2016 SUPPLEMENT to Texas Collections Manual

Fourth Edition

STUART R. SCHWARTZ
Chair, Manual Committee

This supplement updates the practice notes and forms to conform to changes from the Eighty-fourth Texas legislative session and incorporates relevant case law handed down since 2015. New forms have been added to chapters 1 and 3, and several forms in chapter 35 have been updated. The appendix has been updated to assist attorneys in navigating justice court rules and rules related to expedited trials.

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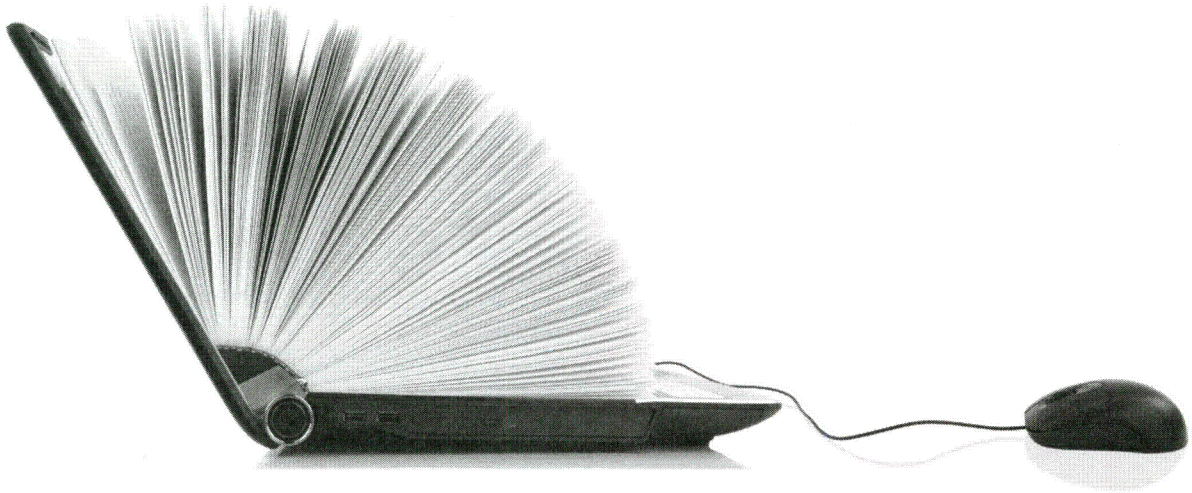

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TEXAS COLLECTIONS MANUAL

Fourth Edition

Volume 1

Austin 2011

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To the memory of Daniel J. Goldberg, 1944–2013, chair of the Texas Collections Manual *editorial committee and without whom this book would not exist.*

His great dedication, knowledge, and leadership shaped the Texas Collections Manual *since 1975. Dan's wit and good humor will be missed by all who knew him.*

TEXAS COLLECTIONS MANUAL

Fourth Edition

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Special thanks to LISA T. CHAMBERLAIN, *former publications attorney, for her contributions to this project.*

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

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

Terry O. Tottenham

Terry O. Tottenham
President, State Bar of Texas

Preface

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

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

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

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

—Daniel J. Goldberg, *Chair*

[Reserved]

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Discussion of law office management, client relations, and attorney's fees regarding debt collection matters

2 Laws Affecting Debt Collection

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

3 Finding Debtor and Debtor's Assets

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

4 Communicating with Debtor

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

5 Repossession

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

6 Presuit Considerations

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

7 Creation and Enforcement of Liens

Practice notes and forms concerning mechanic's and other liens

8 Prejudgment Remedies

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

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14 Causes of Action

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

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

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

17 Defenses and Counterclaims

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

18 Discovery

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

19 Trial Procedure

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

20 Judgment

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

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26 Postjudgment Discovery

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27 Postjudgment Remedies

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28 Landlord-Tenant Law

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

29 Probate and Guardianship

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

[chapters 30-34 reserved]

35 Bankruptcy

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

[Reserved]

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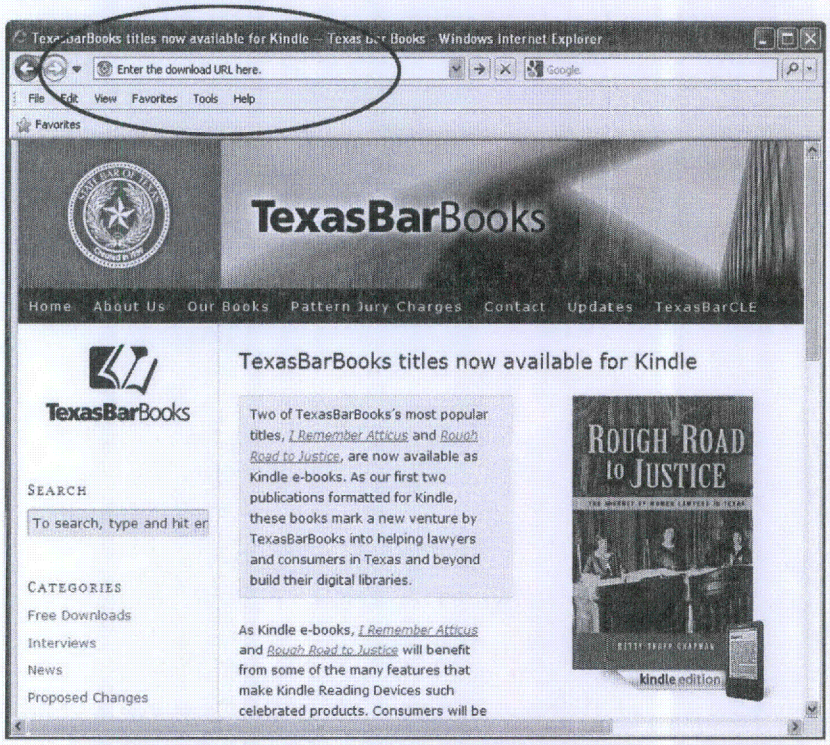

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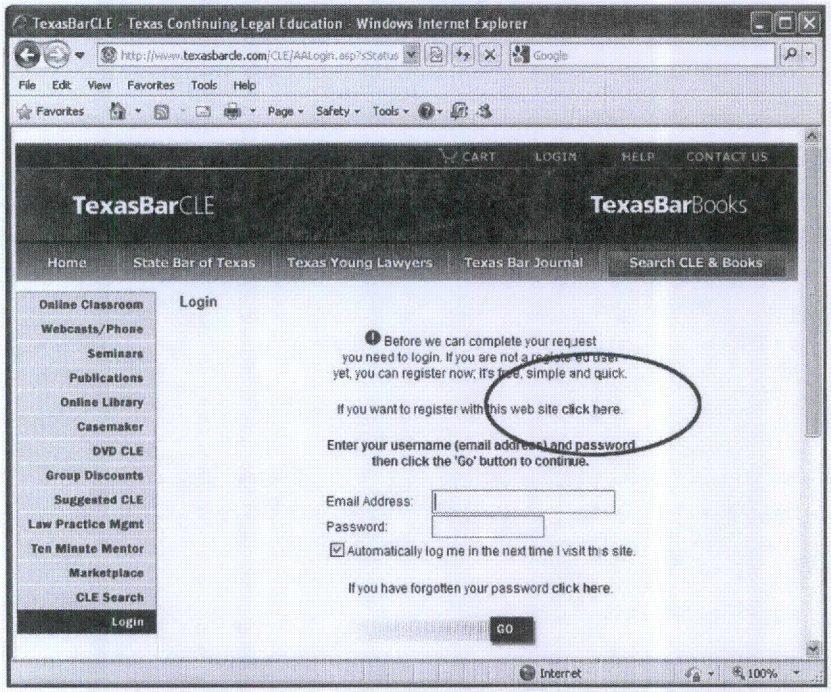
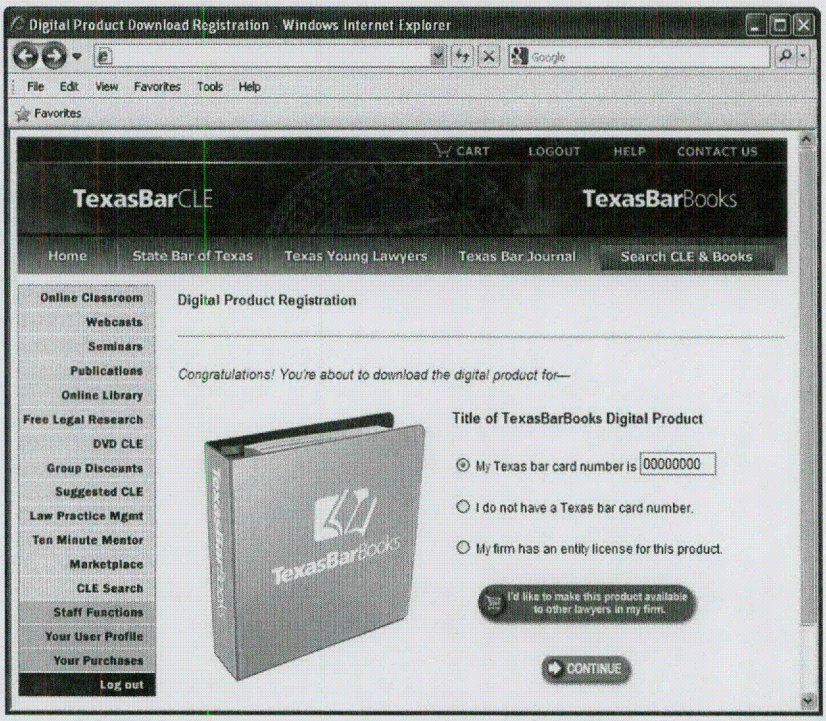


3. The initial download Web page should look similar to the one below.



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

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

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

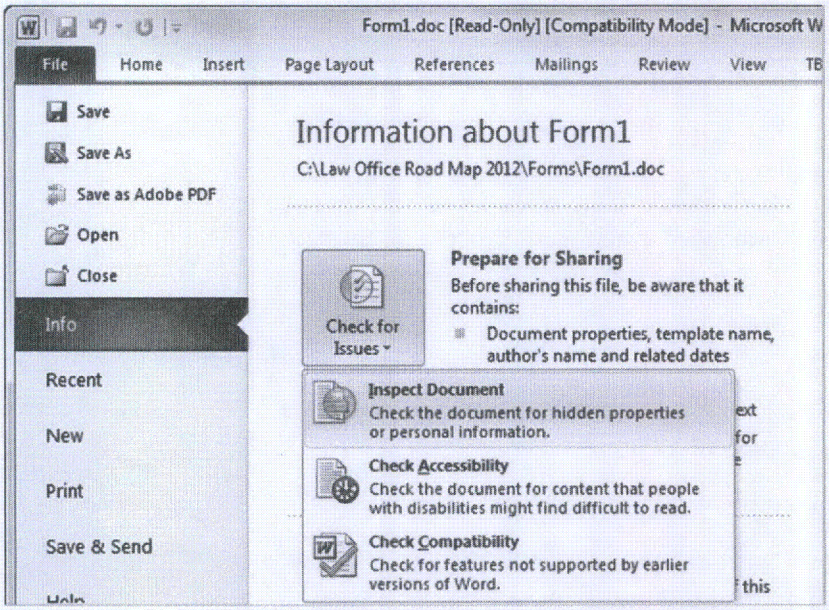
Preparing Word Forms for E-Filing (Windows)

Notes for Other Software

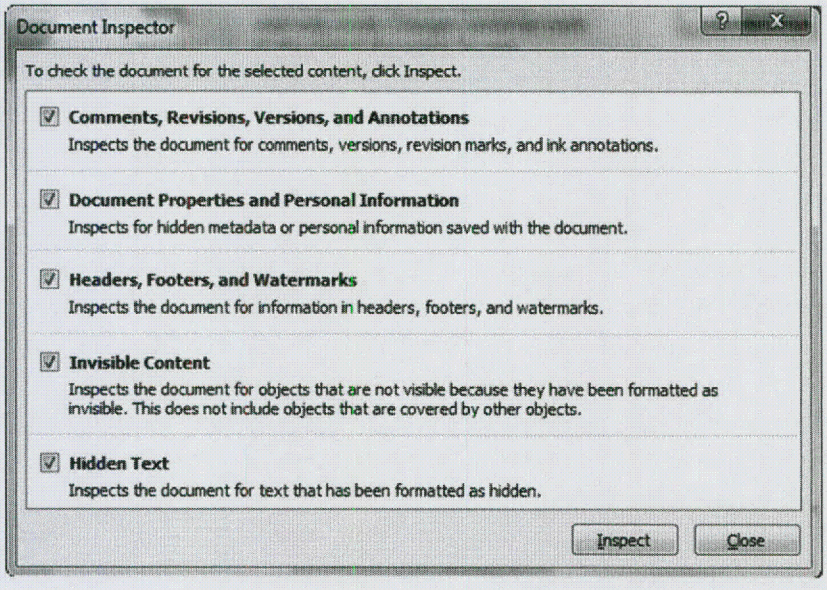
- *Word for Macintosh:* See the section titled "Remove Metadata" in the document named "Macintosh--How to Use the Word Forms" included with the digital product.
- *WordPerfect:* To remove metadata from forms saved as WordPerfect files (version X3 or later), launch the "Save Without Metadata" tool (File > Save Without Metadata, or Alt + F + M).

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

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



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



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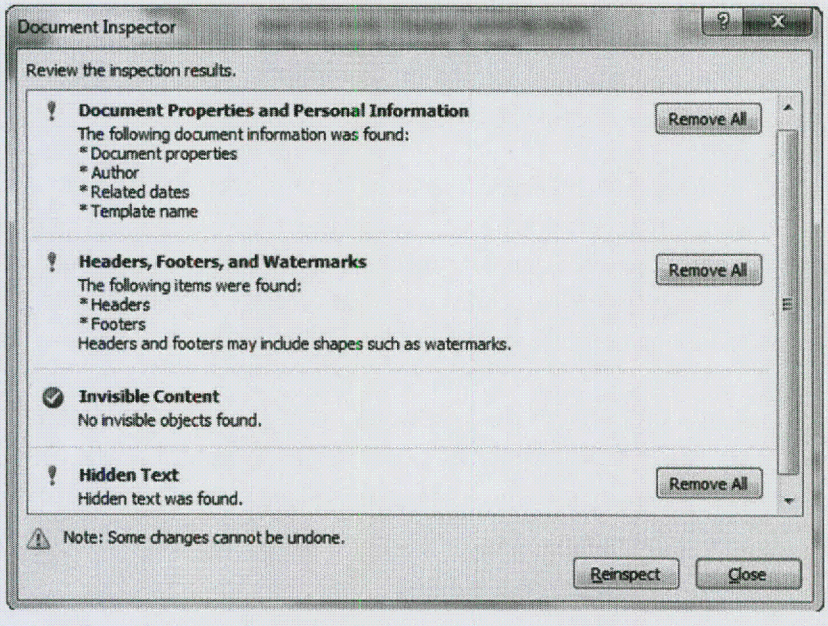

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Introduction

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

§ 1 Practice Notes

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

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

§ 2 Forms

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

1. Optional content

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

2. Typeface conventions

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

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

3. Bracketed material

Several types of bracketed material appear in the forms.

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

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

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

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

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

4. Blank lines

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

5. Language in boxes

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

6. Form numbers

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

7. Captions

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

8. Digital product

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

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

Caveat: Note that the word-processing forms included in the digital product contain instructional language as hidden text. Be aware that this language will be included in your completed forms unless you specifically delete it.

For more information about the digital product including usage notes, see the material following the "How to Download This Manual" tab in volume 1 of this manual.

§ 3 Captions of Forms

1. Court designations for caption of petition

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

District Court

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

Constitutional County Court

IN THE COUNTY COURT
OF _____ COUNTY, TEXAS

Unnumbered County Court at Law

IN THE COUNTY COURT AT LAW
OF _____ COUNTY, TEXAS

Numbered County Court at Law

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

Justice Court

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

No. 00–12345

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

---

2. Appearance of caption

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

3. Notice of Sensitive Data

If a document filed in a civil case is required to contain sensitive data, the filer must notify the clerk by (1) designating the document as containing sensitive data when it is electronically filed or (2), if the document is not electronically filed, including on the upper left-hand side of the first page, the phrase: "NOTICE: THIS DOCUMENT CONTAINS SENSITIVE DATA." Tex. R. Civ. P. 21c(d). See section 1.40 in chapter 1 of this manual for additional information concerning sensitive data.

§ 4 Page Numbers

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

§ 5 Corrections and Updates

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

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

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

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[Reserved]

Chapter 1

Debt Collection Law Practice

I. Managing the Law Office

§ 1.1 Client and Claim Information

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

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

§ 1.2 Professionalism

§ 1.2:1 Informing Client of Grievance Process

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

§ 1.2:2 Texas Lawyer's Creed

The Supreme Court of Texas and the Texas Court of Criminal Appeals adopted "The Texas Lawyer's Creed—A Mandate for Professionalism" in 1989. The Texas Lawyer's Creed, along with additional information regarding its adoption, is available at **www.legalethicstexas.com**.

§ 1.2:3 Texas Lawyer's Oath

The Texas Lawyer's Oath was amended in 2015 to require the pleading attorney to "conduct myself with integrity and civility in dealing and communicating with the court and all parties." The amendment also removed masculine pronouns from the oath in favor of gender-neutral terms. *See* Tex. Gov't Code § 82.037. A copy of the Oath is available at **texasbar.com**.

§ 1.3 Conflicts of Interest

§ 1.3:1 Conflicts Generally

A detailed discussion of conflicts of interest is beyond the scope of this manual. Attorneys should incorporate a conflicts check in the processing of matters they are engaged to handle. *See* Tex. Disciplinary Rules Prof'l Conduct R. 1.06, 1.09, *reprinted in* Tex. Gov't Code Ann., tit. 2, subtit. G, app. A (West 2013 & Supp. 2015) (Tex. State Bar R. art. X, § 9).

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

§ 1.3:2 Going into Business with Clients

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

§ 1.4 Ticklers and Calendars

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

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

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

§ 1.5 Handling Money

§ 1.5:1 Trust Accounts

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

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

§ 1.5:2 Debtor's Payments on Account

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

§ 1.6 Taxation of Debt Collection Services

Legal services to collect debts are apparently exempt from sales tax unless the attorney is acting in a transaction as nothing more than a debt collector. Tex. Att'y Gen. Op. No. JM-823

(1987); *see also* Texas Comptroller of Public Accounts Private Letter Ruling 9301L1222F05. (See **http://comptroller.texas.gov/taxinfo/letters31.html** for information on the binding effect of Private Letter Rulings.)

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

§ 1.7 Bonding of Attorneys and Nonattorney Employees

Debt collectors in Texas must be bonded, and an attorney or the attorney's employees may be "debt collectors" for bonding purposes. See section 2.32:4 in this manual.

[Sections 1.8 through 1.10 are reserved for expansion.]

II. Client Relations

§ 1.11 Keeping Client Informed

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

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

§ 1.12 Forwarders

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

Every forwarder has very specific operating procedures. These procedures can range from one page to more than thirty pages. Most operating procedures discuss reporting, remittances, fees,

and what happens when certain events occur such as bankruptcy, death, or a request to close the account. Before accepting files, the attorney should review these procedures to understand the agreement and whether the attorney can ethically agree to their requirements.

§ 1.13 Authority to Sue or Take Other Action

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

§ 1.14 Multiple Clients with Claims against Same Debtor

Occasionally an attorney will receive claims against one debtor from more than one client. An attorney may represent multiple clients if the attorney reasonably believes the representation of each client will not be materially affected and if each affected or potentially affected client consents to the representation after full disclosure of the existence, nature, implications, and possible adverse consequences of the common representation and the advantages and disadvantages involved, if any. Tex. Disciplinary Rules Prof'l Conduct R. 1.06(c). The reason for the rule is that a lawyer owes a duty of loyalty to every client. Tex. Disciplinary Rules Prof'l Conduct R. 1.06 cmt 1.

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

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

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

forwarder of all facts or to return the second or subsequent claim with a full explanation.

§ 1.15 When to Recommend Not Filing Suit

The attorney may consider recommending not filing suit if—

1. the debtor cannot be located;
2. the debtor has not responded to demands for payment, and the amount involved is too small to justify filing suit;
3. the debtor's assets would not be sufficient to satisfy or substantially contribute toward satisfaction of a judgment;
4. the debtor disputes the claim and alleges a plausible affirmative defense or counterclaim, and the time and expense involved in handling a contested suit on his claim cannot be justified; or
5. an investigation indicates that many claims against the debtor have been handled by local attorneys without successful settlement or that some judgments have been obtained with little or no satisfaction of them having been achieved.

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

§ 1.16 Declining Representation

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

§ 1.17 Withdrawal from Representation

§ 1.17:1 When Withdrawal Is Necessary

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

§ 1.17:2 If Matter Is in Litigation

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

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

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

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

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

§ 1.17:3 Ethical Requirements

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

§ 1.17:4 Attorney's Fees after Wrongful Discharge

An attorney who is wrongfully discharged by the client should be able to recover a fee either under the client contract or under a quantum meruit theory. *See Mandell & Wright v. Thomas*, 441 S.W.2d 841, 847 (Tex. 1969); *Diaz v. Attorney General*, 827 S.W.2d 19, 22–23 (Tex. App.—Corpus Christi 1992, no writ). However, this rule "assumes an enforceable fee contract, and it is the plaintiff's burden to establish the existence of a valid contract." *Tillery & Tillery v. Zurich Insurance Co.*, 54 S.W.3d 356, 360 (Tex. App.—Dallas 2001, pet. denied).

[Sections 1.18 through 1.20 are reserved for expansion.]

III. Attorney's Engagement Agreement

§ 1.21 Attorney's Engagement Agreements with Client

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

matter, the attorney must provide the client with a written statement describing the outcome of the matter and showing the remittance to the client and the method of its determination if there is a recovery. Tex. Disciplinary Rules Prof'l Conduct R. 1.04(d).

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

Additional terms that may be included in the contract include—

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

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

A form for a contingent fee contract for a collections matter is at form 1-8 in this chapter.

§ 1.22 Debtor's Contractual Liability for Attorney's Fees

§ 1.22:1 Contractual Amount or Percentage Specified

The parties to a note, security agreement, or other contract may provide in the contract for recovery of attorney's fees by the prevailing party in the event of litigation of the primary agreement. Promissory notes commonly provide that the maker is liable for the holder's attorney's fees and costs of collection on default. The legal owner and holder of a note is prima facie entitled to recover stipulated attorney's fees from the obligor on the happening of a contingency that makes the note payable. *Kuper v. Schmidt*, 338 S.W.2d 948, 950 (Tex. 1960). The fees may be expressed either as a percentage of a readily ascertainable amount or as a sum certain. *See Kuper*, 338 S.W.2d at 950. The holder need not prove he has made an agreement to pay attorney's fees, and he is not required to prove that any such fee is reasonable unless the defendant affirmatively pleads its unreasonableness. *Highlands Cable Television, Inc. v. Wong*, 547 S.W.2d 324, 327 (Tex. Civ. App.—Austin 1977, writ ref'd n.r.e.); *see also Jalco, Inc. v. Tool Traders, Inc.*, 535 S.W.2d 898, 902–03 (Tex. Civ. App.—Houston [1st Dist.] 1976, no writ) (rental agreement). To defeat the presumption of reasonableness of attorney's fees, the obligor must plead and prove their unreasonableness. *F.R. Hernandez Construction & Supply Co. v. National Bank of Commerce*, 578 S.W.2d 675, 677 (Tex. 1979).

Chapter 9 of the Texas Business and Commerce Code recognizes the propriety of applying proceeds from the enforcement of either nonpossessory collateral or possessory collateral to reasonable attorney's fees, "to the extent provided for by agreement and not prohibited by law." Tex. Bus. & Com. Code §§ 9.608(a)(1)(A), 9.615(a)(1).

§ 1.22:2 Reasonable Attorney's Fees

If the note provides for recovery of reasonable attorney's fees instead of a sum certain, the plaintiff must plead and prove what would be reasonable fees for the services rendered to him in collecting the note. *Farm Credit Bank of Texas v. Snyder National Bank*, 802 S.W.2d 709, 716 (Tex. App.—Eastland 1990, writ denied); *Yandell v. Tarrant State Bank*, 538 S.W.2d 684, 688–90 (Tex. Civ. App.—Fort Worth 1976, writ ref'd n.r.e.).

Reasonableness is determined by the trier of fact. *Jim Rutherford Investments, Inc. v. Terramar Beach Community Ass'n*, 25 S.W.3d 845, 853 (Tex. App.—Houston [14th Dist.] 2000, pet. denied); *see also Arthur Andersen & Co. v. Perry Equipment Co.*, 945 S.W.2d 812, 818 (Tex. 1997) (factors in determining "reasonable").

Reasonableness is not wholly dependent on the amount in controversy. *Failing v. Equity Management Corp.*, 674 S.W.2d 906, 910–11 (Tex. App.—Houston [1st Dist.] 1984, no writ) (attorney's fees of $1,600 on debt of $875 reasonable).

§ 1.22:3 Liability of Endorser

The endorser of a note that provides for recovery of attorney's fees is liable for those fees even in the absence of an express agreement by the endorser to pay attorney's fees. *Dewey v. C.I.T. Corp.*, 374 S.W.2d 298, 299–300 (Tex. Civ. App.—Amarillo 1963, writ ref'd n.r.e.).

§ 1.23 Debtor's Statutory Liability for Attorney's Fees (Texas Civil Practice and Remedies Code Chapter 38)

§ 1.23:1 General Basis for Recovery

A person may recover reasonable attorney's fees from an individual or corporation, in addition to the amount of a valid claim and costs, if the claim is for services rendered, labor performed, material furnished, a sworn account, or an oral or written contract. Tex. Civ. Prac. & Rem. Code § 38.001(1), (2), (3), (7), (8).

In general, the amount of statutory attorney's fees is a jury question. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 367 (Tex. 2000).

§ 1.23:2 Net Recovery Not Required

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

§ 1.23:3 Presentment of Claim

A demand for the claim must be made and go unpaid for thirty days for attorney's fees to be recovered. Tex. Civ. Prac. & Rem. Code § 38.002. The claim must be presented thirty days before trial, not thirty days before filing suit. *K.C. Roofing Co. v. Abundis*, 940 S.W.2d 375, 379 (Tex. App.—San Antonio 1997, writ denied). The purpose of the requirement for presentment is to allow the person against whom the claim is asserted an opportunity to pay within thirty days after notice without incurring an obligation for attorney's fees. *Jones v. Kelley*, 614 S.W.2d 95, 100 (Tex. 1981); *Grace v. Duke*, 54 S.W.3d 338, 344 (Tex. App.—Austin 2001, pet. denied). Presentment does not have to be

made by the attorney; it can be an invoice from the creditor to the debtor before referral to the attorney. *Adams v. Petrade International, Inc.*, 754 S.W.2d 696, 719 (Tex. App.—Houston [1st Dist.] 1988, writ denied); *Gensco, Inc. v. Transformaciones Metalurgicias Especiales, S.A.*, 666 S.W.2d 549, 554 (Tex. App.—Houston [14th Dist.] 1984, writ dism'd).

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

§ 1.23:4 Pleading and Proof

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

§ 1.23:5 Oral and Written Contracts

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

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

§ 1.23:6 Rendered Services

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

1. Ground preparation work performed by a dirt contractor. *Mathews Construction Co.*, 528 S.W.2d at 327.

2. Utility company's furnishing electricity to owners of apartment houses. *Caston v. Texas Power & Light Co.*, 501 S.W.2d 472, 473 (Tex. Civ. App.—Texarkana 1973, no writ).

3. Advertising and promotional services provided by the plaintiff, including those provided by third parties retained by the plaintiff, for the defendant's benefit. *Clark Advertising Agency v. Tice*, 490 F.2d 834, 837–38 (5th Cir. 1974).

4. Architect's services. *Allison v. Douglas*, 531 S.W.2d 445, 447–48 (Tex. Civ. App.—Waco 1975, no writ).

5. Engineer's services. *Mitchell v. M.M.M., Inc.*, 261 S.W.2d 472, 475 (Tex. Civ. App.—Galveston 1953), *rev'd on other grounds*, 265 S.W.2d 584 (Tex. 1954).

6. Accountant's services. *Williams v. Milliger*, 352 S.W.2d 794, 796 (Tex. Civ. App.—Houston 1961, writ ref'd n.r.e.).

7. Attorney's services. *McLeod, Alexander, Powel & Apffel, P.C. v. Quarles*, 894 F.2d 1482 (5th Cir. 1990); *see also Youngblood v. Wilson & Cureton*, 321 S.W.2d 887, 888 (Tex. Civ. App.—Fort Worth 1959, writ ref'd n.r.e.).

§ 1.23:7 "Labor Done"

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

There must be a contractual relationship between the person performing the labor (or his employer) and the person against whom the claim is asserted. *First National Bank v. Sledge*, 653 S.W.2d 283, 288 (Tex. 1983), *superseded by statute on other grounds,* Tex. Prop. Code § 53.056(b), *as recognized in Morrell Masonry Supply, Inc. v. Lupe's Shenandoah Reserve, LLC*, 363 S.W.3d 901 (Tex. App.—Beaumont 2012).

§ 1.23:8 "Material Furnished"

The "material" referred to in Tex. Civ. Prac. & Rem. Code § 38.001 is the substance or substances or the part, goods, stock, or the like of which anything is composed or may be made. *Pacific Coast Engineering Co. v. Trinity Construction Co.*, 481 S.W.2d 406, 407 (Tex. 1972); *Ferrous Products Co. v. Gulf States Trading Co.*, 332 S.W.2d 310, 313 (Tex. 1960). If the item furnished is the final or end product, not to be used as a component of a further or larger product, it is not "material." *See Pacific Coast Engineering Co.*, 481 S.W.2d at 407. Texas courts have held the following to be materials:

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

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

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

4. Fabricated plastic component parts used by the recipient in the assembly of fire extinguishers. *Ganda, Inc. v. All Plastics Molding, Inc.*, 521 S.W.2d

940, 944 (Tex. Civ. App.—Waco 1975, writ ref'd n.r.e.).

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

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

§ 1.23:9 Sworn Account

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

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

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

1. a statutory mechanic's lien against a motor vehicle, motorboat, vessel, or outboard motor (Tex. Prop. Code § 70.008);
2. nonjudicial foreclosure of a security interest in personal property (Tex. Bus. & Com. Code §§ 9.607, 9.609);
3. the assumed name statutes (Tex. Bus. & Com. Code § 71.201) (only attorney's fees and other expenses associated with locating and serving a party who has not complied with assumed name statutes);
4. defending against a groundless or harassing DTPA suit (Tex. Bus. & Com. Code § 17.50(c));
5. turnover proceedings (Tex. Civ. Prac. & Rem. Code § 31.002(a));
6. declaratory judgment actions (Tex. Civ. Prac. & Rem. Code § 37.009); and
7. false certification as to the evidentiary support or validity of a motion, claim, defense, or allegation (Tex. Civ. Prac. & Rem. Code § 10.002).

§ 1.25 Guarantor's Liability for Attorney's Fees

§ 1.25:1 Liability Based on Contract

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

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

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

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

§ 1.26 Attorney's Fees for Postjudgment Collection Efforts

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

§ 1.27 Proof of Attorney's Fees

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

Attorney's fees are considered unliquidated damages (*Higgins v. Smith*, 722 S.W.2d 825, 827–28 (Tex. App.—Houston [14th Dist.] 1987, no writ)) unless specified in the contract in question; see section 1.22:1 above. *Freeman v. Leasing Associates*, 503 S.W.2d 406, 408 (Tex. Civ. App.—Houston [14th Dist.] 1973, writ ref'd n.r.e.). The creditor's attorney should therefore be prepared to offer evidence regarding the type and amount of work performed, the amount charged per hour, and the reasonableness of the fees. *Goudeau v. Marquez*, 830 S.W.2d 681, 683 (Tex. App.—Houston [1st Dist.] 1992, no writ). If hourly fees are sought, the fees must be proved by attorney time records. *El Apple I, Ltd. v. Olivas*, 370 S.W.3d 757, 761–63 (Tex. 2012). See also section 20.25:2 in this manual.

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

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

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

§ 1.27:3 Default Judgment

If attorney's fees are sought other than under chapter 38 of the Civil Practice and Remedies Code, some proof of attorney's fees, either by affidavit or by live testimony, will be needed to sustain an award of attorney's fees for a default judgment. *Nettles v. Del Lingco of Houston*, 638 S.W.2d 633, 635–36 (Tex. App.—El Paso 1982, no writ). If hourly fees are sought, the fees must be proved by attorney time records. *El Apple I, Ltd. v. Olivas*, 370 S.W.3d 757, 761–63 (Tex. 2012). Proof of contemporaneous time records may be made by the attorney's affidavit with the attorney's itemized bills attached as an exhibit or with the detailed time descriptions by date, description, and hours per item, set out in the affidavit. If judgment is sought under Tex. Civ. Prac. & Rem. Code § 38.001, the court can take judicial notice of the usual and customary attor-

ney's fees and the contents of the case file without receiving further evidence. Tex. Civ. Prac. & Rem. Code § 38.004.

§ 1.27:4 Summary Judgment

If the claim for attorney's fees is not governed by chapter 38 of the Civil Practice and Remedies Code, unless the attorney's fees can be characterized as liquidated damages, the creditor's attorney should prepare an affidavit setting out the factors listed in Tex. Disciplinary Rules Prof'l Conduct R. 1.04(b). The attorney can execute the affidavit; the attorney's opinion that the fee is reasonable is sufficient, if uncontroverted by an opposing affidavit. *Sunbelt Construction Corp. v. S&D Mechanical Contractors, Inc.*, 668 S.W.2d 415, 418 (Tex. App.—Corpus Christi 1983, writ ref'd n.r.e.). If hourly fees are sought, the fees must be proved by attorney time records. *El Apple I, Ltd. v. Olivas*, 370 S.W.3d 757, 761–63 (Tex. 2012). Proof of contemporaneous time records may be made by the attorney's affidavit with the attorney's itemized bills attached as an exhibit or with the detailed time descriptions by date, description, and hours per item, set out in the affidavit. See section 1.27:2 above regarding summary judgment motions in cases governed by chapter 38 of the Civil Practice and Remedies Code.

§ 1.28 Discovery Sanctions

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

§ 1.29 Appellate Proceedings

§ 1.29:1 Appellate Attorney's Fees Generally

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

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

§ 1.29:2 Wording of Judgment

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

35, 38–39 (Tex. App.—Houston [1st Dist.] 1995, no writ).

[Section 1.30 is reserved for expansion.]

IV. Preparation of Pleadings and Other Documents

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

§ 1.31 Signature on Pleading or Motion

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

1. the pleading or motion is not being presented for any improper purpose, including to harass or to cause unnecessary delay or needless increase in the cost of litigation;

2. each claim, defense, or other legal contention contained in it is warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

3. each allegation or other factual contention has evidentiary support or, for a specifically identified allegation or factual contention, is likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

4. each denial of a factual contention is warranted on the evidence or, for a specifically identified denial, is reasonably based on a lack of information or belief.

Tex. Civ. Prac. & Rem. Code § 10.001.

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

§ 1.32 Affidavits

§ 1.32:1 Definition

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

An affidavit must have a notary's jurat, not the notary's acknowledgment. *Perkins v. Crittenden*, 462 S.W.2d 565, 568 (Tex. 1970); *see also Natural Gas Clearinghouse v. Midgard Energy*

Co., 23 S.W.3d 372, 378–79 (Tex. App.—Amarillo 1999, pet. denied); *Sullivan v. Bickel & Brewer*, 943 S.W.2d 477, 486 (Tex. App.—Dallas 1995, writ denied).

§ 1.32:2 Contents of Affidavit

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

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

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

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

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

§ 1.32:4 Affidavits and Business Records

An affidavit made under Tex. R. Civ. P. 185 and Tex. R. Evid. 902(10) may be used to authenticate and identify business records, and such an affidavit will support a summary judgment based on the pleadings. *Special Marine Products, Inc. v. Weeks Welding & Construction, Inc.*, 625 S.W.2d 822, 826–27 (Tex. App.—Houston [14th Dist.] 1981, no writ); *see also Hudspeth v. Investor Collection Services Ltd. Partnership*, 985 S.W.2d 477 (Tex. App.—San Antonio 1998, no pet.) (lender need not file detailed proof reflecting calculations of balance due on note; affidavit of bank employee setting forth total balance due is sufficient). It will not, however, satisfy the requirement of Tex. R. Civ. P. 166a(f) that the affidavit be made on personal knowledge of the affiant, and it will not permit the affiant to testify as to the contents of the business records unless personal knowledge of the contents is affirmatively shown. *Horn v. First Bank of Houston*, 530 S.W.2d 864, 865–66

(Tex. Civ. App.—Houston [14th Dist.] 1975, no writ).

§ 1.32:5 Attorneys Executing Affidavits

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

§ 1.32:6 Affidavits in Sworn Account Cases

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

§ 1.32:7 Verified Pleadings

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

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

§ 1.32:8 Affidavit Evidencing Lien on Real Property

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

1. a copy of the security agreement that creates or provides for a security interest in the obligation secured by the mortgage; and
2. the secured party's sworn affidavit in recordable form stating that—
   a. a default has occurred with respect to the obligations secured by the mortgage; and
   b. the secured party is entitled to enforce the mortgage nonjudicially.

Tex. Bus. & Com. Code § 9.607(b).

§ 1.33 Exhibits

Documentary exhibits may be attached to pleadings. Tex. R. Civ. P. 59. Original documents

should not be attached as exhibits to pleadings unless the court so requires; the originals may be mislaid. A verified copy of the document may be attached to the pleading if necessary.

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

§ 1.34 Adoption by Reference

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

§ 1.35 Amended and Supplemental Pleadings

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

§ 1.36 Misnamed Pleadings

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

§ 1.37 Filing and Service of Papers in Suit

§ 1.37:1 Filing and Service Generally

An attorney must file every pleading, plea, motion, and application to the court for an order, unless the document is presented during a hearing or trial. Except in juvenile cases, attorneys must electrnoically file documents in courts where electronic filing has been mandated. Tex. R. Civ. P. 21(f). See section 1.37:3 below. Persons not represented by an attorney may file documents electronically but are not required to do so. Tex. R. Civ. P. 21(f). As a general rule, an electronically filed document is deemed filed when it is transmitted to the filing party's electronic service provider, but there are exceptions for a document that is transmitted during the weekend or on a holiday or for a document requiring a motion and order allowing its filing. *See* Tex. R. Civ. P. 21(f)(5).

A copy of the document filed must be served on all opposing parties or their attorneys. Tex. R. Civ. P. 21. A document filed electronically must be served electronically through the electronic

filing manager if the e-mail address of the party or attorney to be served is on file with the electronic filing manager. Tex. R. Civ. P. 21a(a)(1). If the e-mail address of the party or attorney to be served is not on file with the electronic filing manager, or if the document was not filed electronically, service may be made in person, by commercial delivery service, by facsimile, by e-mail, or by any other manner that the court may direct. If sent by mail, the document must be sent to the recipient's last known address. Service by mail is considered complete when the document is deposited, with proper postage, with the United States Postal Service. Service by facsimile after 5:00 P.M. is considered to have been served the following day. Tex. R. Civ. P. 21a. Electronic service is complete on transmission of the document to the serving party's electronic filing service provider. Tex. R. Civ. P. 21a. Although the rules now allow service by e-mail, they do not address when service by e-mail is complete. See Tex. R. Civ. P. 21a(a)–(b).

The three-day grace period that used to be added when calendaring the due date for responsive documents applies only when the document triggering the response obligation has been served by regular mail; it does not apply to any other type of service. Tex. R. Civ. P. 21a(c).

§ 1.37:2 Certificate of Service

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

§ 1.37:3 Electronic Filing of Court Documents

In December 2012, the Texas Supreme Court mandated the implementation of electronic filing in civil cases. Misc. Docket No. 12-9206, amended by Misc. Docket Nos. 13-9092 and 13-9164. Electronic filing was initially mandated in the Texas Supreme Court, the court of criminal appeals, and the courts of appeals, as well as the district courts, statutory county courts, and statutory probate courts in the ten most populous counties in Texas. The implementation of electronic filing in the remaining counties will take place in accordance with the schedule outlined in the supreme court's order. By July 1, 2016, attorneys will be required to file electronically in every county in Texas. Practitioners are advised to check the local rules of the appropriate county for electronic filing procedures. More information about electronic filing in Texas can be found on the eFile Texas Web site at **www.efiletexas.gov**. Links to local electronic filing practices and statewide electronic filing rules can be found on the Texas Judicial Branch Web site at **www.txcourts.gov/jcit/electronic-filing.aspx**.

§ 1.38 Notice of Hearing

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

§ 1.39 Transmittal Letters

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

§ 1.40 Sensitive Data

"Sensitive data" is a defined term under the Texas Rules of Civil Procedure and means (1) a driver's license number, passport number, Social

Security number, tax identification number, or similar government-issued personal identification number; (2) a bank account number, credit card number, or other financial account number; and (3) a birth date, home address, and the name of any person who was a minor when the underlying suit was filed. *See* Tex. R. Civ. P. 21c; *see also* Tex. R. App. P. 9.9(a), 9.10(a). In general, sensitive data must be redacted before a document is filed, but in civil cases there is an exception for sensitive data that is required by statute, court rule, or administrative regulation to be included in the filing. Tex. R. Civ. P. 21c(b); Tex. R. App. P. 9.9(b). Documents that are filed under seal need not be redacted.

If a document filed in a civil case is required to contain sensitive data, the filer must notify the clerk by (1) designating the document as containing sensitive data when it is electronically filed or (2), if the document is not electronically filed, including on the upper left-hand side of the first page the phrase "NOTICE: THIS DOCUMENT CONTAINS SENSITIVE DATA." Tex. R. Civ. P. 21c(d); Tex. R. App. P. 9.9(d). Documents that contain sensitive data in violation of the rule must not be posted on the Internet. The burden is on the filer to redact sensitive data before the document is filed in one of two alternative methods:

1. Use the letter X in place of each omitted digit or character.
2. Remove the sensitive data in a manner indicating that the data has been redacted.

Tex. R. Civ. P. 21c(c); Tex. R. App. P. 9.9(c), 9.10(c).

The filer must retain an unredacted version of the document. The length of retention depends on the stage and type of proceeding. Tex. R. Civ. P. 21c(c).

[Reserved]

Form 1-1

Client Information Sheet

File Information

Case file number: _____

Responsible attorney: _____

Forwarder Information (if applicable)

Name of forwarder: _____

Mailing address: _____

_____

E-mail: _____

Phone: _____

Fax: _____

Forwarder's file number: _____

Creditor-Client Information

Name of creditor-client: _____

Contact person: _____

Mailing address: _____

_____

E-mail: _____

Phone: _____

Fax: _____

Client file number: _____

Nature of Fee Arrangement: _____

Debtor Information

Name of debtor: _____

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

Business address: _____

_____

E-mail: _____

Phone: _____

Fax: _____

Residence address: _____

_____

Phone: _____

Debtor's attorney: _____

Mailing address: _____

_____

E-mail: _____

Phone: _____

Fax: _____

Remarks: _____

_____

Date Information Regarding Claim

Date claim received in law office: _____

Date cause of action accrued (for limitations): _____

Date limitations will run: _____

Nature of Claim

Describe generally: _____

Is claim secured? Yes/No

If so, describe collateral and nature of lien: _____

_____

Amount Owed

Original principal amount: $_____

Principal balance as of _____: $_____

Interest or finance charge as of _____: $_____

Interest rate: _____

Demand Letter

Date of demand letter: _____

Date received by debtor: _____

Suit Information

Date suit filed: _____

Date citation served: _____

Answer day: _____

Style of case: _____

Cause number: _____

Court designation: _____

Address of clerk: _____

_____

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

Judgment Information

Date judgment signed: _____

Lien foreclosed? Yes/No

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

Principal amount of judgment: $_____

Costs: $_____

Attorney's fees: $_____

Prejudgment interest: $_____

Other: $_____

Total: $_____

Interest rate on judgment: _____

Abstract and Execution

Date abstract filed: _____

Date execution issued: _____

Writ sent to: _____

Remarks

_____

_____

_____

_____

_____

_____

_____

[Reserved]

Form 1-2

This letter is furnished only as a basic example and should not be used as a standard form. The attorney must be careful to tailor the details of the letter to the facts of the particular case. This letter accepts a matter, establishes a fee arrangement, and establishes an agency relationship for receiving payments in the law office. For discussion of receipt of a matter from a client, see section 1.1 in this chapter.

If a forwarder is involved, this letter should be modified accordingly: Address it to the forwarder, include a creditor identification line above the debtor identification line in the reference block, and include a copy for the forwarder to send to the creditor. A form granting authorization to receive and process payments is at form 1-3. See section 1.15 for potential reasons why a claim should not be pursued.

Letter to Client—Acknowledgment of Client Matter and Confirmation of Terms

[**Date**]

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

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

[**Salutation**]

I acknowledge receipt of the referenced claim with thanks. I accept the claim and will handle it on the terms indicated in our fee agreement.

I have not had previous experience with this debtor. If you have any information about the debtor's assets or bank accounts or any other credit information that you have not already provided to me, please send it immediately. I will make written demand for payment on the claim and will attempt to make personal contact with the debtor.

Select one of the following.

Please execute the enclosed authorization for me to receive payments from the debtor and to endorse checks or other instruments whether payable to me or to you. Please have it

notarized and return it to me as soon as possible. I will hold all money received in trust for you and will distribute it under our agreement regarding this debtor.

Or

It is understood that I am authorized to receive payments from the debtor and to endorse checks or other instruments whether payable to me or to you. I will hold all money received in trust for you and will distribute it under our agreement regarding this debtor. Unless you inform me otherwise promptly, I will assume this to be our agreement.

Continue with the following.

Sincerely yours,

_____

[Name of attorney]

Enc.

Attach fee agreement. Attach authorization if applicable.

Include the following notice if notice is not otherwise provided as required by Tex. Gov't Code § 81.079. See section 1.2:1.

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."

Continue with the following. See section 1.2:2.

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.

Form 1-3

Client's Authorization for Attorney to Receive Payments

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

SIGNED on _____.

_____
[Name of creditor]

SIGNED under oath before me on _____.

_____
Notary Public, State of Texas

[Reserved]

Form 1-4

Payment Record

Case File Number:

Debtor:

Attorney Responsible:

[Forwarder:]

Date File Opened:

Creditor:

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

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

[Reserved]

Form 1-5

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

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

Letter to Client—Suit Recommended

[**Date**]

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

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

[**Salutation**]

Demand on the debtor has been fruitless.

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

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

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

Sincerely yours,

_____

[Name of attorney]

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

Form 1-6

Certificate of Service

I certify that in accordance with the Texas Rules of Civil Procedure I served a true and correct copy of [**title of document, e.g.,** Plaintiff's Motion for Summary Judgment] on the parties listed below. This service was made by [**method of service**].

List the name and address of each party or attorney served.

SIGNED on _____.

_____

[**Name of attorney**]

[Reserved]

Form 1-7

Notice of Hearing

The above motion is set for hearing on _____ at _____ __.M. in [**designation and location of court**].

SIGNED on _____.

_____
Judge or Clerk

[Reserved]

Form 1-8

Contingent Fee Contract

A. Law Firm Retained

[**Name of client**] (the "Client") does hereby retain [**name of firm**], (the "Firm") in connection with the following matter: Claim and lawsuit of the Client against the following Debtor for the following amount or approximate amount.

B. Debtor

Name:

Address:

Telephone:

Fax:

E-mail:

C. Amount

$[**amount**]

D. Fee Arrangement

For its services, the Firm will receive from the Client a contingent fee of [**percent**] percent ([**percent**]%) of all sums collected from the Debtor.

E. Cost Advancement

In addition, the Client agrees to pay all court costs and out-of-pocket expenses incurred by the Firm in prosecuting this suit. For that purpose, the Client will furnish the Firm with an advance in the amount of $[**amount**], which will be held by the Firm in trust and used to pay

court costs and other out-of-pocket expenses. The Firm may request additional court cost advances from time to time, and the Client agrees to furnish such additional court cost advances when requested by the Firm. Any amount of such cost advances that remain unexpended at the time the case is finally settled or paid will be refunded to the Client.

F. Excluded Services

This fee arrangement includes prosecution of the suit through trial, final judgment, and postjudgment collection activity. However, it does not include defense of a counterclaim or cross-claim that may be filed by another party against the Client, ancillary proceedings such as an injunction, or an appeal. This fee contract is a limited undertaking for services in connection with the specific matter described in this contract, and the Firm does not undertake to represent the Client generally or on other matters not specified in this contract.

G. Hourly Fee If Countersuit Is Filed

If the Debtor should file a counterclaim, cross-claim, or countersuit against the Client, then, in that event, the Client will pay the Firm for all services rendered thereafter on an hourly fee basis of $[**amount**] per hour for all services rendered from that date forward, and the contingent fee will no longer apply.

H. Conduct of Case

The Firm agrees to perform legal services that, in the exercise of its professional judgment, it deems necessary and appropriate to represent the Client's interest in such legal matters. The Firm will consult with the Client regarding the case and keep the Client informed as to developments that it considers significant. The Firm reserves the right to assign lawyers and other personnel of its choice to perform the legal services, to hire experts it deems necessary, to engage in discovery it thinks desirable, and in all ways determine the conduct of the case. The Client will promptly respond to requests for assistance and information. The Client shall

assist the Firm by furnishing information about the case, responding to discovery requests, furnishing testimony when required to support the Client's claims and defenses, and attending mediation and trial.

I. No Guaranteed Outcome

The Client understands that the Firm has made no representations concerning the successful outcome of any contested claim or negotiation or the favorable outcome of any legal action that may be filed or be required to be filed on behalf of the Client by the Firm. The Firm has not guaranteed that it will obtain reimbursement to the Client of any of its costs or expenses resulting from the incident out of which the claim may arise.

J. IOLTA Disclosure

You are hereby notified that all funds deposited in the Firm trust account, including your funds, draw interest. That interest is paid by the depository to the Texas Equal Access to Justice Foundation under orders of the Texas Supreme Court. This Firm receives none of the interest so earned and receives no benefit from the Foundation except those benefits that all Texas citizens receive as a result of the services rendered by the Foundation.

K. Security Interest in Recovery

The Firm is granted a security interest in any recovery, whether money, property, or otherwise, that may be recovered by compromise, settlement agreement, suit, or judgment. The security interest granted herein shall survive any termination of this contract until all costs and reimbursable expenses are paid.

L. Mediation

The court will require that the parties and their attorneys attend a mediation before a mediator selected either by the parties or by the judge of the court, before the court will con-

duct a trial on the merits of the suit. The Client agrees to pay the Client's portion of the mediator's fee to the mediator at or before the time of the mediation.

M. Attorney's Obligation to the Court System

Pursuant to section 9.001 *et seq.* of the Texas Civil Practice and Remedies Code and rule 13 of the Texas Rules of Civil Procedure, the signature of an attorney on any pleading or pleadings, motion, or other paper means that, to the best of the attorney's knowledge, information, and belief, formed after reasonable inquiry, such instrument is not groundless or brought in bad faith or for the purpose of harassment. The rule further provides that an attorney or a party who brings a fictitious suit as an experiment to get an opinion of the court or files any fictitious pleading in a cause for such a purpose or makes statements in pleadings that are known to be groundless and false for the purpose of securing a delay of the trial of the cause shall be guilty of contempt of court. "Groundless" for the purpose of rule 13 means that there is no basis in law or fact and not warranted by good-faith argument for the extension, modification, or reversal of existing law. Rule 11 of the Federal Rules of Civil Procedure is a similar rule.

In light of section 9.001 *et seq.* of the Texas Civil Practice and Remedies Code, rule 13 of the Texas Rules of Civil Procedure, and rule 11 of the Federal Rules of Civil Procedure, the Client agrees that the Firm will not advance any spurious claims of fact or law in the advancement of the claim covered by this employment agreement. In the event of a conflict between the Firm and the Client as to whether a proposed course of action violates or purports to violate these three rules, or any of them, resolution of that conflict shall be solely vested in the Firm. If the Client persists, at any time, in advancing a spurious claim of fact, the Firm may treat this contract as breached, may withdraw from the employment, may withdraw from the litigation, and shall be entitled to whatever rights the Firm would otherwise have for breach of contract.

The State Bar Act, effective September 1, 1991, requires all attorneys practicing law in Texas to notify their clients of the existence of the 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 Office of General Counsel will provide you with information about how to file a complaint. For more information, you may call 1-800-932-1900. This is a toll-free telephone call.

N. Preservation of Records

You must preserve and retain all paper files and electronically stored information that is related to this lawsuit and the underlying dispute or transaction. It is important that you take immediate actions to preserve these records and this information, as failure to take adequate steps to collect and preserve evidence, including electronic evidence, could result in sanctions being imposed by the court for spoliation of evidence. The law provides that, if a party who has the duty to preserve records relevant to a matter involved in a lawsuit fails to preserve the records, the judge may instruct the jury to presume that the missing records would support the opposing party's version of the facts. (1) Assign to one person responsibility for preservation of records. (2) Gather up and preserve all contracts, business records, reports, photographs, e-mails, faxes, and letters related to the matter and send copies to us. (3) Contact former employees who may have been involved, inform them of the lawsuit, and identify those former employees for us. (4) Preserve backup tapes or other computer records for your file server and e-mail server. (5) Suspend any routine for automatically disposing of digital or paper records and backup tapes. (6) Identify for us any records that might relate to the lawsuit that have been lost or destroyed for any reason.

O. Client's Authority to Contract

The Client represents that it is the full owner of the claims and matters for which it has engaged the Firm and that the Client has full authority without encumbrance to prosecute the same and to enter into this contract of employment.

P. Termination

Either the Client or the Firm may terminate the Firm's representation of the Client in this matter at any time, with or without cause, by written notice. If the Client terminates the Firm's representation of the Client, the Firm has the right to retain its contingent-fee interest in the proceeds of the case. The Firm has the right of immediate reimbursement for any costs outstanding. Any monies on deposit or in trust on behalf of the Client will be refunded to the Client upon termination. If the Firm terminates the Firm's representation of the Client, the Client is entitled to any monies held on behalf of the Client to be refunded immediately, less any outstanding costs. If the Firm terminates its representation of the Client, then the Firm will waive its right for any further recovery in the proceeds of the case.

Q. General Provisions

This agreement shall be construed under and in accordance with the laws of the state of Texas, and all obligations of the parties created hereunder are performable in [**county**] County, Texas. This contract is binding on the parties hereto, their successors, executors, administrators, and heirs, and may not be altered or amended except in writing signed by all of the parties hereto. In case any one or more of the provisions contained in this agreement shall for any reason be held to be invalid, illegal, or unenforceable in any respect, such invalidity, illegality, or unenforceability shall not affect any other provision thereof, and this agreement shall be construed as if such invalid, illegal, or unenforceable provision had never been contained herein. This agreement constitutes the entire agreement of the parties. No promises,

representations, or agreements not set forth herein have been made by either the Client or the Firm or form any part of this agreement.

SIGNED [**date**].

_____
[**Name of client**]

By _____

Address: _____

Telephone: _____

E-mail: _____

_____
[**Name of firm**]

By _____

Address: _____

Telephone: _____

E-mail: _____

[Reserved]

Chapter 2

Laws Affecting Debt Collection

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Chapter 2

Laws Affecting Debt Collection

I. Overview of Debtor-Creditor Statutes

§ 2.1 Scope of Chapter

This chapter discusses laws of which the debt collection attorney should be aware. Statutes such as the federal Truth in Lending Act and the consumer credit sections of the Texas Finance Code are included and discussed but are not, strictly speaking, debt collection laws. They are included here primarily to aid the attorney in evaluating a debt collection matter for possible defenses and counterclaims arising from the creditor's conduct.

§ 2.2 Commercial Debts

Most of the statutes discussed in this chapter pertain to consumer debts. In particular, the federal Fair Debt Collection Practices Act and Truth in Lending Act, the Texas Debt Collection Practices Act, and many of the former Consumer Credit Code provisions now incorporated into the Texas Finance Code apply only to consumer transactions. Attorneys collecting commercial debts can safely ignore these statutes—once it is established that they do not apply. In general, consumer debts are debts incurred for personal, family, or household purposes. 15 U.S.C. § 1692a(5); Tex. Fin. Code § 392.001. For a more detailed discussion of the definition of consumer debt, see section 2.12:2 below.

§ 2.3 Texas Credit and Interest Statutes

§ 2.3:1 Texas Finance Code

Formerly, statutes relevant to creditors and debt collectors were contained in article 5069 of the Texas Revised Civil Statutes. Most of the statutes contained in article 5069 were repealed and subsequently codified into the Texas Finance Code in 1997. Relevant Finance Code chapters are—

- Interest (chapters 301–308, 339)
- Loans and Financed Transactions (includes old Consumer Credit Code) (chapters 341–351)
- Debt Collection (chapter 392)

Home solicitation transactions were moved to Texas Business and Commerce Code chapter 39 and business opportunities to chapter 41, recodified at chapters 601 and 51, respectively, of the Texas Business and Commerce Code, effective April 1, 2009.

§ 2.3:2 Repealed Statutes Subsequently Amended

After the 1997 repeal of article 5069 of the Texas Revised Civil Statutes, a number of these repealed statutes were amended. The repeal of a statute by a code does not affect the amendment of that repealed statute by the same legislature that enacted the code. The amendment is pre-

served and given effect as part of the code section. Tex. Gov't Code § 311.031(c).

§ 2.3:3 Determining Applicable Law

The Texas Credit Title became effective September 1, 1997, and applies only to acts committed or transactions occurring after that date. Acts 1997, 75th Leg., R.S., ch. 1396, §§ 49, 51 (H.B. 1971), eff. Sept. 1, 1997. The Texas Credit Title was merged into the Texas Finance Code.

The Texas Finance Code became effective September 1, 1997. Acts 1997, 75th Leg., R.S., ch. 1008, § 8 (H.B. 10), eff. Sept. 1, 1997. Because no substantive change was intended in the codification, there should be few instances in which the practitioner needs to determine whether the Finance Code or old article 5069 of the Revised Civil Statutes applies, except for accuracy in citing to the applicable law.

In 1999 the legislature completed the repeal of article 5069. Whether a violation is governed by the law at the time a contract was made, the law at the time the violation occurred, or the law at the time suit is brought is a question that will have to be resolved by the courts.

[Sections 2.4 through 2.10 are reserved for expansion.]

II. Federal Fair Debt Collection Practices Act

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

§ 2.11 Who Is a Debt Collector?

§ 2.11:1 Definition Generally

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

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

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

§ 2.11:2 Original Creditor

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

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

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

§ 2.11:4 Creditor-Assignee

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

The majority of courts have held that a creditor who acquires a debt already in default is not a creditor but a debt collector. *Cirkot v. Diversified Financial Systems, Inc.*, 839 F. Supp. 941 (D. Conn. 1993); *Holmes v. Telecredit Service Corp.*, 736 F. Supp. 1289 (D. Del. 1990); *Kimber v. Federal Financial Corp.*, 668 F. Supp. 1480 (M.D. Ala. 1987); *Commercial Service of Perry v. Fitzgerald*, 856 P.2d 58 (Colo. App. 1993).

§ 2.11:5 Statutory Exemptions

Those who are not debt collectors include—

1. any officer or employee of a creditor who, while in the name of the creditor, collects the creditor's debts (see section 2.11:6 below regarding attorneys as debt collectors);
2. any person or organization who acts as a debt collector for another, both of whom are related by common ownership or affiliated by corporate control, if the debt collector does so only for persons or organizations to whom it is so related or affiliated and if the principal business of each person or organization is not the collection of debts;
3. any officer or employee of the United States or any state to the extent that collecting or attempting to collect any debt is in the performance of his official duties;
4. any person while serving or attempting to serve legal process on any other person in connection with the judicial enforcement of any debt;
5. any nonprofit organization that, at the request of consumers, performs bona fide consumer credit counseling and assists consumers in the liquidation of their debts by receiving payments from those consumers and distributing those payments to creditors; and
6. any person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity—
   a. is incidental to a bona fide fiduciary obligation or escrow arrangement;
   b. concerns a debt originated by the person or organization;
   c. concerns a debt not in default when it was obtained by the person or organization; or
   d. concerns a debt obtained by the person or organization as a secured party in a commercial credit transaction involving the creditor.

15 U.S.C. § 1692a(6).

§ 2.11:6 Attorneys as Debt Collectors

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

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

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

§ 2.12 Other Definitions

§ 2.12:1 Who Is a Consumer?

A consumer is any natural person obligated or allegedly obligated to pay a debt. 15 U.S.C. § 1692a(3). The nature of the debt determines the distinction between commercial and consumer debts; see section 2.12:2 below. A debt that was created as a consumer debt remains a consumer debt even if the collateral securing the debt is subsequently used for commercial purposes. *See, e.g., Miller v. McCalla, Raymer, Padrick, Cobb, Nichols & Clark, L.L.C.*, 214 F.3d 872 (7th Cir. 2000) (residential mortgage debt remains consumer obligation even if collateral subsequently turned into rental property).

§ 2.12:2 What Is a Debt?

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

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

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

§ 2.13 Validation Notice

§ 2.13:1 Contents of Notice

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

debt) send the consumer a written notice containing—

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

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

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

In *Miller v. McCalla, Raymer, Padrick, Cobb, Nichols & Clark, L.L.C.*, 214 F.3d 872 (7th Cir. 2000), the court held that the obligation to state the amount of the debt means that the attorney must state the full amount of the debt as of the date of the validation notice. If the debt, such as a mortgage debt, is subject to change, the attorney who sends a demand letter should state the full amount of the debt as of the date the letter is sent and should further notify the debtor that the payoff balance is subject to change and that the debtor should call or verify the correct payoff amount before sending payment. *See also Waterfield Mortgage Co., Inc. v. Rodriguez*, 929 S.W.2d 641 (Tex. App.—San Antonio 1996, no writ) (if payoff quote has limited duration, demand letter should contain deadline through which payoff amount will be accepted).

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

§ 2.13:2 Overshadowing, Contradictory, or Deceptive Notices

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

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

The debt collector does not need to suspend all collection efforts during the thirty-day period during which the consumer can request verifica-

tion, but if the consumer does request verification, the debt collector must suspend collection until the verification is obtained and sent to the consumer. 15 U.S.C. § 1692g(b); *Trull v. GC Services Limited Partnership*, 961 F. Supp. 1199, 1205 (N.D. Ill. 1997).

§ 2.13:4 Responding to Request for Verification

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

§ 2.14 "Mini-Miranda" Notice

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

§ 2.15 Prohibited Practices: Contact with Consumers and Others

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

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

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

§ 2.15:2 Inconvenient Time for Communication with Consumer

Unless the consumer gives prior consent or a court expressly permits it, a debt collector may not communicate with the consumer at any unusual time or place or at a time or place known or that should be known to be inconvenient to the consumer. Before 8:00 A.M. or after 9:00 P.M. local time (for the consumer) is pre-

sumed to be inconvenient unless contrary circumstances are known. 15 U.S.C. § 1692c(a)(1); *see also United States v. Central Adjustment Bureau, Inc.*, 667 F. Supp. 370 (N.D. Tex. 1986), *aff'd as modified on other grounds*, 823 F.2d 880 (5th Cir. 1987). For purposes of this rule, the term *consumer* includes the consumer's spouse, guardian, executor, administrator, or parent (if the consumer is a minor). 15 U.S.C. § 1692c(d).

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

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

§ 2.15:4 Telephone Conduct

Debt collectors may not—

1. cause the phone to ring or engage any person in a conversation repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number;

2. place phone calls without giving meaningful disclosure of the caller's identity, unless the call is to another person to acquire location information for the debtor; or

3. cause charges to be made to any person for communications (such as collect phone calls or telegrams) by concealing the true purpose of the communication.

15 U.S.C. §§ 1692d(5), (6), 1692f(5).

§ 2.15:5 Ceasing Communication

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

1. to advise the consumer that the debt collector is ceasing its efforts;

2. to notify the consumer that the debt collector or creditor may invoke certain specified remedies that are ordinarily invoked by the debt collector or creditor; or

3. if applicable, to notify the consumer that the debt collector or creditor intends to invoke a specified remedy.

15 U.S.C. § 1692c(c).

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

§ 2.15:6 Obscene or Profane Language

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

§ 2.15:7 Language or Symbol on Envelope

Debt collectors may not use language or symbols on the envelope, other than the debt collector's address, when communicating with the consumer by mail or telegram, but the debt collector may use his own business name if the name does not indicate that he is in the debt collection business. 15 U.S.C. § 1692f(8); *see also Peter v. GC Services, L.P.*, 310 F.3d 344 (5th Cir. 2002) (collection agency violated FDCPA by sending collection letter in envelope that displayed name and address of U.S. Department of Education and "penalty for private use" message).

§ 2.15:8 Postcard

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

§ 2.15:9 Communication with Third Parties

Except for lawful communications with reporting credit agencies, the debt collector may not contact third parties for any reason other than ascertaining the consumer's location, unless the consumer gives prior consent or a court expressly authorizes the contact. 15 U.S.C. § 1692c(b); *see also Masuda v. Thomas Richards & Co.*, 759 F. Supp. 1456 (C.D. Cal. 1991). When communicating with anyone other than the consumer to find out the consumer's whereabouts, the debt collector must identify himself, state that he is confirming or correcting location information concerning the consumer and, only if expressly asked, identify his employer. He may not—

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

15 U.S.C. § 1692b.

§ 2.16 Prohibited Practices: Misrepresentations

§ 2.16:1 Falsehoods and Deceptions Generally

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

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

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

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

§ 2.16:3 Referral or Transfer of Debt

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

§ 2.16:4 Governmental Affiliation

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

§ 2.16:5 Attorney Participation

A debt collector may not falsely represent or imply that the collector is an attorney or that a communication is from an attorney. 15 U.S.C. § 1692e(3). Demand letters sent by a nonattorney debt collector using the attorney's letterhead and an image of the attorney's signature violates the FDCPA. The attorney as well as the debt collector is liable. *Taylor v. Perrin, Landry, DeLaunay & Durand*, 103 F.3d 1232 (5th Cir. 1997); *Clomon v. Jackson*, 988 F.2d 1314 (2d Cir. 1993). Liability also attaches if the attorney signs demand letters at the direction of a debt collection agency without independent knowledge of the cases. *Masuda v. Thomas Richards & Co.*, 759 F. Supp. 1456 (C.D. Cal. 1991).

§ 2.16:6 Threats of Action

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

§ 2.16:7 Criminal Conduct

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

§ 2.17 Prohibited Practices: Handling Funds

§ 2.17:1 Collection of More Than Amount Allowed

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

§ 2.17:2 Postdated Checks

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

§ 2.18 Bringing Collection Suit in Court of Improper Venue

Except when filing a suit to foreclose a real estate lien, a debt collector must bring its action against the consumer in the judicial district in which the consumer signed the contract sued on or in which the consumer resides at the commencement of the action. 15 U.S.C. § 1692i(a). This requirement preempts any contrary provision of state law. *Fox v. Citicorp Credit Services, Inc.*, 15 F.3d 1507 (9th Cir. 1994). *See Beeler-Lopez v. Dodeka, LLC*, 711 F. Supp. 2d 679 (E.D. Tex. 2010) (stating that a law firm substituted after a violation of the venue provision of the FDCPA could not be held liable for the violation). See section 15.4 in this manual regarding venue generally.

§ 2.19 Bona Fide Error Defense

If the violation was not intentional and resulted from a bona fide error made despite the maintenance of procedures reasonably adapted to avoid any such error, the debt collector can avoid liability. 15 U.S.C. § 1692k(c); *see also Stojanovski v. Strobl & Manoogian, P.C.*, 783 F. Supp. 319 (E.D. Mich. 1992). *But see Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, ___ U.S. ___ (2010) (holding that bona fide error defense does not apply if violation resulted from incorrect interpretation of law).

§ 2.20 Remedies and Penalties

§ 2.20:1 Consumer Recovery

A debt collector who violates the FDCPA is liable for—

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

15 U.S.C. § 1692k(a).

The $1,000 statutory damages cap on an individual claim is per suit, not per violation. *Wright v. Finance Service of Norwalk*, 22 F.3d 647 (6th Cir. 1994); *Harper v. Better Business Services, Inc.*, 961 F.2d 1561 (11th Cir. 1992).

§ 2.20:2 Bad-Faith Suit by Consumer

If the court finds that a consumer's action was brought in bad faith or for purposes of harassment, the court may award the defendant attorney's fees reasonable in relation to the work expended and costs. 15 U.S.C. § 1692k(a)(3).

[Sections 2.21 through 2.30 are reserved for expansion.]

III. Texas Debt Collection Practices Act

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

§ 2.31 Scope

§ 2.31:1 Transactions Covered

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

§ 2.31:2 Parties Liable

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

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

§ 2.31:3 Potential Parties

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

§ 2.31:4 Restrictive Language of Debt Collection Practices Act

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

§ 2.31:5 Use of Independent Debt Collector

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

§ 2.32 Required Conduct

§ 2.32:1 Providing Name of Assignee

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

§ 2.32:2 Debt Collector Identification

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

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

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

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

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

§ 2.33 Prohibited Practices

§ 2.33:1 Debtor Contact

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

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

Tex. Fin. Code § 392.302.

§ 2.33:2 Misrepresentations

Tex. Fin. Code § 392.304(a) lists nineteen fraudulent, deceptive, or misleading representations that are illegal under the DCPA. Some of the commonly encountered violations include—

1. using a name other than the true business or professional name or the true legal or personal name of the debt collector while engaged in the debt collection;
2. falsely representing that the debt collector has information or something of value for the consumer in order to solicit or discover information about the consumer;
3. in the case of a third-party debt collector, failing to disclose clearly in the initial written or oral communication between the third-party debt collector and the debtor that the communication is an attempt to collect a debt and that any information obtained will be used for that purpose (does not apply to a formal pleading);
4. in the case of a third-party debt collector, failing to disclose in communications between the third-party debt collector and the debtor subsequent to

the initial communication that the communication is from a debt collector (does not apply to a formal pleading);

5. using a written communication that fails to indicate clearly the name of the debt collector and the debt collector's address if the written notice refers to a delinquent consumer debt;

6. misrepresenting the character, extent, or amount of a consumer debt or misrepresenting the consumer debt's status in a judicial or governmental proceeding;

7. using a communication that purports to be from an attorney or law firm if it is not; and

8. representing that a consumer debt is being collected by an attorney or law firm if it is not.

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

§ 2.33:3 Threats or Coercion

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

1. accusing falsely or threatening to accuse falsely a person of fraud or another crime;

2. threatening to file a charge, complaint, or criminal action against a debtor if the debtor has not violated a criminal law; and

3. threatening to take an action prohibited by law.

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

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

§ 2.33:4 Other Unfair or Unconscionable Means

Debt collectors may not use unfair or unconscionable means to seek or obtain a written statement or acknowledgment in any form specifying that the debt was incurred for necessaries if it was not or to collect or attempt to collect interest, a charge, a fee, or an expense incidental to the obligation unless it was expressly authorized by the agreement creating the obligation or legally chargeable to the consumer. Tex. Fin. Code § 392.303. Further, the debt collector may not collect or attempt to collect an obligation under a check, draft, debit payment, or credit card payment if the check or draft was dishonored or the payment was refused because the check or draft was not drawn or the payment was not made by a person authorized to use the account; the debt collector has received written notice from a person authorized to use the account that the check, draft, or payment was unauthorized; and the authorized person has filed a report concerning the unauthorized check, draft, or payment with a law enforcement agency and has provided the debt collector a copy of the report. Tex. Fin. Code § 392.303(a)(3). A debt collector is not prohibited from collecting or attempting to collect such an obligation if the debt collector has credible evidence that the report filed with the law enforcement agency is fraudulent and that the check, draft, or payment was authorized. Tex. Fin. Code § 392.303(c).

§ 2.34 Requirement of Actual Damages

In addition to proving a violation of the DCPA, a consumer ordinarily must also prove actual damages to recover. *Elston v. Resolution Ser-*

vices, Inc., 950 S.W.2d 180, 183–84 (Tex. App.—Austin 1997, no writ). It is possible that recovery of an injunction under the Act is enough to allow an award of attorney's fees, but *Elston* did not reach that issue.

§ 2.35 Defense—Bona Fide Error

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

§ 2.36 Remedies and Penalties

§ 2.36:1 Civil

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

§ 2.36:2 Criminal

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

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

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

§ 2.36:4 Bad-Faith Suit by Debtor

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

[Sections 2.37 through 2.40 are reserved for expansion.]

IV. Interest and Time-Price Differential

§ 2.41 Interest Defined

§ 2.41:1 Interest Generally

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

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

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

§ 2.42 Charges Other Than Contractual Interest

§ 2.42:1 Other Charges Generally

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

§ 2.42:2 "Front-End" Charges

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

§ 2.42:3 Commitment Fees

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

§ 2.42:4 Late Charges

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

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

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

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

§ 2.42:5 Prepayment Penalties or Charges

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

§ 2.42:6 Assumption of Third Party's Debt

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

§ 2.42:7 Pleadings

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

§ 2.43 Methods of Computing Interest

§ 2.43:1 United States Rule

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

§ 2.43:2 Actuarial Method

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

§ 2.43:3 Add-On Method

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

§ 2.43:4 Determining Which Method to Use

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

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

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

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

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

§ 2.44 Interest Rates

§ 2.44:1 Default Rate of 10 Percent

Unless a statute provides otherwise, the maximum interest rate in Texas is 10 percent. Tex. Const. art. XVI, § 11; Tex. Fin. Code §§ 302.001(b), 342.004(a). Virtually all loans have a statutorily provided alternative maximum interest rate.

§ 2.44:2 If Rate Not Specified—6 Percent

If no specified interest rate is agreed on by the parties, 6 percent annual interest, starting thirty days after the amount is due and payable, may be charged. Tex. Const. art. XVI, § 11; Tex. Fin. Code § 302.002; *see Miner-Dederick Construction Corp. v. Mid-County Rental Service, Inc.*,

603 S.W.2d 193, 200 (Tex. 1980). This rate is referred to as "legal interest." *See* Tex. Fin. Code § 301.002(a)(8).

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

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

§ 2.45 Interest Rate Ceilings

§ 2.45:1 Ceilings Generally

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

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

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

§ 2.45:2 Variable Rate Ceilings

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

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

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

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

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

§ 2.45:4 Where to Find Ceiling Rates

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

§ 2.46 Time-Price Differential

§ 2.46:1 Time-Price Differential Generally

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

§ 2.46:2 Retail Installment Sale or Retail Charge Agreement

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

§ 2.46:3 Motor Vehicle Installment Sale

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

[Sections 2.47 through 2.50 are reserved for expansion.]

V. Usury

§ 2.51 Elements of Usury

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

Usury is committed by contracting for, charging, or receiving interest or time-price differential greater than the maximum allowable by law. Tex. Fin. Code §§ 302.001(b), 305.001(a), 349.001(a).

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

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

§ 2.52 Actions Constituting Usury

§ 2.52:1 Contracting for Usurious Interest

If there is a question regarding the existence or terms of a contract, traditional rules of contract interpretation apply. *See Baker v. Howard*, 799 S.W.2d 450 (Tex. App.—Waco 1990, no writ).

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

§ 2.52:2 Charging Usurious Interest

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

§ 2.53 Agent's Liability for Usury

A creditor's agent, such as a law firm or collection agency, may be liable if by its actions it contracts for, charges, or receives usurious interest or time-price differential. *Lupo v. Equity Collection Service*, 808 S.W.2d 122, 124–25 (Tex. App.—Houston [1st Dist.] 1991, no writ).

§ 2.54 Guarantors and Usury

Guarantors are not obligors for purposes of the Texas Credit Title (Texas Finance Code tit. 4, subtit. A, Tex. Fin. Code §§ 301.001–339.005)

and therefore cannot claim usury under that title. Tex. Fin. Code § 301.002(a)(13)(B). The Finance Code does not specifically address whether guarantors may claim usury, but it is doubtful that a guarantor could claim usury unless the guaranty contract itself was usurious. *See Houston Sash & Door Co. v. Heaner*, 577 S.W.2d 217, 222 (Tex. 1979).

§ 2.55 Discounted Debt

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

§ 2.56 Penalties

§ 2.56:1 Texas Finance Code Chapter 305

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

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

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

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

transaction subject to Tex. Fin. Code §§ 301.001–339.005. Tex. Fin. Code § 305.004(b).

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

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

§ 2.56:2 Texas Finance Code Chapter 349

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

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

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

§ 2.56:3 Attorney's Fees

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

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

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

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

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

§ 2.57 Notice by Obligor

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

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

§ 2.58 Spreading

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

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

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

§ 2.59 Usury Savings Clause

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

§ 2.60 Curing Usury

§ 2.60:1 Texas Credit Title

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

1. not later than sixty days after the date of actually discovering the violation, the creditor corrects the violation by taking any necessary action and making any necessary adjustment, including paying interest on a refund, if any,

at the applicable rate provided for in the contract between the parties; and

2. the creditor gives written notice to the debtor of the violation before the debtor gives notice of the violation or files an action alleging the violation.

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

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

§ 2.60:2 Texas Finance Code Chapter 349

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

§ 2.61 Defenses

§ 2.61:1 Bona Fide Error

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

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

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

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

§ 2.61:3 Time-Price Differential

If the transaction is not one in which a maximum time-price differential is set by law (for example, a motor vehicle installment transaction), proof that the transaction involved a time-price differential and not interest is a defense to usury. The creditor must prove that—

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

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

§ 2.61:4 De Minimis Violation

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

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

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

§ 2.62 Statute of Limitation

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

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

§ 2.63 Common-Law Usury

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

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

[Sections 2.64 through 2.70 are reserved for expansion.]

VI. Federal Statutory Requirements

§ 2.71 Truth in Lending Act and Regulation Z

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

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

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

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

§ 2.71:2 Covered Transactions—Regulation Z

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

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

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

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

§ 2.71:3 Required Disclosures—Open-End Transactions

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

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

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

§ 2.71:4 Required Disclosures—Credit Card Transactions

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

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

§ 2.71:5 Required Disclosures—Closed-End Transactions

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

§ 2.71:6 Commonly Encountered Violations

Some of the more common disclosure violations are listed below.

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

§ 2.72 Defenses to Liability

§ 2.72:1 Bona Fide Error

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

§ 2.72:2 Good-Faith Compliance

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

§ 2.72:3 Correction of Error

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

§ 2.72:4 Use of Model Forms

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

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

§ 2.73 Interaction of State and Federal Disclosure Laws

§ 2.73:1 Generally

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

§ 2.73:2 Retail Installment Sales

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

§ 2.73:3 Retail Charge Agreements

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

§ 2.73:4 Credit Card Transactions

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

§ 2.73:5 Availability of State and Federal Remedies

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

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

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

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

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

§ 2.75:1 Generally

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

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

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

§ 2.75:2 Limitation on Amount of Claim or Defense

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

§ 2.76 FTC Holder-in-Due-Course Rule

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

§ 2.77 Consumer Lease Disclosures

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

§ 2.77:1 Definition

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

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

15 U.S.C. § 1667(1).

Consumer leases do not include—

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

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

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

§ 2.77:2 Required Disclosures

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

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

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

§ 2.78 Servicemembers Civil Relief Act

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

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

§ 2.78:1 Persons Entitled to Claim Protection

Servicemember: The SCRA primarily protects persons in the military service. Military service means active duty with any military branch set out below, as well as training or education under the supervision of the United States before induction into military service. A person in the military service is a member of the Army of the United States, the United States Navy, the Marine Corps, the Air Force, or the Coast Guard on active duty. Members of the National Guard are included while under a call to active service for a period of more than thirty consecutive days. Any officer of the Public Health Service or the National Oceanic and Atmospheric Association on active service is also included. Although military service ends with the servicemember's termination of active service or death, many provisions of the SCRA allow for relief by a veteran after he leaves active service. Military service includes any period during which the servicemember is absent from duty due to sickness, wounds, leave, or other lawful cause. *See* 50 U.S.C. § 3911(1)–(3). The SCRA also covers U.S. citizens serving in the forces of a nation allied with the United States in a war or military action if that service is similar to military service. 50 U.S.C. § 3914.

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

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

§ 2.78:2 Installment Contract for Purchase of Property

If a person enters into a contract to buy or lease property, pays a deposit or installment toward the purchase or lease, and then enters military service, the creditor or lessor may not exercise a right or option to terminate the contract or repossess the property for nonpayment of the contract or any other breach of its terms, except through court action. In a court action, the court may order the repayment of prior installments or deposits or any part of them as a condition of terminating the contract and resuming possession of the property, may order a stay of proceedings, or may make other disposition of the case as may be equitable to preserve the interests of all parties (as set out in sections 2.78:5 through 2.78:8 below). 50 U.S.C. § 3952. The servicemember's dependents may claim the protection of this provision unless in the court's

opinion their ability to comply with the contract is not materially impaired by the servicemember's military service. 50 U.S.C. § 3959.

§ 2.78:3 Maximum Interest Rate for Preservice Obligation

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

§ 2.78:4 Judicial Foreclosure of Security Interest

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

§ 2.78:5 Stay of Enforcement of Obligation

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

§ 2.78:6 Stay of Fines and Penalties on Contracts

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

§ 2.78:7 Stay of Nonjudicial Repossession of Security Interest

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

§ 2.78:8 Stay of Judicial Proceedings

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

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

50 U.S.C. § 3932(b)(2).

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

§ 2.78:9 Default Judgments

In all default judgments, if the defendant has not made an appearance, the prevailing plaintiff must file an affidavit setting forth facts showing that the defendant is not in military service. If the plaintiff is unable to make such a showing, he must file an alternative affidavit, stating either that the defendant is in military service or the defendant's military service status cannot be determined. 50 U.S.C. § 3931(b)(1). A person who knowingly uses a false affidavit may be fined or imprisoned or both. 50 U.S.C. § 3931(c). See form 20-3 in this manual for a nonmilitary affidavit. If the defendant is in military service, the court may not enter a judgment until it has appointed an attorney to represent the defendant. If appointed counsel cannot locate the servicemember, the attorney's actions in the case do not waive any of the servicemember's defenses or otherwise bind him. 50 U.S.C. § 3931(a), (b)(2). On counsel's application or on the court's own motion, the court shall also grant a stay of proceedings for at least ninety days if the court determines that there may be a defense to the action and it cannot be presented without the defendant's presence, or, after due diligence, counsel has not been able to determine if a meritorious defense exists. 50 U.S.C. § 3931(d).

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

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

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

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

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

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

§ 2.78:11 Settlement of Cases Involving Property

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

§ 2.78:12 Statutes of Limitation Affected by Military Service

Regardless of whether the plaintiff's cause of action accrued before or during the defendant's period of military service, the servicemember's period of military service is not included in computing any limitations period or period for the redemption of real property, except limitations periods under the internal revenue laws. 50 U.S.C. § 3936.

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

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

§ 2.78:14 Waiver

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

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

§ 2.78:15 Real Estate–Related Provisions

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

§ 2.79 Other Credit Statutes

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

§ 2.79:1 Equal Credit Opportunity Act

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

§ 2.79:2 Fair Credit Reporting Act

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

[Section 2.80 is reserved for expansion.]

VII. Texas Consumer Credit Laws

§ 2.81 Consumer Credit Laws Generally

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

regarding pre- and post-1997 Texas credit statutes.

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

§ 2.82 Commonly Encountered Violations

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

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

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

§ 2.83 Open-End Accounts

§ 2.83:1 Definition

An open-end account is one in which—

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

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

§ 2.83:2 Rules Governing Interest

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

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

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

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

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

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

§ 2.83:3 Other Rules

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

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

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

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

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

§ 2.84 Consumer Loans (Texas Finance Code Chapter 342)

§ 2.84:1 Definitions

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

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

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

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

§ 2.84:3 Applicability of Chapter 342

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

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

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

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

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

§ 2.84:6 Other Charges or Credits

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

§ 2.84:7 Form and Content of Loan Instruments

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

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

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

§ 2.84:8 Other Requirements

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

§ 2.84:9 Commonly Encountered Violations Regarding Insurance

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

§ 2.85 Revolving Credit Accounts

§ 2.85:1 Definition

A revolving credit account is an account—

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

3. in which the unpaid balance of and interest on the extensions of credit are debited to the account;
4. in which interest is not precomputed but may be computed on the balances of the account outstanding from time to time;
5. in which the customer may defer payment of any part of the balance of the account; and
6. in which the customer may obtain from the creditor one or more extensions of credit.

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

§ 2.85:2 Rules Governing Interest

1. Average daily balance defined. Tex. Fin. Code § 346.002.
2. Maximum interest rate. Tex. Fin. Code § 346.101.
3. Permissible interest rate for billing cycle. Tex. Fin. Code § 346.102.
4. Optional ceiling rate as set out in Tex. Fin. Code § 303.001.

§ 2.85:3 Other Charges

1. No fees except those authorized by statute. Tex. Fin. Code § 346.103.
2. Charges recoverable by creditor. Tex. Fin. Code § 346.202.

§ 2.85:4 Other Rules

1. Revolving credit accounts are subject to Tex. Fin. Code chs. 303 and 349 but are not subject to other chapters of title 4 unless specifically provided for in chapter 346. Tex. Fin. Code § 346.005(a).
2. A creditor offering a revolving credit account for personal, family, or household use must hold a license under chapter 342 unless he is not required to hold a license under Tex. Fin. Code § 342.051. Tex. Fin. Code § 346.005(b).
3. May enter into more than one revolving credit account at customer's request. Tex. Fin. Code § 346.203(a).
4. May not require customer to enter into more than one revolving credit account to collect higher-than-legal interest rates. Tex. Fin. Code § 346.203(b).
5. May unilaterally amend revolving credit account. Tex. Fin. Code § 346.204(a). See Tex. Fin. Code § 346.204(b) regarding when amended terms take effect.
6. Rules governing insurance. Tex. Fin. Code § 346.201.

§ 2.86 Retail Installment Sales

§ 2.86:1 Definitions and General Rules

1. *Retail installment contract.* One or more instruments entered into in Texas evidencing a secured or unsecured retail installment transaction. Tex. Fin. Code § 345.001(6).
2. *Retail installment transaction.* One in which retail buyer purchases goods or services from retail seller under retail installment contract or retail charge agreement that provides for time-price differential and in which buyer agrees to pay unpaid balance and time-price

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

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

4. *Goods.* Tex. Fin. Code § 345.002.

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

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

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

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

§ 2.86:2 Rules Governing Time-Price Differential

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

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

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

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

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

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

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

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

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

§ 2.86:3 Other Charges or Credits

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

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

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

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

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

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

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

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

§ 2.86:4 Form and Content of Contract

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

§ 2.86:5 Other Rules

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

§ 2.87 Retail Charge Agreements

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

§ 2.87:1 Definition

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

§ 2.87:2 Rules Governing Time-Price Differential

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

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

§ 2.87:3 Other Charges

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

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

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

§ 2.87:4 Other Rules

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

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

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

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

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

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

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

§ 2.88 Motor Vehicle Installment Sales

§ 2.88:1 Criteria and Relevant Definitions

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

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

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

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

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

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

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

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

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

   Tex. Fin. Code § 348.003.

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

§ 2.88:2 Rules Governing Time-Price Differential

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

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

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

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

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

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

§ 2.88:3 Other Charges or Credits

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

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

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

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

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

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

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

§ 2.88:4 Form and Content of Contract

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

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

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

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

§ 2.88:5 Other Rules

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

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

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

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

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

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

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

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

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

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

§ 2.89:1 Liability Generally

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

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

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

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

§ 2.89:2 No License

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

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

§ 2.90:1 Bona Fide Error

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

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

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

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

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

§ 2.90:3 Correcting Violation within Sixty Days

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

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

§ 2.90:4 Correcting Violation after Sixty-Day Period

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

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

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

§ 2.90:5 Only One Recovery

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

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

§ 2.90:6 Statute of Limitation

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

§ 2.90:7 Judgment under Federal Consumer Credit Protection Act

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

[Sections 2.91 through 2.100 are reserved for expansion.]

VIII. Other Texas Statutes Affecting Debtor-Creditor Relations

§ 2.101 Variable Rate Transactions

§ 2.101:1 Definition

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

§ 2.101:2 Rules Governing Interest

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

§ 2.101:3 Other Rules

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

§ 2.102 Credit Card Transactions

§ 2.102:1 Definition

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

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

§ 2.102:2 Rules Governing Interest

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

§ 2.102:3 Other Charges

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

§ 2.102:4 Other Rules

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

§ 2.103 Loans for Business, Commercial, or Investment Purposes

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

§ 2.104 Loans to Corporation—Rules Governing Interest

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

§ 2.105 Commercial Loans

§ 2.105:1 Definition

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

§ 2.105:2 Rules Governing Interest

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

§ 2.105:3 Other Charges

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

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

§ 2.106:1 Definition

A "qualified commercial loan" is either—

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

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

§ 2.106:2 Rules Governing Interest

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

§ 2.106:3 Other Charges

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

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

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

§ 2.108 Home Solicitation Transactions

§ 2.108:1 Definition

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

§ 2.108:2 Rules Governing Interest

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

§ 2.108:3 Contents of Contract or Documentation

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

§ 2.108:4 Rights Involving Cancellation

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

§ 2.108:5 Other Rules

All these rules are commonly violated.

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

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

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

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

§ 2.109 Business Opportunity Act

§ 2.109:1 Definition

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

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

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

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

§ 2.109:2 Requirements for Disclosure Form and Contract

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

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

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

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

§ 2.109:3 Other Rules

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

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

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

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

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

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

[Section 2.110 is reserved for expansion.]

IX. Acceleration; Holder in Due Course

§ 2.111 Acceleration

§ 2.111:1 Acceleration Generally

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

§ 2.111:2 Acceleration Clauses

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

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

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

§ 2.111:4 Acceleration for Insecurity

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

§ 2.111:5 Retail and Motor Vehicle Installment Sales

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

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

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

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

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

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

§ 2.111:7 Waiver of Notice

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

§ 2.112 Holder in Due Course

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

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

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

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

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

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

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

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

6. The holder must take without notice that—

   a. the instrument is overdue;

   b. the instrument has been dishonored; or

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

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

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

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

§ 2.112:3 Burden of Proof

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

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

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

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

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

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

4. discharge in insolvency proceedings.

Tex. Bus. & Com. Code § 3.305(a)(1).

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

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

NOTICE

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

16 C.F.R. § 433.2.

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

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

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

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

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

§ 2.112:7 General Prohibition against Waiver of Rights

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

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

[Sections 2.113 through 2.120 are reserved for expansion.]

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

§ 2.121 Chapter 9 Generally

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

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

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

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

§ 2.121:1 Multistate Secured Lending Transactions

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

§ 2.121:2 Consumer-Goods Transactions

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

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

ordinary course of business" status under section 1.201.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

requires the secured party to dispose of consumer goods collateral that has been repossessed.

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

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

§ 2.121:3 Information-Gathering Procedures under Chapter 9

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

1. requesting that the secured party prepare and send an accounting (defined in Tex. Bus. & Com. Code § 9.102(a)(4));

2. submitting to the secured party a list of collateral for approval or correction; or

3. submitting to the secured party a statement of the aggregate amount of unpaid secured obligations for approval or correction.

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

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

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

§ 2.122 Subchapter F "Default"

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

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

1. the required notices;

2. the persons to whom notices must be sent;

3. required deadlines for notices;

4. the standard of conduct to which a secured party will be held;
5. how any proceeds of a disposition will be applied; and
6. the consequences for failure to observe the requirements of subchapter F.

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

§ 2.122:1 Debtor, Secondary Obligor, Waiver

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

1. a person having an interest, other than a security interest or other lien, in the collateral, whether or not the person is an obligor;
2. a seller of accounts, chattel paper, payment intangibles, or promissory notes; or
3. a consignee.

Tex. Bus. & Com. Code § 9.102(a)(28).

An "obligor" is a person who—

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

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

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

§ 2.122:2 Rights of Collection and Enforcement of Collateral

Tex. Bus. & Com. Code § 9.607 explains in greater detail than former section 9.502 the rights of a secured party who seeks to collect or enforce nonpossessory collateral, such as accounts, chattel paper, and payment intangibles. It also sets forth the enforcement rights of a depositary bank holding a security interest in a deposit account maintained with the depositary bank. *See* Tex. Bus. & Com. Code § 9.607(a)(4), (5). However, section 9.607 addresses only the

rights of the secured party with respect to the debtor and not the rights or duties of third parties, such as account debtors on collateral, which are addressed elsewhere (*see, e.g.*, Tex. Bus. & Com. Code § 9.406). See Tex. Bus. & Com. Code § 9.608 concerning the manner in which proceeds of collection or enforcement are to be applied.

§ 2.122:3 Disposition of Collateral

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

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

§ 2.122:4 Rights and Duties of Secondary Obligor

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

§ 2.122:5 Transfer of Record or Legal Title

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

§ 2.122:6 Strict Foreclosure

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

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

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

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

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

[Reserved]

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Chapter 3

Finding Debtor and Debtor's Assets

I. Finding Debtor

§ 3.1 Why Finding Debtor Is Necessary

Finding the debtor is necessary because an amicable settlement of the claim is impossible otherwise. Although a judgment may be obtained against a missing defendant through service by publication (see section 16.5 in this manual), the process is expensive and involves extra costs of service and the appointment of an attorney ad litem. The judgment is subject to several forms of collateral attack (see section 16.5:3), and it is almost certainly uncollectible unless and until the debtor is found.

If the debtor cannot be found, it is better to advise the client of that fact and recommend closing the file. See section 17.53:2 regarding tolling of limitations when a defendant is absent from Texas.

One of the easiest and most effective strategies for locating a debtor is if the creditor-client obtains relevant location and identification information at the outset of the business relationship, for example, in a credit application or identification request. Such an application or request should ask the debtor to specifically provide the following information:

1. full name (d/b/a, a/k/a, or trade name, if any);
2. address (include e-mail address if available);
3. business status (for example, corporation, LLC, sole proprietorship, or partnership, including state of registration);
4. phone and fax numbers;
5. bank account and other relevant financial information;
6. description of any litigation or claims;
7. Web site information;
8. Social Security Number or Employer Tax ID Number; and
9. references.

§ 3.2 Statutory Limitations on Debt Collectors' Activities in Finding People

The activities of debt collectors in trying to find consumer debtors are governed by the federal Fair Debt Collection Practices Act and the Texas Debt Collection Practices Act, which are discussed at length at sections 2.11 through 2.36 in this manual. The following sections apply particularly to debt collectors locating the debtor: 2.14 ("Mini-Miranda" notice), 2.15:9 (communication with third parties), 2.16 (misrepresentations), 2.32:2 (Texas law requiring debt collector identification), and 2.33 (Texas law concerning prohibited debt collection practices).

There are no statutory limitations concerning activities to locate nonconsumer debtors. However, the practitioner should be careful not to make an excessive demand when locating a nonconsumer debtor, which may preclude recovery of attorney's fees. *Findlay v. Cave*, 611 S.W.2d

57, 58 (Tex. 1981). Similarly, the practitioner should be mindful of the common-law tort of unreasonable collection, which might create a counterclaim against the creditor or the creditor's attorney. *EMC Mortgage Corp. v. Jones*, 252 S.W.3d 857, 868 (Tex. App.—Dallas 2008, no pet.); *see also McDonald v. Bennett*, 674 F.2d 1080, 1089 n.8 (5th Cir. 1982) (noting that the tort of unreasonable collection efforts is intended to deter "outrageous collection techniques").

§ 3.3 Post Office Resources

§ 3.3:1 Address Corrections

The simplest way to determine whether a debtor has moved from the last known address is to add the notation "Address Correction Requested—Do Not Forward" to the front of the envelope addressed to the last known address. If the post office has a forwarding address for the debtor, it will provide that address without charge when it returns the letter. Alternatively, the post office will deliver the letter to the debtor if it bears the notation "Forwarding and Address Correction Requested" and will return both the debtor's address and a postage-due charge.

§ 3.3:2 Other Information Post Office Will Provide

The creditor's attorney may request change of address or boxholder information from the U.S. Postal Service under the Freedom of Information Act, 5 U.S.C. § 552, for service of process. *See also* 39 C.F.R. § 265.6(d)(4)(i), (ii), (5)(ii). The request should be addressed to the postmaster for the post office that serves the post office box in question.

The request can be used either to find a forwarding address for a defendant who has filed a change of address form but has indicated that it is for his family or to obtain a name and street address for a business boxholder. This information will be provided only to an attorney, process server, or pro se party to aid that person in serving a defendant with process. 39 C.F.R. § 265.6(d)(5)(ii). The request can be made if the debtor is the subject of actual or prospective litigation. Unless suit is actually planned against the debtor, however, the attorney should not consider the "prospective litigation" option to be a loophole to obtain information not otherwise available. *See* 15 U.S.C. § 1692. See form 3-1 in this chapter.

The post office will provide—

1. the new address of a specific customer who has filed a permanent or temporary change of address order (but if the debtor has indicated on the change of address order that the change of address is for the debtor's family, the information is available only to aid service of process);
2. the name and address of the holder of a bulk mail permit or other similar permit; and
3. the recorded name, address, and telephone number of the holder of a post office box only if the information is sought for service of process.

39 C.F.R. § 265.6(d)(1), (2), (4).

§ 3.4 Driver's License Resources

On receipt of a written request and payment of a nominal fee, the Department of Public Safety may disclose information relating to an individual's most recent address as shown on its records. The requester must submit either the individual's driver's license number or full name and date of birth. The request should also list the individual's most current address in the creditor's or attorney's file. Tex. Transp. Code §§ 521.045, 730.007(a)(2)(C)(ii). Although state and federal law has limited the availability of driver's license information, this information is

still available for debt collection purposes. *See* 18 U.S.C. § 2721(b)(3); Tex. Transp. Code § 730.007(a)(2)(C)(ii). A Texas DPS Application for Copy of Driver Record may be used to obtain this information and can be found at **www.txdps.state.tx.us/internetforms/Forms/DR-1.pdf**. See form 3-2 in this chapter. The information is not available online through the DPS Web site as of the publication date of the latest supplement of this manual.

§ 3.5 Assumed Name Records

§ 3.5:1 Who Must File Assumed Name Certificates

Assumed name certificates must be filed by—

1. any individual who does business under a name that does not include his own surname;
2. any partnership whose name does not include the surname or other legal name of each general partner or joint venturer;
3. any individual or partnership whose business name suggests the existence of other owners by the use of words such as "Company," "and Company," "and Sons," "Brothers," and so on;
4. any limited partnership, corporation, limited liability company, limited liability partnership, or foreign filing entity doing business under a name other than the one shown in its officially filed documents (for example, articles of incorporation); and
5. any other company conducting business under a name.

Tex. Bus. & Com. Code §§ 71.002(2), 71.051, 71.101.

§ 3.5:2 Where Certificates Must Be Filed

Corporations, limited partnerships, limited liability partnerships, limited liability companies, and foreign filing entities must file their assumed name certificates with the Texas secretary of state in Austin. If the entity does not maintain a registered office in Texas, the entity must also file the certificate in the Texas county in which the entity's office is located or in the Texas county in which its principal place of business is located if the entity is not incorporated or organized in Texas (if that county is different from the one in which the entity's office is located). Tex. Bus. & Com. Code § 71.103(c). If the entity maintains a registered office in Texas, the certificate must also be filed in the county in which the registered office is found (if its principal office is not located in Texas) or in the county of its principal office in Texas. Tex. Bus. & Com. Code § 71.103(b). Other business owners must file in every county in which business is conducted or professional services are rendered. Tex. Bus. & Com. Code § 71.054.

§ 3.5:3 What to Look for in Assumed Name Certificates

An assumed name certificate provides the name and address of the owner of the business. The identity of any co-owners or others potentially liable for the debt may be discovered in this search. Also, a search of a reverse index of owners will show any other businesses a person or entity might own. In urban counties, online searches of assumed name records are available and are usually free of charge.

§ 3.5:4 If Business Owner Fails to File Certificate

If a business owner–defendant fails to file a proper assumed name certificate, a plaintiff or other party bringing an action against the business may recover, if the court so determines, all

expenses, including attorney's fees, incurred in locating and serving the owner. Tex. Bus. & Com. Code § 71.201.

§ 3.6 Searching by Telephone

§ 3.6:1 Telephone Searches Generally

Directory assistance does not give out addresses for number inquiries, but if voice contact with the debtor is sought, directory assistance may be helpful. Phone directories for many Texas towns and cities may be found in the public library or in a local phone company office. If debtors may be calling your office but refusing to give you contact information, caller ID and call return services can help, especially if the call return feature is used from a phone with an alpha-numeric readout of the number dialed.

§ 3.6:2 Ethical and Legal Cautions

See section 2.15:4 in this manual regarding phone conduct generally and section 2.15:9 regarding communication with third parties.

The attorney should not use a gimmick such as claiming to have a package to deliver to the debtor and needing the debtor's address to deliver it. *See* Tex. Fin. Code § 392.304(a)(3). See section 2.33:2.

§ 3.7 City Directory

City directories are published for most major cities. The directories typically have an alphabetical listing of residents, a street-by-street listing of who lives at what address, and a numerical listing of phone numbers. Some persons with unlisted phone numbers can be found in these directories. The street-by-street feature informs the debt collector of the identities of the debtor's neighbors if he wishes to contact them. Before contacting the neighbors with respect to consumer debt, however, the attorney should review the Fair Debt Collection Practices Act and the Debt Collection Practices Act, discussed at sections 2.11 through 2.36 in this manual.

§ 3.8 Online Resources

Caveat: Only the most general information is given in this section. The Internet, in particular, is subject to volatile change.

Web site addresses are printed in bold type. All are in the format that begins **http://www.** unless otherwise noted.

§ 3.8:1 Finding Information on the Internet Generally

Perhaps the most useful overall function of the Internet is its ability to search itself in a natural-language format. A few minutes' use of Google, Yahoo!, Bing, or other search sites can turn up all sorts of helpful information for location, identification, and collection purposes. These search sites also offer free map applications, such as Google Maps, Apple Maps, and MapQuest, which allow the user to enter an address and immediately locate that address on the user's device, obtain directions, and view relatively recent pictures of the location entered.

Another source of information is social networking sites. Sites such as Facebook, Twitter, Instagram, LinkedIn, Pinterest, Google+, Tumblr, VK, Vine, Flickr, and similar sites should be scoured for useful location, identification, and asset information using each site's unique search functions.

§ 3.8:2 Finding People through Web Sites

As of the publication date of the latest supplement of this manual, some of the primary search engines for finding people, addresses, or phone numbers on the Internet include **intelius.com**

(fee-based), **pipl.com** (free and fee-based), **switchboard.com** (free), **whowhere.com** (free), and **wink.com** (free).

§ 3.8:3 Commercial Online Services

Again, this area is so volatile that whichever services are noted as of the publication date of the latest supplement of this manual may become outdated within a year's time, if not sooner. Services that provide general information include **databyacxiom.com**, **lexisnexis.com**, **westlaw.com**, and **ussearch.com**. See also section 3.22 below regarding online UCC searches to find the debtor's assets.

§ 3.8:4 Credit Reporting Bureaus and Agencies

The three major credit reporting agencies are Experian (**experian.com**), Equifax (**equifax.com**), and TransUnion (**transunion.com**). Each Web site has restricted access and is a subscription service. Services vary by site and subscription. The practitioner must have a legitimate reason for needing this information in compliance with the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq*. In general, a simple credit report may reveal such things as the debtor's addresses for the last ten years, Social Security number, and spouse's name.

Dun & Bradstreet (**dandb.com**) is also a subscription service for searching business debtors. In general, it gives good location and financial information with respect to larger businesses. Typically, it is not very helpful for individuals or small businesses.

§ 3.9 Finding Debtor through Property

§ 3.9:1 Motor Vehicle Ownership

The Texas Department of Motor Vehicles will confirm the name of a vehicle's owner if provided with the vehicle identification number. The request must be made in person at any regional office of the DMV by filling out form VTR-275 (Request for Texas Motor Vehicle Information) and paying a nominal fee. See form 3-3 in this chapter. The DMV may be reached for assistance at 888-DMV-GOTX or 888-368-4689. More information on vehicle registration can be found on the DMV's Web site at **http://txdmv.gov/**.

§ 3.9:2 Boat Ownership and Liens

The Texas Parks and Wildlife Department will confirm the name of the owner of a boat if the boat registration number is provided. An online query for boat ownership may be made on the department's Web site at **https://apps.tpwd.state.tx.us/tora/jump.jsf**. Similarly, a printout of the ownership and lienholder information and a report of the boat's ownership history can be requested by submitting a request form to the department. The Ownership/Lien Holder Information Printout Or Ownership History Report (PWD 763) form can be downloaded from the department's site at **tpwd.texas.gov/publications/pwdforms/media/pwd_0763_a0900 _ownership_lien_holder_info_printout_history_rpt.pdf**. See form 3-4 in this chapter. Call the department at 512-389-4800 or toll-free at 800-792-1112 for more information.

§ 3.9:3 Aircraft

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

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

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

§ 3.10 Public Records

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

Location information may also be found in the federal district clerk's (including the bankruptcy court clerk) and county district clerk's records. Typically, because of jurisdictional and venue considerations, the information would be found where the debtor has its principal place of business or resides. Such information and records may be obtained on local county Web sites or through eFILETexas and its various providers. *See* **efiletexas.gov** for more information concerning its service providers and their respective services. Federal court records, including bankruptcy records, can be accessed through the federal PACER system at **https://www.pacer.psc.uscourts.gov**.

§ 3.11 Title Company

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

§ 3.12 Professional or Occupational Licenses

If the debtor has a professional or occupational license, such as real estate broker–salesperson, insurance agent, auctioneer, physician, chiropractor, dentist, surveyor, nurse, accountant, or attorney, the relevant licensing authority should provide the debtor's address according to its records. If the debt or judgment pertains to the

debtor's professional activity, there may be a recovery fund to pay unpaid judgments. *See, e.g.*, Tex. Occ. Code §§ 1101.601–.615 (Real Estate Recovery Fund to pay eligible judgments against licensees).

[Sections 3.13 through 3.20 are reserved for expansion.]

II. Finding Debtor's Assets

§ 3.21 Real Property Searches

§ 3.21:1 County Clerk

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

§ 3.21:2 Tax Assessor-Collector

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

§ 3.21:3 Title Company

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

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

§ 3.22 UCC Searches

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

Because Uniform Commercial Code financing statements must describe the collateral securing a secured debt, a review of these documents will give the attorney such information as the kind of

equipment the debtor may have and the identity of any party claiming a security interest in it. Tex. Bus. & Com. Code § 9.502.

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

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

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

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

3. *Foreign debtors.* If the debtor is located in a jurisdiction outside the United States and that jurisdiction does not provide for a public filing system for nonpossessory security

interests for a secured party to prevail over a subsequent lien creditor, the debtor is deemed to be located in the District of Columbia. *See* Tex. Bus. & Com. Code § 9.307(c).

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

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

1. examine the client's financing statement to see whether the upper right-hand corner has been stamped by the secretary of state or county clerk's office;
2. call the secretary of state's office 512-463-5555, give the name of the debtor, and request the search;
3. perform an online financing statement search on the SOSDirect Web site at **sos.state.tx.us/corp/sosda/index.shtml**; or
4. submit a form UCC11 to the appropriate office. See form 3-5 in this chapter.

On receipt of a form UCC11, the filing officer must issue his certificate showing whether there is on file, on the date and hour stated therein, any presently effective financing statement naming a particular debtor and any statement of assignment and, if there is, giving the date and hour of filing of each such statement and the name and address of each secured party. On request, the filing officer must furnish a copy of any filed financing statement or statement of assignment. A financing statement for some kinds of personal property can be obtained by sending a form UCC11 to the Secretary of State, Uniform Commercial Code Section, P.O. Box 13193, Austin, TX 78711-3193. See form 3-5 in this chapter; form UCC11 is also available on the secretary of state's Web site at **sos.state.tx.us/ucc/forms/ucc11.pdf**. The form can be downloaded or filled out and then printed from the site. This information is also available through the Secretary of State Online Access system, called SOSDirect, which allows computer access to information maintained by the secretary of state. Information on subscribing to this system may be obtained by calling 512-475-2755 (corporations) or 512-475-2703 (UCC); e-mailing **corpinfo@sos.texas.gov**, **ucc_assist@sos.texas.gov**, or **sosdirect@sos.texas.gov**; or by accessing the secretary of state's Web site at **sos.state.tx.us**. See sections 5.11:4 through 5.11:6 in this manual for further discussion of financing statements.

§ 3.23 Debtor's Bank Account

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

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

§ 3.24 Vehicles, Boats, Aircraft

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

[Sections 3.25 through 3.30 are reserved for expansion.]

III. Ascertaining Form of Debtor's Business

§ 3.31 Importance of Ascertaining Debtor's Form of Business

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

§ 3.32 Comptroller

The Open Records Division of the Texas Comptroller of Public Accounts maintains records on corporate franchise tax and sales tax. Its search service is free. The comptroller's phone number is 800-252-1386, which directs the caller to the Web site **http://comptroller.texas.gov** to obtain the location and identification information discussed herein. The information may also be requested by fax at 512-475-1610 or by e-mail at **open.records@cpa.texas.gov**. Information may also be obtained by using the comptroller's taxable entity search found at **https://mycpa.cpa.state.tx.us/coa/Index.html**. The information available from any of the listed searches includes the nature of the business—sole proprietorship, partnership, or corporation—as well as the names of corporate agents and officers, owners of sole proprietorships and partnerships, and corporate assumed names.

§ 3.33 Corporation Records of Secretary of State

If provided with the corporation's name or a close approximation, the secretary of state can provide such information as the corporation's registered agent and the names of its incorporators or whether the business even is a corporation chartered or authorized to do business in Texas. This information may be obtained at no charge by calling 512-475-2755 or by e-mailing **corpinfo@sos.state.tx.us**. It also may be obtained by mail for a small charge per corporation name search or by searching the SOSDirect Web site at **sos.state.tx.us/corp/sosda/index.shtml**.

§ 3.34 Assumed Name Records

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

Form 3-1

This form is mandated by 39 C.F.R. § 265.6(d)(5)(ii). If submitted on the requester's letterhead, it must be used in its entirety, or the postmaster will return it. Also, the warning statement and certification must appear immediately before the signature block. Note that the designation of a statute or regulation requested in item 2. below is not required if the requester is an attorney (as this form presumes) or a party acting pro se; a corporation acting pro se must cite a statute, however. The U.S. Postal Service form contains the same information as form 3-1; it can be downloaded at **www.usps.com** (see section 5-2 of Handbook AS-353—Guide to Privacy, the Freedom of Information Act, and Records Management).

Letter to Postal Service Requesting Information Concerning Address for Service of Process

[Letterhead Optional]

Postmaster Date _____

_____

City, State, ZIP Code

Request for Change of Address or Boxholder

Information Needed for Service of Legal Process

Please furnish the new address or the name and street address (if a boxholder) for the following:

Name: _____

Address: _____

NOTE: Only one request may be made per completed form. The name and last known address are required for change of address information. The name, if known, and Post Office box address are required for boxholder information.

The following information is provided in accordance with 39 CFR 265.6(d)(5)(ii). There is no fee for providing boxholder or change of address information.

1. Capacity of requester (e.g., process server, attorney, party representing self): _____

_____

2. Statute or regulation that empowers me to serve process (not required when requester is an attorney or a party acting pro se—except a corporation acting pro se must cite statute):

_____

3. The names of all known parties to the litigation:_____

_____

4. The court in which the case has been or will be heard:_____

_____

5. The docket or other identifying number (a or b must be completed):

____ a. Docket or other identifying number:_____

____ b. Docket or other identifying number has not been issued.

6. The capacity in which this individual is to be served (e.g., defendant or witness): _____

_____

WARNING

THE SUBMISSION OF FALSE INFORMATION TO OBTAIN AND USE CHANGE OF ADDRESS INFORMATION OR BOXHOLDER INFORMATION FOR ANY PURPOSE OTHER THAN THE SERVICE OF LEGAL PROCESS IN CONNECTION WITH ACTUAL OR PROSPECTIVE LITIGATION COULD RESULT IN CRIMINAL PENALTIES INCLUDING A FINE OF UP TO $10,000 OR IMPRISONMENT OF NOT MORE THAN 5 YEARS, OR BOTH (TITLE 18 U.S.C. SECTION 1001).

I certify that the above information is true and that the address information is needed and will be used solely for service of legal process in conjunction with actual or prospective litigation.

_____	_____
Signature	Address
_____	_____
Printed Name	City, State, ZIP Code

POST OFFICE USE ONLY

__ No change of address order on file.	NEW ADDRESS OR BOXHOLDER'S	POSTMARK
__ Moved, left no forwarding address.	NAME AND STREET ADDRESS	
__ No such address.	_____	
	_____	
	_____	

[Reserved]

Form 3-2

Texas DPS Application for Copy of Driver Record

DR-1 (Rev. 6/15)

TEXAS DPS

APPLICATION FOR COPY OF DRIVER RECORD

MAIL TO: Texas Department of Public Safety, Box 149008, Austin, TX 78714-9008

DO NOT MAIL CASH. Mail check or money order payable to: Texas Department of Public Safety

Any questions regarding the information on this form should be directed to the Contact Center at 512-424-2600. Allow 2-3 weeks for delivery.

Check Type of Record Desired	FEE
☐ 1. Name – DOB – License Status – Latest Address.	$ 4.00
☐ 2. Name – DOB – License Status – 3 Year Record only lists Crashes/Moving Violations.	$ 6.00
☐ 2A. CERTIFIED version of #2. This Record is Not acceptable for a Defensive Driving Course (DDC).	$ 10.00
☐ 3. Name – DOB – License Status – Record of ALL Crashes/Violations. **Furnished to Licensee Only.**	$ 7.00
☐ 3A. CERTIFIED version of #3. **Furnished to Licensee Only and is Acceptable for DDC.**	$ 10.00
☐ 4. Abstract Record – Certified abstract of completed driver record.	$ 20.00
☐ Other: (Original Application, DWLI, etc.) _____	$ ____.00 (If Required)

Mail Driver Record To: (Please Print or Type)

Requestor's Last Name _____ Requestor's First Name _____

Street Address _____ Texas Driver License Number _____

City _____ State _____ Zip Code _____ Daytime Telephone Number (include area code) ___-___-____

If requesting on behalf of a business, organization, or other entity, please include the following:

Name of business, organization, entity, etc. _____

Your Title or Affiliation with above _____

Type of business, organization, etc. (i.e., insurance provider, towing company, private investigation, firm, etc.) _____

Information Requested On:

Texas Driver License Number _____ Date of Birth MM/DD/YYYY _____ Suffix (SR., JR., etc.) _____

Last Name _____

First Name _____

Middle Name/Maiden Name _____

Individual's Written Consent For *ONE TIME* Release to Above Requestor

(Requestor, if you do not meet one of the exceptions listed on the back of this form, please be advised that without the written consent of the driver license/ID card holder, the record you receive will not include personal information.)

I, _____, hereby certify that I granted access on this one occasion to my Driver License/ID Card record, inclusive of the personal information (name, address, driver identification number, etc.) to _____.

Signature of License / ID Card Holder or Parent / Legal Guardian _____ Date _____

State and Federal Law Requires Requestors to Agree to the Following:

In requesting and using this information, I acknowledge that this disclosure is subject to the federal Driver's Privacy Protection Act (18 U.S.C. Section 2721 et seq.) and Texas Transportation Code Chapter 730. False statements or representations to obtain personal information pertaining to any individual from the DPS could result in the denial to release any driver record information to myself and the entity for which I made the request. Further, I understand that if I receive personal information as a result of this request, it may only be used for the stated purpose and I may only resell or redisclose the information pursuant to Texas Transportation Code §730.013. Violations of that section may result in a criminal charge with the possibility of a $25,000 fine.

I certify that I have read and agree with the above conditions and that the information provided by me in this request is true and correct. If I am requesting this driver record on behalf of an entity, I also certify that I am authorized by that entity to make this request on their behalf. I also acknowledge that failure to abide by the provisions of this agreement and any state and federal privacy law can subject me to both criminal and civil penalties.

Signature of Requestor _____ Date _____

If you are not requesting a copy of your own record or do not have the written consent of DL/ID holder, you must provide the information requested on the reverse.

Texas Department of Public Safety	**Save Time – Request Your Driver Record Online www.texas.gov**

Important Instructions – Read Carefully

The Texas Department of Public Safety may disclose personal information to a requestor without written consent of the DL/ID holder, on proof of their identity and a certification by the requestor that the use of the personal information is authorized under state and federal law and that the information will be used only for the purpose stated and in complete compliance with state and federal law.

You must meet one or more of the following exceptions if you do not have written consent of the DL/ID holder to be entitled to receive personal information on the above named individual. Please *initial* each category that applies to the requested driver record.

_____ 1. For use in connection with any matter of (a) motor vehicle or motor vehicle operator safety; (b) motor vehicle theft; (c) motor vehicle emissions; (d) motor vehicle product alterations, recalls, or advisories; (e) performance monitoring of motor vehicles or motor vehicle dealers by a motor vehicle manufacturer; or (f) removal of nonowner records from the original owner records of a motor vehicle manufacturer to carry out the purposes of the Automobile Information Disclosure Act, the Anti Car Theft Act of 1992, the Clean Air Act, and any other statute or regulation enacted or adopted under or in relation to a law included in the above.

_____ 2. For use by a government agency in carrying out its functions or a private entity acting on behalf of a government agency in carrying out its functions.

_____ 3. For use in connection with a matter of (a) motor vehicle or motor vehicle operator safety; (b) motor vehicle theft; (c) motor vehicle product alterations, recalls, or advisories; (d) performance monitoring of motor vehicles, motor vehicle parts, or motor vehicle dealers; (e) motor vehicle market research activities, including survey research; or (f) removal of nonowner records from the original owner records of motor vehicle manufacturers.

_____ 4. For use in the normal course of business by a legitimate business or an authorized agent of the business, but only to verify the accuracy of personal information submitted by the individual to the business or the authorized agent of the business and to obtain correct information if the submitted information is incorrect to prevent fraud by pursuing a legal remedy against, or recovering on a debt or security interest against the individual.

_____ 5. For use in conjunction with a civil, criminal, administrative, or arbitral proceeding in any court or government agency or before any self regulatory body, including service of process, investigation in anticipation of litigation, execution or enforcement of a judgement or order, or under an order of any court.

_____ 6. For use in research or in producing statistical reports, but only if the personal information is not published, redisclosed, or used to contact any individual.

_____ 7. For use by an insurer or insurance support organization, or by a self insured entity, or an authorized agent of the entity, in connection with claims investigation activities, antifraud activities, rating or underwriting.

_____ 8. For use in providing notice to an owner of a towed or impounded vehicle.

_____ 9. For use by a licensed private investigator agency or licensed security service for a purpose permitted as stated on this page.

_____ 10. For use by an employer or an authorized agent or insurer of the employer to obtain or verify information relating to a holder of a commercial driver license that is required under 49 U.S.C. Chapter 313.

_____ 11. For use in connection with the operating of a private toll transportation facility.

_____ 12. For use by a consumer-reporting agency as defined by the Fair Credit Reporting Act (15 U.S.C. §1681 et seq.) for a purpose permitted under the Act.

_____ 13. For any other purpose specifically authorized by law that relates to the operation of a motor vehicle or to public safety.

Please state specific statutory authority _____

_____ 14. For use in the preventing, detecting, or protecting against identity theft or other acts of fraud. The Department prior to release of personal information may require additional information.

Below is an example of how numbers and letters should be written on front of this form:

1 2 3 4 5 6 7 8 9 0

A B C D E F G H I J K L M N O P Q R S T U V W X Y Z

Form 3-3

Request for Texas Motor Vehicle Information

Texas Department of Motor Vehicles

Request for Texas Motor Vehicle Information

Form VTR-275
(Rev. 09/11)
Page 1 of 2

The Driver Privacy Protection Act restricts access to personal information on vehicle title and registration records. **Your signature and a copy of your current government issued photo identification** are required with this application to certify that the statements are true and correct for the described vehicle.

☐ I am the current recorded owner or lienholder of the vehicle.

☐ Written authorization is attached from the person(s) listed as the recorded owner, lienholder or previous owner.

☐ My authority to obtain vehicle information is shown as a Permitted Use on page 2 – initial the appropriate line and check the applicable box on page 2 (you must sign the statement below).

APPLICANT INFORMATION - Type or print			
Last Name or Business Name	First Name		Middle Initial
Address	City	State	ZIP / Postal Code
Day Phone	E-mail		
GOVERNMENT ISSUED PHOTO IDENTIFICATION - SUBMIT PHOTOCOPY			
Entity Issuing ID and Type (i.e., TX Driver License, US Passport, etc.)	Government Photo ID Number		Expires
VEHICLE INFORMATION			
Texas License Plate	Year	Make	
Vehicle Identification Number	Title Document Number		

If you are not the owner/lienholder, initial a **Permitted Use** on page 2 - unless you have written authorization.

☐ Title history $5.75

☐ Certified title history $6.75

☐ Title and registration verification of a vehicle record (current or expired) $2.30

☐ Certified title and registration verification of a vehicle record - for court use $3.30

☐ Duplicate registration receipt for current registration period $2.00

Other (explain) _____ [Fee varies]

_____

STATEMENT - State law makes falsifying information on this application a third-degree felony.

I certify that the statements on this application are true and request that the TxDMV provide me with the requested information contained in the motor vehicle record for the vehicle indicated. In making this request, I also certify that the:

- Information requested is for a lawful and legitimate purpose and will be used only in accordance with 18 U.S.Code §§2721-2725 and Transportation Code, Chapter 730 (Driver Privacy Protection Acts).
- Personal information obtained pursuant to this request **will not** be used for marketing, solicitation or survey purposes, and
- I have not been convicted of a violation of either of the Driver Privacy Protection Acts, or violated a rule adopted by the department relating to the terms and conditions for release of personal information from vehicle records.

Name of Applicant – type or print _____ Date _____

Signature of Applicant _____

Violators can be prosecuted under Transportation Code, Section 730.013 and Penal Code, Section 37.10.

Send check, money order, or cashier's check with processing fee (no refunds) made payable to: TxDMV. Do not mail cash. Submit completed and signed form with copy of your government issued photo ID (and written authorization, if applicable) to: **TxDMV Vehicle Titles and Registration Division, Austin, TX 78779-0001** or visit a TxDMV Regional Service Center for assistance.

FORM VTR-275 Page 1 of 2 **Online Form at www.TxDMV.gov**

PERMITTED USE

Sign or print *your initials* on the appropriate line. Check box if applicable.

INITIAL THE LINE BELOW next to the item that applies to your use of the requested information.

After you initial, check the applicable box that specifies your use. Use of the requested personal information is strictly limited to:

____ A governmental entity, including law enforcement (check applicable box):
- ☐ A government agency, including any court or law enforcement agency, in carrying out its functions.
- ☐ A private person or entity acting on behalf of a government agency in carrying out the functions of the agency.

____ Use in connection with one of the following (check applicable box):
- ☐ Motor vehicle safety or motor vehicle operator safety.
- ☐ Motor vehicle emissions.
- ☐ Motor vehicle theft.
- ☐ Motor vehicle product alterations, recalls or advisories.
- ☐ Performance monitoring of motor vehicles, motor vehicle parts or motor vehicle dealers.
- ☐ Motor vehicle market research activities, including survey research.
- ☐ Removal of non-owner records from the original owner records of a motor vehicle manufacturer to carry out the purposes of the Automobile Information Disclosure Act, 15 U.S.C. §1231 et seq.; 49 U.S.C. Chapters 301, 305, 323, 325, 327, 329, and 331; the Anti Car Theft Act of 1992, 18 U.S.C. §§553, 981, 982, 2119, 2312, 2313, and 2322, 19 U.S.C. §§1646b and 1646c, and 42 U.S.C. §3750a et seq., all as amended; the Clean Air Act, 42 U.S.C. §7401 et seq., as amended.

____ Use in the normal course of business by a legitimate business or its authorized agent, but only to verify accuracy of personal information submitted by the individual; and if the information is not correct, to obtain the correct information for the sole purpose of preventing fraud by, pursuing a legal remedy against or recovering on a debt or security interest against the individual.

____ In conjunction with a civil, criminal, administrative or arbitral proceeding in any court or government agency or before any self-regulatory body, including service of process, investigation in anticipation of litigation, execution or enforcement of a judgment or order, or under an order of any court.

____ For child support enforcement under Chapter 231, Family Code.

____ Use in research or in producing statistical reports, but **only if the personal information is NOT published, redisclosed, or used to contact any individual.**

____ Use by an insurer or insurance support organization, a self-insured entity or as its authorized agent of the entity in connection with claims investigation activities, antifraud activities, rating or underwriting.

____ Use in providing notice to an owner of a towed or impounded vehicle.

____ Use by a licensed private investigation agency or licensed security service authorized to use the information for a purpose listed.

____ Use by an employer or its agent or insurer of the employer to obtain or verify information relating to a holder of a commercial driver license that is required under 49 U.S.C., Chapter 313.

____ Use in connection with the operation of a private toll transportation facility.

Resale and Redisclosure: Motor vehicle record information obtained for a permitted use may not be resold or redisclosed unless the information is used only for the permitted use, and must be maintained for a period of not less than 5 years by the person or entity that received the information. The purchaser must also provide a copy of those vehicle records to the department upon request.

Information obtained as a result of this request **may not be resold or redisclosed** in the same or substantially identical format as it is received from the TxDMV.

Form 3-4

Ownership/Lien Holder Information Printout Or Ownership History Report (PWD 763

Ownership/Lien Holder Information Printout Or Ownership History Report (PWD 763)

This form is used to:

- **Obtain a computer printout**, which provides the current owner/lien holder name, address, vessel/boat and/or outboard motor description. The form PWD 763 must be completed and submitted with appropriate fees to TPWD Headquarters in Austin, a TPWD local law enforcement office, or a participating County Tax Assessor-Collector office.
- **Obtain the History**, which provides a copy of all documents submitted for transactions on file for a vessel/boat and/or outboard motor. TPWD retains historical documentation for vessels and outboard motors for a period of 10 years. The form PWD 763 must be completed and submitted with appropriate fees to TPWD Headquarters in Austin.

Check if your request is for a vessel/boat, outboard motor or both. Complete multiple forms if you need information for more than one vessel/boat and one outboard motor.

☐ **Vessel/Boat Information:** Please complete each blank if possible.

TX #: _____ HIN/Serial#: _____

Make: _____ Year Built: _____

Owner of Record Name and Address: _____

☐ **Outboard Motor Information:** Please complete each blank if possible.

M# (if known): _____ MIN/Serial #: _____

Make: _____ Year Built: _____

Owner of Record Name and Address: _____

Select the type of information you are requesting on the vessel/boat and/or outboard motor.

☐ **Ownership/Lien Holder Information Printout – fee $0.00** each vessel/boat or outboard motor request

I, the undersigned, hereby request the name and address of the owner, name and address of the lien holder (if recorded), vessel/boat registration expiration date, and record status information on the vessel/boat and/or outboard motor described above.

☐ **Ownership History Report – (See Fee Chart)** each vessel/boat or outboard motor request

I, the undersigned, hereby request the historical transaction information recorded for the vessel/boat and/or outboard motor described above.

Check one: ☐ Normal History, or ☐ Certified History (letter is provided for court purposes)

Fees:

Number of Ownership/Lien Holder Reports Requested: _____ x $0 = $ _____

Number of Ownership History Reports Requested: _____ x (See Fee Chart) _____

Total Amount Enclosed: $_____

I hereby certify that the TPWD vessel/boat and/or outboard motor record obtained will be used for lawful purposes.

WARNING: Falsifying information on documents is a punishable offense – Texas Penal Code Chapter 37, Section 37.10. Any person who knowingly makes a false entry in, or false alteration of a governmental record is guilty of a felony of the third degree, punishable by confinement in jail for any term of not more than 10 years or less than 2 years and punishable by a fine not to exceed $10,000. I hereby certify that all statements in this document are true and correct to the best of my knowledge and belief.

Signature of Applicant/Requestor: _____ Date: _____

Print Name: _____

Business Name (if applicable): _____

Mail to Address: _____

City: _____ State: _____ Zip: _____

Daytime Phone Number: _____

Texas Parks and Wildlife Department maintains the information collected through this form. With few exceptions, you are entitled to be informed about the information we collect. Under Sections 552.021 and 552.023 of the Texas Government Code, you are also entitled to receive and review the information. Under Section 559.004, you are also entitled to have this information corrected.

PWD 0763 – A0900 (08/09) Texas Parks and Wildlife Department • 4200 Smith School Road, Austin, TX 78744 • www.tpwd.state.tx.us

[Reserved]

Form 3-5

UCC11
Information Request

[redacted]

INFORMATION REQUEST

FOLLOW INSTRUCTIONS

A. NAME & PHONE OF CONTACT AT FILER (optional)	FILING OFFICE ACCT #
B. E-MAIL CONTACT AT FILER (optional)	
C. RETURN TO: (Name and Address)	

THE ABOVE SPACE IS FOR FILING OFFICE USE ONLY

1. DEBTOR'S NAME to be searched: Provide only one Debtor name (1a or 1b) (use exact full name; do not omit, modify or abbreviate any part of the Debtor's name)

1a. ORGANIZATION'S NAME			
OR			
1b. INDIVIDUAL'S SURNAME	FIRST PERSONAL NAME	ADDITIONAL NAME(S)/INITIAL(S)	SUFFIX

2. INFORMATION OPTIONS relating to UCC filings and other notices on file in the filing office that include the Debtor name identified in item 1:

2a. ☐ LISTING RELATING TO DEBTOR AT SPECIFIED CITY AND STATE ONLY — Filing office requested to furnish a search report listing all financing statements, related records, and other notices on file in filing office that include the Debtor's name identified in item 1 and show that Debtor's address in the city, state, and country indicated here:

CITY	STATE	COUNTRY

2b. ☐ INFORMATION REQUEST RESPONSE WITH FULL COPIES (CERTIFIED) — Filing office requested to furnish a search report listing all financing statements, related records, and other notices, showing date and time of filing and name and address of each Secured Party named therein, and also furnish an exact CERTIFIED COPY of ALL reported records (including all attachments)

2c. ☐ INFORMATION REQUEST RESPONSE WITHOUT COPIES — Filing office requested to furnish a search report (as described in 2b) listing all reported records, but to furnish NO COPIES of reported records

2d. ☐ INFORMATION REQUEST RESPONSE WITH PARTIAL COPIES (CERTIFIED) — Filing office requested to furnish a search report (as described in 2b) and also to furnish an exact CERTIFIED COPY of the FIRST PAGE ONLY of all reported records

3. ☐ SPECIFIED COPIES ONLY — Filing office requested to furnish an exact copy of each page of the financing statements, related records, and other notices (including all attachments) that are identified below by record number. Certain filing offices require additional identifying information — please complete if required

☐ CERTIFIED COPY REQUEST — Filing office requested to furnish CERTIFIED copies per request indicated in this item 3

Record Number	Date Record Filed (if required)	Type of Record and Additional Identifying Information (if required)

4. ☐ LISTING RELATING TO SECURED PARTY — Filing office requested to furnish a search report listing all financing statements, related records, and other notices (regardless of Debtor name) on file in filing office that include the Secured Party's name identified in item 4a or 4b. If a specified city, state, and country are being requested (optional), show that Secured Party's address in item 4c

4a. ORGANIZATION'S NAME			
OR			
4b. INDIVIDUAL'S SURNAME	FIRST PERSONAL NAME	ADDITIONAL NAME(S)/INITIAL(S)	SUFFIX
4c. CITY		STATE	COUNTRY

5. DELIVERY INSTRUCTIONS (request will be filled by mail sent to address shown in item C unless otherwise instructed here):

5a. ☐ FAX Delivery — Filing office requested to fax results of this Information Request to fax number indicated here: ( )

5b. ☐ Pick Up

5c. ☐ Other

Specify desired method here (if available from this office); provide delivery information (e.g., delivery service's name, addressee's account # with delivery service, addressee's phone #, etc.)

Office of the Secretary of State of Texas

FILING OFFICE COPY (1) — INFORMATION REQUEST (Form UCC11) (Texas) (Rev. 07/19/12)

Instructions for Information Request (Form UCC11) (Texas)

Please type or laser-print this form. Be sure it is completely legible. Read and follow all Instructions, especially Instruction 1; use of the correct name for the Debtor is crucial.

Fill in form very carefully; mistakes may have important legal consequences. If you have questions, consult your attorney. The filing office cannot give legal advice.

Send completed form parts 1 and 2 (labeled Filing Office Copy (1) and (2)) to the filing office, with the required fee.

ITEM INSTRUCTIONS

A and B. To assist filing offices that might wish to communicate with filer, filer may provide information in item A and item B. These items are optional.

C. Provide name and address of requestor in item C. This item is NOT optional.

1. **Debtor's name.** Enter only one Debtor name in item 1 -- either an organization's name (1a) or an individual's name (1b). Enter Debtor's correct name. Do not abbreviate words that are not already abbreviated in the Debtor's name.

1a. Organization Debtor Name. "Organization Name" means the name of an entity that is not a natural person. A sole proprietorship is not an organization, even if the individual proprietor does business under a trade name. If Debtor is a registered organization (e.g., corporation, limited partnership, limited liability company), it is advisable to examine Debtor's current filed public organic records to determine Debtor's correct name. Trade name is insufficient. If a corporate ending (e.g., corporation, limited partnership, limited liability company) is part of the Debtor's name, it must be included. Do not use words that are not part of the Debtor's name.

1b. Individual Debtor Name. "Individual Name" means the name of a natural person; this includes the name of an individual doing business as a sole proprietorship, whether or not operating under a trade name. The term includes the name of a decedent where collateral is being administered by a personal representative of the decedent. The term does not include the name of an entity, even if it contains, as part of the entity's name, the name of an individual. Prefixes (e.g., Mr., Mrs., Ms.) and titles (e.g., M.D.) are generally not part of an individual name. Indications of lineage (e.g., Jr., Sr., III) generally are not part of the individual's name, but may be entered in the Suffix box. Enter individual Debtor's surname (family name) in Individual's Surname box, first personal name in First Personal Name box, and all additional names in Additional Name(s)/Initial(s) box.

If a Debtor's name consists of only a single word, enter that word in Individual's Surname box and leave other boxes blank.

For both organization and individual Debtors. Do not use Debtor's trade name, DBA, AKA, FKA, division name, etc. in place of or combined with Debtor's correct name; filer may add such other names as additional Debtors if desired (but this is neither required nor recommended).

2. **Information Options.**

2a. To request a "Listing Relating to Debtor at Specified City and State Only" check box 2a and enter the city, state, and country in item 2a. This type of request will introduce a search criterion that narrows the scope of the search, which may result in an incomplete search (that fails to list all filings against a named Debtor) and requestor may fail to learn information that might be of value.

2b-2d. Check appropriate box (2b, 2c, or 2d) to specify whether search response should include all copies, no copies or partial copies.

3. **Specified Copies Only.** To request specified copies only, check the "Specified Copies Only" box and provide the record number(s) as requested. To request certified copies for record number(s) identified in item 3, also check the "Certified Copy Request" box.

4. **Listing relating to Secured Party.** To request a listing for a named Secured Party, check this box. Enter only one Secured Party name in item 4 -- either an organization's name (4a) or an individual's name (4b). If a specified city, state, and country is being requested (optional), enter that Secured Party's address in item 4c.

5. **Delivery Instructions.** Unless otherwise instructed, filing office will mail information to the name and address in item C. Check appropriate box (5a, 5b, or 5c) if optional delivery method is being requested.

5a. To request information to be faxed to the requestor, check the "FAX Delivery" box and provide fax number in specified area.

5b. To request information to be picked up from the filing office, check the "Pick Up" box.

5c. For other than mail, pick up or FAX, check the "Other" box and specify the other delivery method that is being requested. If requesting delivery service, provide delivery service's name and requestor's account number to bill for delivery charge. Filing office will not deliver by delivery service unless prepaid waybill or account number for billing is provided.

If requesting information from a county clerk filing office, contact county clerk to determine what services are offered by that office.

Chapter 4

Communicating with Debtor

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Chapter 4

Communicating with Debtor

I. Demand and Negotiation

§ 4.1 Why Make Demand?

§ 4.1:1 Confirm Debtor's Location

Mailing an envelope to the debtor at his last known address will either confirm that address as correct or provide information about a new forwarding address. If the notation "address correction requested" is included on the envelope, the post office will provide a forwarding address. See section 3.3 in this manual.

§ 4.1:2 Motivate Debtor to Pay

Letters from attorneys can be effective tools to motivate the debtor to pay. Every communication with the debtor or debtor's attorney should encourage payment. A firm but civil tone to the attorney's communications, combined with the message that *this* debt is one that must be dealt with, may encourage payment in situations in which a more strident tone might not.

A demand letter to the debtor should contain an assertion that the creditor has instructed the attorney to make only one demand for payment before filing suit. This assertion should be made only if true. Although there is apparently no liability for making such an untrue statement in connection with a commercial debt (as contrasted with a consumer debt, where such a false assertion violates the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692–1692p), the attorney sabotages his own authority and credibility by doing so. If the nature of the debt requires notice of intent to accelerate, that notice constitutes a second demand. See form 4-1 in this chapter for a commercial debt demand letter, form 4-2 for a consumer debt demand letter, and form 4-3 for a notice of intent to accelerate.

Demand letters should be sent both by certified mail, return receipt requested, and by regular first-class mail to take advantage of the mail presumption.

§ 4.1:3 Determine Debtor's Ability to Pay or Amenability to Suit

All communications to or with the debtor should be open-ended, encouraging the free flow of information from the debtor. If possible, the attorney should confirm the debtor's address by asking the debtor if he received the demand letter and following up with a request to confirm the debtor's current mailing address. Dialogue with the debtor can tell the attorney about the debtor's financial and employment status and whether the debtor has foreclosures or judgments. Most importantly, listening for any complaints the debtor may have can help determine if the debtor may file a counterclaim. While not everything the debtor says will necessarily be true, it will help the attorney decide in recommending suit and in drafting a more thorough status update to the client.

The attorney should never stop attempting to collect the debt. If the debtor responds that he is unable to pay in full, the attorney should suggest that the debtor offer to set up a payment plan or be creative in trying to reach a compromise, such as allowing the debtor to make smaller

payments during off-peak times. See section 4.12 below.

§ 4.1:4 Predicate Liability for Attorney's Fees

In a variety of cases in which there is no express contractual liability for attorney's fees, demand for payment must be made before attorney's fees can be recovered. This topic is discussed at length in section 1.23 in this manual. *See also* Tex. Civ. Prac. & Rem. Code ch. 38.

§ 4.1:5 Accelerate Debt

If the debt is payable in installments, it must be accelerated before the creditor can either foreclose on any collateral or sue on the debt. In addition, unless there is a valid waiver in the loan document, the creditor must give notice of intent to accelerate before actually accelerating the debt. See form 4-3 in this chapter for a notice of intent to accelerate. Acceleration of a debt payable in installments is discussed at section 2.111 in this manual. The notice of intent to accelerate and notice of acceleration must be clear and unequivocal. *Ogden v. Gibraltar Savings Ass'n*, 640 S.W.2d 232 (Tex. 1982). The attorney should not demand any interest not yet accrued or expenses such as attorney's fees not yet incurred; such a demand may be usurious. *See Jim Walter Homes, Inc. v. Schuenemann*, 668 S.W.2d 324 (Tex. 1984).

§ 4.2 Actions Prohibited by Statute

See sections 2.11 through 2.36 in this manual for a discussion of the application of the federal Fair Debt Collection Practices Act and the Texas Debt Collection Practices Act to the collection of consumer debts. The fact that those statutory provisions are not repeated here does not lessen their importance in this area.

§ 4.2:1 Payoff Figures

Demanding or collecting more money from the debtor than is owed may violate usury laws. If the claim is a consumer claim, the excessive demand may also violate the Fair Debt Collection Practices Act and the Texas Debt Collection Practices Act. See sections 2.17:1, 2.33:2, and 2.52:2 in this manual. It is therefore vitally important that the debtor be given accurate payoff figures. *See Waterfield Mortgage Co., Inc. v. Rodriguez*, 929 S.W.2d 641 (Tex. App.—San Antonio 1996, no writ); *Seitz v. Lamar Savings Ass'n*, 618 S.W.2d 142 (Tex. Civ. App.—Austin 1981, no writ). The creditor may be able to claim bona fide clerical error as a defense to usury if an incorrect payoff figure is quoted. *See* Tex. Fin. Code § 305.101.

If an attorney gives an incorrect payoff amount or demands more money than is owed, the attorney violates the debt collection statutes unless he can show that it was a bona fide error that occurred despite the use of reasonable procedures designed to avoid the error. See sections 2.19, 2.35, and 2.61:1. It is better for the attorney to become familiar with how the creditor computes the amount owed so as not to inaccurately state the amount of the debt to the debtor. *See Duffy v. Landberg*, 215 F.3d 871 (8th Cir. 2000). If the debt bears interest, the attorney should try to ascertain a per diem charge based on the interest rate so as to more easily give a payoff quote for any particular day. See section 2.43 regarding how interest is calculated.

§ 4.2:2 If Debtor Is (or Claims to Be) Represented by Counsel

Both federal debt collection law and the Texas Disciplinary Rules of Professional Conduct require debt collection attorneys to communicate only with the debtor's attorney if one has been engaged. *See* 15 U.S.C. § 1692b(6); Tex. Disciplinary Rules Prof'l Conduct R. 4.02(a), *reprinted in* Tex. Gov't Code Ann., tit. 2, subtit.

G, app. A (West 2013 & Supp. 2015) (Tex. State Bar R. art. X, § 9).

If a claim of representation comes from the debtor instead of the debtor's attorney, the attorney should verify representation by telephone or written contact to the debtor's attorney. A letter to the debtor's alleged attorney may be advisable, asking for verification of representation within a period of time and stating that otherwise it will be assumed that there is no such representation.

If the debtor makes contact while he is represented, the practitioner should politely advise the debtor that he is unable to speak to the debtor until written permission has been obtained from the attorney representing the debtor that the practitioner can speak to the debtor.

§ 4.3 If Debtor Requests Verification of Debt

The validation notice required by the Fair Debt Collection Practices Act for consumer claims is governed by 15 U.S.C. § 1692g and is discussed more extensively at section 2.13 in this manual. If it is a commercial claim, verification is not required. But as a practical matter, it may help in furthering discussions and obtaining payment.

[Sections 4.4 through 4.10 are reserved for expansion.]

II. Payment Agreement with Debtor

§ 4.11 Encouraging Agreement

If the debtor knows that the debt is not going to be forgotten or forgiven and that all the creditor's remedies (such as repossession, foreclosure, execution, garnishment, or turnover) will cause a significant disruption in his life, the debtor may be motivated to work with the creditor's attorney. When encouraging the debtor in this manner, it is entirely proper for the attorney to point out the remedies available to the creditor—*if* the action is lawful and the creditor or debt collector intends to take that action. 15 U.S.C. § 1692e(4), (5); *see United States v. National Financial Services, Inc.*, 98 F.3d 131 (4th Cir. 1996); *Bentley v. Great Lakes Collection Bureau*, 6 F.3d 60 (2d Cir. 1993).

§ 4.12 Potential Settlement Means

Assuming that the debtor does not have sufficient liquid resources to pay the debt, several means exist for settlement. A nonexhaustive list includes obtaining the money from friends, family, or another lender; selling assets; paying the debt in installments; making a partial payment of the debt in installments, with a balloon payment afterward; and the creditor's accepting less than the full amount of the debt. Often, two or more of these options are used in the same settlement.

§ 4.13 Form and Content of Agreement

§ 4.13:1 Form Generally

Although an oral agreement to pay money is generally enforceable unless barred by the statute of frauds, an attorney should evidence the agreement in writing and memorialize its terms. This agreement can be any kind of memorandum, such as a letter agreement, or it can be a more formal promissory note.

The manual committee has not included a promissory note form in this manual, believing that

the creditor's interests are usually sufficiently protected by the documentation from the original transaction combined with a letter agreement setting out the terms of the settlement.

§ 4.13:2 Contents of Agreement

The agreement should—

1. recite the amount owed including, as a sum total, principal, interest, and other charges;
2. contain a valid waiver of limitations;
3. state how the debt is to be paid—for example, in monthly installments of $247.50;
4. recite that the agreement is one to pay the debt or judgment already existing and does not create a new obligation (unless a new obligation is desired);
5. if payable in installments, contain an acceleration clause;
6. if a promissory note, waive presentment; and
7. in all cases, waive notice of default, notice of intent to accelerate, and notice of acceleration.

The attorney may also consider adding a mutual release to avoid future litigation regarding the services or goods provided that were discounted during the settlement process.

§ 4.14 Securing Obligation Created by Agreement

§ 4.14:1 Collateral Generally

Although it is generally preferable to have a secured debt rather than an unsecured one, several matters must be considered before agreeing to accept the debtor's property as collateral. First, does the debtor own the collateral? Second, what liens already exist against the collateral? Third, what price would the collateral bring at foreclosure sale? The decision to take collateral does not necessarily have to be only economic; the threat of losing property to repossession and foreclosure can motivate a debtor to comply with the agreement.

When drafting an agreement to accept any payment in the future, the attorney should consider collateralizing the agreement in some manner. Unless the loan is nonrecourse, the creditor will have at least a partial recovery, and the remainder may be sued for in a deficiency suit. See generally chapter 5 of this manual regarding nonjudicial repossession and section 14.9 regarding deficiency suits.

§ 4.14:2 Equity Lien against Debtor's Real Property

Traditionally, Texas creditors have shied away from securing any payment agreement with a consumer debtor that included a mortgage against the debtor's real property, because such a mortgage would be unenforceable against the debtor's homestead. Such loans are possible now, but the creditor and the attorney should know the numerous requirements involved with such a loan. From a debt collection view, the most important requirement is that a home equity loan must be nonrecourse, unless the owner or his spouse obtained the loan by actual fraud. Tex. Const. art. XVI, § 50(a)(6)(C). This nonrecourse provision will limit the creditor's ultimate recovery to the amount realized at foreclosure sale.

§ 4.15 Waiver of Limitations

See section 17.55 in this manual regarding waiver of limitations.

Form 4-1

This letter does *not* contain language required by the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 *et seq.* If there is any chance that the debt could be considered a consumer debt, the attorney should send the letter at form 4-2 in this chapter.

Demand Letter—Commercial Debt

[**Date**]

[**Name and address of debtor**]

Re: [**name of creditor**], Creditor
[**include if applicable:** Account number [**number**]]
[**other information describing debt, if applicable**]
Our file number: [**law office file number**]

[**Salutation**]

I have been retained by [**name of creditor**] to collect the debt described above. As of [**date**], the amount owed is $[**amount**]. This total amount consists of $[**amount**], principal; $[**amount**], interest accrued through [**date**]; and [**itemize other charges**].

Demand is now made for payment of the debt. Because of the necessity of retaining this firm to collect this debt, payment in the additional amount of $[**amount**] as attorney's fees must also be tendered at this time. Direct your payments to this office.

If a per diem interest charge can be calculated, provide it; otherwise, include the following paragraph.

Additional interest or other charges may accrue on this debt. To obtain a current payoff figure, call [**telephone number**] between [**time**] and [**time**], except for weekends or holidays.

Continue with the following.

I have been instructed to make only one demand for payment. If your payment is not forthcoming and if no arrangements are made to satisfy the debt, I will proceed with immediate suit against you to collect this debt by all lawful means and through all remedies available at law. I trust, however, that this will not be necessary.

You must deal with this situation now. Please call me immediately on receipt of this letter so we can discuss some amicable resolution of this matter. If I have not heard from you within ten days from the date of this letter, I will recommend to my client that suit be filed and that additional attorney's fees and court costs, in addition to the principal of the debt, be recovered from you.

If you have any questions, please do not hesitate to call or write.

Sincerely yours,

_____

[Name of attorney]

Certified Mail No. **[number]**
Return Receipt Requested

Form 4-2

This letter contains both the validation notice and the "mini-Miranda" notice required by the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 *et seq.* If there is any chance that the debt could be considered a consumer debt, the attorney should send this letter instead of the one at form 4-1 in this chapter.

The attorney must be careful not to list an amount that is less than the full amount due as of the date of the letter (*see Miller v. McCalla, Raymer, Padrick, Cobb, Nichols & Clark, LLC*, 214 F.3d 872 (7th Cir. 2000)), and neither the letter nor any subsequent communications should overshadow or contradict the thirty-day validation period (*see Avila v. Rubin*, 84 F.3d 222 (7th Cir. 1996); *Russell v. Equifax A.R.S.*, 74 F.3d 30 (2d Cir. 1996); *Graziano v. Harrison*, 950 F.2d 107 (3d Cir. 1991); *Miller v. Payco-General American Credits, Inc.*, 943 F.2d 482 (4th Cir. 1991); *Swanson v. Southern Oregon Credit Service, Inc.*, 869 F.2d 1222 (9th Cir. 1988)).

Demand Letter—Consumer Debt

[**Date**]

[**Name and address of debtor**]

Re: [**name of creditor**], Creditor
[**include if applicable:** Account number [**number**]]
[**other information describing debt, if applicable**]
Our file number: [**law office file number**]

[**Salutation**]

I have been retained by [**name of creditor**] to collect the debt described above. As of [**date**], the amount owed is $[**amount**]. This total amount consists of $[**amount**], principal; $[**amount**], interest accrued through [**date**]; and [**itemize other charges**].

Demand is now made for payment of the debt. Because of the necessity of retaining this firm to collect this debt, payment in the additional amount of $[**amount**] as attorney's fees must also be tendered at this time. Direct your payments to this office.

> Note: Do not demand fees unless they are legally chargeable at this stage. If a per diem interest charge can be calculated, provide it; otherwise, include the following paragraph.

Additional interest or other charges may accrue on this debt. To obtain a current payoff figure, call [**telephone number**] between [**time**] and [**time**], except for weekends or holidays.

Select one of the following. Do not refer to the filing of suit unless suit is actually contemplated.

I have been instructed to make only one demand for payment. If your payment is not forthcoming and if no arrangements are made to satisfy the debt, I will proceed with suit against you to collect this debt by all lawful means and through all remedies available at law. I trust, however, that this will not be necessary. Please note that regardless of the filing or timing of any suit, you are entitled to dispute the debt as set forth below.

Or

Please call me so that we can discuss some amicable resolution of this matter. If you do not respond within thirty days from the date you receive this letter, I will recommend to my client that suit be filed and that additional attorney's fees and court costs, in addition to the principal of the debt, be recovered from you.

Continue with the following.

Unless, within thirty days after receipt of this letter, you dispute the validity of the debt or any portion of it, I will assume the debt to be valid. If, within thirty days of your receipt of this letter, you notify me in writing that the debt or any portion of it is disputed, I will obtain a verification of the debt or, if the debt is founded on a judgment, a copy of the judgment, and I will mail you a copy of the verification or judgment. If the original creditor is different from the creditor named above, then on your written request within thirty days of the receipt of this letter I will provide you with the name and address of the original creditor.

I am attempting to collect a debt, and I am acting as a debt collector in this matter. Any information obtained will be used for that purpose.

If you have any questions, please do not hesitate to call or write.

Sincerely yours,

_____

[**Name of attorney**]

Certified Mail No. [**number**]
Return Receipt Requested

[Reserved]

Form 4-3

This letter assumes that a clause allowing acceleration is in the loan document.

Notice of Intent to Accelerate

[**Date**]

[**Name and address of debtor**]

Re: [**name of creditor**], Creditor
[**include if applicable:** Account number [**number**]]
[**other information describing debt, if applicable**]
Our file number: [**law office file number**]

[**Salutation**]

I have been retained as attorney for [**name of creditor**].

The terms of your agreement with my client provide that in the event of your default in the agreement, the entire principal amount of the debt may, at the creditor's option, become immediately due and payable.

Despite demand made on [**date**] for payment of amounts overdue, you are still in default. This letter constitutes notice that, unless I receive a certified check, cashier's check, or money order for the full amount that is due and unpaid on or before [**number**] days after the date of this letter, I intend to take whatever steps are necessary to protect my client's interests, including seeking late charges, collection expenses, attorney's fees, interest, and acceleration of the remaining unpaid principal balance under the terms of the referenced note and agreement and the laws of this state.

Enclosed is an addressed, postage-paid envelope for your payment.

Sincerely yours,

_____

[**Name of attorney**]

Certified Mail No. [**number**]
Return Receipt Requested

Enc.

Form 4-4

Notice of Acceleration

[**Date**]

[**Name and address of debtor**]

Re: [**name of creditor**], Creditor
[**include if applicable:** Account number [**number**]]
[**other information describing debt, if applicable**]
Our file number: [**law office file number**]

[**Salutation**]

The creditor has accelerated the debt referenced above in accordance with the terms of the agreement with you. Demand is now made for the total amount of $[**amount**]. This total amount consists of $[**amount**], principal; $[**amount**], interest accrued through [**date of acceleration**]; $[**amount**], attorney's fees; and [**itemize other charges**].

Sincerely yours,

_____

[**Name of attorney**]

Certified Mail No. [**number**]
Return Receipt Requested

[Reserved]

Form 4-5

If the creditor has approved a settlement agreement with the debtor, that agreement should be reduced to writing. See section 4.13 in this chapter.

Presuit Letter Agreement

[**Date**]

[**Name and address of debtor**]

Re: [**name of creditor**], Creditor
[**include if applicable:** Account number [**number**]]
[**other information describing debt, e.g.,** Past-due balance due [**name of creditor**] in the amount of $[**amount**], plus attorney's fees]
Our file number: [**law office file number**]

[**Salutation**]

This letter confirms our agreement to satisfy the balance remaining due to [**name of creditor**] for [**nature of debt**] (the "Account"), as follows:

1. The balance of the Account is $[**amount**], plus attorney's fees in the amount of $[**amount**], plus interest at the rate of [**percent**] percent per year from [**date of agreement**] (the "Debt") (this agreement is intended to satisfy the past-due outstanding Account and does not create an additional obligation in favor of [**name of creditor**]).

2. [**Name of debtor**] agrees to pay the amount of $[**amount**] on or before [**date**] and a similar amount on the [first/last/fifteenth] day of each month thereafter through [**date**], when the entire remaining balance of the Debt shall be paid in full. All payments, in cash or certified checks, are to be received by [**name of creditor**] by the due date in care of [**name of attorney/ name of creditor**], [**address, city, state**].

3. As long as [**name of debtor**] strictly abides by this letter agreement and timely makes the payments as scheduled herein to [**name of creditor**], [**name of creditor**] will not attempt any further collection efforts. But should [**name of debtor**] default in any payment as herein agreed by the parties, [**name of creditor**], without further notice of default, notice of intent to accelerate, and notice of acceleration, may accelerate the full balance remaining due and immediately pursue any and all legal methods to collect the balance due, plus additional attorney's fees and court costs.

4. In exchange for [**name of creditor**]'s willingness to permit [**name of debtor**] to pay the Debt in installments, [**name of debtor**] agrees to toll the running of any applicable statute of limitations for any cause of action accruing to [**name of creditor**] that has not otherwise already expired before the date of this agreement. This tolling agreement will be in effect for ninety days from the date the final payment is due under this agreement. At the end of the tolled period, any existing statute of limitations period that had not already expired before the date of this agreement will recommence.

If these terms are acceptable, please sign and date below and return this letter to me.

Sincerely yours,

_____

[**Name of attorney**]

APPROVED AND AGREED TO
AS TO FORM AND SUBSTANCE:

_____

[**Name of debtor**]

Date: _____

Form 4-6

This form may be used at the time the judgment is to be filed. Note that the debtor cannot consent to or sign a judgment before the lawsuit is filed.

Postjudgment Letter Agreement

[**Date**]

[**Name and address of debtor**]

Re: [**name of creditor**], Creditor
[**include if applicable:** Account number [**number**]]
[**include if applicable:** Judgment rendered in favor of [**name of creditor**] in Cause No. [**number**] in the amount of $[**amount**], plus attorney's fees, against [**name of debtor**]]
Our file number: [**law office file number**]

[**Salutation**]

This letter confirms our agreement to satisfy the balance remaining due to [**name of creditor**] on the judgment rendered against [**name of debtor**], as follows:

1. [**Name of debtor**] agrees to sign and return to me the enclosed judgment, which will be filed of record with the district clerk of [**county**] County, Texas, and abstracted.

2. [**Name of debtor**] agrees to pay the amount of $[**amount**] on or before [**date**] and a similar amount on the [first/last/fifteenth] day of each month thereafter through [**date**], when the entire remaining balance of the judgment, including accrued interest, shall be paid in full. All payments, in cash or certified checks, are to be received by [**name of creditor**] by the due date in care of [**name of attorney/name of creditor**], [**address, city, state**].

3. As long as [**name of debtor**] strictly abides by this letter agreement and timely makes the payments as scheduled herein to [**name of creditor**], [**name of creditor**] will not attempt any further collection efforts. But should [**name of debtor**] default in any payment as

herein agreed by the parties, [**name of creditor**], without further notice, may immediately pursue any and all legal methods to collect the balance due, plus additional attorney's fees and court costs.

If these terms are acceptable, please sign and date below and immediately return this letter to me along with the signed judgment. I will file the judgment of record and return a file-stamped copy to you for your file.

Sincerely yours,

_____

[**Name of attorney**]

APPROVED AND AGREED TO
AS TO FORM AND SUBSTANCE:

_____

[**Name of debtor**]

Date: _____

Enc.

Attach the judgment.

Chapter 5

Repossession

I. Overview

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[Reserved]

Chapter 5

Repossession

I. Overview

In 1999, the legislature made sweeping changes to chapter 9 of the Texas Business and Commerce Code that took effect July 1, 2001. However, if collection efforts as to a particular obligation began before July 1, 2001, *they are still governed by the prior law.* Any postdefault overt action intended to prompt payment of the debt, secure control or surrender of the collateral, or commence settlement negotiations taken before July 1, 2001, should probably be considered the beginning of collection efforts. Because of the significant changes made to chapter 9, it is of paramount importance for the attorney to know whether the prior law or the revised chapter 9 governs collection efforts.

For a general discussion of the changes to chapter 9 of the Business and Commerce Code, see section 2.121 in this manual. For a general discussion of the changes to subchapter F of chapter 9, relating to default, collection, enforcement, or disposition and acceptance of collateral in partial or full satisfaction of a secured debt, see section 2.122.

§ 5.1 Caveats Regarding Self-Help Repossession

This discussion and the forms in this chapter should be used only as a starting point for research on each transaction. Laws relating to contracts, waivers, default, acceleration, repossession, and related topics are scattered throughout overlapping state and federal statutes, rules of court, case law, and administrative opinions. The requirements for an action such as giving notice of default, for instance, may vary depending on the nature of the underlying transaction and the applicable law. The attorney should always research each case separately, keeping in mind that the law relating to debtors' and creditors' rights changes rapidly.

The applicable contract should be read carefully. Many rights and obligations in a secured transaction can be altered or waived by contract. Notice provisions after default or before disposition of collateral are particularly subject to amendment by contract, although revised chapter 9 of the Texas Business and Commerce Code places substantial limitations on waiver and variance of rights and duties. *See* Tex. Bus. & Com. Code §§ 9.602, 9.624. On the other hand, the parties may determine by agreement the standards measuring the fulfillment of the rights of a debtor or obligor and the duties of a secured party under any rule stated in section 9.602 if the standards are not "manifestly unreasonable." Tex. Bus. & Com. Code § 9.603(a). The parties may not agree to determine the standards concerning the duty to refrain from breaching the peace under Tex. Bus. & Com. Code § 9.609. Tex. Bus. & Com. Code § 9.603(b).

Attorneys may be debt collectors under both the federal Fair Debt Collection Practices Act and the Texas Debt Collection Practices Act and therefore should comply with the provisions of both. See sections 2.11 through 2.36 in this manual.

§ 5.2 Repossession Statutes

Most self-help repossessions are based on security agreements arising under Uniform Commercial Code article 9. The principal provision in chapter 9 governing repossession is Tex. Bus. & Com. Code § 9.609. Under this section, after default a secured party may take possession of the collateral and, without removal, may render equipment unusable and dispose of collateral on a debtor's premises under section 9.610. Tex. Bus. & Com. Code § 9.609(a). The secured party may repossess the collateral pursuant to judicial process or may do so without judicial process as long as he proceeds without breaching the peace. Tex. Bus. & Com. Code § 9.609(b). Finally, if so agreed, and in any event after default, a secured party may require the debtor to assemble the collateral and make it available to the secured party at a place to be designated by the secured party that is reasonably convenient to both parties. Tex. Bus. & Com. Code § 9.609(c).

The phrase *without breach of the peace* is not defined in chapter 9, and its interpretation is left to the courts. However, there is no reason to think that the phrase means anything different under the revisions to chapter 9 than it did before July 1, 2001, and presumably prior judicial interpretations of the phrase are still good law.

It is clear from the official comments to the section that actions of third-party contractors, such as professional repossession firms, are subject to the same requirements concerning breach of the peace. Section 9.609 confirms and codifies the rule of such cases as *MBank El Paso, N.A. v. Sanchez*, 836 S.W.2d 151 (Tex. 1992). Also, the use of law-enforcement officers who are not acting under the judicial process to repossess property is not authorized by section 9.609 and may involve a breach of the peace, as some cases have held under prior law. For additional discussion of self-help repossession, see sections 5.21 through 5.23 below.

Section 9.609 permits the sale of the collateral on the debtor's premises, but, unlike prior Code section 9.503, section 9.609 expressly conditions this right on the debtor's (or obligor's) default. On the other hand, a debtor and secured party are free to agree that the secured party may require the debtor to assemble collateral and make it available from time to time at a place that the secured party designates, and such agreements are valid whether or not they are conditioned on the debtor's or obligor's default. Tex. Bus. & Com. Code § 9.609(c).

Unsecured parties may have rights of self-help repossession, however. They include—

1. sellers of goods sold to an insolvent buyer, including a buyer who fails to pay for the goods (see section 5.51 below);

2. lessors of goods leased to lessees who default on the lease (see section 5.52 below); and

3. repairers of motor vehicles, motorboats, vessels, or outboard motors (see section 7.2 in this manual).

§ 5.3 Constitutionality

The issue of due process has frequently been raised in self-help cases. The Fifth Circuit and other circuits have held that repossession under Uniform Commercial Code article 9 is free from federal due-process scrutiny in a civil rights action, for lack of requisite state action. *Calderon v. United Furniture Co.*, 505 F.2d 950 (5th Cir. 1974).

§ 5.4 Considerations in Choosing Self-Help Repossession or Judicial Foreclosure

Breach of Peace: Self-help repossession cannot be used if the repossession results in a breach of the peace. Tex. Bus. & Com. Code § 9.609(b). For a discussion of breach of the peace, see section 5.2 above and sections 5.21 and 5.23 below.

Perishable Collateral: If the collateral is rapidly deteriorating or its value is diminishing, it may be quicker or more effective to file suit, obtain a writ of sequestration, and then hold an emergency sale. Care must be taken in sequestering and disposing of collateral. For a discussion of sequestration, see sections 8.16 through 8.19 in this manual.

Disposition of Collateral and Deficiency: The secured creditor is put to an election regarding the repossessed collateral; he may sell it or retain it in complete satisfaction of the debt. Tex. Bus. & Com. Code §§ 9.610, 9.622; *Tanenbaum v. Economics Laboratory, Inc.*, 628 S.W.2d 769, 771 (Tex. 1982); *Knight v. General Motors Acceptance Corp.*, 728 S.W.2d 480, 483 (Tex. App.—Fort Worth 1987, no writ). See sections 5.32 through 5.38 below regarding sale or disposition of the collateral and section 5.39 regarding retention of collateral in satisfaction of the debt.

Expense and Time: Self-help repossession is usually less expensive and faster than a judicial foreclosure proceeding.

[Sections 5.5 through 5.10 are reserved for expansion.]

II. Security Interest and Agreement

§ 5.11 Security Interest

§ 5.11:1 Attachment

Except as described in section 5.2 above, a creditor's right to repossess depends on whether his security interest has attached to the collateral. Attachment has three elements:

1. A valid security agreement must exist.
2. Value must be given by the creditor.
3. The debtor must have rights in the collateral.

The security agreement must be in writing, must be signed by the debtor, and must describe the collateral. Or, in lieu of a signed writing, the debtor must have "authenticated" the security agreement, a term that would include an electronic signature of an electronic document. Tex. Bus. & Com. Code §§ 9.102(a)(7), 9.203(b)(3)(A). See also section 14.8:1 in this manual.

§ 5.11:2 Perfection

Under the revised chapter 9, effective July 1, 2001, most security interests are perfected by filing a financing statement with (1) the secretary of state or (2) another designated central filing office of the state in which *the debtor* is located. Tex. Bus. & Com. Code § 9.301(1). See Tex. Bus. & Com. Code § 9.307 and the discussion in section 3.22 in this manual concerning how to determine the debtor's location for purposes of chapter 9.

Most security interests are perfected by filing a financing statement with the secretary of state of the state in which the collateral is located. Perfection establishes the priority of competing

rights in the collateral. Perfection is not required to establish a valid security interest and is therefore not required to repossess. *Gulf Oil Co. v. First National Bank of Hereford*, 503 S.W.2d 300, 307 (Tex. Civ. App.—Amarillo 1973, no writ). Failure to perfect, however, may give away valuable rights to others claiming an interest in the collateral. A full discussion of the various means of perfection is beyond the scope of this manual, but note that taking possession or control, or the purchase of certain types of collateral (for example, instruments or investment property), may permit a later secured party or a purchaser to take priority over an earlier secured party who merely filed a financing statement. *See* Tex. Bus. & Com. Code §§ 9.312 cmt. 2, 9.328(1). Certain types of security interests are automatically perfected on attachment. *See* Tex. Bus. & Com. Code § 9.309.

§ 5.11:3 Priorities between Conflicting Claims in Collateral

Unperfected Creditor vs. Unperfected Creditor: If no secured creditor perfects, the first interest to attach has priority. Tex. Bus. & Com. Code § 9.322(a)(3). In this instance, the creditor should perfect immediately if possible; a junior lienholder can jump ahead by perfection.

Perfected Creditor vs. Unperfected Creditor: The perfected security interest has priority, even if that creditor has actual knowledge of a prior attaching security interest. Tex. Bus. & Com. Code § 9.322(a)(2).

Perfected Creditor vs. Perfected Creditor: Conflicting perfected security interests rank according to priority in time of filing or perfection. Priority dates from the earlier of the time a filing covering the collateral is first made or the security interest is first perfected, if there is no period thereafter during which there is neither filing nor perfection. Tex. Bus. & Com. Code § 9.322(a)(1). "Filing" refers to the filing of an effective financing statement. *See* Tex. Bus. & Com. Code § 9.310. "Perfection" refers to the acquisition of a perfected security interest, that is, one that has attached and as to which any required perfection step has been taken. *See* Tex. Bus. & Com. Code § 9.308. Certain security interests are automatically perfected on attachment. *See* Tex. Bus. & Com. Code §§ 9.308, 9.309.

Purchase-Money Security Interest: A purchase-money security interest (PMSI) in collateral other than inventory or livestock has priority over a competing interest in the same collateral or its proceeds if the creditor perfects at the time the debtor receives possession of the collateral or within twenty days thereafter. Tex. Bus. & Com. Code § 9.324(a). See Tex. Bus. & Com. Code § 9.324(b) regarding inventory. The provisions of revised chapter 9 on purchase-money security interests have expanded the definition of a PMSI somewhat and made the preferred status of a PMSI, in transactions other than consumer transactions at least, easier to maintain than it was before. Tex. Bus. & Com. Code § 9.103. Note that in a transaction other than a consumer-goods transaction, a secured party claiming a PMSI has the burden of establishing the extent to which the security interest is a PMSI. Tex. Bus. & Com. Code § 9.103(g).

A detailed discussion of the new definitions and the new priority rules between competing PMSIs is beyond the scope of this manual; see, however, sections 9.103 and 9.324 and the official comments to the Texas Business and Commerce Code for the rules governing priority of a PMSI.

§ 5.11:4 Client's Financing Statement

To determine whether a financing statement has been filed with the Texas secretary of state, the attorney should call the secretary of state's office (512-475-2703), give the name of the

debtor, and request a search or should inspect the client's financing statement and determine whether the secretary of state's filing stamp (indicating the date and place of filing) is shown in the upper right corner of the statement.

For a form UCC1 financing statement, see form 5-1 in this chapter. See section 3.22 regarding description of the collateral and financing statement searches.

§ 5.11:5 Prior Financing Statement

When checking with the secretary of state's office to see if a client's financing statement has been filed, the attorney should also determine whether there is any other financing statement covering the same collateral on file under the debtor's name. Tex. Bus. & Com. Code §§ 9.308–.317, 9.320–.322, 9.324.

Note that if the debtor is a registered organization located outside Texas, a search may have to be done in both the debtor's domiciliary state and in Texas or possibly other jurisdictions because of the change in filing rules in chapter 9 after the revisions. See section 3.22 in this manual.

§ 5.11:6 Filing Financing Statement

A financing statement (form 5-1 in this chapter) should be filed with the Texas secretary of state or the appropriate county clerk, depending on the nature of the collateral. Under the revisions to chapter 9 of the Texas Business and Commerce Code, local filings are required only for as-extracted collateral (such as oil, gas, or other minerals (defined by Tex. Bus. & Com. Code § 9.102(a)(6))), timber to be cut, or fixtures. Tex. Bus. & Com. Code § 9.501. The local filing office is the recording office for the related real property. Additional debtors' names and nonstandard forms require additional fees; the filing office should be contacted to ascertain current fees.

§ 5.12 Agreement Regarding Self-Help Repossession

On default, a secured party has the right to take possession of the collateral unless otherwise agreed. Tex. Bus. & Com. Code § 9.609. It is important, therefore, to determine whether there is any clause in the security agreement prohibiting self-help repossession by the creditor. Most agreements are creditor-oriented and do not contain this prohibition.

§ 5.13 Agreement Regarding Assembly of Collateral by Debtor

A security agreement may contain a provision requiring the debtor, on demand, to make the collateral available to the creditor at a place designated by the creditor that is reasonably convenient to both parties. In addition, the creditor may, without removal of equipment, render it unusable and may thereafter dispose of it on the debtor's premises. Tex. Bus. & Com. Code § 9.609(a)(2).

Rendering equipment unusable and disposing of it on the debtor's premises allows the creditor to avoid the expense of removal and storage pending resale. Tex. Bus. & Com. Code § 9.609. For a letter requiring the debtor to assemble the collateral for the creditor at a mutually convenient location, see form 5-2 in this chapter. If the debtor refuses to comply with the creditor's request, the creditor's remedies include self-help repossession or judicial action. Failure to deliver possession to the secured party may also constitute the offense of hindering a secured creditor. See Tex. Penal Code § 32.33(c), discussed at section 6.6 in this manual.

[Sections 5.14 through 5.20 are reserved for expansion.]

III. Precautions

§ 5.21 Breach of Peace

§ 5.21:1 Requirement of No Breach of Peace

Unless otherwise agreed, a secured party may repossess collateral without judicial process if repossession can be achieved without a breach of the peace. Tex. Bus. & Com. Code § 9.609. The creditor's duty not to breach the peace is not delegable, even if the repossession is performed by an independent contractor. *MBank El Paso, N.A. v. Sanchez*, 836 S.W.2d 151, 153 (Tex. 1992).

§ 5.21:2 Contractual Provisions

Texas courts generally uphold the legality of consumer contract clauses authorizing repossession of collateral wherever it may be found with free right of entry. *See, e.g., Woolard v. Texas Motors, Inc.*, 616 S.W.2d 706, 709 (Tex. Civ. App.—Fort Worth 1981, no writ). Most courts have construed this provision as one of limitation on the creditor that encourages peaceful repossession without trespass. The Supreme Court of Texas has not addressed this specific issue, but in dictum it repeated a remark in *Woolard* that such a provision would be unlawful if it read, "Seller shall have the right to repossess the property wherever the same may be found." *Gonzalez v. Gainan's Chevrolet City, Inc.*, 690 S.W.2d 885, 888 (Tex. 1985). A security agreement may not authorize a breach of the peace. Tex. Fin. Code § 348.411.

§ 5.21:3 Examples of Breach of Peace

The following acts have been held to be a breach of the peace:

1. Breaking into a garage to repossess an automobile. *A.B. Lewis Co. v. Robinson*, 339 S.W.2d 731, 735 (Tex. Civ. App.—Houston 1960, no writ).

2. Picking the lock of a building on business premises to obtain possession of equipment stored therein (the premises were owned by the creditor and leased to the debtor; the debtor was in default under the lease but had not been notified that the lease had been terminated). *Gulf Oil Corp. v. Smithey*, 426 S.W.2d 262 (Tex. Civ. App.—Dallas 1968, writ dism'd).

3. Gaining entry to a home peaceably and refusing to leave after being ordered to do so by the debtors and continuing to search for the collateral, provoking a fight, and causing an assault and a battery. *Godwin v. Stanley*, 331 S.W.2d 341 (Tex. Civ. App.—Amarillo 1959, writ ref'd n.r.e.).

4. Intimidating the debtor into giving the creditor the keys to the mortgaged automobile and then requiring the debtor to leave the automobile. *Watson v. Hernandez*, 374 S.W.2d 326, 328 (Tex. Civ. App.—Amarillo 1963, writ dism'd).

5. Towing an automobile at high speed with the owner inside, then parking the car in a padlocked storage yard where a Doberman pinscher guard dog was running loose. *MBank El Paso, N.A. v. Sanchez*, 836 S.W.2d 151, 152–54 (Tex. 1992).

6. Unreasonably damaging the collateral. *Giese v. NCNB Texas Forney Banking*

Center, 881 S.W.2d 776, 783 (Tex. App.—Dallas 1994, no writ).

7. Damaging the garage in which the collateral was kept. *Meyers v. Ford Motor Credit Co.*, 619 S.W.2d 572, 574 (Tex. Civ. App.—Houston [14th Dist.] 1981, no writ).

§ 5.21:4 Examples of No Breach of Peace

The following acts have been held not to constitute a breach of the peace:

1. Repossessing a car from a public street or other property when the debtor was not present. *Ford Motor Credit Co. v. Cole*, 503 S.W.2d 853, 855 (Tex. Civ. App.—Fort Worth 1973, writ dism'd).

2. Repossessing a car from a service station where the debtor had taken it for repairs, with the creditor allegedly lying by telling the service station employee he had the debtor's permission to take it. *Thompson v. Ford Motor Credit Co.*, 550 F.2d 256 (5th Cir. 1977).

§ 5.21:5 Permissible Actions

Courts routinely sanction self-help repossessions if the creditor has towed the debtor's mortgaged car off the public streets. If, however, the property is in the debtor's actual or constructive possession, as when it is inside his home or garage, the creditor should request the debtor to relinquish possession; if the debtor refuses, the creditor should resort to court action.

If the secured party anticipates difficulty or a breach of the peace, he may obtain judicial process to aid in obtaining possession. *Unicut, Inc. v. Texas Commerce Bank-Chemical*, 704 S.W.2d 442, 445 (Tex. App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.). Without removal, a secured party may render equipment unusable and may dispose of collateral located on the debtor's premises. Tex. Bus. & Com. Code § 9.609(a)(2). The secured party may take any permitted action or combination of actions. See section 5.21:6 below for caveats about prejudgment remedies. All actions in connection with disposition must be taken in a commercially reasonable manner. Tex. Bus. & Com. Code § 9.610(b). Commercial reasonableness is discussed at section 5.32 below.

§ 5.21:6 Using Prejudgment Judicial Remedies as Aid to Self-Help Repossession

The attorney should exercise caution in using prejudgment judicial remedies such as sequestration and attachment as aids to obtaining possession of the collateral. A creditor's actions in sequestering the collateral, obtaining possession through a plaintiff's replevy bond, voluntarily dismissing the lawsuit, and then foreclosing on the collateral through power of sale amounted to an abuse of process, leaving the creditor liable for damages for wrongful sequestration. *Burnett Trailers, Inc. v. Polson*, 387 S.W.2d 692, 694–95 (Tex. Civ. App.—San Antonio 1965, writ ref'd n.r.e.); *see also American Lease Plan v. Ben-Kro Corp.*, 508 S.W.2d 937, 943–44 (Tex. Civ. App.—Houston [1st Dist.] 1974, writ ref'd n.r.e.). Tex. R. Civ. P. 698 requires that a bond for a writ of sequestration must be conditioned on the applicant's prosecuting the suit to effect. Using a writ of sequestration to secure the property and then attempting to nonsuit would be grounds for forfeiture of the bond. See section 8.2 in this manual regarding garnishment, sequestration, attachment, and injunction.

§ 5.22 Conversion of Nonsecured Property

During repossession, a creditor may inadvertently take possession of personal property in

which the creditor does not have a security interest. For example, he may unknowingly take possession of tools or other items in the trunk of a car being repossessed. In such a case, the creditor must notify the debtor within fifteen days of discovering the property of the debtor's rights to identify and claim the property at a reasonable time before the thirty-first day after the date notice is given. The notice must also tell the debtor where the property can be reclaimed. If the debtor fails to reclaim the property, the creditor may either keep it or dispose of it in a reasonable manner and distribute the proceeds according to applicable law. Tex. Fin. Code § 348.407.

The parties cannot contract to exempt the secured party from liability if the debtor's unsecured property is converted by the creditor after repossession. Such a contract is unenforceable as against public policy. *Ford Motor Credit Co. v. Cole*, 503 S.W.2d 853, 856 (Tex. Civ. App.—Fort Worth 1973, writ dism'd).

§ 5.23 Practical Considerations in Self-Help Repossession

The secured party has a nondelegable duty to effect self-help repossession without a breach of the peace and may be held liable for the acts committed during self-help repossession by an independent contractor such as a towing company. *MBank El Paso, N.A. v. Sanchez*, 836 S.W.2d 151, 152–54 (Tex. 1992). The creditor's attorney and the creditor should exercise extreme caution in self-help repossession. A creditor may be held liable for his own or his attorney's conduct in repossessing property. Damages are potentially severe. *See Southwestern Bell Telephone Co. v. Wilson*, 768 S.W.2d 755, 758–59 (Tex. App.—Corpus Christi 1988, writ denied) (creditor liable for attorney's tortious conduct in executing on judgment).

The following is a nonexclusive list of "do's" and "don't's" for creditors attempting repossession.

DO

- make sure that there is a valid security interest in the collateral—in other words, that there is a right to repossess.
- make sure that there is no security interest that has priority over the one being enforced.
- review the contract provisions to make certain they are in compliance with current statutes and case law. If necessary, send notice to correct a violation of the Texas Finance Code.
- ensure that the repossession procedure complies with any specific requirement of the security agreement—for example, a twenty-day notice before sale.
- make sure that the proper notices have been sent to the debtor and that the default permits repossession.
- make sure that no damage is done to other property in the debtor's possession when the collateral is removed.
- protect property belonging to third parties.
- be sure the correct property is repossessed.
- cease all repossession efforts at the first sign of resistance to the repossession; let the property be recovered through the courts.
- immediately notify the debtor of any items of personal property other than the repossessed collateral that were inadvertently taken during the repossession and return the property immediately on demand.

DON'T

- make any show of force or threat or do anything that might be interpreted as a threat to the debtor. Even an implied threat can give

rise to substantial liability in a suit by the debtor against the repossessor. This is true even if the debt is valid.

- use law enforcement officers, whether on or off duty or in or out of uniform, to assist in the repossession. Don't even bring them to the repossession.
- try to obtain the collateral if the debtor offers any resistance, including verbal resistance.
- enter a building or enclosed area through an entrance that is closed or locked unless the debtor or his authorized agent has granted permission.
- use more than one person in making the actual repossession, speak in a gruff voice, or use harsh language. Intimidating the debtor, even through implication, can incur liability.
- do anything that can be considered a breach of the peace.
- threaten the debtor in any manner, such as telling him his credit rating will be ruined or he will be put in bankruptcy or in jail if he does not allow the repossession.

[Sections 5.24 through 5.30 are reserved for expansion.]

IV. Notice and Sale

§ 5.31 Notice

§ 5.31:1 Notice Requirement

Under most circumstances, reasonable notification of the sale must be given to—

1. the debtor;
2. any secondary obligor;
3. any other person from whom the secured party has received, before the notification date, an authenticated notification of a claim of an interest in the collateral; and,
4. if the collateral is other than consumer goods, any secured party perfected under the Texas Business and Commerce Code or under a statute, regulation, or treaty (as described in Code section 9.311).

Tex. Bus. & Com. Code § 9.611(b). Exceptions are set out in section 5.31:3 below. The careful secured party will avail himself of the safe harbor offered by Tex. Bus. & Com. Code § 9.611(e), by requesting in a commercially reasonable manner information concerning financing statements indexed under the debtor's name in the office indicated in Tex. Bus. & Com. Code § 9.611(c)(3)(B). This must be done not later than twenty days or earlier than thirty days before the notification date. The secured party should then send authenticated notifications of disposition to each secured party or other lienholder named in that response whose financing statement covers the collateral. Tex. Bus. & Com. Code § 9.611(b)–(c). The failure to order the search does not necessarily mean that the notification was not done in a commercially reasonable manner, but, considering the relative ease and low expense of doing so in most cases, there is usually no reason not to. Otherwise, the secured party takes the risk that his information about other claimants of an interest in the collateral may be inaccurate. Any secured party or lienholder of record who (1) is *not* notified of the disposition but whose name would have been found if the search had been ordered or (2) has sent a prior authenticated notification of

a claim of an interest in the collateral and who does *not* receive an authenticated notification of disposition has the right to recover any loss resulting from the failure to receive notification. *See* Tex. Bus. & Com. Code § 9.625(b).

If the search is ordered, but the results are not received in time to be included in the notification, the secured party has discharged his duty under section 9.611(c) of the Texas Business and Commerce Code notwithstanding that he did not send a notice to a secured party of record whose name was on the search results when finally obtained. Tex. Bus. & Com. Code § 9.611(e)(2). Note that the failure to receive the search results before the notification date has no effect on the secured party's duty to notify a person from whom an authenticated notification of a claim of an interest in the collateral has been received before the notification date. *See* Tex. Bus. & Com. Code § 9.611(c)(3).

Although earlier Texas cases held that oral notice was not necessarily unreasonable and that the medium of notice was one factor in determining whether notice is reasonable, Tex. Bus. & Com. Code § 9.611(a)(1) requires that an "authenticated notice of disposition" be sent. This means that at the very least an electronic notification complying with the definition of "authenticate" in Tex. Bus. & Com. Code § 9.102(a)(7) must be sent. *See* Tex. Bus. & Com. Code § 9.611 UCC cmt. 5.

Note: The following cases permitting oral notice of disposition have been superseded by Tex. Bus. & Com. Code § 9.611(b): *Beltran v. Groos Bank, N.A.*, 755 S.W.2d 944, 945–47 (Tex. App.—San Antonio 1988, no writ), and *MBank Dallas N.A. v. Sunbelt Manufacturing, Inc.*, 710 S.W.2d 633, 635–36 (Tex. App.—Dallas 1986, writ ref'd n.r.e.).

It is important to understand that section 9.611 no longer allows the disposing secured party to remain passive, sending notice only to those parties that have contacted him. To ensure that notice is sent to all required parties, the foreclosing creditor not only must order a UCC search report listing financing statements filed against the debtor but also must be familiar with other means of perfection and order searches from appropriate recording officers. See Tex. Bus. & Com. Code §§ 9.701–.708 for the provisions governing the transition period that took place from July 1, 2001, until July 1, 2006.

§ 5.31:2 Consequences of Improper Notice

Proper notice is a prerequisite to any subsequent deficiency suit. *Tanenbaum v. Economics Laboratory, Inc.*, 628 S.W.2d 769, 772 (Tex. 1982); *see also Wright v. Interfirst Bank Tyler, N.A.*, 746 S.W.2d 874, 877–78 (Tex. App.—Tyler 1988, no writ); *Knight v. General Motors Acceptance Corp.*, 728 S.W.2d 480, 483 (Tex. App.—Fort Worth 1987, no writ); *Gentry v. Highlands State Bank*, 633 S.W.2d 590, 591 (Tex. App.—Houston [14th Dist.] 1982, writ ref'd). The *Tanenbaum* rule is one of election of remedies, not forfeiture, and has even been applied against the Federal Deposit Insurance Corporation and its successors. *See, e.g., FDIC v. Payne*, 973 F.2d 403, 410 (5th Cir. 1992); *In re Norriss Bros. Lumber Co.*, 133 B.R. 599 (N.D. Tex. 1991). Under Tex. Bus. & Com. Code § 9.625, the failure to give proper notice can also subject the secured party to injunctive relief, damages, and penalties. See section 17.40 in this manual. For a more complete discussion of deficiency suits, see section 14.9.

§ 5.31:3 When Notice Not Required

Notice is not required if the collateral is perishable or threatens to decline speedily in value or is of a type customarily sold in a recognized market. Tex. Bus. & Com. Code § 9.611(d). A "recognized market" might be a stock or commodity market, in which sales involve items so similar that differences between individual items are nonexistent or immaterial, competition

between buyers is not a primary factor in determining sale price, and prices paid for actual sales of comparable items are currently available by quotation. *M.P. Crum Co. v. First Southwest Savings & Loan Ass'n*, 704 S.W.2d 925, 927 (Tex. App.—Tyler 1986, no writ). Cars and trucks are not generally considered collateral of a type sold on such a recognized market. *O'Neil v. Mack Trucks, Inc.*, 533 S.W.2d 832, 836 (Tex. Civ. App.—El Paso 1975), *rev'd on other grounds*, 542 S.W.2d 112 (Tex. 1976).

Notice is also not required if the creditor merely transfers his interest in the collateral and underlying loan and does not sell or dispose of the collateral itself. *Hairgrove v. Cramer Financial Group, Inc.*, 895 S.W.2d 874, 875 (Tex. App.—Fort Worth 1995, writ denied).

In a case decided before the revisions to chapter 9 of the Texas Business and Commerce Code, if the debtor relinquishes the collateral to the creditor for an agreed-on sum to be credited against the debt, he is not entitled to notice of the sale or disposition of the collateral. *Acuff v. Lamesa National Bank*, 919 S.W.2d 154, 156–57 (Tex. App.—Eastland 1996, no writ). Several additional conditions have been imposed on the secured party's acceptance of collateral in full or partial satisfaction of the secured debt by the revised chapter 9. See section 5.38 below.

§ 5.31:4 Who Is Entitled to Notice

See Tex. Bus. & Com. Code § 9.611(b) and the discussion in section 5.31:1 above concerning notice. Much of the earlier case law on this subject is now codified in Code section 9.611.

§ 5.31:5 Contents of Notice—Nonconsumer Transactions

The contents of reasonable notice are prescribed with particularity by Tex. Bus. & Com. Code § 9.613 for all types of transactions other than consumer-goods transactions. Under section 9.613, a notice of disposition is sufficient if it—

1. describes the debtor and the secured party;
2. describes the collateral to be disposed of;
3. states the method of disposition (for example, sale, lease, license, and so forth);
4. states that the debtor is entitled to an accounting of the unpaid debt for a stated fee; and
5. states the time and place of any public sale of the collateral or the time after which the collateral will be disposed of by another manner.

Tex. Bus. & Com. Code § 9.613.

The statute offers a model form; see form 5-5 in this chapter. Note that this notice may be used for either a public or a private sale.

Practice Note: The safest course in describing the collateral is to reproduce exactly the description from the security agreement or financing statement. Incorporating descriptions by references to documents that may be misplaced or unavailable later is risky.

The right to an accounting may carry a fee with it. Section 9.613 does not expressly reference or incorporate section 9.210, which treats the subject of requests for accounting, lists of collateral, or statements of account generally and which provides that a debtor is entitled without charge to one response to a request during any six-month period and allows the secured party to require payment of a charge, not exceeding $25, for each additional response.

A notice that substantially complies with the five requirements of section 9.613 is sufficient. Tex. Bus. & Com. Code § 9.613(3). But a creditor that departs from, negligently completes, or

supplements the model form invites challenges to the propriety of his notice. Whether a notice that lacks one or more of the five requirements is nonetheless sufficient is a question of fact. Tex. Bus. & Com. Code § 9.613(2).

Practice Note: When in doubt about whether a transaction is a consumer or nonconsumer transaction, use the consumer notice found in Tex. Bus. & Com. Code § 9.614. See section 5.31:6 below.

§ 5.31:6 Contents of Notice—Consumer-Goods Transactions

Unlike Tex. Bus. & Com. Code § 9.613, which provides that a notice is sufficient as long as the required information is provided and may be sufficient even if some information is missing, Tex. Bus. & Com. Code § 9.614 requires that a notice in a consumer-goods transaction contain all of the following:

1. a description of the debtor, the secured party, and the collateral that is being disposed of;
2. a description of the method of disposition;
3. a statement that the debtor is entitled to an accounting of the unpaid debt and the charge, if any, for the accounting;
4. the time and place of public sale or the time after which any other disposition is to be made;
5. a description of the recipient's liability for any deficiency;
6. a telephone number from which the recipient can obtain the redemption price of the collateral; and
7. a telephone number or mailing address from which the recipient can obtain additional information concerning the disposition and the obligation.

Section 9.614 also promulgates a model form; see form 5-6 in this chapter.

Practice Note: The model form found at Tex. Bus. & Com. Code § 9.614 must be much more closely adhered to than the notice in nonconsumer-goods transactions found at Tex. Bus. & Com. Code § 9.613. The absence of any required information from a notice under section 9.614 makes the notice insufficient as a matter of law. Tex. Bus. & Com. Code § 9.614 UCC cmt. 2.

The Fort Worth court of appeals held in a case decided before July 1, 2001, that if the note, security agreement, or other contract calls for notice of the time and place of a *private* sale to be given, the creditor must give notice even though the statute does not require it. *Knight v. General Motors Acceptance Corp.*, 728 S.W.2d 480, 483 (Tex. App.—Fort Worth 1987, no writ). Presumably this case is still valid under the current law. The same is likely true of a holding that if the creditor notifies the debtor that a private sale will occur on or after a particular day but sells the collateral before the date stated, such notification is not reasonable. *All Valley Acceptance Co. v. Durfey*, 800 S.W.2d 672, 675–76 (Tex. App.—Austin 1990, writ denied).

§ 5.31:7 When Notice May Be Waived

The debtor or a secondary obligor may waive notice "only by an agreement to that effect entered into and authenticated after default." Tex. Bus. & Com. Code § 9.624(a). Previous Texas cases holding that oral waivers of notice and waivers by guarantors not in compliance with the statute were ineffective have been codified in the revised provisions. Standard or boilerplate clauses in which the debtor or a guarantor purports to waive notice of disposition of collateral, signed before default, have no

validity in Texas. Tex. Bus. & Com. Code § 9.624(a).

§ 5.31:8 Acceleration Accompanying Notice

An installment debt in default must be accelerated before the creditor can collect the unpaid principal not yet due. Without acceleration, the creditor can collect only past-due installments plus accumulated interest. *Williamson v. Dunlap*, 693 S.W.2d 373 (Tex. 1985). A defaulted secured debt should be accelerated before or at the same time as giving the notice of sale. See section 2.111 in this manual for a general discussion of acceleration.

To avoid a contention that the overall standard of commercial reasonableness was not met, a notice of default should be sent even if the security agreement contains a waiver of notice. For a discussion of what constitutes default and the procedure afterward, see section 14.7. See form 5-3 in this chapter for a letter giving notice of default and intent to accelerate and form 5-4 for a letter giving notice of acceleration.

§ 5.32 Commercial Reasonableness of Sale

§ 5.32:1 Requirement of Commercial Reasonableness

The secured party may dispose of the collateral by either public or private sale. In both instances, the Business and Commerce Code requires that the sale be conducted in a "commercially reasonable" manner. Tex. Bus. & Com. Code § 9.610(b). "Commercially reasonable," however, is not defined, leaving the court and jury to judge all the circumstances of the sale after the fact. Whether the sale is conducted privately or publicly, the creditor should retain documentation of the details of the sale so that, if the debtor contests the sale's commercial reasonableness, the creditor can substantiate his efforts.

The commercial reasonableness requirement is an implied covenant in all contracts governed by article 9 of the Uniform Commercial Code. Under prior law, breach of this covenant was treated as a breach of contract, and no punitive damages were recoverable. *Texas National Bank v. Karnes*, 717 S.W.2d 901, 903 (Tex. 1986). The revised chapter 9 expressly provides for actual damages, liquidated damages, and penalties. Tex. Bus. & Com. Code § 9.625. See the discussion in section 17.40 in this manual.

§ 5.32:2 Choice of Kind of Sale

The creditor has broad choices regarding his handling of the collateral. He can dispose of it by public or private sale, in bulk or in lots, at any time or place and on any terms, as long as the sale is commercially reasonable. He may also elect to retain the collateral in satisfaction of the debt. *Tanenbaum v. Economics Laboratory, Inc.*, 628 S.W.2d 769, 771–72 (Tex. 1982).

§ 5.32:3 Factors in Determining Commercial Reasonableness

The revised chapter 9 of the Texas Business and Commerce Code, like the prior version, does not define commercial reasonableness, although it does provide some safe harbors and some examples. Section 9.627 states that the fact that a greater amount could have been obtained by a collection, enforcement, disposition, or acceptance at a different time or by a different method from that selected by the secured party is not of itself sufficient to preclude the secured party from establishing that the collection, enforcement, disposition, or acceptance was made in a commercially reasonable manner. Tex. Bus. & Com. Code § 9.627(a). A disposition of collateral is made in a commercially reasonable manner if the disposition is made—

1. in the usual manner on any recognized market;
2. at the price current in any recognized market at the time of the disposition; or
3. otherwise in conformity with reasonable commercial practices among dealers in the type of property that was the subject of the disposition.

Tex. Bus. & Com. Code § 9.627(b). A collection, enforcement, disposition, or acceptance is commercially reasonable if it has been approved in a judicial proceeding, by a bona fide creditors' committee, by a representative of creditors, or by an assignee for the benefit of creditors. Tex. Bus. & Com. Code § 9.627(c). These approvals are not mandatory, however, and the failure to obtain them does not mean that the collection, enforcement, disposition, or acceptance is not commercially reasonable. Tex. Bus. & Com. Code § 9.627(d).

Some factors the courts have considered in determining whether a sale was commercially reasonable are—

1. general market demand for the type of goods in question at the time of the sale;
2. whether the creditor tried to obtain the best price for the collateral;
3. what type and how many advertisements or solicitations for bids were used by the creditor to notify the general public of the sale;
4. adequacy of the time provided for responding to the notice or advertisement before the sale occurred;
5. opportunity to inspect the goods;
6. the sale location's accessibility to prospective purchasers and the demand for goods at that location;
7. the manner in which bids or purchase offers were made and accepted;
8. the cost of the sale;
9. the cost of reconditioning, rebuilding, or repairing the goods;
10. the price obtained at the sale and the later resale price (if resold); and
11. the fact that full market value is seldom obtained at forced sales.

Havins v. First National Bank of Paducah, 919 S.W.2d 177, 181 (Tex. App.—Amarillo 1996, no writ); *Pruske v. National Bank of Commerce*, 533 S.W.2d 931, 937 (Tex. Civ. App.—San Antonio 1976, no writ). The fact that the fair market value was not received at the sale or that a better price could have been obtained does not necessarily render the sale commercially unreasonable. Tex. Bus. & Com. Code § 9.627; *Siboney Corp. v. Chicago Pneumatic Tool Co.*, 572 S.W.2d 4, 8 (Tex. Civ. App.—Houston [1st Dist.] 1978, writ ref'd n.r.e.).

§ 5.33 Right to Redeem Collateral

At any time before the secured party has disposed of the collateral, entered into a contract for its disposition, or discharged the obligation by retaining the collateral in satisfaction of the debt, the debtor or any other secured party may redeem the collateral, unless otherwise agreed in writing after default. Redemption requires fulfilling all obligations secured by the collateral, paying the secured party's expenses in retaking, holding, and preparing the collateral for disposition and arranging for a sale, and paying reasonable attorney's fees and legal expenses to the extent provided in the contract and not prohibited by law. Tex. Bus. & Com. Code §§ 9.608(a)(1)(A), 9.615(a)(1), 9.623(b). It is clear that the right of redemption extends to nonpossessory collateral, such as accounts receivable, as well as possessory collateral, such as goods. Except in a consumer-goods transaction, a debtor or secondary obligor may waive

the right to redeem collateral under section 9.623 only by an agreement to that effect entered into and authenticated after default. Tex. Bus. & Com. Code § 9.624(c). Otherwise, the right may not be waived at all. Tex. Bus. & Com. Code § 9.602(11).

§ 5.34 Application of Proceeds of Sale

The proceeds of the sale are to be applied in the following order to—

1. the reasonable expenses of retaking, holding, preparing for disposition, processing, and disposing, and, to the extent provided for in the agreement and not prohibited by law, the reasonable attorney's fees and legal expenses incurred by the secured party;

2. the satisfaction of obligations of indebtedness secured by the security interest under which the disposition is made;

3. the satisfaction of obligations secured by any subordinate security interest in or other subordinate lien on the collateral if—

   a. the secured party receives from the holder of a subordinate security interest or other lien an authenticated demand for proceeds before distribution of the proceeds is completed; and

   b. in a case in which a consignor has an interest in the collateral, the subordinate security interest or other lien is senior to the interest of the consignor; and

4. a secured party that is a consignor of the collateral if the secured party receives from the consignor an authenticated demand for proceeds before distribution of the proceeds is completed.

Tex. Bus. & Com. Code § 9.615(a).

If requested by a secured party, the holder of a subordinate security interest or other lien must seasonably furnish reasonable proof of his interest, and unless he does so, the secured party need not comply with his demand. Tex. Bus. & Com. Code § 9.615(b).

Practice Note: This hierarchy of application differs slightly from that prescribed in Tex. Bus. & Com. Code § 9.608, which applies to proceeds of collection (such as accounts receivable) or enforcement (such as a promissory note held as collateral), that is, proceeds of nonpossessory collateral.

If a surplus results from the sale of the collateral, the secured party must pay any surplus to the debtor. If the collateral sale leaves a deficiency, the obligor is liable for any deficiency. Tex. Bus. & Com. Code § 9.615(d). If the underlying transaction was a sale of accounts, chattel paper, payment intangibles or promissory notes, however, the debtor is not entitled to any surplus, and the obligor is not liable for any deficiency. Tex. Bus. & Com. Code §§ 9.608(b), 9.615(e). For discussion of the right to pursue a deficiency after applying the proceeds of a sale to the debt, see section 14.9 in this manual. See form 5-8 in this chapter for a letter giving notice of deficiency after sale.

§ 5.35 UCC Notice Requirements to Guarantors

The revisions to chapter 9 of the Texas Business and Commerce Code define "obligor" to mean a person who, with respect to an obligation secured by a security interest in or an agricultural lien on the collateral—

1. owes payment or other performance of the obligation;

2. has provided property other than the collateral to secure payment or other performance of the obligation; or

3. is otherwise accountable in whole or in part for payment or other performance of the obligation.

Tex. Bus. & Com. Code § 9.102(a)(60).

The term does not include issuers or nominated persons under a letter of credit. Tex. Bus. & Com. Code § 9.102(a)(60). The term "secondary obligor" is defined to mean an obligor to the extent that the obligor's obligation is secondary or the obligor has a right of recourse with respect to an obligation secured by collateral against the debtor, another obligor, or property of either. Tex. Bus. & Com. Code § 9.102(a)(72).

Section 9.611 imposes a duty on a secured party who wishes to dispose of collateral under section 9.610 to send a reasonable, authenticated notice of disposition not only to the debtor but also to any secondary obligor. There are exceptions for collateral that is perishable, threatens to decline speedily in value, or is of a type customarily sold on a recognized market. Tex. Bus. & Com. Code § 9.611. Accordingly, guarantors or sureties are entitled to receive notification of an intended disposition of collateral. If the surety or guarantor created the security interest, the surety or guarantor is treated as the debtor. If not, the surety or guarantor is treated as a secondary obligor. *See* Tex. Bus. & Com. Code § 9.102(a)(28). Note that a debtor or secondary obligor may waive the right to notification of disposition of collateral under section 9.611 only by an agreement to that effect entered into and authenticated *after default*. Tex. Bus. & Com. Code § 9.602(7); *see also* Tex. Bus. & Com. Code § 9.624(a).

The secondary obligor is also entitled to a notice of a proposal to accept collateral in partial satisfaction of the obligation it secures. Tex. Bus. & Com. Code § 9.621(b). A secured party need not send notification to a debtor or secondary obligor unknown to the secured party. Tex. Bus. & Com. Code § 9.605. Note also that under Tex. Bus. & Com. Code § 9.611(b), the borrower, who is implicitly from the definitions the principal obligor, is not always entitled to notification of disposition.

Finally, Tex. Bus. & Com. Code § 9.618 governs certain situations in which a secondary obligor, such as a guarantor or surety, acquires the rights and becomes obligated to perform the duties of the secured party in circumstances other than at a foreclosure sale. Although brief, the section is complex and beyond the scope of this manual. If representing a guarantor or surety that is considering a "take-out" of the secured party, the attorney must study this section and the official comment carefully and evaluate whether the client will become responsible for giving notices, for care and custody of the collateral, and the like.

§ 5.36 Notice to Taxing Authorities of Sale of Collateral

§ 5.36:1 Notice to Internal Revenue Service

If the Internal Revenue Service has properly filed a notice of federal tax lien with the Texas secretary of state or the county clerk against the debtor's property more than thirty days before sale of the collateral, notice of the sale must be sent to the IRS at least twenty-five days before the sale. 26 U.S.C. § 7425(c)(1). If notice is given, the IRS has a right to redeem the property for 120 days after sale, but after the redemption period the lien will no longer attach. 26 U.S.C. § 7425(d)(1). If no notice is given, the lien remains against the property, even though it may have been subordinate to the creditor's lien. 26 U.S.C. § 7425(b)(1). For a notice to the IRS, see form 5-10 in this chapter.

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

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

§ 5.36:2 Notice to Texas Comptroller

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

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

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

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

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

§ 5.37 Purchase of Property by Creditor

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

§ 5.38 Disposition of Collateral by Methods Other Than Sale

§ 5.38:1 What Constitutes Disposition

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

§ 5.38:2 Destruction of Collateral

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

§ 5.38:3 Delivery to Third Party

Delivery of the collateral to a third party with the intention that that party will retain it for a period of time or permanently is a disposition requiring notice, even if no transfer of title is made. *See First City Bank v. Guex*, 677 S.W.2d 25, 28 (Tex. 1984).

§ 5.38:4 Voting of Stock Shares

Exercise of voting rights in stock without notice is not necessarily a retention of collateral, nor would the exercise of voting rights necessarily constitute a disposition of collateral. It is not necessary, however, that there be a transfer for value in order for there to be a disposition of collateral. *See Cohen v. Rains*, 769 S.W.2d 380 (Tex. App.—Fort Worth 1989, writ denied).

§ 5.39 Retention of Collateral in Satisfaction of Debt

§ 5.39:1 When Collateral May Be Retained

The creditor may generally elect to retain the collateral in full or partial satisfaction of the secured obligation. Tex. Bus. & Com. Code § 9.620(a). In consumer transactions, no acceptance in partial satisfaction is permitted, and in certain cases involving consumer goods, no acceptance in full satisfaction is permitted as explained in section 5.39:3 below. Retaining the collateral instead of selling it is sometimes referred to as "strict foreclosure." Code section 9.620 describes the conditions under which strict foreclosure may or may not be done, section 9.621 describes the persons to whom notice of a proposal for strict foreclosure must be sent, and section 9.622 describes the effects of strict foreclosure.

§ 5.39:2 Conditions of Retention in Satisfaction

A creditor may accept collateral in full or partial satisfaction of the unpaid secured debt only if the following conditions are satisfied.

Consent of Debtor: The debtor must consent to the creditor's proposal. If the creditor proposes partial strict foreclosure, the debtor consents by agreeing to the proposal in a record authenticated after default. If the creditor proposes full strict foreclosure, one of two events must occur:

1. the debtor can expressly consent in a record authenticated after default; or
2. the debtor's consent will be inferred if—
   a. the creditor's proposal is unconditional (or subject only to the condition that collateral not in the creditor's possession be preserved and maintained);
   b. the creditor's proposal expresses an intent to accept collateral in full satisfaction of the unpaid secured debt;
   c. the creditor fails to receive, within twenty days after sending his proposal to the debtor, the debtor's notification of objection; and
   d. the creditor's proposal is made in good faith.

Tex. Bus. & Com. Code § 9.620(a)(1).

Absence of Objections from Notified Parties: After sending the notice of a proposal for strict foreclosure to the persons entitled to receive it under Tex. Bus. & Com. Code § 9.621, the secured party may retain the collateral only if he has not received a timely authenticated notice of objection from (1) a party to whom the secured

party is required to send its proposal or (2) a lienholder or other secured party with a subordinate property interest in the collateral subject to the proposal. Tex. Bus. & Com. Code § 9.620(a). To be timely, an objection must be received by the secured party within twenty days after the date when the secured party sent his proposal. Tex. Bus. & Com. Code § 9.620(d).

Debtor Not in Possession (Applicable to Consumer-Goods Collateral): A strict foreclosure of consumer goods is not effective if the debtor possesses the consumer goods when he consents to the strict foreclosure. Tex. Bus. & Com. Code § 9.620(a)(3). Note that this condition applies only to consumer goods.

No More than 60 Percent of Principal Amount or Cash Price Paid (Applicable to Consumer-Goods Collateral): A creditor cannot exercise the remedy of strict foreclosure if it possesses consumer goods and at least 60 percent of the cash price of the goods has been paid (if the security interest is a purchase-money security interest (PMSI)), or at least 60 percent of the principal amount has been paid (in non-PMSI cases). Tex. Bus. & Com. Code § 9.620(e). Instead, the creditor must timely dispose of the collateral (in compliance with the requirements of Tex. Bus. & Com. Code § 9.610). A timely disposal in this context means selling it within ninety days of taking possession of it or within a longer period of time to which the debtor and all secondary obligors have agreed in an agreement entered into and authenticated after default. Tex. Bus. & Com. Code § 9.620(f). A debtor may waive the right to require disposition (rather than a proposed retention) of collateral under section 9.620(e), but only by an agreement entered into and authenticated after default. Tex. Bus. & Com. Code § 9.624(b). Note that section 9.620(e) applies only to consumer goods.

§ 5.39:3 Persons to Whom Notice of Proposal to Retain Must Be Sent

The creditor should send a notice of intent to retain the collateral in satisfaction of the debt to—

1. any secondary obligor (only if the proposal is to retain the collateral in partial satisfaction of the debt);

2. any person from whom the secured party has received, before the debtor consented to the acceptance, an authenticated notification of a claim of an interest in the collateral;

3. any other secured party or lienholder that, ten days before the debtor consented to the acceptance, held a security interest in or other lien on the collateral perfected by the filing of a financing statement that—

   a. identified the collateral;

   b. was indexed under the debtor's name as of that date; and

   c. was filed in the office or offices in which to file a financing statement against the debtor covering the collateral as of that date; and

4. any other secured party or lienholder that, ten days before the debtor consented to the acceptance, held a security interest in the collateral perfected by compliance with a statute, regulation, or treaty described in section 9.311(a).

Tex. Bus. & Com. Code § 9.621.

See form 5-9 in this chapter for a letter to the debtor giving notice of intent to retain collateral.

§ 5.40 Penalties for Failure to Comply with Chapter 9

If the creditor fails to comply with the provisions of chapter 9 of the Texas Business and Commerce Code, including those relating to collection, enforcement, disposition, and acceptance, certain aggrieved persons may be entitled to injunctive relief and to recover damages incurred as a result, including liquidated damages and statutory penalties. Tex. Bus. & Com. Code § 9.625.

[Sections 5.41 through 5.50 are reserved for expansion.]

V. Other Repossession Statutes

§ 5.51 Reclamation (UCC Article 2)

§ 5.51:1 Credit Sale

If a credit seller discovers that his buyer has received goods on credit while insolvent, he may reclaim the goods on demand made within ten days after the receipt. If the buyer misrepresented his solvency to the seller within three months before delivery of the goods, the ten-day limitation does not apply. Tex. Bus. & Com. Code § 2.702(b). The seller has no other right to reclaim goods on the buyer's fraudulent or innocent misrepresentation of solvency or of intent to pay. The seller's right to reclaim is subject to the rights of a buyer in the ordinary course, another good-faith purchaser, or a lien creditor. Successful reclamation of goods excludes all other remedies with respect to those goods. Tex. Bus. & Com. Code § 2.702(c); *see also* Tex. Bus. & Com. Code § 2.403 (defines "power to transfer" and "good faith purchase").

§ 5.51:2 Cash Sale—Buyer Refuses to Pay for Goods Received or Issues Bad Check in Payment

Although no statute explicitly provides a cash seller with the right or power to recover goods already delivered to a buyer in breach, courts have recognized such a right of reclamation based on the language of section 2.507(b) and comment 3 to section 2.507(b) of the Texas Business and Commerce Code. The comment states:

> This subsection [section 2.507(b)] codifies the cash seller's right of reclamation which is in the nature of a lien. There is no specific time limit for a cash seller to exercise the right of reclamation. However, the right will be defeated by delay causing prejudice to the buyer, waiver, estoppel, or ratification of the buyer's right to retain possession. Common law rules and precedents governing such principles are applicable [section 1.103]. If third parties are involved, [section 2.403] protects good faith purchasers.

Tex. Bus. & Com. Code § 2.507(b) cmt. 3.

See Chapman Parts Warehouse v. Guderian, 609 S.W.2d 317, 319 (Tex. Civ. App.—Austin 1980, no writ); *Peerless Equipment Co. v. Azle State Bank*, 559 S.W.2d 114 (Tex. Civ. App.—Fort Worth 1977, no writ); *Ranchers & Farmers Livestock Auction Co. v. First State Bank*, 531 S.W.2d 167 (Tex. Civ. App.—Amarillo 1975, writ ref'd n.r.e.).

Acceptance of a check is considered a cash transaction, not a credit transaction. *Ranchers & Farmers Livestock Auction Co.*, 531 S.W.2d at 169.

§ 5.51:3 Limitations and Waiver

The seller's right of reclamation under either Tex. Bus. & Com. Code § 2.507 or § 2.702 is not a security interest within the scope of UCC article 9 secured transactions. However, the seller may acquire a security interest by complying with the provisions of chapter 9. *See* Tex. Bus. & Com. Code § 1.201(b)(35). The right to reclaim under Tex. Bus. & Com. Code § 2.702 is limited to a ten-day period from delivery of the goods, and, therefore, if the right is not exercised within that period, it is waived. If there has been a misrepresentation of solvency in writing by the buyer to the particular seller within the three-month period before delivery, the ten-day limitation does not apply. After this right is waived, the seller's remedies are then on the instrument and for breach of contract. *Ranchers & Farmers Livestock Auction Co. v. First State Bank*, 531 S.W.2d 167, 169 (Tex. Civ. App.—Amarillo 1975, writ ref'd n.r.e.).

The seller may afford himself greater protection by having the debtor sign a security agreement describing the collateral, then taking the applicable steps required for perfection of a purchase-money security interest. *Peerless Equipment Co. v. Azle State Bank*, 559 S.W.2d 114, 115 (Tex. Civ. App.—Fort Worth 1977, no writ); *see also* Tex. Bus. & Com. Code § 1.201(b)(35).

§ 5.52 Leases

§ 5.52:1 Governing Law

Transactions involving the lease of goods are governed by Texas Business and Commerce Code chapter 2A. *See* Tex. Bus. & Com. Code §§ 2A.101–.532. Chapter 2A is an amalgam of chapters 2 and 9 of the Code, borrowing from each as the drafters deemed appropriate.

§ 5.52:2 Lessor's Right to Repossess

If the lessee defaults by failing to make a lease payment or by committing another default as defined in the lease contract, the lessor has a right—

1. to repossess the goods without judicial process;
2. to require the lessee to make the goods available to the lessor at a mutually convenient place designated by the lessor, if the lease contract so provides;
3. without removing goods employed in trade or business, to render them unusable if the lease contract so provides; or
4. to dispose of goods on the lessee's premises.

Tex. Bus. & Com. Code § 2A.525(b).

The lessor may employ any of these remedies without judicial process if that can be done without committing a breach of the peace. Tex. Bus. & Com. Code § 2A.525(c).

§ 5.52:3 Lessor's Right to Dispose of Goods

After default and repossession, the lessor has the right to dispose of the goods by lease, sale, or otherwise. Tex. Bus. & Com. Code § 2A.527(a).

§ 5.52:4 Deficiency Owed by Lessee after Disposition

Unless there is a liquidated damages clause in the lease agreement or damages are otherwise determined by agreement of the parties, if the lessor has re-leased the goods by a lease agreement substantially similar to the original agreement and has re-leased in good faith and in a

commercially reasonable manner, he may recover the following damages from the lessee:

1. accrued and unpaid rent as of the date of the commencement of the new lease agreement;
2. the present value, as of the same date, of the total rent for the then-remaining term of the original lease agreement minus the present value, as of the same date, of the rent under the new lease agreement applicable to that period of the new lease term that is comparable to the then-remaining term of the original lease agreement; and
3. incidental damages allowed under section 2A.530 of the Business and Commerce Code.

Tex. Bus. & Com. Code § 2A.527(b).

If the lessor disposes of the goods by a lease agreement not qualifying under section 2A.527(b) or disposes of the goods by sale or otherwise, the lessor may recover from the lessee as if the lessor had elected not to dispose of the goods. Tex. Bus. & Com. Code § 2A.527(c). See Tex. Bus. & Com. Code § 2A.528 regarding damages the lessor may recover.

For a thorough discussion of the various theories of the measure of damages for the breach of a lease and their application in the personal property leasing context, applying the Wyoming versions of sections 2A.527 and 2A.528, see *The Corner v. Pinnacle, Inc.*, 907 P.2d 1281 (Wyo. 1995).

§ 5.52:5 Criminal Penalties for Wrongfully Holding Rental Property

A person having control of personal property under a written rental agreement who intentionally holds the property beyond the expiration of the rental period may be charged with the offense of theft of service. Tex. Penal Code § 31.04(a)(3). See section 6.5:5 in this manual.

[Reserved]

Form 5-1

UCC1
Financing Statement

[redacted]

UCC FINANCING STATEMENT

FOLLOW INSTRUCTIONS (front and back) CAREFULLY

A. NAME & PHONE OF CONTACT AT FILER [optional]

B. SEND ACKNOWLEDGMENT TO: (Name and Address)

THE ABOVE SPACE IS FOR FILING OFFICE USE ONLY

1. DEBTOR'S EXACT FULL LEGAL NAME insert only one debtor name (1a or 1b) - do not abbreviate or combine names

1a. ORGANIZATION'S NAME

OR

1b. INDIVIDUAL'S LAST NAME	FIRST NAME	MIDDLE NAME	SUFFIX

1c. MAILING ADDRESS	CITY	STATE	POSTAL CODE	COUNTRY

1d. SEE INSTRUCTIONS	ADD'L INFO RE ORGANIZATION DEBTOR	1e. TYPE OF ORGANIZATION	1f. JURISDICTION OF ORGANIZATION	1g. ORGANIZATIONAL ID #, if any
				☐ NONE

2. ADDITIONAL DEBTOR'S EXACT FULL LEGAL NAME - insert only one debtor name (2a or 2b) do not abbreviate or combine names

2a. ORGANIZATION'S NAME

OR

2b. INDIVIDUAL'S LAST NAME	FIRST NAME	MIDDLE NAME	SUFFIX

2c. MAILING ADDRESS	CITY	STATE	POSTAL CODE	COUNTRY

2d. SEE INSTRUCTIONS	ADD'L INFO RE ORGANIZATION DEBTOR	2e. TYPE OF ORGANIZATION	2f. JURISDICTION OF ORGANIZATION	2g. ORGANIZATIONAL ID #, if any
				☐ NONE

3. SECURED PARTY'S NAME (or NAME of TOTAL ASSIGNEE of ASSIGNOR S/P) insert only one secured party name (3a or 3b)

3a. ORGANIZATION'S NAME

OR

3b. INDIVIDUAL'S LAST NAME	FIRST NAME	MIDDLE NAME	SUFFIX

3c. MAILING ADDRESS	CITY	STATE	POSTAL CODE	COUNTRY

4. This FINANCING STATEMENT covers the following collateral:

5. ALTERNATIVE DESIGNATION [if applicable]: ☐ LESSEE/LESSOR ☐ CONSIGNEE/CONSIGNOR ☐ BAILEE/BAILOR ☐ SELLER/BUYER ☐ AG. LIEN ☐ NON-UCC FILING

6. ☐ This FINANCING STATEMENT is to be filed [for record] (or recorded) in the REAL ESTATE RECORDS. Attach Addendum [if applicable]

7. Check to REQUEST SEARCH REPORT(S) on Debtor(s) [ADDITIONAL FEE] [optional] ☐ All Debtors ☐ Debtor 1 ☐ Debtor 2

8. OPTIONAL FILER REFERENCE DATA

FILING OFFICE COPY — UCC FINANCING STATEMENT (FORM UCC1) (REV. 05/22/02) International Association of Commercial Administrators (IACA)

Instructions for UCC Financing Statement (Form UCC1)

Please type or laser-print this form. Be sure it is completely legible. Read all Instructions, especially Instruction 1; correct Debtor name is crucial. Follow Instructions completely.

Fill in form very carefully; mistakes may have important legal consequences. If you have questions, consult your attorney. Filing office cannot give legal advice.

Do not insert anything in the open space in the upper portion of this form; it is reserved for filing office use.

When properly completed, send Filing Office Copy, with required fee, to filing office. If you want an acknowledgment, complete item B and, if filing in a filing office that returns an acknowledgment copy furnished by filer, you may also send Acknowledgment Copy; otherwise detach. If you want to make a search request, complete item 7 (after reading Instruction 7 below) and send Search Report Copy, otherwise detach. Always detach Debtor and Secured Party Copies.

If you need to use attachments, you are encouraged to use either Addendum (Form UCC1Ad) or Additional Party (Form UCC1AP).

A. To assist filing offices that might wish to communicate with filer, filer may provide information in item A. This item is optional.

B. Complete item B if you want an acknowledgment sent to you. If filing in a filing office that returns an acknowledgment copy furnished by filer, present simultaneously with this form a carbon or other copy of this form for use as an acknowledgment copy.

1. **Debtor name**: Enter only one Debtor name in item 1, an organization's name (1a) or an individual's name (1b). Enter Debtor's exact full legal name. Don't abbreviate.

1a. Organization Debtor. "Organization" means an entity having a legal identity separate from its owner. A partnership is an organization; a sole proprietorship is not an organization, even if it does business under a trade name. If Debtor is a partnership, enter exact full legal name of partnership; you need not enter names of partners as additional Debtors. If Debtor is a registered organization (e.g., corporation, limited partnership, limited liability company), it is advisable to examine Debtor's current filed charter documents to determine Debtor's correct name, organization type, and jurisdiction of organization.

1b. Individual Debtor. "Individual" means a natural person; this includes a sole proprietorship, whether or not operating under a trade name. Don't use prefixes (Mr., Mrs., Ms.). Use suffix box only for titles of lineage (Jr., Sr., III) and not for other suffixes or titles (e.g., M.D.). Use married woman's personal name (Mary Smith, not Mrs. John Smith). Enter individual Debtor's family name (surname) in Last Name box, first given name in First Name box, and all additional given names in Middle Name box.

For both organization and individual Debtors: Don't use Debtor's trade name, DBA, AKA, FKA, Division name, etc. in place of or combined with Debtor's legal name; you may add such other names as additional Debtors if you wish (but this is neither required nor recommended).

1c. An address is always required for the Debtor named in 1a or 1b.

1d. Reserved for Financing Statements to be filed in North Dakota or South Dakota only. If this Financing Statement is to be filed in North Dakota or South Dakota, the Debtor's taxpayer identification number (tax ID#) — social security number or employer identification number must be placed in this box.

1e,f,g. "Additional information re organization Debtor" is always required. Type of organization and jurisdiction of organization as well as Debtor's exact legal name can be determined from Debtor's current filed charter document. Organizational ID #, if any, is assigned by the agency where the charter document was filed; this is different from tax ID #; this should be entered preceded by the 2-character U.S. Postal identification of state of organization if one of the United States (e.g., CA12345, for a California corporation whose organizational ID # is 12345); if agency does not assign organizational ID #, check box in item 1g indicating "none."

Note: If Debtor is a trust or a trustee acting with respect to property held in trust, enter Debtor's name in item 1 and attach Addendum (Form UCC1Ad) and check appropriate box in item 17. If Debtor is a decedent's estate, enter name of deceased individual in item 1b and attach Addendum (Form UCC1Ad) and check appropriate box in item 17. If Debtor is a transmitting utility or this Financing Statement is filed in connection with a Manufactured-Home Transaction or a Public-Finance Transaction as defined in applicable Commercial Code, attach Addendum (Form UCC1Ad) and check appropriate box in item 18.

2. If an additional Debtor is included, complete item 2, determined and formatted per Instruction 1. To include further additional Debtors, attach either Addendum (Form UCC1Ad) or Additional Party (Form UCC1AP) and follow Instruction 1 for determining and formatting additional names.

3. Enter information for Secured Party or Total Assignee, determined and formatted per Instruction 1. To include further additional Secured Parties, attach either Addendum (Form UCC1Ad) or Additional Party (Form UCC1AP) and follow Instruction 1 for determining and formatting additional names. If there has been a total assignment of the Secured Party's interest prior to filing this form, you may either (1) enter Assignor S/P's name and address in item 3 and file an Amendment (Form UCC3) [see item 5 of that form]; or (2) enter Total Assignee's name and address in item 3 and, if you wish, also attaching Addendum (Form UCC1Ad) giving Assignor S/P's name and address in item 12.

4. Use item 4 to indicate the collateral covered by this Financing Statement. If space in item 4 is insufficient, put the entire collateral description or continuation of the collateral description on either Addendum (Form UCC1Ad) or other attached additional page(s).

5. If filer desires (at filer's option) to use titles of lessee and lessor, or consignee and consignor, or seller and buyer (in the case of accounts or chattel paper), or bailee and bailor instead of Debtor and Secured Party, check the appropriate box in item 5. If this is an agricultural lien (as defined in applicable Commercial Code) filing or is otherwise not a UCC security interest filing (e.g., a tax lien, judgment lien, etc.), check the appropriate box in item 5, complete items 1-7 as applicable and attach any other items required under other law.

6. If this Financing Statement is filed as a fixture filing or if the collateral consists of timber to be cut or as-extracted collateral, complete items 1-5, check the box in item 6, and complete the required information (items 13, 14 and/or 15) on Addendum (Form UCC1Ad).

7. This item is optional. Check appropriate box in item 7 to request Search Report(s) on all or some of the Debtors named in this Financing Statement. The Report will list all Financing Statements on file against the designated Debtor on the date of the Report, including this Financing Statement. There is an additional fee for each Report. If you have checked a box in item 7, file Search Report Copy together with Filing Officer Copy (and Acknowledgment Copy). Note: Not all states do searches and not all states will honor a search request made via this form; some states require a separate request form.

8. This item is optional and is for filer's use only. For filer's convenience of reference, filer may enter in item 8 any identifying information (e.g., Secured Party's loan number, law firm file number, Debtor's name or other identification, state in which form is being filed, etc.) that filer may find useful.

Form 5-2

Letter Requiring Debtor to Assemble Collateral at Convenient Location

[**Date**]

[**Name and address of debtor**]

Re: [**description of collateral, note, and security agreement**]

[**Salutation**]

I have been retained as attorney for [**name of creditor**].

Because of your default on the referenced note, my client demands that you assemble the referenced collateral and make it available to my client at [**address, city, state**] on or before [**date and time**]. You are required to do this on demand of the creditor by the referenced security agreement, a copy of which is enclosed.

Your failure to comply with the demands in this letter may force my client to take whatever legal action is necessary to protect my client's rights under the note and security agreement.

Under the security agreement, any sale of the collateral by my client will be credited against the amount of your deficiency under the note.

Sincerely yours,

_____

[**Name of attorney**]

Certified Mail No. [**number**]
Return Receipt Requested

Enc.

c: [**name of creditor**]

Attach copies of the note and security agreement.

Form 5-3

This form may be used to notify the debtor, any secondary obligor, and other secured parties in any transaction other than a consumer-goods transaction. *See* Tex. Bus. & Com. Code § 9.613. The notice should be sent to each party by certified mail, return receipt requested. This form may be used in connection with either a public or a private sale. For a form to be used in consumer transactions, see form 5-4 in this chapter.

Notification of Disposition of Collateral

To: [**name and address of debtor, obligor, or other notice recipient**]

From: [**name, address, and telephone number of secured party**]

Include the following in a notice to persons other than the debtor.

Name[s] of Debtor[s]: [**name[s] of debtor[s]**]

Select the following for a public sale.

We will [sell/lease/license] the [**describe collateral**] [**include if applicable:** to the highest qualified bidder] in public as follows:

Date: [**date of sale**]

Time: [**time of sale**]

Place: [**physical address of sale**]

Select the following for a private sale.

We will [sell/lease/license] the [**describe collateral**] privately sometime after [**day and date**]. A sale could include a lease or license.

Continue with the following.

You are entitled to an accounting of the unpaid indebtedness secured by the property that we intend to [sell/lease/license] [**include if applicable:** for a charge of $[**amount**]]. You may request an accounting by calling us at [**telephone number**].

_____

[**Name of attorney**]

Certified Mail No. [**number**]
Return Receipt Requested

c: [**name of creditor**]

Form 5-4

This form must be used to notify the debtor and any secondary obligor in a consumer-goods transaction. *See* Tex. Bus. & Com. Code § 9.614. Although the statute does not require a particular phrasing for the notification, using the form set out in section 9.614(3) provides a safe harbor that satisfies section 9.614(1). Tex. Bus. & Com. Code § 9.614 cmt. 3. The notice should be sent to each party by certified mail, return receipt requested. This notice may be used in connection with either a public or a private sale. For a form to be used in transactions other than consumer-goods transactions, see form 5-3 in this chapter.

[Name and address of secured party]

[Date]

Notice of Our Plan to Sell Property

To: **[name and address of any obligor who is also a debtor]**

Subject: **[identify secured transaction]**

We have your **[describe collateral]**, because you broke promises in our agreement.

Select the following for a public sale.

We will sell **[describe collateral]** at public sale. A sale could include a lease or license. The sale will be held as follows:

Date: **[day and date of sale]**

Time: **[time of sale]**

Place: **[physical address of sale]**

You may attend the sale and bring bidders if you want.

Select the following for a private sale.

We will sell **[describe collateral]** at private sale sometime after **[date]**. A sale could include a lease or license.

Continue with the following.

The money that we get from the sale (after paying our costs) will reduce the amount you owe. If we get less money than you owe, you [will/will not] still owe us the difference. If we get more money than you owe, you will get the extra money, unless we must pay it to someone else.

You can get the property back at any time before we sell it by paying us the full amount you owe (not just the past due-payments), including our expenses. To learn the exact amount you must pay, call us at [**telephone number**].

If you want us to explain to you in writing how we have figured the amount that you owe us, you may call us at [**telephone number**] or write us at [**address of secured party**] and request a written explanation. [**Include if applicable:** We will charge you $[**amount**] for the explanation if we sent you another written explanation of the amount you owe us within the last six months.]

If you need more information about the sale, call us at [**telephone number**] or write us at [**address of secured party**].

Include the following if applicable.

We are sending this notice to the following other people who have an interest in [**describe collateral**] or who owe money under your agreement:

[**Names of all other debtors and/or obligors**]

Continue with the following.

_____

[**Name of attorney**]

Certified Mail No. [**number**]
Return Receipt Requested

c: [**name of creditor**]

[Reserved]

Form 5-5

This form assumes that the default is the debtor's failure to pay an installment when due. Another event of default may exist. If so, it should be stated in the letter. See section 14.7 in this manual for discussion of default.

Letter to Debtor Giving Notice of Default and Intent to Accelerate

[**Date**]

[**Name and address of debtor**]

Re: [**description of collateral, note, and security agreement**]

[**Salutation**]

I have been retained as attorney for [**name of creditor**].

Your obligation to my client as set out in the referenced note and security agreement is in default because of your failure to make payment of $[**amount**] on [**due date**] as required by the note and security agreement, a copy of which is enclosed.

The total amount owed is $[**amount**]. This total amount consists of $[**amount**], principal; $[**amount**], interest accrued through [**date**]; and [**itemize other charges**].

Demand is now made for payment of the total amount owed. Direct your payments to this office.

If a per diem interest charge can be calculated, provide it; otherwise, include the following paragraph.

Additional interest or other charges may accrue on this debt. To obtain a current payoff figure, call [**telephone number**] between [**time**] and [**time**], except for weekends or holidays.

Continue with the following.

Please forward payment of the full amount that is due and unpaid under the terms of the agreement to my office immediately. This letter constitutes notice that, unless I receive a certified check, cashier's check, or money order for the full amount that is due and unpaid on or before [**number**] days after the date of this letter, I intend to take whatever steps are necessary to protect my client's interests, including seeking late charges, collection expenses, attorney's fees, interest, and acceleration of the remaining unpaid principal balance under the terms of the referenced note and security agreement and the laws of this state.

Enclosed is an addressed, postage-paid envelope for your payment.

Sincerely yours,

_____

[**Name of attorney**]

Certified Mail No. [**number**]
Return Receipt Requested

Enc.

c: [**name of creditor**]

Attach copies of the note and security agreement.

Form 5-6

This form assumes that the default is the debtor's failure to pay an installment when due. Another ground for acceleration may exist. If so, it should be stated in the letter.

Letter to Debtor Giving Notice of Acceleration

[**Date**]

[**Name and address of debtor**]

Re: [**description of collateral, note, and security agreement**]

[**Salutation**]

I have been retained as attorney for [**name of creditor**].

Because of your default in making payment in accordance with the terms of the referenced note and security agreement, the entire unpaid principal balance under the agreement, together with accrued but unpaid interest charges, late charges, and collection expenses as provided for in the agreement, is hereby accelerated and declared immediately due and payable. A copy of the note and security agreement is enclosed.

Demand is hereby made for the total amount of $[**amount**], which consists of $[**amount**], principal; $[**amount**], interest accrued through [**date of acceleration**]; and [**itemize other charges**].

Please forward payment of the full amount, after acceleration, that is due and unpaid under the terms of the agreement to my office immediately. Please note that the agreement requires you to pay any accrued late charges, collection expenses, and attorney's fees. I have been instructed that unless I receive a certified check, cashier's check, or money order for the full amount, after acceleration, that is due and unpaid on or before [**number**] days after the

date of this letter, I am to take all legal steps that may be necessary to protect my client's interests.

Enclosed is an addressed, postage-paid envelope for your payment.

Sincerely yours,

_____

[**Name of attorney**]

Certified Mail No. [**number**]
Return Receipt Requested

Enc.

c: [**name of creditor**]

Attach copies of the note and security agreement.

Form 5-7

Letter to Debtor Giving Notice of Deficiency after Sale

[**Date**]

[**Name and address of debtor**]

Re: [**description of collateral, note, and security agreement**]

[**Salutation**]

I have been retained as attorney for [**name of creditor**].

On [**date of repossession**], under the terms of the referenced note and security agreement and because of your default under their terms, my client repossessed the referenced collateral.

After giving proper notice, my client sold this collateral for $[**amount**], incurred expenses of sale of $[**amount**], and realized a net amount of $[**amount**].

After you are given full credit for this net amount realized, there remains a deficiency under the terms and conditions of the note of $[**amount**].

Please forward payment of the full amount of the deficiency under the terms of the agreement to my office immediately. I have been instructed that, unless I receive a certified check, cashier's check, or money order for the full amount of the deficiency on or before [**number**] days after the date of this letter, I am to take whatever legal action is necessary to protect my client's interests.

Enclosed is an addressed, postage-paid envelope for your payment.

Sincerely yours,

_____

[**Name of attorney**]

Certified Mail No. [**number**]
Return Receipt Requested

Enc.

c: [**name of creditor**]

Form 5-8

Letter Notifying Internal Revenue Service of Intention to Sell Collateral

[**Date**]

Internal Revenue Service
Attention: Technical Services Advisory Group Manager
[**Refer to relevant IRS publications for appropriate address.**]

Re: Notice of nonjudicial sale of property

[**Salutation**]

This notice is submitted on behalf of [**name of creditor**], whose address is [**address, city, state**].

Enclosed is a copy of a notice of federal tax lien under the Internal Revenue Laws Form 668(Y), relating to taxpayer [**name of debtor**], whose address is [**address, city, state**]. The notice was filed with the [Texas secretary of state/county clerk of [**county**] County, Texas,] on [**date**] and is recorded under file number [**number**].

[**Name of creditor**], as secured party under a security agreement executed by [**name of debtor**] on [**date**], intends to sell the following property at a public sale in accordance with the security agreement and under chapter 9 of the Texas Business and Commerce Code: [**describe items to be sold**].

The sale will occur on [**date and time**] at [**address, city, state**]. Principal, interest, and other charges totaling approximately $[**amount**] are due and will be chargeable against the sale proceeds. [**Include if applicable:** In addition, legal fees, appraisal costs, lien search fees, filing fees, and selling costs will be chargeable against the sale proceeds.]

Sincerely yours,

_____

[**Name of attorney**]
Attorney for [**name of creditor**]

Certified Mail No. [**number**]
Return Receipt Requested

Enc.

Enclose a copy of the federal tax lien and the notice of sale.

Form 5-9

Letter to Debtor Giving Notice of Intent to Retain Collateral in Satisfaction of Debt

[**Date**]

[**Name and address of debtor**]

[**Include name[s] and address[es] of other secured parties if applicable**]

Re: [**description of collateral, note, and security agreement**]

[**Salutation**]

You are hereby notified that my client, [**name of creditor**], as secured party now in possession of the above-described collateral under the referenced note and security agreement now in default, proposes to retain the collateral in satisfaction of the obligation.

Sincerely yours,

_____

[**Name of attorney**]

Certified Mail No. [**number**]
Return Receipt Requested

c: [**name of creditor**]

[Reserved]

Form 5-10

It is recommended that all public sales to dispose of collateral be advertised at least three times in a newspaper of general circulation in the geographical area in which the sale is to be conducted. When this notice is sent to the newspaper, the attorney should request a bill for the advertisement and an affidavit that the notice was published on the requested dates. The terms of sale shown in the second paragraph are shown only as an example; they should be altered as necessary to make the sale commercially reasonable. See section 5.32 in this chapter.

Newspaper Notice of Public Sale

Because of a default by [**name of debtor**], Debtor, under the terms of a note and security agreement executed by Debtor on [**date of agreement**], the undersigned holder of the note and security agreement and the indebtedness represented thereby will sell at the premises of the undersigned, [**address, city, state**], on [**date and time of sale**], all right, title, and interest of the undersigned in the following property: [**describe property**].

The seller requires at the time of the auction a minimum down payment of 25 percent of the accepted bid in either cash, a certified check, or a cashier's check, with the balance due within twenty-four hours thereafter. The undersigned reserves the right to bid at the sale.

Date: [**date**].

_____

[**Name of creditor**]

[Reserved]

Chapter 6
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[Reserved]

Chapter 6

Presuit Considerations

I. Remedies Other Than Suit on Debt

§ 6.1 Criminal Prosecution of Debtor

Caveat: The manual committee strongly advises against pursuing simultaneous civil and criminal actions against the debtor. As set out in the following two sections, both creditor and attorney face substantial risks in pursuing criminal prosecution in any case. If criminal charges are brought or threatened before the civil suit is resolved, the debtor will almost certainly demand that the criminal charges be dropped as a condition of settlement. Even participating in such a discussion opens the creditor's attorney to a charge that he has violated rule 4.04(b); refusing to discuss the criminal case may make settlement of the civil action impossible. *See generally* Tex. Disciplinary Rules Prof'l Conduct R. 4.04(b), *reprinted in* Tex. Gov't Code Ann., tit. 2, subtit. G, app. A (West 2013 & Supp. 2015) (Tex. State Bar R. art. X, § 9). Therefore, the attorney should caution the creditor to defer criminal prosecution, or the threat of prosecution, until the civil action is resolved.

§ 6.1:1 Criminal Prosecution Generally

Criminal prosecution of a debtor should be pursued with extreme caution. The client's potential exposure for malicious prosecution and unreasonable collection efforts must be evaluated. See section 6.8 below and section 17.39 in this manual. The attorney and the client should consult with the prosecutor's office before the client institutes criminal proceedings against a debtor. Various crimes relating to debts and credit are reviewed in later sections in this chapter. See sections 6.4 through 6.8 below. Threats of criminal prosecution may violate the Texas Debt Collection Practices Act. *See* Tex. Fin. Code § 392.301(a); see also section 2.33:3 in this manual.

A creditor cannot threaten criminal action if the debtor has not violated the law. Tex. Fin. Code § 392.301(a)(6). Likewise, the creditor does not have the power and authority to determine the guilt or innocence of the debtor. *Brown v. Oaklawn Bank*, 718 S.W.2d 678, 680 (Tex. 1986).

§ 6.1:2 Ethical Considerations for Attorneys

A lawyer must not present, participate in presenting, or threaten to present criminal charges solely to gain an advantage in a civil matter. *See* Tex. Disciplinary Rules Prof'l Conduct R. 4.04(b). A lawyer who represents a creditor in a civil suit cannot "assist" in prosecuting a criminal charge against the defendant even if both the creditor and the attorney insist that the motivation is not solely to gain an advantage in the civil matter. *See* Tex. Comm. on Prof'l Ethics, Op. 455 (1988).

Giving any notice required by law or applicable rules of practice or procedure as a prerequisite to instituting criminal charges is allowed, unless the underlying criminal charges were made without probable cause. Tex. Disciplinary Rules Prof'l Conduct R. 4.04 cmt. 2. See, for example, section 6.5:6 below concerning notice required for prosecutiion of theft by check.

§ 6.2 False Statement to Obtain Property or Credit or in the Provision of Certain Services

It is an offense if a person intentionally or knowingly makes a materially false or misleading written statement to obtain property or credit for himself or another or in providing an appraisal of real property for compensation. Tex. Penal Code § 32.32(b), (b–1). "Credit" is broadly defined to include a loan of money; furnishing property or service on credit; extending the due date of an obligation; comaking, endorsing, or guaranteeing a note or other instrument for obtaining credit; a line or letter of credit; and a credit card. Tex. Penal Code § 32.32(a). Making the written false or misleading statement is the offense; actually acquiring the property or credit is not a required element. *Cheney v. State*, 755 S.W.2d 123, 129 (Tex. Crim. App. 1988). Whether the offense is classified as a felony or a misdemeanor will depend on the value of the property or the amount of credit obtained. *See* Tex. Penal Code § 32.32(c).

§ 6.3 Credit and Debit Card Abuse

Various acts involving the use of a credit or debit card may constitute criminal offenses. They include (1) presenting a card knowing it has expired or been revoked or canceled, (2) inducing a cardholder to use the cardholder's card to obtain property or services for the actor's benefit for which the cardholder is unable to pay, and (3) using a fictitious card or card number to obtain property or services. Tex. Penal Code § 32.31(b). These offenses are state jail felonies, unless it is shown at trial that the offense was committed against an elderly individual, in which case the offense is a felony of the third degree. Tex. Penal Code § 32.31(d).

§ 6.4 Issuance of Bad Check

§ 6.4:1 Elements of Offense

It is an offense if a person issues or passes a check knowing that there are not sufficient funds available to pay in full the check and all other checks outstanding on his account at that time. *See* Tex. Penal Code § 32.41(a). The issuer's knowledge of insufficient funds is presumed (except in the case of a postdated check or order) if (1) he had no account with the bank or other drawee at the time he issued the check or order or (2) payment was refused by the bank or other drawee for lack of funds or insufficient funds on presentation with thirty days after issue and the issuer failed to pay the holder in full with ten days after receiving notice of that refusal. Tex. Penal Code § 32.41(b).

§ 6.4:2 Notice

If the check was refused for lack of funds or insufficient funds, notice may be actual notice or notice given in writing that is sent by (1) first-class mail supported by an affidavit of service or (2) registered or certified mail with a return receipt requested. Tex. Penal Code § 32.41(c)(1). The notice must be sent to the address (1) on the check or order, (2) in the bank's records, or (3) in the holder's records. Tex. Penal Code § 32.41(c)(2). The notice must also contain the following statement:

> This is a demand for payment in full for a check or order not paid because of a lack of funds or insufficient funds. If you fail to make payment in full within 10 days after the date of receipt of this notice, the failure to pay creates a presumption for committing an offense, and this matter may be referred for criminal prosecution.

Tex. Penal Code § 32.41(c)(3). If notice is given in accordance with subsection (c), there is a presumption that it was received no later than five days after it was sent. Tex. Penal Code § 32.41(d).

Caveat: The federal Fair Debt Collection Practices Act and the Texas Debt Collection Practices Act govern collection practices for various types of debts including consumer debts and contain additional requirements for communication with and notice to debtors. The attorney should consult these acts for compliance before communicating with the debtor. See parts II. and III. in chapter 2 of this manual.

§ 6.4:3 Restitution

A person charged with an offense under Texas Penal Code section 32.41 may make restitution for the bad checks or sight orders. Restitution shall be made through the prosecutor's office if collection and processing were initiated through that office. In other cases restitution may be, with the approval of the court in which the offense is filed, (1) made through the court or (2) collected by a law enforcement agency if a peace officer of that agency executes a warrant against the person charged with the offense. Tex. Penal Code § 32.41(e).

§ 6.4:4 Classification of Offense

Issuance of a bad check is a class C misdemeanor unless the check was issued to pay a child support obligation established by court order; in that case, it is a class B misdemeanor. Tex. Penal Code § 32.41(f).

§ 6.5 Theft of Property or Service by Check

§ 6.5:1 Issuance of Bad Check vs. Theft by Check

Prosecution for issuance of a bad check or similar sight order under Penal Code section 32.41 is usually used only for the payment of a preexisting debt by a bad check. Theft of property or service by check is a more serious offense. The key distinction between the two offenses is whether the issuer of the check received any property. The same logic presumably extends to theft of service. Receipt of property and proof of its value are critical elements in the offense of theft. They are not required elements in the offense of issuance of a bad check. *Christiansen v. State*, 575 S.W.2d 42, 44 (Tex. Crim. App. 1979); *see also* Tex. Penal Code §§ 31.03, 31.06, 32.41.

Issuance of a bad check or similar sight order is not a lesser included offense of theft by check of property or service. Tex. Penal Code § 32.41(g).

§ 6.5:2 Elements of Offense

Theft of Property: A person commits theft of property if he unlawfully appropriates it with the intent to deprive the owner of it. Appropriation of property is unlawful if it is without the owner's consent or the property is received with knowledge that it is stolen by another. Tex. Penal Code § 31.03(a), (b)(1), (2).

Theft of Service: A person commits theft of service if, with intent to avoid payment for service that he knows is provided only for compensation—

1. the actor intentionally or knowingly secures the service by deception, threat, or false token;
2. having control of the disposition of the services of another to which the actor

is not entitled, the actor intentionally or knowingly diverts the other's services to the actor's own benefit or to the benefit of another not entitled to the services;

3. having control of personal property under a written rental agreement, the actor holds the property beyond the expiration of the rental period without the effective consent of the owner, thereby depriving the owner of the use of the property for further rentals; or

4. the actor intentionally or knowingly secures the performance of the service by agreeing to provide compensation and, after the service is rendered, fails to make payment after receiving notice demanding payment.

Tex. Penal Code § 31.04(a).

§ 6.5:3 Presumption for Theft by Check

If the actor did not have sufficient funds in the account to pay the check or similar sight order, intent to deprive the owner of property under Penal Code section 31.03 (Theft) or to avoid payment for service under section 31.04 (Theft of Service) is presumed if the issuer had no account with the bank at the time he issued the check or similar sight order or the bank refused payment for lack of funds or insufficient funds on presentation within thirty days after issue, and the issuer failed to pay the holder in full within ten days after receiving notice of that refusal. *See* Tex. Penal Code § 31.06(a).

§ 6.5:4 Presumption for Stop Payment on Check

Intent to deprive an owner of property is presumed if—

1. the actor ordered the bank or drawee to stop payment on the check;

2. the bank or drawee refused payment to the holder on presentation of the check or order within thirty days after issue;

3. the owner gave the actor notice of the refusal of payment and made a demand to the actor for payment or return of the property; and

4. the actor failed to pay the holder within ten days after receiving the demand or return the property to the owner within ten days after receiving the demand for return of the property.

Tex. Penal Code § 31.06(f).

Partial restitution does not preclude the presumption of intent for theft by check. Tex. Penal Code § 31.06(e).

§ 6.5:5 Presumption of Intent—Theft of Service

Intent to avoid payment for a service is presumed if a person—

1. absconds without paying or expressly refuses to pay if payment is ordinarily made immediately on rendering the service, as in hotels, campgrounds, recreational vehicle parks, restaurants, and comparable establishments;

2. fails to pay under a service agreement within ten days after receiving notice demanding payment;

3. returns rental property after the expiration of the rental agreement and fails to pay applicable rental charges for the property within ten days after receiving notice demanding payment; or

4. fails to return rental property within five days (for property valued less than $1,500) or within three days (for property valued at $1,500 or more) after receiving notice demanding return.

Tex. Penal Code § 31.04(b).

§ 6.5:6 Notice—Theft by Check

The notice required by Tex. Penal Code § 31.06(f)(3) may be actual notice or notice in writing that is sent by (1) first-class mail supported by an affidavit of service or (2) registered or certified mail with a return receipt requested. Tex. Penal Code § 31.06(b)(1). Notice must be sent to the address (1) on the check or order, (2) in the records of the bank or other drawee, or (3) in the records of the person to whom the check or order has been issued or passed. Tex. Penal Code § 31.06(b)(2). If the property is rental property, the better practice is to send notice by registered or certified mail or by telegram to the person who took control of the property under the rental agreement at the address shown on the agreement.

The notice must include the following language:

> This is a demand for payment in full for a check or order not paid because of a lack of funds or insufficient funds. If you fail to make payment in full within 10 days after the date of receipt of this notice, the failure to pay creates a presumption for committing an offense, and this matter may be referred for criminal prosecution.

Tex. Penal Code § 31.06(b)(3).

If notice is given, there is a presumption that it was received no later than five days after it was sent. Tex. Penal Code § 31.04(d).

Caveat: The federal Fair Debt Collection Practices Act and the Texas Debt Collection Practices Act govern collection practices for various types of debts including consumer debts and contain additional requirements for communication with and notice to debtors. The attorney should consult both these statutes for compliance with their requirements before communicating with the debtor. See parts II. and III. in chapter 2 of this manual.

§ 6.5:7 Classification of Offense

The classifications for theft of property and theft of service vary from class C misdemeanors to first-degree felonies, depending on the value of the stolen property or service. *See* Tex. Penal Code §§ 31.03(e), 31.04(e).

§ 6.5:8 Civil Liability for Theft

A person who commits theft as defined in the Texas Penal Code is liable for the damages resulting from the theft and for additional damages not to exceed $1,000. Tex. Civ. Prac. & Rem. Code §§ 134.002–.005. The parent or other person having a duty of control over a minor child who commits theft is liable for actual damages up to $5,000. Tex. Civ. Prac. & Rem. Code § 134.005(a)(2). The prevailing party is entitled to costs and attorney's fees. Tex. Civ. Prac. & Rem. Code § 134.005(b).

§ 6.5:9 Theft as Ground for Removing Limitation on Exemplary Damages

Although there are generally limits on the recovery of exemplary damages, those limitations are removed if the action is based on theft punishable as a third-degree felony or higher. *See* Tex. Civ. Prac. & Rem. Code § 41.008(c)(13); *see also* Tex. Civ. Prac. & Rem. Code §§ 41.003, 41.008(b).

§ 6.6 Hindrance of Secured Creditor

§ 6.6:1 Elements of Offense

A person who has signed a security agreement creating a security interest or lien on property

commits an offense if, with intent to hinder enforcement of that interest or lien, he destroys, removes, conceals, encumbers, or otherwise harms or reduces the value of the property. Tex. Penal Code § 32.33(b). Removal occurs if the property is transported, without the secured party's effective consent, from the state in which the property was located when the security interest or lien attached. Tex. Penal Code § 32.33(a)(1).

A debtor under a security agreement who does not have a right to sell or dispose of secured property or is required to account to the secured party for the proceeds of a permitted sale or disposition commits an offense if, with intent to appropriate the proceeds, he sells or disposes of the property or does not account to the secured party for the sale or other disposition as required. Tex. Penal Code § 32.33(e).

A debtor who removes the property to another state with the intent to hinder enforcement of the security interest or lien may be subject to extradition under the Uniform Criminal Extradition Act. *See* Tex. Code Crim. Proc. art. 51.13.

§ 6.6:2 Presumption of Intent

Intent to hinder enforcement is presumed if the debtor fails to pay any part of the secured debt when due and, after demand by the secured party, fails to deliver possession of the secured property to the secured party. Tex. Penal Code § 32.33(c). Despite the statutory presumption, difficult fact questions may be involved in proving intent to hinder. *See, e.g., Guernsey Community Federal Credit Union v. Gonzalez*, 539 S.W.2d 896 (Tex. Civ. App.—El Paso 1976, writ ref'd n.r.e.).

§ 6.6:3 Classification of Offense

Hindering a secured creditor is classified as either a misdemeanor or felony, depending on the value of the property involved. Tex. Penal Code § 32.33(d).

§ 6.6:4 Combining Criminal Prosecution with Repossession

A secured creditor will often request his attorney to threaten the debtor with prosecution for hindrance if the debtor does not voluntarily relinquish possession of the collateral. If the debt is a consumer debt, such a threat may violate Tex. Fin. Code § 392.301; *see Brown v. Oaklawn Bank*, 718 S.W.2d 678, 680 (Tex. 1986). Even if the debt is not a consumer debt, such a threat may violate Tex. Disciplinary Rules Prof'l Conduct R. 4.04. See the caveat at section 6.1 above and sections 6.1:1 and 6.1:2.

§ 6.7 Unauthorized Automobile Title Transfer

A person commits an offense if he acquires, accepts possession of, or exercises control over the motor vehicle of another under a written or oral agreement to arrange for the transfer of the vehicle to a third party and—

1. knowing the vehicle is subject to a security interest, lease, or lien, transfers the vehicle to a third party without first obtaining written authorization from the vehicle's secured creditor, lessor, or lienholder;
2. intending to defraud or harm the vehicle's owner, transfers the vehicle to a third party;
3. intending to defraud or harm the vehicle's owner, disposes of the vehicle in a manner other than by transfer to a third party; or
4. does not disclose the location of the vehicle on the request of the vehicle's owner, secured creditor, lessor, or lienholder.

Tex. Penal Code § 32.34(b). This offense is either a class A misdemeanor, a state jail felony, or a third-degree felony, depending on the nature of the offense. Tex. Penal Code § 32.34(f), (g).

§ 6.8 Malicious Criminal Prosecution

A plaintiff in a malicious criminal prosecution claim must establish—

1. commencement of a criminal prosecution against the plaintiff;
2. causation (initiation or procurement) of the action by the defendant;
3. termination of the prosecution in the plaintiff's favor;
4. the plaintiff's innocence;
5. absence of probable cause for the proceedings;
6. malice in filing the charge; and
7. damage to the plaintiff.

Richey v. Brookshire Grocery Co., 952 S.W.2d 515, 517 (Tex. 1997); *see also Ada Oil Co. v. Dillaberry*, 440 S.W.2d 902, 909–10 (Tex. Civ. App.—Houston [14th Dist.] 1969, writ dism'd) (even though plaintiff is innocent of criminal offense involved, there can be no recovery if defendants had probable cause for instituting prosecution); *J.C. Penney Co. v. Gilford*, 422 S.W.2d 25, 28 (Tex. Civ. App.—Houston [1st Dist.] 1967, writ ref'd n.r.e.) (defining probable cause as the existence of such facts and circumstances as would excite the belief, in a reasonable mind, acting on the facts within the knowledge of the prosecutor, that the person charged was guilty of the crime for which he was prosecuted).

The creditor who considers bringing a criminal action against a debtor should make certain there is probable cause to believe the debtor has committed a crime; he must not file criminal charges merely to collect a debt. If the creditor had probable cause to believe the debtor had committed a crime, the fact that the creditor was attempting to collect a debt is not sufficient to show malice. *See Jackson v. Train*, 495 S.W.2d 36, 39 (Tex. Civ. App.—Beaumont 1972, no writ); *Ada Oil Co.*, 440 S.W.2d at 912. Without probable cause, malice can be shown if the creditor's purpose in instituting criminal proceedings was to collect a debt. *See Sebastian v. Cheney*, 25 S.W. 691 (Tex. 1894); *Gilford*, 422 S.W.2d at 29.

§ 6.9 Setoff against Deposit

Except as otherwise provided by the Truth in Lending Act (15 U.S.C. §§ 1601–1667f) or other federal law, a bank has a right of setoff, without further agreement or action, against all accounts owned by a depositor to whom or on whose behalf the bank has made an advance of money by loan, overdraft, or otherwise if the bank has previously disclosed this right to the depositor. If the depositor defaults in the repayment or satisfaction of the obligation, the bank, without notice to or consent of the depositor, may set off or cancel on its books all or part of the accounts owned by the depositor and apply the value of the accounts in payment of and to the extent of the obligation. Tex. Fin. Code § 34.307(a); *see also Sears v. Continental Bank & Trust Co.*, 562 S.W.2d 843 (Tex. 1997).

For purposes of section 34.307, a default occurs if an obligor has failed to make a payment as provided by the terms of the loan or other credit obligation and a grace period provided for by the agreement or law has expired. An obligation is not required to be accelerated or matured for a default to authorize setoff of the depositor's obligation against the defaulted payment. Tex. Fin. Code § 34.307(b).

A bank may not exercise its right of setoff under section 34.307 against an account unless the account is due the depositor in the same capacity

as the defaulted credit obligation. A trust account for which a depositor is trustee, including a trustee under a certificate of trust delivered under section 34.306(b), is not subject to the right of setoff unless the trust relationship is solely evidenced by the account as provided by chapter 11 of the Texas Probate Code (now codified in chapter 113 of the Texas Estates Code). Tex. Fin. Code § 34.307(c).

Section 34.307 does not limit the exercise of another right of setoff, including a right under contract or common law. Tex. Fin. Code § 34.307(d).

Chapter 9 of the Texas Business and Commerce Code does not generally apply to a right of recoupment or setoff. Tex. Bus. & Com. Code § 9.109(d)(10). But its provisions both recognize and affect such rights in specific contexts. *See* Tex. Bus. & Com. Code § 9.340. Section 9.340 contains three important provisions: (1) If a debtor has a deposit account at a bank to which the debtor's secured party holding a security interest in the deposit account also owes money, the bank can offset the account in respect to a debt of the secured party; (2) generally a bank can permit a third party to take a security interest in a deposit account maintained with the bank without impairing any common-law or statutory right the bank has to offset the deposit account balance against a debt owed the bank by the account owner; and (3) as an exception to the foregoing general rule, even a bank's right of setoff will be ineffective as against a secured party of the bank's deposit account holder who takes the steps to acquire control over the account prescribed by Tex. Bus. & Com. Code § 9.104(a)(3) (the secured party in effect becomes the bank's customer or owner of the account). *See also* Tex. Bus. & Com. Code § 9.404 (with respect to possible claims by way of recoupment of an account debtor against an assignee of the account).

See Tex. Bus. & Com. Code § 4.303 regarding priority rights of payment between checks presented to the bank and the bank's offset rights. See section 27.70 in this manual regarding the relationship between offset and garnishment.

§ 6.10 Suit on Debt vs. Suit on Bad Check

Ordinarily the creditor will want to sue on the account or note itself and, in the alternative, on the check. Attorney's fees are recoverable in suits on sworn accounts, whereas they have not been available in suits on worthless checks. Recovery of attorney's fees is allowed, however, if the claim is founded on an oral or written contract. Awards of attorney's fees in suits on bad checks should therefore be permitted on the theory that a check is a contract. *See* Tex. Civ. Prac. & Rem. Code § 38.001(8). Attorney's fees for a suit on a dishonored cashier's check have been allowed on this theory. *Guardian Bank v. San Jacinto Savings Ass'n*, 593 S.W.2d 860, 863 (Tex. Civ. App.—Houston [1st Dist.] 1980, writ ref'd n.r.e.). See part III. in chapter 1 of this manual for a discussion of attorney's fees.

Suit on the check may be preferable to suit on the account or note for the following reasons:

1. Venue for a suit on the contract may be in a distant county, but venue for a suit on the check may be permitted in a closer county. *See* Tex. Civ. Prac. & Rem. Code §§ 15.001–.039.
2. The check may be viewed by the court as an admission of the debt.
3. The passing of a bad check by the defendant may create a bias favorable to the creditor with the trier of fact.
4. Suit on a bad check will enable judicial foreclosure of a worker's lien if one is allowed by Tex. Prop. Code § 70.001.

Suits on a note are discussed at section 14.5 in this manual. Criminal prosecution on a bad check is discussed at section 6.4 above. Worker's possessory liens are discussed at section 7.2.

§ 6.11 Self-Help Repossession

Self-help repossession is covered in chapter 5 of this manual. See particularly section 5.4, which discusses considerations in choosing between repossession and judicial foreclosure.

[Sections 6.12 through 6.20 are reserved for expansion.]

II. Liability for Debts of Another

§ 6.21 Contractual Guaranties

The easiest and most often encountered method for imposing individual liability for the obligation of a business is through a personal guaranty. Actions on personal guaranties are discussed at section 14.11 in this manual.

§ 6.22 Corporation or Limited Liability Company That Fails to Pay Franchise Tax

§ 6.22:1 Forfeiture of Right to Do Business

A corporation that fails to pay its franchise tax or file reports will forfeit its right to do business in Texas, thereby losing its right to sue or defend in any court in this state. This forfeiture can be made by the comptroller of public accounts without a judicial proceeding. *See* Tex. Tax Code §§ 171.251–.257. These provisions also apply to other taxable entities as defined in Tex. Tax Code § 171.0002(a), including limited liability companies. *See* Tex. Tax Code §§ 171.0002, 171.2515.

§ 6.22:2 Individual Liability of Directors, Officers, and Managers

If the corporate privileges of a corporation are forfeited for the failure to file a report or pay a tax or penalty, each director or officer of the corporation is liable for each debt of the corporation that is created or incurred in this state after the date on which the report, tax, or penalty is due and before the corporate privileges are revived. Tex. Tax Code § 171.255. The liability of partners is joint and several, so not all the officers and directors need be sued; the obligation can be enforced against individual officers or directors. *See First National Bank v. Silberstein*, 398 S.W.2d 914, 915–16 (Tex. 1966); *Sheffield v. Nobles*, 378 S.W.2d 391, 392 (Tex. Civ. App.—Austin 1964, writ ref'd). The creditor should serve each individual whose liability is sought. *See Bruce v. Freeman Decorating Services*, No. 14-10-00611-CV, 2011 WL 3585619 (Tex. App.—Houston [14th Dist.] Aug. 16, 2011, pet. denied) (judgment affirmed against director of forfeited limited liability company).

If a corporation's charter or certificate of authority and its corporate privileges are forfeited and revived under Tax Code chapter 171, the liability under this section of a director or officer of the corporation is not affected by the revival of the charter or certificate and the corporate privileges. Tex. Tax. Code § 171.255(d).

§ 6.22:3 Relation-Back Doctrine

"[C]ontractual obligations entered into before the forfeiture of corporate privileges do not impose liability on the officers or directors for payments that are due after forfeiture." *Serna v.*

State, 877 S.W.2d 516, 519 (Tex. App.—Austin 1994, writ denied). "When parties enter into a contract the law presumes they intend the consequences of its performance. It follows that performance or implementation of the contractual provisions relate back to and are authorized at the time of execution of the contract." *Curry Auto Leasing v. Byrd*, 683 S.W.2d 109, 112 (Tex. App.—Dallas 1984, no writ) (officers not liable for damages on breach of lease agreement, which was signed prior to forfeiture) (citation omitted).

§ 6.22:4 Defense

Any officer or director can avoid liability by showing that the debt was created either over his objection or without his knowledge, if the exercise of reasonable diligence to ascertain the affairs of the corporation would not have revealed the intention to create the debt. *See* Tex. Tax Code § 171.255(c).

§ 6.23 Reserved

§ 6.24 Piercing the Corporate Veil

§ 6.24:1 Limitation of Liability

A shareholder may not be held liable to the corporation or its obligees with respect to any contractual obligation of the corporation or any matter relating to the obligation (1) on the basis that the shareholder is or was the alter ego of the corporation or (2) on the basis of actual or constructive fraud or other similar theory. Tex. Bus. Orgs. Code § 21.223(a)(2). If, however, the obligee demonstrates that the shareholder caused the corporation to be used for the purpose of perpetrating and did perpetrate an actual fraud on the obligee primarily for the direct personal benefit of the shareholder, section 21.223(a)(2) does not prevent or limit liability of the shareholder. Tex. Bus. Orgs. Code § 21.223(b). See section 6.24:3 below.

§ 6.24:2 Inadequate Capitalization

Inadequate capitalization of the corporation, such that the corporation's assets were insufficient to meet its debts, is another ground for piercing the corporate veil. *See Castleberry v. Branscum*, 721 S.W.2d 270, 272 (Tex. 1986); *Harwood Tire-Arlington, Inc. v. Young*, 963 S.W.2d 881, 885 (Tex. App.—Fort Worth 1998, pet. dism'd by agr.); *Holmes v. Clow*, 533 S.W.2d 99, 105 (Tex. Civ. App.—Tyler 1976, no writ).

§ 6.24:3 Other Theories

The corporate veil can also be pierced if the shareholder uses the corporation to—

1. perpetrate an actual fraud for the shareholder's personal benefit;
2. evade an existing legal obligation;
3. circumvent a statute;
4. protect a crime or justify a wrong; or
5. achieve a monopoly.

Castleberry v. Branscum, 721 S.W.2d 270, 272 (Tex. 1986). For contract cases, actual fraud must also be proved. *See* Tex. Bus. Orgs. Code § 21.223.

§ 6.24:4 Failure to Follow Corporate Formalities

Shareholders may not be held liable for failure to observe corporate formalities, although this was formerly a consideration in proving alter ego in contract claims. Tex. Bus. Orgs. Code § 21.223(a)(3).

§ 6.24:5 Single Business Enterprise

The Texas Supreme Court has rejected the single business enterprise theory of liability, which advocates that corporations may be held liable for each other's obligations merely because of centralized control, mutual purposes, and shared

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

§ 6.24:6 Foreign Corporation

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

§ 6.25 Insolvency, Dissolution, and Forfeiture of Corporations

§ 6.25:1 "Trust Fund" Theory

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

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

§ 6.25:2 Dissolved Legal Entity

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

§ 6.25:3 "Denuding" of Corporate Assets

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

§ 6.26 General Partnership

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

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

An action may be brought against a partnership and any or all of the partners in the same action or in separate actions. Tex. Bus. Orgs. Code § 152.305. Citation served on one member of a partnership authorizes a judgment against the partnership and the partner actually served. Tex. Civ. Prac. & Rem. Code § 17.022. If a suit is against several partners who are jointly indebted under a contract and citation has been served on at least one but not all of the partners, the court may render judgment against the partnership and against the partners who were actually served but may not award a personal judgment or execution against any partner who was not served. Tex. Civ. Prac. & Rem. Code § 31.003. See section 16.10 in this manual regarding citation and service on partnerships.

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

§ 6.27 Limited Partnership

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

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

§ 6.28 Limited Liability Partnership

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

Partners are not individually liable, directly or indirectly, by contribution, indemnity, or otherwise, for any obligation of the partnership incurred while the partnership is a registered limited liability partnership. Tex. Bus. Orgs. Code § 152.801(a).

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

§ 6.29 Limited Liability Company

A limited liability company is an entity distinct from its members. A limited liability company may have one or more members. Tex. Bus. Orgs.

Code § 101.101(a). Except as otherwise provided, the limited liability company's existence begins on the filing of the certificate of formation. *See* Tex. Bus. Orgs. Code §§ 3.001, 4.051.

Except as and to the extent the company agreement specifically provides otherwise, a member or manager is not liable for a debt, obligation, or liability of a limited liability company, including a debt, obligation, or liability under a judgment, decree, or order of a court. Tex. Bus. Orgs. Code § 101.114. A member of a limited liability company may be named as a party in an action by or against the limited liability company only if the action is brought to enforce the member's right against or liability to the company. Tex. Bus. Orgs. Code § 101.113.

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

§ 6.30 Professional Corporation

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

§ 6.31 Association or Unincorporated Joint-Stock Company

Liability for a debt of a foreign or domestic association or unincorporated joint-stock company can be fixed on an individual member as well as on the company or association, provided that the individual sought to be held liable is served and judgment is obtained against him. Execution cannot issue against a stockholder's or member's individual property until execution has issued against the organization's joint property and has been returned without satisfaction. Tex. Rev. Civ. Stat. arts. 6133, 6136, 6137. The composition and liability of these entities are discussed in *Thompson v. Schmitt*, 274 S.W. 554 (Tex. 1925), and *Wells v. Mackay Telegraph-*

Cable Co., 239 S.W. 1001 (Tex. Civ. App.—Galveston 1921, no writ).

§ 6.32 Personal Liability of Individual Signing in Representative Capacity

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

§ 6.33 Guarantor or Surety

See section 14.11 in this manual regarding guarantors and sureties.

§ 6.34 Agency

One who contracts in his own name as an agent for an undisclosed principal is personally liable, even if he disclosed the fact of agency. *Carter v. Walton*, 469 S.W.2d 462, 471–72 (Tex. Civ. App.—Corpus Christi 1971, writ ref'd n.r.e.). An individual is personally liable on a contract he signed as a purported agent if no authority to do so existed. *Talmadge Tinsley Co. v. Kerr*, 541 S.W.2d 207, 209 (Tex. Civ. App.—Dallas 1976, writ ref'd n.r.e.). To avoid personal liability, an agent has the duty to disclose not only that he is acting in a representative capacity but also the identity of his principal. *Gonzales County Water Supply Corp. v. Jarzombek*, 918 S.W.2d 57, 60 (Tex. App.—Corpus Christi 1996, no writ). The fact that a person opened an account in the name of a business without use of the terms *incorporated*, *corporation*, or *company* in the business name is not enough to create a duty for a creditor to investigate to see if the business is in fact a corporation. *See Ferrant v. Graham Associates, Inc.*, No. 02-12-00190-CV, 2014 WL 1875825 (Tex. App.—Fort Worth May 8, 2014, no pet.) (mem. op.) (CFO personally liabile; "West Fort Worth" was insufficient disclosure of true principal, West Fort Worth Day Care, LLC); *Avenell v. Chrisman Properties, L.L.C.*, No. 14-08-01180-CV (Tex. App.—Houston [14th Dist.] Apr. 8, 2010, no pet.) (mem. op) ("K&S Contracting" was insufficient disclosure of K&S Contracting, Inc.). The test of disclosure is the creditor's actual knowledge that a business is a corporation or whether the creditor had reasonable grounds to know of the corporation's existence. *Wynne v. Adcock Pipe & Supply*, 761 S.W.2d 67, 69 (Tex. App.—San Antonio 1988, writ denied). "Knowledge of the real position of affairs acquired after a cause of action has accrued cannot affect the right to recover from the agent personally on a contract." *Burch v. Hancock*, 56 S.W.3d 257, 262 (Tex. App.—Tyler 2001, no pet.) (citation omitted).

Form 6-1

See Tex. Civ. Prac. & Rem. Code § 171.085 regarding the contents of an application. Use the same caption as in the original petition unless the cause has been transferred.

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

Application to Confirm Arbitration Award

1. Plaintiff, [**name of plaintiff**], whose address is [**address, city, state**], applies to this Court for an order confirming an arbitration award under the Federal Arbitration Act. Defendant is [**name of defendant**], who can be served with citation at [**address, city, state**].

2. This Court has jurisdiction under Texas Civil Practice and Remedies Code sections 171.081 and 171.082. Venue in this Court is proper under Texas Civil Practice and Remedies Code section 171.096(c).

Plead additional facts if required for venue. See section 15.4 in this manual.

3. A copy of the agreement to arbitrate is attached hereto as Exhibit [**exhibit number/letter**] and incorporated by reference.

4. The issue that was subject to arbitration between the parties under the agreement was [**describe issue**].

State specific facts relied on by the plaintiff to warrant the required findings by the court.

5. The status of the arbitration before the arbitrators is final. The time for bringing an action to vacate, modify, or correct the award has passed, and the Defendant has not filed any such action.

Include the following paragraph if the underlying agreement permits attorney's fees.

6. The failure of Defendant to pay the arbitration award has made it necessary for Plaintiff to employ an attorney to sue to confirm the award. Plaintiff has agreed to pay the undersigned attorney reasonable and necessary attorney's fees.

Continue with the following.

7. Plaintiff asks that citation issue and that Plaintiff have a judgment confirming the arbitration award as made and ordering the Defendant to pay Plaintiff $[**amount**] plus interest, attorney's fees, costs of the application and of the proceedings subsequent to the application and disbursements, and for all other relief to which Plaintiff may be entitled.

_____

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

Attach exhibit(s).
Attach any additional documents as needed.

Chapter 7

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Chapter 7

Creation and Enforcement of Liens

I. Miscellaneous Property Code Liens

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

§ 7.1:1 Scope of Lien

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

§ 7.1:2 Who May Claim Lien

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

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

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

§ 7.1:3 Property Subject to Lien

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

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

Tex. Prop. Code § 58.003.

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

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

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

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

§ 7.1:5 Lien Priority

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

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

§ 7.1:6 Attorney's Fees

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

§ 7.2 Possessory Liens

§ 7.2:1 Scope of Worker's Possessory Lien

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

§ 7.2:2 Availability of Worker's Possessory Lien

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

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

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

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

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

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

§ 7.2:4 Requirement of Possession Generally

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

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

If the worker relinquishes a motor vehicle, motorboat, vessel, or outboard motor in reliance on a check, money order, or credit card transaction on which payment is stopped or has been dishonored because of insufficient funds or because the drawer has no account or has closed the account, the lien continues to exist, and the worker is entitled to regain possession of the item. Tex. Prop. Code § 70.001(b). A worker who wants to regain possession under these circumstances must do so in accordance with the repossession provisions of Tex. Bus. & Com. Code § 9.609. See generally part III. in chapter 5 of this manual. For the worker to have a perfected right to repossess the repaired property, the person obligated for the repairs must sign a notice stating that the article may be subject to repossession under Property Code section 70.001(c). The notice must be separate from the written contract, or, if printed on the written contract, it must be in bold-faced type, capitalized, underlined, or otherwise set off so as to be conspicuous, with a separate signature line. Tex. Prop. Code § 70.001(c).

The worker repossessing an article under the repair statute may charge for the costs of repossessing the article to the extent of the reasonable fair market value of the services required to take possession of the article. The reasonable fair market value is defined as the actual cost of the repossession. Tex. Prop. Code § 70.001(d).

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

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

§ 7.2:6 Priority of Worker's Possessory Lien

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

§ 7.2:7 Enforcement of Worker's Possessory Lien

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

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

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

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

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

§ 7.2:8 Judicial Supervision of Sale

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

§ 7.2:9 Excess after Sale

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

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

§ 7.2:10 Constitutionality

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

§ 7.3 Landlord's Liens

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

§ 7.4 Other Property Code Liens

§ 7.4:1 Types of Liens

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

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

§ 7.4:2 Enforcement Provisions

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

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

[Sections 7.5 through 7.10 are reserved for expansion.]

II. Private Mechanic's and Materialman's Liens

§ 7.11 Overview

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

Under chapter 53 of the Texas Property Code, the owner of real property being improved under a private construction contract is required to withhold from construction payments earned by

the general contractor (called an "original contractor" by the Property Code) both a statutory retainage equal to 10 percent of the payments earned by the general contractor and funds earned by but not yet paid to the general contractor that are "trapped" in the owner's possession by the receipt from subcontractors of claims of unpaid amounts owing on the project. The Property Code establishes a procedure whereby the unpaid claimant can assert a mechanic's lien on the property being improved to secure the owner's obligation to use the retainage and "trapped funds" to pay the claim. If the owner does not make the required payments to the lien claimant out of the retainage, the claimant can seek judicial foreclosure of the lien for the purpose of selling the property to obtain proceeds to pay the claim. The statute governing the perfection of claims on private projects is discussed at section 7.12 below.

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

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

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

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

§ 7.12 Statutory Mechanic's Lien

§ 7.12:1 Mechanic's Liens Generally

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

Chapter 53 establishes a procedure whereby mechanic's lien claimants owed money for their labor or materials may "perfect" a claim against retainage and trapped construction payments in the owner's possession. By following the requirements of chapter 53, the claimant also

obtains a lien against the owner's property, and this lien can be judicially foreclosed to generate funds to pay the claimant in the event the owner has not withheld or refuses to pay the statutorily mandated amounts. To accomplish this, the lien claimant must give notices and file a lien affidavit that meets the requirements of chapter 53 within the statutorily defined time frames. However, even if the claimant follows the procedures set forth in chapter 53, the amount the property owner is required to pay the claimant may prove to be less than the unpaid amount owing to the claimant.

§ 7.12:2 Scope and Utility of Lien

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

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

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

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

78th Leg., R.S., ch. 410, § 3 (H.B. 208), eff. Sept. 1, 2003.

Lending Services: Creditors advancing money to contractors are not entitled to a mechanic's lien, even if the funds are used to pay for labor and materials for a specific construction project. *Verschoyle v. Holifield*, 123 S.W.2d 878, 883 (Tex. 1939); *F.&C. Engineering Co. v. Moore*, 300 S.W.2d 323, 325 (Tex. Civ. App.—San Antonio 1957, writ ref'd n.r.e.).

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

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

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

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

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

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

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

§ 7.12:3 Property Subject to Lien

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

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

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

Lien Attaches to Original Tract Configuration: The mechanic's lien attaches to the tract as configured at the start of construction under the original contract. The subsequent conveyance of portions of the tract, even if before the filing of the actual lien affidavit, does not prevent the lien's attachment to the conveyed portions. *Valdez v. Diamond Shamrock*, 842 S.W.2d 273 (Tex. 1992).

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

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

§ 7.12:4 Payment Bonds

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

Statutory Payment Bond: Statutory payment bonds are established by the procedures set forth at Tex. Prop. Code §§ 53.201–.211. If a statutory payment bond in the requisite form and substance is filed in the public records, the lien claimant cannot file a mechanic's lien against the owner's property or file a suit against the owner, but instead must pursue payment on the payment bond. Tex. Prop. Code § 53.201(b).

The filing of the payment bond also relieves the owner of any obligation to withhold statutory retainage, observe fund trapping notices, or pay undisputed claims. *Industrial Indemnity Co. v. Zack Burkett Co.*, 677 S.W.2d 493, 495 (Tex. 1984) (construing article 5472d, section 7, of the Texas Revised Civil Statutes, now codified in Tex. Prop. Code § 53.201). Claims against the payment bond are perfected by giving the notices required under section 53.206 within the specified time periods. Tex. Prop. Code § 53.206. If the claim remains unpaid for sixty days after the claimant perfects the claim, the claimant may bring a lawsuit against the principal and surety on the bond. Tex. Prop. Code § 53.208(a). The claimant must sue on the bond within twelve months after the claim is perfected if the bond is recorded at the time the lien is filed or within two years if the bond was not recorded at the time the lien was filed; otherwise, the claim is barred by limitations. Tex. Prop. Code § 53.208.

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

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

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

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

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

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

1. the statement is in writing and substantially complies with a form in Property Code section 53.284;
2. the claimant has actually received payment in good and sufficient funds in full for the lien or payment bond claim; or
3. the statement is in a written original contract or subcontract for the construction, remodel, repair, or land development related to a single-family house, townhouse, or duplex and the statement is made before labor or

materials are provided under the original contract or subcontract. (Note that this subsection does not apply to a person who supplies only material and not labor. *See* Tex. Prop. Code § 53.282(c)).

Tex. Prop. Code § 53.282(a).

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

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

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

§ 7.12:6 Perfecting Statutory Lien Generally

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

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

§ 7.12:7 Relationship of Claimant to Owner

The filing and notice requirements applicable to perfecting statutory mechanic's lien claims dif-

fer according to the status of the party that contracted for the labor or materials.

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

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

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

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

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

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

§ 7.12:8 Proper Parties for Statutory Lien Notices

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

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

Practice Note: If time permits, the original contractor should consider giving the owner written demand for payment of the debt and notice of intent to file a mechanic's lien affidavit if the debt is not paid. The claimant's goal is to obtain payment while avoiding the generally unrecoverable expenses of preparing and filing a lien, and a demand or warning letter will often accomplish that goal. Further, giving the owner prior notice before filing the lien may help maintain the lines of communication with the

owner necessary to complete the construction project. (The contractor's filing a mechanic's lien claim without prior notice is particularly objectionable to an owner who is financing the construction, as the filing of a mechanic's lien claim puts the owner in default under most standard loan agreements.)

Subcontractor: Before the subcontractor can file a mechanic's lien affidavit, the subcontractor must first give statutorily prescribed notices of the unpaid amount of the claim to (1) the original contractor and the owner of unpaid amounts owing by a subcontractor and (2) the owner of unpaid amounts owing by the original contractor. Tex. Prop. Code § 53.056. The notice of claim must state the amount of the claim. Tex. Prop. Code § 53.056(b).

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

§ 7.12:9 Deadlines for Notices of Unpaid Contract Amounts

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

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

> a single-family house, duplex, triplex, or quadruplex or a unit in a multiunit structure used for residential purposes that is:
>
> (A) owned by one or more adult persons; and
>
> (B) used or intended to be used as a dwelling by one of the owners.

Tex. Prop. Code § 53.001(8).

Thus, residential construction contracts cover both homesteads and part-time, nonhomestead residences such as vacation homes. The requirements of Property Code sections 53.251–.260 pertaining to residential construction contracts are in addition to the other requirements of chapter 53. Tex. Prop. Code § 53.251(b).

The time frames for mailing notices and filing lien affidavits under a residential construction contract are generally shorter than those for a nonresidential one. *See* Tex. Prop. Code §§ 53.052(b), 53.252. Fund-trapping notices work in the same manner for residential construction projects as for nonresidential projects. *See* Tex. Prop. Code §§ 53.056, 53.252. Notice must be sent for *each* month in which unpaid work is furnished; however, the deadline for filing lien affidavits runs from the *last* month in which work was furnished by the claimant. Tex. Prop. Code §§ 53.052–.053, 53.252.

The following chart shows the applicable time frames for giving notice of an unpaid claim on a residential construction project.

	Sold to Owner:	*Sold to Original Contractor:*		*Sold to Subcontractor:*	
Month Labor/ Material Furnished	*File Lien Affidavit*	*Notice of Claim to Owner/ Original Contractor*	*File Lien Affidavit*	*Notice of Claim to Owner/ Original Contractor*	*File Lien Affidavit*
January	April 15	March 15	April 15	March 15	April 15
February	May 15	April 15	May 15	April 15	May 15
March	June 15	May 15	June 15	May 15	June 15
April	July 15	June 15	July 15	June 15	July 15
May	August 15	July 15	August 15	July 15	August 15
June	September 15	August 15	September 15	August 15	September 15
July	October 15	September 15	October 15	September 15	October 15
August	November 15	October 15	November 15	October 15	November 15
September	December 15	November 15	December 15	November 15	December 15
October	January 15	December 15	January 15	December 15	January 15
November	February 15	January 15	February 15	January 15	February 15
December	March 15	February 15	March 15	February 15	March 15

See section 7.12:10 below concerning notice of contractual retainage claims on residential construction projects.

See forms 7-8 and 7-9 in this chapter for a notice of claim against a homestead property. See form 7-10 for a contractor's disclosure statement for residential construction.

Payment Claim on Nonresidential Construction Contract: A nonresidential construction contract is any construction contract other than a residential construction contract.

A subcontractor who contracted with the original contractor must give notice of the unpaid balance to the owner with a copy to the original contractor by the fifteenth day of the third month following each month for which the material or labor was provided. Tex. Prop. Code § 53.056(b), (c). A subcontractor who contracted with a subcontractor must give notice of the unpaid balance to (1) the original contractor by the fifteenth day of the second month following each month for which the material or labor was provided and (2) the owner and the original contractor by the fifteenth day of the third month following the month for which the material or labor was provided. Tex. Prop. Code § 53.056(b). Notices of default in payment must be sent for each month in which unpaid labor or materials were furnished. Tex. Prop. Code § 53.056(b). The deadline for filing lien affidavits runs from the *last* month in which work was furnished by the claimant. Tex. Prop. Code §§ 53.053, 53.056(b). All lien affidavits must be filed before thirty days after completion of the original contract between the owner and the original contractors. *See* Tex. Prop. Code §§ 53.084, 53.101; see also "Filing Liens and Trapping Funds at Project's End" in section 7.12:11 below.

The following chart shows the applicable time frames for giving notice of an unpaid claim on a nonresidential construction project.

	Sold to Owner:	*Sold to Original Contractor:*		*Sold to Subcontractor:*		
Month Labor/ Material Furnished	*File Lien Affidavit*	*Notice of Claim to Owner/ Original Contractor*	*File Lien Affidavit*	*Notice of Claim to Original Contractor*	*Notice of Claim to Owner/ Original Contractor*	*File Lien Affidavit*
January	May 15	April 15	May 15	March 15	April 15	May 15
February	June 15	May 15	June 15	April 15	May 15	June 15
March	July 15	June 15	July 15	May 15	June 15	July 15
April	August 15	July 15	August 15	June 15	July 15	August 15
May	September 15	August 15	September 15	July 15	August 15	September 15
June	October 15	September 15	October 15	August 15	September 15	October 15
July	November 15	October 15	November 15	September 15	October 15	November 15
August	December 15	November 15	December 15	October 15	November 15	December 15
September	January 15	December 15	January 15	November 15	December 15	January 15
October	February 15	January 15	February 15	December 15	January 15	February 15
November	March 15	February 15	March 15	January 15	February 15	March 15
December	April 15	March 15	April 15	February 15	March 15	April 15

See section 7.12:10 below for special notice requirements not included in this chart.

See form 7-12 for a notice to original contractor by second-tier claimant.

Practice Note: As a practical matter, the third-month notice is not required if the second-month notice contains the statutory language required by section 53.056 and is sent to both the original contractor and the owner on or before the fifteenth day of the second month after all or part of the claimant's labor or material was provided. See form 7-8. One consideration in favor of sending the notices sequentially rather than concurrently is to give the original contractor the opportunity to see that payment is made without putting the owner on notice of potential problems with the original contractor's subcontractors and possibly creating friction between the owner and the original contractor that will affect the subcontractor. However, the delay in presenting the claim to the owner may adversely affect the amount of funds "trapped" in the owner's hands by the notice, as discussed in section 7.12:20 below.

Specially Fabricated Materials: Sections 53.021 and 53.058 of the Property Code establish additional notice requirements for contractors who provide specially fabricated materials. In order for a claimant providing specially fabricated materials to fully protect his lien rights, the claimant must give the owner notice not later than the fifteenth day of the second month after the month in which the claimant receives and accepts the order for the specially fabricated materials. Tex. Prop. Code § 53.058(b). If the contract is with a person other than the original contractor, the claimant must also give notice within that same time to the original contractor. Tex. Prop. Code § 53.058(b). The notice must contain a statement that the order has been received and accepted and that includes the price of the order. Tex. Prop. Code § 53.058(c). This notice must be sent by registered or certi-

fied mail, return receipt requested, to the last known business address or residence address of the owner or reputed owner and the original contractor as applicable. Tex. Prop. Code § 53.058(d). It is not necessary that the specially fabricated materials actually be delivered to the construction site for the claimant to perfect the lien claim. Tex. Prop. Code § 53.021(b). If the claimant actually delivers the specially fabricated materials to the job site, the claimant must also comply with the normal notice procedures for material suppliers. Tex. Prop. Code § 53.058(e). A claimant providing specially fabricated materials who fails to give the section 53.058 notice will still have a valid claim as to delivered items if the required notices are given under section 53.056 of the Property Code. Tex. Prop. Code § 53.058(f). See form 7-13 for a notice regarding specially fabricated materials.

§ 7.12:10 Notice for Contractual Retainage Claims

Both original contracts and subcontracts may provide that a percentage of each payment earned by the contractor supplying material or labor will be held back or "retained" until final completion of work. This contractual "retainage" serves as a kind of security deposit or reserve fund that can be used to address problems with the quality of the contractor's work or defaults by the contractor in paying for labor or materials used in the contract.

If a subcontract provides for contractual retainage, the retainage could be construed as an unpaid amount owing under the contract subject to the regular notice and filing requirements of the mechanic's lien statutes, notwithstanding that the funds were withheld pursuant to an agreement and not because of a payment default. To relieve that subcontractor of the burden of giving notices for each month's contractual retainage, the Texas Property Code provides that by giving the project owner (and the original contractor, if the retainage pertains to a contract with a second-tier or lower subcontractor) early notice of the contractual retainage agreement, the subcontractor is relieved of the burden of giving the default notices otherwise required. *See* Tex. Prop. Code § 53.057.

Retainage Claims on Nonresidential Projects: A subcontractor on a nonresidential construction project may give the owner written notice of a subcontract containing a retainage agreement under section 53.057 instead of or in addition to the notice under section 53.056 (labor and materials) or section 53.252 (specially fabricated materials). Tex. Prop. Code § 53.057(a). Notice under section 53.057 must be given to the owner not later than the earlier of (1) the thirtieth day after the date the retainage agreement is completed, terminated, or abandoned; or (2) the thirtieth day after the date the original contract is terminated or abandoned. Tex. Prop. Code § 53.057(b). If the claimant's retainage agreement is with a subcontractor and not with the original contractor, the claimant must also give notice within that time frame to the original contractor. Tex. Prop. Code § 53.057(b–1). If the claimant is a subcontractor, filing a notice for contractual retainage under section 53.057 and section 53.055 will relieve the subcontractor of the obligation to send monthly fund-trapping notices for the retainage under section 53.056. *See* Tex. Prop. Code § 53.057(e); *see also* Tex. Prop. Code § 53.056(b).

Retainage Claims on Residential Projects: The claimant must give notice of the retainage agreement to the owner not later than the earlier of (1) the thirtieth day after the date the retainage agreement is completed, terminated, or abandoned; or (2) the thirtieth day after the date the original contract is terminated or abandoned. Tex. Prop. Code § 53.057(b). If the contract is a subcontract, the claimant must also give notice to the original contractor. Tex. Prop. Code § 53.057(b–1). No further notice of contractual retainage agreements is required on residential

construction projects. Tex. Prop. Code § 53.057(e).

Form of Retainage Notice: The notice must generally state the existence of a requirement for retainage and include the name and address of the claimant and the name and address of the subcontractor, if the retainage agreement is with a subcontractor. Tex. Prop. Code § 53.057(c). These notices must be sent to the last known business or residence address of the owner or reputed owner and the original contractor as applicable. Tex. Prop. Code § 53.057(d). See form 7-14 in this chapter for a notice of agreement providing for retainage.

Effect of Retainage Notice: Although section 53.057(e) provides that a claimant who gives notice under section 53.057 is not required to give any other notices for retainage, the notice does not appear to authorize the owner to withhold any additional funds as under the fund-trapping notice described in section 7.12:11 below.

A claimant has a lien on the retained funds, and the owner is personally liable to the claimant for such funds, if the claimant gives notice of the filed affidavit required by section 53.055 and gives notice in accordance with section 53.057 along with either complying with chapter 53, subchapter E, of the Texas Property Code or filing an affidavit claiming a lien. Tex. Prop. Code § 53.057(f). If the claimant files an affidavit claiming a lien, it must be filed not later than the earliest of—

1. the date required for filing an affidavit under section 53.052;
2. the fortieth day after the date stated in an affidavit of completion as the date of completion of the work under the original contract, if the owner sent the claimant notice of an affidavit of completion as required;
3. the fortieth day after the date of termination or abandonment of the original contract, if the owner sent the claimant notice of the termination or abandonment as required; or
4. the thirtieth day after the date the owner sent to the claimant a written notice of demand for the claimant to file the affidavit claiming the lien.

Tex. Prop. Code § 53.057(f)(1)(B).

An owner's written demand for the claimant to file an affidavit claiming a lien must contain the owner's name and address, a description of the real property on which the improvement is located that is legally sufficient for identification, and a statement that the claimant must file the lien affidavit not later than the thirtieth day after the date the demand is sent. Tex. Prop. Code § 53.057(g)(1)(2). The written demand is effective only for the amount of contractual retainage earned by the claimant as of the day the demand was sent. Tex. Prop. Code § 53.057(g)(3).

§ 7.12:11 Funds Subject to Lien Claims

Statutory Retainage: Section 53.101 of the Texas Property Code provides that—

(a) During the progress of work under an original contract for which a mechanic's lien may be claimed and for 30 days after the work is completed, the owner shall retain:

(1) 10 percent of the contract price of the work to the owner; or

(2) 10 percent of the value of the work, measured by the proportion that the work done bears to the work to be done, using the contract

> price or, if there is no contract price, using the reasonable value of the completed work.

Tex. Prop. Code § 53.101.

For purposes of chapter 53 of the Property Code, the work is not "completed" until actual completion; substantial completion will not suffice. Tex. Prop. Code § 53.001(15). The required retainage is computed separately for each original contract and not for the project as a whole. *Page v. Structural Wood Components, Inc.*, 102 S.W.3d 720, 723–24 (Tex. 2003). If the owner fails to withhold such retainage, the owner is potentially liable to lien claimants for the payment of lien claims up to the amount of the retainage that should have been withheld. Tex. Prop. Code § 53.105(a); *Hunt County Lumber, Inc. v. Hunt-Collin Electric Co-operative, Inc.*, 749 S.W.2d 179 (Tex. App.—Dallas 1988, writ denied). Retainage secures artisans and mechanics first and then the other lien claimants in proportion to their relative claims. Tex. Prop. Code §§ 53.102, 53.104.

Trapped Construction Payments: In addition to meeting the minimum statutory retainage requirements, an owner is also required to withhold from payments earned by the original contractor an amount sufficient to pay alleged claims if the owner is given written notice to the effect that, if the claim remains unpaid, the owner may be personally liable and the owner's property subjected to a lien unless the owner withholds payments from the contractor for payment of the claim or the claim is otherwise paid or settled. Tex. Prop. Code §§ 53.056(d), 53.081, 53.082.

Practice Note: The following statement is sufficient to comply with section 53.056(d): "If the claim remains unpaid, you may be personally liable and your property may be subjected to a lien unless you withhold payments from the contractor for payment of the claim or the claim is otherwise paid or settled." *See* Tex. Prop. Code § 53.056(d). This notice is commonly referred to as a "fund trapping" notice and should be routinely included as part of the notice of unpaid claim sent to the owner and original contractor. Trapping funds is important to the claimant because the statutory 10 percent retainage may not in itself be sufficient to cover all the perfected claims under a contract.

Once the owner receives a notice of default with such a statement, the owner must withhold trapped funds from payments owing to the original contractor until the time for filing the affidavit of mechanic's lien has passed or, if a lien affidavit has been filed, until the lien claim is satisfied or released. Tex. Prop. Code § 53.082. The amount trapped is the amount the owner owes the original contractor, over and above offsets and back charges. *Lennox Industries v. Phi Kappa Sigma Educational & Building Ass'n*, 430 S.W.2d 404 (Tex. Civ. App.—Austin 1968, no writ); *accord Page*, 102 S.W.3d at 720.

Fund Trapping for Specially Fabricated Materials: An owner may withhold funds under a fund-trapping notice given with respect to specially fabricated materials under section 53.058 if the owner has also received notice of an unpaid claim under Property Code section 53.056.

Filing Liens and Trapping Funds at Project's End: Under Property Code sections 53.084 and 53.101, the owner has to hold statutory retainage funds for only thirty days past "completion of the work," which the supreme court has interpreted to mean the completion or termination of the original contract under which a claimant is proceeding. *See* Tex. Prop. Code §§ 53.084, 53.101. *See Page v. Marton Roofing, Inc.*, 102 S.W.3d 733, 735 (Tex. 2003) (fund-trapping liens); *Page v. Structural Wood Components, Inc.*, 102 S.W.3d 720, 725 (Tex. 2003) (statutory liens). Moreover, all lien affidavits must be filed within thirty days of completion of

the original contract. Accordingly, these statutes effectively shorten the time otherwise given a claimant for giving a fund-trapping notice.

Practice Note: Contractors providing labor and materials at the end of a project (those doing interior painting and carpet installation, for example) are more likely to be affected by the shorter effective deadlines than contractors working at the start of a project (those pouring the foundation, for example). However, any contractor could be caught by shorter deadlines if the owner terminates the original contract (for the original contractor's default, for example) before the original anticipated completion date. The only certain way for a claimant to protect his lien rights is to give all required notices and file the lien affidavit within thirty days of the completion of the claimant's work or delivery of materials.

§ 7.12:12 Demands for Payment

Once a subcontractor has provided the owner with notice of a payment claim, the subcontractor may demand payment from the owner. The demand must state that all or part of the claim has accrued under Property Code section 53.053 or is past due according to the agreement between the parties. Tex. Prop. Code § 53.083(a). A copy of the demand letter must be sent to the original contractor. Once this notice is given, the original contractor must notify the owner within thirty days if it intends to dispute the claim. Tex. Prop. Code § 53.083(d). If the original contractor does not provide timely notice to the owner that it disputes the claim, the original contractor is considered to have assented to the demand, and the owner is required to pay the claim. Tex. Prop. Code § 53.083(b). The claimant may incorporate a demand for payment into the original notice of claim. Tex. Prop. Code § 53.083(c). Notice and demand alone will not preserve a lien claim. If the owner does not pay the claim, a mechanic's lien affidavit must still be filed within the time required by the statute, except as allowed by Texas Property Code section 53.057(f). Tex. Prop. Code §§ 53.052(a), 53.103.

§ 7.12:13 Mechanic's Lien Affidavit

If the claimant does not receive payment after giving notice of its claim, the next step is to file the mechanic's lien affidavit to perfect the lien claim against the owner's interest in the real property to secure payment of the claimant's interest in the statutory retainage and any trapped funds.

§ 7.12:14 Form of Statutory Lien Affidavit

General Contents: The lien affidavit must be signed by either the person claiming the lien or by an authorized representative on the claimant's behalf and must contain—

1. a sworn statement of the amount of the claim;
2. the name and last known address of the owner or reputed owner;
3. a general statement of the kind of work done and materials furnished by the claimant and, for a claimant other than an original contractor, a statement of each month in which the work was done or the materials were furnished;
4. the name and last known address of the person by whom the claimant was employed or to whom the claimant furnished the material or labor;
5. the name and last known address of the original contractor;
6. a description, legally sufficient for identification, of the property sought to be charged with a lien;

7. the claimant's name, mailing address, and physical business address; and

8. for a claimant other than an original contractor, a statement identifying the date each notice of the claim was sent to the owner and the method by which the notice was sent.

Tex. Prop. Code § 53.054.

See forms 7-15 and 7-16 in this chapter for an affidavit and cover letter.

Homestead Lien Affidavit: A lien affidavit against a homestead must contain the mandatory disclosure set out in Tex. Prop. Code § 53.254(g). It reads "Notice: This is not a lien. This is only an affidavit claiming a lien." This notice must be conspicuously printed, stamped, or typed at the top of the page in a type size equal to a least ten-point boldface or the computer equivalent. Tex. Prop. Code § 53.254(f).

Jurat Required: The notary statement on the lien affidavit must state that the affidavit was "subscribed and sworn to" and not just "acknowledged"; otherwise, the lien affidavit is legally insufficient to perfect the claim. *See Sugarland Business Center, Ltd. v. Norman*, 624 S.W.2d 639, 641 (Tex. App.—Houston [14th Dist.] 1981, no writ); *Perkins Construction Co. v. Ten-Fifteen Corp.*, 545 S.W.2d 494, 498 (Tex. Civ. App.—San Antonio 1976, no writ); *Conn, Sherrod & Co. v. Tri-Electric Supply Co.*, 535 S.W.2d 31, 34 (Tex. Civ. App.—Tyler 1976, writ ref'd n.r.e.); *Crockett v. Sampson*, 439 S.W.2d 355, 359 (Tex. Civ. App.—Austin 1969, no writ).

Description of Work and Materials: The affidavit must provide a meaningful description of the general type of work or material supplied, but it is not necessary to describe individual items of work done or material furnished. Tex. Prop. Code § 53.054(c). If there is a written contract for the work, it is often useful to attach a copy to the affidavit as an exhibit. The affidavit may use abbreviations or symbols customarily used in the trade. Tex. Prop. Code § 53.054(c). But using abbreviations and symbols that are not commonly recognized in the trade may render the lien invalid. *See Haden Co. v. Mixers, Inc.*, 667 S.W.2d 316, 316 (Tex. App.—Dallas 1984, no writ) (holding that description "5—12' 2" x 14' 1" O.H.Std.M.G. $3,328.00" was "gibberish" and insufficient to perfect lien).

Multiple Contracts: The better practice is not to file one lien claim for payments owing under multiple contracts, even if the different projects are located in a single tract or development. *See H.B. Zachry Co. v. Waller Creek, Ltd. (In re Waller Creek, Ltd.)*, 867 F.2d 228 (5th Cir. 1989) (lien claim defeated on grounds that claims on two separate contracts combined into one lien affidavit).

§ 7.12:15 Requests for Information

By statute, the mechanic's lien affidavit must contain certain information that may not be known or easily learned by the claimant. *See* Tex. Prop. Code § 53.054. On written request, owners and contractors must furnish the mechanic's lien claimant with information needed to perfect the claimant's lien rights or evaluate the merits of the payment claims. Tex. Prop. Code § 53.159.

Request to Owner: On written request from any person furnishing labor or materials for a project, an owner is required to furnish within a reasonable time not exceeding ten days from receipt of the request—

1. a description of the property being improved legally sufficient to identify it;

2. a statement of whether a bond is in place on the construction project and, if a bond does exist, the name of the

bonding company and a copy of the bond;

3. a statement of whether there are any prior recorded liens or security interests against the real property and the name and address of any persons having lien or security interests; and

4. the date on which the original contract for the project was executed.

Tex. Prop. Code § 53.159(a).

Subsection 53.159(g) of the Texas Property Code provides that a subcontractor who does not receive information requested under subsection (a)(4) within the period prescribed is not required to comply with section 53.057 and may perfect a lien for retainage by filing a lien affidavit under section 53.052. Subsection (g) expires on September 1, 2013.

See form 7-17 in this chapter for a request to an owner.

Request to Original Contractor: On written request from any person furnishing labor or materials under the original contract, the original contractor is required to provide within a reasonable time not exceeding ten days from the receipt of the request—

1. the name and last known address of the person to whom the original contractor has furnished labor and materials for the project (usually the owner);

2. confirmation of whether the original contractor furnished or was furnished with a payment bond;

3. if a bond does exist, the name and address of the surety and a copy of the bond; and

4. the date on which the original contract for the project was executed.

Tex. Prop. Code § 53.159(b).

See form 7-18 for a request to an original contractor.

Request to Subcontractor: On written request from an owner, original contractor, bond surety on the original contract, or any person furnishing work under a subcontract, a subcontractor is required to provide within a reasonable time not exceeding ten days from receipt of the request—

1. the name and last known address of each person from whom the subcontractor purchased labor or materials (other than materials furnished from the subcontractor's inventory);

2. the name and last known address of each person to whom the subcontractor furnished labor or materials;

3. whether the subcontractor has furnished or been furnished a payment bond on the project; and

4. if a payment bond exists, the name and last known address of the surety and a copy of the bond.

Tex. Prop. Code § 53.159(c).

See form 7-19 for a request to a subcontractor.

Information from Claimant: An owner, contractor, or bond surety may request that a claimant for a lien or under a bond furnish a copy of any applicable written agreement, purchase order, or contract and any billing statement or payment request reflecting the amount claimed and, if further requested, the estimated amount due for each calendar month in which the claimant performed labor or furnished materials. The claimant must provide the information within thirty days of receipt of the request. Tex. Prop. Code § 53.159(d).

Payment of Costs: If the person from whom information is requested does not have a direct contractual relationship on the project with the

person requesting the information, the person requesting the information may be required to pay for the actual costs, not to exceed $25, of furnishing the information. Tex. Prop. Code § 53.159(e).

Failure to Provide Information: If a person other than a claimant requested to furnish information under Property Code section 53.159(e) fails to provide it, that person may be liable to the requesting person for the reasonable and necessary costs incurred in obtaining the requested information elsewhere. Tex. Prop. Code § 53.159(f).

No Tolling: Chapter 53 does not allow requests for information necessary to prepare a notice letter or a lien affidavit under Code section 53.159 to toll the statutory time limits for sending a notice of claim or filing a mechanic's lien affidavit. Therefore, the claimant should always allow enough time to obtain the required information elsewhere should the requested party fail to provide it in a timely manner.

§ 7.12:16 Deadlines for Filing Statutory Lien Affidavit

The lien affidavit itself must be filed by the earlier of (1) the fifteenth day of the fourth calendar month after the month in which the indebtedness accrues on a nonresidential construction contract (Tex. Prop. Code § 53.052(a)); (2) the fifteenth day of the third month after the month in which the indebtedness accrues on a residential construction project (Tex. Prop. Code § 53.052(b)); or (3) the thirtieth day after completion or termination of the original contract under which the claim arises (*Page v. Structural Wood Components, Inc.*, 102 S.W.3d 720, 723–24 (Tex. 2003)).

Original Contractor: Indebtedness to an original contractor accrues—

1. on the last day of the month in which a written declaration by the original contractor or the owner is received by the other party to the original contract stating that the original contract has been terminated; or
2. on the last day of the month in which the original contract has been completed, finally settled, or abandoned.

Tex. Prop. Code § 53.053(b).

Subcontractor: Indebtedness to a subcontractor accrues on the last day of the last month in which the labor was performed or the material furnished. Tex. Prop. Code § 53.053(c).

Specially Fabricated Materials: Indebtedness for specially fabricated materials accrues on the last day of—

1. the last month in which materials were delivered;
2. the last month in which delivery of the last of the material would normally have been required at the job site; or
3. the month of any material breach or termination of the original contract by the owner or contractor or of the subcontract under which the specially fabricated material was furnished.

Tex. Prop. Code § 53.053(d).

Retainage: "A claim for retainage accrues on the last day of the month in which all work called for by the contract between the owner and the original contractor has been completed, finally settled, or abandoned." Tex. Prop. Code § 53.053(e).

Architects, Engineers, and Surveyors: Since an architect, engineer, or surveyor is usually an original contractor, the "accrual of indebtedness" for determining the lien filing deadline will run from the completion of his services. *See* Tex. Prop. Code § 53.053(b). The

indebtedness may accrue before the actual start of construction, if all the contract work is preparatory in nature. This means that the architect, engineer, or surveyor may have to file a lien before the start of construction.

§ 7.12:17 Special Homestead Requirements

If labor or materials are provided for work on a homestead property, no mechanic's lien can be created against the property unless the original contractor meets very specific statutory requirements before the start of construction on the project. If the original contractor does not meet these requirements, no subcontractor providing labor or materials for the project will be able to meet the statutory requirements to perfect a mechanic's lien on the homestead property. Tex. Const. art. XVI, § 50; Tex. Prop. Code § 53.254.

Basic Requirements: If a homestead is involved, to create a valid mechanic's lien against the property—

1. the original contractor and the owner must execute a written agreement setting out the terms of the contract before work commences;
2. if the owner of the homestead is married, both spouses must sign the contract; and
3. the contract must be filed with the clerk of the county in which the homestead is located.

Tex. Prop. Code § 53.254.

The contract inures to the benefit of all persons who labor or furnish material for the original contractor. Tex. Prop. Code § 53.254(d).

Practice Note: While Code section 53.254 provides that the contract must be signed before construction starts, no particular time for the filing of the contract is specified. However, filing the contract before the start of construction will evidence that the contract was timely executed.

Extensions of Credit: Any homestead construction project involving a loan has additional statutory requirements that must be met in connection with closing the construction contract with the owner. A contract for the improvement (as opposed to new construction) of homestead property cannot be signed before the fifth day after the owner has made written application for the extension of credit unless the owner must make immediate repairs to conditions that materially affect the health or safety of the people residing in the homestead. Tex. Const. art. XVI, § 50(a)(5)(B). Because the validity of the lien is in issue, lenders are highly reluctant to waive the five-day period. The construction contract cannot be executed except in the office of the lender, an attorney, or a title company. Tex. Const. art. XVI, § 50(a)(5)(D). (That is, there are no more "kitchen table closings" by home improvement salesmen that create liens on the property.) The owner can rescind a construction contract within three days after execution. Tex. Const. art. XVI, § 50(a)(5)(C).

Additional Notices: Certain additional notices are required with respect to homestead construction projects.

Disclosure Statement. The Property Code provides that a mandatory disclosure statement must be provided to the owner—

1. by a third-party lender, before closing of the loan (Tex. Prop. Code § 53.257);
2. by the original contractor, before the residential construction contract is executed (Tex. Prop. Code § 53.255(a)); and
3. by any lien claimant, with the second-month notice letter to the owner (Tex. Prop. Code § 53.252(a), (b)).

See form 7-10 in this chapter for a disclosure statement.

Practice Note: There are no statutory penalties for failing to give the notice, and the statute expressly provides that the failure of an original contractor or a lender to provide the statement will not invalidate a lien. Tex. Prop. Code §§ 53.255(c), 53.257(c). However, some attorneys argue that the statute creates a new civil cause of action in favor of residential owners.

Notice of Proposed Subcontractors. Before beginning construction, the original contractor must provide the owner with a list of the proposed subcontractors and suppliers for the project. Tex. Prop. Code § 53.256. This list must contain the notice set forth at Property Code section 53.256 and must be updated within fifteen days after each occasion in which a subcontractor or supplier is added or deleted. Tex. Prop. Code § 53.256(a)(2), (b). The owner may waive the right to receive the list by a written waiver that meets the requirements of Property Code section 53.256(d). The waiver may be included in the residential construction contract or may be separate. Tex. Prop. Code § 53.256(d). There is no express penalty for failure to provide the list, and the failure to provide the list does not invalidate a lien. Tex. Prop. Code § 53.256(c). See form 7-11 for a list of subcontractors and suppliers.

Disbursement of Funds. Whenever the original contractor requests payment on a residential construction contract (whether from the owner or a third-party lender), the original contractor must provide a disbursement statement showing at minimum the name and address of every person contracting directly with the original contractor and whom the original contractor intends to pay with the requested funds. Tex. Prop. Code § 53.258. If the owner finances the construction through a third-party lender, the lender must obtain a signed disbursement statement from the original contractor for each advance and provide to the owner a statement of funds disbursed since the last disbursement statement. Tex. Prop. Code § 53.258(b). The original contractor's or the lender's failure to provide the statement does not invalidate a mechanic's lien claim, but there are criminal penalties for the intentional, knowing, or reckless provision of false or misleading information in a disbursement statement. Tex. Prop. Code § 53.258(e), (f). See form 7-20 for a disbursement statement.

Final Payment Affidavit. As a condition to final payment, the original contractor must execute and deliver to the owner an affidavit stating that the original contractor has paid each person in full for all labor and materials used in the construction of improvements on the real property (or, in the alternative, stating who has not been paid, and, if known, their address and telephone number and the amount owing). Tex. Prop. Code § 53.259(a). See form 7-21 for an affidavit of bills paid.

Practice Note: The mechanic's lien statutes pertaining to homesteads do not differentiate between the residential homestead and the business homestead. Accordingly, if a contractor intends to work on a business location owned by an individual rather than a corporate entity, the contractor should carefully evaluate whether a business homestead issue exists.

§ 7.12:18 Owner's Financial Liability

The owner is liable to an original contractor for any unpaid portion of the original construction contract that was earned by the original contractor. However, there are statutory limits on an owner's liability to subcontractors. In general, the owner's maximum liability to the subcontractors as a group under any particular original contract is the sum of—

1. the 10 percent statutory retainage the owner is required to hold back from the original contractor for thirty days

after final completion of the construction project; and

2. any funds "trapped" under a proper notice of nonpayment under Tex. Prop. Code §§ 53.081–.084.

However, the claimant traps only those funds owed by the owner to the contractor over and above offsets and back charges. *Lennox Industries v. Phi Kappa Sigma Educational & Building Ass'n*, 430 S.W.2d 404 (Tex. Civ. App.—Austin 1968, no writ), *overruled in part by Hayek v. Western Steel Co.*, 478 S.W.2d 786 (Tex. 1972), *but supported by Page v. Structural Wood Components, Inc.*, 102 S.W.3d 720 (Tex. 2003).

§ 7.12:19 Priority of Lien Claims

Except for the special preference to (1) individual artisans and mechanics as to statutory retainage under Tex. Prop. Code § 53.104 and (2) liens for preconstruction work by architects, engineers, and surveyors under Tex. Prop. Code §§ 53.021(c), 53.124(e), the priority date of a perfected mechanic's lien claim relates back to the date of the start of construction or the delivery of materials for the project under the contract between the owner and the original contractor. Tex. Prop. Code § 53.124(a). For this purpose, a subcontractor's claim priority will be determined by tracing back through the chain of subcontracts to the start of construction under the original contract with the owner. The effect is that (except for the statutory exceptions referenced above) all lien claims of all subcontractors under the same original contract will have the same priority date, regardless of the actual dates of filing of the respective lien affidavits.

Multiple Original Contracts: If there is more than one original contractor on a project and construction under the separate contracts with the different original contractors began on different dates, the date of relative lien priority for the claimant is determined by the start of construction under the particular original contract under which the claimant performed.

Priority with Respect to Third Parties: All subcontractors with a perfected lien have a priority over other creditors of the original contractor. Tex. Prop. Code § 53.121.

Priority of Claims for Removables: Mechanic's lien claimants have a preferential first priority over all other liens on removable improvements, regardless of the relative priority of filing. Tex. Prop. Code § 53.123. "Removable improvements" generally means items that can be removed without material injury to the land or other improvements. *First National Bank in Dallas v. Whirlpool Corp.*, 517 S.W.2d 262, 269 (Tex. 1974). The question of "material injury" is usually one of fact. Postremoval damage to the remaining property might also be considered in determining whether an item was a "removable" under the mechanic's lien statutes. *Exchange Savings & Loan Ass'n v. Monocrete Pty., Ltd.*, 629 S.W.2d 34, 36–37 (Tex. 1982) (removal of roofing tiles would cause material injury to townhouse as matter of law because it would expose structure to postremoval damage by elements). Because the priority preference for removables defeats prior recorded liens (*Whirlpool Corp.*, 517 S.W.2d at 269), the lien for removables can be a useful tool for extracting payment from the project owner or an existing lienholder, but it is not a self-help lien. The contractor must get a court order authorizing the removal and cannot simply resort to self-help remedies. *See* Tex. Prop. Code § 53.154.

One court has held that a subcontractor claimant must be able to identify the specific removable materials it furnished in order to assert the priority claim for removables. *See, e.g., Kaspar v. Cockrell-Riggins Lighting Co.*, 511 S.W.2d 109 (Tex. Civ. App.—Eastland 1974, no writ). But another court has held that an original contractor claimant may assert a priority claim to all removable items furnished under the original

contract, even if such items were supplied through subcontractors. *L&N Consultants, Inc. v. Richard H. Sikes*, 648 S.W.2d 368, 370–71 (Tex. App.—Dallas 1983, writ ref'd, n.r.e.).

§ 7.12:20 Payment on Perfected Claims

The owner is to use the retainage and trapped funds to pay the perfected mechanic's lien claimants on a priority class by priority class basis. If the retainage and trapped funds held by the owner are insufficient to discharge all the perfected lien claims of a particular class, the available funds are to be divided pro-rata among the claimants of the class in accordance with the relative amount of their claims.

If the owner properly disburses among the perfected claimants the full amount of the retainage and trapped funds the owner was required to hold under the Texas Property Code, the claimants cannot pursue the owner or the owner's property for the balance of their respective payment claims.

Practice Note: It is not uncommon for the retainage and trapped funds held by the owner to be less than the perfected claims. This occurs, for example, when a particular lien claimant fails to trap funds in the owner's hands but otherwise perfects the lien claim.

Practice Note: Because (1) claims of equal priority may accrue and be perfected throughout the entire construction period and for thirty days thereafter and (2) fact issues may exist as to the validity of the payment claims made by any one or more of the claimants (which will affect the calculation of the proper pro-rata division of funds among claimants), the owner is typically reluctant to make any payment on lien claims before thirty-one days after final completion of the construction project, and even then disbursement of funds carries great potential risks to the owner. Unless a global agreement can be reached among the claimants and the owner, the owner may be forced to interplead the funds or seek a judicial determination of the proper amounts owing to the respective claimants. The delay and cost of such litigation is, of course, a great incentive for the various parties to compromise and settle their claims.

Attorney's Fees: The court must award both original contractors and subcontractors equitable costs and attorney's fees in a foreclosure action. However, with respect to a lien or claim arising out of a residential construction contract, the court is not required to order the property owner to pay costs and attorney's fees. Tex. Prop. Code § 53.156.

§ 7.12:21 Judicial Enforcement of Lien

Limitations for Filing Suit: If the claimant has timely filed and perfected a mechanic's lien affidavit but the owner refuses to pay the amount properly owing to the claimant, the claimant can seek payment through a judicial foreclosure sale of the property that was the subject of the mechanic's lien affidavit. Statutory mechanic's liens can be foreclosed only by judicial action. If the claim pertains to a nonresidential construction claim, suit to foreclose the lien must be filed within two years of the later of the last day a claimant may file the lien affidavit or one year after completion, termination, or abandonment of the work under the original contract under which the lien is claimed. Tex. Prop. Code § 53.158(a). If the claim pertains to a residential construction contract, suit to foreclose the lien must be filed by the later of one year after the last day a claimant could file a lien affidavit under section 53.052 of the Property Code or one year after completion, termination, or abandonment of the original contract. Tex. Prop. Code § 53.158(b).

Jurisdiction: The state district courts have original jurisdiction over suits to foreclose a mechanic's lien, but special exceptions in chapter 25 of the Government Code grant shared

jurisdiction to the county courts in Harris, Calhoun, Hopkins, Kaufman, Nueces, Panola, Smith, and Tarrant counties.

Judicial Foreclosure Proceeds: If the owner's property goes to judicial foreclosure sale, the sales proceeds will be used to pay each class of claimant in accordance with its relative priority, for as far as the sales proceeds will go. If the available sales proceeds are not sufficient to pay all the claims of a particular priority class, the available funds will be divided pro-rata among the claimants, in accordance with the relative amount of their claims, as determined by the court. Tex. Prop. Code §§ 53.104(b), 53.122(b).

Attorney's Fees and Costs: The court must award costs and reasonable attorney's fees for a suit to foreclose on a lien or declare a lien claim invalid. However, with respect to a lien or claim arising out of a residential construction contract, the court is not required to order the property owner to pay costs and attorney's fees. Tex. Prop. Code § 53.156.

§ 7.12:22 Arbitration of Claim

While chapter 53 of the Texas Property Code establishes a statutory system for handling mechanic's lien claims on construction projects, the parties may execute contracts providing for mandatory binding arbitration of mechanic's lien claims. *Dalton Contractors v. Bryan Autumn Woods*, 60 S.W.3d 351, 353–54 (Tex. App.—Houston [1st Dist.] 2001, no pet.), *cited with approval in CVN Group, Inc. v. Delgado*, 95 S.W.3d 234, 242 (Tex. 2002); *Hearthshire Braeswood Plaza v. Bill Kelly Co.*, 849 S.W.2d 380, 390–91 (Tex. App.—Houston [14th Dist.] 1993, writ denied).

§ 7.12:23 Removing Invalid Mechanic's Liens

Texas Property Code sections 53.160–.162 establish a summary motion procedure for removing invalid mechanic's lien claims. *See* Tex. Prop. Code §§ 53.160–.162. A suit and a summary motion must be filed. A bond may be required in connection with an order removing the lien, pending the final outcome in the litigation. Tex. Prop. Code § 53.161. The Code also establishes procedures for reviving the lien if the claimant should ultimately prevail in court. *See* Tex. Prop. Code § 53.162.

§ 7.12:24 Prompt Pay Statute

While not part of mechanic's lien statutes in Texas Property Code chapter 53, Code chapter 28, on prompt payment to contractors and subcontractors, provides significant rights to the mechanic's lien claimant. Chapter 28 provides that for private (not public) projects, on receipt from a contractor of a written request for payment of an invoiced amount, the owner has thirty-five days to make the payment (less statutory or contractual retainage) for work properly performed or materials delivered. *See* Tex. Prop. Code § 28.002(a). Once the contractor receives payment he must pay his subcontractors their respective shares of the draw not less than seven days after receipt of payment from the owner. Tex. Prop. Code § 28.002(b). In turn, these subcontractors must pay their subcontractors their proportionate share within seven days thereafter. Tex. Prop. Code § 28.002(c).

If a good-faith dispute exists concerning the amount properly payable, the owner, contractor, or subcontractor may not withhold more than (1) 110 percent of the amount in dispute on residential construction projects and (2) 100 percent of the amount in dispute on nonresidential construction projects. Tex. Prop. Code § 28.003.

Contractors and subcontractors have a statutory right to suspend work on private nonresidential construction projects if the owner does not make payment in accordance with the statute. The work cannot be suspended, however, until the tenth day after the claimant gives notice to the owner that payment has not been received and notifies the owner of the intent to suspend performance. Tex. Prop. Code § 28.009(a). If there is construction financing on the project, the same notices must be given to the lender. Tex. Prop. Code § 28.009(b). Once work is suspended, the claimant is not required to perform further work until the amount due is paid, plus the cost of shutting down and restarting work. Tex. Prop. Code § 28.009(c)(1). The claimant is not responsible for damages arising from the claimant's suspension of work unless the claimant was notified in writing before suspension either that payment has been made or a good-faith dispute exists concerning the payment. Tex. Prop. Code § 28.009(c)(2). The notice of good faith must include a list of specific reasons for nonpayment. Tex. Prop. Code § 28.009(d). If a reason given for nonpayment is allegedly defective or incomplete work, the claimant must be given reasonable time to either adjust its payment claim or correct the defective work. Tex. Prop. Code § 28.009(d).

§ 7.13 Constitutional Mechanic's Lien on Real Property

§ 7.13:1 Scope and Utility of Lien

The Texas Constitution grants every original contractor a constitutional lien "upon the buildings and articles made or repaired by them for the value of their labor done thereon, or material furnished therefor." Tex. Const. art. XVI, § 37. This lien is "self-executing" in that it exists without any requirement of giving notice or filing an affidavit, but it must be enforced through a judicial foreclosure suit. *Hayek v. Western Steel Co.*, 478 S.W.2d 786, 790 (Tex. 1972); *see also* Tex. Const. art. XVI, § 37 interp. commentary (Vernon 1993).

Practice Note: The constitutional lien is most often used in situations in which either no attempt was made to perfect a statutory lien or the claimant failed to properly perfect a statutory lien.

Benefits Original Contractors: Only original contractors may claim a constitutional lien. "Original contractor" means only those in privity with the property owner. *Da-Col Paint Manufacturing Co. v. American Indemnity Co.*, 517 S.W.2d 270, 273 (Tex. 1974). Subcontractors are derivative claimants and therefore have no constitutional, common-law, or contractual lien on the owner's property. *First National Bank v. Sledge*, 653 S.W.2d 283, 285 (Tex. 1983). A materialman supplying materials to another materialman will not qualify. *Huddleston v. Nislar*, 72 S.W.2d 959, 962 (Tex. Civ. App.—Amarillo 1934, writ ref'd).

Sham Contracts: A person who labors, specially fabricates materials, or furnishes labor or materials under a direct contractual relationship with another person is deemed to be an original contractor in direct contractual relationship with the owner if the owner contracted with the other person for the construction or repair and (1) the owner can effectively control that person through the ownership of voting stock, interlocking directorships, or otherwise; (2) that other person can effectively control the owner through the ownership of voting stock, interlocking directorships, or otherwise; or (3) the contract was made without good-faith intention of the parties that the other person was to perform the contract. Tex. Prop. Code § 53.026(a)(1), (3). Such owner-controlled contractors are commonly called "sham contractors."

Limitations of Constitutional Lien: Many types of work are not covered by the constitutional lien, such as claims for water or sewer

lines, landscaping, and other similar work not considered a "building." *See, e.g., Campbell v. City of Dallas*, 120 S.W.2d 1095, 1097 (Tex. Civ. App.—Waco 1938, writ ref'd) (water and sewer lines); *Black, Sivalls & Bryson v. Operators' Oil & Gas Co.*, 37 S.W.2d 313, 316 (Tex. Civ. App.—Eastland 1931, writ dism'd) (repairing grade after a flood). See section 7.13:2 below for discussion of the term *building*.

The unrecorded constitutional lien will be defeated by any person who purchases or liens the subject property in good faith, for value, and without notice of the constitutional lien claim. *Wood v. Barnes*, 420 S.W.2d 425, 429 (Tex. Civ. App.—Dallas 1967, writ ref'd n.r.e.). In contrast, the properly perfected and recorded statutory lien claim will be good against any subsequent purchaser or lender. *Detering Co. v. Green*, 989 S.W.2d 479 (Tex. App.—Houston [1st Dist.] 1999, no writ); *Wood*, 420 S.W.2d at 429. See section 7.13:5 below.

Practice Note: Because the constitutional lien is both limited in scope and cut off by a sale to a bona fide purchaser, the original contractor should always attempt to perfect a statutory lien and treat the constitutional lien as a remedy of last resort if the original contractor fails to timely perfect a statutory lien under the Property Code.

§ 7.13:2 Eligibility—Real Property

Because the constitutional lien is restricted to work or material furnished for construction or repair of buildings or articles, defining the terms *building* and *article* becomes important. Although the constitutional provision refers to buildings and not the underlying land, decisional law has consistently found the lien to attach also to the land on which the building sits. *See, e.g., Myers v. Houston*, 30 S.W. 912, 913 (Tex. 1895); *Ferrell v. Ertel*, 100 S.W.2d 1084, 1088 (Tex. Civ. App.—Fort Worth 1936, writ dism'd). "Building" has been defined to include a pier. *See Ambrose & Co. v. Hutchison*, 356 S.W.2d 215, 216–17 (Tex. Civ. App.—Fort Worth 1962, no writ). Some actual construction must be made before a constitutional lien attaches. *See Branecky v. Seaman*, 688 S.W.2d 117, 120 (Tex. App.—Corpus Christi 1984, writ ref'd n.r.e.).

§ 7.13:3 Enforcement Generally

The lien claimant must file suit to enforce the lien. However, there is no requirement of notice or fulfillment of other statutory obligations before suit is filed. *Dee's Cabinet Shop, Inc. v. Weber*, 562 S.W.2d 945, 947 (Tex. Civ. App.—Fort Worth 1978, no writ). When a suit for foreclosure of real property under a constitutional lien is filed, the attorney should also file a notice of lis pendens to protect the claimant's priority against a bona fide sale or encumbrance. *See* Tex. Prop. Code § 13.004.

§ 7.13:4 Enforcement against Public Property or Homestead

A constitutional lien cannot attach to public buildings or grounds or to a homestead unless the claimant has complied with other constitutional or statutory requirements for perfecting such a lien. *Atascosa County v. Angus*, 18 S.W. 563 (Tex. 1892) (public buildings); *J.D. McCollom Lumber Co. v. Whitfield*, 59 S.W.2d 1106, 1107 (Tex. Civ. App.—Austin 1933, writ ref'd) (homesteads).

§ 7.13:5 Enforcement against Third Parties

A claimant's constitutional lien is valid against the property owner even if the claimant takes no affirmative steps, such as recording the contract, to perfect the lien. *Brick & Tile, Inc. v. Parker*, 186 S.W.2d 66, 67 (Tex. 1945). This self-executing aspect of the lien, however, does not protect the claimant if the property is sold or mortgaged to a bona fide purchaser. Third parties may cut off the constitutional lien claimant's

rights to the property unless they have notice of the claim. *Irving Lumber Co. v. Alltex Mortgage Co.*, 446 S.W.2d 64, 72 (Tex. Civ. App.—Dallas 1969), *aff'd*, 468 S.W.2d 341 (Tex. 1971).

If the constitutional lien involves construction, constructive notice of the constitutional lien protects the lien claimant. Some courts have held that anyone acquiring an interest in property while it is under construction has constructive notice of a potential constitutional lien. *Inman v. Clark*, 485 S.W.2d 372, 374 (Tex. Civ. App.—Houston [1st Dist.] 1972, no writ); *Tomlinson v. Higginbotham Bros. & Co.*, 229 S.W.2d 920, 922 (Tex. Civ. App.—Eastland 1950, no writ). The party claiming bona fide purchaser status has the burden of proving the absence of actual or constructive notice; it is an affirmative defense. *Contract Sales Co. v. Skaggs*, 612 S.W.2d 652, 653 (Tex. Civ. App.—Dallas 1981, no writ).

If the property is involved in bankruptcy, the trustee or debtor-in-possession can avoid a constitutional lien unless some notice of the lien has been recorded. *See In re Mid-America Petroleum, Inc.*, 83 B.R. 937, 943 (Bankr. N.D. Tex. 1988); *McEvoy v. Ron Watkins, Inc.*, 105 B.R. 362, 364–65 (Bankr. N.D. Tex. 1987).

§ 7.14 Constitutional Lien on Personal Property

The Texas Constitution grants every original contractor a constitutional lien "upon the buildings and articles made or repaired by them for the value of their labor done thereon, or material furnished therefor." Tex. Const. art. XVI, § 37.

For a petition and application to foreclose a constitutional lien on personal property, see form 7-22 in this chapter.

§ 7.14:1 Eligibility—Personal Property

The term *articles made* is restricted to articles specially fabricated according to the purchaser's specifications, rather than articles manufactured for sale on the open market, such as refrigerators and ranges installed in an apartment complex. *First National Bank in Dallas v. Whirlpool Corp.*, 517 S.W.2d 262, 268 (Tex. 1974). If the articles are specially made in accordance with the ultimate purchaser's instructions, the lien will attach. *In re A&M Operating Co.*, 182 B.R. 986, 991 (Bankr. E.D. Tex. 1993), *rev'd in part*, 182 B.R. 997 (Bankr. E.D. Tex. 1995), *aff'd*, 84 F.3d 433 (5th Cir. 1996).

§ 7.14:2 Possessory Rights in Property

Unlike a claimant who may have a right to possession by virtue of a lien arising from Tex. Prop. Code ch. 70, a constitutional lien claimant has no authority under the constitutional provision itself to keep or repossess the repaired article pending payment. *Garcia v. Rutledge*, 649 S.W.2d 307, 311 (Tex. App.—Amarillo 1982, no writ). If he does so solely on the basis of the constitutional lien, he may be liable for conversion. *Clifton v. Jones*, 634 S.W.2d 883, 886 (Tex. App.—El Paso 1982, no writ). The right to this constitutional lien, which may be foreclosed through the courts, and any right to retain possession until the debt is paid are two separate and distinct rights. *Paul v. Nance Buick Co.*, 487 S.W.2d 426, 428 (Tex. Civ. App.—El Paso 1972, no writ). Therefore the attorney should strongly consider coupling a petition for writ of sequestration with the constitutional lien suit. See section 8.16 in this manual regarding sequestration and form 7-23 in this chapter for an application and affidavit for writ of sequestration in a suit to foreclose a constitutional lien.

§ 7.15 No Personal Liability of Owner

A constitutional lien by itself does not create any personal liability in the owner. *Fox v. Christopher & Simpson Iron Works Co.*, 199 S.W. 833, 835 (Tex. Civ. App.—Galveston 1917, writ ref'd).

§ 7.16 Attorney's Fees

A constitutional lien itself does not provide for payment of attorney's fees. *Rhoades v. Miller*, 414 S.W.2d 942, 944 (Tex. Civ. App.—Tyler 1967, no writ). The lien claimant may be entitled to attorney's fees either under a contractual provision for their payment or under Tex. Civ. Prac. & Rem. Code ch. 38. *See Wood v. Barnes*, 420 S.W.2d 425, 429–30 (Tex. Civ. App.—Dallas 1967, writ ref'd n.r.e.). See part III. in chapter 1 of this manual regarding attorney's fees.

§ 7.17 Priority of Constitutional Lien

If property involved in construction is the subject of a constitutional lien, lien priorities among competing claimants are generally determined by the date of inception of the liens. *See University Savings & Loan Ass'n v. Security Lumber Co.*, 423 S.W.2d 287, 293–96 (Tex. 1967).

If the property subject to the constitutional lien is chattel, actual notice may be required because establishing constructive notice of the lien would be impossible under ordinary circumstances. *See Continental Radio Co. v. Continental Bank & Trust Co.*, 369 S.W.2d 359, 362 (Tex. Civ. App.—Houston 1963, writ ref'd n.r.e.) (lien asserted against airplane).

If the property is a chattel subject to a competing claim under the Uniform Commercial Code, resolution of the priority conflict depends in part on whether the constitutional lien claimant has possession of the chattel. *Garcia v. Rutledge*, 649 S.W.2d 307, 311 (Tex. App.—Amarillo 1982, no writ). However, if possession is authorized by another statute, such as Tex. Prop. Code § 70.001, a valid constitutional lien may take priority over a perfected security interest under Tex. Bus. & Com. Code § 9.333. *See Nelms v. Gulf Coast State Bank*, 516 S.W.2d 421, 424 (Tex. Civ. App.—Houston [1st Dist.] 1974), *aff'd*, 525 S.W.2d 866 (Tex. 1975).

The attorney representing a party who wishes to assert a constitutional mechanic's lien for repairs should ensure that a bank holding a security interest in the same property has a record of the mechanic's lien. If the bank becomes insolvent and is then subject to FDIC receivership, a mechanic's lien of which the bank has no record cannot be enforced against the FDIC. *See D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447 (1942). The existence of federal recording statutes governing certain types of property may also preempt state statutes governing mechanic's liens. *See Aero Support Systems, Inc. v. FDIC*, 726 F. Supp. 651, 653 (N.D. Tex. 1989).

[Sections 7.18 through 7.20 are reserved for expansion.]

III. Governmental Mechanic's Liens

§ 7.21 Bond Claims in State and Local Public Works Contracts

§ 7.21:1 State and Local Projects Generally

Because mechanic's liens cannot be asserted against public works in Texas, the legislature has provided subcontractors with alternative methods to secure their rights to payment for work on government projects. *See City of LaPorte v. Taylor*, 836 S.W.2d 829, 831–32 (Tex. App.—Houston [1st Dist.] 1992, no writ). These methods include maintaining a lien on money due the prime contractor and pursuing a claim on a payment bond. The amount of money involved in a contract for public works determines the relief that a subcontractor can pursue.

A "governmental entity" refers to a governmental or quasi-governmental authority authorized by state law to make a public work contract. This could include a department, board, or agency of the state or a school district or subdivision of a school district. Tex. Gov't Code § 2253.001(1). A "public work contract" is a contract for constructing, altering, or repairing a public building or carrying out or completing any public work. Tex. Gov't Code § 2253.001(4). Public work labor or material is labor or material used to carry out this purpose. *See* Tex. Gov't Code § 2253.001(5).

Governmental Entity That Is Not a Municipality or Joint Board: If the amount of the contract does not exceed $25,000, an aggrieved party (who provides proper notice) can maintain a lien on the money, bonds, or warrants due for the work if the governmental entity is not a municipality or joint board created under subchapter D, chapter 22, of the Texas Transportation Code. Tex. Prop. Code § 53.231(a). When this type of governmental entity enters into a contract with a prime contractor for a public work project in excess of $25,000, the contractor is required to execute a payment bond in the amount of the contract. Tex. Gov't Code § 2253.021(a)(2)(A).

Municipality or Joint Board: If the amount of the contract does not exceed $50,000, an aggrieved party (who provides proper notice) can maintain a lien on the money, bonds, or warrants due for the work if the governmental entity is a municipality or joint board created under subchapter D, chapter 22, of the Texas Transportation Code. Tex. Prop. Code § 53.231(b). When a municipality or joint board created under subchapter D, chapter 22, of the Transportation Code enters into a contract with a prime contractor for a public work project in excess of $50,000, the contractor is required to execute a payment bond in the amount of the contract. Tex. Gov't Code § 2253.021(a)(2)(B).

Contracts in Excess of $100,000: If the contract is in excess of $100,000, the prime contractor must also execute a performance bond. *See* Tex. Gov't Code § 2253.021(a)(1).

A payment bond provides security to parties who contract with the prime contractor to ensure that it will be able to make payment under the contract. *See* Tex. Gov't Code § 2253.021(c). (While the government is already protected under the theory of sovereign immunity, a payment bond can also be employed to protect a private owner from claims asserted by subcontractors.) The performance bond, on the other hand, acts as security for the government should the contractor fail to complete the project. *See* Tex. Gov't Code § 2253.021(b).

§ 7.21:2 Perfection

To recover in a suit on a payment bond for a public work project, a claimant must "perfect"

his claim. Perfection of a claim simply means providing the proper notice and information required under the applicable statutes. Texas courts have recognized that the rules regarding the substance of notices should be liberally construed. *See S.A. Maxwell Co. v. R.C. Small & Associates*, 873 S.W.2d 447, 454 (Tex. App.—Dallas 1994, writ denied) (construing article 5160 of the Texas Revised Civil Statutes, repealed and replaced by Tex. Gov't Code § 2253.041). It is important to note, however, that strict compliance will be required as to rules regarding the time and manner of giving notice. Failure to timely and procedurally comply with the requirements could result in the loss of all potential recovery. *See S.A. Maxwell Co.*, 873 S.W.2d at 451.

Contracts under $25,000: The Texas Property Code requires the lien claimant to send written notice of his claim by registered or certified mail to (1) the officials of the state, county, town, or municipality whose duty it is to pay the contractor and (2) the contractor at the contractor's last known business or residence address. Tex. Prop. Code § 53.232. The notice should include—

1. the amount claimed;
2. the name of the party to whom the materials were delivered or for whom the labor was performed;
3. the dates and place of delivery or performance;
4. a description reasonably sufficient to identify the materials delivered or labor performed and the amount due;
5. a description reasonably sufficient to identify the project for which the material was delivered or the labor performed; and
6. the claimant's business address.

Tex. Prop. Code § 53.233. The notice must be sent not later than the fifteenth day of the second month following the month in which the labor was performed or the material furnished. Tex. Prop. Code § 53.234. If the claim involves an action on a bond, the claimant must sue on the bond within six months after the bond is filed. Tex. Prop. Code § 53.239.

Contracts Exceeding $25,000: To perfect a claim, the aggrieved party must mail to the prime contractor and the surety written notice of the claim. Tex. Gov't Code § 2253.041(a). "The notice must be mailed on or before the 15th day of the third month after each month in which any of the claimed labor was performed or any of the claimed material was delivered." Tex. Gov't Code § 2253.041(b). The statute also requires that the notice be accompanied by a sworn statement of account that states that—

1. the amount claimed is just and correct; and
2. all just and lawful offsets, payments, and credits known to the affiant have been allowed.

Tex. Gov't Code § 2253.041(c).

The statement of account must also include the amount of any retainage that has not become due under the terms of the contract between the beneficiary and the prime contractor or between the beneficiary and a subcontractor. Tex. Gov't Code § 2253.041(d). The aggrieved party may also enclose a copy of the written agreement and a statement of the completion or the value of the partial completion of the agreement. Tex. Gov't Code § 2253.042.

All notices must be sent by certified or registered mail. Notice to a prime contractor must be addressed to the contractor's residence or last known business address. Tex. Gov't Code § 2253.048(a), (b). Notices are effective on the day they are sent and not on the day received. *See* Tex. Gov't Code § 2253.041(b); *see also Buckner v. Anderson-Dunham, Inc.*, 482 S.W.2d 350 (Tex. Civ. App.—Eastland 1972, writ ref'd

n.r.e.) (construing article 5160, section B, of the Texas Revised Civil Statutes, repealed and replaced by Tex. Gov't Code § 2253.041).

Oral Contracts: If the contract between the parties was an oral agreement, the notice for a claim must contain—

1. the name of the party for whom the labor was performed or to whom the material was delivered;
2. the approximate date of performance or delivery;
3. a description of the public work labor or material for reasonable identification; and
4. the amount due.

Tex. Gov't Code § 2253.043(a).

The claim should be itemized and documents should be included that identify the work performed or material delivered, the job, and the destination of the delivery. Tex. Gov't Code § 2253.043(b).

Multiple Claims: If a party seeks a lump sum for several items of labor or material, the party should include in the notice a description of the labor or material provided, the name of the party for whom the labor was performed or to whom the material was delivered, and the approximate date of performance or delivery. The notice should also provide whether the contract was written or oral, the amount of the contract, and the amount claimed. Tex. Gov't Code § 2253.044. If the claim is for work or materials under a written unit price agreement, the party should attach to the sworn statement a list of units and unit prices as set under the contract and a statement of those completed or partially completed units. Tex. Gov't Code § 2253.045.

Retainage: "Retainage" refers to payments under the contract that are not required to be paid within the month after the month in which the labor is performed or materials are delivered. Tex. Gov't Code § 2253.001(7). A claim for retainage is limited to the amount specified for retainage in the contract, and in no event may it exceed 10 percent of the total contract price. Tex. Gov't Code § 2253.076(c).

To recover for a claim for retainage, written notice of the claim must be mailed to the prime contractor and the surety on or before the ninetieth day after the date of final completion of the contract. Tex. Gov't Code § 2253.046. The notice should contain the amount of the contract, any amount paid, and the outstanding balance. Tex. Gov't Code § 2253.046(b).

No Direct Contractual Relationship with Prime Contractor: It is important to note that additional notice requirements exist for second- or lower-tier subcontractors, who do not have a direct contractual relationship with the prime contractor. In addition to the notices described above, on or before the fifteenth day of the second month after the date of the beginning of delivery of material or performance of labor, the second-tier subcontractor must mail written notice to the prime contractor and send a copy of the statement to the subcontractor with whom the second-tier subcontractor has a direct contractual relationship. If the claim is for retainage, the notice must state that the contract provides for retainage and generally provide the nature of the retainage. Tex. Gov't Code § 2253.047.

Notice for Each Claim: The importance of perfecting each claim for each month is illustrated in *S.A. Maxwell Co.*, 873 S.W.2d at 451–53. In this case, the second-tier subcontractor shipped materials to a warehouse under an agreement with the subcontractor in May 1990. The subcontractor retrieved the materials from the warehouse on May 31 and June 4. When the second-tier subcontractor was not paid, he attempted to perfect his claim by sending notice on July 26, 1990, and second notice on August

15, 1990. A person not in a direct contractual relationship with the prime contractor must send notice on or before the fifteenth day of the second month after materials are delivered, and, in this case, the court held that the materials were "delivered" when the contractor picked them up, both on May 31 and June 4. Thus, to perfect a claim for the first pickup, the second-tier subcontractor had to send notice by July 15 (not July 26). Accordingly, the court held that he had not properly perfected his claim for this first delivery.

§ 7.21:3 Requests for Information

On request from anyone who provides public work, prime contractors must provide—

1. the name and last known address of the governmental entity with whom the prime contractor contracted for the public work;
2. a copy of the payment and performance bonds for the public work, including bonds furnished by or to the prime contractor; and
3. the name of the surety issuing the payment bond and the performance bond and the toll-free telephone number maintained by the Texas Department of Insurance under subchapter B, chapter 521, of the Texas Insurance Code for obtaining information concerning licensed insurance companies.

Tex. Gov't Code § 2253.024(a). The prime contractor must provide this information within ten days from receiving a request. Tex. Gov't Code § 2253.024(c).

Subcontractor's Obligations: A subcontractor must provide, on written request from a governmental entity, the prime contractor, the surety on a bond covering the public work contract, or any other person providing work under the subcontract—

1. the name and last known address of each person from whom the subcontractor purchased public work labor or material, other than public work material from the subcontractor's inventory;
2. the name and last known address of each person to whom the subcontractor provided public work labor or material;
3. a statement of whether the subcontractor furnished a bond for the benefit of its subcontractors and materialmen;
4. the name and last known address of the surety on the bond the subcontractor furnished; and
5. a copy of that bond.

Tex. Gov't Code § 2253.024(b). The subcontractor must also provide this information within ten days from receiving a request. Tex. Gov't Code § 2253.024(c).

The prime contractor or the subcontractor may require payment of the actual cost of producing this information (up to $25) if the requestor does not have a direct contractual relationship with the provider. Tex. Gov't Code § 2253.024(d). Failure to produce this information may result in the prime contractor or subcontractor being liable to the requestor for the reasonable and necessary costs incurred in obtaining the requested information. Tex. Gov't Code § 2253.024(e).

Payment Bond Beneficiary's Obligations: If a request for information is made to the payment bond beneficiary by the prime contractor or the surety, the beneficiary must provide within thirty days—

1. a copy of any applicable written agreement or purchase order; and
2. any statement or payment request of the beneficiary that shows the amount claimed and the work performed by

> the beneficiary for which the claim is made.

Tex. Gov't Code § 2253.025(a). If it is requested, the beneficiary must also provide the estimated amount due for each calendar month in which the beneficiary performed labor or provided material. Tex. Gov't Code § 2253.025(b).

§ 7.21:4 Procedures after Perfection

Once the bond claim has been perfected, it is still incumbent on the claimant to press its claim by following up with the surety. Often negotiations result in compromise and settlement on payment of an agreed amount by the bonding company or the prime contractor (who generally is required to indemnify the bonding company acting as surety). In other cases, it is necessary for the claimant to file suit or institute arbitration proceedings to force the prime contractor or surety to pay the balance due under the contract.

The substantive requirements to perfect a bond claim on state and local public works contracts can be easily completed. The true hurdle is ensuring that all deadlines have been timely met and that all notices contain the necessary information. Failure to do so can result in loss of the security provided by the payment bond. Where the prime contractor becomes insolvent, failure to meet the perfection deadlines can totally eliminate any recovery on a valid claim for payment. *See S.A. Maxwell Co. v. R.C. Small & Associates*, 873 S.W.2d 447 (Tex. App.—Dallas 1994, writ denied).

§ 7.22 Bond Claims in Federal Public Works Projects

§ 7.22:1 Federal Projects Generally

The Miller Act, 40 U.S.C. §§ 3131–3134, requires the prime contractor of a federal project to furnish a payment bond to insure payment to individuals who supply labor or materials for the federal project. The Miller Act was designed as an alternative remedy to the mechanic's lien available in ordinary private construction disputes because the lien cannot attach to government property. *United States v. Aetna Casualty & Surety Co.*, 981 F.2d 448, 450 (9th Cir. 1992).

> The amount of the payment bond shall equal the total amount payable by the terms of the contract unless the officer awarding the contract determines, in a writing supported by specific findings, that a payment bond in that amount is impractical, in which case the contracting officer shall set the amount of the payment bond. The amount of the payment bond shall not be less than the amount of the performance bond.

40 U.S.C. § 3131(b)(2). The performance bond, in turn, is required to be in such amount as the officer awarding the federal contract deems adequate for the protection of the United States. 40 U.S.C. § 3131(b). The performance and payment bond requirements of the Miller Act apply to all contracts of more than $100,000 for the construction, alteration, or repair of any public building or public work of the United States. The federal acquisition regulation provides alternative payment protections for contracts that are more than $25,000 and not more than $100,000. The contracting officer selects from among these alternative protections and specifies in the solicitation of offers the payment protections selected. 40 U.S.C. § 3132.

§ 7.22:2 Perfection

In order to have the right to sue on the payment bond, a first-tier subcontractor on a federal project is not required to give any specific notice. The Miller Act provides that any subcontractor who has not been paid in full for its labor or material before the expiration of ninety days after the last day on which labor was done or material supplied has the right to sue on the pay-

ment bond for the amount unpaid at the time the suit is filed. 40 U.S.C. § 3133(b)(1). It is presumed that the general contractor has notice of the amounts due and unpaid to its own subcontractors. *See Continental Casualty Co. v. United States*, 305 F.2d 794, 797 (8th Cir.), *cert. denied*, 371 U.S. 922 (1962).

However, any second-tier subcontractor, defined as "a person having a direct contractual relationship with a subcontractor but no contractual relationship, express or implied, with the contractor furnishing the payment bond," must perfect its claim on the bond by giving written notice to the general contractor within the ninety-day period, stating with substantial accuracy the amount claimed and the name of the party to whom the material was supplied or for whom the labor was performed. 40 U.S.C. § 3133(b)(2). The notice must be served by any means that provides written, third-party verification of delivery to the contractor at any place he maintains an office or conducts his business or at his residence; or in any manner in which the U.S. marshal for the district in which the public improvement is situated may serve summons. 40 U.S.C. § 3133(b)(2). The notice must be received by the contractor, rather than merely being mailed, within the ninety-day period. *Pepper Burns Insulation, Inc. v. Artco Corp.*, 970 F.2d 1340, 1343 (4th Cir. 1992), *cert. denied*, 506 U.S. 1053 (1993).

Unlike the procedure for bond claims in state and local public works projects, bond claims in federal projects do not require repeated notices to be sent either to the general contractor or to the surety. Notice to the principal contractor is a strict condition precedent to suit under the Miller Act by a supplier who deals with a subcontractor, but the supplier is not required to give notice to the surety before commencing suit. *Continental Casualty Co.*, 305 F.2d at 797.

§ 7.22:3 "Subcontractor" vs. "Materialman"

Although the Miller Act is to be construed liberally, it is limited by a proviso that the payment bond protects only those persons who have a contractual agreement with a prime contractor or first-tier subcontractor engaged in a federal project. Persons supplying labor or material to a mere "materialman" are not protected. *United States v. Aetna Casualty & Surety Co.*, 981 F.2d 448, 450 (9th Cir. 1992). The United States Supreme Court has defined a subcontractor as "one who performs for and takes from the prime contractor a specific part of the labor or material requirements of the original contract." *See Clifford F. MacEvoy Co. v. United States*, 322 U.S. 102, 109 (1944). The test for whether one is a subcontractor is based on the "substantiality and importance of his relationship with the prime contractor." *F.D. Rich Co. v. United States*, 417 U.S. 116, 123 (1974). This means that even though a supplier may have an express written contract directly with the prime contractor, the supplier may not qualify as a "subcontractor" unless the supplier's relationship with the prime contractor is "substantial" enough. If the supplier does not qualify as a subcontractor, those who provide labor or material to that supplier are dealing with a mere materialman and cannot claim protection under the Miller Act payment bond.

The Court in *F.D. Rich* reasoned, "It is the substantiality of the relationship which will usually determine whether the prime contractor can protect himself, since he can easily require bond security or other protection from those few 'subcontractors' with whom he has a substantial relationship in the performance of the contract." *F.D. Rich Co.*, 417 U.S. at 123–24.

The Court acknowledged, however, that "'this method of protection is generally inadequate to cope with remote and undeterminable liabilities incurred by an ordinary materialman.'" *F.D.*

Rich Co., 417 U.S. at 123 (quoting *Clifford F. MacEvoy Co.*, 322 U.S. at 110).

In distinguishing a subcontractor from a materialman, courts apply a balancing test with certain factors tending to weigh in favor of a subcontractor relationship—particularly if the company assumed a significant and definable part of the construction project—and other factors tending to weigh in favor of a materialman relationship.

Generally, courts have found the following factors to weigh in favor of a subcontractor relationship:

1. The product supplied is custom fabricated.
2. The product supplied is a complex integrated system.
3. A close financial interrelationship exists between the companies.
4. A continuing relationship exists with the prime contractor as evidenced by the requirement of shop drawing approval by the prime contractor or the requirement that the supplier's representative be on the job site.
5. The supplier is required to perform on site.
6. There is a contract for labor in addition to materials.
7. The term "subcontractor" is used in the agreement.
8. The materials supplied do not come from existing inventory.
9. The supplier's contract constitutes a substantial portion of the prime contract.
10. The supplier is required to furnish all the material of a particular type.
11. The supplier is required to post performance bonds.
12. There is a back charge for costs of correcting the supplier's mistakes.
13. There is a system of progressive or proportionate fee payment.

Generally, courts have found the following factors to weigh in favor of a materialman relationship:

1. A purchase order form is used by the parties.
2. The materials come from preexisting inventory.
3. The item supplied is relatively simple in nature.
4. The contract is a small percentage of the total construction costs.
5. Sales tax is included in the contract price.

Aetna Casualty & Surety Co., 981 F.2d at 451–52.

Practice Note: Lower-tier suppliers of labor or materials on federal projects would be well advised to tailor their agreements to incorporate as many of the factors weighing towards "subcontractor" classification as possible.

§ 7.22:4 Oral Contracts

The Miller Act does not require that the contract between the claimant and the general contractor or a subcontractor be in writing. There simply must be some underlying contract, whether established in a telephone call or a formal document. *United States v. William L. Crow Construction Co.*, 826 F. Supp. 647, 654 (E.D.N.Y. 1993).

§ 7.22:5 Express or Implied Contractual Relationship

As suggested by the foregoing discussion, the Miller Act protects subcontractors (as opposed

to mere materialman) and, provided they give proper notice, persons having direct contractual relationships with the subcontractor but no contractual relationship, express or implied, with the prime contractor. Recovery under the theory of implied contracts known as "quantum meruit" is appropriate when the breaching party has been unjustly enriched through its wrongful conduct, and such recovery may also be appropriate when the aggrieved party has been induced to perform beyond the scope of the express contract, resulting in a benefit to the breaching party. *United States v. Mountain States Construction Co.*, 588 F.2d 259, 262 (9th Cir. 1978). Thus under appropriate circumstances a supplier of labor or material might be able to recover on the bond even though its contract claim may be barred for lack of a signed writing or other technical defect. The supplier might be able to recover amounts greater than the contract price if change orders were performed but never documented in an express contract. The cases are unclear as to whether second-tier subcontractors or other lower-tier claimants can maintain a suit against the prime contractor or the surety based on an implied contract under the principles of quantum meruit. *See Undersea Engineering & Construction Co. v. International Telephone & Telegraph Corp.*, 429 F.2d 543 (9th Cir. 1970), *abrogated on other grounds by Avery v. United States*, 829 F.2d 817 (9th Cir. 1987) (work performed by second-tier subcontractor done under its express "sub" contract with subcontractor, thus negating implied contract with prime contractor); *but see Fidelity & Deposit Co. of Maryland v. Harris*, 360 F.2d 402 (9th Cir. 1966) (second-tier subcontractor's supplier could recover against contractor on ground of unjust enrichment).

§ 7.22:6 Procedures after Perfection

Just as in a state project, bond claimants on federal projects must pursue their claims against the surety by negotiation and, if necessary, litigation or alternative dispute resolution proceedings. Any lawsuit on a Miller Act bond must be filed in federal court in the federal district in which the contract was to be performed. Lawsuits under the Miller Act must be filed within one year after the day on which the last of the labor was performed or material was supplied by the claimant. 40 U.S.C. § 3133(b)(4).

§ 7.23 Construction Trust Fund

Chapter 162 of the Texas Property Code is a statute of last resort for a claimant who has failed to properly perfect a mechanic's lien claim under a construction contract for the improvement of real property. Chapter 162 provides that (1) all payments under a construction contract to an original contractor, a subcontractor, or an officer, director, or agent of a contractor or subcontractor and (2) all loan proceeds received by an owner, original contractor, or subcontractor or by an officer, director, or agent of an owner, contractor, or subcontractor for the purpose of improving specific real property are "trust funds" for the benefit of persons furnishing labor or materials on the construction project. Tex. Prop. Code §§ 162.001, 162.003.

However, chapter 162 does not apply to a lender, title company, closing agent, or corporate surety (Tex. Prop. Code § 162.004) or to a contractor's fee under a cost-plus contract (Tex. Prop. Code § 162.001(c)).

§ 7.23:1 Parties Liable as Trustees

An owner, original contractor, and subcontractor and their respective officers, directors, and agents who receive, control, or direct the "trust funds" (that is, the construction payments or loan proceeds) are deemed to be "trustees" of the funds. Tex. Prop. Code § 162.002.

§ 7.23:2 Beneficiaries of Trust

An artisan, laborer, mechanic, contractor, subcontractor, or materialman who labors or fur-

nishes labor or materials for the construction or repair of an improvement on real property is a beneficiary of any trust funds paid or received in connection with the improvement. Tex. Prop. Code § 162.003(a). A property owner is a beneficiary of trust funds paid or received in connection with a residential construction contract, including funds deposited into a construction account. Tex. Prop. Code § 162.003(b).

§ 7.23:3 Residential Homestead Projects

A contractor who enters into a written contract with a property owner to construct improvements to a residential homestead in an amount exceeding $5,000 shall deposit the trust funds in a construction account in a financial institution. Tex. Prop. Code § 162.006. The contractor must maintain account records in accordance with the requirements of Property Code section 162.007. *See* Tex. Prop. Code § 162.007.

§ 7.23:4 Penalties for Misapplication of Monies by Trustees

A trustee who knowingly or intentionally retains, uses, or diverts trust funds without first fully paying all current or past-due obligations incurred by the trustee to the "beneficiaries" (that is, the unpaid contractors) has misapplied the trust funds. Tex. Prop. Code § 162.031(a). If the misapplied amount exceeds $500, this is a Class A misdemeanor if there is no intent to defraud and a third-degree felony if intent to defraud is shown. Tex. Prop. Code § 162.032.

Practice Note: The statute, by imposing a statutory duty on the trustee, creates a civil cause of action for damages arising from the trustee's breach of his duties. The statute also allows the claimant to pierce the corporate veil and get to the individual who actually handled the money.

Intent to Defraud: The statute defines "intent to defraud" to include—

1. retaining, using, disbursing, or diverting trust funds with the intent to deprive the beneficiaries of the trust funds;
2. the trustee's failing to establish and maintain a separate construction account or the required account records for residential homestead improvement contracts of $5,000 or more; and
3. misapplying trust funds that were paid in reliance on a false bills-paid affidavit.

Tex. Prop. Code § 162.005(1); *see also* Tex. Prop. Code §§ 53.085, 162.006, 162.007. While the trustee is not required to open more than one bank account per project, the statute does specifically prohibit the trustee from comingling its own funds with the trust account. Failure to keep the accounts and the records is in and of itself a Class A misdemeanor. Tex. Prop. Code § 162.032(c).

Affirmative Defenses: The statute establishes three affirmative defenses for a trustee accused of misappropriation. The first is that a trustee may affirmatively plead that trust funds not paid to the beneficiary of the trust were used to pay the trustee's "actual expenses directly related to the construction or repair of the improvement." Tex. Prop. Code § 162.031(b). Thus, the trustee may use construction funds to pay overhead expenses, as long as the expenses are actually incurred and are necessary to obtain or complete the project. However, the trustee will have to prove that the payments were for actual expenses directly related to the construction. The second affirmative defense is that, after notice to the claimant, the trustee merely retained the money because of the trustee's reasonable belief that the beneficiary was not entitled to such funds or that the trustee was

otherwise authorized or required by other provisions of the Property Code to withhold the funds. The trustee must prove that it withheld payment based on a reasonable belief. Tex. Prop. Code § 162.031(b). The third affirmative defense is that the trustee paid the beneficiaries the monies they were entitled to receive no later than thirty days following written notice to the trustee of the filing of a criminal complaint or other notice of a pending criminal investigation. Tex. Prop. Code § 162.031(c).

A trustee who commingles trust funds with other funds in the trustee's possession does not defeat a trust created by chapter 162 of the Property Code. Tex. Prop. Code § 162.031(d).

Form 7-1

Affidavit to Fix Worker's Lien

BEFORE ME, the undersigned authority, on this day personally appeared [**name of affiant**], who swore on oath that the following facts are true:

"I am a resident of [**county**] County, Texas. On [**date**], I entered into an employment contract with [**name of employer**], Employer, to provide labor or services in [**county**] County, Texas, as a [**type of employment**] to [**describe work**] at Employer's [**type of premises**], located at [**address, city**], Texas. The work was performed for Employer's benefit.

"Under the terms of the employment contract between Employer and me, Employer was obligated to pay me $[**amount**] per [**time period**] for the labor or services described above. Employer now owes me $[**amount**] but refuses to pay me.

"This debt accrued within the past thirty days. Since then I have given Employer an account of the labor or services performed with regard to [**describe property for which lien is claimed**]. A copy of the account is attached to this affidavit and is incorporated in this affidavit for all purposes.

"The facts stated in this affidavit are within my personal knowledge and are true and correct."

_____

[**Name of affiant**]
Affiant

SIGNED under oath before me on _____.

_____

Notary Public, State of Texas

Attach an account of services with amount due. Copies of the affidavit and attached account should be both served on the employer or the employer's agent and filed with the county clerk.

Form 7-2

See section 14.29 in this manual for other forms of party designation. See also section 14.22 regarding exercising caution in pleading conditions precedent. Do not add prejudgment interest to the amounts claimed.

[Caption. See § 3 of the Introduction in volume 1 of this manual.]

Petition and Application to Foreclose Worker's Lien

1. *Parties.* Plaintiff is [**name of plaintiff**], whose address is [**address, city, state**]. Defendant is [**name of defendant**], who can be served with citation at [**address, city, state**].

2. *Facts.* On [**date**], Plaintiff as employee and Defendant as employer entered into a contract by which Defendant employed Plaintiff to provide labor or services as a [**type of employment**] to [**describe work**] at Defendant's [**type of premises**], located at [**address, city, county**] County, Texas. The work was performed for Defendant's benefit.

3. *Debt.* Under terms of the contract between Plaintiff and Defendant, Defendant was obligated to pay Plaintiff, as wages for labor or services rendered in [**describe work**], $[**amount**] per [**time period**]. Defendant now owes Plaintiff $[**amount**] but refuses to pay Plaintiff.

4. *Conditions Precedent.* All conditions precedent have been performed or have occurred.

5. *Lien.* Under section 58.002 of the Texas Property Code, Plaintiff holds a worker's lien on [**describe property**]. This lien was fixed by Plaintiff on [**date**]. A copy of the lien affidavit, served on Defendant, is attached as Exhibit [**exhibit number/letter**] and is incorporated by reference.

6. *Attorney's Fees.* Defendant's failure to pay Plaintiff for Plaintiff's labor or services has made it necessary for Plaintiff to employ the undersigned attorney to file suit. This claim was timely presented to Defendant and remains unpaid. Reasonable fees for the attorney's services rendered and to be rendered through trial and appeal are at least $[**amount**].

7. *Prayer.* Plaintiff prays that—

a. Defendant be cited to appear and answer;

b. Plaintiff be granted judgment for $[**amount**] as the principal amount due on the debt;

c. Plaintiff be granted foreclosure of the worker's lien against the property described in this petition;

d. Plaintiff be granted judgment for prejudgment and postjudgment interest at the highest legal or contractual rate allowed by law;

e. Plaintiff be granted judgment for at least $[**amount**] as reasonable attorney's fees, with additional contingent amounts in the event of appellate proceedings;

f. Plaintiff be granted judgment for all costs of court; and

g. Plaintiff be granted all further relief to which Plaintiff may be entitled.

_____

[**Name**]
Attorney for Plaintiff
State Bar No.:
[**E-mail address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

Attach a copy of the worker's lien affidavit (form 7-1). Prepare an application for a writ of sequestration (form 7-3).

[Reserved]

Form 7-3

To prevent destruction or waste of the property in which a worker's lien is claimed and to avoid losing the property to a bona fide purchaser, the claimant should seek to sequester the property at the time the suit to foreclose the lien is filed; see section 7.1:5 in this chapter. A petition to foreclose a worker's lien is at form 7-2. Additional sequestration forms are at forms 8-8 through 8-16. See section 14.29 for other forms of party designation. In most counties, the clerk will prepare the writ of sequestration and the return. In some cases, the attorney may wish to prepare them for the clerk.

[Caption. See § 3 of the Introduction in volume 1 of this manual.]

Use the same caption as in the petition and application to foreclose the worker's lien unless the cause has been transferred.

Application and Affidavit for Writ of Sequestration in Suit on Worker's Lien

1. *Parties.* Plaintiff [**name of plaintiff**], whose address is [**address, city, state**], makes this Application for Writ of Sequestration. Defendant is [**name of defendant**], who can be served with citation at [**address, city, state**].

State specific facts relied on by the plaintiff to warrant the required findings by the court. The following paragraphs are sample allegations; the actual allegations must be drafted to fit the facts.

2. *Facts.* In this suit, now pending in this Court, Plaintiff is seeking damages from Defendant and foreclosure or enforcement of a lien under section 58.002 of the Texas Property Code in the following personal property: [**describe each item of property with sufficient certainty that it can be identified and distinguished from similar property**]. Each item of property has the following value: [**list each item and its value**]. All this property is in Defendant's possession at [**address, city, county**] County, Texas.

3. *Lien.* On [**date**], Plaintiff as employee and Defendant as employer entered into a contract by which Defendant employed Plaintiff to provide labor or services as a [**type of employment**] to [**describe work**] at Defendant's [**type of premises**], located at [**address, city,**

county] County, Texas. The work was performed for Defendant's benefit. Under the terms of the contract, Defendant was obligated to pay Plaintiff, as wages for labor or services rendered, $[**amount**] per [**time period**]. Defendant now owes Plaintiff $[**amount**] but refuses to pay Plaintiff. Plaintiff holds a worker's lien on this property under section 58.002 of the Texas Property Code, which was fixed on [**date**].

4. *Grounds.* Defendant refused to surrender possession of the property when specifically and rightfully requested by Plaintiff to do so. This refusal by Defendant is an intentional concealment of the property and therefore jeopardizes Plaintiff's lien on the property. Plaintiff fears that Defendant may dispose of or further conceal the property or may convey the property to a third party without notice of Plaintiff's claim to a lien on the property.

5. *Prayer.* Plaintiff prays that a writ of sequestration issue and that Plaintiff receive all further relief to which Plaintiff may be entitled.

_____

[**Name**]
Attorney for Plaintiff
State Bar No.:
[**E-mail address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

Affidavit

BEFORE ME, the undersigned authority, on this day personally appeared [**name of affiant**], who swore on oath that the following facts are true:

"I am Plaintiff in this cause.

Select one of the following.

"I have personal knowledge of the facts stated above, and they are true and correct."

Or

"I make this affidavit on information and belief. The basis for that belief is the following: [**state specific grounds for belief**]."

Continue with the following.

_____

[Name of affiant]
Affiant

SIGNED under oath before me on _____.

_____

Notary Public, State of Texas

Prepare the following tc take to the hearing: form 8-9 (order for issuance of writ of sequestration), form 8-4 (bond to defendant), form 8-10 (writ of sequestration), and form 8-12 (officer's return).

[Reserved]

Form 7-4

Texas Property Code section 70.006 discusses the sale of motor vehicles, motorboats, vessels, and outboard motors, including the requirements of this notice. Written notice must be given to the owner and each holder of a lien recorded on the certificate of title. Tex. Prop. Code § 70.006(a). A copy of the notice must be filed with the county tax assessor-collector's office in the county in which the repairs were made not later than thirty days after the date on which the charges accrue. Tex. Prop. Code § 70.006(a). Unless an exception exists for notice by publication under Tex. Prop. Code § 70.006(c), the notice must be sent by certified mail with return receipt requested and include the amount of the charges and a request for payment. Tex. Prop. Code § 70.006(b).

A holder of a possessory lien on a motor vehicle under Tex. Prop. Code § 70.001, other than a person licensed as a franchised dealer under the Texas Occupations Code, must include additional information in the notice. See Tex. Prop. Code § 70.006(b–1) for those requirements.

Notice of Sale under Worker's Possessory Lien

[Motor Vehicle, Motorboat, Vessel, or Outboard Motor]

[Date]

To: [**name and address of owner**], Owner
[**name and address of lienholder**], Lienholder

Re: [**describe motor vehicle, motorboat, vessel, or outboard motor**]

I [**include if applicable:** , [**legal name**], [taxpayer identification number/employer identification number] [**number**],] have maintained possession of the [motor vehicle/motorboat/vessel/outboard motor] described above, which I have repaired at the owner's request.

A total of $[**amount**] is now due for the repair of this [vehicle/motorboat/vessel/outboard motor], and I request that the charges due be paid immediately. The charges accrued on [**date**].

Include the following if applicable. See Tex. Prop. Code § 70.006(b–1) to determine applicability.

The physical address at which the repairs to the motor vehicle were made is [**address**]. Attached is a signed copy of the work order authorizing the repairs on the motor vehicle.

Continue with the following.

If I do not receive payment within thirty days after this notice is mailed, I intend to sell the [vehicle/motorboat/vessel/outboard motor] at public sale and to apply the proceeds of the sale to payment of the charges. I will then pay any excess to the person entitled to it.

The public sale will be at [**address, city, county**] County, Texas, on [**date**] at [**time**].

_____

[**Name**]

Certified Mail No. [**number**]
Return Receipt Requested

Attach a copy of the work order if applicable.

Form 7-5

First Notice of Sale under Worker's Possessory Lien

[Property Other Than Motor Vehicle, Motorboat, Vessel, or Outboard Motor]

[**Date**]

To: [**name and address of owner**], Owner

Re: [**describe property subject to lien**]

I have maintained possession of the property described above, which you own and which I repaired at your request, for at least sixty days after the repair charges accrued against you.

A total of $[**amount**] is now due for the repair of this property, and I request that you pay the charges due immediately. If you do not make payment within ten days after receipt of this notice, I intend to sell the property at public sale, after twenty days' notice, and to apply the proceeds of the sale to payment of the charges. I will then pay any excess to the person entitled to it.

_____

[**Name**]

Certified Mail No. [**number**]
Return Receipt Requested

[Reserved]

Form 7-6

Second Notice of Sale under Worker's Possessory Lien

[Property Other Than Motor Vehicle, Motorboat, Vessel, or Outboard Motor]

[**Date**]

To: [**name and address of owner**], Owner

Re: [**describe property subject to lien**]

I have maintained possession of the property described above, which you own and which I repaired at your request, for at least sixty days after the repair charges accrued against you. At least ten days before the date of this notice, you were advised that, if you failed to pay the charges within ten days, I would sell the property after twenty days' notice. You have not paid the charges within ten days after your receipt of the first notice.

A total of $[**amount**] is now due for the repair of this property, and I request that you pay the charges due immediately. If you do not make payment within twenty days after receipt of this second notice, I intend to sell the property at public sale and to apply the proceeds of the sale to payment of the charges. I will then pay any excess to the person entitled to it.

The public sale will be at [**address, city, county**] County, Texas, on [**date**] at [**time**].

_____

[**Name**]

Certified Mail No. [**number**]
Return Receipt Requested

[Reserved]

Form 7-7

Notice to Owner of Filing of Lien Affidavit

[**Date**]

[**Name and address of owner**]
[**Name and address of original contractor**]

Re: Notice of filing of an Affidavit Claiming Mechanic's and Materialman's Lien with respect to the construction project at [**specify**] ("Property")

[**Salutation**]

By this letter I am forwarding to you the enclosed copies of an affidavit claiming a mechanic's and materialman's lien against the Property that was filed in the official real property records of [**county**] County, Texas, on [**date**].

This affidavit pertains to the unpaid sums owing for labor or material provided by [**name of original contractor**] in connection with the construction of improvements on the Property. You are hereby notified that if this claim remains unpaid, the owner of the Property may be personally liable, and the owner's Property may be subjected to a lien unless (1) the owner withholds payment from the contractor for payment of the claim or (2) the claim is otherwise paid or settled.

Sincerely yours,

_____

[**Name of attorney**]

Certified Mail No. [**number**]
Return Receipt Requested

Certified Mail No. [**number**]
Return Receipt Requested

Attach a copy of the lien affidavit (form 7-15).

Form 7-8

Notice of Claim to Owner and Original Contractor

[**Date**]

[**Name and address of owner**]
[**Name and address of original contractor**]

Re: Claims of [**name of claimant**] ("Claimant") for unpaid billings totaling $[**amount**] ("Claim Amount"); [**specify**] construction project ("Project")

[**Salutation**]

This is to provide you with notice that Claimant is owed the Claim Amount for its past-due and unpaid billings for [labor/materials/labor and materials] furnished on the Project. Claimant furnished [**description of work and/or materials furnished**] for the Project under Claimant's agreement with [**name of customer**].

This notice is sent in compliance with the Texas Property Code's mechanic's lien provisions. Accordingly, we must notify you that if the Claim Amount remains unpaid, the owner of the premises may be personally liable, and the owner's property may be subjected to a lien unless the owner withholds payment from the contractor for payment of the claim or the claim is otherwise paid or settled.

Also, further notice is given that all of the Claim Amount has accrued and is past due. Accordingly, demand for payment of the claim in the Claim Amount is hereby made.

Enclosed are copies of the statements or billings that constitute this claim.

This also constitutes notice pursuant to section 162.001 *et seq.* of the Texas Property Code (the Trust Fund Act) that Claimant has a priority interest in the construction funds for this project in your possession now or released to you in the future. The Trust Fund Act states

that project owners and contractors are trustees of the construction funds they receive. Such funds must be used to pay for the labor and materials on the Project and cannot be used for other purposes. The owner and contractor are deemed to be trustees of the Project funds for the benefit of unpaid subcontractors and suppliers, including Claimant, to see that payment is made. Consequently, you are directed to set aside such construction funds to cover the Claim Amount. Diversion of construction trust funds constitutes violation of the Trust Fund Act.

Please contact me immediately regarding this notice.

Sincerely yours,

_____

[**Name of attorney**]

Certified Mail No. [**number**]
Return Receipt Requested

Certified Mail No. [**number**]
Return Receipt Requested

Attach the notice at form 7-9 if the lien is against homestead property.

Form 7-9

To fix a lien on homestead, the following statement must be included in or attached to form 7-8, the notice required to be given to the owner under Property Code section 53.252. Tex. Prop. Code § 53.254. The language is derived from the statute, and the user must be careful not to alter the prescribed language.

Notice to Owner Regarding Liens against Homestead Property

If a subcontractor or supplier who furnishes materials or performs labor for construction of improvements on your property is not paid, your property may be subject to a lien for the unpaid amount if:

1. after receiving notice of the unpaid claim from the claimant, you fail to withhold payment to your contractor that is sufficient to cover the unpaid claim until the dispute is resolved; or

2. during construction and for 30 days after completion of construction, you fail to retain 10 percent of the contract price or 10 percent of the value of the work performed by your contractor.

If you have complied with the law regarding the 10 percent retainage and you have withheld payment to the contractor sufficient to cover any written notice of claim and have paid that amount, if any, to the claimant, any lien claim filed on your property by a subcontractor or supplier, other than a person who contracted directly with you, will not be a valid lien on your property. In addition, except for the required 10 percent retainage, you are not liable to a subcontractor or supplier for any amount paid to your contractor before you received written notice of the claim.

[Reserved]

Form 7-10

The language of this disclosure is based on Tex. Prop. Code § 53.255(b). The disclosure must be substantially similar to the statutory language.

Contractor's Disclosure Statement for Residential Construction

Date:

Owner:

Contractor:

Property:

[Lender:]

Know Your Rights and Responsibilities under the Law. You are about to enter into a transaction to build a new home or remodel existing residential property. Texas law requires your contractor to provide you with this brief overview of some of your rights, responsibilities, and risks in this transaction.

Conveyance to Contractor Not Required. Your contractor may not require you to convey your real property to your contractor as a condition to the agreement for the construction of improvements on your property.

Know Your Contractor. Before you enter into your agreement for the construction of improvements to your real property, make sure that you have investigated your contractor. Obtain and verify references from other people who have used the contractor for the type and size of construction project on your property.

Get It in Writing. Make sure that you have a written agreement with your contractor that includes (1) a description of the work the contractor is to perform; (2) the required or estimated time for completion of the work; (3) the cost of the work or how the cost will be determined; and (4) the procedure and method of payment, including provisions for statutory retainage and conditions for final payment. If your contractor made a promise, warranty, or representation to you concerning the work the contractor is to perform, make sure that promise, warranty, or representation is specified in the written agreement. An oral promise that is not included in the written agreement may not be enforceable under Texas law.

Read Before You Sign. Do not sign any document before you have read and understood it. NEVER SIGN A DOCUMENT THAT INCLUDES AN UNTRUE STATEMENT. Take your time in reviewing documents. If you borrow money from a lender to pay for the improvements, you are entitled to have the loan closing documents furnished to you for review at least one business day before the closing. Do not waive this requirement unless a bona fide emergency or another good cause exists, and make sure you understand the documents before you sign them. If you fail to comply with the terms of the documents, you could lose your property. You are entitled to have your own attorney review any documents. If you have any question about the meaning of a document, consult an attorney.

Get a List of Subcontractors and Suppliers. Before construction commences, your contractor is required to provide you with a list of the subcontractors and suppliers the contractor intends to use on your project. Your contractor is required to supply updated information on any subcontractors and suppliers added after the list is provided. Your contractor is not required to supply this information if you sign a written waiver of your rights to receive this information.

Monitor the Work. Lenders and governmental authorities may inspect the work in progress from time to time for their own purposes. These inspections are not intended as quality control inspections. Quality control is a matter for you and your contractor. To ensure that

your home is being constructed in accordance with your wishes and specifications, you should inspect the work yourself or have your own independent inspector review the work in progress.

Monitor Payments. If you use a lender, your lender is required to provide you with a periodic statement showing the money disbursed by the lender from the proceeds of your loan. Each time your contractor requests payment from you or your lender for work performed, your contractor is also required to furnish you with a disbursement statement that lists the name and address of each subcontractor or supplier that the contractor intends to pay from the requested funds. Review these statements and make sure that the money is being properly disbursed.

Claims by Subcontractors and Suppliers. Under Texas law, if a subcontractor or supplier who furnishes labor or materials for the construction of improvements on your property is not paid, you may become liable and your property may be subject to a lien for the unpaid amount, even if you have not contracted directly with the subcontractor or supplier. To avoid liability, you should take the following actions:

1. If you receive a written notice from a subcontractor or supplier, you should withhold payment from your contractor for the amount of the claim stated in the notice until the dispute between your contractor and the subcontractor or supplier is resolved. If your lender is disbursing money directly to your contractor, you should immediately provide a copy of the notice to your lender and instruct the lender to withhold payment in the amount of the claim stated in the notice. If you continue to pay the contractor after receiving the written notice without withholding the amount of the claim, you may be liable and your property may be subject to a lien for the amount you failed to withhold.

2. During construction and for thirty days after final completion, termination, or abandonment of the contract by the contractor, you should withhold or cause your lender to

withhold 10 percent of the amount of payments made for the work performed by your contractor. This is sometimes referred to as "statutory retainage." If you choose not to withhold the 10 percent for at least thirty days after final completion, termination, or abandonment of the contract by the contractor and if a valid claim is timely made by a claimant and your contractor fails to pay the claim, you may be personally liable and your property may be subject to a lien up to the amount that you failed to withhold.

If a claim is not paid within a certain time period, the claimant is required to file a mechanic's lien affidavit in the real property records in the county in which the property is located. A mechanic's lien affidavit is not a lien on your property, but the filing of the affidavit could result in a court imposing a lien on your property if the claimant is successful in litigation to enforce the lien claim.

Some Claims May Not Be Valid. When you receive a written notice of a claim or when a mechanic's lien affidavit is filed on your property, you should know your legal rights and responsibilities regarding the claim. Not all claims are valid. A notice of a claim by a subcontractor or supplier is required to be sent, and the mechanic's lien affidavit is required to be filed, within strict time periods. The notice and the affidavit must contain certain information. All claimants may not fully comply with the legal requirements to collect on a claim. If you have paid the contractor in full before receiving a notice of a claim and have fully complied with the law regarding statutory retainage, you may not be liable for that claim. Accordingly, you should consult your attorney when you receive a written notice of a claim to determine the true extent of your liability or potential liability for that claim.

Obtain a Lien Release and a Bills-Paid Affidavit. When you receive a notice of claim, do not release withheld funds without obtaining a signed and notarized release of lien and claim from the claimant. You can also reduce the risk of having a claim filed by a subcontractor or supplier by requiring as a condition of each payment made by you or your lender that your contractor furnish you with an affidavit stating that all bills have been paid. Under

Texas law, on final completion of the work and before final payment, the contractor is required to furnish you with an affidavit stating that all bills have been paid. If the contractor discloses any unpaid bill in the affidavit, you should withhold payment in the amount of the unpaid bill until you receive a waiver of lien or release from that subcontractor or supplier.

Obtain Title Insurance Protection. You may be able to obtain a title insurance policy to insure that the title to your property and the existing improvements on your property are free from liens claimed by subcontractors and suppliers. If your policy is issued before the improvements are completed and covers the value of the improvements to be completed, you should obtain, on the completion of the improvements and as a condition of your final payment, a "completion of improvements" policy endorsement. This endorsement will protect your property from liens claimed by subcontractors and suppliers that may arise from the date the original title policy is issued to the date of the endorsement.

I have received a copy of this contractor's disclosure statement for residential construction.

I have also received a copy of the attached contractor's list of subcontractors and suppliers.

_____

[Name of owner]

Attach list of subcontractors and suppliers (form 7-11).

[Reserved]

Form 7-11

The prescribed language in the "Notice" paragraph of this form must appear in a minimum of ten-point bold-faced type. The list may be given either with form 7-10 or before the commencement of construction. This list must be updated and provided to the owner not later than the fifteenth day after a subcontractor or supplier is added or deleted unless the owner has signed a written waiver of the right to receive updates. Tex. Prop. Code § 53.256.

Contractor's List of Subcontractors and Suppliers

Date:

Owner:

Contractor:

Property:

[Lender:]

NOTICE: THIS LIST OF SUBCONTRACTORS AND SUPPLIERS MAY NOT BE A FINAL LISTING. UNLESS YOU SIGN A WAIVER OF YOUR RIGHT TO RECEIVE UPDATED INFORMATION, THE CONTRACTOR IS REQUIRED BY LAW TO SUPPLY UPDATED INFORMATION, AS THE INFORMATION BECOMES AVAILABLE, FOR EACH SUBCONTRACTOR OR SUPPLIER USED IN THE WORK PERFORMED ON YOUR RESIDENCE.

Name of subcontractor or supplier:

Address:

Telephone number:

Repeat abcve information as needed.

If this list was not delivered with form 7-10, include the following.

I have received a copy of this list of subcontractors and suppliers.

_____

[**Name of owner**]

Form 7-12

Notice to Original Contractor by Second-Tier Claimant

[**Date**]

[**Name and address of original contractor**]

Re: Claims of [**name of claimant**] ("Claimant") for unpaid billings totaling $[**amount**] ("Claim Amount"); [**specify**] construction project ("Project")

[**Salutation**]

This is to provide you with the required notice, in accordance with section 53.056 of the Texas Property Code, that Claimant is owed the Claim Amount for its billings to [**name of customer**] for [labor/materials/labor and materials] furnished on the Project. Claimant's [labor/materials/labor and materials] are generally described as [**description of work and/or materials furnished**].

Enclosed are copies of Claimant's unpaid statements or billings. Please contact me regarding this notice. Thank you for your attention to this matter.

Sincerely yours,

_____

[**Name of attorney**]

Certified Mail No. [**number**]
Return Receipt Requested

[Reserved]

Form 7-13

This notice must be sent to the owner by the fifteenth day of the second month following the claimant's receipt and acceptance of an order for the specially fabricated material. The original contractor must also be sent notice if the indebtedness was incurred by a person other than the original contractor. Tex. Prop. Code §§ 53.058, 53.253.

Notice Regarding Specially Fabricated Material[s]

[**Date**]

[**Name and address of owner**]
[**Name and address of original contractor**]

Re: [**specify**] construction project ("Project")

[**Salutation**]

[**Name of claimant**] ("Claimant") has received and accepted an order from [**name of customer**] for specially fabricated [**description**] to be delivered to your Project after [they are/it is] made. The price of the specially fabricated order is $[**amount**]. This notice is sent to you in compliance with the mandatory provisions of Texas law regarding receipt of orders for specially fabricated materials. This is not intended as a comment in any way on Claimant's customer, [**name of customer**], but is merely sent in compliance with the state law.

Claimant is pleased to be a participant in this Project and looks forward to working with [**name of customer**] toward the Project's successful conclusion.

Sincerely yours,

_____
[**Name of attorney**]

Certified Mail No. [**number**]
Return Receipt Requested

Certified Mail No. [**number**]
Return Receipt Requested

Form 7-14

This notice must be given to the owner by the earlier of the thirtieth day after the date the claimant's retainage agreement is completed, terminated, or abandoned; or the thirtieth day after the date the original contract is terminated or abandoned. Tex. Prop. Code § 53.057(b). The original contractor also must be sent notice if the claimant's contract is not with the original contractor. Tex. Prop. Code § 53.057(b–1). Please refer to Texas Property Code section 53.057 for additional requirements for this notice.

Notice of Agreement Providing for Retainage

[**Date**]

[**Name and address of owner**]
[**Name and address of original contractor**]

Re: Notice for Contractual Retainage Claim—[**describe in detail the name and location of the construction project**] ("Project")

[**Salutation**]

[**Name of claimant**] ("Claimant"), at [**address of claimant**], is pleased to have been selected as a [subcontractor/supplier] for the Project. Claimant's contract with [**name of contractor**], at [**address of contractor**], provides that [10/[**specify other percentage**]] percent of the contract price may be withheld as retainage. Claimant therefore respectfully submits its notice of contractual retainage agreement. This notice is required by section 53.057 of the Texas Property Code.

The general nature of the agreement is as follows: [**specify, e.g.,** 10 percent of contract price as adjusted by the change orders].

The date or dates when retainage is payable are as follows: [**specify, e.g.,** thirty days after final completion of our portion of the work on the Project].

We believe the total amount to be retained under our contract will be $[**amount**]. Also [**percent**] percent of increases to Claimant's contract by change order(s) will be subject to retainage.

This notice is not in any way to be considered a negative comment regarding Claimant's customer, [**name of customer**], and Claimant looks forward to working toward a successful completion of your Project.

Sincerely yours,

_____

[**Name of attorney**]

Certified Mail No. [**number**]
Return Receipt Requested

Certified Mail No. [**number**]
Return Receipt Requested

Form 7-15

If the lien relates to a homestead, the affidavit must contain the notice preceding the title of this form. The language of the notice is prescribed by Tex. Prop. Code § 53.254(f) and must appear at the top of the page in a minimum of ten-point bold-faced type or equivalent.

NOTICE: THIS IS NOT A LIEN. THIS IS ONLY AN AFFIDAVIT CLAIMING A LIEN.

Affidavit Claiming Mechanic's and Materialman's Lien

Affiant, [**name of affiant**], on oath swears that the following statements are true and are within the personal knowledge of Affiant:

"My name is [**name of affiant**]. I am the [claimant/[**title**] of [**name of claimant**]] ('Claimant'). This affidavit is made to perfect a mechanic's and materialman's lien against the real property described below:

"1. Claimant has an unpaid claim in the amount of $[**amount**] ('Claim Amount') for [labor/materials/labor and materials] furnished on the construction of improvements generally known as the [**specify**] construction project. The Claim Amount is, within my personal knowledge, just and true, the same is due and unpaid, and all just and lawful offsets, payments, and credits have been allowed. The Claim Amount is for [labor/materials/labor and materials] furnished and described below, on which a systematic record has been kept.

"2. The name and last known address of the owner or reputed owner ('Owner') of the real property and improvements on which this claim is made are [**name and address**].

"3. The Claim Amount represents the unpaid contract price due Claimant, or, in the alternative, is the reasonable value of the unpaid portion of Claimant's [labor/materials/labor and materials] furnished, which are described below.

"4. Claimant's [labor/materials/labor and materials] furnished for construction of improvements on the real property described below [is/are] generally described as [**describe, e.g.,** specially fabricated and installed plumbing, heating, ventilating, and air-conditioning duct work, equipment, and allied systems]. Payment of the Claim Amount is requested for work performed or materials furnished during each of the following months: [**specify months**].

"5. Claimant furnished the above-described [labor/materials/labor and materials] under a [subcontract/contract/purchase order] with [**name of customer**], whose last known address is [**address**].

"6. The name and last known address of the original contractor on the above-referenced project are [**name and address**].

"7. The legal description of the real property improved by Claimant's above-described [labor/materials/labor and materials] is [**legal description**]. That real property and improvements on it are sought to be charged with Claimant's lien.

"8. Claimant claims a mechanic's and materialman's lien on the above-described real property and improvements thereon to secure payment of its Claim Amount in accordance with the Texas Property Code.

"9. Claimant's physical address is [**address**]. Claimant's mailing address is [**address**].

"10. Claimant's notice[s] of mechanic's lien [was/were] sent to Owner by United States certified mail, return receipt requested, on the following date[s]: [**specify date[s]**].

"11. In compliance with the Texas Property Code, Claimant is sending one copy of this affidavit to Owner at its last known address and also one copy to the above-referenced original contractor at its last known address."

_____

[**Name of affiant**]

SUBSCRIBED AND SWORN TO before me on _____

by [**name of affiant**].

_____

Notary Public, State of Texas

[Reserved]

Form 7-16

Copies of the lien affidavit must be sent within five days of filing the lien affidavit. Tex. Prop. Code § 53.055(a).

Cover Letter Sending Copy of Lien Affidavit

[**Date**]

[**Name and address of owner**]
[**Name and address of original contractor**]

Re: Claim of [**name of claimant**] ("Claimant"); mechanic's and materialman's lien

[**Salutation**]

Enclosed is a copy of Claimant's affidavit claiming a mechanic's and materialman's lien ("Affidavit").

In accordance with the Texas Property Code, we notify you again that if the claim described in the Affidavit remains unpaid, the owner of the property described may be liable, unless the owner withholds payment from the contractor for the amount of the claim or it is otherwise settled or paid.

Claimant was forced to proceed with securing its lien rights because Claimant has not received payment from any source on the claim set forth in the Affidavit.

Include the following if applicable.

Previous written demand by Claimant for payment of this claim was made on [**date**]. No notice of dispute regarding this claim was submitted. Therefore demand for payment of the claim amount is hereby made in accordance with section 53.083 of the Texas Property Code.

Continue with the following.

Please contact me on receipt of this letter so that we may discuss a prompt resolution of this matter.

Sincerely yours,

_____

[**Name of attorney**]

Enc.
Certified Mail No. [**number**]
Return Receipt Requested

Certified Mail No. [**number**]
Return Receipt Requested

Attach a copy of the lien affidavit (form 7-15). For residential construction on a homestead, also attach the notice at form 7-9.

Form 7-17

Request for Information to Owner

[Date]

[Name and address of owner]

Re: Request for information on [specify] construction project ("Project")

[Salutation]

[Name of claimant] is furnishing [labor/materials/labor and materials] for the Project. This is to respectfully request that you, as owner of the Project, furnish to us the following information not later than the tenth day after the date you receive this request, as required by sections 53.106 and 53.159 of the Texas Property Code:

1. a sufficient legal description of the real property being improved;

2. whether there is a surety bond and, if so, the name and last known address of the surety and a copy of the bond;

3. whether there are any prior recorded liens or security interests on the Project property being improved and, if so, the name and address of the person or entity having the lien or security interest;

4. the date on which the original contract for the Project was executed; and

5. whether there is an affidavit of commencement or affidavit of completion filed, and, if so, a copy of each affidavit.

Thank you for your cooperation and prompt attention.

Sincerely yours,

_____

[**Name of attorney**]

Certified Mail No. [**number**]
Return Receipt Requested

Form 7-18

Request for Information to Original Contractor

[**Date**]

[**Name and address of original contractor**]

Re: Request for information on [**specify**] construction project ("Project")

[**Salutation**]

[**Name of claimant**] is furnishing [labor/materials/labor and materials] for the Project. This is to respectfully request that you, as original contractor for the Project, furnish to us the following information not later than the tenth day after you receive this request, as required by section 53.159 of the Texas Property Code:

1. the name and last known address of the person to whom you furnished labor and materials for the Project;

2. whether you have furnished or have been furnished any payment bonds for any work on the Project and, if so, the name and last known address of the surety or sureties and a copy of each bond; and

3. the date on which the original contract for the Project was executed.

Thank you for your cooperation and prompt attention.

Sincerely yours,

_____

[**Name of attorney**]

Certified Mail No. [**number**]
Return Receipt Requested

[Reserved]

Form 7-19

Request for Information to Subcontractor

[Date]

[**Name and address of subcontractor**]

Re: Request for information on [**specify**] construction project ("Project")

[**Salutation**]

[**Name of claimant**] has furnished [labor/materials/labor and materials] for the Project under your subcontract on the Project. This is to respectfully request that you, as a subcontractor for the Project, furnish to us the following information not later than the tenth day after you receive this request, as required by section 53.159 of the Texas Property Code:

1. the name and last known address of each person from whom you purchased labor or materials for the Project, other than the materials that were furnished from your inventory;

2. the name and last known address of each person to whom you furnished labor and materials for the Project; and

3. whether you have furnished or have been furnished any payment bonds for any work on the Project and, if so, the name and last known address of the surety or sureties and a copy of each bond.

Thank you for your cooperation and prompt attention.

Sincerely yours,

_____

[**Name of attorney**]

Certified Mail No. [**number**]
Return Receipt Requested

Form 7-20

Contractor's Disbursement Disclosure for Residential Construction (Consumer-Owned)

Date:

Owner:

Property:

Project: [**include description**]

Contractor:

[Lender:]

The following information is required to be provided under section 53.258 of the Texas Property Code in connection with this payment request for construction on the Property. This statement will be furnished by depositing the statement in the United States mail, first class, postage paid, and properly addressed to Owner or by hand delivering the statement to Owner before Contractor receives the requested funds.

A. Bills Paid. The following is a list of bills or expenses for labor or materials used on the Project that have been paid and for which Contractor is requesting payment:

Name and address of subcontractor or supplier:

Description of bill or expense paid:

Amount paid:

Repeat above information as needed.

B. Bills to Be Paid. The following is a list of bills or expenses relating to labor or materials used on the Project that will be paid from the funds requested. This list contains the name and address of each person who subcontracted directly with Contractor and whom Contractor intends to pay from the requested funds.

Name and address of payee:

Description of bill or expense to be paid:

Amount to be paid:

Repeat above information as needed.

_____

[Name of contractor]

Form 7-21

This form may be used as written by an original contractor to fulfill the requirements of Tex. Prop. Code §§ 53.085, 53.258, 53.259; the wording may be modified if the affidavit is made for a subcontractor or supplier under Tex. Prop. Code § 53.085.

[Final] Bills-Paid Affidavit

Date:

Owner:

Owner's Mailing Address: [**include county**]

Contractor:

Contractor's Mailing Address: [**include county**]

Affiant: [**include relationship to contractor**]

Affiant's Mailing Address: [**include county**]

Property: [**include legal description**]

Improvements:

Affiant swears individually and on behalf of Contractor that the following statements are true and within the personal knowledge of Affiant:

1. Affiant has personal knowledge of the facts stated in this affidavit. Affiant has full authority to make the agreements in this affidavit on behalf of Contractor.

2. Affiant understands that Owner has required this affidavit as a condition of payment for labor or materials used in construction of the Improvements.

3. Contractor has paid each of Contractor's subcontractors, laborers, and materialmen in full for all labor and materials provided to Owner or Contractor for construction of the Improvements, excepting only the amounts owed to the persons identified below:

List all subcontractors, laborers, and materialmen and amounts owed to each. If there are no unpaid subcontractors, laborers, or materialmen, state "None."

Name:

Address:

Telephone number:

Amount owed:

Repeat above information as needed.

Include the following if applicable.

Contractor warrants and represents that the following specified bills or classes of bills will be paid by Contractor from the funds paid to Contractor by Owner in reliance on this affidavit:

Name of payee or description of class:

Amount:

Repeat above information as needed.

Include the following if applicable.

In consideration of the funds paid to Contractor by Owner in reliance on this affidavit, Contractor waives and releases all of Contractor's statutory and constitutional mechanic's lien rights connected with the construction of the Improvements, conditioned on the actual payment or collection if payment is made by check or draft.

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

[Reserved]

Form 7-22

The sworn account suit is the usual method by which a constitutional lien is foreclosed, and this petition initiates that kind of suit. By following the form petitions in chapter 14 of this manual, the attorney can modify this form to fit other situations. For other forms of party designation, see section 14.29. See also section 14.22 regarding exercising caution in pleading conditions precedent. The affidavit, statement of account, and any invoices must also be attached; abbreviations and other items in the account must be explained for clarity if necessary. The application for a writ of sequestration (form 7-23) should be filed when suit on the debt is filed. The sworn account procedure is discussed at section 14.1, and sequestration is discussed at sections 8.16 through 8.24.

Caveat: In calculating the amount due on the account, do not include any interest that may have been posted to it.

[Caption. See § 3 of the Introduction in volume 1 of this manual.]

Petition and Application to Foreclose Constitutional Lien on Personal Property

1. *Parties.* Plaintiff is [**name of plaintiff**], whose address is [**address, city, state**]. Defendant is [**name of defendant**], who can be served with citation at [**address, city, state**].

2. *Facts.* In the usual course of business, Plaintiff [made/repaired] for Defendant the following article[s] of personal property: [**describe property**], as shown on the attached statement of account. Defendant accepted the article[s] and became bound to pay Plaintiff [its/their] designated price, which is a reasonable, usual, and customary price for such [an] item[s]. The statement of account is attached as Exhibit [**exhibit number/letter**] and incorporated by reference. This account represents a transaction or series of transactions of which a systematic record has been kept.

3. *Debt.* Defendant has defaulted by failing to make payments on the account. The principal balance due Plaintiff on the account is $[**amount**] after all just and lawful offsets, payments, and credits have been allowed, as shown on Exhibit [**exhibit number/letter**]. Plaintiff has demanded that Defendant pay this amount, but Defendant has not done so.

4. *Conditions Precedent.* All conditions precedent have been performed or have occurred.

5. *Lien.* Under article XVI, section 37, of the Texas Constitution, Plaintiff holds a lien on the above-described article[s], because Plaintiff [made/repaired] the article[s] as requested by Defendant. [This/These] article[s] [is/are] now in Defendant's possession. Plaintiff has a right to repossess and reclaim possession of the article[s] under Plaintiff's right to enforce and satisfy Plaintiff's constitutional lien claim against the article[s].

6. *Attorney's Fees.* Defendant's default has made it necessary for Plaintiff to employ the undersigned attorney to file suit. This claim was timely presented to Defendant and remains unpaid. Reasonable fees for the attorney's services rendered and to be rendered through trial and appeal are at least $[**amount**].

7. *Prayer.* Plaintiff prays that—

a. Defendant be cited to appear and answer;

b. Plaintiff be granted judgment for $[**amount**] as the principal amount due on the account;

c. Plaintiff be granted foreclosure of the constitutional lien against the property described in this petition;

d. Plaintiff be granted judgment for prejudgment and postjudgment interest at the highest legal or contractual rate allowed by law;

e. Plaintiff be granted judgment for at least $[**amount**] as reasonable attorney's fees, with additional contingent amounts in the event of appellate proceedings;

f. Plaintiff be granted judgment for all costs of court; and

g. Plaintiff be granted all further relief to which Plaintiff may be entitled.

[**Name**]
Attorney for Plaintiff
State Bar No.:
[**E-mail address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

Attach exhibit(s). Attach an affidavit for suit on a sworn account (form 14-2). Prepare an application for a writ of sequestration (form 7-23).

[Reserved]

Form 7-23

The lienholder should apply for a writ of sequestration on personal property subject to the lien at the time suit is filed on the debt; see sections 7.14:2, 8.16, and 8.17 in this manual. For a petition on a sworn account seeking foreclosure of the lien, see form 7-22. Additional sequestration forms are at forms 8-8 through 8-16. See section 14.29 for other forms of party designation. In most counties, the clerk will prepare the writ of sequestration and the return. In some cases, the attorney may wish to prepare them for the clerk.

[Caption. See § 3 of the Introduction in volume 1 of this manual.]

> Use the same caption as in the petition and application to foreclose the constitutional lien unless the cause has been transferred.

Application and Affidavit for Writ of Sequestration in Suit on Constitutional Lien on Personal Property

1. *Parties.* Plaintiff, [**name of plaintiff**], whose address is [**address, city, state**], makes this Application for Writ of Sequestration. Defendant is [**name of defendant**], who can be served with citation at [**address, city, state**].

> State specific facts relied on by the plaintiff to warrant the required findings by the court. The following paragraphs are sample allegations; the actual allegations must be drafted to fit the facts.

2. *Facts.* In this suit, now pending in this Court, Plaintiff is seeking damages from Defendant and foreclosure or enforcement of a constitutional lien pursuant to article XVI, section 37, of the Texas Constitution, in the following personal property: [**describe each item of property with sufficient certainty that it can be identified and distinguished from similar property**]. Each item of property has the following value: [**list each item and its value**]. All this property is in Defendant's possession at [**address, city, county**] County, Texas.

3. *Lien.* On [**date**], Plaintiff [delivered to Defendant/repaired] the property described above, for which Defendant still owes Plaintiff $[**amount**]. Defendant refuses to pay

this amount to Plaintiff. Plaintiff holds a lien on this property under article XVI, section 37, of the Texas Constitution, having [made/repaired] the property. This property is in Defendant's possession.

Select one of the following.

4. *Grounds.* Plaintiff fears that Defendant may convey the property to a third party without notice of Plaintiff's claim to a constitutional lien on the property, so that the conveyance would probably sever Plaintiff's constitutional lien.

Or

4. *Grounds.* Defendant refused to surrender possession of the property when specifically and rightfully requested by Plaintiff to do so. This refusal by Defendant is an intentional concealment of the property and therefore jeopardizes Plaintiff's lien on the property.

Continue with the following.

5. *Prayer.* Plaintiff prays that a writ of sequestration issue and that Plaintiff receive all further relief to which Plaintiff may be entitled.

_____

[Name]
Attorney for Plaintiff
State Bar No.:
[E-mail address]
[Address]
[Telephone]
[Telecopier]

Affidavit

BEFORE ME, the undersigned authority, on this day personally appeared [**name of affiant**], who swore on oath that the following facts are true:

"I am [Plaintiff/[**other capacity, e.g.**, credit manager of Plaintiff]] in this cause. [**Include if affiant is agent:** I am authorized to make this affidavit and to apply for a writ of sequestration in this cause.]

Select one of the following.

"I have personal knowledge of the facts stated above, and they are true and correct."

Or

"I make this affidavit on information and belief. The basis for that belief is the following: [**state specific grounds for belief**]."

Continue with the following.

_____

[**Name of affiant**]
Affiant

SIGNED under oath before me on _____.

_____

Notary Public, State of Texas

Prepare the following to take to the hearing: form 8-9 (order for issuance of writ of sequestration), form 8-4 (bond to defendant), form 8-10 (writ of sequestration), and form 8-12 (officer's return).

[Reserved]

Form 7-24

If a claimant or potential claimant is required to execute a waiver and release in exchange for or to induce the payment of a progress payment and is not paid in exchange for the waiver and release, or if a single payee check or joint payee check is given in exchange for the waiver and release, the waiver and release must substantially comply with the form below, described in Texas Property Code section 53.284(b). Tex. Prop. Code § 53.284(a), (b).

Conditional Waiver and Release on Progress Payment

Project _____

Job No. _____

On receipt by the signer of this document of a check from _____ (maker of check) in the sum of $_____ payable to _____ (payee or payees of check) and when the check has been properly endorsed and has been paid by the bank on which it is drawn, this document becomes effective to release any mechanic's lien right, any right arising from a payment bond that complies with a state or federal statute, any common law payment bond right, any claim for payment, and any rights under any similar ordinance, rule, or statute related to claim or payment rights for persons in the signer's position that the signer has on the property of _____ (owner) located at _____ (location) to the following extent: _____ (job description).

This release covers a progress payment for all labor, services, equipment, or materials furnished to the property or to _____ (person with whom signer contracted) as indicated in the attached statement(s) or progress payment request(s), except for unpaid retention, pending modifications and changes, or other items furnished.

Before any recipient of this document relies on this document, the recipient should verify evidence of payment to the signer.

The signer warrants that the signer has already paid or will use the funds received from this progress payment to promptly pay in full all of the signer's laborers, subcontractors, materialmen, and suppliers for all work, materials, equipment, or services provided for or to the above referenced project in regard to the attached statement(s) or progress payment request(s).

Date _____

_____ (Company name)

By _____ (Signature)

_____ (Title)

Form 7-25

If a claimant or potential claimant is required to execute an unconditional waiver and release to prove the receipt of good and sufficient funds for a progress payment and the claimant or potential claimant asserts in the waiver and release that the claimant or potential claimant has been paid the progress payment, the waiver and release must substantially comply with the form below, described in Texas Property Code section 53.284(c). Tex. Prop. Code § 53.284(a), (c). The notice provision must appear at the top of the document, printed in bold type at least as large as the largest type used in the document, but not smaller than ten-point type. Tex. Prop. Code § 53.284(c)(1).

NOTICE: This document waives rights unconditionally and states that you have been paid for giving up those rights. It is prohibited for a person to require you to sign this document if you have not been paid the payment amount set forth below. If you have not been paid, use a conditional release form.

Unconditional Waiver and Release on Progress Payment

Project _____

Job No. _____

The signer of this document has been paid and has received a progress payment in the sum of $_____ for all labor, services, equipment, or materials furnished to the property or to _____ (person with whom signer contracted) on the property of _____ (owner) located at _____ (location) to the following extent: _____ (job description). The signer therefore waives and releases any mechanic's lien right, any right arising from a payment bond that complies with a state or federal statute, any common law payment bond right, any claim for payment, and any rights under any similar ordinance, rule, or statute related to claim or payment rights for persons in the signer's position that the signer has on the above referenced project to the following extent:

This release covers a progress payment for all labor, services, equipment, or materials furnished to the property or to _____ (person with whom signer contracted) as indicated in the attached statement(s) or progress payment request(s), except for unpaid retention, pending modifications and changes, or other items furnished.

The signer warrants that the signer has already paid or will use the funds received from this progress payment to promptly pay in full all of the signer's laborers, subcontractors, materialmen, and suppliers for all work, materials, equipment, or services provided for or to the above referenced project in regard to the attached statement(s) or progress payment request(s).

Date _____

_____ (Company name)

By _____ (Signature)

_____ (Title)

Form 7-26

If a claimant or potential claimant is required to execute a waiver and release in exchange for or to induce the payment of a final payment and is not paid in good and sufficient funds in exchange for the waiver and release, or if a single payee check or joint payee check is given in exchange for the waiver and release, the waiver and release must substantially comply with the form below, described in Texas Property Code section 53.284(d). Tex. Prop. Code § 53.284(a), (d).

Conditional Waiver and Release on Final Payment

Project _____

Job No. _____

On receipt by the signer of this document of a check from _____ (maker of check) in the sum of $_____ payable to _____ (payee or payees of check) and when the check has been properly endorsed and has been paid by the bank on which it is drawn, this document becomes effective to release any mechanic's lien right, any right arising from a payment bond that complies with a state or federal statute, any common law payment bond right, any claim for payment, and any rights under any similar ordinance, rule, or statute related to claim or payment rights for persons in the signer's position that the signer has on the property of _____ (owner) located at _____ (location) to the following extent: _____ (job description).

This release covers the final payment to the signer for all labor, services, equipment, or materials furnished to the property or to _____ (person with whom signer contracted).

Before any recipient of this document relies on this document, the recipient should verify evidence of payment to the signer.

The signer warrants that the signer has already paid or will use the funds received from this final payment to promptly pay in full all of the signer's laborers, subcontractors, material-men, and suppliers for all work, materials, equipment, or services provided for or to the above referenced project up to the date of this waiver and release.

Date _____

_____ (Company name)

By _____ (Signature)

_____ (Title)

Form 7-27

If a claimant or potential claimant is required to execute an unconditional waiver and release to prove the receipt of good and sufficient funds for a final payment and the claimant or potential claimant asserts in the waiver and release that the claimant or potential claimant has been paid the final payment, the waiver and release must substantially comply with the form below, described in Texas Property Code section 53.284(e). Tex. Prop. Code § 53.284(a), (e). The notice provision must appear at the top of the document, printed in bold type at least as large as the largest type used in the document, but not smaller than ten-point type. Tex. Prop. Code § 53.284(e)(1).

NOTICE: This document waives rights unconditionally and states that you have been paid for giving up those rights. It is prohibited for a person to require you to sign this document if you have not been paid the payment amount set forth below. If you have not been paid, use a conditional release form.

Unconditional Waiver and Release on Final Payment

Project _____

Job No. _____

The signer of this document has been paid in full for all labor, services, equipment, or materials furnished to the property or to _____ (person with whom signer contracted) on the property of _____ (owner) located at _____ (location) to the following extent: _____ (job description). The signer therefore waives and releases any mechanic's lien right, any right arising from a payment bond that complies with a state or federal statute, any common law payment bond right, any claim for payment, and any rights under any similar ordinance, rule, or statute related to claim or payment rights for persons in the signer's position.

The signer warrants that the signer has already paid or will use the funds received from this final payment to promptly pay in full all of the signer's laborers, subcontractors, material-

men, and suppliers for all work, materials, equipment, or services provided for or to the above referenced project up to the date of this waiver and release.

Date _____

_____ (Company name)

By _____ (Signature)

_____ (Title)

Chapter 8

Prejudgment Remedies

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Chapter 8

Prejudgment Remedies

I. Prejudgment Remedies Generally

§ 8.1 Use of Prejudgment Remedies

The prejudgment remedies discussed in this chapter are typically used after suit is filed, but before judgment is obtained, to preserve the debtor's assets for satisfying the eventual judgment. Note that an alternative remedy not covered in this chapter may be available for an employee who is owed wages as prescribed by Tex. Lab. Code §§ 61.051–.067.

§ 8.2 Summary of Prejudgment Remedies

§ 8.2:1 Mechanic's and Other Liens

The liens most commonly encountered in collections work not involving real property are constitutional mechanic's liens; farm, factory, or store worker's liens; worker's possessory liens; and landlord's liens. See chapter 7 in this manual for a discussion of liens and chapter 28 for a discussion of landlord-tenant law.

§ 8.2:2 Garnishment

Prejudgment garnishment allows a creditor to reach assets of the debtor that are in possession of a third party, including debts that third parties owe to the debtor, to secure the property until judgment is entered. See sections 8.11 through 8.15 below regarding prejudgment garnishment.

§ 8.2:3 Sequestration

Sequestration enables a secured creditor to preserve his collateral until a disputed claim to the collateral is settled by disposition of the underlying case. See sections 8.16 through 8.24 below regarding sequestration.

§ 8.2:4 Attachment

Attachment enables an unsecured creditor (or a creditor without a claim on subject property) to preserve the debtor's nonexempt property for satisfaction of a probable judgment in the underlying case. Generally, the plaintiff must show that the defendant plans to hide property or otherwise cause the plaintiff to lose the ability to collect a debt. Attachment is effected by an officer's authorized seizure and retention of the debtor's nonexempt property. See sections 8.25 through 8.32 below regarding attachment.

§ 8.2:5 Distinction between Garnishment, Sequestration, and Attachment

The foregoing judicial prejudgment remedies are often confused. Briefly, garnishment reaches the defendant's property in the hands of a third party, such as a bank in which the defendant has deposited funds. Sequestration reaches any of the debtor's property in which the creditor has an interest, regardless of its exempt status. Attachment reaches any nonexempt property of the debtor.

§ 8.2:6 Injunction

Injunctions are used in collections litigation to maintain the status quo regarding property in dispute pending outcome of the litigation. *See Transport Co. of Texas v. Robertson Transports, Inc.*, 261 S.W.2d 549, 553 (Tex. 1953). An injunction may be used to enjoin a debtor from selling, alienating, or further encumbering property. See sections 8.33 through 8.40 below regarding injunction.

§ 8.3 Cautions Regarding Use of Prejudgment Remedies

§ 8.3:1 Effect on Debtor

Using any of the prejudgment remedies discussed in this chapter as coercive measures may backfire on the creditor. The debtor may respond by filing bankruptcy and using the avoidance powers of the Bankruptcy Code to nullify any such action made within ninety days of filing. The debtor could also file a counterclaim or cross-claim (for destruction of his business, for example) for an amount much greater than the creditor's claim.

§ 8.3:2 Affidavits

Although the applicable statutes allow it, attorneys should not sign affidavits on their clients' behalf unless they have actual knowledge of the facts set out in the affidavit. The general risks involved if attorneys execute affidavits are discussed at section 1.32:5 in this manual. The additional risks in seeking writs of garnishment, sequestration, or attachment in prejudgment proceedings should make the attorney even more cautious, because wrongful issuance of the writ can lead to substantial damages, potentially rendering both client and attorney liable. Therefore, only a person with actual, personal knowledge of the facts, preferably a personal representative of the creditor, should sign an affidavit supporting an application for a writ for any of these prejudgment remedies.

§ 8.3:3 Form Pleadings

Because of the constitutional problems and challenges surrounding prejudgment remedies and the possibility of substantial damages arising from a successful counterclaim, the manual committee emphasizes that the attorney should take the highest degree of care in drafting an application for a writ and a supporting affidavit. These documents are never routine forms, but rather pleadings that detail in each case the uniqueness of the "immediate danger" or threat to the likelihood of the plaintiff's recovery on the debt.

§ 8.4 Indemnity Bonds

An officer must execute a writ issued by a Texas court without requiring a bond indemnifying him, and he is not liable for damages resulting from execution of a writ if he in good faith executes or attempts to execute the writ as provided by law. Tex. Civ. Prac. & Rem. Code § 7.003; *see also Richardson v. Parker*, 903 S.W.2d 801, 804 (Tex. App.—Dallas 1995, no writ). An officer is liable, however, for injury or loss resulting from his own negligence. Tex. Civ. Prac. & Rem. Code § 34.061. For further discussion of this topic, see section 27.23 in this manual.

[Sections 8.5 through 8.10 are reserved for expansion.]

II. Judicial Prejudgment Remedies

§ 8.11 Prejudgment Garnishment Generally

§ 8.11:1 Purpose and Use of Prejudgment Writ of Garnishment

Prejudgment garnishment is a remedy at law by which a creditor (the plaintiff) can, before judgment, prevent a third party (the garnishee) from delivering any effects or paying any debt owed by the garnishee to a defendant debtor. If the garnishee is a corporation or a joint-stock company, after service of the writ the garnishee may not permit or recognize a sale or transfer of shares or an interest alleged to be owned by the defendant. Tex. Civ. Prac. & Rem. Code § 63.003. Both prejudgment and postjudgment garnishment remedies are governed by Tex. Civ. Prac. & Rem. Code §§ 63.001–.006 and Tex. R. Civ. P. 657–679. For a discussion of postjudgment garnishment, see part IV. in chapter 27 of this manual.

§ 8.11:2 Constitutionality

The Texas prejudgment garnishment statutes and rules meet federal Constitutional requirements. *Southwest Metal Fabricators v. Internacional de Aceros, S.A.*, 503 F. Supp. 76 (S.D. Tex. 1980); *Lincoln Ten, Ltd. v. White*, 706 S.W.2d 125 (Tex. App.—Houston [14th Dist.] 1986, no writ).

§ 8.11:3 Availability of Prejudgment Garnishment

A prejudgment writ of garnishment is available if—

1. an original attachment has been issued; or
2. the plaintiff sues on the debt and makes an affidavit that—
   a. the debt is just, due, and unpaid;
   b. within the plaintiff's knowledge, the defendant does not possess property in Texas subject to execution sufficient to satisfy the debt; and
   c. the garnishment is not sought to injure the defendant or the garnishee.

Tex. Civ. Prac. & Rem. Code § 63.001(1), (2).

§ 8.11:4 Risks to Creditor in Seeking Prejudgment Garnishment

As with all prejudgment remedies, caution must be used in seeking the writ of garnishment before judgment. Issuance of a writ before judgment may force a defendant out of business or may cause him severe economic loss, and the creditor's attorney must be sure the client is aware of the risks involved and has assented to the procedure. A debtor may institute proceedings for wrongful garnishment in some circumstances. Significant federal constitutional issues may also be involved.

§ 8.12 Garnishment Procedure

§ 8.12:1 When Writ Available

An application for a prejudgment writ of garnishment may be filed either at the beginning of the suit or at any time during its progress. Tex. R. Civ. P. 658.

§ 8.12:2 Application

The application must be supported by an affidavit of the plaintiff, his agent, his attorney, or

another person having personal knowledge of relevant facts. It must meet all statutory requirements and must state grounds for issuing the writ and specific facts relied on by the plaintiff sufficient to warrant the required findings by the court. Two or more grounds for the writ may be stated conjunctively or disjunctively. Tex. R. Civ. P. 658. An application is at form 8-1 in this chapter.

§ 8.12:3 Affidavit—Information and Belief or Personal Knowledge

The affidavit must be made on personal knowledge and must contain facts that would constitute admissible evidence. Facts may be stated on information and belief if the grounds for such belief are specifically stated. The trial court has discretion to determine whether an affidavit meets the "personal knowledge" requirement of Tex. R. Civ. P. 658. *See Metroplex Factors, Inc. v. First National Bank*, 610 S.W.2d 862, 865 (Tex. Civ. App.—Fort Worth 1980, writ ref'd n.r.e.); *see also Hudler-Tye Construction, Inc. v. Pettijohn & Pettijohn Plumbing, Inc.*, 632 S.W.2d 219, 222 (Tex. App.—Fort Worth 1982, no writ). An affidavit not affirmatively stating the specific grounds for issuance and the specific acts of the defendant entitling the plaintiff to issuance of the writ will not support issuance of the writ. If the affidavit is made on information and belief, the grounds for that belief must be specifically stated. *El Periodico, Inc. v. Parks Oil Co.*, 917 S.W.2d 777, 778–79 (Tex. 1996). The attorney should not execute the affidavit unless he has personal knowledge of relevant facts. See section 1.32:5 in this manual. An affidavit is at form 8-2 in this chapter.

§ 8.12:4 Statutory Requirements for Affidavit

The affidavit must state that—

1. the debt is just, due, and unpaid;
2. within the plaintiff's knowledge, the defendant does not possess property in Texas subject to execution sufficient to satisfy the debt; and
3. the garnishment is not sought to injure the defendant or the garnishee.

Tex. Civ. Prac. & Rem. Code § 63.001(2).

The plaintiff is not required to prove as a matter of fact that the debtor does not have assets sufficient to satisfy the debt. The statute requires only that the plaintiff have no knowledge of any property owned by the defendant within the state sufficient to satisfy the debt. Tex. Civ. Prac. & Rem. Code § 63.001(2)(B), (3); *cf. Black Coral Investments v. Bank of the Southwest*, 650 S.W.2d 135 (Tex. App.—Houston [14th Dist.] 1983, writ ref'd n.r.e.).

The fact that the affidavit fails to state that within the plaintiff's knowledge the debtor does not possess property in Texas subject to execution sufficient to satisfy the debt does not give the debtor a claim for wrongful garnishment (although it may serve as a basis for quashing the writ on the garnishee's motion). *Cf. Canyon Lake Bank v. Townsend*, 649 S.W.2d 809 (Tex. App.—Austin 1983, writ ref'd n.r.e.) (postjudgment garnishment case construing affidavit requirement identical to affidavit requirement for prejudgment garnishment under Tex. Civ. Prac. & Rem. Code § 63.001(2)(B)).

Significant defects in a garnisher's affidavit may be waived by the garnishee if the garnishee fails to appear and answer. *See Sherry Lane National Bank v. Bank of Evergreen*, 715 S.W.2d 148, 150 (Tex. App.—Dallas 1986, writ ref'd n.r.e.).

§ 8.12:5 Hearing

A hearing must be held before a prejudgment writ of garnishment may issue. The hearing may be ex parte. Tex. R. Civ. P. 658.

§ 8.12:6 Order for Prejudgment Garnishment

The court's order must make specific findings of facts to support the statutory grounds found to exist. The order must also specify the maximum value of property or indebtedness that may be garnished and the amount of the bond required of the plaintiff. The court further must find the amount of bond required for the defendant to replevy. Unless the defendant exercises his option under rule 664, this amount must be the amount of the plaintiff's claim, one year's accrual of interest (if allowed by law), and the estimated costs of court. The court's order may direct issuance of more than one writ at the same time, or in succession, to be sent to different counties. Tex. R. Civ. P. 658. An order is at form 8-3 in this chapter.

§ 8.13 Other Garnishment Issues

§ 8.13:1 Garnishee's Duty to Raise Debtor's Defenses

The garnishee has a duty to raise any of the defendant's defenses to the garnishment of which he is aware. This duty is not discharged by notifying the defendant of the garnishment action. *Southwest Bank & Trust Co. v. Calmark Asset Management*, 694 S.W.2d 199, 200–01 (Tex. App.—Dallas 1985, writ ref'd n.r.e.).

§ 8.13:2 Bond for Prejudgment Garnishment

Before issuance of a prejudgment writ of garnishment, a bond payable to the defendant in the amount set by the court, with sufficient surety or sureties as provided by statute, must be filed by the party applying for the writ. After notice to the opposite party, before or after issuance of the writ, a motion may be filed to increase or reduce the amount of the bond. Tex. R. Civ. P. 658a. For detailed provisions covering the bond and hearing to reduce the amount of the bond, see Tex. R. Civ. P. 658a. A bond is at form 8-4 in this chapter.

§ 8.13:3 Service of Writ on Garnishee and Defendant

Once the application, affidavit, and bond are filed, the case must be docketed in the name of the plaintiff as plaintiff and the garnishee as defendant, and the writ of garnishment must be served on the garnishee. Tex. R. Civ. P. 659. Copies of the writ, the application, accompanying affidavit(s), and the order must be served on the defendant as soon as practicable following service of the writ on the garnishee. Tex. R. Civ. P. 663a. The forms of the writ and notice to the defendant are prescribed in Tex. R. Civ. P. 661 and 663a. For a writ to be served on the garnishee, see form 8-5 in this chapter; for a notice to the defendant, see form 8-7. Form 8-6 is the officer's return. In *Walnut Equipment Leasing Co. v. J-V Dirt & Loam*, 907 S.W.2d 912, 916 (Tex. App.—Austin 1995, writ denied), a postjudgment garnishment case, the court held that the garnisher must serve the debtor in accordance with Tex. R. Civ. P. 663a; failure to do so is fatal to the creditor's garnishment action, even though the debtor may have actual notice of it. *See also Hering v. Norbanco Austin I, Ltd.*, 735 S.W.2d 638, 641–42 (Tex. App.—Austin 1987, writ denied); *contra Del-Phi Engineering Associates v. Texas Commerce Bank-Conroe, N.A.*, 771 S.W.2d 589, 592 (Tex. App.—Beaumont 1989, no writ); *Mullins v. Main Bank & Trust*, 592 S.W.2d 24, 25–26 (Tex. Civ. App.—Beaumont 1979, no writ).

For discussion of service on a garnishee-financial institution, see section 27.59:2 in this manual.

It is recommended that, instead of serving the defendant personally, his copy of the application and affidavit be served by certified mail, return receipt requested, and by regular mail. The copy of the writ served on the defendant must include,

in ten-point type and in a manner calculated to advise a reasonably attentive person of its contents, the following statement:

> To _____, Defendant:
>
> You are hereby notified that certain properties alleged to be owned by you have been garnished. If you claim any rights in such property, you are advised:
>
> YOU HAVE A RIGHT TO REGAIN POSSESSION OF THE PROPERTY BY FILING A REPLEVY BOND. YOU HAVE A RIGHT TO SEEK TO REGAIN POSSESSION OF THE PROPERTY BY FILING WITH THE COURT A MOTION TO DISSOLVE THIS WRIT.

Tex. R. Civ. P. 663a. Some court clerks provide additional copies of the writs with the notice language. Others do not; in that case, it is necessary to photocopy the writ and type the notice language on the face of the copy before serving it on the defendant. The notice at form 8-7 is to be used as a cover sheet only and not as a substitute for the writ with notice language included on it. These forms are usually prepared by the clerk of the court.

Although the debtor must be served with notice of the garnishment proceedings, the garnishee does not have standing to sue or to appeal based on a right of service belonging to the debtor. *Sherry Lane National Bank v. Bank of Evergreen*, 715 S.W.2d 148, 151–52 (Tex. App.—Dallas 1986, writ ref'd n.r.e.).

After service of the writ "the garnishee may not deliver any effects or pay any debt to the defendant." Any such delivery or payment is void. Tex. Civ. Prac. & Rem. Code § 63.003(a), (b).

§ 8.13:4 Replevy by Defendant

At any time before judgment, the defendant may replevy all or part of the garnished property (or the proceeds from sale of the garnished property if it has been sold under order of the court) by posting bond. Tex. R. Civ. P. 664. The court must find in its order for issuance of a writ of garnishment the amount of bond required for the defendant to replevy. Tex. R. Civ. P. 658. This amount must be the amount of the plaintiff's claim, one year's interest if allowed by law on the claim, and the estimated costs of court, unless the defendant exercises his option under rule 664 to post bond in the amount of the value of the property, as estimated by the officer who levied the writ, plus one year's interest at the legal rate. Tex. R. Civ. P. 658, 664. On reasonable notice (which may be less than three days), the amount or denial of the bond, the sufficiency of the sureties, or the estimated value of the property may be reviewed, on motion of either party, by the court that authorized issuance of the writ. Tex. R. Civ. P. 664. On motion by the defendant with reasonable notice to the opposing party (which may be less than three days), the defendant may move to substitute other property for the property garnished. Tex. R. Civ. P. 664.

§ 8.13:5 Motion to Dissolve or Modify Writ

A defendant whose property or account has been garnished or any intervening party claiming an interest in garnished property may seek by sworn written motion to dissolve or modify the writ. Tex. R. Civ. P. 664a. *But see Central Park Bank v. LeBlanc*, 659 S.W.2d 872 (Tex. App.—San Antonio 1983, no writ), in which the court approved the unsworn motion of the *garnishee* to dissolve the writ, saying the error, if any, was harmless. The lack of a sworn motion was a pleading error that, unless controverted by motion, plea in abatement, or special exception, was waived.

The motion to dissolve or modify "shall admit or deny each finding of the order directing the issuance of the writ except where the movant is

unable to admit or deny the finding, in which case movant shall set forth the reasons why he cannot admit or deny." Tex. R. Civ. P. 664a. This requirement does not necessarily mean that the denial must appear on the face of the motion, or that each individual finding must be separately denied. *See Glassman & Glassman v. Somoza*, 694 S.W.2d 174, 177 (Tex. App.—Houston [14th Dist.] 1985, no writ) (motion that set forth findings of court and attached affidavit that denied "the findings set out above" sufficient, because requirements of rule 664a met by reading motion and affidavit together); *see also Metroplex Factors, Inc. v. First National Bank*, 610 S.W.2d 862, 866–67 (Tex. Civ. App.—Fort Worth 1980, writ ref'd n.r.e.) (defendant's motion to quash, which discussed court's findings but did not specifically enumerate admissions or denials of findings, sufficient to comply with Tex. R. Civ. P. 664a).

§ 8.13:6 Hearing on Motion to Dissolve or Modify

The motion to dissolve must be heard promptly, after reasonable notice to the plaintiff (which may be less than three days), and the issue must be determined not later than ten days after the motion is filed. The parties may agree to an extension of time. Filing a motion to dissolve stays further proceedings under the writ until after the hearing on the motion. Exceptions exist for perishable property. Tex. R. Civ. P. 664a.

§ 8.13:7 Burden of Proof for Motion to Dissolve or Modify

The movant for dissolution or modification has the burden to prove that the reasonable value of the property garnished exceeds the amount necessary to secure the debt, interest for one year, and probable costs. The movant also has the burden to prove facts to justify substitution of property. Tex. R. Civ. P. 664a.

The plaintiff has the burden to prove the grounds relied on for issuance of the writ. Tex. R. Civ. P. 664a. Any failure to carry this burden with respect to each statutory ground will require the trial court to dissolve the writ. *Huie-Clark Joint Venture v. American States Insurance Co.*, 629 S.W.2d 109, 110–11 (Tex. App.—Dallas 1981, writ ref'd n.r.e.).

§ 8.14 Third-Party Rights to Garnished Property

Garnishment of a debt represented by a promissory note does not affect the rights of a holder in due course, even though the garnishment action occurred before the negotiation of the note. The debtor has the responsibility to protect himself by bringing into the garnishment case all claimants to the property to be garnished. Failure to do so may subject the debtor to double liability. *Williams v. Stansbury*, 649 S.W.2d 293, 296 (Tex. 1983).

It has been held an abuse of discretion for the trial court to deny intervention in a garnishment proceeding to one who would be deprived of a substantial right to assert a security interest to the fund that is subject to garnishment. *Apparel Contractors v. Vantage Properties*, 620 S.W.2d 666, 668 (Tex. Civ. App.—Dallas 1981, writ ref'd n.r.e.) (postjudgment garnishment).

§ 8.15 Wrongful Garnishment

Note: Most Texas cases concerning wrongful garnishment are based on wrongful postjudgment garnishment. See section 27.71 in this manual.

A garnishment is wrongful if the facts set forth in the affidavit are false. *Chandler v. Cashway Building Materials, Inc.*, 584 S.W.2d 950, 952 (Tex. Civ. App.—El Paso 1979, no writ) (postjudgment garnishment). However, even if the applicant for the writ swears falsely that he knows of no property in Texas possessed by the

debtor subject to execution and sufficient to satisfy the debt, the debtor may not recover for wrongful garnishment unless he pleads and proves that he does in fact have nonexempt property in Texas sufficient to satisfy the debt and that the plaintiff knew as much before applying for the writ. *King v. Tom*, 352 S.W.2d 910, 913 (Tex. Civ. App.—El Paso 1961, no writ). *But see Barr v. Cardiff*, 75 S.W. 341 (Tex. Civ. App. 1903, writ ref'd) (ground alleged by plaintiff for suing out writ of garnishment did not in fact exist, and even though affiant believed its existence, writ held to be wrongfully sued out, resulting in actual damage to defendant).

Damages may be recovered for wrongful garnishment for injuries proximately caused by the wrongful act. *Aetna Casualty & Surety Co. v. Raposa*, 560 S.W.2d 106, 110 (Tex. Civ. App.—Fort Worth 1977, writ dism'd by agr.).

§ 8.16 Sequestration Generally

§ 8.16:1 Purpose and Use

In Texas, sequestration is the extraordinary remedy by which, before judgment, a creditor can possess the goods securing his debt or one claiming title to disputed property can effectively control possession while the dispute is justly settled.

Sequestration differs from attachment in that it requires the claimant to have an interest in the sequestered property. *See* Tex. Civ. Prac. & Rem. Code § 62.001. It is pursued as an ancillary remedy to an underlying claim.

Through use of the writ of sequestration, the property is physically (or constructively, in the case of real property) possessed by a sheriff or constable and placed in the court's custody until the property interest claimed by the creditor can be established. The most common use of the writ is by commercial lenders whose loans are secured by security interests in personal property, such as automobiles. The Texas sequestration statutes and rules are located at Tex. Civ. Prac. & Rem. Code §§ 62.001–.063 and Tex. R. Civ. P. 696–716.

§ 8.16:2 Constitutionality

The Texas sequestration statutes and rules are constitutional. *Marrs v. South Texas National Bank*, 686 S.W.2d 675, 678 (Tex. App.—San Antonio 1985, writ ref'd n.r.e.); *Monroe v. General Motors Acceptance Corp.*, 573 S.W.2d 591, 594 (Tex. Civ. App.—Waco 1978, no writ).

§ 8.16:3 Availability—Title, Possession, Enforcement of Lien

Sequestration is available to the plaintiff if he sues for title to or possession of real property, personal property, or fixtures or for the foreclosure or enforcement of a mortgage, lien, or security interest in the property and a reasonable conclusion may be drawn that there is immediate danger that the defendant or the party in possession will conceal, dispose of, ill-treat, waste, or destroy the property or remove it from the county. Tex. Civ. Prac. & Rem. Code § 62.001(1), (2).

Sequestration is available to a plaintiff in a suit to try title to real property, to remove a cloud on the title, to foreclose a lien, or to partition real property if the plaintiff makes an oath that one or more of the defendants is a nonresident of Texas. Tex. Civ. Prac. & Rem. Code § 62.001(4); *but see Shaffer v. Heitner*, 433 U.S. 186 (1977) (minimum contacts required for sequestration of nonresident's property).

§ 8.16:4 Ejectment

Sequestration is also available to a plaintiff if he sues for title to or possession of property from

which he has been ejected by force or violence. Tex. Civ. Prac. & Rem. Code § 62.001(3).

§ 8.16:5 Claim on Personal Property Not Due

A writ of sequestration may be issued for personal property under a mortgage or lien even though the right of action on the mortgage or lien has not accrued. In these cases, final judgment may not be rendered against the defendant until the right of action has accrued. Tex. Civ. Prac. & Rem. Code § 62.003.

§ 8.17 Sequestration Procedure

§ 8.17:1 When Writ Available

An application for a prejudgment writ of sequestration may be filed either at the beginning of the suit or at any time during its progress. Tex. R. Civ. P. 696.

§ 8.17:2 Application

The application must be made under oath and must set out specific facts that state the nature of the claim, the amount in controversy (if any), and the grounds for issuance of the writ. Tex. Civ. Prac. & Rem. Code § 62.022. Two or more grounds may be stated conjunctively or disjunctively. The property to be sequestered must be described with such certainty that it may be identified and distinguished from like property, and the value of each article and the county in which each article is located must be stated. Tex. R. Civ. P. 696. For an application and affidavit, see form 8-8 in this chapter. For the sequestration of motor vehicles, many courts and constables require the use of the vehicle identification number in order to accurately distinguish the vehicle to be sequestered from other vehicles of a similar make and model.

§ 8.17:3 Affidavit

The application must be supported by an affidavit of the plaintiff, his agent, his attorney, or other persons having knowledge of relevant facts. Tex. R. Civ. P. 696. The application and affidavit must be made on personal knowledge and must state facts that would be admissible in evidence. However, the facts may be stated on information and belief if the grounds of such belief are specifically stated. Tex. R. Civ. P. 696. In this manual the application and affidavit are combined; see form 8-8 in this chapter.

Attorneys generally should not execute affidavits on their clients' behalf. See section 1.32:5 in this manual.

§ 8.17:4 Hearing

Before the writ can issue, the court must hold a hearing. Tex. R. Civ. P. 696. The hearing may be ex parte, but some courts require notification to the defendant (or his attorney, if known) by telephone, or otherwise, of the hearing. The only evidence typically considered by the court is the sworn pleadings. See section 8.19:2 below regarding service of the writ.

If a judge for the court in which the application is pending is unavailable, the party requesting sequestration may be able to have the order signed by another judge sitting in that county, subject to local rules. *See, e.g.*, Tex. Gov't Code § 74.094(a) (district and statutory county court judges have authority to conduct hearings and sign orders for other courts without transferal of case).

§ 8.17:5 Order

No writ may issue except on written order of the court. Tex. R. Civ. P. 696. The court's order must include—

1. specific findings of fact supporting the statutory grounds for the issuance of the writ found by the court to exist;
2. a clear description of each item of property to be sequestered so that it may be identified and distinguished from like property;
3. the value of each item of property to be sequestered;
4. the county in which each item is located;
5. the amount of bond required of the plaintiff (see section 8.18 below); and
6. the amount of bond required of the defendant to replevy (see section 8.21 below).

Tex. R. Civ. P. 696. The order may direct the issuance of several writs at the same time or in succession, to be sent to different counties. Tex. R. Civ. P. 696. For an order of sequestration, see form 8-9 in this chapter.

It is good practice to contact the sheriff or constable to whom the writ will be sent before drafting the order, so that the order may address any particular concerns or requirements of that office. For example, some constables require that the order specify that the property may be returned to the plaintiff without the requirement of a replevy bond, as long as the sequestration bond complies with the requirements of rule 708 of the Texas Rules of Civil Procedure. Additionally, some constables will allow the plaintiff to select the location for storage of the sequestered property during the ten-day replevy period, as long as the order contains language to that effect.

It is also advisable to obtain a certified copy of the order and the sequestration and replevy bonds, because some sheriffs and constables require production of these documents before the sequestered property will be released to the plaintiff.

§ 8.18 Plaintiff's Sequestration Bond

§ 8.18:1 Requisites of Sequestration Bond

Before the writ can issue, the court must fix the amount of the applicant's sequestration bond to the defendant. The bond is to be set in the amount that would adequately compensate the defendant if the plaintiff were to fail to prosecute the suit to effect and pay all damages and costs adjudged against him for wrongfully suing out the writ, including the elements of damages stated in Tex. Civ. Prac. & Rem. Code §§ 62.044, 62.045. Tex. R. Civ. P. 696. A bond is at form 8-4 in this chapter.

§ 8.18:2 Conditions of Sequestration Bond

The bond must be conditioned that the plaintiff will prosecute his suit to effect and pay, to the extent of the penal amount of the bond, all damages and costs adjudged against the plaintiff in case it shall be decided that the writ of sequestration was wrongfully issued. Tex. R. Civ. P. 698.

The plaintiff may combine the conditions of the sequestration bond with the further conditions listed in rule 708 for a plaintiff's replevy bond. If the plaintiff combines the sequestration and replevy bond language in its initial bond, the plaintiff will not later be required to give an additional bond to replevy unless the court orders otherwise. Tex. R. Civ. P. 698, 708. See section 8.22 below regarding replevy by the plaintiff.

§ 8.18:3 Sureties and Modification of Bond

The bond must be executed by the surety or sureties as provided by statute, to be approved by the officer issuing the writ. Either party,

before or after issuance of the writ, may file a motion to increase or decrease the amount of the bond or to question the sufficiency of the sureties; a hearing is required. Tex. R. Civ. P. 698.

§ 8.18:4 Release of Bond

The plaintiff should remember to include in any judgment, settlement, or other order disposing of the litigation language releasing the plaintiff and its surety from continued liability on the sequestration bond.

§ 8.19 Writ of Sequestration

§ 8.19:1 Requisites of Writ

The writ must be directed "to the Sheriff or any Constable within the State of Texas" (not naming a specific county) and must command him to take the described property into his possession if it is found in his county and to keep it, subject to further order of the issuing court, unless it is replevied. Tex. R. Civ. P. 699. The writ must describe the property as it is described in the application or affidavits. On the face of the writ, "in ten-point type and in a manner calculated to advise a reasonably attentive person of its contents," the following notice must be displayed:

> To _____, Defendant:
>
> You are hereby notified that certain properties alleged to be claimed by you have been sequestered. If you claim any rights in such property, you are advised:
>
> YOU HAVE A RIGHT TO REGAIN POSSESSION OF THE PROPERTY BY FILING A REPLEVY BOND. YOU HAVE A RIGHT TO SEEK TO REGAIN POSSESSION OF THE PROPERTY BY FILING WITH THE COURT A MOTION TO DISSOLVE THIS WRIT.

Tex. R. Civ. P. 700a; *see also* Tex. Civ. Prac. & Rem. Code § 62.023; Tex. R. Civ. P. 699. A writ of sequestration is at form 8-10 in this chapter.

§ 8.19:2 Service of Writ on Defendant

The defendant must be served with a copy of the writ, the application, accompanying affidavits, and the court's order. Tex. R. Civ. P. 21a provides generally for service in person, by registered or certified mail, by courier receipted delivery, or by telephonic document transfer. A notice concerning replevy rights must be prominently displayed on the face of the copy of the writ served on the defendant. Service must be had on the defendant "as soon as practicable following the levy of the writ" and not before. Tex. R. Civ. P. 700a. The defendant should not be served until after sequestration has occurred. For a notice to the defendant, see form 8-11 in this chapter.

§ 8.19:3 Failure of Defendant to Surrender Property

Often the defendant is served contemporaneously with execution of the writ, because the defendant is the party likely to be in possession of the property to be sequestered. If the defendant fails or refuses to surrender the property to the officer executing the writ, the plaintiff should have the defendant served with a copy of the writ and order and proceed with a motion for contempt against the defendant for failure to abide by the court's order. After notice and a hearing, the defendant may be held in contempt of court. Alternatively, the plaintiff may file a motion for show cause contemporaneously with the application for writ of sequestration and set a hearing on the motion, so that the defendant is immediately on notice that failure to attend the hearing and explain why the defendant did not surrender the property may result in a writ of attachment or capias writ.

If the plaintiff has reason to believe that the defendant will fail or refuse to surrender the property to be sequestered, the plaintiff should include in the order authorizing the issuance of the writ language directly ordering the defendant to surrender the property to the officer.

§ 8.19:4 Errors in Affidavit, Bond, or Writ

Clerical errors in the affidavit, bond, writ of sequestration, or officer's return may be amended. Application in writing must be made to the judge of the court in which the suit was filed. After notice to the opponent, the writ may be amended in the manner and on the terms the court authorizes. However, the amendment can reach only clerical errors and may not change or add to the grounds for sequestration stated in the affidavit. In addition, the amendment must appear to the judge to be in furtherance of justice. Tex. R. Civ. P. 700.

§ 8.20 Dissolution or Modification of Writ of Sequestration

§ 8.20:1 Motion to Dissolve Writ

After issuance of the writ, the defendant or any intervening party who claims an interest in the sequestered property may seek dissolution of the writ by sworn written motion. Reasonable notice (which may be less than three days) must be given to the plaintiff. A hearing on the defendant's motion must be held promptly, and the issue must be determined not later than ten days after the filing of the motion unless the parties agree to an extension. The writ must be dissolved unless the plaintiff proves the specific facts alleged and the grounds relied on for its issuance—for example, immediate danger, ejectment by force or violence, or nonresidence of the defendant. Tex. R. Civ. P. 712a; *see* Tex. Civ. Prac. & Rem. Code §§ 62.001, 62.041–.043.

§ 8.20:2 Motion to Reduce Amount Sequestered

The movant may also seek to reduce the amount of property sequestered if the total amount described and authorized by the court's order exceeds the amount necessary to secure the plaintiff's claim (plus interest for one year, if allowed by law, and costs). The burden of proof to show excessive property sequestered is on the movant. Tex. R. Civ. P. 712a.

§ 8.20:3 Procedure

The filing of the motion stays any further proceeding under the writ (except for orders concerning the care, preservation, or sale of perishable property) until determination of the issue after a hearing. Unless the parties otherwise agree, the motion must be promptly heard (after reasonable notice to the plaintiff, which may be less than three days), and the issue must be determined not later than ten days after filing. The court may determine the issue on the basis of uncontroverted affidavits "setting forth such facts as would be admissible in evidence." Otherwise the parties must submit evidence. Tex. R. Civ. P. 712a; Tex. Civ. Prac. & Rem. Code §§ 62.041–.043.

§ 8.20:4 Effect of Dissolution

If the writ is dissolved, the action proceeds as though no writ had been issued, except that the defendant's cause of action for damages (if any) for wrongful sequestration is a compulsory counterclaim. Tex. Civ. Prac. & Rem. Code §§ 62.043, 62.044. In addition to other damages, the defendant may recover reasonable attorney's fees incurred in dissolution of the writ. Tex. Civ. Prac. & Rem. Code § 62.044. If the sequestered personalty is consumer goods, the defendant is entitled to recover, in addition to reasonable attorney's fees, the greater of $100, the finance charge contracted for, or actual damages. These damages may not be awarded if the plaintiff

shows that his failure to prove his specific allegations was the result of a bona fide error and that he used reasonable procedures to avoid such error. Tex. Civ. Prac. & Rem. Code § 62.045. The right to seek dissolution of the writ is cumulative of the defendant's right to replevy. The filing of the motion stays any further proceedings under the writ until a hearing on the motion is had and the motion is ruled on. Tex. Civ. Prac. & Rem. Code § 62.041. Presumably the defendant may replevy if the motion is denied.

§ 8.21 Defendant's Right to Replevy Sequestered Property

§ 8.21:1 Right to Replevy

If the sequestered property has not been claimed, replevied, or sold, the defendant may replevy all or part of the property at any time before judgment. If the property has been sold by court order, the defendant can replevy the proceeds of the sale. Tex. R. Civ. P. 701.

§ 8.21:2 Required Bond

To replevy either the property itself or the sale proceeds, the defendant first must give a bond, with sufficient sureties to be approved by the officer who levied the writ, payable to the plaintiff in an amount fixed by the court's order. Tex. R. Civ. P. 701.

§ 8.21:3 Challenge to Bond

On reasonable notice (which may be less than three days) to the opposing party, either party may challenge the amount of the bond, the denial of the bond, the sufficiency of the sureties, or the estimated value of the property, before the court that authorized issuance of the writ. Tex. R. Civ. P. 701.

§ 8.21:4 Condition of Bond on Personalty

> If the property to be replevied be personal property, the condition of the bond shall be that the defendant will not remove the same out of the county, or that he will not waste, ill-treat, injure, destroy, or dispose of the same, according to the plaintiff's affidavit, and that he will have such property, in the same condition as when it is replevied, together with the value of the fruits, hire or revenue thereof, forthcoming to abide the decision of the court, or that he will pay the value thereof, or the difference between its value at the time of replevy and the time of judgment and of the fruits, hire or revenue of the same in case he shall be condemned to do so.

Tex. R. Civ. P. 702.

§ 8.21:5 Condition of Bond on Realty

If the property to be replevied is real estate, the condition of the defendant's bond must be that he will not injure the property and that he will pay the value of any rents generated by the real estate if he is required to do so. Tex. R. Civ. P. 703.

§ 8.21:6 Effect of Adverse Judgment

If the suit is decided against the defendant, judgment must be rendered against all the obligors on the defendant's bond, jointly and severally, for the value of the property replevied (as of the date of the execution of the replevy bond) and the value of the fruits, hire, revenue, or rent derived from it. Tex. R. Civ. P. 704.

§ 8.22 Plaintiff's Replevy Bond

§ 8.22:1 Plaintiff's Right to Replevy Sequestered Property

The plaintiff may replevy the property if the defendant has not done so within ten days after levy and service of the writ of sequestration. Tex. R. Civ. P. 708. To replevy, the plaintiff must post a replevy bond payable to the defendant. The purpose of the replevy bond is separate from that of the sequestration bond, and the replevy bond is intended to guarantee that the plaintiff will have the property in the same condition to abide the decision of the court. *Kelso v. Hanson*, 388 S.W.2d 396, 399 (Tex. 1965).

§ 8.22:2 Conditions of Plaintiff's Replevy Bond

For personal property, the conditions of the bond must be that the plaintiff—

1. will hold the sequestered property in the same condition as received, together with the value of its fruits, hire, or revenue until final decision of the court; and
2. will pay either the value of the personal property or the difference between its value at the time of replevy and the time of judgment (regardless of the cause of the difference in value, and of the fruits, hire, or revenue of the property in case it is required).

Tex. R. Civ. P. 708.

If realty is sequestered, the plaintiff must not injure the property, and he must pay the value of the rents of the same if he is later ordered to do so. Tex. R. Civ. P. 708.

The plaintiff may combine its replevy bond with the sequestration bond in order to avoid the posting of two bonds, unless the court orders otherwise. See section 8.18:2 above regarding the posting of a combined bond.

§ 8.22:3 Notice and Review of Plaintiff's Replevy Bond

As in the case of the defendant's replevy bond, both parties have the right on reasonable notice (which may be less than three days) to prompt judicial review of the amount of the bond, the denial of the bond, the sufficiency of the sureties, and the estimated value of the property. The replevy bond must be filed with the constable. Tex. R. Civ. P. 708. A plaintiff's replevy bond is at form 8-13 in this chapter.

§ 8.22:4 Release of Plaintiff's Replevy Bond

The plaintiff should remember to include in any judgment, settlement, or other dispositive order language releasing the plaintiff and its surety from continued liability on the replevy bond.

§ 8.23 Emergency Sale of Perishable Goods after Sequestration

If after ten days from levy of the writ of sequestration the defendant has not replevied the property and (1) either the plaintiff or the defendant has filed a written affidavit that all or part of the property is likely to be wasted, destroyed, or greatly depreciated in value by continued retention and (2) the officer having possession of the property has certified to the truth of the affidavit, on presentation of the affidavit and certificate, the judge must order the sale of the property or of the portion of the property that is likely to be wasted, destroyed, or depreciated in value by retention. Either party may replevy the property before the sale. Tex. R. Civ. P. 710. Forms in this chapter for an emergency sale are at forms 8-14 (application), 8-15 (affidavit), and 8-16 (order).

§ 8.24 Wrongful Sequestration

If a writ of sequestration is dissolved, any action for wrongful sequestration must be brought as a compulsory counterclaim. Tex. Civ. Prac. & Rem. Code § 62.044(a). The creditor is guilty of wrongful sequestration if he has obtained a prejudgment writ of sequestration, seized the property, and then voluntarily dismissed the suit without returning the property to the debtor. In that case, the debtor has a right to institute an independent action to recover damages suffered by reason of the wrongful sequestration. Moreover, a voluntary dismissal is a final judgment in favor of the debtor, and the debtor is entitled to return of the property or a judgment against all the obligors on the replevy bond. *See Burnett Trailers, Inc. v. Polson*, 387 S.W.2d 692, 694–95 (Tex. Civ. App.—San Antonio 1965, writ ref'd n.r.e.).

A wrongful sequestration action may allow the debtor to recover actual and exemplary damages and attorney's fees or, for wrongful sequestration of consumer goods, attorney's fees and the greater of $100, the finance charge contracted for, or actual damages. Tex. Civ. Prac. & Rem. Code §§ 62.044–.045. At least one court has held that one claiming wrongful sequestration may recover damages, even though the claimant suffered no actual damages and never lost possession of the property. *See Callaway v. East Texas Government Credit Union*, 619 S.W.2d 411, 414 (Tex. Civ. App.—Tyler 1981, writ ref'd n.r.e.).

§ 8.25 Attachment Generally

§ 8.25:1 Purpose and Use of Attachment

Attachment is an extraordinary or special remedy allowing a creditor to seize the debtor's property to secure payment of a probable judgment on an otherwise unsecured debt. Attached property is held in the court's custody to be available for execution if the plaintiff obtains a judgment in the underlying cause.

§ 8.25:2 Constitutionality

The Texas attachment statutes have not been reviewed for due-process compliance in any recently published opinion.

§ 8.25:3 Strategic Use

Strategically, attachment may be used against a debtor—

1. to prevent a debtor from alienating, destroying, or removing property from the jurisdiction, which would frustrate recovery on the debt; or
2. to obtain jurisdiction over a nonresident debtor who has property located within the jurisdiction. However, minimum contacts between the defendant and the foreign state must be found in order to confer in personam jurisdiction over the debtor. *See Shaffer v. Heitner*, 433 U.S. 186 (1977) (sequestration).

§ 8.25:4 Property That May Be Attached

Only property subject to levy under a writ of execution may be attached. Tex. Civ. Prac. & Rem. Code § 61.041. The property need not be in the debtor's possession to be attached. *See Briggs v. Briggs*, 227 S.W. 511 (Tex. Civ. App.—Texarkana 1921, no writ).

§ 8.25:5 When Writ Available

An application for a writ of attachment may be filed at the commencement of a suit or at any time during its progress. Tex. R. Civ. P. 592.

§ 8.25:6 Requirements Generally

A writ of attachment may issue if three general conditions and any one of nine specific conditions (see section 8.25:7 below) occur. The general conditions are that—

1. the defendant is justly indebted to the plaintiff;
2. the attachment is not sought to injure or harass the defendant; and
3. without the attachment the plaintiff's debt would be lost.

Tex. Civ. Prac. & Rem. Code § 61.001. The "indebtedness" can be based in tort, and the amount in controversy need not be liquidated, if personal service on the defendant cannot be effected within the state. Tex. Civ. Prac. & Rem. Code § 61.005. Otherwise, attachment is not available for a tort action, and the amount in controversy must be liquidated. *Cleveland v. San Antonio Building & Loan Ass'n*, 223 S.W.2d 226, 228 (Tex. 1949).

§ 8.25:7 Specific Grounds

In addition to meeting the general requirements set out in section 8.25:6 above, an applicant for a writ of attachment must show at least one of the following nine specific grounds:

1. The defendant is not a resident of Texas or is a foreign corporation or is acting as such (but see section 8.25:3 above regarding minimum contacts).
2. The defendant is about to move from Texas permanently and has refused to pay or secure the debt due the plaintiff.
3. The defendant is in hiding so that ordinary process of law cannot be served on him.
4. The defendant has hidden or is about to hide his property for the purpose of defrauding his creditors.
5. The defendant is about to remove his property from Texas without leaving an amount sufficient to pay his debts.
6. The defendant is about to remove all or part of his property from the county in which the suit is brought with the intent to defraud his creditors.
7. The defendant has disposed of or is about to dispose of all or part of his property with the intent to defraud his creditors.
8. The defendant is about to convert all or part of his property into money for the purpose of placing it beyond the reach of his creditors.
9. The defendant owes the plaintiff for property obtained by the defendant under false pretenses.

Tex. Civ. Prac. & Rem. Code § 61.002.

§ 8.25:8 Availability against Financial Institutions

An attachment may not be issued against or served on a financial institution to collect a prospective money judgment against the financial institution before the judgment is final and all appeals have been foreclosed by law. Tex. Fin. Code § 59.007(a). "Financial institution" is defined at Tex. Fin. Code § 31.002(25).

§ 8.26 Attachment Procedure

§ 8.26:1 Application

The statutes governing attachment do not provide for the use of an application for a writ of attachment. The writ is issued instead on the basis of one or more affidavits alone. The rules of procedure, however, require an application

and hearing. *See* Tex. R. Civ. P. 592. The application requires an affidavit, but in a supporting capacity; an affidavit is not sufficient in itself.

§ 8.26:2 Requisites of Application

The application must comply with all statutory requirements and must state the grounds for issuing the writ and the specific facts relied on by the plaintiff to warrant the required findings by the court. The grounds may be stated conjunctively or disjunctively. The application must be made on personal knowledge and must "set forth such facts as would be admissible in evidence," but the facts may be based on information and belief if the grounds are specified. The application must be supported by one or more affidavits (see section 8.26:3 below). Tex. R. Civ. P. 592. An application for a writ of attachment is at form 8-17 in this chapter, and an affidavit is at form 8-18.

§ 8.26:3 Affidavit

One or more affidavits must support an application for a writ of attachment filed with the court. Affidavits may be made by the plaintiff, the plaintiff's agent, other persons with "knowledge of relevant facts," or the plaintiff's attorney, but attorneys should be extremely wary of making the affidavit, as discussed in section 1.32 in this manual. Like the application, affidavits "shall be made on personal knowledge and shall set forth such facts as would be admissible in evidence; provided that facts may be stated based upon information and belief if the grounds of such belief are specifically stated." Tex. R. Civ. P. 592. The affidavit must recite the statutory general and appropriate specific grounds, which are listed in sections 8.25:6 and 8.25:7 above, and must state the amount of the demand. Tex. Civ. Prac. & Rem. Code § 61.022. An affidavit is at form 8-18 in this chapter.

§ 8.26:4 Hearing

Before a writ of attachment may issue, the court must hold a hearing (which may be ex parte) on the plaintiff's application for the writ. Tex. R. Civ. P. 592. If the plaintiff prevails at the hearing, the court may issue a written order authorizing issuance of the writ.

§ 8.26:5 Order

No writ of attachment may issue except on written order of the court, which must recite specific findings of fact to support the statutory grounds. The court must specify the maximum value of property that may be attached and the amount of bond required of the plaintiff. The order must require that the attached property be kept safe and preserved subject to further orders of the court. The court also must state the amount of bond required of the defendant to replevy. Tex. R. Civ. P. 592. An order is at form 8-19 in this chapter.

§ 8.26:6 Sheriff's and Clerk's Responsibilities

The sheriff or constable levies on the property specified in the writ of attachment that is owned by the defendant and found in the officer's jurisdiction. When levying on the property, the officer either takes the goods and retains them or, in the case of real property, places an endorsement on the writ and files it with the county clerk in the county in which the property is located. The clerk records the attachment in the appropriate records. Tex. Civ. Prac. & Rem. Code § 61.043; Tex. Prop. Code § 12.012.

§ 8.27 Plaintiff's Bond for Attachment

§ 8.27:1 Requisites of Bond

The plaintiff must file with the officer authorized to issue a writ a bond payable to the defendant in an amount fixed by the court's order. The bond must be in an amount that, in the court's opinion, will adequately compensate the defendant if the plaintiff does not prosecute the suit to effect and that will cover all damages and costs that may be adjudged against the plaintiff for wrongfully suing. Tex. R. Civ. P. 592a. For an attachment bond, see form 8-4 in this chapter.

§ 8.27:2 Sureties

The bond must be backed by sufficient surety or sureties as provided by statute. Tex. R. Civ. P. 592a; *see* Tex. Civ. Prac. & Rem. Code § 61.023 (requiring "two or more good and sufficient sureties"). *But see* Tex. Ins. Code §§ 3503.001–.005 (allowing guaranty solely by a surety company provided reinsurance requirements are met). The officer issuing the writ must approve the choice of sureties. The bond must be conditioned that the plaintiff will prosecute the suit to effect and pay to the extent of the penal amount of the bond all damages and costs that may be adjudged for wrongfully suing out the writ of attachment. Tex. R. Civ. P. 592, 592a. Certain governmental entities are exempt from bond requirements. Tex. Civ. Prac. & Rem. Code § 6.001.

§ 8.27:3 Modification of Bond

After notice to the opposite party, either before or after issuance of the writ, either the defendant or the plaintiff may file a motion to increase or reduce the amount of the bond or to question the sufficiency of the bond's sureties. On hearing the motion, the court will enter an order on the final amount of the bond or the sufficiency of the bond's sureties. Tex. R. Civ. P. 592a.

§ 8.28 Writ of Attachment

§ 8.28:1 Requisites of Writ

The writ of attachment is to be directed to any sheriff or constable within Texas. It commands the officer to attach and hold in that officer's county the defendant's property of a reasonable value in approximately the amount fixed by the court, unless the defendant has replevied it. Tex. R. Civ. P. 593. The form of the writ is contained in Tex. R. Civ. P. 594, 598a. See form 8-20 in this chapter.

§ 8.28:2 Service of Writ on Defendant

As soon as practicable following levy of the writ, the defendant must be served with copies of the application, affidavits, orders of the court, and writ of attachment. The defendant may be served in any manner prescribed for service of citation or as provided in Tex. R. Civ. P. 21a. The writ served on the defendant must display on its face, in ten-point type and in a manner calculated to advise a reasonably attentive person of its contents, the following pronouncement:

> To _____, Defendant:
>
> You are hereby notified that certain properties alleged to be owned by you have been attached. If you claim any rights in such property, you are advised:
>
> YOU HAVE A RIGHT TO REGAIN POSSESSION OF THE PROPERTY BY FILING A REPLEVY BOND. YOU HAVE A RIGHT TO SEEK TO REGAIN POSSESSION OF THE PROPERTY BY FILING WITH THE COURT A MOTION TO DISSOLVE THIS WRIT.

Tex. R. Civ. P. 598a. The defendant should not be served before attachment has occurred. A notice of attachment and an officer's return are at forms 8-21 and 8-22 in this chapter.

§ 8.28:3 Errors in Affidavit, Bond, or Writ

Clerical errors in the affidavit, bond, writ of attachment, or return may be corrected by amendment. Application must be made in the court in which the suit was filed, and, after notice to the opponent, the writ may be amended in the manner that the court authorizes. However, the amendment can reach only clerical errors and cannot add to or change the grounds for attachment as stated in the affidavit. In addition, the amendment must appear to the court "to be in furtherance of justice." Tex. R. Civ. P. 609.

§ 8.29 Defendant's Rights in Attached Property

§ 8.29:1 Replevy

If the attached property has not been claimed or sold, the defendant may replevy all or part of it at any time before judgment or may recover the proceeds from any sale made under court order. To replevy, the defendant must give a bond payable to the plaintiff with sufficient surety or sureties as provided by statute; the sureties are to be approved by the officer who levied under the writ. The amount of the defendant's bond must be—

1. the amount fixed by the court in its original order granting the plaintiff's writ of attachment (the amount of the plaintiff's claim, one year's accrual of interest if allowed by law on the claim, and the estimated costs of court); or

2. at the defendant's option, the value of the property sought to be replevied (the value to be estimated by the officer) plus one year's interest at the legal rate from the date of the bond.

The bond must also be conditioned that the defendant will satisfy, to the extent of the penal amount of the bond, any judgment that may be rendered. Tex. R. Civ. P. 592, 599.

§ 8.29:2 Defendant's Right to Substitute Property

On reasonable notice to the plaintiff, which may be less than three days, the defendant may apply to the court for substitution of other property of equal value for the attached property. If the court considers the values of the properties equal, it may authorize substitution, and personal property thus released from attachment must be delivered to the defendant. Liens resulting from the original attachment order on the released property are terminated, and the substituted property is deemed to have been attached from the date of the levy on the property originally attached. If liens have been affixed to property since the original date of levy, that property may not be used for substitution. Tex. R. Civ. P. 599.

§ 8.30 Dissolution or Modification of Writ of Attachment

§ 8.30:1 Motion and Hearing

A defendant whose property has been attached or any intervening party who claims an interest in the property may by sworn written motion seek to vacate, dissolve, or modify the writ and the order directing its issuance for any extrinsic or intrinsic grounds or cause. After reasonable notice to the plaintiff, which may be less than three days, the motion must be heard promptly. Each issue presented by the motion must be decided not later than ten days after filing of the motion. Except for orders concerning the care, preservation, or sale of perishable property, the filing of the motion stays any further proceedings under the writ until a hearing occurs and every issue is determined. Tex. R. Civ. P. 608.

§ 8.30:2 Burden of Proof

At the hearing the plaintiff is required to prove the grounds for the issuance of the writ, or it will be dissolved. The court, however, may modify both its previous order granting the writ and the writ itself. The movant, though, bears the burden of proving that the reasonable value of the attached property exceeds the amount necessary to secure the debt, interest for one year, and probable costs. The movant must also prove that the facts justify the substitution of property if substitution is desired. The court may base its determination on uncontroverted affidavits that present facts otherwise admissible in evidence. If the affidavit is controverted, evidence must be presented. Tex. R. Civ. P. 608.

§ 8.30:3 Orders

The court may make orders as justice requires, including orders concerning the care, preservation, or disposition of the property (or its proceeds if it has been sold). If the movant has given a replevy bond, an order vacating or dissolving the writ vacates the bond and discharges the sureties. If the court modifies its order or the writ, it can make further orders with respect to the bond consistent with the modification. Tex. R. Civ. P. 608.

§ 8.31 Emergency Sale of Perishable Goods after Attachment

§ 8.31:1 Availability of Emergency Sale

The court may order the sale of personal property that has been attached but not claimed or replevied if the property is in danger of serious and immediate waste or decay or if retention of the property until trial will cause such an expense or deterioration in value as to greatly lessen the amount likely to be realized from the property. Tex. R. Civ. P. 600.

§ 8.31:2 Notice, Hearing, and Order

In determining whether the attached property is perishable and should therefore be sold, the court may consider affidavits and oral testimony. If the court determines that the property should be sold, it may issue a preliminary order directing the sheriff or constable to sell it for cash at public auction. The court in its discretion may give the parties notice of the sale or may order the sale without notice if the urgency of the situation demands it. Tex. R. Civ. P. 601. Forms in this chapter for an emergency sale are at forms 8-23 (application), 8-24 (affidavit), and 8-25 (order).

§ 8.31:3 Bond

An applicant for an order of sale who is not the defendant must file a bond with the court payable to the defendant. The bond must have two or more court-approved "good and sufficient sureties" responsible to the defendant for damages the defendant sustains if the sale is illegally and unjustly applied for or made. Tex. R. Civ. P. 602.

§ 8.31:4 Sale

The court-ordered sale of the perishable property is to be conducted in the same manner as sales of personal property under execution. Tex. R. Civ. P. 603; *see also* Tex. R. Civ. P. 649, 650. Under the proper circumstances, however, the court may order that both the sale and its advertisement occur earlier than ten days, ordinarily required under rule 650, in which case notice shall be as directed by the court's order. Tex. R. Civ. P. 603. The officer making the sale must promptly give the proceeds to the court clerk and must make a written, signed return of the order of sale, detailing the events of the sale and itemizing the expenses attending it. Tex. R. Civ. P. 604.

§ 8.32 Postjudgment Disposal of Attached Property

§ 8.32:1 Personal Property

If the plaintiff succeeds in the suit, the attachment lien on the debtor's personal property is foreclosed as in the case of other liens. The court will direct that the proceeds of any personalty already sold be applied to satisfaction of the judgment. If attached personalty is still in the hands of the attaching officer, the court will order its sale to satisfy the judgment. Tex. Civ. Prac. & Rem. Code § 61.062.

§ 8.32:2 Replevied Personal Property

If attached personal property has been replevied by the defendant, the judgment is taken against the defendant and sureties on the replevy bond for the amount of the judgment, interest, and costs, or for the value of the property replevied and interest, according to the terms of the defendant's replevy bond. Tex. Civ. Prac. & Rem. Code § 61.063.

§ 8.32:3 Real Property

If realty has been attached, the court will order its sale to satisfy the judgment. No order or decree foreclosing the attachment lien is necessary, but the judgment must briefly recite the issuance and levy of the attachment. This recital will be sufficient to preserve the attachment lien. The purchaser of real property sold under execution to satisfy the judgment will be vested with the same estate in the property that the defendant in attachment possessed at the time the writ of attachment was levied. Tex. Civ. Prac. & Rem. Code § 61.062.

§ 8.33 Injunction Generally

§ 8.33:1 Purpose and Use of Injunctive Relief

The injunction, an equitable remedy for preventing irreparable injury to personal or property rights, is a court's command that a party act or refrain from acting in a specific way. *See Passel v. Fort Worth Independent School District*, 440 S.W.2d 61, 63 (Tex. 1969), *on appeal after remand*, 453 S.W.2d 888 (Tex. Civ. App.—Fort Worth 1970, writ ref'd n.r.e.), *cert. denied*, 402 U.S. 968 (1971). In collection matters, the main purpose of the injunction is to restrain the defendant in pending litigation from violating the plaintiff's rights in a manner that would render a judgment ineffectual. *See* Tex. Civ. Prac. & Rem. Code § 65.011(2). Defendants pursued by creditors often try to dispose of assets before a judgment is rendered.

§ 8.33:2 Constitutional and Statutory Bases

Courts may issue injunctions under express statutory authority or general principles of equity. Tex. Const. art. V, §§ 8, 16; Tex. Civ. Prac. & Rem. Code §§ 65.001–.015; *see Garland v. Shepherd*, 445 S.W.2d 602, 604 (Tex. Civ. App.—Dallas 1969, no writ). In addition to the general injunction statute, many other statutes provide for injunctive relief in specific situations.

§ 8.33:3 Types of Injunctive Relief

Generally, injunctions may be either prohibitory—prohibiting certain acts—or mandatory—commanding a party to act. Beyond this distinction, an injunction may take one of three forms, distinguishable primarily by the length of time for which it is valid. These forms are outlined below.

Temporary Restraining Order: A temporary restraining order expires at the end of the period set by its own terms, not to exceed fourteen days, but the court may extend the order for one additional period and may grant additional extensions if the request is unopposed. It may be issued without notice to the adverse party and without a hearing if otherwise "immediate and irreparable injury, loss, or damage will result to the applicant." Tex. R. Civ. P. 680.

Temporary Injunction: A temporary injunction operates until disposition of the case on the merits, and it replaces any existing temporary restraining order. Tex. R. Civ. P. 680. It may not be issued without notice to the adverse party. Tex. R. Civ. P. 681.

Permanent Injunction: A permanent injunction may operate indefinitely or until an appointed date. It is part of the final judgment.

Permanent injunctions are rarely sought as ultimate relief in collection matters, so this part of the manual will focus on the temporary injunction and, to a lesser extent, the temporary restraining order.

§ 8.34 Substantive Requirements for Injunction

§ 8.34:1 Underlying Cause of Action

A plaintiff must have a genuine cause of action against a defendant to be entitled to injunctive relief. *Walling v. Metcalfe*, 863 S.W.2d 56, 58 (Tex. 1993); *Valenzuela v. Aquino*, 853 S.W.2d 512 (Tex. 1993).

§ 8.34:2 Probable Recovery and Probable Injury

For a temporary injunction, the applicant must show the probability of recovering in the underlying suit and of suffering an injury in the interim unless the injunction is granted. *Walling v. Metcalfe*, 863 S.W.2d 56, 57 (Tex. 1993); *State v. Southwestern Bell Telephone Co.*, 526 S.W.2d 526, 528 (Tex. 1975). It is not necessary to show that the plaintiff will ultimately prevail. *Southwestern Bell*, 526 S.W.2d at 528. The threat of injury to the plaintiff must be supported by evidence, not merely by speculation or conjecture. *See Dallas General Drivers, Warehousemen & Helpers v. Wamix, Inc.*, 295 S.W.2d 873, 879 (Tex. 1956); *Texas Industrial Gas v. Phoenix Metallurgical Corp.*, 828 S.W.2d 529, 532 (Tex. App.—Houston [1st Dist.] 1992, no writ).

§ 8.34:3 Irreparable Injury

A showing of irreparable injury is one of the requirements for issuance of a temporary restraining order. Tex. R. Civ. P. 680. "Irreparable injury" is also an independent ground for obtaining a temporary injunction. Tex. Civ. Prac. & Rem. Code § 65.011(5). One court, however, disapproved of granting injunctive relief based on this ground, because it seemed to eliminate the requirement that the plaintiff had no adequate remedy at law. *Speedman Oil Co. v. Duval County Ranch Co.*, 504 S.W.2d 923, 929 n.1 (Tex. Civ. App.—San Antonio 1974, writ ref'd n.r.e.).

§ 8.34:4 Inadequate Legal Remedy

The applicant must allege and prove that no adequate remedy at law can prevent or reduce the threatened injury. *Texas Industrial Gas v. Phoenix Metallurgical Corp.*, 828 S.W.2d 529, 532 (Tex. App.—Houston [1st Dist.] 1992, no writ). Legal remedies are inadequate if the defendant will be unable to provide damages, such as when a defendant is rapidly depleting assets from which damages would be paid. *R.H. Sanders Corp. v. Haves*, 541 S.W.2d 262, 265–66 (Tex. Civ. App.—Dallas 1976, no writ).

To preclude an equitable remedy, an available legal remedy must be "as practical and efficient

to the ends of justice as the equitable remedy." *Irving Bank & Trust Co. v. Second Land Corp.*, 544 S.W.2d 684, 688 (Tex. Civ. App.—Dallas 1976, writ ref'd n.r.e.). By this principle, the remedy of sequestration might not preclude injunctive relief in a suit for title or possession of specific property. *See Surko Enterprises v. Borg-Warner Acceptance Corp.*, 782 S.W.2d 223 (Tex. App.—Houston [14th Dist.] 1989, no writ).

§ 8.34:5 Interrelationship of Inadequate Legal Remedy and Irreparable Injury

The relationship between the grounds of inadequate legal remedy and irreparable injury is ambiguous. Some courts recite the two grounds conjunctively, suggesting that the applicant must prove both grounds. *Ballenger v. Ballenger*, 694 S.W.2d 72, 76 (Tex. App.—Corpus Christi 1985, no writ); *see also Texas Industrial Gas v. Phoenix Metallurgical Corp.*, 828 S.W.2d 529, 532 (Tex. App.—Houston [1st Dist.] 1992, no writ). Other courts pair the two grounds disjunctively. *See Houck v. Kroger Co.*, 555 S.W.2d 803, 805 (Tex. Civ. App.—Houston [14th Dist.] 1977, writ ref'd n.r.e.). Still other courts try to have it both ways. *See Inman v. Padrezas*, 540 S.W.2d 789, 797 (Tex. Civ. App.—Corpus Christi 1976, no writ) ("One seeking injunctive relief must plead irreparable injury and/or that he has no adequate remedy at law, and/or that irreparable injury is threatened.").

§ 8.34:6 Balancing of Equities

An injunction will not be granted unless the threatened injury to the plaintiff outweighs the harm that the injunction might bring to the defendant or if granting it would "disserve the public interest." *Morgan v. Fletcher*, 518 F.2d 236, 239 (5th Cir. 1975); *see also Viking Homes, Inc. v. Larkin*, 452 S.W.2d 25, 28 (Tex. Civ. App.—Houston [14th Dist.] 1970, no writ). This doctrine of balancing equities has numerous exceptions and corollaries. One important exception is that the doctrine does not apply if granting an injunction would "aid an act which, if done, would be criminal or illegal." *Riley v. Davidson*, 196 S.W.2d 557, 559 (Tex. Civ. App.—Galveston 1946, writ ref'd n.r.e.).

§ 8.34:7 Other Equity Issues

The applicant must have "clean hands"; injunctive relief will be denied to anyone who has caused the conditions of which he complains or has acquiesced as the conditions have developed. *Vaughan v. Kizer*, 400 S.W.2d 586, 589–90 (Tex. Civ. App.—Waco 1966, writ ref'd n.r.e.). Also, laches may foil an application for an injunction if the applicant has waited too long to seek protection. *Keene v. Reed*, 340 S.W.2d 859, 860 (Tex. Civ. App.—Waco 1960, writ ref'd).

§ 8.35 Availability of Injunction

§ 8.35:1 Discretion of Trial Court

The grant or refusal of an injunction is ordinarily within the court's sound discretion, and the action will be reversed only on a showing of clear abuse of that discretion. *Walling v. Metcalfe*, 863 S.W.2d 56, 58 (Tex. 1993); *Repka v. American National Insurance Co.*, 186 S.W.2d 977, 981 (Tex. 1945). If a plaintiff has adequate grounds, alleges a cause of action, and introduces evidence tending to sustain the cause, the trial court does not abuse its discretion by issuing a temporary injunction. *Southwestern Greyhound Lines v. Railroad Commission*, 99 S.W.2d 263, 270 (Tex. 1936).

§ 8.35:2 Unsecured Creditor

Unsecured creditors may be unable to obtain an injunction seizing or impounding property, because, absent an authorizing statute, a court of equity lacks jurisdiction to seize or impound

assets unless the claimant either has a lien on those assets or has reduced his claim to judgment. *Garland v. Shepherd*, 445 S.W.2d 602, 605 (Tex. Civ. App.—Dallas 1969, no writ); *see also Nowak v. Los Patios Investors, Ltd.*, 898 S.W.2d 9 (Tex. App.—San Antonio 1995, no writ); *Perryton Feeders, Inc. v. Feldmann*, 483 S.W.2d 386 (Tex. Civ. App.—Amarillo 1972, writ ref'd n.r.e.). Attachment is the proper remedy for such a situation. See sections 8.25 through 8.32 above.

§ 8.35:3 Preventing Transfer of Assets

If ownership of the property is disputed, injunctions sometimes issue to prevent transfer that could defraud the rightful owner. Examples include—

1. prohibiting transfer of funds that the defendant had fraudulently obtained from the plaintiff, *Baucum v. Texam Oil Corp.*, 423 S.W.2d 434, 442 (Tex. Civ. App.—El Paso 1967, writ ref'd n.r.e.);

2. enjoining the mortgagor of an automobile from transferring its title, in part on the basis that he held the certificate of title only by mistake, *Hall v. Universal C.I.T. Credit Corp.*, 298 S.W.2d 858, 859 (Tex. Civ. App.—Eastland 1957, no writ); and

3. making the debtor's primary creditor a de facto receiver of the debtor's business by ordering all receipts paid to the creditor, *Surko Enterprises v. Borg-Warner Acceptance Corp.*, 782 S.W.2d 223, 225 (Tex. App.—Houston [1st Dist.] 1989, no writ).

§ 8.36 Procedural Requirements for Temporary Injunction

§ 8.36:1 Procedure Generally

The plaintiff may seek a temporary injunction in the original petition as either the sole remedy or an ancillary remedy, or a separate petition may request the injunction as an ancillary remedy. The manual committee recommends a separate application because in collection cases a temporary injunction or restraining order is usually sought as an interim pretrial remedy. This section discusses procedural requirements for the injunction; section 8.34 above discusses substantive requirements. Differences in procedure for the temporary restraining order are discussed at section 8.37 below. An application is at form 8-26 in this chapter.

§ 8.36:2 Allegation of Grounds

The application must contain "a plain and intelligible statement of the grounds" for issuance of the writ. Tex. R. Civ. P. 682. Several grounds may be pleaded alternatively if each is sufficient, and proof of only one is necessary. *Bales v. Jones*, 288 S.W.2d 266, 268 (Tex. Civ. App.—Fort Worth 1956, writ ref'd n.r.e.).

§ 8.36:3 Allegation of Facts

The application must plead facts, not legal conclusions. *Texas State Board of Medical Examiners v. McKinney*, 315 S.W.2d 387, 390 (Tex. Civ. App.—Waco 1958, no writ). Fact allegations must be specific and leave nothing to inference; they should allege the applicant's right, the defendant's wrong, and the resulting injury. *Mendoza v. Canizales*, 695 S.W.2d 266, 268 (Tex. App.—San Antonio 1985, no writ). The applicant has the burden of proof. *Butler v. Butler*, 296 S.W.2d 635, 637 (Tex. Civ. App.—Fort Worth 1956, no writ). The application is strictly construed. *Thomas v. Bunch*, 41 S.W.2d 359,

362 (Tex. Civ. App.—Fort Worth 1931), *aff'd*, 49 S.W.2d 421 (Tex. 1932).

§ 8.36:4 Negation of Inferences Contrary to Injunctive Relief

The application must negate "every reasonable inference arising upon the facts so stated, that the party might not, under other pertinent supposable facts, be entitled to relief." *Gillis v. Rosenheimer*, 64 Tex. 243, 346 (1885); *see also Mendoza v. Canizales*, 695 S.W.2d 266, 268 (Tex. App.—San Antonio 1985, no writ). This rule is often invoked to deny or dissolve a temporary injunction when the applicant has failed to disprove or negate facts that would undermine the alleged grounds for the injunction if they were proved. *See, e.g., Southwestern Associated Telephone Co. v. City of Dalhart*, 254 S.W.2d 819, 826 (Tex. Civ. App.—Amarillo 1952, writ ref'd n.r.e.); *Refrigeration Discount Corp. v. Meador*, 134 S.W.2d 331, 332 (Tex. Civ. App.—Eastland 1939, no writ).

§ 8.36:5 Request for Relief

The application must specify the relief sought; the court may enjoin only the acts specified. *Hues v. Warren Petroleum Co.*, 814 S.W.2d 526, 529–30 (Tex. App.—Houston [14th Dist.] 1991, writ denied); *Scoggins v. Cameron County Water Improvement District No. 15*, 264 S.W.2d 169, 173 (Tex. Civ. App.—Austin 1954, writ ref'd n.r.e.).

§ 8.36:6 Verification

The application must be verified by affidavit. Tex. R. Civ. P. 682. Affidavits based on "information and belief" are insufficient. *Ex parte Rodriguez*, 568 S.W.2d 894, 897 (Tex. Civ. App.—Fort Worth 1978, no writ); *Durrett v. Boger*, 234 S.W.2d 898, 900 (Tex. Civ. App.—Texarkana 1950, no writ). The applicant's attorney should not make the affidavit; see section 1.32:5 in this manual. If an injunction is granted after notice and hearing, however, it is not essential that the petition be sworn to, because a full and complete hearing was had before the court. *Williams v. City of Tom Bean*, 688 S.W.2d 618, 621 (Tex. App.—Dallas 1985, no writ). See Tex. Gov't Code § 312.011(1) for the requirements for affidavits. The application at form 8-26 in this chapter includes an affidavit.

§ 8.36:7 Notice

"No temporary injunction shall be issued without notice to the adverse party." Tex. R. Civ. P. 681. Tex. R. Civ. P. 680 allows temporary restraining orders to issue without notice if it clearly appears from specific facts shown by affidavit or verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before notice can be served and a hearing had on the matter. The adverse party must be given notice before the required hearing on the temporary injunction.

§ 8.36:8 Bond

Before the injunction issues, the applicant must execute and file a bond to the adverse party in the amount fixed by the court. Tex. R. Civ. P. 684. For a discussion of the bond, see section 8.38 below.

§ 8.37 Temporary Restraining Order

Temporary restraining orders have the same procedural requirements as temporary injunctions discussed in section 8.36 above, except that notice to the adverse party is not required if "it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before notice can be served and a hearing had thereon." Tex. R. Civ. P. 680.

§ 8.38 Bond for Injunctive Relief

Before issuance of a temporary injunction or temporary restraining order, the applicant must execute and file a bond to the adverse party in the amount fixed by the court. The bond is "conditioned that the applicant will abide the decision which may be made in the cause, and that he will pay all sums of money and costs that may be adjudged against him if the restraining order or temporary injunction shall be dissolved in whole or in part." The bond must have "two or more good and sufficient sureties, to be approved by the clerk." Tex. R. Civ. P. 684. A surety company "duly authorized to do business in this state," however, may be used in lieu of individual sureties. Tex. Ins. Code §§ 3503.001–.005. A bond given for a temporary restraining order is sometimes continued for a succeeding temporary injunction, but more often the plaintiff must execute a new bond.

For a bond, see form 8-31 in this chapter.

§ 8.39 Order for Injunctive Relief

§ 8.39:1 Order Generally

The order granting a temporary injunction or temporary restraining order must meet the requirements of Tex. R. Civ. P. 683 precisely. If a court issues an order that does not conform to the rule, the nonconformity constitutes an abuse of discretion and mandates reversal. The injunction is void even if the defendant does not bring the order's nonconformity to the court's attention. *Fasken v. Darby*, 901 S.W.2d 591, 593 (Tex. App.—El Paso 1995, no writ); *University Interscholastic League v. Torres*, 616 S.W.2d 355, 358 (Tex. Civ. App.—San Antonio 1981, no writ). Requirements for temporary injunctions and temporary restraining orders are generally the same, but the latter have some additional requirements, discussed at section 8.40 below. An order for issuance of a temporary injunction is at form 8-29 in this chapter.

§ 8.39:2 Statement of Grounds

In stating the reasons for its issuance, the order must be "specific in terms." Tex. R. Civ. P. 683. The stated reasons must be legally sufficient and must not be mere conclusory statements. *Martin v. Linen Systems for Hospitals*, 671 S.W.2d 706, 710 (Tex. App.—Houston [1st Dist.] 1984, no writ). The court need not explain its reasons for believing that the applicant will prevail on the merits, but it must explain why the applicant will be injured if the injunction is denied. If the order fails to meet the requirement of rule 683 that the reasons for issuance be specifically stated, the order will be invalid. *Courtlandt Place Historical Foundation v. Doerner*, 768 S.W.2d 924, 925 (Tex. App.—Houston [1st Dist.] 1989, no writ).

§ 8.39:3 Statement of Acts Enjoined

The order must "describe in reasonable detail and not by reference to the complaint or other document, the act or acts sought to be restrained." Tex. R. Civ. P. 683. The description of enjoined acts must be clear, definite, and precise, so that the defendant need not make inferences or draw conclusions about matters that persons might differ on. *Villalobos v. Holguin*, 208 S.W.2d 871, 875 (Tex. 1948).

§ 8.39:4 Persons Affected

The order "is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise." Tex. R. Civ. P. 683.

§ 8.39:5 Setting for Trial Date

Every order granting a temporary injunction must include an order setting a date for trial on the merits with respect to the ultimate relief sought. Tex. R. Civ. P. 683. If the order granting

an injunction fails to include the trial setting, the order must be dissolved. *InterFirst Bank San Felipe v. Paz Construction Co.*, 715 S.W.2d 640, 641 (Tex. 1986); *Higginbotham v. Clues*, 730 S.W.2d 129 (Tex. App.—Houston [14th Dist.] 1987, no writ).

§ 8.40 Additional Requirements for Temporary Restraining Order

Temporary restraining orders must meet requirements in addition to those described in section 8.39 above. Every such order must define the threatened injury, state why the injury would be irreparable, state why the order was granted without notice, set the date for a hearing on the application for a temporary injunction, and be endorsed with the date and hour of issuance. Tex. R. Civ. P. 680.

An order for issuance of a temporary restraining order is at form 8-27 in this chapter, and a temporary restraining order is at form 8-28.

[Reserved]

Form 8-1

The attorney should consult sections 8.11 through 8.15 in this chapter before using the prejudgment garnishment remedy.

The application must be accompanied with one or more affidavits. Tex. R. Civ. P. 658. Both the garnishee and the defendant must be served. *See* Tex. R. Civ. P. 659, 661, 663a. The application is discussed at section 8.12:2, and an affidavit is at form 8-2. See section 14.22 regarding exercising caution in pleading conditions precedent.

The clerk will docket the application to show the garnishee as the defendant, but the prejudgment garnishment proceeding should be conducted as an ancillary part of the underlying cause. *See* Tex. R. Civ. P. 659. In most counties, the clerk will prepare the writ of garnishment and the return. In some cases, the attorney may wish to prepare them for the clerk.

[Caption. See § 3 of the Introduction in volume 1 of this manual.]

Use the same docket number and court designation as in the original petition (unless the cause has been transferred), but include the garnishee's name in the style, as in "Carl Creditor, Plaintiff, v. Dan Debtor, Defendant and LastNational Bank, Garnishee."

Application for Prejudgment Writ of Garnishment

1. *Parties.* [**Name of plaintiff**], Plaintiff, whose address is [**address, city, state**], makes this Application for Prejudgment Writ of Garnishment. Garnishee is [**name of garnishee**], who can be served with citation at [**address, city, state**]. Defendant is [**name of defendant**], who can be served with citation at [**address, city, state**].

2. *Facts.* Plaintiff has reason to believe that Garnishee has property belonging to Defendant or is indebted to Defendant. Within Plaintiff's knowledge, Defendant does not possess property in Texas subject to execution sufficient to satisfy the debt. This garnishment is not sought to injure Defendant or Garnishee.

3. *Affidavit.* Plaintiff is entitled to the issuance of a writ of garnishment before judgment on the grounds stated in the attached affidavit. The affidavit is incorporated in this application by reference.

4. *Conditions Precedent.* All conditions precedent have been performed or have occurred.

5. *Prayer.* Plaintiff prays that a writ of garnishment issue before judgment and that Plaintiff be granted all further relief to which Plaintiff may be entitled.

_____

[**Name**]
Attorney for Plaintiff
State Bar No.:
[**E-mail address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

Attach affidavit(s) (form 8-2). Prepare the following, as necessary, to take to the hearing: form 8-3 (order for issuance of writ of garnishment), form 8-4 (bond to defendant), form 8-5 (writ to be served on garnishee), and form 8-6 (officer's return) with a copy of the writ, application, and affidavit(s) to be served on the defendant.

Form 8-2

This affidavit may be executed by the plaintiff, his agent or attorney, or someone having knowledge of relevant facts. Tex. R. Civ. P. 658. Even though Tex. R. Civ. P. 658 permits the plaintiff's attorney to execute this affidavit, the manual committee recommends that the attorney not execute any affidavit for a client; see section 1.32:5 in this manual. See Tex. Civ. Prac. & Rem. Code § 63.001 for statutory affidavit requirements.

[Caption. See § 3 of the Introduction in volume 1 of this manual.]

Use the same caption as in the application for writ of garnishment at form 8-1.

Affidavit for Prejudgment Writ of Garnishment

BEFORE ME, the undersigned authority, on this day personally appeared [**name of affiant**], who swore on oath that the following facts are true:

"I am [Plaintiff/[**other capacity, e.g.,** credit manager of Plaintiff]] in this cause. [**Include if affiant is agent:** I am authorized to make this affidavit and to apply for a prejudgment writ of garnishment in this cause.]

Select one of the following.

"I have personal knowledge of the facts stated in this affidavit, and they are true and correct.

Or

"I make this affidavit on information and belief. The basis for that belief is the following: [**state specific grounds for belief**].

Continue with the following.

"In this suit, now pending in this Court, Plaintiff has filed an action against Defendant alleging [**describe type of action, e.g.,** an unpaid debt based on a secured promissory note].

"This debt is just, due, and unpaid. Within my knowledge, Defendant does not possess property in Texas subject to execution sufficient to satisfy the debt. This garnishment is not sought to injure Defendant or Garnishee.

State specific facts relied on by the plaintiff to warrant issuance of the writ. The following paragraph is a sample allegation; the actual allegations must be drafted to fit the facts.

"Defendant has stated to me that he is conducting a going-out-of-business sale, that he has sold Plaintiff's collateral, that he does not intend to pay any of his creditors, and that he plans to move out of the country in two weeks. In the past, Defendant has often promised to pay Plaintiff but has failed to do so.

Continue with the following.

"In the suit against Defendant, Plaintiff has alleged that Defendant has damaged Plaintiff in the amount of $[**amount**]. Plaintiff should be permitted to garnish property of Defendant in that amount."

_____

[Name of affiant]
Affiant

SIGNED under oath before me on _____.

_____

Notary Public, State of Texas

Form 8-3

This form assumes the hearing was ex parte. *See* Tex. R. Civ. P. 658. For appearances by the defendant or garnishee, modify the form as appropriate. Unless the defendant chooses to replevy under Tex. R. Civ. P. 664, the amount of the defendant's replevy bond must be the amount of the plaintiff's claim, plus one year's accrual of interest if allowed by law on the claim, and estimated costs of court. Tex. R. Civ. P. 658.

[Caption. See § 3 of the Introduction in volume 1 of this manual.]

Use the same caption as in the application for writ of garnishment at form 8-1.

Order for Issuance of Prejudgment Writ of Garnishment

At the hearing on Plaintiff's Application for Prejudgment Writ of Garnishment in this cause, Plaintiff appeared by and through his attorney of record. The hearing was conducted without notice to Defendant or Garnishee.

The Court finds that—

Specific findings of fact must be made; findings 1.–4. are examples only.

1. Defendant executed a promissory note payable to Plaintiff. The note was due on February 1, 2010, and was secured by a 2005 Dodge pickup truck, VIN 1234567890;

2. this note is in default, and there is currently due to Plaintiff from Defendant $5,000, which represents unpaid principal and interest on the note;

3. Defendant is in the process of going out of business;

4. Defendant has sold the above-described collateral in which Plaintiff has a security interest;

Findings 5. and 6. are required in all orders.

5. within Plaintiff's knowledge, Defendant has no property in Defendant's possession in Texas subject to execution sufficient to satisfy the debt; and

6. the garnishment is not sought to injure Defendant or Garnishee.

It is therefore ORDERED that a prejudgment writ of garnishment be issued against [**name of garnishee**] for property or indebtedness in the maximum amount of $_____, conditioned that Plaintiff must post a bond in the amount of $_____, payable to Defendant, conditioned as required by law.

It is further ORDERED that Defendant may replevy part or all of the property or indebtedness by posting a bond in the amount of $_____, payable to Plaintiff, conditioned as required by law.

SIGNED on _____.

_____
JUDGE PRESIDING

APPROVED AS TO FORM:

_____
[Name]
Attorney for Plaintiff
State Bar No.:
[E-mail address]
[Address]
[Telephone]
[Telecopier]

If the application is granted, have the clerk issue a writ of garnishment (with application, affidavit, and order) to the defendant and the garnishee.

Form 8-4

The form of the bond is suggested by Tex. R. Civ. P. 592b. Bonds are discussed at sections 8.13:2 (prejudgment garnishment), 8.18 (sequestration), and 8.27 (attachment) in this chapter. A surety company may be used in lieu of one or more individual sureties. *See* Tex. Ins. Code §§ 3503.001–.005. If individual sureties are used, two will probably be required, and the form should be so modified. Duplicate originals should be prepared and executed, one for the clerk and the other for the sheriff or constable. See form 8-13 for a plaintiff's replevy bond for sequestered property and form 8-31 for a bond to a defendant for an injunction. If this form is used for a writ of sequestration, the plaintiff may add the conditions required by Tex. R. Civ. P. 708 for a replevy bond (see form 8-13); no separate replevy bond will then be required.

[Caption. See § 3 of the Introduction in volume 1 of this manual.]

Bond to Defendant for [Writ of Attachment/Writ of Sequestration/ Writ of Prejudgment Garnishment]

WE, THE UNDERSIGNED, [**name of plaintiff**], Plaintiff, as principal and [**name of surety**] as surety, acknowledge ourselves bound to pay [**name of defendant**], Defendant, up to the sum of [**number**] dollars, conditioned that Plaintiff will prosecute this cause to effect and that Plaintiff will pay to the extent of the penal amount of this bond all damages and costs as may be adjudged against Plaintiff for wrongfully suing out this [**type of remedy sought, e.g.,** writ of attachment].

SIGNED on _____.

_____
[**Name of plaintiff**]
Principal

_____
[**Name of surety company**]
Surety

By _____
Agent for Surety

APPROVED on _____.

_____
[**Name of clerk**], Clerk
[**Designation of court**]

By _____
Deputy

Form 8-5

The form of the writ, including clauses governing time for the garnishee to appear, is set forth in Tex. R. Civ. P. 661. Usually the writ is provided by the clerk. Additional language must be included in the copy of the writ served on the defendant. For a notice to be served on the defendant, see form 8-7 in this chapter.

[Caption. See § 3 of the Introduction in volume 1 of this manual.]

Use the same caption as in the application for writ of garnishment at form 8-1.

Writ of Garnishment to Be Served on Garnishee

To [**name of garnishee**], Garnishee:

WHEREAS, in the [**designation**] Court of [**county**] County [**include the number of the precinct if a justice court**], in a certain cause where [**name of plaintiff**] is Plaintiff and [**name of defendant**] is Defendant, Plaintiff, claiming an indebtedness against [**name of defendant**] of $[**amount**], besides interest and costs of suit, has applied for a writ of garnishment against you, [**name of garnishee**]; therefore you are hereby commanded to appear before the Court at [**location of court**]

Select one of the following. Select the first option if the writ is issued from a county or district court. Select the second option if the writ is issued from a justice court.

at 10:00 A.M. on the Monday next after the expiration of twenty days from the date of service of this writ,

Or

at or before 10:00 A.M. on the Monday next after the expiration of ten days from the date of service of this writ,

Continue with the following.

then and there to answer on oath what, if anything, you are indebted to [**name of defendant**] and were indebted when this writ was served on you, and what effects, if any, of [**name of defendant**] you have in your possession and had when this writ was served, and what other persons, if any, within your knowledge, are indebted to [**name of defendant**] or have effects belonging to Defendant in their possession. You are further commanded NOT to pay to Defendant any debt or to deliver to Defendant any effects, pending further order of this Court. Herein fail not, but make due answer as the law directs.

ISSUED on _____.

_____

[**Name of clerk**], Clerk
[**Designation of court**]

Prepare form 8-6 (officer's return for prejudgment writ of garnishment) if needed and form 8-7 (notice to be served on defendant). Unless the clerk provides an extra copy of the writ that includes the notice language required by Tex. R. Civ. P. 663a, photocopy the writ and add the notice language (see form 8-7) before service on the defendant.

Form 8-6

A return is usually included in the form writ furnished by the clerk. If the attorney prepares the writ, a return should be provided. The officer receiving the writ "shall make return thereof as of other citations." Tex. R. Civ. P. 663. See the discussions of the officer's return at sections 16.8 and 27.60 in this manual.

For a writ of garnishment before judgment to be served on the garnishee, see form 8-5. For a notice of garnishment to be served on the defendant, see form 8-7.

[Caption. See § 3 of the Introduction in volume 1 of this manual.]

Use the same caption as in the application for writ of garnishment at form 8-1.

Officer's Return for Prejudgment Writ of Garnishment

CAME TO HAND at _____ __.M. on the _____ day of _____ and executed at _____ __.M. on the _____ day of _____ at _____, _____ County, Texas, by delivering to the within named Garnishee, in person, a true copy of this Writ of Garnishment.

The distance actually traveled by me in execution of this process was _____ miles, and my fees are $_____.

_____
SHERIFF OR CONSTABLE

[Reserved]

Form 8-7

The defendant is to receive a copy of the application, affidavit(s), order, and writ of garnishment. Tex. R. Civ. P. 663a. The writ is the same as the one to be served on the garnishee, except it must contain the additional notice set forth in Tex. R. Civ. P. 663a. The notice must be "prominently displayed on the face of the copy of the writ served on the defendant, in ten-point type and in a manner calculated to advise a reasonably attentive person of its contents."

Service may be as provided by Tex. R. Civ. P. 21a, which includes service by registered or certified mail or by telephonic document transfer. For a writ to be served on the garnishee and adapted for service on the defendant, see form 8-5 in this chapter.

Proof of service of the writ of garnishment on the defendant may be documented with this form, which is to be used as a cover sheet for the writ.

[Caption. See § 3 of the Introduction in volume 1 of this manual.]

Use the same caption as in the application for writ of garnishment at form 8-1.

Notice of Garnishment

To [**name of defendant**], Defendant:

You are hereby notified that certain properties alleged to be owned by you have been garnished. If you claim any rights in such property, you are advised:

YOU HAVE A RIGHT TO REGAIN POSSESSION OF THE PROPERTY BY FILING A REPLEVY BOND. YOU HAVE A RIGHT TO SEEK TO REGAIN POSSESSION OF THE PROPERTY BY FILING WITH THE COURT A MOTION TO DISSOLVE THIS WRIT.

[**Name**]
Attorney for Plaintiff
State Bar No.:
[**E-mail address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

Attach a copy of the writ (form 8-5). Include a certificate of service (form 1-6).

Form 8-8

This form may be used to sequester property for which foreclosure or enforcement of a mortgage, lien, or security interest in personal property or fixtures is sought. Discussion of foreclosure of many kinds of liens is at sections 7.1 through 7.4 in this manual. If sequestration of real property is sought in a suit for title, partition, or possession for other purposes, this form must be adapted to fit existing facts. Real property is generally beyond the scope of this manual. The application and affidavit may be combined with the original petition; here, the application and affidavit are in one form, to be filed separately when or after the petition is filed. For a discussion of the application and affidavit, see section 8.17.

This form is based on the requirements for application and affidavit set forth in Tex. R. Civ. P. 696 and the grounds stated in Tex. Civ. Prac. & Rem. Code § 62.001. In most counties, the clerk will prepare the writ of sequestration and the return. In some cases, the attorney may wish to prepare them for the clerk. See forms 8-10 and 8-12.

See section 8.16:3 regarding the grounds for and availability of sequestration. See section 14.29 for other forms of party designation.

[Caption. See § 3 of the Introduction in volume 1 of this manual.]

Use the same caption as in the original petition unless the cause has been transferred.

Application and Affidavit for Writ of Sequestration

1. *Parties.* [**Name of plaintiff**], Plaintiff, whose address is [**address, city, state**], makes this Application for Writ of Sequestration. Defendant is [**name of defendant**], who can be served with citation at [**address, city, state**].

State specific facts relied on by the plaintiff to warrant the required findings by the court. The following paragraphs are sample allegations; the actual allegations must be drafted to fit the facts.

2. *Facts.* In this suit, now pending in this Court, Plaintiff is seeking damages from Defendant and [foreclosure/enforcement] of Plaintiff's [security interest/mortgage/lien] in the following property: [**describe each item of property with sufficient certainty that it can be identified and distinguished from similar property**]. Each item of property has the following value: [**list each item and its value**]. All this property is in Defendant's possession at [**address, city,**

county] County, Texas. Plaintiff has a valid and existing [security interest/mortgage/lien] in this property.

3. *Default.* The debt owed to Plaintiff, as described in the original petition, is just and unsatisfied. Defendant has failed and refused to pay [**number**] payments of $[**amount**] each, although he agreed to do so. Plaintiff has exercised the right to accelerate the obligations owed by Defendant as set out in the [agreement/security agreement] between Plaintiff and Defendant. Defendant currently owes Plaintiff $[**amount**].

4. *Grounds.* Plaintiff fears Defendant may conceal the property or may remove it from [**county**] County during the pendency of this suit because Defendant refused to surrender possession of the property when specifically and rightfully requested by Plaintiff to do so. This refusal by Defendant is an intentional concealment of the property and therefore jeopardizes Plaintiff's [security interest/mortgage/lien] in the property.

5. *Prayer.* Plaintiff prays that a writ of sequestration issue and that Plaintiff be granted all further relief to which Plaintiff may be entitled.

_____

[**Name**]
Attorney for Plaintiff
State Bar No.:
[**E-mail address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

Affidavit

BEFORE ME, the undersigned authority, on this day personally appeared [**name of affiant**], who swore on oath that the following facts are true:

"I am [Plaintiff/[**other capacity, e.g.,** credit manager of Plaintiff]] in this cause. [**Include if affiant is agent:** I am authorized to make this affidavit and to apply for a writ of sequestration in this cause.]

Select one of the following.

"I have personal knowledge of the facts stated above, and they are true and correct."

Or

"I make this affidavit on information and belief. The basis for that belief is the following: [**state specific grounds for belief**]."

Continue with the following.

_____

[**Name of affiant**]
Affiant

SIGNED under oath before me on _____.

_____

Notary Public, State of Texas

Prepare the following, as necessary, to take to the hearing: form 8-9 (order for issuance of writ of sequestration), form 8-10 (writ of sequestration), form 8-12 (officer's return), and form 8-4 (bond to defendant).

[Reserved]

Form 8-9

The order is discussed at section 8.17:5 in this chapter. Usually the hearing will be ex parte. *See* Tex. R. Civ. P. 696. For appearance by the defendant, modify the form as appropriate. The content of this form is based on the requirements set forth at Tex. R. Civ. P. 696, including the requirement that the order make specific findings of fact to support the statutory grounds under Tex. Civ. Prac. & Rem. Code § 62.001.

Describe each item of property to be sequestered "with such certainty that it may be identified and distinguished from property of a like kind, giving the value of each article of the property and the county in which it is located." Tex. R. Civ. P. 696.

The court's order must specify the amount of both the plaintiff's sequestration bond and the defendant's replevy bond. Tex. R. Civ. P. 696.

[Caption. See § 3 of the Introduction in volume 1 of this manual.]

Use the same caption as in the application for writ of sequestration at form 8-8.

Order for Issuance of Writ of Sequestration

At the hearing on Plaintiff's Application for Writ of Sequestration in this cause, Plaintiff appeared by and through his attorney of record. The hearing was conducted without notice to Defendant.

The Court finds that—

Specific findings of fact on specific statutory grounds must be made. The following are examples; the actual findings must be drafted to fit the facts.

1. this cause is still pending in this Court;

2. Plaintiff is seeking damages from Defendant and [foreclosure/enforcement] of Plaintiff's asserted [security interest/mortgage/lien] in the following property with value as stated: [**describe property, including value**];

3. the property is located in [**city, county**] County, Texas; and

> The court's order must make specific findings to support the statutory grounds found to exist; the following example tracks the specific grounds set forth in the application and affidavit at form 8-8.

4. Defendant or the party in possession may conceal the property or remove it from the county during the pendency of this suit. Defendant refused to surrender possession of the property when specifically and rightfully requested by Plaintiff to do so. This refusal by Defendant constitutes an intentional concealment of the property and therefore jeopardizes Plaintiff's [security interest/mortgage/lien] in the property.

It is therefore ORDERED that a writ of sequestration be issued, conditioned that Plaintiff must post a bond in the amount of $_____, payable to Defendant, conditioned and approved as required by law.

It is further ORDERED that Defendant may replevy any of the property by posting a bond in the amount of $_____, payable to Plaintiff, conditioned and approved as required by law.

SIGNED on _____.

_____
JUDGE PRESIDING

APPROVED AS TO FORM:

_____
[Name]
Attorney for Plaintiff
State Bar No.:
[E-mail address]
[Address]
[Telephone]
[Telecopier]

If the application is granted, have the clerk issue a writ of sequestration (with application, affidavit, and order) for service on the defendant.

[Reserved]

Form 8-10

A copy of the writ, application and affidavit, and order must be served on the defendant. Tex. R. Civ. P. 700a. Usually the form is provided by the clerk. The language in the notice to the defendant of his right to file a replevy bond and seek dissolution of the writ is from Tex. R. Civ. P. 699, 700a. The time frame for the officer's return is dictated by Tex. R. Civ. P. 15. The writ is discussed at section 8.19 in this chapter.

Describe each item of property "with such certainty that it may be identified and distinguished from property of a like kind." Tex. R. Civ. P. 696; *see* Tex. R. Civ. P. 699 ("describing the same as it is described in the application or affidavits").

The language in the notice to the defendant must be in ten-point type. Tex. Civ. Prac. & Rem. Code § 62.023; Tex. R. Civ. P. 699.

[Caption. See § 3 of the Introduction in volume 1 of this manual.]

Use the same caption as in the application for writ of sequestration at form 8-8.

Writ of Sequestration

To the sheriff or any constable of any county within the state of Texas, greetings:

Plaintiff has applied for and given bond for a writ of sequestration in this cause, which is now pending in this Court. You are therefore commanded to take into your possession, if it is found in your county, the following property: [**describe property**]. You are commanded to keep the property safe and preserved, subject to the further order of this Court, unless it is replevied.

Herein fail not, but have you this writ, with your return showing how you have executed it, before this Court on or before the Monday next after the expiration of twenty days from the date the writ is served.

You are to display to the interested persons present at the time of the levy the following:

To [**name of defendant**], Defendant:

You are hereby notified that certain properties alleged to be claimed by you have been sequestered. If you claim any rights in such property, you are advised:

YOU HAVE A RIGHT TO REGAIN POSSESSION OF THE PROPERTY BY FILING A REPLEVY BOND. YOU HAVE A RIGHT TO SEEK TO REGAIN POSSESSION OF THE PROPERTY BY FILING WITH THE COURT A MOTION TO DISSOLVE THIS WRIT.

ISSUED on _____.

_____

[**Name of clerk**], Clerk
[**Designation of court**]

Prepare officer's return if needed (form 8-12).

Form 8-11

The manual committee recommends serving this notice with the other documents. The notice must be in ten-point type. Tex. R. Civ. P. 700a.

[Caption. See § 3 of the Introduction in volume 1 of this manual.]

Use the same caption as in the application for writ of sequestration at form 8-8.

Notice of Sequestration

To [**name of defendant**], Defendant:

You are hereby notified that certain properties alleged to be claimed by you have been sequestered. If you claim any rights in such property, you are advised:

YOU HAVE A RIGHT TO REGAIN POSSESSION OF THE PROPERTY BY FILING A REPLEVY BOND. YOU HAVE A RIGHT TO SEEK TO REGAIN POSSESSION OF THE PROPERTY BY FILING WITH THE COURT A MOTION TO DISSOLVE THIS WRIT.

[**Name**]
Attorney for Plaintiff
State Bar No.:
[**E-mail address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

Attach a copy of the writ, the application, accompanying affidavits, and the orders of the court. Include a certificate of service (form 1-6).

[Reserved]

Form 8-12

A return is usually included in the form writ furnished by the clerk. If the attorney prepares the writ, a return should be provided. The attorney should make sure the return meets the requirements of the Texas Rules of Civil Procedure. See section 16.8 in this manual for a discussion of the officer's return. A writ of sequestration is at form 8-10.

[Caption. See § 3 of the Introduction in volume 1 of this manual.]

Use the same caption as in the application for writ of sequestration at form 8-8.

Officer's Return for Writ of Sequestration

CAME TO HAND at _____ __.M. on the _____ day of _____ and executed at _____ __.M. on the _____ day of _____ at _____, _____ County, Texas, by taking into possession the following property:

_____

_____

_____.

This property remains in my custody, subject to the further order of the court issuing the writ.

The distance actually traveled by me in execution of this process was _____ miles, and my fees are $_____.

_____
SHERIFF OR CONSTABLE

[Reserved]

Form 8-13

Replevy by the plaintiff is discussed at section 8.22 in this chapter. The amount of the replevy bond shall not be less than the amount fixed by the court's order. Tex. R. Civ. P. 708.

For a form sequestration bond, which is to be filed with the application for the writ of sequestration, see form 8-4. If the sequestration bond is conditioned as provided in Tex. R. Civ. P. 708, the plaintiff will not be required to file this replevy bond. Tex. R. Civ. P. 698.

A surety company may be used in lieu of one or more individual sureties. *See* Tex. Ins. Code §§ 3503.001–.005. If individual sureties are used, two will probably be required, and the form should be so modified. The sufficiency of the surety or sureties is to be approved by the officer. Tex. R. Civ. P. 708.

[Caption. See § 3 of the Introduction in volume 1 of this manual.]

Use the same caption as in the application for writ of sequestration at form 8-8.

Plaintiff's Replevy Bond for Sequestered Property

WE, THE UNDERSIGNED, [**name of plaintiff**], Plaintiff, as principal and [**name of surety**] as surety, acknowledge ourselves bound to pay [**name of defendant**], Defendant, up to the sum of [**number**] dollars, conditioned that

Select one of the following. The first option is to be used for personal property and the second for real property.

Plaintiff will have the sequestered property, in the same condition as when it is replevied, together with the value of its fruits, hire, or revenue, forthcoming to abide the decision of the Court; or that Plaintiff will pay its value, or the difference between its value at the time of replevy and the time of judgment (regardless of the cause of the difference in value and of the fruits, hire, or revenue of the same in case Plaintiff is condemned to do so).

Or

Plaintiff will not injure the property and that Plaintiff will pay the value of the rents of the property if condemned to do so.

Continue with the following.

SIGNED on _____.

_____
[**Name of plaintiff**]
Principal

_____
[**Name of surety company**]
Surety

By _____
Agent for Surety

APPROVED by _____ on _____.
Levying Officer Date

APPROVED AS TO FORM:

_____
[**Name**]
Attorney for Plaintiff
State Bar No.:
[**E-mail address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

Form 8-14

Perishable personal property that has been sequestered may be sold during pendency of the suit under conditions outlined in Tex. R. Civ. P. 710. The sale of perishable goods is discussed at section 8.23 in this chapter. Tex. R. Civ. P. 710 requires an affidavit and that the officer having possession of the property certify to the truth of the affidavit. This form includes a request that the property be sold as under ordinary execution. *See* Tex. R. Civ. P. 711.

[Caption. See § 3 of the Introduction in volume 1 of this manual.]

Use the same caption as in the application for writ of sequestration at form 8-8.

Application for Emergency Sale of Perishable Property
[after Sequestration]

[**Name of plaintiff**], Plaintiff in this action, makes this Application for Emergency Sale of Perishable Personal Property.

The [sheriff/constable] of [**county**] County, Texas, under writ of sequestration has seized and holds [**describe property as in form 8-8**]. This property is likely to be wasted, destroyed, or greatly depreciated in value before this cause can be heard on its merits, greatly lessening the amount likely to be realized from the property. The interest of justice will be served by selling the property and placing the proceeds in the registry of this Court.

An affidavit, certified by the officer and stating that the condition of the property requires its sale, is attached to and incorporated in this application.

Plaintiff requests that the described property be sold as under ordinary execution, as provided for by rule 710 of the Texas Rules of Civil Procedure, and that the proceeds be placed in the registry of this Court.

[**Name**]
Attorney for Plaintiff
State Bar No.:
[**E-mail address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

Attach affidavit(s) (form 8-15). Prepare form 8-16 (order for emergency sale).

Form 8-15

This affidavit is based on the requirements of Tex. R. Civ. P. 710. The affidavit is to be made by the plaintiff and attached to the application. Emergency sale of perishable goods is discussed at section 8.23 in this chapter. An application is at form 8-14.

The attorney should not swear to the truth of the facts on which the application is based. See section 1.32:5.

[Caption. See § 3 of the Introduction in volume 1 of this manual.]

Use the same caption as in the application for emergency sale at form 8-14.

Affidavit for Emergency Sale of Perishable Property
[after Sequestration]

BEFORE ME, the undersigned authority, on this day personally appeared [**name of affiant**], who swore on oath that the following facts are true:

"I am [Plaintiff/[**other capacity, e.g.,** credit manager of Plaintiff]] in this cause. [**Include if affiant is agent:** I am authorized to make this affidavit and to apply for an order for emergency sale.]

"More than ten days have expired since the levy of the writ of sequestration, and Defendant has not replevied the property or dissolved the writ. The following property was seized under the writ: [**describe property as in form 8-14**]. This property is likely to [waste/greatly depreciate in value/be destroyed] if continued to be kept in storage, in that [**state facts supporting allegation**]."

_____
[**Name of affiant**]
Affiant

SIGNED under oath before me on _____.

_____

Notary Public, State of Texas

Officer's Certification of Affidavit

I CERTIFY on _____ that the foregoing affidavit is true.

_____

[Name of officer]
[Title of officer]

Form 8-16

Emergency sale of perishable goods is discussed at section 8.23 in this chapter. The application and affidavit on which this order is based are at forms 8-14 and 8-15. The hearing will probably be ex parte because the rule does not provide for notice to or participation of the adverse party. *See* Tex. R. Civ. P. 710. If appropriate, include a signature line for the defendant's attorney.

Tex. R. Civ. P. 712 requires the officer making the sale to return the order of sale to the court and at the time of making the return to pay the clerk or justice of the peace the proceeds of the sale.

[Caption. See § 3 of the Introduction in volume 1 of this manual.]

Use the same caption as in the application for emergency sale at form 8-14.

Order for Emergency Sale of Perishable Property
[after Sequestration]

The Court has heard Plaintiff's Application for Emergency Sale of Perishable Personal Property in this cause. The Court finds that good cause exists for the issuance of an order to sell the property described in this Order.

It is therefore ORDERED that an order of sale be issued directing the officer to sell, as under execution, the following property: [**describe property as in form 8-14**].

It is further ORDERED that the proceeds of the sale be placed in the registry of this Court pending a trial of this cause on its merits. The officer will return the order of sale, sign it, and state on it the time and place of sale, name of the purchaser, amount of money received, and expenses of the sale.

SIGNED on _____.

_____
JUDGE PRESIDING

APPROVED AS TO FORM:

[Name]
Attorney for Plaintiff
State Bar No.:
[E-mail address]
[Address]
[Telephone]
[Telecopier]

Include the following if applicable.

[Name]
Attorney for Defendant
State Bar No.:
[E-mail address]
[Address]
[Telephone]
[Telecopier]

If the application is granted, the clerk should issue an order of sale.

Form 8-17

The attorney should consult sections 8.25 through 8.32 in this chapter before seeking attachment.

The application may be filed at commencement of the suit or at any time during its progress and must be supported by one or more affidavits. Tex. R. Civ. P. 592. An affidavit is at form 8-18. The application is discussed at section 8.26:1. In most counties, the clerk will prepare the writ of attachment and the return. In some cases, the attorney may wish to prepare them for the clerk.

For other forms of party designation, see section 14.29. See section 14.22 regarding exercising caution in pleading conditions precedent. Under the paragraph setting out the facts, include in the allegation the appropriate specific ground for attachment from the list found at Tex. Civ. Prac. & Rem. Code § 61.002.

[Caption. See § 3 of the Introduction in volume 1 of this manual.]

Use the same caption as in the original petition unless the cause has been transferred.

Application for Writ of Attachment

1. *Parties.* [**Name of plaintiff**], Plaintiff, whose address is [**address, city, state**], makes this Application for Writ of Attachment. Defendant is [**name of defendant**], who can be served with citation at [**address, city, state**].

State specific facts relied on by the plaintiff to warrant the required findings by the court and state grounds for issuing the writ. The following paragraph is a sample of fact and ground allegations; the actual allegations must be drafted to fit the situation.

2. *Facts.* During the period from about January 29, 2010, through February 19, 2010, Plaintiff sold and delivered to Defendant face brick and fireplace equipment, which had a fair market value and agreed purchase price of $3,053.90. Plaintiff has made demand for this amount, but Defendant has not paid. Defendant has stated that he intends to sell his property and move to another state permanently and has refused to pay or secure the debt due Plaintiff.

3. *Affidavit.* Plaintiff is entitled to the issuance of a writ of attachment on the grounds stated in the attached affidavit. The affidavit is incorporated in this application by reference.

4. *Conditions Precedent.* All conditions precedent have been performed or have occurred.

5. *Prayer.* Plaintiff prays that a writ of attachment issue and that Plaintiff be granted all further relief to which Plaintiff may be entitled.

_____

[Name]
Attorney for Plaintiff
State Bar No.:
[E-mail address]
[Address]
[Telephone]
[Telecopier]

Attach affidavit(s) (form 8-18). Prepare the following to take to the hearing: form 8-19 (order for issuance of writ of attachment), form 8-4 (bond to defendant), form 8-20 (writ of attachment), and form 8-22 (officer's return).

Form 8-18

This affidavit is to be executed by the plaintiff, his agent or attorney, or someone having knowledge of relevant facts. The affidavit is to be attached to the application; see form 8-17 in this chapter. The affidavit is discussed at section 8.26:3.

The attorney should use the appropriate ground(s) stated in Tex. Civ. Prac. & Rem. Code § 61.002 and state material facts. The facts should not be stated in a conclusory fashion but should go beyond a "bare assertion of fact." The affidavit should carefully track the facts and grounds presented in the application. The facts stated should be admissible in evidence.

[Caption. See § 3 of the Introduction in volume 1 of this manual.]

Use the same caption as in the application for writ of attachment at form 8-17.

Affidavit for Writ of Attachment

BEFORE ME, the undersigned authority, on this day personally appeared [**name of affiant**], who swore on oath that the following facts are true:

"I am [Plaintiff/[**other capacity, e.g.,** credit manager of Plaintiff]] in this cause. [**Include if affiant is agent:** I am authorized to make this affidavit and to apply for a writ of attachment in this cause.]

Select one of the following.

"I have personal knowledge of the facts stated in this affidavit, and they are true and correct.

Or

"I make this affidavit on information and belief. The basis for that belief is the following: [**state specific grounds for belief**].

Continue with the following.

"In this suit, now pending in this Court, Plaintiff is seeking damages from Defendant, [**include if applicable:** a resident of [**county**] County, Texas,] alleging [**describe type of action, e.g.,** an unpaid debt].

"Defendant is justly indebted to Plaintiff. This attachment is not sued out for the purpose of injuring or harassing Defendant, and Plaintiff will probably lose the debt unless an attachment is issued.

The following paragraph is a sample fact allegation; the actual allegations must be drafted to fit the facts.

"During the period from about January 29, 2010, through February 19, 2010, Plaintiff sold and delivered to Defendant face brick and fireplace equipment, which had a fair market value and agreed purchase price of $3,053.90. I have made demand for this amount, but Defendant has refused to pay or secure his debt. Defendant has stated to me that he intends to sell his property and move to another state.

Continue with the following.

"In the suit against Defendant, Plaintiff has alleged that Defendant has damaged Plaintiff in the amount of $[**amount**]. Plaintiff should be permitted to attach property of Defendant in that amount."

_____

[**Name of affiant**]
Affiant

SIGNED under oath before me on _____.

_____

Notary Public, State of Texas

Form 8-19

The order is discussed at section 8.26:5 in this chapter. This form assumes that the hearing will be ex parte. For appearance by the defendant, modify the form as appropriate.

[Caption. See § 3 of the Introduction in volume 1 of this manual.]

Use the same caption as in the application for writ of attachment at form 8-17.

Order for Issuance of Writ of Attachment

At the hearing on Plaintiff's Application for Writ of Attachment in this cause, Plaintiff appeared by and through his attorney of record. The hearing was conducted without notice to Defendant.

The Court finds that—

Specific findings of fact on specific statutory grounds must be made. Findings 1.–5. are examples; the actual findings must be drafted to fit the facts.

1. during the period from about January 29, 2010, through February 19, 2010, Plaintiff sold and delivered to Defendant certain face brick and fireplace equipment;

2. these materials had a fair market value and agreed purchase price of $3,053.90;

3. Plaintiff has demanded payment from Defendant, but Defendant has not made payment;

4. Defendant is indebted to Plaintiff in the amount of $3,053.90;

5. Defendant has stated that he intends to sell his property and move to another state;

Findings 6. and 7. are required in all orders.

6. the attachment is not sued out to injure or harass Defendant; and

7. Plaintiff will probably lose his debt unless this attachment is issued.

It is therefore ORDERED that a writ of attachment be issued against Defendant for property in Defendant's possession in the maximum amount of $_____, conditioned that Plaintiff must post a bond in the amount of $_____, payable to Defendant, conditioned and approved as required by law.

It is further ORDERED that the property be kept safe and preserved subject to further orders of this Court.

It is further ORDERED that Defendant may replevy any of the property by posting a bond in the amount of $_____, payable to Plaintiff, conditioned and approved as required by law.

SIGNED on _____.

_____
JUDGE PRESIDING

APPROVED AS TO FORM:

_____
[Name]
Attorney for Plaintiff
State Bar No.:
[E-mail address]
[Address]
[Telephone]
[Telecopier]

If the application is granted, have the clerk issue a writ of attachment (with application, affidavit(s), and order) to the defendant.

[Reserved]

Form 8-20

The language of the writ is dictated by Tex. R. Civ. P. 594, 598a. Usually the form is provided by the clerk. Copies of the writ, application, affidavit(s), and order must be served on the defendant. Tex. R. Civ. P. 598a. The writ is discussed at section 8.28 in this chapter. The language in the notice to the defendant must be in ten-point type. Tex. R. Civ. P. 598a.

[Caption. See § 3 of the Introduction in volume 1 of this manual.]

Use the same caption as in the application for writ of attachment at form 8-17.

Writ of Attachment

To the sheriff or any constable of any county within the state of Texas, greetings:

We command that you attach forthwith as much of the property of [**name of defendant**], if it is found in your county, repleviable on security, as shall be of value sufficient to make the sum of $[**amount**], and the probable costs of suit, to satisfy the demand of [**name of plaintiff**], and that you keep and secure in your hands the property so attached, unless replevied, that the same may be liable to further proceedings thereon to be had before our Court in [**city**], County of [**county**]. You will true return make of this writ on or before 10:00 A.M. of Monday, [**date**], showing how you have executed the same.

You are to display to the interested persons present at the time of the levy the following:

To [**name of defendant**], Defendant:

You are hereby notified that certain properties alleged to be owned by you have been attached. If you claim any rights in such property, you are advised:

YOU HAVE A RIGHT TO REGAIN POSSESSION OF THE PROPERTY BY FILING A REPLEVY BOND. YOU HAVE A RIGHT TO SEEK TO REGAIN POSSESSION OF THE PROPERTY BY FILING WITH THE COURT A MOTION TO DISSOLVE THIS WRIT.

ISSUED on _____.

_____

[**Name of clerk**], Clerk
[**Designation of court**]

Prepare the officer's return (form 8-22).

Form 8-21

The manual committee recommends serving this notice with the other documents. The documents must be served "as soon as practicable" following levy of the writ. The notice must be in ten-point type. Tex. R. Civ. P. 598a.

[Caption. See § 3 of the Introduction in volume 1 of this manual.]

Use the same caption as in the application for writ of attachment at form 8-17.

Notice of Attachment

To [**name of defendant**], Defendant:

You are hereby notified that certain properties alleged to be owned by you have been attached. If you claim any rights in such property, you are advised:

YOU HAVE A RIGHT TO REGAIN POSSESSION OF THE PROPERTY BY FILING A REPLEVY BOND. YOU HAVE A RIGHT TO SEEK TO REGAIN POSSESSION OF THE PROPERTY BY FILING WITH THE COURT A MOTION TO DISSOLVE THIS WRIT.

[**Name**]
Attorney for Plaintiff
State Bar No.:
[**E-mail address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

Attach a copy of the writ, the application, accompanying affidavits, and the orders of the court. Include a certificate of service (form 1-6).

[Reserved]

Form 8-22

A return is usually included in the form writ furnished by the clerk. If the attorney prepares the writ, a return should be provided. The attorney should make sure the return meets the requirements of the Texas Rules of Civil Procedure. See section 16.8 in this manual for a discussion of the officer's return. A writ of attachment is at form 8-20.

[Caption. See § 3 of the Introduction in volume 1 of this manual.]

Use the same caption as in the application for writ of attachment at form 8-17.

Officer's Return for Writ of Attachment

CAME TO HAND at _____ __.M. on the _____ day of _____ and executed at _____ __.M. on the _____ day of _____ at _____, _____ County, Texas, by taking into possession the following property:

_____

_____

_____.

The property remains in my custody, subject to the further order of the court issuing the writ.

The distance actually traveled by me in execution of this process was _____ miles, and my fees are $_____.

_____
SHERIFF OR CONSTABLE

[Reserved]

Form 8-23

Perishable personal property that has been attached may be sold during pendency of the suit under conditions outlined in Tex. R. Civ. P. 600. The sale of perishable goods is discussed at section 8.31 in this chapter.

[Caption. See § 3 of the Introduction in volume 1 of this manual.]

Use the same caption as in the application for writ of attachment at form 8-17.

Application for Emergency Sale of Perishable Property

[after Attachment]

[**Name of plaintiff**], Plaintiff in this action, makes this Application for Emergency Sale of Perishable Property.

The [sheriff/constable] of [**county**] County, Texas, under writ of attachment has seized and holds [**describe property as in form 8-17**]. This property is likely to be wasted, destroyed, or greatly depreciated in value before this cause can be heard on its merits, greatly lessening the amount likely to be realized from the property. The interest of justice will be served by selling the property and placing the proceeds in the registry of this Court.

An affidavit stating that the condition of the property requires its sale is attached to this application and incorporated by reference. Also attached is a bond to Defendant making Plaintiff responsible to Defendant in case the sale is illegally or unjustly applied for or made.

Plaintiff requests that the described property be sold as under ordinary execution, as provided for by rule 600 of the Texas Rules of Civil Procedure, and that the proceeds be placed in the registry of this Court.

[**Name**]
Attorney for Plaintiff
State Bar No.:
[**E-mail address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

Attach affidavit(s) (form 8-24) and a bond (adapt form 8-4).
Prepare form 8-25 (order for emergency sale).

Form 8-24

The rules do not state who must make the affidavit in support of an application for emergency sale of perishable personal property. *See* Tex. R. Civ. P. 601. This form is drafted for execution by the plaintiff or the plaintiff's agent. Emergency sale of perishable goods is discussed at section 8.31 in this chapter. This affidavit is to be attached to the application; see form 8-23. The attorney should not swear to the truth of the facts on which the application is based. See section 1.32:5.

[Caption. See § 3 of the Introduction in volume 1 of this manual.]

Use the same caption as in the application for emergency sale at form 8-23.

Affidavit for Emergency Sale of Attached Property
[after Attachment]

BEFORE ME, the undersigned authority, on this day personally appeared [**name of affiant**], who swore on oath that the following facts are true:

"I am [Plaintiff/[**other capacity, e.g.,** credit manager of Plaintiff]] in this cause. [**Include if affiant is agent:** I am authorized to make this affidavit and to apply for an order for emergency sale.]

"Since levy of the writ of attachment in this cause, sufficient time has passed for Defendant to replevy the property or dissolve the writ. The following property was seized under the writ: [**describe property as in form 8-17**]. This property is likely to [waste/decay/cause great expense/greatly deteriorate in value] if continued to be kept in storage, in that [**state facts supporting allegation**]."

_____
[**Name of affiant**]
Affiant

SIGNED under oath before me on _____.

_____

Notary Public, State of Texas

Form 8-25

This form assumes that the hearing was conducted ex parte, without notice to the defendant. If the defendant receives notice and/or appears, the form should be modified accordingly. Emergency sale of perishable goods is discussed at section 8.31 in this chapter. The application on which this order is based is at form 8-23.

[Caption. See § 3 of the Introduction in volume 1 of this manual.]

Use the same caption as in the application for emergency sale at form 8-23.

Order for Emergency Sale of Attached Property

[after Attachment]

The Court has heard Plaintiff's Application for Emergency Sale of Perishable Property in this cause. The Court finds that good cause exists for the issuance of an order to sell the property described in this Order.

It is therefore ORDERED that an order of sale be issued directing the officer to sell, as under execution, the following property: [**describe property as in form 8-23**].

It is further ORDERED that the proceeds of the sale be placed in the registry of this Court pending a trial of this cause on its merits. The officer will return the order of sale, sign it, and state on it the time and place of sale, name of the purchaser, amount of money received, and expenses of the sale.

SIGNED on _____.

_____
JUDGE PRESIDING

APPROVED AS TO FORM:

_____

[**Name**]
Attorney for Plaintiff
State Bar No.:
[**E-mail address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

If the application is granted, the clerk should issue an order of sale.

Form 8-26

A temporary restraining order will be granted without notice only if it clearly appears from specific facts shown in the verified application that the applicant will suffer immediate and irreparable injury, loss, or damage before notice can issue and a hearing can be held. Tex. R. Civ. P. 680. This form seeks both a temporary restraining order and a subsequent temporary injunction. No separate application for a temporary injunction is included in this manual, because a temporary injunction and a temporary restraining order are usually sought simultaneously. In most counties, the clerk will prepare the temporary restraining order. In some cases, the attorney may wish to prepare it for the clerk. See form 8-28 in this chapter. For further discussion, see sections 8.36 and 8.37. See section 14.22 regarding exercising caution in pleading conditions precedent.

[Caption. See § 3 of the Introduction in volume 1 of this manual.]

Use the same caption as in the original petition unless the cause has been transferred.

Application and Affidavit for Temporary Restraining Order and Temporary Injunction

1. *Parties.* [**Name of plaintiff**], Plaintiff, whose address is [**address, city, state**], makes this Application for Temporary Restraining Order and Temporary Injunction. Defendant is [**name of defendant**], who can be served with citation at [**address, city, state**]. [**Include if applicable:** Third-Party Defendant is [**name of party possessing defendant's property**], who can be served with citation at [**address, city, state**].]

State specific facts relied on by the plaintiff to warrant issuance of the restraining order and the temporary injunction. The following paragraph is a sample allegation; the actual allegations must be drafted to fit the facts.

2. *Facts.* In this suit, now pending in this Court, Plaintiff is seeking damages from Defendant. Plaintiff lent Defendant $5,000 and received Defendant's promissory note for that amount. On December 31, 2010, Defendant defaulted on the note. The sum of $4,800, representing principal and interest, remains due and unpaid on the debt. Plaintiff believes that Defendant's assets are being secreted and placed beyond Plaintiff's reach. This belief is based on the fact that, after Defendant was served with Plaintiff's original petition in this cause,

Defendant stated to Plaintiff that, unless Plaintiff withdrew this suit, Defendant would liquidate his business property and hide the proceeds and all cash now in Defendant's bank accounts in another state.

State grounds for issuance of the restraining order and the temporary injunction. The following paragraph is a sample allegation of grounds; the actual allegations must be drafted to fit the facts.

3. *Grounds.* Plaintiff will suffer immediate and irreparable injury, loss, or damage if Defendant's conduct described above is not enjoined for these reasons: Defendant will not be able to satisfy the judgment that will probably be rendered in Plaintiff's favor in this suit; Defendant lacks nonexempt property with which to satisfy the judgment; Defendant has demonstrated unwillingness to pay Plaintiff's claim; and this conduct of Defendant will result in Defendant's not having assets subject to execution.

The following paragraph will be suitable for most applications, but ensure that these allegations fit the specific situation.

Plaintiff does not have an adequate remedy at law because if Defendant's conduct continues Defendant will not have assets to satisfy an award of damages, because proceedings such as sequestration and garnishment will be more costly to Plaintiff than will injunctive relief, and because these proceedings will not be effective until after Defendant has placed most or all of Defendant's assets beyond Plaintiff's reach. Plaintiff has exercised due diligence in prosecuting this claim. The injury to Plaintiff if Defendant continues the conduct described above would outweigh any injury the restraining order and injunction might cause Defendant, and issuance of the restraining order and injunction would not disserve the public interest.

4. *Conditions Precedent.* All conditions precedent have been performed or have occurred.

5. *Prayer.* Plaintiff prays that—

a. without notice to Defendant [**include if applicable:** or Third-Party Defendant], the Court issue a temporary restraining order restraining Defendant [**include if applicable:** , Third-Party Defendant,] and [his/their] officers, agents, servants, and employees from directly or indirectly [**describe conduct to be restrained, e.g.,** transferring or removing any of Defendant's funds or other property in Third-Party Defendant's possession];

b. the Court set a date and time for a hearing on this application for a temporary injunction;

c. Defendant be cited to appear and answer;

d. after hearing, the Court issue a temporary injunction enjoining Defendant [**include if applicable:** , Third-Party Defendant,] and [his/their] officers, agents, servants, and employees from directly or indirectly [**describe conduct to be restrained, e.g.,** transferring or removing any of Defendant's funds or other property in Third-Party Defendant's possession] during the pendency of this action;

e. Plaintiff be granted reasonable expenses incurred in obtaining the restraining order and injunction; and

f. Plaintiff be granted all further relief to which Plaintiff may be entitled.

_____

[Name]
Attorney for Plaintiff
State Bar No.:
[E-mail address]
[Address]
[Telephone]
[Telecopier]

Affidavit

BEFORE ME, the undersigned authority, on this day personally appeared [**name of affiant**], who swore on oath that the following facts are true:

"I am [Plaintiff/[**other capacity, e.g.,** credit manager of Plaintiff]] in this cause. I have personal knowledge of the facts stated above, and they are true and correct. [**Include if affiant is agent:** I am authorized to make this affidavit and to apply for injunctive relief on behalf of Plaintiff.]"

_____

[**Name of affiant**]
Affiant

SIGNED under oath before me on _____.

_____

Notary Public, State of Texas

Prepare the following to take to the hearing: form 8-27 (order granting temporary restraining order and setting hearing on temporary injunction), form 8-28 (temporary restraining order), and form 8-31 (bond to defendant).

Form 8-27

This form should be prepared in advance of and brought to the ex parte hearing on the application for a temporary restraining order. The form is divided into one part granting the restraining order and a second part setting a hearing on the application for a temporary injunction. Each part must be signed by the judge if the restraining order is granted; if a restraining order is denied but a hearing is set on the temporary injunction application, only the second part is signed. The order is discussed at section 8.39 in this chapter. The conduct to be enjoined must be described clearly, definitely, and precisely, so that the defendant will not have to draw inferences or conclusions about what is proscribed.

[Caption. See § 3 of the Introduction in volume 1 of this manual.]

Use the same caption as in the application at form 8-26.

Order for Issuance of Temporary Restraining Order and Setting Hearing on Application for Temporary Injunction

At the hearing on Plaintiff's Application for Temporary Restraining Order and Temporary Injunction, Plaintiff appeared by and through his attorney of record. The hearing was conducted without notice to Defendant.

The Court finds that—

1. it clearly appears from specific facts shown by Plaintiff's verified application that immediate and irreparable injury, loss, or damage will result to Plaintiff before notice can be served on Defendant and before a hearing can be held on Plaintiff's application for a temporary injunction because, unless [**describe conduct to be restrained, e.g.,** the transferring or removing of Defendant's funds and other property in the possession of First National Bank of Austin] is immediately restrained, Defendant will [**describe injury, e.g.,** be unable to satisfy the judgment that will probably be rendered in Plaintiff's favor in this cause]. This injury will be irreparable unless this restraint is ordered because [**state why injury will be irreparable, e.g.,** all of Defendant's nonexempt assets will be placed beyond Plaintiff's reach];

2. unless this restraint is ordered immediately, without notice to Defendant, Plaintiff will suffer irreparable injury immediately, because no other legal remedy can be obtained and effected before the injury occurs;

3. Plaintiff has no adequate remedy at law;

4. Plaintiff has exercised due diligence in prosecuting the underlying claim in this cause;

5. Plaintiff's injury will outweigh any injury to Defendant that may occur on issuance of this restraining order;

6. the restraining order will not disserve the public interest;

7. the status quo should be maintained, in the public interest; and

8. Plaintiff's bond in the amount of $_____ will fully protect Defendant's rights until a hearing can be held on Plaintiff's application for a temporary injunction.

It is therefore ORDERED that a temporary restraining order issue, operative until the date of the hearing hereinafter ordered, restraining and enjoining [**name[s]**] from [**describe conduct to be restrained, e.g.,** transferring or removing any funds or other property belonging to [**name of defendant**] in the possession of [**name of third-party defendant**]], provided that, before the issuance of the restraining order, Plaintiff must post bond in the amount of $_____, payable to Defendant, conditioned and approved as required by law.

SIGNED on _____ at _____ __.M.

_____

JUDGE PRESIDING

APPROVED AS TO FORM:

_____

[**Name**]
Attorney for Plaintiff
State Bar No.:
[**E-mail address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

Order Setting Hearing on Application for Temporary Injunction

It is ORDERED that [**name of defendant**], Defendant in this cause, appear before this Court on _____ at _____ .M. at [**address, city**], Texas, to show cause, if any, why the temporary injunction requested by Plaintiff should not issue against Defendant.

SIGNED on _____.

_____
JUDGE PRESIDING

If the application is granted in full, have the clerk issue a restraining order and citation for hearing with a copy of the application (form 8-28). If the application for a restraining order is denied but a hearing on the temporary injunction is set, have the clerk issue citation for hearing with a copy of the application.

[Reserved]

Form 8-28

The conduct restrained must be described clearly, definitely, and precisely, so that the defendant will not have to draw inferences or conclusions about what is proscribed; see section 8.39 in this chapter.

[Caption. See § 3 of the Introduction in volume 1 of this manual.]

Use the same capt on as in the application at form 8-26.

Temporary Restraining Order

STATE OF TEXAS)

To [**name of each person and entity restrained**]:

Plaintiff has applied and given bond for a temporary restraining order and temporary injunction in this cause.

On the basis of the application, the Court has ordered the issuance of a temporary restraining order because it appears to the Court that, unless you are restrained as ordered below before notice can issue and a hearing can be held, Plaintiff will be irreparably injured because [**describe injury, e.g.,** Defendant will not be able to satisfy the judgment that will probably be rendered in Plaintiff's favor in this cause because Defendant's nonexempt assets will be beyond Plaintiff's reach].

You are therefore commanded to obey the order of this Court and to immediately desist and refrain from [**describe conduct restrained, e.g.,** transferring or removing any funds or other property of [**name of defendant**] in the possession of [**name of third-party defendant**]].

You are further ordered to appear before this Court at _____ __.M. on _____ at [**address, city**], Texas, to show cause why a temporary injunction, effective until final judgment in this cause, should not be granted as prayed for.

ISSUED at _____ __.M. on _____.

_____

[**Name of clerk**], Clerk
[**Designation of court**]

Form 8-29

This form should be prepared in advance of and brought to the hearing on the application for a temporary injunction. This manual contains no separate application for the temporary injunction, because it is assumed that the plaintiff will initially file a combined application for a temporary restraining order and a temporary injunction; see form 8-26 in this chapter.

If the defendant appears without counsel or does not appear, the form should be modified accordingly. The order probably should recite that notice was given. *See* Tex. R. Civ. P. 681.

The order must state the reasons the court believes the plaintiff will be injured if the injunction does not issue. The enjoined conduct must be described clearly, definitely, and precisely, so that the defendant will not have to draw inferences or conclusions about what is proscribed. See section 8.39.

[Caption. See § 3 of the Introduction in volume 1 of this manual.]

Use the same capt on as in the application at form 8-26.

Order for Issuance of Temporary Injunction

After due notice was given, the Court heard Plaintiff's Application for Temporary Injunction in this cause. Plaintiff and Defendant appeared by and through their attorneys of record.

The Court finds that—

1. Defendant intends to [**state defendant's wrongful action, e.g.,** liquidate his personal property, close his bank accounts, and remove all his assets from this state, to effectively place them beyond Plaintiff's reach before a judgment can be rendered in this cause];

2. Plaintiff will probably be awarded a recovery in this cause;

3. if Defendant's threatened conduct as described above is not enjoined during the pendency of this suit, Plaintiff will be injured because [**state reasons for injury, e.g.,** Defendant will not have nonexempt assets available to satisfy Plaintiff's judgment for damages, so that the judgment will be ineffectual and Plaintiff will have no adequate remedy at law];

4. Plaintiff has exercised due diligence in prosecuting the underlying claim in this cause;

5. Plaintiff's injury will outweigh any injury to Defendant that may occur on issuance of this injunction;

6. the injunction will not disserve the public interest;

7. Defendant's intended conduct as described above will change the status quo, which should be maintained in the public interest; and

8. Plaintiff's bond in the amount of $_____ will fully protect Defendant's rights during the pendency of this action.

It is therefore ORDERED that a temporary injunction issue, operative until judgment is entered in this cause, enjoining [**name[s]**] from [**describe conduct enjoined, e.g.,** transferring or removing any funds or other property belonging to [**name of defendant**] in the possession of [**name of third-party defendant**]], provided that, before the issuance of the injunction, Plaintiff must post bond in the amount of $_____, payable to Defendant, conditioned and approved as required by law.

SIGNED on _____.

_____
JUDGE PRESIDING

APPROVED AS TO FORM:

_____

[**Name**]
Attorney for Plaintiff
State Bar No.:
[**E-mail address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

_____

[**Name**]
Attorney for Defendant
State Bar No.:
[**E-mail address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

Order Setting Cause for Trial

It is ORDERED that the foregoing cause of action is set for trial on

_____, at _____ __.M. at [**designation and location of court**].

SIGNED on _____.

_____

JUDGE PRESIDING

[Reserved]

Form 8-30

The conduct enjoined must be described clearly, definitely, and precisely, so that the defendant will not have to draw inferences or conclusions about what is proscribed; see section 8.39 in this chapter.

[Caption. See § 3 of the Introduction in volume 1 of this manual.]

Use the same caption as in the application at form 8-26.

Temporary Injunction

STATE OF TEXAS)

To [**name of each person enjoined**]:

Plaintiff has applied and given bond for a temporary injunction in this cause, and the Court has ordered that the injunction issue.

You are therefore commanded to obey the order of this Court and to immediately desist and refrain from [**describe conduct enjoined, e.g.,** transferring or removing any funds or other property of [**name of defendant**] in the possession of [**name of third-party defendant**]].

This writ is returnable at or before 10:00 A.M. on the Monday next after the expiration of twenty days from the date of service hereof.

ISSUED on _____.

_____

[**Name of clerk**], Clerk
[**Designation of court**]

[Reserved]

Form 8-31

Two or more good and sufficient sureties, to be approved by the clerk, are required. Tex. R. Civ. P. 684. A surety company may be used in lieu of one or more individual sureties. *See* Tex. Ins. Code §§ 3503.001–.005. If individual sureties are used, two will probably be required, and the form should be so modified.

[Caption. See § 3 of the Introduction in volume 1 of this manual.]

Use the same caption as in the application at form 8-26.

Bond to Defendant for Injunction

WE, THE UNDERSIGNED, [**name of plaintiff**], Plaintiff, as principal and [**name of surety**] as surety, acknowledge ourselves bound to pay [**name of defendant**], Defendant, up to the sum of [**number**] dollars, conditioned that Plaintiff will abide the decision that may be made in this cause and that Plaintiff will pay all amounts of money and costs that may be adjudged against Plaintiff if the temporary restraining order or temporary injunction ordered in this cause is dissolved in whole or in part.

SIGNED on _____.

_____
[**Name of plaintiff**]
Principal

_____
[**Name of surety company**]
Surety

By _____
Agent for Surety

APPROVED on _____.

_____

[**Name of clerk**], Clerk
[**Designation of court**]

By _____
Deputy