 2018*. Austin: State Bar of Texas, 2018.

Brownfield, William H., and Lawrence M. Mayerhofer. "Office Escalation Clauses—Some Observations." In *Advanced Real Estate Law Course, 2017*. Austin: State Bar of Texas, 2017.

Burton, Bob, and Preston A. Patten. "Leasehold Condominiums." In *Advanced Real Estate Law Course, 2018*. Austin: State Bar of Texas, 2018.

Cipione, Susan Mills, and Thomas M. Whelan. "Written Materials for Mock Negotiations of Lease." In *Advanced Real Estate Law Course, 2015*. Austin: State Bar of Texas, 2015.

Darowski, Adam S. "Drafting and Negotiating Pro-Landlord and Pro-Tenant Provisions." In *Advanced Real Estate Drafting Course, 2015*. Austin: State Bar of Texas, 2015.

Dorsaneo, William V. III, and Frank A. St. Claire. *Texas Real Estate Guide*. New York: Matthew Bender & Co., 2019.

Dysart, Sara E. "Tenant Estoppel Certificate and SNDA from a Tenant's Perspective." In *Advanced Real Estate Drafting Course, 2017*. Austin: State Bar of Texas, 2017.

Friedman, Milton R., and Andrew R. Berman. *Friedman on Leases*. 6th ed. 3 vols. New York: Practising Law Institute, 2019.

Gray, Travis H. "Drafting Documents for Evictions: Forcible Form Fundamentals." In *Advanced Real Estate Drafting Course, 2016*. Austin: State Bar of Texas, 2016.

Magliolo, Holly E. "Limits on SNDA Protection." In *Advanced Real Estate Law Course, 2018*. Austin: State Bar of Texas, 2018.

McFarland, Charles B. "Condemnation Clauses in Commercial Leases." In *Advanced Real Estate Law Course, 2015*. Austin: State Bar of Texas, 2015.

Newsome, Kent. "Eight Things in a Lease that Matter." In *Advanced Real Estate Law Course, 2016*. Austin: State Bar of Texas, 2016.

Tabb, Harriet Anne. "Short, but Not Sweet: The Landlord's Subordination Agreement." In *Advanced Real Estate Strategies Course, 2018*. Austin: State Bar of Texas, 2018.

———. "*Who* is Going to Do *What* by *When*: The Lawyer's Role in Drafting Construction Agreements for Commercial Leases." In *Advanced Real Estate Law Course, 2016*. Austin: State Bar of Texas, 2016.

Taylor, Consuella Simmons. "SNDAs and Estoppels." In *Advanced Real Estate Law Course, 2015*. Austin: State Bar of Texas, 2015.

———. "Tips for Drafting Retail Leases." In *Advanced Real Estate Drafting Course, 2018*. Austin: State Bar of Texas, 2018.

Tomek, David W. and Reed A. Standly. "Important Whys, Whens, and Hows in the Use of Letters of Intent for Leasing and for Sales, Along with Illustrative Cases." In *Advanced Real Estate Law Course, 2018*. Austin: State Bar of Texas, 2018.

Weiner, David J. "Drafting Tips for Build-to-Suit Leases." In *Advanced Real Estate Drafting Course, 2017*. Austin: State Bar of Texas, 2017.

Whelan, Thomas M. "Texas Annotated Office Lease." In *Advanced Real Estate Drafting Course, 2017*. Austin: State Bar of Texas, 2017.

Form 25-1

Lease
[Basic]

Basic Information

Date:

Landlord:

Landlord's Address:

Tenant:

Tenant's Address:

[**Include if applicable:** Guarantors: [**see guaranty agreement at form 25-22 in this chapter**]]

[**Include if applicable:** Guarantors' Addresses:]

Premises

Approximate square feet:

Street address/suite:

City, state, zip:

Include or attach any additional necessary legal description.

Term (months):

Commencement Date:

Termination Date:

Base Rent (monthly):

Tenant's Pro Rata Share: [**percent**] percent ([**percent**]%)

Security Deposit:

Permitted Use:

Tenant's Insurance: As required by Insurance Addendum

Landlord's Insurance: As required by Insurance Addendum

Tenant's Rebuilding Obligations: If the Premises are damaged by fire or other elements, Tenant will be responsible for repairing or rebuilding the following leasehold improvements: [**see section 25.1:4**]

A. Definitions

A.1. "Agent" means agents, contractors, employees, licensees, and, to the extent under the control of the principal, invitees.

A.2. "Essential Services" means utility connections reasonably necessary for occupancy of the Premises for the Permitted Use.

A.3. "Injury" means (a) harm to or impairment or loss of property or its use, (b) harm to or death of a person, or (c) "personal and advertising injury" as defined in the form of liability insurance Tenant is required to maintain.

A.4. "Lienholder" means the holder of a deed of trust covering the Premises.

A.5. "Rent" means Base Rent plus any other amounts of money payable by Tenant to Landlord.

B. Tenant's Obligations

B.1. **Tenant agrees to—**

B.1.a. Lease the Premises for the entire Term beginning on the Commencement Date and ending on the Termination Date.

B.1.b. Accept the Premises in their present condition "AS IS," the Premises being currently suitable for the Permitted Use.

B.1.c. Obey (i) all laws relating to Tenant's use, maintenance of the condition, and occupancy of the Premises and Tenant's use of any common areas and (ii) any requirements imposed by utility companies serving or insurance companies covering the Premises.

B.1.d. Pay monthly, in advance, without demand, on the first day of the month, the Base Rent to Landlord at Landlord's Address.

B.1.e. Pay a late charge of 5 percent of any Rent not received by Landlord by the tenth day after it is due.

B.1.f. Obtain and pay for all utility services used by Tenant and not provided by Landlord.

B.1.g. Pay Tenant's Pro Rata Share of any utility services provided by Landlord.

B.1.h. Allow Landlord to enter the Premises to perform Landlord's obligations, inspect the Premises, and show the Premises to prospective purchasers or tenants.

B.1.i. Repair, replace, and maintain any part of the Premises that Landlord is not obligated to repair, replace, or maintain, normal wear excepted.

B.1.j. Submit in writing to Landlord any request for repairs, replacement, and maintenance that are the obligations of Landlord.

B.1.k. Allow Landlord to file a financing statement perfecting the security interest created by this lease.

B.1.l. Vacate the Premises on the last day of the Term.

B.1.m. INDEMNIFY, DEFEND, AND HOLD LANDLORD AND LIENHOLDER, AND THEIR RESPECTIVE AGENTS, HARMLESS FROM ANY INJURY (AND ANY RESULTING OR RELATED CLAIM, ACTION, LOSS, LIABILITY, OR REASONABLE EXPENSE, INCLUDING ATTORNEY'S FEES AND OTHER FEES AND COURT AND OTHER COSTS) OCCURRING IN ANY PORTION OF THE PREMISES IF CAUSED IN WHOLE OR IN PART BY THE ACTS OR OMISSIONS OF TENANT OR ITS AGENTS, INCLUDING IN WHOLE OR IN PART BY THE NEGLIGENT ACTS OR OMISSIONS OF TENANT OR ITS AGENTS. **THE INDEMNITY CONTAINED IN THIS PARAGRAPH (i) IS INDEPENDENT OF TENANT'S INSURANCE, (ii) WILL NOT BE LIMITED BY COMPARATIVE NEGLIGENCE STATUTES OR DAMAGES PAID UNDER THE WORKERS' COMPENSATION ACT OR SIMILAR EMPLOYEE BENEFIT ACTS, (iii) WILL SURVIVE THE END OF THE TERM, AND (iv) WILL APPLY EVEN IF AN INJURY IS CAUSED IN PART BY THE ORDINARY NEGLIGENCE OR STRICT LIABILITY OF LANDLORD BUT WILL NOT APPLY TO THE EXTENT AN INJURY IS CAUSED IN WHOLE OR IN PART BY THE GROSS NEGLIGENCE OR WILLFUL MISCONDUCT OF LANDLORD, LIENHOLDER, OR THEIR RESPECTIVE AGENTS.**

B.2. **Tenant agrees not to—**

B.2.a. Use the Premises for any purpose other than the Permitted Use.

B.2.b. Create a nuisance.

B.2.c. Permit any waste.

B.2.d. Use the Premises in any way that would increase insurance premiums or void insurance on the Premises.

B.2.e. Change Landlord's lock system.

B.2.f. Alter the Premises.

B.2.g. Allow a lien to be placed on the Premises.

B.2.h. Assign this lease or sublease any portion of the Premises without Landlord's written consent.

C. Landlord's Obligations

C.1. **Landlord agrees to—**

C.1.a. Lease to Tenant the Premises for the entire Term beginning on the Commencement Date and ending on the Termination Date.

C.1.b. Obey all laws relating to Landlord's operation of the Premises.

C.1.c. Provide the Essential Services.

C.1.d. Repair, replace, and maintain the (i) roof, (ii) foundation, and (iii) structural soundness of the exterior walls, excluding windows and doors.

C.1.e. Return the Security Deposit to Tenant, less itemized deductions, if any, on or before the sixtieth day after the date Tenant surrenders the Premises.

C.2. **Landlord agrees not to—**

C.2.a. Interfere with Tenant's possession of the Premises as long as Tenant is not in default.

C.2.b. Unreasonably withhold consent to a proposed assignment or sublease.

D. General Provisions

Landlord and Tenant agree to the following:

D.1. Alterations. Any physical additions or improvements to the Premises made by Tenant will become the property of Landlord. Landlord may require that Tenant, at the end of the Term and at Tenant's expense, remove any physical additions and improvements, repair any alterations, and restore the Premises to the condition existing at the Commencement Date, normal wear excepted.

D.2. Abatement. Tenant's covenant to pay Rent and Landlord's covenants are independent. Except as otherwise provided, Tenant may not abate Rent for any reason.

D.3. Insurance. Tenant and Landlord will maintain the respective insurance coverages described in the attached Insurance Addendum.

D.4. Release of Claims/Subrogation. LANDLORD AND TENANT RELEASE EACH OTHER AND LIENHOLDER, AND THEIR RESPECTIVE AGENTS, FROM ALL CLAIMS OR LIABILITIES FOR DAMAGE TO THE PREMISES, DAMAGE TO OR LOSS OF PERSONAL PROPERTY WITHIN THE PREMISES, AND LOSS OF BUSINESS OR REVENUES THAT ARE INSURED BY THE RELEASING PARTY'S PROPERTY INSURANCE OR THAT WOULD HAVE BEEN INSURED BY THE REQUIRED INSURANCE IF THE PARTY FAILS TO MAINTAIN THE PROPERTY COVERAGES REQUIRED BY THIS LEASE. THE PARTY INCURRING THE DAMAGE OR LOSS WILL BE RESPONSIBLE FOR ANY DEDUCTIBLE OR SELF-INSURED RETENTION UNDER ITS PROPERTY INSURANCE. LANDLORD AND TENANT WILL NOTIFY THE ISSUING PROPERTY INSURANCE COMPANIES OF THE RELEASE SET FORTH IN THIS PARAGRAPH AND WILL HAVE THE PROPERTY INSURANCE POLICIES ENDORSED, IF NECESSARY, TO PREVENT INVALIDATION OF COVERAGE. THIS RELEASE WILL NOT APPLY IF IT INVALIDATES THE PROPERTY INSURANCE COVERAGE OF THE RELEASING PARTY. **THE RELEASE IN THIS PARAGRAPH WILL APPLY EVEN IF THE DAMAGE OR LOSS IS CAUSED IN WHOLE OR IN PART BY THE ORDINARY NEGLIGENCE OR STRICT LIABILITY OF THE RELEASED PARTY OR ITS AGENTS BUT WILL NOT APPLY TO THE EXTENT THE DAMAGE OR**

LOSS IS CAUSED IN WHOLE OR IN PART BY THE GROSS NEGLIGENCE OR WILLFUL MISCONDUCT OF THE RELEASED PARTY OR ITS AGENTS.

D.5. Casualty/Total or Partial Destruction

D.5.a. If the Premises are damaged by casualty and can be restored within ninety days, Landlord will, at its expense, restore the roof, foundation, and structural soundness of the exterior walls of the Premises and any leasehold improvements within the Premises that are not within Tenant's Rebuilding Obligations to substantially the same condition that existed before the casualty and Tenant will, at its expense, be responsible for replacing any of its damaged furniture, fixtures, and personal property and performing Tenant's Rebuilding Obligations. If Landlord fails to complete the portion of the restoration for which Landlord is responsible within ninety days from the date of written notification by Tenant to Landlord of the casualty, Tenant may terminate this lease by written notice to Landlord before Landlord completes Landlord's restoration obligations.

D.5.b. If Landlord cannot complete the portion of the restoration for which Landlord is responsible within ninety days, Landlord has an option to restore the Premises. If Landlord chooses not to restore, this lease will terminate. If Landlord chooses to restore, Landlord will notify Tenant in writing of the estimated time to restore and give Tenant an option to terminate this lease by notifying Landlord in writing within ten days from receipt of Landlord's estimate. If Tenant does not notify Landlord timely of Tenant's election to terminate this lease, the lease will continue and Landlord will restore the Premises as provided in D.5.a. above.

D.5.c. To the extent the Premises are untenantable after the casualty, the Rent will be adjusted as may be fair and reasonable.

D.6. Condemnation/Substantial or Partial Taking

D.6.a. If the Premises cannot be used for the purposes contemplated by this lease because of condemnation or purchase in lieu of condemnation, this lease will terminate.

D.6.b. If there is a condemnation or purchase in lieu of condemnation and this lease is not terminated, Landlord will, at Landlord's expense, restore the Premises, and the Rent payable during the unexpired portion of the Term will be adjusted as may be fair and reasonable.

D.6.c. Tenant will have no claim to the condemnation award or proceeds in lieu of condemnation.

D.7. Uniform Commercial Code. Tenant grants Landlord a security interest in Tenant's personal property now or subsequently located on the Premises. This lease is a security agreement under the Uniform Commercial Code. Landlord may file financing statements or continuation statements to perfect or continue the perfection of the security interest.

D.8. Default by Landlord/Events. Defaults by Landlord are failing to comply with any provision of this lease within thirty days after written notice and failing to provide Essential Services to Tenant within ten days after written notice.

D.9. Default by Landlord/Tenant's Remedies. Tenant's remedies for Landlord's default are to sue for damages and, if Landlord does not provide an Essential Service for thirty days after default, terminate this lease.

D.10. Default by Tenant/Events. Defaults by Tenant are (a) failing to pay Rent timely, (b) abandoning the Premises or vacating a substantial portion of the Premises, and (c) failing to comply within ten days after written notice with any provision of this lease other than the defaults set forth in (a) and (b).

D.11. Default by Tenant/Landlord's Remedies. Landlord's remedies for Tenant's default are to (a) enter and take possession of the Premises and sue for Rent as it accrues; (b) enter and take possession of the Premises, after which Landlord may relet the Premises on behalf of Tenant and receive the Rent directly by reason of the reletting, and Tenant agrees to reimburse Landlord for any expenditures made in order to relet; (c) enter the Premises and perform Tenant's obligations; and (d) terminate this lease by written notice and sue for damages. Landlord may enter and take possession of the Premises by self-help, by picking or changing locks if necessary, and may lock out Tenant or any other person who may be occupying the Premises, until the default is cured, without being liable for damages.

D.12. Default/Waiver. All waivers must be in writing and signed by the waiving party. Landlord's failure to enforce any provisions of this Lease or its acceptance of late installments of Rent will not be a waiver and will not estop Landlord from enforcing that provision or any other provision of this Lease in the future.

D.13. Mitigation. Landlord has mitigated the loss of rent if Landlord, within thirty days after Tenant's loss of possession, (a) places a "For Lease" sign at the Premises, (b) places the Premises on Landlord's inventory of properties for lease, (c) makes Landlord's inventory available to area brokers on a monthly basis, (d) advertises the Premises for lease in a suitable trade journal in the county in which the Premises are located, and (e) shows the Premises to prospective tenants who request to see it.

D.14. Security Deposit. If Tenant defaults, Landlord may use the Security Deposit to pay arrears of Rent, to repair any damage or injury, or to pay any expense or liability incurred by Landlord as a result of the default.

D.15. Holdover. If Tenant does not vacate the Premises following termination of this lease, Tenant will become a tenant at will and must vacate the Premises on receipt of

notice from Landlord. No holding over by Tenant, whether with or without the consent of Landlord, will extend the Term.

D.16. Alternative Dispute Resolution. Landlord and Tenant agree to mediate in good faith before filing a suit for damages.

D.17. Attorney's Fees. If either party retains an attorney to enforce this lease, the party prevailing in litigation is entitled to recover reasonable attorney's fees and other fees and court and other costs.

D.18. Venue. Exclusive venue is in the county in which the Premises are located.

D.19. Entire Agreement. This lease [**include if applicable:** , its exhibits, addenda, and riders] [is/are] the entire agreement of the parties concerning the lease of the Premises by Landlord to Tenant. There are no representations, warranties, agreements, or promises pertaining to the Premises or the lease of the Premises by Landlord to Tenant, and Tenant is not relying on any statements or representations of any agent of Landlord, that are not in this lease [**include if applicable:** and any exhibits, addenda, and riders].

D.20. Amendment of Lease. This lease may be amended only by an instrument in writing signed by Landlord and Tenant.

D.21. Limitation of Warranties. THERE ARE NO IMPLIED WARRANTIES OF MERCHANTABILITY, OF FITNESS FOR A PARTICULAR PURPOSE, OR OF ANY OTHER KIND ARISING OUT OF THIS LEASE, AND THERE ARE NO WARRANTIES THAT EXTEND BEYOND THOSE EXPRESSLY STATED IN THIS LEASE.

D.22. Notices. Any notice required or permitted under this lease must be in writing. Any notice required by this lease will be deemed to be given (whether received or not) the earlier of receipt or three business days after being deposited with the United States Postal Service, postage prepaid, certified mail, return receipt requested, and addressed to the intended

recipient at the address shown in this lease. Notice may also be given by regular mail, personal delivery, courier delivery, or e-mail and will be effective when received. Any address for notice may be changed by written notice given as provided herein.

D.23. Abandoned Property. Landlord may retain, destroy, or dispose of any property left on the Premises at the end of the Term.

Attach insurance addendum, form 25-36 or 25-37. If applicable, include additional clauses like those suggested in form 25-13 and/or a list of exhibits and riders.

_____

[Name of landlord]

_____

[Name of tenant]

[Reserved]

Form 25-2

Retail Lease

Basic Information

Date:

Landlord:

Landlord's Address:

Tenant:

Tenant's Address:

Tenant's Trade Name:

[**Include if applicable:** Guarantors: [**see guaranty agreement at form 25-22 in this chapter**]]

[**Include if applicable:** Guarantors' Addresses:]

Premises

Approximate square feet:

Name of Shopping Center:

Street address/suite:

City, state, zip:

Include or attach any additional necessary legal description.

Term (months):

Commencement Date:

Termination Date:

Base Rent (monthly):

Percentage Rent: The excess of [**percent**] percent ([**percent**]%) of monthly Gross Sales over Base Rent

Tenant's Pro Rata Share: [**percent**] percent ([**percent**]%)

Initial Monthly CAM Charge:

Initial Monthly Tax and Insurance Charge:

Security Deposit:

Permitted Use:

Operating Hours

Weekdays: _____ to _____

Saturdays: _____ to _____

Sundays: _____ to _____

Tenant's Insurance: As required by Insurance Addendum

Landlord's Insurance: As required by Insurance Addendum

Tenant's Rebuilding Obligations: If the Premises are damaged by fire or other elements, Tenant will be responsible for repairing or rebuilding the following leasehold improvements: [**see section 25.1:4**]

A. Definitions

A.1. "Agent" means agents, contractors, employees, licensees, and, to the extent under the control of the principal, invitees.

A.2. "CAM Charge" means the reasonable cost of ownership, operation, and maintenance of the Common Areas.

A.3. "Common Areas" means all facilities and areas of the Shopping Center that are intended and designated by Landlord from time to time for the common, general, and nonexclusive use of all tenants of the Shopping Center, including parking lots. Landlord has the exclusive control over and right to manage the Common Areas.

A.4. "Essential Services" means utility connections reasonably necessary for occupancy of the Premises for the Permitted Use.

A.5. "Gross Sales" means the entire amount of the sales price, whether for cash or otherwise, of all sales of merchandise (including [Internet sales and] gift and merchandise certificates), services, and all other receipts of all business conducted in or from the Premises. Each sale on installment or credit will be treated as a sale for the full price in the month during which the sale was made, irrespective of when Tenant receives payment from its customer. Gross Sales, however, will not include any sums collected and paid out for any sales or excise tax.

A.6. "Injury" means (a) harm to or impairment or loss of property or its use, (b) harm to or death of a person, or (c) "personal and advertising injury" as defined in the form of liability insurance Tenant is required to maintain.

A.7. "Lienholder" means the holder of a deed of trust covering the Premises.

A.8. "Rent" means Base Rent plus any other amounts of money payable by Tenant to Landlord.

A.9. "Taxes and Insurance" means all ad valorem taxes and all insurance costs incurred by Landlord with respect to the Shopping Center.

B. Tenant's Obligations

B.1. **Tenant agrees to—**

B.1.a. Lease the Premises for the entire Term beginning on the Commencement Date and ending on the Termination Date.

B.1.b. Accept the Premises in their present condition "AS IS," the Premises being currently suitable for the Permitted Use.

B.1.c. Obey (i) all laws relating to Tenant's use, maintenance of the condition, and occupancy of the Premises and Tenant's use of any Common Areas in the Shopping Center; (ii) any requirements imposed by utility companies serving or insurance companies covering the Premises or Shopping Center; and (iii) any rules and regulations of the Shopping Center adopted by Landlord.

B.1.d. Pay monthly, in advance, without demand, on the first day of the month, the Base Rent to Landlord at Landlord's Address.

B.1.e. Pay the Percentage Rent applicable to the previous month on or before the tenth day of each month. With each payment of Percentage Rent, Tenant will deliver a written statement substantiating the amount of the payment. Tenant will keep a permanent, accurate set of books and records of all sales available for Landlord's inspection.

B.1.f. Pay Tenant's Pro Rata Share of the monthly CAM Charge and monthly Taxes and Insurance on or before the first day of each month. The initial charges are based on Land-

lord's estimates and are set forth in the Basic Terms. Landlord may adjust the monthly payment from time to time by notice to Tenant. If the actual amount of Tenant's Pro Rata Share of actual costs for any period exceeds the amount paid by Tenant, Tenant will pay to Landlord the deficiency within fifteen days following notice from Landlord; if the amount paid by Tenant exceeds Tenant's Pro Rata Share of the actual cost, then the surplus will be credited to the next payment due by Tenant, or Landlord may refund the net surplus.

B.1.g. Pay a late charge of 5 percent of any Rent not received by Landlord by the tenth day after it is due.

B.1.h. Obtain and pay for all utility services used by Tenant and not provided by Landlord.

B.1.i. Pay Tenant's Pro Rata Share of any utility services provided by Landlord.

B.1.j. Allow Landlord to enter the Premises to perform Landlord's obligations, inspect the Premises, and show the Premises to prospective purchasers or tenants.

B.1.k. Repair, replace, and maintain any part of the Premises that Landlord is not obligated to repair, replace, or maintain, normal wear excepted.

B.1.l. Keep the sidewalks, service ways, and loading areas adjacent to the Premises clean and unobstructed.

B.1.m. Submit in writing to Landlord any request for repairs, replacement, and maintenance that are the obligations of Landlord.

B.1.n. (i) Continuously and in good faith conduct on the entire Premises the type of business for which the Premises are leased in an efficient and reputable manner and (ii) except during reasonable periods for repairing, cleaning, and decorating, keep the Premises open to

the public for business during Operating Hours so as to produce the maximum amount of Gross Sales.

B.1.o. Vacate the Premises on the last day of the Term.

B.1.p. On request, execute an estoppel certificate that states the Commencement Date and Termination Date of the lease, identifies any amendments to the lease, describes any rights to extend the Term or purchase rights, lists defaults by Landlord, and provides any other information reasonably requested.

B.1.q. INDEMNIFY, DEFEND, AND HOLD LANDLORD AND LIENHOLDER, AND THEIR RESPECTIVE AGENTS, HARMLESS FROM ANY INJURY (AND ANY RESULTING OR RELATED CLAIM, ACTION, LOSS, LIABILITY, OR REASONABLE EXPENSE, INCLUDING ATTORNEY'S FEES AND OTHER FEES AND COURT AND OTHER COSTS) OCCURRING IN ANY PORTION OF THE PREMISES IF CAUSED IN WHOLE OR IN PART BY THE ACTS OR OMISSIONS OF TENANT OR ITS AGENTS, INCLUDING IN WHOLE OR IN PART BY THE NEGLIGENT ACTS OR OMISSIONS OF TENANT OR ITS AGENTS. **THE INDEMNITY CONTAINED IN THIS PARAGRAPH (i) IS INDEPENDENT OF TENANT'S INSURANCE, (ii) WILL NOT BE LIMITED BY COMPARATIVE NEGLIGENCE STATUTES OR DAMAGES PAID UNDER THE WORKERS' COMPENSATION ACT OR SIMILAR EMPLOYEE BENEFIT ACTS, (iii) WILL SURVIVE THE END OF THE TERM, AND (iv) WILL APPLY EVEN IF AN INJURY IS CAUSED IN PART BY THE ORDINARY NEGLIGENCE OR STRICT LIABILITY OF LANDLORD BUT WILL NOT APPLY TO THE EXTENT AN INJURY IS CAUSED IN WHOLE OR IN PART BY THE GROSS NEGLIGENCE OR WILLFUL MISCONDUCT OF LANDLORD, LIENHOLDER, OR THEIR RESPECTIVE AGENTS.**

B.2. **Tenant agrees not to—**

B.2.a. Use the Premises for any purpose other than the Permitted Use.

B.2.b. Create a nuisance.

B.2.c. Interfere with any other tenant's normal business operations or Landlord's management of the Shopping Center.

B.2.d. Permit any waste.

B.2.e. Use the Premises in any way that would increase insurance premiums or void insurance on the Shopping Center.

B.2.f. Change Landlord's lock system.

B.2.g. Alter the Premises.

B.2.h. Allow a lien to be placed on the Premises.

B.2.i. Assign this lease or sublease any portion of the Premises without Landlord's written consent.

B.2.j. Use the roof of the Shopping Center.

B.2.k. Place any signs on the Premises without Landlord's written consent.

C. Landlord's Obligations

C.1. **Landlord agrees to—**

C.1.a. Lease to Tenant the Premises for the entire Term beginning on the Commencement Date and ending on the Termination Date.

C.1.b. Obey all laws relating to Landlord's operation of the Shopping Center.

C.1.c. Provide the Essential Services.

C.1.d. Repair, replace, and maintain the (i) roof, (ii) foundation, (iii) Common Areas, and (iv) structural soundness of the exterior walls, excluding windows, store fronts, and doors.

C.1.e. Return the Security Deposit to Tenant, less itemized deductions, if any, on or before the sixtieth day after the date Tenant surrenders the Premises.

C.1.f. INDEMNIFY, DEFEND, AND HOLD TENANT HARMLESS FROM ANY INJURY AND ANY RESULTING OR RELATED CLAIM, ACTION, LOSS, LIABILITY, OR REASONABLE EXPENSE, INCLUDING ATTORNEY'S FEES AND OTHER FEES AND COURT AND OTHER COSTS, OCCURRING IN ANY PORTION OF THE COMMON AREAS. **THE INDEMNITY CONTAINED IN THIS PARAGRAPH (i) IS INDEPENDENT OF LANDLORD'S INSURANCE, (ii) WILL NOT BE LIMITED BY COMPARATIVE NEGLIGENCE STATUTES OR DAMAGES PAID UNDER THE WORKERS' COMPENSATION ACT OR SIMILAR EMPLOYEE BENEFIT ACTS, (iii) WILL SURVIVE THE END OF THE TERM, AND (iv) WILL APPLY IF CAUSED IN WHOLE OR IN PART BY THE ACTS OR OMISSIONS OF LANDLORD OR ITS AGENTS, INCLUDING IN WHOLE OR IN PART BY THE NEGLIGENT ACTS OR OMISSIONS OF LANDLORD OR ITS AGENTS, EVEN IF AN INJURY IS CAUSED IN PART BY THE ORDINARY NEGLIGENCE OR STRICT LIABILITY OF TENANT BUT WILL NOT APPLY TO THE EXTENT AN INJURY IS CAUSED IN WHOLE OR IN PART BY THE GROSS NEGLIGENCE OR WILLFUL MISCONDUCT OF TENANT.**

C.2. **Landlord agrees not to—**

C.2.a. Interfere with Tenant's possession of the Premises as long as Tenant is not in default.

C.2.b. Unreasonably withhold consent to a proposed assignment or sublease.

D. General Provisions

Landlord and Tenant agree to the following:

D.1. Alterations. Any physical additions or improvements to the Premises made by Tenant will become the property of Landlord. Landlord may require that Tenant, at the end of the Term and at Tenant's expense, remove any physical additions and improvements, repair

any alterations, and restore the Premises to the condition existing at the Commencement Date, normal wear excepted.

D.2. Abatement. Tenant's covenant to pay Rent and Landlord's covenants are independent. Except as otherwise provided, Tenant may not abate Rent for any reason.

D.3. Insurance. Tenant and Landlord will maintain the respective insurance coverages described in the attached Insurance Addendum.

D.4. Release of Claims/Subrogation. LANDLORD AND TENANT RELEASE EACH OTHER AND LIENHOLDER, AND THEIR RESPECTIVE AGENTS, FROM ALL CLAIMS OR LIABILITIES FOR DAMAGE TO THE PREMISES OR SHOPPING CENTER, DAMAGE TO OR LOSS OF PERSONAL PROPERTY WITHIN THE SHOPPING CENTER, AND LOSS OF BUSINESS OR REVENUES THAT ARE INSURED BY THE RELEASING PARTY'S PROPERTY INSURANCE OR THAT WOULD HAVE BEEN INSURED BY THE REQUIRED INSURANCE IF THE PARTY FAILS TO MAINTAIN THE PROPERTY COVERAGES REQUIRED BY THIS LEASE. THE PARTY INCURRING THE DAMAGE OR LOSS WILL BE RESPONSIBLE FOR ANY DEDUCTIBLE OR SELF-INSURED RETENTION UNDER ITS PROPERTY INSURANCE. LANDLORD AND TENANT WILL NOTIFY THE ISSUING PROPERTY INSURANCE COMPANIES OF THE RELEASE SET FORTH IN THIS PARAGRAPH AND WILL HAVE THE PROPERTY INSURANCE POLICIES ENDORSED, IF NECESSARY, TO PREVENT INVALIDATION OF COVERAGE. THIS RELEASE WILL NOT APPLY IF IT INVALIDATES THE PROPERTY INSURANCE COVERAGE OF THE RELEASING PARTY. **THE RELEASE IN THIS PARAGRAPH WILL APPLY EVEN IF THE DAMAGE OR LOSS IS CAUSED IN WHOLE OR IN PART BY THE ORDINARY NEGLIGENCE OR STRICT LIABILITY OF THE RELEASED PARTY OR ITS AGENTS BUT WILL NOT APPLY TO THE EXTENT THE DAMAGE OR LOSS IS CAUSED IN WHOLE OR IN PART BY THE GROSS NEGLIGENCE OR WILLFUL MISCONDUCT OF THE RELEASED PARTY OR ITS AGENTS.**

D.5. Casualty/Total or Partial Destruction

D.5.a. If the Premises are damaged by casualty and can be restored within ninety days, Landlord will, at its expense, restore the roof, foundation, Common Areas, and structural soundness of the exterior walls of the Premises and any leasehold improvements within the Premises that are not within Tenant's Rebuilding Obligations to substantially the same condition that existed before the casualty and Tenant will, at its expense, be responsible for replacing any of its damaged furniture, fixtures, and personal property and performing Tenant's Rebuilding Obligations. If Landlord fails to complete the portion of the restoration for which Landlord is responsible within ninety days from the date of written notification by Tenant to Landlord of the casualty, Tenant may terminate this lease by written notice delivered to Landlord before Landlord completes Landlord's restoration obligations.

D.5.b. If Landlord cannot complete the portion of the restoration for which Landlord is responsible within ninety days, Landlord has an option to restore the Premises. If Landlord chooses not to restore, this lease will terminate. If Landlord chooses to restore, Landlord will notify Tenant in writing of the estimated time to restore and give Tenant an option to terminate this lease by notifying Landlord in writing within ten days from receipt of Landlord's estimate. If Tenant does not notify Landlord timely of Tenant's election to terminate this lease, the lease will continue and Landlord will restore the Premises as provided in D.5.a. above.

D.5.c. To the extent the Premises are untenantable after the casualty, the Rent will be adjusted as may be fair and reasonable.

D.6. Condemnation/Substantial or Partial Taking

D.6.a. If the Premises cannot be used for the purposes contemplated by this lease because of condemnation or purchase in lieu of condemnation, this lease will terminate.

D.6.b. Whether or not any portion of the Premises is taken by condemnation or purchase in lieu of condemnation, Landlord or Tenant may elect to terminate this lease if 50 percent or more of the Common Area is taken.

D.6.c. If there is a condemnation or purchase in lieu of condemnation and this lease is not terminated, Landlord will, at Landlord's expense, restore the Premises, and the Rent payable during the unexpired portion of the Term will be adjusted as may be fair and reasonable.

D.6.d. Tenant will have no claim to the condemnation award or proceeds in lieu of condemnation, except for relocation or other benefits that are payable to Tenant by the condemning authority but that do not reduce the award or proceeds payable to Landlord.

D.7. Uniform Commercial Code. Tenant grants Landlord a security interest in Tenant's personal property now or subsequently located on the Premises. This lease is a security agreement under the Uniform Commercial Code. Landlord may file financing statements or continuation statements to perfect or continue the perfection of its security interest.

D.8. Default by Landlord/Events. Defaults by Landlord are failing to comply with any provision of this lease within thirty days after written notice and failing to provide Essential Services to Tenant within ten days after written notice.

D.9. Default by Landlord/Tenant's Remedies. Tenant's remedies for Landlord's default are to sue for damages and, if Landlord does not provide an Essential Service for thirty days after default, terminate this lease.

D.10. Default by Tenant/Events. Defaults by Tenant are (a) failing to pay Rent timely, (b) abandoning the Premises or vacating a substantial portion of the Premises, and (c) failing to comply within ten days after written notice with any provision of this lease other than the defaults set forth in (a) and (b).

D.11. Default by Tenant/Landlord's Remedies. Landlord's remedies for Tenant's default are to (a) enter and take possession of the Premises and sue for Rent as it accrues; (b) enter and take possession of the Premises, after which Landlord may relet the Premises on behalf of Tenant and receive the Rent directly by reason of the reletting, and Tenant agrees to reimburse Landlord for any expenditures made in order to relet; (c) enter the Premises and perform Tenant's obligations; and (d) terminate this lease by written notice and sue for damages. Landlord may enter and take possession of the Premises by self-help, by picking or changing locks if necessary, and may lock out Tenant or any other person who may be occupying the Premises, until the default is cured, without being liable for damages.

D.12. Default/Waiver. All waivers must be in writing and signed by the waiving party. Landlord's failure to enforce any provisions of this Lease or its acceptance of late installments of Rent will not be a waiver and will not estop Landlord from enforcing that provision or any other provision of this Lease in the future.

D.13. Mitigation. Landlord has mitigated the loss of rent if Landlord, within thirty days after Tenant's loss of possession, (a) places a "For Lease" sign at the Premises, (b) places the Premises on Landlord's inventory of properties for lease, (c) makes Landlord's inventory available to area brokers on a monthly basis, (d) advertises the Premises for lease in a suitable trade journal in the county in which the Premises are located, and (e) shows the Premises to prospective tenants who request to see it.

D.14. Security Deposit. If Tenant defaults, Landlord may use the Security Deposit to pay arrears of Rent, to repair any damage or injury, or to pay any expense or liability incurred by Landlord as a result of the default.

D.15. Holdover. If Tenant does not vacate the Premises following termination of this lease, Tenant will become a tenant at will and must vacate the Premises on receipt of

notice from Landlord. No holding over by Tenant, whether with or without the consent of Landlord, will extend the Term.

D.16. Alternative Dispute Resolution. Landlord and Tenant agree to mediate in good faith before filing a suit for damages.

D.17. Attorney's Fees. If either party retains an attorney to enforce this lease, the party prevailing in litigation is entitled to recover reasonable attorney's fees and other fees and court and other costs.

D.18. Venue. Exclusive venue is in the county in which the Premises are located.

D.19. Entire Agreement. This lease, its exhibits, addenda, and riders are the entire agreement of the parties concerning the lease of the Premises by Landlord to Tenant. There are no representations, warranties, agreements, or promises pertaining to the Premises or the lease of the Premises by Landlord to Tenant, and Tenant is not relying on any statements or representations of any agent of Landlord, that are not in this lease and any exhibits, addenda, and riders.

D.20. Amendment of Lease. This lease may be amended only by an instrument in writing signed by Landlord and Tenant.

D.21. Limitation of Warranties. THERE ARE NO IMPLIED WARRANTIES OF MERCHANTABILITY, OF FITNESS FOR A PARTICULAR PURPOSE, OR OF ANY OTHER KIND ARISING OUT OF THIS LEASE, AND THERE ARE NO WARRANTIES THAT EXTEND BEYOND THOSE EXPRESSLY STATED IN THIS LEASE.

D.22. Notices. Any notice required or permitted under this lease must be in writing. Any notice required by this lease will be deemed to be given (whether received or not) the earlier of receipt or three business days after being deposited with the United States Postal Service, postage prepaid, certified mail, return receipt requested, and addressed to the intended

recipient at the address shown in this lease. Notice may also be given by regular mail, personal delivery, courier delivery, or e-mail and will be effective when received. Any address for notice may be changed by written notice given as provided herein.

D.23. Use of Common Areas. Tenant will have the nonexclusive right to use the Common Areas subject to such reasonable rules and regulations that Landlord may prescribe.

D.24. Merchants' Association. If Landlord organizes a merchants' association, Tenant must join and maintain membership and comply with its rules.

D.25. Abandoned Property. Landlord may retain, destroy, or dispose of any property left on the Premises at the end of the Term.

Attach insurance addendum, form 25-36 or 25-37. If applicable, include additional clauses like those suggested in form 25-13 and/or a list of exhibits and riders.

_____

[Name of landlord]

_____

[Name of tenant]

Form 25-3

Office Lease

Basic Information

Date:

Landlord:

Landlord's Address:

Tenant:

Tenant's Address:

[**Include if applicable:** Guarantors: [**see guaranty agreement at form 25-22 in this chapter**]]

[**Include if applicable:** Guarantors' Addresses:]

Premises

Approximate square feet:

Name of Building:

Street address/suite:

City, state, zip:

Include or attach necessary legal description.

Term (months):

Commencement Date:

Termination Date:

Base Rent (monthly):

Security Deposit:

Tenant's Pro Rata Share: [**percent**] percent ([**percent**]%)

Permitted Use:

Tenant's Insurance: As required by Insurance Addendum

Landlord's Insurance: As required by Insurance Addendum

Tenant's Rebuilding Obligations: If the Premises are damaged by fire or other elements, Tenant will be responsible for repairing or rebuilding the following leasehold improvements: [**see section 25.1:4**]

A. Definitions

A.1. "Agent" means agents, contractors, employees, licensees, and, to the extent under the control of the principal, invitees.

A.2. "Building Operating Hours" means 8:00 A.M. to 6:00 P.M. Monday through Friday, except holidays.

A.3. "Common Areas" means all facilities and areas of the Building [**include if applicable:** and Parking Facilities] and the related land that are intended and designated by Landlord from time to time for the common, general, and nonexclusive use of all tenants of the Building. Landlord has the exclusive control over and right to manage the Common Areas.

A.4. "Essential Services" means the following services: (a) air-conditioning and heating to the Premises reasonable for the Permitted Use (exclusive of air-conditioning or

heating for electronic data-processing or other specialized equipment) during Building Operating Hours and at such other times at such additional cost as Landlord and Tenant may agree on, (b) hot and cold water for lavatory and drinking purposes, (c) janitorial service and periodic window washing, (d) elevator service, if necessary, to provide access to and from the Premises, (e) electric current for normal office machines and the Building's standard lighting reasonable for the Permitted Use, and (f) lighting in Common Areas and fluorescent lights in the Building's standard light fixtures on the Premises.

A.5. "Injury" means (a) harm to or impairment or loss of property or its use, (b) harm to or death of a person, or (c) "personal and advertising injury" as defined in the form of liability insurance Tenant is required to maintain.

A.6. "Lienholder" means the holder of a deed of trust covering the Premises.

A.7. "Operating Expenses" means all reasonable expenses, including real property taxes, that Landlord pays in connection with the ownership, operation, and maintenance of the Building, except principal and interest on any debt, expenditures classified as capital expenditures for federal income tax purposes, and expenses for which Tenant is required to reimburse Landlord.

Include the following if applicable.

A.8. "Parking Facility" means the facility or area described in the attached parking facility rider.

Continue with the following.

A.9. "Rent" means Base Rent plus any other amounts of money payable by Tenant to Landlord.

B. Tenant's Obligations

B.1. **Tenant agrees to—**

B.1.a. Lease the Premises for the entire Term beginning on the Commencement Date and ending on the Termination Date.

B.1.b. Accept the Premises in their present condition "AS IS," the Premises being currently suitable for the Permitted Use.

B.1.c. Obey (i) all laws relating to Tenant's use, maintenance of the condition, and occupancy of the Premises and Tenant's use of any Common Areas in the Building; (ii) any requirements imposed by utility companies serving or insurance companies covering the Premises or Building; and (iii) any rules and regulations for the Building and Common Areas adopted by Landlord.

B.1.d. Pay monthly, in advance, without demand, on the first day of the month, the Base Rent to Landlord at Landlord's Address.

B.1.e. Pay a late charge of 5 percent of any Rent not received by Landlord by the tenth day after it is due.

B.1.f. Obtain and pay for all utility services used by Tenant and not provided by Landlord.

B.1.g. Pay (i) monthly, in advance, Tenant's Pro Rata Share of the monthly estimated Operating Expenses and (ii) annually, any amount by which the actual Operating Expenses exceed the estimated Operating Expenses, within thirty days of receiving notice of such difference from the Landlord.

B.1.h. Allow Landlord to enter the Premises to perform Landlord's obligations, inspect the Premises, and show the Premises to prospective purchasers or tenants.

B.1.i. Repair, replace, and maintain any part of the Premises that Landlord is not obligated to repair, replace, or maintain, normal wear excepted.

B.1.j. Submit in writing to Landlord any request for repairs, replacement, and maintenance that are the obligations of Landlord.

B.1.k. If requested, deliver to Landlord a financing statement perfecting the security interest created by this lease.

B.1.l. Vacate the Premises and return all keys to the Premises on the last day of the Term.

B.1.m. On request, execute an estoppel certificate that states the Commencement Date and Termination Date of the lease, identifies any amendments to the lease, describes any rights to extend the Term or purchase rights, lists defaults by Landlord, and provides any other information reasonably requested.

B.1.n. Arrange with Landlord in advance for any heating, air-conditioning, or electrical needs in excess of the services provided by Landlord and pay for such additional services as billed by Landlord.

B.1.o. INDEMNIFY, DEFEND, AND HOLD LANDLORD AND LIENHOLDER, AND THEIR RESPECTIVE AGENTS, HARMLESS FROM ANY INJURY (AND ANY RESULTING OR RELATED CLAIM, ACTION, LOSS, LIABILITY, OR REASONABLE EXPENSE, INCLUDING ATTORNEY'S FEES AND OTHER FEES AND COURT AND OTHER COSTS) OCCURRING IN ANY PORTION OF THE PREMISES IF CAUSED IN WHOLE OR IN PART BY THE ACTS OR OMISSIONS OF TENANT OR ITS AGENTS, INCLUDING IN WHOLE OR IN PART BY THE NEGLIGENT ACTS OR OMISSIONS OF TENANT OR ITS AGENTS. **THE INDEMNITY CONTAINED IN THIS PARAGRAPH (i) IS INDEPENDENT OF TENANT'S INSURANCE, (ii) WILL NOT BE LIMITED BY COMPARATIVE NEGLIGENCE STATUTES OR DAMAGES PAID UNDER THE WORKERS' COMPENSATION ACT OR SIMILAR**

EMPLOYEE BENEFIT ACTS, (iii) WILL SURVIVE THE END OF THE TERM, AND (iv) WILL APPLY EVEN IF AN INJURY IS CAUSED IN PART BY THE ORDINARY NEGLIGENCE OR STRICT LIABILITY OF LANDLORD BUT WILL NOT APPLY TO THE EXTENT AN INJURY IS CAUSED IN WHOLE OR IN PART BY THE GROSS NEGLIGENCE OR WILLFUL MISCONDUCT OF LANDLORD, LIENHOLDER, OR THEIR RESPECTIVE AGENTS.

B.2. **Tenant agrees not to—**

B.2.a. Use the Premises for any purpose other than the Permitted Use.

B.2.b. Create a nuisance.

B.2.c. Interfere with any other tenant's normal business operations or Landlord's management of the Building.

B.2.d. Permit any waste.

B.2.e. Use the Premises in any way that would increase insurance premiums or void insurance on the Building.

B.2.f. Change Landlord's lock system.

B.2.g. Alter the Premises.

B.2.h. Allow a lien to be placed on the Premises.

B.2.i. Assign this lease or sublease any portion of the Premises without Landlord's written consent.

C. Landlord's Obligations

C.1. **Landlord agrees to—**

C.1.a. Lease to Tenant the Premises for the entire Term beginning on the Commencement Date and ending on the Termination Date.

C.1.b. Obey all laws relating to Landlord's operation of the Building and Common Areas.

C.1.c. Provide the Essential Services.

C.1.d. Repair, replace, and maintain the (i) roof, (ii) foundation, (iii) Common Areas, (iv) structural soundness of the exterior walls, doors, corridors, and windows, and (v) other structures or equipment serving the Premises.

C.1.e. Return the Security Deposit to Tenant, less itemized deductions, if any, on or before the sixtieth day after the date Tenant surrenders the Premises.

C.1.f. Provide Tenant promptly after receipt of a written request from Tenant with a reconciliation of Tenant's Pro Rata Share of the actual Operating Expenses incurred by Landlord during the preceding calendar year and the estimated Operating Expenses paid by Tenant for the same period and reimburse Tenant for the amount of any estimated Operating Expenses paid by Tenant in excess of Tenant's Pro Rata Share of actual Operating Expenses for the preceding calendar year.

C.1.g. Provide Tenant with detailed invoices for all heating, air-conditioning, and electrical charges in excess of the Essential Services for which Landlord requests reimbursement.

C.1.h. INDEMNIFY, DEFEND, AND HOLD TENANT HARMLESS FROM ANY INJURY AND ANY RESULTING OR RELATED CLAIM, ACTION, LOSS, LIABILITY, OR REASONABLE EXPENSE, INCLUDING ATTORNEY'S FEES AND OTHER FEES AND COURT AND OTHER COSTS, OCCURRING IN ANY PORTION OF THE COMMON AREAS. **THE INDEMNITY CONTAINED IN THIS PARAGRAPH (i) IS INDEPENDENT OF LANDLORD'S INSURANCE, (ii) WILL NOT BE LIMITED BY COMPARATIVE NEGLIGENCE STATUTES OR DAMAGES PAID UNDER THE WORKERS' COMPENSATION**

ACT OR SIMILAR EMPLOYEE BENEFIT ACTS, (iii) WILL SURVIVE THE END OF THE TERM, AND (iv) WILL APPLY IF CAUSED IN WHOLE OR IN PART BY THE ACTS OR OMISSIONS OF LANDLORD OR ITS AGENTS, INCLUDING IN WHOLE OR IN PART BY THE NEGLIGENT ACTS OR OMISSIONS OF LANDLORD OR ITS AGENTS, EVEN IF AN INJURY IS CAUSED IN PART BY THE ORDINARY NEGLIGENCE OR STRICT LIABILITY OF TENANT BUT WILL NOT APPLY TO THE EXTENT AN INJURY IS CAUSED IN WHOLE OR IN PART BY THE GROSS NEGLIGENCE OR WILLFUL MISCONDUCT OF TENANT.

C.2. **Landlord agrees not to—**

C.2.a. Interfere with Tenant's possession of the Premises as long as Tenant is not in default.

C.2.b. Unreasonably withhold consent to a proposed assignment or sublease.

D. General Provisions

Landlord and Tenant agree to the following:

D.1. Alterations. Any physical additions or improvements to the Premises made by Tenant will become the property of Landlord. Landlord may require that Tenant, at the end of the Term and at Tenant's expense, remove any physical additions and improvements, repair any alterations, and restore the Premises to the condition existing at the Commencement Date, normal wear excepted.

D.2. Abatement. Tenant's covenant to pay Rent and Landlord's covenants are independent. Except as otherwise provided, Tenant may not abate Rent for any reason.

D.3. Insurance. Tenant and Landlord will maintain the respective insurance coverages described in the attached Insurance Addendum.

D.4. Release of Claims/Subrogation. LANDLORD AND TENANT RELEASE EACH OTHER AND LIENHOLDER, AND THEIR RESPECTIVE AGENTS, FROM ALL CLAIMS OR LIABILITIES FOR DAMAGE TO THE PREMISES OR BUILDING, DAMAGE TO OR LOSS OF PERSONAL PROPERTY WITHIN THE BUILDING, AND LOSS OF BUSINESS OR REVENUES THAT ARE INSURED BY THE RELEASING PARTY'S PROPERTY INSURANCE OR THAT WOULD HAVE BEEN INSURED BY THE REQUIRED INSURANCE IF THE PARTY FAILS TO MAINTAIN THE PROPERTY COVERAGES REQUIRED BY THIS LEASE. THE PARTY INCURRING THE DAMAGE OR LOSS WILL BE RESPONSIBLE FOR ANY DEDUCTIBLE OR SELF-INSURED RETENTION UNDER ITS PROPERTY INSURANCE. LANDLORD AND TENANT WILL NOTIFY THE ISSUING PROPERTY INSURANCE COMPANIES OF THE RELEASE SET FORTH IN THIS PARAGRAPH AND WILL HAVE THE PROPERTY INSURANCE POLICIES ENDORSED, IF NECESSARY, TO PREVENT INVALIDATION OF COVERAGE. THIS RELEASE WILL NOT APPLY IF IT INVALIDATES THE PROPERTY INSURANCE COVERAGE OF THE RELEASING PARTY. **THE RELEASE IN THIS PARAGRAPH WILL APPLY EVEN IF THE DAMAGE OR LOSS IS CAUSED IN WHOLE OR IN PART BY THE ORDINARY NEGLIGENCE OR STRICT LIABILITY OF THE RELEASED PARTY OR ITS AGENTS BUT WILL NOT APPLY TO THE EXTENT THE DAMAGE OR LOSS IS CAUSED IN WHOLE OR IN PART BY THE GROSS NEGLIGENCE OR WILLFUL MISCONDUCT OF THE RELEASED PARTY OR ITS AGENTS.**

D.5. Casualty/Total or Partial Destruction

D.5.a. If the Premises are damaged by casualty and can be restored within ninety days, Landlord will, at its expense, restore the roof, foundation, Common Areas, and structural soundness of the exterior walls of the Premises and any leasehold improvements within the Premises that are not within Tenant's Rebuilding Obligations to substantially the same condition that existed before the casualty and Tenant will, at its expense, be responsible for replacing any of its damaged furniture, fixtures, and personal property and performing Tenant's Rebuilding Obligations. If Landlord fails to complete the portion of the restoration for which Landlord is responsible within ninety days from the date of written notification by Tenant to

Landlord of the casualty, Tenant may terminate this lease by written notice delivered to Landlord before Landlord completes Landlord's restoration obligations.

D.5.b. If the Premises cannot be restored within ninety days, Landlord has an option to restore the Premises. If Landlord chooses not to restore, this lease will terminate. If Landlord chooses to restore, Landlord will notify Tenant of the estimated time to restore and give Tenant an option to terminate this lease by notifying Landlord within ten days. If Tenant does not terminate this lease, the lease will continue and Landlord will restore the Premises as provided in D.5.a. above.

D.5.c. To the extent the Premises are untenantable after the casualty, the Rent will be adjusted as may be fair and reasonable.

D.6. Condemnation/Substantial or Partial Taking

D.6.a. If the Premises cannot be used for the purposes contemplated by this lease because of condemnation or purchase in lieu of condemnation, this lease will terminate.

D.6.b. If there is a condemnation or purchase in lieu of condemnation and this lease is not terminated, Landlord will, at Landlord's expense, restore the Premises, and the Rent payable during the unexpired portion of the Term will be adjusted as may be fair and reasonable.

D.6.c. Tenant will have no claim to the condemnation award or proceeds in lieu of condemnation.

D.7. Uniform Commercial Code. Tenant grants Landlord a security interest in Tenant's personal property now or subsequently located on the Premises. This lease is a security agreement under the Uniform Commercial Code. Landlord may file financing statements or continuation statements to perfect or continue the perfection of the security interest.

D.8. Default by Landlord/Events. Defaults by Landlord are failing to comply with any provision of this lease within thirty days after written notice and failing to provide Essential Services to Tenant within ten days after written notice.

D.9. Default by Landlord/Tenant's Remedies. Tenant's remedies for Landlord's default are to sue for damages and, if Landlord does not provide an Essential Service within thirty days after default, terminate this lease.

D.10. Default by Tenant/Events. Defaults by Tenant are (a) failing to pay Rent timely, (b) abandoning the Premises or vacating a substantial portion of the Premises, and (c) failing to comply within ten days after written notice with any provision of this lease other than the defaults set forth in (a) and (b).

D.11. Default by Tenant/Landlord's Remedies. Landlord's remedies for Tenant's default are to (a) enter and take possession of the Premises and sue for Rent as it accrues; (b) enter and take possession of the Premises, after which Landlord may relet the Premises on behalf of Tenant and receive the Rent directly by reason of the reletting, and Tenant agrees to reimburse Landlord for any expenditures made in order to relet; (c) enter the Premises and perform Tenant's obligations; and (d) terminate this lease by written notice and sue for damages. Landlord may enter and take possession of the Premises by self-help, by picking or changing locks if necessary, and may lock out Tenant or any other person who may be occupying the Premises, until the default is cured, without being liable for damages.

D.12. Default/Waiver. All waivers must be in writing and signed by the waiving party. Landlord's failure to enforce any provisions of this Lease or its acceptance of late installments of Rent will not be a waiver and will not estop Landlord from enforcing that provision or any other provision of this Lease in the future.

D.13. Mitigation. Landlord has mitigated the loss of rent if Landlord, within thirty days after Tenant's loss of possession, (a) places a "For Lease" sign at the Premises, (b) places the Premises on Landlord's inventory of properties for lease, (c) makes Landlord's inventory available to area brokers on a monthly basis, (d) advertises the Premises for lease in a suitable trade journal in the county in which the Premises are located, and (e) shows the Premises to prospective tenants who request to see it.

D.14. Security Deposit. If Tenant defaults, Landlord may use the Security Deposit to pay arrears of Rent, to repair any damage or injury, or to pay any expense or liability incurred by Landlord as a result of the default.

D.15. Holdover. If Tenant does not vacate the Premises following termination of this lease, Tenant will become a tenant at will and must vacate the Premises on receipt of notice from Landlord. No holding over by Tenant, whether with or without the consent of Landlord, will extend the Term.

D.16. Alternative Dispute Resolution. Landlord and Tenant agree to mediate in good faith before filing a suit for damages.

D.17. Attorney's Fees. If either party retains an attorney to enforce this lease, the party prevailing in litigation is entitled to recover reasonable attorney's fees and other fees and court and other costs.

D.18. Venue. Exclusive venue is in the county in which the Premises are located.

D.19. Entire Agreement. This lease, its exhibits, addenda, and riders are the entire agreement of the parties concerning the lease of the Premises by Landlord to Tenant. There are no representations, warranties, agreements, or promises pertaining to the Premises or the lease of the Premises by Landlord to Tenant, and Tenant is not relying on any statements or

representations of any agent of Landlord, that are not in this lease and any exhibits, addenda, and riders.

D.20. Amendment of Lease. This lease may be amended only by an instrument in writing signed by Landlord and Tenant.

D.21. Limitation of Warranties. THERE ARE NO IMPLIED WARRANTIES OF MERCHANTABILITY, OF FITNESS FOR A PARTICULAR PURPOSE, OR OF ANY OTHER KIND ARISING OUT OF THIS LEASE, AND THERE ARE NO WARRANTIES THAT EXTEND BEYOND THOSE EXPRESSLY STATED IN THIS LEASE.

D.22. Notices. Any notice required or permitted under this lease must be in writing. Any notice required by this lease will be deemed to be given (whether received or not) the earlier of receipt or three business days after being deposited with the United States Postal Service, postage prepaid, certified mail, return receipt requested, and addressed to the intended recipient at the address shown in this lease. Notice may also be given by regular mail, personal delivery, courier delivery, or e-mail and will be effective when received. Any address for notice may be changed by written notice given as provided herein.

D.23. Use of Common Areas. Tenant will have the nonexclusive right to use the Common Areas subject to any reasonable rules and regulations that Landlord may prescribe.

D.24. Abandoned Property. Landlord may retain, destroy, or dispose of any property left on the Premises at the end of the Term.

Attach insurance addendum, form 25-36 or 25-37. If applicable, include additional clauses like those suggested in form 25-13 and/or a list of exhibits and riders.

_____

[Name of landlord]

_____

[Name of tenant]

Form 25-4

Parking Facility Rider to Office Lease

Parking Facility:

Number of Reserved Spaces:

Identification of spaces:

Basic charge:

Number of Nonreserved Spaces:

Basic charge:

Basic Charge Adjustment:

Adjustment Stop:

General Provisions

1. Tenant leases from Landlord, for the Term, the parking spaces indicated above in the Parking Facility.

2. Basic charge payment is due on the first day of each month during the Term.

3. Landlord may adjust the basic charge as provided above but not more frequently than once a year and never in excess of the Adjustment Stop.

4. Default in the payment of any basic charge constitutes a default in the payment of Rent under the lease.

5. Tenant may not assign or sublet any parking space without Landlord's prior written consent.

_____

[**Name of landlord**]

_____

[**Name of tenant**]

Form 25-5

Residential Lease

Basic Information

Date:

Landlord:

Landlord's Address:

Tenant:

Tenant's Address:

Premises

Street address/suite:

City, state, zip:

Include or attach any additional necessary legal description.

Monthly Rent:

Term (months):

Commencement Date:

Termination Date:

Security Deposit:

Permitted Use: Private residence

Occupants (other than Tenant):

Utilities to Be Provided by Landlord:

Tenant's Insurance: As required by Insurance Addendum

Landlord's Insurance: As required by Insurance Addendum

A. Definitions

A.1. "Agent" means agents, contractors, employees, licensees, and, to the extent under the control of the principal, invitees.

A.2. "Injury" means (a) harm to or impairment or loss of property or its use or (b) harm to or death of a person.

A.3. "Rent" means Monthly Rent plus any other amounts of money payable by Tenant to Landlord.

B. Tenant's Obligations

B.1. **Tenant agrees to—**

B.1.a. Lease the Premises for the entire Term beginning on the Commencement Date and ending on the Termination Date.

B.1.b. Accept the Premises in their present condition "AS IS," the Premises being currently suitable for the Permitted Use.

B.1.c. Obey all laws relating to Tenant's Permitted Use, maintenance of condition, and occupancy of the Premises.

B.1.d. Pay monthly, in advance, without demand, on the first day of the month, the Monthly Rent to Landlord at Landlord's Address.

B.1.e. Pay, as additional Rent, all other amounts due under this lease.

B.1.f. Pay a late charge of 5 percent of any Rent not received by Landlord by the tenth day after it is due.

B.1.g. Pay for all utility services used by Tenant and not provided by Landlord.

B.1.h. Allow Landlord to enter the Premises to perform Landlord's obligations, inspect the Premises, and show the Premises to prospective purchasers or tenants.

B.1.i. Repair any damage to the Premises caused by Tenant or the occupants listed under "Occupants (other than Tenant)."

B.1.j. Submit in writing to Landlord any request for repairs, replacement, and maintenance that are the obligations of Landlord.

B.1.k. Move out of the Premises at the end of the Term.

B.1.l. Pay Rent by check, money order, or other traceable or negotiable instrument.

B.2. **Tenant agrees not to—**

B.2.a. Use the Premises other than as a residence occupied by the named Tenant and the occupants listed under "Occupants (other than Tenant)."

B.2.b. Create or permit a nuisance or interfere with any neighbor's use of its Premises.

B.2.c. Change Landlord's lock system.

B.2.d. Alter the Premises.

B.2.e. Allow a lien to be placed on the Premises.

B.2.f. Assign this lease or sublease any portion of the Premises without Landlord's written consent.

C. Landlord's Obligations

Landlord agrees to—

C.1. Lease to Tenant the Premises for the entire Term beginning on the Commencement Date and ending on the Termination Date.

C.2. Obey all laws, ordinances, orders, rules, regulations, and covenants applicable to the use, condition, and occupancy of the Premises.

C.3. Provide the utilities specified in the lease.

C.4. Use reasonable efforts to make repairs to the Premises, but Landlord will not be required to repair a condition unless Tenant notifies Landlord of the condition and Tenant has paid all Rent then due. Landlord will not be required to repair conditions caused by Tenant or the occupants listed under "Occupants (other than Tenant)," unless caused by normal wear and tear, and will not be required to recarpet or repaint the Premises.

C.5. Return the Security Deposit to Tenant on or before the thirtieth day after the date Tenant surrenders the Premises, after subtracting from the Security Deposit all amounts applied to cure any breach of the lease by Tenant as provided below, provided that Tenant has given Landlord written notice of Tenant's new address.

D. General Provisions

Landlord and Tenant agree to the following:

D.1. Abatement. Tenant's covenant to pay Rent and Landlord's covenants are independent. Except as otherwise provided, Tenant may not abate Rent for any reason.

D.2. Insurance. Tenant and Landlord will maintain the respective insurance coverages described in the attached Insurance Addendum.

D.3. Release of Claims/Subrogation. LANDLORD AND TENANT RELEASE EACH OTHER, AND THEIR RESPECTIVE AGENTS, FROM ALL CLAIMS OR LIABILITIES FOR DAMAGE TO THE PREMISES OR DAMAGE TO OR LOSS OF PERSONAL PROPERTY WITHIN THE PREMISES THAT ARE INSURED BY THE RELEASING PARTY'S PROPERTY INSURANCE OR THAT WOULD HAVE BEEN INSURED BY THE REQUIRED INSURANCE IF THE PARTY FAILS TO MAINTAIN THE PROPERTY COVERAGES REQUIRED BY THIS LEASE. THE PARTY INCURRING THE DAMAGE OR LOSS WILL BE RESPONSIBLE FOR ANY DEDUCTIBLE OR SELF-INSURED RETENTION UNDER ITS PROPERTY INSURANCE. LANDLORD AND TENANT WILL NOTIFY THE ISSUING PROPERTY INSURANCE COMPANIES OF THE RELEASE SET FORTH IN THIS PARAGRAPH AND WILL HAVE THE PROPERTY INSURANCE POLICIES ENDORSED, IF NECESSARY, TO PREVENT INVALIDATION OF COVERAGE. THIS RELEASE WILL NOT APPLY IF IT INVALIDATES THE PROPERTY INSURANCE COVERAGE OF THE RELEASING PARTY. **THE RELEASE IN THIS PARAGRAPH WILL APPLY EVEN IF THE DAMAGE OR LOSS IS CAUSED IN WHOLE OR IN PART BY THE ORDINARY NEGLIGENCE OR STRICT LIABILITY OF THE RELEASED PARTY OR ITS AGENTS BUT WILL NOT APPLY TO THE EXTENT THE DAMAGE OR LOSS IS CAUSED IN WHOLE OR IN PART BY THE GROSS NEGLIGENCE OR WILLFUL MISCONDUCT OF THE RELEASED PARTY OR ITS AGENTS.**

D.4. Casualty/Condemnation. If the Premises are damaged by fire or other casualty or are condemned, then either Landlord or Tenant may terminate this lease by notifying the other. Any Rent prepaid by Tenant will be returned to Tenant on termination.

D.5. Default by Landlord/Events. Defaults by Landlord are failing to comply with any provision of this lease within thirty days after written notice and failing to remedy a con-

dition that materially affects the physical health or safety of an ordinary tenant within ten days after written notice, unless such condition results from Tenant's actions.

D.6. Default by Landlord/Tenant's Remedies. **Tenant's remedies for Landlord's default are to sue for damages and, if Landlord does not remedy a condition (not resulting from Tenant's actions) that materially affects the physical health or safety of an ordinary tenant for thirty days after notice, terminate this lease.**

a. Provided Tenant is not delinquent in the payment of Rent when Tenant provides Landlord any required notices and subject to applicable limitations in section 92.056 of the Texas Property Code, if Landlord has not repaired or remedied within a reasonable time or if Landlord is not making a diligent effort to repair or remedy any condition that materially affects the physical health or safety of an ordinary tenant, and Landlord is obligated under this lease to repair or remedy the condition, then Tenant may, following notice to Landlord (i) by certified mail, return receipt requested, or by registered mail or (ii) by notice to the person to whom or at the place where Tenant's Rent is normally paid, followed by a subsequent written notice if the condition is not remedied or repaired within a reasonable period of time following the first notice—

i. terminate this lease;

ii. have the condition repaired or remedied according to section 92.0561 of the Texas Property Code if the condition involves any of the following and at least one of Tenant's notices to Landlord includes a reasonable description of the proposed repair or remedy, along with a statement that Tenant intends to repair or remedy the condition:

(a) the backup or overflow of raw sewage inside the Premises or the flooding from broken pipes or natural drainage inside the Premises;

(b) potable water service to the Premises is not available, and Landlord has expressly or impliedly agreed in this lease to furnish potable water to the Premises;

(c) heating or cooling equipment serving the Premises is producing inadequate heat or cooled air, Landlord has expressly or impliedly agreed in this lease to furnish heating or cooling equipment, and Landlord has been notified in writing by the appropriate local housing, building, or health official or other official having jurisdiction that the lack of heat or cooling materially affects the health or safety of an ordinary tenant; or

(d) any other condition exists at the Premises that materially affects the health or safety of an ordinary tenant, and Landlord has been notified in writing by the appropriate local housing, building, or health official or other official having jurisdiction of such condition;

iii. deduct from Tenant's Rent, without necessity of judicial action, the cost of the repair or remedy of any condition listed in section D.6.a.ii. in compliance with section 92.0561 of the Texas Property Code; or

iv. obtain judicial remedies according to section 92.0563 of the Texas Property Code.

b. If Tenant elects to terminate this lease, Tenant is—

i. entitled to a pro rata refund of Rent from the date of termination or the date Tenant moves out, whichever is later;

ii. entitled to deduct Tenant's Security Deposit from Tenant's Rent without the necessity of lawsuit or to obtain a refund of Tenant's Security Deposit according to law; and

iii. not entitled to the other repair-and-deduct remedies under section 92.0561 of the Texas Property Code or the judicial remedies under subdivisions (1) and (2) of subsection (a) of section 92.0563 of the Texas Property Code.

c. If Tenant elects to have the condition repaired or remedied following the requirements of section 92.0561 of the Texas Property Code, Tenant may have the condition repaired or remedied—

i. immediately following Tenant's notice of intent to repair if the condition involves sewage or flooding;

ii. within three days following Tenant's delivery of notice of intent to repair if the condition involves a cessation of potable water or inadequate heat or cooled air; or

iii. within seven days following Tenant's notice of intent to repair or remedy the condition if the condition involves any other matter affecting the physical health or safety of an ordinary tenant; and

Tenant may deduct the cost to repair or remedy the condition from a subsequent Rent payment, but the deduction may not exceed the amount

of one month's Rent under the lease or $500, whichever is greater. When deducting the cost of repairs from the Rent, Tenant must furnish Landlord, along with payment of the balance of the Rent, a copy of the repair bill and the receipt for its payment. A repair bill and receipt may be the same document. Repairs and deductions may be made as often as necessary as long as Tenant otherwise complies with section 92.0561 of the Texas Property Code and the total repairs and deductions in any one month do not exceed one month's Rent or $500, whichever is greater.

d. If Tenant's Rent is subsidized in whole or in part by a governmental agency, the deduction limitation of one month's Rent shall mean the fair market rent for the dwelling and not the Rent that Tenant pays. The fair market rent shall be determined by the governmental agency subsidizing the Rent, or in the absence of such a determination, it shall be a reasonable amount of rent under the circumstances.

e. Tenant repairs pursuant to section 92.0561 of the Texas Property Code must be made by a company, contractor, or repairman listed in the yellow or business pages of the telephone directory or in the classified advertising section of a newspaper of the local city, county, or adjacent county at the time of Tenant's notice of intent to repair and must be made in compliance with applicable building codes, including a building permit when required. Unless otherwise agreed between Tenant and Landlord, any repairs made pursuant to section 92.0561 of the Texas Property Code may not be made by Tenant, Tenant's immediate family, Tenant's employer or employees, or a company in which Tenant has an ownership interest. In addition, repairs may not be made by Tenant under section 92.0561 of the Texas Property Code to the foundation or

load-bearing structural elements of a building of which the Premises is a part if the building contains two or more dwelling units.

f. If Landlord repairs or remedies the condition or delivers to Tenant an affidavit for delay under section 92.0562 of the Texas Property Code after Tenant has contacted a repairman but before the repairman commences work, Landlord shall be liable for the cost incurred by Tenant for the repairman's trip charge and Tenant may deduct the charge from Tenant's Rent as if it were a repair cost.

g. If Tenant elects to pursue judicial remedies against Landlord pursuant to section 92.0563 of the Texas Property Code, those remedies include—

i. an order directing Landlord to take reasonable action to repair or remedy the condition;

ii. an order reducing Tenant's Rent, from the date of the first repair notice, in proportion to the reduced rental value resulting from the condition until the condition is repaired or remedied;

iii. a judgment against Landlord for a civil penalty of one month's Rent plus $500;

iv. a judgment against Landlord for the amount of Tenant's actual damages; and

v. court costs and attorney's fees, excluding any attorney's fees for a cause of action for damages relating to a personal injury.

D.7. Default by Tenant/Events. Defaults by Tenant are (a) failing to pay Rent timely, (b) abandoning the Premises or vacating a substantial portion of the Premises, and (c)

failing to comply within ten days after written notice with any provision of this lease other than the defaults set forth in (a) and (b).

D.8. Default by Tenant/Landlord's Remedies. Landlord's remedies for Tenant's default are to (a) enter and take possession of the Premises and sue for Rent as it accrues; (b) enter and take possession of the Premises, after which Landlord may relet the Premises on behalf of Tenant and receive the Rent directly by reason of the reletting, and Tenant agrees to reimburse Landlord for any expenditures made in order to relet; (c) enter the Premises and perform Tenant's obligations; and (d) terminate this lease by written notice and sue for possession or damages or both.

D.9. Default/Waiver. All waivers must be in writing and signed by the waiving party. Landlord's failure to enforce any provisions of this Lease or its acceptance of late installments of Rent will not be a waiver and will not estop Landlord from enforcing that provision or any other provision of this Lease in the future.

D.10. Mitigation. Landlord and Tenant have a duty to mitigate damages.

D.11. Security Deposit. If Tenant defaults, Landlord may use the Security Deposit to pay arrears of Rent, to repair any damage or injury, or to pay any expense or liability incurred by Landlord as a result of the default.

D.12. Holdover. If Tenant does not vacate the Premises following termination of this lease, Tenant will become a tenant at will and must vacate the Premises on receipt of notice from Landlord. No holding over by Tenant, whether with or without the consent of Landlord, will extend the Term.

D.13. Alternative Dispute Resolution. Landlord and Tenant agree to mediate in good faith before filing a suit for damages.

D.14. Attorney's Fees. If either party retains an attorney to enforce this lease, the party prevailing in litigation is entitled to recover reasonable attorney's fees and court and any other costs.

D.15. Venue. Exclusive venue is in the county in which the Premises are located.

D.16. Entire Agreement. This lease, its exhibits, addenda, and riders are the entire agreement of the parties concerning the lease of the Premises by Landlord to Tenant. There are no representations, warranties, agreements, or promises pertaining to the Premises or the lease of the Premises by Landlord to Tenant, and Tenant is not relying on any statements or representations of any agent of Landlord, that are not in this lease and any exhibits, addenda, and riders.

D.17. Amendment of Lease. This lease may be amended only by an instrument in writing signed by Landlord and Tenant.

D.18. Limitation of Warranties. THERE ARE NO IMPLIED WARRANTIES OF MERCHANTABILITY, OF FITNESS FOR A PARTICULAR PURPOSE, OR OF ANY OTHER KIND ARISING OUT OF THIS LEASE, AND THERE ARE NO WARRANTIES THAT EXTEND BEYOND THOSE EXPRESSLY STATED IN THIS LEASE.

D.19. Notices. Any notice required or permitted under this lease must be in writing. Any notice required by this lease will be deemed to be given (whether received or not) the earlier of receipt or three business days after being deposited with the United States Postal Service, postage prepaid, certified mail, return receipt requested, and addressed to the intended recipient at the address shown in this lease. Notice may also be given by regular mail, personal delivery, courier delivery, or e-mail and will be effective when received. Any address for notice may be changed by written notice given as provided herein.

D.20. Texas Property Code. Landlord and Tenant each acknowledge that chapter 92 of the Texas Property Code, which deals with residential tenancies, affords certain rights and imposes certain duties on them.

D.21. Abandoned Property. Landlord may retain, destroy, or dispose of any property left on the Premises at the end of the Term.

D.22. Tenant's Statutory Right to Terminate. Tenant may have special statutory rights to terminate the lease early in certain situations involving family violence, military deployment or transfer, or certain sexual offenses or stalking.

D.23. Emergencies. Tenant may call [**telephone number**] to report emergencies that affect the Premises and that threaten Tenant's physical health or safety.

Attach insurance addendum. If applicable, include additional clauses like those suggested in form 25-29 in this chapter and/or a list of exhibits and riders.

_____

[**Name of landlord**]

_____

[**Name of tenant**]

Insurance Addendum to Lease

Lease

Date:

Landlord:

Tenant:

This insurance addendum is part of the lease.

A. Tenant agrees to—

1. Maintain the property and liability insurance policy required below during the Term and any period before or after the Term when Tenant is present on the Premises:

Type of Insurance	**Minimum Policy Limit**
Tenant's homeowner's (also known as tenant's or renter's)	*Personal Liability:* Per occurrence: $_____ Aggregate: $_____ *Property:* 100 percent of replacement cost of all Tenant's furniture, fixtures, equipment, and other personal property located in the Premises, and will include release of claims/subrogation referenced in paragraph D.3.

2. Deliver a certificate of insurance to Landlord before entering the Premises and thereafter at least ten days before the expiration of the policies.

B. Landlord agrees to maintain the property insurance policy required below during the Term:

Type of Insurance	Minimum Policy Limit
Causes of loss—special form property	100 percent of replacement cost of the building in which Premises are located, exclusive of foundation, footings, infrastructure, and sitework, and will include release of claims/ subrogation referenced in paragraph D.3.

[Reserved]

Form 25-6

Industrial Lease

Basic Information

Date:

Landlord:

Landlord's Address:

Tenant:

Tenant's Address:

[**Include if applicable:** Guarantors: [**see guaranty agreement at form 25-22 in this chapter**]]

[**Include if applicable:** Guarantors' Addresses:]

Premises

Approximate square feet:

Name of Building:

Street address/suite:

City, state, zip:

Include or attach any additional necessary legal description.

Term (months):

Commencement Date:

Termination Date:

Base Rent (monthly):

Tenant's Pro Rata Share: [**percent**] percent ([**percent**]%)

Security Deposit:

Permitted Use:

Tenant's Insurance: As required by Insurance Addendum

Landlord's Insurance: As required by Insurance Addendum

Tenant's Rebuilding Obligations: If the Premises are damaged by fire or other elements, Tenant will be responsible for repairing or rebuilding the following leasehold improvements: [**see section 25.1:4**]

A. Definitions

A.1. "Agent" means agents, contractors, employees, licensees, and, to the extent under the control of the principal, invitees.

A.2. "Common Areas" means all facilities and areas of the Building that are intended and designated by Landlord from time to time for the common, general, and nonexclusive use of all tenants of the Building, including parking lots. Landlord has the exclusive control over and right to manage the Common Areas.

A.3. "Essential Services" means utility connections reasonably necessary for occupancy of the Premises for the Permitted Use.

A.4. "Injury" means (a) harm to or impairment or loss of property or its use, (b) harm to or death of a person, or (c) "personal and advertising injury" as defined in the form of liability insurance Tenant is required to maintain.

A.5. "Lienholder" means the holder of a deed of trust covering the Premises.

A.6. "Rent" means Base Rent plus any other amounts of money payable by Tenant to Landlord.

B. Tenant's Obligations

B.1. **Tenant agrees to—**

B.1.a. Lease the Premises for the entire Term beginning on the Commencement Date and ending on the Termination Date.

B.1.b. Accept the Premises in their present condition "AS IS," the Premises being currently suitable for the Permitted Use.

B.1.c. Obey (i) all laws relating to Tenant's use, maintenance of the condition, and occupancy of the Premises and Tenant's use of any Common Areas in the Building; (ii) any requirements imposed by utility companies serving or insurance companies covering the Premises or Building; and (iii) any rules and regulations for the Building and Common Areas adopted by Landlord.

B.1.d. Pay monthly, in advance, without demand, on the first day of the month, the Base Rent to Landlord at Landlord's Address.

B.1.e. Pay a late charge of 5 percent of any Rent not received by Landlord by the tenth day after it is due.

B.1.f. Reimburse Landlord for real property taxes paid on the Premises.

B.1.g. Obtain and pay for all utility services used by Tenant and not provided by Landlord.

B.1.h. Pay Tenant's Pro Rata Share of any utility services provided by Landlord.

B.1.i. Allow Landlord to enter the Premises to perform Landlord's obligations, inspect the Premises, and show the Premises to prospective purchasers or tenants.

B.1.j. Repair, replace, and maintain any part of the Premises that Landlord is not obligated to repair, replace, or maintain, reasonable wear excepted.

B.1.k. Keep the sidewalks, service ways, and loading areas adjacent to the Premises clean and unobstructed.

B.1.l. Submit in writing to Landlord any request for repairs, replacement, and maintenance that are the obligations of Landlord.

B.1.m. If requested, deliver to Landlord a financing statement perfecting the security interest created by this lease.

B.1.n. Vacate the Premises and return all keys to the Premises on the last day of the Term.

B.1.o. Pay all costs caused by Tenant's introduction of materials, other than ordinary human waste, into the sanitary sewer system.

B.1.p. Install and maintain any dilution tanks, holding tanks, settling tanks, sewer sampling devices, sand traps, grease traps, or other devices required by law for the Permitted Use of the sanitary sewer system.

B.1.q. If the Premises are served by rail and if requested by the railroad, enter into a joint maintenance agreement with the railroad and bear Tenant's Pro Rata Share of the cost of maintaining the railroad spur.

B.1.r. On request, execute an estoppel certificate that states the Commencement Date and Termination Date of the lease, identifies any amendments to the lease, describes any rights to extend the Term or purchase rights, lists defaults by Landlord, and provides any other information reasonably requested.

B.1.s. INDEMNIFY, DEFEND, AND HOLD LANDLORD AND LIENHOLDER, AND THEIR RESPECTIVE AGENTS, HARMLESS FROM ANY INJURY (AND ANY RESULTING OR RELATED CLAIM, ACTION, LOSS, LIABILITY, OR REASONABLE EXPENSE, INCLUDING ATTORNEY'S FEES AND OTHER FEES AND COURT AND OTHER COSTS) OCCURRING IN ANY PORTION OF THE PREMISES IF CAUSED IN WHOLE OR IN PART BY THE ACTS OR OMISSIONS OF TENANT OR ITS AGENTS, INCLUDING IN WHOLE OR IN PART THE NEGLIGENT ACTS OR OMISSIONS OF TENANT OR ITS AGENTS. **THE INDEMNITY CONTAINED IN THIS PARAGRAPH (i) IS INDEPENDENT OF TENANT'S INSURANCE, (ii) WILL NOT BE LIMITED BY COMPARATIVE NEGLIGENCE STATUTES OR DAMAGES PAID UNDER THE WORKERS' COMPENSATION ACT OR SIMILAR EMPLOYEE BENEFIT ACTS, (iii) WILL SURVIVE THE END OF THE TERM, AND (iv) WILL APPLY EVEN IF AN INJURY IS CAUSED IN PART BY THE ORDINARY NEGLIGENCE OR STRICT LIABILITY OF LANDLORD OR LANDLORD'S AGENTS BUT WILL NOT APPLY TO THE EXTENT AN INJURY IS CAUSED IN WHOLE OR IN PART BY THE GROSS NEGLIGENCE OR WILLFUL MISCONDUCT OF LANDLORD, LIENHOLDER, OR THEIR RESPECTIVE AGENTS.**

B.2. **Tenant agrees not to—**

B.2.a. Use the Premises for any purpose other than the Permitted Use.

B.2.b. Create a nuisance.

B.2.c. Interfere with any other tenant's normal business operations or Landlord's management of the Premises.

B.2.d. Permit any waste.

B.2.e. Use the Premises in any way that would increase insurance premiums or void insurance on the Premises.

B.2.f. Change Landlord's lock system.

B.2.g. Alter the Premises.

B.2.h. Allow a lien to be placed on the Premises.

B.2.i. Assign this lease or sublease any portion of the Premises without Landlord's written consent.

B.2.j. Use the roof on the Premises.

B.2.k. Place any signs on the Premises without Landlord's written consent.

C. Landlord's Obligations

C.1. **Landlord agrees to—**

C.1.a. Lease to Tenant the Premises for the entire Term beginning on the Commencement Date and ending on the Termination Date.

C.1.b. Obey all laws relating to Landlord's operation of the Building.

C.1.c. Repair, replace, and maintain the (i) roof, (ii) foundation, (iii) Common Areas, and (iv) structural soundness of the exterior walls, excluding windows, window glass, plate glass, and doors.

C.1.d. Return the Security Deposit to Tenant, less itemized deductions, if any, on or before the sixtieth day after the date Tenant surrenders the Premises.

C.1.e. INDEMNIFY, DEFEND, AND HOLD TENANT HARMLESS FROM ANY INJURY AND ANY RESULTING OR RELATED CLAIM, ACTION, LOSS, LIABILITY, OR REASONABLE EXPENSE, INCLUDING ATTORNEY'S FEES AND OTHER FEES AND COURT AND OTHER COSTS, OCCURRING IN ANY PORTION OF THE COMMON AREAS. **THE INDEMNITY CONTAINED IN THIS PARAGRAPH (i) IS INDEPENDENT OF LANDLORD'S INSURANCE, (ii) WILL NOT BE LIMITED BY COMPARATIVE NEGLIGENCE STATUTES OR DAMAGES PAID UNDER THE WORKERS' COMPENSATION ACT OR SIMILAR EMPLOYEE BENEFIT ACTS, (iii) WILL SURVIVE THE END OF THE TERM, AND (iv) WILL APPLY IF CAUSED IN WHOLE OR IN PART BY THE ACTS OR OMISSIONS OF LANDLORD OR ITS AGENTS, INCLUDING IN WHOLE OR IN PART BY THE NEGLIGENT ACTS OR OMISSIONS OF LANDLORD OR ITS AGENTS, EVEN IF AN INJURY IS CAUSED IN PART BY THE ORDINARY NEGLIGENCE OR STRICT LIABILITY OF TENANT BUT WILL NOT APPLY TO THE EXTENT AN INJURY IS CAUSED IN WHOLE OR IN PART BY THE GROSS NEGLIGENCE OR WILLFUL MISCONDUCT OF TENANT.**

C.2. **Landlord agrees not to—**

C.2.a. Interfere with Tenant's possession of the Premises as long as Tenant is not in default.

C.2.b. Unreasonably withhold consent to a proposed assignment or sublease.

D. General Provisions

Landlord and Tenant agree to the following:

D.1. Alterations. Any physical additions or improvements to the Premises made by Tenant will become the property of Landlord. Landlord may require that Tenant, at the end of the Term and at Tenant's expense, remove any physical additions and improvements, repair

any alterations, and restore the Premises to the condition existing at the Commencement Date, normal wear excepted.

D.2. Abatement. Tenant's covenant to pay Rent and Landlord's covenants are independent. Except as otherwise provided, Tenant may not abate Rent for any reason.

D.3. Insurance. Tenant and Landlord will maintain the respective insurance coverages described in the attached Insurance Addendum.

D.4. Release of Claims/Subrogation. LANDLORD AND TENANT RELEASE EACH OTHER AND LIENHOLDER, AND THEIR RESPECTIVE AGENTS, FROM ALL CLAIMS OR LIABILITIES FOR DAMAGE TO THE PREMISES OR BUILDING, DAMAGE TO OR LOSS OF PERSONAL PROPERTY WITHIN THE BUILDING, AND LOSS OF BUSINESS OR REVENUES THAT ARE INSURED BY THE RELEASING PARTY'S PROPERTY INSURANCE OR THAT WOULD HAVE BEEN INSURED BY THE REQUIRED INSURANCE IF THE PARTY FAILS TO MAINTAIN THE PROPERTY COVERAGES REQUIRED BY THIS LEASE. THE PARTY INCURRING THE DAMAGE OR LOSS WILL BE RESPONSIBLE FOR ANY DEDUCTIBLE OR SELF-INSURED RETENTION UNDER ITS PROPERTY INSURANCE. LANDLORD AND TENANT WILL NOTIFY THE ISSUING PROPERTY INSURANCE COMPANIES OF THE RELEASE SET FORTH IN THIS PARAGRAPH AND WILL HAVE THE PROPERTY INSURANCE POLICIES ENDORSED, IF NECESSARY, TO PREVENT INVALIDATION OF COVERAGE. THIS RELEASE WILL NOT APPLY IF IT INVALIDATES THE PROPERTY INSURANCE COVERAGE OF THE RELEASING PARTY. **THE RELEASE IN THIS PARAGRAPH WILL APPLY EVEN IF THE DAMAGE OR LOSS IS CAUSED IN WHOLE OR IN PART BY THE ORDINARY NEGLIGENCE OR STRICT LIABILITY OF THE RELEASED PARTY OR ITS AGENTS BUT WILL NOT APPLY TO THE EXTENT THE DAMAGE OR LOSS IS CAUSED IN WHOLE OR IN PART BY THE GROSS NEGLIGENCE OR WILLFUL MISCONDUCT OF THE RELEASED PARTY OR ITS AGENTS.**

D.5. Casualty/Total or Partial Destruction

D.5.a. If the Premises are damaged by casualty and can be restored within ninety days, Landlord will, at its expense, restore the roof, foundation, Common Areas, and structural soundness of the exterior walls of the Premises and any leasehold improvements within the Premises that are not within Tenant's Rebuilding Obligations to substantially the same condition that existed before the casualty and Tenant will, at its expense, be responsible for replacing any of its damaged furniture, fixtures, and personal property and performing Tenant's Rebuilding Obligations. If Landlord fails to complete the portion of the restoration for which Landlord is responsible within ninety days from the date of written notification by Tenant to Landlord of the casualty, Tenant may terminate this lease by written notice delivered to Landlord before Landlord completes Landlord's restoration obligations.

D.5.b. If Landlord cannot complete the portion of the restoration for which Landlord is responsible within ninety days, Landlord has an option to restore the Premises. If Landlord chooses not to restore, this lease will terminate. If Landlord chooses to restore, Landlord will notify Tenant in writing of the estimated time to restore and give Tenant an option to terminate this lease by notifying Landlord in writing within ten days from receipt of Landlord's estimate. If Tenant does not notify Landlord timely of Tenant's election to terminate this lease, the lease will continue and Landlord will restore the Premises as provided in D.5.a. above.

D.5.c. To the extent the Premises are untenantable after the casualty, the Rent will be adjusted as may be fair and reasonable.

D.6. Condemnation/Substantial or Partial Taking

D.6.a. If the Premises cannot be used for the purposes contemplated by this lease because of condemnation or purchase in lieu of condemnation, this lease will terminate.

D.6.b. If there is a condemnation or purchase in lieu of condemnation and this lease is not terminated, Landlord will, at Landlord's expense, restore the Premises, and the Rent payable during the unexpired portion of the Term will be adjusted as may be fair and reasonable.

D.6.c. Tenant will have no claim to the condemnation award or proceeds in lieu of condemnation.

D.7. Uniform Commercial Code. Tenant grants Landlord a security interest in Tenant's personal property now or subsequently located on the Premises. This lease is a security agreement under the Uniform Commercial Code. Landlord may file financing statements or continuation statements to perfect or continue the perfection of the security interest.

D.8. Default by Landlord/Events. Defaults by Landlord are failing to comply with any provision of this lease within thirty days after written notice and failing to provide Essential Services to Tenant within ten days after written notice.

D.9. Default by Landlord/Tenant's Remedies. Tenant's remedies for Landlord's default are to sue for damages and, if Landlord does not provide an Essential Service for thirty days after default, terminate this lease.

D.10. Default by Tenant/Events. Defaults by Tenant are (a) failing to pay Rent timely, (b) abandoning the Premises or vacating a substantial portion of the Premises, and (c) failing to comply within ten days after written notice with any provision of this lease other than the defaults set forth in (a) and (b).

D.11. Default by Tenant/Landlord's Remedies. Landlord's remedies for Tenant's default are to (a) enter and take possession of the Premises and sue for Rent as it accrues; (b) enter and take possession of the Premises, after which Landlord may relet the Premises on behalf of Tenant and receive the Rent directly by reason of the reletting, and Tenant agrees to reimburse Landlord for any expenditures made in order to relet; (c) enter the Premises and

perform Tenant's obligations; and (d) terminate this lease by written notice and sue for damages. Landlord may enter and take possession of the Premises by self-help, by picking or changing locks if necessary, and may lock out Tenant or any other person who may be occupying the Premises, until the default is cured, without being liable for damages.

D.12. Default/Waiver. All waivers must be in writing and signed by the waiving party. Landlord's failure to enforce any provisions of this Lease or its acceptance of late installments of Rent will not be a waiver and will not estop Landlord from enforcing that provision or any other provision of this Lease in the future.

D.13. Mitigation. Landlord has mitigated the loss of rent if Landlord, within thirty days after Tenant's loss of possession, (a) places a "For Lease" sign at the Premises, (b) places the Premises on Landlord's inventory of properties for lease, (c) makes Landlord's inventory available to area brokers on a monthly basis, (d) advertises the Premises for lease in a suitable trade journal in the county in which the Premises are located, and (e) shows the Premises to prospective tenants who request to see it.

D.14. Security Deposit. If Tenant defaults, Landlord may use the Security Deposit to pay arrears of Rent, to repair any damage or injury, or to pay any expense or liability incurred by Landlord as a result of the default.

D.15. Holdover. If Tenant does not vacate the Premises following termination of this lease, Tenant will become a tenant at will and must vacate the Premises on receipt of notice from Landlord. No holding over by Tenant, whether with or without the consent of Landlord, will extend the Term.

D.16. Alternative Dispute Resolution. Landlord and Tenant agree to mediate in good faith before filing a suit for damages.

D.17. Attorney's Fees. If either party retains an attorney to enforce this lease, the party prevailing in litigation is entitled to recover reasonable attorney's fees and other fees and court and other costs.

D.18. Venue. Exclusive venue is in the county in which the Premises are located.

D.19. Entire Agreement. This lease, its exhibits, addenda, and riders are the entire agreement of the parties concerning the lease of the Premises by Landlord to Tenant. There are no representations, warranties, agreements, or promises pertaining to the Premises or the lease of the Premises by Landlord to Tenant, and Tenant is not relying on any statements or representations of any agent of Landlord, that are not in this lease and any exhibits, addenda, and riders.

D.20. Amendment of Lease. This lease may be amended only by an instrument in writing signed by Landlord and Tenant.

D.21. Limitation of Warranties. THERE ARE NO IMPLIED WARRANTIES OF MERCHANTABILITY, OF FITNESS FOR A PARTICULAR PURPOSE, OR OF ANY OTHER KIND ARISING OUT OF THIS LEASE, AND THERE ARE NO WARRANTIES THAT EXTEND BEYOND THOSE EXPRESSLY STATED IN THIS LEASE.

D.22. Notices. Any notice required or permitted under this lease must be in writing. Any notice required by this lease will be deemed to be given (whether received or not) the earlier of receipt or three business days after being deposited with the United States Postal Service, postage prepaid, certified mail, return receipt requested, and addressed to the intended recipient at the address shown in this lease. Notice may also be given by regular mail, personal delivery, courier delivery, or e-mail and will be effective when received. Any address for notice may be changed by written notice given as provided herein.

D.23. Use of Common Areas. Tenant will have the nonexclusive right to use the Common Areas subject to any reasonable rules and regulations that Landlord may prescribe.

D.24. Abandoned Property. Landlord may retain, destroy, or dispose of any property left on the Premises at the end of the Term.

Attach insurance addendum, form 25-36 or 25-37. If applicable, include additional clauses like those suggested in form 25-13 and/or a list of exhibits and riders.

_____

[Name of landlord]

_____

[Name of tenant]

[Reserved]

Form 25-7

Hunting Lease

Basic Information

Date:

Landlord:

Landlord's Address:

Tenant:

Tenant's Address:

Premises: SURFACE ONLY of approximately [**number**] acres of land, situated in [**county**] County, Texas, as described in Exhibit [**exhibit number/letter**] ("Land").

Include or attach any additional necessary legal description.

The Premises do not include livestock, crops, or Excluded Improvements located on the Land. Tenant will not be permitted to use the Excluded Improvements.

Excluded Improvements: Any structure, improvement, or equipment situated on the Land and constructed or installed by any person other than Tenant, except for the following: [**specify**].

Base Rent:

Term (months):

Commencement Date:

Termination Date:

Permitted Use: Solely for hunting of the following game: [**specify**].

Tenant's Insurance: As required by Insurance Addendum

A. Definitions

A.1. "Agent" means agents, contractors, employees, licensees, and, to the extent under the control of the principal, invitees.

A.2. "Injury" means (a) harm to or impairment or loss of property or its use or (b) harm to or death of a person.

A.3. "Rent" means Base Rent plus any other amounts of money payable by Tenant to Landlord.

B. Tenant's Obligations

B.1. **Tenant agrees to—**

B.1.a. Lease the Premises for the entire Term beginning on the Commencement Date and ending on the Termination Date.

B.1.b. Accept the Premises in their present condition "AS IS," the Premises being suitable for the Permitted Use.

B.1.c. Obey all laws relating to (i) Tenant's Permitted Use; (ii) Tenant's activities while on the Premises, including times and manner for hunting and removing game (and keeping of any applicable records), handling and discharging firearms, operating motor vehicles, and consuming alcoholic beverages; (iii) Tenant's use of any existing structure, improvement, or equipment that Tenant is permitted to use pursuant to this lease; or (iv) Tenant's use of any structure, improvement, or equipment erected or installed by Tenant on the Premises in accordance with this lease.

B.1.d. Pay, in advance, without demand, Base Rent to Landlord at Landlord's Address.

B.1.e. Pay for all utility services used by Tenant.

B.1.f. Pay all taxes on Tenant's property located on the Premises.

B.1.g. Repair, replace, and maintain any part of the crops, livestock, or Improvements damaged by Tenant.

B.1.h. Operate vehicles on the Land in a manner that will not damage existing roads, trails, or vegetation.

B.1.i. Keep all gates on the Land closed and locked.

B.1.j. Enter and exit the Premises only at those places designated by Landlord.

B.1.k. Vacate the Premises on the last day of the Term.

B.1.l. Maintain the insurance coverages described in the attached Insurance Addendum.

B.1.m. Properly supervise all persons present on the Premises at the invitation or request of Tenant.

B.1.n. Deliver to Landlord a Release, Indemnity, and Assumption of Risks in the form attached to this lease as Exhibit B, executed by each individual (including Tenant) who will enter the Premises at the invitation or request of Tenant before entry by any such individual.

B.1.o. INDEMNIFY, DEFEND, AND HOLD LANDLORD AND LANDLORD'S AGENTS HARMLESS FROM ANY INJURY (AND ANY RESULTING OR RELATED CLAIM, ACTION, LOSS, LIABILITY, OR REASONABLE EXPENSE, INCLUDING ATTORNEY'S FEES AND OTHER FEES AND COURT AND OTHER COSTS) ARISING FROM OR RELATED TO TENANT'S OR TENANT'S AGENTS' USE OF THE PREMISES IF CAUSED IN WHOLE OR IN PART BY THE ACTS OR OMISSIONS OF TENANT OR ITS

AGENTS, INCLUDING IN WHOLE OR IN PARTY BY THE NEGLIGENT ACTS OR OMISSIONS OF TENANT OR ITS AGENTS. **THE INDEMNITY CONTAINED IN THIS PARAGRAPH (i) IS INDEPENDENT OF TENANT'S INSURANCE, (ii) WILL SURVIVE THE END OF THE TERM, AND (iii) WILL APPLY EVEN IF AN INJURY IS CAUSED IN PART BY THE ORDINARY NEGLIGENCE OR STRICT LIABILITY OF LANDLORD OR LANDLORD'S AGENTS BUT WILL NOT APPLY TO THE EXTENT AN INJURY IS CAUSED IN WHOLE OR IN PART BY THE GROSS NEGLIGENCE OR WILLFUL MISCONDUCT OF LANDLORD OR LANDLORD'S AGENTS.**

B.2. **Tenant agrees not to—**

B.2.a. Use the Premises for any purpose other than the Permitted Use.

B.2.b. Create or allow a nuisance or permit any waste or injury to the Premises or the crops or livestock thereon.

B.2.c. Change Landlord's lock system.

B.2.d. Alter the Premises, including clearing new roads or trails, digging ponds or tanks, moving or erecting any fences, or locating on the Premises any type of manufactured housing or mobile home.

B.2.e. Allow a lien to be placed on the Premises.

B.2.f. Assign this lease or sublease any portion of the Premises without Landlord's written consent.

B.2.g. Litter or leave trash, debris, or shell casings on the Premises.

B.2.h. Allow anyone other than those persons listed in Exhibit A to hunt on the Premises.

B.2.i. Construct any kennel, blind, feeder, or stand on the Premises without Landlord's prior written consent.

C. Landlord's Obligations

C.1. **Landlord agrees to—**

C.1.a. Lease to Tenant the Premises for the entire Term beginning on the Commencement Date and ending on the Termination Date.

C.1.b. Obey all laws relating to Landlord's operation of the Premises.

C.2. **Landlord agrees not to—**

C.2.a. Allow any use of the Premises inconsistent with Tenant's Permitted Use as long as Tenant is not in default.

C.2.b. Unreasonably withhold consent to a proposed assignment or sublease.

D. General Provisions

Landlord and Tenant agree to the following:

D.1. Alterations. Any physical additions or improvements to the Premises made by Tenant will become the property of Landlord. Landlord may require that Tenant, at termination of this lease and at Tenant's expense, remove any physical additions and improvements, repair any alterations, and restore the Premises to the condition existing at the Commencement Date, normal wear excepted.

D.2. Abatement. Tenant's covenant to pay Rent and Landlord's covenants are independent. Except as otherwise provided, Tenant may not abate Rent for any reason.

D.3. Release of Claims. TENANT RELEASES LANDLORD AND LANDLORD'S AGENTS FROM ALL CLAIMS OR LIABILITIES FOR ANY INJURY TO TENANT AND TENANT'S AGENTS WHILE PRESENT ON THE PREMISES OR TO TENANT'S OR TENANT'S AGENTS' PROPERTY LOCATED ON THE PREMISES. **THE RELEASE IN THIS PARAGRAPH WILL APPLY EVEN IF THE DAMAGE OR LOSS IS CAUSED IN WHOLE OR IN PART BY THE ORDINARY NEGLIGENCE OR STRICT LIABILITY OF LANDLORD OR LANDLORD'S AGENTS BUT WILL NOT APPLY TO THE EXTENT THE DAMAGE OR LOSS IS CAUSED IN WHOLE OR IN PART BY THE GROSS NEGLIGENCE OR WILLFUL MISCONDUCT OF LANDLORD OR LANDLORD'S AGENTS.**

D.4. Condemnation/Substantial or Partial Taking

D.4.a. If the Premises cannot be used for the Permitted Use because of condemnation or purchase in lieu of condemnation, this lease will terminate.

D.4.b. If there is a condemnation or purchase in lieu of condemnation and this lease is not terminated, the Rent payable during the unexpired portion of the Term will be adjusted as may be fair and reasonable.

D.4.c. Tenant will have no claim to the condemnation award or proceeds in lieu of condemnation.

D.5. Default by Landlord/Events. A default by Landlord is the failure to comply with any provision of this lease that is not cured within thirty days after written notice.

D.6. Default by Landlord/Tenant's Remedies. Tenant's remedies for Landlord's default are to sue for damages and terminate this lease.

D.7. Default by Tenant/Events. Defaults by Tenant are (a) failing to pay Rent timely, (b) abandoning the Premises or vacating a substantial portion of the Premises, and (c) failing to comply within ten days after written notice with any provision of this lease other than the defaults set forth in (a) and (b).

D.8. Default by Tenant/Landlord's Remedies. Landlord's remedies for Tenant's default are to (a) enter and take possession of the Premises and sue for Rent as it accrues; (b) enter and take possession of the Premises, after which Landlord may relet the Premises on behalf of Tenant and receive the Rent directly by reason of the reletting, and Tenant agrees to reimburse Landlord for any expenditures made in order to relet; (c) enter the Premises and perform Tenant's obligations; and (d) terminate this lease by written notice and sue for damages. Landlord may enter and take possession of the Premises by self-help, by picking or changing locks if necessary, and may lock out Tenant or any other person who may be hunting on the Premises, until the default is cured, without being liable for damages.

D.9. Default/Waiver. All waivers must be in writing and signed by the waiving party. Landlord's failure to enforce any provisions of this Lease or its acceptance of late installments of Rent will not be a waiver and will not estop Landlord from enforcing that provision or any other provision of this Lease in the future.

D.10. Mitigation. Landlord has mitigated the loss of rent if Landlord, within thirty days after Tenant's loss of possession, (a) places a "For Lease" sign at the Premises, (b) places the Premises on Landlord's inventory of properties for lease, (c) makes Landlord's inventory available to area brokers on a monthly basis, (d) advertises the Premises for lease in a suitable trade journal in the county in which the Premises are located, and (e) shows the Premises to prospective tenants who request to see it.

D.11. Holdover. If Tenant does not vacate the Premises following termination of this lease, Tenant will become a tenant at will and must vacate the Premises on receipt of notice from Landlord. No holding over by Tenant, whether with or without the consent of Landlord, will extend the Term.

D.12. Alternative Dispute Resolution. Landlord and Tenant agree to mediate in good faith before filing a suit for damages.

D.13. Attorney's Fees. If either party retains an attorney to enforce this lease, the party prevailing in litigation is entitled to recover reasonable attorney's fees and other fees and court and other costs.

D.14. Venue. Exclusive venue is in the county in which the Premises are located.

D.15. Entire Agreement. This lease, its exhibits, addenda, and riders are the entire agreement of the parties concerning the lease of the Premises by Landlord to Tenant. There are no representations, warranties, agreements, or promises pertaining to the Premises or the lease of the Premises by Landlord to Tenant, and Tenant is not relying on any statements or representations of any agent of Landlord, that are not in this lease and any exhibits, addenda, and riders.

D.16. Amendment of Lease. This lease may be amended only by an instrument in writing signed by Landlord and Tenant.

D.17. Limitation of Warranties. THERE ARE NO IMPLIED WARRANTIES OF MERCHANTABILITY, OF FITNESS FOR A PARTICULAR PURPOSE, OR OF ANY OTHER KIND ARISING OUT OF THIS LEASE, AND THERE ARE NO WARRANTIES THAT EXTEND BEYOND THOSE EXPRESSLY STATED IN THIS LEASE.

D.18. Notices. Any notice required or permitted under this lease must be in writing. Any notice required by this lease will be deemed to be given (whether received or not) the earlier of receipt or three business days after being deposited with the United States Postal Service, postage prepaid, certified mail, return receipt requested, and addressed to the intended recipient at the address shown in this lease. Notice may also be given by regular mail, personal delivery, courier delivery, or e-mail and will be effective when received. Any address for notice may be changed by written notice given as provided herein.

D.19. Mineral Interests. This lease is subordinate to any present or future oil, gas, or other mineral exploration agreements and leases relating to the Land. Landlord will not be liable to Tenant for any damages for actions attributable to those agreements and will receive all consideration paid therefor.

D.20. Landlord's Use. Landlord, both for Landlord and for third parties, retains the right to enter on and use the Land for grazing, farming, erecting telecommunications towers or antennas, and other uses that do not materially interfere with the Permitted Use.

D.21. Identity. Landlord reserves the right to verify the identity of all persons on the Premises.

D.22. Option to Terminate. Landlord will have the option to terminate this lease with respect to any portion of the Land that is sold. Landlord's option will be exercisable by written notice delivered to Tenant no later than thirty days before the date of termination. The Rent payable during the unexpired portion of the Term will be adjusted as may be fair and reasonable. Tenant will receive a refund of any prepaid Base Rent fairly and reasonably allocable to the portion of the Premises for which this lease has been terminated.

If applicable, include additional clauses like those suggested in form 25-13 in this chapter and/or a list of exhibits and riders.

_____

[Name of landlord]

_____

[Name of tenant]

Insurance Addendum to Hunting Lease

The landowner's liability for injuries and damages from the tenant's use of the property may be limited by compliance with the requirements of Tex. Civ. Prac. & Rem. Code ch. 75.

Lease

Date:

Landlord:

Tenant:

This insurance addendum is part of the lease.

Tenant agrees to—

1. Maintain the property and/or liability insurance policies required below (mark applicable boxes) during the lease Term and any period before or after the lease Term when Tenant is present on the Premises:

Type of Insurance	**Minimum Policy Limit**	
If Tenant is an individual:		
☐ Hunting lease liability	Per occurrence:	$_____
	Aggregate:	$_____
Or		
☐ Endorsement extending homeowner's policy liability to Premises		
☐ Texas personal auto	Minimum limits required by law	

If Tenant is a business entity:

☐	Hunting lease liability	Per occurrence: Aggregate:	$_____ $_____
☐	Business automobile		$_____

Or

☐	Texas personal auto	Minimum limits required by law

2. Comply with the following additional insurance requirements: (a) the hunting lease liability or homeowner's insurance policy must be endorsed to name Landlord as "additional insured," (b) additional insured endorsements must not exclude coverage for the ordinary negligence of Landlord, (c) any property insurance policies covering Tenant's property on the Premises must contain a waiver of subrogation of claims against Landlord, and (d) certificates of insurance and copies of any additional insured and waiver of subrogation endorsements must be delivered by Tenant to Landlord before entering the Premises and thereafter at least ten days before the expiration of the policies.

Exhibit A

Individuals Who Will Hunt on the Premises

List names of those individuals who are permitted to hunt on the premises.

Exhibit B

Release, Indemnity, and Assumption of Risks

Lease

Date:

Landlord:

Tenant:

1. *Assumption of Risks.* THE UNDERSIGNED ACKNOWLEDGES THAT (a) DANGEROUS NATURAL OR MAN-MADE CONDITIONS MAY EXIST OR OCCUR ON THE PREMISES DESCRIBED IN THE LEASE, INCLUDING STREAMS AND RIVERS WITH CURRENTS AND WATER THAT MAY BE DEEP OR FLOOD, HAZARDOUS DRIVING AND WALKING CONDITIONS, UNEVEN TERRAIN, THE PRESENCE OF WILD, DOMESTIC, POISONOUS, OR DISEASED ANIMALS, ELEVATED HUNTING STANDS, AND/OR CAMOUFLAGED SUNKEN HUNTING BLINDS; AND (b) HUNTING IS AN INHERENTLY DANGEROUS ACTIVITY INVOLVING THE USE OF FIREARMS AND OTHER LETHAL IMPLEMENTS AND THE PRESENCE OF OTHER HUNTERS. THE UNDERSIGNED ASSUMES ALL SUCH DANGERS AND RISKS.

2. *Indemnity.* THE UNDERSIGNED WILL INDEMNIFY, DEFEND, AND HOLD LANDLORD AND ITS AGENTS, EMPLOYEES, INVITEES, LICENSEES, OR VISITORS (COLLECTIVELY, "LANDLORD") HARMLESS AGAINST ALL CLAIMS, DAMAGES, AND COSTS (COLLECTIVELY, "CLAIMS") INCURRED BY OR ALLEGED AGAINST LANDLORD AND ARISING OUT OF OR RELATING TO ANY ACT OR OMISSION OF THE UNDERSIGNED OR ANY OF THE UNDERSIGNED'S AGENTS, EMPLOYEES, CONTRACTORS, LICENSEES, OR VISITORS (COLLECTIVELY, "HUNTER") WHILE AT THE PREMISES, INCLUDING ANY CLAIMS BASED ON ANY (a) INJURY TO OR DEATH OF ANY PERSON(S), (b) DAMAGE TO OR LOSS OF PROPERTY, OR (c) FAILURE OF HUNTER TO COMPLY WITH ANY APPLICABLE LAWS OR THE LEASE.

3. *Release.* THE UNDERSIGNED WAIVES ALL CLAIMS AGAINST LANDLORD AND RELEASES LANDLORD FROM ANY LIABILITY, BASED ON ANY (a) INJURY TO OR DEATH OF HUNTER OR (b) DAMAGE TO OR LOSS OF ANY PROPERTY BELONGING TO HUNTER.

4. *Negligence of Landlord.* **THE FOREGOING INDEMNITIES, WAIVERS, AND RELEASES WILL APPLY EVEN IF THE INCIDENT GIVING RISE TO THE CLAIM IS CAUSED IN WHOLE OR IN PART BY THE CONDITION OF THE PREMISES OR BY THE SOLE OR CONCURRENT ORDINARY NEGLIGENCE OF LANDLORD (BUT NOT THE GROSS NEGLIGENCE OR WILLFUL MISCONDUCT OF LANDLORD).**

_____

[Name of tenant]

[Date]

Form 25-8

Agricultural Lease

Basic Information

Date:

Landlord:

Landlord's Address:

Tenant:

Tenant's Address:

Premises: SURFACE ONLY of approximately [**number**] acres of land, situated in [**county**] County, Texas, as described in Exhibit [**exhibit number/letter**] ("Land").

Include or attach any additional necessary legal description.

The Premises do not include and Tenant will not be permitted to use the Excluded Improvements.

Excluded Improvements: Any structure, improvement, or equipment situated on the Land and constructed or installed by any person other than Tenant, except for the following: [**specify**].

Base Rent:

Select as applicable.

$[**amount**] payable on execution of this lease.

And/Or

$[**amount**] (monthly) due on the first day of the month

And/Or

[**percent**] percent of all cotton produced on the Premises delivered to the gin of Tenant's choice.

And/Or

[**percent**] percent of all corn, wheat, and other grains produced on the Premises delivered at the turn row.

And/Or

[**percent**] percent of all crops produced on and harvested from the Premises.

And/Or

[**percent**] percent of the gross sales proceeds from the sale of all [**specify**] raised on and harvested from the Premises less [**percent**] percent of the cost of [**specify**] payable on the sale of the [**specify**].

And/Or

[**percent**] percent of all USDA agricultural program payments.

Continue with the following.

Term (months):

Commencement Date:

Termination Date:

Security Deposit:

Permitted Use: Solely for planting, raising, and harvesting [**specify**] and no other purpose.

Tenant's Insurance: As required by Insurance Addendum

A. Definitions

A.1. "Agent" means agents, contractors, employees, licensees, and, to the extent under the control of the principal, invitees.

A.2. "Injury" means (a) harm to or impairment or loss of property or its use or (b) harm to or death of a person.

A.3. "Rent" means Base Rent plus any other amounts of money payable by Tenant to Landlord.

B. Tenant's Obligations

B.1. **Tenant agrees to—**

B.1.a. Lease the Premises for the entire Term beginning on the Commencement Date and ending on the Termination Date.

B.1.b. Accept the Premises in their present condition "AS IS," the Premises being currently suitable for the Permitted Use.

B.1.c. Obey all laws relating to Tenant's use, maintenance of condition, and occupancy of the Premises, including the rules and regulations of the United States Department of Agriculture and the Texas Agriculture Commissioner.

B.1.d. Pay the Base Rent when it is due, without demand, to Landlord at Landlord's Address.

B.1.e. Pay a late charge of 5 percent of any Rent not received by Landlord by the tenth day after it is due.

B.1.f. Pay for all labor, fuel, and utility services used by Tenant.

B.1.g. Pay all taxes on the crops raised on and Tenant's property located on the Premises.

B.1.h. Allow Landlord to enter the Premises to inspect the Premises and show the Premises to prospective purchasers or tenants.

B.1.i. Repair, replace, and maintain any part of the Premises used by Tenant.

B.1.j. Repair any damage to the Premises, Land, or Excluded Improvements caused by Tenant.

B.1.k. Maintain the insurance coverages described in the attached Insurance Addendum.

B.1.l. INDEMNIFY, DEFEND, AND HOLD LANDLORD AND LANDLORD'S AGENTS HARMLESS FROM ANY INJURY (AND ANY RESULTING OR RELATED CLAIM, ACTION, LOSS, LIABILITY, OR REASONABLE EXPENSE, INCLUDING ATTORNEY'S FEES AND OTHER FEES AND COURT AND OTHER COSTS) ARISING OUT OF TENANT'S OR TENANT'S AGENTS' USE OF THE PREMISES IF CAUSED IN WHOLE OR IN PART BY THE ACTS OR OMISSIONS OF TENANT OR ITS AGENTS, INCLUDING IN WHOLE OR IN PART BY THE NEGLIGENT ACTS OR OMISSIONS OF TENANT OR ITS AGENTS. **THE INDEMNITY CONTAINED IN THIS PARAGRAPH (i) IS INDEPENDENT OF TENANT'S INSURANCE, (ii) WILL NOT BE LIMITED BY COMPARATIVE NEGLIGENCE STATUTES OR DAMAGES PAID UNDER THE WORKERS' COMPENSATION ACT OR SIMILAR EMPLOYEE BENEFIT ACTS, (iii) WILL SURVIVE THE END OF THE TERM, AND (iv) WILL APPLY EVEN IF AN INJURY IS CAUSED IN PART BY THE ORDINARY NEGLIGENCE OR STRICT LIABILITY OF LANDLORD OR LANDLORD'S AGENTS BUT WILL NOT APPLY TO THE EXTENT AN INJURY IS CAUSED IN WHOLE OR IN PART BY THE GROSS NEGLIGENCE OR WILLFUL MISCONDUCT OF LANDLORD OR LANDLORD'S AGENTS.**

B.1.m. Deliver to Landlord a financing statement perfecting the security interest.

B.1.n. Vacate the Premises on the last day of the Term.

B.1.o. Pay all costs of planting, raising, and harvesting the crops, unless Landlord elects to receive payment in kind, in which case costs will be shared in the same proportion as the crops.

B.1.p. Cultivate the Premises in a timely, thorough, and farmer-like manner, employing the best methods of farming customarily practiced on like crops in the area.

B.1.q. Maintain adequate records on all matters related to farming the Premises and provide Landlord with a copy.

B.1.r. Keep all gates on the Premises closed and locked.

B.1.s. Enter and exit the Premises only at those places designated by Landlord.

B.2. **Tenant agrees not to—**

B.2.a. Use the Premises for any purpose other than the Permitted Use.

B.2.b. Create or allow a nuisance or permit any waste of the Premises.

B.2.c. Change Landlord's lock system.

B.2.d. Alter the Premises, including clearing new roads, moving or erecting any fences, or locating on the Premises any type of manufactured housing or mobile home.

B.2.e. Assign this lease or sublease any portion of the Premises without Landlord's written consent.

B.2.f. Make any new or change any existing agreement with any governmental entity.

B.2.g. Hunt or fish on the Land or allow anyone else to do so.

B.2.h. Litter or leave trash or debris on the Premises.

B.2.i. Allow a lien to be placed on the Premises.

Include the following if applicable.

B.2.j. Allow a lien to be placed on the crops raised on or harvested from the Premises.

Continue with the following.

C. Landlord's Obligations

C.1. **Landlord agrees to—**

C.1.a. Lease to Tenant the Premises for the entire Term beginning on the Commencement Date and ending on the Termination Date.

C.1.b. Return the Security Deposit to Tenant, less itemized deductions, if any, on or before the sixtieth day after the date Tenant surrenders the Premises.

C.1.c. Obey all laws relating to Landlord's operation of the Premises.

C.2. **Landlord agrees not to—**

C.2.a. Allow any use of the Premises inconsistent with the Permitted Use as long as Tenant is not in default.

C.2.b. Unreasonably withhold consent to a proposed assignment or sublease.

D. General Provisions

Landlord and Tenant agree to the following:

D.1. Alterations. Any physical additions or improvements to the Premises made by Tenant will become the property of Landlord. Landlord may require that Tenant, at termination of this lease and at Tenant's expense, remove any physical additions and improvements, repair any alterations, and restore the Premises to the condition existing at the Commencement Date, normal wear excepted.

D.2. Abatement. Tenant's covenant to pay Rent and Landlord's covenants are independent. Except as otherwise provided, Tenant may not abate Rent for any reason.

D.3. Release of Claims/Subrogation. TENANT RELEASES LANDLORD AND LANDLORD'S AGENTS FROM ALL CLAIMS OR LIABILITIES FOR ANY INJURY TO TENANT AND TENANT'S AGENTS OR TO TENANT'S OR TENANT'S AGENTS' PROPERTY LOCATED ON THE PREMISES. **THE RELEASE IN THIS PARAGRAPH WILL APPLY EVEN IF THE DAMAGE OR LOSS IS CAUSED IN WHOLE OR IN PART BY THE ORDINARY NEGLIGENCE OR STRICT LIABILITY OF LANDLORD OR LANDLORD'S AGENTS BUT WILL NOT APPLY TO THE EXTENT THE DAMAGE OR LOSS IS CAUSED IN WHOLE OR IN PART BY THE GROSS NEGLIGENCE OR WILLFUL MISCONDUCT OF LANDLORD OR LANDLORD'S AGENTS.**

D.4. Condemnation/Substantial or Partial Taking

D.4.a. If the Premises cannot be used for the Permitted Use because of condemnation or purchase in lieu of condemnation, this lease will terminate.

D.4.b. If there is a condemnation or purchase in lieu of condemnation and this lease is not terminated, the Rent payable during the unexpired portion of the Term will be adjusted as may be fair and reasonable.

D.4.c. Tenant will have no claim to the condemnation award or proceeds in lieu of condemnation.

D.5. Landlord's Lien. Tenant grants to Landlord a security interest in the collateral to secure payment and performance by Tenant of all obligations and payments due from Tenant under this lease. The collateral will include all of Tenant's crops, livestock, and personal property located or to be located on the Premises, and all products, proceeds, offspring, increase, governmental payments, insurance proceeds, documents of title, and warehouse receipts relating to such property.

This lease is a security agreement under both article 9 of the Texas Business and Commerce Code and the federal Food Security Act of 1985. Landlord may file financing statements or continuation statements to perfect or continue the perfection of the security interest. Tenant agrees to furnish to Landlord a list of the names and addresses of any buyer, commission merchant, or selling agent to or through whom Tenant may sell the collateral. Tenant agrees to notify Landlord of the identity of any buyer, commission merchant, selling agent, or warehouse to or with whom Tenant intends to sell or store the collateral within seven days before any sale or storage of the collateral.

D.6. Default by Landlord/Events. A default by Landlord is the failure to comply with any provision of this lease that is not cured within thirty days after written notice.

D.7. Default by Landlord/Tenant's Remedies. Tenant's remedies for Landlord's default are to sue for damages and terminate this lease.

D.8. Default by Tenant/Events. Defaults by Tenant are (a) failing to pay Rent timely, (b) abandoning the Premises or vacating a substantial portion of the Premises, and (c) failing to comply within ten days after written notice with any provision of this lease other than the defaults set forth in (a) and (b).

D.9. Default by Tenant/Landlord's Remedies. Landlord's remedies for Tenant's default are to (a) enter and take possession of the Premises and sue for Rent as it accrues; (b) enter and take possession of the Premises, after which Landlord may relet the Premises on

behalf of Tenant and receive the Rent directly by reason of the reletting, and Tenant agrees to reimburse Landlord for any expenditures made in order to relet; (c) enter the Premises and perform Tenant's obligations; and (d) terminate this lease by written notice and sue for damages. Landlord may enter and take possession of the Premises by self-help, by picking or changing locks if necessary, and may lock out Tenant or any other person who may be farming the Premises, until the default is cured, without being liable for damages.

D.10. Default/Waiver. All waivers must be in writing and signed by the waiving party. Landlord's failure to enforce any provisions of this Lease or its acceptance of late installments of Rent will not be a waiver and will not estop Landlord from enforcing that provision or any other provision of this Lease in the future.

D.11. Mitigation. Landlord has mitigated the loss of rent if Landlord, within thirty days after Tenant's loss of possession, (a) places a "For Lease" sign at the Premises, (b) places the Premises on Landlord's inventory of properties for lease, (c) makes Landlord's inventory available to area brokers on a monthly basis, (d) advertises the Premises for lease in a suitable trade journal in the county in which the Premises are located, and (e) shows the Premises to prospective tenants who request to see it.

D.12. Security Deposit. If Tenant defaults, Landlord may use the Security Deposit to pay arrears of Rent, to repair any damage or injury, or to pay any expense or liability incurred by Landlord as a result of the default.

D.13. Holdover. If Tenant does not vacate the Premises following termination of this lease, Tenant will become a tenant at will and must vacate the Premises on receipt of notice from Landlord. No holding over by Tenant, whether with or without the consent of Landlord, will extend the Term.

D.14. Alternative Dispute Resolution. Landlord and Tenant agree to mediate in good faith before filing a suit for damages.

D.15. Attorney's Fees. If either party retains an attorney to enforce this lease, the party prevailing in litigation is entitled to recover reasonable attorney's fees and other fees and court and other costs.

D.16. Venue. Exclusive venue is in the county in which the Premises are located.

D.17. Entire Agreement. This lease, its exhibits, addenda, and riders are the entire agreement of the parties concerning the lease of the Premises by Landlord to Tenant. There are no representations, warranties, agreements, or promises pertaining to the Premises or the lease of the Premises by Landlord to Tenant, and Tenant is not relying on any statements or representations of any agent of Landlord, that are not in this lease and any exhibits, addenda, and riders.

D.18. Amendment of Lease. This lease may be amended only by an instrument in writing signed by Landlord and Tenant.

D.19. Limitation of Warranties. THERE ARE NO IMPLIED WARRANTIES OF MERCHANTABILITY, OF FITNESS FOR A PARTICULAR PURPOSE, OR OF ANY OTHER KIND ARISING OUT OF THIS LEASE, AND THERE ARE NO WARRANTIES THAT EXTEND BEYOND THOSE EXPRESSLY STATED IN THIS LEASE.

D.20. Notices. Any notice required or permitted under this lease must be in writing. Any notice required by this lease will be deemed to be given (whether received or not) the earlier of receipt or three business days after being deposited with the United States Postal Service, postage prepaid, certified mail, return receipt requested, and addressed to the intended recipient at the address shown in this lease. Notice may also be given by regular mail, personal delivery, courier delivery, or e-mail and will be effective when received. Any address for notice may be changed by written notice given as provided herein.

D.21. Mineral Interests. This lease is subordinate to any present or future oil, gas, or other mineral exploration agreements and leases relating to the Land. Landlord will not be liable to Tenant for any damages for actions attributable to those agreements and will receive all consideration paid therefor. Any damages to growing crops arising from an oil, gas, or mineral interest will be divided between Landlord and Tenant in the same proportions as the crops are divided.

D.22. Landlord's Use. Landlord retains the right to enter on and use and/or permit third parties to enter on and use the Premises for hunting, fishing, and other uses that do not materially interfere with Tenant's farming rights.

D.23. Crops Grown for Tenant's Use. If Tenant uses any of the Premises for crops for Tenant's use, Tenant will obtain Landlord's written consent and will pay Landlord the average market price for the crop harvested.

D.24. Marketing Landlord's Share. If Landlord elects to receive payment in kind, Landlord will give written notice to Tenant within [**number**] days after the Commencement Date. Landlord's share will be delivered to Landlord in [**county**] County, Texas.

D.25. Governmental Payments. If Tenant receives any payment from any governmental agency because of growing or not growing crops on the Premises and the Rent payable hereunder is based on a crop share, that payment will be divided between Tenant and Landlord in the same proportion as set out in the Rent clause.

Include the following if applicable.

D.26. Tenant's Use of Water

D.26.a. Surface. [**Describe permitted use, if any.**]

D.26.b. Subsurface. [**Describe permitted use, if any.**]

If applicable, include additional clauses like those suggested in form 25-13 in this chapter and/or a list of exhibits and riders.

_____

[**Name of landlord**]

_____

[**Name of tenant**]

Insurance Addendum to Lease

Lease

Date:

Landlord:

Tenant:

This insurance addendum is part of the lease.

Tenant agrees to—

1. Maintain the liability insurance policies required below (mark applicable boxes) during the Term and any period before or after the Term when Tenant is present on the Premises:

	Type of Insurance	**Minimum Policy Limit**	
☐	Commercial general liability (occurrence basis) endorsed to cover farm operations	Per occurrence: Aggregate:	$_____ $_____

Or

☐	Farm owner's on a renter's form such as AAIS Form No. FO-4		

Or

☐	Farm liability policy		
☐	Workers' compensation	$500,000	
☐	Employer's liability	$_____	
☐	Business automobile liability	$_____	
☐	Umbrella/excess liability (occurrence basis)	$_____	

2. Comply with the following additional insurance requirements:

   a. All liability policies must be endorsed to name Landlord as an "additional insured" on a form that does not exclude coverage for the sole or contributory ordinary negligence of Landlord and must not be endorsed to exclude the sole negligence of Landlord from the definition of "insured contract."

   b. Certificates of insurance and copies of any additional insured and waiver of subrogation endorsements must be delivered by Tenant to Landlord before entering the Premises and thereafter at least ten days before the expiration of the policies.

Form 25-9

Grazing Lease

Basic Information

Date:

Landlord:

Landlord's Address:

Tenant:

Tenant's Address:

Premises: SURFACE ONLY of approximately [**number**] acres of land, situated in [**county**] County, Texas, as described in Exhibit [**exhibit number/letter**] ("Land").

Include or attach any additional necessary legal description.

The Premises do not include crops or Excluded Improvements located on the Land. Tenant will not be permitted to use the Excluded Improvements.

Excluded Improvements: Any structure, improvement, or equipment situated on the Land and constructed or installed by any person other than Tenant, except for the following: [**specify**].

Term (months):

Commencement Date:

Termination Date:

Permitted Use: Solely for grazing of [**specify**].

Base Rent (monthly):

Security Deposit:

Tenant's Insurance: As required by Insurance Addendum

A. Definitions

A.1. "Agent" means agents, contractors, employees, licensees, and, to the extent under the control of the principal, invitees.

A.2. "Injury" means (a) harm to or impairment or loss of property or its use or (b) harm to or death of a person.

A.3. "Rent" means Base Rent plus any other amounts of money payable by Tenant to Landlord.

B. Tenant's Obligations

B.1. **Tenant agrees to—**

B.1.a. Lease the Premises for the entire Term beginning on the Commencement Date and ending on the Termination Date.

B.1.b. Accept the Premises in their present condition "AS IS," the Premises being currently suitable for the Permitted Use.

B.1.c. Obey all laws relating to Tenant's use, maintenance of condition, and occupancy of the Premises.

B.1.d. Pay monthly, in advance, without demand, on the first day of the month, the Base Rent to Landlord at Landlord's Address.

B.1.e. Pay a late charge of 5 percent of any Rent not received by Landlord by the tenth day after it is due.

B.1.f. Pay for all labor, fuel, and utility services used by Tenant.

B.1.g. Pay all taxes on Tenant's property located on the Premises.

B.1.h. Allow Landlord to inspect the Premises and show the Premises to prospective purchasers or tenants.

B.1.i. Repair, replace, and maintain any part of the Premises used by Tenant.

B.1.j. Repair any damage to the Premises, Land, or Excluded Improvements caused by Tenant.

B.1.k. Maintain the insurance coverages described in the attached Insurance Addendum.

B.1.l. INDEMNIFY, DEFEND, AND HOLD LANDLORD AND LANDLORD'S AGENTS HARMLESS FROM ANY INJURY (AND ANY RESULTING OR RELATED CLAIM, ACTION, LOSS, LIABILITY, OR REASONABLE EXPENSE, INCLUDING ATTORNEY'S FEES AND OTHER FEES AND COURT AND OTHER COSTS) ARISING OUT OF TENANT'S OR TENANT'S AGENTS' USE OF THE PREMISES IF CAUSED IN WHOLE OR IN PART BY THE ACTS OR OMISSIONS OF TENANT OR ITS AGENTS, INCLUDING IN WHOLE OR IN PART BY THE NEGLIGENT ACTS OR OMISSIONS OF TENANT OR ITS AGENTS. **THE INDEMNITY CONTAINED IN THIS PARAGRAPH (i) IS INDEPENDENT OF TENANT'S INSURANCE, (ii) WILL NOT BE LIMITED BY COMPARATIVE NEGLIGENCE STATUTES OR DAMAGES PAID UNDER THE WORKERS' COMPENSATION ACT OR SIMILAR EMPLOYEE BENEFIT ACTS, (iii) WILL SURVIVE THE END OF THE TERM, AND (iv) WILL APPLY EVEN IF AN INJURY IS CAUSED IN PART BY THE ORDINARY NEGLIGENCE OR STRICT LIABILITY OF LANDLORD OR LANDLORD'S AGENTS BUT WILL NOT APPLY TO THE EXTENT**

AN INJURY IS CAUSED IN WHOLE OR IN PART BY THE GROSS NEGLIGENCE OR WILLFUL MISCONDUCT OF LANDLORD OR LANDLORD'S AGENTS.

B.1.m. Deliver to Landlord a financing statement perfecting the security interest.

B.1.n. Vacate the Premises on the last day of the Term.

B.1.o. Use the highest standards of animal husbandry in grazing the Premises.

B.1.p. Keep all gates on the Premises closed and locked.

B.1.q. Enter and exit the Premises at those places designated by Landlord.

B.2. **Tenant agrees not to—**

B.2.a. Use the Premises for any purpose other than the Permitted Use.

B.2.b. Create or allow a nuisance or permit any waste of the Premises.

B.2.c. Change Landlord's lock system.

B.2.d. Alter the Premises, including clearing new roads, moving or erecting any fences, or locating on the Premises any type of manufactured housing or mobile home.

B.2.e. Allow a lien to be placed on the Premises.

B.2.f. Assign this lease or sublease any portion of the Premises without Landlord's written consent.

B.2.g. Graze more than [**number**] head of [**specify**] on the Premises.

B.2.h. Hunt or fish on the Land or allow anyone else to do so.

B.2.i. Litter or leave trash or debris on the Premises.

C. Landlord's Obligations

C.1. **Landlord agrees to—**

C.1.a. Lease to Tenant the Premises for the entire Term beginning on the Commencement Date and ending on the Termination Date.

C.1.b. Return the Security Deposit to Tenant, less itemized deductions, if any, on or before the sixtieth day after the date Tenant surrenders the Premises.

C.1.c. Obey all laws relating to Landlord's operation of the Premises.

C.2. **Landlord agrees not to—**

C.2.a. Allow any use of the Premises inconsistent with the Permitted Use as long as Tenant is not in default.

C.2.b. Unreasonably withhold consent to a proposed assignment or sublease.

D. General Provisions

Landlord and Tenant agree to the following:

D.1. Alterations. Any physical additions or improvements to the Premises made by Tenant will become the property of Landlord. Landlord may require that Tenant, at termination of this lease and at Tenant's expense, remove any physical additions and improvements, repair any alterations, and restore the Premises to the condition existing at the Commencement Date, normal wear excepted.

D.2. Abatement. Tenant's covenant to pay Rent and Landlord's covenants are independent. Except as otherwise provided, Tenant may not abate Rent for any reason.

D.3. Release of Claims. TENANT RELEASES LANDLORD AND LANDLORD'S AGENTS FROM ALL CLAIMS OR LIABILITIES FOR ANY INJURY TO TENANT AND TENANT'S AGENTS OR TO TENANT'S OR TENANT'S AGENTS' PROPERTY LOCATED ON THE PREMISES. **THE RELEASE IN THIS PARAGRAPH WILL APPLY EVEN IF THE DAMAGE OR LOSS IS CAUSED IN WHOLE OR IN PART BY THE ORDINARY NEGLIGENCE OR STRICT LIABILITY OF LANDLORD OR LANDLORD'S AGENTS BUT WILL NOT APPLY TO THE EXTENT THE DAMAGE OR LOSS IS CAUSED IN WHOLE OR IN PART BY THE GROSS NEGLIGENCE OR WILLFUL MISCONDUCT OF LANDLORD OR LANDLORD'S AGENTS.**

D.4. Condemnation/Substantial or Partial Taking

D.4.a. If the Premises cannot be used for the Permitted Use because of condemnation or purchase in lieu of condemnation, this lease will terminate.

D.4.b. If there is a condemnation or purchase in lieu of condemnation and this lease is not terminated, the Rent payable during the unexpired portion of the Term will be adjusted as may be fair and reasonable.

D.4.c. Tenant will have no claim to the condemnation award or proceeds in lieu of condemnation.

D.5. Landlord's Lien. Tenant grants to Landlord a security interest in the collateral to secure payment and performance by Tenant of all obligations and payments due from Tenant under this lease. The collateral will include all of Tenant's crops, livestock, and personal property located or to be located on the Premises, and all products, proceeds, offspring, increase, governmental payments, insurance proceeds, documents of title, and warehouse receipts relating to such property.

This lease is a security agreement under both chapter 9 of the Texas Business and Commerce Code and the federal Food Security Act of 1985. Landlord may file financing state-

ments or continuation statements to perfect or continue the perfection of the security interest. Tenant agrees to furnish to Landlord a list of the names and addresses of any buyer, commission merchant, or selling agent to or through whom Tenant may sell the collateral. Tenant agrees to notify Landlord of the identity of any buyer, commission merchant, selling agent, or warehouse to or with whom Tenant intends to sell or store the collateral within seven days before any sale or storage of the collateral.

D.6. Default by Landlord/Events. A default by Landlord is the failure to comply with any provision of this lease that is not cured within thirty days after written notice.

D.7. Default by Landlord/Tenant's Remedies. Tenant's remedies for Landlord's default are to sue for damages and terminate this lease.

D.8. Default by Tenant/Events. Defaults by Tenant are (a) failing to pay Rent timely, (b) abandoning the Premises or vacating a substantial portion of the Premises, and (c) failing to comply within ten days after written notice with any provision of this lease other than the defaults set forth in (a) and (b).

D.9. Default by Tenant/Landlord's Remedies. Landlord's remedies for Tenant's default are to (a) enter and take possession of the Premises and sue for Rent as it accrues; (b) enter and take possession of the Premises, after which Landlord may relet the Premises on behalf of Tenant and receive the Rent directly by reason of the reletting, and Tenant agrees to reimburse Landlord for any expenditures made in order to relet; (c) enter the Premises and perform Tenant's obligations; and (d) terminate this lease by written notice and sue for damages. Landlord may enter and take possession of the Premises by self-help, by picking or changing locks if necessary, and may lock out Tenant or any other person who may be using the Premises for grazing, until the default is cured, without being liable for damages.

D.10. Default/Waiver. All waivers must be in writing and signed by the waiving party. Landlord's failure to enforce any provisions of this Lease or its acceptance of late

installments of Rent will not be a waiver and will not estop Landlord from enforcing that provision or any other provision of this Lease in the future.

D.11. Mitigation. Landlord has mitigated the loss of rent if Landlord, within thirty days after Tenant's loss of possession, (a) places a "For Lease" sign at the Premises, (b) places the Premises on Landlord's inventory of properties for lease, (c) makes Landlord's inventory available to area brokers on a monthly basis, (d) advertises the Premises for lease in a suitable trade journal in the county in which the Premises are located, and (e) shows the Premises to prospective tenants who request to see it.

D.12. Security Deposit. If Tenant defaults, Landlord may use the Security Deposit to pay arrears of Rent, to repair any damage or injury, or to pay any expense or liability incurred by Landlord as a result of the default.

D.13. Holdover. If Tenant does not vacate the Premises following termination of this lease, Tenant will become a tenant at will and must vacate the Premises on receipt of notice from Landlord. No holding over by Tenant, whether with or without the consent of Landlord, will extend the Term.

D.14. Alternative Dispute Resolution. Landlord and Tenant agree to mediate in good faith before filing a suit for damages.

D.15. Attorney's Fees. If either party retains an attorney to enforce this lease, the party prevailing in litigation is entitled to recover reasonable attorney's fees and other fees and court and other costs.

D.16. Venue. Exclusive venue is in the county in which the Premises are located.

D.17. Entire Agreement. This lease, its exhibits, addenda, and riders are the entire agreement of the parties concerning the lease of the Premises by Landlord to Tenant. There are no representations, warranties, agreements, or promises pertaining to the Premises or the

lease of the Premises by Landlord to Tenant, and Tenant is not relying on any statements or representations of any agent of Landlord, that are not in this lease and any exhibits, addenda, and riders.

D.18. Amendment of Lease. This lease may be amended only by an instrument in writing signed by Landlord and Tenant.

D.19. Limitation of Warranties. THERE ARE NO IMPLIED WARRANTIES OF MERCHANTABILITY, OF FITNESS FOR A PARTICULAR PURPOSE, OR OF ANY OTHER KIND ARISING OUT OF THIS LEASE, AND THERE ARE NO WARRANTIES THAT EXTEND BEYOND THOSE EXPRESSLY STATED IN THIS LEASE.

D.20. Notices. Any notice required or permitted under this lease must be in writing. Any notice required by this lease will be deemed to be given (whether received or not) the earlier of receipt or three business days after being deposited with the United States Postal Service, postage prepaid, certified mail, return receipt requested, and addressed to the intended recipient at the address shown in this lease. Notice may also be given by regular mail, personal delivery, courier delivery, or e-mail and will be effective when received. Any address for notice may be changed by written notice given as provided herein.

D.21. Mineral Interests. This lease is subordinate to any present or future oil, gas, or other mineral exploration agreements and leases relating to the Land. Landlord will not be liable to Tenant for any damages for actions attributable to those agreements and will receive all consideration paid therefor.

D.22. Landlord's Use. Landlord retains the right to permit third parties to use the Premises for hunting, fishing, and other uses that do not materially interfere with Tenant's grazing rights.

If applicable, include additional clauses like those suggested in form 25-13 in this chapter and/or a list of exhibits and riders.

_____

[Name of landlord]

_____

[Name of tenant]

Insurance Addendum to Lease

Lease

Date:

Landlord:

Tenant:

This insurance addendum is part of the lease.

Tenant agrees to—

1. Maintain the liability insurance policies required below (mark applicable boxes) during the Term and any period before or after the Term when Tenant is present on the Premises:

	Type of Insurance	**Minimum Policy Limit**	
☐	Commercial general liability (occurrence basis) endorsed to cover farm and ranch operations	Per occurrence: Aggregate:	$_____ $_____

Or

☐	Farm owner's on a renter's form such as AAIS Form No. FO-4	

Or

☐	Farm liability policy	
☐	Workers' compensation	$500,000
☐	Employer's liability	$_____
☐	Business automobile liability	$_____
☐	Umbrella/excess liability (occurrence basis)	$_____

2. Comply with the following additional insurance requirements:

   a. All liability policies must be endorsed to name Landlord as an "additional insured" on a form that does not exclude coverage for the sole or contributory ordinary negligence of Landlord and must not be endorsed to exclude the sole negligence of Landlord from the definition of "insured contract."

   b. Certificates of insurance and copies of any additional insured and waiver of subrogation endorsements must be delivered by Tenant to Landlord before entering the Premises and thereafter at least ten days before the expiration of the policies.

Form 25-10

Cell Tower Lease

Basic Information

Date:

Landlord:

Landlord's Address:

Tenant:

Tenant's Address:

[**Include if applicable:** Guarantors:]

[**Include if applicable:** Guarantors' Addresses:]

Site: That certain parcel of real property depicted on Exhibit A and legally described on Exhibit D, together with any easements appurtenant thereto.

Tower: A communications tower best described at approximately the following location:

911 Address (if applicable):

FCC ASR# (if applicable):

Latitude:

Longitude:

Tower Leased Premises: The space on the Tower reserved for the installation of Tenant's antennas and appurtenant Equipment, depicted on Exhibit B and described as follows: [**describe tower leased premises**]

Ground Leased Premises: Ground Space comprising a portion of the Site for placement of Tenant's Equipment as depicted on Exhibit A and described as follows: [**describe ground leased premises**]

Ground Space: Approximately [**number**] square feet.

Leased Premises: The Ground Leased Premises, the Tower Leased Premises, and nonexclusive use of space to connect Tenant's Equipment on the Ground Leased Premises, together with nonexclusive easements for access and utilities to Tenant's Equipment.

Tenant's Equipment: The equipment listed on Exhibit C attached hereto, as modified, changed, or substituted with the prior written approval of Landlord.

Term (months):

Commencement Date:

Termination Date:

Extension Terms:

Base Rent (monthly):

Capital Contribution Fee: Tenant shall pay Landlord on or before the Commencement Date a capital contribution of $[**amount**] toward the costs associated with modifications of the Site and Tower related to this Lease.

Security Deposit: $[**amount**]

Permitted Use: Tenant will use the Leased Premises only for the purpose of placing, maintaining, and operating Tenant's Equipment and uses directly incidental thereto.

Tenant's Insurance: As required by the Insurance Addendum attached hereto as Exhibit E.

Landlord's Insurance: As required by the Insurance Addendum attached hereto as Exhibit E.

A. Definitions

A.1. "Agent" means agents; contractors; employees; Tenants; and, to the extent under the control of the principal, invitees.

A.2. "Injury" means (a) harm to or impairment or loss of property or its use, (b) harm to or death of a person, or (c) "personal and advertising injury" as defined in the form of liability insurance Tenant is required to maintain.

A.3. "Lienholder" means the holder of a deed of trust covering the Leased Premises.

A.4. "Rent" means Base Rent plus any other amounts of money payable by Tenant to Landlord.

B. Tenant's Obligations

B.1. **Tenant agrees to—**

B.1.a. Lease the Leased Premises for the entire Term beginning on the Commencement Date and ending on the Termination Date.

B.1.b. Accept the Site and Leased Premises in their present condition "AS IS," the Leased Premises being currently suitable for the Permitted Use.

B.1.c. Comply with (i) all laws and requirements relating to Tenant's use, maintenance, and occupancy of the Leased Premises and use of Tenant's Equipment and (ii) any requirements of Landlord, including the Communications Tower Safety Standards attached hereto as Exhibit F.

B.1.d. Coordinate all filings with the Federal Aviation Administration ("FAA") and/or the FCC related to the Tower height, location, or NEPA with Landlord and allow Landlord to handle, at Tenant's sole cost and expense, any amended filings with the FAA or FCC needed to accommodate Tenant's Equipment or operations.

B.1.e. Pay monthly, in advance, without demand, on the first day of the month, the Base Rent to Landlord at Landlord's Address.

B.1.f. Pay a late charge of 5 percent of any Rent not received by Landlord by the tenth day after it is due.

B.1.g. Obtain and pay for all utility services used by Tenant and not provided by Landlord.

B.1.h. Pay Tenant's pro rata share of any utility services provided by Landlord.

B.1.i. Allow Landlord to enter the Leased Premises to perform Landlord's obligations, inspect the Leased Premises, and show the Leased Premises to prospective purchasers or tenants.

B.1.j. Repair, replace, and maintain in good condition any part of the Leased Premises and Tenant's Equipment.

B.1.k. Repair and replace any property of Landlord, or any property of any other tenant of the Site, that is damaged or adversely affected by reason of the installation, maintenance, use, or removal by Tenant of Tenant's Equipment. Any repairs to the Tower or to the

property of any other tenant will, at Landlord's sole option, be performed by or on behalf of Landlord at Tenant's sole expense.

B.1.l. Install Tenant's Equipment and all subsequent approved substitutions to Tenant's Equipment and perform all other work on the Tower and at the Site (collectively, the "Work") in a good and workmanlike manner using prime quality materials (i) complying with the Communications Tower Safety Standards attached as Exhibit F; (ii) using only licensed, qualified, and reputable contractors or mechanics; (iii) performing the Work in accordance with detailed plans and specifications approved in writing by Landlord, such approval not to be unreasonably withheld, conditioned, or delayed; (iv) incorporating any reasonable modifications, terms, and conditions imposed by Landlord; and (v) beginning the Work only after it has obtained all required permits and delivered copies to Landlord.

B.1.m. Be solely responsible for the safe and proper design, construction, and installation of the Work.

B.1.n. Require that any of its contractors or subcontractors working on the Tower and at the Site have and provide to Landlord evidence of insurance coverage with reputable carriers licensed to do business in Texas in accordance with the provisions of Exhibit E.

B.1.o. Vacate the Leased Premises and return all keys to the leased Premises on the last day of the Term.

B.1.p. INDEMNIFY, DEFEND, AND HOLD LANDLORD AND LIENHOLDER, AND THEIR RESPECTIVE AGENTS, HARMLESS FROM ANY INJURY (AND ANY RESULTING OR RELATED CLAIM, ACTION, LOSS, LIABILITY, OR REASONABLE EXPENSE, INCLUDING ATTORNEY'S FEES AND OTHER FEES AND COURT AND OTHER COSTS) OCCURRING IN ANY PORTION OF THE LEASED PREMISES IF CAUSED IN WHOLE OR IN PART BY THE ACTS OR OMISSIONS OF TENANT OR ITS AGENTS, INCLUDING IN WHOLE OR IN PART BY THE NEGLIGENT ACTS OR OMISSIONS OF TENANT OR ITS AGENTS. **THE INDEMNITY CONTAINED IN THIS PARAGRAPH (i) IS INDEPEN-**

DENT OF TENANT'S INSURANCE, (ii) WILL NOT BE LIMITED BY COMPARATIVE NEGLIGENCE STATUTES OR DAMAGES PAID UNDER THE WORKERS' COMPENSATION ACT OR SIMILAR EMPLOYEE BENEFIT ACTS, (iii) WILL SURVIVE THE END OF THE TERM, AND (iv) WILL APPLY EVEN IF AN INJURY IS CAUSED IN PART BY THE ORDINARY NEGLIGENCE OR STRICT LIABILITY OF LANDLORD BUT WILL NOT APPLY TO THE EXTENT AN INJURY IS CAUSED IN WHOLE OR IN PART BY THE GROSS NEGLIGENCE OR WILLFUL MISCONDUCT OF LANDLORD, LIENHOLDER, OR THEIR RESPECTIVE AGENTS.

B.1.q. Contract with utility companies serving the Site for Tenant's utility needs and promptly pay cost of the utility services. Under the direction of Landlord, Tenant may, at Tenant's cost and expense, tie the Leased Premises into the electric system serving the Site, if available, and will install a separate meter for the measurement of electricity used or consumed by Tenant.

B.2. **Tenant agrees not to—**

B.2.a. Use the Leased Premises for any purpose other than the Permitted Use.

B.2.b. Create a nuisance.

B.2.c. Permit any waste.

B.2.d. Use the Leased Premises in any way that would increase insurance premiums or void insurance on the Leased Premises.

B.2.e. Change Landlord's lock system.

B.2.f. Alter the Leased Premises.

B.2.g. Allow a lien to be placed on the Leased Premises.

B.2.h. Assign this Lease or sublease any portion of the Leased Premises without Landlord's written consent.

B.2.i. Record this Lease, or a memorandum thereof, in any public records.

B.2.j. Use any equipment that causes, or may cause, interference with any other antenna or equipment at the Site as of the Term Commencement Date.

C. Landlord's Obligations

C.1. **Landlord agrees to—**

C.1.a. Lease to Tenant the Leased Premises for the entire Term beginning on the Commencement Date and ending on the Termination Date.

C.1.b. Obey all laws relating to Landlord's operation of the Leased Premises.

C.1.c. Furnish access to the Leased Premises on a twenty-four-hours-a-day, seven-days-a-week basis to Tenant and Tenant's persons, agents, contractors, and other designees.

C.1.d. Return the Security Deposit to Tenant, less itemized deductions, if any, on or before the sixtieth day after the date Tenant surrenders the Leased Premises.

C.1.e. Before Tenant's installation of Tenant's Equipment, obtain from a licensed engineer chosen by Landlord at Tenant's expense a certification that the structural and loading capacity of the Tower is sufficient for Tenant's Equipment and that Tenant's installation of Tenant's Equipment in accordance with the approved plans and specifications will comply with all applicable federal, state, and local laws, regulations, and standards.

C.1.f. Approve or disapprove in writing Tenant's plans and specifications within [**number**] days of receipt.

C.2. **Landlord agrees not to—**

C.2.a. Interfere with Tenant's possession of the Leased Premises as long as Tenant is not in default.

C.2.b. Unreasonably withhold consent to a proposed assignment or sublease.

D. General Provisions

Landlord and Tenant agree to the following:

D.1. Alterations. Any physical additions or improvements to the Leased Premises made by Tenant will become the property of Landlord. Landlord may require that Tenant, at the end of the Term and at Tenant's expense, remove any physical additions, improvements, and Tenant's Equipment; repair any alterations; and restore the Leased Premises to the condition existing at the Commencement Date, normal wear excepted.

D.2. Abatement. Tenant's covenant to pay rent and Landlord's covenants are independent. Except as otherwise provided, Tenant may not abate Rent for any reason.

D.3. Insurance. Tenant and Landlord will maintain the respective insurance coverages described in the Insurance Addendum attached as Exhibit E.

D.4. Release of Claims/Subrogation. LANDLORD AND TENANT RELEASE EACH OTHER AND LIENHOLDER, AND THEIR RESPECTIVE AGENTS, FROM ALL CLAIMS OR LIABILITIES FOR DAMAGE TO THE LEASED PREMISES, DAMAGE TO OR LOSS OF PERSONAL PROPERTY WITHIN THE LEASED PREMISES, AND LOSS OF BUSINESS OR REVENUES THAT ARE INSURED BY THE RELEASING PARTY'S PROPERTY INSURANCE OR THAT WOULD HAVE BEEN INSURED BY THE REQUIRED INSURANCE IF THE PARTY FAILS TO MAINTAIN THE PROPERTY COVERAGES REQUIRED BY THIS LEASE. THE PARTY INCURRING THE DAMAGE OR LOSS WILL BE RESPONSIBLE FOR ANY DEDUCTIBLE OR SELF-INSURED RETENTION UNDER ITS PROPERTY INSURANCE. LANDLORD AND TENANT WILL NOTIFY THE ISSUING PROPERTY INSURANCE COMPANIES OF THE RELEASE SET FORTH IN THIS PARAGRAPH AND WILL HAVE THE PROPERTY INSURANCE

POLICIES ENDORSED, IF NECESSARY, TO PREVENT INVALIDATION OF COVERAGE. THIS RELEASE WILL NOT APPLY IF IT INVALIDATES THE PROPERTY INSURANCE COVERAGE OF THE RELEASING PARTY. **THE RELEASE IN THIS PARAGRAPH WILL APPLY EVEN IF THE DAMAGE OR LOSS IS CAUSED IN WHOLE OR IN PART BY THE ORDINARY NEGLIGENCE OR STRICT LIABILITY OF THE RELEASED PARTY OR ITS AGENTS BUT WILL NOT APPLY TO THE EXTENT THE DAMAGE OR LOSS IS CAUSED IN WHOLE OR IN PART BY THE GROSS NEGLIGENCE OR WILLFUL MISCONDUCT OF THE RELEASED PARTY OR ITS AGENTS.**

D.5. Casualty/Total or Partial Destruction

D.5.a. If the Leased Premises are damaged by casualty and can be restored within ninety days, Landlord will, at its expense, restore the roof, foundation, and structural soundness of the exterior walls of the Leased Premises and any leasehold improvements within the Leased Premises that are not within Tenant's rebuilding obligations to substantially the same condition that existed before the casualty, and Tenant will, at its expense, be responsible for replacing any of its damaged furniture, fixtures, and personal property and performing Tenant's rebuilding obligations. If Landlord fails to complete the portion of the restoration for which Landlord is responsible within ninety days from the date of written notification by Tenant to Landlord of the casualty, Tenant may terminate this Lease by written notice to Landlord before Landlord completes Landlord's restoration obligations.

D.5.b. If Landlord cannot complete the portion of the restoration for which Landlord is responsible within ninety days, Landlord has an option to restore the Leased Premises. If Landlord chooses not to restore, this Lease will terminate. If Landlord chooses to restore, Landlord will notify Tenant in writing of the estimated time to restore and give Tenant an option to terminate this Lease by notifying Landlord in writing within ten days from receipt of Landlord's estimate. If Tenant does not notify Landlord timely of Tenant's election to terminate this Lease, the Lease will continue and Landlord will restore the Leased Premises as provided in subparagraph D.5.a. above.

D.5.c. To the extent the Leased Premises are untenantable after the casualty, the Rent will be adjusted as may be fair and reasonable.

D.6. Condemnation/Substantial or Partial Taking

D.6.a. If the Leased Premises cannot be used for the purposes contemplated by this Lease because of condemnation or purchase in lieu of condemnation, this Lease will terminate.

D.6.b. If there is a condemnation or purchase in lieu of condemnation and this Lease is not terminated, Landlord will, at Landlord's expense, restore the Tower Leased Premises, and the Rent payable during the unexpired portion of the Term will be adjusted as may be fair and reasonable.

D.6.c. Tenant will have no claim to the condemnation award or proceeds in lieu of condemnation.

D.7. Uniform Commercial Code. Tenant grants Landlord a security interest in Tenant's personal property now or subsequently located on the Leased Premises. This Lease is a security agreement under the Uniform Commercial Code. Landlord may file financing statements or continuation statements to perfect or continue the perfection of the security interest.

D.8. Default by Landlord/Events. Defaults by Landlord are failing to comply with any provision of this Lease within thirty days after written notice and failing to provide essential services to Tenant within ten days after written notice.

D.9. Default by Landlord/Tenant's Remedies. Tenant's remedies for Landlord's default are to sue for damages and, if Landlord does not provide an essential service for thirty days after default, terminate this Lease.

D.10. Default by Tenant/Events. Defaults by Tenant are (a) failing to pay Rent timely, (b) abandoning the Leased Premises or vacating a substantial portion of the Leased Premises, and (c) failing to comply within ten days after written notice with any provision of this Lease other than the defaults set forth in (a) and (b).

D.11. Default by Tenant/Landlord's Remedies. Landlord's remedies for Tenant's default are to (a) enter and take possession of the Leased Premises and sue for Rent as it accrues; (b) enter and take possession of the Leased Premises, after which Landlord may re-let the Leased Premises on behalf of Tenant and receive the rent directly by reason of the re-letting, and Tenant agrees to reimburse Landlord for any expenditures made in order to re-let; (c) enter the Leased Premises and perform Tenant's obligations; and (d) terminate this Lease by written notice and sue for damages. Landlord may enter and take possession of the Leased Premises by self-help, by picking or changing locks if necessary, and may lock out Tenant or any other person who may be occupying the Leased Premises, until the default is cured, without being liable for damages.

D.12. Default/Waiver/Mitigation. All waivers must be in writing and signed by the waiving party. Landlord's failure to enforce any provisions of this Lease or its acceptance of late installments of Rent will not be a waiver and will not estop Landlord from enforcing that provision or any other provision of this Lease in the future. Landlord and Tenant have a duty to mitigate damages.

D.13. Security Deposit. If Tenant defaults, Landlord may use the security deposit to pay arrears of Rent, to repair any damage or injury, or to pay any expense or liability incurred by Landlord as a result of the default.

D.14. Holdover. If Tenant does not vacate the Leased Premises following termination of this Lease, Tenant will become a tenant at will and must vacate the Leased Premises on

receipt of notice from Landlord. No holding over by Tenant, whether with or without the consent of Landlord, will extend the Term.

D.15. Alternative Dispute Resolution. Landlord and Tenant agree to mediate in good faith before filing a suit for damages.

D.16. Attorney's Fees. If either party retains an attorney to enforce this Lease, the party prevailing in litigation is entitled to recover reasonable attorney's fees and other fees and court and other costs.

D.17. Venue. Exclusive venue is in the county in which the Leased Premises are located.

D.18. Entire Agreement. This Lease [**include if applicable:** , its exhibits, addenda, and riders] [is/are] the entire lease of the parties concerning the lease of the Leased Premises by Landlord to Tenant. There are no representations, warranties, agreements, or promises pertaining to the Leased Premises or the lease of the Leased Premises by Landlord to Tenant, and Tenant is not relying on any statements or representations of any agent of Landlord, that are not in this Lease [**include if applicable:** and any exhibits, addenda, and riders].

D.19. Amendment of Lease. This Lease may be amended only by an instrument in writing signed by Landlord and Tenant.

D.20. Limitation of Warranties. THERE ARE NO IMPLIED WARRANTIES OF MERCHANTABILITY, OF FITNESS FOR A PARTICULAR PURPOSE, OR OF ANY OTHER KIND ARISING OUT OF THIS LEASE, AND THERE ARE NO WARRANTIES THAT EXTEND BEYOND THOSE EXPRESSLY STATED IN THIS LEASE.

D.21. Notices. Any notice required or permitted under this Lease must be in writing. Any notice required by this Lease will be deemed to be delivered (whether actually received or not) when deposited with the United States Postal Service, postage prepaid, certified mail,

return receipt requested, and addressed to the intended recipient at the address shown in this Lease. Notice may also be given by regular mail, personal delivery, courier delivery, facsimile transmission, or other commercially reasonable means and will be effective when actually received. Any address for notice may be changed by written notice delivered as provided herein.

D.22. Abandoned Property. Landlord may retain, destroy, or dispose of any property left on the Leased Premises at the end of the Term.

D.23. Generator. With Landlord's prior written approval, not to be unreasonably withheld, [and on payment of an additional rent of $[**amount**] per month,] Tenant may install a generator at the Site to service Tenant's Equipment.

D.24. Interference. If Tenant's Equipment causes interference with operations of other tenants on the Tower, Tenant will immediately cease the interference and, at its own expense, make any changes to Tenant's Equipment needed to correct the interference, subject to Landlord's written approval.

D.25. Use of Site by Other Parties. Tenant's use of the Site is nonexclusive. Landlord may enter into leases with other parties for the use of the Site, Tower, and other improvements. Parties other than Landlord and Tenant will have access to the Site, and Landlord is not responsible for the behavior of the other parties. Tenant will be responsible for securing Tenant's Equipment.

_____

[Name of landlord]

_____

[Name of tenant]

Exhibit A

Plan of Site, Access Drive, and Leased Premises

Provide a depiction of the real property being leased for the cell tower site, including any easements.

Exhibit B

Sketch of Tower and Tower Space

Provide a sketch of the cell tower and the space on the tower reserved for the installation of the tenant's equipment.

Exhibit C

Tenant's Equipment

List the tenant's equipment that will be placed on the cell tower site and that will be installed on the tower itself.

Exhibit D

Property Description

Provide the legal description of the real property being leased for the cell tower site.

Exhibit E

Insurance Addendum to Lease

Provide details on the required insurance for both the tenant and the landlord, including any required for contractors or sub-contractors.

Exhibit F

Communications Tower Safety Standards

A. Scope and Application

The rules in this exhibit contain requirements for policies, procedures, and safe work practices to protect the employees, agents, and contractors of Landlord and Tenant from the hazards of working on communications towers during construction, alteration, repair, operation, inspection, and maintenance activities. A "Communications Tower" is defined as any tower over six feet in height that is used primarily as an antenna or to host one or more antennas. Where the Communications Tower is affixed to another structure, such as an electrical transmission tower, church steeple, building rooftop, or water tower, the applicable part of any controlling regulation for protection of persons (e.g., 29 C.F.R. sections 1910.268 and 1910.269, and part 1926, subpart V, for transmission towers) will apply up to the point of access to the Communications Tower.

B. Definitions

In addition to the definitions set forth in 29 C.F.R. parts 1910 and 1926, the following definitions apply throughout the rules in this exhibit.

B.1. "Acceptable Conditions for Access" means the conditions that must exist before Tenant grants permission for construction, alteration, repair, or maintenance work to be performed on a Communications Tower. These conditions include the following:

B.1.a. Work under the control of a work safety program meeting the requirements of the rules in this exhibit.

B.1.b. Work where an accumulation of snow, ice, or other slippery material is not present, except as necessary for the inspection or removal of such material.

B.1.c. Notwithstanding the prohibitions outlined in subparagraph B.1.b. above, if Tower emergency maintenance work must be performed where there is an accumulation of snow, ice, or other slippery material, Tenant will implement safe work practices (equipment, practices, and procedures) that address the hazards known to be associated with Tower work to minimize the associated risk to persons while working on the Tower structure and the support structure to which it is affixed, where applicable.

B.2. "Climbing Facility" means a component specifically designed or provided to permit access to the Tower structure, such as a fixed ladder, step bolt, or other structural member.

B.3. "Competent Person" means a person who is trained to identify existing and predictable hazards in the surroundings or working conditions that are hazardous or dangerous to persons and who has authorization from Tenant or Tenant's contractor to take prompt corrective measures to eliminate them, including halting the work as required by the rules in this exhibit.

B.4. "Elevated (High-Angle) Rescue" means the process by which methods and equipment are used to gain access to and egress from the location of an injured person on the Tower structure and lower both the injured person and the rescuer safely to the ground.

B.5. "Fall Protection Equipment" means the personal equipment that persons use in conjunction with fall protection systems, including connectors, body belts or body harnesses, lanyards, and deceleration devices.

B.6. "Ladder Safety System" means an assembly of components whose function is to arrest the fall of a user, including the carrier and its associated attachment elements (e.g., brackets, fasteners), the Safety Sleeve, and the body support and connectors, wherein the carrier is permanently attached to the climbing face of the ladder or immediately adjacent to the structure.

B.7. "100% Fall Protection" means each person exposed to fall hazards above six feet while ascending, descending, or moving point to point must be protected at all times by fall protection as described in section E. below.

B.8. "Qualified Climber" means a person who has, by virtue of knowledge, training, and experience, been deemed qualified in writing by Tenant to perform Tower work.

B.9. "Qualified Person" means a person possessing a degree; certificate; professional standing; or knowledge, training, and experience in the field of Communications Tower work and who has demonstrated to Tenant or Tenant's contractor the ability to resolve problems relating to the subject matter, the work, or the project.

B.10. "Safety Sleeve" means the part of a Ladder Safety System consisting of the moving component with locking mechanism that travels on the carrier and makes the connection between the carrier and the body support.

B.11. "Site" means the Tower and the surrounding land or property where Tower work is being performed.

B.12. "Step Bolt" means a bolt or rung attached at intervals along a structural member and used for foot placement during climbing or standing.

B.13. "Tower Construction" means the building of a new Tower or structure or the installation of new equipment on an existing Tower or structure.

B.14. "Tower Emergency Maintenance Work" means the repair, restoration, or replacement of any preexisting device installed on the Tower in the interest of public safety, such as aviation signaling devices and equipment used to transmit or receive broadcast signals.

B.15. "Tower Inspection" means the procedure in which a person climbs the Tower or rides the structure's elevator to visually inspect the Tower for potential problems and test for Tower plumbness and guy cable tension.

B.16. "Tower Maintenance Work" means the replacement in kind of any device on an existing Tower, the repair of existing equipment, and painting.

C. Tenant Responsibilities

C.1. Tenant will require its employees, agents, and contractors to adhere to Acceptable Conditions for Access, as defined above, before climbing the Tower at heights above six feet.

C.2. Tenant will ensure that at least two persons, including at least one Competent Person, are on the Site at all times when anyone is exposed to fall hazards above six feet, provided, however, Tenant will not be required to have more than two persons on the Site at any given time.

C.3. A Competent Person will visually inspect the Tower base for damage, deterioration, structural deficiencies, and functionality of safety features and anchorages before persons are allowed to climb the Tower at heights above six feet. Additionally, Tenant will ensure that the Tower is visually inspected for these items as it is ascended to the elevation point where work is being performed.

D. Hazard Identification and Assessment

D.1. In addition to the inspections required by paragraphs C.3. above and E.2. below, Tenant will conduct a hazard assessment to identify, assess, and control exposure to hazards as required by the standards in this exhibit and any other applicable state or federal statutes, rules, or regulations.

D.2. Tenant will perform and document the hazard assessments required by these standards—

D.2.a. initially and daily for each Site before permitting persons to climb the structure and

D.2.b. when safety and health information or change in workplace conditions indicates that a new or increased hazard may be present.

D.3. The hazard assessments required by these standards will—

D.3.a. be performed by a Competent Person;

D.3.b. evaluate new equipment, materials, and processes for hazards before they are introduced into the workplace; and

D.3.c. identify meteorological conditions that could affect work at heights above six feet on a tower, such as wind, rain, snow, or ice.

D.4. If hazards are identified, Tenant will assess the severity of identified hazards and implement means to control such hazards, including providing persons with personal protective equipment ("PPE") designed to control the identified hazards and ensuring the proper use of the PPE by the persons.

E. Fall Protection

E.1. General. Before anyone climbs the Tower at heights above six feet, Tenant will ensure that 100% Fall Protection systems compatible with the tasks assigned are provided, used, and maintained. The rules in this section will not require the retrofitting of Communications Towers, provided that persons who are exposed to fall hazards above six feet while performing work on Communications Towers are protected from such hazards by means of a 100% Fall Protection system.

E.2. Preclimb Planning and Inspection. In addition to the criteria for preclimb planning and inspection included in paragraph E.7. below, Tenant will ensure that the following items occur before persons climb the Tower at heights above six feet:

E.2.a. All climbing jobs will be planned by a Competent Person.

E.2.b. All climbing facilities will be visually inspected daily at the Tower base by a Competent Person for rust, corrosion, deterioration, or other hazards. Additionally, Tenant will ensure that the climbing facilities are visually inspected for these items as it is ascended, to the elevation point where work is being performed. If any such hazard is identified during this inspection, persons will not use the Climbing Facility until such hazards are abated.

E.2.c. A Competent Person will ensure that all Fall Protection Equipment is inspected before each use for wear, damage, defect, or other deterioration by persons who have been trained in accordance with section J. below. Defective equipment will be identified as defective and immediately removed from service.

E.2.d. Components of a fall protection system and the Fall Protection Equipment used by persons will be compatible with one another and will be used in accordance with the manufacturer's recommendations.

E.2.e. Tenant will ensure that the planning and inspections are performed and documented. The documentation will be maintained on the Site while work is being performed and thereafter by Tenant at its place of business. The documentation will include the date of the planning and inspection, the name of the Competent Person performing the planning and inspection, and the Site location.

E.3. Fall Protection Systems. To comply with the requirements of paragraphs E.1. and E.2. above, Tenant may permit persons to use the fall protection systems described in paragraphs E.4. through E.7. below. If the fall protection systems described therein are not

present on the Tower, Tenant will not permit persons to climb the Tower at heights above six feet unless—

E.3.a. an alternative means of 100% Fall Protection is used that is at least as effective as the fall protection systems described in paragraphs E.4. through E.7. below;

E.3.b. an alternative means of access to the work area is used such as an aerial lift or elevated work platform; or

E.3.c. Tenant can demonstrate that the requirements for a fall protection plan under paragraph E.8. below have been met.

E.4. Guardrail Systems. Tenant will ensure that guardrail systems and their components that are used by persons as a means of 100% Fall Protection conform to the criteria in 29 C.F.R. section 1926.502(b).

E.5. Personal Fall Arrest Systems ("PFAS"). Tenant will ensure that personal fall arrest systems ("PFAS") and their components that are used by persons as a means of 100% Fall Protection conform to the criteria in 29 C.F.R. section 1926.502(d) and are used according to the manufacturer's recommendations. Tenant will ensure that Step Bolts and attachment points to the structure, when used by persons as an anchorage as part of a PFAS, are designed to meet the requirements of an approved anchorage in accordance with 29 C.F.R. section 1926.502(d) and are designed to ensure the connector will not slip off the end of the Step Bolt.

E.6. Positioning Device System. Tenant will ensure that positioning device systems and their components that are used by persons as a means of 100% Fall Protection conform to the criteria in 29 C.F.R. section 1926.502(e).

E.7. Ladder Safety Systems. Tenant will ensure that, in addition to the applicable criteria in 29 C.F.R. part 1926, subpart X, Ladder Safety Systems and related support systems for fixed ladders that are used by persons as a means of 100% Fall Protection conform to the following criteria:

E.7.a. Before any persons climb the structure, Tenant will ensure that the persons have tested the Ladder Safety System for proper operation and that all components used with the Ladder Safety System are compatible.

E.7.b. To perform the test required by subparagraph E.7.a. above, the persons will—

i. approach the ladder at the base and connect to the functional safety;

ii. climb the system to a height less than six feet;

iii. forcibly engage the device without letting go of the ladder;

iv. if the device functions as intended, begin the ascension;

v. if the device does not function properly, immediately descend the structure and not use the device until it functions properly; and

vi. if a ladder is obstructed, inhibiting the effective use of the Ladder Safety System, use an alternative means of 100% Fall Protection that is at least as effective as the types of fall protection described by this rule.

E.8. Fall Protection Plan. This paragraph applies when persons are working on a structure where no adequate tie-off anchorage point exists, the fall protection systems described in paragraph E.3. above are not feasible or create a greater hazard, and the work cannot be completed using an alternative means of access to the work area such as an aerial

lift or elevated work platform. If Tenant demonstrates the foregoing conditions are present, then in addition to the criteria in 29 C.F.R. section 1926.502(k), Tenant will conform to the following provisions:

E.8.a. Tenant will ensure that each person under the fall protection plan has been trained as a Qualified Climber.

E.8.b. The fall protection plan will be made available and communicated to exposed persons before the persons begin work, and such communication will be documented.

E.8.c. The fall protection plan will identify each location on the Tower structure where fall protection methods as described in paragraph E.3. above cannot be used. As soon as adequate tie-off anchorage points or other fall protection systems can be established, Tenant will use any of the fall protection systems described in paragraph E.3.

E.9. Emergency and Rescue Procedures. Tenant will establish procedures for rescue of persons in the event of an emergency, which will include whether Tenant will designate its own persons to perform the rescue procedures or whether Tenant will designate a third party to perform the rescue procedures. The procedures will be documented and available for review by the Deputy Commissioner of Labor for Occupational Safety and Health or his designee, upon request.

E.10. Tenant to Perform Rescue Procedures. Tenant will take the following measures:

E.10.a. Ensure at least two trained and designated rescue persons or contractors are on the Site when persons are working at heights over six feet on the Tower, provided, however, where there are only two persons on the Site, Tenant may comply with this requirement if one person is a trained and designated rescue person and one person has received documented orientation outlining steps to take in an emergency.

E.10.b. Ensure that personal protective equipment ("PPE") and Elevated (High–Angle) Rescue equipment needed to conduct elevated rescues are provided, used, and maintained by the designated rescue persons.

E.10.c. Train designated rescue persons so they are proficient in the use and maintenance of PPE and Elevated (High–Angle) Rescue equipment needed to conduct elevated rescues or contract with persons with such proficiency.

E.10.d. Train designated rescue persons to perform assigned rescue duties to ensure that they become competent to perform such duties, including conducting simulated rescue operations at least once every twelve months, or contract with persons with such competency.

E.11. Third Party to Perform Rescue Procedures. If Tenant designates a third-party rescue and emergency service to provide Elevated (High-Angle) Rescue and emergency services, Tenant will take the following measures:

E.11.a. Obtain verification from the third-party rescue team or service that it is able to respond to a rescue summons in a timely manner.

E.11.b. Obtain verification from the third-party rescue team or service that it is proficient with rescue-related tasks and equipment as they relate to rescuing climbers from elevated heights on communications structures.

E.11.c. Select a rescue team or service from those evaluated that has verified it has the capability to reach the victims and is equipped for and capable of performing the needed rescue services.

E.11.d. Provide the selected rescue team or service with contact information regarding all Towers/structures from which rescue may be necessary so that the rescue service can develop appropriate rescue plans and practice rescue operations as it deems necessary.

E.11.e. Before the first day on which persons perform work at heights over six feet on the Tower, inform the selected rescue team or service of the Site and location of the Towers to be climbed, the hazards identified on the Site, the number of persons that will climb the Towers, the heights at which persons will be working, the names and telephone numbers for any Tenant contacts, and any other information that is requested by the rescue team or service.

E.12. First Aid/CPR Training and Supplies. In addition to the requirements of 29 C.F.R. sections 1910.151 and 1926.50, Tenant will ensure that at least two persons on the Site are trained and hold current certifications in basic first aid and cardiopulmonary resuscitation ("CPR") issued by the American Red Cross or any other organization whose standards are equivalent to the American Red Cross, provided, however, where there are only two persons on the Site, Tenant may comply with the requirements of this paragraph if one person is trained and holds current certifications in basic first aid and CPR.

F. Nonionizing Radiation

F.1. General. Tenant will ensure that persons performing work on Communications Towers are not exposed to radio frequency ("RF") electromagnetic fields in excess of the Federal Communications Commission ("FCC") maximum permissible exposure ("MPE") limits for exposure as prescribed in 47 C.F.R. section 1.1310.

F.2. Protection from Radiation Exposure. Persons will not enter areas where RF exposure levels are above the general population/uncontrolled MPE limits described in 47 C.F.R. section 1.1310 unless they understand the potential for exposure and can exercise control over the exposure.

F.3. Control Procedures. Before persons perform work in areas on a Communications Tower where RF exposure levels exceed the occupational/controlled MPE values stated in 47 C.F.R. section 1.1310, Tenant will enact and enforce written control procedures that pro-

vide for the reduction, elimination, avoidance, or protection from such RF exposure levels. These written control procedures will include the following:

F.3.a. Reducing the transmitter power to a level that ensures RF exposure levels in areas where persons are working do not exceed the occupational/controlled MPE values stated in 47 C.F.R. section 1.1310 and that the transmitter power level is not increased until all persons have ceased working in those areas. If this method is chosen, the transmitter power will be locked out and tagged out at the reduced level by a Competent Person in accordance with 29 C.F.R. section 1910.147. Before removing lock-out/tag-out devices and restoring the original transmitter power level, all persons will be notified, and the work area will be checked to ensure that all persons have been safely positioned and removed.

F.3.b. If the transmitter power level in areas where persons are working cannot be reduced and maintained at a level that ensures RF exposure levels do not exceed the occupational/controlled MPE values stated in 47 C.F.R. section 1.1310, the transmitter power will be locked out and tagged out by a Competent Person in accordance with 29 C.F.R. section 1910.147. Before removing lock-out/tag-out devices and restoring the transmitter power level, all persons will be notified, and the work area will be checked to ensure that all persons have been safely positioned and removed.

F.3.c. If the transmitter power level cannot be reduced or eliminated, Tenant may permit persons to access areas where the occupational/controlled MPE values stated in 47 C.F.R. section 1.1310 are exceeded if it implements engineering or administrative controls that comply with the FCC's regulations concerning such exposure, including limiting the duration of the exposure and using monitoring equipment, RF protective clothing, and other related PPE.

F.3.d. If Tenant cannot ensure that the conditions in subparagraph F.3.a., F.3.b., or F.3.c. above are met, persons will not be permitted to access areas where RF exposure levels exceed the occupational/controlled MPE values stated in 47 C.F.R. section 1.1310.

F.4. Use of Controls. Before commencing work on a Communications Tower, a Competent Person will assess potential RF hazards of areas that may be accessed by persons in the course of their work and post temporary signage to indicate areas where the RF hazard exceeds the general population/uncontrolled MPE limits for exposure set forth in 47 C.F.R. section 1.1310. Temporary signage will remain in place while work is performed and the hazard exists.

F.5. RF Safety Program. When persons are exposed to RF fields in excess of the general population/uncontrolled MPE limits established in 47 C.F.R. section 1.1310 as a consequence of their work, Tenant will develop, implement, and maintain a written safety and health program with Site-specific procedures and elements based on the electromagnetic radiation hazards present, in accordance with these standards.

G. Hoists

Hoists used during the construction, alteration, repair, maintenance, or demolition of Communications Towers will meet the following requirements:

G.1. All hoists will meet the requirements set forth in this rule and 29 C.F.R. parts 1910, subpart N, and 1926, subpart N, where applicable.

G.2. All hoists will meet applicable requirements for design, construction, installation, testing, inspection, maintenance, and operation as prescribed by the manufacturer or a licensed professional engineer.

G.3. Tenant will maintain at the work Site the operating manual developed by the manufacturer for the specific make and model of hoist being used, as well as documentation for any inspection, testing, and operator training certification required by the rules in this section.

G.4. Tenant will not operate or permit to be operated a hoist that Tenant knows, or reasonably should know, will expose persons to an unsafe condition that is likely to result in personal injury or property damage.

H. Gin Poles

H.1. Rigging Equipment

H.1.a. Wire rope, slings, chains, shackles, turnbuckles, links, hooks, sheaves, rotating rooster heads, blocks, and hoists used in a gin pole lifting arrangement will meet the manufacturer's safe working load limits. In addition, each component will have a nominal breaking strength of no less than five times the static load applied. Consideration for end fitting losses and actual positioning of connecting parts will be given.

H.1.b. Lugs or other devices for lifting or attaching the gin pole in position will be designed with load and resistance factors appropriate for their intended use.

H.1.c. Only alloy chains marked by the manufacturer with an 8, a T, or an A, rated for lifting, will be used.

H.1.d. Only quenched and tempered hooks and shackles will be used. The manufacturer's load rating will be stamped on the product.

H.1.e. The breaking strength of the sheave will equal or exceed the breaking strength of the wire rope intended for the sheave.

H.2. Gin Pole Use

H.2.a. A user's gin pole load chart will be provided for each pole.

H.2.b. Any special engineered pick that is outside of the load chart will be allowed only at the direction of a licensed professional engineer. Monitoring and measuring condi-

tions, as specified by a licensed professional engineer, will be provided and used during all special engineered picks.

H.2.c. Modifications or repairs of a gin pole will be made with like or similar materials to meet or exceed the original specifications. Modifications or repairs will be recertified by a licensed professional engineer.

H.2.d. A mechanism will be in place to prevent the gin pole from tipping during the jumping process.

H.3. Wire Rope. Wire rope used for rigging will be as follows:

H.3.a. Compatible with the sheaves of the rooster head and hoisting blocks.

H.3.b. Lubricated in accordance with manufacturer specifications to prevent corrosion and wear.

H.3.c. End connections will be terminated per industry and manufacturer's specifications.

H.3.d. Wedge sockets will have a minimum tail length of one rope lay with a properly torqued clip attached to prevent accidental disengagement.

H.3.e. Flemish eyes will contain heavy-duty thimbles of appropriate size for the wire rope diameter and will have a minimum tail length of one rope lay secured with a properly torqued clip at its end.

H.4. Inspections

H.4.a. Gin poles will have a documented inspection annually by a Qualified Person.

H.4.b. In addition to the annual inspection, Tenant will designate a Competent Person who will visually inspect the gin pole and rigging before each use and during use to make sure it is in safe operating condition. Any deficiencies will be repaired before use continues.

H.4.c. During each inspection, the Qualified Person or Competent Person will—

i. inspect the legs and bracing members for bends or distortion;

ii. inspect the straightness tolerances for the overall assembly (including leg and bracing members);

iii. visually inspect the welds for quality, deformation, cracks, rust, or pitting or loss of cross-sectional area;

iv. inspect the members for excessive rust or pitting or loss of cross-sectional area;

v. inspect the sling attachment points for distortion, wear, cracks, and rust;

vi. ensure that proper bolts are used and all associated hardware is in good condition;

vii. inspect side plates on rooster heads for distortion or other damage;

viii. inspect all attachment hardware, including rigging and parts such as cables, slings, and sling attachment points, shackles, hooks, and sockets for wear, distortion, cracks, and rust; and

ix. ensure that all problems identified during the inspection are corrected before placing the gin pole into service.

I. Recordkeeping

To fulfill responsibilities under the provisions of the rules in this section, Tenant will, upon request, provide the Deputy Commissioner of Labor for Occupational Safety and Health or his designee access to the following records:

I.1. Training Records. All material related to Tenant's training and education program, pursuant to section J. below.

I.2. Medical Records and Nonionizing Radiation Exposure Records. All medical records (in accordance with 29 C.F.R. section 1910.1020(d)(1)(i)) and material related to each analysis using exposure or medical records (in accordance with 29 C.F.R. section 1910.1020(d)(1)(iii)).

I.3. Equipment Inspections and Testing Records. All material related to the modification, repair, test, calibration, or maintenance service of all equipment.

J. Training

J.1. Persons working at heights above six feet on a Communications Tower must be approved for such work in advance by a Qualified Person.

J.2. Competency of Trainer. Training of persons in Communications Tower work will be performed by or under the supervision of a Qualified Person.

J.3. Written Work Procedures

J.3.a. Tenant's written work procedures will be provided to persons as part of their training.

J.3.b. Pictures and symbols may be used as a means of instruction if understanding is improved using this method.

J.3.c. Manufacturers' operating manuals for personnel hoisting systems satisfy the requirement for operating procedures for the respective equipment or can serve as the basis for these procedures.

J.4. Hazardous Materials Training. Persons required to handle or use flammable liquids, gases, or toxic materials will be instructed in the safe handling and use of these materials and made aware of the specific requirements contained in 29 C.F.R. sections 1926.55 and 1910.1200, as applicable.

J.5. Fall Protection Training

J.5.a. Tenant will provide a training program for each person who might be exposed to fall hazards.

J.5.b. The program will enable each person to recognize the hazards of falling and will train each person in the procedures to be followed to minimize these hazards.

J.5.c. Tenant will ensure that each person has been trained by or under the supervision of a Qualified Person in the following areas:

i. the nature of fall hazards in the work area;

ii. the correct procedures for erecting, maintaining, disassembling, and inspecting the fall protection systems to be used;

iii. the correct procedures for inspecting Fall Protection Equipment for wear, damage, defect, or deterioration;

iv. climbing safety procedures;

v. the use and operation of the fall protection systems used by Tenant, as described in these standards;

vi. the role of each person in any safety monitoring system being used;

vii. the correct procedures for the handling and storage of equipment and materials and the erection of overhead protection;

viii. the role of persons in fall protection plans; and

ix. the compatibility of Fall Protection Equipment and fall protection systems.

J.6. Hoist Operator Training. Tenant will maintain documentation that the hoist operator has practical training on the hoist he is operating. Training of hoist operators will meet the requirements of 29 C.F.R. section 1910.179 and part 1926, subpart N.

J.7. RF Training

J.7.a. All persons exposed in excess of the general population/uncontrolled MPE limits stated in 47 C.F.R. section 1.1310 will receive RF hazard awareness training by or under the supervision of a Qualified Person in the following areas:

i. MPE limits for occupational/controlled exposure;

ii. recognition of RF exposure sources in Communications Tower work;

iii. proper use and interpretation of RF exposure;

iv. work procedures to avoid excessive RF exposure;

v. proper use of RF protective clothing and other related PPE;

vi. symptoms and health issues related to RF exposure; and

vii. RF exposure first-aid procedures.

J.7.b. Tenant will ensure that each affected person who works in an electromagnetic energy environment with potential RF exposure in excess of the general population/uncontrolled MPE limits stated in 47 C.F.R. section 1.1310 has access to and understands the specific Site information related to the RF energy and RF fields present at each individual Site.

J.8. Retraining. Unless stated otherwise in this rule, when Tenant or Qualified Person has reason to believe that any person who has already been trained does not have the understanding and skill required to safely perform the work assigned, Tenant will retrain each such person. Retraining is required in any of the following situations:

J.8.a. Changes in the workplace render previous training obsolete.

J.8.b. Changes in the types of fall protection systems or Fall Protection Equipment to be used render previous training obsolete.

J.8.c. Inadequacies in a person's knowledge or use of fall protection systems or Fall Protection Equipment indicate that the person has not retained the requisite understanding or skill.

J.9. Training Records

J.9.a. Tenant will certify that each person has been trained by preparing a certification record which includes—

i. the identity of the person trained,

ii. the signature of Tenant or the Qualified Person who conducted the training, and

iii. the date that training was completed.

J.9.b. A copy of the training lesson plan for each topic of instruction will be maintained by Tenant.

J.9.c. The certification record will be prepared at the completion of the training required by this rule and will be maintained for the duration of the person's employment.

J.9.d. The most current certification record will be kept available for review by the Deputy Commissioner of Labor for Occupational Safety and Health or his designee, upon request.

J.9.e. Tenant may accept training records or certificates for previous training if Tenant verifies that all training and knowledge is current and applicable to the new person's job duties.

[Reserved]

Form 25-11

Manufactured-Home Community Lease

Notice to Tenant: Chapter 94 of the Texas Property Code governs certain rights granted to a manufactured-home community tenant and obligations imposed on a manufactured-home community landlord by law.

Basic Information

Date:

Landlord:

Landlord's Address:

Landlord's Agent for Official Notices:

Address of Landlord's Agent for Official Notices:

Property Manager:

Property Manager's Address:

Emergency Contact Person:

Emergency Contact Person's Telephone Number:

Tenant:

Tenant's Primary Residential Address:

Tenant's Manufactured Home

Manufacturer:

Model:

Serial Number:

Label/Seal Number:

Certificate of Title Number:

Size:

Lienholder:

Lienholder's Address:

Premises

Manufactured Home Community Name:

Lot Number:

[Block Number:]

Plat Recording Information:

Lot Address:

Number and Location of Parking Spaces:

Monthly Rent:

Term (months):

Commencement Date:

Termination Date:

Security Deposit:

Permitted Use: Placement of Tenant's Manufactured Home for use as a private residence

Occupants (other than Tenant):

Utilities to Be Provided by Landlord:

Identification of Addenda Relating to Submetering of Utility Services:

[Expiration Date of Temporary Zoning Permit:]

A. Definition

"Rent" means Monthly Rent plus any other amounts of money payable by Tenant to Landlord.

B. Tenant's Obligations

B.1. Tenant agrees to—

B.1.a. Lease the Premises for the entire Term beginning on the Commencement Date and ending on the Termination Date.

B.1.b. Accept the Premises in their present condition "AS IS," the Premises being currently suitable for Tenant's intended Use.

B.1.c. Obey all laws and rules of the Manufactured Home Community relating to Tenant's use and occupancy of the Premises and any common areas.

B.1.d. Pay monthly, in advance, on the first day of the month, the Monthly Rent to Landlord at Landlord's Address.

B.1.e. Pay, as additional Rent, all other amounts due under this lease.

B.1.f. Pay a late charge of 5 percent of any Rent not received by Landlord by the tenth day of the month in which it is due.

B.1.g. Pay for all utility services used by Tenant and not provided by Landlord.

B.1.h. Allow Landlord to enter the Premises to perform Landlord's obligations, inspect the Premises, and show the Premises to prospective purchasers or tenants.

B.1.i. Repair any damage to the Premises caused by Tenant or Occupants.

B.1.j. Submit in writing to Landlord any request for repairs, replacement, and maintenance that are the obligations of Landlord.

B.1.k. Maintain insurance on Tenant's manufactured home and personal property.

B.1.l. Move out of the Premises at the end of the Term.

B.1.m. Pay Rent by check, money order, or other traceable or negotiable instrument.

B.1.n. Give written notice to Landlord of any change in Tenant's Primary Residential Address.

B.2. **Tenant agrees not to—**

B.2.a. Use the Premises other than for the placement of Tenant's Manufactured Home as a residence to be occupied by the named Tenant and Occupants.

B.2.b. Create or permit a nuisance or interfere with any other tenant's use of its Premises.

B.2.c. Alter the Premises.

B.2.d. Allow a lien to be placed on the Premises.

B.2.e. Assign this lease or sublease any portion of the Premises without Landlord's written consent.

C. Landlord's Obligations

Landlord agrees to—

C.1. Lease to Tenant the Premises for the entire Term beginning on the Commencement Date and ending on the Termination Date.

C.2. Obey all laws relating to Landlord's operation of the Manufactured Home Community.

C.3. Provide the utilities specified in the lease.

C.4. Use reasonable efforts to maintain and make repairs to the common areas, utility lines in the Manufactured Home Community except those maintained by a public utility or political subdivision, the roads within the Manufactured Home Community, and conditions on the Premises that would materially affect the physical health or safety of an ordinary tenant of the Manufactured Home Community and to maintain an individual mailbox for Tenant and services for garbage and solid waste removal. Landlord will not be required to repair a condition unless Tenant notifies Landlord of the condition and Tenant has paid all Rent then due. Landlord will not be required to repair conditions caused by Tenant or Occupants, unless caused by normal wear and tear, and Landlord will not be required to maintain or make any repairs to Tenant's Manufactured Home placed on the Premises.

C.5. Return the Security Deposit to Tenant on or before the thirtieth day after the date Tenant surrenders the Premises, after subtracting from the Security Deposit all amounts applied to cure any breach of the lease by Tenant as provided below, provided that Tenant has given Landlord written notice of Tenant's new address.

C.6. At least sixty days before the date the Term expires, give Tenant written notice to vacate the Premises or an offer of lease renewal specifying the proposed monthly rent and any change of lease terms together with a statement notifying Tenant that the failure of Tenant to reject the offer of lease renewal not later than the thirtieth day before the date the Term expires will result in the automatic renewal of this lease as modified by the changes specified in the offer of lease renewal.

C.7. At least 180 days before a change of the Manufactured Home Community's land use, (a) give written notice of nonrenewal to Tenant and, if the addresses are provided to Landlord in writing, to the owner of the Manufactured Home, if different from Tenant, and any Lienholder; and (b) post a notice in a conspicuous place in the Manufactured Home Community, specifying the date that the land use will change.

D. General Provisions

Landlord and Tenant agree to the following:

D.1. Casualty/Condemnation. If the Premises or the Tenant's Manufactured Home is damaged by fire or other casualty or the Premises are condemned, either Landlord or Tenant may terminate this lease by notifying the other. Any Rent prepaid by Tenant will be returned to Tenant on termination.

D.2. Default by Landlord/Events. Defaults by Landlord are failing to comply with any provision of this lease within thirty days after written notice and failing to remedy a condition that materially affects the physical health or safety of an ordinary tenant within ten days after written notice, unless such condition results from Tenant's actions.

D.3. Default by Landlord/Tenant's Remedies. Tenant's remedies for Landlord's default are to sue for damages and, if Landlord does not remedy a condition (not resulting

from Tenant's actions) that materially affects the physical health or safety of an ordinary tenant for thirty days after notice, terminate this lease.

D.4. Grounds for Eviction of Tenant. Landlord may begin eviction proceedings against Tenant if Tenant fails to remove Tenant's Manufactured Home from the Premises and otherwise vacate the Premises, after Landlord terminates this lease for one of the following grounds:

D.4.a. Violation of Lease Provisions or Community Rules. Tenant's failure to comply within ten days after written notice with any provision of this lease or any rule of the Manufactured Home Community established by Landlord.

D.4.b. Abandonment. Tenant's vacating or abandoning of Tenant's Manufactured Home or the Premises.

D.4.c. Nonpayment of Rent. Tenant's failure to timely pay Rent in the aggregate amount equal to at least one Monthly Rent within ten days after written notice of the delinquent Rent.

D.5. Landlord's Remedy for Early Termination. The maximum amount Landlord is entitled to recover as damages for Tenant's early termination of this lease is the amount of Rent outstanding for the remainder of the Term. If the Premises is reoccupied before the twenty-first day after the date Tenant surrenders possession of the Premises, the maximum amount Landlord is entitled to recover as damages for Tenant's early termination of this lease is the Monthly Rent for one month.

D.6. Mitigation. Landlord and Tenant have a duty to mitigate damages.

D.7. Security Deposit. If Tenant defaults, Landlord may use the Security Deposit to pay arrears of Rent, to repair any damage or injury, or to pay any expense or liability incurred by Landlord as a result of the default.

D.8. Renewal of Lease. If Tenant fails to reject Landlord's offer to renew this lease at least thirty days before the expiration of the Term, this lease will automatically renew under the modified terms offered by Landlord beginning on the first day after expiration of the Term.

D.9. Holdover. If Tenant does not vacate the Premises following termination of this lease, Tenant will become a tenant at will and must relocate Tenant's Manufactured Home and otherwise vacate the Premises on receipt of notice from Landlord. Unless this lease is renewed, no holding over by Tenant, whether with or without the consent of Landlord, will extend the Term.

D.10. Alternative Dispute Resolution. Landlord and Tenant agree to mediate in good faith before filing a suit for damages.

D.11. Attorney's Fees. If either party retains an attorney to enforce this lease, the party prevailing in litigation is entitled to recover reasonable attorney's fees and court and any other costs.

D.12. Venue. Venue is in the county in which the Premises are located.

D.13. Entire Agreement. This lease, its exhibits, riders, [and] any addenda relating to submetering of utility services [**include if applicable:** , and the Manufactured Home Community rules] are the entire agreement of the parties concerning the lease of the Premises by Landlord to Tenant. There are no representations, warranties, agreements, or promises pertaining to the Premises or the lease of the Premises by Landlord to Tenant, and Tenant is not relying on any statements or representations of any agent of Landlord, that are not in those documents.

D.14. Amendment of Lease. This lease may be amended only by an instrument in writing signed by Landlord and Tenant.

D.15. Limitation of Warranties. THERE ARE NO IMPLIED WARRANTIES OF MERCHANTABILITY, OF FITNESS FOR A PARTICULAR PURPOSE, OR OF ANY OTHER KIND ARISING OUT OF THIS LEASE, AND THERE ARE NO WARRANTIES THAT EXTEND BEYOND THOSE EXPRESSLY STATED IN THIS LEASE.

D.16. Notices. Any notice required or permitted under this lease must be in writing. Any notice required by this lease will be deemed to be given (whether received or not) the earlier of receipt or three business days after being deposited with the United States Postal Service, postage prepaid, certified mail, return receipt requested, and addressed to the intended recipient at the address shown in this lease. Notice may also be given by regular mail, personal delivery, courier delivery, or e-mail and will be effective when received. Any address for notice may be changed by written notice given as provided herein.

D.17. Texas Property Code. Landlord and Tenant each acknowledge that chapter 94 of the Texas Property Code, which deals with manufactured-home community tenancies, affords certain rights and imposes certain duties on them.

D.18. Abandoned Property. Landlord may retain, destroy, or dispose of any property abandoned on the Premises at the end of the Term.

If applicable, include additional clauses like those suggested in form 25-13 in this chapter and/or a list of exhibits and riders, including community rules, if any.

_____

[Name of landlord]

_____

[Name of tenant]

[Reserved]

Form 25-12

This disclosure is required by Tex. Prop. Code § 94.051. The notice to prospective tenant must be prominently printed in at least ten-point type. Tex. Prop. Code § 94.051.

Manufactured-Home Community Disclosure

Application Date:

Landlord:

Landlord's Address:

Prospective Tenant:

Prospective Tenant's Address:

Premises

Manufactured Home Community Name:

Lot Number:

[Block Number:]

Prospective Tenant is applying to lease the Premises. Prospective Tenant acknowledges that on the Application Date Landlord has given to Prospective Tenant a copy of the proposed lease [**include if applicable:** and a copy of the rules of the Manufactured Home Community].

Notice to Prospective Tenant

You have the legal right to an initial lease term of six months. If you prefer a different lease period, you and your landlord may negotiate a shorter or longer lease period. After the initial lease period expires, you and your landlord may negotiate a new lease term by mutual

agreement. Regardless of the term of the lease, the landlord must give you at least 60 days' notice of a nonrenewal of the lease, except that if the manufactured home community's land use will change, the landlord must give you at least 180 days' notice. During the applicable period, you must continue to pay all rent and other amounts due under the lease agreement, including late charges, if any, after receiving notice of the nonrenewal.

_____

[Name of landlord]

_____

[Name of tenant]

Form 25-13

Additional Clauses for Leases

Subordination

Clause 25-13-1

Landlord subordinates its security interest and liens to purchase-money security interests in Tenant's personal property.

Base Rent Adjustment

Clause 25-13-2

Beginning one year from the Commencement Date, the Base Rent will be adjusted on each anniversary of the Commencement Date (the "Adjustment Date") to reflect increases in the Consumer Price Index for "All Urban Consumers, U.S. City Average, All Items," issued by the Bureau of Labor Statistics of the United States Department of Labor.

a. The adjustments in the Base Rent will be determined by multiplying the Base Rent specified in the lease ("Initial Base Rent") by a fraction, the numerator of which is the index number for the last month before the adjustment and the denominator of which is the index number for the first month of the first year of the Term. If the product is greater than the Initial Base Rent, Tenant will pay this greater amount as Base Rent until the next rental adjustment. Base Rent will never be less than the Initial Base Rent.

b. Landlord will notify Tenant of each adjustment to Base Rent no later than sixty days after the Adjustment Date.

Advertisement of Premises

Clause 25-13-3

During the last thirty days of the Term, Landlord may place a sign on the Premises advertising the Premises for rent or sale.

Expansion Option

Clause 25-13-4

Use the following with form 25-14 in this chapter.

Tenant has the option to lease the expansion space identified in the expansion space rider. Tenant may exercise the option by giving Landlord the prior written notice described in the expansion space rider. Tenant will lease the expansion space for the rent stated in the expansion space rider. The expansion space will be accepted in "AS IS" condition with any tenant improvements to be at the expense of Tenant. The expansion space will become part of the Premises and be subject to all the terms of this lease.

Extension Option

Clause 25-13-5

Use the following with form 25-15.

Tenant has the option to extend the Term as provided in the attached extension option rider.

Waiver of Property Tax Protest Rights

Clause 25-13-6

Tenant waives all rights to protest the appraised value of the Premises or to appeal the same and all rights to receive notices of reappraisal as set forth in sections 41.413 and 42.015 of the Texas Tax Code.

Asbestos

Clause 25-13-7

Buildings or structures located on the Premises may contain asbestos-containing material or presumed asbestos-containing material as defined by OSHA regulations. Tenant has inspected the Premises and conducted such tests and inspections as Tenant deems necessary or desirable. Tenant will provide Landlord with copies of all such test results and inspections. Tenant will comply with all rules and regulations relating to asbestos in performing any maintenance, housekeeping, construction, renovation, or remodeling of the premises, and Tenant will bear all costs related to removal and disposal of asbestos from the Premises.

Tenant's Rebuilding Obligations

Clause 25-13-8

Include the following if the tenant will rebuild everything other than the building shell.

All partitions, walls, ceiling systems, wiring, light fixtures, floors, finishes, wall coverings, floor coverings, signs, doors, hardware, windows, window coverings, plumbing, heating, ventilating, and air-conditioning

equipment, and other improvements in the Premises, whether installed by Landlord or Tenant.

Include the following if the tenant will rebuild everything installed by the tenant.

Clause 25-13-9

All partitions, walls, ceiling systems, wiring, light fixtures, floors, finishes, wall coverings, floor coverings, signs, doors, hardware, windows, window coverings, plumbing, heating, ventilating, and air-conditioning equipment, and other improvements originally installed in the Premises by Tenant.

Include the following if the tenant will rebuild nonstandard improvements.

Clause 25-13-10

All improvements that are not building standard leasehold improvements. For purposes of this lease, building standard leasehold improvements are all partitions, walls, ceiling systems, wiring, light fixtures, floors, finishes, wall coverings, floor coverings, signs, doors, hardware, windows, window coverings, plumbing, heating, ventilating, and air-conditioning equipment, and other improvements preselected by Landlord for use throughout the [Building/Shopping Center] [and described in Exhibit [**exhibit number/letter**] attached hereto].

Form 25-14

Expansion Space Rider

Description: Approximately [**number**] square feet as outlined in Exhibit [**exhibit number/ letter**].

Rent: [At the Base Rent applicable to the Premises/At the rate of $[**amount**] per month/ [**specify other rent**]].

Exercise of Option: [At any time during the Term/[**specify other time to exercise option**]].

Prior Written Notice: At least [**number**] days before desired date of occupancy.

_____

[**Name of landlord**]

_____

[**Name of tenant**]

[Reserved]

Form 25-15

Extension Option Rider

Landlord grants Tenant an option to extend the Term for the period from [**date**] to [**date**] (the "Additional Term").

Tenant's rights under this option terminate if (1) the lease or Tenant's right to possession of the Premises is terminated, (2) Tenant assigns its interest in the lease or sublets any portion of the Premises, (3) Tenant fails to timely exercise the option, or (4) default exists at the time Tenant seeks to exercise the option.

Landlord and Tenant agree to the following:

Select one of the following.

1. During the Additional Term the lease will continue as written.

Or

1. During the Additional Term the lease will continue as written except that the Base Rent will be [the prevailing rental rate, at the commencement of the Additional Term, for space of equivalent quality, size, utility, and location, with the length of the extended term and the credit standing of Tenant to be taken into account/[**specify other rent**]].

Continue with the following.

2. The option to extend for the Additional Term must be exercised by written notice delivered to Landlord ninety days before the Termination Date.

_____

[**Name of landlord**]

_____

[**Name of tenant**]

[Reserved]

Form 25-16

Subordination, Attornment, and Nondisturbance Agreement

Date:

Lender:

Lender's Address:

Lease

Date:

Landlord:

Tenant:

Tenant's Address for Notices:

Deed of Trust

Date:

Grantor:

Beneficiary:

Recording information (if known):

Property:

Tenant agrees to the following:

1. The Lease is subordinate to the Deed of Trust and all modifications, renewals, and extensions.

2. Tenant will not prepay rent more than one month before its regular monthly payment date.

3. Tenant will pay rent as instructed by a notice in substantial compliance with Texas Property Code section 64.056, received by Tenant at Tenant's Address for Notices.

4. Tenant will attorn to the purchaser at any foreclosure sale under the Deed of Trust.

5. Lender will have no obligations and incur no liability under the Lease beyond Lender's equity in the Property.

6. Tenant will not terminate the Lease until Tenant has given written notice of Landlord's default to Lender and Lender has failed to cure the default within thirty days.

Lender agrees to the following:

1. Tenant may change Tenant's Address for Notices by delivering to Lender at Lender's Address a signed notification of the change.

2. The Lease will not be terminated in any foreclosure pursuant to the Deed of Trust.

3. The purchaser at foreclosure sale will take title to the Property subject to the terms of the Lease, and Tenant's occupancy will not be disturbed except in accordance with the Lease.

_____

[Name of lender]

_____

[Name of tenant]

Include acknowledgments if agreement is to be recorded.

[Reserved]

Form 25-17

Tenant's Subordination to Deed of Trust Lien

Date:

Borrower:

Borrower's Address:

Lender:

Lender's Address:

Lease

Date:

Landlord:

Tenant:

Recording information:

Note

Date:

Maker: Borrower

Payee: Lender

Original principal amount:

Deed of Trust

Date:

Trustee:

Recording information (if known):

Property:

To secure a loan from Lender, Borrower executed the Note and Deed of Trust, which created a lien on the premises described in the Lease. Tenant is in possession of all or part of the premises. As a condition for closing the loan, advancing the funds, and accepting the Note and Deed of Trust, Lender requires that Tenant make the following agreements and warranties.

In return for valuable consideration, Tenant (1) subordinates the Lease and all of Tenant's rights under it to the Deed of Trust lien, (2) agrees that the Deed of Trust lien will remain superior to the Lease and all of Tenant's rights under it, regardless of the frequency and manner of renewal, extension, or alteration of the Note and the liens securing it, and (3) warrants that the rent specified in the Lease is being paid to Landlord.

_____

[Name of tenant]

Include acknowledgment.

Form 25-18

Subordination of Landlord's Lien

Date:

Landlord:

Landlord's Address:

Secured Party:

Secured Party's Address:

Tenant:

Tenant's Address:

Secured Property: All items described in attached Schedule 1.

Secured Indebtedness:

Lease

Date:

Landlord:

Tenant:

Property Address:

Square Footage:

Premises:

Landlord, Secured Party, and Tenant agree to the following:

1. Landlord subordinates Landlord's lien on the Secured Property to the lien of the Secured Party, but only to the extent of the Secured Indebtedness.

2. Landlord will grant Secured Party access to the Premises to remove the Secured Property upon receipt of written notice from Secured Party of Tenant's default as borrower under the Secured Indebtedness. Secured Party may not enter the Premises for any other purpose. In the event of Tenant's default as borrower under the Secured Indebtedness, Tenant authorizes Landlord to grant Secured Party access to the Premises to remove the Secured Property.

3. Secured Party must remove the Secured Property within thirty days after Landlord delivers notice to Secured Party demanding removal. Secured Party will be liable for all repairs resulting from the removal of the Secured Property. Failure to remove the Secured Property within the thirty-day period terminates Landlord's agreements and obligations and gives Landlord the right to remove the Secured Property and dispose of it as Landlord wishes without being obligated in any way to account to Secured Party or to Tenant.

4. Wherever any notice is required under this agreement, the notice must be in writing. Any notice is delivered when actually received by the addressee or, if earlier and regardless of whether actually received or not, when deposited with the United States Postal Service, postage prepaid, certified mail, return receipt requested, or when sent by messenger or courier (but not facsimile or e-mail), addressed to the applicable party at the party's address set forth above.

_____

[Name of landlord]

_____

[Name of secured party]

[**Name of tenant**]

Attach Schedule 1 describing Secured Property.

[Reserved]

Form 25-19

Lease Assignment

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

Date:

Assignor:

Assignee:

Lease

Date:

Landlord:

Tenant:

Premises:

Assignor assigns to Assignee Tenant's interest in the Lease. Assignor agrees that Assignor remains liable on the Lease.

Assignee agrees to assume Tenant's obligations under the Lease and to accept the premises in their present "AS IS" condition.

Landlord consents to this assignment.

_____

[Name of assignee]

_____

[Name of assignor]

_____

[Name of landlord]

Include acknowledgement(s) as necessary.

Form 25-20

Tenant's Acceptance Letter

Date:

Lease

Date:

Landlord:

Tenant:

Premises:

Tenant acknowledges that—

1. Tenant has taken possession of the Premises.

2. Tenant has inspected the Premises.

3. The Premises are satisfactory to Tenant in the present condition and for the purpose for which they were leased.

4. Tenant has ratified the Lease.

5. Landlord has completed all improvements required by the terms of the Lease to the satisfaction of Tenant [**include if applicable:** except as follows: [**list any improvements not completed**]].

_____

[Name of tenant]

[Reserved]

Form 25-21

Tenant Estoppel Certificate

Date:

Lease

Date:

Landlord:

Tenant:

Premises:

Addressee:

Tenant certifies to Addressee that—

1. Tenant has accepted and is in possession of the Premises.

2. All required improvements have been completed to the satisfaction of Tenant.

3. Neither Landlord nor Tenant is in default in the performance of the Lease.

4. No rent under the Lease has been paid more than thirty days in advance of its due date.

5. Tenant, as of this date, has no claim of offset against the rent.

6. Tenant understands that Addressee is relying on the representations in this certificate.

7. The current monthly base rent is $[**amount**]. The next payment is due on [**date**].

8. The Lease is valid, enforceable, and unmodified [**include if applicable:** except as follows: [**list any modifications**]].

_____

[**Name of tenant**]

Form 25-22

Guaranty

Date:

Lease

Date:

Landlord:

Tenant:

Premises:

Guarantor:

Guarantor's Address:

To induce Landlord to enter into the Lease and for other consideration, Guarantor agrees that—

1. Guarantor guarantees the performance of Tenant's obligations under the Lease.

2. This is a primary, irrevocable, and unconditional guaranty of payment and performance and not of collection and is independent of Tenant's obligations under the Lease.

3. Guarantor will make all payments to Landlord at Landlord's address set forth in the Lease.

4. This guaranty will remain in effect regardless of any modification or extension of the Lease.

5. Guarantor's obligations will not be diminished by any compromise or release agreed on by Tenant and Landlord or by the discharge, limitation, or modification of Tenant's obligations in any bankruptcy or other debtor relief proceeding.

6. If there is more than one guarantor, the obligations of each guarantor will be joint and several.

7. Texas law applies to the guaranty.

Guarantor waives its rights—

1. To notices of acceptance, modification, extension, and default and any other notice.

2. To claim any defense arising out of lack of diligence; any failure to pursue Tenant; loss or impairment of any right of subrogation or reimbursement; release of any other guarantor or collateral; death, insolvency, or lack of corporate authority of Tenant; and waiver, release, or election, based on Landlord's or Tenant's rights and obligations under the Lease and the enforcement of its terms.

3. Under chapter 43 of the Texas Civil Practice and Remedies Code.

The prevailing party in any dispute arising out of this guaranty will be entitled to recover reasonable attorney's fees.

_____

[Name of guarantor]

Form 25-23

Sublease

Basic Information

Date:

Sublessor:

Sublessor's Address:

Sublessee:

Sublessee's Address:

Subleased Premises:

Sublease Commencement Date:

Sublease Termination Date:

Sublease Term:

Sublease Rent:

Permitted Sublease Use:

Base Lease

Date:

Landlord:

Tenant:

Premises:

A. Sublessee's Obligations

A.1. **Sublessee agrees to—**

A.1.a. Sublease the Subleased Premises for the Sublease Term beginning on the Sublease Commencement Date and ending on the Sublease Termination Date.

A.1.b. Pay the Sublease Rent to Sublessor in advance of the first day of each month.

A.1.c. Obey all laws relating to Sublessee's use of the Subleased Premises and terms of the Base Lease as they apply to the Subleased Premises.

A.1.d. Vacate the Subleased Premises and return all keys to the Subleased Premises on termination of this sublease.

A.1.e. INDEMNIFY, DEFEND, AND HOLD SUBLESSOR AND SUBLESSOR'S AGENTS HARMLESS FROM ANY INJURY (AND ANY RESULTING OR RELATED CLAIM, ACTION, LOSS, LIABILITY, OR REASONABLE EXPENSE, INCLUDING ATTORNEY'S FEES AND OTHER FEES AND COURT AND OTHER COSTS) OCCURRING IN ANY PORTION OF THE SUBLEASED PREMISES. **THE INDEMNITY CONTAINED IN THIS PARAGRAPH (i) IS INDEPENDENT OF SUBLESSEE'S INSURANCE, (ii) WILL NOT BE LIMITED BY COMPARATIVE NEGLIGENCE STATUTES OR DAMAGES PAID UNDER THE WORKERS' COMPENSATION ACT OR SIMILAR EMPLOYEE BENEFIT ACTS, (iii) WILL SURVIVE THE END OF THE SUBLEASE TERM, AND (iv) WILL APPLY EVEN IF AN INJURY IS CAUSED IN WHOLE OR IN PART BY THE ORDINARY NEGLIGENCE OR STRICT LIABILITY OF SUBLESSOR OR SUBLESSOR'S AGENTS, BUT WILL NOT APPLY TO THE EXTENT AN INJURY IS CAUSED BY THE GROSS NEGLIGENCE OR WILLFUL MISCONDUCT OF SUBLESSOR OR SUBLESSOR'S AGENTS.**

A.1.f. Maintain liability insurance for the Subleased Premises and the conduct of Sublessee's business, with Sublessor named as an additional insured, in the amounts stated in the Base Lease.

A.1.g. Maintain insurance on Sublessee's personal property.

A.1.h. Deliver certificates of insurance to Sublessor before the Sublease Commencement Date and thereafter when requested.

A.2. **Sublessee agrees not to—**

A.2.a. Use the Subleased Premises for any purpose other than the Permitted Sublease Use.

A.2.b. Create a nuisance.

A.2.c. Interfere with any other tenant's normal business operations or Landlord's management of the building.

A.2.d. Permit any waste.

A.2.e. Use the Subleased Premises in any way that is extrahazardous, would increase insurance premiums, or would void insurance on the building.

A.2.f. Change Landlord's lock system.

A.2.g. Alter the Subleased Premises.

A.2.h. Allow a lien to be placed on the Subleased Premises.

A.2.i. Assign this sublease or sublease any portion of the Subleased Premises without Sublessor's written consent.

B. Sublessor's Obligations

Sublessor agrees to—

B.1. Sublease the Subleased Premises to Sublessee for the Sublease Term.

B.2. Comply with Tenant's obligations under the Base Lease.

B.3. Enforce Landlord's obligations under the Base Lease.

B.4. Make available to the Subleased Premises all services and rights provided under the Base Lease.

B.5. Obey all laws relating to Sublessor's operation of the Subleased Premises.

C. General Provisions

Sublessor and Sublessee agree to the following:

C.1. Defaults by Sublessee are (a) failing to pay timely Sublease Rent, (b) abandoning or vacating a substantial portion of the Subleased Premises, and (c) failing to comply within ten days after written notice with any provision of the Base Lease or sublease other than the defaults set forth in (a) or (b).

C.2. Sublessor's remedies for Sublessee's default are to (a) enter and take possession of the Subleased Premises, after which Sublessor may relet the Subleased Premises on behalf of Sublessee and receive the Sublease Rent directly by reason of the reletting, and Sublessee agrees to reimburse Sublessor for any expenditures made in order to relet, (b) enter the Subleased Premises and perform Sublessee's obligations, and (c) terminate this sublease by written notice and sue for damages.

C.3. Default by Sublessor is failing to comply with any provision of this sublease within thirty days after written notice or for such lesser period provided in the Base Lease.

C.4. Sublessee's remedy for Sublessor's default is to sue for damages and, if the default is the failure to enforce Landlord's obligations under the Base Lease to provide services reasonably necessary for Sublessee to occupy the Subleased Premises, terminate the Sublease.

C.5. This sublease is subordinate to the Base Lease, a copy of which Sublessee acknowledges as received.

C.6. Sublessor may retain, destroy, or dispose of any property left in the Subleased Premises at the end of the Sublease Term.

C.7. Sublessor has all the rights of Landlord under the Base Lease as to Sublessee.

C.8. If either party retains an attorney to enforce this sublease, the party prevailing in litigation is entitled to recover reasonable attorney's fees and court and other costs.

If applicable, include additional clauses like those suggested in form 25-13 in this chapter and/or a list of exhibits and riders.

_____

[Name of sublessor]

_____

[Name of sublessee]

Include acknowledgement(s) as necessary.

Consent of Landlord

Landlord consents to this sublease by Sublessor to Sublessee.

_____

[Name of landlord]

[Reserved]

Form 25-24

Landlord's Lien Waiver

Date:

Landlord:

Landlord's Mailing Address:

Tenant:

Tenant's Mailing Address:

Lender:

Lender's Mailing Address:

Lender's Security Agreement of [**date**]:

Premises:

Tenant occupies the Premises under a lease from Landlord and maintains on the Premises personal property that Lender has a security interest in, or lien on, or that Lender owns.

For valuable consideration, Landlord waives all rights to maintain or enforce a statutory or contractual landlord's lien, security interest, or any other claim against the personal property described in Lender's Security Agreement. This waiver binds Landlord's heirs and successors and inures to the benefit of Lender and its successors and assigns.

_____

[**Name of landlord**]

Include acknowledgement as necessary.

[Reserved]

Form 25-25

Notice of Default

[**Date**]

[**Name and address of tenant**]

Re: Lease dated [**date**] (the "Lease"), between [**name**] ("Landlord") and [**name**] ("Tenant"), for [**describe space or give suite number**] at [**address**] ("the Premises")

[**Salutation**]

We represent Landlord in connection with the Lease. You are in default under the Lease for the following reason[s]: [**describe default[s]**]. If you do not cure [this/these] default[s] by [**deadline for cure**], Landlord will pursue [his/her/its] available remedies.

Nothing in this letter waives any rights Landlord may have regarding [this/these] or other defaults. Landlord demands strict and timely compliance with all terms of the Lease, including the timely payment of rent.

Sincerely,

_____

[**Name of attorney**]

[Reserved]

Form 25-26

Termination of Right of Possession Letter

[**Date**]

[**Name and address of tenant**]

Re: Lease dated [**date**] (the "Lease"), between [**name**] ("Landlord") and [**name**] ("Tenant"), for [**describe space or give suite number**] at [**address**] ("the Premises")

[**Salutation**]

By letter dated [**date**], you were notified that you were in default under the Lease. To date, you have not cured the default[s]. Therefore, Landlord has elected to terminate [your right to possess the Premises and to reenter and take possession of the Premises/the Lease].

Landlord demands that you immediately vacate the Premises. [**Include if applicable:** If you do not vacate the Premises before the eleventh day after the date this letter is received and Landlord files suit against you, Landlord may recover attorney's fees.]

[**Include if applicable:** This demand does not constitute a termination or forfeiture of the Lease. Your obligation to pay rent under the Lease continues.]

Nothing in this letter waives any rights Landlord may have regarding [this/these] or other defaults.

Sincerely,

_____

[**Name of attorney**]

[Reserved]

Form 25-27

This notice is to be posted at the premises. It is for use with commercial leases only. *See* Tex. Prop. Code § 93.002. Do not use it with residential leases, which are governed by Tex. Prop. Code § 92.0081.

Lockout Notice Posting

[**Date**]

LANDLORD HAS TERMINATED TENANT'S RIGHT TO POSSESS THIS SPACE AND HAS CHANGED THE LOCKS. TENANT MAY ACQUIRE A NEW KEY, AFTER PAYING ALL PAST-DUE RENT, BY CONTACTING [**name**] AT [**address/telephone number**] DURING [**hours available, which must be during tenant's normal working hours**].

[Reserved]

Form 25-28

This form is to be used for commercial leases only. *See* Tex. Prop. Code § 93.002. Do not use it for residential leases, which are governed by Tex. Prop. Code § 92.0081.

Notice of Change of Locks Letter

[**Date**]

[**Name and address of tenant**]

Re: Lease dated [**date**] (the "Lease"), between [**name**] ("Landlord") and [**name**] ("Tenant"), for [**describe space or give suite number**] at [**address**] ("the Premises")

[**Salutation**]

You are in default under the Lease, and Landlord has changed the locks to the Premises. You may obtain a new key, after paying all past-due rent, during [[**hours available, which must be during tenant's normal working hours**]/your regular business hours] by contacting [**name**] at [**address/telephone number**].

Sincerely,

_____

[**Name of attorney**]

[Reserved]

Form 25-29

Tenant Improvements Rider to Lease or Work Letter

Terms and Definitions

General Description of Work: [**describe work**]

[Architect/Engineer] Preparing Plans: [**name**]

[Architect/Engineer]'s Address: [**address**]

Contractor: [**name**]

Contractor's Address: [**address**]

Contractor's Insurance

Death/bodily injury:

Property/Builder's risk:

Agreements

A. Preparation of Plans. Within [**number**] days from the execution of this lease, [Landlord/Tenant] will retain the [architect/engineer] to prepare the Plans, specifications, and other material required for completing performance of the Work (the "Plans"). The Plans will be delivered immediately to [Tenant/Landlord], who has [**number**] days to approve the Plans or to indicate any objections to the Plans. If [Tenant/Landlord] has objections to the Plans, it will communicate them to [Landlord/Tenant] within that time. This process will be repeated until the Plans are approved by both Landlord and Tenant. The cost of preparation of the Plans will be borne as follows: [**describe cost arrangement, e.g.,** Landlord will pay for the initial $[**amount**] of the cost and Tenant will pay all excess costs].

B. Performance of Work. [Landlord/Tenant] will be responsible for retaining Contractor to perform the Work. [Landlord/Tenant/Contractor] will obtain all required permits for the Work. After approval of the Plans, Contractor will be instructed to perform the Work in accordance with the approved Plans and all applicable laws. The cost of performance of the Work will be borne as follows: [**describe cost arrangement, e.g.,** Landlord will pay for the initial $[**amount**] of the cost and Tenant will pay all excess costs].

C. Schedules

1. The parties estimate that the Plans will be approved no later than [**date**]. If the Plans are not approved by that date, the Commencement Date will be extended by the number of days of delay. If the Plans are not approved by [**date**], either party may terminate this lease by notifying the other before approval of the Plans.

2. The parties estimate that it will take [**number**] days to complete the Work. If the Work takes longer to perform and the delay is Tenant's fault, the Commencement Date will be as stated in the lease and Tenant must begin paying Rent on the Commencement Date notwithstanding that the Work is not finished. If the delay is Landlord's fault, the Commencement Date will be extended by the number of days of delay. As provided in paragraph B., [Landlord/Tenant] is responsible for retaining Contractor; accordingly, any delay in performance of the Work that is Contractor's fault will be attributable to [Landlord/Tenant].

D. Changes in Work. Any changes in the Plans or the Work after initial approval of the Plans will require approval of Landlord and Tenant. As part of such approval, the parties must agree on any required changes to the construction schedule and who will bear any increase in cost.

E. Contractor's Insurance. Contractor must maintain insurance reasonably satisfactory to Landlord in the amounts specified in the terms and definitions.

_____

[Name of landlord]

_____

[Name of tenant]

[Reserved]

Form 25-30

This disclosure is used to warn a tenant about potential risks associated with lead-based paint. The form is based on the notice requirements of 40 C.F.R. § 745.113 and the disclosure form suggested by the Department of Housing and Urban Development; the language should not be altered without a review of the applicable regulations. The heading and text of the notice are required by the regulations to be in bold-faced type.

Disclosure of Information on Lead-Based Paint and/or Lead-Based Paint Hazards

[Lease]

Lessor's Name and Address:

Lessee's Name and Address:

Description of Property:

Lead Warning Statement

Housing built before 1978 may contain lead-based paint. Lead from paint, paint chips, and dust can pose health hazards if not managed properly. Lead exposure is especially harmful to young children and pregnant women. Before renting pre-1978 housing, lessors must disclose the presence of lead-based paint and/or lead-based paint hazards in the dwelling. Lessees must also receive a federally approved pamphlet on lead poisoning prevention.

Lessor's Disclosure

(a) Presence of lead-based paint and/or lead-based paint hazards (check (i) or (ii) below):

☐ (i) Known lead-based paint and/or lead-based paint hazards are present in the housing [**explain, providing the basis for the determination that lead-based paint and/or lead-based paint hazards exist, the location of the lead-based paint and/or lead-based paint hazards, and the condition of the painted surfaces**].

☐ (ii) Lessor has no knowledge of lead-based paint and/or lead-based paint hazards in the housing.

(b) Records and reports available to Lessor (check (i) or (ii) below):

☐ (i) Lessor has provided Lessee with all available records and reports pertaining to lead-based paint and/or lead-based paint hazards in the housing (list documents below).

_____

☐ (ii) Lessor has no reports or records pertaining to lead-based paint and/or lead-based paint hazards in the housing.

Lessee's Acknowledgment (initial)

____ (c) Lessee has received copies of all information listed above.

____ (d) Lessee has received the lead hazard information pamphlet described in 15 U.S.C. section 2686.

Agent's Acknowledgment (initial)

____ (e) Agent has informed Lessor of Lessor's obligations under 42 U.S.C. section 4852d and is aware of his/her responsibility to ensure compliance.

Certification of Accuracy

The following parties have reviewed the information above and certify, to the best of their knowledge, that the information they have provided is true and accurate.

_____
Lessor Date

_____
Lessee Date

_____
Agent Date

[Reserved]

Form 25-31

This form is used to confirm a landlord's knowledge of the presence or absence of asbestos in the property being leased, as required by 29 C.F.R. §§ 1910.1001 *et seq.*, 1926.1101 *et seq.*

Asbestos Disclosure Notice

[Lease]

Date:

Landlord's Name and Address:

Tenant's Name and Address:

Description of Property:

THIS ASBESTOS DISCLOSURE NOTICE ("NOTICE") IS A DISCLOSURE OF KNOWLEDGE OF THE CONDITION OF THE PROPERTY AS OF THE DATE SIGNED AND IS NOT A SUBSTITUTE FOR ANY INSPECTIONS OR WARRANTIES THAT MAY BE DESIRED. THIS NOTICE IS NOT A WARRANTY OF ANY KIND.

Landlord's Disclosure

1. Presence of asbestos-containing or presumed asbestos-containing material (check one):

☐ Known asbestos-containing material is present in the Property (explain).

_____

☐ The Property was constructed before 1981, and presumed asbestos-containing material is present in the Property (explain).

_____

☐ The Property was constructed after 1980, and Landlord has no knowledge of asbestos-containing material in the Property.

2. Records and reports available to Tenant (check one):

☐ Landlord has provided Tenant with all available records and reports pertaining to asbestos-containing material in the Property (list documents below).

_____

☐ Landlord has no records or reports pertaining to asbestos-containing material in the Property.

Tenant's Acknowledgment

Tenant has received copies of all information listed above. Tenant is aware of Tenant's responsibility to ensure compliance with 15 U.S.C. sections 2641 through 2656 and 29 C.F.R. sections 1910.1001 *et seq.* and 1926.1101 *et seq.*

_____
Landlord Date

_____
Tenant Date

Form 25-32

Real Estate Commission Rider

1. *Commission.* Landlord agrees to pay to the real estate broker named below (Broker) a commission in the amount of [**percent**] percent of the Base Rent.

2. *Payment.* The commission will be paid out of each Base Rent payment if and when actually received by Landlord. If Tenant defaults and any rent due Landlord is collected by means of litigation or with the aid of an attorney, Broker will receive a commission out of Landlord's net recovery in the percentage amount set forth above. Landlord's net recovery is defined as the amount Landlord eventually collects from Tenant less attorney's fees, court costs, out-of-pocket expenses, and costs expended to obtain a new tenant for the remainder of Tenant's term (e.g., broker's commissions and remodeling and refurbishing costs).

3. *Brokers.* Landlord represents that it has had no dealings with any real estate broker in connection with the negotiation of this lease except Broker and knows of no other real estate broker entitled to a commission in connection with this lease. Landlord agrees to pay all real estate commissions due in connection with this lease to Broker. Landlord agrees to indemnify and hold harmless Tenant from any liability or claim arising by, through, or on behalf of Landlord, whether meritorious or not, with respect to any real estate broker not named below. Tenant represents that it has had no dealings with any real estate broker in connection with the negotiations of this lease except Broker and knows of no other real estate broker entitled to a commission in connection with this lease. Tenant agrees to indemnify and hold harmless Landlord from any liability or claim arising by, through, or on behalf of Tenant, whether meritorious or not, with respect to any real estate broker not named below.

4. *Broker Not Party to Lease.* Broker acknowledges that Broker is a party to this lease only for purposes of this Commission Rider and that Landlord and Tenant may modify,

assign, or terminate this lease without notice to or the consent of Broker as long as Broker's commission rights are not affected.

Date: _____.

_____

[Name of landlord]

_____

[Name of tenant]

_____

[Name of broker]

Form 25-33

Modification of Lease

Date:

Lease

Date:

Landlord:

Tenant:

Premises

Approximate square feet:

Name of building:

Street address/suite:

City, county, state, zip:

Lease Commencement Date:

Lease Termination Date:

Security Deposit:

Landlord and Tenant agree to the following modifications: [**list modifications.**]

The Lease is ratified as modified.

_____

[**Name of landlord**]

_____

[Name of tenant]

Form 25-34

Termination of Lease

Date:

Lease

Date:

Landlord:

Tenant:

Premises

Approximate square feet:

Name of building:

Street address/suite:

City, county, state, zip:

Lease Commencement Date:

Lease Termination Date:

Effective Termination Date:

Security Deposit:

Consideration:

1. Landlord and Tenant ratify the Lease.

2. Landlord acknowledges receiving from Tenant the following consideration: $[**amount**].

3. The Lease is terminated as of the Effective Termination Date and Tenant agrees to surrender the Premises by that date in accordance with the terms of the Lease.

4. [Tenant's Security Deposit is forfeited to Landlord/Landlord will refund the Security Deposit subject to any charge permitted by the Lease].

_____

[**Name of landlord**]

_____

[**Name of tenant**]

Form 25-35

Memorandum of Lease

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

Date:

Landlord:

Landlord's Mailing Address:

Tenant:

Tenant's Mailing Address:

Tenant's Trade Name:

Date of Lease:

Premises: [**Describe or attach legal description as described in lease.**]

Term:

Additional Provisions: The Lease is incorporated by reference and is binding on Landlord and Tenant. If a conflict exists between any term of this Memorandum of Lease and the Lease, the Lease controls.

_____

[**Name of landlord**]

_____

[**Name of tenant**]

Include acknowledgments.

Form 25-36

Insurance Addendum to Lease
[Long Form]

Lease

Date:

Landlord:

Tenant:

This insurance addendum is part of the lease.

A. Tenant agrees to—

1. Maintain the property and/or liability insurance policies required below (mark applicable boxes) and such other insurance coverages and/or higher policy limits as may be required by Lienholder during the Term and any period before or after the Term when Tenant is present on the Premises:

Type of Insurance or Endorsement		**Minimum Policy or Endorsement Limit**
General Liability Insurance Policies Required of Tenant:		
☐	Commercial general liability	Each occurrence: $_____ General aggregate: $_____
Or		
☐	Business owner's policy	Each occurrence: $_____ General aggregate: $_____

Required Endorsements to Tenant's General Liability or Business Owner's Policy:

☐	Designated location(s) general aggregate limit	$_____
☐	_____	$_____

Include any other desired endorsements. See chapter 17 in this manual.

Additional Liability Insurance Policies Required of Tenant:

☐	Workers' compensation	Statutory limit
☐	Employer's liability	$_____ each accident for bodily injury by accident/each employee for bodily injury by disease/bodily injury by disease for entire policy
☐	Business auto liability	$_____
☐	Excess liability	$_____
	Or	
☐	Umbrella liability (occurrence basis)	$_____

Property Insurance Policy Required of Tenant:

☐	Commercial property insurance written on a causes of loss—special form (formerly known as "all risks" form)	100 percent of replacement cost of (a) all items included in the definition of Tenant's Rebuilding Obligations and (b) all of Tenant's furniture, fixtures, equipment, and other business personal property located in the Premises

Or

☐	Business owner's policy	100 percent of replacement cost of (a) all items included in the definition of Tenant's Rebuilding Obligations and (b) all of Tenant's furniture, fixtures, equipment, and other business personal property located in the Premises

Required Endorsements to Tenant's Causes of Loss—[Special Form/Business Owner's] Policy:

☐	Business income and additional expense	Sufficient limits to address reasonably anticipated business interruption losses for a period of ____ months
☐	Equipment breakdown (formerly boiler and machinery)	$_____
☐	Flood	$_____
☐	Earth movement	$_____
☐	Increased limits of ordinance or law coverage to cover increased cost of construction	$_____
☐	Increased limits of debris removal	$_____
☐	Plate Glass	Sufficient limits to cover plate glass
☐	Increased limits for signs	Sufficient limits to cover exterior signage

Include any other desired endorsements. See chapter 17.

2. Comply with the following additional insurance requirements:

   a. The commercial general liability (or business owner's property policy) must be (i) written on an occurrence basis, (ii) endorsed to name of Landlord, Landlord's property manager, if any, and Landlord's Lienholder, if any, as "additional insureds," (iii) include contractual liability under Coverage A sufficient to respond to a broad-form indemnity, (iv) if Tenant operates multiple locations, be endorsed with a Designated Location(s) General Aggregate Limit endorsement, and (v) be primary and noncontributory with Landlord's liability insurance coverage.

b. The commercial property insurance policies must contain (i) a waiver of subrogation clause in favor of the party not carrying the commercial property insurance [,/and] (ii) waivers of subrogation of claims against Landlord and Lienholder [**include if applicable:** [,/and] (iii) coverage for agreed value to eliminate the coinsurance clause] [**include if applicable:** and (iv) coverage for replacement cost].

c. Certificates of insurance and copies of any additional insured and waiver of subrogation endorsements must be delivered by Tenant to Landlord before entering the Premises and thereafter at least ten days before the expiration of the policies.

3. Obtain the approval of Landlord and Lienholder with respect to the following: the forms of Tenant's insurance policies, endorsements and certificates, and other evidence of Tenant's Insurance; the amounts of any deductibles or self-insured retentions amounts under Tenant's Insurance; and the creditworthiness and ratings of the insurance companies issuing Tenant's Insurance.

B. Landlord agrees to maintain the property and/or liability insurance policies required below (mark applicable boxes) during the Term:

Type of Insurance		**Minimum Policy Limit**	
☐	Commercial general liability (occurrence basis)	Each occurrence: General aggregate:	$_____ $_____
☐	Commercial property insurance written on a causes of loss—special form (formerly known as "all risks" form)	100 percent of replacement cost of the [Shopping Center/Building] exclusive of foundation, footings, infrastructure, sitework, and the rebuilding requirements of all lessees, and will include waiver of subrogation referenced in paragraph A.2.b.	

Form 25-37

Insurance Addendum to Lease
[Short Form]

Lease

Date:

Landlord:

Tenant:

This insurance addendum is part of the lease.

A. Tenant agrees to—

1. Maintain the following coverages:

   a. Commercial property insurance written on a causes of loss—special form (formerly known as "all risks" form) covering Tenant's personal property, fixtures, and leasehold improvements in the Premises, and naming Landlord as "Building Owner Loss Payable."

   b. Business income and extra expense property insurance naming Landlord as an "additional insured" and covering income and ongoing expenses, including rent, for a period of at least twelve months.

   c. Commercial general liability insurance written on an occurrence basis, including contractual liability, covering Tenant's operations within the Premises, naming Landlord, Landlord's property manager, if any, and Landlord's Lienholder, if any, as "additional insured," and having limits of not less than $1,000,000 each occurrence and $2,000,000 general aggregate.

d. Business auto liability insurance written on an occurrence basis and having a combined single limit of not less than $1,000,000.

e. Workers' compensation insurance in the statutory amount and employer's liability insurance having limits of not less than $500,000 each accident for bodily injury by accident, $500,000 each employee for bodily injury by disease, and $500,000 bodily injury by disease for entire policy. Both policies must have a waiver of subrogation in favor of Landlord.

2. Deliver certificates of insurance and copies of any additional insured and waiver of subrogation endorsements to Landlord before entering the Premises and thereafter at least ten days before the expiration of the policies.

B. Landlord agrees to maintain—

1. Commercial property insurance written on a causes of loss—special form covering the building in which the Premises is located.

2. Commercial general liability insurance written on an occurrence basis, including contractual liability, covering Landlord's operations within the building in which the Premises is located and having limits not less than $2,000,000 each occurrence and $4,000,000 general aggregate.

C. Landlord and Tenant agree that—

1. The commercial property insurance policies maintained by them will contain (a) optional coverage for agreed value to eliminate the coinsurance clause, (b) optional coverage for replacement cost, (c) increased limits of ordinance or law coverage to cover increased cost of construction, (d) increased limits for debris removal coverage, and (e) a waiver of subrogation clause in favor of the party not carrying the commercial property insurance.

2. The commercial general liability insurance will be primary to the maintaining party and not contributory to any similar insurance carried by the other party and will contain a severability-of-interest clause.

[Reserved]

Chapter 26

Miscellaneous Documents

by common law and the warranties in Section 5.023 of the Texas Property Code (or its successor) are excluded].

Terms and Conditions: The following terms and conditions apply to the Easement granted by this agreement:

1. *Character of Easement.* The Easement and related rights granted by Grantor in this agreement to Grantee are an [exclusive/nonexclusive] and irrevocable easement in gross for the benefit of Grantee and its successors and assigns, as owner of the rights created by the Easement in gross, and is exclusive and irrevocable (as applicable, the "Holder"). The Easement and related rights granted by Grantor in this agreement are binding on Grantor; on the Grantor's heirs, legal representatives, successors, and assigns; and on all future owners of the Easement Property. This Easement and other rights granted by Grantor in this agreement are independent of any lands or estates of interest in lands; there is no other real property benefitting from the Easement granted in this agreement.

2. *Assignment.* Grantee may assign, sublease, license, transfer, or convey its interest in this agreement or any part of its interest in the Easement without Grantor's consent, provided that the assignee or transferee shall be subject to all of the obligations, covenants, and conditions applicable to Grantee.

3. *Duration of Easement.* [The duration of the Easement is perpetual./The duration of the Easement is for [**number**] years beginning [**date**].]

4. *Improvement and Maintenance of Easement Property.* Improvement and maintenance of the Easement Property and the Facilities will be at the sole expense of Holder. Holder has the right to eliminate any encroachments into the Easement Property that interfere with the Easement Purpose. Holder must maintain the Easement Property in a neat and clean condition. Holder has the right to construct, install, maintain, replace, and remove the Facilities on, under, or across any portion of the Easement Property. All matters concerning the

Facilities and their configuration, construction, installation, maintenance, replacement, and removal are at Holder's sole discretion, subject to performance of Holder's obligations under this agreement. Holder has the right to remove or relocate any fences within the Easement Property or along or near its boundary lines if reasonably necessary to construct, install, maintain, replace, or remove the Facilities, subject to replacement of the fences to their original condition on the completion of the work.

5. *Equitable Rights of Enforcement.* This Easement may be enforced by restraining orders and injunctions (temporary or permanent) prohibiting interference and commanding compliance. Restraining orders and injunctions will be obtainable on proof of the existence of interference or threatened interference, without the necessity of proof of inadequacy of legal remedies or irreparable harm, and will be obtainable only by the parties to or those benefited by this agreement; provided, however, that the act of obtaining an injunction or restraining order will not be deemed to be an election of remedies or a waiver of any other rights or remedies available at law or in equity.

6. *Attorney's Fees.* If [either/any] party retains an attorney to enforce this agreement, the party prevailing in litigation is entitled to recover reasonable attorney's fees and court and other costs.

7. *Binding Effect.* This agreement binds, benefits, and may be enforced by the parties and their respective heirs, successors, and permitted assigns.

8. *Choice of Law.* This agreement will be construed under the laws of the state of Texas, without regard to choice-of-law rules of any jurisdiction. Venue is in the county or counties in which the Easement Property is located.

9. *Counterparts.* This agreement may be executed in multiple counterparts. All counterparts taken together constitute this agreement.

Form 26-32

This form is used to effect a partial release of specified property from a judgment lien.

Partial Release of Judgment Lien

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

Date:

Judgment Debtor:

Judgment Creditor:

Judgment

Date:

Cause number:

Style of case:

Court:

Abstract of Judgment Recording Information:

Judgment Creditor acknowledges satisfaction of the Judgment in part and releases to Judgment Debtor any and all liens existing by reason of the Judgment and the filing of the abstract of judgment only against the following described property: [**describe property**].

The liens existing by reason of the Judgment and the filing of the abstract of judgment continue in full force and effect as to all properties not expressly released by this instrument.

[Name of judgment creditor]

Include acknowledgment.

Form 26-33

This form is used to evidence a buyer's acceptance of property subject to a disclaimer of warranties by the seller.

Property Condition Disclaimer

Date:

Seller:

Seller's Address:

Buyer:

Buyer's Address:

Transaction: The purchase of the Property by Buyer from Seller.

Buyer's Reliance Items: [**List items of information regarding the property that the seller has provided to the buyer.**]

Property:

[Contract:]

[Closing Documents:]

Consideration: The same consideration exchanged in the Transaction; in addition, Buyer's stipulation that Seller has sold the Property at the purchase price in this Transaction on the basis that this disclaimer is a material part of the Transaction, and Seller would have required additional consideration had this disclaimer not been a part of the Transaction.

For the Consideration stated, Buyer agrees and represents to Seller as follows:

1. *Inspections.* Buyer has been entitled to inspect every aspect of the Property to Buyer's satisfaction, and Buyer has actually inspected to Buyer's satisfaction each aspect of the Property considered to be a substantial or material factor by Buyer in making the decision to complete the Transaction.

2. *Importance of Disclaimer.* BUYER IS TAKING THE PROPERTY IN AN ARM'S-LENGTH AGREEMENT BETWEEN THE PARTIES. THE CONSIDERATION WAS BARGAINED ON THE BASIS OF AN "AS IS, WHERE IS" TRANSACTION AND REFLECTS THE AGREEMENT OF THE PARTIES THAT THERE ARE NO REPRESENTATIONS OR EXPRESS OR IMPLIED WARRANTIES [**include if applicable:** , EXCEPT FOR THE WARRANTY OF TITLE STATED IN THE [DEED/CLOSING DOCUMENTS] [AND SELLER'S REPRESENTATIONS AND WARRANTIES TO BUYER SET FORTH IN THE SALES CONTRACT]]. This disclaimer is not an incidental or boilerplate provision. Buyer and Seller have relatively equal bargaining positions.

3. *Level of Buyer's Knowledge.* Buyer understands that Buyer has the right to employ professionals to advise Buyer on every aspect of the Property, and Buyer has agreed not to rely on Seller for such information.

4. *Absence of Seller Representations.* Other than for the Buyer's Reliance Items, which Seller has furnished to Buyer and on which Buyer is relying, Buyer is not relying on any of Seller's representations, statements, or assertions concerning the Property. Buyer is not relying on Seller to provide any information about the Property that Buyer has not independently verified. Other than the Buyer's Reliance Items, Buyer is relying solely on Buyer's independent verifications, rather than Seller's information, assertions, statements, or representations. Other than the Buyer's Reliance Items, any information, assertions, statements, or representations made by Seller or Seller's representatives have been recognized as puffing or opinion. Further, if such information, assertions, statements, or representations were or are incorrect, their insignificance to Buyer would not be affected, and they would not constitute misrepresentations of material fact.

5. *Waiver of Warranties.* BUYER IS NOT RELYING ON ANY REPRESENTATIONS, DISCLOSURES, OR EXPRESS OR IMPLIED WARRANTIES OTHER THAN THOSE EXPRESSLY CONTAINED IN THIS DISCLOSURE [**include as applicable:** , THE CONTRACT, THE CLOSING DOCUMENTS, AND [**describe other documents**]]. BUYER IS NOT RELYING ON ANY INFORMATION REGARDING THE PROPERTY PROVIDED BY ANY PERSON, OTHER THAN BUYER'S OWN INSPECTION AND THE REPRESENTATIONS AND WARRANTIES CONTAINED IN THIS DISCLOSURE, THE CONTRACT, AND THE CLOSING DOCUMENTS.

6. *Dangerous Conditions.* Buyer has thoroughly inspected the Property to determine the existence of any conditions posing unreasonable risk of harm. To the extent such conditions have been discovered, Buyer will prevent persons from being subject to the risks of such conditions and Buyer will exercise reasonable care to reduce or eliminate the risks.

7. *Consequences of Disclaimer.* Buyer understands that, by executing this disclaimer, Buyer has agreed to make Buyer's own appraisal of the bargain and to accept the risk that Buyer may be wrong. Furthermore, Buyer agrees not to hold Seller liable if the Property turns out to be worth less than the price paid or if the Property turns out to have patent or latent defects that Buyer has not discovered before closing. Instead, Buyer would be the sole cause of any loss occasioned by the foregoing, because Buyer is relying on surveys, elevation analyses, appraisals, inspections, and other analyses conducted only by Buyer's representatives, in determining the condition, suitability, and value of the Property, or because Buyer has been free to conduct such analyses but has chosen not to do so.

8. *Permits.* Buyer is solely responsible for determining what, if any, permits, licenses, certificates, and the like (collectively, the "Permits") are necessary for Buyer's intended uses of the Property. Buyer is solely responsible for taking all necessary steps to obtain any such Permits that Buyer deems necessary for Buyer's intended uses of the Property.

9. *No Reliance of Buyer on Seller's Disclosure Notice.* Buyer has not relied on any of the information contained in the [**select one of the following:** Seller's Disclosure Notice (TAR)/Seller's Disclosure of Property Condition (TREC Residential)/Commercial Property Condition Statement (TAR Commercial)], if one has been provided in connection with the transaction.

10. *Survival.* Buyer's agreements with and representations to Seller made in this disclaimer will survive closing.

11. *Construction.* When the context requires, singular nouns and pronouns include the plural.

_____

[Name of buyer]

Include acknowledgment.

Form 26-34

This form is used to effect a complete release of a recorded judgment lien.

Release of Judgment Lien

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

Date:

Judgment Debtor:

Judgment Creditor:

Judgment

Date:

Cause number:

Style of case:

Court:

Abstract of Judgment Recording Information:

Judgment Creditor acknowledges satisfaction of the Judgment and releases to Judgment Debtor any and all liens existing by reason of the Judgment and the filing of the abstract of judgment.

_____

[Name of judgment creditor]

Include acknowledgment.

Form 26-37

This form is provided by section 752.051 of the Texas Estates Code. It has broad, sweeping, and detailed powers and can be used for real estate transactions as well as a wide variety of other transactions.

Statutory Durable Power of Attorney

NOTICE: THE POWERS GRANTED BY THIS DOCUMENT ARE BROAD AND SWEEPING. THEY ARE EXPLAINED IN THE DURABLE POWER OF ATTORNEY ACT, SUBTITLE P, TITLE 2, ESTATES CODE. IF YOU HAVE ANY QUESTIONS ABOUT THESE POWERS, OBTAIN COMPETENT LEGAL ADVICE. THIS DOCUMENT DOES NOT AUTHORIZE ANYONE TO MAKE MEDICAL AND OTHER HEALTH-CARE DECISIONS FOR YOU. YOU MAY REVOKE THIS POWER OF ATTORNEY IF YOU LATER WISH TO DO SO. IF YOU WANT YOUR AGENT TO HAVE THE AUTHORITY TO SIGN HOME EQUITY LOAN DOCUMENTS ON YOUR BEHALF, THIS POWER OF ATTORNEY MUST BE SIGNED BY YOU AT THE OFFICE OF THE LENDER, AN ATTORNEY AT LAW, OR A TITLE COMPANY.

You should select someone you trust to serve as your agent. Unless you specify otherwise, generally the agent's authority will continue until:

(1) you die or revoke the power of attorney;

(2) your agent resigns, is removed by court order, or is unable to act for you; or

(3) a guardian is appointed for your estate.

I, _____(insert your name and address), appoint _____ (insert the name and address of the person appointed) as my agent to act for me in any lawful way with respect to all of the fol-

lowing powers that I have initialed below. (YOU MAY APPOINT CO-AGENTS. UNLESS YOU PROVIDE OTHERWISE, CO-AGENTS MAY ACT INDEPENDENTLY.)

TO GRANT ALL OF THE FOLLOWING POWERS, INITIAL THE LINE IN FRONT OF (O) AND IGNORE THE LINES IN FRONT OF THE OTHER POWERS LISTED IN (A) THROUGH (N).

TO GRANT A POWER, YOU MUST INITIAL THE LINE IN FRONT OF THE POWER YOU ARE GRANTING.

TO WITHHOLD A POWER, DO NOT INITIAL THE LINE IN FRONT OF THE POWER. YOU MAY, BUT DO NOT NEED TO, CROSS OUT EACH POWER WITHHELD.

____ (A) Real property transactions;

____ (B) Tangible personal property transactions;

____ (C) Stock and bond transactions;

____ (D) Commodity and option transactions;

____ (E) Banking and other financial institution transactions;

____ (F) Business operating transactions;

____ (G) Insurance and annuity transactions;

____ (H) Estate, trust, and other beneficiary transactions;

____ (I) Claims and litigation;

____ (J) Personal and family maintenance;

____ (K) Benefits from social security, Medicare, Medicaid, or other governmental programs or civil or military service;

____ (L) Retirement plan transactions;

____ (M) Tax matters;

____ (N) Digital assets and the content of an electronic communication;

____ (O) ALL OF THE POWERS LISTED IN (A) THROUGH (N). YOU DO NOT HAVE TO INITIAL THE LINE IN FRONT OF ANY OTHER POWER IF YOU INITIAL LINE (O).

SPECIAL INSTRUCTIONS:

Special instructions applicable to agent compensation (initial in front of one of the following sentences to have it apply; if no selection is made, each agent will be entitled to compensation that is reasonable under the circumstances):

____ My agent is entitled to reimbursement of reasonable expenses incurred on my behalf and to compensation that is reasonable under the circumstances.

____ My agent is entitled to reimbursement of reasonable expenses incurred on my behalf but shall receive no compensation for serving as my agent.

Special instructions applicable to co-agents (if you have appointed co-agents to act, initial in front of one of the following sentences to have it apply; if no selection is made, each agent will be entitled to act independently):

____ Each of my co-agents may act independently for me.

____ My co-agents may act for me only if the co-agents act jointly.

____ My co-agents may act for me only if a majority of the co-agents act jointly.

Special instructions applicable to gifts (initial in front of the following sentence to have it apply):

____ I grant my agent the power to apply my property to make gifts outright to or for the benefit of a person, including by the exercise of a presently exercisable general power of appointment held by me, except that the amount of a gift to an individual may not exceed the amount of annual exclusions allowed from the federal gift tax for the calendar year of the gift.

Include the following, if applicable, pursuant to Tex. Est. Code § 752.052.

GRANT OF SPECIFIC AUTHORITY (OPTIONAL)

My agent MAY NOT do any of the following specific acts for me UNLESS I have INITIALED the specific authority listed below:

(CAUTION: Granting any of the following will give your agent the authority to take actions that could significantly reduce your property or change how your property is distributed at your death. INITIAL ONLY the specific authority you WANT to give your agent. If you DO NOT want to grant your agent one or more of the following powers, you may also CROSS OUT a power you DO NOT want to grant.)

____ Create, amend, revoke, or terminate an inter vivos trust

____ Make a gift, subject to the limitations of Section 751.032 of the Durable Power of Attorney Act (Section 751.032, Estates Code) and any special instructions in this power of attorney

____ Create or change rights of survivorship

____ Create or change a beneficiary designation

____ Authorize another person to exercise the authority granted under this power of attorney.

Continue with the following.

ON THE FOLLOWING LINES YOU MAY GIVE SPECIAL INSTRUCTIONS LIMITING OR EXTENDING THE POWERS GRANTED TO YOUR AGENT.

UNLESS YOU DIRECT OTHERWISE BELOW, THIS POWER OF ATTORNEY IS EFFECTIVE IMMEDIATELY AND WILL CONTINUE UNTIL IT TERMINATES.

CHOOSE ONE OF THE FOLLOWING ALTERNATIVES BY CROSSING OUT THE ALTERNATIVE NOT CHOSEN:

(A) This power of attorney is not affected by my subsequent disability or incapacity.

(B) This power of attorney becomes effective upon my disability or incapacity.

YOU SHOULD CHOOSE ALTERNATIVE (A) IF THIS POWER OF ATTORNEY IS TO BECOME EFFECTIVE ON THE DATE IT IS EXECUTED.

IF NEITHER (A) NOR (B) IS CROSSED OUT, IT WILL BE ASSUMED THAT YOU CHOSE ALTERNATIVE (A).

If Alternative (B) is chosen and a definition of my disability or incapacity is not contained in this power of attorney, I shall be considered disabled or incapacitated for purposes of this power of attorney if a physician certifies in writing at a date later than the date this power of attorney is executed that, based on the physician's medical examination of me, I am mentally incapable of managing my financial affairs. I authorize the physician who examines me for this purpose to disclose my physical or mental condition to another person for purposes of this power of attorney. A third party who accepts this power of attorney is fully protected from any action taken under this power of attorney that is based on the determination made by a physician of my disability or incapacity.

I agree that any third party who receives a copy of this document may act under it. Termination of this durable power of attorney is not effective as to a third party until the third party has actual knowledge of the termination. I agree to indemnify the third party for any claims that arise against the third party because of reliance on this power of attorney. The meaning and effect of this durable power of attorney is determined by Texas law.

If any agent named by me dies, becomes incapacitated, resigns, or refuses to act, or is removed by court order, or if my marriage to an agent named by me is dissolved by a court decree of divorce or annulment or is declared void by a court (unless I provided in this document that the dissolution or declaration does not terminate the agent's authority to act under this power of attorney), I name the following (each to act alone and successively, in the order named) as successor(s) to that agent:

_____

_____

Signed this _____ day of _____, _____.

_____
(your signature)

State of _____

County of _____

This document was acknowledged before me on _____ (date) by

_____ (name of principal).

_____
(signature of notarial office)
(Seal, if any, of notary)

_____
(printed name of notary)

My commission expires: _____

IMPORTANT INFORMATION FOR AGENT

Agent's Duties

When you accept the authority granted under this power of attorney, you establish a "fiduciary" relationship with the principal. This is a special legal relationship that imposes on you legal duties that continue until you resign or the power of attorney is terminated, suspended, or revoked by the principal or by operation of law. A fiduciary duty generally includes the duty to:

(1) act in good faith;

(2) do nothing beyond the authority granted in this power of attorney;

(3) act loyally for the principal's benefit;

(4) avoid conflicts that would impair your ability to act in the principal's best interest; and

(5) disclose your identity as an agent when you act for the principal by writing or printing the name of the principal and signing your own name as "agent" in the following manner:

(Principal's Name) by (Your Signature) as Agent

In addition, the Durable Power of Attorney Act (Subtitle P, Title 2, Estates Code) requires you to:

(1) maintain records of each action taken or decision made on behalf of the principal;

(2) maintain all records until delivered to the principal, released by the principal, or discharged by a court; and

(3) if requested by the principal, provide an accounting to the principal that, unless otherwise directed by the principal or otherwise provided in the Special Instructions, must include:

(A) the property belonging to the principal that has come to your knowledge or into your possession;

(B) each action taken or decision made by you as agent;

(C) a complete account of receipts, disbursements, and other actions of you as agent that includes the source and nature of each receipt, disbursement, or action, with receipts of principal and income shown separately;

(D) a listing of all property over which you have exercised control that includes an adequate description of each asset and the asset's current value, if known to you;

(E) the cash balance on hand and the name and location of the depository at which the cash balance is kept;

(F) each known liability;

(G) any other information and facts known to you as necessary for a full and definite understanding of the exact condition of the property belonging to the principal; and

(H) all documentation regarding the principal's property.

Termination of Agent's Authority

You must stop acting on behalf of the principal if you learn of any event that terminates or suspends this power of attorney or your authority under this power of attorney. An event

that terminates this power of attorney or your authority to act under this power of attorney includes:

(1) the principal's death;

(2) the principal's revocation of this power of attorney or your authority;

(3) the occurrence of a termination event stated in this power of attorney;

(4) if you are married to the principal, the dissolution of your marriage by a court decree of divorce or annulment or declaration that your marriage is void, unless otherwise provided in this power of attorney;

(5) the appointment and qualification of a permanent guardian of the principal's estate unless a court order provides otherwise; or

(6) if ordered by a court, your removal as agent (attorney in fact) under this power of attorney. An event that suspends this power of attorney or your authority to act under this power of attorney is the appointment and qualification of a temporary guardian unless a court order provides otherwise.

Liability of Agent

The authority granted to you under this power of attorney is specified in the Durable Power of Attorney Act (Subtitle P, Title 2, Estates Code). If you violate the Durable Power of Attorney Act or act beyond the authority granted, you may be liable for any damages caused by the violation or subject to prosecution for misapplication of property by a fiduciary under Chapter 32 of the Texas Penal Code.

THE AGENT, BY ACCEPTING OR ACTING UNDER THE APPOINTMENT, ASSUMES THE FIDUCIARY AND OTHER LEGAL RESPONSIBILITIES OF AN AGENT.

Form 26-38

This form is provided by section 751.203(b) of the Texas Estates Code. A certification made in compliance with section 751.203(b) of the Texas Estates Code is conclusive proof of the factual matter that is the subject of the certification.

Certification of Durable Power of Attorney by Agent

I, _____ (agent), certify under penalty of perjury that:

1. I am the agent named in the power of attorney validly executed by _____ (principal) ("principal") on _____ (date), and the power of attorney is now in full force and effect.

2. The principal is not deceased and is presently domiciled in _____ (city and state/territory or foreign country).

3. To the best of my knowledge after diligent search and inquiry:

   a. The power of attorney has not been revoked by the principal or suspended or terminated by the occurrence of any event, whether or not referenced in the power of attorney;

   b. At the time the power of attorney was executed, the principal was mentally competent to transact legal matters and was not acting under the undue influence of any other person;

   c. A permanent guardian of the estate of the principal has not qualified to serve in that capacity;

   d. My powers under the power of attorney have not been suspended by a court in a temporary guardianship or other proceeding;

e. If I am (or was) the principal's spouse, my marriage to the principal has not been dissolved by court decree of divorce or annulment or declared void by a court, or the power of attorney provides specifically that my appointment as the agent for the principal does not terminate if my marriage to the principal has been dissolved by court decree of divorce or annulment or declared void by a court;

f. No proceeding has been commenced for a temporary or permanent guardianship of the person or estate, or both, of the principal; and

g. The exercise of my authority is not prohibited by another agreement or instrument.

4. If under its terms the power of attorney becomes effective on the disability or incapacity of the principal or at a future time or on the occurrence of a contingency, the principal now has a disability or is incapacitated or the specified future time or contingency has occurred.

5. I am acting within the scope of my authority under the power of attorney, and my authority has not been altered or terminated.

6. If applicable, I am the successor to _____ (predecessor agent), who has resigned, died, or become incapacitated, is not qualified to serve or has declined to serve as agent, or is otherwise unable to act. There are no unsatisfied conditions remaining under the power of attorney that preclude my acting as successor agent.

7. I agree not to:

a. Exercise any powers granted by the power of attorney if I attain knowledge that the power of attorney has been revoked, suspended, or terminated; or

b. Exercise any specific powers that have been revoked, suspended, or terminated.

8. A true and correct copy of the power of attorney is attached to this document.

9. If used in connection with an extension of credit under Section 50(a)(6), Article XVI, Texas Constitution, the power of attorney was executed in the office of the lender, the office of a title company, or the law office of _____.

Date: _____

_____
(signature of agent)

[Reserved]

Form 26-39

Road Maintenance Agreement

Date:

Property Owner A:

Mailing Address:

Property:

Property Owner B:

Mailing Address:

Property:

Description of Roadway:

The Parties, whose property is benefited or burdened by the Roadway described above, agree to the following:

Select one of the following.

1. Property Owner A will pay all expenses of maintenance, repair, and restoration of the Roadway covered by this Agreement.

Or

1. The Parties will share equally in the expenses for normal maintenance and repair of the Roadway. No expense shall be incurred by any Party without consent of the other Party. Such consent shall be in writing and signed by all Parties, with a copy delivered to each Party.

Continue with the following.

2. The Roadway will be maintained in good, passable condition under all traffic and weather conditions, and in a condition no less than equal to its condition at the time of execution of this Agreement. Maintenance and repair will include snow plowing and drainage facilities as well as surface work.

Select one of the following.

3. If Property Owner A does not perform the required maintenance, Property Owner B, after giving the nonperforming Property Owner A thirty days' written notice, will have the right to perform the maintenance and receive reimbursement from the nonperforming Property Owner A.

Reimbursement will be payable on demand and include the costs of the maintenance, plus interest at the highest rate permitted by law (or if no maximum rate is prescribed by law, at the rate of 18 percent per year).

Or

3. The cost for agreed maintenance and repair shall be borne and shared equally by the Parties. In the consent to repair, the Parties shall designate a party to be the agent for contracting or undertaking the agreed repair or maintenance and to collect each Party's share of the cost.

Continue with the following.

4. If a Party damages or disturbs the surface of the roadway (other than normal automobile and service ingress and egress), that Party is responsible for immediately restoring the road surface to as nearly as possible the condition in which it existed before being disturbed.

5. This Agreement runs with the properties described above and is appurtenant to the land.

6. This Agreement is made by and between Parties who own property benefited/burdened by the Roadway. The property for Property Owner A is described within Exhibit A, and the property for Property Owner B is described within Exhibit B. All such Parties shall have the right of access over the Roadway. All property accessed over the Roadway is deemed benefited thereby.

7. *Attorney's Fees.* If either Party retains an attorney to enforce this Agreement, the Party prevailing in litigation is entitled to recover reasonable attorney's fees, other fees, and court and other costs.

8. *Binding Effect.* This Agreement binds and inures to the benefit of the Parties and their respective heirs, successors, and permitted assigns.

9. *Choice of Law.* This Agreement will be construed under the laws of the state of Texas, without regard to choice-of-law rules of any other jurisdiction. Venue is in the county or counties in which the Properties are located.

10. *Waiver of Default.* It is not a waiver of or consent to default if the nondefaulting Party fails to declare immediately a default or delays in taking any action. Pursuit of any remedies set forth in this Agreement does not preclude pursuit of other remedies in this Agreement or provided by law.

11. *Further Assurances.* Each signatory Party agrees to execute and deliver any additional documents and instruments and to perform any additional acts necessary or appropriate to perform the terms, provisions, and conditions of this Agreement and all transactions contemplated by this Agreement.

12. *Integration.* This Agreement contains the complete agreement of the Parties and cannot be varied except by written agreement of the Parties. The Parties agree that there are no

oral agreements, representations, or warranties that are not expressly set forth in this Agreement.

13. *Legal Construction.* If any provision in this Agreement is for any reason unenforceable, to the extent the unenforceability does not destroy the basis of the bargain among the Parties, the unenforceability will not affect any other provision hereof, and this Agreement will be construed as if the unenforceable provision had never been a part of the Agreement. Whenever context requires, the singular will include the plural and neuter include the masculine or feminine gender, and vice versa. Article and section headings in this Agreement are for reference only and are not intended to restrict or define the text of any section. This Agreement will not be construed more or less favorably between the Parties by reason of authorship or origin of language.

14. *Notices.* Any notice required or permitted under this Agreement must be in writing. Any notice required by this Agreement will be deemed to be delivered (whether actually received or not) when deposited with the United States Postal Service, postage prepaid, certified mail, return receipt requested, and addressed to the intended recipient at the address shown in this Agreement. Notice may also be given by regular mail, personal delivery, courier delivery, facsimile transmission, or other commercially reasonable means and will be effective when actually received. Any address for notice may be changed by written notice delivered as provided herein.

15. *Time.* Time is of the essence. Unless otherwise specified, all references to "days" mean calendar days. Business days exclude Saturdays, Sundays, and legal public holidays. If the date for performance of any obligation falls on a Saturday, Sunday, or legal public holiday, the date for performance will be the next following regular business day.

16. *Rights Reserved.* Each Party reserves for that Party and that Party's heirs, successors, and assigns the right to continue to use and enjoy the surface of the Properties for all

purposes that do not unreasonably interfere with or interrupt the use or enjoyment of the Roadway.

17. *Equitable Rights of Enforcement.* This Roadway may be enforced by restraining orders and injunctions (temporary or permanent) prohibiting interference and commanding compliance. Restraining orders and injunctions will be obtainable on proof of the existence of interference or threatened interference, without the necessity of proof of inadequacy of legal remedies or irreparable harm, and will be obtainable only by the Parties to or those benefited by this Agreement, provided, however, that the act of obtaining an injunction or restraining order will not be deemed to be an election of remedies or a waiver of any other rights or remedies available at law or in equity.

_____

[Name of property owner A]

_____

[Name of property owner B]

Include acknowledgments.

[Reserved]

Form 26-40

This affidavit identifies one or more individuals with authority to transfer on behalf of a domestic or foreign entity an estate or interest in real property in the name of the entity if the entity is "(1) a limited liability company, a limited partnership, or a professional entity as defined by Section 301.003, Business Organizations Code; and (2) active or in good standing under the laws of the entity's jurisdiction of formation." Tex. Prop. Code § 12.019(c). This affidavit may not be used by a domestic nonprofit entity or a foreign entity that is exempt from federal taxation as further described in Tex. Prop. Code § 12.019(b) or in "a transaction involving the transfer of an estate or interest in real property in an amount that exceeds $1 million." Tex. Prop. Code § 12.019(b). Further limitations and requirements are contained in Tex. Prop. Code § 12.019.

"Transfer" means a transaction to sell, exchange, convey with or without covenants, quitclaim, release, surrender, mortgage, encumber, partition or consent to partitioning, subdivide, apply for zoning, rezoning, or other governmental permits, plat or consent to platting, develop, grant options concerning, lease or sublet, or otherwise dispose of an estate or interest in real property or a right incident to real property. Tex. Prop. Code § 12.019(a)(2).

Affidavit of Authority to Transfer
(Pursuant to Section 12.019, Texas Property Code)

Date:

Name of Domestic or Foreign Entity Owning Title to the Property (the "Entity"):

Entity's Address: [**include street address**]

Property to Be Transferred: [**insert legal description**]

Name[s] and Title[s] of Individual[s] Authorized to Transfer on Entity's Behalf an Estate or Interest in the Property:

Affiant:

Affiant on oath swears that the following statements are true and are within the personal knowledge of Affiant:

1. My name is [**name of affiant**]. I am at least eighteen years of age. I am authorized to execute this affidavit on behalf of the Entity. I am competent to execute this affidavit. I understand that third parties will rely on the truthfulness of the statements made in this affidavit and that this affidavit is made under penalty of perjury.

2. The name of the Entity that holds title to the Property is set forth above.

3. The address, including street address, of the Entity's principal place of business in Texas, or, if the Entity does not have a principal place of business in Texas, the address of the Entity's principal place of business in the state or country that is the Entity's jurisdiction of formation, is set forth above.

4. The Entity is active or in good standing under the laws of the Entity's jurisdiction of formation.

5. The legal description of the Property, an estate or interest in which is to be transferred, is set forth above.

6. The nature of the transfer authorized hereby is [**insert using definition of "transfer" set forth in Tex. Prop. Code § 12.019(a)(2)**].

7. The name[s] and title[s] of the person[s] authorized to transfer on the Entity's behalf an estate or interest in the Property [is/are] set forth above.

Include the following if the entity is a domestic entity that files a franchise tax public information report under Tex. Tax Code § 171.203.

8. Affiant is authorized to execute this affidavit because on the date this affidavit is executed, Affiant is [a manager or member of the limited liability company/a general partner of the limited partnership/a director or officer of the professional entity].

Include the following if affiant and the person authorized to transfer on the entity's behalf are the same person.

9. The Entity is [a limited liability company and Affiant is the sole member and manager of the limited liability company/a limited partnership and Affiant is the sole general partner of the limited partnership/a professional entity and Affiant is the sole director and officer of the professional entity].

_____

[**Name of affiant**]

SUBSCRIBED AND SWORN TO before me on _____ by [**name of affiant**].

_____

Notary Public, State of Texas

Include acknowledgment.

[Reserved]

Form 26-41

A domestic or foreign entity that has executed and recorded an affidavit authorizing one or more individuals with authority to transfer on behalf of the entity an estate or interest in real property in the name of the entity may terminate the transfer authority specified in the affidavit at any time by recording a written termination of the authority specified in the affidavit with the county clerk in the county in which the real property is located. Tex. Prop. Code § 12.019(n).

Affidavit of Termination of Authority to Transfer (Pursuant to Section 12.019, Texas Property Code)

Date:

Name of Domestic or Foreign Entity Owning Title to the Property (the "Entity"):

Entity's Address: [**include street address**]

Property to Be Transferred: [**insert legal description**]

Affidavit of Authority to Transfer: [**insert recording information**]

Affiant:

Affiant on oath swears that the following statements are true and are within the personal knowledge of Affiant:

1. My name is [**name of affiant**]. I am at least eighteen years of age. I am authorized to execute this affidavit on behalf of the Entity. I am competent to execute this affidavit. I understand that third parties will rely on the truthfulness of the statements made in this affidavit and that this affidavit is made under penalty of perjury.

2. The authority to transfer an estate or interest in the Property as contained in the Affidavit of Authority to Transfer described above is terminated effective when this Affidavit

of Termination of Authority to Transfer is indexed by the county clerk of the county where the Property is located.

_____

[**Name of affiant**]

SUBSCRIBED AND SWORN TO before me on _____ by [**name of affiant**].

_____

Notary Public, State of Texas

Include acknowledgment.

Appendix

Third-Party Legal Opinion Letters

Lenders often require a borrower's counsel to issue a legal opinion letter to the lender on certain aspects of a loan transaction, including, among other matters, an opinion regarding the borrower's legal status and the enforceability of the lender's loan documents. Historically, the initial form of the legal opinion letter is presented to the borrower's counsel by the lender or its counsel. Although several national, state, and local private attorney organizations and bar association groups have published suggested standard third-party legal opinion letter formats for use in rendering a third-party legal opinion letter, neither a single opinion format nor a single standard for interpreting the opinions included in an opinion letter has been universally accepted by lenders, borrowers, or their respective legal counsel. Information and guidance on the preparation and use of third-party legal opinion letters may be obtained from sources listed in the selected bibliography in this appendix. Additional information can be obtained from the Legal Opinion Resource Center at **https://www.americanbar.org/groups/business_law/migrated/tribar**.

Several of the articles listed in the bibliography discuss the Texas Supreme Court case of *McCamish, Martin, Brown & Loeffler v. F.E. Appling Interests*, 991 S.W.2d 787, 791 (Tex. 1999), which held that attorneys (as well as other professionals) could be liable in Texas for the tort of negligent misrepresentation, as defined by the *Restatement (Second) of Torts* § 552 (1977). Even as the supreme court reaffirmed the availability in Texas of the defense of a lack of privity in legal malpractice cases, it noted several times that section 552 does not require privity to impose liability for negligent misrepresentation or implicate the policy concerns behind the privity rule. *See McCamish*, 991 S.W.2d at 792–93, 795.

As the supreme court pointed out in *McCamish*, an attorney can be liable to a nonclient for negligent misrepresentation based on the issuance of an opinion letter; however, section 552 limits liability to situations in which (1) the attorney who provides the false information is aware of the nonclient and intends that the nonclient rely on the false information and (2) the nonclient justifiably relies on the false information. *See McCamish*, 991 S.W.2d at 793–94. Furthermore, the supreme court expressly recognized that "[a] lawyer may also avoid or minimize the risk of liability to a nonclient by setting forth (1) limitations as to whom the representation is directed and who should rely on it, or (2) disclaimers as to the scope and accuracy of the factual investigation or assumptions forming the basis of the representation or the representation itself." *See McCamish*, 991 S.W.2d at 794. The foregoing quote explains a good deal of the scope of reliance disclaimers in current third-party opinion letter practice.

Selected Bibliography

Reports

American College of Real Estate Lawyers. "Statement of Policy on Mortgage Loan Enforceability Opinions." *The Attorney's Opinion Letter in Real Estate Transactions* 1 (American Bar Association, 1992).

American College of Real Estate Lawyers Attorneys' Opinion Committee and the American Bar Association, Section of Real Property, Probate and Trust Law, Committee on Legal Opinions in Real Estate Transactions. "Real Estate Opinion Letter Guidelines." 38 *Real Property, Probate & Trust Journal* 241 (2003).

American College of Real Estate Lawyers Attorneys' Opinion Committee and the American Bar Association, Section of Real Property, Probate and Trust Law, Committee on Legal Opinions in Real Estate Transactions, Subcommittee on Creation of an Inclusive Opinion. "Inclusive Real Estate Secured Transaction Opinion" (1999), *available at* **http://dirt.umkc.edu/files/incl_rep.htm**.

American College of Real Estate Lawyers Attorneys' Opinion Committee and the American Bar Association, Section of Real Property, Probate and Trust Law, Committee on Legal Opinions in Real Estate Transactions, and the American College of Mortgage Attorneys, Opinions Committee. "Local Counsel Opinion Letters in Real Estate Finance Transactions—A Supplement to the Real Estate Finance Opinion Report of 2012." 51 *Real Property, Probate & Trust Journal* 167 (2016).

———. "The Real Estate Finance Opinion Report of 2012." 47 *Real Property, Probate & Trust Journal* 213 (2012).

American College of Real Estate Lawyers Attorneys' Opinion Committee and the American Bar Association, Section of Real Property, Probate and Trust Law, Committee on Legal Opinions in Real Estate Transactions, and the American College of Mortgage Attorneys, Opinions Committee, reviewed and approved by the American College of Commercial Finance Lawyers. "Uniform Commercial Code Opinions in Real Estate Finance Transactions." 53 *Real Property, Trust, and Estate Law Journal* 163 (2019).

Section of Business Law, American Bar Association Legal Opinions Committee. "Guidelines for the Preparation of Closing Opinions." 57 *The Business Lawyer* 875 (2002).

———. "Legal Opinion Principles." 53 *The Business Lawyer* 831 (1998).

———. "Report on the 2010 Survey of Law Firm Opinion Practices." 68 *The Business Lawyer* 785 (2013).

———. "Statement on the Role of Customary Practice in the Preparation and Understanding of Third-Party Legal Opinions." 63 *The Business Lawyer* 1277 (2008).

———. "Third-Party Legal Opinion Report, Including the Legal Opinion Accord, of the Section of Business Law, American Bar Association." 47 *The Business Lawyer* 167 (1991) (reprinted in 29 *Real Property, Probate & Trust Journal* 487 (1994)).

Section of Business Law, American Bar Association Legal Opinions Committee and Working Group on Legal Opinions Foundation. "Statement of Opinion Practices." 74 *The Business Lawyer* 801 (2019).

Section of Business Law, American Bar Association for Real Estate Secured Transactions, Section of Real Property, Probate and Trust Law of the American Bar Association and the American College of Real Estate Lawyers. "Report on Adaptation of the Legal Opinion Accord." 29 *Real Property, Probate & Trust Journal* 569 (1994).

State Bar of Texas, Business Law Section. "Report of the Legal Opinions Committee Regarding Legal Opinions in Business Transactions." 29 *State Bar of Texas Bulletin of the Business Law Section* 2 & 3 (1992).

———. "Supplement No. 1 to the Report of the Legal Opinions Committee Regarding Legal Opinions in Business Transactions." 31 *State Bar of Texas Bulletin of the Business Law Section* 4 (1994).

———. "Supplement No. 2 to the Report of the Legal Opinions Committee Regarding Legal Opinions in Business Transactions." 37 *Texas Journal of Business Law* 2 (2001).

State Bar of Texas, Business Law Section, Legal Opinions Committee. "Limiting Negligent Misrepresentation Liability for Third-Party Legal Opinions." 38 *Texas Journal of Business Law* 20 (2003).

———. "Statement on Legal Opinions Regarding Indemnification and Exculpation Provisions Under Texas Law." 41 *Texas Journal of Business Law* 271 (2006).

———. "Supplement No. 4 to the Report of the Legal Opinions Committee Regarding Legal Opinions in Business Transactions: Statement on ABA Principles and Guidelines." 43 *Texas Journal of Business Law* 1 (2009).

———. "Supplement No. 5 to the Report of the Legal Opinions Committee Regarding Legal Opinions in Business Transactions: Statement on Entity Status, Power and Authority Opinions Regarding Pre-Code Texas Entities and Pre-Code Registered Foreign Entities under the Texas Business Organizations Code." 45 *Texas Journal of Business Law* 1 (2012).

———. "Supplement No. 6 to the Report of the Legal Opinions Committee Regarding Legal Opinions in Business Transactions: Statement on Changes to the Procedure for Good Standing Certificates Issued by the Texas Comptroller of Public Accounts." 45 *Texas Journal of Business Law* 201 (2013).

State Bar of Texas, Committee on Lawyers' Opinion Letters in Mortgage Loan Transactions. "1996 Texas Supplement Regarding Lawyers' Opinion Letters in Mortgage Loan Transactions." 35 *Real Estate, Probate & Trust Law Reporter* 1 (Oct. 1996).

State Bar of Texas, Real Estate, Probate & Trust Law Section, Real Estate, Probate & Trust Law Council. "Customary Practice Statement." 47 *Real Estate, Probate & Trust Law Reporter* 1 (Oct. 2008).

Articles and CLE Materials

Dunn, William B. "Third Party Legal Opinions in Real Estate Transactions: A Clearer Path." 29 *Real Property, Probate & Trust Journal* 461 (1994).

Harrell, Robert S., Karl G. Dial, and Kent Altsuler. "Opinion Letters (3d Party Reliance)." In *Advanced Real Estate Law Course, 2000.* Austin: State Bar of Texas, 2000.

Jolley, Rhonda G. "Opinion Letters, Pre and Post-McCamish with Drafting Tips (It's not as Bad as It Sounds!)." In *Mortgage Lending Institute, 2000.* Austin: University of Texas School of Law and Texas Mortgage Bankers Association, 2000.

Keyes, David R. "Annotated Legal Opinion for Secured Financing Transactions." In *Advanced Business Law Course, 2003.* Austin: State Bar of Texas, 2003.

Knowles, Mark. "Developments in Mortgage Loan Opinions." In *Mortgage Lending Institute, 2011.* Austin: University of Texas School of Law, 2011.

Maloney, Marilyn C. "UCC Opinions in Real Estate Financings." In *Advanced Real Estate Law Course, 2018*. Austin: State Bar of Texas, 2018.

———. "The ABA-ACREL-ACMA Local Counsel Opinion Report a/k/a/ Local Counsel Opinion Letters—A Supplement to the Real Estate Finance Opinion Report of 2012." In *Advanced Real Estate Law Course, 2016.* Austin: State Bar of Texas, 2016.

———. "Third Party Financing Opinions." In *Advanced Real Estate Strategies Course, 2015.* Austin: State Bar of Texas, 2015.

Menges, Charles L., and David W. Tomek. "Local Counsel Opinions for Real Estate Lawyers." In *Advanced Real Estate Law Course, 2013.* Austin: State Bar of Texas, 2013.

Merel, Gail, A. Mark Adcock, Robert W. Barron, Willis R. Buck, Jr., Jerome A. Grossman, Louis G. Hering, Timothy G. Hoxie, Andrew M. Kaufman, Reade H. Ryan, Jr., Philip B. Schwartz, and Stephen C. Tarry. "Common Qualifications to a Remedies Opinion in U.S. Commercial Loan Transactions." 70 *The Business Lawyer* 121 (2014).

Merel, Gail, Arthur Field, David R. Keyes, and Stephen C. Tarry. "Current National Legal Opinion Issues." In *Advanced Business Law Course, 2007.* Austin: State Bar of Texas, 2007.

Scofield, John B., and Josh Davin Morton. "Mortgage Loan Opinions: Working within Customary Practice." In *Real Estate Law Conference, 2007.* Houston: South Texas College of Law, 2007, *available at* **http://images.jw.com/com/publications/1037.pdf.**

Spencer, Richard L. "Opinions 101." In *Advanced Real Estate Law Course, 2019.* Austin: State Bar of Texas, 2019.

Tarry, Stephen C. "Primer on Legal Opinions." In *Essentials of Business Law Course, 2011.* Austin: State Bar of Texas, 2011.

Wallenstein, James H. "ABA/ACREL Real Estate Opinion Letter Guidelines." In *Advanced Real Estate Drafting Course, 2004.* Austin: State Bar of Texas, 2004.

———. "New ABA Opinion Letter Guidelines." In *Advanced Real Estate Law Course, 2002.* Austin: State Bar of Texas, 2002.

———. "Opinion Letter Update: Giving 'Accord' Opinions." In *Mortgage Lending Institute, 1994.* Austin: University of Texas School of Law, 1994.

———. "Provisions Often Negotiated in Mortgage Loan Opinion Letters." In *Advanced Real Estate Law Course, 2008.* Austin: State Bar of Texas, 2008.

———. "The New State Bar Mortgage Opinion Letter Format." In *Advanced Real Estate Law Course, 1996.* Austin: State Bar of Texas, 1996.

Willis, Sterling Scott. "Real Estate Finance Opinion Report of 2012." In *Advanced Real Estate Drafting Course, 2014.* Austin: State Bar of Texas, 2014.

Youngblood, D. Hull, Jr. "7 Deadly Sins of Opinion Letters." In *Essentials of Business Law Course, 2018.* Austin: State Bar of Texas, 2018.

[Reserved]

Statutes and Rules Cited

[This index reflects only statutes and rules cited at text sections in the practice notes.]

TEXAS

Texas Constitution

Texas Revised Civil Statutes

Texas Agriculture Code

Texas Alcoholic Beverage Code

Texas Business & Commerce Code

Texas Business Organizations Code

Texas Civil Practice & Remedies Code

Texas Code of Criminal Procedure

Texas Education Code

Texas Election Code

Texas Estates Code

Texas Family Code

Texas Finance Code

Texas Government Code

Texas Health & Safety Code

Texas Human Resources Code

Texas Insurance Code

Texas Labor Code

Texas Local Government Code

Texas Natural Resources Code

Texas Occupations Code

Texas Penal Code

Texas Property Code

Texas Special District Local Laws Code

Texas Tax Code

Texas Transportation Code

Texas Utilities Code

Texas Water Code

Texas Administrative Code

Texas Rules of Civil Procedure

Texas Attorney General Opinions

State Bar Rules

Texas Disciplinary Rules of Professional Conduct

UNITED STATES

United States Code

Code of Federal Regulations

Cases Cited

[References are to section numbers in the practice notes.]

E

F

G

H

U

V

W

Y

Z

[Reserved]

Subject Index to Forms

[All references in this subject index are to form numbers.]

A

B

C

D

E

F

G

H

I

J

L

M

N

O

P

Q

R

S

T

List of Forms by Title

[All references in this list are to form numbers.]

A

B

C

[All references in this list are to form numbers.]

[Chapters 1–7, vol. 1; chs. 8–15, vol. 2; chs. 16–22, vol. 3; chs. 23–26, vol. 4.]

D

[All references in this list are to form numbers.]

[Chapters 1–7, vol. 1; chs. 8–15, vol. 2; chs. 16–22, vol. 3; chs. 23–26, vol. 4.]

E

F

G

H

I

J

L

[All references in this list are to form numbers.]

[Chapters 1–7, vol. 1; chs. 8–15, vol. 2; chs. 16–22, vol. 3; chs. 23–26, vol. 4.]

M

N

[All references in this list are to form numbers.]

[Chapters 1–7, vol. 1; chs. 8–15, vol. 2; chs. 16–22, vol. 3; chs. 23–26, vol. 4.]

[All references in this list are to form numbers.]

[Chapters 1–7, vol. 1; chs. 8–15, vol. 2; chs. 16–22, vol. 3; chs. 23–26, vol. 4.]

O

P

[All references in this list are to form numbers.]

[Chapters 1–7, vol. 1; chs. 8–15, vol. 2; chs. 16–22, vol. 3; chs. 23–26, vol. 4.]

Q

R

[All references in this list are to form numbers.]

[Chapters 1–7, vol. 1; chs. 8–15, vol. 2; chs. 16–22, vol. 3; chs. 23–26, vol. 4.]

S

[All references in this list are to form numbers.]

[Chapters 1–7, vol. 1; chs. 8–15, vol. 2; chs. 16–22, vol. 3; chs. 23–26, vol. 4.]

T

U

V

W

[All references in this list are to form numbers.]

[Chapters 1–7, vol. 1; chs. 8–15, vol. 2; chs. 16–22, vol. 3; chs. 23–26, vol. 4.]

[Reserved]

Subject Index

[References are to section numbers in the practice notes.]

B

C

D

E

F

G

H

I

J

K

L

M

N

Q

R

S

T

U

V

W

Z

LIST OF EFFECTIVE PAGES

This list shows the current version of each sheet that should be in the *Texas Real Estate Forms Manual*, third edition, after incorporating into it the 2020 supplement. After this supplement has been inserted, use this list to check the completeness of the manual. Only the right-hand pages are listed; next to each page number is the date of the current version of that sheet, which should be the same as the date printed in the lower right corner of the page, underneath the page number, in the manual. Pages that have not been replaced by supplementation do not bear dates. The first four pages in each volume (half-title page through copyright page) and the State Bar of Texas officers page in volume 1 do not bear dates. Please note that pages xiii through xx are the List of Effective Pages and will be inserted in the manual after you have checked all other pages against this list.

It is often necessary to reprint pages with unchanged content because of the reflow of text following added, amended, or deleted text, and occasionally pages are reprinted to simplify the task of removing and replacing pages.

Volume 1

Half-title
Title
v . . . . . (1/20)
vii . . . . . ——
ix . . . . . (1/20)
xi . . . . . (1/20)
*xiii . . . . . (1/20)
*xv . . . . . (1/20)
*xvii . . . . . (1/20)
*xix . . . . . (1/20)

Summary of Contents

Contents-1 . . (1/20)
Contents-3 . . ——

How to Download This Manual

Doc-1 . . . . . (1/20)
Doc-3 . . . . . ——
Doc-5 . . . . . ——
Doc-7 . . . . . ——

Introduction

Intro-1 . . . . . ——
Intro-3 . . . . . ——

Chapter 1

1-i . . . . . (1/20)
1-1 . . . . . (1/20)
1-3 . . . . . (1/20)
1-5 . . . . . (1/20)
1-7 . . . . . (1/20)
1-9 . . . . . (1/20)
1-11 . . . . . (1/20)
1-13 . . . . . (1/20)
1-1-1 . . . . . ——
1-2-1 . . . . . ——
1-3-1 . . . . . ——
1-3-3 . . . . . ——
1-4-1 . . . . . ——
1-5-1 . . . . . ——
1-5-3 . . . . . ——
1-6-1 . . . . . ——
1-6-3 . . . . . ——
1-7-1 . . . . . ——
1-7-3 . . . . . ——
1-8-1 . . . . . ——
1-8-3 . . . . . ——
1-8-5 . . . . . ——
1-8-7 . . . . . ——
1-8-9 . . . . . ——
1-8-11 . . . . . ——
1-9-1 . . . . . ——
1-9-3 . . . . . ——
1-9-5 . . . . . ——
1-9-7 . . . . . ——
1-9-9 . . . . . ——
1-9-11 . . . . . ——
1-10-1 . . . . . ——
1-10-3 . . . . . ——
1-10-5 . . . . . ——
1-10-7 . . . . . ——
1-10-9 . . . . . ——
1-11-1 . . . . . ——
1-12-1 . . . . . ——
1-13-1 . . . . . ——
1-14-1 . . . . . ——
1-15-1 . . . . . (1/20)
1-15-3 . . . . . (1/20)
1-15-5 . . . . . (1/20)
1-15-7 . . . . . (1/20)
1-15-9 . . . . . (1/20)
1-15-11 . . . . (1/20)

Chapter 2

2-i . . . . . (1/20)
2-iii . . . . . (1/20)
2-v . . . . . (1/20)
2-vii . . . . . (1/20)
2-ix . . . . . (1/20)
2-1 . . . . . (1/20)
2-3 . . . . . (1/20)
2-5 . . . . . (1/20)
2-7 . . . . . (1/20)
2-9 . . . . . (1/20)
2-11 . . . . . (1/20)
2-13 . . . . . (1/20)
2-15 . . . . . (1/20)
2-17 . . . . . (1/20)
2-19 . . . . . (1/20)
2-21 . . . . . (1/20)
2-23 . . . . . (1/20)
2-25 . . . . . (1/20)
2-27 . . . . . (1/20)
2-29 . . . . . (1/20)
2-31 . . . . . (1/20)
2-33 . . . . . (1/20)
2-35 . . . . . (1/20)
2-37 . . . . . (1/20)
2-39 . . . . . (1/20)
2-41 . . . . . (1/20)
2-43 . . . . . (1/20)
2-45 . . . . . (1/20)
2-47 . . . . . (1/20)
2-49 . . . . . (1/20)
2-51 . . . . . (1/20)
2-53 . . . . . (1/20)
2-55 . . . . . (1/20)
2-57 . . . . . (1/20)
2-59 . . . . . (1/20)
2-61 . . . . . (1/20)
2-63 . . . . . (1/20)
2-65 . . . . . (1/20)
2-67 . . . . . (1/20)

Chapter 3

3-i . . . . . (1/20)
3-iii . . . . . (1/20)
3-1 . . . . . (1/20)
3-3 . . . . . (1/20)
3-5 . . . . . (1/20)
3-7 . . . . . (1/20)
3-9 . . . . . (1/20)
3-11 . . . . . (1/20)
3-13 . . . . . (1/20)
3-15 . . . . . (1/20)
3-17 . . . . . (1/20)
3-19 . . . . . (1/20)
3-1-1 . . . . . ——
3-2-1 . . . . . ——
3-3-1 . . . . . ——
3-4-1 . . . . . ——
3-5-1 . . . . . ——
3-6-1 . . . . . ——
3-7-1 . . . . . ——
3-8-1 . . . . . ——
3-9-1 . . . . . ——
3-10-1 . . . . . ——
3-11-1 . . . . . ——
3-12-1 . . . . . ——
3-13-1 . . . . . ——
3-14-1 . . . . . ——
3-15-1 . . . . . ——
3-16-1 . . . . . ——

* Please note that pages xiii through xx are the List of Effective Pages.

Chapter 24

Chapter 25

Chapter 26

Appendix

Statutes and Rules Cited

Cases Cited

Subject Index to Forms

List of Forms by Title

Subject Index

[Reserved]