TEXAS COLLECTIONS MANUAL

Fifth edition
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State Bar of Texas
Austin, Texas 78711

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Printed in the United States of America

Fifth Edition, 2018
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.
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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 indispensable 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*
Preface to the Texas Collections Manual, Fifth Edition

Throughout the years the Texas Collections Manual has been the product of selfless volunteers—highly experienced attorneys with busy practices who have given much of their time, talent, thought, and energy to improving the quality and practice of law in Texas. This fifth edition is no exception and is dedicated to one individual in particular, Daniel J. Goldberg, who was instrumental to the Manual since its very beginning in 1973 and chair for many years. Without his leadership, the Manual would not be the invaluable resource that it is today. Moreover, he was much respected and loved by attorneys across Texas, including those on this Committee.

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

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

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

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

—Stuart R. Schwartz, Chair
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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

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Practice notes and forms concerning mechanic’s and other liens
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14 Petitions and Causes of Action
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Preparing Word Forms for E-Filing (Windows)

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.


Notes for Other Software

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- **WordPerfect**: To remove metadata from forms saved as WordPerfect files (version X3 or later), launch the “Save Without Metadata” tool (File > Save Without Metadata, or Alt + F + M).
2. In the “Document Inspector” window that opens, select the categories desired by checking the appropriate boxes (be certain to check the “Hidden Text” box to ensure that any remaining red, hidden instructional text in the document will be also be detected) and click the “Inspect” button.

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

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The Texas Collections Manual, Fifth 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 digital download 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 download

The digital download 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 Word 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 download 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 download 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 § 345th JUDICIAL DISTRICT

Defendant §
§ 3 Introduction

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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Chapter 1

Debt Collection Law Practice

I. Managing the Law Office

§ 1.1 Client and Claim Information

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

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

§ 1.2 Professionalism

§ 1.2:1 Informing Client of Grievance Process

Attorneys practicing law in Texas must provide notice to clients of the existence of the grievance process by one of four means: making available at the attorney’s place of business brochures printed by the State Bar of Texas describing the grievance process; posting a sign prominently in the attorney’s place of business describing the grievance process; including the grievance process information in the written contract for services with the client; or providing the information with the bill for services. Tex. Gov’t Code § 81.079(b). This information 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 requires an attorney practicing law in Texas to—

1. support the U.S. and Texas constitutions;
2. “honestly demean oneself in the practice of law;”
3. discharge the attorney’s duty to the attorney’s client; and
4. “conduct oneself with integrity and civility in dealing and communicating with the court and all parties.”
The oath must be endorsed on the attorney’s license, subscribed by the attorney, and attested by the officer administering the oath. Tex. Gov’t Code § 82.037(b). Tex. Gov’t Code §§ 602.002–.005 set out a list of persons who may administer the oath. A copy of the oath is available at texasbar.com.

§ 1.3 Conflicts of Interest

§ 1.3:1 Conflicts Generally


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 on statute of limitations can be found in chapter 14 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 any 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 debt is referred for collection. 34 Tex. Admin. Code § 3.354(b)(1). The term debt collection service does not include the collection of court-ordered child support or medical child support or the collection of current credit and real estate accounts. Tex. Tax Code § 151.0036(b); see also 34 Tex. Admin. Code § 3.354(d). “A current credit or real estate transaction is one that has not exceeded the later of the due date of the payment or the date on which a penalty or other contractual sanction attaches.” 34 Tex. Admin. Code § 3.354(b)(2). Fees for dishonored checks are taxable while late charges are considered additional interest and not debt collection charges. 34 Tex. Admin. Code § 3.354(b)(2)–(3).

§ 1.7    Bonding of Attorneys and Nonattorney Employees

Debt collectors in Texas must be bonded, and an attorney or the attorney’s employees may be “debt collectors” for bonding purposes. See section 2.31:4 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 and make sure he understands the agreement and can ethically agree to the 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).

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

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

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

§ 1.15 When to Recommend Not Filing Suit

The attorney may consider recommending not filing suit if—

1. the debtor cannot be located;
2. the debtor has not responded to demands for payment, and the amount involved is too small to justify filing suit;
3. the debtor’s assets would not be sufficient to satisfy or substantially contribute toward satisfaction of a judgment;
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 if determined;
2. that the party approves the substitution; and
3. that the withdrawal is not sought for delay only.

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

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

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

§ 1.17:3 Ethical Requirements

An attorney who withdraws from employment should give reasonable notice to the client, allowing time for employment of other counsel; surrender papers and property to which the client is entitled; and refund any advance payment of a fee that has not been earned. The attorney may keep papers relating to the client to the extent permitted by law only if the client will not be prejudiced as a result. Tex. Disciplinary Rules Prof’l Conduct R. 1.15(d).
§ 1.17:4 Attorney’s Fees after Wrongful Discharge

An attorney who is wrongfully discharged by the client should be able to recover a fee either under the client contract or under a quantum meruit theory. See Mandell & Wright v. Thomas, 441 S.W.2d 841, 847 (Tex. 1969); Diaz v. Attorney General, 827 S.W.2d 19, 22–23 (Tex. App.—Corpus Christi 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 Fees and the 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 arbitration is enforceable, including disputes over fees and attorney malpractice claims. See *Royston, Rayzor, Vickery & Williams v. Lopez*, 467 S.W.3d 494 (Tex. 2015) (enforcing agreement to arbitrate attorney malpractice claims); *Porter & Clements v. Stone*, 935 S.W.2d 217, 220–22 (Tex. App.—Houston [1st Dist.] 1996, no writ) (dispute over fees). The manual committee makes no recommendation about whether an arbitration clause should be included in the contract.

A form for a contingent fee contract for a collections matter is at form 1-6 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 Corp.*, 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 Metalurgicas 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.).


§ 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.


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).


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.
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 14.16 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);


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));


6. declaratory judgment actions (Tex. Civ. Prac. & Rem. Code § 37.009); and


§ 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 27.92 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).

§ 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.


§ 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 attorney’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
§ 1.28    Discovery Sanctions

Awards of attorney’s fees for discovery abuse are discussed at sections 18.83 and 18.84 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

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

________________________________________________________________________
________________________________________________________________________
________________________________________________________________________
________________________________________________________________________
________________________________________________________________________
________________________________________________________________________
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.

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.
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
Form 1-4

Payment Record

Case File Number:
Debtor:

Attorney Responsible:
Forwarder:

Date File Opened:
Creditor:

<table>
<thead>
<tr>
<th>Payment record</th>
<th>To attorney</th>
<th>To client</th>
</tr>
</thead>
<tbody>
<tr>
<td>Amount received</td>
<td>Date received</td>
<td>Check #</td>
</tr>
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<td>---</td>
</tr>
</tbody>
</table>

Make a tickler for the next date when payment or receipt of other proceeds is expected.
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).
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 medi-
ator’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, inform-
ation, 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 attor-
ney 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 advance-
ment 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 vi-
olate 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: _____________________________
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 some laws of which the debt collection attorney should be aware, including the Truth in Lending Act, the consumer credit sections of the Texas Finance Code, the Servicemembers Civil Relief Act, and the Military Lending Act. Such statutes or authorities ordinarily may not be considered debt collection laws but should be taken into account when evaluating a debt collection matter for possible defenses and counterclaims that may be asserted by the consumer.

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

§ 2.2 Consumer Debts

Many of the statutes discussed in this chapter primarily—if not exclusively—pertain to consumer debts. For example, the federal Fair Debt Collection Practices Act and Truth in Lending Act, the Texas Debt Collection Practices Act, and many of the former Consumer Credit Code provisions are now incorporated into the Texas Finance Code. Generally speaking, consumer debts are debts that are primarily incurred for personal, family, or household purposes. See, e.g., 15 U.S.C. § 1692a(5); Tex. Fin. Code § 392.001. For a more detailed discussion of the definition of consumer debt, see section 2.11:2 below. Because consumer protection laws include hurdles and penalties not always found in other laws, attorneys should confirm whether the debts being collected have been properly classified as primarily consumer or nonconsumer debts and then confirm which laws apply to their collection efforts before proceeding further.

[Sections 2.3 through 2.10 are reserved for expansion.]

II. Federal Fair Debt Collection Practices Act

The abbreviation “FDCPA” is often used by judges, authors, and practitioners when writing about the Fair Debt Collection Practices Act and is so used in this chapter.
§ 2.11 Who Is a Debt Collector?

§ 2.11:1 Definition Generally

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

1. uses any instrumentality of interstate commerce or the mails in any business whose principal purpose is the collection of any debts; or

2. regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due to another.

Under certain circumstances, the term *debt collector* may also apply to a business whose principal purpose is the enforcement of security interests. 15 U.S.C. § 1692a(6); see also 15 U.S.C. § 1602(d). See section 2.11:2 below regarding what constitutes a debt for FDCPA purposes.

§ 2.11:2 Original Creditor


§ 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-Assigenee

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

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

§ 2.11:5 Statutory Exemptions

Those who are not debt collectors include—
1. any officer or employee of a creditor who, while in the name of the creditor, collects the creditor’s debts (see section 2.10:6 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.


§ 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 2.15:5 below regarding attorney liability for letting another debt collector use the attorney’s name, letterhead, or signature.

§ 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 2.11:2 below. A debt that was created as a consumer debt remains a consumer debt even if the collateral securing the debt is subsequently used for commercial purposes. See, e.g., Miller v. McCalla, Raymer, Padrick, Cobb, Nichols & Clark, L.L.C., 214 F.3d 872 (7th Cir. 2000) (residential mortgage debt remains consumer obligation even if collateral subsequently turned into rental property).

§ 2.12:2 What Is a Debt?

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

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

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

§ 2.13 Notice to Debtor and Request for Validation

§ 2.13:1 Contents of Notice

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

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

A “mini-Miranda” notice should be included with the validation notice; see section 2.13 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 verification, but if the consumer does request verification, the debt collector must suspend collection until the verification is obtained and sent to the consumer. 15 U.S.C. § 1692g(b); *Trull v. GC Services Limited Partnership*, 961 F. Supp. 1199, 1205 (N.D. Ill. 1997).

§ 2.13:4 Responding to Request for Verification

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

§ 2.14 “Mini-Miranda” Notice

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

§ 2.15 Prohibited Practices: Contact with Consumers and Others

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

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


§ 2.15:2 Inconvenient Time for Communication with Consumer

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

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

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

§ 2.15:4 Telephone Conduct

Debt collectors may not—
1. cause the phone to ring or engage any person in a conversation repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number;

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

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


§ 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.


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

§ 2.15:6 Obscene or Profane Language

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

§ 2.15:7 Language or Symbol on Envelope

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

§ 2.15:8 Postcard

A debt collector may not communicate with a consumer by postcard. 15 U.S.C. § 1692f(7).
§ 2.16:9  Communication with Third Parties

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

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


§ 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).


§ 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. Hageman v. Barton, 817 F.3d 611, 618 (8th Cir. 2016); see also Beeler-Lopez v. Dodeka, LLC, 711 F. Supp. 2d 679, 681 (E.D. Tex. 2010) (stating that a law firm substituted after a violation of the venue provision of the FDCPA could not be held liable for the violation). See part II. in chapter 15 of this manual regarding venue generally.

§ 2.19  Bona Fide Error Defense

If the violation was not intentional and resulted from a bona fide error made despite the maintenance of procedures reasonably adapted to avoid any such error, the debt collector can avoid liability. 15 U.S.C. § 1692k(c); see also Stojanovski v. Strobl & Manoogian, P.C., 783 F. Supp. 319 (E.D. Mich. 1992). But see Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA, 559 U.S. 573 (2010) (holding that bona fide error defense does not apply if violation resulted from incorrect interpretation of law).

§ 2.20  Remedies and Penalties

§ 2.20:1  Consumer Recovery

A debt collector who violates the FDCPA is liable for—

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

The $1,000 statutory damages cap on an individual claim is per suit, not per violation. Wright v. Finance Service of Norwalk, 22 F.3d 647 (6th Cir. 1994); Harper v. Better Business Services, Inc., 961 F.2d 1561 (11th Cir. 1992). Further, actual damages attributable to the consumer’s conduct cannot be assessed, even if they occurred in conjunction with a possible FDCPA violation. See Coursen v. Shapiro & Fishman, GP, 558 Fed. App’x 882, 886 (11th Cir. 2014) (technical FDCPA violation during foreclosure proceeding did not result in consumer’s loss of property; consumer’s failure to pay was precipitating cause).
§ 2.20:2 Materiality

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

§ 2.20:3 Limitations

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

§ 2.20:4 Bad-Faith Suit by Consumer

If the court finds that a consumer’s action was brought in bad faith or for purposes of harassment, the court may award the defendant 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 nonattorney employees who either are regularly engaged to solicit debts for collection or regularly make contact with debtors to collect or adjust debts. Tex. Fin. Code § 392.001(7). See sections 2.31:3 and 2.31:4 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.


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

§ 2.35 Defense—Bona Fide Error

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

§ 2.36 Remedies and Penalties

§ 2.36:1 Civil

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

§ 2.36:2 Criminal


§ 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 2.45 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), disapproved as to other issue by *George A. Fuller Co. of Texas v. Carpet Services, Inc.*, 823 S.W.2d 603 (Tex. 1992). If the transaction is not a credit or lending transaction, however, a late charge is not interest. See, e.g., *Bexar County Ice Cream Co. v. Swensen’s Ice Cream Co.*, 859 S.W.2d 402, 406 (Tex. App.—San Antonio 1993, writ denied) (franchise agreement), overruled on other grounds by *Barraza v. Koliba*, 933 S.W.2d 164, 167–68 (Tex. App.—San Antonio, 1996, writ denied); *Potomac Leasing Co. v. Housing Authority of City of El Paso*, 743 S.W.2d 712, 713 (Tex. App.—El Paso 1987, writ denied) (lease).

If the debtor alleges usury because of late charges, the presence of a usury savings clause in the contract may negate the usury claim. See *Parhms v. B&B Ventures, Inc.*, 938 S.W.2d 199, 203–04 (Tex. App.—Houston [14th Dist.] 1997, writ denied); see also *Coxson v. Commonwealth Mortgage Co. of America, L.P.*, 43 F.3d 189, 191 (5th Cir. 1995) (quoting *Shropshire v. Commerce Farm Credit Co.*, 120 Tex. 400, 30 S.W.2d 282, 285–86 (Tex. 1930) (“[A] contract is usurious when there is any contingency by which the lender may get more than the lawful rate of interest”). See section 2.58 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 2.83:5, 2.83:6, 2.85:3, and 2.87:3 below.

§ 2.42:6 Assumption of Third Party’s Debt

If as a condition of making a loan to a borrower a lender requires that the borrower assume a third party’s debt to that lender, the amount of the assumed debt is interest on the new loan. *Alamo Lumber Co. v. Gold*, 661 S.W.2d 926, 928 (Tex. 1983). But if the lender requires that the borrower assume a debt owed to another creditor, that debt is not interest. *Victoria Bank & Trust Co. v. Brady*, 811 S.W.2d 931, 935–36 (Tex. 1991).
§ 2.42:7  Pleadings

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

§ 2.43  Methods of Computing Interest

§ 2.43:1  United States Rule

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

§ 2.43:2  Actuarial Method

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

§ 2.43:3  Add-On Method

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

§ 2.43:4  Determining Which Method to Use

If the loan is of a type in which add-on interest is allowed or dictated by statute—for example, motor vehicle installment contracts—that method should be used unless the situation dictates otherwise. For an act committed or a transaction occurring before September 1, 1997, the United States Rule apparently is the correct method in Texas of computing earned interest absent an agreement otherwise. See *Community Savings & Loan Ass’n v. Fisher*, 409 S.W.2d 546, 550 (Tex. 1966). For acts committed or transactions occurring on or after September 1, 1997, the actuarial method should be used. See Tex. Fin. Code § 302.001(c).
§ 2.43:5 Calculating Interest Based on 360-Day Year

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

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

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

§ 2.44 Interest Rates

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

§ 2.44:1 Default Maximum Rate of 10 Percent

Unless a statute provides otherwise, the maximum interest rate in Texas is 10 percent per annum. Tex. Const. art. XVI, § 11; Tex. Fin. Code §§ 302.001(b), 342.004(a); Cf. Tully v. Citibank (South Dakota), N.A., 173 S.W.3d 212, 218, n.6 (Tex. App.—Texarkana 2005, no pet.) (noting that Texas’s usury laws may be preempted by federal law and that Texas law allows for interest up to 18 percent per annum for revolving charge accounts). Virtually all loans have a statutorily provided alternative maximum interest rate.

§ 2.44:2 If Rate Not Specified—6 Percent

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

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

The issue of an unspecified interest rate frequently arises if a seller wants to encourage prompt payment by charging interest on unpaid amounts, even though no interest rate was agreed on by the parties. See Triton Oil & Gas Corp. v. Marine Contrac-
tors & 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).

It is important to note that the 6 percent interest rate under Tex. Fin. Code § 302.002 is distinct from interest charges under section 342.201, which governs the interest rates charged in loans and financed transactions. For a further discussion on interest rates under Tex. Fin. Code § 342.201, see section 20.10:2 in chapter 20.

§ 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 2.100 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 2.82:2
- consumer loans, section 2.83:4
revolving credit accounts, section 2.84:2
variable rate transactions, section 2.100:2
credit card transactions, section 2.101:2
loans for business, commercial, or investment purposes, section 2.102
loans to corporations, section 2.103
commercial loans, section 2.104:2
commercial loans of $3,000,000 or more, section 2.105:2
negotiable instruments, section 2.106
home solicitation transactions, section 2.107:2

§ 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 2.85:2 below regarding rules governing time-price differential in retail installment sales and section 2.86:2 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 2.87:2 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); Cf., Tully v. Citibank (South Dakota), N.A., 173 S.W.3d 212, 218 n.6 (Tex. App.—Texarkana 2005, no pet.) (noting that Texas’s usury laws may be preempted by federal law and that Texas law allows for interest up to 18 percent per annum for revolving charge accounts).

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

The civil penalties for excessive interest, time-price differential, and other charges are set out in Finance Code chapters 305 and 349 and discussed at sections 2.55:1 and 2.55:2 below.

§ 2.52 Actions Constituting Usury

§ 2.52:1 Contracting for Usurious Interest

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

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

§ 2.52:2 Charging Usurious Interest

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

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

§ 2.54 Guarantors and Usury

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

§ 2.55 Discounted Debt

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

§ 2.56 Penalties

§ 2.56:1 Texas Finance Code Chapter 305

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

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

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

**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 2.43:2 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 2.59 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 2.57 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 2.89:3 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.


§ 2.61:4 De Minimis Violation


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

See section 2.89 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 2.50 above. This cause of action is not a suit for penalties, but one to declare the usurious transaction void. This means that no interest is collectible and the debtor is entitled to recover all interest paid. *See Allee v. Benser, 779 S.W.2d 61, 65 (Tex. 1988); Danziger v. San Jacinto Savings Ass’n, 732 S.W.2d 300, 304 (Tex. 1987).*

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

*Sections 2.64 through 2.70 are reserved for expansion.*
VI. Federal Statutory Requirements

§ 2.71 Truth in Lending Act and Regulation Z

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

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


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

§ 2.71:2 Covered Transactions—Regulation Z

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

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

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

12 C.F.R. § 1026.1(c)(1).

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

§ 2.71:3 Required Disclosures—Open-End Transactions

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

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

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. See 12 C.F.R. § 535.13(c).
§ 2.71:4  Required Disclosures—Credit Card Transactions

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

2. Grace periods for avoiding finance charge, if such periods exist. 15 U.S.C. § 1637(c)(1)(A)(iii); 12 C.F.R. § 1026.60(b)(5).

§ 2.71:5  Required Disclosures—Closed-End Transactions

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

§ 2.72  Defenses to Liability

§ 2.72:1  Bona Fide Error

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

§ 2.72:2  Good-Faith Compliance

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

§ 2.72:3  Correction of Error

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

A creditor or assignee has no liability under this section or section 1607 of this title or section 1611 of this title for any failure to comply with any requirement imposed under this part or part E, if within sixty days after discovering an error, whether pursuant to a final written examination report or notice issued under section 1607(e)(1) of this title or through the creditor’s or assignee’s own procedures, and prior to the institution of an action under this section or the receipt of written notice of the error from the obligor, the creditor or assignee notifies the person con-
cerned of the error and makes whatever adjustments in the appropriate account are necessary to assure that the
person will not be required to pay an amount in excess of the charge actually disclosed, or the dollar equivalent of
the annual percentage rate actually disclosed, whichever is lower.


§ 2.72:4 Use of Model Forms

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

§ 2.73 Interaction of State and Federal Disclosure Laws

§ 2.73:1 Generally

The Truth in Lending Act does not exempt any creditor from complying with state credit disclosure laws and does not affect
state law except to the extent that the state law is inconsistent with the federal law or regulation. If the Federal Reserve Board
determines that an inconsistency between federal and state disclosure laws exists, creditors in the state may not use the in-consis-
tent 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 compli-

§ 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

§ 2.73:5 Availability of State and Federal Remedies

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

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

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

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

§ 2.75:1 Generally

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

1. the obligor has made a good-faith effort to obtain satisfactory resolution of the problem with the person honoring the card;

2. the amount of the initial transaction exceeds $50; and

3. the initial transaction occurred either within the same state as the cardholder’s previously provided mailing address or within one hundred miles of that address.

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

§ 2.75:2 Limitation on Amount of Claim or Defense

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

§ 2.76 FTC Holder-in-Due-Course Rule

See section 2.111:5 below regarding the FTC holder-in-due-course rule.
Consumer Lease Disclosures


§ 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.”


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.”


§ 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.


§ 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. 50 U.S.C. § 3913(a). The same right accrues when a court vacates or sets aside a judgment or decree. 50 U.S.C. § 3913(b). See section 2.77:14 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 2.77:5 through 2.77:8 below). 50 U.S.C. § 3952. The servicemember’s dependents may claim the protection of this provision unless in the court’s opinion their ability to comply with the contract is not materially impaired by the servicemember’s military service. 50 U.S.C. § 3959.

§ 2.78:3 Maximum Interest Rate for Preservice Obligation

If the servicemember incurred an obligation requiring him to pay interest greater than 6 percent per year before entering military service, his obligation is reduced to 6 percent annual interest during his period of military service and one year thereafter, in case of an obligation or liability consisting of a mortgage, trust deed, or other security in the nature of a mortgage or during his period of military service, in the case of any other obligation or liability. 50 U.S.C. § 3937(a). “Interest” includes service charges, renewal charges, fees, or any other charges except bona fide insurance in respect of the obligation. 50 U.S.C. § 3937(d). The creditor may apply to a court for an order authorizing payment of a greater interest rate on a showing that the ability of the servicemember to pay more than 6 percent annual interest is not materially affected by his military service. 50 U.S.C. § 3937(c).
§ 2.78:4 Judicial Foreclosure of Security Interest

If a servicemember is obligated under a security agreement and still owns the collateral when he enters military service, any action to enforce the security interest arising from the servicemember’s alleged breach of the security agreement committed before or during his military service may be stayed as provided in sections 2.77:5 through 2.77:8 below, or the court may make another disposition of the case as may be equitable to preserve the interests of all parties. 50 U.S.C. § 3953(b). The servicemember’s dependents may claim the protection of this provision unless in the court’s opinion their ability to comply with the security agreement is not materially impaired by the servicemember’s military service. 50 U.S.C. § 3959.

§ 2.78:5 Stay of Enforcement of Obligation

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

§ 2.78:6 Stay of Fines and Penalties on Contracts

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

§ 2.78:7 Stay of Nonjudicial Repossession of Security Interest

If a servicemember is obligated under a security agreement when he enters military service and still owns the collateral when he enters, the secured creditor may not seize, sell, or foreclose on the collateral during the period of his military service or for nine months thereafter, except under an agreement between the servicemember and the creditor as described in section 2.77:14 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.


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

§ 2.78:9 Default Judgments

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

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

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

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

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

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

§ 2.78:11 Settlement of Cases Involving Property

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

§ 2.78:12 Statutes of Limitation Affected by Military Service

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

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

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

§ 2.78:14 Waiver

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

A secondarily liable party may waive the protections set out above by written waiver executed as an instrument separate from the contract or instrument setting out the obligation or liability. 50 U.S.C. § 3913. No such waiver is valid if it is executed by an individual who later joins the military or if it is executed by a dependent of that individual, unless executed by the individual during the call-up period set out in section 2.77:1 above. 50 U.S.C. § 3913(d)(2).
§ 2.78:15 Real Estate–Related Provisions

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

§ 2.78:16 Distinguishable from Military Lending Act

The SCRA is distinguishable from the Military Lending Act (the “MLA”), which is codified at 10 U.S.C. § 987, and the regulations promulgated in connection therewith, which are also defined as the MLA for purposes of this section. 32 C.F.R. § 232.1 et seq. The SCRA applies to servicemembers and their spouses and dependents with regard to preservice debts when they subsequently become active duty servicemembers. By contrast, the MLA applies to servicemembers and their spouses and dependents who are on active duty at the time they become obligated on the indebtedness at issue. See 10 U.S.C. § 987(a). Interest, including fees, is capped at 6 percent per annum under the SCRA, whereas interest, including fees, is capped at a 36 percent per annum Military Annual Percentage Rate (MAPR) as that term is defined under the MLA. Compare 50 U.S.C. § 3937(a) and 10 U.S.C. § 987(b). Under the SCRA, certain written disclosures are required after forty-five days of delinquency, whereas, under the MLA, written and oral disclosures are required at the time the credit account is established or when the borrower becomes obligated on the transaction under the new MLA rule. See 10 U.S.C. § 987(c). As with most laws, many of the key terms of the MLA are defined and must be carefully reviewed and considered. See 10 U.S.C. § 987(i). A failure to comply with the MLA can result in serious penalties, including a voiding of the note or credit as of inception and a requirement that the creditor refund all fees and interest paid by the affected borrower. See 10 U.S.C. § 987(f). A violation of the MLA may also constitute a violation under Regulation Z and an unfair, deceptive, or abusive act or practice under the Dodd-Frank Act, which is set forth in 12 U.S.C. §§ 5531, 5536.

§ 2.79 Fair Credit Reporting Act

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

[Section 2.80 is reserved for expansion.]

VII. Texas Consumer Credit Laws

§ 2.81 Consumer Credit Laws Generally

The Texas Consumer Credit Code was formerly found at Texas Revised Civil Statutes articles 5069–2.01 through –8.06. In 1997, the legislature moved those provisions to subtitle B of title 4 of the Texas Finance Code, and the former statutes were repealed.
Remedies for violations of subtitle B are found in Tex. Fin. Code ch. 349. See part V. in this chapter regarding usury generally and section 2.88 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


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


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


§ 2.84 Consumer Loans (Texas Finance Code Chapter 342)

§ 2.84:1 Definitions

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

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

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

Unless otherwise fixed by law, the maximum interest rate is 10 percent per year. Tex. Fin. Code § 342.004(a). A loan with an interest rate that is 10 percent per year or less is not subject to chapter 342 of the Finance Code. Tex. Fin. Code § 342.004(b).
§ 2.84:3  Applicability of Chapter 342

A loan is governed by chapter 342 of the Finance Code if it (1) provides for interest in excess of 10 percent per year; (2) is extended primarily for personal, family, or household use; (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


§ 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.

§ 2.84:6  Other Charges or Credits

§ 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).


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.


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.


§ 2.84:9  Commonly Encountered Violations Regarding Insurance

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

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

§ 2.85:1 Definition

A revolving credit account is an account—

1. established by a creditor for a customer under a written agreement between the creditor and the customer;
2. accepted by the customer by using the account;
3. in which the unpaid balance of and interest on the extensions of credit are debited to the account;
4. in which interest is not precomputed but may be computed on the balances of the account outstanding from time to time;
5. in which the customer may defer payment of any part of the balance of the account; and
6. in which the customer may obtain from the creditor one or more extensions of credit.

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

§ 2.85:2 Rules Governing Interest


§ 2.85:3 Other Charges


§ 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).

§ 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).


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


§ 2.86:3 Other Charges or Credits


§ 2.86:4 Form and Content of Contract

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


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.


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


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.


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.

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.


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.


§ 2.87 Retail Charge Agreements

Note: Retail charge agreements are by definition retail installment transactions. The rules set out in section 2.85 above apply unless contradicted by a particular statutory provision as set out below.

§ 2.87:1 Definition

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

§ 2.87:2 Rules Governing Time-Price Differential


§ 2.87:3 Other Charges


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.


§ 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).


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

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

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

§ 2.88 Motor Vehicle Installment Sales

§ 2.88:1 Criteria and Relevant Definitions


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).


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.


§ 2.88:2 Rules Governing Time-Price Differential


§ 2.88:3 Other Charges or Credits

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).
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

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).
9. Must contain residence or other address of buyer as specified by buyer. Tex. Fin. Code § 348.102(a)(3).


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).


§ 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.


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


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

§ 2.89:1 Liability Generally

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

1. three times the amount of actual economic loss resulting from the violation; or
2. if the violation was material and induced the obligor to enter into a transaction that would not have been entered into 
but for the violation, twice the interest or time-price differential contracted for, charged, or received, not to exceed 
$2,000 in a transaction in which the amount financed does not exceed $5,000, or not to exceed $4,000 for any other 
transaction. The court determines whether the violation was “material.”

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

§ 2.89:2 No License

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

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

§ 2.90:1 Bona Fide Error

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

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

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

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

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. 

§ 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 2.89:3 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).


§ 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.


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


2. Credit card issuer generally subject to all claims or defenses of cardholder. 15 U.S.C. § 1666i; 12 C.F.R. § 1026.12(c).


§ 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


§ 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


§ 2.105:3  Other Charges


§ 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.


§ 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


§ 2.108:4 Rights Involving Cancellation


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).


§ 2.108:5 Other Rules

All these rules are commonly violated.


6. Must furnish consumer, at the time consumer signs contract or otherwise agrees to the purchase, with a completed notice of cancellation, in duplicate, attached to the contract or receipt and easily detachable. Tex. Bus. & Com. Code § 601.053.
7. Must complete both copies of the notice of cancellation by entering the merchant’s name and address, the date of transaction, and the date by which consumer must give notice of cancellation. Tex. Bus. & Com. Code § 601.052(b).


§ 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.


§ 2.109:2 Requirements for Disclosure Form and Contract


§ 2.109:3 Other Rules


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).


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 §§ 9.617(a), 9.601(a).

§ 2.111:2 Acceleration Clauses

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

§ 2.111:3 “Acceleration of Note” vs. “Acceleration of Debt”

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

§ 2.111:4 Acceleration for Insecurity

Section 1.208 of the Texas Business and Commerce Code, providing that the creditor “may accelerate payment or performance at will” or “when he deems himself insecure” if he in good faith believes that the prospect of payment or performance is impaired, was repealed by the 2003 legislature. See Acts 2003, 78th Leg., R.S., ch. 542, § 1 (H.B. 1394), eff. Sept. 1, 2003.
§ 2.111:5  Retail and Motor Vehicle Installment Sales

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

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

Without a waiver, the holder of a note providing for acceleration of maturity at the option of the holder must demand payment of the delinquent installments before exercising the option to accelerate, and failure to give proper notice of intent to accelerate makes any attempted acceleration ineffective. Williamson v. Dunlap, 693 S.W.2d 373, 374 (Tex. 1985); Ogden v. Gibraltar Savings Ass’n, 640 S.W.2d 232, 233–34 (Tex. 1982); Allen Sales & Servicenter v. Ryan, 525 S.W.2d 863, 866 (Tex. 1975).

See section 2.110:7 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 2.111:4 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 2.111:5 and 2.111:6 below.

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


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).


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 2.111:4 below regarding these “real” defenses. A “claim in recoupment” is a claim raised by the obligor against the original payee arising out of the original transaction. See FDIC v. Lattimore Land Corp., 656 F.2d 139, 143 (5th Cir. 1981).

§ 2.112:3 Burden of Proof

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

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

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

1. infancy, to the extent it is a defense to a simple contract (see section 17.8:2 in this manual);
2. duress, lack of legal capacity, or illegality of the transaction that, under other law, nullifies the obligor’s obligation (see sections 17.19, 17.8, and 17.24);
3. fraud that induced the obligor to sign the instrument with neither knowledge nor reasonable opportunity to learn of its character or essential terms (see section 17.23); or
4. discharge in insolvency proceedings.

§ 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, bold-faced 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.


§ 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 2.83 above);
2. Tex. Fin. Code § 345.356 (retail installment sales; see section 2.85);
3. Tex. Fin. Code § 347.053 (manufactured-home credit transactions); and
4. Tex. Fin. Code § 348.412 (motor vehicle installment sales; see section 2.87).

[Sections 2.113 through 2.120 are reserved for expansion.]
§ 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 nonconsumer transactions leaves to the courts the fashioning of proper rules for consumer-goods transactions.

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


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


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)**).


Certain provisions of chapter 9 do not apply to consumer transactions:


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 2.121:7 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.


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).


§ 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


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.


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


§ 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 2.120:2 above). Tex. Bus. & Com. Code § 9.626. The deficiency claim of a noncomplying secured party is calculated by crediting the obligor with the greater of the actual net proceeds of a disposition or the amount of net proceeds that would have been realized if the disposition had been conducted in accordance with subchapter F (that is, in a commercially reasonable manner). Tex. Bus. & Com. Code § 9.626(a)(3). For nonconsumer transactions, this section rejects the “absolute bar” test that some courts have imposed, barring a noncomplying secured party from recovering any deficiency, regardless of the loss (if any) the debtor suffered as a consequence of the noncompliance. See Tex. Bus. & Com. Code § 9.626 cmt. 4.

§ 2.122:8  “Low-Price” Disposition: Calculation of Deficiency and Surplus

Tex. Bus. & Com. Code § 9.615(f) addresses the problem of procedurally regular postdefault dispositions of collateral that nonetheless fetch a low price. It provides a special method of calculation of a deficiency if the proceeds of a disposition of collateral to a secured party, a person related to the secured party, or a secondary obligor are “significantly below the range of proceeds that a complying disposition to a person other than the secured party, a person related to the secured party, or a secondary obligor would have brought.” Tex. Bus. & Com. Code § 9.615(f). (See Tex. Bus. & Com. Code § 9.102(a)(64) for a definition of “person related to.”) In these situations, because of the possibility that there were not adequate incentives to obtain a better price, the calculation of a deficiency or surplus is based not on the actual net proceeds but on the proceeds that would have been received in a disposition to a person other than the secured party, a person related to the secured party, or a secondary obligor.
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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 16.16:3), and it is almost certainly uncollectible unless and until the debtor is found.

If the debtor cannot be found, it is better to advise the client of that fact and recommend closing the file. See section 17.63:2 regarding tolling of limitations when a defendant is absent from Texas.

One of the easiest and most effective strategies for locating a debtor is if the creditor-client obtains relevant location and identification information at the outset of the business relationship, for example, in a credit application or identification request. Such an application or request should ask the debtor to specifically provide the following information:

1. full name (d/b/a, a/k/a, or trade name, if any);
2. address (include e-mail address if available);
3. business status (corporation, LLC, sole proprietorship, or partnership, including state of registration);
4. business principals (owner, officers, directors, members, partners);
5. phone and fax numbers;
6. bank account and other relevant financial information;
7. description of any litigation or claims;
8. website information;
9. Social Security number or Employer Tax ID Number; and
10. references.

§ 3.2 Importance of Ascertaining Debtor’s Form of Business

There are three primary reasons for ascertaining the form a business debtor takes. First, different entities are served with process in different ways. See sections 16.10 through 16.13 in this manual regarding service of process on different entities. Second, the nature of liability of the owners of the business varies with the type of entity. See sections 6.21 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 3.21 below.
The Open Records Division of the Texas Comptroller of Public Accounts maintains records on taxable entities franchise tax and sales tax. Its search service is free. The comptroller’s phone number is (800) 252-1386, which directs the caller to the website www.comptroller.texas.gov to obtain the location and identification information discussed herein. The information may also be requested by fax at (512) 475-1610 or by e-mail at open.records@cpa.texas.gov. And information may be obtained by using the comptroller’s taxable entity search found at https://mycpa.cpa.state.tx.us/coa/index.html. The information available from any of the listed searches includes the nature of the business—sole proprietorship, partnership, or corporation—as well as the names of corporate agents and officers, owners of sole proprietorships and paternships, and corporate assumed names. The search will also tell whether the entity is in good standing. An entity is not in good standing when it forfeits its right to do business in Texas as a result of (1) failing to file the report required by chapter 171 of the Texas Tax Code, (2) failing to pay franchise taxes within forty-five days after a notice of forfeiture is mailed, or (3) refusing to permit the Texas comptroller to examine the filing entity’s records pursuant to section 171.211 of the Texas Tax Code.

If provided with the business organization’s name or a close approximation thereof, the secretary of state can provide such information as the business organization’s registered agent and the names of its incorporators or whether the business is even a corporation chartered or authorized to do business in Texas. This information may be obtained at no charge by calling (512) 475-2755 or by sending an e-mail to corpinfo@sos.state.tx.us. It also may be obtained by mail for a small charge per corporation name search or by searching the SOSDirect website at sos.state.tx.us/corp/sosda/index.shtml.

Searching the assumed name records is discussed at section 3.5 below. An assumed name record search will disclose not only the name but also the form of the debtor’s business.

The activities of debt collectors in trying to find consumer debtors are governed by the federal Fair Debt Collection Practices Act and the Texas Debt Collection Practices Act, which are discussed at length at sections 2.11 through 2.36 in this manual. The following sections apply particularly to debt collectors (as defined in the two acts) locating the debtor: 2.14 (“Mini-Miranda” notice), 2.15:9 (communication with third parties), 2.16 (misrepresentations), 2.32:2 (Texas law requiring debt collector identification), and 2.33 (Texas law concerning prohibited debt collection practices).

There are no statutory limitations concerning activities to locate nonconsumer debtors. The practitioner should be mindful of the common-law tort of unfair collections practices which might create a counter-claim against the creditor or the creditor’s attorney. See also EMC Mortgage Corp. v. Jones, 252 S.W.3d 857, 868 (Tex. App.—Dallas 2008, no pet.); see also McDonald v. Bennett, 674 F.2d 1080, 1089 n.8 (5th Cir. 1982) (noting that the tort of unreasonable collection efforts is intended to deter “outrageous collection techniques”).
§ 3.4 Post Office Resources

§ 3.4:1 Address Corrections

The simplest way to determine whether a debtor has moved from the last known address and discover the debtor’s new location is to add the notation “Address Correction Requested—Do Not Forward” to the front of the envelope addressed to the last known address. If the post office has a forwarding address for the debtor, it will provide that address without charge when it returns the letter. Alternatively, the post office will deliver the letter to the debtor if it bears the notation “Forwarding and Address Correction Requested” and will return a card with a photocopy of the forwarded envelope showing the debtor’s address along with a postage-due charge.

§ 3.4:2 Obtaining Debtor Information through Post Office

The creditor’s attorney may request change of address or boxholder information from the U.S. Postal Service under the Freedom of Information Act, 5 U.S.C. § 552, for service of process. See also 39 C.F.R. § 265.6(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).

§ 3.5 Driver’s License Resources

On receipt of a written request and payment of a nominal fee, the Department of Public Safety may disclose information relating to an individual’s most recent address as shown on its records. The requester must submit either the individual’s driver’s license number or full name and date of birth. The request should also include the individual’s most current known address. Tex. Transp. Code §§ 521.045, 730.007(a)(2)(C)(ii). Although state and federal law has limited the availability of driver’s license information, this information is still available for debt collection purposes. See 18 U.S.C. § 2721(b)(3); Tex. Transp. Code § 730.007(a)(2)(C)(ii). A DPS Application for Copy of Driver Record may be used to obtain this information and can be found at www.txdps.state.tx.us/internetforms/Forms/DR-1.pdf. See form 3-2 in this chapter. The information is not avail-
able online through the DPS website as of the date of this publication; however, there are several fee-based commercial online services which will provide this information (for example, TLO, Accurint, Lexis/Nexis). See also section 3.8:3.

§ 3.6 Assumed Name Records

§ 3.6:1 Who Must File Assumed Name Certificates

Assumed name certificates must be filed by—

1. any individual who does business under a name that does not include his own surname;

2. any partnership whose name does not include the surname or other legal name of each general partner or joint venturer;

3. any individual or partnership whose business name suggests the existence of other owners by the use of words such as “Company,” “and Company,” “and Sons,” “Brothers,” and so on;

4. any limited partnership, corporation, limited liability company, limited liability partnership, or foreign filing entity doing business under a name other than the one shown in its officially filed documents (for example, articles of incorporation); and

5. any other company conducting business under a name.


§ 3.6:2 Where Certificates Must Be Filed

Corporations, limited partnerships, limited liability partnerships, limited liability companies, and foreign filing entities must file their assumed name certificates with the Texas secretary of state in Austin. 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.

§ 3.6:3 What to Look for in Assumed Name Certificates

An assumed name certificate provides the name and address of the owner of the business. The identity of any co-owners or others potentially liable for the debt may be discovered in this search. Also, a search of a reverse index of owners will show any other businesses a person or entity might own. In some urban counties, online searches of assumed name records are available and are usually free of charge.
§ 3.6:4  If Business Owner Fails to File Certificate

If a business owner–defendant fails to file a proper assumed name certificate, a plaintiff or other party bringing an action against the business may recover, if the court so determines, all expenses, including attorney’s fees, incurred in locating and serving the owner. Tex. Bus. & Com. Code § 71.201.

§ 3.7  Searching by Telephone

§ 3.7:1  Telephone Searches Generally

Directory assistance does not give out addresses for number inquiries, but if voice contact with the debtor is sought, directory assistance may be helpful. Phone directories for many Texas towns and cities may be found in the public library or in a local phone company office. If debtors may be calling your office but refusing to give you contact information, caller ID and call return services can help, especially if the call return feature is used from a phone with an alpha-numeric readout of the number dialed.

§ 3.7:2  Ethical and Legal Cautions

See section 2.15:4 in this manual regarding phone conduct generally and section 2.15:9 regarding communication with third parties.

The attorney should not use a gimmick such as claiming to have a package to deliver to the debtor and needing the debtor’s address to deliver it. See Tex. Fin. Code § 392.304(a)(3). See section 2.33:2.

§ 3.7:3  Pretexting and Other False Pretenses

Pretexting occurs when someone tries to gain access to personal, nonpublic information without proper authority to do so by impersonating the account holder by phone, mail, e-mail, or by other means. See 15 U.S.C. §§ 6821–6827 (known as the Gramm-Leach-Bliley Act or the “GLBA”). The GLBA makes it illegal for financial institutions to collect data under false pretenses, i.e., by pretext. 15 U.S.C. §§ 6821(a)–(b). While there is little case law on the subject, it seems clear that as an agent of financial institutions, a debt collector would be subject to the GLBA’s prohibitions and resulting liability. In addition, pretextual collection activity may give rise to a “false pretenses” cause of action or defense by the debtor under common law. Practitioners should be aware that such conduct could also violate the Texas Disciplinary Rules of Professional Conduct. See Tex. Disciplinary R. Prof. Conduct R. 3.01, 5.03, 8.04.

§ 3.8  Online Resources

§ 3.8:1  Finding Information on the Internet

Perhaps the most useful overall function of the Internet is its ability to search itself in a natural-language format. A few minutes’ use of Google, Yahoo!, Bing, or other search sites can turn up all sorts of helpful information for location, identification, and collection purposes. These search sites also offer free map applications, such as Google Maps, Apple Maps, and MapQuest, which allow the user to enter an address and immediately locate that address on the user’s device, obtain directions, and view relatively recent pictures of the location entered.
Another source of information is social networking sites. Social networking sites such as Facebook, Twitter, Instagram, LinkedIn, Pinterest, Google+, Tumblr, Vine, Flickr, SnapChat, and similar sites should be scoured for useful location, identification, and asset information using each site’s unique search functions.

§ 3.8:2 Commercial Online Services

There are many fee-based commercial online services available for locating debtor information. Services that provide information concerning debtors include, lexisnexis.com, westlaw.com, accurint.com, TLO.com, PeopleMap.com, and ussearch.com

§ 3.8:3 Credit Reporting Bureaus and Agencies

A simple credit report may tell you such things as the debtor’s addresses for the last ten years, Social Security number, spouse’s name, and employer. However, a credit report cannot be accessed without the consumer’s permission. 15 U.S.C. § 1681b(a)(2).

Under the provisions of the Fair Credit Reporting Act (FCRA) you must—

1. obtain credit reports only for permissible purposes under the FCRA (15 U.S.C. § 1681b(a)(3));

2. notify the debtor when an adverse action is taken on the basis of such reports (15 U.S.C. § 1681b(b)(2)); and

3. identify the company that provided the report, so that the accuracy and completeness of the report may be verified or contested by the consumer (15 U.S.C. § 1681b(c))

Permissible purposes under the FCRA include—

1. use in a credit transaction involving the consumer on whom the information is to be furnished and involving the extension of credit to, or review or collection of an account of, the consumer (15 U.S.C. § 1681b(a)(3)(A));


4. governmental issuance of a license or benefit (15 U.S.C. § 1681b(a)(3)(D));

5. use in assessment of personal credit risks as a potential investor or servicer, or current insurer (15 U.S.C. § 1681b(a)(3)(E));

6. a legitimate business need for the information—
   a. in connection with a business transaction that is initiated by the debtor; or
   a. to review an account to determine whether the debtor continues to meet the terms of the account (15 U.S.C. § 1681b(a)(3)(F));

7. as an executive department or an agency in connection with the issuance of government-sponsored individually-billed travel charge card (15 U.S.C. § 1681b(a)(3)(G));

There are three major credit reporting agencies. They are Experian (experian.com), Equifax (equifax.com), and TransUnion (transunion.com). Each website has restricted access and is a subscription service. Attorneys typically do not subscribe to the services offered by credit reporting agencies, but often clients will have access to credit information.
§ 3.8:4 Asset Searches

There are also asset search applications on sites such as Lexis.com and Westlaw.com. See also the sites listed in section 3.8:3 above. Each website has restricted access and is a subscription service. Services vary by website and subscription. You must have a legitimate reason to obtain this information in compliance with the Driver’s Protection Policy Act (DPPA) and Gramm-Leach-Bliley Act (GLBA). Legitimate reasons include the following.

For the DPPA:

1. Litigation—in connection with any proceeding (including arbitration) in any court or government agency, or before any self-regulatory body, including investigation in anticipation of litigation, service of process, and execution of judgments. 18 U.S.C. § 2721(b)(4).

2. Debt recovery/fraud—to verify the accuracy of information about a person or obtain corrected information about a person who provided the information to you (or to your client) only if the information is used to recover on a debt against the person or to pursue legal remedies against the person for fraud. 18 U.S.C. § 2721(b)(3).

3. Business—in the normal course of business by a legitimate business or its agents, employees or contractors to verify the accuracy of personal information submitted by the individual. 18 U.S.C. § 2721(b)(3).

4. Governmental use—by a government agency, including any court or law enforcement agency, in carrying out its functions. 18 U.S.C. § 2721(b)(1).

5. Insurers—by an insurer (or its agent) in connection with claims investigation activities, antifraud activities, rating or underwriting. 18 U.S.C. § 2721(b)(6).

For the GLBA:

1. Fraud prevention or detection—“to protect against or prevent actual or potential fraud, unauthorized transactions, claims or other liability.” 15 U.S.C. § 6802(e)(3)(B).

2. Legal compliance—to comply with federal, state, or local laws, rules, and other applicable legal requirements. 15 U.S.C. § 6802(e)(8).


4. Consumer authorization—with the consent and direction of a consumer or as necessary to effect, or enforce a transaction requested or authorized by the consumer. 15 U.S.C. § 6802(e)(1), (2).


Dun & Bradstreet (dandb.com) is another subscription service available for searching business debtors. In general, it gives good location and financial information with respect to larger business. Typically, it is not very helpful for individuals or small business.
§ 3.9 Finding Debtor through Property Records

§ 3.9:1 Motor Vehicle Ownership

The Texas Department of Motor Vehicles will confirm the name of a vehicle’s owner if provided with the vehicle identification number. The request must be made in person at any regional office of the DMV by filling out form VTR-275 (Request for Texas Motor Vehicle Information) and paying a nominal fee. See form 3-3 in this chapter. The DMV may be reached for assistance at 888-DMV-GOTX or 888-368-4689. More information on vehicle registration can be found on the DMV’s website at http://txdmv.gov/.

§ 3.9:2 Boat Ownership and Liens

The Texas Parks and Wildlife Department will confirm the name of the owner of a boat if the boat registration number is provided. An online query for boat ownership may be made on the department’s website at https://apps.tpwd.state.tx.us/tora/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 https://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 website. The records are available either on paper or electronically on a CD-ROM. Certified copies of the records are also available. A schedule of charges can be found on the FAA’s website at www.faa.gov/licenses_certificates/aircraft_certification/aircraft_registry/copies_aircraft_records/.

§ 3.10 Public Records

Although the county clerk’s and tax assessor’s records are more often searched to find the debtor’s assets, they may contain address information as well. See sections 3.20:1 and 3.20:2 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 websites or through eFILETexas and its various providers. See [efiletexas.gov](http://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](https://www.pacer.psc.uscourts.gov). Reviewing such information and records may also give the attorney a clearer picture of the collectability of the debt pursued.

§ 3.11 Professional or Occupational Licenses

If the debtor has a professional or occupational license, such as real estate broker–salesperson, insurance agent, auctioneer, physician, chiropractor, dentist, surveyor, nurse, accountant, or attorney, the relevant licensing authority should provide the debtor’s address according to its records. If the debt or judgment pertains to the debtor’s professional activity, there may be a recovery fund to pay unpaid judgments. See, e.g., Tex. Occ. Code §§ 1101.601–.615 (Real Estate Recovery Fund to pay eligible judgments against licensees). A database of many Texas occupational licenses can be searched on the Texas Department of Licensing and Regulation’s website, [https://www.tdlr.texas.gov/](https://www.tdlr.texas.gov/). The practitioner should also visit the website of the agency regulating the occupation.

*Sections 3.12 through 3.20 are reserved for expansion.*

II. Finding Debtor’s Assets

§ 3.21 Real Property Searches

§ 3.21:1 County Clerk

Every county clerk in the state must keep an index of grantors and grantees of documents recorded in the clerk’s county. Many indexes are available on line. If the county records are not on line, a local title company may be of assistance; see section 3.20:3 below. Both the grantor and grantee indexes for tax liens and abstracts of judgment as well as conveyances should be searched in the county records.

§ 3.21:2 Tax Assessor-Collector

The county tax assessor keeps a tax roll for all real and tangible personal property located within the county. Most such rolls can be searched by name, providing a way to determine whether an individual may own property in that county. The assessor’s or taxing authority’s records may not indicate whether an individual or entity actually owns property, but at a minimum they will indicate the person or entity who receives the tax bill for that property. The assessor’s records may be used as a starting point for tracing ownership of real property. If the county tax assessor does not maintain a name index, other taxing
authorities in the county, such as school or water districts, may maintain such an index. Many counties now provide Internet access to their tax rolls.

§ 3.21:3 Title Company

A title company can provide a chain of title to a particular piece of property. A complete abstract of title can be prohibitively expensive and of little use to the debt collector, but the title company can usually provide a last deed in the chain to any piece of property, as well as liens recorded against that property.

§ 3.22 UCC Searches

With respect to liens encumbering personal property, the creditor will often record the lien in the public records of the secretary of state of the debtor’s state of incorporation or organization pursuant to the provisions of the Uniform Commercial Code (the UCC). The system is similar to the recording system for real estate in county real property records. The purpose is to give potential buyers of personal property notice that the property is encumbered by a lien.

Under the UCC, a “debtor” is (1) “a person having an interest, other than a security interest or other lien, in the collateral, whether or not the person is an obligor”; (2) “a seller of accounts, chattel paper, payment intangibles, or promissory notes”; or (3) a 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,” (1) “owes payment or other performance of the obligation,” (2) “has provided property other than the collateral to secure payment or other performance of the obligation,” or (3) “is otherwise accountable in whole or in part for payment or other performance of the obligation.” Issuers or nominated persons under a letter of credit are not obligors as defined by the UCC. Tex. Bus. & Com. Code § 9.102(a)(73). A “secured party” is (1) a person in whose favor a security interest is created or provided for under a security agreement, whether or not any obligation to be secured is outstanding; (2) a person holding an agricultural lien; (3) a consignor; (4) a person to which accounts, chattel paper, payment intangibles, or promissory notes have been sold; (5) a trustee, indenture trustee, agent, collateral agent, or other representative in whose favor a security interest or agricultural lien is created or provided for; or (6) a person that holds a security interest arising under section 2.401, 2.505, 2.711(c), 2A.508(e), 4.210, or 5.118 of the UCC. Tex. Bus. & Com. Code § 9.102(73).

A secured party perfects its security interest by filing a financing statement, also called a UCC1. A UCC1 is a simple form that includes information such as the legal names and addresses of the debtor and creditor and a description of the collateral.

Because the UCC1 must describe the collateral securing a secured debt, a review of these documents will also give the attorney such information as the kind of assets the debtor may have and the identity of any party claiming a security interest in the assets as collateral for a debt. Tex. Bus. & Com. Code § 9.502.

To determine whether a particular UCC1 has actually been filed, the attorney can—

1. examine the particular UCC1 to see whether the upper right-hand corner has been stamped by the secretary of state or county clerk’s office;
2. call the secretary of state’s office 512-463-5555, give the name of the debtor, and request the search;
3. perform an online financing statement search on the SOSDirect website at sos.state.tx.us/corp/sosda/index.shtml; or
submit a form UCC11 to the appropriate office. See form 3-5 in this chapter.

On receipt of a form UCC11, the filing officer must issue his certificate showing whether there is on file, on the date and hour stated therein, any presently effective financing statement naming a particular debtor and any statement of assignment and, if there is, giving the date and hour of filing of each such statement and the name and address of each secured party. On request, the filing officer must furnish a copy of any filed financing statement or statement of assignment. A financing statement for some kinds of personal property can be obtained by sending a form UCC11 to the Secretary of State, Uniform Commercial Code Section, P.O. Box 13193, Austin, TX 78711-3193. See form 3-5 in this chapter; form UCC11 is also available on the secretary of state’s website at sos.state.tx.us/ucc/forms/ucc11.pdf. The form can be downloaded or filled out and then printed from the site. This information is also available through the Secretary of State Online Access system, called SOSDirect, which allows computer access to information maintained by the secretary of state. Information on subscribing to this system may be obtained by calling 512-475-2755 (corporations) or 512-475-2703 (UCC); e-mailing corpinfo@sos.texas.gov, ucc_assist@sos.texas.gov, or sosdirect@sos.texas.gov; or by accessing the secretary of state’s website at sos.state.tx.us. See sections 5.11:4 through 5.11:6 in this manual for further discussion of financing statements.

§ 3.23 Debtor’s Bank Account

An easy way to find out where the debtor banks is to write him a check on an unfamiliar account, which when cashed will show the depository bank and offer the account number itself. If the debtor is a business, something may be bought from the business with a check. This procedure should not be used in a consumer debt situation because such a procedure may violate consumer protection laws. See generally chapter 2.

Discovery from financial institutions is discussed at section 18.16 in this manual.

§ 3.24 Vehicles, Boats, Aircraft

The resources set out in section 3.9 above for finding the debtor’s address can also be used for ascertaining whether the debtor has any of these particular types of assets.
Form 3-1

This form is mandated by 39 C.F.R. § 265.14 (effective July 18, 2017). If submitted on the requester’s letterhead, it must be used in its entirety or the postmaster will return it. Also, the warning statement and certification must appear immediately before the signature block. Note that the copy of a statute or regulation is not required if the requester is an attorney or a party acting pro se; a corporation acting pro se must include a copy of a statute or regulation, however. As of the date of this publication, the U.S. Postal Service form available at www.usps.com does not reflect recent changes to 39 C.F.R. §§ 265.6, 265.14. (See also 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: __________________________________________________________________________________________________________________________

Last Known Address: __________________________________________________________________________________________________________________________

NOTE: Only one request may be made per completed form. The name and last known address are required for change of address information. The name, if known, and Post Office box address are required for boxholder information. **You must enclose a copy of the statute or regulation that empowers you to serve process.** (Not required for attorneys or individuals acting pro se.) If you are a corporation proceeding pro se in state court, you must enclose a copy of the state statute or regulation permitting corporations to proceed pro se.

The following information is provided in accordance with 39 CFR 265.14(d)(4)(ii). There is no fee for providing boxholder or change of address information.
Form 3-1  Letter to Postal Service Requesting Information Concerning Address for Service of Process

1. Capacity of requester (e.g., process server, attorney, party representing self): _________________________________________________________________________________
__________________________________________________________________________________________________________________________ ... __________________________________________________________________________________________________________________________

2. The names of all known parties to the litigation: __________________________________________________________________________________________________________________________
__________________________________________________________________________________________________________________________ ... __________________________________________________________________________________________________________________________

3. The court in which the case has been or will be heard: __________________________________________________________________________________________________________________________
__________________________________________________________________________________________________________________________ ... __________________________________________________________________________________________________________________________

4. The docket or other identifying number if one has been issued: __________________________________________________________________________________________________________________________

5. The capacity in which this individual is to be served (e.g., defendant or witness): __________________________________________________________________________________________________________________________

WARNING: THE SUBMISSION OF FALSE INFORMATION TO OBTAIN AND USE CHANGE OF ADDRESS INFORMATION OR BOXHOLDER INFORMATION FOR ANY PURPOSE OTHER THAN THE SERVICE OF LEGAL PROCESS IN CONNECTION WITH ACTUAL OR PROSPECTIVE LITIGATION COULD RESULT IN CRIMINAL PENALTIES INCLUDING A FINE OF UP TO $10,000 OR IMPRISONMENT OF NOT MORE THAN 5 YEARS, OR BOTH (TITLE 18 U.S.C. SECTION 1001).

I certify that the above information is true and that the address information is needed and will be used solely for service of legal process in conjunction with actual or prospective litigation.

__________________________________________________________________________________________________________________________ ... __________________________________________________________________________________________________________________________
______________________________ ______________________________
Signature Address

______________________________ ______________________________
Printed Name City, State, ZIP Code
Letter to Postal Service Requesting Information Concerning Address for Service of Process  

FOR POST OFFICE USE ONLY

__ No change of address order on file.
__ Moved and left no forwarding address
__ No such address.

NEW ADDRESS OR BOXHOLDER
NAME POSTMARK AND STREET
ADDRESS:

________________________________
________________________________

________________________________

________________________________
Texas DPS Application for Copy of Driver Record

Form 3-2

Mail Driver Record To:  (Please Print or Type)

Requestor’s Last Name: __________________________ Requestor’s First Name: __________________________
Street Address: __________________________________________
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: __________________________ 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.
The Texas Department of Public Safety may disclose personal information to a requestor without written consent of the DL/ID holder, on proof of their identity and a certification by the requestor that the use of the personal information is authorized under state and federal law and that the information will be used only for the purpose stated and in complete compliance with state and federal law.

You must meet one or more of the following exceptions if you do not have written consent of the DL/ID holder to be entitled to receive personal information on the above named individual. Please initial each category that applies to the requested driver record.

1. For use in connection with any matter of (a) motor vehicle or motor vehicle operator safety; (b) motor vehicle theft; (c) motor vehicle emissions; (d) motor vehicle product alterations, recalls, or advisories; (e) performance monitoring of motor vehicles or motor vehicle dealers by a motor vehicle manufacturer; or (f) removal of nonowner records from the original owner records of a motor vehicle manufacturer to carry out the purposes of the Automobile Information Disclosure Act, the Anti Car Theft Act of 1992, the Clean Air Act, and any other statute or regulation enacted or adopted under or in relation to a law included in the above.

2. (Valid for Certified Abstract) For use by a government agency in carrying out its functions or a private entity acting on behalf of a government agency in carrying out its functions.

3. For use in connection with a matter of (a) motor vehicle or motor vehicle operator safety; (b) motor vehicle theft; (c) motor vehicle product alterations, recalls, or advisories; (d) performance monitoring of motor vehicles, motor vehicle parts, or motor vehicle dealers; (e) motor vehicle market research activities, including survey research; or (f) removal of nonowner records from the original owner records of motor vehicle manufacturers.

4. For use in the normal course of business by a legitimate business or an authorized agent of the business, but only to verify the accuracy of personal information submitted by the individual to the business or the authorized agent of the business and to obtain correct information if the submitted information is incorrect to prevent fraud by pursuing a legal remedy against, or recovering on a debt or security interest against the individual.

5. (Valid for Certified Abstract) For use in conjunction with a civil, criminal, administrative, or arbitral proceeding in any court or government agency or before any self regulatory body, including service of process, investigation in anticipation of litigation, execution or enforcement of a judgement or order, or under an order of any court.

6. For use in research or in producing statistical reports, but only if the personal information is not published, redisclosed, or used to contact any individual.

7. For use by an insurer or insurance support organization, or by a self insured entity, or an authorized agent of the entity, in connection with claims investigation activities, antifraud activities, rating or underwriting.

8. For use in providing notice to an owner of a towed or impounded vehicle.

9. For use by a licensed private investigator agency or licensed security service for a purpose permitted as stated on this page.

10. (Valid for Certified Abstract) For use by an employer or an authorized agent or insurer of the employer to obtain or verify information relating to a holder of a commercial driver license that is required under 49 U.S.C. Chapter 313.

11. For use in connection with the operating of a private toll transportation facility.

12. For use by a consumer-reporting agency as defined by the Fair Credit Reporting Act (15 U.S.C. §1681 et seq.) for a purpose permitted under the Act.

13. For any other purpose specifically authorized by law that relates to the operation of a motor vehicle or to public safety.

Please state specific statutory authority.

14. For use in the preventing, detecting, or protecting against identity theft or other acts of fraud. The Department prior to release of personal information may require additional information.

Below is an example of how numbers and letters should be written on front of this form:

<table>
<thead>
<tr>
<th>1</th>
<th>2</th>
<th>3</th>
<th>4</th>
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</tr>
</thead>
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<tr>
<td>A</td>
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<td></td>
</tr>
</tbody>
</table>
Request for Texas Motor Vehicle Information

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).

<table>
<thead>
<tr>
<th>APPLICANT INFORMATION - Type or print</th>
</tr>
</thead>
<tbody>
<tr>
<td>Last Name or Business Name</td>
</tr>
<tr>
<td>Address</td>
</tr>
<tr>
<td>Day Phone</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>GOVERNMENT ISSUED PHOTO IDENTIFICATION - SUBMIT PHOTOCOPY</th>
</tr>
</thead>
<tbody>
<tr>
<td>Entity Issuing ID and Type (i.e., TX Driver License, US Passport, etc.)</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>VEHICLE INFORMATION</th>
</tr>
</thead>
<tbody>
<tr>
<td>Texas License Plate</td>
</tr>
<tr>
<td>Vehicle Identification Number</td>
</tr>
</tbody>
</table>

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.

☐ 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.
Ownership/Lien Holder Information Printout Or Ownership History Report (PWD 763)

Form 3-4

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/Requester: ____________________________ 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 552.024, you are also entitled to have the information corrected.

PMD 0783 – A0900 (08/09) Texas Parks and Wildlife Department • 4200 Smith School Road, Austin, TX 78744 • www.tpwd.state.tx.us
### UCC11 Information Request

**FILING OFFICE COPY (1) — INFORMATION REQUEST (Form UCC11) (Texas) (Rev. 07/19/12)**

**Form 3-5**

#### INFORMATION REQUEST

**FOLLOW INSTRUCTIONS**

<table>
<thead>
<tr>
<th>A. NAME &amp; PHONE OF CONTACT AT FILER (optional)</th>
<th>FILING OFFICE ACCT #</th>
</tr>
</thead>
<tbody>
<tr>
<td>B. E-MAIL CONTACT AT FILER (optional)</td>
<td></td>
</tr>
</tbody>
</table>

**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)

2. **INFORMATION OPTIONS** relating to UCC filings and other notices on file in the filing office that include the Debtor's 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 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

   - 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

<table>
<thead>
<tr>
<th>CERTIFIED COPY REQUEST — Filing office requested to furnish CERTIFIED copies per request indicated in this item 3</th>
</tr>
</thead>
</table>

<table>
<thead>
<tr>
<th>Record Number</th>
<th>Date Record Filed (if required)</th>
<th>Type of Record and Additional Identifying Information (if required)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

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 specified city, state, and country are being requested (optional), show that Secured Party's address in item 4c

<table>
<thead>
<tr>
<th>A. ORGANIZATION’S NAME</th>
</tr>
</thead>
<tbody>
<tr>
<td>B. INDIVIDUAL'S SURNAME</td>
</tr>
<tr>
<td>FIRST PERSONAL NAME</td>
</tr>
<tr>
<td>ADDITIONAL NAME(S)/INITIAL(S)</td>
</tr>
<tr>
<td>SUFFIX</td>
</tr>
</tbody>
</table>

| C. CITY |

| STATE |

| COUNTRY |

5. **DELIVERY INSTRUCTIONS** (request will be filled by mail sent to address shown in item 2 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 deailed method here if available from this office; provide delivery information (e.g., delivery service’s name, address, addressee’s phone #, etc.)

**Office of the Secretary of State of Texas**
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.

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.

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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  § 4.1:1 Confirm Debtor’s Location .................................. 4-1
  § 4.1:2 Motivate Debtor to Pay ....................................... 4-1
  § 4.1:3 Determine Debtor’s Ability to Pay or Amenability to Suit ........ 4-1
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Chapter 4

Communicating with Debtor

I. Demand and Negotiation

§ 4.1 Why Make Demand?

§ 4.1:1 Confirm Debtor’s Location

Mailing an envelope to the debtor at his last known address will either confirm that address as correct or provide information about a new forwarding address. If the notation “address correction requested” is included on the envelope, the post office will provide a forwarding address. See section 3.4 in this manual.

§ 4.1:2 Motivate Debtor to Pay

Letters from attorneys can be effective tools to motivate the debtor to pay. Every communication with the debtor or debtor’s attorney should encourage payment. A firm but civil tone to the attorney’s communications, combined with the message that this debt is one that must be dealt with, may encourage payment in situations in which a more strident tone might not.

A demand letter to the debtor should contain an assertion that the creditor has instructed the attorney to make only one demand for payment before filing suit. This assertion should be made only if true. Although there is apparently no liability for making such an untrue statement in connection with a commercial debt (as contrasted with a consumer debt, where such a false assertion violates the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692–1692p), the attorney sabotages his own authority and credibility by doing so. If the nature of the debt requires notice of intent to accelerate, that notice constitutes a second demand. See form 4-1 in this chapter for a commercial debt demand letter, form 4-2 for a consumer debt demand letter, and form 4-3 for a notice of intent to accelerate.

Demand letters should be sent both by certified mail, return receipt requested, and by regular first-class mail to take advantage of the mail presumption.

§ 4.1:3 Determine Debtor’s Ability to Pay or Amenability to Suit

All communications to or with the debtor should be open-ended, encouraging the free flow of information from the debtor. If possible, the attorney should confirm the debtor’s address by asking the debtor if he received the demand letter and follow up with a request to confirm the debtor’s current mailing address. Dialogue with the debtor can tell the attorney about the debtor’s financial and employment status and whether the debtor has foreclosures or judgments. Most importantly, listening for any complaints the debtor may have can help determine if the debtor may file a counterclaim. While not everything the debtor says may necessarily be true, it will help the attorney decide in recommending suit and in drafting a more thorough status update for the client.
The attorney should never stop attempting to collect the debt. If the debtor responds that he is unable to pay in full, the attorney should suggest that the debtor offer to set up a payment plan or be creative in trying to reach a compromise, such as allowing the debtor to make smaller payments during off-peak times. See section 4.12 below.

§ 4.1:4 Predicate Liability for Attorney’s Fees

In a variety of cases in which there is no express contractual liability for attorney’s fees, demand for payment must be made before attorney’s fees can be recovered. This topic is discussed at length in section 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


If a claim of representation comes from the debtor instead of the debtor’s attorney, the attorney should verify representation by telephone or written contact to the debtor’s attorney. A letter to the debtor’s alleged attorney may be advisable, asking for verification of representation within a period of time and stating that otherwise it will be assumed that there is no such representation. Written permission from the debtor’s attorney is needed before the collection attorney may speak to the debtor, even if the debtor has initiated the contact.

§ 4.3 If Debtor Requests Verification of Debt

The validation notice required by the Fair Debt Collection Practices Act for consumer claims is governed by 15 U.S.C. § 1692g and is discussed more extensively at section 2.13 in this manual. If it is a commercial claim, verification is not required. But as a practical matter, it may help in furthering discussions and obtaining payment.

[Sections 4.4 through 4.10 are reserved for expansion.]

II. Payment Agreement with Debtor

§ 4.11 Encouraging Agreement

If the debtor knows that the debt is not going to be forgotten or forgiven and that all the creditor’s remedies (such as repossession, foreclosure, execution, garnishment, or turnover) will cause a significant disruption in his life, the debtor may be motivated to work with the creditor’s attorney. When encouraging the debtor in this manner, it is entirely proper for the attorney to point out the remedies available to the creditor—if the action is lawful and the creditor or debt collector intends to take that action. 15 U.S.C. § 1692e(4), (5); see United States v. National Financial Services, Inc., 98 F.3d 131 (4th Cir. 1996); Bentley v. Great Lakes Collection Bureau, 6 F.3d 60 (2d Cir. 1993).

§ 4.12 Potential Settlement Means

Assuming that the debtor does not have sufficient liquid resources to pay the debt, several means exist for settlement. A non-exhaustive 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 14.24 regarding deficiency suits.
§ 4.14:2    Equity Lien against Debtor’s Real Property

Traditionally, Texas creditors have shied away from securing any payment agreement with a consumer debtor that included a mortgage against the debtor’s real property, because such a mortgage would be unenforceable against the debtor’s homestead. Such loans are possible now, but the creditor and the attorney should know the numerous requirements involved with such a loan. From a debt collection view, the most important requirement is that a home equity loan must be nonrecourse, unless the owner or his spouse obtained the loan by actual fraud. Tex. Const. art. XVI, § 50(a)(6)(C). This nonrecourse provision will limit the creditor’s ultimate recovery to the amount realized at foreclosure sale.

§ 4.15    Waiver of Limitations

See section 17.65 in this manual regarding waiver of limitations.
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 or if no arrangements are made to satisfy the debt, [name of creditor] will have no alternative but to pursue collection of this debt by all lawful means and through all remedies available at law. I trust, however, that this will not be necessary.

If you will forward to this office the amount of $[amount] within ten days from the date of this letter, we can all then put this matter to rest.

If you have any questions, please do not hesitate to call or write.

Sincerely yours,

[Name of attorney]

Certified Mail No. [number]
Return Receipt Requested
Form 4-2

This letter contains both the validation notice and the “mini-Miranda” notice required by the Fair Debt Collection Practices Act, 15 U.S.C. § 1692. If there is any chance that the debt could be considered a consumer debt, the attorney should send this letter instead of the one at form 4-1 in this chapter. See sections 2.13 through 2.16 in this manual regarding communicating with consumers.

The attorney must be careful not to list an amount that is different than the full amount due as of the date of the letter (see Miller v. McCalla, Raymer, Padrick, Cobb, Nichols & Clark, LLC, 214 F.3d 872 (7th Cir. 2000)), and neither the letter nor any subsequent communications during the thirty-day validation period should overshadow or contradict the consumer’s thirty-day validation rights (see Avila v. Rubin, 84 F.3d 222 (7th Cir. 1996); Russell v. Equifax A.R.S., 74 F.3d 30 (2d Cir. 1996); Graziano v. Harrison, 950 F.2d 107 (3d Cir. 1991); Miller v. Payco-General American Credits, Inc., 943 F.2d 482 (4th Cir. 1991); Swanson v. Southern Oregon Credit Service, Inc., 869 F.2d 1222 (9th Cir. 1988)).

Making demand for attorney’s fees in the initial Demand and Notice Letter is not recommended, especially if the contract does not provide for it.

Demand and Notice Letter—Consumer Debt

I AM ACTING AS A DEBT COLLECTOR IN THIS MATTER. I AM ATTEMPTING TO COLLECT A DEBT, AND ANY INFORMATION OBTAINED WILL BE USED FOR THAT PURPOSE.

[Date]

[Name and address of debtor]

Re: [name of creditor], Creditor

[include if applicable: Original Creditor: [name of creditor]]

[include if applicable: Account number [number]]

[other information describing debt, if applicable]

Our file number: [law office file number]

[Salutation]

I have been retained by [name of creditor] to collect the debt described above. The amount owed is $[amount]. This total amount consists of $[amount], principal; $[amount], interest accrued through [date]; and [itemize other charges]. Please direct any payments to this office.
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.

Unless, within thirty days after your receipt of this letter, you dispute the validity of the debt or any portion of it, I will assume the debt to be valid. If, within that same thirty-day period, you notify me in writing that the debt or any portion of it is disputed, I will obtain a verification of the debt or, if the debt is founded on a judgment, a copy of the judgment, and I will mail you a copy of the verification or judgment. If the original creditor is different from the creditor named above, then on your written request within the same thirty-day period I will provide you with the name and address of the original creditor.

If you have any questions, please do not hesitate to call or write.

Sincerely yours,

[Name of attorney]

Certified Mail No. [number]
Return Receipt Requested
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
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: ________________________________
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

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Chapter 5

Repossession

I. Overview

§ 5.1 Caveats Regarding Self-Help Repossession

This discussion and the forms in this chapter should be used only as a starting point for research on each transaction. Laws relating to contracts, waivers, default, acceleration, repossession, and related topics are scattered throughout overlapping state and federal statutes, rules of court, case law, and administrative opinions. The requirements for an action such as giving notice of default, for instance, may vary depending on the nature of the underlying transaction and the applicable law. The attorney should always research each case separately, keeping in mind that the law relating to debtors’ and creditors’ rights changes rapidly.

The applicable contract should be read carefully. Many rights and obligations in a secured transaction can be altered or waived by contract. Notice provisions after default or before disposition of collateral are particularly subject to amendment by contract, although revised chapter 9 of the Texas Business and Commerce Code places substantial limitations on waiver and variance of rights and duties. See Tex. Bus. & Com. Code §§ 9.602, 9.624. On the other hand, the parties may determine by agreement the standards measuring the fulfillment of the rights of a debtor or obligor and the duties of a secured party under any rule stated in section 9.602 if the standards are not “manifestly unreasonable.” Tex. Bus. & Com. Code § 9.603(a). The parties may not agree to determine the standards concerning the duty to refrain from breaching the peace under Tex. Bus. & Com. Code § 9.609. Tex. Bus. & Com. Code § 9.603(b).

Attorneys may be debt collectors under both the federal Fair Debt Collection Practices Act and the Texas Debt Collection Practices Act and therefore should comply with the provisions of both. See sections 2.10 through 2.35 in this manual.

§ 5.2 Repossession Statutes

Most self-help repossessions are based on security agreements arising under Uniform Commercial Code article 9. The principal provision in chapter 9 governing repossession is Tex. Bus. & Com. Code § 9.609. Under this section, after default a secured party may take possession of the collateral and, without removal, may render equipment unusable and dispose of collateral on a debtor’s premises under section 9.610. Tex. Bus. & Com. Code § 9.609(a). The secured party may repossess the collateral pursuant to judicial process or may do so without judicial process as long as he proceeds without breaching the peace. Tex. Bus. & Com. Code § 9.609(b). Finally, if so agreed, and in any event after default, a secured party may require the debtor to assemble the collateral and make it available to the secured party at a place to be designated by the secured party that is reasonably convenient to both parties. Tex. Bus. & Com. Code § 9.609(c).

The phrase without breach of the peace is not defined in chapter 9, and its interpretation is left to the courts. However, there is no reason to think that the phrase means anything different under the revisions to chapter 9 than it did before July 1, 2001, and presumably prior judicial interpretations of the phrase are still good law.
It is clear from the official comments to the section that actions of third-party contractors, such as professional repossession firms, are subject to the same requirements concerning breach of the peace. Section 9.609 confirms and codifies the rule of such cases as *MBank El Paso, N.A. v. Sanchez*, 836 S.W.2d 151 (Tex. 1992). Also, the use of law-enforcement officers who are not acting under the judicial process to repossess property is not authorized by section 9.609 and may involve a breach of the peace, as some cases have held under prior law. For additional discussion of self-help repossession, see sections 5.21 through 5.23 below.

Section 9.609 permits the sale of the collateral on the debtor’s premises, but, unlike prior Code section 9.503, section 9.609 expressly conditions this right on the debtor’s (or obligor’s) default. On the other hand, a debtor and secured party are free to agree that the secured party may require the debtor to assemble collateral and make it available from time to time at a place that the secured party designates, and such agreements are valid whether or not they are conditioned on the debtor’s or obligor’s default. *Tex. Bus. & Com. Code § 9.609(c).*

Unsecured parties may have rights of self-help repossession. They include—

1. sellers of goods sold to an insolvent buyer, including a buyer who fails to pay for the goods (see section 5.51 below);
2. lessors of goods leased to lessees who default on the lease (see section 5.52 below); and
3. repairers of motor vehicles, motorboats, vessels, or outboard motors (see section 7.2 in this manual).

§ 5.3 Constitutionality

The issue of due process has frequently been raised in self-help cases. The Fifth Circuit and other circuits have held that repossession under Uniform Commercial Code article 9 is free from federal due-process scrutiny in a civil rights action, for lack of requisite state action. *Calderon v. United Furniture Co.*, 505 F.2d 950 (5th Cir. 1974).

§ 5.4 Considerations in Choosing Self-Help Repossession or Judicial Foreclosure

**Breach of Peace:** Self-help repossession cannot be used if the repossession results in a breach of the peace. *Tex. Bus. & Com. Code § 9.609(b).* For a discussion of breach of the peace, see section 5.2 above and sections 5.21 and 5.23 below.

**Perishable Collateral:** If the collateral is rapidly deteriorating or its value is diminishing, it may be quicker or more effective to file suit, obtain a writ of sequestration, and then hold an emergency sale. Care must be taken in sequestering and disposing of collateral. For a discussion of sequestration, see sections 8.16 through 8.19 in this manual.

**Disposition of Collateral and Deficiency:** The secured creditor is put to an election regarding the repossessed collateral; he may sell it or retain it in complete satisfaction of the debt. *Tex. Bus. & Com. Code §§ 9.610, 9.622; Tanenbaum v. Economics Laboratory, Inc.*, 628 S.W.2d 769, 771 (Tex. 1982); *Knight v. General Motors Acceptance Corp.*, 728 S.W.2d 480, 483 (Tex. App.—Fort Worth 1987, no writ). See sections 5.32 through 5.38 below regarding sale or disposition of the collateral and section 5.39 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 14.23:1 in this manual.

§ 5.11:2 Perfection


Most security interests are perfected by filing a financing statement with the secretary of state of the state in which the collateral is located. Perfection establishes the priority of competing rights in the collateral. Perfection is not required to establish a valid security interest and is therefore not required to repossess. Gulf Oil Co. v. First National Bank of Hereford, 503 S.W.2d 300, 307 (Tex. Civ. App.—Amarillo 1973, no writ). Failure to perfect, however, may give away valuable rights to others claiming an interest in the collateral. A full discussion of the various means of perfection is beyond the scope of this manual, but note that taking possession or control, or the purchase of certain types of collateral (for example, instruments or investment property), may permit a later secured party or a purchaser to take priority over an earlier secured party who merely filed a financing statement. See Tex. Bus. & Com. Code §§ 9.312 cmt. 2, 9.328(1). Certain types of security interests are automatically perfected on attachment. See Tex. Bus. & Com. Code § 9.309.

§ 5.11:3 Priorities between Conflicting Claims in Collateral

Unperfected Creditor vs. Unperfected Creditor: If no secured creditor perfects, the first interest to attach has priority. Tex. Bus. & Com. Code § 9.322(a)(3). In this instance, the creditor should perfect immediately if possible; a junior lienholder can jump ahead by perfection.

Perfected Creditor vs. Unperfected Creditor: The perfected security interest has priority, even if that creditor has actual knowledge of a prior attaching security interest. Tex. Bus. & Com. Code § 9.322(a)(2).
**Perfected Creditor vs. Perfected Creditor:** Conflicting perfected security interests rank according to priority in time of filing or perfection. Priority dates from the earlier of the time a filing covering the collateral is first made or the security interest is first perfected, if there is no period thereafter during which there is neither filing nor perfection. Tex. Bus. & Com. Code § 9.322(a)(1). “Filing” refers to the filing of an effective financing statement. See Tex. Bus. & Com. Code § 9.310. “Perfection” refers to the acquisition of a perfected security interest, that is, one that has attached and as to which any required perfection step has been taken. See Tex. Bus. & Com. Code § 9.308. Certain security interests are automatically perfected on attachment. See Tex. Bus. & Com. Code §§ 9.308, 9.309.

**Purchase-Money Security Interest:** A purchase-money security interest (PMSI) in collateral other than inventory or livestock has priority over a competing interest in the same collateral or its proceeds if the creditor perfects at the time the debtor receives possession of the collateral or within twenty days thereafter. Tex. Bus. & Com. Code § 9.324(a). See also Tex. Bus. & Com. Code § 9.324(b) regarding inventory. The provisions of revised chapter 9 on purchase-money security interests have expanded the definition of a PMSI somewhat and made the preferred status of a PMSI, in transactions other than consumer transactions at least, easier to maintain than it was before. Tex. Bus. & Com. Code § 9.103. Note that in a transaction other than a consumer-goods transaction, a secured party claiming a PMSI has the burden of establishing the extent to which the security interest is a PMSI. Tex. Bus. & Com. Code § 9.103(g).

A detailed discussion of the new definitions and the new priority rules between competing PMSIs is beyond the scope of this manual; see, however, sections 9.103 and 9.324 and the official comments to the Texas Business and Commerce Code for the rules governing priority of a PMSI.

§ 5.11:4  **Client’s Financing Statement**

To determine whether a financing statement has been filed with the Texas secretary of state, the attorney should call the secretary of state’s office (512-475-2703), give the name of the debtor, and request a search or should inspect the client’s financing statement and determine whether the secretary of state’s filing stamp (indicating the date and place of filing) is shown in the upper right corner of the statement. Alternatively, UCC filings may be examined on the Texas secretary of state’s website, SOS Direct, at [http://direct.sos.state.tx.us](http://direct.sos.state.tx.us).

For a form UCC1 financing statement, see form 5-1 in this chapter. See section 3.21 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 3.21 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 criminal offense of hindering a secured creditor. See Tex. Penal Code § 32.33(c), discussed at section 6.27 in this manual. Although ethical considerations are beyond the scope of this manual, note that pursuing criminal activity may implicate serious ethical concerns pursuant to rule 4.04(b) of the Texas Rules of Disciplinary Conduct if not handled properly and kept separate from the civil proceeding.

[Sections 5.14 through 5.20 are reserved for expansion.]

III. Precautions

§ 5.21    Breach of Peace

§ 5.21:1    Requirement of No Breach of Peace

Unless otherwise agreed, a secured party may repossess collateral without judicial process if repossession can be achieved without a breach of the peace. Tex. Bus. & Com. Code § 9.609. The creditor’s duty not to breach the peace is not delegable, even if the repossession is performed by an independent contractor. MBank El Paso, N.A. v. Sanchez, 836 S.W.2d 151, 153 (Tex. 1992).
§ 5.21:2  Contractual Provisions

Texas courts generally uphold the legality of consumer contract clauses authorizing repossession of collateral wherever it may be found with free right of entry. See, e.g., Woolard v. Texas Motors, Inc., 616 S.W.2d 706, 709 (Tex. Civ. App.—Fort Worth 1981, no writ). Most courts have construed this provision as one of limitation on the creditor that encourages peaceful repossession without trespass. The Supreme Court of Texas has not addressed this specific issue, but in dictum it repeated a remark in Woolard that such a provision would be unlawful if it read, “Seller shall have the right to repossess the property wherever the same may be found.” Gonzalez v. Gainan’s Chevrolet City, Inc., 690 S.W.2d 885, 888 (Tex. 1985). A security agreement may not authorize a breach of the peace. Tex. Fin. Code § 348.411.

§ 5.21:3  Examples of Breach of Peace

The following acts have been held to be a breach of the peace:


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).


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 completion. Using a writ of sequestration to secure the property and then attempting to nonsuit would be grounds for forfeiture of the bond. See section 8.2 in this manual regarding garnishment, sequestration, attachment, and injunction.

§ 5.22 Conversion of Nonsecured Property

During repossession, a creditor may inadvertently take possession of personal property in which the creditor does not have a security interest. For example, he may unknowingly take possession of tools or other items in the trunk of a car being repossessed. In such a case, the creditor must notify the debtor, within fifteen days of discovering the property, of the debtor’s rights to identify and claim the property at a reasonable time before the thirty-first day after the date notice is given. The notice must also tell the debtor where the property can be reclaimed. If the debtor fails to reclaim the property, the creditor may either keep it or dispose of it in a reasonable manner and distribute the proceeds according to applicable law. *Tex. Fin. Code § 348.407*.

The parties cannot contract to exempt the secured party from liability if the debtor’s unsecured property is converted by the creditor after repossession. Such a contract is unenforceable as against public policy. *Ford Motor Credit Co. v. Cole*, 503 S.W.2d 853, 856 (Tex. Civ. App.—Fort Worth 1973, writ dism’d).
§ 5.23 Practical Considerations in Self-Help Repossession

The secured party has a nondelegable duty to effect self-help repossession without a breach of the peace and may be held liable for the acts committed during self-help repossession by an independent contractor such as a towing company. *MBank El Paso, N.A. v. Sanchez*, 836 S.W.2d 151, 152–54 (Tex. 1992). The creditor and his attorney should exercise extreme caution in self-help repossession. A creditor may be held liable for his own or his attorney’s conduct in repossessing property. Damages are potentially severe. *See Southwestern Bell Telephone Co. v. Wilson*, 768 S.W.2d 755, 758–59 (Tex. App.—Corpus Christi 1988, writ denied) (creditor liable for attorney’s tortious conduct in executing on judgment).

The following is a nonexclusive list of “do’s” and “don’t’s” for creditors attempting repossession.

**DO**

- make sure that there is a valid security interest in the collateral—in other words, that there is a right to repossess.
- make sure that there is no security interest that has priority over the one being enforced.
- review the contract provisions to make certain that they are in compliance with current statutes and case law. If necessary, send notice to correct a violation of the Texas Finance Code.
- ensure that the repossession procedure complies with any specific requirement of the security agreement—for example, a twenty-day notice before sale.
- make sure that the proper notices have been sent to the debtor and that the default permits repossession.
- make sure that no damage is done to other property in the debtor’s possession when the collateral is removed.
- protect property belonging to third parties.
- be sure the correct property is repossessed.
- cease all repossession efforts at the first sign of resistance to the repossession; let the property be recovered through the courts.
- immediately notify the debtor of any items of personal property other than the repossessed collateral that were inadvertently taken during the repossession and return the property immediately on demand.

**DON’T**

- make any show of force or threat, or do anything that might be interpreted as a threat to the debtor. Even an implied threat can give rise to substantial liability in a suit by the debtor against the repossessor. This is true even if the debt is valid.
- use law enforcement officers, whether on or off duty or in or out of uniform, to assist in the repossession. Don’t even bring them to the repossession.
- try to obtain the collateral if the debtor offers any resistance, including mere verbal resistance.
- enter a building or enclosed area through an entrance that is closed or locked unless the debtor or his authorized agent has granted permission.
- use more than one person in making the actual repossession, speak in a gruff voice, or use harsh language. Intimidating the debtor, even through implication, can incur liability.
- 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.*
§ 5.31 Notice

§ 5.31:1 Notice Requirement

Under most circumstances, reasonable notification of the sale must be given to—

1. the debtor;
2. any secondary obligor;
3. any other person from whom the secured party has received, before the notification date, an authenticated notification of a claim of an interest in the collateral; and,
4. if the collateral is anything other than consumer goods, any secured party that has perfected its security interest under the Texas Business and Commerce Code or under another statute, regulation, or treaty (as described in Code section 9.311).

Tex. Bus. & Com. Code § 9.611(b). Exceptions are set out in section 5.31:3 below. The careful secured party will avail himself of the safe harbor offered by Tex. Bus. & Com. Code § 9.611(e), by requesting in a commercially reasonable manner information concerning financing statements indexed under the debtor’s name in the office indicated in Tex. Bus. & Com. Code § 9.611(c)(3)(B). This must be done not later than twenty days or earlier than thirty days before the notification date. The secured party should then send authenticated notifications of disposition to each secured party or other lienholder named in that response whose financing statement covers the collateral. Tex. Bus. & Com. Code § 9.611(b)–(c). The failure to order the search does not necessarily mean that the notification was not done in a commercially reasonable manner, but, considering the relative ease and low expense of doing so in most cases, there is usually no reason not to. Otherwise, the secured party takes the risk that his information about other claimants of an interest in the collateral may be inaccurate. Any secured party or lienholder of record who (1) is not notified of the disposition but whose name would have been found if the search had been ordered or (2) has sent a prior authenticated notification of a claim of an interest in the collateral and who does not receive an authenticated notification of disposition has the right to recover any loss resulting from the failure to receive notification. See Tex. Bus. & Com. Code § 9.625(b).

If the search is ordered, but the results are not received in time to be included in the notification, the secured party has discharged his duty under section 9.611(c) of the Texas Business and Commerce Code notwithstanding that he did not send a notice to a secured party of record whose name was on the search results when finally obtained. Tex. Bus. & Com. Code § 9.611(e)(2). Note that the failure to receive the search results before the notification date has no effect on the secured party’s duty to notify a person from whom an authenticated notification of a claim of an interest in the collateral has been received before the notification date. See Tex. Bus. & Com. Code § 9.611(c)(3).

Although earlier Texas cases held that oral notice was not necessarily unreasonable and that the medium of notice was only one factor in determining whether notice is reasonable, Tex. Bus. & Com. Code § 9.611(a)(1) requires that an “authenticated notice of disposition” be sent. This means that at the very least, an electronic notification complying with the definition of “authenticate” in Tex. Bus. & Com. Code § 9.102(a)(7) must be sent. See Tex. Bus. & Com. Code § 9.611 UCC cmt. 5.

It is important to understand that section 9.611 no longer allows the disposing secured party to remain passive, sending notice only to those parties that have contacted him. To ensure that notice is sent to all required parties, the foreclosing creditor not only must order a UCC search report listing financing statements filed against the debtor but also must be familiar with other means of perfection and order searches from appropriate recording officers. See Tex. Bus. & Com. Code §§ 9.701–.708 for the provisions governing the transition period that took place from July 1, 2001, until July 1, 2006.

§ 5.31:2 Consequences of Improper Notice

Proper notice is a prerequisite to any subsequent deficiency suit. Tanenbaum v. Economics Laboratory, Inc., 628 S.W.2d 769, 772 (Tex. 1982); see also Wright v. Interfirst Bank Tyler, N.A., 746 S.W.2d 874, 877–78 (Tex. App.—Tyler 1988, no writ); Knight v. General Motors Acceptance Corp., 728 S.W.2d 480, 483 (Tex. App.—Fort Worth 1987, no writ); Gentry v. Highlands State Bank, 633 S.W.2d 590, 591 (Tex. App.—Houston [14th Dist.] 1982, writ ref’d). The Tanenbaum rule is one of election of remedies, not forfeiture, and has even been applied against the Federal Deposit Insurance Corporation and its successors. See, e.g., FDIC v. Payne, 973 F.2d 403, 410 (5th Cir. 1992); In re Norriss Bros. Lumber Co., 133 B.R. 599 (N.D. Tex. 1991). Under Tex. Bus. & Com. Code § 9.625, the failure to give proper notice can also subject the secured party to injunctive relief, damages, and penalties. See section 17.50 in this manual. For a more complete discussion of deficiency suits, see section 14.24.

§ 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.


The statute offers a model form; see form 5-3 in this chapter. Note that this notice may be used for either a public or a private sale.

Practice Note: The safest course in describing the collateral is to reproduce exactly the description from the security agreement or financing statement. Incorporating descriptions by references to documents that may be misplaced or unavailable later is risky.

The right to an accounting may carry a fee with it. Section 9.613 does not expressly reference or incorporate section 9.210, which treats the subject of requests for accounting, lists of collateral, or statements of account generally and which provides that a debtor is entitled without charge to one response to a request during any six-month period and allows the secured party to require payment of a charge, not exceeding $25, for each additional response.

A notice that substantially complies with the five requirements of section 9.613 is sufficient. Tex. Bus. & Com. Code § 9.613(3). But a creditor that departs from, negligently completes, or supplements the model form invites challenges to the propriety of his notice. Whether a notice that lacks one or more of the five requirements is nonetheless sufficient is a question of fact. Tex. Bus. & Com. Code § 9.613(2).

Practice Note: When in doubt about whether a transaction is a consumer or nonconsumer transaction, use the consumer notice found in Tex. Bus. & Com. Code § 9.614. See section 5.31:6 below.

§ 5.31:6 Contents of Notice—Consumer-Goods Transactions

Unlike Tex. Bus. & Com. Code § 9.613, which provides that a notice is sufficient as long as the required information is provided and may be sufficient even if some information is missing, Tex. Bus. & Com. Code § 9.614 requires that a notice in a consumer-goods transaction contain all of the following:
1. a description of the debtor, the secured party, and the collateral that is being disposed of;
2. a description of the method of disposition;
3. a statement that the debtor is entitled to an accounting of the unpaid debt and the charge, if any, for the accounting;
4. the time and place of public sale or the time after which any other disposition is to be made;
5. a description of the recipient’s liability for any deficiency;
6. a telephone number from which the recipient can obtain the redemption price of the collateral; and
7. a telephone number or mailing 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 5-4 in this chapter.


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 2.110 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 14.22. See form 5-5 in this chapter for a letter giving notice of default and intent to accelerate and form 5-6 for a letter giving notice of acceleration.
§ 5.32 Commercial Reasonableness of Sale

§ 5.32:1 Requirement of Commercial Reasonableness

The secured party may dispose of the collateral by either public or private sale. In both instances, the Business and Commerce Code requires that the sale be conducted in a “commercially reasonable” manner. Tex. Bus. & Com. Code § 9.610(b). “Commercially reasonable,” however, is not defined, leaving the court and jury to judge all the circumstances of the sale after the fact. Whether the sale is conducted privately or publicly, the creditor should retain documentation of the details of the sale so that, if the debtor contests the sale’s commercial reasonableness, the creditor can substantiate his efforts.

The commercial reasonableness requirement is an implied covenant in all contracts governed by article 9 of the Uniform Commercial Code. Under prior law, breach of this covenant was treated as a breach of contract, and no punitive damages were recoverable. Texas National Bank v. Karnes, 717 S.W.2d 901, 903 (Tex. 1986). The revised chapter 9 expressly provides for actual damages, liquidated damages, and penalties. Tex. Bus. & Com. Code § 9.625. See the discussion in section 17.50 in this manual.

§ 5.32:2 Choice of Kind of Sale

The creditor has broad choices regarding his handling of the collateral. He can dispose of it by public or private sale, in bulk or in lots, at any time or place and on any terms, as long as the sale is commercially reasonable. He may also elect to retain the collateral in satisfaction of the debt. Tanenbaum v. Economics Laboratory, Inc., 628 S.W.2d 769, 771–72 (Tex. 1982).

It is recommended that all public sales to dispose of collateral be advertised at least three times in a newspaper of general circulation in the geographical area in which the sale is to be conducted. See form 5-7.

§ 5.32:3 Factors in Determining Commercial Reasonableness

The revised chapter 9 of the Texas Business and Commerce Code, like the prior version, does not define commercial reasonableness, although it does provide some safe harbors and some examples. Section 9.627 states that the fact that a greater amount could have been obtained by a collection, enforcement, disposition, or acceptance at a different time or by a different method from that selected by the secured party is not of itself sufficient to preclude the secured party from establishing that the collection, enforcement, disposition, or acceptance was made in a commercially reasonable manner. Tex. Bus. & Com. Code § 9.627(a). A disposition of collateral is made in a commercially reasonable manner if the disposition is made—

1. in the usual manner on any recognized market;

2. at the price current in any recognized market at the time of the disposition; or

3. otherwise in conformity with reasonable commercial practices among dealers in the type of property that was the subject of the disposition.

Tex. Bus. & Com. Code § 9.627(b). A collection, enforcement, disposition, or acceptance is commercially reasonable if it has been approved in a judicial proceeding, by a bona fide creditors’ committee, by a representative of creditors, or by an assignee for the benefit of creditors. Tex. Bus. & Com. Code § 9.627(c). These approvals are not mandatory, however, and the failure to obtain them does not mean that the collection, enforcement, disposition, or acceptance is not commercially reasonable. Tex. Bus. & Com. Code § 9.627(d).
Some factors the courts have considered in determining whether a sale was commercially reasonable are—

1. general market demand for the type of goods in question at the time of the sale;
2. whether the creditor tried to obtain the best price for the collateral;
3. what type and how many advertisements or solicitations for bids were used by the creditor to notify the general public of the sale;
4. adequacy of the time provided for responding to the notice or advertisement before the sale occurred;
5. opportunity to inspect the goods;
6. the sale location’s accessibility to prospective purchasers and the demand for goods at that location;
7. the manner in which bids or purchase offers were made and accepted;
8. the cost of the sale;
9. the cost of reconditioning, rebuilding, or repairing the goods;
10. the price obtained at the sale and the later resale price (if resold); and
11. the fact that full market value is seldom obtained at forced sales.

_Havins v. First National Bank of Paducah_, 919 S.W.2d 177, 181 (Tex. App.—Amarillo 1996, no writ); _Pruske v. National Bank of Commerce_, 533 S.W.2d 931, 937 (Tex. Civ. App.—San Antonio 1976, no writ). The fact that the fair market value was not received at the sale or that a better price could have been obtained does not necessarily render the sale commercially unreasonable. _Tex. Bus. & Com. Code § 9.627; Siboney Corp. v. Chicago Pneumatic Tool Co._, 572 S.W.2d 4, 8 (Tex. Civ. App.—Houston [1st Dist.] 1978, writ ref’d n.r.e.).

§ 5.33 Right to Redeem Collateral

At any time before the secured party has disposed of the collateral, entered into a contract for its disposition, or discharged the obligation by retaining the collateral in satisfaction of the debt, the debtor or any other secured party may redeem the collateral, unless otherwise agreed in writing after default. Redemption requires fulfilling all obligations secured by the collateral, paying the secured party’s expenses in retaking, holding, and preparing the collateral for disposition and arranging for a sale, and paying reasonable attorney’s fees and legal expenses to the extent provided in the contract and not prohibited by law. _Tex. Bus. & Com. Code §§ 9.608(a)(1)(A), 9.615(a)(1), 9.623(b)._ It is clear that the right of redemption extends to nonpossessory collateral, such as accounts receivable, as well as possessory collateral, such as goods. Except in a consumer-goods transaction, a debtor or secondary obligor may waive the right to redeem collateral under section 9.623 only by an agreement to that effect entered into and authenticated after default. _Tex. Bus. & Com. Code § 9.624(c)._ Otherwise, the right may not be waived at all. _Tex. Bus. & Com. Code § 9.602(11)._ 

§ 5.34 Application of Proceeds of Sale

The proceeds of the sale are to be applied in the following order to—

1. the reasonable expenses of retaking, holding, preparing for disposition, processing, and disposing, and, to the extent provided for in the agreement 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.


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 14.24 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.


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).


Finally, Tex. Bus. & Com. Code § 9.618 governs certain situations in which a secondary obligor, such as a guarantor or surety, acquires the rights and becomes obligated to perform the duties of the secured party in circumstances other than at a foreclosure sale. Although brief, the section is complex and beyond the scope of this manual. If representing a guarantor or surety that is considering a “take-out” of the secured party, the attorney must study this section and the official comment carefully and evaluate whether the client will become responsible for giving notices, for care and custody of the collateral, and the like.

§ 5.36 Notice to Taxing Authorities of Sale of Collateral

§ 5.36:1 Notice to Internal Revenue Service

If the Internal Revenue Service has properly filed a notice of federal tax lien with the Texas secretary of state or the county clerk against the debtor’s property more than thirty days before sale of the collateral, notice of the sale must be sent to the IRS at least twenty-five days before the sale. 26 U.S.C. § 7425(c)(1). If notice is given, the IRS has a right to redeem the property for 120 days after sale, but after the redemption period the lien will no longer attach. 26 U.S.C. § 7425(d)(1). If no notice is given, the lien remains against the property, even though it may have been subordinate to the creditor’s lien. 26 U.S.C. § 7425(b)(1). For a notice to the IRS, see form 5-9 in this chapter.

A search of the relevant records should be made and should go back at least ten years, as tax liens generally become unenforceable after ten years from the date of assessment. The taxpayer and the IRS can agree to extend the ten-year period. 26 U.S.C. § 6502(a). A variety of occurrences, including a bankruptcy stay, will suspend the running of the ten-year period. 26 U.S.C. § 6503. Note also the refiling rights of the IRS as set out in 26 U.S.C. § 6323(g).

Any notices of possible federal tax liens filed against persons with the same or similar names as the debtor should be examined carefully. The notice will have either a taxpayer identification number or a Social Security number. The possibility that the defaulting taxpayer and defaulting debtor are different people or entities may be established based on information in the client’s file such as a credit application or report. 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 involv-
ing 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.


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(c). 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 authenti-
cated 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).


See form 5-10 in this chapter for a letter to the debtor giving notice of intent to retain collateral.

§ 5.40 Penalties for Failure to Comply with Chapter 9

If the creditor fails to comply with the provisions of chapter 9 of the Texas Business and Commerce Code, including those
relating to collection, enforcement, disposition, and acceptance, certain aggrieved persons may be entitled to injunctive relief
and to recover damages incurred as a result, including liquidated damages and statutory penalties. Tex. Bus. & Com. Code
§ 9.625.

[Sections 5.41 through 5.50 are reserved for expansion.]

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 deliv-
er 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.


Acceptance of a check is considered a cash transaction, not a credit transaction. Ranchers & Farmers Livestock Auction Co., 531 S.W.2d at 169.

§ 5.51:3 Limitations and Waiver

The seller’s right of reclamation under either Tex. Bus. & Com. Code § 2.507 or § 2.702 is not a security interest within the scope of UCC Article 9 secured transactions. However, the seller may acquire a security interest by complying with the provisions of Chapter 9. See Tex. Bus. & Com. Code § 1.201(b)(35). The right to reclaim under Tex. Bus. & Com. Code § 2.702 is limited to a ten-day period from delivery of the goods, and, therefore, if the right is not exercised within that period, it is waived. If there has been a misrepresentation of solvency in writing by the buyer to the particular seller within the three-month period before delivery, the ten-day limitation does not apply. After this right is waived, the seller’s remedies are then on the instrument and for breach of contract. Ranchers & Farmers Livestock Auction Co. v. First State Bank, 531 S.W.2d 167, 169 (Tex. Civ. App.—Amarillo 1975, writ ref’d n.r.e.).

The seller may afford himself greater protection by having the debtor sign a security agreement describing the collateral, then taking the applicable steps required for perfection of a purchase-money security interest. Peerless Equipment Co. v. Azle State Bank, 559 S.W.2d 114, 115 (Tex. Civ. App.—Fort Worth 1977, no writ); see also Tex. Bus. & Com. Code § 1.201(b)(35).
§ 5.52  Leases

§ 5.52:1 Governing Law

Transactions involving the lease of goods are governed by chapter 2A of the Texas Business and Commerce Code chapter 2A. See Tex. Bus. & Com. Code §§ 2A.101–.532. Chapter 2A is an amalgam of chapters 2 and 9 of the Code, borrowing from each as the drafters deemed appropriate.

§ 5.52:2 Lessor’s Right to Repossess

If the lessee defaults by failing to make a lease payment or by committing another default as defined in the lease contract, the lessor has a right—

1. to repossess the goods without judicial process;
2. to require the lessee to make the goods available to the lessor at a mutually convenient place designated by the lessor, if the lease contract so provides;
3. without removing goods employed in trade or business, to render them unusable if the lease contract so provides; or
4. to dispose of goods on the lessee’s premises.


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.

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.


§ 5.52:5 Criminal Penalties for Wrongfully Holding Rental Property

A person having control of personal property under a written rental agreement who intentionally holds the property beyond the expiration of the rental period may be charged with the offense of theft of service. Tex. Penal Code § 31.04(a)(3).
Form 5-1

UCC1 Financing Statement

UCC FINANCING STATEMENT
FOLLOW INSTRUCTIONS (front and back) CAREFULLY

A. NAME & PHONE OF CONTACT AT FILER (optional)

B. SEND ACKNOWLEDGMENT TO: (Name and Address)

THE ABOVE SPACE IS FOR FILING OFFICE USE ONLY

1. DEBtor’s EXACT FULL LEGAL NAME (insert only one debtor name [Ts or Ts]: do not abbreviate or combine names)

   OR

   16. INDIVIDUAL’S LAST NAME

   17. TYPE OF ORGANIZATION

   18. JURISDICTION OF ORGANIZATION

   19. ORGANIZATIONAL ID #: If any

2. ADDITIONAL DEBtor’s EXACT FULL LEGAL NAME (insert only one debtor name [Ts or Ts]: do not abbreviate or combine names)

   OR

   26. INDIVIDUAL’S LAST NAME

   27. TYPE OF ORGANIZATION

   28. JURISDICTION OF ORGANIZATION

   29. ORGANIZATIONAL ID #: If any

3. SECURED PARTY’S NAME (or NAME OF TOTAL ASSIGNEE OF ASSIGNOR [SIF]: insert only one secured party name [Ts or Ts])

   OR

   36. INDIVIDUAL’S LAST NAME

   37. TYPE OF ORGANIZATION

   38. JURISDICTION OF ORGANIZATION

   39. ORGANIZATIONAL ID #: If any

4. This FINANCING STATEMENT covers the following collateral:

5. ALTERNATIVE DESIGNATIONS (if applicable)

   46. LEASELESSOR

   47. CONSIGNEE/CONSIGNOR

   48. BAILOR/BAILOR

   49. SELLER/BUYER

   50. AG. LEN

   51. NON-UCFILING

6. TEN-MONTH STATEMENT is to be filed for security interest recorded in the state(s) shown. ADDITIONAL REMARKS

   66. DATE OF RECORDING

   67. AMOUNT OF CLAIM

   68. ADDITIONAL REMARKS

   69. OPTIMUM 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 4b to indicate the collateral covered by this Financing Statement. If space in item 4b 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 7b 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, firm file number, Debtor’s name or other identification, state in which form is being filed, etc.) that filer may find useful.
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.
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].

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]
Certified Mail No. [number]
Return Receipt Requested

c: [name of creditor]
Form 5-5

This form assumes that the default is the debtor’s failure to pay an installment when due. Another event of default may exist. If so, it should be stated in the letter. See section 14.27 in this manual for discussion of default.

Letter to Debtor Giving Notice of Default and Intent to Accelerate

[Date]

[Name and address of debtor]

Re: [description of collateral, note, and security agreement]

[Salutation]

I have been retained as attorney for [name of creditor].

Your obligation to my client as set out in the referenced note and security agreement is in default because of your failure to make payment of $[amount] on [due date] as required by the note and security agreement, a copy of which is enclosed.

The total amount owed is $[amount]. This total amount consists of $[amount], principal; $[amount], interest accrued through [date]; and [itemize other charges].

Demand is now made for payment of the total amount owed. Direct your payments to this office.

If a per diem interest charge can be calculated, provide it; otherwise, include the following paragraph.

Additional interest or other charges may accrue on this debt. To obtain a current payoff figure, call [telephone number] between [time] and [time], except for weekends or holidays.

Continue with the following.
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.
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

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]
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 5-9

If the Internal Revenue Service has properly filed a notice of federal tax lien with the Texas secretary of state or the county clerk against the debtor’s property more than thirty days before sale of the collateral, notice of the sale must be sent to the IRS at least twenty-five days before the sale. 26 U.S.C. § 7425(c)(1). See section 5.36:1.

Letter Notifying Internal Revenue Service of Intention to Sell Collateral

[Date]

Internal Revenue Service
Attention: Technical Services Advisory Group Manager
[Refer to relevant IRS publications for appropriate address.]

Re: Notice of nonjudicial sale of property

[Salutation]

This notice is submitted on behalf of [name of creditor], whose address is [address, city, state].

Enclosed is a copy of a notice of federal tax lien under the Internal Revenue Laws Form 668(Y), relating to taxpayer [name of debtor], whose address is [address, city, state]. The notice was filed with the [Texas secretary of state/county clerk of [county] County, Texas,] on [date] and is recorded under file number [number].

[Name of creditor], as secured party under a security agreement executed by [name of debtor] on [date], intends to sell the following property at a public sale in accordance with the security agreement and under chapter 9 of the Texas Business and Commerce Code: [describe items to be sold].

The sale will occur on [date and time] at [address, city, state]. Principal, interest, and other charges totaling approximately $[amount] are due and will be chargeable against the
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.
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]
# Chapter 6

## Presuit Considerations

### I. Liability for Debts of Another

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Chapter 6
Presuit Considerations

I. Liability for Debts of Another

§ 6.1 Contractual Guarantees

The easiest and most often encountered method for imposing personal liability for the obligation of a corporation is a personal guaranty. Actions on personal guaranties are discussed at section 14.26 in this manual.

§ 6.2 Taxable Entity that Fails to Pay Franchise Tax

§ 6.2:1 Forfeiture of Right to Do Business

A corporation or other taxable entity that fails to pay its franchise tax or file a required report will forfeit its right to do business in Texas, thereby losing its right to sue or defend in any court in this state. See Tex. Tax Code §§ 171.251–.257. The forfeiture of the corporate privileges of a corporation is effected by the comptroller without a judicial proceeding. Tex. Tax Code § 171.257. “Taxable entity” means a partnership, limited liability partnership, corporation, banking corporation, savings and loan association, limited liability company, business trust, professional association, business association, joint venture, joint stock company, holding company, or other legal entity. Tex. Tax Code § 171.0002(a).

§ 6.2:2 Individual Liability of Directors, Officers, and Managers

If the corporate privileges of a corporation are forfeited for the failure to file a report or pay a tax or penalty, each director or officer of the corporation is liable for each debt of the corporation that is created or incurred in this state after the date on which the report, tax, or penalty is due and before the corporate privileges are revived. Tex. Tax Code § 171.255(a). The liability of partners is joint and several, so not all the officers and directors need be sued; the obligation can be enforced against individual officers or directors. Sheffield v. Nobles, 378 S.W.2d 391, 392 (Tex. Civ. App.—Austin 1964, writ ref’d) (judgment affirmed against defendant-president only; other officers not sued); but see Williams v. Adams, 74 S.W.3d 437, (Tex. App.—Corpus Christi 2002, pet. denied) (section 171.255 cannot be used to impute personal liability to an officer or director of a corporation for a corporate debt when the “debt” at issue is a tort judgment based on negligence liability). The creditor should serve each individual whose liability is sought.

Liability extends to officers and directors of forfeited limited liability companies. “The comptroller may, for the same reasons and using the same procedures the comptroller uses in relation to the forfeiture of the corporate privileges of a corporation, forfeit the right of a taxable entity to transact business in this state.” Tex. Tax Code § 171.2515(a). “The provisions of this subchapter, including Section 171.255, that apply to the forfeiture of corporate privileges apply to the forfeiture of a taxable entity’s right to transact business in this state.” Tex. Tax Code § 171.2515(b). See also Bruce v. Freeman Decorating Services, Inc., No. 14-10-00611-CV, 2011 WL 3585619, at *6–7 (Tex. App.—Houston [14th Dist.] Aug. 16, 2011, pet. denied) (mem. op., not designated for publication) (affirming judgment against defendant-officer; Texas Franchise Tax Public Information...
Reports listed defendant as director of forfeited limited liability company; defendant failed to bring forth an exception to personal liability).

If a corporation’s charter or certificate of authority and its corporate privileges are forfeited and revived, the liability under of a director or officer of the corporation is not affected by the revival of the charter or certificate and the corporate privileges. Tex. Tax Code § 171.255(d). Other means of imposing liability on officers, directors, and managers can be found at section 6.3 below.

**§ 6.2:3 Relation-Back Doctrine**

“When parties enter into a contract the law presumes they intend the consequences of its performance. It follows that performance or implementation of the contractual provisions relate back to and are authorized at the time of execution of the contract.” *Curry Auto Leasing v. Byrd*, 683 S.W.2d 109 (Tex. App.—Dallas 1984, no pet.) (officers not liable on breach of lease agreement, which was signed before corporate forfeiture).

**§ 6.2:4 Defenses**

“A director or officer is not liable for a debt of the corporation if the director or officer shows that the debt was created or incurred: (1) over the director’s objection; or (2) without the director’s knowledge and that the exercise of reasonable diligence to become acquainted with the affairs of the corporation would not have revealed the intention to create the debt.” Tex. Tax Code § 171.255(c).

**§ 6.3 Personal Liability of Individual Signing in Representative Capacity**

An authorized representative signing an instrument will not be personally liable on the instrument if the party represented is identified in the instrument and the instrument shows unambiguously that the representative signed on behalf of the represented party. Tex. Bus. & Com. Code § 3.402(b)(1). The representative will be liable to a holder in due course without notice of the representative capacity if either condition is not met. The representative will be liable to a party not a holder in due course if either condition is not met, unless the representative can prove that the original parties to the instrument did not intend for the representative to be liable. Tex. Bus. & Com. Code § 3.402(b)(2). Notwithstanding the above, if the representative signs his name as drawer of a check without indication of his representative status and the check is payable from an account of the represented party who is identified on the check, the representative is not liable if his signature is an authorized signature of the represented party. Tex. Bus. & Com. Code § 3.402(c).

**§ 6.4 Agency**

One who contracts in his own name as an agent for an undisclosed principal is personally liable, even if he disclosed the fact of agency. *Carter v. Walton*, 469 S.W.2d 462, 471–72 (Tex. Civ. App.—Corpus Christi 1971, writ ref’d n.r.e.). An individual is personally liable on a contract he signed as a purported agent if no authority to do so existed. *Talmadge Tinsley Co. v. Kerr*, 541 S.W.2d 207, 209 (Tex. Civ. App.—Dallas 1976, writ ref’d n.r.e.). “It is the duty of the agent, if he would avoid personal liability on a contract entered into by him on behalf of the principal, to disclose not only the fact that he is acting in a representative capacity but also the identity of his principal, as the person dealt with is not bound to inquire whether or not the agent is acting as such for another.” *Mahoney v. Pitman*, 43 S.W.2d 143, 146 (Tex. Civ. App.—Amarillo 1931, no writ). The fact that a person opened an account in the name of a business without use of the terms incorporated, corporation, or company in the
business name is not enough to create a duty for a creditor to investigate to see if the business is in fact a corporation. See *Ferrant v. Graham Associates, Inc.*, No. 02-12-00190-CV (Tex. App.—Fort Worth, May 8, 2014, no pet.) (mem. op.) (CFO personally liable; “West Fort Worth” was insufficient disclosure of the true principal, West Fort Worth Day Care, LLC); *Avenell v. Chrisman Properties, LLC*, No. 14-08-01180-CV, (Tex. App.—Houston [14th Dist.] April 8, 2010, no pet.) (mem. op.) (manager personally liable on lease; “K&S Contracting” insufficient disclosure of K&S Contracting, Inc.). The test of disclosure is the creditor’s actual knowledge that a business is a corporation or whether the creditor had reasonable grounds to know of the corporation’s existence. *Wynne v. Adcock Pipe & Supply*, 761 S.W.2d 67, 69 (Tex. App.—San Antonio 1988, writ denied). Knowledge of the real position of affairs acquired after a cause of action accrued cannot affect the right to recover from the agent personally on a contract. *Burch v. Hancock*, 56 S.W.3d 257, 262 (Tex. App.—Tyler 2001, no pet.).

§ 6.5 Corporations

A shareholder may not be held liable to the corporation or its obligees with respect to any contractual obligation of the corporation or any matter relating to or arising from the obligation on the basis that the shareholder is or was the alter ego of the corporation or on the basis of actual or constructive fraud, a sham to perpetrate a fraud, or other similar theory. Tex. Bus. Orgs. Code § 21.223(a)(2). However, subsection (a)(2) does not prevent or limit the liability of a shareholder if the obligee demonstrates that the shareholder caused the corporation to be used for the purpose of perpetrating and did perpetrate an actual fraud on the obligee primarily for the direct personal benefit of the shareholder. Tex. Bus. Orgs. Code § 21.223(b).

Moreover, a shareholder may not be held liable for failure to observe corporate formalities, including the failure to comply with the certificate of formation or bylaws of the corporation. See Tex. Bus. Orgs. Code § 21.223(a)(3).

The same protections afforded corporate shareholders are available to members of a limited liability company. See Tex. Bus. Orgs. Code § 101.002.

§ 6.6 Piercing the Corporate Veil

Traditionally, Texas cases have attempted to treat contract claims and tort claims differently in determining whether to pierce the corporate veil. *Menetti v. Chavers*, 974 S.W.2d 168, 173 (Tex. App.—San Antonio 1998, no pet.). The theory behind disparate treatment is that plaintiff, in contract cases, had the opportunity to select the entity with which plaintiff deals, as opposed to tort cases in which no such choice exists.

In *Castleberry v. Branscum*, the Texas Supreme Court laid out six instances where the corporate veil could be pierced: (1) when the corporate fiction is used as a means of perpetrating fraud; (2) where a corporation is organized and operated as a mere tool or business conduit of another corporation; (3) where the corporate fiction is resorted to as a means of evading an existing legal obligation; (4) where the corporate fiction is employed to achieve or perpetrate monopoly; (5) where the corporate fiction is used to circumvent a statute; and (6) where the corporate fiction is relied upon as a protection of crime or to justify wrong. See *Castleberry v. Branscum*, 721 S.W.2d 270, 271 (Tex. 1986); *but see SSP Partners v. Gladstrong Investments (USA) Corp.*, 275 S.W.3d 444, 455 (Tex. 2008) (constructive fraud not grounds to pierce corporate veil).

It is extremely difficult to pierce the corporate veil on contract claims. Actual fraud must be proved, committed primarily for the direct personal benefit of a shareholder. See Tex. Bus. Orgs. Code § 21.223(b); *Willis v. Donnelly*, 199 S.W.3d 262 (Tex. 2006) (no liability for individual shareholders under implied ratification theory absent showing of actual fraud); *Menetti v.*
Chavers, 974 S.W.2d 168 (Tex. App.—San Antonio 1998, no pet.) (judgment against individual shareholders reversed; claims arose from construction contract and no showing of actual fraud).

§ 6.6:1 Single Business Enterprise

The Texas Supreme Court rejected the single business enterprise theory, which advocates that corporations may be held liable for each other’s obligations merely because of centralized control, mutual purposes, and shared finances. See SSP Partners v. Gladstrong Investments (USA) Corp., 275 S.W.3d 444, 456 (Tex. 2008) (single business enterprise liability theory would not support imposition of one corporation’s obligations on another without evidence of fraud to support disregard of corporate structure under Tex. Bus. Corp. Act Art. 2.21 (now Tex. Bus. Orgs. Code § 21.223)).

§ 6.6:2 Foreign Corporations

The statutory limitations on piercing the corporate veil may or may not apply to foreign corporations. See Tex. Bus. Orgs. Code § 1.002(14), which includes for-profit corporation, nonprofit corporation, and professional corporation in its definition of “corporation” but does not specify domestic or foreign. Also, Tex. Bus. Orgs. Code § 21.223 refers only to “corporations” and does not specify domestic or foreign. The manual committee is not aware of case law on this matter.

§ 6.7 Insolvency, Dissolution, and Forfeiture of Corporations

§ 6.7:1 Terminated Legal Entity

A terminated entity has a limited existence for three years after termination for the purposes of prosecuting or defending proceedings in its entity name by or against the terminated entity, permitting the survival of a claim by or against the terminated entity, holding title to and liquidating property for the purpose of distributing the property, and settling affairs not completed before termination. See Tex. Bus. Orgs. Code § 11.356. A “terminated entity” means a domestic entity the existence of which has been (1) terminated in a manner authorized or required by the Business Organizations Code or (2) forfeited pursuant to the Tax Code. See Tex. Bus. Orgs. Code § 11.001(4).

§ 6.7:2 “Trust Fund” Theory

Under the “trust fund” theory, when a corporation becomes insolvent and ceases doing business, the officers and directors hold corporate assets in trust for the benefit of creditors. Hixson v. Pride of Texas Distributing Co., 683 S.W.2d 173, 176 (Tex. App.—Fort Worth 1985, no writ). The officers owe a fiduciary duty to administer the corporate assets for the benefit of the creditors, and breach of that duty gives rise to a cause of action against the officers and directors, which can be prosecuted directly by the creditors. Hixon, 683 S.W.2d at 176. See also Fagan v. La Gloria Oil & Gas Co., 494 S.W.2d 624, 628 (Tex. Civ. App.—Houston [14th Dist.] 1973, no writ) (judgment affirmed against officer under trust fund theory; officer failed to hold corporate assets in trust for benefit of creditors once corporation became insolvent).

This common-law doctrine has been circumscribed by statute. It does not apply, for instance, to a dissolved corporation except for predissolution claims. Hunter v. Fort Worth Capital Corp., 620 S.W.2d 547, 551–52 (Tex. 1981). But see Smith v. Chapman, 897 S.W.2d 399, 401–02 (Tex. App.—Eastland 1995, no writ) (trust fund cause of action available against directors of dissolved corporation).
§ 6.7:3 “Denuding” of Corporate Assets

If one or more shareholders appropriate the corporation’s assets, leaving it unable to satisfy corporate claims, the corporation’s creditors may trace the assets and hold the shareholders responsible for the corporation’s obligations, to the extent of the corporate assets received by the shareholder. *World Broadcasting System, Inc. v. Bass*, 328 S.W.2d 863, 865–66 (Tex. 1959); *Huff v. Harrell*, 941 S.W.2d 230, 236 (Tex. App.—Corpus Christi 1996, writ denied). A “denuding” claim is typically brought with one or more causes of action, such as fraudulent transfer. See section 14.10 in this manual for more discussion on fraudulent transfer.

§ 6.8 General Partnership


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 the partnership and any individual partner. Tex. Bus. Orgs. Code § 152.305. Service on any partner will support a judgment against the partnership and the partner served. Tex. Civ. Prac. & Rem. Code § 17.022. If the suit is against several partners jointly indebted under a contract and citation is served on at least one but not all partners, judgment may be rendered only against the partnership and the partners actually served, not against the partners not served. Tex. Civ. Prac. & Rem. Code § 31.003. See section 16.10 in this manual regarding citation and service on partnerships.

A 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).

§ 6.9 Limited Partnership

A limited partner is not liable for the debts of the limited partnership unless he either is also a general partner or participates in the control of the business. If the limited partner participates in control of the business, he is liable only to persons transacting business with the limited partnership who reasonably believe, based on the limited partner’s conduct, that he is a general partner. Tex. Bus. Orgs. Code § 153.102.

See Tex. Bus. Orgs. Code § 153.103 for a nonexclusive list of actions a limited partner can take that are deemed not to constitute participation in control of the business.
§ 6.10 Limited Liability Partnership


Partners are not individually liable, directly or indirectly, by contribution, indemnity, or otherwise, for any obligation of the partnership incurred while the partnership is a registered limited liability partnership. Tex. Bus. Orgs. Code § 152.801(a).

See section 16.10 in this manual regarding citation and service on a limited liability partnership.

§ 6.11 Limited Liability Company

A limited liability company is an entity distinct from its members. See Tex. Bus. Orgs. Code § 101.101(a). (A limited liability company may have one or more members.) Except as otherwise provided, the limited liability company’s existence begins on the filing of the certificate of formation. See Tex. Bus. Orgs. Code §§ 3.001, 4.051.

Except as and to the extent the regulations specifically provide otherwise, a member or manager is not liable for the debts, obligations or liabilities of a limited liability company including under a judgment, decree, or order of a court. Tex. Bus. Orgs. Code § 101.114. A member of a limited liability company is not a proper party to proceedings by or against a limited liability company, except where the object is to enforce a member’s right against or liability to the limited liability company. Tex. Bus. Orgs. Code § 101.113.

Courts in other states have begun to allow piercing the limited liability company veil in many, but not all, of the circumstances in which corporate veils have been pierced in other cases. For example, in Kaycee Land & Livestock v. Flahive, 46 P.3d 323 (Wyo. 2002), the Wyoming supreme court concluded that wording similar to that of the Texas statute (construed in conjunction with the legislative history of the Wyoming statute) was not intended to limit the piercing doctrine to corporations. Some commentators have noted that, except for the failure to follow corporate formalities (one of the key purposes of organizing as a limited liability company being to escape such formalities), tests similar to those applied to corporations may be applied to limited liability companies in deciding when and whether to pierce the entity veil. See, e.g., Warren H. Johnson, Limited Liability Companies (LLC): Is the LLC Liability Shield Holding Up Under Judicial Scrutiny?, 35 New Eng. L. Rev. 177 (2000). The court in Pinebrook Properties, Ltd. v. Brookhaven Lake Property Owners Ass’n, 77 S.W.3d 487 (Tex. App.—Texarkana 2002, no pet.), reversed the holding of the trial court that a limited liability company was the alter ego of the company’s president. The court analyzed the issue using the same factors that would determine whether to pierce a corporate veil: commingling of assets, failure to comply with formalities, use of entity assets for personal purposes, and fraudulent use or purpose in the creation or operation of the entity. Pinebrook Properties, Ltd., 77 S.W.3d at 500–01. The court’s disposition is generally in accord with the approach suggested by the commentators mentioned above.

§ 6.12 Professional Corporation

A professional corporation is an entity distinct from its shareholders. One or more individuals may incorporate a professional corporation by filing a certificate of formation with the secretary of state. See Tex. Bus. Orgs. Code §§ 3.001, 4.002. Unless otherwise provided in its governing documents, a professional corporation exists perpetually until the winding up and termination of the corporation. Tex. Bus. Orgs. Code §§ 3.003, 303.005. Shareholders of a professional corporation have no greater...

§ 6.13 Association or Unincorporated Joint-Stock Company

Liability for a debt of a foreign or domestic association or unincorporated joint-stock company can be fixed on an individual member as well as on the company or association, provided that the individual sought to be held liable is served and judgment is obtained against him. Execution cannot issue against a stockholder’s or member’s individual property until execution has issued against the organization’s joint property and has been returned without satisfaction. Tex. Rev. Civ. Stat. arts. 6133, 6136, 6137. The composition and liability of these entities are discussed in Thompson v. Schmitt, 274 S.W. 554 (Tex. 1925), and Wells v. Mackay Telegraph-Cable Co., 239 S.W. 1001 (Tex. Civ. App.—Galveston 1921, no writ).

[Sections 6.14 through 6.20 are reserved for expansion.]

II. Criminal Actions

§ 6.21 Criminal Prosecution of Debtor

Caveat: The manual committee strongly advises against pursuing simultaneous civil and criminal actions against the debtor. As set out in the following two sections, both creditor and attorney face substantial risks in pursuing criminal prosecution in any case. If criminal charges are brought or threatened before the civil suit is resolved, the debtor will almost certainly demand that the criminal charges be dropped as a condition of settlement. Even participating in such a discussion opens the creditor’s attorney to a charge that he has violated Tex. Disciplinary Rules Prof’l Conduct R. 4.04(b). Refusing to discuss the criminal case may make settlement of the civil action impossible. Therefore, the attorney should caution the creditor to defer criminal prosecution, or the threat of prosecution, until the civil action is resolved.

Criminal prosecution of a debtor should be pursued with extreme caution. The client’s potential exposure for malicious prosecution and unreasonable collection efforts must be evaluated. See section 6.29 below and section 17.49 in this manual. The attorney and the client should consult with the prosecutor’s office before the client institutes criminal proceedings against a debtor. Various crimes relating to debts and credit are reviewed in this chapter. See sections 6.25, 6.26, 6.27, 6.28, and 6.29. Threats of criminal prosecution may violate the Texas Debt Collection Practices Act and the federal Fair Debt Collection Practices Act. See Tex. Fin. Code § 392.301(a); 15 U.S.C. §§ 1692–1692p.

A creditor cannot threaten criminal action if the debtor has not violated the law. Tex. Fin. Code § 392.301(a)(6). Likewise, the creditor does not have the power and authority to determine the guilt or innocence of the debtor. Brown v. Oaklawn Bank, 718 S.W.2d 678, 680 (Tex. 1986).

§ 6.22 Ethical Considerations for Attorneys

A lawyer must not present, participate in presenting, or threaten to present criminal charges solely to gain an advantage in a civil matter. See Tex. Disciplinary Rules Prof’l Conduct R. 4.04(b). A lawyer who represents a creditor in a civil suit cannot “assist” in prosecuting a criminal charge against a defendant even if both the creditor and the attorney insist that the motivation is not solely to gain an advantage in the civil matter. See Tex. Comm. on Prof’l Ethics, Op. 455 (1988).
Giving any notice required by law or applicable rules of practice or procedure as a prerequisite to instituting criminal charges is allowed, unless the underlying criminal charges were made without probable cause. Tex. Disciplinary Rules Prof’l Conduct R. 4.04 cmt. 2. See, for example, section 6.26:5, notice required for prosecution of theft by check.

§ 6.23 False Statement to Obtain Property or Credit or in the Provision of Certain Services

It is an offense if a person intentionally or knowingly makes a materially false or misleading written statement to obtain property or credit for himself or another or in providing an appraisal of real property for compensation. Tex. Penal Code § 32.32(b), (b–1). “Credit” is broadly defined to include a loan of money; furnishing property or service on credit; extending the due date of an obligation; comaking, endorsing, or guaranteeing a note or other instrument for obtaining credit; a line or letter of credit; and a credit card. Tex. Penal Code § 32.32(a). Making the written false or misleading statement is the offense; actually acquiring the property or credit is not a required element. Cheney v. State, 755 S.W.2d 123, 129 (Tex. Crim. App. 1988). Whether the offense is classified as a felony or a misdemeanor will depend on the value of the property or the amount of credit obtained. See Tex. Penal Code § 32.32(c).

§ 6.24 Credit and Debit Card Abuse

Various acts involving the use of a credit or debit card may constitute criminal offenses. Tex. Penal Code § 32.31(b) lists eleven offenses, including presentment or use of a card that has expired or been revoked, use of a fictitious card to obtain property or services, and sale of a debit or credit card without being the issuer. These offenses are state jail felonies, unless it is shown at trial that the offense was committed against an elderly individual, in which case the offense is a felony of the third degree. Tex. Penal Code § 32.31(d).

§ 6.25 Issuance of Bad Check

§ 6.25:1 Elements of Offense

It is an offense if a person issues or passes a check knowing that there are not sufficient funds available to pay in full the check and all other checks outstanding on his account at that time. See Tex. Penal Code § 32.41(a). The issuer’s knowledge of insufficient funds is presumed (except in the case of a postdated check or order) if: (1) he had no account with the bank or other drawee at the time he issued the check or order; or (2) payment was refused by the bank or other drawee for lack of funds or insufficient funds on presentation within thirty days after issue and the issuer failed to pay the holder in full within ten days after receiving notice of that refusal. Tex. Penal Code § 32.41(b).

§ 6.25:2 Notice

If the check was refused for lack of funds or insufficient funds, notice may be actual notice or notice given in writing that is sent by (1) first-class mail supported by an affidavit of service or (2) registered or certified mail with a return receipt requested. Tex. Penal Code § 32.41(c)(1). The notice must be sent to the address (1) on the check or order, (2) in the bank’s records, or (3) in the holder’s records. Tex. Penal Code § 32.41(c)(2). The notice must also contain the following statement:

This is a demand for payment in full for a check or order not paid because of a lack of funds or insufficient funds. If you fail to make payment in full within 10 days after the date of receipt of this notice, the failure to pay creates a presumption for committing an offense, and this matter may be referred for criminal prosecution.
Tex. Penal Code § 32.41(c)(3). If notice is given in accordance with subsection (c), there is a presumption that it was received no later than five days after it was sent. Tex. Penal Code § 32.41(d).

Practice Note: To avoid potential violations of the federal Fair Debt Collection Practices Act and the Texas Debt Collection Practices Act, the better practice is to have the creditor send the required notice, not the creditor’s attorney.

§ 6.25:3 Restitution

A person charged with an offense under this section may make restitution for the bad checks or sight orders. Restitution shall be made through the prosecutor’s office if collection and processing were initiated through that office. In other cases restitution may be, with the approval of the court in which the offense is filed: (1) made through the court; or (2) collected by a law enforcement agency if a peace officer of that agency executes a warrant against the person charged with the offense. Tex. Penal Code § 32.41(e).

§ 6.25:4 Classification of Offense

Issuance of a bad check is a class C misdemeanor unless the check was issued to pay a child support obligation established by court order; in that case, it is a class B misdemeanor. Tex. Penal Code § 32.41(f).

§ 6.26 Theft of Property or Service by Check

§ 6.26:1 Issuance of Bad Check vs. Theft by Check

Prosecution for issuance of a bad check or similar sight order under Penal Code section 32.41 is usually used only for the payment of a preexisting debt by a bad check. Theft of property or service by check is a more serious offense. The key distinction between the two offenses is whether the issuer of the check received any property. The same logic presumably extends to theft of service. Receipt of property and proof of its value are critical elements in the offense of theft. They are not required elements in the offense of issuance of a bad check. Christiansen v. State, 575 S.W.2d 42, 44 (Tex. Crim. App. 1979); see also Tex. Penal Code §§ 31.03, 31.06, and 32.41.

Issuance of a bad check or similar sight order is not a lesser included offense of theft by check of property or service. Tex. Penal Code § 32.41(g).

Practice Tip: Check your local district attorney’s office before filing a theft by check complaint. Statutory notice under Texas Penal Code section 31.06(f)(3) may be required. In Travis County, a driver’s license number, or other identification number, is required on the face of the check.

§ 6.26:2 Elements of Offense

Theft of Property: A person commits theft of property if he unlawfully appropriates it with the intent to deprive the owner of the property. Tex. Penal Code § 31.03(a). Appropriation of property is unlawful if it is without the owner’s consent or the property is received with knowledge that it is stolen by another. Tex. Penal Code § 31.03(b)(1), (2).

Theft of Service: A person commits theft of service if, with intent to avoid payment for service that the actor knows is provided only for compensation:
1. the actor intentionally or knowingly secures the service by deception, threat, or false token;

2. having control of the disposition of the services of another to which the actor is not entitled, the actor intentionally or knowingly diverts the other’s services to the actor’s own benefit or to the benefit of another not entitled to the services;

3. having control of personal property under a written rental agreement, the actor holds the property beyond the expiration of the rental period without the effective consent of the owner, thereby depriving the owner of the use of the property for further rentals; or

4. the actor intentionally or knowingly secures the performance of the service by agreeing to provide compensation and, after the service is rendered, fails to make payment after receiving notice demanding payment.

Tex. Penal Code § 31.04(a).

§ 6.26:3 Presumption for Theft by Check

If the actor did not have sufficient funds in the account to pay the check or similar sight order, intent to deprive the owner of property under Penal Code section 31.03 (Theft) or to avoid payment for service under section 31.04 (Theft of Service) is presumed if the issuer had no account with the bank at the time he issued the check or similar sight order or the bank refused payment for lack of funds or insufficient funds on presentation within thirty days after issue, and the issuer failed to pay the holder in full within ten days after receiving notice of that refusal. Tex. Penal Code § 31.06(a).

§ 6.26:4 Presumption for Stop Payment on Check

Intent to deprive an owner of property is presumed if:

1. the actor ordered the bank or other drawee to stop payment on the check or order;

2. the bank or drawee refused payment to the holder on presentation of the check or order within thirty days after issue;

3. the owner gave the actor notice of the refusal of payment and made a demand to the actor for payment or return of the property; and

4. the actor failed to pay the holder within ten days after receiving the demand for payment or return the property to the owner within ten days after receiving the demand for return of the property.

Tex. Penal Code § 31.06(f).

Partial restitution does not preclude the presumption of intent for theft by check. Tex. Penal Code § 31.06(e). For presumptions of intent regarding theft of service, see Tex. Penal Code § 31.04(b).

§ 6.26:5 Notice—Theft by Check

The notice required by Tex. Penal Code § 31.06(f)(3) may be actual notice or notice in writing that is sent by (1) first-class mail supported by an affidavit of service or (2) registered or certified mail with a return receipt requested. Tex. Penal Code § 31.06(b)(1). Notice must be sent to the address (1) on the check or order, (2) in the bank’s records, or (3) in the holder’s records. See Tex. Penal Code § 31.06(b)(2). If the property is rental property, the better practice is to send notice by registered
or certified mail or by telegram to the person who took control of the property under the rental agreement at the address shown on the agreement.

The notice must include the following language:

This is a demand for payment in full for a check or order not paid because of a lack of funds or insufficient funds. If you fail to make payment in full within 10 days after the date of receipt of this notice, the failure to pay creates a presumption for committing an offense, and this matter may be referred for criminal prosecution.

Tex. Penal Code § 31.06(b)(3).

If notice is given, there is a presumption that it was received no later than five days after it was sent. Tex. Penal Code § 31.04(d).

Practice Note: To avoid potential violations of the federal Fair Debt Collection Practices Act and the Texas Debt Collection Practices Act, the better practice is to have the creditor send the required notice, not the creditor’s attorney.

§ 6.26:6 Classification of Offense

The classifications for theft of property and theft of service vary from class C misdemeanors to first-degree felonies, depending on the value of the stolen property or service. See Tex. Penal Code §§ 31.03(e), 31.04(e).

§ 6.26:7 Theft as Ground for Removing Limitation on Exemplary Damages

Although there are generally limits on the recovery of exemplary damages, those limitations are removed if the action is based on theft punishable as a third-degree felony or higher. See Tex. Civ. Prac. & Rem. Code § 41.008(c)(13); see also Tex. Civ. Prac. & Rem. Code §§ 41.003, 41.008(b).

§ 6.27 Hindrance of Secured Creditor

§ 6.27:1 Elements of Offense

A person who has signed a security agreement creating a security interest or lien on property commits an offense if, with intent to hinder enforcement of that interest or lien, he destroys, removes, conceals, encumbers, or otherwise harms or reduces the value of the property. Tex. Penal Code § 32.33(b). Removal occurs if the property is transported, without the secured party’s effective consent, from the state in which the property was located when the security interest or lien attached. Tex. Penal Code § 32.33(a)(1).

A debtor under a security agreement who does not have a right to sell or dispose of secured property or is required to account to the secured party for the proceeds of a permitted sale or disposition commits an offense if, with intent to appropriate the proceeds, he sells or disposes of the property or does not account to the secured party for the sale or other disposition as required. Tex. Penal Code § 32.33(e).

A debtor who removes the property to another state with the intent to hinder enforcement of the security interest or lien may be subject to extradition under the Uniform Criminal Extradition Act. See Tex. Code Crim. Proc. art. 51.13.
§ 6.27:2 Presumption of Intent

Intent to hinder enforcement is presumed if the debtor fails to pay any part of the secured debt when due and, after demand by the secured party, fails to deliver possession of the secured property to the secured party. Tex. Penal Code § 32.33(c). Despite the statutory presumption, difficult fact questions may be involved in proving intent to hinder. See, e.g., Guernsey Community Federal Credit Union v. Gonzalez, 539 S.W.2d 896 (Tex. Civ. App.—El Paso 1976, writ ref’d n.r.e.).

§ 6.27:3 Classification of Offense

Hindering a secured creditor is classified as either a misdemeanor or felony, depending on the value of the property involved. Tex. Penal Code § 32.33(d).

§ 6.27:4 Combining Criminal Prosecution with Repossession

A secured creditor will often request his attorney to threaten the debtor with prosecution for hindrance if the debtor does not voluntarily relinquish possession of the collateral. If the debt is a consumer debt, such a threat may violate Tex. Fin. Code § 392.301. See Brown v. Oaklawn Bank, 718 S.W.2d 678, 680 (Tex. 1986) (bank’s letters threatening criminal prosecution violated Texas Debt Collection Act). Even if the debt is not a consumer debt, such a threat may violate Tex. Disciplinary Rules Prof’l Conduct R. 4.04.

§ 6.28 Unauthorized Automobile Title Transfer

A person commits an offense if he acquires, accepts possession of, or exercises control over the motor vehicle of another under a written or oral agreement to arrange for the transfer of the vehicle to a third party and—

1. knowing the vehicle is subject to a security interest, lease, or lien, transfers the vehicle to a third party without first obtaining written authorization from the vehicle’s secured creditor, lessor, or lienholder;
2. intending to defraud or harm the vehicle’s owner, transfers the vehicle to a third party;
3. intending to defraud or harm the vehicle’s owner, disposes of the vehicle in a manner other than by transfer to a third party; or
4. does not disclose the location of the vehicle on the request of the vehicle’s owner, secured creditor, lessor, or lienholder.

Tex. Penal Code § 32.34(b). This offense is either a class A misdemeanor, a state jail felony, or a third-degree felony, depending on the nature of the offense. Tex. Penal Code § 32.34(f), (g).

§ 6.29 Malicious Criminal Prosecution

A plaintiff in a malicious criminal prosecution claim must establish—

1. commencement of a criminal prosecution against the plaintiff;
2. causation (initiation or procurement) of the action by the defendant;
3. termination of the prosecution in the plaintiff’s favor;
4. innocence of the plaintiff;
5. absence of probable cause for the proceedings;
6. malice in filing the charge; and
7. damage to the plaintiff.


The creditor who considers bringing a criminal action against a debtor should make certain there is probable cause to believe the debtor has committed a crime; he must not file criminal charges merely to collect a debt. If the creditor had probable cause to believe the debtor had committed a crime, the fact that the creditor was attempting to collect a debt is not sufficient to show malice. *See Jackson v. Train*, 495 S.W.2d 36, 39 (Tex. Civ. App.—Beaumont 1972, no writ) (creditor not liable for malicious prosecution; all facts fully and fairly disclosed to prosecutor; no showing of malice).

§ 6.30 Setoff against Deposit

Except as otherwise provided by the Truth in Lending Act, 15 U.S.C. §§ 1601–1667f, or other federal law—

a bank has a right of setoff, without further agreement or action, against all accounts owned by a depositor to whom or on whose behalf the bank has made an advance of money by loan, overdraft, or otherwise if the bank has previously disclosed this right to the depositor. If the depositor defaults in the repayment or satisfaction of the obligation, the bank, without notice to or consent of the depositor, may set off or cancel on its books all or part of the accounts owned by the depositor and apply the value of the accounts in payment of and to the extent of the obligation.

*Tex. Fin. Code § 34.307(a).* “The relationship of a bank to its general depositors is that of debtor to creditor. It follows that the bank has the right to set off against an amount on deposit an equal amount of indebtedness owed by the depositor to the bank.” *Sears v. Continental Bank & Trust Co.*, 562 S.W.2d 843, 843 (Tex. 1997).

For purposes of section 34.307, a default occurs if an obligor has failed to make a payment as provided by the terms of the loan or other credit obligation and a grace period provided for by the agreement or law has expired. An obligation is not required to be accelerated or matured for a default to authorize setoff of the depositor’s obligation against the defaulted payment. *Tex. Fin. Code § 34.307(b).*

A bank may not exercise its right of setoff under section 34.307 against an account unless the account is due the depositor in the same capacity as the defaulted credit obligation. A trust account for which a depositor is trustee, including a trustee under a certificate of trust delivered under section 34.306(b), is not subject to the right of setoff unless the trust relationship is solely evidenced by the account as provided by subchapter B, chapter 11, and chapters 112 and 113 of the Texas Estates Code. *Tex. Fin. Code § 34.307(c).*

Section 34.307 does not limit the exercise of another right of setoff, including a right under contract or common law. *Tex. Fin. Code § 34.307(d).*

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).


§ 6.31 Suit on Debt vs. Suit on Bad Check

Ordinarily the creditor will want to sue on the account or note itself and, in the alternative, on the check. Attorney’s fees are recoverable in suits on sworn accounts, whereas they have not been available in suits on worthless checks. Recovery of attorney’s fees is allowed, however, if the claim is founded on an oral or written contract. Awards of attorney’s fees in suits on bad checks should therefore be permitted on the theory that a check is a contract. See Tex. Civ. Prac. & Rem. Code § 38.001(8). See also 1/2 Price Checks Cashed v. United Automobile Insurance Co., 344 S.W.3d 378 (Tex. 2011) (holder entitled to recover attorney’s fees against drawer of dishonored check).

Suit on the check may be preferable to suit on the account or note for the following reasons:

1. Venue for a suit on the contract may be in a distant county, but venue for a suit on the check may be permitted in a closer county. See Tex. Civ. Prac. & Rem. Code §§ 15.001–.039.

2. The check may be viewed by the court as an admission of the debt.

3. The passing of a bad check by the defendant may create a bias favorable to the creditor with the trier of fact.

4. Suit on a bad check will enable judicial foreclosure of a worker’s lien if one is allowed by Tex. Prop. Code § 70.001.

Suits on a note are discussed at section 14.20 in this manual. Criminal prosecution on a bad check is discussed at section 6.25 above. Worker’s possessory liens are discussed at section 7.2.
Application to Confirm Arbitration Award

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.

Texas Civil Practice and Remedies Code section 30.014 requires each party to include partial identification information in its initial pleading in a civil action filed in district court, county court, or statutory county court.

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

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. [The last three numbers of Plaintiff’s driver’s license number are [numbers]./Plaintiff has not been issued a driver’s license.] [The last three numbers of Plaintiff’s Social Security number are [numbers]./Plaintiff has not been issued a Social Security number.] Defendant is [name of defendant], who can be served with citation at [address, city, state].

2. 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 part II. in chapter 15 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.

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.

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
Creation and Enforcement of Liens

I. Property Code Liens

§ 7.1 Farm, Factory, or Store Worker’s Lien

§ 7.1:1 Scope of Lien
§ 7.1:2 Who May Claim Lien
§ 7.1:3 Property Subject to Lien
§ 7.1:4 Claim, Perfection, and Enforcement of Lien
§ 7.1:5 Lien Priority
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§ 7.2 Worker’s Possessory Liens

§ 7.2:1 Scope of Worker’s Possessory Lien
§ 7.2:2 Availability of Worker’s Possessory Lien
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§ 7.2:8 Judicial Supervision of Sale
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§ 7.3 Landlord’s Liens

§ 7.4 Other Property Code Liens

§ 7.4:1 Types of Liens
§ 7.4:2 Enforcement Provisions

II. Private Mechanic’s and Materialman’s Liens

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I. Property Code Liens

§ 7.1 Farm, Factory, or Store Worker’s Lien

§ 7.1:1 Scope of Lien

A worker has a statutory lien on property of his employer created or used by the worker or necessarily connected with the work to secure payment of the amount due for work or services performed under a contract for certain types of work. Tex. Prop. Code §§ 58.001–.003. This lien is independent of the constitutional lien, discussed at section 7.14 below.

§ 7.1:2 Who May Claim Lien

A worker claiming the lien can be a clerk, accountant, bookkeeper, waiter, waitress, cook, maid, porter, servant, employee, artisan, craftsman, factory operator, mill operator, mechanic, quarry worker, common laborer, or farmhand. Tex. Prop. Code § 58.001(2).

Courts generally deny the lien to anyone who could be classified as a manager or supervisor under the terms of employment. The lien is available only to those who labor for wages, not to their employers who contract with others to render services. Cotton Belt State Bank v. Roy H. Hatcheries, Inc., 351 S.W.2d 325, 326 (Tex. Civ. App.—Waco 1961, no writ); see also Ferrell-Michael Abstract & Title Co. v. McCormac, 184 S.W. 1081, 1086 (Tex. Civ. App.—Fort Worth 1916), aff’d on other grounds, 215 S.W. 559 (Tex. Comm’n App. 1919, judgm’t adopted) (distinguishing between supervisors who also do manual labor by choice, not entitled to lien, and those who perform both functions by agreement, entitled to lien).


§ 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.

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 Worker’s Possessory Liens

§ 7.2:1 Scope of Worker’s Possessory Lien

A worker who repairs an article may retain it until the amount specified by the repair contract is paid or, if no amount is specified by contract, until the reasonable and usual compensation is paid. Tex. Prop. Code § 70.001(a). Chapter 70 of the Property Code provides similar liens for stable keepers, garagemen, pasturers, and cotton ginners (Tex. Prop. Code § 70.003) and liens on garments (Tex. Prop. Code § 70.002).
§ 7.2:2 Availability of Worker’s Possessory Lien

The lien is available to any worker in Texas “who by labor repairs an article.” Tex. Prop. Code § 70.001(a). Presumably, this broad category includes corporations. See Miller & Freeman Ford, Inc. v. Greater Houston Bank, 544 S.W.2d 925 (Tex. 1976). The lien applies to the repaired article while it is in the worker’s possession, and in limited circumstances the lien may continue if the worker has released the article in return for a check that is subsequently not honored. Possession of the article as a condition for the lien is discussed at section 7.2:4 below.

The lien arises only if the article’s owner authorizes the repairs. If property has been stolen, a person without title cannot make repairs and accessions to the property and then demand payment when the true owner recovers the property. Drake Insurance Co. v. King, 606 S.W.2d 812, 818 (Tex. 1980), superseded by rule on other grounds as stated in Bay Area Healthcare Group, Ltd. v. McShane, 239 S.W.3d 231 (Tex. 2007). Similarly, the courts scrutinize carefully any worker’s claim that repairs were authorized by the owner’s agent; the lien does not attach in the absence of any express, implied, or apparent agency. See Hydra-Rig, Inc. v. ETF Corp., 707 S.W.2d 288, 291–92 (Tex. App.—Fort Worth 1986, writ ref’d n.r.e.).

§ 7.2:3 Distinction between Statutory Worker’s Possessory Lien and Constitutional Mechanic’s Lien

The possessory lien created by Tex. Prop. Code § 70.001 differs in important respects from the nonpossessory constitutional lien deriving from Tex. Const. art. XVI, § 37. The constitutional lien is discussed at section 7.14 below.

Possession of the article is an essential element of the statutory worker’s lien but is irrelevant to the constitutional lien. The constitutional lien survives the worker’s relinquishment of the article to the owner, but ordinarily the statutory lien does not. The constitutional lien does not authorize the worker to retain a repaired article pending payment for the repairs, but the statute creating a worker’s lien for repairs provides this specific right. The constitutional lien can serve as a basis for a suit for recovery of payment, but will not serve as a defense to an action for conversion. See generally Garcia v. Rutledge, 649 S.W.2d 307, 311 (Tex. App.—Amarillo 1982, no writ) (discussing the difference between the constitutional and statutory liens); River Oaks Chrysler-Plymouth, Inc. v. Barfield, 482 S.W.2d 925, 927–28 (Tex. Civ. App.—Houston [14th Dist.] 1972, writ dism’d) (discussing the fact that the constitutional lien does not require possession, gives no possessory rights, and is not a defense to conversion).

§ 7.2:4 Requirement of Possession Generally

Generally, if the worker voluntarily returns possession of the article to the owner, he loses his statutory lien on it. Clifton v. Jones, 634 S.W.2d 883, 886 (Tex. App.—El Paso 1982, no writ); Atlas Amalgamated, Inc. v. Castillo, 601 S.W.2d 728, 730 (Tex. Civ. App.—Waco 1980, writ ref’d n.r.e.).

§ 7.2:5 Ability to Repossess If Repairs Paid for by Bad Check

If the worker relinquishes a motor vehicle, motorboat, vessel, or outboard motor in reliance on a check not honored after acceptance, the lien continues to exist, and the worker is entitled to regain possession of the item. Tex. Prop. Code § 70.001(b). A worker who wants to regain possession under these circumstances must do so in accordance with the repossession provisions of Tex. Bus. & Com. Code § 9.609. See generally part III. in chapter 5 of this manual. For the worker to have a perfected right to repossess the repaired property, the person obligated for the repairs must sign a notice stating that the article may be subject to repossession under Property Code section 70.001(c). The notice must be separate from the written con-
tract, 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).


§ 7.2:6 Priority of Worker’s Possessory Lien

If an automobile is in the possession of a mechanic who has repaired it and who claims a worker’s possessory lien on it, the mechanic’s lien has priority over a competing lien of a secured party who previously perfected a security interest by noting it on the vehicle’s certificate of title. Gulf Coast State Bank v. Nelms, 525 S.W.2d 866, 869–70 (Tex. 1975). See also Tex. Bus. & Com. Code § 9.333.

§ 7.2:7 Enforcement of Worker’s Possessory Lien

Sale of property subject to a worker’s possessory lien is controlled by two overlapping and confusing sections of the Texas Property Code, sections 70.005 and 70.006. The confusion is caused because Tex. Prop. Code § 70.005 excludes lienholders of vehicles subject to the Certificate of Title Act (Tex. Transp. Code §§ 501.001–.179) whereas Tex. Prop. Code § 70.006 includes not only those lienholders but also lienholders of motorboats, vessels, or outboard motors to which chapter 31 of the Texas Parks and Wildlife Code applies. Procedures for selling property are outlined clearly, but provisions specifying which types of property are subject to each of the two Property Code sections are not clear.

This discussion assumes that section 70.006 applies to motor vehicles subject to the Certificate of Title Act and to vessels and outboard motors requiring a certificate of title under Tex. Parks & Wild. Code §§ 31.045–.056. It also assumes that Property Code section 70.005 applies to all other types of property subject to a worker’s possessory lien.

Under Property Code section 70.005, a lienholder possessing designated property for sixty days after the repair charges accrue must send a first notice of sale, requesting the owner to pay the unpaid charges, if the owner’s Texas residence is known. See form 7-4 in this chapter. If the charges are not paid before the eleventh day after the date of the request, a second notice must be sent to the owner, stating that, after twenty days, the lienholder may sell the property at a public sale. See form 7-5. If the request for payment and notice of sale under section 70.005 is premature, however, this will not invalidate a public sale, if the public sale takes place more than twenty days after the notice. Cranetex, Inc. v. Precision Crane & Rigging of Houston, Inc., 760 S.W.2d 298, 304 (Tex. App.—Texarkana 1988, writ denied). If the property owner’s residence is outside Texas or is unknown, the lienholder may sell the property without notice at a public sale after the sixtieth day after the unpaid charges accrued. Proceeds of the sale are applied to the repair charges and, if the repaired property is a garment, to the reasonable costs of the sale. Excess proceeds are paid to the person entitled to them, as discussed at section 7.2:9 below.
Under Property Code section 70.006, a lienholder possessing designated property must give written notice to the owner and each holder of a lien recorded on the certificate of title, and must file a copy of the notice and other required information with the county tax assessor-collector’s office in the county in which the repairs were made, not later than the thirtieth day after the charges accrue. Tex. Prop. Code § 70.006(a). The notice must state the amount of the charges and request payment and must be sent by certified mail, return receipt requested. If the charges are not paid before the thirty-first day after the notice is mailed, the lienholder may sell the property at a public sale and apply the proceeds to the charges. See Dob’s Tire & Auto Center v. Safeway Insurance Agency, 923 S.W.2d 715, 720 (Tex. App.—Houston [1st Dist.] 1996, writ dism’d w.o.j.). Excess proceeds are paid to the person entitled to them, as discussed at section 7.2:9 below. On the other hand, a proper tender of the amount claimed in the notice will discharge the worker’s possessory lien. Refusal of the worker to surrender a vehicle after proper tender has been made constitutes conversion. Collision Center Paint & Body, Inc. v. Campbell, 773 S.W.2d 354, 355 (Tex. App.—Dallas 1989, no writ).

If the property subject to the lien is a motor vehicle, and the lienholder determines that the vehicle’s only residual value is as a source of parts or scrap metal, or that it is not economical to dispose of the vehicle at a public sale, the lienholder may sell, give, or otherwise dispose of the vehicle to a motor vehicle demolisher under Tex. Transp. Code ch. 683. Tex. Prop. Code § 70.006(f–1), (f–2).

See form 7-6 for a notice of sale for a motor vehicle, motorboat, vessel, or outboard motor under a worker’s possessory lien.

§ 7.2:8 Judicial Supervision of Sale

Tex. Prop. Code §§ 70.005–.006 do not require judicial supervision or public notice of the sale. If the attorney believes that a sale would create constitutional problems (see section 7.2:10 below), the lienholder should probably obtain a court judgment and then sell the chattel pursuant to a writ of execution and order of sale, rather than proceeding with a public sale as prescribed under sections 70.005 and 70.006. See Adams v. Department of Motor Vehicles, 520 P.2d 961, 965 (Cal. 1974); Gary Spivey, Annotation, Garagemen’s Lien: Modern View as to Validity of Statute Permitting Sale of Vehicle without Hearing, 64 A.L.R. 3d Art. 814 (1975).

§ 7.2:9 Excess after Sale

If there are excess proceeds after sale, the lienholder must pay them to “the person entitled to them.” Tex. Prop. Code §§ 70.005(d), 70.006(f).

If a person entitled to excess proceeds is unknown or has moved from Texas or from the county in which the lien accrued, the excess must be paid to the treasurer of the county in which the lien accrued. Tex. Prop. Code § 70.007(a).

§ 7.2:10 Constitutionality

Because the enforcement procedures described in section 7.2:7 above do not require a hearing, they may violate constitutional due-process requirements. A similar statutory scheme in California was held unconstitutional because, unless the owner brought suit, the lienholder could sell the property without a hearing and thus deprive the owner of due process of law. Adams v. Department of Motor Vehicles, 520 P.2d 961 (Cal. 1974). Courts in several other states have reached the same conclusion and have declared their statutes unconstitutional. The California court suggested that lienholders might retain the chattel, file a suit on the merits, 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 giners (section 70.003). These provisions generally provide a remedy for those who have provided repair or maintenance on personal property or who have provided storage or care for personal property such as vehicles, livestock, garments, and agricultural crops. *See* Tex. Prop. Code ch. 70.

Chapter 59 of the Property Code creates a lien over property in a self-service storage facility. Under chapter 59, the owner, lessor, sublessor, or managing agent of a self-service storage facility may foreclose a lien on all property in the facility for the payment of unpaid charges under a rental agreement. *See* Tex. Prop. Code §§ 59.001(1), 59.021, 59.042.

Chapter 56 of the Property Code provides for a statutory scheme to perfect liens against mineral properties. The chapter has unique notice and filing requirements somewhat similar to the mechanic’s and materialman’s lien process. The Property Code also addresses hospital/emergency medical services liens at chapter 55, railroad worker’s liens at chapter 57, newspaper employee’s liens at chapter 60, motor vehicle mortgages at chapter 61, broker’s and appraiser’s liens at chapter 62, and manufactured home liens at chapter 63.

§ 7.4:2  **Enforcement Provisions**

Property subject to a lien under subchapter A of chapter 70 of the Texas Property Code may be sold at a public sale or, in the case of garments, a private sale. Tex. Prop. Code § 70.003(d)(1) (cotton under a cotton ginner’s lien), § 70.005 (property other than cotton or motor vehicles), § 70.006 (motor vehicles, motorboats, vessels, and outboard motors). Notice of the charges due the lienholder and notice of the sale are generally required; however, the specific notice requirements vary between the liens. *See, e.g.*, Tex. Prop. Code § 70.003(d)(1) (sale of cotton), § 70.005(a), (b) (sale of property other than cotton or motor vehicles), § 70.006(a)–(h) (sale of motor vehicles).

The sale of property subject to a self-service storage facility lien must be sold at public sale at the facility itself or at a reasonably near public place. Tex. Prop. Code § 59.045. The lessor’s notice of the sale and notice to the owner and lienholders are discussed in sections 59.044 and 59.0445 of the Texas Property Code.

Mineral liens are enforced within the same time and in the same manner as a mechanic’s or materialman’s lien. Tex. Prop. Code § 56.041 et seq.

*Sections 7.5 through 7.10 are reserved for expansion.*
II. Private Mechanic’s and Materialman’s Liens

§ 7.11 Overview

Contractors, subcontractors, and others who provide material or labor for a construction project but who are not paid for that material or labor may normally bring suit for payment against the party that contracted for the material and labor. However, economic factors such as the cost of a lawsuit or the financial viability of the defendant may make a lawsuit either impractical or pointless. Both state and federal governments have attempted to address this problem by adopting statutes that give unpaid contractors, subcontractors, and others additional recourse for the recovery of at least partial payment for their material and labor.

Under chapter 53 of the Texas Property Code, the owner of real property being improved under a private construction contract is required to withhold from construction payments earned by the general contractor (called an “original contractor” by the Property Code) a statutory retainage equal to 10 percent of the payments earned by the general contractor. In addition, the owner may be required to pay subcontractors funds earned by but not yet paid to the general contractor that are “trapped” in the owner’s possession by the receipt from subcontractors of claims of unpaid amounts owing on the project. The Property Code establishes procedures whereby the unpaid claimant can assert a mechanic’s lien on the property being improved to secure the owner’s obligation to use the retainage and “trapped funds” to pay the claim. If the owner does not make the required payments to the lien claimant out of the retainage, the claimant can seek judicial foreclosure of the lien for the purpose of selling the property to obtain proceeds to pay the claim. The statute governing the perfection of claims on private projects is discussed at section 7.12 below.

The “prompt pay” statute sets forth a statutory time frame that governs how quickly owners, contractors, and subcontractors must assent to or make payment of undisputed claims of late or incomplete payments to a contractor on a private construction project. The “prompt payment” statute is discussed at section 7.12:24 below.

In addition to the state statutes providing for a system of mechanic’s lien claims on private construction projects, the Texas Constitution grants general contractors a mechanic’s lien claim that is independent of the statutory mechanic’s lien system. These constitutional provisions are discussed at sections 7.13 and 7.14 below.

Mechanic’s lien claims may also arise in the context of public works projects. Public works projects, however, generally involve public lands, and public lands owned by the state, a county, a city, a school district, or the federal government are not subject to lien foreclosure in favor of private individuals. To provide an alternative remedy to contractors on public work projects, both state and federal law have established systems whereby payment bonds are issued by third-party sureties, and the unpaid claimant is required by statute to pursue recovery against the bond rather than against the public lands. These public works statutes are discussed at sections 7.21 and 7.22 below.

Finally, chapter 162 of the Property Code provides 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 pursue the individual officers and directors who received payments owing to the claimant if they diverted the funds for impermissible purposes. The “construction trust fund” statute is discussed at section 7.23 below.
§ 7.12 Statutory Mechanic’s Lien

§ 7.12:1 Mechanic’s Liens Generally

Private construction projects are governed by chapter 53 of the Texas Property Code. (This portion of the Property Code was formerly referred to as the “Hardeman Act” because that was the name of the predecessor statute that was codified by the Property Code.) An original contractor is granted mechanic’s lien rights under both chapter 53 of the Property Code and article XVI, section 37, of the Texas Constitution. A subcontractor’s mechanic’s lien rights, however, are totally dependent on the subcontractor’s compliance with chapter 53 of the Property Code. First National Bank v. Sledge, 653 S.W.2d 283, 285 (Tex. 1983).

Chapter 53 establishes a procedure whereby mechanic’s lien claimants owed money for their labor or materials may “perfect” a claim against retainage and trapped construction payments in the owner’s possession. By following the requirements of chapter 53, the claimant also obtains a lien against the owner’s property, and this lien can be judicially foreclosed to generate funds to pay the claimant in the event the owner has not withheld or refuses to pay the statutorily mandated amounts. To accomplish this, the lien claimant must give notices and file a lien affidavit that meets the requirements of chapter 53 within the statutorily defined time frames. However, even if the claimant follows the procedures set forth in chapter 53, the amount the property owner is required to pay the claimant may prove to be less than the unpaid amount owing to the claimant. The lien may also be subject to prior mortgages or encumbrances.

§ 7.12:2 Scope and Utility of Lien

A mechanic’s lien may be established by any person who (1) labors, specially fabricates material, or furnishes labor or materials for construction or repair in Texas of (a) a house, building, or improvement; (b) a levee or embankment to be erected for the reclamation of overflow land along a river or creek; or (c) a railroad; and (2) does so under or by virtue of a contract with the owner or the owner’s agent, trustee, receiver, contractor, or subcontractor. Tex. Prop. Code § 53.021(a). Because the statute (Tex. Prop. Code § 53.001(3)) requires that labor be used in the “direct prosecution of the work” to qualify for the lien, it is difficult to qualify off-site labor unless the Texas Property Code expressly provides otherwise, as with the manufacture of specially fabricated materials. Tex. Prop. Code § 53.001(12). The statute defines “materials” to include (1) material, machinery, fixtures, or tools incorporated or consumed in the work or that are ordered and delivered for incorporation or consummation; (2) reasonable rent and costs of actual running repairs for construction equipment used or reasonably required and delivered for use in the direct prosecution of the work at the site of the construction or repair; or (3) power, water, fuel, and lubricants consumed or ordered and delivered for consumption in the direct prosecution of the work. Tex. Prop. Code § 53.001(2). For material suppliers, it is sufficient to show either delivery of the materials to the construction site or that the materials were furnished to a contractor for the specific project. It is not necessary to show how the contractor ultimately used the materials. W.L. MacAtee & Sons, Inc. v. House, 153 S.W.2d 460 (Tex. 1941). See also Addison Urban Development Partners, LLC v. Alan Ritchey Materials Co., LC, 437 S.W.3d 597, 606 (Tex. App.—Dallas 2014, no pet) (finding that lien provided by Tex. Prop. Code § 53.021 does not require showing of how contractor used delivered materials, only that materials were delivered for specific project); Lexcom, Inc. v. Gray, 740 S.W.2d 83, 85 (Tex. App.—Dallas 1987, no writ) (“In order to establish a lien, the materialman need not prove that the materials furnished actually went into the construction.”).

Architects, Engineers, and Surveyors: The Property Code grants mechanic’s lien rights to architects, engineers, and surveyors who, by virtue of a written contract with the owner or the owner’s agent, trustee, or receiver, prepare a plan or plat in connection with the actual or proposed design, construction, or repair of improvements on real property or the location of the
boundaries of the real property. Tex. Prop. Code § 53.021(c). The right to a lien can now be established for plans that were intended for a project even if they are not actually used. However, the work must be done pursuant to written contract; an oral contract will not suffice. See Centurion Planning Corp., Inc. v. Seabrook Venture II, 176 S.W.3d 498, 507 (Tex. App.—Houston [1st Dist.] 2004, no pet.) (noting that Tex. Prop. Code § 53.021(c)’s use of word “written” precludes basing lien on oral contract).

Landscapers:  The Property Code grants mechanic’s lien rights to a person who provides labor, plant material, or other supplies for the installation of landscaping for a house, building, or improvement, including the construction of a retention pond, retaining wall, berm, irrigation system, fountain, or other similar installation under or by virtue of a written contract with the owner or the owner’s agent, contractor, subcontractor, trustee, or receiver. Tex. Prop. Code § 53.021(d).

Demolition Services:  The Property Code grants mechanic’s lien rights to a person who performs labor or furnishes labor or materials for demolition of a structure on real property under or by virtue of a written contract with the owner or the owner’s agent, trustee, receiver, contractor, or subcontractor. Tex. Prop. Code § 53.021(e).

Lending Services:  Creditors advancing money to contractors are not entitled to a mechanic’s lien, even if the funds are used to pay for labor and materials for a specific construction project. Verschoyle v. Holifield, 123 S.W.2d 878, 883 (Tex. 1939); F.&C. Engineering Co. v. Moore, 300 S.W.2d 323, 325 (Tex. Civ. App.—San Antonio 1957, writ ref’d n.r.e.).


Preparatory Services:  Preparatory activities conducted before the commencement of construction of improvements, such as erecting stakes and batterboards, do not qualify for liens. Diversified Mortgage Investors v. Lloyd D. Blaylock General Contractor, Inc., 576 S.W.2d 794, 802 (Tex. 1978).

Cost-Plus Fees:  The mechanic’s lien statutes will secure the contractor’s fee on a “cost-plus” contract. Stricklin v. Southwest Reserve Life Insurance Co., 234 S.W.2d 439 (Tex. 1950).

Sales Tax:  The mechanic’s lien statutes will secure sales tax owed to a claimant. First National Bank in Dallas v. Whirlpool Corp., 517 S.W.2d 262 (Tex. 1974).

Attorney’s Fees:  Statutory mechanic’s liens do not secure attorney’s fees incurred in filing the lien, although attorney’s fees are recoverable in litigation to enforce and foreclose the lien. See Tex. Prop. Code § 53.156; Palomita Inc. v. Medley, 747 S.W.2d 575, 577 (Tex. App.—Corpus Christi 1988, no writ) (holding that section 53.156 does not support attachment of attorney’s fees to mechanic’s liens); Dossman v. National Loan Investors, L.P., 845 S.W.2d 384, 386–87 (Tex. App.—Houston [1st Dist.] 1992, writ denied) (affirming Palomita). But see In re Bigler L.P., 458 B.R. 345, 385–388 (Bankr. S.D. Tex. 2011) (disagreeing with “Palomita and its progeny” and attaching attorney’s fees to mechanic’s lien that arose after, but was superior to, deed of trust lien).

Prejudgment Interest:  Statutory mechanic’s liens do not secure prejudgment interest or unearned or lost profits. Ambassador Development Corp. v. Valdez, 791 S.W.2d 612, 622–24 (Tex. App.—Fort Worth 1990, no writ).

**§ 7.12:3 Property Subject to Lien**

A valid mechanic’s lien attaches to “the house, building, fixtures, or improvements, the land reclaimed from overflow, or the railroad and all of its properties, and to each lot of land necessarily connected or reclaimed.” Tex. Prop. Code § 53.022(a). “The lien does not extend to abutting sidewalks, streets, and utilities that are public property.” Tex. Prop. Code § 53.022(b). A single lien will not attach to two noncontiguous tracts. *Centex Materials, Inc. v. Dalton*, 574 S.W.2d 621, 623–24 (Tex. Civ. App.—Tyler 1978, no writ); see also *Houston Electrical Distributing Co. v. MBB Enterprises*, 703 S.W.2d 206, 208 (Tex. App.—Houston [14th Dist.] 1985, no writ).

**Urban Tracts:** “A lien against land in a city, town, or village extends to each lot on which the house, building, or improvement is situated or on which the labor was performed.” Tex. Prop. Code § 53.022(c).

**Rural Tracts:** “A lien against land not in a city, town, or village extends to not more than 50 acres on which the house, building, or improvement is situated or on which the labor was performed.” Tex. Prop. Code § 53.022(d).

**Lien Attaches to Original Tract Configuration:** The mechanic’s lien attaches to the tract as configured at the start of construction under the original contract. The subsequent conveyance of portions of the tract, even if before the filing of the actual lien affidavit, does not prevent the lien’s attachment to the conveyed portions. *Valdez v. Diamond Shamrock*, 842 S.W.2d 273 (Tex. 1992).

**Leasehold Estate:** The general rule is that a mechanic’s lien will attach only to the interest that the party contracting for the construction project has in the real property that is the subject of the improvements. This means that contractors working for tenants will normally be able to place a lien only on the tenant’s leasehold estate. In such instances, the termination of the leasehold estate will extinguish the mechanic’s lien claim against the property. See *Diversified Mortgage Investors v. Lloyd D. Blaylock General Contractor, Inc.*, 576 S.W.2d 794, 805 (Tex. 1978). The only exception to this general rule is that, if the tenant is acting as the landlord’s agent for the work, the lien claim will attach to the fee title of the fee owner. *Rosen v. Peck*, 445 S.W.2d 241 (Tex. Civ. App.—Waco 1969, no writ). However, landlords rarely agree to authorize a lien for work by a tenant, and Texas courts have held that a tenant who does leasehold finish-out pursuant to the terms of a typical lease agreement is generally not the landlord’s agent for purposes of authorizing a mechanic’s lien against the landlord’s fee interest. See *Diversified Mortgage Investors*, 576 S.W.2d at 805; 2811 Associates v. Metroplex Lighting & Electric, 765 S.W.2d 851 (Tex. App.—Dallas 1989, writ denied). But see *Bond v. Kagan-Edelman Enterprises*, 985 S.W.2d 253 (Tex. App.—Houston [1st Dist.] 1999), rev’d in part, 20 S.W.3d 706 (Tex. 2000) (finding that fee owner of commercial property, where lessee of property contracted with subcontractor to finish out premises, was liable as owner to subcontractor claimant on statutory retainage and fund trapping claims).

**Practice Note:** The effectiveness of enforcing a mechanic’s lien claim against a leasehold estate to collect payment of the lien generally depends on the financial circumstances of the tenant. Under most modern commercial leases, it is an event of default for a tenant to allow a mechanic’s lien to be filed against the leasehold property. See, for example, 4 State Bar of Tex., *Texas Real Estate Forms Manual* ch. 25, forms 25-2, 25-3, 25-6 (3d ed. 2017). Since the landlord will almost certainly termi-
nate the lease rather than allow a stranger to the lease to take possession of the leasehold as a purchaser at a mechanic’s lien foreclosure sale, the mechanic’s lien claimant has little chance of realizing a significant monetary recovery through a foreclosure sale of the leasehold. Nonetheless, if the tenant’s business is more or less viable, the threat of disrupting that business operation through either prompting action under the lease by the landlord or foreclosing the mechanic’s lien against the leasehold estate may be effective leverage to collect payment from the tenant. However, if the tenant is insolvent or otherwise financially unstable, the threat of losing the leasehold may not be effective leverage to collect from the tenant. Thus, whenever possible, the contractor would prefer to contract directly with the owner to do “landlord’s finish-out work” rather than with the tenant for “tenant’s finish-out work.”

§ 7.12:4 Payment Bonds

The claimant’s right to seek judicial foreclosure of a statutory mechanic’s lien against the real property is cut off if a bond of proper form is filed of record. The two types of bonds provided for in the Texas Property Code are statutory payment bonds and lien release bonds. See Tex. Prop. Code §§ 53.171(c), 53.201(b).

Statutory Payment Bond: The payment bond or “Property Code payment bond” (also called “statutory bond”) is a payment bond posted by an original contractor that meets the requirements set out in Tex. Prop. Code §§ 53.202–.203. Bonds posted by subcontractors are not Property Code payment bonds. If a statutory payment bond in the requisite form and substance is filed in the public records, the lien claimant cannot file a mechanic’s lien against the owner’s property or file a suit against the owner, but instead must pursue payment on the payment bond. Tex. Prop. Code § 53.201(b). The filing of the payment bond also relieves the owner of any obligation to withhold statutory retainage, observe fund trapping notices, or pay undisputed claims. Industrial Indemnity Co. v. Zack Burkett Co., 677 S.W.2d 493, 495 (Tex. 1984) (construing article 5472d, section 7, of Texas Revised Civil Statutes, now codified in Tex. Prop. Code § 53.201). In other words, the property is cleared of the liens filed by subcontractors and suppliers. Sentry Insurance Co. v. Radcliff Materials of Texas, Inc., 687 S.W.2d 437 (Tex. Civ. App.—Houston [14th Dist.] 1985, no writ); Fondren Construction Co. v. Briarcliff Housing Development Associates, Inc., 196 S.W.3d 210, 216 (Tex. App.—Houston [1st Dist.] 2006, no pet.).

The bond must be in a penal sum at least equal to the total of the original contract amount, be written in favor of the owner, and have the written approval of the owner endorsed on the bond. The bond must also be executed by both the original contractor as principal and a corporate surety authorized and admitted to do business in the state of Texas and licensed by the state to execute bonds as a surety. Tex. Prop. Code § 53.202.

The bond and the contract between the original contractor and the owner (or a memorandum of contract) must be filed in the county where the owner’s property is located on which the construction is being performed. Tex. Prop. Code § 53.203. The bond must be approved by the owner, and that approval must be endorsed across the face of the bond. Once filed in the real property records as required under section 53.203, a purchaser, lender, or other person acquiring an interest in the property is entitled to rely on the record of the bond and the contract as constituting payment of all claims as if each claimant had filed a complete release and relinquishment of lien rights. Tex. Prop. Code § 53.204.

Claims against the payment bond are perfected by giving the notices required under section 53.206 within the specified time periods. Tex. Prop. Code § 53.206. If the claim remains unpaid for sixty days after the claimant perfects the claim, the claimant may bring a lawsuit against the principal and surety on the bond. Tex. Prop. Code § 53.208(a). The claimant must sue on the bond within twelve months after the claim is perfected if the bond is recorded at the time the lien is filed or within two
years if the bond was not recorded at the time the lien was filed; otherwise, the claim is barred by limitations. Tex. Prop. Code § 53.208.

**Advantage of Bond Claim:** A claimant on a bonded job has the important advantage of not having to worry about “fund trapping” and statutory retainage. As long as the statutory requirements are met for perfecting the bond claim, a claimant’s valid claim should be paid by the surety. This advantage is particularly significant to those subcontractors who provide work (or deliver material) toward the end of the project. On an unbonded job, funds available to “trap” may be insufficient to pay such claimants, and the statutory retainage may likewise not be sufficient to cover all of the claims. With a payment bond, the claimants do not have to worry about the amount of contract funds remaining or the amount of the other claims (as long as the total amount of claims does not exceed the penal limits of the bond).

**Requirements for Perfecting Bond Claim:** The best way to perfect a bond claim is to satisfy the requirements for a lien claim. The lien, if properly perfected, is also a perfected claim against the bond. Tex. Prop. Code § 53.206(b). Claimants should elect to perfect the claim as if a lien is being sought because, if the bond claim is defective in some way, the claimant will be able to fall back on its lien claim.

The alternate method for perfecting the claim against a payment bond is to furnish the surety with the same notices that were required to be sent to the owner for a lien claim. Again, it is highly recommended that a claimant meet the requirements for perfecting a lien claim even if the claimant knows that a payment bond has been provided to the owner. However, if a claimant is unable or unwilling for some reason to comply with the lien perfection procedures, the notice to owner can be modified so that it is addressed and sent to the surety. A copy should be sent to the original contractor and the owner. The claimant must send a written notice to the surety giving it fair notice of the amount and nature of the claim asserted no later than the fifteenth day of the third month following the month in which the work was performed or material delivered. The claimant must also send the required notices to the original contractor (including the “second month notice”). See Tex. Prop. Code § 53.206.

If the owner receives any notices for a lien affixed under subchapter C, the owner must mail the surety a copy of all notices received. However, failure of the owner to send copies of the notices to the surety does not relieve the surety of any liability under the bond if the claimant has complied with the requirements for perfecting a claim. Tex. Prop. Code § 53.207.

**Practice Note:** The attorney should perfect the claim both ways. When there is a bond on a private project, a claimant may perfect the claim as a lien claim by sending the owner and original contractor the proper notice letters and by filing the mechanic’s lien affidavit. To perfect the claim as a bond claim as well, the claimant need only send the surety a copy of everything the claimant sends to the owner. By sending the surety all the notices, the claim is perfected against the bond in the event that there is some technical defect in the mechanic’s lien affidavit. On the other hand, if the claim is properly perfected as a lien claim, the claimant has the lien on the property if there is a problem with the validity of the bond.

**Lien Release Bond or Bond to Indemnify:** A “lien release bond” or “bond to indemnify” is a 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.
There is one case that holds that the lien release bond does not release the owner from personal liability for failing to withhold trapped funds or statutory retainage. *See Stolz v. Honeycutt*, 42 S.W.3d 305, 312 (Tex. App.—Houston [14th Dist.] 2001, no writ) (relying, in part, on the notice language from Property Code section 53.056(d) that “if the claim remains unpaid, the owner may be personally liable”).

If a lien is filed by a subcontractor or supplier and the general contractor disputes the claim, the general contractor may choose (or may be required by contract) to file a bond to indemnify. This will “rid” the owner’s property of the lien while the claim is disputed. This process is also referred to as “bonding around a lien.”

Requirements for a bond to indemnify are as follows:

1. The bond must be filed with the county clerk in the county in which the property subject to the lien is located. Tex. Prop. Code § 53.171(b).

2. The bond must—
   a. describe the property on which the liens are claimed;
   b. refer to each lien claimed in a manner sufficient to identify it;
   c. be in an amount that is double the amount of the liens referred to in the bond unless the total amount of the lien exceeds $40,000, in which case the bond must be in an amount that is the greater of 1-1/2 times the amount of the lien or the sum of $40,000 and the amount of the lien;
   d. be payable to the party claiming the lien;
   e. be executed by—
      i. the party filing the bond as principal; and
      ii. a corporate surety authorized and admitted to do business under the law in this state and licensed by this state to execute the bond as surety; and
   a. be conditioned substantially that the principal and surety will pay to the named obligees or to their assignees the amount that the named obligees would have been entitled to recover if their claim had been proved to be a valid and enforceable lien on the property. Tex. Prop. Code § 53.172.

3. After the bond is filed, the county clerk shall issue notice of the bond to all named obligees. Tex. Prop. Code § 53.173(a).
   b. The notice must be served on each obligee by having a copy delivered to the obligee by certified mail, return receipt requested, to the address of the claimant as listed in the lien affidavit. Tex. Prop. Code § 53.173(c).

4. If the claimant’s lien affidavit does not state the claimant’s address, the notice is not required to be mailed to the claimant. Tex. Prop. Code § 53.173(d).

5. A party making or holding a lien claim may not sue on the bond later than one year after the date on which the notice is served or after the date on which the underlying lien claim becomes unenforceable under section 53.158 (statute of limitations for lien claims). Tex. Prop. Code § 53.175(a).

6. The bond is not exhausted by one action against it. Each named obligee or assignee of an obligee may maintain a separate suit on the bond in any court of jurisdiction in the county in which the real property is located. Tex. Prop. Code § 53.175(b).
§ 7.12:5  Waiver and Release of Lien or Payment Bond Claim

A waiver and release of a lien or payment bond claim is enforceable only if the waiver and release is executed and delivered according to chapter 53, subchapter L, of the Texas Property Code. Tex. Prop. Code § 53.281(a). The waiver and release may release the owner, owner’s property, contractor, and surety on a payment bond from claims and liens only if the waiver and release substantially complies with one of the forms in Property Code section 53.284 and is signed by the claimant or his authorized agent and notarized. Tex. Prop. Code § 53.281(b)(1), (2). In the case of a conditional release, evidence of payment to the claimant must also exist. Tex. Prop. Code § 53.281(b)(1), (3).

A statement purporting to waive, release, or otherwise adversely affect a lien or payment bond claim is enforceable and creates an estoppel or impairment of a lien or payment bond only if—

1. the statement is in writing and substantially complies with a form in Property Code section 53.284;

2. the claimant has actually received payment in good and sufficient funds in full for the lien or payment bond claim; or

3. the statement is in a written original contract or subcontract for the construction, remodel, repair, or land development related to a single-family house, townhouse, or duplex and the statement is made before labor or materials are provided under the original contract or subcontract. (Note that this subsection does not apply to a person who supplies only material and not labor. See Tex. Prop. Code § 53.282(c).)


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 Texas Civil Practices and Remedies Code section 12.002. Tex. Prop. Code § 53.282(b).

A person may not require a claimant or potential claimant to execute an unconditional waiver and release for a progress payment or final payment amount unless the claimant or potential claimant received payment in that amount in good and sufficient funds. Tex. Prop. Code § 53.283. For conditional and unconditional waivers and releases on progress payment and final payment, see forms 7-24, 7-25, 7-26, and 7-27 in this chapter. See also Tex. Prop. Code § 53.284.

Subchapter L applies to contracts executed on or after January 1, 2012. Subchapter L does not apply to written agreements to subordinate, release, waive, or satisfy all or part of a lien or bond claim in (1) an accord and satisfaction of an identified dispute, (2) an agreement concerning an action pending in a court or arbitration proceeding, or (3) an agreement that is executed after an affidavit claiming the lien has been filed or the bond claim has been made. Tex. Prop. Code § 53.287.

§ 7.12:6  Perfecting Statutory Lien Generally

The process of perfecting a statutory mechanic’s lien consists of giving notice of the payment claim in proper form to the proper parties within the applicable statutory time frames and, if the claim is not paid, thereafter timely filing a lien affidavit in proper form in the official real property records of the county in which the property is located. If all the requirements are met, the claimant then gets a perfected lien against the owner’s interest in the real property improved by the labor or materials to
secure payment of the claim from retainage and trapped funds in the owner’s possession, but only in the amount authorized under the Texas Property Code, which may ultimately prove to be less than the actual amount of the payment claim. See section 7.12:20 below. The statutory mechanic’s lien can be foreclosed only by judicial foreclosure.

**Practice Note:** By agreement between the owner and the original contractor before the start of construction, a deed-of-trust lien may be created against the owner’s property to secure payment to the original contractor of the construction contract price. This allows the original contractor to nonjudicially foreclose the deed of trust rather than proceed through the judicial foreclosure process required under the mechanic’s lien statutes.

Even though Texas courts have consistently held that chapter 53 of the Property Code is to be “liberally construed for purposes of protecting laborers and materialmen” (*see Republic Bank Dallas, N.A. v. Interkal, Inc.*, 691 S.W.2d 605, 607 (Tex. 1985)), lien claimants are strongly urged to strictly comply with the statutory requirements. The so-called liberal construction policy has historically been applied to the wording and content of notices and affidavits—but not to the statutory deadlines. *See Suretec Insurance Co. v. Myrex Industries*, 232 S.W.3d 811, 815–816 (Tex. App.—Beaumont 2007, pet. denied) (finding notice mailed on a Monday the 16th to be insufficient, when the deadline for mailing was defined by statute as the 15th of the same month); *Wesco Distribution, Inc. v. Westport Group, Inc.*, 150 S.W.3d 553, 561 (Tex. App.—Austin 2004, no pet.) (finding that notice was insufficient when timely mailed but without sufficient postage, then remailed late with correct postage); *Bunch Electric Co. v. Tex-Craft Builders, Inc.*, 480 S.W.2d 42, 45–46 (Tex. Civ. App.—Tyler 1972) (finding that subcontractor had no cause of action on bond claim when neither actual notice nor notice by certified mail could be proved); *Hunt Developers, Inc. v. Western Steel Co.*, 409 S.W.2d 443, 449 (Tex. Civ. App.—Corpus Christi 1966, no writ) (“The Legislature did not intend that the materialman should lose his lien through the technicalities of a warning, where the owner was not misled to his prejudice.”); *Day v. Van Horn Trading Co.*, 183 S.W. 85 (Tex. Civ. App.—Austin 1916, no writ).

§ 7.12:7 Relationship of Claimant to Owner

The filing and notice requirements applicable to perfecting statutory mechanic’s lien claims differ according to the status of the party that contracted for the labor or materials.

It is essential to determine whether the claimant contracted to provide the labor or materials to an “owner,” an “original contractor,” or a “subcontractor” to make an accurate determination of the proper parties and time frames for notice.

**Owner:** Although used repeatedly in chapter 53 of the Texas Property Code, “owner” is not expressly defined in the Code. The actual use of “owner” in the Code clearly indicates, however, that an owner is the person holding title to the real property interest that is being improved by the construction. *See, e.g.*, Tex. Prop. Code § 53.021(e). Generally, the owner is either a fee owner or a tenant holding a leasehold estate.

**Original Contractor:** An original contractor is defined as “a person contracting with an owner either directly or through the owner’s agent.” Tex. Prop. Code § 53.001(7). On large projects, it is not uncommon to have more than one original contractor. For example, if the mechanical and electrical contractors on a project contract directly with the owner, both contractors will be considered original contractors under the lien statute. Tex. Prop. Code § 53.002.

**Practice Note:** An original contractor is usually called a “general contractor” or “prime contractor” by people in the construction industry, but the Property Code uses the term *original contractor*. 
**Subcontractor:** A subcontractor is a person who does not contract directly with the owner but instead contracts to provide labor or material to either an original contractor or another subcontractor to fulfill all or part of the work required by contract between the owner and the original contractor. Tex. Prop. Code § 51.001(13). Because subcontractors cannot claim to be third-party beneficiaries of the contract between the owner and the original contractor without specific terms to that effect in the original contract, subcontractors can claim against the owner only through the perfection of a statutory mechanic’s lien. *Raymond v. Rahme*, 78 S.W.3d 552, 559–62 (Tex. App.—Austin 2002, no pet.).

**Practice Note:** In the construction industry, a subcontractor is often referred to as a “second-tier” contractor, “third-tier” contractor, and so forth, depending on how far down the chain of contracts the subcontractor is from the original contractor. These are not terms used by the Property Code, however, and for purposes of the mechanic’s lien statutes found in the Code the only meaningful distinction is whether the subcontractor contracted with an original contractor or another subcontractor. The major difference between the first-tier and second-tier subcontractors (and all lower tiers) is an additional preliminary notice that only second-tier subcontractors/suppliers must give to the original contractor to perfect their lien rights. Texas has no limit on the number of tiers down the food chain a claimant can be and still be eligible to perfect a claim. First-tier subcontractors/suppliers and second-tier subcontractors/suppliers are also referred to by the statute as “derivative claimants.”

§ 7.12:8 **Proper Parties for Statutory Lien Notices**

The proper parties for notice of the payment claim are determined by whether the claimant is an original contractor or a subcontractor. *See* Tex. Prop. Code §§ 53.055–.056.

**Original Contractor:** An original contractor does not have to give notice of nonpayment to the owner. Tex. Prop. Code § 53.056(a). The only statutory notice requirement applicable to the original contractor is that notice of the filing of the mechanic’s lien affidavit must be given to the owner at the owner’s last known business or residence address by the fifth business day after the lien affidavit is filed. Tex. Prop. Code § 53.055. See form 7-7 in this chapter for a notice to owner of filing lien affidavit.

**Practice Note:** If time permits, the original contractor should consider giving the owner written demand for payment of the debt and notice of intent to file a mechanic’s lien affidavit if the debt is not paid. The claimant’s goal is to obtain payment while avoiding the generally unrecoverable expenses of preparing and filing a lien, and a demand or warning letter may accomplish that goal. Further, giving the owner prior notice before filing the lien may help maintain the lines of communication with the owner necessary to complete the construction project. (The contractor’s filing a mechanic’s lien claim without prior notice is particularly objectionable to an owner who is financing the construction, as the filing of a mechanic’s lien claim puts the owner in default under most standard loan agreements.)

**Subcontractor:** Before the subcontractor can file a mechanic’s lien affidavit, the subcontractor must first give statutorily prescribed notices of the unpaid amount of the claim to (1) the original contractor and the owner of unpaid amounts owing by a subcontractor and (2) the owner of unpaid amounts owing by the original contractor. Tex. Prop. Code § 53.056. The notice of claim must state the amount of the claim. Tex. Prop. Code § 53.056(b).

“A copy of the statement or billing in the usual and customary form is sufficient as notice.” Tex. Prop. Code § 53.056(f). The notice must be given by registered or certified mail to the owner or original contractor (as applicable) at the last known business address or residence. Tex. Prop. Code § 53.056(e). See form 7-8 for a notice of claim to owner and original contractor.
§ 7.12:9  Deadlines for Notices of Unpaid Contract Amounts

The statutory deadlines for giving notice of the unpaid claim are always keyed to the month in which the unpaid labor or material was provided by the claimant. However, the deadlines and forms of the notices vary according to whether the construction project involves a residential construction contract or a nonresidential construction contract.

Payment Claim on Residential Construction Contract:  A “residential construction contract” is a contract between an owner and a contractor to construct or repair a new or existing residence or improvements appurtenant to the residence. Tex. Prop. Code § 53.001(9). A “residence” is—

a single-family house, duplex, triplex, or quadruplex or a unit in a multiunit structure used for residential purposes that is:

(A) owned by one or more adult persons; and

(B) used or intended to be used as a dwelling by one of the owners.

Tex. Prop. Code § 53.001(8).

Thus, residential construction contracts cover both homesteads and part-time, nonhomestead residences such as vacation homes. The requirements of Property Code sections 53.251–.260 pertaining to residential construction contracts are in addition to the other requirements of chapter 53. Tex. Prop. Code § 53.251(b).

The time frames for mailing notices and filing lien affidavits under a residential construction contract are generally shorter than those for a nonresidential one. See Tex. Prop. Code §§ 53.052(b), 53.252. Fund-trapping notices work generally in the same manner for residential construction projects as for nonresidential projects. See Tex. Prop. Code §§ 53.056, 53.252. Notice must be sent for each month in which unpaid work is furnished; however, the deadline for filing lien affidavits runs from the last month in which work was furnished by the claimant. Tex. Prop. Code §§ 53.052–.053, 53.252.

The following chart shows the applicable time frames for giving notice of an unpaid claim on a residential construction project.

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<tr>
<th>Month Labor/ Material Furnished</th>
<th>Furnished to Owner: File Lien Affidavit</th>
<th>Furnished to Original Contractor: Notice of Claim to Owner/ Original Contractor</th>
<th>Furnished to Higher-tier Subcontractor: File Lien Affidavit</th>
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This chart outlines the deadlines for notices of unpaid contract amounts in residential construction projects.
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.

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<th>Month Labor/ Material Furnished</th>
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See section 7.12:10 below for special notice requirements not included in this chart.

See form 7-12 for a notice to original contractor by second-tier claimant.

**Practice Note:** As a practical matter, the third-month notice is not required if the second-month notice contains the statutory language required by section 53.056 and is sent to both the original contractor and the owner on or before the fifteenth day of the second month after all or part of the claimant’s labor or material was provided. See form 7-8. One consideration in favor of sending the notices sequentially rather than concurrently is to give the original contractor the opportunity to see that payment is made without putting the owner on notice of potential problems with the original contractor’s subcontractors and possibly creating friction between the owner and the original contractor that will affect the subcontractor. However, the delay in presenting the claim to the owner may adversely affect the amount of funds “trapped” in the owner’s hands by the notice, as discussed in section 7.12:20 below.

**Specially Fabricated Materials:** Sections 53.021 and 53.058 of the Property Code establish additional notice requirements for contractors who provide specially fabricated materials. In order for a claimant providing specially fabricated materials to fully protect his lien rights, the claimant must give the owner notice not later than the fifteenth day of the second month after the month in which the claimant receives and accepts the order for the specially fabricated materials. Tex. Prop. Code § 53.058(b). If the contract is with a person other than the original contractor, the claimant must also give notice within that same time to the original contractor. Tex. Prop. Code § 53.058(b). The notice must contain a statement that the order has been received and accepted and that includes the price of the order. Tex. Prop. Code § 53.058(c). This notice must be sent by registered or certified mail, return receipt requested, to the last known business address or residence address of the owner or reputed owner and the original contractor as applicable. Tex. Prop. Code § 53.058(d). It is not necessary that the specially fabricated materials actually be delivered to the construction site for the claimant to perfect the lien claim. Tex. Prop. Code § 53.021(b). If the claimant actually delivers the specially fabricated materials to the job site, the claimant must also comply with the normal notice procedures for material suppliers. Tex. Prop. Code § 53.058(e). A claimant providing specially fabricated materials who fails to give the section 53.058 notice will still have a valid claim as to delivered items if the required notices are given under section 53.056 of the Property Code. Tex. Prop. Code § 53.058(f). See form 7-13 for a notice regarding specially fabricated materials.

### § 7.12:10 Notice for Contractual Retainage Claims

Both original contracts and subcontracts may provide that a percentage of each payment earned by the contractor supplying material or labor will be held back or “retained” until final completion of work. This contractual “retainage” serves as a kind of reserve fund that can be used to address problems with the quality of the contractor’s work or defaults by the contractor in paying for labor or materials used in the contract.

If a subcontract provides for contractual retainage, the retainage could be construed as an unpaid amount owing under the contract subject to the regular notice and filing requirements of the mechanic’s lien statutes, notwithstanding that the funds were withheld pursuant to an agreement and not because of a payment default. To relieve that subcontractor of the burden of giving

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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.


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.


For purposes of chapter 53 of the Property Code, the work is not “completed” until actual completion; substantial completion will not suffice. Tex. Prop. Code § 53.001(15). The required retainage is computed separately for each original contract and not for the project as a whole. Page v. Structural Wood Components, Inc., 102 S.W.3d 720, 723–24 (Tex. 2003). If the owner fails to withhold such retainage, the owner is potentially liable to lien claimants for the payment of lien claims up to the amount of the retainage that should have been withheld. Tex. Prop. Code § 53.105(a); Hunt County Lumber, Inc. v. Hunt-Collin Electric Co-operative, Inc., 749 S.W.2d 179 (Tex. App.—Dallas 1988, writ denied). Retainage secures artisans and mechanics first and then the other lien claimants in proportion to their relative claims. Tex. Prop. Code §§ 53.102, 53.104.

The punchlist work required to complete the contract scope of work extends the date of completion and, therefore, the deadline for filing mechanic’s liens. However, performing warranty work will generally not extend the completion date. In 1999, the definition of “completion” was modified to make it clear that replacement or repair of work performed under the contract will not extend the date.

Trapped Construction Payments: In addition to meeting the minimum statutory retainage requirements, an owner is authorized to withhold from payments earned by the original contractor an amount sufficient to pay alleged claims if the owner is given written notice to the effect that, if the claim remains unpaid, the owner may be personally liable and the owner’s property subjected to a lien unless the owner withholds payments from the contractor for payment of the claim or the claim is otherwise paid or settled. Tex. Prop. Code §§ 53.056(d), 53.081, 53.082.

Practice Note: The following statement is sufficient to comply with section 53.056(d): “If the claim remains unpaid, you may be personally liable and your property may be subjected to a lien unless you withhold payments from the contractor for
payment of the claim or the claim is otherwise paid or settled.” See Tex. Prop. Code § 53.056(d). This notice is commonly referred to as a “fund trapping” notice and should be routinely included as part of the notice of unpaid claim sent to the owner and original contractor. Trapping funds is important to the claimant because the statutory 10 percent retainage may not in itself be sufficient to cover all the perfected claims under a contract.

Once the owner receives a notice of default with such a statement, the owner may withhold trapped funds from payments owing to the original contractor until the time for filing the affidavit of mechanic’s lien has passed or, if a lien affidavit has been filed, until the lien claim is satisfied or released. Tex. Prop. Code § 53.082. The amount trapped is the amount the owner owes the original contractor, over and above offsets and back charges. Lennox Industries v. Phi Kappa Sigma Educational & Building Ass’n, 430 S.W.2d 404 (Tex. Civ. App.—Austin 1968, no writ); accord Page, 102 S.W.3d at 720.

**Fund Trapping for Specially Fabricated Materials:** An owner may withhold funds under a fund-trapping notice given with respect to specially fabricated materials under section 53.058 if the owner has also received notice of an unpaid claim under Property Code section 53.056.

**Filing Liens and Trapping Funds at Project’s End:** Under Property Code sections 53.084 and 53.101, the owner has to hold statutory retainage funds for only thirty days past “completion of the work,” which the Texas Supreme Court has interpreted to mean the completion or termination of the original contract under which a claimant is proceeding. See Tex. Prop. Code §§ 53.084, 53.101. See Page v. Marton Roofing, Inc., 102 S.W.3d 733, 735 (Tex. 2003) (fund-trapping liens); Page v. Structural Wood Components, Inc., 102 S.W.3d 720, 725 (Tex. 2003) (statutory liens). Moreover, all lien affidavits must be filed within thirty days of completion of the original contract. Accordingly, these statutes effectively shorten the time otherwise given a claimant for giving a fund-trapping notice. See, e.g., Bond v. Kagan-Edelman Enterprises, 985 S.W.2d 253 (Tex. App.—Houston [1st Dist.] 1999), rev’d in part, 20 S.W.3d 706 (Tex. 2000).

**Practice Note:** Contractors providing labor and materials at the end of a project (those doing interior painting and carpet installation, for example) are more likely to be affected by the shorter effective deadlines than contractors working at the start of a project (those pouring the foundation, for example). However, any contractor could be caught by shorter deadlines if the owner terminates the original contract (for the original contractor’s default, for example) before the original anticipated completion date. The only certain way for a claimant to protect his lien rights is to give all required notices and file the lien affidavit within thirty days of the completion of the claimant’s work or delivery of materials.

§ 7.12:12 **Demands for Payment**

Once a subcontractor has provided the owner with notice of a payment claim, the subcontractor may demand payment from the owner. The demand must state that all or part of the claim has accrued under Texas Property Code section 53.053 or is past due according to the agreement between the parties. Tex. Prop. Code § 53.083(a). A copy of the demand letter must be sent to the original contractor. Once this notice is given, the original contractor must notify the owner within thirty days if it intends to dispute the claim. Tex. Prop. Code § 53.083(d). If the original contractor does not provide timely notice to the owner that it disputes the claim, the original contractor is considered to have assented to the demand, and the owner is required to pay the claim. Tex. Prop. Code § 53.083(b). The claimant may incorporate a demand for payment into the original notice of claim. Tex. Prop. Code § 53.083(c). Notice and demand alone will not preserve a lien claim. If the owner does not pay the claim, a mechanic’s lien affidavit must still be filed within the time required by the statute, except as allowed by Property Code section 53.057(f). Tex. Prop. Code §§ 53.052(a), 53.103.
Practice Note: All derivative claimants should include demand language to the owner in all second-month and third-month notices. In other words, while the derivative claimant is properly fulfilling the notice requirements of the Property Code, he is also able to make demand on the owner for the claim. If the original contractor fails to notify the owner that the claim is disputed, the owner is, at least by the terms of the statute, authorized to release the money to the claimant.

§ 7.12:13 Mechanic’s Lien Affidavit

If the claimant does not receive payment after giving notice of its claim, the next step is to file the mechanic’s lien affidavit to perfect the lien claim against the owner’s interest in the real property to secure payment of the claimant’s interest in the statutory retainage and any trapped funds.

§ 7.12:14 Form of Statutory Lien Affidavit

General Contents: The lien affidavit must be signed by either the person claiming the lien or by an authorized representative on the claimant’s behalf and must contain—

1. a sworn statement of the amount of the claim;
2. the name and last known address of the owner or reputed owner;
3. a general statement of the kind of work done and materials furnished by the claimant and, for a claimant other than an original contractor, a statement of each month in which the work was done or the materials were furnished;
4. the name and last known address of the person by whom the claimant was employed or to whom the claimant furnished the material or labor;
5. the name and last known address of the original contractor;
6. a description, legally sufficient for identification, of the property sought to be charged with a lien;
7. the claimant’s name, mailing address, and physical business address; and
8. for a claimant other than an original contractor, a statement identifying the date each notice of the claim was sent to the owner and the method by which the notice was sent.


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
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.


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.


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.


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.


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.


Retainage:  “A claim for retainage accrues on the last day of the month in which all work called for by the contract between the owner and the original contractor has been completed, finally settled, or abandoned.”  Tex. Prop. Code § 53.053(e).

Architects, Engineers, and Surveyors:  Since an architect, engineer, or surveyor is considered to be an original contractor, the “accrual of indebtedness” for determining the lien filing deadline will run from the completion of services. See Tex. Prop. Code § 53.053(b). The indebtedness may accrue before the actual start of construction, if all the contract work is preparatory in nature. This means that the architect, engineer, or surveyor may have to file a lien before the start of construction.

§ 7.12:17  Special Homestead Requirements

If labor or materials are provided for work on a homestead property, no mechanic’s lien can be created against the property unless the original contractor meets very specific statutory requirements before the start of construction on the project. If the original contractor does not meet these requirements, no subcontractor providing labor or materials for the project will be able to meet the statutory requirements to perfect a mechanic’s lien on the homestead property. Tex. Const. art. XVI, § 50; Tex. Prop. Code § 53.254.

Basic Requirements:  If a homestead is involved, to create a valid mechanic’s lien against the property—

1. the original contractor and the owner must execute a written agreement setting out the terms of the contract before work commences;
2. if the owner of the homestead is married, both spouses must sign the contract; and
3. the contract must be filed with the clerk of the county in which the homestead is located.

*Tex. Prop. Code § 53.254.* The contract inures to the benefit of all persons who labor or furnish material for the original contractor. *Tex. Prop. Code § 53.254(d).*

Texas Constitution article XVI, section 50(a), may provide further limitations on when a mechanic’s lien attaches to a homestead property. If the work and material furnished by a contractor on a residential homestead property is for renovation or repair work on an existing homestead, the claimant must satisfy the specific requirements in subsections (a)(5)(A)–(D) of article XVI, § 50, of the Constitution in addition to the requirements of *Tex. Prop. Code § 53.254.* On the other hand, if the work and material furnished by an original contractor is for new construction of a residential homestead property, then a constitutional mechanic’s lien may arise simply if the contract is in writing. *Cavazos v. Muñoz, 305 B.R. 661, 678 (S.D. Tex. 2004)* (citing *Spradlin v. Jim Walter Homes, Inc., 34 S.W.3d 578, 581 (Tex. 2000)).

**Practice Note:** While Code section 53.254 provides that the contract must be signed before construction starts, no particular time for the filing of the contract is specified. However, filing the contract before the start of construction will evidence that the contract was timely executed.

**Extensions of Credit:** Any homestead construction project involving a loan has additional statutory requirements that must be met in connection with closing the construction contract with the owner. A contract for the improvement (as opposed to new construction) of homestead property cannot be signed before the fifth day after the owner has made written application for the extension of credit unless the owner must make immediate repairs to conditions that materially affect the health or safety of the people residing in the homestead. *Tex. Const. art. XVI, § 50(a)(5)(B).* Because the validity of the lien is in issue, lenders are reluctant to waive the five-day period. The construction contract cannot be executed except in the office of the lender, an attorney, or a title company. *Tex. Const. art. XVI, § 50(a)(5)(D).* (That is, there are no more “kitchen table closings” by home improvement salesmen that create liens on the property.) The owner can rescind a construction contract within three days after execution. *Tex. Const. art. XVI, § 50(a)(5)(C).*

**Additional Notices:** Certain additional notices are required with respect to homestead construction projects.

*Disclosure Statement.* The Texas Property Code provides that a mandatory disclosure statement must be provided to the owner—

1. by a third-party lender, before closing of the loan (*Tex. Prop. Code § 53.257*);

2. by the original contractor, before the residential construction contract is executed (*Tex. Prop. Code § 53.255(a)*); and

3. by any lien claimant, with the second-month notice letter to the owner (*Tex. Prop. Code § 53.252(a), (b)).

See form 7-10 in this chapter for a disclosure statement.

**Practice Note:** There are no statutory penalties for failing to give the notice, and the statute expressly provides that the failure of an original contractor or a lender to provide the statement will not invalidate a lien. *Tex. Prop. Code §§ 53.255(c), 53.257(c).* However, some attorneys argue that the statute creates a new civil cause of action in favor of residential owners.

*Notice of Proposed Subcontractors.* Before beginning construction, the original contractor must provide the owner with a list of the proposed subcontractors and suppliers for the project. *Tex. Prop. Code § 53.256.* This list must contain the notice set forth at Property Code section 53.256 and must be updated within fifteen days after each occasion in which a subcontractor or
supplier is added or deleted. Tex. Prop. Code § 53.256(a)(2), (b). The owner may waive the right to receive the list by a written waiver that meets the requirements of Property Code section 53.256(d). The waiver may be included in the residential construction contract or may be separate. Tex. Prop. Code § 53.256(d). There is no express penalty for failure to provide the list, and the failure to provide the list does not invalidate a lien. Tex. Prop. Code § 53.256(c). See form 7-11 for a list of subcontractors and suppliers. The list of subcontractors can be an important tool for the owner and should not be waived without thoughtful consideration and legal guidance.

**Disbursement of Funds.** Whenever the original contractor requests payment on a residential construction contract (whether from the owner or a third-party lender), the original contractor must provide a disbursement statement showing at minimum the name and address of every person contracting directly with the original contractor and whom the original contractor intends to pay with the requested funds. Tex. Prop. Code § 53.258. If the owner finances the construction through a third-party lender, the lender must obtain a signed disbursement statement from the original contractor for each advance and provide to the owner a statement of funds disbursed since the last disbursement statement. Tex. Prop. Code § 53.258(b). The original contractor’s or the lender’s failure to provide the statement does not invalidate a mechanic’s lien claim, but there are criminal penalties for the intentional, knowing, or reckless provision of false or misleading information in a disbursement statement. Tex. Prop. Code § 53.258(e), (f). See form 7-20 for a disbursement statement.

**Final Payment Affidavit.** As a condition to final payment, the original contractor must execute and deliver to the owner an affidavit stating that the original contractor has paid each person in full for all labor and materials used in the construction of improvements on the real property (or, in the alternative, stating who has not been paid, and, if known, their address and telephone number and the amount owing). Tex. Prop. Code § 53.259(a). See form 7-21 for an affidavit of bills paid.

**Practice Note:** The mechanic’s lien statutes pertaining to homesteads do not differentiate between the residential homestead and the business homestead. Accordingly, if a contractor intends to work on a business location owned by an individual rather than a corporate entity, the contractor should carefully evaluate whether a business homestead issue exists.

§ 7.12:18 **Owner’s Financial Liability**

The owner is liable to an original contractor for any unpaid portion of the original construction contract that was earned by the original contractor. However, there are statutory limits on an owner’s liability to subcontractors. In general, the owner’s maximum liability to the subcontractors as a group under any particular original contract is the sum of—

1. the 10 percent statutory retainage the owner is required to hold back from the original contractor for thirty days after final completion of the construction project; and
2. any funds “trapped” under a proper notice of nonpayment under Tex. Prop. Code §§ 53.081—.084.

However, the claimant traps only those funds owed by the owner to the contractor over and above offsets and back charges. *Lennox Industries v. Phi Kappa Sigma Educational & Building Ass’n*, 430 S.W.2d 404 (Tex. Civ. App.—Austin 1968, no writ), overruled in part by *Hayek v. Western Steel Co.*, 478 S.W.2d 786 (Tex. 1972), but supported by *Page v. Structural Wood Components, Inc.*, 102 S.W.3d 720 (Tex. 2003).

§ 7.12:19 **Priority of Lien Claims**

The perfection of a mechanic’s and materialman’s lien does not guarantee a claimant payment. Instead, it improves the claimant’s chances of payment and gives him a right to a share of any funds available or that should be available to pay mechanic’s
and materialman’s lien claimants. The priority of the various types of claims determines what funds, if any, should be or are available to pay claims and also the amount of any judgment the claimant is entitled to receive in a suit brought to foreclose his mechanic’s and materialman’s lien.

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(c), the priority date of a perfected mechanic’s lien claim relates back to the date of the start of construction or the delivery of materials for the project under the contract between the owner and the original contractor. Tex. Prop. Code § 53.124(a). For this purpose, a subcontractor’s claim priority will be determined by tracing back through the chain of subcontracts to the start of construction under the original contract with the owner. The effect is that (except for the statutory exceptions referenced above) all lien claims of all subcontractors under the same original contract will have the same priority date, regardless of the actual dates of filing of the respective lien affidavits. As such, a properly recorded affidavit claiming a mechanic’s and materialman’s lien that is recorded, for example, in April has equal footing with one properly recorded in June. If the proceeds of a foreclosure sale of property are insufficient to discharge properly perfected mechanic’s and materialman’s liens that have equal footing in full, the various liens share pro rata in the proceeds. Tex. Prop. Code § 53.122(b).

In determining the priority of mechanic’s liens against other liens, Tex. Prop. Code §§ 53.123, 53.124, along with the “relation back” doctrine, provide generally that a mechanic’s lien will be superior to other liens (except for the special preferences noted above) that come into existence after the inception of the mechanic’s lien, as well as prior liens that exist at the inception of the mechanic’s lien as long as the contracting party had an equitable or legal interest in the property at the time of the mechanic’s lien’s inception. See Diversified Mortgage Investors v. Lloyd D. Blaylock General Contractor, Inc., 576 S.W.2d 794, 806–807 (Tex. 1978) (finding mechanic’s lien normally to be superior to deed of trust lien when mechanic’s lien’s inception was prior to recording of deed of trust lien and during owner’s option to purchase period, but not if owner had no legal or equitable interest prior to purchasing property and mechanic’s lien’s inception was after recording of deed of trust). However, these statutory provisions and the “relation back” doctrine are somewhat limited by whether items supplied by contractors and subcontractors are “removable” or not. See “Priority of Claims for Removables” below for further discussion.

**Multiple Original Contracts:** If there is more than one original contractor on a project and construction under the separate contracts with the different original contractors began on different dates, the date of relative lien priority for the claimant is determined by the start of construction under the particular original contract under which the claimant performed.

**Priority with Respect to Third Parties:** All subcontractors with a perfected lien have preference over other creditors of the original contractor. Tex. Prop. Code § 53.121.

**Priority of Claims for Removables:** Under the “relation back” doctrine and statutory provisions discussed above, mechanic’s lien claimants generally have a preferential first priority over all other liens on removable improvements, regardless of the relative priority of filing. Tex. Prop. Code §§ 53.122, 53.124. This preference even extends under certain circumstances to deeds of trust that are filed before the inception of the mechanic’s lien. See Diversified Mortgage Investors, 576 S.W.2d at 806–07; First National Bank in Dallas v. Whirlpool Corp., 517 S.W.2d 262, 269 (Tex. 1974) (giving priority to lien recorded after deed of trust when items were considered removable). The courts, however, have required claimants to be able to prove that they furnished the removable (i.e., to be able to identify the specific removable) in order to have the preference. See Kaspar v. Cockrell-Riggens Lighting Co., 511 S.W.2d 109, 111 (Tex. Civ. App.—Eastland 1974, no writ) (overruling trial court when it disregarded jury finding that items could not be separated and identified from similar items that were supplied for same project); In re Jamail, 609 F.2d 1387, 1390–91 (5th Cir. 1980) (declining to give priority to materialman’s lien for
goods delivered that supplier could not separately identify from similar items supplied by others). Thus, for example, a lumber supplier could not remove an air handling unit because the lumber supplier did not provide the unit. The original contractor, however, is entitled to remove all removables provided by it and its subcontractors and suppliers since the entirety of the construction was provided pursuant to his contract with the owner. \textit{L&N Consultants, Inc. v. Sikes}, 648 S.W.2d 368, 370–371 (Tex. Civ. App.—Dallas 1983, writ ref’d n. r. e.).

“Removable improvements” generally means items that can be removed without material injury to the land or other improvements. \textit{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. \textit{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 (\textit{Whirlpool Corp.}, 517 S.W.2d at 269), the lien for removables can be a useful tool for extracting payment from the project owner or an existing lienholder, but it is not a self-help lien. The contractor must obtain judicial foreclosure of the lien before removal and cannot simply resort to self-help remedies. \textit{See Tex. Prop. Code § 53.154; P&T Manufacturing Co., Inc. v. Exchange Savings & Loan Ass’n}, 633 S.W.2d 332, 333 (Tex. App.—Dallas 1982, writ ref’d n.r.e.).

Whether a particular item constitutes a “removable” is a question of fact for a jury to decide and will be decided on a case-by-case basis. The following questions must be asked to determine removability. Will the removal cause: (1) material damage to the land; (2) material damage to an improvement that was already in existence at the time the improvement in question was installed or affixed; (3) material detriment or material injury to the building or lot; or (4) material injury to the improvement itself? In determining whether an item is removable, the court will look to the manner of its attachment to the land or existing improvements, the extent to which the removal of the item would require repairs, modifications, or protection of the land or existing improvements, the status of the construction at the time the removal is sought, and the function of the improvements sought to be removed. \textit{Exchange Savings & Loan Ass’n}, 629 S.W.2d 34, 37 (Tex. 1982).

The following is a list of some of the items that courts have treated as removables:

1. Garbage disposals and dishwashers. \textit{See Whirlpool Corp.}, 517 S.W.2d at 270;

2. Air-conditioning and heating system equipment such as furnaces, air-conditioning coils, compressors, thermostats, and condensing units. \textit{See Houck Air Conditioning, Inc. v. Mortgage & Trust, Inc.}, 517 S.W.2d 593, 596 (Tex. Civ. App.—Waco 1974, no writ);

3. Windows and doors that can be removed by temporarily taking out surrounding brick without causing ultimate damage to a residence. \textit{See First Continental Real Estate Investment Trust v. Continental Steel Co.}, 569 S.W.2d 42, 47 (Tex. Civ. App.—Fort Worth 1978, no writ);


8. Mirrors. See Occidental Nebraska FSB v. East End Glass Co., 773 S.W.2d 687, 689 (Tex. App.—San Antonio 1989, no writ);


10. Highway billboard signs. See Hoarel Sign Co. v. Dominion Equity Corp., 910 S.W.2d 140, 143 (Tex. App.—Amarillo 1995, writ denied);

11. Light fixtures, gears, electrical panels, lamps, wire, and electrical wire. See In re Demay International, LLC, 431 B.R. 164, 174 (Bankr. S.D. Tex. 2010);

12. Chiller to provide air-conditioning. See RDI Mechanical, Inc. v. WPVA, L.P., No. 01-06-00962-CV, 2008 WL 920315, at *3 (Tex. App.—Houston [1st Dist.] Apr. 3, 2008, no pet.) (mem. op.); and


The following is a list of some of the items that the courts have treated as nonremovable:

1. Concrete roof tiles. See Monocrete Pty. Ltd., 629 S.W.2d at 37;

2. Window frames. See McCallen v. Mogul Production & Refining Co., 257 S.W. 918, 923 (Tex. Civ. App.—Galveston 1923, no writ);

3. Certain types of cabinets. See Houck Air Conditioning, Inc., 517 S.W.2d at 596;

4. Lumber used in construction of a house. See Cameron County Lumber Co. v. Al & Lloyd Parker Inc., 62 S.W.2d 63, 64 (Tex. 1933);


7. Duct work for air-conditioning and heating systems, copper plumbing, piping, sheet rock, electrical wiring and conduit, electromagnetic insulation, glass brick interior wall, and suspended ceiling. See In re Orah Wall Financial Corp., 84 B.R. at 446–448; and

§ 7.12:20 Payment on Perfected Claims

The owner is to use the retainage and trapped funds to pay the perfected mechanic’s lien claimants on a priority class by priority class basis. If the retainage and trapped funds held by the owner are insufficient to discharge all the perfected lien claims of a particular class, the available funds are to be divided pro rata among the claimants of the class in accordance with the relative amount of their claims.

If the owner properly disburses among the perfected claimants the full amount of the retainage and trapped funds the owner was required to hold under the Texas Property Code, the claimants cannot pursue the owner or the owner’s property for the balance of their respective payment claims.

Practice Note: It is not uncommon for the retainage and trapped funds held by the owner to be less than the perfected claims. This occurs, for example, when a particular lien claimant fails to trap funds in the owner’s hands but otherwise perfects a lien claim.

Practice Note: Because (1) claims of equal priority may accrue and be perfected throughout the entire construction period and for thirty days thereafter and (2) fact issues may exist as to the validity of the payment claims made by any one or more of the claimants (which will affect the calculation of the proper pro rata division of funds among claimants), the owner is typically reluctant to make any payment on lien claims before thirty-one days after final completion of the construction project, and even then disbursement of funds carries great potential risks to the owner. Unless a global agreement can be reached among the claimants and the owner, the owner may be forced to interplead the funds or seek a judicial determination of the proper amounts owing to the respective claimants. The delay and cost of such litigation is, of course, a great incentive for the various parties to compromise and settle their claims.

Attorney’s Fees: The court must award both original contractors and subcontractors equitable costs and attorney’s fees in a foreclosure action. However, with respect to a lien or claim arising out of a residential construction contract, the court is not required to order the property owner to pay costs and attorney’s fees. Tex. Prop. Code § 53.156.

§ 7.12:21 Judicial Enforcement of Lien

Limitations for Filing Suit: If the claimant has timely filed and perfected a mechanic’s lien affidavit but the owner refuses to pay the amount properly owing to the claimant, the claimant can seek payment through a judicial foreclosure sale of the property that was the subject of the mechanic’s lien affidavit. Statutory mechanic’s liens can be foreclosed only by judicial action. If the claim pertains to a nonresidential construction claim, suit to foreclose the lien must be filed within two years of the later of the last day a claimant may file the lien affidavit or one year after completion, termination, or abandonment of the work under the original contract under which the lien is claimed. Tex. Prop. Code § 53.158(a). If the claim pertains to a residential construction contract, suit to foreclose the lien must be filed by the later of one year after the last day a claimant could file a lien affidavit under section 53.052 of the Texas Property Code or one year after completion, termination, or abandonment of the original contract. Tex. Prop. Code § 53.158(b).

Jurisdiction: A suit to foreclose a lien on real property may be filed in district court in all counties. In addition, suits to foreclose liens on real property in Harris, Tarrant, El Paso, and Dallas counties may be filed in those counties’ statutory county courts at law. The amount in controversy must exceed $500 and be less than $100,000 for the suit to be filed in Harris County. Tex. Gov’t Code § 25.1032(c)(3) (Harris County), § 25.2222(b)(7) (Tarrant County), § 25.0592(a) (Dallas County),
§ 25.0372(a) (El Paso County). Lastly, suits to foreclose a lien on real property may not be filed in constitutional county courts. Tex. Gov’t Code § 26.043.

Venue: There is no mandatory venue provision governing where a suit to foreclose on a lien must be brought. Section 53.154 of the Property Code requires only that the suit be heard by a “court of competent jurisdiction.” However, section 53.157 of the Code provides that a mechanic’s lien may be extinguished by “failing to institute suit to foreclose the lien in the county in which the property is located . . . .” Therefore, chapter 53 appears to require a claimant to file suit to foreclose a lien in the county where the project is located. While there is no case that decides the issue definitively, the best practice is to file suit in the county where the project is located.

Judicial Foreclosure Proceeds: If the owner’s property goes to judicial foreclosure sale, the sales proceeds will be used to pay each class of claimant in accordance with its relative priority for as far as the sales proceeds will go. If the available sales proceeds are not sufficient to pay all the claims of a particular priority class, the available funds will be divided pro rata among the claimants in accordance with the relative amount of their claims, as determined by the court. Tex. Prop. Code §§ 53.104(b), 53.122(b).

Attorney’s Fees and Costs: A court must award costs and reasonable attorney’s fees for a suit to foreclose on a lien, declare a lien claim invalid, or enforce a bond claim. However, with respect to a lien or claim arising out of a residential construction contract, the court is not required to order the property owner to pay costs and attorney’s fees. Tex. Prop. Code § 53.156.

§ 7.12:22 Arbitration of Claim


§ 7.12:23 Removing Invalid Mechanic’s Liens


§ 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

In addition to the specific statutory procedures outlined above, the Texas Constitution provides a self-executing lien for improvements to property made by an original contractor who is in direct privity of contract with the owner. The original contractor need not comply with the requirements of chapter 53 of the Property Code to enforce such a constitutional lien. This right, however, is very limited. Article XVI, § 37, of the Texas Constitution provides:

Mechanics, artisans and material men, of every class, shall have a lien upon the buildings and articles made or repaired by them for the value of their labor done thereon, or materials furnished therefor; and the Legislature shall provide by law for the speedy and efficient enforcement of said liens.

On the other hand, subcontractors and suppliers not contracting directly with the owner do not have a constitutional lien and are relegated to statutory liens. The constitutional lien is only available to one in privity with the owner of the property in question. First National Bank of Paris v. Lyon-Gray Lumber Co., 194 S.W. 1146, 1150 (Tex. Civ. App.—Texarkana 1917), aff’d, 217 S.W. 133 (Tex. 1919); In re A&M Operating Co., 182 B.R. 997 (E.D. Tex. 1995). But see Trinity Drywall Systems v. TOKA General Contractors, Ltd., 416 S.W.3d 201, 212 (Tex. App.—El Paso 2013, pet. denied) (construing statutory provisions of Tex. Prop. Code § 53.026 as allowing subcontractors to have same rights as contractors to constitutional liens).

Although a constitutional lien exists without the necessity of filing a lien affidavit, certain circumstances that would bar collection of the debt can prevent enforcement of the lien. For example, a constitutional lien cannot be enforced against a good-faith purchaser for value of the property who had no knowledge of the lien claim. See Cavazos v. Munoz, 305 B.R. 661, 681–82 (S.D. Tex. 2004). Therefore, in order to preserve such a claim against a subsequent good-faith purchaser, claimants are encouraged to file a lien affidavit in the county records for the property in question. The filing of the lien affidavit will put pro-
spective purchasers of the property on notice of the lien. See FDIC v. Bodin Concrete Co., 869 S.W.2d 372, 374, 382 (Tex. App.—Dallas 1993, writ denied) (remanding to trial court for determination of priority of constitutional lien vis-à-vis deed of trust, where lienholders filed lien affidavits prior to deed of trust, but issue of priority depended on further fact-finding); Justice Mortgage Investors v. C.B. Thompson Construction Co., 533 S.W.2d 939, 942, 944 (Tex. Civ. App.—Amarillo 1976, writ ref’d n.r.e.).

**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.


**Sham Contractors:** A person who labors, specially fabricates materials, or furnishes labor or materials under a direct contractual relationship with another person is deemed to be an original contractor in direct contractual relationship with the owner if the owner contracted with the other person for the construction or repair and (1) the owner can effectively control that person through the ownership of voting stock, interlocking directorships, or otherwise; (2) that other person can effectively control the owner through the ownership of voting stock, interlocking directorships, or otherwise; or (3) the contract was made without good-faith intention of the parties that the other person was to perform the contract. Tex. Prop. Code § 53.026(a)(1), (3). Such owner-controlled contractors are commonly called “sham contractors.”

While a valid constitutional lien normally requires direct contractual privity with the owner, Tex. Prop. Code § 53.026 may allow a subcontractor or supplier to prevail on a constitutional lien claim against an owner. See Trinity Drywall Systems, 416 S.W.3d at 212 (construing statutory provisions of Tex. Prop. Code § 53.026 as allowing subcontractors to have rights of contractors to constitutional liens); but see Southwest Properties, L.P. v. Lite-Dec, Inc., 989 S.W.2d 69, 72 (Tex. App.—San Antonio 1998, pet. denied) (construing application of Tex. Prop. Code § 53.026 to loosening subcontractor lien notice requirements but not creating contractual alter ego liability for owners acting as original contractors).

**Limitations of Constitutional Lien:** Many types of work are not covered by the constitutional lien, such as claims for water or sewer lines, landscaping, and other similar work not considered a “building.” See, e.g., Campbell v. City of Dallas, 120 S.W.2d 1095, 1097 (Tex. 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. McColom 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 [the contractor] for the value of their labor done thereon, or materials 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


§ 7.16 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.) (finding good-faith mortgagee’s lien on airplane was superior to lien asserted by installer of autopilot when mortgagee had no actual or constructive notice of installer’s lien).

If the property is a chattel subject to a competing claim under the Uniform Commercial Code, resolution of the priority conflict depends in part on whether the constitutional lien claimant has possession of the chattel. *Garcia v. Rutledge*, 649 S.W.2d 307, 311 (Tex. App.—Amarillo 1982, no writ). However, if possession is authorized by another statute, such as Tex. Prop. Code § 70.001, a valid constitutional lien may take priority over a perfected security interest under Tex. Bus. & Com. Code § 9.333. *See Nelms v. Gulf Coast State Bank*, 516 S.W.2d 421, 424 (Tex. 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.]

I. 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).

There are no payment bonds available for the protection of prime contractors (i.e., those with a direct contractual relationship with the public entity). If a public entity fails to pay, the prime contractor is left to contractual remedies and statutory claims procedures. Indeed, sovereign immunity may insulate the public entity from suit, a topic beyond the scope of this manual. See generally Tex. Gov’t Code ch. 2260.

§ 7.21:2 Perfection

To recover in a suit on a payment bond for a public work project, a claimant must “perfect” his claim. Perfection of a claim means providing the proper notice and information required under the applicable statutes. Texas courts have recognized that the rules regarding the substance of notices should be liberally construed. See S.A. Maxwell Co. v. R.C. Small & Associates, 873 S.W.2d 447, 454 (Tex. App.—Dallas 1994, writ denied) (construing article 5160 of the Texas Revised Civil Statutes, repealed and replaced by Tex. Gov’t Code § 2253.041). It is important to note, however, that strict compliance will be required as to rules regarding the time and manner of giving notice. Failure to timely and procedurally comply with the requirements could result in the loss of all potential recovery. See S.A. Maxwell Co., 873 S.W.2d at 451.

Contracts under $25,000: The Texas Property Code requires the lien claimant to send 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 a second notice on August 15, 1990. A person not in a direct contractual relationship with the prime contractor must send notice on or before the fifteenth day of the second month after materials are delivered, and, in this case, the court held that the materials were “delivered” when the contractor picked them up, both on May 31 and June 4. Thus, to perfect a claim for the first pickup, the second-tier subcontractor had to send notice by July 15 (not July 26). Accordingly, the court held that he had not properly perfected his claim for this first delivery.

§ 7.21:3 Requests for Information

To properly file a bond claim, the claimant must send notices to the prime contractor and the surety who provided the bond. Tex. Gov’t Code § 2253.041. The addresses of the prime contractor and the surety may be obtained from the governmental entity for whom the work is being performed. Tex. Gov’t Code § 2253.026. The surety’s information is also available from the Texas Insurance Commission. The governmental entity may charge a reasonable fee for a copy of the bond.

Practice Note: Do not expect the request to be processed timely if it is made at the last minute. It is good practice to routinely request this information at the start of each job.

Prime Contractor’s Obligations: On request from anyone who provides public work, prime contractors must provide—
1. the name and last known address of the governmental entity with whom the prime contractor contracted for the public work;
2. a copy of the payment and performance bonds for the public work, including bonds furnished by or to the prime contractor; and
3. the name of the surety issuing the payment bond and the performance bond and the toll-free telephone number maintained by the Texas Department of Insurance under subchapter B, chapter 521, of the Texas Insurance Code for obtaining information concerning licensed insurance companies.

Tex. Gov't Code § 2253.024(a). The prime contractor must provide this information within ten days from receiving a request. Tex. Gov't Code § 2253.024(c).

Subcontractor’s Obligations: A subcontractor must provide, on written request from a governmental entity, the prime contractor, the surety on a bond covering the public work contract, or any other person providing work under the subcontract—

1. the name and last known address of each person from whom the subcontractor purchased public work labor or material, other than public work material from the subcontractor’s inventory;
2. the name and last known address of each person to whom the subcontractor provided public work labor or material;
3. a statement of whether the subcontractor furnished a bond for the benefit of its subcontractors and materialmen;
4. the name and last known address of the surety on the bond the subcontractor furnished; and
5. a copy of that bond.

Tex. Gov’t Code § 2253.024(b). The subcontractor must also provide this information within ten days from receiving a request. Tex. Gov’t Code § 2253.024(c).

The prime contractor or the subcontractor may require payment of the actual cost of producing this information (up to $25) if the requestor does not have a direct contractual relationship with the provider. Tex. Gov’t Code § 2253.024(d). Failure to produce this information may result in the prime contractor or subcontractor being liable to the requestor for the reasonable and necessary costs incurred in obtaining the requested information. Tex. Gov’t Code § 2253.024(e).

Payment Bond Beneficiary’s Obligations: If a request for information is made to the payment bond beneficiary by the prime contractor or the surety, the beneficiary must provide within thirty days—

1. a copy of any applicable written agreement or purchase order; and
2. any statement or payment request of the beneficiary that shows the amount claimed and the work performed by the beneficiary for which the claim is made.

Tex. Gov’t Code § 2253.025(a). If it is requested, the beneficiary must also provide the estimated amount due for each calendar month in which the beneficiary performed labor or provided material. Tex. Gov’t Code § 2253.025(b).

§ 7.21:4 Procedures after Perfection

Once the bond claim has been perfected, it is still incumbent on the claimant to press its claim by following up with the surety. Often negotiations result in compromise and settlement on payment of an agreed amount by the bonding company or the prime contractor (who generally is required to indemnify the bonding company). In other cases, it is necessary for the claim-
ant to file suit or institute arbitration proceedings to force the prime contractor or surety to pay the balance due under the con-
tract.

The substantive requirements to perfect a bond claim on state and local public works contracts can be easily completed. The
ture 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.

§ 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 alterna-
tive remedy to the mechanic’s lien available in ordinary private construction disputes because the lien cannot attach to govern-

The amount of the payment bond shall equal the total amount payable by the terms of the contract unless the officer
awarding the contract determines, in a writing supported by specific findings, that a payment bond in that amount
is impractical, in which case the contracting officer shall set the amount of the payment bond. The amount of the
payment bond shall not be less than the amount of the performance bond.

40 U.S.C. § 3131(b)(2). The performance bond, which protects the project owner, is required to be in such amount as the offi-
cer awarding the federal contract deems adequate for the protection of the United States. 40 U.S.C. § 3131(b). The perfor-
mance 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

§ 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

However, any second-tier subcontractor, defined as “a person having a direct contractual relationship with a subcontractor but
no contractual relationship, express or implied, with the contractor furnishing the payment bond,” must perfect its claim on the
bond by giving written notice to the general contractor within the ninety-day period, stating with substantial accuracy the
amount claimed and the name of the party to whom the material was supplied or for whom the labor was performed. 40 U.S.C.
§ 3133(b)(2). The notice must be served by any means that provides written, third-party verification of delivery to the contractor at any place he maintains an office or conducts his business or at his residence; or in any manner in which the U.S. marshal for the district in which the public improvement is situated may serve summons. 40 U.S.C. § 3133(b)(2). The notice must be received by the contractor, rather than merely being mailed, within the ninety-day period. Pepper Burns Insulation, Inc. v. Artco Corp., 970 F.2d 1340, 1343 (4th Cir. 1992), cert. denied, 506 U.S. 1053 (1993).

Unlike the procedure for bond claims in state and local public works projects, bond claims on federal projects do not require repeated notices to be sent either to the general contractor or to the surety. Notice to the principal contractor is a strict condition precedent to suit under the Miller Act by a supplier who deals with a subcontractor, but the supplier is not required to give notice to the surety before commencing suit. Continental Casualty Co., 305 F.2d at 797.

§ 7.22:3 “Subcontractor” vs. “Materialman”

Although the Miller Act is to be construed liberally, it is limited by a proviso that the payment bond protects only those persons who have a contractual agreement with a prime contractor or first-tier subcontractor engaged in a federal project. Persons supplying labor or material to a mere “materialman” are not protected. United States v. Aetna Casualty & Surety Co., 981 F.2d 448, 450 (9th Cir. 1992). The United States Supreme Court has defined a subcontractor as “one who performs for and takes from the prime contractor a specific part of the labor or material requirements of the original contract.” See Clifford F. MacEvoy Co. v. United States, 322 U.S. 102, 109 (1944). The test for whether one is a subcontractor is based on the “substantiality and importance of his relationship with the prime contractor.” F.D. Rich Co. v. United States, 417 U.S. 116, 123 (1974). This means that even though a supplier may have an express written contract directly with the prime contractor, the supplier may not qualify as a “subcontractor” unless the supplier’s relationship with the prime contractor is “substantial” enough. If the supplier does not qualify as a subcontractor, those who provide labor or material to that supplier are dealing with a mere materialman and cannot claim protection under the Miller Act payment bond.

The Court in F.D. Rich reasoned, “It is the substantiality of the relationship which will usually determine whether the prime contractor can protect himself, since he can easily require bond security or other protection from those few ‘subcontractors’ with whom he has a substantial relationship in the performance of the contract.” F.D. Rich Co., 417 U.S. at 123–24.

The Court acknowledged, however, that “‘this method of protection is generally inadequate to cope with remote and undeterminable liabilities incurred by an ordinary materialman.’” F.D. 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 Texas Property Code 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 furnishes labor or materials for the construction or repair of an improvement on real property is a beneficiary of any trust funds paid or received in connection with the improvement. Tex. Prop. Code § 162.003(a). A property owner is a beneficiary of trust funds paid or received in connection with a residential construction contract, including funds deposited into a construction account. Tex. Prop. Code § 162.003(b).
§ 7.23:3  Residential Homestead Projects

A contractor who enters into a written contract with a property owner to construct improvements to a residential homestead in an amount exceeding $5,000 shall deposit the trust funds in a construction account in a financial institution. Tex. Prop. Code § 162.006. The contractor must maintain account records in accordance with the requirements of Property Code section 162.007. See Tex. Prop. Code § 162.007.

§ 7.23:4  Penalties for Misapplication of Monies by Trustees

A trustee who knowingly or intentionally retains, uses, or diverts trust funds without first fully paying all current or past-due obligations incurred by the trustee to the “beneficiaries” (that is, the unpaid contractors) has misapplied the trust funds. Tex. Prop. Code § 162.031(a). If the misapplied amount exceeds $500, this is a Class A misdemeanor if there is no intent to defraud and a third-degree felony if intent to defraud is shown. Tex. Prop. Code § 162.032.

Practice Note: The statute, by imposing a statutory duty on the trustee, creates a civil cause of action for damages arising from the trustee’s breach of his duties. The statute also allows the claimant to sue certain individuals including the owner and officers of the business entity to get to the individual who actually handled the money.

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.
Petition and Application to Foreclose Worker’s Lien

Form 7-2

See section 14.10 in this manual for other forms of party designation. See also section 14.2 regarding exercising caution in pleading conditions precedent. Do not add prejudgment interest to the amounts claimed.

Texas Civil Practice and Remedies Code section 30.014 requires each party to include partial identification information in its initial pleading in a civil action filed in district court, county court, or statutory county court.

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

Petition and Application to Foreclose Worker’s Lien

1. Parties. Plaintiff is [name of plaintiff], whose address is [address, city, state]. [The last three numbers of Plaintiff’s driver’s license number are [numbers]./Plaintiff has not been issued a driver’s license.] [The last three numbers of Plaintiff’s Social Security number are [numbers]./Plaintiff has not been issued a Social Security number.] Defendant is [name of defendant], who can be served with citation at [address, city, state].

2. Facts. On [date], Plaintiff as employee and Defendant as employer entered into a contract by which Defendant employed Plaintiff to provide labor or services as a [type of employment] to [describe work] at Defendant’s [type of premises], located at [address, city, county] County, Texas. The work was performed for Defendant’s benefit.

3. Debt. Under terms of the contract between Plaintiff and Defendant, Defendant was obligated to pay Plaintiff, as wages for labor or services rendered in [describe work], $[amount] per [time period]. Defendant now owes Plaintiff $[amount] but refuses to pay Plaintiff.

4. Conditions Precedent. All conditions precedent have been performed or have occurred.
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).
Form 7-3

To prevent destruction or waste of the property in which a worker’s lien is claimed and to avoid losing the property to a bona fide purchaser, the claimant should seek to sequester the property at the time the suit to foreclose the lien is filed; see section 7.1:5 in this chapter. A petition to foreclose a worker’s lien is at form 7-2. Additional sequestration forms are at forms 8-8 through 8-16. See section 14.10 for other forms of party designation. In most counties, the clerk will prepare the writ of sequestration and the return. In some cases, the attorney may wish to prepare them for the clerk.

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

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].

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]
[Telex copier]

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.”
“I make this affidavit on information and belief. The basis for that belief is the following: [state specific grounds for belief].”

Continue with the following.

[Name of affiant]
Affiant

SIGNED under oath before me on ________________________________.

Notary Public, State of Texas

Prepare the following to take to the hearing: form 8-9 (order for issuance of writ of sequestration), form 8-4 (bond to defendant), form 8-10 (writ of sequestration), and form 8-12 (officer’s return).
Form 7-4

First Notice of Sale under Worker’s Possessory Lien
[Property Other Than Motor Vehicle, Motorboat, Vessel, or Outboard Motor]

[Date]

To: [name and address of owner], Owner

Re: [describe property subject to lien]

I have maintained possession of the property described above, which you own and which I repaired at your request, for at least sixty days after the repair charges accrued against you.

A total of $[amount] is now due for the repair of this property, and I request that you pay the charges due immediately. If you do not make payment within ten days after receipt of this notice, I intend to sell the property at public sale, after twenty days’ notice, and to apply the proceeds of the sale to payment of the charges. I will then pay any excess to the person entitled to it.

________________________________________
[Name]

Certified Mail No. [number]
Return Receipt Requested
Form 7-5

Second Notice of Sale under Worker’s Possessory Lien
[Property Other Than Motor Vehicle, Motorboat, Vessel, or Outboard Motor]

[Date]

To: [name and address of owner], Owner

Re: [describe property subject to lien]

I have maintained possession of the property described above, which you own and which I repaired at your request, for at least sixty days after the repair charges accrued against you. At least ten days before the date of this notice, you were advised that, if you failed to pay the charges within ten days, I would sell the property after twenty days’ notice. You have not paid the charges within ten days after your receipt of the first notice.

A total of $[amount] is now due for the repair of this property, and I request that you pay the charges due immediately. If you do not make payment within twenty days after receipt of this second notice, I intend to sell the property at public sale and to apply the proceeds of the sale to payment of the charges. I will then pay any excess to the person entitled to it.

The public sale will be at [address, city, county] County, Texas, on [date] at [time].

[Name]

Certified Mail No. [number]
Return Receipt Requested
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.

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**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.
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.
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).
Notice of Claim to Owner and Original Contractor

[Name and address of owner]
[Name and address of original contractor]


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

Notice to Owner Regarding Liens against Homestead Property

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.
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).
Form 7-11

The prescribed language in the “Notice” paragraph of this form must appear in a minimum of ten-point bold-faced type. The list may be given either with form 7-10 or before the commencement of construction. This list must be updated and provided to the owner not later than the fifteenth day after a subcontractor or supplier is added or deleted unless the owner has signed a written waiver of the right to receive updates. Tex. Prop. Code § 53.256.

Contractor’s List of Subcontractors and Suppliers

Date:

Owner:

Contractor:

Property:

[Lender:]  

NOTICE: THIS LIST OF SUBCONTRACTORS AND SUPPLIERS MAY NOT BE A FINAL LISTING. UNLESS YOU SIGN A WAIVER OF YOUR RIGHT TO RECEIVE UPDATED INFORMATION, THE CONTRACTOR IS REQUIRED BY LAW TO SUPPLY UPDATED INFORMATION, AS THE INFORMATION BECOMES AVAILABLE, FOR EACH SUBCONTRACTOR OR SUPPLIER USED IN THE WORK PERFORMED ON YOUR RESIDENCE.

Name of subcontractor or supplier:

Address:

Telephone number:

Repeat above information as needed.
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]


[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
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
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
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.

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.

Include the following if applicable.
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
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
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.
Contractor agrees to indemnify and hold Owner harmless from any loss or expense resulting from false or incorrect information in this affidavit.

Include the following if applicable.

SUBSCRIBED AND SWORN TO before me on ________________________________ by [name of affiant].

Notary Public, State of Texas
Form 7-22

The sworn account suit is the usual method by which a constitutional lien is foreclosed, and this petition initiates that kind of suit. By following the form petitions in chapter 14 of this manual, the attorney can modify this form to fit other situations. For other forms of party designation, see section 14.10. See also section 14.2 regarding exercising caution in pleading conditions precedent. The affidavit, statement of account, and any invoices must also be attached; abbreviations and other items in the account must be explained for clarity if necessary. The application for a writ of sequestration (form 7-23) should be filed when suit on the debt is filed. The sworn account procedure is discussed at section 14.21, and sequestration is discussed at sections 8.16 through 8.24.

Texas Civil Practice and Remedies Code section 30.014 requires each party to include partial identification information in its initial pleading in a civil action filed in district court, county court, or statutory county court.

Caveat: In calculating the amount due on the account, do not include any interest that may have been posted to it.

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

Petition and Application to Foreclose Constitutional Lien on Personal Property

1. Parties. Plaintiff is [name of plaintiff], whose address is [address, city, state]. [The last three numbers of Plaintiff’s driver’s license number are [numbers]./Plaintiff has not been issued a driver’s license.] [The last three numbers of Plaintiff’s Social Security number are [numbers]./Plaintiff has not been issued a Social Security number.] Defendant is [name of defendant], who can be served with citation at [address, city, state].

2. Facts. In the usual course of business, Plaintiff [made/repaired] for Defendant the following article[s] of personal property: [describe property], as shown on the attached statement of account. Defendant accepted the article[s] and became bound to pay Plaintiff [its/their] designated price, which is a reasonable, usual, and customary price for such [an] item[s]. The statement of account is attached as Exhibit [exhibit number/letter] and incorporated by reference. This account represents a transaction or series of transactions of which a systematic record has been kept.
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).
Form 7-23

The lienholder should apply for a writ of sequestration on personal property subject to the lien at the time suit is filed on the debt; see sections 7.14:2, 8.16, and 8.17 in this manual. For a petition on a sworn account seeking foreclosure of the lien, see form 7-22. Additional sequestration forms are at forms 8-8 through 8-16. See section 14.10 for other forms of party designation. In most counties, the clerk will prepare the writ of sequestration and the return. In some cases, the attorney may wish to prepare them for the clerk.

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].

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.

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.

5. **Prayer.** Plaintiff prays that a writ of sequestration issue and that Plaintiff receive all further relief to which Plaintiff may be entitled.

---

**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).
If a claimant or potential claimant is required to execute a waiver and release in exchange for or to induce the payment of a progress payment and is not paid in exchange for the waiver and release, or if a single payee check or joint payee check is given in exchange for the waiver and release, the waiver and release must substantially comply with the form below, described in Texas Property Code section 53.284(b). See Tex. Prop. Code § 53.284(a), (b).

---

Conditional Waiver and Release on Progress Payment
(Pursuant to Tex. Prop. Code § 53.284)

Project __________________

Job No. __________________

On receipt by the signer of this document of a check from ________________ (maker of check) in the sum of $__________ payable to _____________________ (payee or payees of check) and when the check has been properly endorsed and has been paid by the bank on which it is drawn, this document becomes effective to release any mechanic’s lien right, any right arising from a payment bond that complies with a state or federal statute, any common law payment bond right, any claim for payment, and any rights under any similar ordinance, rule, or statute related to claim or payment rights for persons in the signer’s position that the signer has on the property of ________________ (owner) located at ________________________ (location) to the following extent: ______________________ (job description).

This release covers a progress payment for all labor, services, equipment, or materials furnished to the property or to ____________________ (person with whom signer contracted) as indicated in the attached statement(s) or progress payment request(s), except for unpaid retention, pending modifications and changes, or other items furnished.
Before any recipient of this document relies on this document, the recipient should verify evidence of payment to the signer.

The signer warrants that the signer has already paid or will use the funds received from this progress payment to promptly pay in full all of the signer’s laborers, subcontractors, materialmen, and suppliers for all work, materials, equipment, or services provided for or to the above referenced project in regard to the attached statement(s) or progress payment request(s).

Date ____________________________

_________________________________ (Company name)

By ______________________________ (Signature)

_________________________________ (Title)

STATE OF TEXAS )
COUNTY OF )

This instrument was ACKNOWLEDGED before me, the undersigned Notary Public, by ___________________________________ (signer’s name), as ________________ (title) of ________________ (company) known to me to be the person whose name is subscribed to the foregoing instrument, who after being duly sworn acknowledged to me that the same was the act of ________________ (company) and that he/she executed same as an act of such company for the purposes and consideration stated therein and further swore that the foregoing was true and correct.

SUBSCRIBED AND SWORN TO on this the ______ day of ____________, 20____.

__________________________________________________________________________________________________________________________ ... __________________________________________________________________________________________________________________________

NOTARY PUBLIC, STATE OF TEXAS
Form 7-25

If a claimant or potential claimant is required to execute an unconditional waiver and release to prove the receipt of good and sufficient funds for a progress payment and the claimant or potential claimant asserts in the waiver and release that the claimant or potential claimant has been paid the progress payment, the waiver and release must substantially comply with the form below, described in Texas Property Code section 53.284(c). Tex. Prop. Code § 53.284(a), (c). The notice provision must appear at the top of the document, printed in bold type at least as large as the largest type used in the document, but not smaller than ten-point type. Tex. Prop. Code § 53.284(c)(1).

__________________________

NOTICE: This document waives rights unconditionally and states that you have been paid for giving up those rights. It is prohibited for a person to require you to sign this document if you have not been paid the payment amount set forth below. If you have not been paid, use a conditional release form.

Unconditional Waiver and Release on Progress Payment (Pursuant to Tex. Prop. Code § 53.284)

Project __________________

Job No. __________________

The signer of this document has been paid and has received a progress payment in the sum of $___________ for all labor, services, equipment, or materials furnished to the property or to _____________________ (person with whom signer contracted) on the property of _____________________ (owner) located at ______________________ (location) to the following extent: ______________________ (job description). The signer therefore waives and releases any mechanic’s lien right, any right arising from a payment bond that complies with a state or federal statute, any common law payment bond right, any claim for payment, and any rights under any similar ordinance, rule, or statute related to claim or payment rights for persons in the signer’s position that the signer has on the above referenced project to the following extent:
This release covers a progress payment for all labor, services, equipment, or materials furnished to the property or to ________________ (person with whom signer contracted) as indicated in the attached statement(s) or progress payment request(s), except for unpaid retention, pending modifications and changes, or other items furnished.

The signer warrants that the signer has already paid or will use the funds received from this progress payment to promptly pay in full all of the signer’s laborers, subcontractors, materialmen, and suppliers for all work, materials, equipment, or services provided for or to the above referenced project in regard to the attached statement(s) or progress payment request(s).

Date ____________________________

______________________________ (Company name)

By ______________________________ (Signature)

______________________________ (Title)

STATE OF TEXAS )
COUNTY OF )

This instrument was ACKNOWLEDGED before me, the undersigned Notary Public, by ________________________________ (signer’s name), as ____________________ (title) of ____________________ (company) known to me to be the person whose name is subscribed to the foregoing instrument, who after being duly sworn acknowledged to me that the same was the act of ____________________ (company) and that he/she executed same as an act of such company for the purposes and consideration stated therein and further swore that the foregoing was true and correct.

SUBSCRIBED AND SWORN TO on this the _____ day of ____________, 20____.
NOTARY PUBLIC, STATE OF TEXAS
Conditional Waiver and Release on Final Payment

(Pursuant to Tex. Prop. Code § 53.284)

Project __________________

Job No. __________________

On receipt by the signer of this document of a check from ________________ (maker of check) in the sum of $____________ payable to _____________________ (payee or payees of check) and when the check has been properly endorsed and has been paid by the bank on which it is drawn, this document becomes effective to release any mechanic’s lien right, any right arising from a payment bond that complies with a state or federal statute, any common law payment bond right, any claim for payment, and any rights under any similar ordinance, rule, or statute related to claim or payment rights for persons in the signer’s position that the signer has on the property of _____________________ (owner) located at _____________________ (location) to the following extent: ______________________ (job description).

This release covers the final payment to the signer for all labor, services, equipment, or materials furnished to the property or to _____________________ (person with whom signer contracted).

Before any recipient of this document relies on this document, the recipient should verify evidence of payment to the signer.
Form 7-26  Conditional Waiver and Release on Final Payment

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)

STATE OF TEXAS )
COUNTY OF )

This instrument was ACKNOWLEDGED before me, the undersigned Notary Public, by ___________________________________ (signer’s name), as ________________ (title) of ________________ (company) known to me to be the person whose name is subscribed to the foregoing instrument, who after being duly sworn acknowledged to me that the same was the act of ________________ (company) and that he/she executed same as an act of such company for the purposes and consideration stated therein and further swore that the foregoing was true and correct.

SUBSCRIBED AND SWORN TO on this the ______ day of ____________, 20____.

_________________________________

NOTARY PUBLIC, STATE OF TEXAS
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(c). Tex. Prop. Code § 53.284(a), (e). The notice provision must appear at the top of the document, printed in bold type at least as large as the largest type used in the document, but not smaller than ten-point type. Tex. Prop. Code § 53.284(e)(1).

NOTICE: This document waives rights unconditionally and states that you have been paid for giving up those rights. It is prohibited for a person to require you to sign this document if you have not been paid the payment amount set forth below. If you have not been paid, use a conditional release form.

Unconditional Waiver and Release on Final Payment
(Pursuant to Tex. Prop. Code § 53.284)

Project __________________

Job No. __________________

The signer of this document has been paid in full for all labor, services, equipment, or materials furnished to the property or to ____________________ (person with whom signer contracted) on the property of ____________________ (owner) located at ____________________ (location) to the following extent: ____________________ (job description). The signer therefore waives and releases any mechanic’s lien right, any right arising from a payment bond that complies with a state or federal statute, any common law payment bond right, any claim for payment, and any rights under any similar ordinance, rule, or statute related to claim or payment rights for persons in the signer’s position.

The signer warrants that the signer has already paid or will use the funds received from this final payment to promptly pay in full all of the signer’s laborers, subcontractors, material-
men, and suppliers for all work, materials, equipment, or services provided for or to the above referenced project up to the date of this waiver and release.

Date ____________________________

_________________________________ (Company name)

By ______________________________ (Signature)

_________________________________ (Title)

STATE OF TEXAS )
COUNTY OF )

This instrument was ACKNOWLEDGED before me, the undersigned Notary Public, by ______________________________ (signer’s name), as __________________ (title) of ________________ (company) known to me to be the person whose name is subscribed to the foregoing instrument, who after being duly sworn acknowledged to me that the same was the act of ________________ (company) and that he/she executed same as an act of such company for the purposes and consideration stated therein and further swore that the foregoing was true and correct.

SUBSCRIBED AND SWORN TO on this the _____ day of ____________, 20____.

_________________________________
NOTARY PUBLIC, STATE OF TEXAS
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

Liens commonly encountered in collections work not involving real property are constitutional mechanic’s liens; farm, factory, or store worker’s liens; worker’s possessory liens; and landlord’s liens. See chapter 7 in this manual for a discussion of liens and chapter 28 for a discussion of landlord-tenant law.

§ 8.2:2 Garnishment

Prejudgment garnishment allows a creditor to reach assets of the debtor that are in possession of a third party, including debts that third parties owe to the debtor, to secure the property until judgment is entered. See sections 8.11 through 8.15 below regarding prejudgment garnishment.

§ 8.2:3 Sequestration

Sequestration enables a secured creditor to preserve his collateral until a disputed claim to the collateral is settled by disposition of the underlying case. See sections 8.16 through 8.24 below regarding sequestration.

§ 8.2:4 Attachment

Attachment enables an unsecured creditor (or a creditor without a claim on subject property) to preserve the debtor’s nonexempt property for satisfaction of a probable judgment in the underlying case. Generally, the plaintiff must show that the defendant plans to hide property or otherwise cause the plaintiff to lose the ability to collect a debt. Attachment is effected by an officer’s authorized seizure and retention of the debtor’s nonexempt property. See sections 8.25 through 8.32 below regarding attachment.
§ 8.2:5 Distinction between Garnishment, Sequestration, and Attachment

The foregoing judicial prejudgment remedies are often confused. Briefly, garnishment reaches the defendant’s property in the hands of a third party, such as a bank in which the defendant has deposited funds. Sequestration reaches any of the debtor’s property in which the creditor has a secured interest, regardless of its exempt status. Attachment reaches any nonexempt property of the debtor.

§ 8.2:6 Injunction

Injunctions are used in collections litigation to maintain the status quo regarding property in dispute pending outcome of the litigation. See *Transport Co. of Texas v. Robertson Transports, Inc.*, 261 S.W.2d 549, 553 (Tex. 1953). An injunction may be used to enjoin a debtor from selling, alienating, or further encumbering property. See sections 8.33 through 8.40 below regarding injunction.

§ 8.3 Cautions Regarding Use of Prejudgment Remedies

§ 8.3:1 Effect on Debtor

Using any of the prejudgment remedies discussed in this chapter as coercive measures may backfire on the creditor. The debtor may respond by filing bankruptcy and using the avoidance powers of the Bankruptcy Code to nullify any such action made within ninety days of filing. See, e.g., *Weaver v. Aquila Energy Marketing Corp.*, 196 B.R. 945, 950–51 (S.D. Tex. 1996) (natural gas seller’s writ of garnishment against nonpaying purchaser, granted by trial court less than ninety days before purchaser’s filing for bankruptcy, was later avoided in bankruptcy proceedings). The debtor could also file a counterclaim or cross-claim (for destruction of his business, for example) for an amount much greater than the creditor’s claim.

§ 8.3:2 Affidavits and Unsworn Declarations by Attorneys

Although the applicable statutes allow it, attorneys should not sign affidavits on their clients’ behalf unless they have actual knowledge of the facts set out in the affidavit. The general risks involved if attorneys execute affidavits are discussed at section 19.17:3 in this manual. The additional risks in seeking writs of garnishment, sequestration, or attachment in prejudgment proceedings should make the attorney even more cautious, because wrongful issuance of the writ can lead to substantial damages, potentially rendering both client and attorney liable. Therefore, only a person with actual, personal knowledge of the facts, preferably a personal representative of the creditor, should sign an affidavit supporting an application for a writ for any of these prejudgment remedies. Similarly, attorneys should avoid executing an unsworn declaration under Tex. Civ. Prac. & Rem. Code § 132.001 in support of a prejudgment remedy.

§ 8.3:3 Form Pleadings

Because of the constitutional problems and challenges surrounding prejudgment remedies and the possibility of substantial damages arising from a successful counterclaim, the manual committee emphasizes that the attorney should take the highest degree of care in drafting an application for a writ and a supporting affidavit or unsworn declaration. These documents are never routine forms, but rather pleadings that detail in each case the uniqueness of the “immediate danger” or threat to the likelihood of the plaintiff’s recovery on the debt.
§ 8.4 Indemnity Bonds

An officer must execute a writ issued by a Texas court without requiring a bond indemnifying him, and he is not liable for damages resulting from execution of a writ if he in good faith executes or attempts to execute the writ as provided by law. Tex. Civ. Prac. & Rem. Code § 7.003; see also Richardson v. Parker, 903 S.W.2d 801, 804 (Tex. App.—Dallas 1995, no writ). An officer is liable, however, for injury or loss resulting from his own negligence. Tex. Civ. Prac. & Rem. Code § 34.061. For further discussion of this topic, see section 27.23 in this manual.

[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 an extraordinary remedy by which a creditor (the plaintiff) can, before judgment, prevent a third party (the garnishee) from delivering any effects or paying any debt owed by the garnishee to a defendant debtor. Tex. Civ. Prac. & Rem. Code §§ 63.001–.008. If the garnishee is a corporation or a joint-stock company, after service of the writ the garnishee may not permit or recognize a sale or transfer of shares or an interest alleged to be owned by the defendant. Tex. Civ. Prac. & Rem. Code § 63.003. Both prejudgment and postjudgment garnishment remedies are governed by Tex. Civ. Prac. & Rem. Code §§ 63.001–.008 and Tex. R. Civ. P. 657–679. For a discussion of postjudgment garnishment, see part IV. in chapter 27 of this manual.

§ 8.11:2 Constitutionality


§ 8.11:3 Availability of Prejudgment Garnishment

A prejudgment writ of garnishment is available if—

1. an original attachment has been issued; or
2. the plaintiff sues on the debt and makes an affidavit that—
   a. the debt is just, due, and unpaid;
   b. within the plaintiff’s knowledge, the defendant does not possess property in Texas subject to execution sufficient to satisfy the debt; and
c. the garnishment is not sought to injure the defendant or the garnishee.

Tex. Civ. Prac. & Rem. Code § 63.001(1), (2). Observe that Tex. Civ. Prac. & Rem. Code § 63.001(3) is applicable only when the plaintiff has a valid, subsisting judgment it is seeking to enforce.

§ 8.11:4 Risks to Creditor in Seeking Prejudgment Garnishment

As with all prejudgment remedies, caution must be used in seeking the writ of garnishment before judgment. Issuance of a writ before judgment may force a defendant out of business or may cause him severe economic loss, and the creditor’s attorney must be sure the client is aware of the risks involved and has assented to the procedure. A debtor may institute proceedings for wrongful garnishment in some circumstances. Significant federal constitutional issues may also be involved.

§ 8.12 Garnishment Procedure

§ 8.12:1 When Writ Available

An application for a prejudgment writ of garnishment may be filed either at the commencement of a suit or at any time during its progress. Tex. R. Civ. P. 658.

§ 8.12:2 Availability against Financial Institutions

Garnishment may not be issued against or served on a financial institution that has its principal office or a branch in Texas to collect a prospective money judgment against the financial institution before the judgment is final and all appeals have been foreclosed by law. Tex. Fin. Code § 59.007(a). “Financial institution” means a bank, savings association, or savings bank maintaining an office, branch, or agency office in this state. Tex. Fin. Code § 31.002(25).

§ 8.12:3 Availability against Customer of Financial Institution

Prejudgment garnishment is available against a customer of a financial institution. Tex. Fin. Code §§ 59.007(b), 59.008.

A claim against a customer of a financial institution must be delivered or served as otherwise required or permitted by law at the address designated as the address of the registered agent of the financial institution in a registration filed with the secretary of state pursuant to Tex. Fin. Code § 201.102 (out-of-state financial institutions) or Tex. Fin. Code § 201.103 (Texas financial institutions). A claim against a customer of a financial institution that has complied with Tex. Fin. Code §§ 201.102, 201.103 will be ineffective as to the financial institution unless it is served or delivered to the registered address. However, the customer bears the burden of preventing or limiting the institution’s compliance by seeking an appropriate remedy, including a restraining order, injunction, protective order, or other appropriate remedy. If the financial institution has not filed a registration with the secretary of state pursuant to Tex. Fin. Code §§ 201.102, 201.103, the institution is subject to service or delivery of all claims against customers of the financial institution as otherwise provided by law. Tex. Fin. Code § 59.008.

§ 8.12:4 Application

The application must be supported by an affidavit of the plaintiff, his agent, his attorney, or another person having personal knowledge of relevant facts. It must meet all statutory requirements and must state grounds for issuing the writ and specific facts relied on by the plaintiff sufficient to warrant the required findings by the court. Two or more grounds for the writ may
be stated conjunctively or disjunctively. Tex. R. Civ. P. 658. An application is at form 8-1 in this chapter. An amendment to the Civil Practices and Remedies Code authorizes the use of an unsworn declaration in lieu of an “affidavit required by statute or required by rule, order, or requirement adopted as provided by law.” Act of May 25, 2011, 82d Leg., R.S., ch. 847, § 1 (current version at Tex. Civ. Prac. & Rem. Code § 132.001). The statutory form for an unsworn declaration with its jurat is at form 19-5 in this manual. The unsworn declaration must (1) be in writing, (2) be subscribed by the person making the declaration as true under penalty of perjury, and (3) include a jurat in prescribed form. The substantial form of the required jurat is set forth in Tex. Civ. Prac. & Rem. Code § 132.001(d). The second requirement (subscription under penalty of perjury) appears to supplant an affidavit’s requirements showing affirmatively that it is based on personal knowledge, the facts sought to be proved would be “admissible in evidence” at a conventional trial, and the facts recited therein are “true and correct.”

§ 8.12:5 Affidavit—Information and Belief or Personal Knowledge

An affidavit must be made on personal knowledge and must contain facts that would constitute admissible evidence. Facts may be stated on information and belief if the grounds for such belief are specifically stated. The trial court has discretion to determine whether an affidavit meets the “personal knowledge” requirement of Tex. R. Civ. P. 658. See Metroplex Factors, Inc. v. First National Bank, 610 S.W.2d 862, 865 (Tex. Civ. App.—Fort Worth 1980, writ ref’d n.r.e.); see also Hudler-Tye Construction, Inc. v. Pettijohn & Pettijohn Plumbing, Inc., 632 S.W.2d 219, 222 (Tex. App.—Fort Worth 1982, no writ). An affidavit not affirmatively stating the specific grounds for issuance and the specific acts of the defendant entitling the plaintiff to issuance of the writ will not support issuance of the writ. If the affidavit is made on information and belief, the grounds for that belief must be specifically stated. El Periodico, Inc. v. Parks Oil Co., 917 S.W.2d 777, 778–79 (Tex. 1996). The attorney should not execute the affidavit unless he has personal knowledge of relevant facts. See sections 8.3:2 and 19.17:3 in this manual. An affidavit is at form 8-2 in this chapter.

§ 8.12:6 Statutory Requirements for Affidavit or Unsworn Declaration in Lieu Thereof

The affidavit or unsworn declaration in lieu thereof must state that—

1. the debt is just, due, and unpaid;
2. within the plaintiff’s knowledge, the defendant does not possess property in Texas subject to execution sufficient to satisfy the debt; and
3. the garnishment is not sought to injure the defendant or the garnishee.


The plaintiff is not required to prove as a matter of fact that the debtor does not have assets sufficient to satisfy the debt. The statute requires only that the plaintiff have no knowledge of any property owned by the defendant within the state sufficient to satisfy the debt. Tex. Civ. Prac. & Rem. Code § 63.001(2)(B), (3); cf. Black Coral Investments v. Bank of the Southwest, 650 S.W.2d 135, 136 (Tex. App.—Houston [14th Dist.] 1983, writ ref’d n.r.e.) (trial court’s order quashing postjudgment garnishment was reversed when plaintiff made affidavit that defendant had not, within his knowledge, property in his possession within this state, subject to execution, sufficient to satisfy such judgment; statute does not expressly or impliedly state that plaintiff must prove such as matter of fact).
The fact that the affidavit fails to state that within the plaintiff’s knowledge the debtor does not possess property in Texas subject to execution sufficient to satisfy the debt does not give the debtor a claim for wrongful garnishment (although it may serve as a basis for quashing the writ on the garnishee’s motion). Cf. Canyon Lake Bank v. Townsend, 649 S.W.2d 809 (Tex. App.—Austin 1983, writ ref’d n.r.e.) (postjudgment garnishment case construing affidavit requirement identical to affidavit requirement for prejudgment garnishment under Tex. Civ. Prac. & Rem. Code § 63.001(2)(B)).

Significant defects in a garnisher’s affidavit may be waived by the garnishee if the garnishee fails to appear and answer. See Sherry Lane National Bank v. Bank of Evergreen, 715 S.W.2d 148, 150 (Tex. App.—Dallas 1986, writ ref’d n.r.e.).

§ 8.12:7 Hearing

A hearing must be held before a prejudgment writ of garnishment may issue. The hearing may be ex parte. Tex. R. Civ. P. 658.

§ 8.12:8 Order for Prejudgment Garnishment

The court’s order must make specific findings of facts to support the statutory grounds found to exist. The order must also specify the maximum value of property or indebtedness that may be garnished and the amount of the bond required of the plaintiff. The court further must find the amount of bond required for the defendant to replevy. Unless the defendant exercises his option under Tex. R. Civ. P. 664, this amount must be the amount of the plaintiff’s claim, one year’s accrual of interest (if allowed by law), and the estimated costs of court. The court’s order may direct issuance of more than one writ at the same time, or in succession, to be sent to different counties. Tex. R. Civ. P. 658. An order is at form 8-3 in this chapter.

§ 8.13 Other Garnishment Issues

§ 8.13:1 Garnishee’s Duty to Raise Debtor’s Defenses

The garnishee has a duty to raise any of the defendant’s defenses to the garnishment of which he is aware. This duty is not discharged by notifying the defendant of the garnishment action. Southwest Bank & Trust Co. v. Calmark Asset Management, 694 S.W.2d 199, 200–01 (Tex. App.—Dallas 1985, writ ref’d n.r.e.).

§ 8.13:2 Bond for Prejudgment Garnishment

Before issuance of a prejudgment writ of garnishment, a bond payable to the defendant in the amount set by the court, with sufficient surety or sureties as provided by statute, must be filed by the party applying for the writ. After notice to the opposite party, before or after issuance of the writ, a motion may be filed to increase or reduce the amount of the bond. Tex. R. Civ. P. 658a. For detailed provisions covering the bond and hearing to reduce the amount of the bond, see Tex. R. Civ. P. 658a. A bond is at form 8-4 in this chapter.

§ 8.13:3 Service of Writ on Garnishee and Defendant

Once the application, affidavit, and bond are filed, the case must be docketed in the name of the plaintiff as plaintiff and the garnishee as defendant, and the writ of garnishment must be served on the garnishee. Tex. R. Civ. P. 659. Copies of the writ, the application, accompanying affidavit(s), and the order must be served on the defendant as soon as practicable following service of the writ on the garnishee. Tex. R. Civ. P. 663a. The forms of the writ and notice to the defendant are prescribed in Tex.
R. Civ. P. 661 and 663a. For a writ to be served on the garnishee, see form 8-5 in this chapter; for a notice to the defendant, see form 8-7. Form 8-6 is the officer’s return. In Walnut Equipment Leasing Co. v. J-V Dirt & Loam, 907 S.W.2d 912, 916 (Tex. App.—Austin 1995, writ denied), a postjudgment garnishment case, the court held that the garnisher must serve the debtor in accordance with Tex. R. Civ. P. 663a; failure to do so is fatal to the creditor’s garnishment action, even though the debtor may have actual notice of it. See also Mendoza v. Luke Furia Investments, Inc., 962 S.W.2d 650, 652 (Tex. App.—Corpus Christi 1998, no pet.) (holding garnishor to strict compliance with Tex. R. Civ. P. 663a’s requirements in serving postjudgment writ of garnishment); Hering v. Norbanco Austin I, Ltd., 735 S.W.2d 638, 641–42 (Tex. App.—Austin 1987, writ denied) (“We conclude that Rule 663a is unambiguous and means exactly what it says—the debtor must be served.”); contra Del-Phi Engineering Associates v. Texas Commerce Bank-Conroe, N.A., 771 S.W.2d 589, 592 (Tex. App.—Beaumont 1989, no writ) (debtor waived statutorily required notice by appearing at hearing on motion to dissolve writ of garnishment). The better practice is comply with rule 663a and serve the defendant with notice.

For discussion of service on a garnishee-financial institution, see section 27.59:2 in this manual.

It is recommended that, instead of serving the defendant personally or by e-mail, his copy of the application and affidavit be served by certified mail, return receipt requested, and by regular mail. The copy of the writ served on the defendant must include, in ten-point type and in a manner calculated to advise a reasonably attentive person of its contents, the following statement:

To ________________, Defendant:

You are hereby notified that certain properties alleged to be owned by you have been garnished. If you claim any rights in such property, you are advised:

YOU HAVE A RIGHT TO REGAIN POSSESSION OF THE PROPERTY BY FILING A REPLEVY BOND. YOU HAVE A RIGHT TO SEEK TO REGAIN POSSESSION OF THE PROPERTY BY FILING WITH THE COURT A MOTION TO DISSOLVE THIS WRIT.

Tex. R. Civ. P. 663a. Some court clerks provide additional copies of the writs with the notice language. Others do not; in that case, it is necessary to photocopy the writ and type the notice language on the face of the copy before serving it on the defendant. The notice at form 8-7 is to be used as a cover sheet only and not as a substitute for the writ with notice language included on it. These forms are usually prepared by the clerk of the court.

Although the debtor must be served with notice of the garnishment proceedings, the garnishee does not have standing to sue or to appeal based on a right of service belonging to the debtor. Sherry Lane National Bank v. Bank of Evergreen, 715 S.W.2d 148, 151–52 (Tex. App.—Dallas 1986, writ ref’d n.r.e.).

After service of the writ “the garnishee may not deliver any effects or pay any debt to the defendant.” Any such delivery or payment is void as to the amount of the debt, effects, shares, or interest necessary to satisfy the plaintiff’s demand. Tex. Civ. Prac. & Rem. Code § 63.003(a), (b).

§ 8.13:4 Replevy by Defendant

At any time before judgment, the defendant may replevy all or part of the garnished property (or the proceeds from sale of the garnished property if it has been sold under order of the court) by posting bond. Tex. R. Civ. P. 664. The court must find in its order for issuance of a writ of garnishment the amount of bond required for the defendant to replevy. Tex. R. Civ. P. 658. This amount must be the amount of the plaintiff’s claim, one year’s interest if allowed by law on the claim, and the estimated costs
of court, unless the defendant exercises his option under rule 664 to post bond in the amount of the value of the property, as estimated by the officer who levied the writ, plus one year’s interest at the legal rate. Tex. R. Civ. P. 658, 664. On reasonable notice (which may be less than three days), the amount or denial of the bond, the sufficiency of the sureties, or the estimated value of the property may be reviewed, on motion of either party, by the court that authorized issuance of 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) (purchaser of promissory note with holder-in-due-course status had right to demand that debtor pay note according to its terms and was not required to intervene in postjudgment garnishment proceeding in order to protect his rights; debtor had responsibility to bring into garnishment case all claimants to note in order to protect himself).

It has been held an abuse of discretion for the trial court to deny intervention in a garnishment proceeding to one who would be deprived of a substantial right to assert a security interest to the fund that is subject to garnishment. *Apparel Contractors v. Vantage Properties*, 620 S.W.2d 666, 668 (Tex. Civ. App.—Dallas 1981, writ ref’d n.r.e.) (postjudgment garnishment).

§ 8.15 Wrongful Garnishment

Note: Most Texas cases concerning wrongful garnishment are based on wrongful postjudgment garnishment. See section 27.71 in this manual.

A garnishment is wrongful if the facts set forth in the affidavit are false. *Chandler v. Cashway Building Materials, Inc.*, 584 S.W.2d 950, 952 (Tex. Civ. App.—El Paso 1979, no writ) (postjudgment garnishment). However, even if the applicant for the writ swears falsely that he knows of no property in Texas possessed by the debtor subject to execution and sufficient to satisfy the debt, the debtor may not recover for wrongful garnishment unless he pleads and proves that he does in fact have nonexempt property in Texas sufficient to satisfy the debt and that the plaintiff knew as much before applying for the writ. *King v. Tom*, 352 S.W.2d 910, 913 (Tex. Civ. App.—El Paso 1961, no writ). *But see Barr v. Cardiff*, 75 S.W. 341 (Tex. Civ. App. 1903, writ ref’d) (ground alleged by plaintiff for suing out writ of garnishment did not in fact exist, and even though affiant believed its existence, writ held to be wrongfully sued out, resulting in actual damage to defendant). This analysis and result would apply for false statements in an unsworn declaration under *Tex. Civ. Prac. & Rem. Code* § 132.001.

Damages may be recovered for wrongful garnishment for injuries proximately caused by the wrongful act. *Aetna Casualty & Surety Co. v. Raposa*, 560 S.W.2d 106, 110 (Tex. Civ. App.—Fort Worth 1977, writ dism’d by agr.).

§ 8.16 Sequestration Generally

§ 8.16:1 Purpose and Use

Sequestration is the extraordinary remedy by which, before judgment, a creditor can possess the goods securing his debt or one claiming title to disputed property can effectively control possession while the dispute is justly settled. *Tex. Civ. Prac. & Rem. Code* §§ 62.001–.063.

Sequestration differs from attachment in that it requires the claimant to have an interest in the sequestered property. See *Tex. Civ. Prac. & Rem. Code* § 62.001. It is pursued as an ancillary remedy to an underlying claim.

Through use of the writ of sequestration, the property is physically (or constructively, in the case of real property) possessed by a sheriff or constable and placed in the court’s custody until the property interest claimed by the creditor can be established.
The most common use of the writ is by commercial lenders whose loans are secured by security interests in personal property, such as automobiles, trucks, tractors and trailers, boats, and airplanes. And in the oil field, it may apply to loans secured by drilling rigs and drilling or oil field equipment. The Texas sequestration statutes and rules are located at Tex. Civ. Prac. & Rem. Code §§ 62.001–.063 and Tex. R. Civ. P. 696–716.

§ 8.16:2 Constitutionality


§ 8.16:3 Availability—Title, Possession, Enforcement of Lien

Sequestration is available to the plaintiff if he sues for title to or possession of real property, personal property, or fixtures or for the foreclosure or enforcement of a mortgage, lien, or security interest in the property and a reasonable conclusion may be drawn that there is immediate danger that the defendant or the party in possession will conceal, dispose of, ill-treat, waste, or destroy the property or remove it from the county. Tex. Civ. Prac. & Rem. Code § 62.001(1), (2).

Sequestration is available to a plaintiff in a suit to try title to real property, to remove a cloud on the title, to foreclose a lien, or to partition real property if the plaintiff makes an oath that one or more of the defendants is a nonresident of Texas. Tex. Civ. Prac. & Rem. Code § 62.001(4); but see Shaffer v. Heitner, 433 U.S. 186 (1977) (minimum contacts required for sequestration of nonresident’s property).

§ 8.16:4 Ejectment

Sequestration is also available to a plaintiff if he sues for title to or possession of property from which he has been ejected by force or violence. Tex. Civ. Prac. & Rem. Code § 62.001(3).

§ 8.16:5 Claim on Personal Property Not Due

A writ of sequestration may be issued for personal property under a mortgage or lien even though the right of action on the mortgage or lien has not accrued. In these cases, final judgment may not be rendered against the defendant until the right of action has accrued. Tex. Civ. Prac. & Rem. Code § 62.003.

§ 8.17 Sequestration Procedure

§ 8.17:1 When Writ Available

An application for a prejudgment writ of sequestration may be filed either at the commencement of the suit or at any time during its progress. Tex. R. Civ. P. 696.
§ 8.17:2 Application

The application must be made under oath and must set out specific facts that state the nature of the claim, the amount in controversy (if any), and the grounds for issuance of the writ. Tex. Civ. Prac. & Rem. Code § 62.022. Two or more grounds may be stated conjunctively or disjunctively. The property to be sequestered must be described with such certainty that it may be identified and distinguished from like property, and the value of each article and the county in which each article is located must be stated. Tex. R. Civ. P. 696. For an application and affidavit, see form 8-8 in this chapter. For the sequestration of motor vehicles, many courts and constables require the use of the vehicle identification number in order to accurately distinguish the vehicle to be sequestered from other vehicles of a similar make and model.

§ 8.17:3 Affidavit

The application must be supported by an affidavit of the plaintiff, his agent, his attorney, or other persons having knowledge of relevant facts. Tex. R. Civ. P. 696. (The rule has not been amended to address unsworn declarations authorized by Tex. Civ. Prac. & Rem. Code § 132.001.) The application and affidavit must be made on personal knowledge and must state facts that would be admissible in evidence. However, the facts may be stated on information and belief if the grounds of such belief are specifically stated. Tex. R. Civ. P. 696. In this manual the application and affidavit are combined; see form 8-8 in this chapter.


§ 8.17:4 Hearing

Before the writ can issue, the court must hold a hearing. Tex. R. Civ. P. 696. The hearing may be ex parte, but some courts require notification to the defendant (or his attorney, if known) by telephone, or otherwise, of the hearing. The only evidence typically considered by the court is the sworn pleadings. See section 8.19:2 below regarding service of the writ.

If a judge for the court in which the application is pending is unavailable, the party requesting sequestration may be able to have the order signed by another judge sitting in that county, subject to local rules. See, e.g., Tex. Gov’t Code § 74.094(a) (district and statutory county court judges have authority to conduct hearings and sign orders for other courts without transferal of case. The judgment, order, or action is valid and binding as if the case were pending in the court of the judge who acts in the matter.).

§ 8.17:5 Order

No writ may issue except on written order of the court. Tex. R. Civ. P. 696. The court’s order must include—

1. specific findings of fact supporting the statutory grounds for the issuance of the writ found by the court to exist;

2. a clear description of each item of property to be sequestered so that it may be identified and distinguished from like property;

3. the value of each item of property to be sequestered;

4. the county in which each item is located;
5. the amount of bond required of the plaintiff (see section 8.18 below); and

6. the amount of bond required of the defendant to replevy (see section 8.21 below).

**Tex. R. Civ. P. 696.** The order may direct the issuance of several writs at the same time or in succession, to be sent to different counties. Tex. R. Civ. P. 696. For an order of sequestration, see form 8-9 in this chapter.

It is good practice to contact the sheriff or constable to whom the writ will be sent before drafting the order, so that the order may address any particular concerns or requirements of that office. For example, some constables require that the order specify that the property may be returned to the plaintiff without the requirement of a replevy bond, as long as the sequestration bond complies with the requirements of rule 708 of the Texas Rules of Civil Procedure. Additionally, some constables will allow the plaintiff to select the location for storage of the sequestered property during the ten-day replevy period, as long as the order contains language to that effect. There may be other additional concerns or requirements.

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.


§ 8.19:2  Service of Writ on Defendant

The defendant must be served with a copy of the writ, the application, accompanying affidavits, and the court’s order in “any manner provided for service of citation” or as provided for in Tex. R. Civ. P. 21a. Tex. R. Civ. P. 700a. Rule 21a provides for service electronically through the electronic filing manager, in person, by mail, by commercial delivery service, by fax, by e-mail, or by such other manner as the court in its discretion may direct. A notice, in ten-point type and in a manner calculated to advise a reasonably attentive person of its contents, concerning replevy rights must be prominently displayed on the face of the copy of the writ served on the defendant. Service must be had on the defendant “as soon as practicable following the levy of the writ” and not before. Tex. R. Civ. P. 700a. The defendant should not be served until after sequestration has occurred. For a notice to the defendant, see form 8-11 in this chapter.

Practice Note:  It is recommended that, instead of serving the defendant personally or by e-mail, his copy of the application and affidavit be served by certified mail, return receipt requested, and by regular mail.

§ 8.19:3  Failure of Defendant to Surrender Property

Often the defendant is served contemporaneously with execution of the writ, because the defendant is the party likely to be in possession of the property to be sequestered. If the defendant fails or refuses to surrender the property to the officer executing the writ, the plaintiff should have the defendant served with a copy of the writ and order and proceed with a motion for contempt against the defendant for failure to abide by the court’s order. After notice and a hearing, the defendant may be held in
contempt of court. Alternatively, the plaintiff may file a motion for show cause contemporaneously with the application for writ of sequestration and set a hearing on the motion, so that the defendant is immediately on notice that failure to attend the hearing and explain why the defendant did not surrender the property may result in a writ of attachment or capias writ.

If the plaintiff has reason to believe that the defendant will fail or refuse to surrender the property to be sequestered, the plaintiff should include in the order authorizing the issuance of the writ language directly ordering the defendant to surrender the property to the officer.

§ 8.19:4   Errors in Affidavit, Bond, or Writ

Clerical errors in the affidavit, bond, writ of sequestration, or officer’s return may be amended. Application in writing must be made to the judge of the court in which the suit was filed. After notice to the opponent, the writ may be amended in the manner and on the terms the court authorizes. However, the amendment can reach only clerical errors and may not change or add to the grounds for sequestration stated in the affidavit. In addition, the amendment must appear to the judge to be in furtherance of justice. Tex. R. Civ. P. 700.

§ 8.20   Dissolution or Modification of Writ of Sequestration

§ 8.20:1   Motion to Dissolve Writ

After issuance of the writ, the defendant or any intervening party who claims an interest in the sequestered property may seek dissolution of the writ by sworn written motion. Reasonable notice (which may be less than three days) must be given to the plaintiff. A hearing on the defendant’s motion must be held promptly, and the issue must be determined not later than ten days after the filing of the motion unless the parties agree to an extension. The writ must be dissolved unless the plaintiff proves the specific facts alleged and the grounds relied on for its issuance—for example, immediate danger, ejectment by force or violence, or nonresidence of the defendant. Tex. R. Civ. P. 712a; see Tex. Civ. Prac. & Rem. Code §§ 62.001, 62.041–.043.

§ 8.20:2   Motion to Reduce Amount Sequestered

The movant may also seek to reduce the amount of property sequestered if the total amount described and authorized by the court’s order exceeds the amount necessary to secure the plaintiff’s claim (plus interest for one year, if allowed by law, and costs). The burden of proof to show excessive property sequestered is on the movant. Tex. R. Civ. P. 712a.

§ 8.20:3   Procedure

The filing of the motion stays any further proceeding under the writ (except for orders concerning the care, preservation, or sale of perishable property) until determination of the issue after a hearing. Unless the parties otherwise agree, the motion must be promptly heard (after reasonable notice to the plaintiff, which may be less than three days), and the issue must be determined not later than ten days after filing. The court may determine the issue on the basis of uncontroverted affidavits “setting forth such facts as would be admissible in evidence.” Otherwise the parties must submit evidence. Tex. R. Civ. P. 712a; Tex. Civ. Prac. & Rem. Code §§ 62.041–.043.
§ 8.20:4  Effect of Dissolution

If the writ is dissolved, the action proceeds as though no writ had been issued, except that the defendant’s cause of action for damages (if any) for wrongful sequestration is a compulsory counterclaim. Tex. Civ. Prac. & Rem. Code §§ 62.043, 62.044. In addition to other damages, the defendant may recover reasonable attorney’s fees incurred in dissolution of the writ. Tex. Civ. Prac. & Rem. Code § 62.044. If the sequestered personalty is consumer goods, the defendant is entitled to recover, in addition to reasonable attorney’s fees, the greater of $100, the finance charge contracted for, or actual damages. These damages may not be awarded if the plaintiff shows that his failure to prove his specific allegations was the result of a bona fide error including proof that he used reasonable procedures to avoid such error. Tex. Civ. Prac. & Rem. Code § 62.045. The right to seek dissolution of the writ is cumulative of the defendant’s right to replevy. The filing of the motion stays any further proceedings under the writ until a hearing on the motion is had and the motion is ruled on. Tex. Civ. Prac. & Rem. Code § 62.041. Presumably the defendant may replevy if the motion is denied.

§ 8.21  Defendant’s Right to Replevy Sequestered Property

§ 8.21:1  Right to Replevy

If the sequestered property has not been claimed, replevied, or sold, the defendant may replevy all or part of the property at any time before judgment. If the property has been sold by court order, the defendant can replevy the proceeds of the sale. Tex. R. Civ. P. 701.

§ 8.21:2  Required Bond

To replevy either the property itself or the sale proceeds, the defendant first must give a bond, with sufficient sureties to be approved by the 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).


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 remedy allowing a creditor to seize the debtor’s property to secure payment of a probable judgment on an otherwise unsecured debt. Attached property is held in the court’s custody to be available for execution if the plaintiff obtains a judgment in the underlying cause. See generally Tex. Civ. Prac. & Rem. Code §§ 61.001–.082.

§ 8.25:2 Constitutionality

The Texas attachment statutes have not been reviewed for due-process compliance in any recently published opinion.
§ 8.25:3 Strategic Use

Strategically, attachment may be used against a debtor—

1. to prevent a debtor from alienating, destroying, or removing property from the jurisdiction, which would frustrate recovery on the debt; or

2. to obtain jurisdiction over a nonresident debtor who has property located within the jurisdiction. However, minimum contacts between the defendant and the foreign state must be found in order to confer in personam jurisdiction over the debtor. See Shaffer v. Heitner, 433 U.S. 186 (1977) (sequestration).

§ 8.25:4 Property That May Be Attached

Only property subject to levy under a writ of execution may be attached. Tex. Civ. Prac. & Rem. Code § 61.041. The property need not be in the debtor’s possession to be attached. See Briggs v. Briggs, 227 S.W. 511, 512 (Tex. Civ. App.—Texarkana 1921, no writ) (person in possession of two bales of cotton, holding bales as security for money owed him by owner of bales, had no right to resist levy under writ of attachment solely on ground that property had been pledged to him and had been delivered into his possession).

§ 8.25:5 When Writ Available

An application for a writ of attachment may be filed at the commencement of a suit or at any time during its progress. Tex. R. Civ. P. 592.

§ 8.25:6 Requirements Generally

A writ of attachment may issue if three general conditions and any one of nine specific conditions (see section 8.25:7 below) occur. The general conditions are that—

1. the defendant is justly indebted to the plaintiff;

2. the attachment is not sought to injure or harass the defendant; and

3. without the attachment the plaintiff’s debt would be lost.


§ 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.


§ 8.25:8 Availability against Financial Institutions

An attachment may not be issued against or served on a financial institution that has its principal office or a branch in Texas to collect a prospective money judgment against the financial institution before the judgment is final and all appeals have been foreclosed by law. Tex. Fin. Code § 59.007(a). “Financial institution” means “a bank, savings association, or savings bank maintaining an office, branch, or agency office in this state.” Tex. Fin. Code § 31.002(25).

§ 8.25:9 Availability against Customer of Financial Institution

Attachment is available against a customer of a financial institution. Tex. Fin. Code §§ 59.007(b), 59.008.

A claim against a customer of a financial institution must be delivered or served as otherwise required or permitted by law at the address designated as the address of the registered agent of the financial institution in a registration filed with the secretary of state pursuant to Tex. Fin. Code § 201.102 (out-of-state financial institutions) or Tex. Fin. Code § 201.103 (Texas financial institutions). A claim against a customer of a financial institution that has complied with Tex. Fin. Code §§ 201.102, 201.103 will be ineffective as to the financial institution unless it is served or delivered to the registered address. However, the customer bears the burden of preventing or limiting the institution’s compliance by seeking an appropriate remedy, including a restraining order, injunction, protective order, or other appropriate remedy. If the financial institution has not filed a registration with the secretary of state pursuant to Tex. Fin. Code §§ 201.102, 201.103, the institution is subject to service or delivery of all claims against customers of the financial institution as otherwise provided by law. Tex. Fin. Code § 59.008.

§ 8.26 Attachment Procedure

§ 8.26:1 Application

The statutes governing attachment do not provide for the use of an application for a writ of attachment. The writ is issued instead on the basis of one or more affidavits alone. The rules of procedure, however, require an application and hearing. See Tex. R. Civ. P. 592. The application requires an affidavit, but in a supporting capacity; an affidavit is not sufficient in itself.
§ 8.26:2 Requisites of Application

The application must comply with all statutory requirements and must state the grounds for issuing the writ and the specific facts relied on by the plaintiff to warrant the required findings by the court. The grounds may be stated conjunctively or disjunctively. The application must be made on personal knowledge and must “set forth such facts as would be admissible in evidence,” but the facts may be based on information and belief if the grounds are specified. The application must be supported by one or more affidavits (see section 8.26:3 below). Tex. R. Civ. P. 592. An application for a writ of attachment is at form 8-17 in this chapter, and an affidavit is at form 8-18.

§ 8.26:3 Affidavit

One or more affidavits must support an application for a writ of attachment filed with the court. Affidavits may be made by the plaintiff, the plaintiff’s agent, other persons with “knowledge of relevant facts,” or the plaintiff’s attorney, but attorneys should be extremely wary of making the affidavit, as discussed in section 19.17:3 in this manual. Like the application, affidavits “shall be made on personal knowledge and shall set forth such facts as would be admissible in evidence; provided that facts may be stated based upon information and belief if the grounds of such belief are specifically stated.” Tex. R. Civ. P. 592. (The rule has not been amended to address unsworn declarations authorized by Tex. Civ. Prac. & Rem. Code § 132.001.) The affidavit must recite the statutory general and appropriate specific grounds, which are listed in sections 8.25:6 and 8.25:7 above, and must state the amount of the demand. Tex. Civ. Prac. & Rem. Code § 61.022. An affidavit is at form 8-18 in this chapter.


§ 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

§ 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 REP办LEVY BOND. YOU HAVE A RIGHT TO SEEK TO REGAIN POSSESSION OF THE PROPERTY BY FILING WITH THE COURT A MOTION TO DISSOLVE THIS WRIT.

Tex. R. Civ. P. 598a. The defendant should not be served before attachment has occurred. A notice of attachment and an officer’s return are at forms 8-21 and 8-22 in this chapter.

Practice Note: It is recommended that, instead of serving the defendant personally or by e-mail, his copy of the application and affidavit be served by certified mail, return receipt requested, and by regular mail.

§ 8.28:3 Errors in Affidavit, Bond, or Writ

Clerical errors in the affidavit, bond, writ of attachment, or return may be corrected by amendment. Application must be made in the court in which the suit was filed, and, after notice to the opponent, the writ may be amended in the manner that the court authorizes. However, the amendment can reach only clerical errors and cannot add to or change the grounds for attachment as stated in the affidavit. In addition, the amendment must appear to the court “to be in furtherance of justice.” Tex. R. Civ. P. 609.

§ 8.29 Defendant’s Rights in Attached Property

§ 8.29:1 Replevy

If the attached property has not been claimed or sold, the defendant may replevy all or part of it at any time before judgment or may recover the proceeds from any sale made under court order. To replevy, the defendant must give a bond payable to the plaintiff with sufficient surety or sureties as provided by statute; the sureties are to be approved by the officer who levied under the writ. The amount of the defendant’s bond must be—

1. the amount fixed by the court in its original order granting the plaintiff’s writ of attachment (the amount of the plaintiff’s claim, one year’s accrual of interest if allowed by law on the claim, and the estimated costs of court); or

2. at the defendant’s option, the value of the property sought to be replevied (the value to be estimated by the officer) plus one year’s interest at the legal rate from the date of the bond.

The bond must also be conditioned that the defendant will satisfy, to the extent of the penal amount of the bond, any judgment that may be rendered. Tex. R. Civ. P. 592, 599.

§ 8.29:2 Defendant’s Right to Substitute Property

On reasonable notice to the plaintiff, which may be less than three days, the defendant may apply to the court for substitution of other property of equal value for the attached property. If the court considers the values of the properties equal, it may authorize substitution, and personal property thus released from attachment must be delivered to the defendant. Liens resulting from the original attachment order on the released property are terminated, and the substituted property is deemed to have
been attached from the date of the levy on the property originally attached. If liens have been affixed to property since the original date of levy, that property may not be used for substitution. Tex. R. Civ. P. 599.

§ 8.30 Dissolution or Modification of Writ of Attachment

§ 8.30:1 Motion and Hearing

A defendant whose property has been attached or any intervening party who claims an interest in the property may by sworn written motion seek to vacate, dissolve, or modify the writ and the order directing its issuance for any extrinsic or intrinsic grounds or cause. After reasonable notice to the plaintiff, which may be less than three days, the motion must be heard promptly. Each issue presented by the motion must be decided not later than ten days after filing of the motion. Except for orders concerning the care, preservation, or sale of perishable property, the filing of the motion stays any further proceedings under the writ until a hearing occurs and every issue is determined. Tex. R. Civ. P. 608.

§ 8.30:2 Burden of Proof

At the hearing the plaintiff is required to prove the grounds for the issuance of the writ, or it will be dissolved. The court, however, may modify both its previous order granting the writ and the writ itself. The movant, though, bears the burden of proving that the reasonable value of the attached property exceeds the amount necessary to secure the debt, interest for one year, and probable costs. The movant must also prove that the facts justify the substitution of property if substitution is desired. The court may base its determination on uncontroverted affidavits that present facts otherwise admissible in evidence. If the affidavit is controverted, evidence must be presented. Tex. R. Civ. P. 608.

§ 8.30:3 Orders

The court may make orders as justice requires, including orders concerning the care, preservation, or disposition of the property (or its proceeds if it has been sold). If the movant has given a replevy bond, an order vacating or dissolving the writ vacates the bond and discharges the sureties. If the court modifies its order or the writ, it can make further orders with respect to the bond consistent with the modification. Tex. R. Civ. P. 608.

§ 8.31 Emergency Sale of Perishable Goods after Attachment

§ 8.31:1 Availability of Emergency Sale

The court may order the sale of personal property that has been attached but not claimed or replevied if the property is in danger of serious and immediate waste or decay or if retention of the property until trial will cause such an expense or deterioration in value as to greatly lessen the amount likely to be realized from the property. Tex. R. Civ. P. 600.

§ 8.31:2 Notice, Hearing, and Order

In determining whether the attached property is perishable and should therefore be sold, the court may consider affidavits and oral testimony. The court could consider an unsworn declaration under Tex. Civ. Prac. & Rem. Code § 132.001 in lieu of an affidavit. If the court determines that the property should be sold, it may issue a preliminary order directing the sheriff or constable to sell it for cash at public auction. The court in its discretion may give the parties notice of the sale or may order the
sale without notice if the urgency of the situation demands it. Tex. R. Civ. P. 601. Forms in this chapter for an emergency sale are at forms 8-23 (application), 8-24 (affidavit), and 8-25 (order) in this chapter may be used for an emergency sale.

§ 8.31:3 Bond

An applicant for an order of sale who is not the defendant must file a bond with the court 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

Injunction is an extraordinary remedy that may be used to prevent irreparable injury to personal or property rights when legal remedies are not available. See generally Tex. Civ. Prac. & Rem. Code §§ 65.001–.045. Injunction is a court’s command that a party act or refrain from acting in a specific way. See Passel v. Fort Worth Independent School District, 440 S.W.2d 61, 63 (Tex. 1969), on appeal after remand, 453 S.W.2d 888 (Tex. Civ. App.—Fort Worth 1970, writ ref’d n.r.e.), cert. denied, 402 U.S. 968 (1971). In collection matters, the main purpose of the injunction is to restrain the defendant in pending litigation from violating the plaintiff’s rights in a manner that would render a judgment ineffectual. See Tex. Civ. Prac. & Rem. Code § 65.011(2). Defendants pursued by creditors often try to dispose of assets before a judgment is rendered.

§ 8.33:2 Bases for Injunctive Relief

Courts may issue injunctions under express statutory authority or general principles of equity. See Tex. Const. art. V, §§ 8, 16; Tex. Civ. Prac. & Rem. Code §§ 65.001–.015; Tex. Civ. Prac. & Rem. Code § 65.001 (“The principles governing courts of equity govern injunction proceedings if not in conflict with [chapter 65] on injunctions or other law”). Injunctive relief is designed primarily to grant relief against the threatened violation of a right when legal remedies are inadequate. The existence of a right violated is a prerequisite to the granting of an injunction, and, where it is clear that the complainant does not have the right that he claims, he is not entitled to an injunction. See Garland v. Shepherd, 445 S.W.2d 602, 604 (Tex. Civ. App.—Dallas 1969, no writ) (writ of injunction dismissed when plaintiff’s alleged right to be protected was dependent on several contingencies and therefore unvested). In addition to the general injunction statute, many other statutes provide for injunctive relief in specific situations.

§ 8.33:3 Types of Injunctive Relief

Injunctions may be either prohibitory—prohibiting certain acts—or mandatory—commanding a party to act. Injunctive relief proceeds in stages and is distinguished by the time relief is issued and the duration of the relief. The forms of injunctive relief are discussed below.

Temporary Restraining Order: A temporary restraining order expires at the end of the period set by its own terms, not to exceed fourteen days, but the court may extend the order for one additional period and may grant additional extensions if the request is unopposed. It may be issued without notice to the adverse party and without a hearing if otherwise “immediate and irreparable injury, loss, or damage will result to the applicant.” Every restraining order shall include an order setting a certain date for hearing on the temporary or permanent injunction sought. Tex. R. Civ. P. 680.

Temporary Injunction: A temporary injunction operates until disposition of the case on the merits, and it replaces any existing temporary restraining order. Tex. R. Civ. P. 680. It may not be issued without notice to the adverse party. Tex. R. Civ. P. 681. Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe, in reasonable detail and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only on the parties to the action, their officers, agents, servants, employees, and attorneys, and on those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise. Every order granting a temporary injunction shall include an order setting the cause for trial on the merits with respect to the ultimate relief sought. Tex. R. Civ. P. 683.
Permanent Injunction: A permanent injunction may operate indefinitely or until an appointed date. It is part of the final judgment.

Permanent injunctions are rarely sought as ultimate relief in collection matters, so this part of the manual will focus on the temporary injunction and, to a lesser extent, the temporary restraining order.

§ 8.34 Substantive Requirements for Injunctive Relief

Injunctive relief is proper if the applicant can demonstrate the following four grounds for relief: (1) the existence of a wrongful act, (2) the existence of imminent harm, (3) the existence of irreparable injury, and (4) the absence of an adequate remedy at law. Hues v. Warren Petroleum Co., 814 S.W.2d 526, 529 (Tex. App.—Houston [14th Dist.] 1991, writ denied) (citing Priest v. Texas Animal Health Commission, 780 S.W.2d 874, 875 (Tex. App.—Dallas 1990, no writ)). The grant or refusal of a permanent or temporary injunction is ordinarily within the sound discretion of the trial court, and the trial court’s action will not be disturbed on appeal absent a clear abuse of discretion. Priest, 780 S.W.2d at 875. As a prerequisite to the granting of an injunction, the pleadings and prayer must state the particular form of injunction sought and the prayer must specify the type of judgment sought. Warren Petroleum, 814 S.W.2d at 529–30 (citing American Precision Vibrator Co. v. National Air Vibrator Co., 764 S.W.2d 274, 279 (Tex. App.—Houston [1st Dist.] 1988, no writ; Fairfield v. Stonehenge Ass’n Co., 678 S.W.2d 608, 611 (Tex. App.—Houston [14th Dist.] 1984, no writ)).

§ 8.34:1 Underlying Cause of Action

A plaintiff must have a genuine cause of action against a defendant to be entitled to injunctive relief. Valenzuela v. Aquino, 853 S.W.2d 512 (Tex. 1993); Walling v. Metcalfe, 863 S.W.2d 56, 58 (Tex. 1993).

§ 8.34:2 Probable Recovery and Probable Injury

For a temporary injunction, the applicant must show the probability of recovering in the underlying suit and of suffering an injury in the interim unless the injunction is granted. Walling v. Metcalfe, 863 S.W.2d 56, 57 (Tex. 1993); State v. Southwestern Bell Telephone Co., 526 S.W.2d 526, 528 (Tex. 1975). It is not necessary to show that the plaintiff will ultimately prevail in the litigation. Southwestern Bell, 526 S.W.2d at 528; Oil Field Haulers Ass’n v. Railroad Commission, 381 S.W.2d 183, 186 (Tex. 1964). The threat of injury to the plaintiff must be supported by evidence, not merely by speculation or conjecture. See Dallas General Drivers, Warehousemen & Helpers v. Wamix, Inc., 295 S.W.2d 873, 879 (Tex. 1956); Texas Industrial Gas v. Phoenix Metallurgical Corp., 828 S.W.2d 529, 532 (Tex. App.—Houston [1st Dist.] 1992, no writ).

§ 8.34:3 Irreparable Injury

A showing of irreparable injury is one of the requirements for issuance of a temporary restraining order. Tex. R. Civ. P. 680. “Irreparable injury” is also an independent ground for obtaining a temporary injunction. Tex. Civ. Prac. & Rem. Code § 65.011(5). At least one court, however, has disapproved of granting a temporary injunction based on this ground, because it seemed to eliminate the requirement that the plaintiff had no adequate remedy at law. See Speedman Oil Co. v. Duval County Ranch Co., 504 S.W.2d 923, 929 n.1 (Tex. Civ. App.—San Antonio 1974, writ ref’d n.r.e.).
§ 8.34:4  Inadequate Legal Remedy

The applicant must allege and prove that no adequate remedy at law can prevent or reduce the threatened injury. *Texas Industrial Gas v. Phoenix Metallurgical Corp.*, 828 S.W.2d 529, 532 (Tex. App.—Houston [1st Dist.] 1992, no writ). Legal remedies are inadequate if the defendant will be unable to provide damages, such as when a defendant is rapidly depleting assets from which damages would be paid. *R.H. Sanders Corp. v. Haves*, 541 S.W.2d 262, 265–66 (Tex. Civ. App.—Dallas 1976, no writ) (defendant was stripping corporation of its assets).

To preclude an equitable remedy, an available legal remedy must be “as practical and efficient to the ends of justice as the equitable remedy.” *Irving Bank & Trust Co. v. Second Land Corp.*, 544 S.W.2d 684, 688 (Tex. Civ. App.—Dallas 1976, writ ref’d n.r.e.). By this principle, the remedy of sequestration might not preclude injunctive relief in a suit for title or possession of specific property. *See Surko Enterprises v. Borg-Warner Acceptance Corp.*, 782 S.W.2d 223 (Tex. App.—Houston [14th Dist.] 1989, no writ).

§ 8.34:5  Interrelationship of Inadequate Legal Remedy and Irreparable Injury

The relationship between the grounds of inadequate legal remedy and irreparable injury is ambiguous. Some courts recite the two grounds conjunctively, suggesting that the applicant must prove both grounds. *Ballenger v. Ballenger*, 694 S.W.2d 72, 76 (Tex. App.—Corpus Christi 1985, no writ); *see also Texas Industrial Gas v. Phoenix Metallurgical Corp.*, 828 S.W.2d 529, 532 (Tex. App.—Houston [1st Dist.] 1992, no writ). Other courts pair the two grounds disjunctively. *See Houck v. Kroger Co.*, 555 S.W.2d 803, 805 (Tex. Civ. App.—Houston [14th Dist.] 1977, writ ref’d n.r.e.). Still other courts try to have it both ways. *See Inman v. Padrezas*, 540 S.W.2d 789, 797 (Tex. Civ. App.—Corpus Christi 1976, no writ) (“One seeking injunctive relief must plead irreparable injury and/or that he has no adequate remedy at law, and/or that irreparable injury is threatened.”). The better practice is to prove both grounds.

§ 8.34:6  Balancing of Equities

An injunction will not be granted unless the threatened injury to the plaintiff outweighs the harm that the injunction might bring to the defendant or if granting it would “disserve the public interest.” *Morgan v. Fletcher*, 518 F.2d 236, 239 (5th Cir. 1975); *see also Viking Homes, Inc. v. Larkin*, 452 S.W.2d 25, 28 (Tex. Civ. App.—Houston [14th Dist.] 1970, no writ). This doctrine of balancing equities has numerous exceptions and corollaries. One important exception is that the doctrine does not apply if granting an injunction would “aid an act which, if done, would be criminal or illegal.” *Riley v. Davidson*, 196 S.W.2d 557, 559 (Tex. Civ. App.—Galveston 1946, writ ref’d n.r.e.).

§ 8.34:7  Other Equity Issues

The applicant must have “clean hands”; injunctive relief will be denied to anyone who has caused the conditions of which he complains or has acquiesced as the conditions have developed. *Vaughan v. Kizer*, 400 S.W.2d 586, 589–90 (Tex. Civ. App.—Waco 1966, writ ref’d n.r.e.). Also, laches may foil an application for an injunction if the applicant has waited too long to seek protection. *Keene v. Reed*, 340 S.W.2d 859, 860 (Tex. Civ. App.—Waco 1960, writ ref’d).
§ 8.35 Availability of Injunction

§ 8.35:1 Discretion of Trial Court

The grant or refusal of an injunction is ordinarily within the court's sound discretion, and the action will be reversed only on a showing of clear abuse of that discretion. Walling v. Metcalfe, 863 S.W.2d 56, 58 (Tex. 1993); Repka v. American National Insurance Co., 186 S.W.2d 977, 981 (Tex. 1945). If a plaintiff has adequate grounds, alleges a cause of action, and introduces evidence tending to sustain the cause, the trial court does not abuse its discretion by issuing a temporary injunction. Southwestern Greyhound Lines v. Railroad Commission, 99 S.W.2d 263, 270 (Tex. 1936).

§ 8.35:2 Unsecured Creditor

Unsecured creditors may be unable to obtain an injunction seizing or impounding property, because, absent an authorizing statute, a court of equity lacks jurisdiction to seize or impound assets unless the claimant either has a lien on those assets or has reduced his claim to judgment. Garland v. Shepherd, 445 S.W.2d 602, 605 (Tex. Civ. App.—Dallas 1969, no writ); see also Nowak v. Los Patios Investors, Ltd., 898 S.W.2d 9 (Tex. App.—San Antonio 1995, no writ); Perryton Feeders, Inc. v. Feldmann, 483 S.W.2d 386 (Tex. Civ. App.—Amarillo 1972, writ ref’d n.r.e.). Attachment is the proper remedy for such a situation. See sections 8.25 through 8.32 above.

§ 8.35:3 Preventing Transfer of Assets

If ownership of the property is disputed, injunctions sometimes issue to prevent transfer that could defraud the rightful owner. Examples include—

1. prohibiting transfer of funds that the defendant had fraudulently obtained from the plaintiff, Baucum v. Texam Oil Corp., 423 S.W.2d 434, 442 (Tex. Civ. App.—El Paso 1967, writ ref’d n.r.e.);

2. enjoining the mortgagor of an automobile from transferring its title, in part on the basis that he held the certificate of title only by mistake, Hall v. Universal C.I.T. Credit Corp., 298 S.W.2d 858, 859 (Tex. Civ. App.—Eastland 1957, no writ); and

3. making the debtor’s primary creditor a de facto receiver of the debtor’s business by ordering all receipts paid to the creditor, Surko Enterprises v. Borg-Warner Acceptance Corp., 782 S.W.2d 223 (Tex. App.—Houston [1st Dist.] 1989, no writ).

§ 8.36 Procedural Requirements for Temporary Injunction

§ 8.36:1 Procedure Generally

The plaintiff may seek a temporary injunction in the original petition as either the sole remedy or an ancillary remedy, or a separate petition may request the injunction as an ancillary remedy. The manual committee recommends a separate application because in collection cases a temporary restraining order or temporary injunction is usually sought as an interim pretrial remedy. This section discusses procedural requirements for the injunction; section 8.34 above discusses substantive requirements. Differences in procedure for the temporary restraining order are discussed at section 8.37 below. An application is at form 8-26 in this chapter.
§ 8.36:2  Allegation of Grounds

The application must contain “a plain and intelligible statement of the grounds” for issuance of the writ. Tex. R. Civ. P. 682. Several grounds may be pleaded alternatively if each is sufficient, and proof of only one is necessary. Bales v. Jones, 288 S.W.2d 266, 268 (Tex. Civ. App.—Fort Worth 1956, writ ref’d n.r.e.).

§ 8.36:3  Allegation of Facts


§ 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, 246 (1885) (“The rule of pleading, that the statements of a party are to be taken most strongly against himself, is re-enforced in injunction suits by the further requirement that the material and essential elements which entitle him to relief shall be sufficiently certain to negative every reasonable inference arising upon the facts so stated, from which it might be deduced that he might not, under other supposable facts connected with the subject, thus be entitled to relief.”); see also Mendoza v. Canizales, 695 S.W.2d 266, 268 (Tex. App.—San Antonio 1985, no writ) (sustaining injunction against enforcement of contract between plaintiff boxer and defendant manager when pleadings clearly set out unique manager-boxer relationship, recited the importance of boxer receiving proper training, alleged manager prevented training and supervision and participation in remunerative boxing contests, and stated that manager’s conduct harmed boxer, the damages were largely intangible, boxer had no adequate remedy at law, and the harm would likely continue without intervention by the court). This rule is often invoked to deny or dissolve a temporary injunction when the applicant has failed to disprove or negate facts that would undermine the alleged grounds for the injunction if they were proved. See, e.g., Southwestern Associated Telephone Co. v. City of Dalhart, 254 S.W.2d 819, 826 (Tex. Civ. App.—Amarillo 1952, writ ref’d n.r.e.) (affirming denial of temporary injunction against city’s attempt to raise telephone rates pursuant to its ordinance, where applicant did not plead or prove that city was trying to enforce various remedies against it during pending dispute); Refrigeration Discount Corp. v. Meador, 134 S.W.2d 331, 332 (Tex. Civ. App.—Eastland 1939, no writ) (overturning injunction by district court in Erath County, Texas, enjoining execution of judgment rendered by county court at law in Tarrant County, where application for injunction pointed to amount of the order ($167) as proof that amount in controversy did not meet jurisdictional requirements of the county court ($200) but failed to allege that amount sued for or value of the property did not exceed $200).

§ 8.36:5  Request for Relief

A party seeking injunctive relief must state the particular form of injunctive relief sought in both the pleadings and prayer, and the prayer must specify the type of judgment sought. Hues v. Warren Petroleum Co., 814 S.W.2d 526, 529–30 (Tex. App.—
Houston [14th Dist.] 1991, writ denied) (injunction affirmed when petition requested court enjoin defendants from storing gaseous products and saltwater in salt dome but did not request injunctive relief in prayer “nor plead the specific type of injunctive relief sought”) (citing American Precision Vibrator Co. v. National Air Vibrator Co., 764 S.W.2d 274, 279 (Tex. App.—Houston [1st Dist.] 1988, no writ); Fairfield v. Stonehenge Ass’n Co., 678 S.W.2d 608, 611 (Tex. App.—Houston [14th Dist.] 1984, no writ); Scoggins v. Cameron County Water Improvement District No. 15, 264 S.W.2d 169, 173 (Tex. Civ. App.—Austin 1954, writ ref’d n.r.e.) (“to be entitled to injunctive relief the petition must specify the relief sought . . . a court is without authority to grant relief beyond that so specified) (citing Fletcher v. King, 75 S.W.2d 980, 982 (Tex. Civ. App.—Amarillo 1934, writ ref’d)). In Villalobos v. Holguín, the court said, “We recognize that the rule is . . . that an injunction decree must be as definite, clear and precise as possible and when practicable it should inform the defendant of the acts he is restrained from doing, without calling on him for inferences or conclusions about which persons might well differ and without leaving anything for further hearing. . . . This view gives effect to the equally important rule that the decree must not be so broad as to enjoin a defendant from activities which are lawful and a proper exercise of his rights.” See Villalobos v. Holguín, 208 S.W.2d 871, 875 (Tex. 1948).

§ 8.36:6 Verification

The application must be verified by affidavit. Tex. R. Civ. P. 682. (The rule has not been amended to address unsworn declarations authorized by Tex. Civ. Prac. & Rem. Code § 132.001.) Affidavits based on “information and belief” are insufficient. Ex parte Rodriguez, 568 S.W.2d 894, 897 (Tex. Civ. App.—Fort Worth 1978, no writ) (under Tex. R. Civ. P. 682, affidavits based on “information and belief” are insufficient); Durrett v. Boger, 234 S.W.2d 898, 900 (Tex. Civ. App.—Texarkana 1950, no writ) (“[A]n affidavit on information and belief [is] insufficient to meet the requirements of Rule 682.”). The applicant’s attorney should not make the affidavit; see section 19.17:3 in this manual. If an injunction is granted after notice and hearing, however, it is not essential that the petition be sworn to, because a full and complete hearing was had before the court. Williams v. City of Tom Bean, 688 S.W.2d 618, 621 (Tex. App.—Dallas 1985, no writ) (affirming temporary injunction based on unverified petition when hearing was had after notice and when respondent did not challenge sufficiency of petition by special exception or other pleading but instead objected during hearing). See Tex. Gov’t Code § 312.011(1) for the requirements for affidavits. The application at form 8-26 in this chapter includes an affidavit. The court could consider an unsworn declaration under Tex. Civ. Prac. & Rem. Code § 132.001 in lieu of an affidavit.

§ 8.36:7 Notice

“No temporary injunction shall be issued without notice to the adverse party.” Tex. R. Civ. P. 681. Tex. R. Civ. P. 680 allows temporary restraining orders to issue without notice if it clearly appears from specific facts shown by affidavit or verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before notice can be served and a hearing had on the matter. The adverse party must be given notice before the required hearing on the temporary injunction.

§ 8.36:8 Bond

Before the injunction issues, the applicant must execute and file a bond to the adverse party in the amount fixed by the court. Tex. R. Civ. P. 684. For a discussion of the bond, see section 8.38 below.
§ 8.37 Temporary Restraining Order

Temporary restraining orders have the same procedural requirements as temporary injunctions discussed in section 8.36 above, except that notice to the adverse party is not required if “it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before notice can be served and a hearing had thereon.” Tex. R. Civ. P. 680.

§ 8.38 Bond for Injunctive Relief

Before issuance of a temporary injunction or temporary restraining order, the applicant must execute and file a bond to the adverse party in the amount fixed by the court. The bond is “conditioned that the applicant will abide the decision which may be made in the cause, and that he will pay all sums of money and costs that may be adjudged against him if the restraining order or temporary injunction shall be dissolved in whole or in part.” The bond must have “two or more good and sufficient sureties, to be approved by the clerk.” Tex. R. Civ. P. 684. The execution of an obligation by a surety company is in full compliance with a rule that requires the obligation to be executed by one or more sureties. Tex. Ins. Code § 3501.002(b)(1). See generally Tex. Ins. Code §§ 3503.001–.005. A bond given for a temporary restraining order is sometimes continued for a succeeding temporary injunction, but more often the plaintiff must execute a new bond.

For a bond, see form 8-31 in this chapter.

§ 8.39 Order for Injunctive Relief

§ 8.39:1 Order Generally

The order granting a temporary injunction or temporary restraining order must meet the requirements of Tex. R. Civ. P. 683 precisely. Rule 683 states in relevant part: “Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail and not by reference to the complaint or other document, the act or acts sought to be restrained.” See Fasken v. Darby, 901 S.W.2d 591, 593 (Tex. App.—El Paso 1995, no writ) (temporary injunction dissolved when it did not identify harm appellees would have suffered if it had not issued; injunction did not comply with rule 683). If a court issues an order that does not conform to the rule, the nonconformity constitutes an abuse of discretion and mandates reversal. Smith v. Hamby, 609 S.W.2d 866, 868 (Tex. Civ. App.—Fort Worth 1980, no writ) (citing Charter Medical Corp. v. Miller, 547 S.W.2d 77, 78 (Tex. Civ. App.—Dallas 1977, no writ); Board of Equalization of City of Plano v. Wells, 473 S.W.2d 88, 91 (Tex. Civ. App.—Dallas 1972, no writ). The injunction is void even if the defendant does not bring the order’s nonconformity to the court’s attention. Fasken, 901 S.W.2d at 593 (“An injunction that fails to identify the harm that will be suffered if it does not issue must be declared void and be dissolved . . . even when the complaining party fails to bring the error to the trial court’s attention”); University Interscholastic League v. Torres, 616 S.W.2d 355, 358 (Tex. Civ. App.—San Antonio 1981, no writ) (failure of temporary injunction order to meet strict requirements of rule 683 on its face renders order fatally defective and void, whether specifically raised by point of error or not) (citing State v. Cook United, Inc., 464 S.W.2d 105, 106 (Tex. 1971); Hamby, 609 S.W.2d at 868; Charter Medical Corp., 547 S.W.2d at 78; Holt v. City of San Antonio, 547 S.W.2d 715, 716 (Tex. Civ. App.—San Antonio 1977, writ ref’d n.r.e.)). Requirements for temporary injunctions and temporary restraining orders are generally the same, but the latter have some additional requirements, discussed at section 8.40 below. An order for issuance of a temporary injunction is at form 8-29 in this chapter.
§ 8.39:2 Statement of Grounds

In stating the reasons for its issuance, the order must be “specific in terms.” Tex. R. Civ. P. 683. The stated reasons must be legally sufficient and must not be mere conclusory statements. Martin v. Linen Systems for Hospitals, 671 S.W.2d 706, 710 (Tex. App.—Houston [1st Dist.] 1984, no writ). The court need not explain its reasons for believing that the applicant will prevail on the merits, but it must explain why the applicant will be injured if the injunction is denied. If the order fails to meet the requirement of rule 683 that the reasons for issuance be specifically stated, the order will be invalid. Courtlandt Place Historical Foundation v. Doerner, 768 S.W.2d 924, 925 (Tex. App.—Houston [1st Dist.] 1989, no writ).

§ 8.39:3 Statement of Acts Enjoined

The order must “describe in reasonable detail and not by reference to the complaint or other document, the act or acts sought to be restrained.” Tex. R. Civ. P. 683. The description of enjoined acts must be clear, definite, and precise, so that the defendant need not make inferences or draw conclusions about matters that persons might differ on. Villalobos v. Holguin, 208 S.W.2d 871, 875 (Tex. 1948).

§ 8.39:4 Persons Affected

Rule 683 state in relevant part that “[e]very order granting an injunction and every restraining order . . . is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.” Tex. R. Civ. P. 683.

§ 8.39:5 Setting for Trial Date

Every order granting a temporary injunction must include an order setting a date for trial on the merits with respect to the ultimate relief sought. Tex. R. Civ. P. 683. If the order granting an injunction fails to include the trial setting, the order must be dissolved. InterFirst Bank San Felipe v. Paz Construction Co., 715 S.W.2d 640, 641 (Tex. 1986) (judgment reversed without oral hearing and injunction order found void because it did not include order setting cause for trial on merits; rule 683 requirement that “[e]very order granting a temporary injunction shall include an order setting the cause for trial on the merits with respect to the ultimate relief sought” is mandatory and must be strictly followed); Higginbotham v. Clues, 730 S.W.2d 129 (Tex. App.—Houston [14th Dist.] 1987, no writ).

§ 8.40 Additional Requirements for Temporary Restraining Order

Temporary restraining orders must meet requirements in addition to those described in section 8.39 above. Every such order must define the threatened injury, state why the injury would be irreparable, state why the order was granted without notice, set the date for a hearing on the application for a temporary injunction, and be endorsed with the date and hour of issuance. Tex. R. Civ. P. 680.

An order for issuance of a temporary restraining order is at form 8-27 in this chapter, and a temporary restraining order is at form 8-28.
Application for Prejudgment Writ of Garnishment

Form 8-1

The attorney should consult sections 8.11 through 8.15 in this chapter before using the prejudgment garnishment remedy.

The application must be accompanied with one or more affidavits. Tex. R. Civ. P. 658. Both the garnishee and the defendant must be served. See Tex. R. Civ. P. 659, 661, 663a. The application is discussed at section 8.12:4 in this chapter, and an affidavit is at form 8-2. See section 14.2 in this manual regarding exercising caution in pleading conditions precedent.

The clerk will docket the application to show the garnishee as the defendant, but the prejudgment garnishment proceeding should be conducted as an ancillary part of the underlying cause. See Tex. R. Civ. P. 659. In most counties, the clerk will prepare the writ of garnishment and the return. In some cases, the attorney may wish to prepare them for the clerk.

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

Use the same docket number and court designation as in the original petition (unless the cause has been transferred), but include the garnishee’s name in the style, as in “Carl Creditor, Plaintiff, v. Dan Debtor, Defendant and LastNational Bank, Garnishee.”

Application for Prejudgment Writ of Garnishment

1. **Parties.** [Name of plaintiff], Plaintiff, whose address is [address, city, state], makes this Application for Prejudgment Writ of Garnishment. Garnishee is [name of garnishee], who can be served with citation at [address, city, state]. Defendant is [name of defendant], who can be served with citation at [address, city, state].

2. **Facts.** Plaintiff has reason to believe that Garnishee has property belonging to Defendant or is indebted to Defendant. Within Plaintiff’s knowledge, Defendant does not possess property in Texas subject to execution sufficient to satisfy the debt. This garnishment is not sought to injure Defendant or Garnishee.

3. **Affidavit.** Plaintiff is entitled to the issuance of a writ of garnishment before judgment on the grounds stated in the attached affidavit. The affidavit is incorporated in this application by reference.
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.

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[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 sections 8.3:2 and 19.17:3 in this manual. See Tex. Civ. Prac. & Rem. Code § 63.001 for statutory affidavit requirements.

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

Use the same caption as in the application for writ of garnishment at form 8-1.

Affidavit for Prejudgment Writ of Garnishment

BEFORE ME, the undersigned authority, on this day personally appeared [name of affiant], who swore on oath that the following facts are true:

“I am [Plaintiff/[other capacity, e.g., credit manager of Plaintiff]] in this cause. [Include if affiant is agent: I am authorized to make this affidavit and to apply for a prejudgment writ of garnishment in this cause.]

Select one of the following.

“I have personal knowledge of the facts stated in this affidavit, and they are true and correct.

Or

“I make this affidavit on information and belief. The basis for that belief is the following: [state specific grounds for belief].

Continue with the following.

“In this suit, now pending in this Court, Plaintiff has filed an action against Defendant alleging [describe type of action, e.g., an unpaid debt based on a secured promissory note].
“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.

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**Order for Issuance of Prejudgment Writ of Garnishment**

At the hearing on Plaintiff’s Application for Prejudgment Writ of Garnishment in this cause, Plaintiff appeared by and through his attorney of record. The hearing was conducted without notice to Defendant or Garnishee.

The Court finds that—

Specific findings of fact must be made; findings 1.–4. are examples only.

1. Defendant executed a promissory note payable to Plaintiff. The note was due on February 1, 2018, and was secured by a 2005 Dodge pickup truck, VIN 1234567890;

2. this note is in default, and there is currently due to Plaintiff from Defendant $5,000, which represents unpaid principal and interest on the note;

3. Defendant is in the process of going out of business;

4. Defendant has sold the above-described collateral in which Plaintiff has a security interest;

Findings 5. and 6. are required in all orders.
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.
Bond to Defendant for Writs

Form 8-4

The form of the bond is suggested by Tex. R. Civ. P. 592b. Bonds are discussed at sections 8.13:2 (pre-judgment 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 per-
son, 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
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.

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.

[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 19-1).
Form 8-8

This form may be used to sequester property for which foreclosure or enforcement of a mortgage, lien, or security interest in personal property or fixtures is sought. Discussion of foreclosure of many kinds of liens is at sections 7.1 through 7.4 in this manual. If sequestration of real property is sought in a suit for title, partition, or possession for other purposes, this form must be adapted to fit existing facts. Real property is generally beyond the scope of this manual. The application and affidavit may be combined with the original petition; here, the application and affidavit are in one form, to be filed separately when or after the petition is filed. For a discussion of the application and affidavit, see section 8.17.

This form is based on the requirements for application and affidavit set forth in Tex. R. Civ. P. 696 and the grounds stated in Tex. Civ. Prac. & Rem. Code § 62.001. In most counties, the clerk will prepare the writ of sequestration and the return. In some cases, the attorney may wish to prepare them for the clerk. See forms 8-10 and 8-12.

See section 8.16:3 regarding the grounds for and availability of sequestration. See section 14.10 for other forms of party designation.

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

Use the same caption as in the original petition unless the cause has been transferred.

Application and Affidavit for Writ of Sequestration

1. Parties. [Name of plaintiff], Plaintiff, whose address is [address, city, state], makes this Application for Writ of Sequestration. Defendant is [name of defendant], who can be served with citation at [address, city, state].

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, state].
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.

---

**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).
Order for Issuance of Writ of Sequestration

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
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]
[Telexcopier]
If the application is granted, have the clerk issue a writ of sequestration (with application, affidavit, and order) for service on the defendant.
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”).


[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 19-1).
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
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.
Form 8-13  Plaintiff’s Replevy Bond for Sequestered Property

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]
[Telexo]
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.

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.
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 19.17:3 in this manual.

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]
Order for Emergency Sale of Perishable Property [after Sequestration]

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
Form 8-16  Order for Emergency Sale of Perishable Property [after Sequestration]

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 14.10 in this manual. See section 14.2 regarding exercising caution in pleading conditions precedent. Under the paragraph setting out the facts, include in the allegation the appropriate specific ground for attachment from the list found at Tex. Civ. Prac. & Rem. Code § 61.002.

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

Use the same caption as in the original petition unless the cause has been transferred.

Application for Writ of Attachment

1. Parties. [Name of plaintiff], Plaintiff, whose address is [address, city, state], makes this Application for Writ of Attachment. Defendant is [name of defendant], who can be served with citation at [address, city, state].

State specific facts relied on by the plaintiff to warrant the required findings by the court and state grounds for issuing the writ. The following paragraph is a sample of fact and ground allegations; the actual allegations must be drafted to fit the situation.

2. Facts. During the period from about January 29, 2018, through February 19, 2018, Plaintiff sold and delivered to Defendant face brick and fireplace equipment, which had a fair market value and agreed purchase price of $3,053.90. Plaintiff has made demand for this amount, but Defendant has not paid. Defendant has stated that he intends to sell his property and move to another state permanently and has refused to pay or secure the debt due Plaintiff.
3. **Affidavit.** Plaintiff is entitled to the issuance of a writ of attachment on the grounds stated in the attached affidavit. The affidavit is incorporated in this application by reference.

4. **Conditions Precedent.** All conditions precedent have been performed or have occurred.

5. **Prayer.** Plaintiff prays that a writ of attachment issue and that Plaintiff be granted all further relief to which Plaintiff may be entitled.

---

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

Attach affidavit(s) (form 8-18). Prepare the following to take to the hearing: form 8-19 (order for issuance of writ of attachment), form 8-4 (bond to defendant), form 8-20 (writ of attachment), and form 8-22 (officer’s return).
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.

“During the period from about January 29, 2018, through February 19, 2018, Plaintiff sold and delivered to Defendant face brick and fireplace equipment, which had a fair market value and agreed purchase price of $3,053.90. I have made demand for this amount, but Defendant has refused to pay or secure his debt. Defendant has stated to me that he intends to sell his property and move to another state.

“The following paragraph is a sample fact allegation; the actual allegations must be drafted to fit the facts.

“During the period from about January 29, 2018, through February 19, 2018, Plaintiff sold and delivered to Defendant face brick and fireplace equipment, which had a fair market value and agreed purchase price of $3,053.90. I have made demand for this amount, but Defendant has refused to pay or secure his debt. Defendant has stated to me that he intends to sell his property and move to another state.

“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
Order for Issuance of Writ of Attachment

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.]

Order for Issuance of Writ of Attachment

At the hearing on Plaintiff's Application for Writ of Attachment in this cause, Plaintiff appeared by and through his attorney of record. The hearing was conducted without notice to Defendant.

The Court finds that—

Specific findings of fact on specific statutory grounds must be made. Findings 1.–5. are examples; the actual findings must be drafted to fit the facts.

1. during the period from about January 29, 2018, through February 19, 2018, Plaintiff sold and delivered to Defendant certain face brick and fireplace equipment;

2. these materials had a fair market value and agreed purchase price of $3,053.90;

3. Plaintiff has demanded payment from Defendant, but Defendant has not made payment;

4. Defendant is indebted to Plaintiff in the amount of $3,053.90;

5. Defendant has stated that he intends to sell his property and move to another state;

Findings 6. and 7. are required in all orders.
6. the attachment is not sued out to injure or harass Defendant; and

7. Plaintiff will probably lose his debt unless this attachment is issued.

It is therefore ORDERED that a writ of attachment be issued against Defendant for property in Defendant’s possession in the maximum amount of $___________, conditioned that Plaintiff must post a bond in the amount of $___________, payable to Defendant, conditioned and approved as required by law.

It is further ORDERED that the property be kept safe and preserved subject to further orders of this Court.

It is further ORDERED that Defendant may replevy any of the property by posting a bond in the amount of $___________, payable to Plaintiff, conditioned and approved as required by law.

SIGNED on ________________________________.

JUDGE PRESIDING

APPROVED AS TO FORM:

______________________________
[Name]
Attorney for Plaintiff
State Bar No.:
[E-mail address]
[Address]
[Telephone]
[Telecopier]
If the application is granted, have the clerk issue a writ of attachment (with application, affidavit(s), and order) to the defendant.
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 19-1).
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
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]
[Telexcopier]

Attach affidavit(s) (form 8-24) and a bond (adapt form 8-4). Prepare form 8-25 (order for emergency sale).
The rules do not state who must make the affidavit in support of an application for emergency sale of perishable personal property. See Tex. R. Civ. P. 601. This form is drafted for execution by the plaintiff or the plaintiff’s agent. Emergency sale of perishable goods is discussed at section 8.31 in this chapter. This affidavit is to be attached to the application; see form 8-23. The attorney should not swear to the truth of the facts on which the application is based. See sections 8.3:2 and 19.17:3 in this manual.

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:

“[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]
[Telexcopier]

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 14.2 in this manual regarding exercising caution in pleading conditions precedent.

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

Use the same caption as in the original petition unless the cause has been transferred.

Application and Affidavit for Temporary Restraining Order and Temporary Injunction

1. Parties. [Name of plaintiff], Plaintiff, whose address is [address, city, state], makes this Application for Temporary Restraining Order and Temporary Injunction. Defendant is [name of defendant], who can be served with citation at [address, city, state]. [Include if applicable: Third-Party Defendant is [name of party possessing defendant’s property], who can be served with citation at [address, city, state].]

State specific facts relied on by the plaintiff to warrant issuance of the restraining order and the temporary injunction. The following paragraph is a sample allegation; the actual allegations must be drafted to fit the facts.

2. Facts. In this suit, now pending in this Court, Plaintiff is seeking damages from Defendant. Plaintiff lent Defendant $5,000 and received Defendant’s promissory note for that amount. On December 31, 2017, Defendant defaulted on the note. The sum of $4,800, representing principal and interest, remains due and unpaid on the debt. Plaintiff believes that Defendant’s assets are being secreted and placed beyond Plaintiff’s reach. This belief is based on the fact that, after Defendant was served with Plaintiff’s original petition in this cause,
Defendant stated to Plaintiff that, unless Plaintiff withdrew this suit, Defendant would liqui-
date his business property and hide the proceeds and all cash now in Defendant’s bank
accounts in another state.

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.

Plaintiff does not have an adequate remedy at law because if Defendant’s conduct con-
tinues 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 dili-
gence 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: or Third-Party Defendant] and [his/their] officers, agents, ser-
vants, and employees from directly or indirectly [describe conduct to be
restrained, e.g., transferring or removing any of Defendant’s funds or other
property in Third-Party Defendant’s possession];

b. the Court set a date and time for a hearing on this application for a temporary
injunction;

c. Defendant be cited to appear and answer;

d. after hearing, the Court issue a temporary injunction enjoining Defendant
[include if applicable: or Third-Party Defendant] and [his/their] officers,
agents, servants, and employees from directly or indirectly [describe conduct
to be restrained, e.g., transferring or removing any of Defendant’s funds or
other property in Third-Party Defendant’s possession] during the pendency of
this action;

e. Plaintiff be granted reasonable expenses incurred in obtaining the restraining
order and injunction; and

f. Plaintiff be granted all further relief to which Plaintiff may be entitled.

__________________________________________________________________________________________________________________________
[Name]
Attorney for Plaintiff
State Bar No.:
[E-mail address]
[Address]
[Telephone]
[Telexcopier]
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
Order for Issuance of Temporary Restraining Order and Setting Hearing on Injunction

APPROVED AS TO FORM:

________________________________________________________________________________________________________________________
________________________________________________________________________________________________________________________

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

Order Setting Hearing on Application for Temporary Injunction

It is ORDERED that [name of defendant], Defendant in this cause, appear before this Court on __________________ at ________.___.M. at [address, city], Texas, to show cause, if any, why the temporary injunction requested by Plaintiff should not issue against Defendant.

SIGNED on ________________________________.

________________________________________________________________________________________________________________________
________________________________________________________________________________________________________________________

JUDGE PRESIDING

If the application is granted in full, have the clerk issue a restraining order (form 8-28) and citation for hearing with a copy of the application. If the application for a restraining order is denied but a hearing on the temporary injunction is set, have the clerk issue citation for hearing with a copy of the application.
Temporary Restraining Order

The conduct restrained must be described clearly, definitely, and precisely, so that the defendant will not have to draw inferences or conclusions about what is proscribed; see section 8.39 in this chapter.

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

Use the same caption as in the application at form 8-26.

Temporary Restraining Order

STATE OF TEXAS )

To [name of each person and entity restrained]:

Plaintiff has applied and given bond for a temporary restraining order and temporary injunction in this cause.

On the basis of the application, the Court has ordered the issuance of a temporary restraining order because it appears to the Court that, unless you are restrained as ordered below before notice can issue and a hearing can be held, Plaintiff will be irreparably injured because [describe injury, e.g., Defendant will not be able to satisfy the judgment that will probably be rendered in Plaintiff’s favor in this cause because Defendant’s nonexempt assets will be beyond Plaintiff’s reach].

You are therefore commanded to obey the order of this Court and to immediately desist and refrain from [describe conduct restrained, e.g., transferring or removing any funds or other property of [name of defendant] in the possession of [name of third-party defendant]].

You are further ordered to appear before this Court at __________ __.M. on __________________ at [address, city], Texas, to show cause why a temporary injunction, effective until final judgment in this cause, should not be granted as prayed for.
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 caption as in the application at form 8-26.

Order for Issuance of Temporary Injunction

After due notice was given, the Court heard Plaintiff’s Application for Temporary Injunction in this cause. Plaintiff and Defendant appeared by and through their attorneys of record.

The Court finds that—

1. Defendant intends to [state defendant's wrongful action, e.g., liquidate his personal property, close his bank accounts, and remove all his assets from this state, to effectively place them beyond Plaintiff’s reach before a judgment can be rendered in this cause];

2. Plaintiff will probably be awarded a recovery in this cause;

3. if Defendant’s threatened conduct as described above is not enjoined during the pendency of this suit, Plaintiff will be injured because [state reasons for injury, e.g., Defendant will not have nonexempt assets available to satisfy Plaintiff’s judgment for damages, so that the judgment will be ineffectual and Plaintiff will have no adequate remedy at law];
4. Plaintiff has exercised due diligence in prosecuting the underlying claim in this cause;

5. Plaintiff’s injury will outweigh any injury to Defendant that may occur on issuance of this injunction;

6. the injunction will not disserve the public interest;

7. Defendant’s intended conduct as described above will change the status quo, which should be maintained in the public interest; and

8. Plaintiff’s bond in the amount of $___________ will fully protect Defendant’s rights during the pendency of this action.

It is therefore ORDERED that a temporary injunction issue, operative until judgment is entered in this cause, enjoining [name[s]] from [describe conduct enjoined, e.g., transferring or removing any funds or other property belonging to [name of defendant] in the possession of [name of third-party defendant]], provided that, before the issuance of the injunction, Plaintiff must post bond in the amount of $___________, payable to Defendant, conditioned and approved as required by law.

SIGNED on ________________________________.

__________________________________________________________________________________________________________________________ ... __________________________________________________________________________________________________________________________

__________________________________________________________________________________________________________________________

JUDGE PRESIDING
Order for Issuance of Temporary Injunction

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
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]
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 ________________________.
Bond to Defendant for Injunction

[Name of clerk], Clerk
[Designation of court]

By ______________________________
Deputy
Chapter 14

Petitions and Causes of Action

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Chapter 14

Petitions and Causes of Action

I. Petitions

§ 14.1 Statement of Cause of Action

Each petition must contain a short statement of the cause of action that gives fair notice of the claim and a demand for judgment for the relief that the party seeks. The plaintiff may state more than one claim in a petition and may present more than one statement of the claim alternatively or hypothetically. Tex. R. Civ. P. 47–48.

§ 14.2 Allegation of Conditions Precedent

The plaintiff should plead generally, when appropriate, that every condition precedent has been performed or has occurred. After such a plea, the plaintiff must prove only those conditions specifically denied by the defendant. Tex. R. Civ. P. 54. The attorney should use caution in asserting that all conditions precedent have been met; the attorney’s signature on the pleading certifies that the allegations contained in it are likely to have evidentiary support. Tex. Civ. Prac. & Rem. Code § 10.001(3).

The defendant’s answer “denying all conditions precedent to the satisfaction of the claim” is not a specific denial. The plaintiff does not in response to such an answer have to prove the performance or occurrence of any condition precedent. Tex. R. Civ. P. 54. Hill v. Thompson & Knight, 756 S.W.2d 824, 826 (Tex. App.—Dallas 1988, no writ) (creditor not required to prove ownership because defendant failed to specifically deny any condition precedent to recovery on note).

In consumer-goods cases, pleading that “all conditions precedent have been performed” in a deficiency suit satisfies the requirement that the plaintiff plead that the foreclosure sale was performed in a commercially reasonable manner. The plaintiff has no further burden to prove commercial reasonableness unless the defendant specifically denies the commercial reasonableness of the sale. Greathouse v. Charter National Bank-Southwest, 851 S.W.2d 173, 176–77 (Tex. 1992). See section 14.29 below regarding deficiency judgments generally. For nonconsumer-goods transactions, see the discussion in section 14.29:4 below.

§ 14.3 Damages

Items of special damage must be specifically stated. Tex. R. Civ. P. 56. This requirement applies particularly to collections litigation because of the many special types of damages involved, such as statutory interest, contractual interest, attorney’s fees, and costs. Unliquidated damages may be sought if the petition states that the damages sought are within the jurisdictional limits of the court. On special exception, the court can require that the petitioner amend the petition to specify the maximum amount claimed. Tex. R. Civ. P. 47. Although there are generally limits on the recovery of exemplary damages, those limitations are removed if the action is based on theft punishable as a third-degree felony or higher. See Tex. Civ. Prac. & Rem. Code § 41.008(c)(13); see also Tex. Civ. Prac. & Rem. Code §§ 41.003, 41.008(b).
§ 14.4 Expeditied Actions

§ 14.4:1 Application of the Expedited Action Process

Rule 169 was added to rules effective March 31, 2013, to promote the prompt, efficient, and cost-effective resolution of civil actions. See 76 Tex. B.J. 221 (2013). Rule 169 is mandatory and applies to civil actions in district courts, county courts at law, and statutory probate courts in which the amount in controversy, inclusive of all claims for damages of any kind, whether actual or exemplary, a penalty, attorney’s fees, expenses, costs, interest, or any other type of damage of any kind, does not exceed $100,000. Tex. R. Civ. P. 169(a)(1); see also Tex. R. Civ. P. 169, cmt. 1. Tex. R. Civ. P. 47, 190.2 were revised to conform to the expedited actions procedures. Tex. R. Civ. P. 190.2(a)(1) was added to include in level 1 discovery control plan “any suit that is governed by the expedited actions process in Rule 169” and the rule was recaptioned as “Discovery Control Plan—Expedited Actions and Divorces Involving $50,000 or Less (Level 1).” See 76 Tex. B.J. 221 (2013). Rule 47(c), by requiring a statement of monetary relief sought, now expressly requires the plaintiff to plead into the requirements of the rule, or describe relief that falls outside the rule. See Tex. R. Civ. P. 47(c).

Rule 47 requires: (1) a short statement of the claim to give sufficient and fair notice of the claim involved; (2) a statement that the damages sought are within the jurisdictional limits of the court; (3) a statement of the monetary relief sought, and (4) a demand for judgment for all the other relief to which the party deems itself entitled. Tex. R. Civ. P. 47(a)–(d).

The expedited actions process applies in a suit in which all claimants, other than counter-claimants, affirmatively plead that they seek only monetary relief aggregating $100,000 or less, including damages of any kind, penalties, costs, expenses, prejudgment interest, and attorney’s fees. Tex. R. Civ. P. 169(a)(1). The expedited process does not apply to actions filed pursuant to the Texas Family Code, the Property Code, the Tax Code, or to medical liability claims governed by chapter 74 of the Texas Civil Practice and Remedies Code. Tex. R. Civ. P. 169(a)(2).

See section 14.24 below and part II in chapter 19 for more information about expedited actions.

§ 14.4:2 Statement of Claim

In order to plead into the expedited process, a claimant’s pleadings must indicate that the party seeks monetary relief of $100,000 or less, including damages of any kind, penalties, costs, expenses, prejudgment interest, and attorney’s fees. Tex. R. Civ. P. 169(a)(1). The following language may be used to plead into the expedited rules: “Plaintiff intends that discovery be conducted under Level 1 and affirmatively pleads that this suit is governed by the expedited-actions process in Tex. R. Civ. P. 169.”

If additional, nonmonetary relief is pleaded, the case will not be governed by the expedited rules. Tex. R. Civ. P. 169(c)(1)(B). Importantly, a claimant that does not plead as required by section (c) of rule 47 may not conduct discovery until the pleading is amended to comply with rule 47. Tex. R. Civ. P. 47.

§ 14.4:3 Special Exceptions in Attempt to Force Pleading into Expedited Action

A defendant that wishes to force a plaintiff into the expedited process may seek to use a special exception. Tex. R. Civ. P. 47. A defendant, out of an abundance of caution, may also wish to have the court rule on any outstanding discovery requests,
since a plaintiff may not conduct discovery until he complies with the pleading requirements of rule 47. The following special exception may accomplish this purpose:

Defendant specially excepts to the Plaintiff’s Petition in that it fails to comply with Tex. R. Civ. P. 47 which requires the Plaintiff to identify the amount of damages being sought, and whether Plaintiff seeks only monetary relief. Defendant requests that Plaintiff comply with Tex. R. Civ. P. 47(c) and amend the Petition to identify the amount of damages being sought, and whether Plaintiff seeks only monetary relief. Defendant requests that this special exception be set for hearing and that said special exception be granted. Defendant further requests that the Plaintiff be ordered to not conduct any discovery until the Petition is amended to comply with Tex. R. Civ. P. 47, and that any outstanding discovery requests served by Plaintiff on Defendant, if any, be quashed as untimely under Tex. R. Civ. P. 47.

§ 14.4:4 Effect of Mandatory Expedited Action Process on Parties

Since a plaintiff will always be the master of his petition, he will be able to plead in or out of the expedited rules. However, a defendant, even one with counter-claims in excess of $100,000 or a nonmonetary claim, may be forced to try the case under the expedited process unless he can show “good cause.” See Tex. R. Civ. P. 169(a)(1), (c)(1)(A).

§ 14.4:5 Removal from Expedited Action Process

A court must remove a suit from the expedited process in two instances. First, a suit must be removed from the expedited process on a showing of “good cause.” Tex. R. Civ. P. 169(c)(1)(A). Second, a court must remove the suit from the expedited process if a claimant, other than a counter-claimant, files a pleading, an amended pleading, or a supplemental pleading that seeks nonmonetary relief. Tex. R. Civ. P. 169(c)(1)(B). The rules do not provide that the parties can opt out of the expedited action process by agreement. The process is mandatory except in the two instances referenced immediately above.

In determining “good cause” to remove a suit from the expedited action process the court should consider factors such as—

1. whether the damages sought by multiple claimants against the same defendant exceed, in the aggregate, the relief allowed under rule 169(a)(1);
2. whether a defendant has filed, in good faith, a compulsory counterclaim that seeks nonmonetary relief;
3. the number of parties and witnesses;
4. the complexity of the legal and factual issues; and
5. whether an interpreter is necessary.

Tex. R. Civ. P. 169, cmt. 3.

Further, a pleading, an amended pleading, or a supplemental pleading that removes a case from the expedited process may not be filed without leave of court unless it is filed the earlier of thirty days after the discovery period is closed (the discovery period opens on filing of suit and closes 180 days after any discovery request of any kind is served on any party) or thirty days before the date set for trial. Tex. R. Civ. P. 169(c)(2), 190.2(b)(1). Leave to amend a pleading may only be granted if good cause outweighs any prejudice to the opposing party. Tex. R. Civ. P. 169(c)(2).
If a suit is removed from the expedited process then discovery must be reopened. Tex. R. Civ. P. 169(c)(3), 190.2(c). Once discovery is reopened, all discovery must be completed within the timeframes set forth in the new discovery control plan ordered by the court (within the limitations provided in Tex. R. Civ. P. 190.3 and 190.4). Any person previously deposed may be redeposed. And, on motion by any party, the court should continue the trial date so that discovery under the new control plan can be completed. Tex. R. Civ. P. 190.2(c).

§ 14.5 Allegations about Parties

§ 14.5:1 Information to Be Pledged

The original petition should contain appropriate allegations about the parties, such as—

1. the complete true name and any alias of each individual defendant (see Tex. R. Civ. P. 79);
2. any assumed business name (Tex. R. Civ. P. 28);
3. the name and kind of entity, if any defendant is not an individual;
4. information about any individual who can accept service for any defendant that is not an individual;
5. the name and address of the registered agent for any corporate defendant;
6. the capacity of any defendant (for example, personal representative, receiver) not being sued for his own liability;
7. the residential address of each party (Tex. R. Civ. P. 79);
8. the business address of each defendant; and
9. all other addresses where each defendant might be found, to aid in serving the petition.

Additionally, Tex. Civ. Prac. & Rem. Code § 30.014 requires each party to include partial identification information in its initial pleading in a civil action filed in a district court, county court, or statutory county court. The last three numbers of the party’s driver’s license number (if issued) and the last three numbers of the party’s Social Security number (if issued) must be included. Tex. Civ. Prac. & Rem. Code § 30.014(a). A court may order that an initial pleading be amended to include this information and may find a party in contempt if the party does not amend the pleading as ordered. Tex. Civ. Prac. & Rem. Code § 30.014(b).

§ 14.5:2 Purpose and Use of Allegations

Allegations about the parties provide necessary information for service of process. This information should be in the petition instead of a separate letter, because cover letters can easily become separated from the petition. Considered in light of the stated cause of action, party allegations help determine whether jurisdiction and venue are proper. These allegations also establish, for purposes of res judicata and joinder, who is involved in the suit. The plaintiff’s attorney must take care to include all necessary parties, all parties whose liability is sought, and all individuals whose personal liability is sought to satisfy debts of corporate defendants and other such entities. Individual liability for debts of entities is discussed in part II. in chapter 6 of this manual.
§ 14.6 Ascertaining Status of Business as Party to Suit

§ 14.6:1 Generally

A suit can be maintained only by and against parties who have an actual or legal existence. *Ray Malooly Trust v. Juhl*, 186 S.W.3d 568, 571 (Tex. 2006). The attorney should therefore ascertain that both his client and the defendant exist as legal entities with the capacity to sue or be sued.

§ 14.6:2 Corporations and Limited Liability Companies

A Texas corporation or a foreign corporation authorized to transact business in Texas loses its privilege to file suit if it fails to pay franchise taxes. Tex. Tax Code § 171.252. Limited liability companies are considered corporations for franchise tax purposes. See Tex. Tax Code § 171.002(a). The attorney should call the secretary of state’s office corporations section at 512-463-5555 to determine a corporation’s or limited liability company’s standing. This information is also available online by subscribing to secretary of state’s online SOS-Direct resource. See section 3.22 in this manual for additional information on contacting the secretary of state’s office.

A foreign corporation need not be registered to bring suit in Texas. See Tex. Bus. Orgs. Code § 9.251. This statute also applies to foreign limited liability companies. See part II. in chapter 6 of this manual regarding corporations and limited liability companies.

§ 14.6:3 Limited Partnerships and Limited Liability Partnerships

Limited partnerships and limited liability partnerships can lose their privilege to file suit if they fail to file a periodic report required by the Texas Revised Limited Partnership Act. See Tex. Bus. Orgs. Code § 153.307. The attorney should call the secretary of state’s office at 512-463-5555 to determine the standing of a limited partnership or limited liability partnership. See also section 6.27 in this manual regarding limited partnerships and section 6.28 regarding limited liability partnerships.

§ 14.6:4 Business Operating under Assumed Name

A business operating under an assumed name must have a properly filed assumed name certificate to bring an action based on a contract or act in which the assumed name was used. Tex. Bus. & Com. Code § 71.201 (formerly Business and Commerce Code section 36.25).

§ 14.7 Multiple Defendants—Joinder of Parties

§ 14.7:1 Required Joinder

A person subject to process must be joined as a party if—

1. complete relief cannot be accorded among the other parties without his joinder, or

2. his interest in the action is such that disposition of the matter in his absence may—
   a. subject any other party to a substantial risk of incurring multiple or otherwise inconsistent obligations because of the claimed interest, or
b. impair or impede the unjoined party’s ability to protect his interest as a practical matter.

If a person is indispensable and cannot be made a party, the court must dismiss the cause. In determining whether a party is indispensable, the court will consider, among other matters—

1. the extent to which a judgment rendered without the person’s joinder might be prejudicial to him or to the joined parties;
2. the extent to which this prejudice can be lessened or avoided by including protective provisions in the judgment, by shaping the relief, or by any other measure;
3. whether a judgment rendered without the person’s joinder would be adequate; and
4. whether dismissal for nonjoinder will leave the plaintiff with an adequate remedy.


A party whose presence is truly indispensable is rare; the court can usually adjudicate the dispute between the parties already joined. Indian Beach Property Owners’ Ass’n v. Linden, 222 S.W.3d 682, 698 (Tex. 2007); Cooper v. Texas Gulf Industries, 513 S.W.2d 200, 204 (Tex. 1974). A failure to join “indispensable” parties does not render a judgment void. Browning v. Placke, 698 S.W.2d 362, 363 (Tex. 1985).

§ 14.7:2 Permissive Joinder

Multiple defendants may be joined if—

1. a right to relief is asserted against them jointly, severally, or alternatively;
2. the claimed right arises out of the same transaction, occurrence, or series of transactions or occurrences; and
3. any question of law or fact common to all of them will arise in the action.

Tex. R. Civ. P. 40(a).

§ 14.7:3 Joinder of Spouse

A spouse may generally be sued without the other spouse’s joinder. Tex. Fam. Code § 1.105. In a suit to reach joint-management community property, both spouses should be joined, although failure to do so will not render the judgment void, and the judgment will bind the party-spouse. Dr. Donald R. Klein & Associates, M.D., P.A. v. Klein, 637 S.W.2d 507, 508–509 (Tex. 1982); Dulak v. Dulak, 513 S.W.2d 205, 207 (Tex. 1974), overruled by statute as recognized in Stauffer v. Henderson, 801 S.W.2d 858, 868 (Tex. 1990). In a suit to reach community property under one spouse’s sole management and control, it is presumably not fatal to omit the other spouse as a party; in a suit affecting community property, each spouse should be a proper party. See section 27.33 in this manual regarding community and separate property.

§ 14.7:4 Joinder of Party to Instrument

An assignor, endorser, or other party not primarily liable on an instrument may be joined in a suit against the principal obligor. Tex. R. Civ. P. 30. A conditionally liable party may be sued without joining the maker or principal obligor if the principal obligor—
1. is a nonresident or resides in a place at which he cannot be reached by ordinary process of law;

2. has an unknown residence that cannot be ascertained by use of reasonable diligence;

3. is dead; or

4. is actually or notoriously insolvent.


The exceptions to joinder of guarantors and principal obligors cannot be enlarged. An insane maker, therefore, must be joined in a suit against his guarantor. Johnson v. First Mortgage Loan Co., 135 S.W.2d 806, 810–11 (Tex. Civ. App.—Austin 1939, no writ). The plaintiff, however, may sue a comaker singly and may proceed to judgment without joinder of the other comakers, even if the defendant was an accommodation party. It is the defendant’s duty to join other comakers. Reed v. Buck, 370 S.W.2d 867, 873 (Tex. 1963).

§ 14.8 Entities as Defendants

§ 14.8:1 Entities as Defendants Generally

The petition should name every entity and individual against whom the creditor would impose liability. Rules about names under which various entities, rather than individuals, can or should be named as defendants are discussed in the following sections. A defendant’s entity status should be alleged, and the name, address, and capacity of an individual who can accept service for the entity should be stated. See Reynolds v. Haws, 741 S.W.2d 582, 589 (Tex. App.—Fort Worth 1987, writ denied) (entity not party to suit without being named in pleadings). The petition should name as defendants all individuals (for example, partners, shareholders, directors) against whom personal liability is sought. See Ray Malooly Trust v. Juhl, 186 S.W.3d 568 (Tex. 2006) (holding that a trust is not a legal entity and civil suits may be maintained only by or against parties having an actual or legal existence). Service of process is discussed in chapter 16 of this manual. See forms 14-14 through 14-20 in this chapter for clauses for party designation.

§ 14.8:2 Texas Corporation or Limited Liability Company

A corporation or limited liability company should be sued in its corporate name. See Tex. Bus. Orgs. Code § 2.101(1). The statute also applies to nonprofit corporations; see also Tex. Bus. Orgs. Code § 2.109 (professional corporations). A dissolved corporation may be sued in its corporate name within three years after dissolution. Tex. Bus. Orgs. Code § 11.356. The statute also applies to nonprofit corporations and limited liability companies; see Tex. R. Civ. P. 29; see also Tex. Bus. Orgs. Code § 2.109 (professional corporations). If individual liability for directors, shareholders, or members is sought, those individuals must be identified and named as defendants. See part II. in chapter 6 of this manual. See forms 14-14 through 14-20 in this chapter for additional clauses for party designation.
§ 14.8:3 Foreign Corporation

A foreign corporation that is transacting or has transacted business in Texas can be sued in Texas, even if it is not registered to transact business in this state. Tex. Bus. Orgs. Code § 9.051. Allegations pertaining to service on the corporation will vary depending on the status of the corporation’s registration. See chapter 16 in this manual.

Entering into a contract by mail or by other means with a Texas resident is doing business in Texas for the purpose of allowing long-arm jurisdiction, if any part or all of the contract is to be performed in Texas by either party. Also, the act of recruiting Texas residents, directly or through an intermediary located in Texas, for employment inside or outside Texas is deemed doing business in Texas. Tex. Civ. Prac. & Rem. Code § 17.042(3). The petition should allege the specific basis for jurisdiction. The liability of shareholders of a foreign corporation for corporate debts, liabilities, and obligations for which they are not otherwise liable by statute or agreement is governed by the laws of the jurisdiction of incorporation of the foreign corporation. Tex. Bus. Orgs. Code § 1.104.

§ 14.8:4 When Corporation Must Be Represented by Attorney


§ 14.8:5 Partnerships

A partnership may be sued in the name of the partnership. Tex. R. Civ. P. 28. All general partners are jointly and severally liable for all obligations of the partnership. Tex. Bus. Orgs. Code § 152.304. A suit against the partnership, with service on one or more partners, authorizes judgment against the partnership and the partner(s) actually served. Tex. Civ. Prac. & Rem. Code § 17.022. See also Tex. Civ. Prac. & Rem. Code § 31.003 (court may render judgment against partnership if suit is against several partners who are jointly indebted under a contract and citation has been served on at least one but not all of the partners); Tex. Bus. Orgs. Code § 152.306(a), (b) (judgment may be entered against partner who has been served in suit against partnership if judgment is obtained against partner and remains unsatisfied for ninety days; exceptions exist). An individual partner who enters an appearance, although not served, will also be subject to individual liability. Bentley Village, Ltd. v. Nasits Building Co., 736 S.W.2d 919, 923 (Tex. App.—Tyler 1987, no writ).


§ 14.8:6 Business Operating under Assumed Name

A partnership, private corporation, unincorporated association, or individual doing business under an assumed name may be sued under the assumed name, partnership name, or common name. Tex. R. Civ. P. 28. For clarity, it is the better practice to allege both the assumed name and the name of the partnership, association, individual, or corporation operating under that name. See section 14.9:2 below. A court, in its discretion, may substitute the true name of the defendant in the judgment; the plaintiff is not necessarily required to replead. Trails East v. Mustafa, 713 S.W.2d 422, 424 (Tex. App.—Fort Worth 1986, no writ); but see Bailey v. Vanscot Concrete Co., 894 S.W.2d 757, 760–61 (Tex. 1995) (court declined to substitute correct name of defendant when plaintiff failed to add correct name). See also the discussion in section 17.63:9 in this manual.
§ 14.8:7 Association

A foreign or domestic unincorporated joint-stock company or association doing business in Texas may be sued in its company or distinguishing name without naming its individual stockholders or members. Tex. Rev. Civ. Stat. art. 6133. A nonresident joint-stock company or association may be subject to long-arm jurisdiction if it meets the “doing business” test; see section 16.14 in this manual. See Tex. Civ. Prac. & Rem. Code § 17.042. To obtain personal liability against individual members, it is necessary to also name and serve the individual members as defendants. See Tex. Rev. Civ. Stat. arts. 6136, 6137. Individual liability is discussed at section 6.31 in this manual. See forms 14-14 through 14-20 in this chapter for clauses for party designation.

§ 14.9 Party Designations in Caption of Petition

§ 14.9:1 Party Designation Generally

The parties’ capacities are not a required part of the caption, but they are often included for clarity. To the extent possible, reasonably complete names should be used. For a sole plaintiff and a sole defendant, the recommended form is set out below.

ACME CORPORATION,
Plaintiff

v.

JOHN L. DOE,
Defendant

§ 14.9:2 Assumed Name

An individual, partnership, unincorporated association, or corporation can sue or be sued in an assumed name, but the court or any party may move for substitution of the true name. Tex. R. Civ. P. 28. A person cannot maintain an action or proceeding in any Texas court arising out of a contract or act in which an assumed name was used until an original, new, or renewed business or professional name certificate has been filed. Tex. Bus. & Com. Code § 71.201(a) (formerly Business and Commerce Code section 36.25). See section 14.8:6 above. Because the court clerk may index a pleading or judgment under the names in the caption instead of the introductory paragraph, the recommended form includes both the true name and the assumed name.

ACME CORPORATION,
Plaintiff

v.

JOHN L. DOE, individually and
doing business as
ONE-DAY LAUNDRY,
Defendant
§ 14.9:3 Multiple Parties

Although not required by rule or statute, listing the names of all parties in the caption ensures that all of them will be indexed in the court records.

ACME CORPORATION,
Plaintiff

v.

JOHN L. DOE, JANE C. DOE,
and RICHARD E. ROE,
Defendants

In the petition and answer, and subsequent amended or supplemental petitions and answers, the parties should be listed by their full names in the caption. In other pleadings if listing all parties would be unduly burdensome, the form set out below is suggested.

ACME CORPORATION,
Plaintiff

v.

JOHN L. DOE, et al.,
Defendants


§ 14.10 Additional Forms of Party Designation

§ 14.10:1 Residences and Identification of Parties

The petition should state the names of the parties and, if known, their addresses. Tex. R. Civ. P. 79. Also, each party must include the last three numbers of his driver’s license number (if issued) and the last three numbers of his Social Security number (if issued) in the initial pleading in a civil action filed in a district court, county court, or statutory county court. Tex. Civ. Prac. & Rem. Code § 30.014(a).

§ 14.10:2 Multiple Parties

In a petition with multiple defendants a simple listing of the parties is suggested.

Defendants are [name of defendant], individually and doing business as [name of business], who can be served at [address, city, state], and [name of defendant], who can be served at [address, city, state].

Attorneys who store forms electronically may want to add the following clause at the end of the party allegations paragraph to avoid changing Defendant to Defendants throughout the forms:

Unless the context clearly indicates otherwise, the singular noun “Defendant” in this pleading includes all defendants listed above.
§ 14.10:3  Plaintiff Using Assumed Name

A plaintiff may sue under an assumed name, but the court or another party may move for substitution of the true name. Tex. R. Civ. P. 28. To sue on a transaction made under an assumed name, a plaintiff must first comply with chapter 71 of the Texas Business and Commerce Code. Tex. Bus. & Com. Code § 71.201 (formerly Business and Commerce Code section 36.25). Recommended language for an individual is set out in clause 14-15-1 in this chapter. See section 14.10:4 below if the assumed name is being used by a corporation.

§ 14.10:4  Corporate Plaintiff

A corporation should sue in its corporate name and show its corporate status.

**Texas Corporation:**  See clause 14-15-2 in this chapter.


**Foreign Corporation Not Operating in Texas:**  Foreign corporations not engaged in intrastate business in Texas may bring suit without being registered to transact business. A foreign corporation is not considered to be transacting business in Texas merely by engaging in interstate commerce in this state or by conducting an isolated transaction completed within thirty days. Tex. Bus. Orgs. Code § 9.251 (statute lists other instances of transactions not considered doing business in Texas). See clause 14-15-4.

**Corporation Using Assumed Name:**  See clause 14-15-5.

§ 14.10:5  Partnership as Plaintiff

A partnership may sue under its partnership, assumed, or common name, but the court or another party may move for substitution of the true names of the partnership or the partners if an assumed or common name is used. Tex. R. Civ. P. 28.

**Partnership with No Partnership, Assumed, or Common Name:**  See clause 14-15-6 in this chapter.

**Partnership Using Partnership (but Not Assumed) Name (for Example, Limited or General Partnership):**  See clause 14-15-7.

**Partnership Using Assumed or Common Name:**  See clause 14-15-8.

§ 14.10:6  Individual as Defendant

Personal service is discussed at section 16.3 in this manual. Out-of-state service on an individual is discussed briefly at section 16.9, and long-arm service is discussed at section 16.14.

Most forms in this manual provide examples of citing an individual Texas resident as a defendant. Other common instances of individuals as defendants are listed in form 14-16 in this chapter.


Individual Using Assumed Name: See clause 14-16-3.

Personal Representatives of Deceased Nonresident for Whom Secretary of State Is Agent: If the defendant is a nonresident for whom the secretary of state is an agent for service of process and the defendant dies, the secretary of state remains the agent for a nonresident administrator, executor, or personal representative for the deceased’s estate. See Estate of Pollack v. McMurrey, 858 S.W.2d 388, 391 (Tex. 1991) (holding secretary of state for estate, but only for service of process). If the deceased has no administrator, executor, or personal representative, the secretary of state is an agent for service of process on an heir (as determined by the law of the foreign jurisdiction). See Tex. Civ. Prac. & Rem. Code § 17.044(c). If the secretary of state is served with duplicate copies of process as agent for a nonresident administrator, executor, or personal representative, a statement of the person’s name and address will be required by the secretary of state, who will immediately mail a copy of the process to the person. Tex. Civ. Prac. & Rem. Code § 17.045(e).

Guardian of Incompetent Nonresident for Whom Secretary of State Is Agent: If the nonresident for whom the secretary of state is an agent is judged incompetent, the secretary of state remains the agent for that person’s guardian or personal representative. See Tex. Civ. Prac. & Rem. Code § 17.044(d). If the secretary of state is served with duplicate copies of process as agent for a guardian or personal representative, a statement of the person’s name and address will be required by the secretary of state, who will immediately mail a copy of the process to the person. Tex. Civ. Prac. & Rem. Code § 17.045(e).

§ 14.10:7 Corporation as Defendant

In some cases a corporation’s liability can be fixed on shareholders or other individuals. Individual liability for corporate debts is discussed in part II in chapter 6 of this manual. Allegations suitable for those pleadings are beyond the scope of this manual. For brief discussions of service on corporations, see sections 16.11 and 16.12 in this manual. Long-arm service is discussed at section 16.14.

Texas Corporation


No Registered Agent. Statutory authorities relevant to this situation are the same as those cited above for the situation in which the registered agent cannot be found. See clause 14-17-3.

Foreign Corporation Registered to Transact Business in Texas
For brief discussions of service on foreign corporations operating in Texas, see sections 16.11:3 (business corporations) and 16.12:2 (nonprofit corporations) in this manual.


Foreign Corporation Not Registered to Transact Business in Texas

For a brief discussion of foreign corporations not required to be registered to conduct some transactions in Texas, see section 16.11:4 in this manual.


Corporation Using Assumed Name: See clause 14-17-8.

§ 14.10:8 Partnership (Including Limited Liability Partnership) as Defendant

Because Tex. R. Civ. P. 99 requires that the citation be directed to the defendant, it is good practice to name the partnership and every partner who may be individually liable and to state his partnership status. Service on any partner authorizes judgment on the partnership. Tex. Civ. Prac. & Rem. Code § 17.022.

Practice Tip: Despite the language of section 17.022, the more cautious practice may be to serve separate citations on the partnership and the partners.

Limited liability partnerships shield partners from certain acts or omissions of other partners or representatives of the partnerships. This subject is discussed in more detail in section 6.28. The partnership should be identified as a limited liability partnership in the petition; otherwise, the rules regarding service on partnerships also apply to limited liability partnerships. See Tex. Bus. Orgs. Code §§ 152.304, 152.802; see also Tex. Bus. Orgs. Code § 5.255.

Texas Partnership


Foreign Partnership (Long-Arm Service)


**Partnership Using Assumed Name:** See clause 14-18-5.

**§ 14.10:9 Limited Partnership as Defendant**

Each general partner of a limited partnership, as well as the limited partnership’s registered agent for service of process, may be served. Tex. Bus. Orgs. Code § 5.255. See section 6.27 in this manual regarding the liability of individual limited partners for partnership obligations. Service on limited partnerships is discussed at section 16.10.

**Texas Limited Partnership**


The examples shown in clause 14-19-1 assume that the general partner being served is also a named defendant in the suit. With one service, both the limited partnership and the general partner are served. Tex. Civ. Prac. & Rem. Code § 17.022. Service may also be obtained on the limited partnership through its registered agent for service of process. Tex. Bus. Orgs. Code §§ 5.201, 5.255. If serving the registered agent is advisable (for instance, if no liability is alleged against a general partner), clause 14-17-1 should be used, altering it as appropriate to reflect that the defendant is a limited partnership (there are no presidents or vice-presidents). Serving only the registered agent, however, will not allow a subsequent judgment against a general partner.

**Agent in County of Suit.** Service on an agent or clerk is authorized in certain circumstances. See Tex. Civ. Prac. & Rem. Code § 17.021, which is summarized at section 16.10, for particulars. See clause 14-19-2.


**Foreign Limited Partnership Not Registered to Transact Business in Texas**


**Limited Partnership Using Assumed Name:** See clause 14-19-6.

**§ 14.10:10 Association or Joint-Stock Company as Defendant**

See the brief discussion of service on these entities at section 16.13:3 in this manual.
Texas Association or Joint-Stock Company: See Tex. Rev. Civ. Stat. art. 6134, which is summarized at section 16.13:3. Members of the association or joint-stock company should be served only if the plaintiff anticipates that a judgment against the defendant organization will be returned without satisfaction and that the plaintiff will then try to reach personal property of the members to satisfy the judgment. See Tex. Rev. Civ. Stat. art. 6137. See clause 14-20-1 in this chapter.

Foreign Association or Joint-Stock Company (Long-Arm Service)


Association or Joint-Stock Company Using Assumed Name: See clause 14-20-4.

§ 14.10:11 Limited Liability Company as Defendant

Chapter 5, subchapters E and F, of the Texas Business Organizations Code discuss registered agents and service of process. See also section 14.8:2 above. Service on limited liability companies is discussed at section 16.13:2 in this manual.

Texas Limited Liability Company


Foreign Limited Liability Company Registered to Transact Business in Texas


Foreign Limited Liability Company Not Registered to Transact Business in Texas: The reach of the long-arm statute includes nonresident individuals, foreign corporations, joint-stock companies, associations, and partnerships. Use the language in clause 14-18-3, altering it as appropriate.

Limited Liability Company Using Assumed Name: See clause 14-21-6.

§ 14.10:12 Defendant’s Whereabouts Unknown

If the defendant’s whereabouts are unknown, use the following language or alternative language setting forth the particular grounds specified by Tex. R. Civ. P. 109 for service by publication:

The residence of Defendant is unknown and after due diligence Plaintiff and Plaintiff’s counsel have been unable to locate him. Therefore, Plaintiff seeks service of process by publication.

See section 16.5 and forms 16-7 through 16-13 in this manual.
II. Causes of Action

§ 14.21  Action on Sworn Account

§ 14.21:1  Purpose and Use

A suit on sworn account is probably the most useful collection procedure available to creditors. A defendant who does not file a proper sworn denial to a properly filed suit on sworn account cannot dispute the accuracy of the state charges. See Tex. R. Civ. P. 93(10), 185; Fance v. Holloway, 689 S.W.2d 403, 404 (Tex. 1985); Airborne Freight Corp. v. CRB Marketing, Inc., 566 S.W.2d 573, 574–575 (Tex. 1978) (at trial, sworn account constituted prima facie evidence of debt without necessity of formally introducing account into evidence); Huddleston v. Case Power & Equipment Co., 748 S.W.2d 102, 103 (Tex. App.—Dallas 1988, no writ). “Rule 185, is not a rule of substantive law but a rule of procedure regarding the evidence necessary to establish a prima facie case or right to recover.” Rizk v. Financial Guardian Insurance Agency, Inc., 584 S.W.2d 860, 862 (Tex. 1979); Southern Management Services, Inc. v. SM Energy Co., 398 S.W.3d 350, 354 (Tex. App.—Houston [14th Dist.] 2013, no pet.); Hou-Tex Printers, Inc. v. Marbach, 862 S.W.2d 188, 190 (Tex. App.—Houston [14th Dist.] 1993, no writ). However, when the defendant timely files a verified denial of the correctness of the account, the evidentiary effect of the sworn account is destroyed, and the plaintiff must present further proof of his claim. Schum v. Munck Wilson Mandala, LLP, 497 S.W.3d 121, 125 (Tex. App.—Texarkana 2016, no pet.) (citing Woodhaven Partners, Ltd. v. Shamoun & Norman, L.L.P., 422 S.W.3d 821, 833 (Tex. App.—Dallas 2014, no pet.)); Southern Management Services, 398 S.W.3d at 354.

§ 14.21:2  Applicability

Tex. R. Civ. P. 185 states:

When any action or defense is founded upon an open account or other claim for goods, wares, and merchandise, including any claim for a liquidated money demand based upon written contract or founded on business dealings between the parties, or is for personal service rendered, or labor done or labor or materials furnished, on which a systematic record has been kept, and is supported by the affidavit of the party, his agent or attorney taken before some officer authorized to administer oaths, to the effect that such claim is, within the knowledge of affiant, just and true, that it is due, and that all just and lawful offsets, payments and credits have been allowed, the same shall be taken as prima facie evidence thereof, unless the party resisting such claim shall file a written denial, under oath. A party resisting such a sworn claim shall comply with the rules of pleading as are required in any other kind of suit, provided, however, that if he does not timely file a written denial, under oath, he shall not be permitted to deny the claim, or any item therein, as the case may be. No particularization or description of the nature of the component parts of the account or claim is necessary unless the trial court sustains special exceptions to the pleadings.

It is an extremely broad rule, which includes claims for goods, services, labor or materials furnished, and any claim for liquidated money demand founded on business dealings between the parties, on which a systematic record has been kept. A suit on a sworn account has been used in the following areas:

1. Insurance Premiums. See Bernsen v. Live Oaks Insurance Agency, Inc., 52 S.W.3d 306 (Tex. App.—Corpus Christi 2001, no pet.) (unpaid truck insurance premiums);


5. Oil & Gas Lease Expenses. See Southern Management Services, Inc. v. SM Energy Co., 398 S.W.3d 350 (Tex. App.—Houston [14th Dist.] 2013, no pet.); Vance v. Holloway, 689 S.W.2d 403 (Tex. 1985);

6. Advertising. See Livingston Ford Mercury, Inc. v. Haley, 997 S.W.2d 425 (Tex. App.—Beaumont 1999, no pet.) (radio advertising); and


The sworn account procedure has been held inapplicable to suits on—


2. transactions resting on a special contract. See Meaders v. Biskamp, 316 S.W.2d 75, 78 (Tex. 1958) (contract for sale of real estate not sworn account in claim for attorney’s fees). But see Carr Well Service, Inc. v. Skytop Rig Co., 582 S.W.2d 500, 502 (Tex. Civ. App.—El Paso 1979, writ ref’d n.r.e.) (action on special contract can be brought as sworn account if transaction is among types listed in Tex. R. Civ. P. 185);

3. transactions between third parties or parties who are strangers to the transaction. See Tandan v. Affordable Power, L.P., 377 S.W.3d 889, 894–95 (Tex. App.—Houston [14th Dist.] 2012, no pet.) (plaintiff failed to produce evidence other than sworn account that defendant was party to transaction); American Alloy Steel, Inc. v. Armco, Inc., 777 S.W.2d 173, 178 (Tex. App.—Houston [14th Dist.] 1989, no writ) (purchaser of goods sued seller but submitted sworn account based on contract for sale of goods to subsequent buyer) See generally Lee v. McCormick, 647 S.W.2d 735 (Tex. App.—Beaumont 1983, no writ));

4. promissory notes. Hou-Tex Printers, Inc. v. Marbach, 862 S.W.2d 188, 190 (Tex. App.—Houston [14th Dist.] 1993, no writ). However, it is arguable that a note is within rule 185 as a liquidated claim based on written contract between the parties on which a systematic record has been kept. See Baldwin, 2000 WL 781430 at *1–2; and

5. credit card debt. See Williams v. Unifund CCR Partners Assignee of Citibank, 264 S.W.3d 231, 234 (Tex. App.—Houston [1st Dist.] 2008, no pet.) (credit card debt not sworn account); Tully v. Citibank (South Dakota), N.A., 173 S.W.3d 212 (Tex. App.—Texarkana 2005, no pet.) (same); Bird v. First Deposit National Bank, 994 S.W.2d 280,
The elements of a sworn account are that—

1. the sale and delivery of merchandise or performance of services;
2. amount of the account is “just,” i.e., the prices charged are pursuant to an express agreement, or in the absence of an agreement, that the charges are usual, customary, or reasonable; and
3. the outstanding amount remains unpaid.


§ 14.21:4 Plaintiff’s Pleadings

A sworn account petition is at form 14-1 in this chapter. A sworn account must be supported by the affidavit of the party, his agent, or his attorney. See form 14-2. This affidavit must state that within the affiant’s knowledge—

1. the claim is just and true;
2. the claim is due; and
3. all just and lawful offsets, payments, and credits have been allowed.


A single affidavit, properly prepared, documented, and executed, can support both a sworn account petition and a subsequent summary judgment motion. The basic sworn account affidavit is at form 14-2 in this chapter. This affidavit may be combined with the requirements of a business records affidavit as set out in Tex. R. Evid. 902(10). The supporting documentation should be sufficiently itemized and explained so that the judge can ascertain the date and nature of the transaction or payment history. If necessary, a key or explanation of invoicing or billing should be attached to the pleading. See Price v. Pratt, 647 S.W.2d 756, 757 (Tex. App.—Corpus Christi 1983, no writ) (undefined and unexplained abbreviations on business records did not support sworn account). If the supporting documentation does not sufficiently describe the nature of the component parts of the account or claim, the defendant can specially except to the pleadings. Tex. R. Civ. P. 185; see also Southern Management Services, Inc. v. SM Energy Co., 398 S.W.3d 350, 355 (Tex. App.—Houston [14th Dist.] 2013, no pet.) (pleading was sufficient when it contained list of invoices but not actual invoices and defendant did not specially except or lack of specificity); Willie v. Donovan & Watkins, Inc., No. 01-00-01039-CV, 2002 WL 537682, at *2 (Tex. App.—Houston [1st Dist.] Apr. 11, 2002, no pet.) (not designated for publication) (finding that pleading was sufficient when invoices were attached and trial court denied special exceptions).

The affidavit can be signed by the party, his agent, or his attorney, as long as it is executed by someone with personal knowledge of the matters stated. The creditor’s attorney should exercise extreme caution in signing a sworn account affidavit,
because personal knowledge is required. See section 19.17:3 in this manual, and Tex. Disciplinary Rules Prof’l Conduct R. 3.03.

Normally, a statement of account or invoice copies, if not voluminous, are referenced in the sworn account affidavit. The attorney should review any attachments carefully from a defense perspective. Do the attachments raise issues as to the correct party? Does the statement balance match the petition? Do the attachments raise usury issues?

§ 14.21:5  Defendant’s Pleadings

A party resisting a sworn claim must timely file a written denial, under oath, that complies with the general rules of pleading that are required in any other kind of suit. If he fails to file a proper denial, he will not be permitted to deny the claim on the account in its entirety or to deny any item that is a part of it. Tex. R. Civ. P. 185. The filing of a proper verified denial by the defendant destroys the evidentiary effect of the plaintiff’s itemized account and forces the plaintiff to prove his case at common law. Worley v. Butler, 809 S.W.2d 242 (Tex. App.—Corpus Christi 1990, no writ); Nichols v. William A. Taylor, Inc., 662 S.W.2d 396, 398 (Tex. App.—Corpus Christi 1983, no writ) (citing Rizk v. Financial Guardian Insurance Agency, Inc., 584 S.W.2d 860 (Tex. 1979); Crawford v. Pullman, Inc., 630 S.W.2d 377 (Tex. App.—Houston [14th Dist.] 1982, no writ)).


Sworn General Denial Insufficient: A sworn denial of “each and every allegation” of a petition, demanding “strict proof thereof,” is a general denial that cannot meet the requirements of Tex. R. Civ. P. 93(10) and 185. Huddleston v. Case Power & Equipment Co., 748 S.W.2d 102, 102–04 (Tex. App.—Dallas 1988, no writ); see also Cooper v. Scott Irrigation Construction, Inc., 838 S.W.2d 743, 746 (Tex. App.—El Paso 1992, no writ) (statement in defendant’s affidavit that “cost of repairs and the loss to my 1990 cotton crop far exceed any amount otherwise due and owing for the pipeline system” was not sufficient as sworn denial of account).

Broad, Generalized Sworn Denial Insufficient: “The defendant’s written denial must state more than a broad generalization that he ‘specifically denies’ the sworn account allegations; instead, the verified affidavit must address the facts on which the defendant intends to rebut the plaintiff’s affidavit.” Woodhaven Partners, Ltd. v. Shamoun & Norman, L.L.P., 422 S.W.3d 821, 833 (Tex. App.—Dallas 2014, no pet.) (quoting Andrews v. East Texas Medical Center-Athens, 885 S.W.2d 264, 267 (Tex. App.—Tyler 1994, no writ)).

Amended Sworn Account Requires Amended Sworn Denial: When an amended sworn account substantially differs from the original, the party resisting the account must file another sworn denial. See Southern Management Services, Inc. v. SM Energy Co., 398 S.W.3d 350, 356 (Tex. App.—Houston [14th Dist.] 2013, no pet.) (plaintiff-creditor filed amended sworn account with new invoices and credits that reduced balance by approximately $50,000; defendant did not file a sworn denial of the amended account; summary judgment for creditor affirmed).
§ 14.21:6    Defenses

Affirmative Defenses: Even without a proper sworn denial of account, a debtor may still present affirmative defenses. See Rizk v. Financial Guardian Insurance Agency, Inc., 584 S.W.2d 860, 863 (Tex. 1979) (failure of consideration and statute of limitations could be raised in the absence of verified denial).

Statute of Limitations: Actions on sworn account must be brought not later than four years after the day the cause of action accrued. Tex. Civ. Prac. & Rem. Code § 16.004(c). The cause of action accrues on the day that the dealings in which the parties were interested together cease. Tex. Civ. Prac. & Rem. Code § 16.004(c). See Kaldis v. Crest Financial, 463 S.W.3d 588, 596 (Tex. App.—Houston [1st Dist.] 2015, no pet.) (cause of action accrued no earlier than when account was charged off and closed); Bank of America v. Jeff Taylor LLC, 358 S.W.3d 848, 854 (Tex. App.—Tyler 2012, no pet.); Livingston Ford Mercury, Inc. v. Haley, 997 S.W.2d 425, 429 (Tex. App.—Beaumont 1999, no pet.) (jury finding of open account; stipulation between the parties that open account was not subject to limitations defense).

Practice Tip: Accounts referred with charges over four years old do not give rise to the defense of statute of limitations if there are transactions on the account that are less than four years old. See Tex. Civ. Prac. & Rem. Code § 16.004(c); Kaldis, 463 S.W.3d at 596; Childs v. Taylor Cotton Oil Co., 612 S.W.2d 245, 248–50 (Tex. Civ. App.—Tyler 1981, writ ref’d n.r.e.) (in sworn account suit between two merchants with ten-year history of transactions, court applied predecessor statute to Tex. Civ. Prac. & Rem. Code § 16.004(c) to find four-year limitations period applied and did not commence until cessation of dealings together).

“Stranger to the Transaction” Defense: If defendant is not named on the invoice or statement as named in the petition, the suit may be subject to the “stranger to the transaction” defense. “When the plaintiff’s evidence fails to identify the defendant as the debtor on the account, ‘the sworn account is not considered as prima facie proof of the debt.’” Tandan v. Affordable Power, L.P., 377 S.W.3d 889, 894–95 (Tex. App.—Houston [14th Dist.] 2012, no pet.) (statement attached to petition named defendant and another company, raised fact question as to which company was indebted; sworn denial not required to controvert account) (citing Sundance Oil Co. v. Aztec Pipe & Supply Co., Inc., 576 S.W.2d 780 (Tex. 1978)). If the name on an invoice is not defendant’s legal name, consider pleading that defendant does business under the assumed name. The assumed name is established if defendant does not file a verbal denial. See Tex. R. Civ. P. 93(14).

Payment: Rule 95 of the Texas Rules of Civil Procedure states: “When a defendant shall desire to prove payment, he shall file with his plea an account stating distinctly the nature of such payment, and the several items thereof; failing to do so, he shall not be allowed to prove the same, unless it be so plainly and particularly described in the plea as to give the plaintiff full notice of the character thereof.” Tex. R. Civ. P. 95. If the defendant fails to provide an account, or to precisely identify the payments in its pleading, the payment evidence is inadmissible. See Sage Street Associates v. Northdale Construction Co., 863 S.W.2d 438, 443–44 (Tex. 1993) (defendant’s general pleading regarding “payments to subcontractors and suppliers” failed to satisfy the rule).

§ 14.22    Action on Written Contract

§ 14.22:1    Elements

The elements of a cause based on a written debt or contract are that—

1. there was a valid agreement;
2. the plaintiff performed or tendered performance;
3. the defendant breached; and
4. the plaintiff suffered damages.


§ 14.22:2 Terms of Agreement

The plaintiff’s petition should plead every essential, material part of the contract. See Valero Marketing & Supply Co. v. Kalama International, L.L.C., 51 S.W.3d 345, 351 (Tex. App.—Houston [1st Dist.] 2001, no pet.) (defendant’s no evidence summary judgment granted; no evidence that plaintiff tendered performance under the contract). If the contract is available and reproducible, a copy may be attached to the petition and incorporated into it by reference. See Tex. R. Civ. P. 59. The attached exhibit will fill in any gaps in the pleadings. The contract will prove itself unless its execution or authority is specifically denied by sworn denial. Tex. R. Civ. P. 93(7); see Rockwall Commons Associates, Ltd. v. MRC Mortgage Grantor Trust I, 331 S.W.3d 500, 506 (Tex. App.—El Paso 2010, no pet.) (in failing to file verified denials as to execution of written instruments, and in failing to file verified denial of assignment of any of those instruments, defendants admitted validity of instruments and their assignments). If the original instrument cannot be produced because it has been lost or destroyed, the contents of the agreement can be proved by the oral testimony of witnesses even if the defendant objects that the testimony violates the best-evidence rule. See Tex. Bus. & Com. Code § 3.309(a); Briscoe v. Goodmark Corp., 130 S.W.3d 160 (Tex. App.—El Paso 2003, no pet.) (allowing oral testimony under Tex. Bus. & Com. Code § 3.309(a) about terms of lost promissory notes) (citing Hayes v. Bouligny, 420 S.W.2d 800, 802 (Tex. Civ. App.—Corpus Christi 1967, no writ). See also Tex. R. Evid. 1001–1008 for proof of contents of writings.

§ 14.22:3 Performance of Contract by Plaintiff

The plaintiff must plead and prove that he has performed or tendered his obligations under the contract. See Krayem v. USRP (PAC), L.P., 194 S.W.3d 91, 94 (Tex. App.—Dallas 2006, pet. denied); Valero Marketing & Supply Co. v. Kalama International, L.L.C., 51 S.W.3d 345, 351–54 (Tex. App.—Houston [1st Dist.] 2001, no pet.).

§ 14.22:4 Breach of Contract by Defendant

A petition must plead the defendant’s breach of contract. Hussong v. Schwan’s Sales Enterprises, Inc., 896 S.W.2d 320, 326 (Tex. App.—Houston [1st Dist.] 1995, no writ). “Breach” has been defined, in part, as the failure to perform any promise which forms a whole or part of any agreement, including the refusal of a party to recognize the existence of an agreement or the doing of something inconsistent with its existence. De Santis v. Wackenhut Corp., 732 S.W.2d 29, 34 (Tex. App.—Houston [14th Dist.] 1987), aff’d in part, rev’d in part on other grounds, 793 S.W.2d 670 (Tex. 1990). See also Norsworthy v. American Lease Plan, 447 S.W.2d 768, 770 (Tex. Civ. App.—Houston [14th Dist.] 1969, no writ) (allegation that certain
amount was due and owing was not sufficient allegation that defendant breached lease agreement; summary judgment for plaintiff reversed).

“Whether a party has breached a contract is a question of law for the judge, not a question of fact for the jury.” Lafarge Corp. v. Wolff, Inc., 977 S.W.2d 181, 186 (Tex. App.—Austin 1998, pet. denied) (citing Garza v. Southland Corp., 836 S.W.2d 214, 219 (Tex. App.—Houston [14th Dist.] 1992, no writ)). “When the evidence is undisputed regarding a person’s conduct under a contract, the court as a matter of law determines whether the conduct shows performance or breach of a contract obligation.” Lafarge Corp., 977 S.W.2d at 186.

§ 14.22:5 Consideration

A written contract presumes consideration for its execution. Burges v. Mosley, 304 S.W.3d 623, 628 (Tex. App.—Tyler 2010, no pet.); Doncaster v. Hernaiz, 161 S.W.3d 594, 603 (Tex. App.—San Antonio 2005, no pet.). See also Simpson v. MBank Dallas, N.A., 724 S.W.2d 102, 107 (Tex. App.—Dallas 1987, writ ref’d n.r.e.) (guaranty was written, signed by guarantor, and recited that it was executed “for value received”; therefore, the guaranty presumed consideration, and the burden was on guarantor to plead and prove the absence of consideration). Lack or failure of consideration must be specifically pleaded by verified pleading. Tex. R. Civ. P. 93(9).

§ 14.22:6 Proving Charges for Services by Affidavit

The necessity and reasonableness of charges for services may be proved by affidavit. This affidavit may not be used in a sworn account action. See Tex. Civ. Prac. & Rem. Code § 18.001, which is discussed at section 19.1 in this manual.

§ 14.22:7 Statute of Limitations—Written Contracts Generally


In applying the limitation statutes, a cause of action is generally said to accrue “when the wrongful act affects an injury, regardless of when the plaintiff learned of such injury.” An exception to the general rule is known as the discovery rule, which tolls the running of the limitations period until the time the injured party discovers or through the use of reasonable care and diligence should have discovered the injury. Enterprise-Laredo Associates v. Hachar’s, Inc., 839 S.W.2d 822, 837 (Tex. App.—San Antonio 1992, writ denied) (citing Moreno v. Sterling Drug, Inc., 787 S.W.2d 348, 351 (Tex. 1990)); El Paso Associates, Ltd. v. J.R. Thurman & Co., 786 S.W.2d 17, 20 (Tex. App.—El Paso 1990, no writ). “Some contract breaches may be inherently undiscoverable and objectively verifiable. But those cases should be rare, as diligent contracting parties should generally discover any breach during the relatively long four-year limitations period provided for such claims.” Via Net v. TIG Insurance Co., 211 S.W.3d 310, 315 (Tex. 2006). See also Taub v. Houston Pipeline Co., 75 S.W.3d 606, 618–20 (Tex. App.—Texarkana 2002, pet. denied) (discovery rule did not extend limitations on oil and gas contract because injury was not “inherently undiscoverable”).
§ 14.22:8 Statute of Limitations—Actions by or against Carriers for Hire

An action brought by a carrier of property for hire to recover its charges, or an action against a carrier for recovery of an over-charge, must be brought not later than three years from the day the cause of action accrued. Tex. Civ. Prac. & Rem. Code § 16.006(a), (b). If a person has presented a written claim for overcharges within the three-year period, the limitations period for the claimant is extended for six months from the date written notice is given by the carrier to the claimant of the disallowance of the claim, in whole or in part, as specified in the carrier’s notice. Tex. Civ. Prac. & Rem. Code § 16.006(c). If the carrier either brings an action to recover charges relating to the service provided or, without beginning an action, collects charges relating to that service, the limitations period is extended for ninety days from the day the action is begun or the charges are collected. Tex. Civ. Prac. & Rem. Code § 16.006(d).


An action for breach of contract for a sale of goods must be commenced within four years after the cause accrued unless the parties, by the original agreement, reduce the period of limitations to not less than one year. Tex. Bus. & Com. Code § 2.725(a). See also Buck v. Acme Brick Co., 666 S.W.2d 276, 277 (Tex. App.—Beaumont 1984, no writ) (holding that four-year limitations period applied to sale of bricks).

§ 14.23 Action on Oral Debt

§ 14.23:1 Elements

The elements of an action on a contract are the same whether the contract is oral or written. See section 14.22:1 above for a list of the elements. A plaintiff trying to recover on an oral debt or contract may encounter problems, such as a shorter limitations period (see part III. in chapter 17 of this manual), a statute of frauds defense (see section 17.13), and proof of the existence of the contract or its material terms. The plaintiff will also have to plead and prove consideration. Okemah Construction, Inc. v. Barkley-Farmer, Inc., 583 S.W.2d 458, 460 (Tex. Civ. App.—Houston [1st Dist.] 1979, no writ).

If the suit is based on services rendered by the plaintiff, the attorney should consider using the affidavit described in section 14.22:6 above. For a petition for a suit on an oral debt, see form 14-4 in this chapter.

§ 14.23:2 Statute of Limitations


§ 14.24 Action on Revolving Credit Account

§ 14.24:1 Elements

The elements of an action on a revolving credit account are the same as for any other kind of contract; see section 14.22:1 above. The El Paso court of appeals has held that a line of credit issued by a financial institution does not create the sort of debtor-creditor relationship required to bring suit as a sworn account under Tex. R. Civ. P. 185 because no title to personal property passes from the bank to the cardholder. Bird v. First Deposit National Bank, 994 S.W.2d 280, 282 (Tex. App.—El Paso 1999, pet. denied). However, in Bird the court did not reach the issue of whether a credit card issued directly by a pro-
vider of goods or services, such as a gasoline card or department store card, would be subject to collection by a suit on sworn account. This decision was followed by the Houston court of appeals. Williams v. Unifund CCR Partners Assignee of Citibank, 264 S.W.3d 231, 234 (Tex. App.—Houston [1st Dist.] 2008, no pet.) (holding that a credit card issued by a financial institution is a special contract that does not create the sort of debtor-creditor relationship to bring a claim within the scope of Tex. R. Civ. P. 185). If an action on a sworn account is not available, it may be possible to prove the necessity and reasonableness of charges for services by an affidavit. See Tex. Civ. Prac. & Rem. Code § 18.001, which is discussed at section 19.1 in this manual.

Consumer credit transactions, that is, credit sales of goods or services intended for personal, family, or household use and not for business or commercial purposes, are governed by the Texas Finance Code and by various federal statutes and regulations. Consumer retail credit transactions are subject to numerous, strict requirements for disclosure and finance charge limits, and the creditor’s attorney should review those statutes before filing suit to determine whether potential liability against the creditor exists. The Texas Debt Collection Practices Act and the federal Fair Debt Collection Practices Act should also be reviewed carefully. See parts II. and III. in chapter 2 of this manual for a discussion of these Acts.

See form 14-5 in this chapter for a petition for suit on a revolving credit account and form 14-6 for a petition for suit on a retail installment contract. With respect to retail installment contracts, note that the creditor cannot accelerate the maturity of any part or all of the amount owed under such a contract unless the contract provides for acceleration and either the debtor is in default under any of his obligations or the creditor believes in good faith that the prospect of payment is impaired. See Tex. Fin. Code § 345.062.

§ 14.24:2 Statute of Limitations


§ 14.25 Action on Note

§ 14.25:1 Elements

To collect on a promissory note as a matter of law, the holder or payee must establish that—

1. there is a note;
2. the plaintiff is the legal owner and holder of the note;
3. the defendant is the maker of the note; and
4. a certain balance is due and owing.

Kaspar v. Patriot Bank, No. 05-10-01530-CV, 2012 WL 2087182, at *2 (Tex. App.—Dallas June 8, 2012, no pet.) (mem. op.) (citing Blankenship v. Robins, 899 S.W.2d 236, 238 (Tex. App.—Houston [14th Dist.] 1994, no writ)). An action on a note is usually one of the easiest cases to try. Normally the plaintiff will introduce the original of the note, which will entitle him to a judgment unless the defendant establishes a defense. See, e.g., Clark v. Dedina, 658 S.W.2d 293, 296 (Tex. App.—Houston [1st Dist.] 1983, writ dism’d) (introduction of note in evidence makes prima facie case for holder, where execution of note has not been denied under oath); see also Tex. Bus. & Com. Code § 3.308. For a petition for a suit on a note, see form 14-7 in this chapter.
§ 14.25:2 Execution and Delivery

Denial of execution of a written instrument must be verified, or the note will be received in evidence as fully proved. Tex. R. Civ. P. 93(7); see also Vince Poscente International, Inc. v. Compass Bank, 460 S.W.3d 211, 215–16 (Tex. App.—Dallas 2015, no pet.) (in absence of verified denial of signature, promissory notes received into evidence as fully proved); Wheeler v. Security State Bank, N.A., 159 S.W.3d 754, 756–57 (Tex. App.—Texarkana 2005, no pet.) (same).

§ 14.25:3 Persons Entitled to Enforce Note

Persons entitled to enforce a note include a holder of a note, a nonholder in possession of an instrument with the rights of a holder, and a person not in possession of a note who is entitled to enforce it because the instrument was lost, stolen, destroyed, or paid by mistake. See Tex. Bus. & Com. Code §§ 3.301, 3.309. A party who fails to qualify as a “holder” for lack of an endorsement may still prove that it owns the note. See Martin v. New Century Mortgage Co., 377 S.W.3d 79, 84–85 (Tex. App.—Houston [1st Dist.] 2012, no pet.) (ownership established through common-law assignment rather than negotiation).

§ 14.25:4 Consideration

If the petition alleges that the action is based on a written instrument, it is unnecessary to plead the existence or nature of the consideration; failure or lack of consideration is purely a defensive matter that must be raised by verified answer under Tex. R. Civ. P. 93(9). “All written contracts, including guaranty agreements, are presumed, at the outset, to be supported by consideration.” Cortez v. National Bank of Commerce of Brownsville, 578 S.W.2d 476, 479 (Tex. Civ. App.—Corpus Christi 1979, writ refused n.r.e.).

§ 14.25:5 Maturity

If the note is introduced in evidence and the date for payment has passed, maturity should be apparent on its face. See Tex. Civ. Prac. & Rem. Code § 16.036(d); The Cadle Co. v. Butler, 951 S.W.2d 901, 909 (Tex. App.—Corpus Christi 1997, no writ) (deed of trust executed as single instrument in combination with promissory note, but containing no maturity date, had the same maturity date as promissory note). If maturity or liability depends on a condition, the plaintiff should allege and prove the happening of the contingency or the performance or occurrence of the agreed condition. See section 14.25:7; Tex. R. Civ. P. 54; Wakefield v. Ayers, No. 01-14-00648-CV, 2016 WL 4536454, at *10 (Houston [1st Dist.] Aug. 30, 2016, no pet.) (“A party seeking to recover under a contract bears the burden of proving that all conditions precedent have been satisfied.”) (citing Associated Indemnity Corp. v. CAT Contracting, Inc., 964 S.W.2d 276, 283 (Tex. 1998)).

§ 14.25:6 Acceleration

See section 2.111 in this manual for a discussion of acceleration.

§ 14.25:7 Conditions Precedent

The creditor should allege in its petition that all conditions precedent with respect to the claim have been performed or have occurred. The debtor will then be required to specifically deny the performance or occurrence of the conditions precedent. See Tex. R. Civ. P. 54. A denial stating merely that the debtor denies that all conditions precedent to the satisfaction of the claim have been satisfied and demanding strict proof with respect to those conditions is not a sufficient denial. See Miller v. Univer-
§ 14.25:8 Negotiability

The negotiability of an instrument is a question of law. *Ward v. Stanford*, 443 S.W.3d 334, 343 (Tex. App.—Dallas 2014, pet. denied) (citing *FFP Marketing Co. v. Long Lane Master Trust IV*, 169 S.W.3d 402, 408–09 (Tex. App.—Fort Worth 2005, no pet.). If the suit is between the payee and the maker of the note, it is unimportant whether the note is negotiable or nonnegotiable. If the note has been transferred, concepts of negotiability, real and personal defenses, and holder in due course become relevant. See section 2.112 in this manual regarding holder in due course.

§ 14.25:9 Secondary Liability of Endorser

To hold an endorser liable on a negotiable instrument, the plaintiff must additionally plead endorsement, presentment, and dishonor. See *Tex. Bus. & Com. Code §§ 3.415, 3.502, 3.503*. These requirements can be waived in the note or by other means. See *Tex. Bus. & Com. Code § 3.504.*

§ 14.25:10 Statute of Limitations—Note Payable at Definite Time

The limitation period for a negotiable note payable at a definite time is six years from the due date stated in the note or, if accelerated, from the date of acceleration. *Tex. Bus. & Com. Code § 3.118(a).* A note is “payable at a definite time” if it is payable (1) on elapse of a definite period of time after sight or acceptance; (2) on a fixed date or dates; or (3) at a time or times readily ascertainable at the time the promise or order is issued, all subject to rights of prepayment, acceleration, extension at the holder’s option, or extension to a further definite time at the option of the maker or acceptor or automatically on or after a specified act or event. *Tex. Bus. & Com. Code § 3.108(b).*

When a note payable at a definite time is not negotiable, the applicable statute of limitations is four years. See *Guniganti v. Kalvakuntla*, 346 S.W.3d 242, 247–48 (Tex. App.—Houston [14th Dist.] 2011, no pet.) (six-year limitations statute did not apply because note was determined to be nonnegotiable).

§ 14.25:11 Statute of Limitations—Demand Note

For a negotiable demand note, the limitation period is six years after demand. If no demand is made, the action is barred if neither principal nor interest is paid for a continuous period of ten years. *Tex. Bus. & Com. Code § 3.118(b).* A demand note is one that is payable on demand or at sight, that otherwise indicates that it is payable at the will of the holder, or that does not state any time for payment. *Tex. Bus. & Com. Code § 3.108(a).*

When a demand note is not negotiable, the applicable statute of limitations is four years. See *Guniganti v. Kalvakuntla*, 346 S.W.3d 242, 247–48 (Tex. App.—Houston [14th Dist.] 2011, no pet.) (six-year limitations statute did not apply because note was determined to be nonnegotiable).
§ 14.25:12 Statute of Limitations—Other Commercial Paper

A variety of other limitations statutes exist for negotiable instruments, including unaccepted drafts, accepted drafts, certified checks, teller’s checks, cashier’s checks, traveler’s checks, and certificates of deposit. See Tex. Bus. & Com. Code § 3.118(c)–(f).

§ 14.26 Action on Lease of Personal Property

§ 14.26:1 Governing Law

Leases of personal property are governed by either Tex. Bus. & Com. Code §§ 2A.101–.532 or the common law of bailments for hire. See Franklin v. Jackson, 847 S.W.2d 306, 308 (Tex. App.—El Paso 1992, writ denied) (lease of personal property is a form of a bailment for hire). UCC article 2A governs leases of “goods,” which are defined as all things that are moveable at the time of identification to the lease contract or are fixtures. “Goods” includes the unborn young of animals, but does not include money, documents, instruments, accounts, chattel paper, general intangibles, or minerals or the like, including oil and gas, before extraction. Tex. Bus. & Com. Code § 2A.103(a)(8).

§ 14.26:2 Lease Defined (UCC)

A lease is a “transfer of the right to possession and use of goods for a term in return for consideration.” A sale, including a sale on approval or a sale or return, or retention or creation of security interest, is not a lease. Tex. Bus. & Com. Code § 2A.103(a)(10).

§ 14.26:3 Lease Intended as Security Agreement

A further distinction exists between a true lease and a lease intended as a security agreement. A true lease is one in which the lessor retains title to the property and therefore generally prevails against the lessee’s creditors. A lease intended as security is one in which the lessor retains a security interest by reserving title until the lessee performs his obligations. See Tex. Bus. & Com. Code §§ 1.201(b)(35), 1.203. Whether a transaction in the form of a lease creates a lease or security interest is determined by the facts of each case. Tex. Bus. & Com. Code § 1.203(a). See, e.g., Federal Sign & Signal Corp. v. Berry, 601 S.W.2d 137, 139 (Tex. Civ. App.—Austin 1980, no writ) (fact that final payment was nominal consideration supported determination that lease was intended as security agreement).


Foreclosure of a security interest is discussed at section 14.28 below.
§ 14.26:4 Elements and Remedies

A lease is a contract. Vermont Information Processing, Inc. v. Montana Beverage Corp., 227 S.W.3d 846, 854 (Tex. App.—El Paso 2007, no pet.); Franklin v. Jackson, 847 S.W.2d 306, 308 (Tex. App.—El Paso 1992, writ denied). Therefore, the elements for an action on a lease are the same as those for other contracts. See section 14.22:1 above. If the parties to a contract have agreed to the remedy to be applied in the case of breach, it will be enforced by the courts unless it is illegal or against public policy. Doyle v. Second Master-Bilt Homes, Inc., 453 S.W.2d 226, 229 (Tex. Civ. App.—Fort Worth 1970, writ ref’d n.r.e.). In some cases, the lessor can sue for rent owed under the lease, demand return of the property, sue for conversion in an appropriate situation, or pursue other remedies as long as those remedies are listed in the contract. See Shasteen v. Mid-Continent Refrigerator Co., 517 S.W.2d 437, 439–40 (Tex. Civ. App.—Dallas 1974, writ ref’d n.r.e.).

A lessor under a personal property lease governed by UCC article 2A may on the lessee’s default—

1. cancel the lease contract, retaining the right to recover for damages based on prior default;
2. identify and dispose of goods identified to the contract;
3. withhold delivery of the goods and take possession of goods previously delivered;
4. stop delivery of the goods by a bailee;
5. dispose of the goods and recover damages, or retain the goods and recover damages or, in a proper case, rent; and
6. exercise any other rights or remedies provided for in the lease contract.


See the petition at form 14-8 in this chapter, which may be used for a suit on a true lease but not on a lease intended as security. See Kinerd v. Colonial Leasing Co., 800 S.W.2d 187 (Tex. 1990); see also Tex. Bus. & Com. Code § 1.201(b)(35) (definition of “security interest”), § 1.203 (lease distinguished from security interest). Also note that the sworn account procedure cannot be used for a suit on a lease. Van Zandt v. Fort Worth Press, 359 S.W.2d 893 (Tex. 1962); Meineke Discount Muffler Shops, Inc. v. Coldwell Banker Property Management Co., 635 S.W.2d 135, 138 (Tex. App.—Houston [1st Dist.] 1982, writ ref’d n.r.e.); Parmer v. Anderson, 456 S.W.2d 271 (Tex. Civ. App.—Dallas 1970, no writ).

§ 14.26:5 Disclosures

See 15 U.S.C. § 1667a for various disclosures required for certain consumer leases of personal property. The federal consumer lease statute is discussed at section 2.77 in this manual. The attorney should review those statutes before filing suit to determine whether potential liability against the creditor exists.

§ 14.26:6 Criminal Prosecution

A person having control of personal property under a written rental agreement who intentionally holds the property beyond the expiration of the rental period may be charged with the criminal offense of “theft of service.” Tex. Penal Code § 31.04(a)(3). See section 6.26:6 in this manual for further discussion.
§ 14.26:7 Statute of Limitations

An action for default of a lease of personal property must be brought within four years from the date the cause of action accrues unless the parties (except in the case of a consumer lease) in the original contract reduce the period of limitations to not less than one year. Tex. Bus. & Com. Code § 2A.506(a). If a first action is so terminated as to leave available a remedy by another action for the same breach, the second action may be brought either within the first action’s limitation period or within six months from termination of the first action, unless the first action was terminated voluntarily or from dismissal for want of prosecution. Tex. Bus. & Com. Code § 2A.506(c).

The cause of action accrues when an act or omission or breach of warranty is or should have been discovered by the plaintiff. Tex. Bus. & Com. Code § 2A.506(b).

§ 14.27 Actions by Secured Creditors—Preliminary Considerations

§ 14.27:1 Creditor’s Options

On default, the creditor may—

1. repossess the collateral and either sell it at foreclosure sale or retain it in satisfaction of the debt;
2. sue for enforcement of the lien; or
3. sue for enforcement of the underlying debt.

Repossession is discussed in chapter 5 of this manual, and a postforeclosure suit for deficiency is discussed at section 14.29 below. Suit to enforce the lien is discussed in chapter 7, and suit on the underlying debt is discussed at section 14.28:4 below. The notice requirements to guarantors are discussed at section 5.35.

§ 14.27:2 Default

Default is not determined by law but by the terms of the underlying security agreement. A typical security agreement may specify the following events of default:

1. Default in payments.
2. Failure to comply with any of the terms or conditions of the contract.
3. Failure to procure or maintain insurance on an automobile or on the life of the buyer as required by the contract.
4. Institution by the buyer or against the buyer or his property of a proceeding in bankruptcy, receivership, or insolvency.
5. Belief by the seller that the property is in danger of misuse or confiscation.

A contractual provision of default will be strictly construed. See *Shumway v. Horizon Credit Corp.*, 801 S.W.2d 890, 893 (Tex. 1991) (acceleration provisions must be clear and unequivocal); *Ramo, Inc. v. English*, 500 S.W.2d 461, 466 (Tex. 1973); *Motor & Industrial Finance Corp. v. Hughes*, 302 S.W.2d 386, 394 (Tex. 1957).

§ 14.27:3  Failure to Pay as Default

If default in payment is the ground for enforcement, the attorney should make certain that the debtor is actually in default under the note and security agreement. The creditor is often in a better position than the attorney to compute amounts due. Further, if proper credit for items such as unearned interest is not given to the debtor, there may be a violation of usury laws. See part V. in chapter 2 of this manual regarding usury. The attorney should advise the client to give the debtor credit for all unearned interest, make the computation, and provide a payment history, if possible. The attorney should review this information and compare it with the debtor’s obligations.

§ 14.27:4  Notice of Default

Once it has been determined that the debtor is in default, the creditor should notify the debtor of default by sending a letter, by certified mail with return receipt requested, to the debtor at his residence and business addresses. While many security agreements and notes contain waivers of notice of default, the better practice is to ignore the waiver provisions and inform the debtor of default. For a letter notifying the debtor of default, see form 5-3 in this manual.

§ 14.27:5  Acceleration

In virtually every case, the underlying debt must be accelerated before the creditor can proceed to enforce the security interest. See section 2.111 in this manual for a discussion of acceleration.

§ 14.28  Foreclosure of Security Interest

Chapter 5 of this manual discusses nonjudicial repossession and foreclosure of security interests in personal property. In particular, see section 5.4, which discusses considerations in choosing self-help repossession or judicial foreclosure.

§ 14.28:1  Elements

For a security interest to be foreclosed, there must be a valid security agreement between the creditor and the debtor, with value having been given to the creditor. The agreement must be in writing, signed by the debtor, and must describe the collateral. The debtor must have rights in the collateral and must have defaulted in his obligations under the agreement. *Tex. Bus. & Com. Code §§ 9.203, 9.601*.


Security interests can arise in a variety of debtor-creditor causes of action, including sworn accounts, notes, revolving credit accounts, and retail installment contracts.
§ 14.28:2 Pleading Requirements

In addition to pleading the elements of the underlying debt—for example, sworn account, note, or retail installment contract—the attorney should plead the existence of the security agreement and the nature of the default. In most cases, the security agreement will provide that default of the underlying debt will constitute default of the security agreement. Attaching copies of the security agreement and the underlying debt instrument and incorporating them by reference will satisfy this pleading requirement. Otherwise, the attorney should plead the specific default that is the basis of the suit. In the prayer, foreclosure should be specifically requested. See Tex. R. Civ. P. 47(c).

Refer to the sections of this chapter concerning the specific underlying cause of action (sworn account, note, retail installment contract, and so forth) for other pleading guidelines and to section 20.10 in this manual regarding judgments for foreclosure.

§ 14.28:3 Statute of Limitations

There is a split in the courts of appeals regarding whether a suit to foreclose a lien can be brought after the underlying debt is barred by limitations. See Holman St. Baptist Church v. Jefferson, 317 S.W.3d 540, 546–47 (Tex. App.—Houston [14th Dist.] 2010, pet. denied) (running of statute of limitations on action to collect personally from debtor does not bar right to use collateral in lender’s possession to repay debt); Miller, Hiersche, Martens & Hayward, P.C. v. Bent Tree National Bank, 894 S.W.2d 828, 830 (Tex. App.—Dallas 1995, no writ) (foreclosure allowed past limitations period); contra Proulx v. Wells, 235 S.W.3d 213, 215 (Tex. 2007) (exception exists to procuring service within limitations period when diligence has been exercised, but no exception exists for filing suit within limitations period); Gant v. DeLeon, 786 S.W.2d 259, 260 (Tex. 1990); Slagle v. Prickett, 345 S.W.3d 693, 696–97 (Tex. App.—El Paso 2011, no pet.); McBryde v. Curry, 914 S.W.2d 616, 619 (Tex. App.—Texarkana 1995, writ denied) (when debt barred by limitations, right to foreclose also barred). If a limitations period applies, the applicable period is the one attaching to the underlying cause of action, such as a negotiable instrument or a written contract. See sections 14.22:7 and 14.22:9 above.

The manual committee is not aware of a Texas case applying a statute of limitations to a secured creditor’s right to nonjudicial foreclosure of personal property. It has been suggested that there is no statute of limitations on nonjudicial foreclosure of personal property; because the contractual obligation survives even if the right to enforce the contract judicially expires, so too does the secured creditor’s right to foreclose survive. See Miller, 894 S.W.2d at 830.

§ 14.28:4 Suit on Underlying Debt

The secured party may sue for the entire amount due and recover a personal judgment against the debtor without reference to or resorting to the security. Maupin v. Chaney, 163 S.W.2d 380, 382 (Tex. 1942); Garza v. Allied Finance Co., 566 S.W.2d 57, 62 (Tex. Civ. App.—Corpus Christi 1978); Lazidis v. Goidl, 564 S.W.2d 453, 456 (Tex. Civ. App.—Dallas 1978, no writ).

The secured party is not required to exhaust his remedies against the security before suing on the underlying debt and after obtaining a personal judgment against the debtor on the underlying debt may enforce that judgment against the collateral by a writ of execution. A judicial sale of the collateral under execution is a foreclosure of the security interest. Therefore, the secured party may purchase at the sale and, after the purchase, hold the collateral free of any other requirements of chapter 9 of the Texas Uniform Commercial Code. Garza, 566 S.W.2d at 62; see also Tex. Bus. & Com. Code § 9.601.

The lien obtained through levy of execution relates back to the earliest of the date of the perfection of the security interest, the date of the filing of a financing statement covering the collateral, or, in the case of agricultural liens, the date specified by stat-
ute; therefore, the secured party is afforded a benefit as the first to file. Tex. Bus. & Com. Code § 9.601(e). If the plaintiff does not seek judicial foreclosure but only prays for a specific money judgment combined with a general prayer, a judgment of foreclosure of the security interest should not be granted, because judicial foreclosure is an additional remedy to that of seeking a personal judgment against the debtor and a general prayer is not sufficient to establish a request for judicial foreclosure. The existence of the collateral is immaterial to a suit for a judgment on the debt. Garza, 566 S.W.2d at 62.

§ 14.29 Deficiency Suit

Texas Business and Commerce Code chapter 9 recognizes that an obligor (not necessarily the same person as the debtor (see Tex. Bus. & Com. Code §§ 9.608(a)(4), 9.102(a)(60)) is liable for a deficiency remaining after the disposition of any collateral or other collection efforts unless the parties have agreed otherwise. See Tex. Bus. & Com. Code §§ 9.608(a)(4), 9.615(d), (e) and the official comments; Smith v. Community National Bank, 344 S.W.3d 561, 570 (Tex. App.—Eastland 2011, pet. denied).

§ 14.29:1 Availability

If a deficiency balance remains after foreclosure, the obligor is liable for that deficiency unless the underlying transaction is the sale of accounts, chattel paper, payment intangibles, or promissory notes. Tex. Bus. & Com. Code §§ 9.608, 9.615. However, the parties are free to modify the obligor’s liability by agreement. See Tex. Bus. & Com. Code § 9.608 cmt. 3.

§ 14.29:2 Elements

To recover a deficiency after a nonjudicial foreclosure of collateral, the creditor must prove—

1. a valid debt;
2. a valid security agreement;
3. default of the security agreement;
4. valid notice to the debtor of the sale after repossession (Tex. Bus. & Com. Code §§ 9.611–.614);
5. acceleration of the debt (if acceleration occurred);
6. disposition of the collateral in a commercially reasonable manner (Tex. Bus. & Com. Code § 9.610); and


Two Texas Supreme Court decisions that construed the provisions of chapter 9 relating to deficiency judgments have been limited in their applicability by the July 1, 2001, revisions to chapter 9 of the Texas Business and Commerce Code. See Tex. Bus. & Com. Code § 9.626. The decision in Greathouse v. Charter National Bank-Southwest, 851 S.W.2d 173 (Tex. 1992), concerning the pleading requirements in deficiency actions, is now effectively limited to actions on consumer obligations only. Likewise, application of Tanenbaum v. Economics Laboratory, Inc., 628 S.W.2d 769 (Tex. 1982), which held that a secured party whose collection, enforcement, disposition, or acceptance of collateral is not commercially reasonable is absolutely barred from collecting a deficiency, has been similarly limited to consumer cases. Under the 2001 revisions to chapter 9, commercial cases follow the rebuttable or refutable presumption rule. The secured party need not prove compliance with the
provisions of chapter 9, subchapter F (generally, the commercial reasonableness standard), unless the debtor or secondary obligor puts the secured party’s compliance in issue. Tex. Bus. & Com. Code § 9.626(a)(1); Smith v. Community National Bank, 344 S.W.3d 561, 572–73 (Tex. App.—Eastland 2011, pet. denied). However, once at issue, the amount of any deficiency recoverable by the secured creditor or secondary obligor will be reduced or possibly eliminated by the effect of his failure to comply with the commercial reasonableness standard. Tex. Bus. & Com. Code § 9.626(a); Smith, 344 S.W.3d at 572–73.

The secured party must give notice to the debtor and secondary obligors before disposing of the collateral. Tex. Bus. & Com. Code § 9.611. Such notice must be authenticated, but the “safe harbor” provisions provided in Tex. Bus. & Com. Code § 9.611(e) satisfy the notice requirements. An exception to the notice requirement is provided for collateral that is perishable, threatens to decline speedily in value, or is customarily sold on a recognized market. The notice requirement may be waived by a debtor or secondary obligor but only by a postdefault, authenticated agreement. Tex. Bus. & Com. Code § 9.624(a). See section 14.27 above regarding default and acceleration and sections 5.31 regarding notice, 5.32 regarding commercial reasonableness of the disposition of the collateral, and 5.38 regarding disposition of the collateral generally. A petition for a deficiency judgment cause of action is at form 14-9 in this chapter.

§ 14.29:3 Notice of Deficiency

Consumer-Goods Transactions: “Consumer goods” are goods that are used or bought for use primarily for personal, family, or household purposes. Tex. Bus. & Com. Code § 9.102(a)(23). See also section 2.121:2 in this manual. A secured party must provide a consumer obligor with a written explanation of a deficiency that conforms to Tex. Bus. & Com. Code § 9.616 before attempting to collect the deficiency. Subsection 9.616(a) defines “explanation” as a writing that states the amount of the deficiency; provides an explanation in accordance with subsection (c) of how the secured party calculated the deficiency; states, if applicable, that future debits, credits, charges (including additional credit service charges or interest), rebates, and expenses may affect the amount of the deficiency; and provides a telephone number or mailing address from which additional information concerning the transaction is available. The explanation must be provided to the consumer debtor or obligor no later than the time of the first written attempt to collect the deficiency. Tex. Bus. & Com. Code § 9.616(b). The debtor or obligor need not wait, however, until an attempt to collect is made but can instead make a request that obligates the secured party to provide an explanation within fourteen days after receipt of the request. Tex. Bus. & Com. Code § 9.616(a)–(b), (e). If no attempt is made to collect a deficiency, no explanation need be given.

Section 9.616(c) contains the requirements for how a calculation of a surplus or deficiency must be explained to satisfy subsection (a). The following information must be provided in the following order:

1. the aggregate amount of obligations secured by the security interest under which the disposition was made and, if the amount reflects a rebate of unearned interest or credit service charge, an indication of that fact, calculated as of a specified date—
   a. if the secured party takes or receives possession of the collateral after default, not more than thirty-five days before the secured party takes or receives possession; or
   b. if the secured party takes or receives possession of the collateral before default or does not take possession of the collateral, not more than thirty-five days before the disposition;

2. the amount of proceeds of the disposition;

3. the aggregate amount of the obligations after deducting the amount of proceeds;
4. the amount, in the aggregate or by type, and the types of expenses, including expenses of retaking, holding, preparing for disposition, processing, and disposing of the collateral, and attorney’s fees secured by the collateral that are known to the secured party and related to the current disposition;

5. the amount, in the aggregate or by type, and types of credits, including rebates of interest or credit service charges, to which the obligor is known to be entitled and that are not reflected in the amount in section 9.616(c)(1); and

6. the amount of the surplus or deficiency.


A secured party has some discretion concerning how to explain rebates of interest or credit service charges. The rebates may be included in the aggregate amount of obligations secured under subsection (c)(1) or they may be included with other types of rebates and credits under subsection (c)(5). However, rebates of interest or credit service charges are the only types of rebates for which this discretion is provided. The explanation must indicate whether rebates of precomputed interest are included. The expenses and attorney’s fees to be described under subsection (c)(4) are those relating to the most recent disposition rather than those incurred in connection with earlier enforcement efforts and that have been resolved by the parties. Tex. Bus. & Com. Code. § 9.616(c) UCC cmt. 3.

The secured party who fails to comply with section 9.616(b)(2) is liable for any loss caused plus $500. Tex. Bus. & Com. Code § 9.625(b)–(c), (e). (See the discussion in section 17.50 in this manual.) Section 9.616 also pertains to the explanation and calculation of a surplus. Note: There may be other applicable notices under the federal Fair Debt Collection Practices Act and the Texas Debt Collection Practices Act. See sections 2.11 through 2.36 in this manual.

Nonconsumer-Goods Transactions: Before bringing suit against the debtor for a deficiency, it is good practice to notify the debtor of the sale of the collateral, the net proceeds of sale, and the resulting deficiency. This notice gives the creditor the opportunity to negotiate payment before resorting to litigation.

Attorney’s Fees: In both consumer and nonconsumer goods transactions, if the underlying debt agreement does not provide for payment of attorney’s fees, the notice should also satisfy the requirements of Tex. Civ. Prac. & Rem. Code § 38.001, allowing recovery of attorney’s fees in the deficiency suit.

§ 14.29:4 Pleading Requirements

In consumer-goods transactions, the creditor must plead commercial reasonableness. This pleading requirement may be satisfied either by pleading specifically or by pleading that all conditions precedent have been performed. If pleaded specifically, the creditor has the burden of proof, but if “all conditions precedent” is pleaded, the debtor must specifically deny commercial reasonableness, or the creditor is relieved from his burden of proof. See Greathouse v. Charter National Bank-Southwest, 851 S.W.2d 173, 177 (Tex. 1992) (creditor pleaded that all conditions precedent had been performed; because guarantor did not specifically deny commercially reasonable disposition of collateral, creditor not required to prove commercial reasonableness at trial); Tex. R. Civ. P. 54. If the creditor fails to plead commercial reasonableness or all conditions precedent, however, the debtor’s failure to plead lack of commercial reasonableness does not supply, by default, the proof necessary to establish the creditor’s right. Whirlybirds Leasing Co. v. Aerospatiale Helicopter Corp., 749 S.W.2d 915, 919 (Tex. App.—Dallas 1988, no writ), abrogated on other grounds by Greathouse, 851 S.W.2d at 174 n.2 (because creditor failed to notify debtor of its intent to dispose of collateral or to make proper disposal, creditor repossessed and disposed of collateral in full satisfaction of indebtedness).
The application of *Greathouse* has been limited to consumer-goods transactions by Tex. Bus. & Com. Code § 9.626. Under this new section, in nonconsumer-goods transactions, a secured party is not required to prove compliance with Code provisions unless the debtor or secondary obligor raises the issue. If the debtor or secondary obligor raises the issue and the secured party does not prove compliance, the debtor or obligor is credited with the greater of the actual disposition proceeds or the proceeds that would have been realized if the secured party had complied with the Code. Tex. Bus. & Com. Code § 9.626.

§ 14.29:5  **Amount of Sale as Determining Deficiency**

If the sale was commercially reasonable and the debtor received notice, the fact that a better price could have been obtained will not affect the amount of the deficiency. Tex. Bus. & Com. Code § 9.627(a); *Lister v. Lee-Swofford Investments, L.L.P.*, 195 S.W.3d 746, 753 (Tex. App.—Amarillo 2006, no pet.) (minimal sale proceeds, creditor’s inexperience in disposing of type of collateral, and failure of many dealers to attend auction did not conclusively establish commercial unreasonableness); *Siboney Corp. v. Chicago Pneumatic Tool Co.*, 572 S.W.2d 4, 8 (Tex. Civ. App.—Houston [1st Dist.] 1978, writ ref’d n.r.e.) (the fact that better price could have been obtained does not render sale commercially unreasonable).

§ 14.30  **Fraudulent Transfer**

A petition for a fraudulent transfer cause of action is at form 14-10 in this chapter.

§ 14.30:1  **Availability**

Fraudulent transfer laws enable a party to negate or undo the effect of a transfer of property that would otherwise place the property beyond the reach of the transferor’s creditors. Only creditors can bring fraudulent transfer claims. See Tex. Bus. & Com. Code §§ 24.005–.006. The term *claims* covers a broad concept, including liquidated, unliquidated, matured, unmatured, legal, equitable, or even disputed claims. Tex. Bus. & Com. Code § 24.002(3).

§ 14.30:2  **What Constitutes Transfer**

A “transfer” can be either a transfer of title or of any interest in the debtor’s property or the creation of a lien or other encumbrance in the property. A disclaimer of inheritance is not a transfer. Tex. Bus. & Com. Code § 24.002(12).

§ 14.30:3  **When Transfer or Obligation Occurs**

A transfer of realty (other than fixtures) is made when the transfer is so far perfected that a good-faith purchaser of the asset from the debtor against whom applicable law permits the transfer to be perfected cannot acquire an interest in the asset superior to the interest of the transferee. A transfer of personality or fixtures occurs when the transfer is so far perfected that a creditor on a simple contract cannot acquire a judicial lien (other than under the fraudulent transfer statutes themselves) superior to the transferee’s interest. Tex. Bus. & Com. Code § 24.007(1).

An obligation is incurred when the writing executed by the obligor is delivered to or for the benefit of the obligee, if the obligation is evidenced by a writing. Otherwise, it is incurred when it becomes effective between the parties. Tex. Bus. & Com. Code § 24.007(5).
§ 14.30:4  Present vs. Future Creditors

A present creditor is one whose claim arose before the transfer was made or the obligation was incurred. Tex. Bus. & Com. Code § 24.006(a). A future creditor is one whose claim arose within a reasonable time after the transfer was made or the obligation was incurred. Tex. Bus. & Com. Code § 24.005(a).

§ 14.30:5  Insiders

Certain transfers to insiders can be avoided by either present or future creditors. See Tex. Bus. & Com. Code §§ 24.005(b)(1), 24.006(b). The list of insiders is expansive, including relatives, partners, officers and directors of a debtor corporation, partnerships in which the debtor is a partner, “affiliates,” or “persons in control.” See Tex. Bus. & Com. Code § 24.002(7) for the list of these insiders. See also In re Holloway, 955 F.2d 1008, 1010 (5th Cir. 1992); Telephone Equipment Network, Inc. v. TA/Westchase Place, Ltd., 80 S.W.3d 601, 609 (Tex. App.—Houston [1st Dist.] 2002, no pet.) (principal factors in determining insider status are (1) the closeness of the relationship between the transferee and debtor and (2) whether the transactions were at arm’s length); J. Michael Putman, M.D.P.A. Money Purchase Pension Plan v. Stephenson, 805 S.W.2d 16, 18 (Tex. App.—Dallas 1991, no writ) (list of insiders contained in section 24.002(7) is merely illustrative).

§ 14.30:6  Insolvency

Insolvency is a factor in fraudulent transfers that can be attacked by either present or future creditors. See Tex. Bus. & Com. Code §§ 24.005(b)(9), 24.006. A debtor is insolvent if the sum of his debts is greater than the sum of his assets at a fair valuation. Tex. Bus. & Com. Code § 24.003(a). The sum of the debtor’s assets does not include property that has been transferred, concealed, or removed with intent to hinder, delay, or defraud creditors or that has otherwise been transferred in a manner making the transfer voidable under the Fraudulent Transfer Act. Tex. Bus. & Com. Code § 24.003(d). Debts are not included to the extent they are secured by a valid lien on the property of the debtor not included as an asset. Tex. Bus. & Com. Code § 24.003(e).

The debtor is presumed to be insolvent if he is not paying his debts as they come due. Tex. Bus. & Com. Code § 24.003(b).

§ 14.30:7  Value and Reasonably Equivalent Value

Value is given for a transfer or an obligation if, in exchange for the transfer or obligation, property is transferred or an antecedent debt is secured or satisfied. Value does not include an unperformed promise made otherwise than in the ordinary course of the promisor’s business to furnish support to the debtor or another person. Tex. Bus. & Com. Code § 24.004(a).

A person gives “reasonably equivalent value” if that person acquires an interest of the debtor in an asset by a regularly conducted, noncollusive foreclosure sale or execution of a power of sale for the acquisition or disposition of the debtor’s interest on default under a mortgage, deed of trust, or security agreement. Tex. Bus. & Com. Code § 24.004(b). “Reasonably equivalent value” includes, but is not limited to, a transfer or obligation that is within the range of values for which the transferor would have sold the assets in an arm’s-length transaction. Tex. Bus. & Com. Code § 24.004(d).

The operable date for valuation is the date of the transfer. See, e.g., First National Bank of Seminole v. Hooper, 48 S.W.3d 802, 808 (Tex. App.—El Paso 2001, pet. denied) (transfer occurred on creation of lien rather than date of foreclosure sale;
therefore, operable date for valuation was date lien created), rev’d on other grounds, 104 S.W.3d 83 (Tex. 2003); see also Tex. Bus. & Com. Code §§ 24.002(12), 24.007(1).

§ 14.30:8 Transfer with Intent to Hinder, Delay, or Defraud

A transfer made or obligation incurred by a debtor is fraudulent as to a present or future creditor if the debtor made the transfer or incurred the obligation with actual intent to hinder, delay, or defraud any creditor. Tex. Bus. & Com. Code § 24.005(a)(1). “Actual intent” may be determined by considering the following “badges of fraud,” among other factors:

1. The transfer or obligation was to an insider.
2. The debtor retained possession or control of the property after the transfer.
3. The transfer or obligation was concealed.
4. Before the transfer was made or the obligation was incurred, the debtor had been sued or threatened with suit.
5. The transfer was of substantially all the debtor’s assets.
6. The debtor absconded.
7. The debtor removed or concealed assets.
8. The value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred.
9. The debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred.
10. The transfer occurred shortly before or shortly after a substantial debt was incurred.
11. The debtor transferred the essential assets of his business to a lienor who transferred those assets to an insider of the debtor.


Ordinarily the question of intent is a fact question, unless the fraud is admitted, the fraudulent intent is apparent on the surface, or there is some interest reserved in the property inconsistent with the alleged conveyance. See BMG Music v. Martinez, 74 F.3d 87, 90 (5th Cir. 1996); Quinn v. Dupree, 303 S.W.2d 769, 774 (Tex. 1957) (no fraudulent intent for debtor to prefer one creditor over another); Letsos v. H.S.H., Inc., 592 S.W.2d 665, 670 (Tex. Civ. App.—Waco 1980, writ ref’d n.r.e.).

A transfer or obligation is not voidable under section 24.005(a)(1) against a person who took in good faith and for a reasonably equivalent value or against any subsequent transferee or obligee. Tex. Bus. & Com. Code § 24.009(a).

The general statute of limitations for this cause of action is either four years after the transfer was made or the obligation was incurred or, if later, within one year after the transfer or obligation was or could reasonably have been discovered by the claimant. Tex. Bus. & Com. Code § 24.010(a)(1). If the action is brought on behalf of a spouse, minor, or ward, it must be brought within two years after it accrues or, if later, within one year after the transfer or obligation was or could reasonably have been discovered by the claimant. Tex. Bus. & Com. Code § 24.010(b)(1). But see Smith v. American Founders Financial Corp., 365 B.R. 647, 676–79 (S.D. Tex. 2007) (Tex. Bus. & Com. Code § 24.010 preempted by section 546(a) of the Bankruptcy Code).
§ 14.30:9 Transfer for Less Than Reasonably Equivalent Value—Present or Future Creditors

A transfer made or obligation incurred by a debtor is fraudulent as to a present or future creditor if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor either—

1. was engaged in or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or

2. intended to incur, or believed or reasonably should have believed that the debtor would incur, debts beyond the debtor’s ability to pay as they became due.


A transfer is not voidable on these grounds if it resulted from termination of a lease on default by the debtor when the termination is in accordance with the lease and applicable law or enforcement of an article 9 security interest. Tex. Bus. & Com. Code § 24.009(e).

The general statute of limitations for this cause of action is four years from the date the transfer was made or the obligation was incurred. Tex. Bus. & Com. Code § 24.010(a)(2). If the action is brought on behalf of a spouse, minor, or ward, the cause of action is extinguished unless brought within two years after it accrues or, if later, within one year after the transfer or obligation was or could reasonably have been discovered by the claimant. Tex. Bus. & Com. Code § 24.010(b)(1). But see Smith v. American Founders Financial Corp., 365 B.R. 647, 676–79 (S.D. Tex. 2007) (Tex. Bus. & Com. Code § 24.010 preempted by section 546(a) of the Bankruptcy Code).

§ 14.30:10 Transfer for Less Than Reasonably Equivalent Value—Present Creditors Only

A transfer made or obligation incurred by a debtor is fraudulent as to a present creditor if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or became insolvent as a result of the transfer or obligation. Tex. Bus. & Com. Code § 24.006(a).

The general statute of limitations for this cause of action is four years from the date the transfer was made or the obligation was incurred. Tex. Bus. & Com. Code § 24.010(a)(2). If the action is brought on behalf of a spouse, minor, or ward, it must be brought within two years after it accrues or, if later, within one year after the transfer or obligation was or could reasonably have been discovered by the claimant. Tex. Bus. & Com. Code § 24.010(b)(1). But see Smith v. American Founders Financial Corp., 365 B.R. 647, 676–79 (S.D. Tex. 2007) (Tex. Bus. & Com. Code § 24.010 preempted by section 546(a) of the Bankruptcy Code).
§ 14.30:11 Transfers to Insiders—Present Creditors Only

A transfer made by a debtor is fraudulent as to a present creditor if the transfer was made to an insider for an antecedent debt, the debtor was insolvent at the time, and the insider had reasonable cause to believe that the debtor was insolvent. Tex. Bus. & Com. Code § 24.006(b).

Such a transfer is not voidable—

1. to the extent the insider gave new value to or for the benefit of the debtor after the transfer was made, unless the new value was secured by a valid lien;
2. if made in the ordinary course of business or financial affairs of the debtor and the insider; or
3. if made under a good-faith effort to rehabilitate the debtor and the transfer secured present value given for that purpose as well as an antecedent debt of the debtor.


§ 14.30:12 Remedies of Creditors

The remedies a creditor in a fraudulent transfer action can seek include—

1. avoidance of the transfer or obligation to the extent necessary to satisfy the creditor’s claim;
2. an attachment or other provisional remedy against the asset transferred or other property of the transferee in accordance with applicable law relating to ancillary proceedings;
3. injunctive relief against further disposition or transfer of the asset;
4. appointment of a receiver to take charge of the asset transferred;
5. if judgment has been obtained on a claim against the debtor, a levy of execution on the asset; or
6. any other relief circumstances may require.

Tex. Bus. & Com. Code § 24.008. A creditor may also seek exemplary damages. See Tex. Bus. & Com. Code § 24.008(a)(3)(c); In re Galaz, 850 F.3d 800, 804 (5th Cir. 2017) (affirming exemplary damages in fraudulent transfer suit). If the transfer or obligation is avoidable, the court must render judgment for the creditor against the transferee of the asset or the person for whose benefit the transfer was made, or any subsequent transferee, other than a good faith transferee, who took for value or from any subsequent transferee, in the amount of the value of the asset transferred as of the time of the transfer, subject to adjustment as the equities may require. Tex. Bus. & Com. Code § 24.009(b). Adjustment of the value of the asset may not take into account—

1. physical additions or changes to the asset;
2. repairs to the asset;
3. payment of tax on the asset;
4. payment of any debt secured by a lien on the asset superior or equal to the rights of the voiding creditor; or
5. preservation of the asset.


§ 14.30:13 Credits Accruing to Good-Faith Transferees

Although a good-faith transferee is not entitled to credit for payments made for repair or upkeep of the asset (see section 14.30:12 above), he is entitled to a claim or credit, to the extent he gave value for the transfer or obligation, to—

1. a lien, prior to the rights of the voiding creditor, or a right to retain any interest in the asset transferred;
2. enforcement of any obligation incurred; or
3. a reduction in the amount of liability on the judgment.


§ 14.30:14 Attorney’s Fees

In any proceeding under the Uniform Fraudulent Transfer Act, the court may award costs and reasonable attorney’s fees as are equitable and just. Tex. Bus. & Com. Code § 24.013.

§ 14.31 Action on Guaranty

§ 14.31:1 Guarantors, Sureties, and Accommodation Parties

A guaranty is an undertaking to pay another’s debt or perform his obligation on the happening of one or more contingencies. See Starcrest Trust v. Berry, 926 S.W.2d 343, 350 (Tex. Civ. App.—Austin 1996, no writ). A surety is a party who promises to answer for the debt of another. Crimmins v. Lowry, 691 S.W.2d 582, 585 (Tex. 1985). At common law, the surety was directly liable for performance of the obligation, while the guarantor’s liability was only indirect. Arnett v. Simpson, 235 S.W. 982, 985 (Tex. Civ. App.—Amarillo 1921, writ dism’d). Sureties are defined to include guarantors for Uniform Commercial Code purposes. Tex. Bus. & Com. Code § 1.201(b)(39); Tex. Civ. Prac. & Rem. Code § 43.001.

The law recognizes a distinction between guaranty of collection and guaranty of payment, also called absolute guaranty and unconditional guaranty. An absolute guarantor is primarily liable and waives any requirement that the creditor take action against the principal obligor as a condition precedent to his or her liability on the guaranty. Corona v. Pilgrim’s Pride Corp., 245 S.W.3d 75, 81 (Tex. App.—Texarkana 2008, pet. denied) (citing Hopkins v. First National Bank at Brownsville, 551 S.W.2d 343, 345 (Tex. 1977)). A guaranty of collection is an undertaking of the guarantor to pay if the debt cannot be collected from the primary obligor by the use of reasonable diligence. Cox v. Lerman, 949 S.W.2d 527, 530 (Tex. App.—Houston [14th Dist.] 1997, no writ). With a conditional guaranty, the principal debtor must be joined in the suit unless excused pursuant to section 17.001 of the Civil Practice and Remedies Code. Cox, 949 S.W. at 530 (citing Ford v. Darwin, 767 S.W.2d 851, 854 (Tex. App.—Dallas 1989, writ denied)).
If the party’s signature is accompanied by words indicating unambiguously that he is guaranteeing collection instead of payment of another party’s obligation in the instrument, the signer is obligated to pay the instrument only if—

1. execution of judgment against the other party has been returned unsatisfied;
2. the other party is insolvent or is in an insolvency proceeding;
3. the other party cannot be served with process; or
4. it is otherwise apparent that payment cannot be obtained from the other party.

**Tex. Bus. & Com. Code § 3.419(d).**

**Accommodation Party:** An accommodation party is liable in the capacity in which he has signed. **Tex. Bus. & Com. Code § 3.419(b).** This liability is defined in terms of the accommodation party’s status under the Code—as, for example, a maker or endorser. Therefore, an accommodation endorser is entitled to the same presentment and notice of dishonor as is any other endorser. **Tex. Bus. & Com. Code § 3.419(b).** The accommodation party is not liable to the party accommodated. **Tex. Bus. & Com. Code § 3.419(e).**

### § 14.31:2 Elements

The creditor enforcing a guaranty must establish—

1. the existence and ownership of the guaranty contract;
2. the performance of the terms of the contract by plaintiff;
3. the occurrence of the condition on which liability is based; and
4. guarantor’s failure or refusal to perform the promise.


Independent consideration to the guarantor generally is not required to create a valid guaranty contract. Consideration to the principal is sufficient consideration to bind the guarantor, as is postponement of enforcement of the debt. If a guaranty is entered into independently of the transaction that caused the obligation, the guaranty must be supported by consideration independent of the obligation. *See Gooch v. American Sling Co.*, 902 S.W.2d 181, 185 (Tex. App.—Fort Worth 1995, no writ) (citing *Fourticq v. Fireman’s Fund Insurance Co.*, 679 S.W.2d 562, 564 (Tex. App.—Dallas 1984, no writ) (indemnity agreement signed after creditor provided notice of termination of underlying contract lacked consideration because neither indemnitor nor primary debtor received any benefit, nor did creditor suffer a detriment). *See also Windham v. Cal-Tim, Ltd.*, 47 S.W.3d 846 (Tex. App.—Beaumont 2001, pet. denied) (earlier execution of lease to principal sufficient consideration for guaranty when circumstances indicated lease and guaranty part of same transaction).

### § 14.31:3 Joinder of Principal Obligor

Generally, a surety cannot be sued without joinder of the principal obligor unless judgment has already been rendered against the principal or the case is governed by a specific rule or law providing otherwise. **Tex. R. Civ. P. 31.** Additionally, the surety
may require by written notice that the obligee bring immediate suit if the obligation is a contract for the payment of money or performance of an act. Tex. Civ. Prac. & Rem. Code § 43.002(a).

**Statutory Exceptions to Joinder Requirement:** In addition to when a judgment has been rendered against the principal, the guarantor can be sued without joinder of the principal obligor if the principal obligor—

1. is a nonresident or resides in a place at which he cannot be reached by ordinary process of law;
2. resides in a place that is unknown and cannot be ascertained by the use of reasonable diligence;
3. is dead; or
4. is actually or notoriously insolvent.

Tex. Civ. Prac. & Rem. Code § 17.001(b). If the principal obligor is not joined, the exception on which the exclusion is based must be pleaded and proved. Zimmerman v. Bond, 392 S.W.2d 149, 151 (Tex. Civ. App.—Dallas 1965, no writ) (judgment against guarantor reversed because primary obligor not joined to the lawsuit, and no exception pleaded). By its express terms, section 17.001 applies to suits on contracts involving several obligors or parties that are conditionally liable. Threlkeld-Covington, Inc. v. Baker Drywall Co., 837 S.W.2d 840, 843 (Tex. App.—Eastland 1992, no writ).

**Contractual Waiver of Joinder:** In almost every guaranty agreement, the guarantor waives the necessity of joining the principal obligor in a suit against the guarantor. These waivers are valid. See Universal Metals & Machinery, Inc. v. Bohart, 539 S.W.2d 874, 877 (Tex. 1976) (guarantors waived any requirement that the holder of the note must exhaust its rights or take action against the maker); Yandell v. Tarrant State Bank, 538 S.W.2d 684, 687–88 (Tex. Civ. App.—Fort Worth 1976, writ ref’d n.r.e.) (waiver upheld against guarantor on a note).

**Practice Note:** Usually the creditor will want to pursue both the primary obligor and the guarantor of a note or contract. Although creditor may not be legally required to join the obligor, especially if the guarantor has expressly waived the joinder requirement, the better practice is to name both the principal obligor and the guarantor as party defendants.

**Notes for Which Maker Is Also Guarantor:** If the maker of the note also signs as a guarantor, he must file a verified denial that he is liable in his capacity as a guarantor or he will have admitted liability in that capacity. Breckenridge v. Nationsbank of Texas, N.A., 79 S.W.3d 151, 158 (Tex. App.—Texarkana 2002, pet. denied).

§ 14.31:4 Discharge of Liability

A surety, guarantor, or accommodation party is discharged from liability on a contract if a right of action has accrued on the contract, the surety has given notice to the creditor to sue on the contract, and the obligee fails to prosecute such a suit. Tex. Civ. Prac. & Rem. Code § 43.002.

§ 14.31:5 Surety’s or Accommodation Party’s Rights against Principal Obligor

A surety who, because of his suretyship relation, pays part or all of a judgment against his primary obligor is subrogated to the judgment creditor’s rights under the judgment. Tex. Civ. Prac. & Rem. Code § 43.004(b). Similarly, an accommodation party who pays a negotiable instrument is entitled to reimbursement from the accommodated party and is entitled to enforce the instrument against the accommodated party. Tex. Bus. & Com. Code § 3.419(f).
§ 14.31:6 Guarantor’s Obligation When Defects Exist in Underlying Contract

Under certain facts, a guarantor may not be permitted to rely on defects in the underlying contract to defend an unambiguous guarantee. Universal Metals & Machinery, Inc. v. Bohart, 539 S.W.2d 874, 877 (Tex. 1976) (guarantor, who contracted as primary, absolute, unconditional obligor, is not freed from liability because of forged signature of maker of underlying promissory note); Farmers & Merchants State Bank v. Reece Supply Co., 79 S.W.3d 615 (Tex. App.—Eastland 2002, pet. denied) (guarantor bank was unable to assert offset defense for unfit goods because bank signed unconditional payment guaranty); El Paso Refining, Inc. v. Scurlock Permian Corp., 77 S.W.3d 374 (Tex. App.—El Paso 2002, pet. denied) (usury is personal defense and may not be asserted by guarantor unless contract with guarantor also contains usurious provision); Bair Chase Property Co., L.L.C. v. S&K Development Co., 260 S.W.3d 133, 146 (Tex. App.—Austin 2008, pet. denied) (same).

§ 14.32 Sister-State or Federal Judgments Enforced through Uniform Enforcement of Foreign Judgments Act (UEFJA)

Under the United States Constitution, each state must give a final judgment of a sister state the same force and effect the judgment would be entitled to in the state in which it was rendered. Bard v. Charles R. Myers Insurance Agency, Inc., 839 S.W.2d 791, 794 (Tex. 1992) (citing U.S. Const. art. IV, § 1). In Texas, the enforcement of foreign judgments is governed by the Texas version of the UEFJA, Tex. Civ. Prac. & Rem. Code §§ 35.001 et seq.; Karstetter v. Voss, 184 S.W.3d 396, 401 (Tex. App.—Dallas 2006, no pet.).

§ 14.32:1 Enforcement Options

A creditor seeking to “domesticate” a judgment from a federal court, or from another state, may either use the affidavit procedure set out in the Uniform Enforcement of Foreign Judgments Act, Tex. Civ. Prac. & Rem. Code §§ 35.001–.007, or bring an independent action in a Texas court, Tex. Civ. Prac. & Rem. Code § 35.008. When a judgment creditor proceeds under the UEFJA, the filing of the foreign judgment comprises both a plaintiff’s original petition and a final judgment. Walnut Equipment Leasing Co. v. Wu, 920 S.W.2d 285, 286 (Tex. 1996) (citing Lawrence Systems, Inc. v. Superior Feeders, Inc., 880 S.W.2d 203, 208 (Tex. App.—Amarillo 1994, writ denied). The affidavit procedure is faster and easier than bringing an independent action. The independent action is discussed at section 14.33 below.

§ 14.32:2 Procedure

The creditor or his attorney must file with the clerk of any court of competent jurisdiction a copy of the sister-state judgment authenticated in accordance with an act of Congress or a statute of this state (see Tex. Civ. Prac. & Rem. Code § 35.003(a)), and an affidavit showing the name and last known post office addresses of the judgment debtor and judgment creditor (Tex. Civ. Prac. & Rem. Code § 35.004(a)).

The judgment creditor or the judgment creditor’s attorney must promptly mail notice of the filing to the judgment debtor at debtor’s last known address, and file proof of mailing of the notice with the clerk of the court. Tex. Civ. Prac. & Rem. Code § 35.004(b). Notice must include the name and post office addresses of the judgment creditor and, if the judgment creditor has a Texas attorney, the attorney’s name and address. Tex. Civ. Prac. & Rem. Code § 35.004(c). On receipt of proof of mailing of the notice, the court clerk must note the mailing in the docket. Tex. Civ. Prac. & Rem. Code § 35.004(d).

See form 14-12 in this chapter for authenticating a foreign judgment in Texas.
§ 14.32:3 Authentication of Judgment and Bill of Costs

In the context of Tex. Civ. Prac. & Rem. Code § 35.003, a sister-state judgment or bill of costs can be authenticated in one of the following ways:

1. The judgment can be proved or admitted by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the attestation is in proper form. 28 U.S.C. § 1738. The authentication is often referred to as an “exemplified judgment.” See also Medical Administrators, Inc. v. Koger Properties, Inc., 668 S.W.2d 719, 721 (Tex. App.—Houston [1st Dist.] 1983, no writ) (when plaintiff sues on judgment of sister state in Texas and introduces his judgment, authenticated according to 28 U.S.C. § 1738, he thereby establishes prima facie case); Paschall v. Geib, 405 S.W.2d 385 (Tex. Civ. App.—Dallas 1966, writ ref’d n.r.e.) (fact that foreign judgment and judge’s certificate were signed by two different individuals was not defect).

Practice Note: Requesting an exemplified judgment copy, also called a “triple-sealed” copy, from the foreign court is the most common way to authenticate a sister-state judgment.

2. Evidence of judicial proceedings of another state may be admissible if less is shown than required by the federal statute, as long as it conforms to the rules of evidence of the state where the trial is being held. Medical Administrators, Inc., 668 S.W.2d at 721 (citing Donald v. Jones, 445 F.2d 601, 606 (5th Cir. 1971), cert. denied, 404 U.S. 992 (1971)). A copy of a judgment can be authenticated according to Tex. R. Evid. 901(b)(7) or 902. The certification should be checked, however, to see that it is self-authenticating, in conformance with Tex. R. Evid. 902. See Whithew v. Bulldog Battery Corp., 400 S.W.3d 115, 118–19 (Tex. App.—Dallas 2013, pet. denied) (mem. op. on reh’g); Sanders v. State, 787 S.W.2d 435, 438–40 (Tex. App.—Houston [1st Dist.] 1990, pet. ref’d).

3. A copy of a judgment of another state can be authenticated by the testimony of a witness who has compared the offered copy with the original record entry of the judgment; such a copy then becomes admissible as an “examined copy,” and is sufficient prima facie proof of it. Schwartz v. Vecchiotti, 529 S.W.2d 603, 604–05 (Tex. Civ. App.—Houston [1st Dist.] 1975, writ ref’d n.r.e.).


§ 14.32:4 Defensive Matters

If the judgment debtor can show a ground on which enforcement should be stayed, the Texas court must stay enforcement if the debtor can provide the same sort of security required for staying enforcement of Texas judgments. Tex. Civ. Prac. & Rem. Code § 35.006(b); see also Tex. Civ. Prac. & Rem. Code § 52.006. The following are some of the grounds most often used to attack the validity of a sister-state judgment.

Merits of Original Controversy: The defendant cannot avoid a foreign judgment by pleading a matter that goes to the merits of the original controversy; on those matters the foreign judgment is conclusive, and a Texas court cannot relitigate a matter tried before a sister state’s court with jurisdiction over the parties and subject matter. Massachusetts v. Davis, 168 S.W.2d 216, 220 (Tex. 1942); Shaps v. Union Commerce Bank, 476 S.W.2d 466, 468 (Tex. Civ. App.—Beaumont, writ ref’d n.r.e.), cert. denied, 409 U.S. 1060 (1972).
Collateral Attack on Judgment: As a general rule, a sister state’s judgment that is final and nonpenal in nature can be collaterally attacked only if it is void as rendered on the following grounds:

1. The rendering court lacked jurisdiction.
2. The judgment has been paid or otherwise discharged.
3. It is a cause of action for which the forum state has not provided a court.
4. The judgment was procured by fraud.


Jurisdiction: Personal jurisdiction in Texas does not appear to be an avenue for attack. Haaksman v. Diamond Offshore (Bermuda), Ltd., 260 S.W.3d 476, 479 (Tex. App.—Houston [14th Dist.] 2008, pet. denied) (“Courts in other states have held that, although a judgment debtor may contest recognition by arguing that the foreign-country court lacked personal jurisdiction over the judgment debtor, the judgment debtor may not assert that the court of the state in which the judgment is filed does not have in personam jurisdiction over the judgment debtor.”) (citing Pure Fishing, Inc. v. Silver Star Co., 202 F. Supp. 2d 905, 910 (N.D. Iowa 2002) (holding a party seeking the recognition and enforcement of a foreign judgment under Iowa’s Uniform Foreign Money-Judgment Recognition Act is not required to establish a basis for exercise of personal jurisdiction over the judgment debtor)).

The validity of a sister-state judgment will be tested against the law of that state, except that in all cases the requirements of due process must be satisfied. O’Brien v. Lanpar Co., 399 S.W.2d 340, 341 (Tex. 1966); Country Clubs, Inc. v. Ward, 461 S.W.2d 651, 656 (Tex. Civ. App.—Dallas 1970, writ ref’d n.r.e.). For example, on the question of jurisdiction over a nonresident defendant, a Texas court may consider whether the defendant was properly served under the sister state’s long-arm statute; the Texas court also may examine the long-arm statute of the rendering sister state to ascertain whether it afforded the defendant due process. See Mitchim v. Mitchim, 518 S.W.2d 362 (Tex. 1975) (court examined whether Arizona long-arm statute afforded due process); Brown’s Inc. v. Modern Welding Co., 54 S.W.3d 450 (Tex. App.—Corpus Christi 2001, no pet.) (denial of domestication because of failure to comply with Washington’s personal jurisdiction service requirements); Country Clubs, Inc., 461 S.W.2d at 656 (denial of domestication because of failure to comply with Kentucky long-arm statute) When a collateral attack is made on a duly authenticated foreign judgment filed in Texas, the trial court has only two alternatives: it can enforce the judgment or, if proper evidence is before it, declare the judgment void for want of jurisdiction. Corporate Leasing International v. Bridewell, 896 S.W.2d 419, 422 (Tex. App.—Waco 1995, orig. proceeding) (abuse of discretion for Texas court to vacate Michigan judgment). See also Mindis Metals, Inc. v. Oilfield Motor & Control, Inc., 132 S.W.3d 477, 482 (Tex. App.—Houston [14th Dist.] 2004, pet. denied) (finding that appeal is better vehicle than mandamus for reviewing trial court’s order to vacate domesticated foreign state’s judgment).

Fraud: Full faith and credit can be denied the judgment of a sister state if it was procured through extrinsic fraud. False testimony constitutes intrinsic fraud, and the judgment of a sister state cannot be successfully challenged on that ground. Chapman v. Schefsky, 470 S.W.2d 786, 788 (Tex. Civ. App.—Waco 1971, writ ref’d n.r.e.). Extrinsic fraud refers to fraud that is collateral to the question determined in the original action and that denies the defendant the benefit of a fair adversary proceeding. See E.H. Schopler, Annotation, Fraud as Defense to Action on Judgment of Sister State, 55 A.L.R.2d 673, 687 (1957).

§ 14.32:5 Statute of Limitations

An action on a foreign judgment is barred in Texas if it is barred under the laws of the jurisdiction in which it was rendered. Tex. Civ. Prac. & Rem. Code § 16.066(a). An action against a judgment debtor who has resided in Texas for ten years before the action may not be brought on a foreign judgment rendered more than ten years before the commencement of the Texas action. Tex. Civ. Prac. & Rem. Code § 16.066(b).

§ 14.33 Common-Law Action to Enforce Sister-State Judgments

As an alternative to using the notice and affidavit procedure of the Uniform Enforcement of Foreign Judgments Act as described in section 14.32 above, the creditor may have his judgment domesticated by bringing a common-law suit to enforce it. See Tex. Civ. Prac. & Rem. Code § 35.008.

§ 14.33:1 Procedure

A petition must be prepared, filed, and served as in any other suit. It should allege the particulars of the sister-state suit—that is, proper subject matter jurisdiction, proper service according to the laws or rules of the sister state, and the rendering of a final, valid, and subsisting judgment. An authenticated copy of the sister-state judgment should be attached to the petition. See section 14.32:3 above regarding authentication and see form 14-13 in this chapter for a petition.

§ 14.33:2 Burden of Proof

Once the plaintiff introduces a properly authenticated copy of the sister-state judgment, he creates a prima facie case of the validity of the judgment, and the burden shifts to the defendant to disprove its validity. *Mitchim v. Mitchim*, 518 S.W.2d 362, 364 (Tex. 1975); *In the Interest of M.L.W.*, 358 S.W.3d 772, 774 (Tex. App.—Texarkana 2012, no pet.).

§ 14.33:3 Defensive Matters

See section 14.32:4 above for a discussion of defensive matters that can be raised.

§ 14.33:4 Attorney’s Fees

No express statutory authority exists for recovery of attorney’s fees, but if the parties stipulate that the law of the sister state applies to the case and attorney’s fees can be recovered under that law, attorney’s fees are recoverable. See Tibbetts v. Tibbetts, 679 S.W.2d 152, 154 (Tex. App.—Dallas 1984, no writ). See part III. in chapter 1 of this manual for a general discussion of Texas law regarding attorney’s fees. Rules for the determination of the law of other states and foreign countries are set forth in Tex. R. Evid. 202–203. See the discussion of proof of foreign law at section 14.32 above.

§ 14.33:5 Limitation

A common-law suit to enforce a foreign judgment is barred by the same limitations periods as a suit under the Uniform Enforcement of Foreign Judgments Act. See the discussion in section 14.32:5 above.

§ 14.34 Foreign-Country Judgments

Based on a strong need for uniformity between states with respect to foreign-country judgments, and to protect due process rights of Texas citizens and businesses, the Texas legislature revised the Texas Foreign-Country Money Judgment Recognition Act to conform to the updated Uniform Foreign-Country Money Judgments Recognition Act. See Acts 2017, 85th Leg., R.S., ch. 390, § 1 (S.B. 944), eff. June 1, 2017. See also Tex. Civ. Prac. & Rem. Code §§ 36A.001–.011, which may be cited as the Uniform Foreign-Country Money Judgments Recognition Act.


§ 14.34:1 Applicability

The Act applies to a foreign-country judgment to the extent that the judgment (1) grants or denies recovery of a sum of money and (2) under the law of the foreign country in which the judgment is rendered, is final, conclusive, and enforceable. Tex. Civ. Prac. & Rem. Code § 36A.003(a). The Act excludes a judgment for taxes, fine, or other penalty, and excludes a judgment for divorce, support, maintenance, or in connection with other domestic relations. See Tex. Civ. Prac. & Rem. Code § 36A.003(b).

The party seeking recognition has the burden of establishing that the Act applies to the foreign-country judgment. Tex. Civ. Prac. & Rem. Code § 36A.003(c).

§ 14.34:2 Standards for Recognition

A Texas court shall recognize a foreign-country judgment, unless one of the exceptions in section 36A.004(b) or (c) applies. Tex. Civ. Prac. & Rem. Code § 36A.004(a).

A Texas court may not recognize a foreign-country judgment if:
(1) the judgment was rendered under a judicial system that does not provide impartial tribunals or procedures compatible with the requirements of due process of law;

(2) the foreign court did not have personal jurisdiction over the defendant; or

(3) the foreign court did not have jurisdiction over the subject matter.


A Texas court is not required to recognize a foreign-country judgment if—

(1) the defendant in the proceeding in the foreign court did not receive notice of the proceeding in sufficient time to enable the defendant to defend;

(2) the judgment was obtained by fraud that deprived the losing party of an adequate opportunity to present the party’s case;

(3) the judgment or the cause of action on which the judgment is based is repugnant to the public policy of this state or the United States;

(4) the judgment conflicts with another final and conclusive judgment;

(5) the proceeding in the foreign court was contrary to an agreement between the parties under which the dispute in question was to be determined otherwise than by proceedings in the foreign court;

(6) jurisdiction was based only on personal service and the foreign court was a seriously inconvenient forum for the trial of the action;

(7) the judgment was rendered in circumstances that raise substantial doubt about the integrity of the rendering court with respect to the judgment;

(8) the specific proceeding in the foreign court leading to the judgment was not compatible with the requirements of due process of law; or

(9) it is established that the foreign country in which the judgment was rendered does not recognize judgments rendered in this state.


§ 14.34:3 An Action (Lawsuit) is Required for Recognition

If recognition of a foreign-country judgment is sought as an original matter, the issue of recognition may be raised by filing an action seeking recognition of the foreign-country judgment. Tex. Civ. Prac. & Rem. Code § 36A.006(a). If recognition of a foreign-country judgment is sought in a pending action, the issue of recognition may be raised by counterclaim, cross-claim, or affirmative defense. Tex. Civ. Prac. & Rem. Code § 36A.006(b).

§ 14.34:4 Effect of Recognition

If the court in a proceeding under section 36A.006 finds that the foreign-country judgment is entitled to recognition, then, to the extent that the foreign-country judgment grants or denies recovery of a sum of money, the foreign-country judgment is—

(1) conclusive between the parties to the same extent as the judgment of a sister state entitled to full faith and credit in this state would be conclusive; and

(2) enforceable in the same manner and to the same extent as a judgment rendered in this state.
§ 14.34:5 Stay of Texas Proceeding Pending Appeal of Foreign-Country Judgment

If a party establishes that an appeal from a foreign-country judgment is pending or will be taken, the court may stay any proceedings with regard to the foreign-country judgment until:

1. the appeal is concluded;
2. the time for appeal expires; or
3. the appellant has had sufficient time to prosecute the appeal and has failed to do so.

§ 14.34:6 Limitations Period

An action to recognize a foreign-country judgment must be brought within the earlier of the time during which the foreign-country judgment is effective in the foreign country or fifteen years from the date that the judgment became effective in the foreign country. Tex. Civ. Prac. & Rem. Code § 36A.009.

§ 14.34:7 Converting Foreign Currency

The objective of civil money judgments is to place the judgment creditor in a position as close as possible to that in which he would have been if the obligation had been carried out by the judgment debtor or if the injury had not occurred. In enforcing a foreign judgment, the court should assure that neither party receives a windfall or is penalized as a result of the currency conversion. Restatement of Foreign Relations Law of United States § 823 cmt. c (1987). If the foreign currency has depreciated since the injury or breach, judgment should be given at the rate of exchange applicable on the date of the injury or the breach. If the foreign currency has appreciated since the injury or breach, judgment should be given at the rate of exchange applicable on the date of judgment or date of payment. El Universal, Compania Periodistica Nacional, S.A. de C.V. v. Phoenician Imports, Inc., 802 S.W.2d 799, 803–04 (Tex. App.—Corpus Christi 1990, writ denied).

§ 14.35 Federal Court Judgments

§ 14.35:1 Effect of Federal Court Judgment

Every district court judgment, other than one entered in favor of the United States, constitutes a lien on the property located in the state in which the district court judgment was rendered, to the same extent and under the same conditions as a state court judgment in that state, and the lien ceases to be a lien in the same manner and time. If state law requires certain procedures before a lien attaches, those requirements will apply to federal judgments only if the state law authorizes the judgment of a federal court to be conformed to rules and requirements relating to state court judgments. 28 U.S.C. § 1962.

§ 14.35:2 Out-of-State Federal Court Judgments

A final judgment for the recovery of money or property entered in any federal district court, bankruptcy court, appeals court, or the Court of International Trade may be registered in any other district by filing a certified copy of the judgment with the
other court. The judgment then has the same force and effect as a judgment of the district court in which it is registered, and it may be enforced in a like manner. A certified copy of the satisfaction of any judgment in whole or in part may be registered in any district in which the judgment is abstracted and recorded. 28 U.S.C. § 1963.

Federal court judgments can also be domesticated under the Uniform Enforcement of Foreign Judgments Act, Tex. Civ. Prac. & Rem. Code §§ 35.001–.007. See section 14.32 above.

§ 14.35:3 Indexing Texas Federal District Court Abstracts of Judgment

An abstract of a judgment rendered by a federal court in Texas may be recorded and indexed on the certificate of the clerk of the court. Tex. Prop. Code § 52.007. The phrase on the certificate of the clerk of the court apparently refers to the certificate of the clerk of the federal court in which the judgment was rendered, because the prior version of this law provided that such an abstract of judgment “may be recorded and indexed in the same manner and with like force and effect as provided for judgments of the Courts of this State, upon the certificates of the clerks of such United States courts.” Acts 1925, 39th Leg., repealed by Acts 1983, 68th Leg., R.S., ch. 576, § 6 (S.B. 748), eff. Jan. 1, 1984.
Petition for Suit on Sworn Account

Form 14-1

For discussion of the action on a sworn account, see section 14.21 in this chapter. See section 14.2 regarding exercising caution in pleading conditions precedent.

A suit on a sworn account is the simplest method for reducing an appropriate claim to judgment. It should be used for any retail or commercial claim, whether secured or not, if the transaction can be adequately substantiated and if (1) the claim is based on a sale of goods by which title to personal property passed or on the furnishing of personal services, labor, or materials; and (2) a systematic record of the transaction was kept. The account must be supported by an affidavit; see form 14-2. If the substantiation of the transaction will not satisfy the evidentiary standards for a sworn account, another form petition in this chapter, such as the petition for suit on a written contract at form 14-3, should be used.

The attorney may wish to consider filing a petition containing multiple causes of action, including breach of contract (see forms 14-3 and 14-4) and quantum meruit.

Caveat: In computing the balance due the plaintiff, do not include any interest that may have been posted to the account.

Texas Civil Practice and Remedies Code section 30.014(a) requires certain parties to include partial identification information in initial pleadings in civil actions filed in district, county, or statutory county courts. A court may order that an initial pleading be amended to contain this information if the court determines that the pleading does not contain the information. Tex. Civ. Prac. & Rem. Code § 30.014(b).

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

Petition for Suit on Sworn Account

1. Discovery Level. The damages sought are within the jurisdictional limits of this Court. Tex. R. Civ. P. 47(b). This lawsuit seeks only monetary relief aggregating $100,000 or less. Tex. R. Civ. P. 47(c)(1). Discovery is intended to be conducted under Level 1. Tex. R. Civ. P. 190.2.

   If lawsuit seeks nonmonetary relief and/or damages in excess of $100,000, see Tex. R. Civ. P. 47 and 190 to properly plead the claims for relief and discovery levels.

2. Parties. Plaintiff is [name of plaintiff]. [The last three numbers of Plaintiff’s driver’s license number are [numbers]./Plaintiff has not been issued a driver’s license.] [The last three numbers of Plaintiff’s Social Security number are [numbers]./Plaintiff has not been
issued a Social Security number.] Plaintiff’s address is [address, city, state]. Defendant is [name of defendant], who can be served with citation at [address, city, state].

See section 14.10 and forms 14-15 through 14-21 for other forms of party designation.

3. **Facts.** In the usual course of business, Plaintiff sold to Defendant one or more items of goods, wares, merchandise, or services, as shown on the attached statement of account. Defendant accepted each item and became bound to pay Plaintiff the designated price, which is a reasonable, usual, and customary price for such an item. The statement of account is attached as Exhibit [exhibit number/letter] and incorporated by reference. This account represents a transaction or series of transactions for which a systematic record has been kept.

Include the following if foreclosure of a security interest is sought.

To secure the debt created by the note, Defendant executed a security agreement granting Plaintiff a security interest in [describe collateral explicitly]. The security agreement is attached as Exhibit [exhibit number/letter] and incorporated by reference.

Plead additional facts if required for venue; see part II. of chapter 15.

4. **Debt.** Defendant has defaulted by failing to make payments on the account. The principal balance due Plaintiff on the account is $[amount] after all just and lawful offsets, payments, and credits have been allowed, as shown on Exhibit [exhibit number/letter]. Plaintiff has demanded that Defendant pay this amount, but Defendant has not done so.

5. **Conditions Precedent.** All conditions precedent have been performed or have occurred.

6. **Attorney’s Fees.** Defendant’s default has made it necessary for Plaintiff to employ the undersigned attorney to file suit.
This claim was timely presented to Defendant and remains unpaid.

Defendant has agreed to pay reasonable attorney’s fees for collection in case of default, as shown on Exhibit [exhibit number/letter], attached and incorporated by reference.

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 judgment for prejudgment and postjudgment interest at the highest legal or contractual rate allowed by law;

d. Plaintiff be granted judgment for at least $[amount] as reasonable attorney’s fees, with additional contingent amounts in the event of appellate proceedings;

e. Plaintiff be granted judgment for all costs of court; [;/; and]

Include the following if foreclosure is sought.

f. Plaintiff be granted foreclosure of Plaintiff’s security interest in the collateral; and
Continue with the following.

Plaintiff be granted all further relief to which Plaintiff may be entitled.

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

Attach exhibit(s). Prepare and attach a verification for suit on a sworn account (form 14-2).
Verification for Suit on Sworn Account

BEFORE ME, the undersigned authority, on this day personally appeared [name of affiant], who swore on oath that the following facts are true:

“1. My full name is [name of affiant].

“2. I am employed by [name of plaintiff], and [I have/a person under my supervision has] care, custody, and control of all records concerning the account of [name of defendant], Defendant.

“3. I hereby aver that the claim attached as Exhibit [exhibit number/letter] to Plaintiff’s original petition is within the personal knowledge of the affiant, is just and true, and is due by Defendant to Plaintiff and that all just and lawful offsets, payments, and credits to this account have been allowed.

“4. These records show that a total principal balance of $[amount], exclusive of interest, is due and payable by [name of defendant], Defendant, to [name of plaintiff], Plaintiff, and demand for payment was made more than thirty days ago.”

[Name of affiant]
Affiant

SIGNED under oath before me on ______________________________.
Notary Public, State of Texas
Form 14-3

This petition may be used for a suit on a debt based on a written contract, whether secured or not. Other forms in this chapter are better suited to other kinds of contracts; for examples, see forms 14-1 (sworn account), 14-7 (note), and 14-8 (lease of personal property). Because this form cannot fit every possible agreement giving rise to a debt, the attorney should take care to modify it to fit the facts. The action on a written contract is discussed at section 14.2. See section 14.2 regarding exercising caution in pleading conditions precedent.

Caveat: In computing the balance due the plaintiff, do not include any interest that may have been posted to the account.

Texas Civil Practice and Remedies Code section 30.014(a) requires certain parties to include partial identification information in initial pleadings in civil actions filed in district, county, or statutory county courts. A court may order that an initial pleading be amended to contain this information if the court determines that the pleading does not contain the information. Tex. Civ. Prac. & Rem. Code § 30.014(b).

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

Petition for Suit on Written Contract

1. **Discovery Level.** The damages sought are within the jurisdictional limits of this Court. Tex. R. Civ. P. 47(b). This lawsuit seeks only monetary relief aggregating $100,000 or less. Tex. R. Civ. P. 47(c)(1). Discovery is intended to be conducted under Level 1. Tex. R. Civ. P. 190.2.

If lawsuit seeks nonmonetary relief and/or damages in excess of $100,000, see Tex. R. Civ. P. 47 and 190 to properly plead the claims for relief and discovery levels.

2. **Parties.** Plaintiff is [name of plaintiff]. [The last three numbers of Plaintiff’s driver’s license number are [numbers]./Plaintiff has not been issued a driver’s license.] [The last three numbers of Plaintiff’s Social Security number are [numbers]./Plaintiff has not been issued a Social Security number.] Plaintiff’s address is [address, city, state]. Defendant is [name of defendant], who can be served with citation at [address, city, state].

See section 14.10 and forms 14-15 through 14-21 for other forms of party designation.
3. **Facts.** Attached to this petition as Exhibit [exhibit number/letter] is a copy of an agreement executed by Plaintiff and Defendant. The agreement is incorporated in this petition by reference. Plaintiff has fully complied with the agreement.

   Include the following if foreclosure of a security interest is sought.

   To secure the debt created by the agreement, Defendant executed a security agreement granting Plaintiff a security interest in [describe collateral explicitly]. The security agreement is attached as Exhibit [exhibit number/letter] and incorporated by reference.

   Plead additional facts if required for venue; see part II. of chapter 15.

4. **Default.** Defendant defaulted in paying the debt. [Include if applicable: Plaintiff has accelerated the debt according to the terms of the agreement.] There is currently due the sum of $[amount], plus accrued interest as provided for in the agreement.

5. **Conditions Precedent.** All conditions precedent have been performed or have occurred.

6. **Attorney’s Fees.** Defendant’s default has made it necessary for Plaintiff to employ the undersigned attorney to file suit.

   Select one of the following. Select the second option if the claim for attorney’s fees is based on an agreement authorizing recovery.

   This claim was timely presented to Defendant and remains unpaid.

   Or

   Defendant has agreed to pay reasonable attorney’s fees for collection in case of default, as shown on Exhibit [exhibit number/letter].

   Continue with the following.
Reasonable fees for the attorney’s services rendered and to be rendered through trial and appeal are at least $[amount].

7. **Prayer.** Plaintiff prays that—

   a. Defendant be cited to appear and answer;

   b. Plaintiff be granted judgment for $[amount] as the principal amount due on the agreement;

   c. Plaintiff be granted judgment for accrued and unpaid interest on the debt before maturity;

   d. Plaintiff be granted judgment for prejudgment and postjudgment interest on the matured, unpaid debt at the highest legal or contractual rate allowed by law;

   e. Plaintiff be granted judgment for at least $[amount] as reasonable attorney’s fees, with additional contingent amounts in the event of appellate proceedings;

   f. Plaintiff be granted judgment for all costs of court [;/; and]

   Include the following if foreclosure is sought.

   g. Plaintiff be granted foreclosure of Plaintiff’s security interest in the collateral; and

   Continue with the following.

   [g./h.] Plaintiff be granted all further relief to which Plaintiff may be entitled.
Form 14-3

Petition for Suit on Written Contract

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

Attach exhibit(s).
Form 14-4

This petition contains fundamentals for a suit on a debt that is not supported by a signed agreement. Because oral contracts can vary greatly in the scope of their terms, special drafting will often be required for the petition, and the attorney should be careful to modify this form to fit the facts. For discussion of suit on an oral debt, see section 14.23 in this chapter. See section 14.2 regarding exercising caution in pleading conditions precedent.

Caveat: Do not include unearned interest.

Texas Civil Practice and Remedies Code section 30.014(a) requires certain parties to include partial identification information in initial pleadings in civil actions filed in district, county, or statutory county courts. A court may order that an initial pleading be amended to contain this information if the court determines that the pleading does not contain the information. Tex. Civ. Prac. & Rem. Code § 30.014(b).

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

Petition for Suit on Oral Debt

1. Discovery Level. The damages sought are within the jurisdictional limits of this Court. Tex. R. Civ. P. 47(b). This lawsuit seeks only monetary relief aggregating $100,000 or less. Tex. R. Civ. P. 47(c)(1). Discovery is intended to be conducted under Level 1. Tex. R. Civ. P. 190.2.

If lawsuit seeks nonmonetary relief and/or damages in excess of $100,000, see Tex. R. Civ. P. 47 and 190 to properly plead the claims for relief and discovery levels.

2. Parties. Plaintiff is [name of plaintiff]. [The last three numbers of Plaintiff’s driver’s license number are [numbers]./Plaintiff has not been issued a driver’s license.] [The last three numbers of Plaintiff’s Social Security number are [numbers]./Plaintiff has not been issued a Social Security number.] Plaintiff’s address is [address, city, state]. Defendant is [name of defendant], who can be served with citation at [address, city, state].

See section 14.10 and forms 14-15 through 14-21 for other forms of party designation.
3. **Facts.** [Describe agreement, e.g., Plaintiff lent Defendant $1,000 on January 1, 2009. Defendant agreed to repay Plaintiff the entire amount on December 31, 2010, and Plaintiff and Defendant agreed that the debt would bear interest at the rate of 10 percent per year until paid, the interest to be due and payable at maturity of the debt.]

Plead additional facts if required for venue; see part II. of chapter 15.

4. **Default.** Defendant defaulted in paying the debt. There is currently due the sum of $[amount], plus accrued interest as provided for in the agreement. Plaintiff has demanded that Defendant pay this debt, but Defendant has not done so.

5. **Conditions Precedent.** All conditions precedent have been performed or have occurred.

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 amount due on the debt;

   c. Plaintiff be granted judgment for prejudgment and postjudgment interest at the highest legal or contractual rate allowed by law;

   d. Plaintiff be granted judgment for at least $[amount] as reasonable attorney’s fees, with additional contingent amounts in the event of appellate proceedings;
e. Plaintiff be granted judgment for all costs of court; and

f. Plaintiff be granted all further relief to which Plaintiff may be entitled.

[Name]
Attorney for Plaintiff
State Bar No.:  
[E-mail address]
[Address]
[Telephone]
[Telecopier]
Form 14-5

This petition may be used for a suit on a revolving credit account. The sworn account petition at form 14-1 in this chapter will usually also be appropriate for an action on a commercial or consumer open revolving credit account, whether secured or not. Form 14-6 should be used for a suit on a retail installment contract—that is, for a single purchase, not on a revolving account, that includes a time-price differential in each installment. Preparing a statement of account, showing charges, credits, and accrued interest, is not required, but it is often helpful in demonstrating the claim and is preferred by many courts.

A general request for foreclosure, in the absence of a limiting request for an order of sale, includes a request for possession. *Unicut, Inc. v. Texas Commerce Bank-Chemical*, 704 S.W.2d 442, 445–46 (Tex. App.—Houston [14th Dist.] 1986, writ ref’d n.r.e.). See section 14.2 regarding exercising caution in pleading conditions precedent.

*Caveat:* Do not include any interest that may have been posted to the account.

Texas Civil Practice and Remedies Code section 30.014(a) requires certain parties to include partial identification information in initial pleadings in civil actions filed in district, county, or statutory county courts. A court may order that an initial pleading be amended to contain this information if the court determines that the pleading does not contain the information. *Tex. Civ. Prac. & Rem. Code § 30.014(b).*

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

Petition for Suit on Revolving Credit Account

1. *Discovery Level.* The damages sought are within the jurisdictional limits of this Court. *Tex. R. Civ. P. 47(b).* This lawsuit seeks only monetary relief aggregating $100,000 or less. *Tex. R. Civ. P. 47(c)(1).* Discovery is intended to be conducted under Level 1. *Tex. R. Civ. P. 190.2.*

   If lawsuit seeks nonmonetary relief and/or damages in excess of $100,000, see *Tex. R. Civ. P. 47* and 190 to properly plead the claims for relief and discovery levels.

2. *Parties.* Plaintiff is [name of plaintiff]. [The last three numbers of Plaintiff’s driver’s license number are [numbers]./Plaintiff has not been issued a driver’s license.] [The last three numbers of Plaintiff’s Social Security number are [numbers]./Plaintiff has not been
issued a Social Security number.] Plaintiff’s address is [address, city, state]. Defendant is [name of defendant], who can be served with citation at [address, city, state].

See section 14.10 and forms 14-15 through 14-21 for other forms of party designation.

3. **Facts.** Attached to this petition as Exhibit [exhibit number/letter] is a copy of a revolving credit agreement between Plaintiff and Defendant. The agreement is incorporated in this petition by reference. Plaintiff sold and delivered to Defendant one or more items of goods, wares, merchandise, or services on credit under the terms of the agreement. Defendant accepted each item and became bound to pay Plaintiff the designated price, which is a reasonable, usual, and customary price for such an item.

Include the following if foreclosure of a security interest is sought.

To secure the debt created by the note, Defendant executed a security agreement granting Plaintiff a security interest in [describe collateral explicitly]. The security agreement is attached as Exhibit [exhibit number/letter] and incorporated by reference.

Plead additional facts if required for venue; see part II. of chapter 15.

4. **Default.** Defendant defaulted in making required payments on the account. Defendant’s default constitutes an anticipatory breach of the agreement. [Include if applicable: Plaintiff has accelerated the debt according to the terms of the agreement.] The principal balance due Plaintiff on the account is $[amount], plus accrued interest as provided for in the agreement, after all just and lawful offsets, credits, and payments have been allowed. [Include if applicable: This amount is shown on the statement of account attached as Exhibit [exhibit number/letter] and incorporated by reference.]

5. **Conditions Precedent.** All conditions precedent have been performed or have occurred.
6. **Attorney’s Fees.** Defendant’s default has made it necessary for Plaintiff to employ the undersigned attorney to file suit.

> Select one of the following. Select the second option if the claim for attorney’s fees is based on an agreement authorizing recovery.

This claim was timely presented to Defendant and remains unpaid.

> Or

Defendant has agreed to pay reasonable attorney’s fees for collection in case of default, as shown on Exhibit [exhibit number/letter].

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 judgment for accrued and unpaid interest on the debt before maturity;

d. Plaintiff be granted judgment for prejudgment and postjudgment interest on the matured, unpaid debt at the highest legal or contractual rate allowed by law;
e. Plaintiff be granted judgment for at least $[amount] as reasonable attorney’s fees, with additional contingent amounts in the event of appellate proceedings;

f. Plaintiff be granted judgment for all costs of court [; and]

Include the following if foreclosure is sought.

g. Plaintiff be granted foreclosure of Plaintiff’s security interest in the collateral;

and

Continue with the following.

[g./h.] Plaintiff be granted all further relief to which Plaintiff may be entitled.

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

Attach exhibit(s).
This petition may be used for a suit on a single retail sales contract, whether secured or not, that includes a time-price differential and that is payable in regular, equal installments. If suit is on a revolving charge account, in which interest is periodically charged on the unpaid balance, form 14-5 in this chapter should be used.

“Applicable charges” should be included in or deleted from the list in paragraph 4. below as appropriate according to the terms of the contract. If maturity of the contract has been accelerated, the attorney should be careful not to include unearned time-price differential—that is, that portion included in installments that had not come due when acceleration occurred. See section 2.86. Preparing a statement of account, showing charges, credits, and earned time-price differential, is not required, but it is often helpful in demonstrating the claim and is preferred by many courts. See section 14.2 regarding exercising caution in pleading conditions precedent.

Texas Civil Practice and Remedies Code section 30.014(a) requires certain parties to include partial identification information in initial pleadings in civil actions filed in district, county, or statutory county courts. A court may order that an initial pleading be amended to contain this information if the court determines that the pleading does not contain the information. Tex. Civ. Prac. & Rem. Code § 30.014(b).

Petition for Suit on Retail Installment Contract

1. **Discovery Level.** The damages sought are within the jurisdictional limits of this Court. Tex. R. Civ. P. 47(b). This lawsuit seeks only monetary relief aggregating $100,000 or less. Tex. R. Civ. P. 47(c)(1). Discovery is intended to be conducted under Level 1. Tex. R. Civ. P. 190.2.

   If lawsuit seeks nonmonetary relief and/or damages in excess of $100,000, see Tex. R. Civ. P. 47 and 190 to properly plead the claims for relief and discovery levels.

2. **Parties.** Plaintiff is [name of plaintiff]. [The last three numbers of Plaintiff’s driver’s license number are [numbers]./Plaintiff has not been issued a driver’s license.] [The last three numbers of Plaintiff’s Social Security number are [numbers]./Plaintiff has not been issued a Social Security number.] Plaintiff’s address is [address, city, state]. Defendant is [name of defendant], who can be served with citation at [address, city, state].
3. **Facts.** Attached to this petition as Exhibit [exhibit number/letter] is a copy of a retail installment contract between Plaintiff and Defendant. The agreement is incorporated in this petition by reference. Plaintiff sold and delivered to Defendant one or more items of goods, wares, merchandise, or services on credit under the terms of the contract. Defendant accepted each item and became bound to pay Plaintiff the designated price, which is a reasonable, usual, and customary price for such an item.

4. **Default.** Defendant defaulted in making required payments on the account. [Include if applicable: Plaintiff has accelerated the debt according to the terms of the contract.] The principal balance due Plaintiff on the account is $[amount], plus applicable charges such as official fees, insurance charges, delinquency charges, and earned time-price differential, after all just and lawful offsets, credits, and payments have been allowed. [Include if applicable: This amount is shown on the statement of account attached as Exhibit [exhibit number/letter] and incorporated by reference.]

5. **Conditions Precedent.** All conditions precedent have been performed or have occurred.

6. **Attorney’s Fees.** Defendant’s default has made it necessary for Plaintiff to employ the undersigned attorney to file suit.
This claim was timely presented to Defendant and remains unpaid.

Defendant has agreed to pay reasonable attorney’s fees for collection in case of default, as shown on Exhibit [exhibit number/letter].

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 judgment for earned and unpaid time-price differential on the debt before maturity;

   d. Plaintiff be granted judgment for prejudgment and postjudgment interest on the matured, unpaid debt at the highest legal or contractual rate allowed by law;

   e. Plaintiff be granted judgment for at least $[amount] as reasonable attorney’s fees, with additional contingent amounts in the event of appellate proceedings;

   f. Plaintiff be granted judgment for all costs of court [; and]
g. Plaintiff be granted foreclosure of Plaintiff’s security interest in the collateral;

and

[g./h.] Plaintiff be granted all further relief to which Plaintiff may be entitled.
Form 14-7

This petition should be used if the claim is based on a promissory note, whether secured or not. If the creditor has repossessed the collateral through self-help and suit is for a deficiency after application of the proceeds, the petition at form 14-9 in this chapter should be used. If payment of the note has been guaranteed, the attorney should consider using the petition at form 14-11. The action on a note is discussed at section 14.25, and foreclosure of a security interest is discussed at sections 14.27 and 14.28. See also section 14.2 regarding exercising caution in pleading conditions precedent.

Texas Civil Practice and Remedies Code section 30.014(a) requires certain parties to include partial identification information in initial pleadings in civil actions filed in district, county, or statutory county courts. A court may order that an initial pleading be amended to contain this information if the court determines that the pleading does not contain the information. Tex. Civ. Prac. & Rem. Code § 30.014(b).

Petition for Suit on Note

1. Discovery Level. The damages sought are within the jurisdictional limits of this Court. Tex. R. Civ. P. 47(b). This lawsuit seeks only monetary relief aggregating $100,000 or less. Tex. R. Civ. P. 47(c)(1). Discovery is intended to be conducted under Level 1. Tex. R. Civ. P. 190.2.

If lawsuit seeks nonmonetary relief and/or damages in excess of $100,000, see Tex. R. Civ. P. 47 and 190 to properly plead the claims for relief and discovery levels.

2. Parties. Plaintiff is [name of plaintiff]. [The last three numbers of Plaintiff’s driver’s license number are [numbers]./Plaintiff has not been issued a driver’s license.] [The last three numbers of Plaintiff’s Social Security number are [numbers]./Plaintiff has not been issued a Social Security number.] Plaintiff’s address is [address, city, state]. Defendant is [name of defendant], who can be served with citation at [address, city, state].

See section 14.10 and forms 14-15 through 14-21 for other forms of party designation.
3. **Note [and Security Agreement].** Attached to this petition as Exhibit [exhibit number/letter] is a copy of a note executed by Defendant. Plaintiff is the owner and holder of this note and is entitled to receive all money due under its terms. [Include if applicable: Plaintiff is a holder in due course.] The note is incorporated in this petition by reference.

   Include the following if foreclosure of a security interest is sought.

   To secure the debt created by the note, Defendant executed a security agreement granting Plaintiff a security interest in [describe collateral explicitly]. The security agreement is attached as Exhibit [exhibit number/letter] and incorporated by reference.

   Plead additional facts if required for venue; see part II. of chapter 15.

4. **Default.** Defendant defaulted in paying the note. [Include if applicable: Plaintiff has accelerated the debt according to the terms of the note.] There is currently due the sum of $[amount], plus accrued interest as provided for in the note.

5. **Conditions Precedent.** All conditions precedent have been performed or have occurred.

6. **Attorney’s Fees.** Defendant’s default has made it necessary for Plaintiff to employ the undersigned attorney to file suit.

   Select one of the following. Select the second option if the claim for attorney’s fees is based on an agreement authorizing recovery.

   This claim was timely presented to Defendant and remains unpaid.

   Or

   Defendant has agreed to pay reasonable attorney’s fees for collection in case of default, as shown on Exhibit [exhibit number/letter].
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 note;
   
   c. Plaintiff be granted judgment for accrued and unpaid interest due on the note;
   
   d. Plaintiff be granted judgment for postjudgment interest at the highest legal or contractual rate allowed by law;
   
   e. Plaintiff be granted judgment for at least $[amount] as reasonable attorney’s fees, with additional contingent amounts in the event of appellate proceedings;
   
   f. Plaintiff be granted judgment for all costs of court [;/; and]

   Include the following if foreclosure is sought.

   g. Plaintiff be granted foreclosure of Plaintiff’s security interest in the collateral; and

   Continue with the following.

   [g./h.] Plaintiff be granted all further relief to which Plaintiff may be entitled.
[Name]
Attorney for Plaintiff
State Bar No.: 
[E-mail address]
[Address]
[Telephone]
[Telecopier]

Attach exhibit(s).
Form 14-8

This form may be used for a writ on a true lease but not on a lease intended as a security agreement. This form contains alternative language for use if the debtor still has possession of the property. It also assumes that the default is based on the lessee’s nonpayment of rent. If the basis for alleging default is a contractual act of default other than failure to make a payment, the petition should be altered accordingly. See section 14.26 in this chapter.

Although this petition states that the plaintiff is entitled to “immediate” possession of the leased property, it does not ask for any prejudgment action such as a writ of sequestration. See sections 8.16 through 8.24 regarding sequestration.

See section 14.2 regarding exercising caution in pleading conditions precedent.

Texas Civil Practice and Remedies Code section 30.014(a) requires certain parties to include partial identification information in initial pleadings in civil actions filed in district, county, or statutory county courts. A court may order that an initial pleading be amended to contain this information if the court determines that the pleading does not contain the information. Tex. Civ. Prac. & Rem. Code § 30.014(b).

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

Petition for Suit on Lease of Personal Property

1. **Discovery Level.** The damages sought are within the jurisdictional limits of this Court. Tex. R. Civ. P. 47(b). This lawsuit seeks only monetary relief aggregating $100,000 or less. Tex. R. Civ. P. 47(c)(1). Discovery is intended to be conducted under Level 1. Tex. R. Civ. P. 190.2.

   If lawsuit seeks nonmonetary relief and/or damages in excess of $100,000, see Tex. R. Civ. P. 47 and 190 to properly plead the claims for relief and discovery levels.

2. **Parties.** Plaintiff is [name of plaintiff]. [The last three numbers of Plaintiff’s driver’s license number are [numbers]./Plaintiff has not been issued a driver’s license.] [The last three numbers of Plaintiff’s Social Security number are [numbers]./Plaintiff has not been issued a Social Security number.] Plaintiff’s address is [address, city, state]. Defendant is [name of defendant], who can be served with citation at [address, city, state].
3.  **Facts.** Attached to this petition as Exhibit [exhibit number/letter] is a copy of a personal property lease executed by Plaintiff and Defendant. The lease is incorporated in this petition by reference. Under the terms of the lease, Defendant was to have possession of the leased property and was to make periodic payments to Plaintiff for use of the property. Plaintiff delivered the property to Defendant and has performed all obligations under the lease.

4.  **Default.** Defendant defaulted by failing to make required payments under the lease. This default constitutes an anticipatory repudiation of the lease. [Include if applicable: Plaintiff has accelerated the debt according to the terms of the lease.] There is currently due under the lease the sum of $[amount] [include if applicable: , plus applicable charges such as taxes, official fees, and delinquency charges as provided for in the lease].

5.  **Conditions Precedent.** All conditions precedent have been performed or have occurred.

6.  **Plaintiff’s Right to Possession.** The lease provides that the leased property is and remains Plaintiff’s property and that Defendant has not acquired any right, title, or interest in it. Because of Defendant’s default, Plaintiff is entitled to immediate possession of the leased property. Alternatively, Plaintiff is entitled to recover the value of the leased property.

7.  **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.

Defendant has agreed to pay reasonable attorney’s fees for collection in case of default, as shown on Exhibit [exhibit number/letter], attached and incorporated by reference.

Reasonable fees for the attorney’s services rendered and to be rendered through trial and appeal are at least $[amount].

8. **Prayer.** Plaintiff prays that—

   a. Defendant be cited to appear and answer;

   b. Plaintiff be granted judgment for $[amount] [include if applicable: , plus applicable charges such as taxes, official fees, and delinquency charges as provided for in the lease];

   c. Plaintiff be granted judgment for prejudgment and postjudgment interest on the matured, unpaid debt at the highest legal or contractual rate allowed by law;

   d. Plaintiff be granted judgment for at least $[amount] as reasonable attorney’s fees, with additional contingent amounts in the event of appellate proceedings;

   e. Plaintiff be granted judgment for all costs of court [/; and]
f. Plaintiff be granted judgment for possession of the leased property or, in the alternative, for its value; and

Include the following if judicial repossession of the property is sought.

[f./g.] Plaintiff be granted all further relief to which Plaintiff may be entitled.

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

Attach exhibit(s).
Form 14-9

This petition should be used only if the secured creditor has repossessed the collateral by self-help, has sold it and applied the proceeds to the debt, and wants a judgment for the deficiency under Tex. Bus. & Com. Code §§ 9.608, 9.615. This procedure is not available in some consumer transactions or if the security agreement prohibits it. If the creditor has not repossessed the collateral and suit is instead for judgment on the total debt and for foreclosure, another petition in this chapter should be used, such as the petition for suit on a note at form 14-7. The action for a deficiency judgment is discussed at section 14.29, and commentary and other forms for self-help repossession are found in chapter 5. See section 14.2 regarding exercising caution in pleading conditions precedent.

Texas Civil Practice and Remedies Code section 30.014(a) requires certain parties to include partial identification information in initial pleadings in civil actions filed in district, county, or statutory county courts. A court may order that an initial pleading be amended to contain this information if the court determines that the pleading does not contain the information. Tex. Civ. Prac. & Rem. Code § 30.014(b).

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

Petition for Deficiency Judgment

1. Discovery Level. The damages sought are within the jurisdictional limits of this Court. Tex. R. Civ. P. 47(b). This lawsuit seeks only monetary relief aggregating $100,000 or less. Tex. R. Civ. P. 47(c)(1). Discovery is intended to be conducted under Level 1. Tex. R. Civ. P. 190.2.

If lawsuit seeks nonmonetary relief and/or damages in excess of $100,000, see Tex. R. Civ. P. 47 and 190 to properly plead the claims for relief and discovery levels.

2. Parties. Plaintiff is [name of plaintiff]. [The last three numbers of Plaintiff’s driver’s license number are [numbers]./Plaintiff has not been issued a driver’s license.] [The last three numbers of Plaintiff’s Social Security number are [numbers]./Plaintiff has not been issued a Social Security number.] Plaintiff’s address is [address, city, state]. Defendant is [name of defendant], who can be served with citation at [address, city, state].

See section 14.10 and forms 14-15 through 14-21 for other forms of party designation.
3. **Note and Security Agreement.** Attached to this petition as Exhibit [exhibit number/letter] is a copy of a note executed by Defendant. Plaintiff is the owner and holder of this note and is entitled to receive all money due under its terms. [Include if applicable: Plaintiff is a holder in due course.] The note is incorporated in this petition by reference. To secure the debt created by the note, Defendant executed a security agreement granting Plaintiff a security interest in [describe collateral explicitly]. The security agreement is attached as Exhibit [exhibit number/letter] and incorporated by reference.

4. **Default.** Defendant defaulted in paying the note. [Include if applicable: Plaintiff accelerated the debt according to the terms of the note or security interest.] Plaintiff foreclosed its security interest in the collateral, which was sold in accordance with Texas law. There is currently due the sum of $[amount], plus accrued interest as provided for in the note.

5. **Conditions Precedent.** All conditions precedent have been performed or have occurred.

6. **Attorney’s Fees.** Defendant’s default has made it necessary for Plaintiff to employ the undersigned attorney to file suit.

   This claim was timely presented to Defendant and remains unpaid.

   Select one of the following. Select the second option if the claim for attorney’s fees is based on an agreement authorizing recovery.

   - Or

   Defendant has agreed to pay reasonable attorney’s fees for collection in case of default, as shown on Exhibit [exhibit number/letter].
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 net principal amount due on the note;

   c. Plaintiff be granted judgment for accrued and unpaid interest due on the note;

   d. Plaintiff be granted judgment for postjudgment interest at the highest legal or contractual rate allowed by law;

   e. Plaintiff be granted judgment for at least $[amount] as reasonable attorney’s fees, with additional contingent amounts in the event of appellate proceedings;

   f. Plaintiff be granted judgment for all costs of court; and

   g. Plaintiff be granted all further relief to which Plaintiff may be entitled.

[Name]
Attorney for Plaintiff
State Bar No.:
[E-mail address]
[Address]
[Telephone]
[Telexcoper]
Form 14-10

This petition assumes that the debt has already been reduced to judgment and the debtor conveyed his property to the transferee, intending to place it beyond the judgment creditor’s reach. The petition should be modified as appropriate to reflect the facts of the case.

Fraudulent transfers are discussed at section 14.30 in this chapter. See also Tex. Bus. & Com. Code §§ 24.001–.013.

Texas Civil Practice and Remedies Code section 30.014(a) requires certain parties to include partial identification information in initial pleadings in civil actions filed in district, county, or statutory county courts. A court may order that an initial pleading be amended to contain this information if the court determines that the pleading does not contain the information. Tex. Civ. Prac. & Rem. Code § 30.014(b).

Petition for Fraudulent Transfer Action

1.  Discovery Level.  The damages sought are within the jurisdictional limits of this Court. Tex. R. Civ. P. 47(b). This lawsuit seeks only monetary relief aggregating $100,000 or less. Tex. R. Civ. P. 47(c)(1). Discovery is intended to be conducted under Level 1. Tex. R. Civ. P. 190.2.

   If lawsuit seeks nonmonetary relief and/or damages in excess of $100,000, see Tex. R. Civ. P. 47 and 190 to properly plead the claims for relief and discovery levels.

2.  Parties.  Plaintiff is [name of plaintiff]. [The last three numbers of Plaintiff’s driver’s license number are [numbers]./Plaintiff has not been issued a driver’s license.] [The last three numbers of Plaintiff’s Social Security number are [numbers]./Plaintiff has not been issued a Social Security number.] Plaintiff’s address is [address, city, state]. Defendant Judgment Debtor is [name of defendant judgment debtor], who can be served with citation at [address, city, state]. Defendant Transferee is [name of defendant transferee], who can be served with citation at [address, city, state].
3. **Underlying Debt.** On [date], judgment was rendered in Cause No. [number], styled “[style of case]” in [designation and location of court] in favor of Plaintiff and against Defendant Judgment Debtor, in the amount of $[amount]. The judgment remains unpaid. Plaintiff perfected its lien against Defendant Judgment Debtor’s nonexempt real property located in [county] County, Texas, by filing an abstract of judgment. Copies of the judgment and the recorded abstract of judgment are attached as Exhibits [exhibit number/letter] and [exhibit number/letter] respectively and incorporated by reference.

4. **Transfer.** On [date], Defendant Judgment Debtor executed and delivered a deed conveying to Defendant Transferee, [describe relationship to defendant judgment debtor, e.g., his father], his interest in certain real property described as follows: [describe property]. A copy of the recorded deed is attached as Exhibit [exhibit number/letter] and incorporated by reference. On the date of the transfer, this property had a fair market value of $[amount].

5. **Nature of Fraudulent Transfer.** The transfer referred to in paragraph 4. was a fraud against the rights of Defendant Judgment Debtor’s creditors, because

The following options are examples only.

the transfer was made with the intent to hinder, delay, or defraud Plaintiff and Defendant Judgment Debtor’s other creditors.

And/Or

the transfer was made without Defendant Judgment Debtor’s receiving reasonably equivalent value in exchange for the property, and Defendant Judgment Debtor was insolvent when the transfer was made.

And/Or
the transfer was made to an insider for an antecedent debt, Defendant Judgment Debtor was insolvent at the time, and Defendant Transferee had reasonable cause to believe that Defendant Judgment Debtor was insolvent.

Describe particulars of the transaction, e.g., Although Defendant Judgment Debtor transferred the property in question to Defendant Transferee in June 2010, Defendant Judgment Debtor continues to receive rent from tenants.]

6. Attorney’s Fees. Plaintiff found it necessary to employ the undersigned attorney to file suit. A reasonable fee for the attorney’s services that have and will be rendered is no less than $[amount] in accordance with section 24.013 of the Texas Business and Commerce Code. Plaintiff is also entitled to recover attorney’s fees through appeal.

7. Prayer. Plaintiff prays that—

   a. Defendant Judgment Debtor and Defendant Transferee be cited to appear and answer;

   b. Plaintiff be granted judgment against Defendant Transferee for $[amount];

   c. the Court enter judgment that the transfer of the above-described property from Defendant Judgment Debtor to Defendant Transferee was void with respect to Plaintiff;

   d. the Court enter its decree setting aside and canceling the deed conveying the above-described property as fraudulent;

   e. the Court award prejudgment and postjudgment interest as allowed by law;
f. Plaintiff be granted judgment for at least $[amount] as punitive damages;

g. Plaintiff be granted judgment for $[amount] for attorney’s fees through appeal;

h. Plaintiff be granted judgment for all costs of court [:/; and]

Include the following if foreclosure is sought.

i. Plaintiff be granted foreclosure of Plaintiff’s security interest in the collateral;

and

Continue with the following.

[i./j.] Plaintiff be granted all further relief to which Plaintiff may be entitled.

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

Attach exhibit(s).
Form 14-11

This petition may be used for a suit against either an absolute or an unconditional guarantor. It assumes that the guarantor is guaranteeing payment of a promissory note. If another form of debt is the subject of the guaranty, the petition should be modified accordingly.

The attorney should review the language of the guaranty agreement to ascertain that the guarantor has made the guaranties set out in this form petition. The language may be altered to quote or paraphrase the specific language of the guaranty or may be omitted entirely, because the guaranty agreement is incorporated by reference in the petition.

Guaranties are discussed at section 14.31 in this chapter. See section 14.2 regarding exercising caution in pleading conditions precedent.

Texas Civil Practice and Remedies Code section 30.014(a) requires certain parties to include partial identification information in initial pleadings in civil actions filed in district, county, or statutory county courts. A court may order that an initial pleading be amended to contain this information if the court determines that the pleading does not contain the information. Tex. Civ. Prac. & Rem. Code § 30.014(b).

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

Petition for Suit on Guaranty

1. Discovery Level. The damages sought are within the jurisdictional limits of this Court. Tex. R. Civ. P. 47(b). This lawsuit seeks only monetary relief aggregating $100,000 or less. Tex. R. Civ. P. 47(c)(1). Discovery is intended to be conducted under Level 1. Tex. R. Civ. P. 190.2.

   If lawsuit seeks nonmonetary relief and/or damages in excess of $100,000, see Tex. R. Civ. P. 47 and 190 to properly plead the claims for relief and discovery levels.

2. Parties. Plaintiff is [name of plaintiff]. [The last three numbers of Plaintiff’s driver’s license number are [numbers]./Plaintiff has not been issued a driver’s license.] [The last three numbers of Plaintiff’s Social Security number are [numbers]./Plaintiff has not been issued a Social Security number.]
issued a Social Security number.] Plaintiff’s address is [address, city, state]. Defendants are [name of principal obligor], Principal Obligor, who can be served with citation at [address, city, state], and [name of guarantor], Guarantor, who can be served with citation at [address, city, state].

Or

2. Parties. Plaintiff is [name of plaintiff]. [The last three numbers of Plaintiff’s driver’s license number are [numbers]./Plaintiff has not been issued a driver’s license.] [The last three numbers of Plaintiff’s Social Security number are [numbers]./Plaintiff has not been issued a Social Security number.] Plaintiff’s address is [address, city, state]. Defendant is [name of guarantor], Guarantor, who can be served with citation at [address, city, state]. [Name of principal obligor], Principal Obligor, has not been made a defendant in this suit because Guarantor has waived the requirement for joinder of the principal obligor.

And/Or

Principal Obligor is actually or notoriously insolvent.

And/Or

Principal Obligor cannot be reached by the ordinary process of law.

And/Or

Principal Obligor’s residence is unknown and cannot be ascertained by the use of reasonable diligence.

And/Or

Principal Obligor resides beyond the limits of the state.
Principal Obligor is dead.

Judgment has already been rendered against Principal Obligor.

3. **Guaranty.** Attached to this petition as Exhibit [exhibit number/letter] is a copy of a guaranty agreement executed by Guarantor. The guaranty agreement is incorporated in this petition by reference. As shown on Exhibit [exhibit number/letter], Guarantor unconditionally guaranteed to pay Plaintiff all principal, interest, and collection expenses due Plaintiff on every claim against or indebtedness of Principal Obligor.

4. **Debt and Principal Obligor’s Default.** Attached to this petition as Exhibit [exhibit number/letter] is a copy of a note executed by Principal Obligor. Plaintiff is the owner and holder of this note and is entitled to receive all money due under its terms. [Include if applicable: Plaintiff is a holder in due course.] The note is incorporated in this petition by reference. Principal Obligor defaulted in paying the note. [Include if applicable: Plaintiff has accelerated the debt according to the terms of the note.] There is currently due the sum of $[amount], plus accrued interest as provided for in the note.

5. **Guarantor’s Default.** Under the terms of Exhibit [exhibit number/letter], Guarantor is indebted to Plaintiff for Principal Obligor’s debt described in this petition. [Include unless the guarantor has specifically waived demand: Plaintiff has demanded that Guarantor pay this debt, but Guarantor has not done so.]

6. **Conditions Precedent.** All conditions precedent have been performed or have occurred.
7. **Attorney’s Fees.** [Defendant’s/Defendants’] default has made it necessary for Plaintiff to employ the undersigned attorney to file suit.

Select one of the following. Select the second option if the claim for attorney’s fees is based on an agreement authorizing recovery.

This claim was timely presented to Defendant[s] and remains unpaid.

Defendant[s] [has/have] agreed to pay reasonable attorney’s fees for collection in case of default, as shown on Exhibit [exhibit number/letter].

Reasonable fees for the attorney’s services rendered and to be rendered through trial and appeal are at least $[amount].

8. **Prayer.** Plaintiff prays that—

   a. Defendant[s] be cited to appear and answer;

   b. Plaintiff be granted judgment for $[amount] as the principal amount due on the note;

   c. Plaintiff be granted judgment for accrued and unpaid interest on the debt before maturity;

   d. Plaintiff be granted judgment for prejudgment and postjudgment interest on the matured, unpaid debt at the highest legal or contractual rate allowed by law;
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]  
[Telexcopier]  

Attach exhibit(s).
Form 14-12

This Affidavit and the Notice of Filing Foreign Judgment (Form 14-13) should be filed at the time a foreign judgment is filed under the Uniform Enforcement of Foreign Judgments Act, Tex. Civ. Prac. & Rem. Code §§ 35.001–.007. The Affidavit, along with a properly authenticated foreign judgment, and the Notice of Filing should be mailed certified and first-class to the judgment debtor at the judgment debtor’s last known address, as stated in the Affidavit. See the related discussion at section 14.32:2 in this chapter.

The manual committee recommends that the attorney not execute any affidavit for a client; see section 19.17:3 in this manual. Texas Civil Practice and Remedies Code section 30.014 requires each party to include partial identification in its initial pleading in a civil action filed in district court, county court, or statutory county court. See form 14-1 for sample language.

Affidavit—Filing of Foreign Judgment

BEFORE ME, the undersigned authority, on this day personally appeared [name of affiant], who swore on oath that the following facts are true:

“My name is [name of affiant]. I have personal knowledge of the facts stated in this affidavit. I am authorized to make this affidavit on behalf of Judgment Creditor[s], [name[s] of judgment creditor[s]].

“Judgment Creditor[s] own[s] a judgment against [name of judgment debtor[s]], Judgment Debtor[s]. The last known post office address of Judgment Debtor is [address, city, state]. The last known post office address of Judgment Creditor, [name of judgment creditor], is [address, city, state].

“The name and address of the Texas attorney for Judgment Creditor is [name of attorney], who may be found at [address, city, state].

“On [date], copies of the following documents were mailed by certified mail and United States first-class mail, return receipt requested, with proper postage paid, to Judgment

[Caption. See § 3 of the Introduction in volume 1 of this manual.]
Debtor at the above stated address for Judgment Debtor. Documents mailed to Judgment Debtor include (1) an exemplified copy of the foreign judgment, (2) this Affidavit, and (3) a notice of filing foreign judgment.”

[Name of affiant]
Affiant

SIGNED under oath before me on ______________________________.

Notary Public, State of Texas

Attach a properly authenticated copy of the foreign judgment.
Form 14-13

This Notice of Filing Foreign Judgment should be filed at the time a foreign judgment is filed under the Uniform Enforcement of Foreign Judgments Act, Tex. Civ. Prac. & Rem. Code §§ 35.001–.007. The affidavit (form 14-12), along with a properly authenticated foreign judgment and this notice of filing, should be mailed certified and first-class to the judgment debtor at the judgment debtor’s last known address, as stated in the affidavit. See the related discussion at section 14.32:2 in this chapter.

Texas Civil Practice and Remedies Code section 30.014(a) requires certain parties to include partial identification information in initial pleadings in civil actions filed in district, county, or statutory county courts. A court may order that an initial pleading be amended to contain this information if the court determines that the pleading does not contain the information. Tex. Civ. Prac. & Rem. Code § 30.014(b).

Notice of Filing of Foreign Judgment

1. The attached judgment is being filed in Texas. The documents listed in paragraph 5 accompany this notice and are incorporated herein by reference.

2. The name and last known post office address of Judgment Debtor[s] are [name[s] of judgment debtor[s]], [address, city, state].

3. The name and post office address of Judgment Creditor[s] are [name[s] of judgment creditor[s]], [address, city, state].

4. The name and address of the Texas attorney for Judgment Creditor are [name of attorney], [address, city, state].

5. PROOF OF MAILING: On [date], copies of the following were mailed by certified mail and United States first-class mail, return receipt requested, with proper postage paid, to Judgment Debtor at the above stated address for Judgment Debtor. Documents mailed to Judgment Debtor include true and correct copies of (1) exemplified copy of foreign judgment, (2) an affidavit, and (3) this Notice of Filing Foreign Judgment.
[Name]
Attorney for Plaintiff
State Bar No.:
[E-mail address]
[Address]
[Telephone]
[Telexcopier]
Form 14-14

This petition should be used to commence an independent action. A properly authenticated copy of the sister-state judgment and bill of costs must be attached. The attorney should ascertain the accuracy of the statements in this petition regarding sister-state courts and modify the petition as appropriate. The plaintiff will almost always have incurred postjudgment costs in the foreign jurisdiction. In the rare case in which judgment for such costs is not sought, paragraph 4. and the prayer must be modified. See Tex. Fin. Code §§ 304.002–.003 and section 20.11 in this manual regarding postjudgment interest. See section 14.2 regarding exercising caution in pleading conditions precedent.

Texas Civil Practice and Remedies Code section 30.014(a) requires certain parties to include partial identification information in initial pleadings in civil actions filed in district, county, or statutory county courts. A court may order that an initial pleading be amended to contain this information if the court determines that the pleading does not contain the information. Tex. Civ. Prac. & Rem. Code § 30.014(b).

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

Petition for Suit on Foreign Judgment

1. Discovery Level. The damages sought are within the jurisdictional limits of this Court. Tex. R. Civ. P. 47(b). This lawsuit seeks only monetary relief aggregating $100,000 or less. Tex. R. Civ. P. 47(c)(1). Discovery is intended to be conducted under Level 1. Tex. R. Civ. P. 190.2.

   If lawsuit seeks nonmonetary relief and/or damages in excess of $100,000, see Tex. R. Civ. P. 47 and 190 to properly plead the claims for relief and discovery levels.

2. Parties. Plaintiff is [name of plaintiff]. [The last three numbers of Plaintiff’s driver’s license number are [numbers]./Plaintiff has not been issued a driver’s license.] [The last three numbers of Plaintiff’s Social Security number are [numbers]./Plaintiff has not been issued a Social Security number.] Plaintiff’s address is [address, city, state]. Defendant is [name of defendant], who can be served with citation at [address, city, state].

See section 14.10 and forms 14-15 through 14-21 for other forms of party designation.
3. **Facts.** Attached to this petition as Exhibit [exhibit number/letter] is a properly authenticated copy of a judgment against Defendant granted Plaintiff in a court of a sister state (“sister-state judgment”). The sister-state judgment is incorporated in this petition by reference. Defendant was duly served with citation in that cause, in accordance with the rules of procedure and the laws of that state. The court that rendered the sister-state judgment is a court of general jurisdiction and was created and organized under the laws of that state. The sister-state judgment is final, valid, and subsisting and is entitled to be accorded full faith and credit by the courts of Texas.

4. **Enforcement.** Plaintiff is entitled to enforcement of the sister-state judgment as well as postjudgment interest accruing on it. Plaintiff has also been required to pay costs of court in addition to those awarded in the sister-state judgment. A properly authenticated bill of costs is attached as Exhibit [exhibit number/letter] and incorporated by reference.

5. **Conditions Precedent.** All conditions precedent have been performed or have occurred.

6. **Prayer.** Plaintiff prays that—

   a. Defendant be cited to appear and answer;

   b. the Court grant full faith and credit to the sister-state judgment and grant judgment for all amounts, including prejudgment and postjudgment interest, due under it;

   c. Plaintiff be granted judgment for all postjudgment costs incurred in the state in which Plaintiff obtained the judgment that is the subject of this action, as shown on Exhibit [exhibit number/letter];
d. Plaintiff be granted judgment for all costs incurred in this Court;

e. Plaintiff be granted judgment for postjudgment interest on the total amount of
the judgment of this Court at the rate of [percent] percent per year from the
date of the judgment until paid; and

f. Plaintiff be granted all further relief to which Plaintiff may be entitled.

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

Attach exhibit(s).
Texas Civil Practice and Remedies Code section 30.014(a) requires certain parties to include partial identification information in initial pleadings in civil actions filed in district, county, or statutory county courts. A court may order that an initial pleading be amended to contain this information if the court determines that the pleading does not contain the information. Tex. Civ. Prac. & Rem. Code § 30.014(b).

**Clauses for Party Designation—Plaintiffs**

**Plaintiff Using Assumed Name**

**Clause 14-15-1**

Plaintiff is [true name of plaintiff], doing business as [assumed name of plaintiff]. [The last three numbers of Plaintiff’s driver’s license number are [numbers]./Plaintiff has not been issued a driver’s license.] [The last three numbers of Plaintiff’s Social Security number are [numbers]./Plaintiff has not been issued a Social Security number.]

**Texas Corporation**

**Clause 14-15-2**

Plaintiff is [true (corporate) name of plaintiff], a [corporation/nonprofit corporation/professional corporation] organized under the laws of the state of Texas.

**Foreign Corporation Operating in Texas**

**Clause 14-15-3**
Plaintiff is [true (corporate) name of plaintiff], a [corporation/nonprofit corporation/professional corporation] organized under the laws of the state of [state] and authorized to transact business in Texas.

**Foreign Corporation Not Operating in Texas**

**Clause 14-15-4**

Plaintiff is [true (corporate) name of plaintiff], a [corporation/nonprofit corporation/professional corporation] organized under the laws of the state of [state].

**Corporation Using Assumed Name**

**Clause 14-15-5**

If the corporate plaintiff is operating under an assumed name (see section 14.10:3 in this chapter), include the following sentence after the sentence chosen from the alternatives above.

Plaintiff is [true (corporate) name of plaintiff], a [corporation/nonprofit corporation/professional corporation] organized under the laws of the state of [state] and doing business as [assumed name of plaintiff].

**Partnership with No Partnership, Assumed, or Common Name**

**Clause 14-15-6**

Plaintiffs are [names of partners], who are partners. [The last three numbers of [name of partner A]’s driver’s license number are [numbers]./[Name of partner A] has not been issued a driver’s license.] [The last three numbers of [name of partner A]’s Social Security number are [numbers]./[Name of partner A] has not been issued a Social Security number.] [The last three numbers of [name of partner B]’s driver’s license number are [numbers]./[Name of partner
B] has not been issued a driver’s license.] [The last three numbers of [name of partner B]’s Social Security number are [numbers]./[Name of partner B] has not been issued a Social Security number.]

Partnership Using Partnership (but Not Assumed) Name (for Example, Limited or General Partnership)

Clause 14-15-7

Plaintiff is [name of partnership], a partnership.

Partnership Using Assumed or Common Name

Clause 14-15-8

Plaintiff is [name of partnership], doing business as [assumed or common name].
Clauses for Party Designation—Individual as Defendant

Nonresident Individual Not Required to Have Registered Agent, Having Texas Resident as Person in Charge of Business (Long-Arm Service)

Clause 14-16-1

Defendant is [name of defendant], a resident of the state of [state], who resides at [address, city, state]. Because Defendant engages in business in Texas and has done so at all material times but is not required to designate or maintain an agent in this state and has not done so, service on Defendant should be made by serving [name of defendant's person in charge in Texas], who will be in charge of Defendant’s business in Texas at the time of service, at [address, city], Texas. [Include other information and addresses that may be helpful in obtaining service.] A true copy of the process, together with notice of service, will be sent by registered mail, return receipt requested, to Defendant’s principal place of business at [address, city, state]. Plaintiff’s cause of action arose from or is connected with one or more transactions with Defendant that occurred or were consummated in Texas, as more particularly described in this pleading and any included exhibits.

Nonresident Individual Having Neither Regular Place of Business Nor Registered Agent in Texas (Long-Arm Service)

Clause 14-16-2

Defendant, [name of defendant], a resident of the state of [state], engages in business in Texas and has done so at all material times but does not maintain a place of regular business in Texas or a designated agent on whom
process can be served. Service on Defendant, therefore, should be made by serving Defendant’s statutory agent for service of process, the Secretary of State of Texas, at Service of Process, Secretary of State, P.O. Box 12079, Austin, TX 78711-2079, and forwarded to Defendant’s home or home office, [address]. Plaintiff’s cause of action arose from or is connected with one or more transactions with Defendant that occurred or were consummated in Texas, as more particularly described in this pleading and any included exhibits.

*Individual Using Assumed Name*

*Clause 14-16-3*

If the defendant operates under an assumed name, include the following sentence after the description of the defendant selected from those above.

Defendant is doing business as [assumed name of defendant].
Form 14-17

Clauses for Party Designation—Corporation as Defendant

Texas Corporation—Registered Agent

Clause 14-17-1

Defendant is [name of defendant], a [corporation/nonprofit corporation/professional corporation] organized under the laws of the state of Texas. Service on Defendant can be made by serving its registered agent, [name of registered agent], or its president or any vice-president, at [address, city], Texas. [Include other information and addresses that may be helpful in obtaining service.]

Texas Corporation—Registered Agent Cannot Be Found

Clause 14-17-2

The designation suggested below includes an address for the corporate defendant’s registered office, even though it is not statutorily required in this situation. Including the address helps the secretary of state’s citations office to process the citation more efficiently.

Defendant is [name of defendant], a [corporation/nonprofit corporation/professional corporation] organized under the laws of the state of Texas. Defendant’s registered office is at [address, city], Texas. At least two unsuccessful attempts have been made on different business days to serve Defendant’s registered agent(s), and, because no registered agent of Defendant can be found at Defendant’s registered office despite reasonable diligence, service on Defendant should be made by serving the Secretary of State of Texas, at Service of Process, Secretary of State, P.O. Box 12079, Austin, TX 78711-
2079, and forwarded to Defendant’s home or home office, [address, city, state].

**Texas Corporation—No Registered Agent**

**Clause 14-17-3**

Defendant is [name of defendant], a [corporation/nonprofit corporation/professional corporation] organized under the laws of the state of Texas. The last known address of Defendant’s registered office is [address, city], Texas. Because Defendant has failed to appoint or maintain a registered agent within Texas, service on Defendant should be made by serving the Secretary of State of Texas, at Service of Process, Secretary of State, P.O. Box 12079, Austin, TX 78711-2079, and forwarded to Defendant’s home or home office, [address, city, state].

**Foreign Corporation Registered to Transact Business in Texas—Registered Agent**

**Clause 14-17-4**

Defendant is [name of defendant], a [corporation/nonprofit corporation/professional corporation] organized under the laws of the state of [state] and authorized to transact business in Texas. Service on Defendant can be made by serving its registered agent, [name of registered agent], or its president or any vice-president, at [address, city, state]. [Include other information and addresses that may be helpful in obtaining service.]
Foreign Corporation Registered to Transact Business in Texas—No Registered Agent

Clause 14-17-5

The designation suggested below includes an address for the corporation’s principal office in its state of incorporation, even though it is not statutorily required in this situation; including the address helps the secretary of state’s citations office to process the citation more efficiently.

Defendant is [name of defendant], a [corporation/nonprofit corporation/professional corporation] organized under the laws of the state of [state] and authorized to transact business in Texas. Defendant’s principal office in its state of incorporation is [address, city, state]. Because Defendant has failed to appoint or maintain a registered agent within Texas, service on Defendant should be made by serving the Secretary of State of Texas, at Service of Process, Secretary of State, P.O. Box 12079, Austin, TX 78711-2079, and forwarded to Defendant’s home or home office, [address, city, state].

Foreign Corporation Not Registered to Transact Business in Texas—Corporation with Person in Charge of Business in Texas (Long-Arm Service)

Clause 14-17-6

Defendant is [name of defendant], a [corporation/nonprofit corporation/professional corporation] organized under the laws of the state of [state]. Because Defendant engages in business in Texas and has done so at all material times but is not required to designate or maintain an agent in this state and has not done so, service on Defendant should be made by serving [name of defendant’s person in charge in Texas], who will be in charge of Defendant’s business in Texas at the time of service, at [address, city], Texas. [Include other information and addresses that may be helpful in obtaining service.] A true copy of the process, together with notice of service, will be sent by regis-
tered mail, return receipt requested, to Defendant’s principal place of business, at [address, city, state]. Plaintiff’s cause of action arose from or is connected with one or more transactions with Defendant that occurred or were consummated in Texas, as more particularly described in this pleading and any included exhibits.

*Foreign Corporation Not Registered to Transact Business in Texas—No Agent in Texas*

*(Long-Arm Service)*

**Clause 14-17-7**

Defendant is [name of defendant], a [corporation/nonprofit corporation/professional corporation] organized under the laws of the state of [state]. Defendant’s home office address is [address, city, state]. Because Defendant engages in business in Texas and has done so at all material times but does not maintain a place of regular business in Texas or a designated agent on whom process can be served, service on Defendant should be made by serving the Secretary of State of Texas, at Service of Process, Secretary of State, P.O. Box 12079, Austin, TX 78711-2079, and forwarded to Defendant’s home or home office, [address, city, state]. Plaintiff’s cause of action arose from or is connected with one or more transactions with Defendant that occurred or were consummated in Texas, as more particularly described in this pleading and any included exhibits.

*Corporation Using Assumed Name*

**Clause 14-17-8**

If the corporate defendant operates under an assumed name, include the following sentence at the end of the language chosen from other designations suggested above.
Defendant is [name of defendant], a [corporation/nonprofit corporation/professional corporation] doing business as [assumed name of defendant].
Form 14-18

Clauses for Party Designation—Partnership (including Limited Liability Partnership) as Defendant

Texas Partnership—Principal Office in County of Suit

Clause 14-18-1

Defendant [name of partnership] is a partnership having its principal place of business in [county] County, Texas, and process should be served on Defendant [name of partner], a partner, at [address, city], Texas. [Include other information and addresses that may be helpful in obtaining service.] [For each additional partner named as a defendant, include: Defendant [name of partner], a partner, should also be served at [address, city, state].]

Texas Partnership—Agent in County of Suit

Clause 14-18-2

Defendant [name of partnership] is a partnership having its principal place of business in [county] County, Texas, and process should be served on [name of agent or clerk in partnership’s local office], who is an agent or clerk employed in Defendant’s office, place of business, or agency, at [address, city], Texas. [Include other information and addresses that may be helpful in obtaining service.] [For each partner named as a defendant, include: Defendant [name of partner], a partner, should also be served at [address, city, state].] Plaintiff’s cause of action grew out of or is connected with business transacted or done in the county in which this action is brought and in which this office, place of business, or agency is located, as more particularly described in this pleading and any included exhibits.
Foreign Partnership—Partnership with Person in Charge of Business in Texas (Long-Arm Service)

Clause 14-18-3

Defendant [name of partnership] is a partnership having its principal place of business in the state of [state], whose address is [address, city, state]. Because Defendant engages in business in Texas and has done so at all material times but is not required to designate or maintain an agent in this state and has not done so, service on Defendant should be made by serving [name of defendant's person in charge in Texas], who will be in charge of Defendant’s business in Texas at the time of service, at [address, city], Texas. [Include other information and addresses that may be helpful in obtaining service.] A true copy of the process, together with notice of service, will be sent by registered mail, return receipt requested, to Defendant’s principal place of business, at [address, city, state]. Plaintiff’s cause of action arose from or is connected with one or more transactions with Defendant that occurred or were consummated in Texas, as more particularly described in this pleading and any included exhibits. [Include similar allegations for each partner named as a defendant.]

Foreign Partnership—No Agent in Texas (Long-Arm Service)

Clause 14-18-4

Defendant [name of partnership] is a partnership having its home office at [address, city, state]. Because Defendant engages in business in Texas and has done so at all material times but does not maintain a place of regular business in Texas or a designated agent on whom process can be served, service on Defendant should be made by serving the Secretary of State of Texas, at Ser-
vice of Process, Secretary of State, P.O. Box 12079, Austin, TX 78711-2079, and forwarded to Defendant’s home or home office, at [address, city, state]. Plaintiff’s cause of action arose from or is connected with one or more transactions with Defendant that occurred or were consummated in Texas, as more particularly described in this pleading and any included exhibits. [Include similar allegations for each partner named as a defendant.]

Partnership Using Assumed Name

Clause 14-18-5

If the partnership operates under both an assumed name and a firm name, include the following sentence at the end of the language chosen from other designations suggested above.

Defendant [name of partnership] is a partnership doing business as [assumed name of defendant].
Form 14-19

Clauses for Party Designation—Limited Partnership as Defendant

Texas Limited Partnership—Principal Office in County of Suit

Clause 14-19-1

Defendant is [name of limited partnership], a limited partnership having its principal place of business in [county] County, Texas. Service on Defendant can be made by serving Defendant [name of general partner], general partner,

Select one of the following.

Select if general partner is an individual.

at [address, city], Texas.

Or

Select if general partner is a Texas corporation.

a corporation organized under the laws of Texas, through its registered agent, [name of registered agent], or its president or any vice-president, at [address, city], Texas.

Or

Select if general partner is a foreign corporation.

a corporation organized under the laws of the state of [state] and authorized to transact business in Texas, through its registered agent, [name of registered agent], or its president or any vice-president, at [address, city, state].

Continue with any other information and addresses that may be helpful in obtaining service.
Texas Limited Partnership—Agent in County of Suit

Clause 14-19-2

Defendant is [name of limited partnership], a limited partnership having its principal place of business in [county] County, Texas. Service on Defendant can be made by serving [name of agent or clerk in firm’s local office], who is an agent or clerk employed in Defendant’s office, place of business, or agency, at [address, city], Texas. [Include other information and addresses that may be helpful in obtaining service.] Plaintiff’s cause of action grew out of or is connected with business transacted or done in the county in which this action is brought and in which this office, place of business, or agency is located, as more particularly described in this pleading and any included exhibits.

Foreign Limited Partnership Registered to Transact Business in Texas

Clause 14-19-3

Defendant is [name of limited partnership], a limited partnership organized under the laws of the state of [state] and authorized to transact business in Texas. Service on Defendant can be made by serving its registered agent at [address, city], Texas. [Include other information and addresses that may be helpful in obtaining service.]

Foreign Limited Partnership Not Registered to Transact Business in Texas—Partnership with Person in Charge of Business in Texas (Long-Arm Service)

Clause 14-19-4

Defendant is [name of limited partnership], a limited partnership organized under the laws of the state of [state], whose address is [address, city, state]. Because Defendant engages in business in Texas and has done so at all
material times but is not required to designate or maintain an agent in this state and has not done so, service on Defendant should be made by serving [name of defendant’s person in charge in Texas], who will be in charge of Defendant’s business in Texas at the time of service, at [address, city], Texas. [Include other information and addresses that may be helpful in obtaining service.] A true copy of the process, together with notice of service, will be sent by registered mail, return receipt requested, to Defendant’s principal place of business, at [address, city, state]. Plaintiff’s cause of action arose from or is connected with one or more transactions with Defendant that occurred or were consummated in Texas, as more particularly described in this pleading and any included exhibits.

Foreign Limited Partnership Not Registered to Transact Business in Texas—No Agent in Texas (Long-Arm Service)

Clause 14-19-5

Defendant is [name of limited partnership], a limited partnership organized under the laws of the state of [state]. Defendant’s home office address is [address, city, state]. Because Defendant engages in business in Texas and has done so at all material times but does not maintain a place of regular business in Texas or a designated agent on whom process can be served, service on Defendant should be made by serving the Secretary of State of Texas, at Service of Process, Secretary of State, P.O. Box 12079, Austin, TX 78711-2079, and forwarded to Defendant’s home or home office, [address, city, state]. Plaintiff’s cause of action arose from or is connected with one or more transactions with Defendant that occurred or were consummated in Texas, as more particularly described in this pleading and any included exhibits.
Limited Partnership Using Assumed Name

Clause 14-19-6

If the limited partnership operates under an assumed name, include the following sentence at the end of the language chosen from other designations suggested above.

Defendant [name of defendant] is a limited partnership doing business as [assumed name of defendant].
Clauses for Party Designation—Association or Joint-Stock Company as Defendant

Form 14-20

Texas Association or Joint-Stock Company

Clause 14-20-1

Defendant [name of association or company] is [an association/a joint-stock company] having its principal place of business in [county] County, Texas. Service on Defendant can be made by serving its general agent, [name of general agent], or its president, secretary, or treasurer at [address, city], Texas. [Include other information and addresses that may be helpful in obtaining service.] [For each additional member to be served, include: [Name of member], a member of Defendant, should also be served, at [address, city], Texas.]

Foreign Association or Joint-Stock Company (Long-Arm Service)—Organization with Person in Charge of Business in Texas

Clause 14-20-2

Defendant [name of association or company] is [an association/a joint-stock company] having its principal place of business in the state of [state]. Because Defendant engages in business in Texas and has done so at all material times but is not required to designate or maintain an agent in this state and has not done so, service on Defendant should be made by serving [name of defendant’s person in charge in Texas], who will be in charge of Defendant’s business in Texas at the time of service, at [address, city], Texas. [Include other information and addresses that may be helpful in obtaining service.] A true copy of the process, together with notice of service, will be sent by regis-
Form 14-20  Clauses for Party Designation—Association/Joint-Stock Company as Defendant

tered mail, return receipt requested, to Defendant’s principal place of business, at [address, city, state]. Plaintiff’s cause of action arose from or is connected with one or more transactions with Defendant that occurred or were consummated in Texas, as more particularly described in this pleading and any included exhibits.

Foreign Association or Joint-Stock Company (Long-Arm Service)—No Agent in Texas

Clause 14-20-3

Defendant [name of association or company] is [an association/a joint-stock company] having its principal place of business in the state of [state]. Defendant’s home office address is [address, city, state]. Because Defendant engages in business in Texas and has done so at all material times but does not maintain a place of regular business in Texas or a designated agent on whom process can be served, service on Defendant should be made by serving the Secretary of State of Texas, at Service of Process, Secretary of State, P.O. Box 12079, Austin, TX 78711-2079, and forwarded to Defendant’s home or home office, [address, city, state]. Plaintiff’s cause of action arose from or is connected with one or more transactions with Defendant that occurred or were consummated in Texas, as more particularly described in this pleading and any included exhibits.

Association or Joint-Stock Company Using Assumed Name

Clause 14-20-4

If the defendant operates under an assumed name, include the following sentence at the end of the language chosen from other designations suggested above.
Defendant [name of defendant] is [an association/a joint-stock company] doing business as [assumed name of defendant].
Form 14-21

Clauses for Party Designation—Limited Liability Company as Defendant

Texas Limited Liability Company—Registered Agent

Clause 14-21-1

Defendant is [name of defendant], a limited liability company organized under the laws of the state of Texas. Service on Defendant can be made by serving its registered agent, [name of registered agent], or any of its managers, at [address, city], Texas. [Include other information and addresses that may be helpful in obtaining service.]

Texas Limited Liability Company—Registered Agent Cannot Be Found

Clause 14-21-2

Defendant is [name of defendant], a limited liability company organized under the laws of the state of Texas. Defendant’s registered office is at [address, city], Texas. At least two unsuccessful attempts have been made on different business days to serve the registered agent and the manager of Defendant, and, because no registered agent or manager of Defendant can be found at Defendant’s registered office despite reasonable diligence, service on Defendant should be made by serving the Secretary of State of Texas, at Service of Process, Secretary of State, P.O. Box 12079, Austin, TX 78711-0279, and forwarded to Defendant’s home or home office, at [address, city, state].
Texas Limited Liability Company—No Registered Agent

Clause 14-21-3

Defendant is [name of defendant], a limited liability company organized under the laws of the state of Texas. The last known address of Defendant’s registered office is [address, city], Texas. Because Defendant has failed to appoint or maintain a registered agent within Texas, service on Defendant should be made by serving the Secretary of State of Texas, at Service of Process, Secretary of State, P.O. Box 12079, Austin, TX 78711-0279, and forwarded to Defendant’s home or home office, [address, city, state].

Foreign Limited Liability Company Registered to Transact Business in Texas—Registered Agent

Clause 14-21-4

Defendant is [name of defendant], a limited liability company organized under the laws of the state of [state] and authorized to transact business in Texas. Service on Defendant can be made by serving its registered agent, [name of registered agent], or any manager, at [address, city, state]. [Include other information and addresses that may be helpful in obtaining service.]

Foreign Limited Liability Company Registered to Transact Business in Texas—No Registered Agent

Clause 14-21-5

Defendant is [name of defendant], a limited liability company organized under the laws of the state of [state] and authorized to transact business in Texas. Defendant’s principal office in its state of incorporation is [address, city, state]. Because Defendant has failed to appoint or maintain a registered
agent within Texas, service on Defendant should be made by serving the Secretary of State of Texas, at Service of Process, Secretary of State, P.O. Box 12079, Austin, TX 78711-0279, and forwarded to Defendant’s home or home office, [address, city, state].

Limited Liability Company Using Assumed Name

Clause 14-21-6

If the entity defendant operates under an assumed name, include the following sentence at the end of the language chosen from other designations suggested above.

Defendant [name of defendant] is a limited liability company doing business as [assumed name of defendant].
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Chapter 15
Jurisdiction and Venue

I. Jurisdiction

§ 15.1 Jurisdictional Limits of Trial Courts

§ 15.1:1 Jurisdiction Generally

“Subject-matter jurisdiction refers to the kinds of controversies a court has authority to hear, as determined by the constitution, jurisdictional statutes, and the pleadings.” Perry v. Del Rio, 53 S.W.3d 818, 824 (Tex. App.—Austin), appeal dismissed, 66 S.W.3d 239 (Tex. 2001). When a statute creates a right and prescribes a remedy to enforce that right, a court has subject-matter jurisdiction to act in the manner provided by the statute that created that right. Tarrant Appraisal District v. Gateway Center Associates, Ltd., 34 S.W.3d 712, 714 (Tex. App.—Fort Worth 2000, no pet.).

Texas courts have limited subject-matter jurisdiction; they have no power to act other than that specifically given by the Texas Constitution or by statute. Subject-matter jurisdiction is essential to the authority of a court to decide a case. Texas Ass’n of Business v. Texas Air Control Board, 852 S.W.2d 440, 443 (Tex. 1993). Subject-matter jurisdiction is an issue that may not be waived by the parties and may be raised for the first time on appeal. Texas Ass’n of Business, 852 S.W.2d at 445; see also Acosta v. State, 70 S.W.3d 921, 922–23 (Tex. App.—El Paso 2002, no pet.); Ex parte Cross, 69 S.W.3d 810, 813 (Tex. App.—El Paso 2002, no pet.) (question of law subject to sua sponte review by the court of appeals).

For a court to exercise subject-matter jurisdiction over a case, a party must allege facts that affirmatively demonstrate the court’s jurisdiction to hear that case. Mogayzel v. Texas Department of Transportation, 66 S.W.3d 459, 463 (Tex. App.—Fort Worth 2001, pet. denied). When incurable defects are shown on the face of a plaintiff’s pleadings, the court lacks subject-matter jurisdiction. City of Longview v. Head, 33 S.W.3d 47, 54 (Tex. App.—Tyler 2000, no pet.) (dismissal required when subject-matter jurisdiction lacking regardless of stage of proceeding). Any decision rendered by a court not having jurisdiction is void. Cleveland v. Ward, 285 S.W. 1063, 1071 (Tex. 1926), overruled on other grounds by Walker v. Packer, 827 S.W.2d 833, 842 (Tex. 1992); In re Burlington Northern & Santa Fe Railway Co., 12 S.W.3d 891, 895 (Tex. App.—Houston [14th Dist.] 2000, mandamus denied); Solomon, Lambert, Roth & Associates v. Kidd, 904 S.W.2d 896, 901 (Tex. App.—Houston [1st Dist.] 1995, no writ). Subject-matter jurisdiction is a power that exists by operation of law and may not be conferred on any court by consent of the parties or by waiver. Burke v. Satterfield, 525 S.W.2d 950, 953 (Tex. 1975); Walls Regional Hospital v. Altaras, 903 S.W.2d 36, 40–41 (Tex. App.—Waco 1994, no writ); Nash v. Civil Service Commission, 864 S.W.2d 163, 166 (Tex. App.—Tyler 1993, no writ). In contrast, although a court may not have jurisdiction over a party, that party may appear and consent to personal jurisdiction. Campsey v. Brumley, 55 S.W.2d 810, 812 (Tex. Comm’n App. 1932, holding approved). When jurisdiction has been properly acquired, no subsequent event will serve to divest the court of jurisdiction. Color Tile, Inc. v. Ramsey, 905 S.W.2d 620, 622 (Tex. App.—Houston [14th Dist.] 1995, no writ).

The amount claimed generally determines which court has jurisdiction. See section 15.2 below. Many statutory courts have special jurisdictional requirements, and the attorney should always consult the statute creating the particular court. The following sections summarize the jurisdictional scheme of Texas trial courts.
§ 15.1:2 Justice Court

Justice courts, as creatures of statute, are governed by a legislative grant of jurisdiction. *Color Tile, Inc. v. Ramsey, 905 S.W.2d 620, 622* (Tex. App.—Houston [14th Dist.] 1995, no writ). Justice courts have original jurisdiction of—

1. civil matters in which the amount in controversy is $10,000 or less, exclusive of interest (unless the district or county court has exclusive jurisdiction over the case);
2. forcible-entry-and-detainer cases;
3. foreclosures of mortgages and enforcement of liens on personal property when the amount in controversy is otherwise within the justice court’s jurisdiction; and
4. cases arising under chapter 707 of the Transportation Code, outside a municipality’s territorial limits.

*Tex. Gov’t Code § 27.031(a).*

A justice of the peace has also the power to issue writs of attachment, garnishment, and sequestration in cases in which the court otherwise has jurisdiction, *Tex. Gov’t Code § 27.032,* and the power to issue distress warrants, *Tex. R. Civ. P. 610.*

Small claims cases are lawsuits brought for the recovery of money damages, civil penalties, personal property, or other relief allowed by law, in amounts not more than $10,000, excluding statutory interest and court costs but including attorney’s fees, if any. *Tex. R. Civ. P. 500.3.* Effective September 1, 2013, small claims courts as such were abolished in Texas, and small claims cases were moved to the justice courts. Acts 2011, 82d Leg., 1st C.S., ch. 3, § 5.06 (HB 79), eff. Sept. 1, 2013.

§ 15.1:3 Constitutional County Court

Constitutional county courts have—

1. concurrent jurisdiction with justice courts if the amount in controversy exceeds $200 but does not exceed $10,000, exclusive of interest;
2. concurrent jurisdiction with district courts if the amount in controversy exceeds $500 but does not exceed $5,000, exclusive of interest; and
3. the power to issue writs necessary to enforce the court’s jurisdiction, specifically including writs of mandamus, attachment, garnishment, injunction, sequestration, certiorari, and supersedeas.


Among other matters, the constitutional county court does not have jurisdiction in a suit for the enforcement of a lien on land or a suit for the trial of the right to property valued at $500 or more and levied on under a writ of execution, sequestration, or attachment. *Tex. Gov’t Code § 26.043(2), (6).* To enforce their jurisdictional authority, constitutional county courts have extensive writ jurisdiction. See *Tex. Gov’t Code §§ 26.050–.051.*

§ 15.1:4 Statutory County Court (County Court at Law)

Statutorily created county courts at law that have concurrent jurisdiction with constitutional county courts also have concurrent jurisdiction with district courts if the amount in controversy, as alleged in the petition, exceeds $500 but does not exceed
$100,000, excluding interest, statutory or punitive damages and penalties, and attorney’s fees and costs. Tex. Gov’t Code § 25.0003(c)(1). The statutes relating to statutory county courts of each county are in chapter 25 of the Texas Government Code. The statute creating the particular court should always be consulted. See, e.g., Tex. Gov’t Code § 25.0592 (Dallas County), § 25.0732 (El Paso County), § 25.0862 (Galveston County) (examples of statutory county courts that have concurrent jurisdiction with the district court in civil cases regardless of amount in controversy); see also Tex. Gov’t Code § 25.1252 (Jefferson County), § 25.1542 (Lubbock County), § 25.2292 (Travis County) (examples of counties that have raised the maximum jurisdictional amount for the statutory county courts). A statutory county court may issue writs of injunction, mandamus, sequestration, attachment, garnishment, certiorari, supersedeas, and all writs necessary to enforce its jurisdiction. Tex. Gov’t Code § 25.0004(a). The statutory county court has concurrent jurisdiction with district courts in eminent domain cases (Tex. Prop. Code § 21.001) and with constitutional county courts in probate matters (unless a county has a statutory probate court) (Tex. Gov’t Code § 25.0003(d)–(e)).

§ 15.1:5 District Court

District courts are courts of general jurisdiction and have exclusive, original jurisdiction over cases that are not within the subject-matter jurisdiction of any other court. Tex. Const. art. V, §§ 1, 8. Neither the Texas Constitution nor the Texas Government Code prescribes a minimum or maximum amount in controversy for district court jurisdiction. See Tex. Const. art. V, § 8; Tex. Gov’t Code §§ 24.007–.008. By legislative act in 1985, the prior constitutional and statutory $500 minimum jurisdiction was repealed. Following the 1985 legislative repeals and subsequent appellee court disagreements on minimum jurisdiction, the supreme court held that the district courts may no longer have a jurisdictional minimum amount in controversy. See Dubai Petroleum Co. v. Kazi, 12 S.W.3d 71, 75 n.4 (Tex. 2000).

District courts may have concurrent jurisdiction with one or more inferior courts. District courts may issue writs of mandamus, injunction, sequestration, attachment, garnishment, certiorari, supersedeas, and all other writs necessary to enforce their jurisdiction. Tex. Gov’t Code § 24.011.

§ 15.2 Jurisdictional Amount in Controversy

§ 15.2:1 Amount in Controversy Generally

When subject matter is not exclusive, the amount in controversy determines the court with jurisdiction. That amount is determined from the plaintiff’s pleadings, unless the defendant alleges and proves that the allegations are fraudulently made for the purpose of conferring jurisdiction that otherwise would not exist. Lane v. Davis, 337 S.W.2d 292, 293–94 (Tex. Civ. App.—San Antonio 1960, no writ). The plaintiff may not arbitrarily reduce a liquidated claim to an amount within the jurisdictional limits of the justice courts. Hooper Lumber Co. v. Texas Fixture Co., 230 S.W. 141 (Tex. 1921). The amount in controversy established in the plaintiff’s pleadings, not the proof of his allegations or the result of the case, determines jurisdiction. Brannon v. Pacific Employers Insurance Co., 224 S.W.2d 466, 469 (Tex. 1949); Campsey v. Brumley, 55 S.W.2d 810, 812 (Tex. Comm’n App. 1932, holding approved). Each type of court has its own formula for calculating the amount in controversy. Whether attorney’s fees, costs, or penalties are added to the debt when figuring the amount in controversy depends on the governing statute of the court in question. Many of the statutes creating the county courts at law have specific items that may or may not be included in the amount in controversy. See, e.g., Sears, Roebuck & Co. v. Big Bend Motor Inn, Inc., 818 S.W.2d 542 (Tex. App.—Fort Worth 1991, writ denied).
For an unliquidated claim, the plaintiff’s petition need state only that the damages sought are within the jurisdictional limits of the court. Tex. R. Civ. P. 47(b). Omitting the amount in controversy from the petition does not necessarily deprive the court of jurisdiction, unless lack of jurisdiction is clear from the pleadings. The plaintiff may prevail if the jurisdictional amount in controversy is proved at trial; failure to plead damages is a defect in pleading subject to special exceptions and amendment. *Peek v. Equipment Service Co.*, 779 S.W.2d 802, 804–05 (Tex. 1989).

Special rules apply in the case of multiple claims against one defendant or foreclosure of a lien; see sections 15.2:3 and 15.2:7 below.

§ 15.2:2  **Amount of Debt**

Only the amount due and unpaid at the time suit is instituted is included in computing the amount in controversy. See *Metropolitan Life Insurance Co. v. Evans*, 96 S.W.2d 152, 153 (Tex. Civ. App.—Beaumont 1936, no writ). The amount due and unpaid is the balance after applying all credits, not the amount of the original debt. See *Salter v. Nelson*, 341 S.W.2d 567, 568 (Tex. Civ. App.—Fort Worth 1960, no writ). Any expected reduction in the claimed amount because of an intended offset from another transaction is not included. *Manly v. Citizens National Bank*, 110 S.W.2d 993, 994 (Tex. Civ. App.—Eastland 1937, no writ).

§ 15.2:3  **Multiple Claims**

When a plaintiff makes separate, independent, but joinable claims against multiple parties, each claim is judged on its own merit. *Borrego v. del Palacio*, 445 S.W.2d 620, 622 (Tex. Civ. App.—El Paso 1969, no writ). When one plaintiff makes multiple claims against one defendant, the claims are aggregated for purposes of determining the amount in controversy for jurisdictional purposes. Tex. Gov’t Code § 24.009 (district courts); *Box v. Associates Investment Co.*, 389 S.W.2d 687, 689 (Tex. Civ. App.—Dallas 1965, no writ).

§ 15.2:4  **Interest**

The jurisdictional statutes usually exclude interest in determining the amount in controversy. See, e.g., Tex. Gov’t Code § 26.042(a) (county courts). The nature of interest determines whether it is included in the amount in controversy. Interest as an element of damages (for example, interest accruing from the loss of use of money) is included in calculating the amount in controversy. On the other hand, interest eo nomine (interest in addition to the amount of damages), that is, in the name of interest (for example, interest defined by statute or fixed by the parties to a contract) is not included in determining the amount in controversy. *Bankers Health & Accident Co. v. Adair*, 153 S.W.2d 273, 273–74 (Tex. Civ. App.—San Antonio 1941, no writ). The plaintiff’s attorney should carefully decide whether interest should be included in determining the amount in controversy based on whether the interest is eo nomine or interest as damages. See, e.g., *Eanes v. Haynes*, 135 S.W.2d 190 (Tex. Civ. App.—Eastland 1939, no writ); *Oppenheim v. Hood*, 33 S.W.2d 265 (Tex. Civ. App.—Dallas 1930, writ ref’d).

§ 15.2:5  **Attorney’s Fees**

Generally, a demand for attorney’s fees is included in the amount in controversy and is considered in fixing the court’s jurisdiction. *Johnson v. Universal Life & Accident Insurance Co.*, 94 S.W.2d 1145 (Tex. 1936); *Long v. Fox*, 625 S.W.2d 376, 378 (Tex. App.—San Antonio 1981, writ ref’d n.r.e.). However, in statutory county courts, attorney’s fees are excluded from cal-
calculation of the amount in controversy. Tex. Gov’t Code § 25.0003(c)(1); see also Whitley v. Morning, 814 S.W.2d 537, 538 (Tex. App.—Tyler 1991, no writ).

§ 15.2:6 Costs


§ 15.2:7 Foreclosure of Lien

The jurisdictional amount is determined by the value of the property on which foreclosure is sought if the value exceeds the amount of the debt. Southwestern Drug Corp. v. Webster, 246 S.W.2d 241 (Tex. Civ. App.—Amarillo 1951, no writ).

§ 15.2:8 Immunity

The state’s consent to be sued must be affirmatively established in the plaintiff’s pleadings when a government agency is sued. University of Texas Medical Branch at Galveston v. Mullins, 57 S.W.3d 653, 656 (Tex. App.—Houston [14th Dist.] 2001, no pet.). The state’s consent to suit may be alleged “by reference to a statute or to express legislative permission.” Mullins, 57 S.W.3d at 656 (quoting Texas Department of Transportation v. Jones, 8 S.W.3d 636, 638 (Tex. 1999)).

A trial court lacks subject-matter jurisdiction over a suit against a governmental unit absent the state’s consent to a suit. Texana Community MHMR Center v. Silvas, 62 S.W.3d 317, 321 (Tex. App.—Corpus Christi 2001, no pet.).

§ 15.2:9 Plea to the Jurisdiction

A plea to the jurisdiction is the procedure to contest the trial court’s subject-matter jurisdiction. To determine whether a court has subject-matter jurisdiction over a case challenged by a plea to the jurisdiction, the trial court must look solely to the pleadings. University of Texas Medical Branch at Galveston v. Mullins, 57 S.W.3d 653, 656 (Tex. App.—Houston [14th Dist.] 2001, no pet.). A trial court is required to examine evidence to determine whether it has subject-matter jurisdiction before proceeding with the case. Because a court must not act without determining whether it has subject-matter jurisdiction to do so, the court should hear evidence as necessary to determine the issue before proceeding with the case. However, inquiry into the substance of the claims presented by the plaintiff should not go further than is required to establish jurisdiction. Bland Independent School District v. Blue, 34 S.W.3d 547, 554 (Tex. 2000).

§ 15.3 Suit in Federal Court

§ 15.3:1 Availability of Federal Jurisdiction

Federal jurisdiction may be established when there is diversity of citizenship between the litigants and the amount in controversy exceeds $75,000. 28 U.S.C. § 1332(a). Factors to consider in filing suit in federal court include venue and procedural rules and the status of the dockets. Comprehensive discussion of federal practice is beyond the scope of this manual, but a few important matters are discussed below.
§ 15.3:2 Pleadings


§ 15.3:3 Corporation Citizenship

A corporation is deemed a citizen of the state in which it is incorporated and of the state in which its principal place of business is located. See 28 U.S.C. § 1332(c)(1). Diversity jurisdiction, therefore, does not exist if either party is a corporation and the other party’s domicile is in the same state with the corporation’s principal place of business or its place of incorporation.

§ 15.3:4 Venue

28 U.S.C. § 1391 discusses venue generally and governs all civil actions brought in U.S. district courts, except as otherwise provided by law. See 28 U.S.C. § 1391(a)(1). Proper venue must be determined without regard to whether the action is local or transitory in nature, except as otherwise provided by law. 28 U.S.C. § 1391(a)(2).

A civil action based on diversity jurisdiction can be brought only in—

1. a judicial district in which any defendant resides, if all defendants reside in the state in which the district is located;
2. a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred or in which a substantial part of the property that is the subject of the action is situated; or
3. a judicial district in which any defendant is subject to personal jurisdiction with respect to the action, if there is no district in which the action may otherwise be brought.


A natural person, including an alien lawfully admitted for permanent residence in the United States, is deemed to reside in the judicial district in which that person is domiciled. 28 U.S.C. § 1391(c)(1).

An entity with the capacity to sue and be sued in its common name under applicable law, whether or not incorporated, shall be deemed to reside, if a defendant, in any judicial district in which such defendant is subject to the court’s personal jurisdiction with respect to the civil action in question and, if a plaintiff, only in the judicial district in which it maintains its principal place of business.

28 U.S.C. § 1391(c)(2). A defendant that does not reside in the United States may be sued in any judicial district, and the joinder of such a defendant must be disregarded in determining where the action may be brought with respect to other defendants. 28 U.S.C. § 1391(c)(3).

If a corporation is subject to personal jurisdiction in a state with more than one judicial district, the corporation is deemed to reside in any district in that state within which its contacts would be sufficient to subject it to personal jurisdiction if that district were a separate state. If there is no such district, the corporation is deemed to reside in the district in which it has the most significant contacts. 28 U.S.C. § 1391(d).

[Sections 15.4 through 15.10 are reserved for expansion.]
II. Venue

§ 15.11 Venue Generally

Venue is the place in which a plaintiff has a legal right to file suit regardless of the defendant’s objections. In Texas, the primary venue statutes are found in chapter 15 of the Civil Practice and Remedies Code; however, there are numerous special venue statutes in various other Texas statutes. A court shall determine the venue of a suit based on the facts existing at the time the cause of action that is the basis of the suit accrued. Tex. Civ. Prac. & Rem. Code § 15.006. When one or more plaintiffs is joined in a suit, each must independently establish proper venue. Tex. Civ. Prac. & Rem. Code § 15.003(a); American Home Products Corp. v. Clark, 38 S.W.3d 92, 94 (Tex. 2000).

§ 15.12 Pleading Venue Facts

Venue facts should be pleaded to support the choice of venue because when properly pleaded, all venue facts are taken as true unless they are specifically denied by the adverse party. Sanes v. Clark, 25 S.W.3d 800, 803 (Tex. App.—Waco 2000, pet. denied) (citing GeoChem Tech Corp. v. Verseckes, 962 S.W.2d 541, 543 (Tex. 1998); Tex. R. Civ. P. 87(3)(a)). If the plaintiff’s venue allegations are specifically denied, the plaintiff must support his pleading by prima facie proof, in the form of an affidavit complying with Tex. R. Civ. P. 87(3), that the cause of action accrued in the county of suit. Tex. R. Civ. P. 87(2)(b). No party, however, may ever be required for venue purposes to support the existence of a cause of action by prima facie proof. Tex. R. Civ. P. 87(2)(b), (3)(a).

§ 15.13 Mandatory or Permissive Venue Generally

“Proper venue” means venue as provided in the mandatory venue provisions contained in sections 15.001–.020 or by the permissive venue rules and the general venue rule when the mandatory rules do not apply, or by another statute prescribing mandatory venue. Mandatory venue provisions supersede the general venue rule. Tex. Civ. Prac. & Rem. Code § 15.001(b). If there is no mandatory venue then the permissive venue section may provide an alternative to the general venue rule. See Tex. Civ. Prac. & Rem. Code §§ 15.031–.039.

If the creditor has a choice of where to file suit, his attorney should consider such factors as travel expenses for counsel and witnesses, docket congestion, and how a local judge and jury will respond to the creditor, his counsel, and the nature of the claim asserted.

§ 15.14 Plaintiff’s Choice of Venue

Venue may be proper in more than one county under the venue rules. In re Henry, 274 S.W.3d 185, 190 (Tex. App.—Houston [1st Dist.] 2008, orig. proceeding [mand. denied]) (op. on reh’g) (citing GeoChem Tech Corp. v. Verseckes, 962 S.W.2d 541, 544 (Tex. 1998)). In general, plaintiffs are allowed to choose venue first, and the plaintiff’s choice of venue cannot be disturbed as long as the suit is initially filed in a county of proper venue. In re Henry, 274 S.W.3d at 190 (citing KW Construction v. Stephens & Sons Concrete Contractors, Inc., 165 S.W.3d 874, 879 (Tex. App.—Texarkana 2005, pet. denied); Gerdes v. Kennamer, 155 S.W.3d 541, 549 (Tex. App.—Corpus Christi 2004, no pet.); Chiriboga v. State Farm Mutual Automotive Insurance Co., 96 S.W.3d 673, 678 (Tex. App.—Austin 2003, no pet.).
A plaintiff does not lose the right to choose between two counties in which mandatory venue is proper by filing its first suit in a county in which venue was improper if the first suit is nonsuited before a decision on venue. The venue statutes do not say that the plaintiff may choose venue only once; they simply say that if the county chosen is not proper, the case must be transferred if a sufficient motion is filed and ruled on. See GeoChem Tech Corp., 962 S.W.2d at 542 (citing Tex. Civ. Prac. & Rem. Code § 15.063).

§ 15.14:1 Multiple Defendants

If the plaintiff establishes proper venue against one defendant, venue is proper against all other defendants in all claims or actions arising out of the same transaction, occurrence, or series of transactions or occurrences. Tex. Civ. Prac. & Rem. Code § 15.005; American Home Products Corp. v. Clark, 38 S.W.3d 92, 94 (Tex. 2000). In a suit in which two or more defendants are joined, any action or omission by one defendant in relation to venue, including a waiver of venue by one defendant, does not impair or diminish the right of any other defendant to properly challenge venue. Tex. Civ. Prac. & Rem. Code § 15.0641.

§ 15.14:2 Multiple Claims

If the plaintiff properly joins two or more claims or causes of action arising from the same transaction, occurrence, or series of transactions or occurrences, and one of the claims or causes of action is governed by a mandatory venue provision, the mandatory venue of that claim or cause of action will control. Tex. Civ. Prac. & Rem. Code § 15.004. Rules for multiple plaintiffs and intervening plaintiffs can be found at Tex. Civ. Prac. & Rem. Code § 15.003. These rules are not discussed in this manual.

§ 15.14:3 Counterclaims, Cross-Claims, and Third-Party Claims on Venue

Venue of the main action shall establish venue of a counterclaim, cross-claim, or third-party claim properly joined under the Texas Rules of Civil Procedure or any applicable statute. Tex. Civ. Prac. & Rem. Code § 15.062(a). If an original defendant properly joins a third-party defendant, venue shall be proper for a claim arising out of the same transaction, occurrence, or series of transactions or occurrences by the plaintiff against the third-party defendant if the claim arises out of the subject matter of the plaintiff’s claim against the original defendant. Tex. Civ. Prac. & Rem. Code § 15.062(b).

§ 15.15 Venue Rules

§ 15.15:1 General Venue Rule

The general venue rule is that suit shall be brought—

1. in the county in which all or a substantial part of the events giving rise to the claim occurred;
2. in the county of the defendant’s residence at the time the cause of action accrued if the defendant is a natural person;
3. in the county of the defendant’s principal office in Texas if the defendant is not a natural person; or
4. if the first three provisions do not apply, in the county in which the plaintiff resided at the time of the accrual of the cause of action.

“Principal office” means a principal office of the corporation, unincorporated association, or partnership in this state in which the decision makers for the organization within this state conduct the daily affairs of the organization. The mere presence of an agency or representative does not establish a principal office. Tex. Civ. Prac. & Rem. Code § 15.001(a).

“Residence” requires (1) a fixed place of abode within the possession of the party; (2) occupied or intended to be occupied consistently over a substantial period of time; (3) that is permanent rather than temporary. In re S.D., 980 S.W.2d 758, 760–61 (Tex. App.—San Antonio 1998, pet. denied) (citing Snyder v. Pitts, 150 Tex. 407, 241 S.W.2d 136, 140 (1951)). In meeting these requirements, Texas law is clear that an element of permanency is necessary before a party can be considered a resident of a particular county. In re S.D., 980 S.W.2d at 761 (citing Tieuel v. Southern Pacific Trans. Co., 654 S.W.2d 771, 774 (Tex. App.—Houston [14th Dist.] 1983, no writ)). For venue purposes, an individual may have more than one residence. GeoChem Tech Corp. v. Verseckes, 962 S.W.2d 541, 543–44 (Tex.1998) (citing Snyder, 241 S.W.2d at 140; Rosales v. H.E. Butt Grocery Co., 905 S.W.2d 745, 748 (Tex. App.—San Antonio 1995, writ denied)).

§ 15.15:2    Mandatory Venue Provisions in Civil Practice and Remedies Code Chapter 15

The attorney should always review the numerous mandatory venue provisions found at Tex. Civ. Prac. & Rem. Code §§ 15.011–.020 and review any mandatory venue sections in applicable debt collection statutes to determine whether the nature of the suit or of the parties falls within the general rule or one of the provisions for mandatory venue. Some of the mandatory provisions found in Civil Practice and Remedies Code chapter 15 that may be applicable in debt collection are:

**Land:**   Actions for recovery of real property or an estate or interest in real property, for partition of real property, to remove encumbrances from the title to real property, for recovery of damages to real property, or to quiet title to real property shall be brought in the county in which all or a part of the property is located. Tex. Civ. Prac. & Rem. Code § 15.011.

**Landlord-Tenant:** Except as provided by another statute prescribing mandatory venue, a suit between a landlord and a tenant arising under a lease shall be brought in the county in which all or a part of the real property is located. In this section, “lease” means any written or oral agreement between a landlord and a tenant that establishes or modifies the terms, conditions, or other provisions relating to the use and occupancy of the real property that is the subject of the agreement. Tex. Civ. Prac. & Rem. Code § 15.0115.

**Injunction against Suit:** Actions to stay proceedings in a suit shall be brought in the county in which the suit is pending. Tex. Civ. Prac. & Rem. Code § 15.012.

**Injunction against Execution of Judgment:** Actions to restrain execution of a judgment based on invalidity of the judgment or of the writ shall be brought in the county in which the judgment was rendered. Tex. Civ. Prac. & Rem. Code § 15.013.

**Counties:** An action against a county shall be brought in that county. Tex. Civ. Prac. & Rem. Code § 15.015.

**Certain Political Subdivisions:** Except as provided by a law not contained in this chapter, an action against a political subdivision that is located in a county with a population of 100,000 or less shall be brought in the county in which the political subdivision is located. If the political subdivision is located in more than one county and the population of each county is 100,000 or less, the action shall be brought in any county in which the political subdivision is located. In this section, “political subdivision” means a governmental entity in this state, other than a county, that is not a state agency. The term includes a municipality, school or junior college district, hospital district, or any other special purpose district or authority. Tex. Civ. Prac. & Rem. Code § 15.0151.
Major Transaction: An action arising from a major transaction shall be brought in a county if the party against whom the action is brought has agreed in writing that a suit arising from the transaction may be brought in that county. Tex. Civ. Prac. & Rem. Code § 15.020(b). See section 15.15:6 below for information on major transactions.

§ 15.15:3 Mandatory Venue Provisions in Other Texas Statutes

An action governed by any other statute prescribing mandatory venue shall be brought in the county required by that statute. Tex. Civ. Prac. & Rem. Code § 15.016. The more commonly encountered venue provisions applicable to suits on debts are set out briefly in the following sections, but the attorney should remember that on occasion one of the venue provisions not discussed here may apply.

Receivership of Corporation: An action to have a receiver appointed for a corporation with property in this state shall be brought in the county in which the principal office of the corporation is located. Tex. Civ. Prac. & Rem. Code § 64.071.

Usury: A suit for the statutory penalties for usury is controlled by section 305.006(a)(1)–(5) of the Texas Finance Code, which states that such an action shall be brought in the county in which—

1. the transaction was entered into;
2. the usurious interest was charged or received;
3. the creditor resides at the time of the cause of action, if the creditor is an individual;
4. the creditor maintains its principal office, if the creditor is not an individual; or
5. the obligor resides at the time of the accrual of the cause of action.


Arbitration:

(a) Except as otherwise provided by this section, a party must file the initial application:

1. in the county in which an adverse party resides or has a place of business; or
2. if an adverse party does not have a residence or place of business in this state, in any county.

(b) If the agreement to arbitrate provides that the hearing before the arbitrators is to be held in a county in this state, a party must file the initial application with the clerk of the court of that county.

(c) If a hearing before the arbitrators has been held, a party must file the initial application with the clerk of the court of the county in which the hearing was held.

(d) Consistent with Section 171.024, if a proceeding is pending in a court relating to arbitration of an issue subject to arbitration under an agreement before the filing of the initial application, a party must file the initial application and any subsequent application relating to the arbitration in that court.


§ 15.15:4 Venue in Suit on Consumer Debt

In an action founded on a contractual obligation of the defendant to pay money arising out of or based on a consumer transaction for goods, services, loans, or extensions of credit intended primarily for personal, family, household, or agricultural use, suit by a creditor on or by reason of the obligation may be brought in either the county in which the defendant signed the contract or the county in which the defendant resides when the action is commenced. A consumer cannot waive this venue right in the contract. Tex. Civ. Prac. & Rem. Code § 15.035(b). In most such cases, filing in another county is a violation of the Texas Deceptive Trade Practices Act, unless the plaintiff did not know or have reason to know that the county in which suit was filed was not a proper county. Tex. Bus. & Com. Code § 17.46(b)(23).

Under the federal Fair Debt Collection Practices Act, an action brought by a debt collector must be brought in either the county in which the consumer signed the contract or the county in which the consumer resides when the action is commenced. 15 U.S.C. § 1692i(a)(2). Failure to file suit in a county of proper venue renders the debt collector liable for damages. 15 U.S.C. § 1692k. See part II. in chapter 2 of this manual.

§ 15.15:5 Venue in Breach of Contract (Nonconsumer)

In a breach of contract action, “the county in which all or a substantial part of the events or omissions took place” includes the county in which the contract was formed, was to be performed, or was allegedly breached. See Krchnak v. Fulton, 759 S.W.2d 524, 526 (Tex. App.—Amarillo 1988, writ denied); see also Tex. Civ. Prac. & Rem. Code § 15.002(a)(1) (general venue rule). There are generally two locations where venue may be proper in a suit on a written contract to perform an obligation in a particular county: (1) where the contract expressly names the county or a definite place in that county or (2) in the county where the defendant is domiciled. WTFO, Inc. v. Braithwaite, 899 S.W.2d 709, 716 (Tex. App.—Dallas 1995, no writ) (citing Tex. Civ. Prac. & Rem. Code § 15.035(a)). Therefore, a contract (such as a promissory note) may be sued on in the county designated therein for payment, even though the maker of the note is a resident of another county. This exception applies only in a case where the defendant agreed at the time he executed the instrument to perform his obligation in a particular place other than his place of residence. WTFO, Inc., 899 S.W.2d at 716 (citing Hibbler v. Walker, 598 S.W.2d 19, 20 (Tex. Civ. App.—Texarkana 1980, no writ); see also Texas Workers’ Compensation Assigned Risk Pool v. Perry-Packard Co., 643 S.W.2d 202, 203 (Tex. App.—Austin 1982, no writ)). The place of performance for payment of a contract must be named specifically at the time the instrument was executed to avoid the loss of venue under section 15.035(a). The ability to redesignate in writing the place of performance at some time in the future by appellant or any holder of the indebtedness makes the place of payment uncertain. Otherwise, leaving open a contract’s term of place of performance at the time of execution of the contract would allow the holder at some future time to determine venue at its own will and pleasure. WTFO, Inc., 899 S.W.2d at 716 (citing Hibbler, 598 S.W.2d at 20).

§ 15.15:6 Venue by Agreement

Major Transaction: An action arising from a major transaction shall be brought in a county if the party against whom the action is brought has agreed in writing that a suit arising from the transaction may be brought in that county. Tex. Civ. Prac. & Rem. Code § 15.020(b). “Major transaction” means a transaction evidenced by a written agreement under which a person pays or receives, or is obligated to pay or entitled to receive, consideration with an aggregate stated value equal to or greater than $1 million. The term does not include a transaction entered into primarily for personal, family, or household purposes, or to settle a personal injury or wrongful death claim, without regard to the aggregate value. Tex. Civ. Prac. & Rem. Code § 15.020(a). However, an action arising from a major transaction may not be brought in a county if (1) the party bringing the
action has agreed in writing that an action arising from the transaction may not be brought in that county, and the action may be brought in another county of this state or in another jurisdiction; or (2) the party bringing the action has agreed in writing that an action arising from the transaction must be brought in another county of this state or in another jurisdiction, and the action may be brought in that other county, under this section or otherwise, or in that other jurisdiction. Tex. Civ. Prac. & Rem. Code § 15.020(c). Furthermore, these venue provisions do not apply to an action if (1) the agreement described by section 15.020 was unconscionable at the time that it was made; (2) the agreement regarding venue is voidable under chapter 272 of the Business and Commerce Code (relating to certain construction contracts); or (3) venue is established under a statute of this state other than this title.

Forum Selection Clauses: Although the terms are often used interchangeably and are often not used with precision, forum and venue are not synonymous. Liu v. Cici Enterprises, LP, 14-05-00827-CV, 2007 WL 43816, at *2 (Tex. App.—Houston [14th Dist.] Jan. 9, 2007, no pet.) (mem. op.). “Forum” generally refers to a sovereign or a state. In re Great Lakes Dredge & Dock Co. L.L.C., 251 S.W.3d 68, 73 (Tex. App.—Corpus Christi 2008, orig. proceeding). Venue refers to the propriety of prosecuting, in a particular form, a suit on a given subject matter with specific parties, over which the forum must, necessarily, have subject-matter jurisdiction. Scott v. Gallagher, 209 S.W.3d 262, 264 (Tex. App.—Houston [1st Dist.] 2006, no pet.) (quoting Gordon v. Jones, 196 S.W.3d 376, 383 (Tex. App.—Houston [1st Dist.] 2006, no pet.). At common law, venue meant the neighborhood, place, or county in which the injury is declared to have been done or in fact declared to have happened. In re Great Lakes Dredge & Dock Co., 251 S.W.3d at 73 (quoting State v. Blankenship, 170 S.W.3d 676, 681 (Tex. App.—Austin 2005, pet. ref’d) (quoting Black’s Law Dictionary 1557 (6th ed. 1991)). In Texas, “venue” refers to the county in which suit is proper within the forum state. In re Great Lakes Dredge & Dock Co., 251 S.W.3d at 73 (citing Accelerated Christian Education, Inc. v. Oracle Corp., 925 S.W.2d 66, 67 (Tex. App.—Dallas 1996, no writ) overruled in part on other grounds by In re Tyco Electronic Power Systems, Inc., No. 05-04-01808-CV, 2005 WL 237232; Estrada v. State, 148 S.W.3d 506, 508 (Tex. App.—El Paso 2004, no pet.)). Thus, a “forum” selection agreement is one that chooses another state or sovereign as the location for trial, whereas a “venue” selection agreement chooses a particular county or court within that state or sovereign. In re Great Lakes Dredge & Dock Co., 251 S.W.3d at 73–74.

The distinction between a forum selection clause and a venue selection clause is critical. Under Texas law, forum selection clauses are enforceable unless shown to be unreasonable and may be enforced through a motion to dismiss. Liu, 2007 WL 43816, at *2 (citing M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 10, (1972); Michiana Easy Livin’ Country, Inc. v. Holten, 168 S.W.3d 777, 793 (Tex. 2005)). In contrast, venue selection cannot be the subject of private contract unless otherwise provided by statute. Liu, 2007 WL 43816, at *2 (citing Fleming v. Ahumada, 193 S.W.3d 704, 712–13 (Tex. App.—Corpus Christi 2006, no pet.); Bristol-Myers Squibb Co. v. Goldston, 957 S.W.2d 671, 673–74 (Tex. App.—Fort Worth 1997, pet. dism’d by agr.)).

The burden of proof on a party challenging the validity of a forum selection clause is heavy. In re Lyon Financial Services, Inc., 257 S.W.3d 228, 232 (Tex. 2008) (orig. proceeding) (per curiam). Forum selection clauses are presumptively enforceable, and there is a “heavy, but not impossible, burden of proof” to defeat application of the clauses. Lyon, 257 S.W.3d at 231 (quoting In re AIU Insurance Co., 148 S.W.3d 109, 113 (Tex. 2004) (orig. proceeding)). A trial court abuses its discretion in refusing to enforce a forum selection clause unless the party opposing enforcement of the clause can clearly show that (1) enforcement would be unreasonable or unjust, (2) the clause is invalid for reasons of fraud or overreaching, (3) enforcement would contravene a strong public policy of the forum where the suit was brought, or (4) the selected forum would be seriously inconvenient for trial. Lyon, 257 S.W.3d at 232 (citing AIU Insurance, 148 S.W.3d at 112; In re Automated Collection Technologies, Inc., 156 S.W.3d 557, 559 (Tex. 2004) (orig. proceeding) (per curiam)). Mandamus relief is available to enforce
forum selection agreements because there is no adequate remedy by appeal when a trial court abuses its discretion by refusing to enforce a valid forum-selection clause that covers the dispute. *Lyon*, 257 S.W.3d at 231; *AIU Insurance*, 148 S.W.3d at 115–120.

§ 15.16 Transient Person

A transient person may be sued in any county in which he may be found. Tex. Civ. Prac. & Rem. Code § 15.039.

§ 15.17 Motion to Transfer Generally

Generally, a plaintiff has the first opportunity to fix venue in a proper county by filing suit in that county. The defendant may object to the plaintiff’s venue choice by filing a motion to transfer venue. *In re Pepsico, Inc.*, 87 S.W.3d 787, 789 (Tex. App.—Texarkana 2002) (citing *In re Masonite Corp.*, 997 S.W.2d 194, 197 (Tex.1999) (orig. proceeding)).

§ 15.17:1 Objecting to Venue

A defendant must challenge improper venue or assert a mandatory venue provision by objecting to a plaintiff’s venue choice through a motion to transfer venue filed concurrently with or before an answer. See Tex. Civ. Prac. & Rem. Code § 15.063. A motion objecting to improper venue may be in a separate instrument filed concurrently with or before the filing of the movant’s first responsive pleading, or the motion may be combined with other objections and included in the movant’s first responsive pleading. Tex. R. Civ. P. 86(2). The court, on motion filed and served concurrently with or before the filing of the answer, shall transfer an action to another county of proper venue if the county in which the action is pending is not a proper county as provided by this chapter. Tex. Civ. Prac. & Rem. Code § 15.063(1). An objection to improper venue is waived if not made by written motion filed before or concurrently with any other plea, pleading, or motion, except a special appearance motion provided for in rule 120a. Tex. R. Civ. P. 86(1).

However, as identified in the selections below, under certain circumstances, a written consent of the parties to transfer the case to another county may be requested at any time before trial, and a motion to transfer venue because an impartial trial cannot be had in the county where the action is pending may be asserted after an answer is on file. (See sections 15.17:2 and 15.17:3).

A motion to transfer venue must state—

1. that the action should be transferred to the specific county of proper venue and that such a transfer is requested;
2. that the action should be transferred because the county in which it is pending is not proper or because mandatory venue in another county is prescribed by one or more specific provisions, clearly designated; and
3. the legal and factual basis for the transfer.

Tex. R. Civ. P. 86(3). A party who seeks to transfer venue of the action to another specified county under the general rule, the mandatory venue rules, or the permissive venue rule has the burden to prove that venue is maintainable in the county to which transfer is sought. Tex. R. Civ. P. 87(2)(a), (b). Verification of the motion to transfer is not required. Tex. R. Civ. P. 86(3).

Because all properly pleaded venue facts must be taken as true unless specifically denied, the defendant’s motion to transfer should specifically deny the venue facts pleaded in the original petition. In *Gonzalez v. Nielson*, a motion to transfer venue that specifically denied that the cause of action arose in the county of suit and generally denied that any permissive exception to
the general venue statute applied was found insufficient because it did not specifically deny that the contract was payable in the county of suit. 770 S.W.2d 99, 102 (Tex. App.—Corpus Christi 1989, writ denied).

Several older cases have held that a district court does not have the power to change the venue of a suit on its own motion. Such an order, if entered, is void, and the proper method to prevent its enforcement is to enjoin the clerk of the court from execution of the transfer order. See, e.g., *Wight v. Moss*, 87 S.W.2d 837, 838 (Tex. Civ. App.—Dallas 1935, no writ).

§ 15.17:2 Impartial Trial Cannot Be Had

Texas Civil Practice and Remedies Code section 15.063(2) requires the court, on motion filed and served concurrently with or before the filing of the answer, to transfer the action to another county of proper venue if “an impartial trial cannot be had in the county in which the action is pending.” This can be contrasted with the procedure for a motion based on impartial trial, which is found in rules 257–259 of the Texas Rules of Civil Procedure.

§ 15.17:3 Written Consent of Parties

Section 15.063(3) of the Civil Practice and Remedies Code and Tex. R. Civ. P. 86(1) permit the parties to file a written consent to transfer venue to another county of proper venue at any time. See also Tex. Civ. Prac. & Rem. Code § 15.002; *Farris v. Ray*, 895 S.W.2d 351, 352 (Tex. 1995). Transfer is discretionary with the court if the written consent of the parties is filed after the answer has been filed. However, the Civil Practice and Remedies Code uses mandatory language: “The court, on motion filed and served concurrently with or before the filing of the answer, shall transfer an action to another county of proper venue if . . . written consent of the parties . . . is filed at any time.” Tex. Civ. Prac. & Rem. Code § 15.063. In contrast, rule 87(2)(c) provides that the motion “shall be determined in accordance with Rule 255,” and rule 255 states that on written consent of the parties filed with the court, the court may transfer the trial to the court in “any other county having jurisdiction of the subject matter of such suit.”

The words “at any time” used in section 15.063 conflict with the broader provision that requires the filing of the motion to transfer before or concurrently with the answer; however, it is reasonable to assume that the intent of section 15.063 is to give the parties the absolute right to select another county of proper venue before the court becomes involved in the action, whereas once the court is involved, the court should have the discretion to deny a written consent of the parties in the interest of judicial efficiency.

A motion to transfer is required to satisfy the mandatory transfer provision of section 15.063. However, the rules refer to filing a “motion” and to filing a “written consent”; therefore, a formal motion to transfer under the discretionary transfer provision of rule 255 may not be required.

§ 15.17:4 Statutory Forum Non Conveniens

Section 15.002(b) of the Civil Practice and Remedies Code provides a *forum non conveniens* transfer of venue. On the defendant’s motion (filed and served either before or concurrently with the answer), a court of proper venue may transfer an action to any other county of proper venue, if the court finds that—

1. maintenance of the action in the county of suit would work an injustice to the movant considering the movant’s economic and personal hardship;
2. the balance of interests of all the parties predominates in favor of the action being brought in the other county; and

3. the transfer of the action would not work an injustice to any other party.


§ 15.17:5 Waiver

A party may expressly waive venue rights by clear, overt acts evidencing an intent to waive or impliedly, by taking some action inconsistent with an intent to pursue the venue motion. Toliver v. Dallas Fort Worth Hospital Council, 198 S.W.3d 444, 446–47 (Tex. App.—Dallas 2006, no pet.) (motion to transfer venue not waived when defendant filed motion before filing any other pleading that invoked court’s jurisdiction; defendant also did not waive motion to transfer venue by filing in federal court) (citing Carlile v. RLS Legal Solutions, Inc., 138 S.W.3d 403, 406 (Tex. App.—Houston [14th Dist.] 2004, no pet.) (defendant never obtained hearing on venue motion and moved for new trial after losing at summary judgment without pursuing ruling on venue motion; defendant’s motion for new trial was construed as “affirmative action” by which he submitted to jurisdiction of trial court); Grozier v. L-B Sprinkler & Plumbing Repair, 744 S.W.2d 306, 309–10 (Tex. App.—Fort Worth 1988, writ denied) (filing a motion for new trial when venue motion was pending was “an act seeking to invoke the authority of the court whose authority” defendant challenged). Generally, these actions invoke the judicial power and jurisdiction of the courts. Toliver, 198 S.W.3d at 47 (citing Gentry v. Tucker, 891 S.W.2d 766, 768 (Tex. App.—Texarkana 1995, no writ) (motion will be waived if the defendant who is filing it, without first insisting upon its disposition, tries the case on the merits)); Grozier, 744 S.W.2d at 310; McGrede v. Coursey, 131 S.W.3d 189, 196 (Tex. App.—San Antonio 2004, no pet.) (holding that party invoked the trial court’s jurisdiction and waived any objection to venue by filing an answer to petition alleging conversion of estate assets before he filed motion to transfer venue). However, filing a notice of removal to federal court before filing a motion to transfer in state court does not waive the motion. Toliver, 198 S.W.3d at 47 (citing Antonio v. Marino, 910 S.W.2d 624, 630 (Tex. App.—Houston [14th Dist.] 1995, no writ)). See section 15.14:3 below for amending motions to transfer venue.

Although a trial court may rule on a venue motion without a hearing, the movant has a duty to request a hearing to urge the motion within a reasonable time; failure to do so may result in a waiver. See Grozier, 744 S.W.2d at 311; Whitworth v. Kuhn, 734 S.W.2d 108, 111 (Tex. App.—Austin 1987, no writ) (per curiam) (in dicta, court indicated the trial court could have refused a motion to transfer because the movant waited more than a year after filing his motion to transfer venue before requesting a hearing on that motion); see also Tex. R. Civ. P. 87(1) ("the determination of a motion to transfer venue shall be made promptly by the court . . ."). In Accent Energy Corp. v. Gillman, 824 S.W.2d 274, 276–77 (Tex. App.—Amarillo 1992, writ denied), no waiver resulted in a case in which a motion was filed and a hearing was immediately set but other parties moved for continuance and thereafter continued to file amended pleadings, resulting in a three year delay on the hearing.

A court is specifically required to make its determination of the motion to transfer promptly and in a reasonable time before trial. Tex. R. Civ. P. 87(1).

§ 15.17:6 Filing, Service, and Hearing

A copy of any instrument filed pursuant to rule 86 must be served in accordance with rule 21a. Tex. R. Civ. P. 86(5); see Tex. R. Civ. P. 21a. “Any instrument” includes the motion to transfer venue, any amendments or a response to the motion, a reply to the response, any supporting affidavits, and any attachments, including discovery products. See Tex. R. Civ. P. 86.
The movant has a duty to request a setting on the motion to transfer and provide each party with at least forty-five days’ notice of the hearing. Any response or opposing affidavits must be filed at least thirty days before the hearing, and any reply to the response and additional affidavits must be filed at least seven days before the hearing. Leave of court must be obtained to alter these requirements. Tex. R. Civ. P. 87(1). There are special provisions for motions by parties joined after a venue hearing. See section 15.17:16 below.

§ 15.17:7 Basis of Determination

All venue challenges are determined by the court, without a jury. Tex. R. Civ. P. 87(4). The court must determine the motion to transfer venue on the basis of the pleadings, any stipulations made by and between the parties, and properly filed affidavits, attachments, and discovery products. Tex. Civ. Prac. & Rem. Code § 15.064(a); Tex. R. Civ. P. 87(3)(a), (b), 88. Deposition transcripts, responses to requests for admissions, answers to interrogatories, and other discovery products containing information relevant to venue may be considered by the court in making a venue determination if they are attached to or incorporated by reference in an affidavit. Tex. R. Civ. P. 88. Such an affidavit may be made by a party, a witness, or an attorney who has knowledge of the discovery. Tex. R. Civ. P. 88. A similar discovery provision is set forth for motions to transfer that are based on the ground that an impartial trial cannot be had. See Tex. R. Civ. P. 88(c), 257–59.

§ 15.17:8 Plaintiff’s Response

A response to the defendant’s motion to transfer is not required except that (1) when a venue fact pleaded in the petition is specifically denied by the defendant, the plaintiff must make prima facie proof of that fact and (2) when a venue fact is properly pleaded in the defendant’s motion, the plaintiff must specifically deny it or it will be taken as true. Tex. R. Civ. P. 86(4), 87(3)(a).

Prima facie proof requires an affidavit to be attached to the response. See Tex. R. Civ. P. 87(3)(a). Verification of a response is not required. Tex. R. Civ. P. 86(4). Except on leave of court, any response or opposing affidavits must be filed at least thirty days before the hearing on the motion to transfer. Tex. R. Civ. P. 87(1). See forms 19-1 (Plaintiff’s Response to Motion to Transfer Venue) and 19-2 (Affidavit).

§ 15.17:9 Movant’s Reply to Response

The party seeking transfer of venue may reply to any response made to his motion, although he is not required to do so. Tex. R. Civ. P. 87(1). The reply may be accompanied by additional affidavits supporting the motion to transfer. Tex. R. Civ. P. 87(1). Except on leave of court, any reply and any additional affidavits must be filed at least seven days before the hearing on the motion to transfer. Tex. R. Civ. P. 87(1). A reply gives the movant the opportunity to make prima facie proof of venue facts specifically denied in the nonmovant’s response. See Tex. R. Civ. P. 86(4), 87(3)(a).

§ 15.17:10 Discovery

Discovery shall not be abated or affected by pendency of a motion to transfer. Tex. R. Civ. P. 88.
§ 15.17:11 Burden of Proof

The plaintiff seeking to maintain venue in the county of suit must adequately plead in the original petition and in his response to the motion to transfer those venue facts that support his choice of venue. See Tex. R. Civ. P. 87(2)(a). In addition, he must supply prima facie proof of venue facts the defendant has specifically denied, and he must specifically deny the venue facts pleaded by the defendant. Any properly pleaded venue facts not specifically denied will be taken as true. Tex. R. Civ. P. 87(3)(a).

The plaintiff may seek to maintain venue under the general venue rule, a mandatory or permissive venue provision, or the law governing venue in multiple claims. Tex. R. Civ. P. 87(2)(a); see Tex. Civ. Prac. & Rem. Code §§ 15.002, 15.011–.020, 15.031–.033, 15.035, 15.038–.039, 15.062.

If the plaintiff adequately pleads and makes prima facie proof that venue is proper in the county of suit, the case will not be transferred unless the adverse party establishes that an impartial trial cannot be had where the action is pending or establishes a ground of venue in a different county by prima facie proof of a mandatory venue exception. Tex. R. Civ. P. 87(3)(c).

Any venue facts pleaded by the defendant seeking transfer must be taken as true unless specifically denied by the plaintiff. Once denied, the movant’s facts must be supported by prima facie proof. Tex. R. Civ. P. 87(3)(a). The defendant must prove through his pleadings, affidavits, and attachments that venue is maintainable in the county to which transfer is sought on the basis of the general venue rule, a mandatory or permissive exception, or the law governing venue in multiple claims. Tex. R. Civ. P. 87(2)(a).

If a motion to transfer is based on the parties’ filed written consent, specific venue facts should be alleged that will establish that the court to which transfer is sought has jurisdiction of the subject matter of the suit. See Tex. R. Civ. P. 87(2)(c), 255.

§ 15.17:12 Prima Facie Proof

To make prima facie proof it is necessary to first properly plead the venue facts and then support them by affidavit or affidavits. Affidavits may be accompanied by “duly proved” attachments, or in some cases unsworn declarations. See sections 8.3:2, 8.12:6, 19.17 and 19.19 in this manual for requirements of affidavits and unsworn declarations. Affidavits must be made on personal knowledge, set forth specific facts “as would be admissible in evidence,” and show affirmatively that the affiant is competent to testify. Tex. R. Civ. P. 87(3)(a); see also Cox Engineering, Inc. v. Funston Machine & Supply Co., 749 S.W.2d 508, 512 (Tex. App.—Fort Worth 1988, no writ) (error not preserved if no affidavits filed).

Generally, in determining venue, the trial court may consider only the pleadings and affidavits. The court may consider relevant information in depositions, responses to requests for admission, answers to interrogatories, and other discovery products attached to or incorporated by reference in an affidavit of a party, a witness, or an attorney who has knowledge of such discovery. Tex. R. Civ. P. 88; Cox Engineering, Inc., 749 S.W.2d at 512.

§ 15.17:13 Proof of Merits Not Required

The venue statute and the rules distinguish between proof concerning the merits of a case and proof concerning the situs of the accrual of a cause of action. In all venue hearings, no factual proof concerning the merits of the case is required to establish venue. The court must determine venue questions from the pleadings and affidavits. Tex. Civ. Prac. & Rem. Code § 15.064(a). The existence of a cause of action, if pleaded properly, is established as alleged by the pleadings. Tex. R. Civ. P.
§ 15.17:14  Amending the Motion to Transfer

A timely filed motion to transfer venue may be amended to cure defects in the original motion if the amended motion is filed before the trial court rules on the original motion; the properly filed amended motion relates back to and supersedes the original motion to transfer venue. In re Pepsico, Inc., 87 S.W.3d 787, 794 (Tex. App.—Texarkana 2002, orig. proceeding).

§ 15.17:15  Subsequently Added Parties

Later Added Defendant: If venue has been sustained as against a motion to transfer or if an action has been transferred to a proper county in response to a motion to transfer, no further motions to transfer shall be considered regardless of whether the movant was a party to the prior proceedings or was added as a party subsequent to the venue proceedings, unless the motion to transfer is based on the grounds that an impartial trial cannot be had under Tex. R. Civ. P. 257–259 (unfair trial for local prejudice) or on the ground of mandatory venue, provided that such claim was not available to the other movant or movants. Tex. R. Civ. P. 87(5).

Intervening Party: An intervening party has the status of a plaintiff and is in no better position than the plaintiff to contest the venue of the action. First Heights Bank, FSB v. Gutierrez, 852 S.W.2d 596, 618 (Tex. App.—Corpus Christi 1993, writ denied) (citing Campbell v. Galbreath, 441 S.W.2d 297 (Tex. Civ. App.—Waco 1969, writ dism’d w.o.j.)).

§ 15.17:16  Procedure When Motion to Transfer Venue Sustained

If a motion to transfer venue is sustained, the case is not dismissed but is transferred to the proper court. Tex. R. Civ. P. 89.

§ 15.17:17  Costs and Fees

If a motion to transfer venue is sustained, the costs incurred before the time the suit is filed in the transferee court are taxed against the plaintiff. Tex. R. Civ. P. 89. The clerk of the transferee court must mail notification to the plaintiff or his attorney that transfer is completed and that the filing fee in the proper court is due and payable within thirty days of the mailing of the notification. If the filing fee is not timely paid, any court of the transferee county to which the case might have been assigned may dismiss the case on its own motion or the motion of a party without prejudice to the refiling of the case. Tex. R. Civ. P. 89.

The plaintiff’s attorney should ask the clerk of the original court to ascertain the costs payable in that court before transfer and indicate on the transferred file that he is the plaintiff’s attorney of record. The attorney should ask the clerk of the transferee court for the cause number of the transferred case and the specific court the case is assigned to, if appropriate.

§ 15.18  Postvenue Proceedings

§ 15.18:1  Order Granting Motion to Transfer Venue is Res Judicata

Once a venue determination has been made, that determination is conclusive as to those parties and claims. Because venue is then fixed in any suit involving the same parties and claims, it cannot be overcome by a nonsuit and subsequent refiling in
another county. *In re Team Rocket, L.P.*, 256 S.W.3d 257, 260 (Tex. 2008) (orig. proceeding) (citing *H.H. Watson Co. v. Cobb Grain Co.*, 292 S.W. 174, 177 (Tex. Comm’n App. 1927, judgm’t adopted). However, if the lawsuit is nonsuited prior to a determination on the motion to transfer, the plaintiff will not be precluded from choosing a proper county for venue. *GeoChem Tech Corp. v. Verseckes*, 962 S.W.2d 541, 542–43 (Tex. 1998) (contrasting the current motion to transfer venue procedure with old plea-of-privilege procedure). The venue statutes do not say that the plaintiff may choose venue only once; they simply say that if the county chosen is not proper, the case must be transferred if a sufficient motion is filed and ruled on. *GeoChem*, 962 S.W.2d at 544 (citing Tex. Civ. Prac. & Rem. Code § 15.063) (emphasis added).

### § 15.18:2 Rehearing

Tex. R. Civ. P. 87 provides that if an action has been transferred to a proper county in response to a motion to transfer, no further motions to transfer shall be considered. *In re Chester*, 309 S.W.3d 713, 716 (Tex. App.—Houston [14th Dist.] 2010, no pet.) (citing *In re Team Rocket, L.P.*, 256 S.W.3d 257, 260 (Tex. 2008) (orig. proceeding); Tex. R. Civ. P. 87(5)). Although a trial court’s ruling transferring venue is interlocutory for the parties and not subject to immediate appeal, the order is final for the transferring court as long as it is not altered within the court’s thirty-day plenary jurisdiction. *In re Chester*, 309 S.W.3d at 716 (citing *Team Rocket*, 256 S.W.3d at 260; *In re Southwestern Bell Telephone Co.*, 35 S.W.3d 602, 605 (Tex. 2000) (orig. proceeding) (per curiam)). A court retains plenary jurisdiction to correct its error for thirty days after the order of transfer is signed. *In re Chester*, 309 S.W.3d at 716 (citing *HCA Health Services of Texas, Inc. v. Salinas*, 838 S.W.2d 246, 248 (Tex. 1992) (orig. proceeding) (per curiam)). The thirty-day deadline for plenary power after granting a motion to transfer will not be extended by any motions to reconsider. See *In re Chester*, 309 S.W.3d at 716–718; *In re Darling Homes*, No. 05-05-00497-CV, 2005 WL 1390378 (Tex. App.—Dallas June 14, 2005, orig. proceeding [mand. denied]) (mem. op.).

### § 15.18:3 Mandamus

Although mandamus is not available to review the propriety of venue in the county of suit in cases outside the ambit of section 15.0642 of the Texas Civil Practice and Remedies Code, it is properly employed to correct improper venue procedure. Tex. Civ. Prac. & Rem. Code Ann. § 15.0642. *In re Shell Oil Co.*, 128 S.W.3d 694, 696 (Tex. App.—Beaumont 2004, orig. proceeding) (trial court refused to transfer suit to previously determined county of venue) (citing *In re Missouri Pacific R.R. Co.*, 998 S.W.2d 212, 215 n. 18 (Tex. 1999) (it is presumed that there is no adequate remedy for failure to enforce mandatory venue statute; plaintiffs failed to present prima facie evidence that venue was proper in county where suit was brought; burden shifted to defendant to prove venue was proper in its chosen county; and defendant established venue in its chosen county); *In re Masonite Corp.*, 997 S.W.2d 194, 198 (Tex. 1999) (orig. proceeding) (trial court transferred cases to improper counties after plaintiffs conceded venue was improper and defendant offered prima facie proof of proper county); *HCA Health Services of Texas, Inc. v. Salinas*, 838 S.W.2d 246, 248 (Tex. 1992) (orig. proceeding) (per curiam) (mandamus proper against judge who ordered case to be prosecuted to final judgment in his court after first court mistakenly transferred venue of case then vacated its order); *Union Carbide Corp. v. Moyer*, 798 S.W.2d 792, 793 (Tex. 1990) (orig. proceeding) (denial of continuance to supplement record with affidavits and discovery products pertinent to motion for change of venue was abuse of discretion); *Henderson v. O’Neill*, 797 S.W.2d 905, 905 (Tex. 1990) (orig. proceeding) (per curiam) (trial court abused its discretion in failing to comply with applicable forty-five-day notice requirement before ruling on motion to transfer); see also *In re Chester*, 309 S.W.3d 713, 716–17 (Tex. App.—Houston [14th Dist.] 2010, no pet.) (trial court abused discretion when it vacated order to transfer venue after its plenary power to modify or vacate the order had expired under Tex. R. Civ. P. 329b(b)).
In exceptional circumstances—such as when a trial judge makes no attempt to follow rule 87 and acknowledges deviation
from required procedure—mandamus will issue to correct improper venue procedure. In re Shell Oil Co., 128 S.W.3d 696
(citing Henderson, 797 S.W.2d at 905; Dorchester Master Ltd. Partnership v. Anthony, 734 S.W.2d 151 (Tex. App.—Houston
[1st Dist.] 1996)). Mandamus was appropriate to enforce the notice requirements in a venue proceeding. See Dorchester
Master Ltd. Partnership, 734 S.W.2d at 152.

§ 15.18:4 Generally No Interlocutory Appeal

Once the trial court has ruled on proper venue, that decision cannot generally be the subject of an interlocutory appeal. Once a
venue determination has been made, that determination is conclusive as to those parties and claims. In re Team Rocket, L.P.,
Because venue is then fixed in any suit involving the same parties and claims, it cannot be overcome by a nonsuit and subse-
quent refiling in another county. Team Rocket, 256 S.W.3d at 260 (citing H.H. Watson Co. v. Cobb Grain Co., 292 S.W. 174,
177 (Tex. Comm’n App. 1927)).

§ 15.18:5 Interlocutory Appeal in Limited Circumstances with Multiple Plaintiffs

However, in a suit in which there is more than one plaintiff, whether the plaintiffs are included by joinder, by intervention,
because the lawsuit was begun by more than one plaintiff, there is the potential for an interlocutory appeal. See Tex. Civ. Prac.
& Rem. Code § 15.003. Each plaintiff must, independently of every other plaintiff, establish proper venue. If a plaintiff cannot
independently establish proper venue, that plaintiff's part of the suit, including all of that plaintiff’s claims and causes of
action, must be transferred to a county of proper venue or dismissed, as is appropriate, unless that plaintiff, independently of
every other plaintiff, establishes that: (1) joinder of that plaintiff or intervention in the suit by that plaintiff is proper under the
Texas Rules of Civil Procedure, (2) maintaining venue as to that plaintiff in the county of suit does not unfairly prejudice
another party to the suit, (3) there is an essential need to have that plaintiff’s claim tried in the county in which the suit is pend-
ing, and (4) the county in which the suit is pending is a fair and convenient venue for that plaintiff and all persons against

An interlocutory appeal may be taken of a trial court’s determination under Tex. Civ. Prac. & Rem. Code § 15.003(a) that (1)
a plaintiff did or did not independently establish proper venue or (2) a plaintiff that did not independently establish proper
venue did or did not establish the items prescribed by subsections (a)(1)–(4). Tex. Civ. Prac. & Rem. Code § 15.003(b).

An interlocutory appeal permitted by Tex. Civ. Prac. & Rem. Code § 15.003(b) must be taken to the court of appeals district in
which the trial court is located under the procedures established for interlocutory appeals. The appeal may be taken by any
party that is affected by the trial court’s determination. The court of appeals shall (1) determine whether the trial court’s order
is proper based on an independent determination from the record and not under either an abuse of discretion or substantial evi-
dence standard and (2) render judgment not later than the 120th day after the date the appeal is perfected. Tex. Civ. Prac. &
Rem. Code § 15.003(c).

An interlocutory appeal under Tex. Civ. Prac. & Rem. Code § 15.003(b) has the effect of staying the commencement of trial in
§ 15.18:6 Appeal after Trial

On appeal from the trial on the merits, if venue was improper it shall in no event be harmless error and shall be reversible error. *Wilson v. Texas Parks & Wildlife Department*, 886 S.W.2d 259, 261 (Tex. 1994) (citing *Tex. Civ. Prac. & Rem. Code §15.064(b)*). In determining whether venue was or was not proper, the appellate court shall consider the entire record, including the trial on the merits. *Wilson*, 886 S.W.2d at 262; *see also Ruiz v. Conoco, Inc.*, 868 S.W.2d 752, 757 (Tex. 1993). The appellate court is obligated to conduct an independent review of the entire record to determine whether venue was proper in the ultimate county of suit. *Ruiz*, 868 S.W.2d at 758. However, a court’s ruling or decision to grant or deny a transfer for *forum non conveniens* is not grounds for appeal or mandamus and is not reversible error. *See Tex. Civ. Prac. & Rem. Code §15.002(b), (c)*.

§ 15.19 Venue in Justice Courts

See the appendix to this manual for venue rules in justice courts. *See also Tex. Civ. Prac. & Rem. Code ch. 15, subch. E.*

§ 15.20 Venue in Federal Court

“Venue” refers to the geographic specification of the proper court or courts for the litigation of a civil action that is within the subject-matter jurisdiction of the district courts in general and does not refer to any grant or restriction of subject-matter jurisdiction providing for a civil action to be adjudicated only by the district court for a particular district or districts. 28 U.S.C. §1390(a). The venue statutes for federal court litigation are found in 28 U.S.C. §§ 1390–1413. Some of the more relevant sections are discussed herein, but a full review of the issue is not included in this manual. 28 U.S.C. § 1391 discusses venue generally and governs all civil actions brought in U.S. district courts, except as otherwise provided by law. *See 28 U.S.C. § 1391(a)(1).* Proper venue must be determined without regard to whether the action is local or transitory in nature, except as otherwise provided by law. 28 U.S.C. § 1391(a)(2).

28 U.S.C. § 1391(b) VENUE IN GENERAL. A civil action may be brought in—

1. a judicial district in which any defendant resides, if all defendants are residents of the State in which the district is located;

2. a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated; or

3. if there is no district in which an action may otherwise be brought as provided in this section, any judicial district in which any defendant is subject to the court’s personal jurisdiction with respect to such action.

28 U.S.C. § 1391(c) RESIDENCY. For all venue purposes—

1. a natural person, including an alien lawfully admitted for permanent residence in the United States, shall be deemed to reside in the judicial district in which that person is domiciled;

2. an entity with the capacity to sue and be sued in its common name under applicable law, whether or not incorporated, shall be deemed to reside, if a defendant, in any judicial district in which such defendant is subject to the court’s personal jurisdiction with respect to the civil action in question and, if a plaintiff, only in the judicial district in which it maintains its principal place of business; and
(3) a defendant not resident in the United States may be sued in any judicial district, and the joinder of such a defendant shall be disregarded in determining where the action may be brought with respect to other defendants.

28 U.S.C. § 1391(d) RESIDENCY OF CORPORATIONS IN STATES WITH MULTIPLE DISTRICTS. For purposes of venue under this chapter, in a State which has more than one judicial district and in which a defendant that is a corporation is subject to personal jurisdiction at the time an action is commenced, such corporation shall be deemed to reside in any district in that State within which its contacts would be sufficient to subject it to personal jurisdiction if that district were a separate State, and, if there is no such district, the corporation shall be deemed to reside in the district within which it has the most significant contacts.

28 U.S.C. § 1404 CHANGE OF VENUE

(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented.

(b) Upon motion, consent or stipulation of all parties, any action, suit or proceeding of a civil nature or any motion or hearing thereof, may be transferred, in the discretion of the court, from the division in which pending to any other division in the same district. Transfer of proceedings in rem brought by or on behalf of the United States may be transferred under this section without the consent of the United States where all other parties request transfer.

(c) A district court may order any civil action to be tried at any place within the division in which it is pending.

(d) Transfers from a district court of the United States to the District Court of Guam, the District Court for the Northern Mariana Islands, or the District Court of the Virgin Islands shall not be permitted under this section. As otherwise used in this section, the term “district court” includes the District Court of Guam, the District Court for the Northern Mariana Islands, and the District Court of the Virgin Islands, and the term “district” includes the territorial jurisdiction of each such court.

28 U.S.C. § 1406 CURE OR WAIVER OF DEFECTS

(a) The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.

(b) Nothing in this chapter shall impair the jurisdiction of a district court of any matter involving a party who does not interpose timely and sufficient objection to the venue.

(c) As used in this section, the term “district court” includes the District Court of Guam, the District Court for the Northern Mariana Islands, and the District Court of the Virgin Islands, and the term “district” includes the territorial jurisdiction of each such court.
Form 15-1

This form contains sample allegations relating to venue situations frequently encountered in collections litigation. For a discussion of the response to motion to transfer venue, see section 15.17:1 in this chapter. Venue is discussed generally in part II. in this chapter.

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

Plaintiff’s Response to Motion to Transfer Venue

1. **Parties.** [Name of plaintiff], Plaintiff, files this Response to Motion to Transfer Venue filed herein by [name of defendant], Defendant, and as grounds would show the Court the following:

   Paragraph 2. is an example only; the actual allegations must be drafted to fit the fact situation.

   2. **Facts.** This action is based on a written contract between Plaintiff and Defendant. Under its express terms, [add the specific contractual terms that fix venue in a specific county, e.g., Defendant was obligated to pay $5,000 to Plaintiff in Austin, Travis County, Texas, on June 17, 2018]. Defendant defaulted on the obligation, as alleged in Plaintiff’s original petition on file in this cause. The petition is adopted and incorporated by reference into this response. The allegations in the petition are true and correct.

   3. **Denials.** Plaintiff denies that this suit is not filed in the proper county. Plaintiff further denies that [mandatory/permissive] venue of this action is set in [county named by the defendant] County by [statutory authority cited by the defendant]. [Continue with specific denials of venue facts asserted by the defendant in his motion to transfer venue.]

   4. **Venue Facts.** [Set out venue facts that are specifically denied by the defendant in his motion to transfer venue and that are to be established by prima facie proof through the affidavits and attachments attached to this motion.]
Because of the foregoing facts, venue in this cause is proper in [county] County, Texas, pursuant to [statutory authority, e.g., section 15.035 of the Texas Civil Practice and Remedies Code].

5. Prayer. Plaintiff prays that Defendant’s Motion to Transfer Venue be in all things overruled and that Plaintiff be granted all further relief to which Plaintiff may be entitled.

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

Include a certificate of service (form 19-1). Attach opposing affidavit(s) (form 15-2) and attachments, if any. Prepare the order (form 15-3) and file it with the response to motion to transfer venue.
**Affidavit [Opposing Transfer]**

**Form 15-2**

This affidavit is for use with the response to motion to transfer venue (form 15-1 in this chapter) to make prima facie proof of venue facts specifically denied by the defendant. The affidavit must be made on personal knowledge, set forth specific facts as would be admissible in evidence, and show affirmatively that the affiant is competent to testify. **Tex. R. Civ. P. 87(3)(a).** Note that discovery products to be considered by the court in making the venue determination should be attached to or incorporated by reference in an affidavit of a party, a witness, or an attorney who has knowledge of such discovery. **Tex. R. Civ. P. 88.**

The attorney should not swear to the truth of the facts on which the opposing affidavit is based. See section 19.17:3 in this manual.

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

**Affidavit**

[Opposing Transfer]

BEFORE ME, the undersigned authority, personally appeared [name of affiant], who swore on oath that the following facts are true:

“My name is [name of affiant]. I am of sound mind and capable of making this affidavit. I am personally acquainted with the facts herein stated, and they are true and correct. [Include if applicable: I am authorized to make this affidavit.]”

State specific facts that would be admissible in evidence showing how the affiant has personal knowledge of the matters stated herein and setting forth his evidence.

[Name of affiant]

Affiant

SIGNED under oath before me on ________________________________.

Notary Public, State of Texas
Order Overruling Motion to Transfer Venue

At the hearing on Defendant’s Motion to Transfer Venue and Plaintiff’s response in this cause, the venue issues were tried by the Court, which found that the Motion to Transfer Venue of [name of defendant], Defendant, should be overruled.

It is therefore ORDERED that Defendant’s Motion to Transfer Venue is overruled and that all costs incurred in this venue hearing are taxed against [name of defendant], Defendant.

SIGNED on ________________________________.

JUDGE PRESIDING

APPROVED AS TO FORM:

[Name]
Attorney for Plaintiff
State Bar No.:
[E-mail address]
[Address]
[Telephone]
[Telexcopier]
[Name]
Attorney for Defendant
State Bar No.:
[E-mail address]
[Address]
[Telephone]
[Telecopier]
Chapter 16
Service of Process

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Chapter 16
Service of Process

§ 16.1 Citation

§ 16.1:1 Citation Generally

The citation notifies the defendant that he has been sued. The return is the report of service on the defendant. See Tex. R. Civ. P. 99, 107.

A January 1, 2012, change to Tex. R. Civ. P. 99(a) added a requirement for the clerk to retain a copy of the citation in the court’s file. Returns were customarily made on the citation. However, Tex. R. Civ. P. 107(a) (amended simultaneously with Tex. R. Civ. P. 99(a)) states that the return, “may, but need not, be endorsed on or attached to the citation.” Tex. R. Civ. P. 99(a), 107(a); Texas Supreme Court, Final Approval of Amendments to Texas Rules of Civil Procedure 99 et al., Misc. Docket No. 11-9250 (Dec. 12, 2011); 75 Tex. B.J. 56; see also Acts 2011, 81st Leg., R.S., ch. 245, § 1 (H.B. 962), eff. Jan. 1, 2012.

Before submitting a default judgment, verify that the citation and the return are both file-stamped with the date of filing. The party requesting citation shall be responsible for obtaining service of the citation and a copy of the petition. Tex. R. Civ. P. 99(a). The citation informs the defendant of the suit and advises when, where, and how to answer. The purpose of citation is to give the court jurisdiction over the parties and to provide notice to the defendant that it has been sued, by a particular party asserting a particular claim, so that due process will be served and that the defendant will have an opportunity to appear and defend the action.


On the filing of a petition, the clerk issues and delivers the citation as directed by the requesting party. If requested, separate or additional citations will also be issued by the clerk. Tex. R. Civ. P. 99a. The issuance of a citation includes preparing, dating, attesting to, and delivering it to an officer or other appropriate person for service. See London v. Chandler, 406 S.W.2d 203, 204 (Tex. 1966).

The citation is invalid if it is amended without the trial court's approval. See Tex. R. Civ. P. 118; In re I.G., No. 03-13-00765-CV, 2015 WL 4448836, at *3 (Tex. App.—Austin July 17, 2015, pet. denied); Suave v. State, 638 S.W.2d 608, 610 (Tex. App.—Dallas 1982, pet. ref’d). If the citation is inaccurate, an additional, accurate citation can simply be issued. Tex. R. Civ.
P. 99(a). As with all stages of service of process, precision is required. The citation generally cannot be issued or served on Sunday; see Tex. R. Civ. P. 6 for exceptions.

The citation should not mislead. In one case, the supreme court voided a default judgment when the citation stated that the sheriff or constable “shall deliver” citation to the defendant in person but the defendant was instead served by certified mail. The court found the discrepancy could mislead the defendant into believing that subsequent personal service would occur. *Smith v. Commercial Equipment Leasing Co.*, 678 S.W.2d 917, 917–18 (Tex. 1984).

§ 16.1:2 Citation Requirements

**Style:** The citation must be styled “The State of Texas.” Tex. R. Civ. P. 15, 99b(1).

**Signature and Seal:** The citation must be signed by the clerk under seal of the court. Tex. R. Civ. P. 99b(2). *Midstate Environmental Services, LP v. Peterson*, 435 S.W.3d 287, 290 (Tex. App.—Waco 2014, no pet.) (lack of seal was “glaring defect”; also, citation was not directed to defendant). *But see Consolidated American Industries, Inc. v. Greit-Amberoaks, L.P.*, No. 03-07-00173-CV, 2008 WL 5210925, at *2 (Tex. App.—Austin Dec. 12, 2008, no pet.) (mem. op.) (seal requirement met when citation is signed by deputy of district court as “issued and given under my hand and seal of said court”). Note that per Tex. R. App. P. 34.5(f), “on any party’s motion or its own initiative, the appellate court may direct the trial court clerk to send it any original document.”

**Location of Court:** The citation must contain the court’s name and location. Tex. R. Civ. P. 99b(3). *Faaborg v. Allcorn*, No. 11-05-00365-CV, 2006 WL 3238241, at *2 (Tex. App.—Eastland Nov. 9, 2006, no pet.) (mem. op.) (“County Court at Law #2, Williamson County, Texas” properly stated the name and location of court—though address not stated). See also Tex. R. Civ. P. 99(11), requiring court clerk’s address.


**Names of Parties:** Tex. R. Civ. P. 99b(7). See *Union Pacific Corp. v. Legg*, 49 S.W.3d 72, 77–79 (Tex. App.—Austin 2001, no pet.) ($50 million judgment reversed because citation named Union Pacific Railroad Company, when Union Pacific Corporation was the named defendant); *Mantis v. Resz*, 5 S.W.3d 388, 390–91 (Tex. App.—Fort Worth 1999, pet. denied) overruled
in part on other grounds by Sheldon v. Emergency Medicine Consultants, I, P.A., 43 S.W.3d 701, 702 n.2 (Tex. App.—Fort Worth 2001, no pet.) (petition and citation naming defendant Michael Mantis sufficient, though defendant’s name was Michael Mantis).

Directed to Defendant: The citation must be directed to the defendant, Tex. R. Civ. P. 99b(8). A citation directed to the defendant and the sheriff or constable is sufficient. Barker CATV Construction, Inc. v. Ampro, Inc., 989 S.W.2d 789, 792–93 (Tex. App.—Houston [1st Dist.] 1999, no pet.). While the citation may, and in some cases must, be served on an agent, it is invalid if it is directed to the agent rather than his principal. See ISO Production Management 1982, Ltd. v. M&L Oil & Gas Exploration, Inc., 768 S.W.2d 354, 356 (Tex. App.—Waco 1989, no writ) (citation directed to president of limited partnership’s corporate general partner) (citing Stafford Construction Co., Inc. v. Martin, 513 S.W.2d 667, 668–70 (Tex. Civ. App.—El Paso 1975, no writ)).

Name and Address of Plaintiff’s Attorney: The citation must include the name and address of the plaintiff’s attorney; otherwise the plaintiff’s address should be included. Tex. R. Civ. P. 99b(9).

Time in Which to Answer: The citation must state the time in which the Texas Rules of Civil Procedure require defendant to file a written answer. Tex. R. Civ. P. 99b(10).

Court Clerk’s Address: See Tex. R. Civ. P. 99b(11).

Default Judgment Warning: The citation “shall notify the defendant that in case of failure of defendant to file an answer, judgment by default may be rendered for the relief demanded in the petition. The citation shall direct the defendant to file a written answer to the plaintiff’s petition on or before 10:00 A.M. on the Monday next after the expiration of twenty days [fourteen days in justice court] after the date of service thereof. The requirement of subsections 10 and 12 of this section shall be in the form set forth in section c of this rule.” Tex. R. Civ. P. 99b(12). See the next paragraph.

Required Notice Pursuant to Tex. R. Civ. P. 99c: This rule requires that the citation include the following notice: “You have been sued. You may employ an attorney. If you or your attorney do not file a written answer with the clerk who issued this citation by 10:00 A.M. on the Monday next following the expiration of twenty days after you were served this citation and petition, a default judgment may be taken against you.” Tex. R. Civ. P. 99c.

Petition Copies: The plaintiff must provide sufficient copies for use in serving parties to be served. Tex. R. Civ. P. 99d.

Plaintiff May Prepare: The plaintiff or plaintiff’s attorney may prepare the citation. It should be presented to the clerk for signing and affixing a seal to same. Tex. Civ. Prac. Rem. Code § 17.027; Tex. R. Civ. P. 99b(2).

Statement of Inability to Afford Payment of Court Costs (Formerly Pauper’s Oath): If service of process is requested in a county other than in the county of suit, the clerk must indicate on the citation if a statement of inability to afford payment of court costs has been filed. If a statement has been filed, the sheriff or constable must execute the service without demanding payment. Tex. R. Civ. P. 126.

§ 16.2 Kinds of Service

There are three kinds of service:
1. **Personal Service**—This is delivery of the citation and petition to the defendant in person or to an authorized representative of a corporate defendant or other entity; see section 16.3 below.

2. **Substituted or Alternate Service**—This is service on someone other than the named defendant or service by leaving the citation and petition at the defendant’s usual place of business; see section 16.7.

3. **Constructive Service**—This is citation by publication or service by publication. Because it is constructive, not actual service, it is not a favored method of service. It is discussed at section 16.17. When a defendant’s identity is known, service by publication is generally inadequate. *In re E.R.*, 385 S.W.3d 552, 560 (Tex. 2012).

Some form of service must be accomplished. Even if the defendant has actual notice of the suit, lack of proper service may void a default judgment. *Wilson v. Dunn*, 800 S.W.2d 833, 836–37 (Tex. 1990); *Deanne v. Deanne*, 689 S.W.2d 262, 263 (Tex. App.—Waco 1985, no writ). The plaintiff must exercise extreme diligence in the issuance and service of citation if the lawsuit was filed close to the deadline for the applicable statute of limitation. The mere filing of a suit, without diligence in effecting service, will not toll limitations. *Ashley v. Hawkins*, 293 S.W.3d 175, 179 (Tex. 2009); *Murray v. San Jacinto Agency, Inc.* 800 S.W.2d 826, 830 (Tex. 1990); *Gant v. DeLeon*, 786 S.W.2d 259, 260 (Tex. 1990) (per curiam). Diligence is rarely proven in these cases. See Mark P. Blendon, *Service of Process and Default Judgments*; State Bar of Texas 15th Annual Collections & Creditors’ Rights Course 6 (2017).

### § 16.3 Personal Service

As to who may serve process, see Tex. R. Civ. P. 103 and section 16.6 below. A defendant should be served in person whenever possible. This is the preferred method of service. Alternate forms of service are not usually permitted unless personal service is impractical. Personal service may be made by any person authorized to serve citation and other notices under Tex. R. Civ. P. 103 by—

1. delivering to the defendant, in person, a true copy of the citation, with the petition attached and the date of delivery endorsed on it, to the defendant in person, or

2. mailing a true copy of the citation, with petition attached, to the defendant by registered or certified mail, return receipt requested.

Tex. R. Civ. P. 106(a). No one who is a party or who is interested in the outcome of the suit may serve process. Tex. R. Civ. P. 103. A nonresident or a resident defendant who is temporarily out of the state can be served in the sister state by “any disinterested person who is not less than eighteen years of age, in the same manner as provided in Rule 106.” Tex. R. Civ. P. 108. A party in a foreign country may be served according to the provisions of Tex. R. Civ. P. 108a. Service on a business entity is discussed beginning at section 16.10 below.

The manner of service must strictly comply with the Texas Rules of Civil Procedure. *Smith v. Commercial Equipment Leasing Co.*, 678 S.W.2d 917, 918 (Tex. 1984) (actual manner of service—certified mail—conflicted with terms of citation, which specified personal service only).

### § 16.4 Service by Private Process Server

The party requesting citation is responsible for obtaining service of citation and petition. Tex. R. Civ. P. 99a. The attorney should consider selecting an experienced certified process server to aid in obtaining proper service. A creditor’s rights attorney can benefit from regularly using a capable, professional process server.
Generally, it is not necessary to rely on a constable or sheriff to serve citation. A process server may be authorized by court order to serve citation. The court may order service by any person eighteen years old or older, as long as that person is neither a party nor interested in the outcome of the litigation. See Tex. R. Civ. P. 103. The Texas Supreme Court appoints the commissioners of the Judicial Branch Certification Commission (JBCC), which oversees certification and licensing of Texas process servers, guardians, court reporters, and court interpreters. A list of over 3,000 certified process servers and a process server complaint form can be found at the Process Server Certification link at www.txcourts.gov/jbcc. The telephone number for the JBCC is (512) 475-4368.

A process server certified under order of the Texas Supreme Court must include his identification number and the expiration date of his certification in his return of service. Tex. R. Civ. P. 107(b)(10). See also Tex. Civ. Prac. Rem. Code § 17.030(b)(2)(J). The return must be signed by the authorized person serving or attempting to serve the citation, and, if that person is not a sheriff, constable, or clerk of the court, the return must either be verified or signed under penalty of perjury. Tex. R. Civ. P. 107(e). See Tex. R. Civ. P. 107(e) for the statement that must be included in a return signed under penalty of perjury.

Service by registered or certified mail, if requested, must be made by the clerk of the court in which the case is pending. Tex. R. Civ. P. 103.

§ 16.5 Service by Officer or Process Server

Pursuant to Tex. R. Civ. P. 103, most process can be served by a private process server. See section 16.4 above. But some documents must be served by an officer: “[O]nly a sheriff or constable may serve a citation in an action of forcible entry and detainer, a writ that requires the actual taking of possession of a person, property or thing, or process requiring that an enforcement action be physically enforced by the person delivering the process.” Tex. R. Civ. P. 103. For service of writs of garnishment, see Tex. R. Civ. P. 663 (“The sheriff or constable . . . shall immediately [serve garnishee]”).

Service by publication should be made only by an officer or court clerk. See Tex. R. Civ. P. 116. Often, a private process server can effect service more quickly than a constable or sheriff. Officers are often busy handling criminal matters and other emergencies. The plaintiff’s attorney may request that the clerk send documents to be served directly to the private process server, constable, sheriff, or back to the attorney. Having the citation sent to the attorney is recommended because the attorney or his staff can check the documents for accuracy before forwarding them for service. This method provides an opportunity for the attorney to ask the person serving process to send a draft of the proposed return to the attorney. This allows the attorney to verify before filing that the return is precise, as it must be. If additional instructions are needed, they can be provided. This procedure provides a more personal contact between the attorney and the person serving process.

Sheriffs and constables are not restricted to service in their own counties. Citation and other notices “may be served anywhere by (1) any sheriff or constable or other person authorized by law or, (2) by any person authorized by law or by written order of the court who is not less than eighteen years of age.” Tex. R. Civ. P. 103. Tex. Loc. Gov’t Code § 86.021(d) provides that a constable may execute process anywhere in the county in which his precinct is located or in a contiguous county, “[r]egardless of the Texas Rules of Civil Procedure,” but the constable may not retain a fee for serving civil process. There is no statute governing where a sheriff may serve process. The Local Government Code provides that the sheriff “shall execute all process and precepts directed to the sheriff by legal authority.” Tex. Loc. Gov’t Code § 85.021(a). See also section 16.4 above.
§ 16.6 Procedure for Service

Substituted service on individuals is discussed at section 16.7 below. For service on business entities through the secretary of state, see section 16.11:2.

§ 16.6:1 Involvement of Attorney and Staff

The procedure recommended in this manual calls for the creditor’s attorney to be more involved in service of process than is customary in most other kinds of litigation. The attorney is responsible for proper service. See Tex. R. Civ. P. 99(a). This additional work is warranted because it helps ensure that service is accomplished correctly. Also, the procedure will be more efficient because it should avoid time-consuming corrective measures that might be required or having an additional citation issued and properly served.

A precise return is required. Insurance Co. of Pennsylvania v. Lejeune, 297 S.W.3d 254, 256 (Tex. 2009) (mem. op.) (clerk failed to state hour of receipt on return as required by Tex. R. Civ. P. 16 and 105; reversed and remanded). Strict compliance with applicable statutory provisions and the court’s orders regarding issuance and service of citation is required to support a default judgment. Virtually any deviation will be sufficient to set aside a default judgment. See U.S. Bank National Association as Trustee for SROF-2013-M4 Remic Trust I v. TFHSP LLC Series 6481, 487 S.W.3d 715, 718 (Tex. App.—Fort Worth 2016, no pet.) (citing McKanna v. Edgar, 388 S.W.2d 927, 929–30 (Tex. 1965)). Failure to strike through inapplicable form language may invalidate service. See Primate Construction, Inc. v. Silver, 884 S.W.2d 151, 152 (Tex. 1994) (form language recited that defendant was served with original, instead of amended petition; fatal defect).

§ 16.6:2 Citation to Server

It is recommended that in every case, the attorney request the clerk to send the citation to the attorney’s office. This procedure allows the attorney to confirm that the citation satisfies all the requirements of Tex. R. Civ. P. 99. If the citation is not precise, the attorney should consider requesting a new citation and pointing out the issue. The clerk is to provide additional citations on request. Tex. R. Civ. P. 99(a). Amending a citation or return based on Tex. R. Civ. P. 118 is not recommended, as the rule is vague. Once a correct citation is in hand, the attorney can then directly contact the server or officer when forwarding the citation, so that he can provide specific information about the defendant’s location and request that a draft return be sent to the attorney prior to filing. This procedure also allows the attorney to monitor service more efficiently; see section 16.6:3 below.

§ 16.6:3 Service of Citation

When service has been accomplished, the answer day should be calculated (see section 16.17 below) and calendared. The attorney should ask the person serving process to send a draft return to the attorney before filing the return. The attorney should confirm that the return is precise, including that the correct party was served, that the capacity of the party served is shown if appropriate, and so forth. See section 16.8. The attorney should particularly scrutinize the service documents if substituted service or service on an agent was used. The return must precisely comply with Tex. R. Civ. P. 107, which was amended effective in 2012 to include many more specific requirements than previously. See Tex. R. Civ. P. 107(a); Texas Supreme Court, Final Approval of Amendments to Texas Rules of Civil Procedure 99 et al., Misc. Docket No. 11-9250 (Dec. 12, 2011); 75 Tex. B.J. 56; see also Acts 2011, 81st Leg., R.S., ch. 245, § 1 (H.B. 962), eff. Jan. 1, 2012. On confirmation of same, the server should sign and file the return. The return may be, but is not required to be, electronically filed. Tex. R. Civ. P. 107(g). Processing the return through the law office removes the need to check it at the courthouse and lessens the likeli-
hood of a challenge to its sufficiency. A date-stamped copy of the return should be e-mailed or delivered to the plaintiff’s attorney. Especially with e-filing, confirm that the return itself is stamped with date of filing. The record must establish that the return was on file ten days, excluding date of filing and date of judgment, before a default judgment can be granted. See Tex. R. Civ. P. 107(h).

If the server is unable to serve the citation, the attorney may request that the server file it with the court. Additional citations shall be issued by the clerk on request. Tex. R. Civ. P. 99a. See section 16.6:4.

§ 16.6:4 Alias or Pluries Citation

Citations do not expire under Texas law. Officers, however, will typically return an unserved citation to the clerk or plaintiff’s attorney after several unsuccessful service attempts have been made. Unless the first citation is defective, it should still be valid for service.

If the original citation has been returned unserved to the clerk, the plaintiff’s attorney may request that a new citation be issued pursuant to Tex. R. Civ. P. 99(a). The first new citation issued may be denoted an “alias” citation; the second, a “pluries” citation; a subsequent citation, a “second pluries citation” and so forth. Issuance of an alias or other subsequent citation requires payment of an additional fee.

There is no requirement that a new citation be issued when substituted service is sought. See Tex. R. Civ. P. 106(b).

§ 16.6:5 Service by Certified or Registered Mail

Service of citation may be made by registered or certified mail, return receipt requested. The court clerk mails the citation, with a copy of the petition attached. Tex. R. Civ. P. 103, 106. The primary problem with service of citation by certified or registered mail is that there is no way to compel the defendant to legibly sign for the letter; he may refuse delivery, or sign illegibly. It is best to send certified mail, restricted to the addressee only, though the signature problems persist. Restricted delivery is required in justice court. Tex. R. Civ. P. 501.2(b)(2).

The signature on the return receipt (green card) must be that of the defendant or his authorized agent for service, unless a Tex. R. Civ. P. 106(b) order authorizes substituted service by mail. See section 16.6:6; American Universal Insurance Co. v. D.B.&B., Inc., 725 S.W.2d 764, 765, 767 (Tex. App.—Corpus Christi 1987, writ ref’d n.r.e.) (person who signed was not authorized agent); Pharmakinetics Laboratories, Inc. v. Katz, 717 S.W.2d 704, 706 (Tex. App.—San Antonio 1986, no writ) (return receipt insufficient when addressed to defendant’s agent but signed by unidentified person). The return of service by mail must meet all the requirements governing the return of personal service and must contain the return receipt with the addressee’s signature. Tex. R. Civ. P. 107(c); see Metcalf v. Taylor, 708 S.W.2d 57, 58–59 (Tex. App.—Fort Worth 1986, no writ) (return failed to show either when citation was served or manner of service and was not signed by officer); Melendez v. John R. Schatzman, Inc., 685 S.W.2d 137, 138 (Tex. App.—El Paso 1985, no writ). The return need not state the actual date of delivery, however, if the postmark on the return receipt is clear. Nelson v. Remmert, 726 S.W.2d 171, 172 (Tex. App.—Houston [14th Dist.] 1987, writ ref’d n.r.e.).
§ 16.6:6   Substituted Service by Mail

Substituted service by mail was approved by the supreme court in *State Farm Fire & Casualty Co. v. Costley*, 868 S.W.2d 298, 299 (Tex. 1993) (per curiam). *Costley* illustrates that mail service is best made in conjunction with a motion, affidavit, and substitute service order, pursuant to Tex. R. Civ. P. 106(b). With such an order, one may avoid the need for a mail receipt with addressee’s signature otherwise required by Tex. R. Civ. P. 107(c). *See Singh v. Trinity Marketing & Distribution Co.*, 397 S.W.3d 257, 263–64 (Tex. App.—El Paso 2013, no pet.) (citing *Costley*, 868 S.W.2d at 299); *Rowsey v. Matetich*, No. 03-08-00727-CV (Tex. App.—Austin Aug. 12, 2010, no pet.) (mem. op.) (citing *Costley*, 868 S.W.2d at 299, and approving substituted service by mail without certified mail receipt). *But see Titus v. Southern County Mutual Insurance*, No. 03-05-00310-CV, 2009 WL 2196041, at * (Tex. App.—Austin July 24, 2009, no pet.) (mem. op.) (noting that the supreme court has made clear that there is a heavy burden to support substituted service by first-class mail). Therefore, the substituted service affidavit should specifically report the attempts at personal service and result of each attempt. If defendant evades service, the attorney should state the facts establishing same. Build a strong record to justify mail service, and comply with Tex. R. Civ. P. 106(b). See section 16.7 for discussion of substituted service.

§ 16.7   Substituted Service on Individual

For information on substituted service by mail, see section 16.6:6 above. For more about substituted service on business entities, see section 16.11:2.

If personal service cannot be effected, substituted service may be used. Tex. R. Civ. P. 106(b) states:

Upon motion supported by affidavit stating the location of the defendant’s usual place of business or usual place of abode or other place where the defendant can probably be found and stating specifically the facts showing that service has been attempted under either (a)–(1) or (a)–(2) at the location named in such affidavit but has not been successful, the court may authorize service

1. by leaving a true copy of the citation, with a copy of the petition attached, with anyone over sixteen years of age at the location specified in such affidavit, or

2. in any other manner that the affidavit or other evidence before the court shows will be reasonably effective to give the defendant notice of the suit.

Tex. R. Civ. P. 106(b) (emphasis added).

Note that such substituted service requires a motion; a factual affidavit stating defendant’s usual place of business, usual place of abode, or other place defendant can probably be found, with details of prior service attempts; and a court order authorizing substituted service.

§ 16.7:1   Effect of Substituted Service

Substituted service can survive the “I did not receive it” plea. In *Mixon v. Nelson*, the court signed a substituted service order allowing service by posting to the front door of the residence. Because the return confirmed service was pursuant to the order, it was sufficient to establish service. The defendant’s denial of receipt of the posted citation and petition is not evidence that process was not properly posted and raises no fact issue as to substituted service. *Mixon v. Nelson*, No. 03-15-00287-CV, 2016 WL 4429936, at *3 (Tex. App.—Austin, Aug. 19, 2016, no pet.) (mem. op.) (citing *State Farm Fire & Casualty Co. v. Costley*, 868 S.W.2d 298, 299 (Tex. 1993) (per curiam)).
ley, 868 S.W.2d 298, 298–99 (Tex. 1993) (per curiam)). Though not required by most orders, consider mailing an additional copy of the documents to the defendant by certified and first-class mail. If a new trial motion is filed claiming nonreceipt, mailed copies may reassure the court that the plaintiff not only had the defendant properly served per the court’s order but made additional efforts to give the defendant notice of the suit.

§ 16.7:2 Affidavit Requirements

Process servers and officers often have their own “rule 106” affidavits. Caution should be exercised in using their affidavits. The validity of a future default judgment probably depends on the diligence used in attempting personal service and the specificity and accuracy of the affidavit affirming diligence before substituted service is sought. See Medford v. Salter, 747 S.W.2d 519, 520 (Tex. App.—Corpus Christi 1988, no writ). Failure to secure the affidavit voids any attempt at substituted service and any judgment based on that service. Wilson v. Dunn, 800 S.W.2d 833, 836 (Tex. 1990).

If the affidavit is vague, it may be insufficient. See Hubicki v. Festina, 226 S.W.3d 405, 408 (Tex. 2007) (per curiam) (affidavit failed to establish that alternative service at one of defendant’s two residence addresses was reasonably calculated to provide defendant with notice in time to answer and defend); Torres v. Haynes, 432 S.W.3d 370, 372 (Tex. App.—San Antonio 2014, no pet.) (absence of motion supported by affidavit compelled reversal). See form 16-1.

Tex. R. Civ. P. 106 does not require that both personal service and service by mail be attempted before substituted service is sought. Harrison v. Dallas Court Reporting College, Inc., 589 S.W.2d 813, 815 (Tex. Civ. App.—Dallas 1979, no writ). There is also no requirement that the service be attempted at both the defendant’s residential and business addresses. Pratt v. Moore, 746 S.W.2d 486, 488–89 (Tex. App.—Dallas 1988, no writ). A specific showing of what attempts were made to serve the defendant must appear in the affidavit, however, and failure to show the specific attempts will render the substituted service invalid. See Medford, 747 S.W.2d at 520. The affidavit must also state that service was attempted at the location of the defendant’s usual place of business or usual place of abode or other place where the defendant can probably be found. See Tex. R. Civ. P. 106(b); Garrels v. Wales Transportation, Inc., 706 S.W.2d 757, 759 (Tex. App.—Dallas 1986, no writ).

§ 16.7:3 Need for Strict Compliance with Order

The substituted service order must be followed strictly. Smith v. Commercial Equipment Leasing Co., 678 S.W.2d 917, 918 (Tex. 1984); Dolly v. Aethos Communications Systems, 10 S.W.3d 384, 388–89 (Tex. App.—Dallas 2000, no pet.); Vespa v. National Health Insurance Co., 98 S.W.3d 749, 752 (Tex. App.—Fort Worth 2003, no. pet.) (return failed to state that Tex. R. Civ. P. 106 order was posted at front door with citation and petition as required by order); Becker v. Russell, 765 S.W.2d 899, 901 (Tex. App.—Austin 1989, no writ) (same); Hurd v. D.E. Goldsmith Chemical Metal Corp., 600 S.W.2d 345 346 (Tex. Civ. App.—Houston [1st Dist.] 1980, no writ) (return failed to state that address at which papers were left was defendant’s usual place of business).

Service on the defendant’s agent, unless the agent is affirmatively shown to be the defendant’s agent for service of process, will not suffice. Encore Builders v. Wells, 636 S.W.2d 722, 723 (Tex. App.—Corpus Christi 1982, no writ). Service on the defendant’s attorney, without explicit authorization, does not constitute effective service. The court can give this explicit authorization under Tex. R. Civ. P. 106(b) if the court finds that this service will be reasonably effective to give the defendant notice of the suit. See Leach v. City National Bank of Laredo, 733 S.W.2d 578, 580 (Tex. App.—San Antonio 1987, no writ).

See forms 16-1 and 16-9 through 16-11 for forms for substituted service.
§ 16.8 Return of Service

Before the return is filed, the attorney should review a draft to verify that it meets the requirements of applicable law and will support a default judgment. The return must precisely comply with Tex. R. Civ. P. 107, which was amended effective in 2012 to include many more specific requirements than previously. See Tex. R. Civ. P. 107(a); Texas Supreme Court, Final Approval of Amendments to Texas Rules of Civil Procedure 99 et al., Misc. Docket No. 11-9250 (Dec. 12, 2011), 75 Tex. B.J. 56; see also Acts 2011, 81st Leg., R.S., ch. 245, § 1 (H.B. 962), eff. Jan. 1, 2012. A person who knowingly or intentionally falsifies a return of service may be prosecuted for tampering with a governmental record as provided by chapter 37 of the Texas Penal Code. Tex. Civ. Prac. & Rem. Code § 17.030(d).

The court may allow process or proof of service to be amended. See Tex. R. Civ. P. 118. The rule is vague; the better practice is to have a new citation issued and served, and proper return filed. The process must be endorsed with the hour and date the officer or other authorized person received it, the manner in which he executed it, and the time and place the process was served; it must be signed officially by the officer or authorized person. Process must be executed and returned “without delay.” Tex. R. Civ. P. 16, 105.

The requirements for a return include:

1. The officer or authorized person must complete a return of service that may, but need not, be endorsed on or attached to the citation. Tex. R. Civ. P. 107(a). See also Tex. Civ. Prac. & Rem. Code § 17.030(b)(1)(A).

2. The return, along with any document to which it is attached, must include—
   a. the cause number and case name;
   b. the court in which the case is filed;
   c. a description of what was served;
   d. the date and time the process was received for service;
   e. the person or entity served;
   f. the address served;
   g. the date of service or attempted service;
   h. the manner of delivery of service or attempted service;
   i. the name of the person who served or attempted to serve the process; and
   j. if the person who served or attempted to serve the process is a process server certified under order of the Texas Supreme Court, his identification number and the expiration date of his certification.


3. The return must include a description of what was served. Tex. R. Civ. P. 107(b)(3); In re J.B., No. 02-15-00040-CV, 2015 WL 9435961, at *3 (Tex. App.—Fort Worth Dec. 23, 2015, no pet.) (mem. op.).

4. If the defendant is a corporation or partnership, the return must show the name of the individual to whom the citation and petition were delivered and that person’s title or capacity. See Cox Marketing, Inc. v. Adams, 688 S.W.2d 215, 218 (Tex. App.—El Paso 1985, no writ). The title and capacity of recipient of process may be otherwise established in the court record.

5. If the citation was served by mail under rule 106, the return must contain the return receipt (green card), signed by the addressee. Tex. R. Civ. P. 107(c).
6. If the citation was not served, the return must show the diligence used by the officer or authorized person to execute the citation, the cause of failure to execute it, and where the defendant is to be found, if ascertainable. Tex. R. Civ. P. 107(d).

7. The citation must be signed by the officer or authorized person who serves or attempts to serve the citation. If signed by someone other than a sheriff, constable, or clerk of the court, the return must either be verified or signed under penalty of perjury. A return signed under penalty of perjury must include the statement prescribed in Tex. R. Civ. P. 107(e). See Tex. R. Civ. P. 107(e). See also Tex. Civ. Prac. & Rem. Code § 17.030(c).

8. If the citation was served by substituted service as provided in Tex. R. Civ. P. 106(b), the proof of service must be made in the manner ordered by the court. Tex. R. Civ. P. 107(f). The attorney should confirm that the manner of service required by Tex. R. Civ. P. 107(b)(8) precisely mirrors the order. See section 16.7:3.

9. The return and any document to which it is attached must be filed with the court and may be filed electronically or by facsimile, if available. Tex. R. Civ. P. 107(g). See also Tex. Civ. Prac. & Rem. Code § 17.030(b)(1)(B). It is important to verify that the return itself is file-stamped to establish that it was on file ten days before judgment. See Tex. R. Civ. P. 107(h). Absence of file-stamp on return itself may cause reversal of judgment. Midstate Environmental Services, LP v. Peterson, 435 S.W.3d 287, 290–91 (Tex. App.—Waco 2014, no pet.) (citation to which return was probably attached was file-stamped, but return was not, in violation of Tex. R. Civ. P. 107(h); judgment reversed).

10. If substituted service will be requested under Tex. R. Civ. P. 106(b), the process server’s affidavit must specifically establish the facts showing service has been attempted by regular methods. See Tex. R. Civ. P. 106, 107. The affidavit should report when and where each service attempt was made and the result of each attempt. See section 16.7:2.

11. If the citation was served on the secretary of state because the corporate defendant’s registered agent could not be found at the registered office (Tex. Bus. Orgs. Code § 5.251), the process server’s affidavit or the return for the unserved citation must specifically state, “the diligence used by the officer in executing the citation or the cause of his failure to execute it.” David A. Carl Enterprises, Inc. v. Crow-Shutt #14, 553 S.W.2d 118, 120 (Tex. Civ. App.—Houston [1st Dist.] 1977, no writ). See Tex. R. Civ. P. 107(d) and section 16.11:2 below. A showing of diligence requires specific factual statements describing how the person actually attempted to serve the defendant, not merely a general statement that reasonable diligence was used. See Medford v. Salter, 747 S.W.2d 519, 520 (Tex. App.—Corpus Christi 1988, no writ). An affidavit should include for each service attempt on whom service was attempted; the person’s office or title; and the when, where, and result of each attempt. See Paramount Credit, Inc. v. Montgomery, 420 S.W.3d 226, 231 (Tex. App.—Houston [1st Dist.] 2013, no pet.).

12. If the citation was served on the secretary of state for any reason, the return must show that the secretary of state was served with duplicate copies of the process. See Tex. Bus. Orgs. Code § 5.252; Tex. Civ. Prac. & Rem. Code § 17.045(a). Also, a service certificate from the secretary of state should be filed with the court.

See forms 16-1 (Service on Individual Defendant, in Person), 16-2 (Service on Registered Agent, an Individual), and 16-3 (Service on Registered Agent, Organization).

§ 16.9 Out-of-State Service on Individual

A resident defendant’s absence from the state does not prevent his being served; the rule provides for service by a disinterested person who is at least eighteen years of age with the same effect as if he had been served with citation within the state.
Service on a nonresident individual can also be had. See Tex. R. Civ. P. 108. Also, if the defendant engaged in business in Texas, service can be had under the long-arm statute, Tex. Civ. Prac. & Rem. Code §§ 17.041–.045, discussed at section 16.14 below. See forms 14-14 through 14-20 in this manual for clauses for party designation.

§ 16.10 Service on Partnership

Service on any partner will support a judgment against the partnership and against the individual partner actually served. Tex. Civ. Prac. & Rem. Code §§ 17.022, 31.003. If the partnership has an office, place of business, or agency in a state or county other than that in which the partnership “resides,” citation may be served on any agent or clerk employed there if the action grew out of that business and the suit was brought in that county. Tex. Civ. Prac. & Rem. Code § 17.021(a). Service on an agent or clerk is also permissible if no partner can be found “after diligent search and inquiry.” Tex. Civ. Prac. & Rem. Code § 17.021(b). A foreign partnership engaging in business in Texas may be served under the long-arm statute, discussed at section 16.14 below. Individual liability for partnership debts is discussed briefly at sections 6.26 through 6.28 in this manual. See forms 14-17 and 14-18 for clauses for party designation.

If a default judgment against a partnership or unincorporated association is attacked by restricted appeal (formerly “writ of error”) the judgment will not stand unless the plaintiff shows strict compliance with the requirements of Tex. Civ. Prac. & Rem. Code § 17.021(a). See Ashley Forest Apartments (Lindsay Enterprises) v. Almy, 762 S.W.2d 293, 294–95 (Tex. App.—Houston [14th Dist.] 1988, no writ).

The citation must also comply with the requirement of Tex. R. Civ. P. 99 that it be “directed to the defendant.” To withstand an attack on a default judgment against a partnership, the citation must be directed to the partnership and not just a partner. ISO Production Management 1982, Ltd. v. M&L Oil & Gas Exploration, Inc., 768 S.W.2d 354, 355–56 (Tex. App.—Waco 1989, no writ). A judgment may stand against an individual partner not served if he files an answer or otherwise appears either personally or through his attorney. Bentley Village, Ltd. v. Nasits Building Co., 736 S.W.2d 919, 923 (Tex. App.—Tyler 1987, no writ).

Service may be had on a limited partnership by serving any general partner or the registered agent for service of process. Tex. Bus. Orgs. Code §§ 5.201, 5.255(2). If the registered agent is an organization as described in Tex. Bus. Orgs. Code § 5.201(b)(2)(B), any employee of the organization may receive service at the registered office. Tex. Bus. Orgs. Code § 5.201(d). If the limited partnership fails to appoint or maintain an agent for service of process or if the registered agent cannot be found with reasonable diligence, service may be had through the secretary of state. Tex. Bus. Orgs. Code § 5.251. No special statutes exist regarding service on a limited liability partnership. The rules applicable to partnerships apply.

§ 16.11 Service on Business Corporation

§ 16.11:1 Service on Texas Corporation

The president, all vice-presidents, and the registered agent are agents for service on a corporation, and citation may be served on any one of them. Tex. Bus. Orgs. Code §§ 5.201, 5.255(1). The record must show that the person to be served is one of the statutorily designated persons. To determine whether service has been properly effected, the court may consider as prima facie evidence the recitals in the petition, citation, and return of service. See Pleasant Homes v. Allied Bank of Dallas, 776 S.W.2d 153, 154 (Tex. 1989) (return reciting service on named “V.P.” was sufficient); Advertising Displays, Inc. v. Cote, 732 S.W.2d 360, 362 (Tex. App.—Houston [14th Dist.] 1987, no writ). If the registered agent is an organization as described in Tex. Bus.

If the corporation has failed to appoint or maintain a registered agent or if with reasonable diligence the registered agent cannot be found at the registered office, service may be effected on the Texas secretary of state. Tex. Bus. Orgs. Code § 5.251. See section 16.11:2 below and Tex. Bus. Orgs. Code § 5.252. Because a specific procedure is provided by the Business Organizations Code, the attorney should not use the substituted service procedure set out in Tex. R. Civ. P. 106(b) for a corporation if attempts to serve the corporation have been unsuccessful. In such a case, “the officer’s [unserved] return must itself show the diligence used by the officer to execute the citation and the cause of his failure to execute.” For service on the secretary of state to support a default judgment, there must be “affirmative proof” in the record to show reasonable diligence, and no presumption will be indulged to aid the officer’s return. See Paramount Credit, Inc. v. Montgomery, 420 S.W.3d 226, 231 (Tex. App.—Houston [1st Dist.] 2013, no pet.); David A. Carl Enterprises, Inc. v. Crow-Shutt #14, 553 S.W.2d 118, 120 (Tex. Civ. App.—Houston [1st Dist.] 1977, no writ); see also Advertising Displays, Inc. v. Cote, 732 S.W.2d 360, 363 (Tex. App.—Houston [14th Dist.] 1987, no writ) (describing efforts that demonstrated “reasonable diligence”).

The record must show that the secretary of state forwarded the process, notice, or demand by certified mail, with return receipt requested, addressed to the corporation at its most recent address on file with the secretary of state. Tex. Bus. Orgs. Code § 5.253. If a defendant corporation fails to keep the secretary of state notified of its current address, a default judgment based on the faulty address will apparently stand; see Tankard-Smith, Inc. General Contractors v. Thursby, 663 S.W.2d 473, 475–76 (Tex. App.—Houston [14th Dist.] 1983, writ ref’d n.r.e.); TXZN, Inc. v. D/FW Steel Co., 632 S.W.2d 706, 707–08 (Tex. App.—Fort Worth 1982, no writ). Also, absent fraud or mistake, the failure of the corporation to claim the notice sent by the secretary of state will not void a default judgment. Zuyus v. No’Mis Communications, Inc., 930 S.W.2d 743, 746–47 (Tex. App.—Corpus Christi 1996, no writ). Service on a security-dealer defendant through the Texas Securities commissioner was insufficient when neither the citation nor return stated title or affiliation of person served or that the person served was authorized to accept service for the commissioner. Harvestons Securities v. Narnia Investments, 218 S.W.3d 126, 134–35 (Tex. App.—Houston [14th Dist.] January 11, 2007, pet. denied).

§ 16.11:2 Service through Secretary of State

Important statutory address change: Pursuant to Tex. Bus. Orgs. Code § 5.253, the statutory address for service by the secretary of state is the “most recent address of the [defendant entity] on file with the secretary of state.” Previously, the Texas Business Corporation Act required the registered office address. The Business Organizations Code became effective as to all entities on January 1, 2010.

Note that the statutory address for service (most recent address on file with secretary of state) may differ from certificate of last known address required by Tex. R. Civ. P. 239a. See Katy Venture, Ltd. v. Cremona Bistro Corp., 469 S.W.3d 160, 163 (Tex. 2015) (per curiam) (plaintiff should not have used ineffective statutory service address as last known address; because defendant’s current address was known to plaintiff, that address should have been stated in certificate of last known address).

When Authorized: The secretary of state is the deemed agent of an entity when (l) the entity fails to appoint or does not maintain a registered agent in Texas; (2) with reasonable diligence, the registered agent cannot be found at the registered office; or (3) the certificate of authority of a foreign filing entity has been revoked, or the entity transacts business in Texas without being registered as required by chapter 9. Tex. Bus. Orgs. Code § 5.251. Though diligence may be established through
the unexecuted return, an affidavit may more effectively communicate specific service attempts, establishing diligence. See form 16-2.

In order to exercise reasonable diligence, the officer or process server must attempt to effect service on the registered agent, and such attempt must be made at the registered office. In Paramount Credit, Inc. v. Montgomery, reasonable diligence was not established because record did not show an attempt to serve registered agent at the registered office. See Paramount Credit, Inc. v. Montgomery, 420 S.W.3d 226 (Tex. App.—Houston [1st Dist.] 2013, no pet.). The record should show on whom attempted service of process was made, where, when, how, and in what capacity attempted service of process was made. Paramount, 420 S.W.3 at 231; see also Legends Landscapes LLC v. Brown, No. 06-13-00129-CV, 2014 WL 1260624, at *8 (Tex. App.—Texarkana Mar. 27, 2014, no pet.) (mem. op.) (no reasonable diligence when evidence showed service attempted on entity only; service must instead be attempted on registered agent personally); Humphrey Co. v. Lowry Water Wells, 709 S.W.2d 310, 311 (Tex. App.—Houston [14th Dist.] 1986, no writ) (no reasonable diligence when petition did not allege that address at which service could be effected was the registered office of defendant); David A. Carl Enterprises, Inc. v. Crow-Shutt #14, 553 S.W.2d 118, 120 (Tex. Civ. App.—Houston [1st Dist.] 1977, no writ) (no reasonable diligence when citation showed service at address other than registered office address). Thus, while service on a proper officer or agent may be effected anywhere, if unsuccessful it will support substituted service on the secretary of state only if it has been attempted on the registered agent at the registered office. Ingram Industries, Inc. v. U.S. Bolt Manufacturing, 121 S.W.3d 31, 34 (Tex. App.—Houston [1st Dist.] 2003, no pet.) (reasonable diligence established by one attempt to serve registered agent at registered office; record as whole may be considered as to diligence).

A corporation has a duty to keep the secretary of state apprised of its current registered office address and is negligent if it fails to do so. Campus Investments, Inc. v. Cullever, 144 S.W.3d 464, 466 (Tex. 2004) (per curiam) (citing Tex. Bus. Corp. Act arts. 2.10, 2.10-1, 8.09. These statutes were replaced in 2010 by the Business Organizations Code. See e.g., Tex. Bus. Orgs. Code § 5.253, requiring secretary of state to now forward process to entity’s most recent address on file with the secretary of state, not the registered office address).

Even if the plaintiff has knowledge of another location where an agent for service might be found, he does not have to attempt service at any address other than the registered office in order to exercise reasonable diligence. See Ingram Industries, 121 S.W.3d at 35; State v. Interaction, Inc., 17 S.W.3d 775, 779 (Tex. App.—Austin, 2000, pet. denied); Harold-Elliott Co. v. K.P./ Miller Realty, 853 S.W.2d 752, 754–55 (Tex. App.—Houston [1st Dist.] 1993, no writ) (calling for statutory amendment to require service attempt at alternate known address); Advertising Displays, Inc. v. Cote, 732 S.W.2d 360, 363 (Tex. App.—Houston [14th Dist.] 1987, no writ); TXXN, Inc. v. D/FW Steel Co., 632 S.W.2d 706, 708 (Tex. App.—Fort Worth 1982, no writ). But a more recent address, if known, should be reported in the Tex. R. Civ. P. 239a certification of last known address. Katy Venture, Ltd. v. Cremona Bistro Corp., 469 S.W.3d 160, 163 (Tex. 2015) (per curiam). This allows the clerk to give required notice of interlocutory or default judgment to defendant.

Reasonable diligence must be established from the face of the record—either from the unexecuted return or process server’s affidavit. An affidavit is the recommended method to prove diligence. Plaintiff’s counsel must guard against reliance on conclusory returns or affidavits, as statements must be factual. Reasonable diligence may be established from the information on the unexecuted return, which is prepared pursuant to Tex. R. Civ. P. 107(d) (“When the officer or authorized person has not served the citation, the return shall show the diligence used by the officer or authorized person to execute the same and the cause of failure to execute it, and where the defendant is to be found, if ascertainable”). Proof of diligence must be on file at the time the default judgment was rendered. Marrot Communications, Inc. v. Town & Country Partnership, 227 S.W.3d 372,

The unexecuted return must demonstrate on its face that service on the registered agent at the registered office was actually attempted. See *RWL Construction v. Erickson*, 877 S.W.2d 449, 451–52 (Tex. App.—Houston [1st Dist.] 1994, no writ); *Bilek & Purcell Ind., Inc. v. Paderwerk Gebr. Benteler GmbH & Co.*, 694 S.W.2d 225, 226–27 (Tex. App.—Houston [1st Dist.] 1985, no writ). But the record as a whole may be considered to determine whether the reasonable diligence standard is satisfied. *G.F.S. Ventures v. Harris*, 934 S.W.2d 813, 816 (Tex. App.—Houston [1st Dist.] 1996, no writ).

Proof may also be established by an affidavit from the officer or authorized person explaining his diligence, but the affidavit must give specific information and may not be simply conclusory in nature. *Longoria v. Exxon Mobil Corp.*, No. 04-15-00536-CV, 2016 WL 4013783, at *8 (Tex. App.—San Antonio July 27, 2016, pet. denied) (mem. op.) (citing *Wilson v. Dunn*, 800 S.W.2d 833, 836 (Tex. 1990); *Beach, Bait & Tackle, Inc. v. Holt*, 693 S.W.2d 684, 686 (Tex. App.—Houston [14th Dist.] 1985, no writ); *Mackie Construction Co. v. Carpet Service, Inc.*, 645 S.W.2d 594, 596 (Tex. Civ. App.—Eastland 1982, no writ)). Unsuccessful attempts at substituted service by mail that appear in the record may also be evidence of reasonable diligence. See *National Multiple Sclerosis Society v. Rice*, 29 S.W.3d 174, 177 (Tex. App.—Eastland 2000, no pet.) (mail returned “attempted not known” did not establish diligence); *Advertising Displays, Inc. v. Cote*, 732 S.W.2d 360, 362–63 (Tex. App.—Houston [14th Dist.] 1987, no writ). Process is now forwarded by the secretary of state to the “most recent address on file” pursuant to Tex. Bus. Orgs. Code § 5.253; process was previously forwarded to the registered office address.

If the location of the registered office is not otherwise established by the recitals in the petition, citation, or return, it may be established by a certificate from the secretary of state certifying to the registered agent and the location of registered office. *See Humphrey Co. v. Lowry Water Wells*, 709 S.W.2d 310, 312 (Tex. App.—Houston [14th Dist.] 1986, no writ). However, the certificate of the secretary of state showing that the secretary of state mailed process to a particular address does not, standing alone, establish that such address was in fact the defendant’s registered office. *Humphrey*, 709 S.W.2d at 311; *Global Truck & Equipment, Inc. v. Plaschinski*, 683 S.W.2d 766, 768 (Tex. App.—Houston [14th Dist.] 1984, no writ).

**Perfecting Service on the Secretary of State:** Duplicate copies of the citation and petition must be served on the secretary of state. *See Tex. Bus. Orgs. Code § 5.252.*

Of course, the secretary will be unavailable to personally receive countless citations. Previously, Tex. Bus. Corp. Act art. 2.11 and art. 8.10 allowed service on the secretary, the assistant secretary, or any clerk having charge of the corporation department. At least one court held service on any other employee invalid. *See Travis Builders, Inc. v. Graves*, 583 S.W.2d 865, 867–68 (Tex. Civ. App.—Tyler 1979, no writ). There may be an issue as to validity of service of process that is not made by “delivering to the secretary” per Tex. Bus. Orgs. Code § 5.252(a)(1).

Validity of service delivered to an employee of the secretary of state’s office is indirectly sup-ported by *Campus Investments, Inc. v. Cullever*, 144 S.W.3d 464, 466 (Tex. 2004) (per curiam). In *Campus*, the Texas Supreme Court noted that “A certificate . . . from the secretary of state conclusively establishes that process was served.” Always file such a certificate after serving the secretary of state. *Campus* was decided under the Business Corporations Act, not the Business Organizations Code. The Whitney-service certificate (discussed below) apparently remains conclusive as to service. *See also MC Phase II Owner, LLC v. TI Shopping Center, LLC*, 477 S.W.3d 489, 493–94 (Tex. App.—Amarillo 2015, no pet.) (absence of Whitney-service certificate from secretary of state was fatal omission).
Secretary of State’s Duties: Tex. Bus. Orgs. Code § 5.253 requires the secretary of state to immediately forward process by certified mail, return receipt requested to the “most recent address of the entity on file with the secretary of state.” The secretary of state requires a plaintiff to designate the specific address to which the defendant’s documents are to be mailed. Thus the plaintiff apparently must search secretary of state’s records, determine “the most recent address of the entity on file,” and advise the secretary of state of that address. To bolster the record, include the most recent address in an affidavit, filed before entry of judgment.


Most Recent Address on File: In El Paisano Northwest Highway, Inc. v. Arzate, the plaintiff attempted to serve the defendant at the registered office. After four failed attempts, an affidavit detailing each attempt was filed and the plaintiff served the Texas secretary of state under Tex. Bus. Orgs. Code § 5.051(1)(B) (allowing service after reasonable diligence in attempting to find the registered agent at the registered office). The secretary of state forwarded the service of citation to the defendant’s registered address, but the process was returned marked “unclaimed.” After the trial court entered a default judgment, the defendant appealed, claiming that process should have been sent to the address of its principal place of business. The court of appeals found that the secretary of state’s certificate “conclusively established that the secretary of state received the service of process for El Paisano and forwarded it to El Paisano as required by statute” and upheld the default judgment. El Paisano Northwest Highway, Inc. v. Arzate, No. 05-12-01457-CV, 2014 WL 1477701, at *1–3 (Tex. App.—Dallas Apr. 14, 2014, no pet.) (mem. op.) (citing Campus Investments, Inc. v. Cullever, 144 S.W.3d 464, 466 (Tex. 2004)).

The court in El Paisano also noted that the statute requires the secretary of state forward the process to “the most recent address of the entity on file with the secretary of state.” Tex. Bus. Orgs. Code § 5.253(b)(1).

In the absence of evidence in the record that the defendant’s principal place of business was the most recent address on file, the court found the secretary of state’s service certificate to indirectly establish the most recent address on file with the secretary of state.

Practice Note: A cautious plaintiff serving a defendant through the secretary of state should review the secretary of state’s records and establish in the trial court record before judgment the “most recent address on file with the secretary of state.” This could be done in an affidavit or in the original petition in which an address is pleaded as both defendant’s registered office address, and “most recent address on file with the secretary of state,” if true. If not, consider pleading both defendant’s registered office address and the most recent address on file with the secretary of state.

Proof of Service; Whitney Certificate: The term Whitney certificate arises out of Whitney v. L&L Realty Corp., 500 S.W.2d 94 (Tex. 1973). It is also sometimes referred to as the secretary of state service certificate, or secretary of state certificate. The issue in Whitney was whether the record must show not only service on the secretary of state but also that the secretary of state forwarded process to the defendant. Proof of both is required and easily proven by a Whitney certificate, stating that the secretary of state forwarded a copy of the process. Campus Investments, Inc. v. Cullever, 144 S.W.3d 464, 466 (Tex. 2004); Whitney, 500 S.W.2d at 96; MC Phase II Owner, LLC v. TI Shopping Center, LLC, 477 S.W.3d 489, 492 (Tex. App.—Amarillo 2015, no pet.). The secretary of state certificate alone establishes service of process, if service on the secretary of state is authorized. Campus Investments, 144 S.W.3d at 466 (noting that improper default judgment arising from defective
citation through substituted service on secretary of state could be remedied through bill of review). See also Amor Real Estate Investments, Inc. v. AWC, Inc., No. 05-15-00887-CV, 2016 WL 2753572, at *1–2 (Tex. App.—Dallas May 10, 2016, no pet.) (certificate established proper service, though the certificate noted “. . . no response [apparently, as to certified mail delivery-attempt] has been received in this office”) (citing Campus, 144 S.W.3d at 466); El Paisano, 2014 WL 1477701, at *1–3 (discussed above); Catalyst Partners, Inc. v. BASF Corp., No. 02-10-00377-CV, 2011 WL 2306836, at * (Tex. App.—Fort Worth June 9, 2011, no pet.) (mem. op.) though process returned “Attempted Not Known,” certificate conclusively establishes that process was served) (citing Campus, 144 S.W.3d at 466); Autodynamics Inc. v. Vervoort, No. 14-10-00021-CV, 2011 WL 1260077, at *4 (Tex. App.—Houston [14th Dist.] Apr. 5, 2011, no pet.) (mem. op.) (attempt to serve registered agent at registered office constituted reasonable diligence; defendant properly served through secretary of state; certificate conclusive that process was served, though not conclusive as to reasonable diligence) (citing Campus, 144 S.W.3d at 466).

Some courts may still require the filing of the return of citation, in addition to the secretary of state certificate, as that was the common practice. Campus establishes that the certificate is conclusive as to service on the secretary of state. The secretary of state service certificate, or Whitney certificate, may be purchased from the secretary of state for a nominal fee and should always be filed. The certificate must establish to whom and where the secretary of state forwarded process. It need not state that the person to whom the process was directed was the registered agent or that the place to which it was directed was the proper address, as long as the information appears elsewhere in the record. Advertising Displays, Inc. v. Cote, 732 S.W.2d 360, 362 (Tex. App.—Houston [14th Dist.] 1987, no writ).

The secretary of state service certificate should always be obtained and filed with the court when serving the secretary of state. See Tex. Bus. Orgs. Code § 5.252(b) (“Notice on the secretary of state . . . is returnable in not less than 30 days”). Filing the service certificate at least thirty days after serving the secretary of state should avoid the thirty-day issue in Tex. Bus. Orgs. Code § 5.252(b) issue. But see American Discovery Energy, Inc. v. Apache Corp., 367 S.W.3d 704, 706–07 (Tex. App.—Houston [14th Dist.] 2012, no pet.) (filing return of citation with trial court less than thirty days after unsuccessful attempt at service of process found acceptable to support default judgment; court distinguished between “notice” and “process” when construing Tex. Bus. Orgs. Code § 5.252(b)). The service certificate must be on file when the judgment is signed. See Southern Gulf Operators, Inc. v. Meehan, 969 S.W.2d 586, 588 (Tex. App.—Beaumont 1998, no pet.). Pursuant to Tex. R. Civ. P. 107(h), it is best to have service certificate and proof of service filed ten days prior to judgment, excluding date of filing and date of judgment.

§ 16.11:3 Foreign Corporation Required to Register to Conduct Business in Texas

If a foreign corporation is transacting business in Texas, it may be required to register and have a registered agent in Texas. Tex. Bus. Orgs. Code §§ 9.001, 9.004. Service on such a corporation is the same as for a domestic corporation—citation may be served on the president, any vice-president, or the registered agent. Tex. Bus. Orgs. Code §§ 5.201, 5.255(1). If the registered agent is an organization as described in Tex. Bus. Orgs. Code § 5.201(b)(2)(B), any employee of the organization may receive service at the registered office. Tex. Bus. Orgs. Code § 5.201(d). If there is no registered agent or if he cannot be found at the registered office with reasonable diligence, the secretary of state is an agent for service. Tex. Bus. Orgs. Code § 5.251. See section 16.11:2 above.

For a default judgment against a foreign corporation to stand, some cases require an affirmative showing on the face of the record, by proof independent of the allegations in the petition, recitals in the citation, or statements in the officer’s return, that the person served was in fact the defendant’s agent for service. NBS Southern, Inc. v. Mail Box, Inc., 772 S.W.2d 470, 471–72 (Tex. App.—Dallas 1989, writ denied); but see Conseco Finance Servicing v. Klein Independent School District, 78 S.W.3d
666, 671–72 (Tex. App.—Houston [14th Dist.] 2002, no pet.) (holding that a recital in the petition naming the registered agent is sufficient prima facie evidence unless the defaulted defendant proves otherwise).

A default judgment against a foreign corporation was held to be void when the pleadings referred only to the defendant’s “address” (a post office box) and not to the “home office”; that the defendant received actual notice was irrelevant. Bank of America, N.T.S.A. v. Love, 770 S.W.2d 890, 891–92 (Tex. App.—San Antonio 1989, writ denied); see also Carjan Corp. v. Sonner, 765 S.W.2d 553, 555 (Tex. App.—San Antonio, 1989, no writ) (citation sent to “last known mailing address” did not establish that citation was sent to “home office” address when petition did not indicate that address was “home office”); Seeley v. KCI USA, Inc., 100 S.W.3d 276, 279 (Tex. App.—San Antonio 2002, no pet.) (court refused to infer that the address listed in the petition was the defendant’s home office address); but see Mahon v. Caldwell, Haddad, Skaggs, Inc., 783 S.W.2d 769, 771 (Tex. App.—Fort Worth 1990, no writ) (service on defendant individually and as partner at his “place of business” rather than at “home or home office” address complied with long-arm service requirements; if only one address given in contract as business address, home business address is “home address” or “home office”). Mahon has been criticized. See, e.g., Healey v. Healey, No. 12-15-00047-CV, 2016 WL 4098750, at *2 (Tex. App.—Tyler July 29, 2016, no pet. h.). The better practice is to state in the petition and citation that the defendant’s address is the defendant’s “home address” or “home office address.” See World Distributors, Inc. v. Knox, 968 S.W.2d 474, 477–78 (Tex. App.—El Paso 1998, no writ).

If a foreign corporation is formed when a certificate of formation (or similar instrument) filed with a foreign governmental authority takes effect, the law of the jurisdiction in which the foreign governmental authority is located governs the formation and internal affairs of the corporation. Tex. Bus. Orgs. Code § 1.102. If the foreign corporation is not formed by the filing instrument, the law governing the corporation’s formation and internal affairs is that of the jurisdiction of formation. Tex. Bus. Orgs. Code § 1.103. See Tex. Bus. Orgs. Code § 1.002(43) for a definition of the term formation.

§ 16.11:4 Foreign Corporation Not Having Certificate of Authority to Conduct Business in Texas

In many cases that might give rise to a collection suit (for example, conducting an isolated transaction, not in the course of a number of repeated, like transactions), a foreign corporation may do business in Texas without being required to register. See Tex. Bus. Orgs. Code § 9.002. In these cases, citation may be served under the Texas long-arm statute, discussed at section 16.14 below.

If a foreign corporation’s registration is revoked, the secretary of state is the agent of the foreign corporation for service of process. Tex. Bus. Orgs. Code § 5.251.

§ 16.11:5 Professional Corporation


§ 16.11:6 Allegations in Pleadings

Form 14-16 in this manual contains party designations for a suit against a corporate defendant.
§ 16.12  Service on Nonprofit Corporation

§ 16.12:1  Texas Nonprofit Corporation

Service on a nonprofit corporation may be effected by serving the president, any vice-president, or the registered agent of the corporation. Tex. Bus. Orgs. Code §§ 5.201, 5.255(1). If a committee is authorized to perform the corporation’s chief executive function, each member of the committee is an agent of the corporation. Tex. Bus. Orgs. Code § 5.255(5). If the registered agent is an organization as described in Tex. Bus. Orgs. Code § 5.201(b)(2)(B), any employee of the organization may receive service at the registered office. Tex. Bus. Orgs. Code § 5.201(d). If there is no registered agent or the agent cannot be found at the registered office with reasonable diligence, the secretary of state can be served. Tex. Bus. Orgs. Code § 5.251. See section 16.11:2 above.

§ 16.12:2  Foreign Nonprofit Corporation

Citation for a foreign nonprofit corporation authorized to transact business in Texas may be served on the president, any vice-president, the registered agent, or any member of a committee performing the chief executive function of the corporation. Tex. Bus. Orgs. Code §§ 5.201, 5.255(1), (5). If the registered agent is an organization as described in Tex. Bus. Orgs. Code § 5.201(b)(2)(B), any employee of the organization may receive service at the registered office. Tex. Bus. Orgs. Code § 5.201(d). If there is no registered agent or he cannot be found at the registered office with reasonable diligence, the secretary of state is an agent for service. Tex. Bus. Orgs. Code § 5.251. A corporation engaging in business in Texas without maintaining a designated registered agent in the state may be served under the long-arm statute, discussed at section 16.14 below.

§ 16.13  Service on Other Business Entities

§ 16.13:1  Professional Association


§ 16.13:2  Limited Liability Company

Service on a limited liability company or a series of a limited liability company may be effected on the managers or members, if any, or on the registered agent of the company. Tex. Bus. Orgs. Code §§ 5.201, 5.255(3), 5.302, 5.305. If the registered agent is an organization as described in Tex. Bus. Orgs. Code § 5.201(b)(2)(B), any employee of the organization may receive service at the registered office. Tex. Bus. Orgs. Code § 5.201(d). If the company fails to appoint or maintain an agent or the agent cannot be found through reasonable diligence, service may be effected through the secretary of state. Tex. Bus. Orgs. Code § 5.251.

§ 16.13:3  Service on Association or Joint-Stock Company

Citation for a domestic or foreign unincorporated joint-stock company or association may be served on the president, secretary, treasurer, or general agent. Tex. Rev. Civ. Stat. art. 6134. But see Tex. Civ. Prac. & Rem. Code § 17.023, which provides
that citation may be served by (1) serving the president, vice-president, cashier, assistant cashier, or treasurer of the association; (2) serving the local agent of the association in the county in which the suit is brought; or (3) leaving a copy of the citation at the principal office of the association during office hours. If no officer on whom citation may be served resides in the county in which suit is brought and the association has no agent in that county, citation may be served on any agent representing the association in Texas.

Party designations for pleading an unincorporated entity as a defendant are at form 14-19 in this manual.

§ 16.14  Service under Texas Long-Arm Statute

§ 16.14:1 Jurisdictional and Statutory Reach of Long-Arm Statute

By its terms, the Texas long-arm statute reaches any foreign corporation, nonresident natural person, foreign partnership, foreign association, or foreign joint-stock company doing business in Texas. Tex. Civ. Prac. & Rem. Code §§ 17.041–.045. “Doing business” is defined, albeit nonexclusively, in Tex. Civ. Prac. & Rem. Code § 17.042. See also Kawasaki Steel Corp. v. Middleton, 699 S.W.2d 199, 201 (Tex. 1985), in which the supreme court dispensed entirely with the statutory requirements of doing business in Texas in order to find jurisdiction over the defendant because the defendant sold a product that could be reasonably expected to find its way through the stream of commerce to Texas.

As a practical matter, the reach of long-arm jurisdiction has become coextensive with the “minimum contacts” doctrine first expressed by the U.S. Supreme Court in International Shoe Co. v. Washington, 326 U.S. 310 (1945).

The requirements for exercise of long-arm jurisdiction are as follows:

1. The nonresident defendant must have purposefully established minimum contacts with Texas. In this regard, there must be a substantial connection between the defendant and Texas arising out of the action or conduct of the defendant in Texas. If specific jurisdiction is asserted, the cause of action must arise out of or relate to the defendant’s contacts with Texas; if general jurisdiction is asserted, there must have been continuous and systematic contacts between the defendant and Texas and a showing of substantial activities by the defendant in Texas.

2. The assertion of personal jurisdiction must comport with fair play and substantial justice. The defendant must present a compelling case that the presence of some consideration would render jurisdiction unreasonable.


§ 16.14:2 Person to Be Served

Service on Registered Agent: The registered agent of an entity may be served on behalf of the entity. Tex. Bus. Orgs. Code § 5.201(b)(1). The registered agent may be (1) an individual who is a Texas resident and has consented to serve as the registered agent of the entity or (2) an organization that is registered or authorized to do business in Texas and has consented to serve as the registered agent of the entity. Tex. Bus. Orgs. Code § 5.201(b)(2). If the registered agent is an organization as described in Tex. Bus. Orgs. Code § 5.201(b)(2)(B), any employee of the organization may receive service at the registered office. Tex. Bus. Orgs. Code § 5.201(d). The designation or appointment of a person as registered agent by an organizer is an

Service on Secretary of State: Citation may be served on the secretary of state in the following situations:

1. The defendant does not maintain a place of regular business in Texas or a designated agent, regardless of any statutory requirement. Service on the secretary of state is permissible only if service cannot be effected on the person in charge of the defendant’s business in Texas (see discussion above). See McKanna v. Edgar, 388 S.W.2d 927, 929 (Tex. 1965).

2. The nonresident defendant has not appointed or maintained in Texas a designated agent for service when required to do so.

3. Two unsuccessful attempts have been made on different business days to serve each designated registered agent.

4. The defendant is not required to designate an agent for service, but becomes a nonresident after a cause of action arises but before the cause is matured by suit in a court of competent jurisdiction.


If the secretary of state is served, duplicate copies of the citation and petition must be delivered and the pleading must state the name and home or home office address of the defendant. Tex. Civ. Prac. & Rem. Code § 17.045(a). To sustain a default judgment, the record must contain proof, such as a certificate from the secretary of state, that the defendant was in fact served by the secretary of state. Whitney v. L&L Realty Corp., 500 S.W.2d 94, 96 (Tex. 1973). If the petition does not allege that the defendant performed a specific act in Texas, the defendant’s evidence that he is a nonresident of Texas will negate jurisdiction. Siskind v. Villa Foundation for Education, Inc., 642 S.W.2d 434, 438 (Tex. 1982). A default judgment based on long-arm service by the secretary of state will not be sustained unless the petition contains allegations that, if true, would make the defendant amenable to process by use of the long-arm statute, and there is proof in the record that the defendant was, in fact, served in the manner required by statute. See McKanna, 388 S.W.2d at 927; South Mill Mushrooms Sales v. Weenick, 851 S.W.2d 346, 350 (Tex. App.—Dallas 1993, writ denied).

To comply strictly with the long-arm statute, substituted service on an individual nonresident with no regular place of business and no registered agent for service of process in Texas requires that the secretary of state be provided with a home address or home office address for service. Chaves v. Todaro, 770 S.W.2d 944, 946 (Tex. App.—Houston [1st Dist.] 1989, no writ); see also Bannigan v. Market Street Developers, Ltd., 766 S.W.2d 591, 592–93 (Tex. App.—Dallas 1989, no writ) (mailing petition to “merchant’s notice address” did not strictly comply with statute, which requires plaintiff to provide secretary of state with “home address” or “home office address”). The address must be current; providing the secretary of state with an out-of-date address for a nonresident doing business in Texas may render a default judgment void on direct attack. On a collateral attack, recitations of due service on the face of the judgment would probably suffice. Bludworth Bond Shipyard v. M/V Caribbean Wind, 841 F.2d 646, 649 n.7, 650 (5th Cir. 1988).

It is not necessary that the secretary of state personally be served. Capitol Brick, Inc. v. Fleming Manufacturing Co., 722 S.W.2d 399, 400 (Tex. 1986). For letters for service of citation on the secretary of state, see forms 16-5 and 16-6 in this chapter.

Service on Person in Charge of Nonresident Defendant’s Business: If the defendant is not required to maintain a registered agent for service of process and the action arises from the nonresident’s business in Texas, citation may be served on the
A person who, at the time of service, is in charge of any business in which the nonresident defendant is engaged in Texas. A copy of the process and notice of service on that person must be sent to the defendant or to the defendant’s principal place of business by registered mail or by certified mail, return receipt requested. Tex. Civ. Prac. & Rem. Code §§ 17.043, 17.045(c), (d).

**Service on Administrators of Nonresident Decedents and on Agents of Nonresident Incompetents:** If the secretary of state was the agent for service of process on a nonresident decedent, the secretary of state is the agent for the decedent’s nonresident administrator, executor, or personal representative or, if no personal representative is appointed, for the deceased’s heir under the law of the foreign jurisdiction. Tex. Civ. Prac. & Rem. Code § 17.044(c).

If the secretary of state is an agent for service of process on a nonresident who is adjudged incompetent, the secretary of state is an agent for service of process on the nonresident’s guardian or personal representative. Tex. Civ. Prac. & Rem. Code § 17.044(d).

If the secretary of state is served with duplicate copies of process as an agent for a nonresident administrator, executor, heir, guardian, or personal representative of a nonresident, the secretary of state shall require a statement of the person’s name and address and shall immediately mail a copy of the process to the person. Tex. Civ. Prac. & Rem. Code § 17.045(e).

The attorney should obtain a certificate from the secretary of state confirming service. See *Capitol Brick, Inc. v. Fleming Manufacturing Co.*, 722 S.W.2d 399, 401 (Tex. 1986); *MC Phase II Owner, LLC v. TI Shopping Center, LLC*, 477 S.W.3d 489, 493–94 (Tex. App.—Amarillo 2015, no pet.) (citing *Campus Investments, Inc. v. Cullever*, 144 S.W.3d 464, 466 (Tex. 2004) (per curiam)). For letters for service of citation on the secretary of state, see forms 16-5 and 16-6 in this chapter.

§ 16.15 Sheriff or Constable Reluctant to Serve Citation

The attorney occasionally will encounter difficulty in getting a sheriff or constable to serve a defendant whose whereabouts are known. Often, the problems result from the officers’ busy schedules. The attorney should provide the officer with as much information as possible and stay directly in touch with the officer to supply additional information as required. The attorney should also consider selecting a private process server, certified by the Supreme Court of Texas. See www.txcourts.gov/jbce for a list of over three thousand certified process servers.

§ 16.15:1 Statutory Remedies

The Local Government Code requires that “[t]he sheriff shall execute all process and precepts directed to the sheriff by legal authority and shall return the process or precept to the proper court on or before the date the process or precept is returnable,” and, for failing to do so or for making a false return, the sheriff will be liable for up to $100 to the court to which the process is returnable and will be liable to the injured party for all damages sustained. Tex. Loc. Gov’t Code § 85.021. A similar duty is imposed on constables, subjecting them to a fine of from $10 to $100 and costs, for the benefit of the injured party. Tex. Loc. Gov’t Code §§ 86.021, 86.024. An officer commits a class A misdemeanor if, with intent to obtain a benefit or to harm another, he intentionally or knowingly violates a law relating to his office or employment. Tex. Penal Code § 39.02(a)(1), (b). *Held unconstitutional on other grounds, Ex parte Perry*, 483 S.W.3d 884, 889 n.5, 901–02 (Tex. Crim. App. 2016).
§ 16.15:2 Practical Remedies

See sections 16.4, 16.5, and 16.16:6 for more information about using a private process server. When dealing with a sheriff or constable who seems reluctant to carry out his duty, it is more desirable to persuade him to act than to force the issue.

Possible actions the attorney could take include—

1. writing the officer, advising him that the attorney knows the defendant is available for service, sending him copies of the statutes and rulings mentioned in section 16.15:1 above, and pointing out his liability;
2. writing or calling the county attorney in the officer’s county, advising him of the situation and requesting that he attempt to persuade the sheriff or constable to carry out his statutory duty so that legal action against the officer can be avoided; and
3. writing the officer, advising him of the facts and requesting a copy of his bond or the name of the insurance company that provided his bond. A sheriff or constable cannot take office without furnishing a bond, and an officer who intends to be in office for any period will not want a claim made against his bond.

If suit was filed in a county other than that in which service is to be made, remind the officer that any action to enforce sanctions against him will be in the court in which suit was filed and not in his home county.

§ 16.16 Service by Publication (Not Recommended)

§ 16.16:1 Grounds for Citation by Publication

This is the method of last resort and is not recommended; service by publication is not a favored method of service. See Curley v. Curley, 511 S.W.3d 131, 134–35 (Tex. App.—El Paso 2014, no pet.) (citing In re E.R., 385 S.W.3d 552, 564–66 (Tex. 2012)). In re E.R. discusses the serious due-process issues with publication-service and is critical of the method. The supreme court states, “[w]hen a defendant’s identity is known, service by publication is generally inadequate.” In re E.R., 385 S.W.3d at 560.

Default judgments with actual notice to defendant are often overturned. The law abhors a default. Benefit Planners v. Rencare, Ltd., 81 S.W.3d 855, 857–58 (Tex. App.—San Antonio 2002, pet. denied) (citing Hock v. Salaices, 982 S.W.2d 591, 593 (Tex. App.—San Antonio 1998, no pet.)). Service by publication generally provides no notice of the lawsuit to the defendant. Such judgments are even more likely to be set aside or reversed. It is the most expensive service method. Only an officer or court clerk should serve by publication. See Tex. R. Civ. P. 116 and discussion at section 16.16:6.

Understanding that such service is discouraged, citation by publication is authorized if—

1. after diligent search, the resident of any party defendant is unknown to the plaintiff;
2. the defendant is a transient person and after due diligence the plaintiff has been unable to locate him; or
3. the defendant is absent from or is a nonresident of Texas and the plaintiff has attempted but failed to obtain personal service of the nonresident notice pursuant to Tex. R. Civ. P. 108.

In most jurisdictions, the clerk will issue a citation based on the affidavit, and a motion and court order will not be required (the approach used in this manual). Because a few courts require a motion, the attorney should ascertain what the court (or clerk) will require. Although Tex. R. Civ. P. 109 permits the plaintiff or his agent or attorney to execute the affidavit, the attorney should not swear to the truth of the facts on which the application is based, especially if the information is derived from a client or other person, including facts about the defendant’s whereabouts; only persons with actual knowledge should sign affidavits incorporating these facts. See section 19.17:3 in this manual. Before preparing the affidavit, the attorney should discuss with the plaintiff the diligence used in trying to learn the defendant’s whereabouts, the basis for statements that the defendant is out of the state, efforts to serve the defendant under Tex. R. Civ. P. 108, and other relevant facts for inclusion in the affidavit.

It is the court’s duty, before granting judgment, “to inquire into the sufficiency of the diligence exercised in attempting to ascertain the residence or whereabouts of the defendant.” Tex. R. Civ. P. 109. If there is no appearance after publication-service, an attorney ad litem shall be appointed to defend the suit and judgment shall be rendered as in other cases. See section 16.16:5. A statement of the evidence, approved and signed by the judge, shall be filed in the cause. Tex. R. Civ. P. 244.

The affidavit for service by publication should specify facts showing diligence instead of merely reciting that diligence was used. A deficient affidavit may cause reversal of the judgment. Wood v. Brown, 819 S.W.2d 799, 800 (Tex. 1991) (judgment reversed, insufficient affidavit for publication-service).

Suits against unknown shareholders of a defunct corporation or against unknown heirs of a decedent may be based on service by publication. Tex. R. Civ. P. 111.

Diligence is not shown and a judgment of foreclosure and tax sale can be set aside after citation by publication if a search of county tax rolls or attorney’s files would have produced the taxpayer’s address; a search of city records may be insufficient. Due v. City of Texarkana, 786 S.W.2d 474, 477 (Tex. App.—Texarkana 1990, writ denied).

§ 16.16:2 Alternative to Service by Publication

On motion, the court may order a method of service different from publication if the alternative would be as likely as publication to give the defendant actual notice. Tex. R. Civ. P. 109a. Citation by publication should be used only as a last resort when other methods are impractical.

§ 16.16:3 Problems with Service by Publication

Citation by publication will not be effective to support an in personam judgment against a nonresident of Texas. Sgitcovich v. Sgitcovich, 241 S.W.2d 142, 146 (Tex. 1951), cert. denied, 342 U.S. 903 (1952). Even a slight defect in the procedure may render a default judgment invalid. Fleming v. Hernden, 564 S.W.2d 157, 159–60 (Tex. Civ. App.—El Paso 1978, writ ref’d n.r.e.). If the plaintiff obtains a judgment rendered on service of citation by publication without the defendant’s having appeared in person or by an attorney of his own selection, the court can grant a new trial based on an affidavit filed by the defendant within two years after signing of the judgment and showing good cause. Tex. R. Civ. P. 329(a). If service was invalid, good cause is not required. In re E.R., 385 S.W.3d 552, 563 (Tex. 2012).
§ 16.16:4 Procedure for Service by Publication

The citation must be printed in a newspaper published in the county in which the suit is pending (or if the suit involves land, the county in which the land is located) or, if no newspaper is published there, in an adjoining county. The citation must be published once a week for four consecutive weeks, the first publication being at least twenty-eight days before the return date. Tex. R. Civ. P. 116. Citation is served by the sheriff or constable of any county or the clerk of the court in which the case is pending. Tex. R. Civ. P. 116.

The officer’s return states how and when citation was executed, includes a printed copy of the publication and states when it was published. Tex. R. Civ. P. 117. Requisites of the citation and return are in Tex. R. Civ. P. 99, 114. Usually the attorney submits the plaintiff’s affidavit to the clerk of the court in which the case is pending, who issues the citation and may also serve the citation by publication. Some courts have required a motion and hearing before ordering citation by publication. For an affidavit and a letter to the clerk requesting citation by publication, see forms 16-12 and 16-13 in this chapter. Use caution. As noted in section 16.16:3, a slight defect may render the default judgment invalid or void.

§ 16.16:5 Appointment of Attorney Ad Litem

If service has been made by publication and no answer has been filed or appearance entered within the prescribed time, the court must appoint an attorney ad litem to defend the suit on behalf of the defendant. Tex. R. Civ. P. 244; see Cahill v. Lyda, 826 S.W.2d 932, 933 (Tex. 1992) (per curiam).

See forms 16-16 through 16-18 in this chapter for a motion for appointment of attorney ad litem and for orders appointing and discharging the attorney. The attorney ad litem’s fees are taxed as costs, Tex. R. Civ. P. 244, and are generally paid by the plaintiff. See form 16-13. Tex. R. Civ. P. 244 also requires the judge to approve and sign statement of the evidence.

§ 16.16:6 Citation by Publication by Private Process Server Questionable

Although Tex. R. Civ. P. 103 authorizes service (without restricting the type of service) by any person authorized by law or by written order of the court who is not less than eighteen years old, Tex. R. Civ. P. 116, as to publication-service, states that “[t]he citation, when issued, shall be served by the sheriff or any constable of any county of the State of Texas or by the clerk of the court in which the case is pending.” The safer procedure is to comply with Tex. R. Civ. P. 116. Use an officer or clerk of court when serving by publication.

§ 16.17 Appearance Deadline and Time for Default Judgment

In district and county courts, the deadline for the defendant’s appearance is 10:00 A.M. on the Monday next after the expiration of twenty days after the date of service. See Tex. R. Civ. P. 99(c). For justice courts, the deadline is generally the end of the fourteenth day after the date of service. Tex. R. Civ. P. 501.1(c). Justice court practitioners should read the extensively revised 2013 justice court rules 500–510. This chapter does not cover all changes, including special rules for eviction (Tex. R. Civ. P. 510) and repair and remedy cases (Tex. R. Civ. P. 509). See also Acts 2011, 82d Leg., 1st C.S., ch. 3, §§ 5.02, 5.07 (H.B. 79), eff. Jan. 1, 2012; Acts 2013, 83d Leg., R.S., ch. 2, § 1, 3 (H.B. 1263), eff. Sept. 1, 2013; 76 Tex. B.J. 440 (2013); Texas Supreme Court, Final Approval of Rules for Justice Court Cases, Misc. Docket No. 13-9049 (Apr. 15, 2013), 76 Tex. B.J. 440 (2013).
If citation was effected by publication for a suit filed in district or county court, the deadline is 10:00 A.M. on the first Monday after the expiration of forty-two days from the date of issuance of the citation. If the case is filed in justice court, the deadline is the end of the forty-second day after the day citation was issued. Tex. R. Civ. P. 502.5(e).

A default judgment cannot be granted until proof of service has been on file with the clerk for ten days (three days in the justice court), exclusive of the day of filing and the day of judgment. Tex. R. Civ. P. 107(h), 501.3(h). Therefore, confirm that a file-stamped copy of the return is on file.

A default judgment can be obtained when the defendant has been served with process outside the state under the provisions of rule 108 or 108a. See Tex. R. Civ. P. 107 cmt. If the defendant places his answer in the mail before the deadline, he has met the deadline if the clerk receives it no later than ten days after the deadline. Tex. R. Civ. P. 5; Milam v. Miller, 891 S.W.2d 1, 2 (Tex. App.—Amarillo 1994, writ ref’d).

§ 16.18 Pleadings Must Support Default Judgment

When approving a default judgment, compare it to the petition, considering the parties, claims, damages, and finality of judgment. The petition, citation, return of citation, and judgment should mirror each other. See Tex. R. Civ. P. 301 (“The judgment shall conform to the pleadings”); G&O Diaz Trucking v. Multi Service Technology Solutions Corp., No. 05-14-00032-CV, 2014 WL 5768714, at *4–5 (Tex. App.—Dallas Nov. 6, 2014, no pet.) (mem. op.) (sworn account; name variance of plaintiff, here abbreviated “MSTSC” vs. “MSTSI”; reversed and remanded).

Check that the following requirements for petitions are mirrored in the judgment:

1. The petition must precisely name the parties. Google, Inc. v. Expunction Order, 441 S.W.3d 644, 646–47 (Tex. App.—Houston [1st Dist.] 2014, no pet.) (Google never served or named a party; expunction order void);

2. The petition must assert a legally cognizable cause of action. The petition must allege facts that give rise to a cause of action. If no liability exists as a matter of law on the facts alleged in the petition, a default judgment cannot be granted. First Dallas Petroleum, Inc. v. Hawkins, 727 S.W.2d 640, 645 (Tex. App.—Dallas 1987, no writ);

3. The petition must assert a cause of action on which relief is granted. A default judgment must be based on the pleadings before the court. To support a default judgment, the petition must attempt to state a cause of action that is within the court’s jurisdiction, must give fair notice of the claim asserted and the relief sought, and must not affirmatively disclose the invalidity of the claim. Stoner v. Thompson, 578 S.W.2d 679, 682–85 (Tex. 1979);

4. The petition must include specific allegations. Mere conclusory allegations of a cause of action may not be sufficient to support a judgment by default. In Paramount Pipe & Supply Co. v. Muhr, 749 S.W.2d 491, 494–95 (Tex. 1988), the court stated:

   In [Stoner, 578 S.W.2d at 684–85] we wrote that while a petition which serves as the basis for a default judgment may be subject to special exceptions, the default judgment will be held erroneous only if (1) the petition (or other pleading of the non defaulting party that seeks affirmative relief) does not attempt to state a cause of action that is within the jurisdiction of the court, or (2) the petition (or pleading for affirmative relief) does not give fair notice to the defendant of the claim asserted, or (3) the petition affirmatively discloses the invalidity of such claim;

   Paramount, 749 S.W.2d at 494.
See also Low v. Henry, 221 S.W.3d 609, 612 (Tex. 2007) (fair notice standard met when opposing party can ascertain nature of claim, basic issues, and evidence that might be relevant to the controversy);

5. The petition must request the damages or relief which is granted. Tex. R. Civ. P. 301. See, e.g., Capitol Brick, Inc. v. Fleming Manufacturing Co., 722 S.W.2d 399, 401 (Tex. 1986) (judgment modified where award exceeded amount of prayer); Portfolio Recovery Associates, LLC v. Talplacido, No. 05-13-00682-CV, 2014 WL 2583691, at *2–3 (Tex. App.—Dallas June 10, 2014, no pet.) (mem. op.) (same, prayer for other relief at law or equity was not request for monetary damages);

6. The petition must be consistent; beware of exhibits. The petition must not contain internal contradictions. See Cecil v. Hydorn, 725 S.W.2d 781, 782 (Tex. App.—San Antonio 1987, no writ) (no default judgment could be granted on that portion of plaintiff’s case in which allegations of petition conflicted with attached exhibits); King Fuels, Inc. v. Hashim, No. 14-13-00010-CV, 2014 WL 2446613, at *4 (Tex. App.—Houston [14th Dist.] May 29, 2014, no pet.) (mem. op.) (contract allowed recovery of cost of improvements on Exhibit D of contract, but it was blank);

7. A petition against nonresident defendants must allege jurisdictional facts. In actions against nonresidents, the petition must make sufficient jurisdictional allegations to put the defendant on notice that he is responsible to answer. Capitol Brick, Inc. v. Fleming Manufacturing Co., 722 S.W.2d 399, 400 (Tex. 1986); see also Whitney v. L&L Realty Corp., 500 S.W.2d 94, 95 (Tex. 1973); McKanna v. Edgar, 388 S.W.2d 927, 929–30 (Tex. 1965);

8. The petition should not establish that venue is improper. If defendant does not challenge plaintiff’s choice of venue, it is fixed in the county chosen by plaintiff. Wilson v. Texas Parks & Wildlife Department, 886 S.W.2d 259, 260 (Tex. 1994), overruled in part on other grounds by Golden Eagle Archery, Inc. v. Jackson, 24 S.W.3d 362 (Tex. 2000). But in Jackson v. Biotronics, Inc., 937 S.W.2d 38, 43 (Tex. App.—Houston [14th Dist.] 1996, no writ), the appellate court reviewed the record to confirm that it did not affirmatively demonstrate that venue was improper;

9. The petition must be on file. The plaintiff’s petition on which judgment is sought must be on file on the date the default judgment is granted. See Carborundum Co. v. Keese, 313 S.W.2d 332, 334–35 (Tex. Civ. App.—Amarillo 1958, writ ref’d n.r.e.) (where petition is filed but subsequently lost, no default judgment can be granted unless Tex. R. Civ. P. 77 substitution procedures are followed). The plaintiff must serve the defendant with the live pleading that is on file at the time of service. Caprock Construction Company v. Guaranteed Floorcovering, Inc., 950 S.W.2d 203, 204–05 (Tex. App.—Dallas 1997, no writ).

§ 16.19 Default Judgment on Liquidated Damages

Tex. R. Civ. P. 241 states:

When a judgment by default is rendered against the defendant, or all of several defendants, if the claim is liquidated and proved by an instrument in writing, the damages shall be assessed by the court, or under its direction, and final judgment shall be rendered therefor, unless the defendant shall demand and be entitled to a trial by jury.

A claim is liquidated if the amount of damages caused by the defendant can be accurately calculated from (1) the factual, as opposed to conclusory, allegations in the petition and (2) an instrument in writing. Whether a claim is liquidated must be determined from the language of the petition, as a seemingly liquidated claim may be unliquidated because of pleading allegations which require proof for resolution. Sherman Acquisition II LP v. Garcia, 229 S.W.3d 802, 809 (Tex. App.—Waco 2007, no pet.) (citing Pentes Design, Inc. v. Perez, 840 S.W.2d 75, 79 (Tex. App.—Corpus Christi 1992, writ denied).
§ 16.19:1 Standard of Proof

The court must be able to calculate the amount of the judgment with certainty solely from the instruments sued on and the factual, as opposed to the merely conclusory, allegations of the petition. See Abcon Paving, Inc. v. Crissup, 820 S.W.2d 951, 953 (Tex. App.—Fort Worth 1991, no writ); Willacy County v. South Padre Land Co., 767 S.W.2d 201, 204 (Tex. App.—Corpus Christi 1989, no writ); BLS Limousine Service, Inc. v. Buslease, Inc., 680 S.W.2d 543, 547 (Tex. App.—Dallas 1984, writ ref’d n.r.e.).

§ 16.19:2 Sworn Account


§ 16.19:3 Requirement of Sufficiency

Not every writing is sufficient. The writing must be sufficiently specific for the court to calculate damages with certainty. Higgins v. Smith, 722 S.W.2d 825, 827 (Tex. App.—Houston [14th Dist.] 1987, no writ) (in action on alleged oral loan, five canceled checks were insufficient written instruments where they did not establish parties to loan, date of repayment, or terms of repayment).

§ 16.20 Default Judgment on Unliquidated Damages

If damages are unliquidated or not proved by an instrument in writing, Tex. R. Civ. P. 243 states that the court “shall hear evidence as to damages” before final default judgment may be granted. But case law allows the use of affidavits. “We conclude that because unobjected-to hearsay is, as a matter of law, probative evidence, affidavits can be evidence for purposes of an unliquidated-damages hearing pursuant to Rule 243.” Texas Commerce Bank, National Association v. New, 3 S.W.3d 515, 516 (Tex. 1999); see also Barganier v. Saddle Brook Apartments, 104 S.W.3d 171, 173–74 (Tex. App.—Waco 2003, no pet.).


If the cause of action is based in tort, the plaintiff must establish that the damages sustained were caused by the defendant’s conduct. Morgan v. Compugraphic Corp., 675 S.W.2d 729, 732 (Tex. 1984).

To support a default judgment, the court must hear sufficient evidence on all unliquidated damages. See Tex. R. Civ. P. 243; Holt Atherton Industries v. Heine, 835 S.W.2d 80, 83 (Tex. 1992). See also Otis Elevator Co. v. Parmelee, 850 S.W.2d 179, 181 (Tex. 1993) (trial court, on imposing case-determinative discovery sanctions, improperly awarded unliquidated damages without hearing evidence). Unliquidated damages include the following:

1. Any damages not proved by an instrument in writing. Tex. R. Civ. P. 243;
2. Attorney’s fees “actually incurred.” ("Attorney’s fees are by their very nature unliquidated unless the exact amount is fixed by agreement." Freeman v. Leasing Associates, 503 S.W.2d 406, 408 (Tex. Civ. App.—Houston [14th Dist.] 1973, no writ);

3. “Reasonable” attorney’s fees. Odom v. Pinkston, 193 S.W.2d 888, 891 (Tex. Civ. App.—Austin 1946, writ ref’d n.r.e.); and

4. “Collection expenses” (in addition to attorney’s fees) if the written instrument does not fix the exact amount. Odom, 193 S.W.2d at 891.

If a party is not present or represented by counsel when testimony is taken on damages following entry of a default judgment, the trial court must require the court reporter to make a record of the evidence. The plaintiff’s attorney should request a record if the court fails to do so. Otherwise, the defendant may seek a new trial on unliquidated damages on the ground that the testimony on which the judgment was based was not recorded, and consequently no statement of facts is available for review of the sufficiency of the evidence. Houston Pipe Coating Co. v. Houston Freightways, 679 S.W.2d 42, 45 (Tex. App.—Houston [14th Dist.] 1984, writ ref’d n.r.e.). See also Rogers v. Rogers, 561 S.W.2d 172, 173 (Tex. 1978); Morgan Express, Inc. v. Elizabeth-Perkins, Inc., 525 S.W.2d 312, 314 (Tex. Civ. App.—Dallas 1975, writ ref’d). The rule that, absent a statement of facts, the appellate court must presume that the evidence was sufficient does not apply on direct review of a default judgment if no statement of facts is available. Morgan Express, 525 S.W.2d at 315; see also Michael Pohl & David Hittner, Judgments by Default in Texas, 37 Sw. L.J. 421, 453 (1983) (explaining that proof is required to support a default judgment for unliquidated damages).

§ 16.21 Certificate of Last Known Address

At or before the taking of a default judgment, the attorney should provide written certification to the clerk of the last known mailing address of defendant(s). The clerk will provide written notice of the judgment to defendant and note the fact of such mailing on the docket. See Tex. R. Civ. P. 239a:

At or immediately prior to the time an interlocutory or final default judgment is rendered, the party taking the same or his attorney shall certify to the clerk in writing the last known mailing address of the party against whom the judgment is taken, which certificate shall be filed among the papers in the cause. Immediately upon the signing of the judgment, the clerk shall mail written notice thereof to the party against whom the judgment was rendered at the address shown in the certificate, and note the fact of such mailing on the docket . . . . Failure to comply with the provisions of this rule shall not affect the finality of the judgment.

Tex. R. Civ. P. 239a (emphasis added).

Note that the statutory address for service of an entity through the secretary of state (the most recent address on file with secretary of state) may differ from the certificate of last known address required by Tex. R. Civ. P. 239a. See Katy Venture, Ltd. v. Cremona Bistro Corp., 469 S.W.3d 160, 163 (Tex. 2015) (per curiam) (plaintiff should not have used ineffective statutory service address as last known address; because defendant’s current address was known to plaintiff, that address should have been stated in certificate of last known address).

When providing a last known address, the attorney should request that the clerk provide the defendant notice of judgment and, pursuant to Tex. R. Civ. P. 239a, “[n]ote the fact of mailing on the docket.” Defendants sometimes claim they received no notice of the judgment. The docket entry may establish that the defendant received prompt notice of judgment.
Return of Service on Individual Defendant, in Person

FORM 16-1

This manual recommends that the attorney review the return of service before filing with the court. See Tex. R. Civ. P. 107 and section 16.8 in this chapter for the requirements of a return of service. This form can be accessed at the Texas Judicial Branch Certification Commission’s web page for process server forms at http://www.txcourts.gov/jbcc/process-server-certification/forms/.

Return of Service on Individual Defendant, in Person

RETURN OF SERVICE
SERVICE ON INDIVIDUAL DEFENDANT, IN PERSON

Case Name: _____________________________

Cause Number: ___________________________ Court: _______________ of _______________ County, Texas

1. Date & Time of Receipt of Specified Documents by process server: _______________ , 20___ at ___ ___ m.

2. Date & Time of Delivery of Specified Documents to Defendant: _______________ , 20___ at ___ ___ m.

3. Defendant: ___________________________

4. Stated Address: (Place of delivery) ___________________________

5. Specified Documents: a true copy of the citation with date of delivery endorsed thereon with a true copy of the following documents attached thereto:

6. Method of Service: by delivering to Defendant, in person, at the Stated Address.

I am certified under order of Texas Supreme Court to serve process, including citations in Texas. I am not a party to or interested in the outcome of this suit. My identification number and certification expiration date appear below. I received and delivered the Specified Documents to Defendant as stated above. All statements made herein are true. This return is verified or is signed under penalty of perjury.

Signature: _____________________________ [Complete if signed before a Notary]

Print Name: _____________________________

Identification Number: _____________________________

Certification Expires: _____________________________

Signed and sworn to by the said _____________________________ before me on _____________________________ , 20___

to certify which witness my hand and seal of office.

Notary Public for the State of Texas

[Complete if not signed before a Notary]

My full name is: _____________________________ My date of birth is: _____________________________

My address is: _____________________________ ; zip code: _____________________________ United States.

My server identification number: _____________________________ My certification expires: _____________________________

I declare under penalty of perjury that the foregoing, including the Return of Service, is true and correct.

Executed in _____________________________ , County, Texas, U.S.A., on _____________________________ (date).

Declarant (signature)

End of Return. The following does not constitute part of the return:

1) For service on individual Defendant, in person.

2) Line 4, Stated Address, must be complete, including apartment or room number, if any.

3) Line 5, Specified Documents, must be fully and precisely completed.
Return of Service on Registered Agent, an Individual

RETURN OF SERVICE
SERVICE ON REGISTERED AGENT, AN INDIVIDUAL

Case Name: ____________________________

Cause Number: _________________________ Court: _________________________ of __________ County, Texas

1. Date & Time of Receipt of Specified Documents by process server: _________________________ 20 ______ at ________ m.

2. Date & Time of Delivery of Specified Documents to Defendant: _________________________ 20 ______ at ________ m.

3. Defendant: ____________________________

4. Defendant's Registered Agent: ____________________________

5. Stated Address: ____________________________ (Place of delivery)

6. Specified Documents: ____________________________ a true copy of the citation, with date of delivery endorsed thereon with a true copy of the following documents attached thereto.

7. Method of Service: ____________________________ by delivering to Defendant, by delivering to Defendant's Registered Agent, in person, at the Stated Address.

I am certified under order of Texas Supreme Court to serve process, including citations in Texas. I am not a party to or interested in the outcome of this suit. My identification number and certification expiration date appear below. I received and delivered the Specified Documents to Defendant as stated above. All statements made herein are true. This return is verified or is signed under penalty of perjury.

Signature: ____________________________ [Complete if signed before a Notary]

Print Name: ____________________________

Identification Number: ____________________________

Certification Expires: ____________________________

Signed and sworn to by the said ____________________________ before me on ____________________________ 20 ______ to certify which witness my hand and seal of office.

Notary Public for the State of Texas ____________________________ [Complete if not signed before a Notary]

My full name is: ____________________________ My date of birth is: ____________________________ My address is: ____________________________; zip code: ____________________________; United States.

My server identification number: ____________________________; My certification expires: ____________________________

I declare under penalty of perjury that the foregoing, including the Return of Service, is true and correct.

Executed in ____________________________ County, Texas, U.S.A., on ____________________________ (date).

[Declarant (signature)]

End of Return. The following does not constitute part of the return:
1) For service on registered agent, an individual.
2) Line 5, Stated Address, must be complete, including suite or room number, if any.
3) Line 6, Specified Documents, must be fully and precisely completed.

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16-2-1
Form 16-3

This manual recommends that the attorney review the return of service before filing with the court. See Tex. R. Civ. P. 107 and section 16.8 in this chapter for the requirements of a return of service. This form can be accessed at the Texas Judicial Branch Certification Commission’s web page for process server forms at [http://www.txcourts.gov/jbcc/process-server-certification/forms/](http://www.txcourts.gov/jbcc/process-server-certification/forms/).

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Return of Service on Registered Agent Organization

RETURN OF SERVICE
SERVICE ON REGISTERED AGENT ORGANIZATION

Case Name: _____________________________________________________________

Cause Number: _______________ Court: __________________________ of _______ County, Texas

1. Date & Time of Receipt of Specified Documents by process server: ____________, 20___ at _______ m.

2. Date & Time of Delivery of Specified Documents to Defendant: ____________, 20___ at _______ m.

3. Defendant: ___________________________________________________________

4. Defendant’s Registered Agent: ___________________________________________

5. Defendant’s Registered Office: ___________________________________________

6. Registered Agent’s Employee: ___________________________________________

7. Specified Documents: a true copy of the citation with date of delivery endorsed thereon with a true copy of the following documents attached thereto:

   ________________________________________________________________

   ________________________________________________________________

8. Method of Service: by delivering to Defendant, by delivering to Defendant’s Registered Agent, by delivering to the Registered Agent’s Employee, in person, at Defendant’s Registered Office.

I am certified under order of Texas Supreme Court to serve process, including citations in Texas. I am not a party to or interested in the outcome of this suit. My identification number and certification expiration date appear below. I received and delivered the Specified Documents to Defendant as stated above. All statements made herein are true. This return is verified or is signed under penalty of perjury.

Signature: _____________________________________________________________ [Complete if signed before a Notary]

Print Name: ___________________________________________________________

Identification Number: _________________________________________________

Certification Expires: _________________________________________________

Signed and sworn to by the said _________________________________________ before me on ____________, 20___.

to certify which witness my hand and seal of office.

_____________________________________________________________ Notary Public for the State of Texas [Complete if not signed before a Notary]

My full name is: _______________________________________________________. My date of birth is: _________________.

My address is: ___________________________; zip code ___________; United States.

My server identification number: _________________________________________. My certification expires: _________________.

I declare under penalty of perjury that the foregoing, Including the Return of Service, is true and correct.

Executed in ________________, County, Texas, U.S.A., on ____________, (date).

Declarant (signature)

End of Return. The following does not constitute part of the return:

1) For service on registered agent organization at registered office, see Bus.Org.C. §5.20(6).
2) Line 5, Defendant’s Registered Office, must be complete, including suite or room number, if any.
3) Line 7, Specified Documents, must be fully and precisely completed.

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16-3-1
Substituted service is discussed at section 16.7 in this chapter. This form must be supported by an affidavit (form 16-5 or 16-6).

---

Motion for Substituted Service

1. **Parties.** [Name of plaintiff], Plaintiff in this cause, moves for substituted service of process on Defendant, [name of defendant].

2. **Grounds.** Service of citation on Defendant has been attempted by [personally delivering it to Defendant at/sending it by [registered/certified] mail to] [location named in the affidavit], but these attempts at service have not been successful, as shown by the attached affidavit.

3. **Facts.** [Include a summary of the facts.]

4. **Requested Method of Service.** As authorized by rule 106(b) of the Texas Rules of Civil Procedure, service on Defendant should be made by leaving a copy of the citation, along with a copy of the petition attached, with anyone over sixteen years of age at [location specified in the affidavit].

4. **Requested Method of Service.** [Describe other manner of service, e.g., Service should be made by delivering a copy of the citation, with a copy of the petition attached, to [name of defendant's attorney], an attorney, or by affixing it to the door of [location]. This manner of service will be reasonably effective to give Defendant notice of this suit because]
[describe basis of belief, e.g., [name of defendant's attorney] presently represents Defendant in another suit and consequently has frequent contact with Defendant.]

5. **Prayer.** Movant prays that the Court direct that citation be served on Defendant in the manner described above.

---

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

Attach the executed original of the affidavit (form 16-5 or 16-6). Prepare an order for substituted service (form 16-7).
Substituted service is discussed at section 16.7 in this chapter. This affidavit establishes diligence in attempting service, to allow service on the Texas secretary of state.

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

**Affidavit in Support of Motion for Substituted Service by Certified Process Server**

“My name is [name of affiant]. I am a private process server retained by [name of Plaintiff’s law firm]. I am certified by the Texas Supreme Court to serve process, including citations in Texas. I am not a party to nor interested in the outcome of this suit. I am over the age of eighteen years and competent to make this affidavit.

“‘Defendant’ refers to [name of defendant].

“‘Stated Address’ refers to [address where service was attempted].

“I know that the Stated Address is Defendant’s usual place of [business/abode] because [state reason].

“I have personal knowledge of the matters stated herein, and this affidavit is true. I believe that service by posting at the front door of the Stated Address or by delivering process to someone over the age of sixteen years at that location will inform Defendant of the pending suit. I personally have attempted to serve the Defendant by delivering the citation to the Defendant as stated in paragraphs 6 and 7. The Defendant was unavailable, and I was unable to deliver the citation.

“The following are my specific attempts to serve Defendant at the Stated Address. On the dates indicated I went to the Stated Address with the results indicated.
The following are my specific attempts at locations other than the Stated Address.

[Date] [time] [describe attempt at service]

Repeat as necessary.

“The following are my specific attempts at locations other than the Stated Address.

[Date] [time] [describe attempt at service]”

Repeat as necessary.

[Name of process server]
Process Server
[Texas certification number]
Certification Expires: [date]

SIGNED under oath before me on [date].

[Name of notary public]
Notary Public, State of Texas
Form 16-6

**Tex. R. Civ. P. 106** requires that a motion for substituted service be supported by an affidavit. The court will usually require the most direct form of evidence, so the form provided here calls for the affidavit to be executed by the officer or authorized person who attempted service. If the person who received the citation has been unsuccessful in serving the defendant in person or by registered or certified mail and the attorney and the officer or authorized person believe service may be possible under an alternate provision of rule 106, the attorney should prepare an additional affidavit supporting the motion and have a person who has personal knowledge of the situation execute it. The completed affidavit(s) will be filed with the motion for substituted service at form 16-4 in this chapter. No single form affidavit will be appropriate for every situation, and each should be specially drafted based on facts related to the attorney by the person who attempted service; the following is merely an example. Substituted service is discussed at section 16.7.

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

**Affidavit in Support of Motion for Substituted Service by Officer**

BEFORE ME, the undersigned authority, on this day personally appeared [name of affiant], who swore on oath that the following facts are true:

“I am authorized to serve citations under rule 103 of the Texas Rules of Civil Procedure.

“Citation for Defendant, [name of defendant], in this cause was delivered to the office of the [Sheriff of [county] County, Texas/Constable of Precinct No. [number] of [county] County, Texas/[name and address of person authorized to serve citations]].

State specific facts relied on by the plaintiff to warrant an order for substituted service. The following paragraphs are sample fact allegations; the actual allegations must be drafted to fit the fact situation.

Select one of the following.

“I attempted to make personal service on Defendant at [address, city], Texas, a residential address shown on the citation, on [number] occasions on [date[s] of attempted service] but
was told by someone at that address that Defendant was not there. This residential address is Defendant’s usual place of abode.

Or

“I attempted to make personal service on Defendant at [address, city], Texas, a business address shown on the citation, on [number] occasions on [dates of attempted service] but was told by someone at that address that Defendant was not there. This business address is Defendant’s usual place of business.

Or

“On [date], I mailed by certified mail a true copy of the citation, with a copy of the petition attached, to [address, city], Texas, as shown on the citation, with delivery restricted to Defendant only, as addressee, but the citation was returned marked ‘unclaimed.’

Continue with the following.

“I have personal knowledge of the facts stated above, and they are true and correct.”

[Name of affiant]
Affiant

SIGNED under oath before me on ________________________________.

Notary Public, State of Texas

Send the original and a copy of the affidavit to the officer.
Form 16-7

This order should provide for service by the same method requested in the motion for substituted service (form 16-4). Usually a hearing will not be required and the order can be delivered or mailed to the clerk with the motion and affidavit. Substituted service is discussed at section 16.7. The return of service should factually confirm that the manner of service was precisely as authorized in the order for substituted service.

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

Order for Substituted Service

The Court has considered Plaintiff’s Motion for Substituted Service on Defendant, [name of defendant], in this cause and the evidence in support of the motion.

The Court finds that—

1. service of citation on Defendant has been attempted by [personally delivering it to Defendant at/sending it by [registered/certified] mail to] [location specified in the affidavit], but these attempts at service have not been successful; and

2. the manner of service ordered will be reasonably effective in giving Defendant notice of the suit.

It is therefore ORDERED that service of citation may be made on Defendant, [name of defendant], by

Select one of the following.

leaving a copy of the citation, with a copy of the petition attached, with anyone over sixteen years of age at [location named in the affidavit].

Or
[describe other manner of service, e.g., delivering a copy of the citation, with a copy of the petition attached, to [name of person to be served].]

SIGNED on ________________________________.

JUDGE PRESIDING

Include the order with the motion (form 16-4) and affidavit (form 16-5 or 16-6) or send them to the court clerk.
Form 16-8

This letter may be used if the attorney does not desire a personal appearance before the judge. The attorney should ascertain whether local practice requires a hearing or permits submission of the motion for substituted service by mail. The letter contains alternative language for situations in which the citation either has or has not been returned to the court. Caveat: See the discussion at sections 16.6:3 and 16.6:4 in this chapter concerning issuance of citation and return of unserved citation. To ascertain the correct fee, the clerk should be contacted.

A copy of the signed order should be attached to the citation and served on the defendant. The service return should specify the documents delivered to defendant by the process server, generally the citation, petition and the order for substituted service.

Letter to Clerk Transmitting Motion for Substituted Service

[Date]

[Name or identification and address of clerk]

Re: Motion for Substituted Service

[style of case]

Cause No. [number]

[designation and location of court]

[Salutation]

Please bring the enclosed motion for substituted service and attached affidavit[s] to the judge’s attention and ask the judge to sign the enclosed order for substituted service if the motion is granted.

Select one of the following. Select the first paragraph if the original citation has not been returned to the court. Select the second paragraph if the citation has been returned to the court.

Please forward a certified copy of the signed order to me in the enclosed addressed, stamped envelope.

Or
If the order is signed, please issue an alias citation for the defendant named in the order and send the citation and a certified copy of the order to [name and address of officer or process server] for service. Please send a dated copy of the order to me in the enclosed addressed, stamped envelope.

My check for your fee is enclosed. Thank you for your service.

Sincerely yours,

[Name of attorney]

Enc.
Form 16-9

The record must show grounds for service on the secretary of state. Often, the grounds for service are that with reasonable diligence, the registered agent cannot be found at the registered office. See generally section 16.11:2 in this chapter and Tex. Bus. Orgs. Code § 5.251. As noted in section 16.11:2, reasonable diligence is best shown through the process server’s affidavit (form 16-5). As discussed in section 16.11:2 and Tex. Bus. Orgs. Code § 5.253, the secretary of state shall forward process to the most recent address of the entity on file with the secretary of state. Instead of a return of service, a certificate from the secretary of state should be obtained. See discussion about Whitney Certificates at section 16.11:2. “A certificate . . . from the Secretary of State conclusively establishes that process was served. . . .” Campus Investments, Inc. v. Cullever, 144 S.W.3d 464, 466 (Tex. 2004). Service on the secretary of state can be accomplished by private process server, sheriff, constable, or clerk of the court. See Tex. R. Civ. P. 103.

For service pursuant to the Texas long-arm statute, see section 16.14. Request that the secretary of state forward process to the defendant at the defendant’s home or home office address. See Tex. Civ. Prac. & Rem. Code § 17.045(a) and section 16.14:2.

Letter Transmitting Citation for Service on Secretary of State

[Date]

[Name of constable]
Constable, Precinct 1, Travis County
4717 Heflin Lane, Suite 127
Austin, TX 78721

Re: Secretary of State
[style of case]
Cause No. [number]
[designation and location of court]

[Salutation]

Enclosed are duplicate copies of the citation and petition in the referenced cause to be served on the secretary of state of Texas. In addition to serving duplicate copies of the citation and petition, please deliver to the secretary of state the enclosed letter and check.
We will obtain a Whitney service certificate from the secretary of state, confirming service. (*Campus Investments, Inc. v. Cullever*, 144 S.W.3d 464, 466 (Tex. 2004).) Therefore, we do not require that a citation return be filed.

My check for your fee is enclosed. If you have a question or need additional information, please telephone me (collect if long distance).

Thank you for your immediate attention to this matter.

Sincerely yours,

{Name of attorney}

Certified Mail No. [number]
Return Receipt Requested

Enc.

Prepare a letter to secretary of state (form 16-10).
Form 16-10

This letter should be sent to the officer or other person serving the secretary of state to be delivered to the secretary of state when process is served. If a private process server or court clerk serves citation, change letter accordingly. To ascertain the correct fee, contact the secretary of state’s administrative unit at 512-463-5560.

The record must show grounds for service on the secretary of state. Often, the grounds for service are that with reasonable diligence, the registered agent cannot be found at the registered office. See generally section 16.11:2 in this chapter and Tex. Bus. Orgs. Code § 5.251. Pursuant to Tex. Bus. Orgs. Code § 5.253, the secretary of state shall forward process to the most recent address of the entity on file with the secretary of state. Instead of a return of service, a certificate from the secretary of state should be obtained. See the discussion about Whitney Certificates at section 16.11:2. “A certificate . . . from the Secretary of State conclusively establishes that process was served. . . .” Campus Investments, Inc. v. Cullever, 144 S.W.3d 464, 466 (Tex. 2004). Service on the secretary of state can be accomplished by private process server, sheriff, constable, or clerk of the court. See Tex. R. Civ. P. 103.

For service pursuant to the Texas long-arm statute, see section 16.14. Request that the secretary of state forward process to the defendant at the defendant’s home or home office address. See Tex. Civ. Prac. & Rem. Code § 17.045(a) and section 16.14:2.

Letter to Secretary of State

[Date]

Secretary of State of Texas
Austin, Texas

HAND DELIVERY BY CONSTABLE, PRECINCT 1, TRAVIS COUNTY, TEXAS

Re: [style of case]
Cause No. [number]
[designation and location of court]

[Salutation]

The person delivering this letter is also delivering duplicate copies of citation and the petition in the referenced cause, served on you based on the grounds stated in the petition, and a check for your fees for service and for a certificate of service.
Please forward the citation and petition to the defendant’s most recent address on file with the Texas secretary of state, which is [address, city, state].

The defendant’s home or home office address to which the citation and petition should be mailed is [address, city, state].

Please furnish the usual copy of your letter transmitting the process to the defendant. When the return receipt has been returned to you, please send us your service certificate in the enclosed addressed, stamped envelope, confirming service.

Thank you for your prompt and courteous attention to this matter.

Sincerely yours,

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

Enc.

Send this letter to the constable using the transmittal letter at form 16-9.
Form 16-11

Service through the secretary of state is discussed at section 16.11:2 in this chapter. This affidavit establishes diligence in attempting service, to allow service on the Texas secretary of state.

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

Affidavit in Support of Service on Secretary of State

“My name is [name of affiant]. I am a private process server retained by [name of plaintiff’s law firm]. I am certified by the Texas Supreme Court to serve process, including citations in Texas. I am not a party to nor interested in the outcome of this suit. I am over the age of eighteen years and competent to make this affidavit.

“‘Defendant’ refers to [name of defendant].

“‘Registered Agent’ refers to [name of affiant].

“‘Registered Office’ refers to [registered office address for defendant].

“Most recent address of Defendant on file with Texas secretary of state is [address, city, state].

“I am a process server certified under supreme court order. I have personal knowledge of the matters stated herein, and this affidavit is true. I personally have attempted to serve Defendant by delivering the citation to Registered Agent at Defendant’s Registered Office. Registered Agent was unavailable, and I was unable to deliver the citation.

[Date] [time] [describe attempt at service]

Repeat as necessary.

Include if applicable.
“The following are my specific attempts at locations other than the registered office.

[Date]  [time]  [describe attempt at service]"

Repeat as necessary.

Continue with the following.

[Name of process server]
Process Server
[Texas certification number]
Certification Expires: [date]

SIGNED under oath before me on [date].

Notary Public, State of Texas
Form 16-12

Service by publication is not recommended. See section 16.16:1 in this chapter. Service by publication is discussed at section 16.16 in this chapter. Only the alternative grounds most likely to be used in a collection suit are presented here as options.

Affidavit for Citation by Publication

BEFORE ME, the undersigned authority, on this day personally appeared [name of affiant], who swore on oath that the following facts are true:

“I am the [Plaintiff/[title of affiant, e.g., credit manager and duly authorized agent for Plaintiff]/attorney of record for Plaintiff] in this cause.

“This affidavit is made to authorize the clerk of this Court to issue citation for Defendant, [name of defendant], by publication, in accordance with rule 109 of the Texas Rules of Civil Procedure.

“Mail sent to all of Defendant’s known home or home office addresses has been returned with the notation that Defendant has moved and left no forwarding address. Persons at Defendant’s last known residence and business addresses have told me that they do not know Defendant’s whereabouts or forwarding address. The Texas Department of Public Safety has told me that [address, city, state], Defendant’s last residence address known to me, is the address for Defendant still shown on its records.
“Defendant’s residence is unknown to me [include if the affiant is an agent or attorney: and to Plaintiff]. After using due diligence, as described above, [I/Plaintiff and I] have been unable to learn Defendant’s whereabouts.”

Or

“Defendant is a transient. After using due diligence, as described above, [I/Plaintiff and I] have been unable to learn Defendant’s whereabouts.”

Or

“Defendant is absent from Texas, and, as described above, Plaintiff has attempted to obtain personal service as provided for by rule 108 of the Texas Rules of Civil Procedure but has been unable to do so.”

Or

“Defendant is not a resident of Texas, and Plaintiff has attempted to obtain personal service of nonresident notice on Defendant as provided for by rule 108 of the Texas Rules of Civil Procedure but has been unable to do so.”

Or

“Defendant is absent from Texas, is not within the United States, and is not in the armed forces of the United States, and, as described above, Plaintiff has attempted to obtain personal service of nonresident notice on Defendant as provided for by rule 108 of the Texas Rules of Civil Procedure but has been unable to do so.”

Continue with the following.

[Name of affiant]
Affiant
Affidavit for Citation by Publication

SIGNED under oath before me on ________________________________.

________________________________________________________________________________________________________________________

________________________________________________________________________________________________________________________

Notary Public, State of Texas

File the executed affidavit, using the transmittal letter at form 16-13 if mailed to the clerk.
Form 16-13

This letter may be used to mail the client’s affidavit to the clerk with a request for issuance of citation for service by publication. The letter requests that the citation be returned to the attorney. It is recommended that all citations be processed through the attorney’s office (see section 16.6 in this chapter). To ascertain the correct fee, contact the clerk. Most clerks will issue citation based on an affidavit (see form 16-12). Citation by publication is discussed at section 16.16, and is not recommended, see section 16.16:1. The clerk of the court in which the case is pending may serve the citation by publication. See form 16-15.

Letter to Clerk Requesting Issuance of Citation by Publication

[Date]

[Name or identification and address of clerk]

Re: [style of case]
  Cause No. [number]
  [designation and location of court]

[Salutation]

Please issue a citation to be served by publication for the referenced cause, based on the enclosed affidavit. Please send the citation to me for forwarding to the appropriate officer. A stamped, addressed envelope and a check for your fee are enclosed.

Thank you for your service.

Sincerely yours,

[Name of attorney]

Enc.
Form 16-14

This letter may be used if the plaintiff’s attorney prefers to send the citation to the sheriff or constable rather than having the clerk do so or having the clerk serve the citation and if he wants to see the officer’s return to check all documents for correctness. It is recommended that the citation be processed through the attorney’s office (see sections 16.6 and 16.8 in this chapter). Service by publication is discussed at section 16.16.

To ascertain the correct fee, contact the officer. In some cases, the clerk collects the officer’s fee (local practices vary); in such a case, it is unnecessary to send payment with this letter and that sentence should be deleted or modified.

It is good practice, although not required, to send the citation by certified mail to the officer, obtaining proof (by the green return card) that the officer received the citation.

Caveat: See section 16.16:6 concerning service of citation by publication by a sheriff, constable, or the court clerk under Tex. R. Civ. P. 116 and citation generally under Tex. R. Civ. P. 103. See Tex. R. Civ. P. 117 as to return of citation by publication.

Letter to Officer Transmitting Citation to Be Served by Publication

[Date]

[Name, title, and address of officer]

Re: [style of case]
   Cause No. [number]
   [designation and location of court]

[Salutation]

Enclosed is a citation in the referenced cause to be served by publication.

When the citation has been published for four consecutive weeks, please complete your return by inserting the hour and date of receipt, the title of the newspaper and county of its publication, and the dates of publication and by signing it in your official capacity. Please mail the completed return to me with a printed copy of the published citation in the enclosed addressed, stamped envelope.
My check for your fee is enclosed. If you have a question or need additional information, please telephone me (collect if long distance).

Thank you for your immediate attention to this matter.

Sincerely yours,

[Name of attorney]

Certified Mail No. [number]
Return Receipt Requested

Enc.
Form 16-15

This letter may be used to mail the client’s affidavit to the clerk for issuance of citation and its service by publication. Most clerks will issue citation based on an affidavit (see form 16-12 in this chapter). Contact the clerk to ascertain whether a fee is required, and if so, the amount. Service by publication is discussed at section 16.16.

Letter Requesting Clerk to Issue and Serve Citation by Publication

[Date]

[Name or identification and address of clerk]

Re: [style of case]
  Cause No. [number]
  [designation and location of court]

[Salutation]

Please issue a citation to be served by publication in the referenced cause, based on the enclosed affidavit.

When the citation has been published for four consecutive weeks, please complete your return by inserting the hour and date of receipt, the title of the newspaper and county of its publication, and the dates of publication and by signing it in your official capacity. Please mail the completed return to me with a printed copy of the published citation in the enclosed addressed, stamped envelope.

My check for your fee is enclosed. If you have a question or need additional information, please telephone me (collect if long distance).

Thank you for your immediate attention to this matter.
Sincerely yours,


[Name of attorney]

Enc.
Motion for Appointment of Attorney Ad Litem

Form 16-16

This motion should be used by the plaintiff to request the court to appoint an attorney to defend the suit on behalf of the defendant when service has been made by publication and no answer has been filed or appearance entered within the prescribed time. See Tex. R. Civ. P. 244 and section 16.16:5 in this chapter. For an order granting this motion, see form 16-17.

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

Use the same caption as in the original petition unless the cause has been transferred.

Motion for Appointment of Attorney Ad Litem

1. Parties. [Name of plaintiff], Plaintiff, moves the Court to appoint an attorney ad litem to defend this suit on behalf of [name of defendant], Defendant in this cause, as required by rule 244 of the Texas Rules of Civil Procedure.

2. Facts. On [date], service was made by publication in [title of newspaper] for the statutory time. No answer has been filed or appearance entered by Defendant within the time prescribed by the Texas Rules of Civil Procedure.

3. Grounds. Under rule 244 of the Texas Rules of Civil Procedure, an attorney ad litem should be appointed to defend this suit on behalf of Defendant, because service has been made by publication and no answer has been filed or appearance entered within the prescribed time.

4. Prayer. Plaintiff prays that—

   a. the Court appoint an attorney ad litem to represent and defend this suit on behalf of Defendant;
b. on entry of final judgment in this cause, the attorney ad litem be awarded at least $[amount] as reasonable fees for his services and discharged from further representation of Defendant; and

c. Plaintiff be granted all further relief to which Plaintiff may be entitled.

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

Prepare an order appointing attorney ad litem (form 16-17).
Form 16-17

This order appoints an attorney ad litem to defend the suit on behalf of the defendant when service has been made by publication and no answer has been filed or appearance entered within the prescribed time, as required by Tex. R. Civ. P. 244. This order is based on the motion at form 16-16 in this chapter.

Order Appointing Attorney Ad Litem

The Court has considered Plaintiff’s Motion for Appointment of Attorney Ad Litem in this cause and the evidence in support of the motion.

The Court finds that—

1. service has been made by publication for the statutory time and no answer has been filed or appearance entered within the prescribed time; and

2. the Court should appoint an attorney ad litem to defend the suit on behalf of Defendant.

It is therefore ORDERED that ________________________________ be appointed attorney ad litem to defend this suit on behalf of Defendant.

SIGNED on ________________________________.

JUDGE PRESIDING

Include the order with the motion (form 16-16) when it is filed with the clerk.
Order for Discharge and Compensation of Attorney Ad Litem

The Court has considered Plaintiff’s Motion for Appointment of Attorney Ad Litem and the evidence in support of that motion.

The Court finds that [name of attorney ad litem] was appointed attorney ad litem and appeared on behalf of [name of defendant], Defendant in this suit.

It is therefore ORDERED that [name of attorney ad litem] is hereby discharged from further representation on behalf of Defendant.

Final judgment in this suit is being ORDERED this day, with attorney’s fees to be paid by Plaintiff and taxed as costs against Defendant.

SIGNED on ________________________________.

________________________________________________________________________________________________________________________

JUDGE PRESIDING
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Chapter 17

Defenses and Counterclaims

I. Defenses

§ 17.1 Accord and Satisfaction

§ 17.1:1 Accord and Satisfaction Generally

An accord is an agreement in which, in satisfaction of a claim, one of the parties undertakes to give or perform, and the other to accept, something other than that to which the claimant is or considers himself to be entitled. Satisfaction is the execution or performance of the agreement. *Hunt v. Facility Insurance Corp.*, 78 S.W.3d 564, 568 (Tex. App.—Austin 2002, pet. denied) (citing *Stevens v. State Farm Fire & Casualty Co.*, 929 S.W.2d 665, 673 (Tex. App.—Texarkana 1996, writ denied)); *Texas Commerce Bank National Ass’n v. Geary*, 938 S.W.2d 205, 214 (Tex. App.—Dallas 1997), rev’d on other grounds, *Geary v. Texas Commerce Bank, N.A.*, 967 S.W.2d 836, 837 (Tex. 1998) (per curiam) (citing *Fortner v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 687 S.W.2d 8, 13 (Tex. App.—Dallas 1984, writ ref’d n.r.e.)). Accord and satisfaction rests on a new contract, express or implied, in which the parties agree to the discharge of the existing obligation by tender and acceptance of the lesser amount. *Lopez v. Munoz*, 22 S.W.3d 857, 863 (Tex. 2000); *Jenkins v. Henry C. Beck Co.*, 449 S.W.2d 454, 455 (Tex. 1969); *Gammon v. Hodes*, No. 03-13-00124-CV, 2015 WL 1882274, at *8 (Tex. App.—Austin Apr. 24, 2015, pet. denied) (mem. op.).

 Accord and satisfaction requires proof of a dispute and an unmistakable communication to the creditor that tender of the reduced sum is on the condition that acceptance will satisfy the underlying obligation; the parties must specifically and intentionally agree to the discharge of one of the party’s existing obligations. *Lopez*, 22 S.W.3d at 863 (to prevail on its defense, defendant required to present summary judgment evidence that fee was disputed and claimants specifically and intentionally agreed to relinquish any claims they might have against defendant for its alleged overcharge); (Hairston v. Southern Methodist University, 441 S.W.2d 454, 455 (Tex. 1969); *Gammon v. Hodes*, No. 03-13-00124-CV, 2015 WL 1882274, at *8 (Tex. App.—Austin Apr. 24, 2015, pet. denied) (mem. op.).

The bona fide dispute must be to the claim itself. *Vaughn Excavating & Construction, Inc. v. Centergas Fuels, Inc.*, 223 S.W.3d 591, 592–93 (Tex. App.—Amarillo 2007, no pet.) (no dispute where defendant paid agreed amount for fuel he later claimed was defective and evidence suggested that truck’s mechanical problems had causes other than fuel at issue; defendant’s attempt at offset by way of accord and satisfaction was more in nature of counterclaim); *Klemp Corp. v. Thompson*, 402 S.W.2d 257, 261 (Tex. Civ. App.—Waco 1966, no writ). *See also* Tex. Bus. & Com. Code § 3.311 (statutory defense of accord and satisfaction does not apply to a liquidated amount not subject to a bona fide dispute; see section 17.1:5).

A document in which the parties expressly provide that each retains rights under the original contract and that only part of the contract is canceled cannot qualify as an accord and satisfaction. *Stewart & Stevenson Services v. Enserve, Inc.*, 719 S.W.2d 337, 342 (Tex. App.—Houston [14th Dist.] 1986, writ ref’d n.r.e.), *disapproved on other grounds, Casu v. Marathon Refining Co.*, 896 S.W.2d 388 (Tex. App.—Houston [1st Dist.] 1995, writ denied).
Parties may vary the effect of accord and satisfaction by contract. See *Milton M. Cooke Co. v. First Bank & Trust*, 290 S.W.3d 297, 304–05 (Tex. App.—Houston [1st Dist.] 2009, no pet.).

§ 17.1:2 Sufficiency of Consideration

The mere payment of part of a debt that is liquidated and undisputed is not consideration that supports a promise to accept the same in full payment of the debt. *Petty v. Citibank (South Dakota) N.A.*, 218 S.W.3d 242, 247 (Tex. App.—Eastland 2007, no pet.); *Jeanes v. Hamby*, 685 S.W.2d 695, 697–98 (Tex. App.—Dallas 1984, writ ref’d n.r.e.); *DeLuca v. Munzel*, 673 S.W.2d 373, 375 (Tex. App.—Houston [1st Dist.] 1984, writ ref’d n.r.e.).

Additional consideration, however slight, technical, or insignificant, has been held to be valuable consideration that supports an accord and satisfaction by part payment of a liquidated and undisputed claim. See, e.g., *Brunswick Corp. v. Suburban Bowling, Inc.*, 398 S.W.2d 294 (Tex. Civ. App.—Eastland 1965, no writ) (removal of bowling equipment supplied sufficient additional consideration for accord and satisfaction on unpaid balance of promissory notes).

If the claim is unliquidated or there is a dispute regarding liability, acceptance of less than what the claimant believes he is owed is a valid accord and satisfaction. *Industrial Life Insurance Co. v. Finley*, 382 S.W.2d 100, 106 (Tex. 1964).

If one of the two different amounts is due but there is a genuine dispute as to which is the proper amount, the entire demand is unliquidated and payment of the undisputed amount or liability on the condition that it is in full satisfaction of the entire claim will discharge the entire debt if the creditor accepts it. *Grindstaff v. North Richland Hills Corp. No. 2*, 343 S.W.2d 742, 745 (Tex. Civ. App.—Fort Worth 1961, writ ref’d n.r.e.).

§ 17.1:3 Mutual Assent

Accord and satisfaction requires mutual assent, either expressly or tacitly. There must be an unmistakable communication to the creditor that tender of the lesser sum or alternative satisfaction is on the condition that acceptance constitutes full satisfaction of the underlying obligation. *Republic Underwriters Insurance Co. v. Mex-Tex, Inc.*, 150 S.W.3d 423, 427 (Tex. 2004) (quoting *Jenkins v. Henry C. Beck Co.*, 449 S.W.2d 454, 455 (Tex. 1969)). The condition must be plain, definite, and certain; the statement accompanying tender must be “so clear, full and explicit that it is not susceptible of any other interpretation”; and the offer must be accompanied by acts and declarations that the creditor is “bound to understand.” *Jenkins*, 449 S.W.2d at 455.

§ 17.1:4 Mistake

An accord and satisfaction may be set aside based on mistake. To prove unilateral mistake, a party must show that (1) the mistake is of so great a consequence that enforcement of the contract as made would be unconscionable, (2) the mistake relates to a material feature of the contract, (3) the mistake was made regardless of the exercise of ordinary care, and (4) the parties can be placed in status quo in the equity sense. *Boland v. Mundaca Investment Corp.*, 978 S.W.2d 146, 149 (Tex. App.—Austin 1998, no pet.). If the defense of mistake is established, there is no mutual assent, and the creditor may recover the balance due. *Hines v. Massachusetts Mutual Life Insurance Co.*, 174 S.W.2d 94, 97–98 (Tex. Civ. App.—Fort Worth 1943, no writ); see also *International Life Insurance Co. v. Stuart*, 201 S.W. 1088 (Tex. Civ. App.—Fort Worth 1918, no writ).
§ 17.1:5 Known Insolvency of Debtor Exception

If (1) the debtor (or guarantor) was insolvent or seriously “financially embarrassed,” (2) the debtor’s insolvency or “financial embarrassment” was known to the creditor on the date of the payment, and (3) the creditor accepted his payment on that date in consideration of the debtor’s insolvency or seriously embarrassed financial condition in full settlement and release of the debtor’s liability, there is a valid accord and satisfaction, even if the claim is liquidated and undisputed. *Prather v. Citizens National Bank*, 582 S.W.2d 903, 906–07 (Tex. Civ. App.—Waco 1979, writ ref’d n.r.e.).

§ 17.1:6 Third Parties and Guarantors

A liquidated claim as well as an unliquidated or disputed claim may be discharged by an accord and satisfaction on acceptance by the creditor of a lesser amount from a third person. *Thompson v. Pechacek*, 365 S.W.2d 207, 211 (Tex. Civ. App.—Fort Worth 1963, no writ). The substitution by a debtor of the obligation of an independent third party is a sufficient consideration to sustain a contract on the part of the creditor to release a part of the debt. *Ralston v. Aultman, Miller & Co.*, 26 S.W. 746 (Tex. Civ. App.—Fort Worth 1894, no writ); but see *Johnson v. Hoover & Lyons*, 165 S.W. 900 (Tex. Civ. App.—Amarillo 1914, writ dism’d).

A guarantor may enter into an accord and satisfaction, and acceptance of partial payment with knowledge of a guarantor’s insolvency will extinguish a debt. *Diamond Paint Co. v. Embry*, 525 S.W.2d 529, 532 (Tex. Civ. App.—Houston [14th Dist.] 1975, writ ref’d n.r.e.).

§ 17.1:7 Executory or Executed

Accord and satisfaction can be either executory (the promise must be performed before the old obligation is discharged) or executed (the accord is fully paid or the promise itself is taken as satisfaction). *DoAll Dallas Co. v. Trinity National Bank*, 498 S.W.2d 396, 401 (Tex. Civ. App.—Texarkana 1973, writ ref’d n.r.e.).

§ 17.1:8 Election of Remedies

An accord without complete satisfaction does not bar a suit on the original cause of action. *Rutherford v. Page, Southerland & Page*, 429 S.W.2d 602, 609 (Tex. Civ. App.—Austin 1968, writ ref’d n.r.e.). However, an executory accord may be enforced in favor of a debtor who, in accordance with the terms of an agreement with the creditor, tenders performance that the creditor refuses to accept. *Alexander v. Handley*, 146 S.W.2d 740, 743 (Tex. 1941). An accord that is unbreached by the debtor is a defense against suit on the claim. *Pacific Employers Insurance Co. v. Brannon*, 242 S.W.2d 185 (Tex. 1951).

The satisfaction may be the new promise itself. If the parties expressly agree that the promise itself is accepted as satisfaction of the underlying obligation, the accord and satisfaction is fully executed by a novation that bars an action on the underlying debt. *DoAll Dallas Co.*, 498 S.W.2d at 400. See section 17.2 below for a discussion of novation.

Once tender of payment or other substituted performance has been accepted and nothing remains to be done by either party to the agreement, the settlement is fully executed and not executory. *Thompson v. Pechacek*, 365 S.W.2d 207, 209 (Tex. Civ. App.—Fort Worth 1963, no writ).
§ 17.1:9  Pleading and Proof

Accord and satisfaction is an affirmative defense that must be specifically pleaded. *Tex. R. Civ. P.* 94. The burden of proof is on the party asserting the defense. *Harris v. Rowe*, 593 S.W.2d 303, 306 (Tex. 1979).

§ 17.2  Accord and Satisfaction by Use of Instrument under Texas Business and Commerce Code

A person against whom a claim is asserted may also establish a defense of accord and satisfaction by using a check and following the steps set forth in *Tex. Bus. & Com. Code* § 3.311. *See Baeza v. Hector’s Tire & Wrecker Service, Inc.*, 471 S.W.3d 585, 591 (Tex. App.—El Paso 2015, no pet.) (“A party may assert the defense of accord and satisfaction under a common law doctrine, under statutory authority, or both.”). The elements are similar to those in the common law, but the statutory defense also requires the use of a negotiable written instrument sent with a “good faith” intent for it to be a full settlement of a dispute. *Baeza*, 471 S.W.3d at 593; *Tex. Bus. & Com. Code* § 3.311(a)(1); *Leach v. Wilbur-Ellis Co.*, No. 07-14-00022-CV, 2014 WL 4553204, at *2 (Tex. App.—Amarillo Sept. 15, 2014, no pet.) (mem. op.). Section 3.311 is meant to encourage “informal dispute resolution by [use of] full satisfaction checks” (see section 17.1:5). *Tex. Bus. & Com. Code* § 3.311 cmt. 3.


§ 17.2:1  Elements

Accord and satisfaction exists under *Tex. Bus. & Com. Code* § 3.311 if—

1. the debtor in good faith tendered an instrument to the creditor in full satisfaction of the claim;

2. the instrument or an accompanying writing contained a conspicuous statement to the effect that the instrument was tendered as full satisfaction of the claim;

3. the amount of the claim was unliquidated or subject to bona fide dispute; and

4. the creditor obtained payment of the instrument.


Restrictive endorsements do not need to be on the check itself but can be in an accompanying written communication. In *Custom Transit, LP vs. Richway Cartage, Inc.*, 375 S.W.3d 337, 347–48 (Tex. App.—Houston [14th Dist.] 2012, pet. denied), the court held that the creditor’s oral agreement to accept “full payment” for less than the total amount owed was sufficient to find accord and satisfaction.
§ 17.2:2 Requirement for Liquidated Claim or Bona Fide Dispute

Importantly, a statement on the instrument that the check is being tendered in full satisfaction or marked “paid in full” is not sufficient to constitute an accord and satisfaction if the claim is liquidated and not subject to a bona fide dispute. *Petty v. Citibank (South Dakota) N.A.*, 218 S.W.3d 242, 246 (Tex. App.—Eastland 2007, no pet.) (mere payment of part of debt that is undisputed is not sufficient consideration to support promise to accept same in full payment of entire debt and does not bar creditors suit to recover balance) (quoting *Tex. Bus. & Com. Code § 3.311* cmt. 4: “Section 3–311 does not apply to cases in which the debt is a liquidated amount and not subject to a bona fide dispute”).

§ 17.2:3 Defeating Debtor’s Attempt at Accord and Satisfaction

The debtor’s attempt at accord and satisfaction will be defeated if—

1. a creditor organization, within a reasonable time before the tender, sends a conspicuous statement to the debtor that communications concerning disputed debts, including an instrument tendered as satisfaction, be sent to a designated person, office, or place and the instrument or accompanying communication is not sent there; or

2. the creditor, whether an organization or not, tenders repayment of the amount of the instrument to the debtor within ninety days after payment.

*Tex. Bus. & Com. Code § 3.311(c).* See also *Leach v. Wilbur-Ellis Co.*, No. 07-14-00022-CV, 2014 WL 4553204, at *3 (Tex. App.—Amarillo Sept. 15, 2014, no pet.) (mem. op.) (conspicuousness requirement of section 3.311(c)(1)(A) does not apply to an express provision of a note). Even if the creditor takes these preventive actions, however, the court may still find an accord and satisfaction if, within a reasonable time before collection of the instrument was initiated, the creditor or his agent having direct responsibility with respect to the disputed debt knew that the instrument was tendered in full satisfaction of the claim. *Tex. Bus. & Com. Code § 3.311(d).* See also *Khoury v. Bekins Moving & Storage Co.*, No. 05-98-00619-CV, 2000 WL 1073607, at *2 (Tex. App.—Dallas July 24, 2000, no pet.) (not designated for publication) (in order to avoid accord and satisfaction, the check must be returned to the maker); *Metromarketing Services, Inc. v. HTT Headwear, Ltd.*, 15 S.W.3d 190, 197 (Tex. App.—Houston [1st Dist.] 2000, no pet.) (“to repudiate a transaction that purports to fully satisfy a claim, a creditor should return the check”); *Indiana Lumbermen's Mutual Insurance Co. v. State of Texas*, 1 S.W. 3d 264, 267 (Tex. App.—Fort Worth 1999, pet. denied) (state was required to return checks without cashing them to avoid accord and satisfaction).

Comment 7 to section 3.311 describes the situation when a debtor sends a “full payment” check to a lock box: “If a full satisfaction check is sent to a lock box or other office processing checks sent to the claimant, it is irrelevant whether the clerk processing the check did or did not see the statement that the check was tendered as full satisfaction of the claim. Knowledge of the clerk is not imputed to the organization because the clerk has no responsibility with respect to an accord and satisfaction. Moreover, there is no failure of ‘due diligence’ under [Tex. Bus. & Com. Code § 1.202(f)] if the claimant does not require its clerks to look for full satisfaction statements on checks or accompanying communications. Nor is there any duty of the claimant to assign that duty to its clerks. [Section 3.311(c)] is intended to allow a claimant to avoid an inadvertent accord and satisfaction by complying with either subsection (c)(1) or (2) without burdening the check-processing operation with extraneous and wasteful additional duties.” *Tex. Bus. & Com. Code § 3.311* cmt. 7.

**Practice Note:** Despite the legal bases to defeat an accord and satisfaction defense based on a “full payment” check, the creditor and creditor’s counsel should consider not cashing the “full payment” check and returning it to the debtor. Alternatively, one should attempt to obtain an express confirmation from the debtor (by letter or electronically) confirming rescission
of the restrictive endorsement, and permitting the creditor to negotiate the check as an unconditional payment against a specific outstanding debt.

§ 17.3 Novation

§ 17.3:1 Novation Generally

Novation is the substitution of a new agreement between the same parties or the substitution of a new party with respect to an existing agreement. When a novation occurs, only the new agreement can be enforced. Supply Pro, Inc. v. Ecosorb International, Inc., No. 01-15-00621-CV, 2016 WL 4543136, at *7 (Tex. App.—Houston [1st Dist.] Aug. 30, 2016, no pet.) (mem. op.); New York Party Shuttle, LLC v. Bilello, 414 S.W.3d 206, 214 (Tex. App.—Houston [1st Dist.] 2013, pet. denied). “A novation agreement need not be in writing or evidenced by express words of agreement, and an express release is not necessary to effect a discharge of an original obligation by novation. . . . The intent to accept the new obligation in lieu and in discharge of the old one may be inferred from the facts and circumstances surrounding the transaction [and] the conduct of the parties.” Supply Pro, 2016 WL 4543136, at *7 (quoting Bank of North America v. Bluewater Maintenance, Inc., 578 S.W.2d 841, 842 (Tex. Civ. App.—Houston [1st Dist.] 1979, writ ref’d n.r.e.).

§ 17.3:2 Elements

Novation requires—

1. a previous valid obligation;
2. a mutual agreement of all parties to the acceptance of a new contract;
3. the extinguishment of the old contract; and
4. a valid new agreement.


An express release is not necessary to discharge an original obligation by novation, because the intent or agreement to discharge the old obligation by the new one may be inferred from the facts and circumstances and conduct of the parties. A novation agreement need not be in writing or evidenced by express words because, like any other ultimate fact, it may be inferred from the acts and conduct of the parties and from other facts and circumstances. Computed Imaging Service v. Fayette Memorial Hospital, No. 03-00-232-CV, 2001 WL 23188, at *2 (Tex. App.—Austin Jan. 11, 2001, no pet.) (mem. op.) (citing Commercial Credit Corp. v. Brown, 471 S.W.2d 914, 919 (Tex. Civ. App.—Amarillo 1971, writ ref’d n.r.e.). Nonetheless, the parties’ intent is a key factor in novation. Dodson v. Sizenbach, 663 S.W.2d 13 (Tex. App.—Houston [14th Dist.] 1983, no writ). Economic duress vitiates a novation. Dodson, 663 S.W.2d at 16 (citing Thomas Construction Co. v. Kelso Marine, Inc., 639 F.2d 216 (5th Cir. 1981)).

In the absence of express agreement, whether a new contract operates as a novation of an earlier contract is usually a question of fact and can only become a question of law when the state of the evidence is such that reasonable minds cannot differ as to its effect. Goldman v. Olmstead, 414 S.W.3d 346, 358 (Tex. App.—Dallas 2013, pet. denied).
§ 17.3:3 Novation Compared with Accord and Satisfaction

An accord and satisfaction may or may not also be a novation. Satisfaction is usually the performance of the new promise and not the new promise itself. Satisfaction is the execution or performance of the new agreement. Stevens v. State Farm Fire & Casualty Co., 929 S.W.2d 665, 673 (Tex. App.—Texarkana 1996, writ denied); Fortner v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 687 S.W.2d 8, 13 (Tex. App.—Dallas 1987, writ ref’d n.r.e.). A novation is the acceptance of the new promise itself in lieu of and in extinguishment of the old obligation. If the new promise itself is accepted as satisfaction, the transaction is more properly termed a novation. DoAll Dallas Co. v. Trinity National Bank, 498 S.W.2d 396, 400–01 (Tex. Civ. App.—Texarkana 1973, writ ref’d n.r.e.). For a discussion of accord and satisfaction, see section 17.1 above.

§ 17.3:4 Pleading Requirements


§ 17.4 Payment

§ 17.4:1 Application of Payments to Open Account

Generally, when a contract does not specify how payments shall be applied to a running account, payments shall be applied to the oldest portion of the account. W.E. Grace Manufacturing Co. v. Levin, 506 S.W.2d 580 (Tex. 1974); Mazelheri v. Simons Petroleum, Inc., No. 05-05-00719-CV, 2006 WL 1738275, at *4 (Tex. App.—Dallas June 27, 2006, pet. denied) (mem. op.). Where there is a running account with various items of charges and credits occurring at different times and no direction of payment has been made by the debtor, payments on account as whole are applied by law to oldest unpaid portion of account, even if oldest part of account is barred by limitations. Watson v. Cargill, Inc., 573 S.W.2d 35, 39 (Tex. Civ. App.—Waco 1978, writ ref’d n.r.e.). However, there is an exception to this rule. If the parties have agreed that a payment shall be applied to a certain indebtedness or the debtor has directed such application, the agreement or direction is controlling. Victor v. Harden, No. 01-97-00250-CV, 1998 WL 285947, at *6 (Tex. App.—Houston [14th Dist.], June 4, 1998, no pet.) (not designated for publication); Watson, 573 S.W.2d at 39.

§ 17.4:2 Pleading Requirements for Payment as Defense

Payment must be specifically pleaded; it cannot be shown by a general denial. See Tex. R. Civ. P. 94; Southwestern Investment Co. v. Allen, 328 S.W.2d 866, 868 (Tex. 1959). A defendant pleading payment as a defense must file with his plea an account itemizing the payments. Otherwise, he will not be allowed to prove payment unless it is so plainly and particularly described in the plea as to give the plaintiff full notice of the defense. Tex. R. Civ. P. 95.

§ 17.5 Rescission

§ 17.5:1 Rescission as Defense

The parties may rescind their contract by mutual agreement, discharging themselves from their respective duties. The mutual release of their rights is sufficient consideration for the rescission agreement. The other party must accept an offer of rescission either affirmatively or by acquiescence in a manner and under circumstances sufficient to constitute an election to treat

A signed sales agreement that by its terms excludes modification or rescission except by a signed writing cannot be otherwise modified or rescinded. *Tex. Bus. & Com. Code § 2.209(b)*. See the discussion of oral modification under Code section 2.209(b) at section 17.7:3 below.

§ 17.5:2  **Pleading Requirements**

Rescission is a matter constituting an avoidance or affirmative defense and must be affirmatively pleaded. *Tex. R. Civ. P. 94; Wilson v. Remmel Cattle Co.*, 542 S.W.2d 938, 942 (Tex. Civ. App.—Amarillo 1976, writ ref’d n.r.e.).

§ 17.5:3  **Rescission as Equitable Contractual Remedy**

An otherwise valid contract may be rescinded to avoid unjust enrichment. *Helms v. Swanson*, No. 12-14-00280-CV, 2016 WL 1730737, at *5 (Tex. App.—Tyler Apr. 26, 2016, pet. denied); *Neese v. Lyn*, 479 S.W.3d 368, 369 (Tex. App.—Dallas 2015, no pet.). Grounds for rescission include the following:

1. Fraud. *Dallas Farm Machinery Co. v. Reaves*, 307 S.W.2d 233, 238–39 (Tex. 1957). See also section 17.42 below.

To be entitled to rescission, a party must show either (1) that it and the other party are in the status quo (e.g., that it is not retaining a benefit received under the contract without restoration to the other party), or (2) that there are special equitable considerations that obviate the need for the parties to be in the status quo. *Helms*, 2016 WL 1730737, at *5.

§ 17.6  **Merger and Parol Evidence Rule**

§ 17.6:1  **Merger and Parol Evidence Rule Generally**

Merger is the absorption of one contract into another contract, extinguishing the former. It is largely a matter of intention of the parties. *Capstone Building Corp. v. IES Commercial, Inc.*, No. 10-15-00182-CV, 2016 WL 1722665, at *2 (Tex. App.—Waco Apr. 28, 2016, pet. denied); *Texland Petroleum, L.P v. Scythian, Ltd.*, No. 07-11-00141-CV, 2012 WL 1252967, at *2 (Tex. App.—Amarillo, Apr. 13, 2012, no pet.) (mem. op.) (“As a general principle, when two contracts are entered into by the same parties, covering the same subject matter, but containing terms which are so inconsistent that the terms of the two contracts cannot subsist together, the legal effect of the subsequent contract is to rescind the earlier contract.”) (citing South
Plains Lamesa Railroad, Ltd. v. Kitten Family Living Trust, No. 07-06-0209-CV, 2008 WL 223847, at *2 (Tex. App.—Amarillo Jan. 28, 2008, pet. denied) (mem. op.). However, a prior agreement is not superseded by or merged into a subsequent agreement relating to the same subject matter if the first agreement could constitute a separate agreement or where the first agreement is not fully integrated into the second agreement but merely modifies the first agreement in some respect. Stated another way, when the parties manifest an intent to have any of the original contract’s provisions survive, merger is inapplicable. Thus, application of the doctrine of merger completely discharges the earlier, inconsistent contract. Texland Petroleum, 2012 WL 1252967, at *2. See also Hubacek v. Ennis State Bank, 317 S.W.2d 30, 32 (Tex. 1958) (oral agreement that was not inconsistent with written agreement was enforceable as not superseded by or merged with written agreement).

The doctrine of merger is closely allied with the parol evidence rule. If parties have entered into a valid, integrated agreement dealing with the subject matter of the contract, the parol evidence rule prevents enforcement of prior or contemporaneous agreements inconsistent with the integrated agreement. Unless there is ambiguity, fraud, or accident, it is presumed that all prior agreements of the parties relating to the transaction have been merged into the instrument. Greater Houston Development, Inc. v. Harris County, No. 14-10-00364-CV, 2010 WL 4950634, at *5 (Tex. App.—Houston [14th Dist.] Dec. 7, 2010, no pet.) (mem. op.); Adams v. McFadden, 296 S.W.3d 743, 752 (Tex. App.—El Paso 2009, pet. granted, judgment vacated, and remanded by agreement); Edascio, L.L.C. v. NextiraOne L.L.C., 264 S.W.3d 786, 796 (Tex. App.—Houston [1st Dist.] 2008, pet. denied).

§ 17.6:2 Sale of Goods

Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented:

a. by course of performance, course of dealing, or usage of trade (defined in Tex. Bus. & Com. Code § 1.303), and

b. by evidence of consistent additional terms, unless the court finds that the writing was intended also as a complete and exclusive statement of the terms of the agreement.


§ 17.7 Modification

§ 17.7:1 Availability

§ 17.7:2 Consideration

Generally, modification of an existing contract must be supported by consideration. Hathaway v. General Mills, Inc., 711 S.W.2d 227, 228 (Tex. 1986); Liberty Mutual Insurance Co. v. Sims, No. 12-14-00123-CV, 2015 WL 7770166, at *7 (Tex. App.—Tyler Dec. 3, 2015, pet. denied); Dupree v. Boniuk Interests, Ltd., 472 S.W.3d 355, 367 (Tex. App.—Houston [1st Dist.] 2015, no pet.); Hill v. Heritage Resources, Inc., 964 S.W.2d 89, 113 (Tex. App.—El Paso 1997, pet. denied) (“To conclude that there was a valid modification, the jury had to favorably determine . . . that the modification is based upon new consideration.”). Consideration may consist of a benefit that accrues to one party, or, alternatively, a detriment incurred by the other party. Walden v. Affiliated Computer Services, Inc., 97 S.W.3d 303, 315 (Tex. App.—Houston [14th Dist.] 2003, pet. denied); see also Roark v. Stallworth Oil & Gas, Inc., 813 S.W.2d 492, 496 (Tex. 1991) (“Consideration is a present exchange bargained for in return for a promise. It consists of either a benefit to the promisor or a detriment to the promisee. The detriment must induce the making of the promise, and the promise must induce the incurring of the detriment.”). A promise to fulfill a preexisting obligation cannot serve as new consideration for an amendment to a contract. Walden, 97 S.W.3d at 319.

An exception exists for contracts for the sale of goods, which require no consideration to be modified. Tex. Bus. & Com. Code § 2.209(a). See also El Paso Natural Gas Co. v. Minco Oil & Gas, 8 S.W.3d 309, 314 (Tex. 1998) (quoting comment 2 to Uniform Commercial Code § -2-209; “modifications made [under subsection 2.209(a)] must meet the test of good faith imposed by this Act. The effective use of bad faith to escape performance on the original contract terms is barred, and the extortion of a ‘modification’ without legitimate commercial reason is ineffective as a violation of the duty of good faith. . . . The test of ‘good faith’ between merchants or as against merchants includes ‘observance of reasonable commercial standards of fair dealing in the trade’ (Section 2-103), and may in some situations require an objectively demonstrable reason for seeking a modification.”).

§ 17.7:3 Oral Modification

Texas common law generally permits oral modification of a written contract that does not have to be in writing under the statute of frauds even if the contract contains a no-oral-modification clause, because such a written contract is of no higher legal degree than an oral contract. Hobby Lobby Stores, Inc. v. Standard Renewable Energy, LP, No. 02-15-00124-CV, 2016 WL 4247969, at *5 (Tex. App.—Fort Worth Aug. 11, 2016, pet. denied) (mem. op.); Hyatt Cheek Builders-Engineers Co. v. Board of Regents of the University of Texas System, 607 S.W.2d 258, 265 (Tex. App.—Texarkana 1980, writ dism’d) (“Such a written bargain is of no higher legal degree than an oral one, and either may vary or discharge the other.”).

Not every oral modification to a contract within the statute of frauds is barred. American Garment Properties v. CB Richard Ellis-El Paso, L.L.C., 155 S.W.3d 431, 437 (Tex. App.—El Paso 2004; no pet.); Group Hospital Services, Inc. v. One & Two Brookriver Center, 704 S.W.2d 886, 890 (Tex. App.—Dallas 1986, no writ.). Contracts that must be written to be enforceable may be modified by oral agreement to extend the time of performance of the contract if the parol agreement is made before the contract expires. Gulf Production Co. v. Continental Oil Co., 164 S.W.2d 488, 491 (Tex. 1942); Voss Road Exxon LLC v. Vlahakos, No. 01-10-00146-CV, 2011 WL 2623989, at *6 (Tex. App.—Houston [1st Dist.] June 30, 2011, no pet.) (mem. op.). The critical determination is whether the modification materially effects the obligations of the underlying agreement. American Garment Properties, 155 S.W.3d at 437; see also Dracopoulos v. Rachal, 411 S.W.2d 719, 721 (Tex. 1967) (exception to general rule against oral modification of contracts permits parties to agree orally to extend time of performance of contract required to be in writing, so long as oral agreement is made before expiration of written contract). Where the character or value of the underlying agreement is unaltered, oral modifications are enforceable. American Garment Properties, 155 S.W.3d at 437; Group Hospital Services, Inc., 704 S.W.2d at 890. Nevertheless, the parties to contracts that must be in writing

A signed agreement for the sale of goods that excludes modification or rescission except by a signed writing cannot be otherwise modified or rescinded. But except as between merchants such a requirement on a form supplied by the merchant must be separately signed by the other party. Tex. Bus. & Com. Code § 2.209(b). The requirements of the statute of frauds (section 2.201) must be satisfied if the contract as modified is within its provisions. Tex. Bus. & Com. Code §§ 2.201, 2.209(c).

Although an attempt at modification or rescission does not satisfy the requirements of subsections (b) or (c), it can operate as a waiver. Tex. Bus. & Com. Code § 2.209(d). A party who has made a waiver affecting an executory portion of the contract may retract the waiver by reasonable notification received by the other party that strict performance will be required of any term waived, unless the retraction would be unjust in view of a material change of position in reliance on the waiver. Tex. Bus. & Com. Code § 2.209(e).

§ 17.8 Lack of Capacity

§ 17.8:1 Minority and Removal of Disabilities of Minority

The age of majority in Texas is eighteen. Tex. Civ. Prac. & Rem. Code § 129.001. Except as otherwise expressly provided by statute or by the constitution, every person who has been married in accordance with the law of Texas, regardless of age, has the power and capacity of an adult, including the capacity to contract. Tex. Fam. Code § 1.104. A minor of at least seventeen, or at least sixteen if self-supporting and living separate and apart from his parents, managing conservator, or guardian, may petition the court to have his disabilities of minority removed for limited or general purposes. Tex. Fam. Code § 31.001(a).

§ 17.8:2 Minors and Contracts

The contract of a minor is not void but is merely voidable at his option. The minor may set aside the entire contract at his option, but he is not entitled to enforce portions that are favorable to him while disaffirming other provisions that he finds burdensome. See *Seger v. Yorkshire Insurance Co.*, 503 S.W.3d 388, 406 (Tex. 2016); *Dairyland County Mutual Insurance Co. v. Roman*, 498 S.W.2d 154, 158 (Tex. 1973); *PAK Foods Houston, LLC v. Garcia*, 433 S.W.3d 171, 176 (Tex. App.—Houston [14th Dist.] 2014, pet. dism’d). A minor at the time of contracting can ratify the contract after attaining majority. If he does, he is bound by its terms. *PAK Foods Houston, 433 S.W.3d at 176*. A minor cannot disaffirm a contract if he induced the seller to enter the contract by fraudulently representing himself as an adult. *Cain v. Coleman*, 396 S.W.2d 251, 253 (Tex. Civ. App.—Texarkana 1965, no writ) (citing *Evans v. Henry*, 230 S.W.2d 620, 621 (Tex. Civ. App.—San Antonio 1950, no writ)).

A minor disaffirming his contract must restore property still in his possession or control. As a general rule, however, a minor may repudiate his contract for the purchase of property and is entitled to the return of the money that he has paid under the contract even if he cannot tender return of the property because he has squandered or dissipated it or the proceeds from its sale. *Bullock v. Sprowls*, 54 S.W. 661, 662–63 (Tex. 1899); *James v. Barnett*, 404 S.W.2d 886, 888 (Tex. Civ. App.—Dallas 1966, writ ref’d n.r.e.).

Minors can be bound to contracts for necessaries, although they are bound only to the extent of the reasonable value of those necessaries. *Parsons v. Keys & McKnight*, 43 Tex. 557 (1875); *Johnson v. Newberry*, 267 S.W. 476, 481 (Tex. Comm’n App. 1924, judgm’t adopted); see *Bowman v. Bowman*, 96 S.W.2d 667, 668 (Tex. Civ. App.—Eastland 1936, no writ).
§ 17.8:3  Determination of Incapacity

A person has the mental capacity to contract if he appreciates the effect of what he is doing and understands the nature and consequences of his acts and the business he is transacting. *Mandell & Wright v. Thomas*, 441 S.W.2d 841, 845 (Tex. 1969); *Rowland v. Herrin*, No. 03-07-00247-CV, 2010 WL 5568881, at *2 (Tex. App.—Austin Feb. 14, 2010, no pet.) (mem. op.). A provision of court-ordered, emergency, or voluntary mental health services to a person is not a determination or adjudication of that person’s mental competence and does not limit that person’s legal capacity or property rights. *Tex. Health & Safety Code* § 576.002(a). Mental capacity, or a lack thereof, may be shown by circumstantial evidence, including: (1) a person’s outward conduct, “manifesting an inward and causing condition”; (2) any preexisting external circumstances tending to produce a special mental condition; and (3) the prior or subsequent existence of a mental condition from which a person’s mental capacity (or incapacity) at the time in question may be inferred. *Bach v. Hudson*, 596 S.W.2d 673, 676 (Tex. Civ. App.—Corpus Christi 1980, no writ.). *But see Riggins v. Hill*, No. 14-09-00495-CV, 2011 WL 5248347 at *9 (Tex. App.—Houston [14th Dist.] Nov. 3, 2011, pet. denied) (mem. op.) (stating that “[m]ere nervous tension, anxiety or personal problems do not amount to mental incapacity sufficient to raise a fact issue to defeat a summary-judgment motion”). *See also Tex. Health & Safety Code* § 576.002(b) (a person is presumed mentally competent unless a judicial finding to the contrary is made under the Texas Estates Code).

In general, the question of whether a person knows or understands the nature and consequences of his act at the time of making a contract is a question of fact. *See Fox v. Lewis*, 344 S.W.2d 731, 739 (Tex. Civ. App.—Austin 1961, writ ref’d n.r.e.). The burden of proving incapacity is on the party seeking to rescind the contract. *Rowland v. Herren*, 2010 WL 5568881, at *2.

§ 17.8:4  Effect of Incapacity on Power to Contract

If a person was incompetent when he made a contract, the contract is voidable. *Cole v. McWillie*, 464 S.W.3d 896, 900 (Tex. App.—Eastland 2015, pet. denied). *But see Smith v. Christley*, 755 S.W.2d 525, 532–33 (Tex. App.—Houston [14th Dist.] 1988, writ denied) (relying on the Restatement (Second) of Contracts (1981) § 15 to say that if contract is made by incompetent party on fair terms and other party has no reason to know of incompetency and because of partial or complete performance equities would not best be served by avoidance of contract, contract will cease to be voidable).

A contract made by a person who was sane at the time the contract was made can be enforced regardless of subsequent insanity. *Kern v. Smith*, 164 S.W.2d 193, 195 (Tex. Civ. App.—Texarkana 1942, writ ref’d w.o.m.). Mental incapacity, to the extent it nullifies the obligor’s obligation, is a defense against a holder in due course. *Tex. Bus. & Com. Code* § 3.305(a)(1)(B).

A contract for necessaries entered into by an insane person is enforceable to the extent of the value of the goods or services furnished. *Legler v. Legler*, 189 S.W.2d 505, 512 (Tex. Civ. App.—Austin 1945, writ ref’d w.o.m.). Even if there is no express contract, one will be implied for the reasonable value of the goods or services provided if necessaries are furnished to the insane person. *Chandler v. Warlick*, 321 S.W.2d 897, 901 (Tex. Civ. App.—Eastland 1958, writ ref’d n.r.e.).
§ 17.9   Lack or Failure of Consideration

§ 17.9:1   Lack or Failure of Consideration Generally

A lack (or want) of consideration is different from a failure of consideration. Both are grounds for cancellation or rescission of a contract, because the transaction operates as constructive or legal fraud as to one who receives nothing of value in exchange for property. *Radford v. Snyder National Farm Loan Ass’n*, 121 S.W.2d 478, 480 (Tex. Civ. App.—Amarillo 1938, no writ).

A failure-of-consideration defense presupposes that there was consideration for the agreement in the first place, but that it later failed. *Cheung-Loon, LLC v. Cergon, Inc.*, 392 S.W.3d 738, 748 (Tex. App.—Dallas 2012, no pet.) (a failure of consideration occurs when, because of some supervening cause arising after the contract is formed, the promised performance fails); *Bassett v. American National Bank*, 145 S.W.3d 692, 696 (Tex. App.—Fort Worth 2004, no pet.).


Failure of consideration is grounds for cancellation or rescission of a contract only when one receives nothing of value in exchange for the agreement. See *Radford v. Snyder National Farm Loan Ass’n*, 121 S.W.2d 478, 480 (Tex. Civ. App.—Amarillo 1938, no writ). Cancellation or rescission of consideration happens when, because of some supervening cause after an agreement is reached, the promised performance fails. *Bernal*, 818 S.W.2d at 84; *Stewart v. U.S. Leasing Corp.* , 702 S.W.2d 288, 290 (Tex. App.—Houston [1st Dist.] 1985, no writ); *O’Shea v. Coronado Transmissions Co.*, 656 S.W.2d 557, 563 (Tex. App.—Corpus Christi 1983, writ ref’d n.r.e.). Partial failure of consideration is a *pro tanto* defense and will not invalidate the entire contract or prevent recovery on it. *Cheung-Loon*, 392 S.W.3d at 748; *Estate of Menifee v. Barrett*, 795 S.W.2d 810, 815 (Tex. App.—Texarkana 1990, no writ); *Huff v. Speer*, 554 S.W.2d 259, 263 (Tex. Civ. App.—Houston [1st Dist.] 1977, writ ref’d n.r.e.). A contract that lacks consideration, lacks mutuality of obligation and is unenforceable. *Federal Sign v. Texas Southern University*, 951 S.W.2d 401, 408 (Tex. 1997).

Lack of consideration, on the other hand, occurs when a contract, at its inception, does not impose obligations on both parties. Without a mutuality of obligation, a contract is unenforceable. *Cheung-Loon*, 392 S.W.3d at 747; *National Bank of Commerce v. Williams*, 84 S.W.2d 691, 692 (Tex. 1935); *Johnson v. Bond*, 540 S.W.2d 516, 520 (Tex. Civ. App.—Fort Worth 1976, writ ref’d n.r.e.). But see *1464-Eight, Ltd. v. Joppich*, 154 S.W.3d 101, 105–06, 110 (Tex. 2004) (adopting the Restatement (Second) of Contracts, which provides that recital of nominal consideration in either a guaranty or an option contract supports the underlying promise regardless of whether the recital amount was ever paid).

§ 17.9:2   Pleading Requirements

§ 17.10 Lack of Mutuality

Contracts are construed in favor of mutuality of obligation, because it is presumed that parties to an agreement intend it to be effectual. Texas Gas Utilities Co. v. Barrett, 460 S.W.2d 409, 412 (Tex. 1970); Chan v. Montebello Development Co., L.P., No. 14-06-00936-CV, 2008 WL 2986379, at *7 (Tex. App.—Houston [14th Dist.] July 31, 2008, pet. denied) (mem. op.).

The doctrine of mutuality of obligation does not apply to unilateral contracts. A unilateral contract is binding, therefore, if supported by independent consideration. An option supported by consideration is unilateral; it is not founded on mutual promises, but it is binding on the promisor who has received consideration for his promise and optional on the party who has purchased the option. See, e.g., Johnson v. Breckenridge-Stephens Title Co., 257 S.W. 223, 225–26 (Tex. 1924); Colligan v. Smith, 366 S.W.2d 816, 820 (Tex. Civ. App.—Fort Worth 1963, writ ref’d n.r.e.). Once the option is accepted, it then becomes a bilateral contract that is binding on both parties. Tye v. Apperson, 689 S.W.2d 320, 323 (Tex. App.—Fort Worth 1985, writ ref’d n.r.e.).

§ 17.11 Waiver and Estoppel

§ 17.11:1 Waiver

Waiver is an affirmative defense that may be asserted against a party who intentionally relinquishes a known right or engages in intentional conduct inconsistent with claiming the right. BMG Direct Marketing v. Peake, 178 S.W.3d 763, 780 (Tex. 2005); In re GE Capital Corp., 203 S.W.3d 314, 316 (Tex. 2006); Trelltex, Inc. v. Intexx, LLC, 494 S.W.3d 781, 790 (Tex. App.—Houston [14th Dist.] 2016, no pet.); Byrd v. Estate of Nelms, 154 S.W.3d 149, 162 (Tex. App.—Waco 2004, pet. denied); Continental Casing Corp. v. SIDERCA Corp., 38 S.W.3d 782, 789 (Tex. App.—Houston [14th Dist.] 2001, no pet.).

Waiver may be established by a party’s express renunciation of a known right, or by silence or inaction for a reasonable time period as to show an intention to yield the known right. Byrd, 154 S.W.3d at 162; Continental Casing, 38 S.W.3d at 789.

In general, a waiver will occur when someone dispenses with the performance of something he has a right to do, or where one in possession of any right does or forbears to do something, conferred by law or contract, with full knowledge of the material facts. Nixon Construction Co. v. Downs, 441 S.W.2d 284, 286 (Tex. Civ. App.—Houston [1st Dist.] 1969, no writ). Nonetheless, a party may enforce a right it has previously waived by giving sufficient notice to the other party, so that the other party has reasonable time to comply. Rodriguez v. Classical Custom Homes, Inc., 176 S.W.3d 928, 932 (Tex. App.—Dallas 2005, no pet.).

Waiver is ordinarily a question of fact. But when the facts and circumstances are admitted or clearly established, the question becomes one of law. Tenneco, Inc. v. Enterprise Products Co., 925 S.W.2d 640, 643 (Tex. 1996); In re Estate of Downing, 461 S.W.3d 231, 241 (Tex. App.—El Paso 2015, no pet.).

To establish an implied waiver of a legal right, there must be clear, unequivocal, and decisive acts of the party showing such a purpose or acts amounting to an estoppel. Trelltex, 494 S.W.3d at 790. Therefore, waiver is a matter of intent; for an implied waiver to be found through a party’s actions, intent must be clearly demonstrated by the surrounding facts and circumstances pertaining to the particular case. In re General Electric Capital Corp., 203 S.W.3d at 316; Trelltex, 494 S.W.3d at 790; Continental, 38 S.W.3d at 789. Essentially unilateral in its character, waiver is a legal consequence from an act or conduct of the party against whom it operates, and no act of the party in whose favor it is made is necessary to complete it. Waiver need not
be founded on a new agreement or be supported by consideration. *Massachusetts Bonding & Insurance Co. v. Orkin Exterminating Co.*, 416 S.W.2d 396, 401 (Tex. 1967).

A waiver of a condition can be established by conduct occurring after the time for performance of the condition has expired if the allegedly waived condition “is not a material part of the agreed equivalent of the obligor’s promise and its non-performance does not materially affect the value received by the obligor.” *Bimco Iron & Metal Corp.*, 464 S.W.2d at 357. Silence or inaction, for a sufficient period to show an intention to yield the known right, is enough to prove waiver. *Tenneco Inc.*, 925 S.W.2d at 643. *Trelltex*, 494 S.W.3d at 790. Such silence or inaction, however, must be coupled with knowledge of the right and with other circumstances, such as inaction for an unreasonable period of time, to evidence the intention to waive. *Furr v. Hall*, 553 S.W.2d 666 (Tex. Civ. App.—Amarillo 1977, writ ref’d n.r.e.).

Generally, once a right is waived, it is lost forever and cannot be reclaimed without the other party’s consent. *Burton v. National Bank of Commerce*, 679 S.W.2d 115, 118 (Tex. App.—Dallas 1984, no writ). However, under certain circumstances, a party may enforce a right it has previously waived by giving sufficient notice to the other party, so that the other party has reasonable time to comply. *Rodriguez v. Classical Custom Homes, Inc.*, 176 S.W.3d 928 (Tex. App.—Dallas 2005, no pet.).

What is a reasonable time depends on the circumstances in each case and, therefore, is a question of fact. *Continental Casing*, 38 S.W.3d at 789. However, while waiver is ordinarily a question of fact, “where the facts and circumstances are admitted or clearly established, the question becomes one of law.” *Tenneco Inc.*, 925 S.W.2d at 643.

§ 17.11:2 Sales of Goods

A party who has made a waiver affecting an executory portion of a contract for the sale of goods may retract the waiver by reasonable notification received by the other party that strict performance will be required of any term waived, unless the retraction would be unjust in view of a material change of position in reliance on the waiver. Tex. Bus. & Com. Code § 2.209(e).

§ 17.11:3 Estoppel

Estoppel generally prevents one party from misleading another to the other’s detriment or to the misleading party’s own benefit. *Ulico Casualty Co. v. Allied Pilots Ass’n*, 262 S.W.3d 773, 778 (Tex. 2008); *Johnson & Higgins of Texas, Inc. v. Kenneco Energy, Inc.*, 962 S.W.2d 507, 515–16 (Tex. 1998); *Rice v. Metropolitan Life Insurance Co.*, 324 S.W.3d 660, 667 n.6 (Tex. App.—Fort Worth 2010 no pet.). A person who by his speech or conduct has induced another to act in a particular manner ought not to be permitted to adopt an inconsistent position and thereby cause loss or injury to the other. *Burton v. National Bank of Commerce*, 679 S.W.2d 115, 117 (Tex. App.—Dallas 1984, no writ).

§ 17.11:4 Equitable Estoppel

Equitable estoppel is defensive in character. It is based on the principle that if one party by his conduct induces another to act in a particular manner, he should not be allowed to adopt an inconsistent position and thereby cause loss or injury to the other. *Fabrique, Inc. v. Corman*, 796 S.W.2d 790, 792 (Tex. App.—Dallas 1990), writ denied, 806 S.W.2d 801 (Tex. 1991) (per curiam). The linchpin for equitable estoppel is equity-fairness. *Trammell v. Galaxy Ranch School, LP (In re Trammell)*, 246 S.W.3d 815, 826 (Tex. App.—Dallas 2006, no pet.) (quoting *Grigson v. Creative Artists Agency L.L.C.*, 210 F.3d 524, 528 (5th Cir. 2000); *City of Fredericksburg v. Bopp*, 126 S.W.3d 218, 221 (Tex. App.—San Antonio 2003, no pet.); *In re Shockley*,
To invoke the doctrine of equitable estoppel, a party must satisfy the following elements:

1. A false representation or concealment of material facts;
2. Made with actual or constructive knowledge of the facts;
3. To a party who had neither the knowledge nor the means to acquire knowledge of the real facts;
4. With the intention that the representation should be, and the result that it is, relied on or acted on by the party to whom it was made to the party’s prejudice.

Equitable estoppel may arise from silence or inaction, if one with a duty to speak or act fails to do so and the silence or inaction misleads the other party to his detriment. Smith v. National Resort Communities, Inc., 585 S.W.2d 655, 658 (Tex. 1979). Absent a fiduciary or confidential relationship between the parties, a mere contractual relationship does not impose an affirmative duty to disclose. Crim Truck & Tractor Co. v. Navistar International Transportation Corp., 823 S.W.2d 591, 594 (Tex. 1992); cf. Anderson, Greenwood & Co. v. Martin, 44 S.W.3d 200, 212–13 (Tex. App.—Houston [14th Dist.] 2001, pet. denied) (duty to disclose does exist if necessary to correct misleading information or false impression).

§ 17.11:5 Judicial Estoppel

The doctrine of judicial estoppel is not strictly speaking estoppel at all, but arises from positive rules of procedure based on justice and sound public policy. Long v. Knox, 291 S.W.2d 292, 295 (Tex. 1956). It is to be distinguished from equitable estoppel based on inconsistency in judicial proceedings because the elements of reliance and injury essential to equitable estoppel need not be present for judicial estoppel to apply. Long, 291 S.W.2d at 295.

Under the doctrine of judicial estoppel, a party is estopped merely by the fact of having alleged or admitted either in his pleadings, in a former proceeding under oath, or in other statements made under oath in the course of a former judicial proceeding, a position contrary to the assertion sought to be made. See Miller v. Gann, 842 S.W.2d 641, 641 (Tex. 1992); Long, 291 S.W.2d at 295; Nine Syllables, LLC v. Evans, No. 05-13-01677-CV, 2015 WL 3932751, at *4 (Tex. App.—Dallas June 26, 2015, no pet.) (mem. op.); Byrd v. Estate of Nelms, 154 S.W.3d 149 (Tex. App.—Waco 2004, pet. denied). Furthermore, the person seeking the protection of the doctrine of judicial estoppel need not have been a party to the prior proceeding in which the statement was made. Swilley v. McCain, 374 S.W.2d 871 (Tex. 1964).

To establish the defense of a judicial estoppel, a party must show—

1. a sworn, prior inconsistent statement made in a judicial proceeding;
2. which was successfully maintained in the prior proceeding;
3. not made inadvertently or by mistake, or pursuant to fraud or duress; and
4. which is deliberate, clear, and unequivocal.
In *Jackson v. Hancock & Canada, L.L.P.*, 245 S.W.3d 51, 55–57 (Tex. App.—Amarillo 2007, pet. denied), the court held that the plaintiffs’ failure to list a legal malpractice cause of action in their bankruptcy schedule constituted judicial estoppel, notwithstanding that the bankruptcy was dismissed; inadvertence occurs only when the debtor lacks knowledge of the undisclosed claim or has no motive for its concealment.

§ 17.11:6 Promissory Estoppel

Promissory estoppel is recognized as a defensive doctrine which permits one who has relied on a promise to prevent an attack on the enforceability of the promise. *In re Weekley Homes, L.P.*, 180 S.W.3d 127, 133 (Tex. 2005); *Hruska v. First State Bank of Deanville*, 747 S.W.2d 783, 785 (Tex. 1988); *Bechtel Corp. v. CITGO Products Pipeline Co.*, 271 S.W.3d 898, 926 (Tex. App.—Austin 2008, no pet.); *Stanley v. Citifinancial Mortgage Co.*, 121 S.W.3d 811, 820 (Tex. App.—Beaumont 2003, no pet.); *Robbins v. Payne*, 55 S.W.3d 740, 747 (Tex. App.—Amarillo 2001, pet. denied). Promissory estoppel prevents a promisor who has induced substantial action or forbearance by another from denying that promise if injustice can be avoided only be enforcement, but it does not create a contract right that does not otherwise exist. *Bechtel*, 271 S.W.3d at 926 (citing *Sun Oil Co. (Delaware)* v. *Madeley*, 626 S.W.2d 726, 734 (Tex. 1981) and *Hruska*, 747 S.W.2d at 785). Rather, it merely “prevents a party from insisting upon his strict legal rights”—i.e., the right to avoid his promise as not contractually binding—“when it would be unjust to allow him to enforce them.” *Bechtel*, 271 S.W.3d at 926 (quoting *In re Weekley Homes, L.P.*, 180 S.W.3d at 133).

The elements of promissory estoppel are—

1. a promise;
2. foreseeability of reliance thereon by the promisee; and
3. substantial reliance by the promisee to his detriment.

*See English v. Fischer*, 660 S.W.2d 521, 524 (Tex. 1983); *Gilmartin v. KVTV*, 985 S.W.2d 553, 558 (Tex. App.—San Antonio 1998, no pet.).


§ 17.11:7 Pleading Requirements

Waiver and estoppel are affirmative defenses and must be affirmatively pleaded. *Tex. R. Civ. P. 94.*
§ 17.12 Mutual and Unilateral Mistake

§ 17.12:1 Elements of Mutual Mistake

If parties to an agreement have contracted under a mutual misconception or ignorance of a material fact, the agreement will be avoided. Williams v. Glash, 789 S.W.2d 261, 264 (Tex. 1990). The elements of mutual mistake are: (1) a mistake of fact, (2) held mutually by the parties, and (3) which materially affects the agreed-on exchange. Both parties must have “the same misunderstanding of the same material fact.” In re Estate of Childs, No. 04-15-00623-CV, 2016 WL 3452624, at *4 (Tex. App.—San Antonio June 22, 2016, no pet.) (mem. op.) (quoting City of The Colony v. North Texas Municipal Water District, 272 S.W.3d 699, 735 (Tex. App.—Fort Worth 2010, no pet.)); Lacy v. Ticor Title Insurance Co., 794 S.W.2d 781, 784 (Tex. App.—Dallas 1990), writ denied, 803 S.W.2d 265 (Tex. 1991).

The parol evidence rule does not bar extrinsic evidence of mutual mistake. Glash, 789 S.W.2d at 264; Dyer v. Cotton, 333 S.W.3d 703, 718 (Tex. App.—Houston [1st Dist.] 2010, no pet.).

§ 17.12:2 Remedies for Mutual Mistake

Reformation of the agreement is a proper remedy when the true agreement of the parties is shown and the provision erroneously written into the instrument is there by mutual mistake. Myrad Properties, Inc. v. LaSalle Bank, N.A., 300 S.W.3d 746, 751 (Tex. 2009); Cherokee Water Co. v. Forderhause, 741 S.W.2d 377, 379 (Tex. 1987) (“The underlying objective of reformation is to correct a mutual mistake made in preparing a written instrument so that the instrument truly reflects the original agreement of the parties.”); Goff v. Southmost Savings & Loan Ass’n, 758 S.W.2d 822, 826 (Tex. App.—Corpus Christi 1988, writ denied). Otherwise, mutual mistake is an equitable ground that excuses a party’s failure to perform. See Crump v. Frenk, 404 S.W.3d 146, 153 n.11 (Tex. App.—Texarkana 2013, no pet.); A.L.G. Enterprises v. Huffman, 660 S.W.2d 603, 606 (Tex. App.—Corpus Christi 1983), aff’d as reformed, 672 S.W.2d 230 (Tex. 1984) (per curiam).

§ 17.12:3 Pleading Requirements for Mutual Mistake


§ 17.12:4 Unilateral Mistake

One party’s mistake usually will not constitute a ground for relief, if it was not known to or induced by an act of the other party. Flores v. Medline Industries, Inc., 2015 WL 9257070, at *4 (Tex. App.—Corpus Christi Dec. 17, 2015, no pet.).

However, equitable relief against a unilateral mistake will be granted if (1) the mistake is of so great a consequence that it would be unconscionable to enforce the contract as made, (2) the mistake relates to a material feature of the contract, (3) the mistake was made regardless of the exercise of ordinary care, and (4) the parties can be placed in status quo in the equity sense (that is, rescission must not result in prejudice to the other party except for the loss of his bargain). There may be other circumstances, such as the acts and extent of knowledge of the parties that will govern or influence the extension of relief. James T. Taylor & Son, Inc. v. Arlington Independent School District, 335 S.W.2d 371, 373 (Tex. 1960); Flores, 2015 WL 9257070, at *6.
Unilateral mistake must be affirmatively pleaded, or it will be waived. Tex. R. Civ. P. 94; see also Flores, 2015 WL 9257070, at *6 (characterizing unilateral mistake as an “affirmative defense”).

§ 17.13  Statute of Frauds

§ 17.13:1  Statute of Frauds Generally

The phrase statute of frauds refers to a principle carried forward from English statutory law into several Texas statutes, providing that certain types of promises or agreements are not enforceable unless the promise or agreement or a memorandum of it is in writing and signed by the party to be charged or by someone lawfully authorized to sign for him.

The primary purpose of the statute of frauds is to remove uncertainty, prevent fraudulent claims, and reduce litigation. Givens v. Dougherty, 671 S.W.2d 877, 878 (Tex. 1984); Garza v. Robinson, No. 13-11-00015-CV, 2013 WL 3326465, at *4 (Tex. App.—Corpus Christi June 27, 2013, no pet.) (mem. op.). See also Davis v. Crockett, 398 S.W.2d 302, 305 (Tex. Civ. App.—Dallas 1965, no writ) (statute of frauds prevents fraud and perjury in certain types of transactions by requiring the agreement to be evidenced by a signed writing). The party pleading the statute of frauds bears the initial burden of establishing its applicability. Once that party meets its initial burden, the burden shifts to the opposing party to establish an exception that would take the verbal contract out of the statute of frauds. Whether a contract comes within the statute of frauds is a question of law. See Tex. R. Civ. P. 94; Dynegy, Inc. v. Yates, 422 S.W.3d 638, 642 (Tex. 2013). Whether a contract falls within the statute of frauds is a question of law. Thomas v. Miller, 500 S.W.3d 601, 607 (Tex. App.—Texarkana 2016, no pet.).

§ 17.13:2  Transactions Covered by Various Statutes of Frauds

Texas law requires that certain transactions be memorialized by a signed writing, including the following:


3. A promise by an executor or administrator to answer out of his own estate for the debt or damage due from his decedent. Tex. Bus. & Com. Code § 26.01(b)(1).


8. An agreement which is not to be performed within one year from the making of the agreement. Tex. Bus. & Com. Code § 26.01(b)(6).
9. A promise or agreement to pay a commission for the sale or lease of an oil or gas mining lease, an oil or gas royalty, minerals, or a mineral interest. Tex. Bus. & Com. Code § 26.01(b)(7).

10. An agreement, promise, contract, or warranty of cure relating to medical care and results made by a physician or health care provider other than a pharmacist. Tex. Bus. & Com. Code § 26.01(b)(8).


§ 17.13:3 Loan Agreement

The rights and obligations of the parties to a loan agreement controlled by Tex. Bus. & Com. Code § 26.02 are determined solely from the terms of the written loan agreement. Any prior or contemporaneous oral agreements between the parties are superseded by and merged into the loan agreement. Tex. Bus. & Com. Code § 26.02(c), (d).

A financial institution (as defined in Tex. Bus. & Com. Code § 26.02(a)(1)) must give written notice to the obligor of the applicable statute of frauds and merger provisions of section 26.02. This notice must be either in a separate writing signed by the debtor or obligor or incorporated into one or more of the loan documents signed by him.

The notice must be in type that is bold-faced, capitalized, underlined, or otherwise set out from surrounding written material so as to be conspicuous and must state substantially as follows:

This written loan agreement represents the final agreement between the parties and may not be contradicted by evidence of prior, contemporaneous, or subsequent oral agreements of the parties.

There are no unwritten oral agreements between the parties. Tex. Bus. & Com. Code § 26.02(e). Although the statutory notice form above refers to subsequent agreements, the statute itself does not.

§ 17.13:4 Exceptions

In addition to specific statutory exceptions to the statute of frauds, oral contracts governed by the statute of frauds may be enforced in the following situations.
Main Purpose: If the promise is to pay the debt, default, or miscarriage of another, an oral promise is enforceable if (1) the promisor intended to create primary responsibility in itself to pay for the debt, (2) there was consideration for the promise, and (3) the consideration given for the promise was primarily for the promisor’s own use and benefit. *Dynegy, Inc. v. Yates*, 422 S.W.3d 638, 642 (Tex. 2013). *See also Haas Drilling Co. v. First National Bank*, 456 S.W.2d 886, 890 (Tex. 1970), which seems to add a fourth element that obtaining the benefit is the promisor’s main or leading purpose in making the promise. The question of intent to be primarily responsible for the debt is a question for the finder of fact, taking into account all the facts and circumstances of the case. *Dynegy*, 422 S.W.3d at 642.

Promissory Estoppel: If the oral promise is to sign a written agreement that itself complies with the statute of frauds, it is enforceable if the promisor should have expected the promise to result in some definite and substantial injury to the promisee, the injury occurred, and the court must enforce the promise to avoid injustice. *Nagle v. Nagle*, 633 S.W.2d 796, 800 (Tex. 1982); “*Moore*” *Burger, Inc. v. Phillips Petroleum Co.*, 492 S.W.2d 934 (Tex. 1972). *See also Trammel Crow Co. No. 60 v. Harkinson*, 944 S.W.2d 631, 636 (Tex. 1995) (promissory estoppel exception does not apply to Real Estate License Act).

Estoppel: If the oral promise is to sell or lease land, it is enforceable to avoid actual fraud if there has been payment of consideration, possession by the purchaser, and valuable and permanent improvements made by the purchaser. *Nagle, 633 S.W.2d at 799, 800* (noting that promissory estoppel applies to sale of land only when promise is to sign document that itself complies with statute of frauds); *Hooks v. Bridgewater*, 229 S.W. 1114, 1116 (Tex. 1921).

Substantial (Partial) Performance: If one party has completed performance under the contract to an extent that she has suffered substantial detriment, has no adequate remedy, and it would perpetrate a fraud on her to permit the other party to plead the statute of frauds and reap an unearned benefit, an oral contract is enforceable. In order to establish the partial performance exception, the party alleging the exception must show that (1) she had performed acts unequivocally referable to the agreement, (2) the acts were performed in reliance on the agreement, (3) as a result of the acts she had experienced substantial detriment, (4) she has no adequate remedy for their loss, and (5) the other party would reap an unearned benefit such that not enforcing the agreement would amount to a virtual fraud. *Thomas v. Miller*, 500 S.W.3d 601, 609 (Tex. App.—Texarkana 2016, no pet.). The partial performance must be “unequivocally referable to the agreement and corroborative of the fact that a contract actually was made.” *Miller, 500 S.W.3d at 610* (quoting *Heritage Constructors, Inc. v. Chrietzbert Electric, Inc.*, No. 06-14-00048-CV, 2015 WL 3378377, at *6 (Tex. App.—Texarkana Dec. 9, 2014, no pet.) (mem. op.).


Oral Modification to Extend Time of Performance: Even if the contract is covered by the statute of frauds, the parties may agree orally to extend the time of performance of a contract that is required to be in writing, if the oral modification is made before the expiration of the written contract. *Voss Road Exxon LLC v. Vlahakos*, No. 01-10-00146-CV, 2011 WL 2623989, at *6 (Tex. App.—Houston [1st Dist.] June 30, 2011, no pet.) (mem. op.). Exceptions to the statute of frauds are strictly applied by the courts. *See Hooks*, 229 S.W. at 1116.
§ 17.13:5  Pleading Requirements


§ 17.14  Unconscionability

§ 17.14:1  Sales of Goods

The basic test for unconscionability is whether, given the parties’ general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing when the parties made the contract. Tex. Bus. & Com. Code § 2.302 cmt. 1. See, e.g., Royston, Rayzor, Vickery & Williams, LLP v. Lopez, 467 S.W.3d 494, 502 (Tex. 2015) (arbitration clause not unconscionable); In re FirstMerit Bank, N.A., 52 S.W.3d 749, 757–58 (Tex. 2001, orig. proceeding) (arbitration clause not unconscionable). The principle is one of preventing oppression and unfair surprise and not of disturbing allocation of risks because of superior bargaining power. In re FirstMerit Bank, 52 S.W.3d at 757. If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract or it may enforce the remainder of the contract without the unconscionable clause as to avoid any unconscionable result. Tex. Bus. & Com. Code § 2.302(a). When it claims or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose, and effect to aid the court in making the determination. Tex. Bus. & Com. Code § 2.302(b).

§ 17.14:2  Personal Property Leases

If the court as a matter of law finds a personal property lease or any clause of a lease to have been unconscionable at the time it was made, the court may refuse to enforce the lease contract, it may enforce the remainder of the lease contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable results, and refuse to enforce it. Tex. Bus. & Com. Code § 2A.108(a). With respect to a consumer lease, if the court as a matter of law finds that a lease contract or any clause of a lease contract has been induced by unconscionable conduct or that unconscionable conduct has occurred in the collection of a claim arising from a lease contract, the court may grant appropriate relief. Tex. Bus. & Com. Code § 2A.108(b). Before making a finding of unconscionability, the court, on its own motion or that of a party, shall afford the parties a reasonable opportunity to present evidence as to the setting, purpose, and effect of the lease contract, or clause thereof or the of the conduct. Tex. Bus. & Com. Code § 2A.108(c). In an action in which the lessee claims unconscionability with respect to a consumer lease, if the court finds unconscionability, the court shall award reasonable attorney’s fees to the lessee. If the court does not find unconscionability and the lessee claiming unconscionability has brought or maintained an action he or she knew to be groundless, the court shall award reasonable attorney’s fees to the party against whom the claim is made. In determining attorney’s fees, the amount of the recovery on behalf of the claimant under subsections (a) and (b) is not controlling. Tex. Bus. & Com. Code § 2A.108(d)(1)–(3).

§ 17.14:3  Other Contracts

No single test exists for finding unconscionability; it is determined on a case-by-case basis by looking at the totality of the circumstances as of the time the contract was formed. Coonly v. Gables Residential Services, Inc., No. 04-12-00702-CV, 2013 WL 6022261, at *5 (Tex. App.—San Antonio Nov. 13, 2013, no pet.) (mem. op.); Pony Express Courier Corp. v. Morris, 921
S.W.2d 817, 821 (Tex. App.—San Antonio 1996, no writ). An inquiry into potential unconscionability begins with two broad questions: (1) how the parties arrive at the terms in controversy (the procedural aspect), and (2) are there legitimate commercial reasons justifying the terms of the contract (the substantive aspect)? Coonly, 2013 WL 6022261, at *5 (“In other words, in deciding the fairness of a contract’s substantive terms, the court must also consider whether there were ‘procedural abuses,’ such as an unfair bargaining position between the parties at the time the agreement was made”); Pony Express, 921 S.W.2d at 821; Ski River Development, Inc. v. McCalla, 167 S.W.3d 121 (Tex. App.—Waco 2005, pet. denied) (party asserting unconscionability bears the burden of proving both procedural and substantive unconscionability).

In determining whether a contract is unconscionable, a court examines (1) the “entire atmosphere” in which the agreement was made; (2) the alternatives, if any, available to the parties at the time the contract was made; (3) the “non-bargaining” ability of one party; (4) whether the contract was illegal or against public policy; and (5) whether the contract is oppressive or unreasonable. Ski River Development, 167 S.W.3d at 136. Factors that may contribute to an unconscionable bargaining process include (1) knowledge of the stronger party that the weaker party will be unable to receive substantial benefits from the contract and (2) knowledge of the stronger party that the weaker party is unable reasonably to protect his interests by reason of physical or mental infirmities, ignorance, illiteracy or inability to understand the language of the agreement. Coonly, 2013 WL 6022261, at *5; Ski River Development, 167 S.W.3d at 136.

§ 17.15 Negligent Misrepresentation

§ 17.15:1 Elements

The elements of a claim for negligent misrepresentation are:

1. the representation is made by a defendant in the course of his business or in a transaction in which it has a pecuniary interest;
2. the defendant supplies false information for the guidance of others in its business;
3. the defendant did not exercise reasonable care or competence in obtaining or communicating the information; and
4. the plaintiff suffers pecuniary loss by justifiably relying on the representation.


§ 17.15:2 Misrepresentation in Course of Business

The plaintiff must prove that the defendant misrepresented an existing fact in the course of the defendant’s business. Miksch v. Exxon Corp., 979 S.W.2d 700, 706 (Tex. App.—Houston [14th Dist.] 1998, pet. denied); see also McCamish, Martin, Brown & Loeffler v. F.E. Appling Interests, 991 S.W.2d 787, 794 (Tex. 1999) (negligent misrepresentation cause of action available only when information is transferred by attorney to known party for known purpose); Trans-Gulf Corp. v. Performance Aircraft Services, Inc., 82 S.W.3d 691, 696 (Tex. App.—Eastland 2002, no pet.) (section 552(2) of Restatement of Torts requires actual knowledge of recipient’s identity and specific intent on part of alleged tortfeasor that claimant would rely on misrepresent-
sentation); *Facciolla v. Linbeck Construction Corp.*, 968 S.W.2d 435, 443 (Tex. App.—Texarkana 1998, no pet.) (plaintiff never established that defendant ever made misrepresentation directly to plaintiff).

§ 17.15:3 False Information


§ 17.15:4 Relation to Existing Contract


§ 17.16 Fraud (in Inducement)

§ 17.16:1 Elements

Common-law fraud and fraud in the inducement are one and the same; the latter term is merely used to describe the means by which the fraud is perpetrated. Fraud in the inducement has six elements. Those elements include:

1. a material representation;
2. that was false;
3. that was made with knowledge of its falsity or recklessly without any knowledge of its truth and as a positive assertion;
4. that was made with the intention that it be acted on by the party;
5. that the party acted in reliance on it; and
6. that he thereby suffered injuries.

In re FirstMerit Bank, N.A., 52 S.W.3d 749, 758 (Tex. 2001, orig. proceeding); Green International v. Solis, 951 S.W.2d 384, 390 (Tex. 1997); T.O. Stanley Boot Co. v. Bank of El Paso, 847 S.W.2d 218, 222 (Tex. 1992); Eagle Properties, Ltd. v. Scharbauer, 807 S.W.2d 714, 723 (Tex. 1990); Stone v. Lawyer’s Title Insurance Corp., 554 S.W.2d 183, 185 (Tex. 1977); see also Formosa Plastics Corp. v. Presidio Engineers & Contractors, Inc., 960 S.W.2d 41, 46 (Tex. 1998) (legal duty not to fraudulently procure a contract is separate and independent from duties established by contract itself). The absence of any one of these elements prevents recovery. Stephanz v. Laird, 846 S.W.2d 895, 903 (Tex. App.—Houston [14th Dist.] 1993, writ denied) (to prevail on actionable fraud cause of action, party asserting the claim must satisfy all elements of the tort for each alleged misrepresentation); Mumphord v. First Victoria National Bank, 605 S.W.2d 701, 704 (Tex. Civ. App.—Corpus Christi 1980, no writ); Sawyer v. Pierce, 580 S.W.2d 117, 124 (Tex. Civ. App.—Corpus Christi 1979, writ ref’d n.r.e.).

§ 17.16:2 Material Representation

“Material” information is that which a reasonable person would attach importance to and would be induced to act on in determining his choice of actions in the transaction in question. In re Media Arts Group, Inc., 116 S.W.3d 900, 910 (Tex. App.—Houston [14th Dist.] 2003, orig. proceeding [mand. denied]); Citizens National Bank v. Allen Rae Investments, Inc., 142 S.W.3d 459, 478–79 (Tex. App.—Fort Worth 2004, no pet.).

§ 17.16:3 Parol Evidence Rule

If a party claims fraud or misrepresentation based on a promise inconsistent with the terms of a contract, the parol evidence rule prevents enforcement of such additional terms. See Town North National Bank v. Broaddus, 569 S.W.2d 489, 491 (Tex. 1978); Hubacek v. Ennis State Bank, 317 S.W.2d 30, 32–33 (Tex. 1958); Hallmark v. Port/Cooper-T. Smith Stevedoring Co., 907 S.W.2d 586, 590 (Tex. App.—Corpus Christi 1995, no writ); Weinacht v. Phillips Coal Co., 673 S.W.2d 677, 679 (Tex. App.—Dallas 1984, no writ).

In the Town North National Bank case, the court held that a promissory note that is clear and express in its terms cannot be varied or contradicted by parol agreements or by representations of the payee that the maker would not be held liable according to the tenor of the instrument. The court reasoned that a party to a written agreement is charged as a matter of law with knowledge of its provisions and as a matter of law cannot claim fraud when he is bound to the provisions unless he can demonstrate that he was tricked into its execution. The court specifically held that under the facts of the case, the mere representation by a payee to the maker that the maker will not be liable on the note does not constitute fraud in the inducement so as to be an exception to the parol evidence rule. Town North National Bank, 569 S.W.2d at 491.

Texas courts have uniformly followed Town North in recognizing that fraud cannot be legally predicated in an instrument case on a representation which directly contradicts the terms of the writing itself. Simmons v. Compania Financiera Libano, S.A., 830 S.W.2d 789, 791 (Tex. App.—Houston [1st Dist.] 1992, writ denied); Lindeburg v. Gulfway National Bank, 624 S.W.2d 278, 281 (Tex. Civ. App.—Corpus Christi 1981, writ ref’d n.r.e.).

Similarly, in Albritton Development Co. v. Glendon Investments, Inc., the court disregarded testimony that the payee was induced to execute the note on the representation that it was due only when the payee had lined up additional business prospects. In affirming a summary judgment for the payee the court stated: “It is well established that written instruments, includ-
ing promissory notes, cannot be changed by evidence of a prior or contemporaneous oral agreement that contravenes the terms of the written instrument.” Albritton Development Co. v. Glendon Investments, Inc., 700 S.W.2d 244, 246 (Tex. Civ. App.—Houston [1st Dist.] 1985, writ ref’d n.r.e.), (citing Town North, 569 S.W.2d at 491). See also Edlund v. Bounds, 842 S.W.2d 719, 725 (Tex. App.—Dallas 1992, writ denied) (to establish fraud in inducement sufficient to allow exception to parol evidence rule, there must be some showing of some type of trickery, deceit, or device employed by payee as well as showing that payee represented to maker that he would not be liable on note).

§ 17.16:4 Puffery or Opinion Is Not Fraud

“"Puffery’ is an expression of opinion by a seller not made as a representation of fact.” Dowling v. NADW Marketing, Inc., 631 S.W.2d 726, 729 (Tex. 1982). Pure expressions of opinion generally are not actionable. Helena Chemical Co. v. Wilkins, 47 S.W.3d 486, 502 (Tex. 2001) (mere puffery not actionable under DTPA, section 17.46(b)(5) or (b)(7), but may be actionable under section 17.46(b)(23) or 17.50(a)(3)); Trenholm v. Ratcliff, 646 S.W.2d 927, 931 (Tex. 1983); Angelo Broadcasting, Inc. v. Satellite Music Network, Inc., 836 S.W.2d 726, 733 (Tex. App.—Dallas 1992, writ denied), overruled on other grounds, Hines v. Hash, 843 S.W.2d 464, 469–70 (Tex. 1992).

Whether a statement is an actionable statement of “fact” or merely an innocuous statement of “opinion” often depends upon the circumstances in which a statement is made. Transport Insurance Co. v. Faircloth, 898 S.W.2d 269, 276 (Tex. 1995); Citizens National Bank v. Allen Rae Investments, Inc., 142 S.W.3d 459, 478–79 (Tex. App.—Fort Worth 2004, no pet.). When determining whether a statement constitutes mere puffing, the court considers the following factors:

1. The statement’s specificity—imprecise or vague representations constitute mere opinions;
2. The speaker’s knowledge—an opinion may constitute actionable fraud if the speaker has knowledge of its falsity;
3. The levels of knowledge of the buyer and seller—the seller’s superior knowledge coupled with the lack of knowledge of the buyer operated to make a divergence into representations of fact; and
4. Whether the statement related to a present or future happening—an expression of an opinion as to the happening of a future event may constitute actionable fraud where the speaker purports to have special knowledge of the facts that will occur or exist in the future.

Transport Insurance Co., 898 S.W.2d at 276; GJP, Inc. v. Ghosh, 251 S.W.3d 854, 889 (Tex. App.—Austin 2008, no pet.);

Cases in which courts have held that statements were merely puffing or opinion include Auto-haus, Inc. v. Aguilar, 794 S.W.2d 459, 464 (Tex. App.—Dallas 1990) writ denied, 800 S.W.2d 853 (Tex. 1991) (per curiam) (statements made by a Mercedes salesman that Mercedes-Benz was the best-engineered car in the world, and “joking” that the car would “probably” only need to be brought in for an oil and filter change every 7,500 miles was nonactionable puffing); Duperier v. Texas State Bank, 28 S.W.3d 740, 749 (Tex. App.—Corpus Christi 2000, pet. dism’d by agmt.) (statements that bank notes were safe and suitable investment and there was no chance yield on notes would fall to zero were bank officer’s opinion).

Cases in which courts have held that statements were more than mere expressions of opinion include Helena Chemical Co. v. Wilkins, 47 S.W.3d 486, 502–504 (Tex. 2001) (misrepresentations about seed characteristics, quality, and grade amounted to more than mere puffing); Pennington v. Singleton, 606 S.W.2d 682, 687 (Tex. 1980) (statement that boat and motor were “new” or in “excellent” or “perfect” condition were not mere opinion); Gore v. Scotland Golf, Inc., 136 S.W.3d 26, 32–33
(Tex. App.—San Antonio 2003, pet. denied) (representations that the seller’s relationship with his primary customer was “healthy” when he had knowledge of the falsity of the statement); Hedley Feedlot, Inc. v. Weatherly Trust, 855 S.W.2d 826, 838 (Tex. App.—Amarillo 1992, writ denied) (representations about the type of cattle, weight, projected cost of feeding, the length of time on feed, and the projected gain of the cattle went beyond mere opinion); Milt Ferguson Motor Co. v. Zeretke, 827 S.W.2d 349, 355 (Tex. App.—San Antonio 1991, no writ) (statements in car dealership pamphlets, magazine articles, newspaper articles, and advertisements by salesman at the car dealership stating that the car was “a good, excellent, motor vehicle,” “a better car than the Calais that they [dealership] had,” and “a good car and that they [purchasers] would have no problems” were not merely puffing or opinion); Wheeler v. Box, 671 S.W.2d 75, 77 (Tex. App.—Dallas 1984, no writ) (representations by seller of business that they would provide efficient business operation and complete support, would buy the business back if it did not work out, and would personally fine tune the Boxes’ business constituted more than puffery).

§ 17.16:5 Statements of Value Not Fraud


§ 17.16:6 Falsity

A statement is not fraudulent unless the maker knew it was false when made or made it recklessly without knowledge of the truth. DeSantis v. Wackenhut Corp., 793 S.W.2d 670, 688 (Tex. 1990), cert. denied, 498 U.S. 1048 (1991); Kelly v. LIN TV of Texas, 27 S.W.3d 564, 572 (Tex. App.—Eastland 2000, pet. denied).

When the statement or representation alleged to be fraudulent is in the nature of a promise or an act to be performed in the future, and not a statement of an existing fact or pertinent fact, the pleader must allege and prove that, at the time the statement or promise was made, the person making the promise did not intend to perform it. Formosa Plastics Corp. v. Presidio Engineers & Contractors, Inc., 960 S.W.2d 41, 48 (Tex. 1997); T.O. Stanley Boot Co. v. Bank of El Paso, 847 S.W.2d 218, 222 (Tex. 1992); Cerullo v. Gottlieb, 309 S.W.3d 160, 166 (Tex. App.—Dallas 2010, pet. denied); Mays v. Pierce, 203 S.W.3d 564, 573 (Tex. App.—Houston [14th Dist.] 2006, pet. denied); Wyatt v. McGregor, 855 S.W.2d 5, 12 (Tex. App.—Corpus Christi 1993, no writ). The mere failure to perform a contract is not evidence of fraud. Formosa Plastics, 960 S.W.2d at 48; Crim Truck & Tractor Co. v. Navistar International Transportation Corp., 823 S.W.2d 591, 597 (Tex. 1992); Spoljaric v. Percival Tours, Inc., 708 S.W.2d 432, 435 (Tex. 1986); Bernstein v. Portland Savings and Loan Ass’n, 850 S.W.2d 694, 703 (Tex. App.—Corpus Christi 1993, writ denied).

A party’s later denial that a promise of future performance was made is a factor showing no intent to perform when the promise was made. T.O. Stanley Boot Co., 847 S.W.2d at 222; Spoljaric, 708 S.W.2d at 435.

Representations as to future or contingent events are not deemed fraudulent merely because the predictions do not come true. Fina Supply v. Abilene National Bank, 726 S.W.2d 537, 540 (Tex. 1987) (representation as to the legal effect of documents to be amended in the future is a statement of opinion and will not support fraud in an arm’s-length transaction); Gardner v. Dorsey, 272 S.W. 266, 270–71 (Tex. Civ. App.—El Paso 1925, writ dism’d) (statements about future value not fraudulent unless plaintiff proves intent to deceive). Mere breakage of a promise or failure to perform does not prove that the representa-
tion was fraudulent. *Spoljaric*, 708 S.W.2d at 435; *Bernstein*, 850 S.W.2d at 703. To be actionable, the promise must be made with the intention, design, and purpose of deceiving and with no intention of performing the act. Failure to perform coupled with other facts is a circumstance to be considered to establish in-tent. Intent to defraud can be shown by circumstantial evidence. “A party’s denial that he ever made a promise is a factor showing no intent to perform when he made the promise.” *Spoljaric*, 708 S.W.2d at 434–35.

If there is no contract liability, there is no tort liability for fraud, regardless of whether there was or was not an intention to perform the promise. *Bank of El Paso v. T.O. Stanley Boot Co.*, 809 S.W.2d 279, 288 (Tex. App.—El Paso 1991), *aff’d in part, rev’d in part on other grounds*, 847 S.W.2d 218 (Tex. 1992); *Guaranty Bank v. Lone Star Life Insurance Co.*, 568 S.W.2d 431, 434 (Tex. Civ. App.—Dallas 1978, writ ref’d n.r.e.).

§ 17.16:7 Reliance

In order to be actionable fraud, the defrauded party must have relied on the misrepresentation. If the misrepresentation concerns matters that are generally known or equally available to both parties at the time the transaction occurs, there is no actionable fraud. *Jones v. Herring*, 16 S.W.2d 325, 328 (Tex. Civ. App.—Austin 1929, writ dism’d). A duty to investigate exists when the defrauded party is aware of facts that would cause the ordinarily intelligent and prudent person to investigate. *Bush v. Stone*, 500 S.W.2d 885, 889–90 (Tex. Civ. App.—Corpus Christi 1973, writ ref’d n.r.e.). However, parties may contractually disclaim reliance on representations, and “such a disclaimer, where the parties’ intent is clear and specific, should be effective to negate a fraudulent inducement claim.” *Schlumberger Technology Corp. v. Swanson*, 959 S.W.2d 171, 179 (Tex. 1997) (citing *Prudential Insurance Co. of America v. Jefferson Associates, Ltd.*, 896 S.W.2d 156, 161–62 (Tex. 1995)).

In *Schlumberger*, two parties had concluded a dispute with a settlement-release agreement that contained a disclaimer clause stating that neither party was relying on any advice or statement of the other. Swanson then sought to set aside the release contract based on a fraud in the inducement claim. The court held that where the parties are dealing at arm’s length, and the disclaimer expresses a clear intent to waive fraudulent inducement claims, such a disclaimer of reliance could be binding. Under the facts of *Schlumberger*, the court barred the fraudulent inducement claims as a matter of law. *Schlumberger*, 959 S.W.2d at 180–81.

§ 17.16:8 Intention

When evidence of an intention not to perform is so weak that it creates only a mere surmise or suspicion, it constitutes no evidence and will not support a verdict. *T. O. Stanley Boot Co. v. Bank of El Paso*, 847 S.W.2d 218. The mere failure to perform is not, in itself, evidence of intent not to perform. *Chancellors Racquet Club v. Schwarz*, 661 S.W.2d 194, 196 (Tex. App.—Houston [1st Dist.] 1983, writ ref’d n.r.e.) (quoting *Stone v. Enstam*, 541 S.W.2d 473, 481 (Tex. Civ. App.—Dallas 1976, no writ)).

§ 17.16:9 Failure to Disclose

The failure to disclose a material fact within the knowledge of a party may only be actionable where there is a duty to disclose. *Bradford v. Vento*, 48 S.W.3d 749, 755 (Tex. 2001). Whether such duty exists is a question of law. *Citizens National Bank v. Allen Rae Investments, Inc.*, 142 S.W.3d 459, 476–77 (Tex. App.—Fort Worth 2004, no pet.). A duty to disclose may arise in a commercial context in four situations:
1. when there is a fiduciary relationship between the parties;
2. when one voluntarily discloses information, the whole truth must be disclosed;
3. when one makes a representation, new information must be disclosed when that new information makes the earlier representation misleading or untrue; or
4. when one makes a partial disclosure and conveys a false impression.


§ 17.16:10 Fraudulent Inducement of “As Is” Contract

A valid “as is” provision can negate causation for a variety of claims, including fraud. But a “buyer is not bound by an agreement to purchase something ‘as is’ that he is induced to make because of a fraudulent representation or concealment of information by the seller.” _See Prudential Insurance Co. of America v. Jefferson Associates, Ltd._, 896 S.W.2d 156, 161–62 (Tex. 1995).

§ 17.16:11 Disclaiming Reliance

A contract’s inclusion of a merger clause is insufficient, by itself, to negate a cause of action for fraudulent inducement. _Italian Cowboy Partners, Ltd. v. Prudential Insurance Co. of America_, 341 S.W.3d 323, 331–32 (Tex. 2011). In _Italian Cowboy Partners, Ltd._, the supreme court reinforced its prior holdings that pure merger clauses, without an expressed clear and unequivocal intent to disclaim reliance or waive claims for fraudulent inducement, were ineffective to preclude such claims. Even merger clauses that also contain a statement that no representations were made other than those contained in the contract is not sufficient to defeat a fraudulent inducement claim: “Such language achieves the purpose of ensuring that the contract at issue in-validates or supersedes any previous agreements, as well as negating the apparent authority of an agent to later modify the contract’s terms.” _Italian Cowboy Partners, Ltd._, 341 S.W.3d at 334–35. _See also Community Management, LLC v. Cutten Development_, L.P., No. 14-14-00854-CV, 2016 WL 3554704, at *5 (Tex. App.—Houston [14th Dist.] June 28, 2016, pet. denied) (mem. op.) (applying the holdings of _Schlumberger Technology Corp. v. Swanson_, 959 S.W.2d 170 (Tex. 1997) and _Italian Cowboy_ to an apartment complex purchase agreement).

Instead, to avoid a fraud-in-the-inducement claim, a contract must also contain a specific clause that uses clear and unequivocal language disclaiming reliance. _Community Management_, 2016 WL 3554704, at *5. For example, in _Schlumberger_ the contract provided, “[None] of us is relying upon any statement or representation of any agent of the parties being released hereby. Each of us is relying on his or her own judgment. . . .” _Schlumberger_, 959 S.W.2d at 180. And in _Forest Oil Corp. v. McAllen_, 268 S.W.3d 51, 55 (Tex. 2008), the contract stated that “in executing the releases contained in this Agreement, [the parties are not] relying upon any statement or representation of any agent of the parties being released hereby. [We are] relying on [our] own judgment . . .” “In each case, the intent to disclaim reliance on others’ representations—that is, to rely only on one’s own judgment—was evident from the language of the contract itself. . . . There is a significant difference between a party disclaiming its reliance on certain representations, and therefore potentially relinquishing the right to pursue any claim for which reliance is an element, and disclaiming the fact that no other representations were made.” . . . This elevated requirement of precise language helps ensure that parties to a contract—even sophisticated parties represented by able attorneys—understand that the contract’s terms disclaim reliance, such that the contract may be binding even if it was induced by fraud.” _Italian_
Assuming that there is a clear and unequivocal disclaimer-of-reliance clause, the court then requires an analysis to determine “the circumstances surrounding [the contract’s] formation” in order to determine whether such a provision is binding on the parties involved. This would include an analysis of whether the terms of the contract were negotiated, rather than boilerplate; whether, during negotiations, the parties specifically discussed the issue which became the topic of the subsequent dispute, whether the complaining party was represented by counsel, whether the parties dealt with each other in an arm’s-length transaction, and whether the parties were knowledgeable in business matters. Italian Cowboy Partners, Ltd., 341 S.W.3d at 336–37, n.8. (citing Forest Oil Corp., 268 S.W.3d at 60). If the situation also indicates a “once and for all” settlement of claims, this may constitute an additional factor urging rejection of fraud-based claims.

§ 17.16:12 Remedies

There are three remedies that are available to a defrauded party pleading fraud in the inducement:

1. An affirmative right to damages for being led into the transaction. Under this form of relief the injured party does not seek to undo the fraudulent transaction, but instead claims sufficient compensation to make his position as good as it would have been had he not entered into the transaction at all;

2. Rescission of the fraudulent transaction and restoration of the situation which the parties occupied before the fraudulent transaction was entered into; or

3. “Benefit of the bargain” damages against the fraudulent person for the kind of bargain which he represented that he was making.

27 Williston on Contracts § 69:47 (4th ed. 2017); Mason v. Peterson, 250 S.W. 142, 146 (Tex. Comm’n App. 1923, holding approved, judgm’t adopted); Gage v. Langford, 615 S.W.2d 934, 939–40 (Tex. Civ. App.—Eastland 1981, writ ref’d n.r.e.). Therefore, a party urging fraud in the inducement, either as plaintiff or defendant, must establish not only the fraud but also the correct remedy. Gage, 615 S.W.2d at 940.

In Gage, the payee of a $550,000 promissory note sued the maker for the unpaid balance. The maker alleged fraud in the inducement as an affirmative defense to payment on the note. The note had been originally issued as payment for the privilege of entering the payee’s land to salvage abandoned oil well equipment. The payee had originally stated that there were 271 salvage wells located on the property. It was later determined that there were in fact only 206 wells, and of those, fifty-one were unsalvageable. The jury found that the payee had fraudulently induced the maker to sign the contract. However, no issue was submitted as to the amount of damages incurred by the maker because of the shortage of wells. The maker asserted that he need only establish fraud in the inducement to preclude recovery on the note. The court disagreed and found that the maker must establish the amount of damages he incurred as a result of the fraudulent representation which he failed to do. The court said that if the note was cancelled there would be an implicit finding that the maker was damaged in an amount equal to the remaining balance on the note. Without some proof as to the extent of his injury, these implied damages could not stand. Instead, the court held that the maker must establish the damages resulting from the fraudulent inducement and either seek recession or affirm the obligation and seek a set-off in the amount of any damage. Gage, 615 S.W.2d at 941.
§ 17.16:13 Fraud as Affirmative Defense


§ 17.17 Deceptive Trade Practices

“Unconscionable action or cause of action” is defined as an act or practice which, to a consumer’s detriment, takes advantage of the lack of knowledge, ability, experience, or capacity of the consumer to a grossly unfair degree. Tex. Bus. & Com. Code § 17.45(5). See section 17.41 below regarding the Deceptive Trade Practices–Consumer Protection Act.

§ 17.18 Ambiguity

§ 17.18:1 Elements and Proof

In contract law, the terms “ambiguous” and “ambiguity” have a more specific meaning than merely denoting a lack of clarity in language. RSUI Indemnity Co. v. The Lynd Co., 466 S.W.3d 113, 119 (Tex. 2014); Universal C.I.T. Credit Corp. v. Daniel, 243 S.W.2d 154, 157 (Tex. 1951). “An ambiguity does not arise simply because the parties offer conflicting interpretations,” but only when “the application of pertinent rules of interpretation to the face of the instrument leaves it genuinely uncertain which one of two or more meanings is the proper meaning.” Thus, a contract is ambiguous only if, after applying the rules of construction, it remains subject to two or more reasonable interpretations. RSUI Indemnity Co., 466 S.W.3d at 119 (quoting American Manufacturers Mutual Insurance Co. v. Schaefer, 124 S.W.3d 154, 157 (Tex. 2003); Daniel, 243 S.W.2d at 157).

While extrinsic evidence of the parties’ intent is not admissible to create an ambiguity, the contract may be read in light of the circumstances surrounding its execution to determine whether an ambiguity exists. Plains Exploration & Production Co. v. Torch Energy Advisors Inc., 473 S.W.3d 296, 305 (Tex. 2015); Balandran v. Safeco Insurance Co. of America, 972 S.W.2d 726, 731 (Tex. 1998). Consideration of the surrounding facts and circumstances is simply an aid in the construction of the contract’s language and has its limits. Plains Exploration, 473 S.W.3d at 305; Sun Oil Co. (Delaware) v. Madeley, 626 S.W.2d 726, 731 (Tex. 1981). The rule that extrinsic evidence is not admissible to create an ambiguity “obtains even to the extent of prohibiting proof of circumstances surrounding the transaction when the instrument involved, by its terms, plainly and clearly discloses the intention of the parties, or is so worded that it is not fairly susceptible of more than one legal meaning or construction.” Sun Oil Co., 626 S.W.2d at 732. Mere disagreement over the interpretation of an agreement does not necessarily render the contract ambiguous. Plains Exploration, 473 S.W.3d at 305. Nor is uncertainty or lack of clarity in the language chosen by the parties sufficient to render a contract ambiguous. J.M. Davidson, Inc. v. Webster, 128 S.W.3d 223, 240 (Tex. 2002); TWI XVIII, Inc. v. Christopher S. Carroll No. 1, Ltd., No. 02-12-00065-CV, 2013 WL 1457725, at *4 (Tex. App.—Fort Worth Apr. 11, 2013, pet denied) (mem. op.). If it can be given a certain or definite legal meaning or interpretation, a contract is not ambiguous and the court will construe it as a matter of law. Interpretation of a contract becomes a fact issue to be resolved by extrinsic evidence if application of pertinent rules of construction leaves a general uncertainty about which of two meanings is proper. El Paso Field Services, L.P. v. MasTec North America, Inc., 389 S.W.3d 802, 806 (Tex. 2012).

§ 17.18:2 Pleading Requirements

A court may conclude that an agreement is ambiguous even in the absence of such a pleading by either party. J.M. Davidson, Inc. v. Webster, 128 S.W.3d 223, 231 (Tex. 2002); Seabourne v. Seabourne, 493 S.W.3d 222, 228 (Tex. App.—Texarkana
§ 17.19 Duress

§ 17.19:1 Duress Generally

Duress is any mental, physical, or other coercion of another that caused a party to act contrary to his own free will or to submit to a situation or conditions against his own volition or interests. It requires a threat to do some act the threatening party has no legal right to do, some illegal exaction or some fraud or deception, and imminent restraint such as to destroy free agency without present means of protection. Robertson v. Robertson, No. 13-14-00523-CV, 2015 WL 7820814, at *8 (Tex. App.—Corpus Christi Dec. 3, 2015, no pet.) (mem. op.); Doe v. Catholic Diocese of El Paso, 362 S.W.3d 707, 719 (Tex. App.—El Paso 2011, no pet.) (to constitute duress, the threat must be of such character to overcome the willpower of a person and cause them to do what he or she otherwise would not).

In re Frank Kent Motor Co., 361 S.W.3d 628, 632 (Tex. 2011) (orig. proceeding), cert. denied, 568 U.S. 820 (2012), set out the elements of economic duress or business coercion as (1) a threat of an act that the actor had no legal right to do, (2) a threat of such a nature it destroys the other party’s free agency, (3) a threat that overcomes the other party’s free will and causes it to do what it otherwise would not have done and that it was not legally bound to do, (4) imminent restraint, and (5) no means of protection. Duress frequently depends on the motive on which a claim is based. It may be shown when a threatening party acts oppressively to further his own economic interests. State National Bank v. Farah Manufacturing Co., 678 S.W.2d 661, 685 (Tex. App.—El Paso 1984, writ dism’d by agr.). For example, threatening to sue or actually filing suit does not constitute duress as a matter of law. McMahan v. Greenwood, 108 S.W.3d 467, 482 (Tex. App.—Houston [14th Dist.] 2003, pet. denied).

§ 17.19:2 Pleading Requirements


§ 17.20 Undue Influence

Undue influence is overcoming the free will of an individual and substituting the will of another, causing the individual to do an act that he would not otherwise have done. B.A.L. v. Edna Gladney Home, 677 S.W.2d 826, 831 (Tex. App.—Fort Worth 1984, writ ref’d n.r.e.). To establish a claim of undue influence, a contestant must prove: (1) the existence and exertion of an influence, (2) the effective operation of such influence so as to subvert or overpower the person’s mind when executing the document, and (3) the person would not have executed the document but for the influence. In re Adkins, No. 13-15-00066-CV, 2015 WL 13310094, at *9 (Tex. App.—Corpus Christi June 23, 2015, orig. proceeding) (mem. op.) (citing Rothermel v. Duncan, 369 S.W.2d 917, 922 (Tex. 1963)). Influence cannot be branded as undue merely because it is persuasive and effective. Not all persuasion, entreaty, importunity, or intercession is condemned; what constitutes undue influence depends on the par-
ticular facts and circumstances of each case viewed in the light of applicable principles of law. B.A.L., 677 S.W.2d at 830. Undue influence may be shown by direct or circumstantial evidence. In re Adkins, 2015 WL 13310094, at *9.

§ 17.21 Variance between Offer and Acceptance (“Perfect Tender” Rule)

§ 17.21:1 Common-Law Contracts

No contract exists if there is a variance in the terms of the offer and acceptance or a deficiency in the tender of the subject matter. MRC Permian Co. v. Three Rivers Operating Co., No. 05-14-00353-CV, 2015 WL 4639711, at *10 (Tex. App.—Dallas Aug. 5, 2015, pet. denied) (acceptance that is conditioned on terms at variance with those in offer operates as counteroffer and terminates original offer).

§ 17.21:2 Sale of Goods

A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered, or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms. Tex. Bus. & Com. Code § 2.207(a). The additional terms are to be construed as proposals for addition to the contract. Between merchants, the additional terms become part of the contract unless (1) the offer is expressly limited to acceptance on the terms of the offer, (2) they materially alter it, or (3) notification of objection has already been or is given within a reasonable time after notice of them is received. Tex. Bus. & Com. Code § 2.207(b). Conduct by both parties that recognizes the existence of a contract is sufficient to establish a contract for sale although the writing of the parties does not otherwise establish a contract. In such case, the terms of the particular contract consist of those terms on which the writing of the parties agree, together with any supplementary terms incorporated under any other provisions of the Texas Uniform Commercial Code, Tex. Bus. & Com. Code §§ 1.101–9.809. Tex. Bus. & Com. Code § 2.207(c).

§ 17.22 Laches

To invoke the equitable doctrine of laches, the moving party ordinarily must show an unreasonable delay by the opposing party in asserting its rights and also the moving party’s good faith and detrimental change in position because of the delay. In re Laibe Corp., 307 S.W.3d 314, 318 (Tex. 2010) (orig. proceeding) (per curiam); Bruno Independent Living Aids v. Yzaguirre, No. 13-15-00408-CV, 2016 WL 9000744, at *3 (Tex. App.—Corpus Christi Mar. 31, 2016, no pet.) (mem. op.); Gutierrez v. Draheim, No. 01-14-00267-CV, 2016 WL 921470, at *3 (Tex. App.—Houston [1st Dist.] Mar. 10, 2016, no pet.) (mem. op.) “Generally in the absence of some element of estoppel or such extraordinary circumstances as would render inequitable the enforcement of petitioners’ right after a delay, laches will not bar a suit short of the period set forth in the limitation statute.” Caldwell v. Barnes, 975 S.W.2d 535, 538 (Tex. 1998) (quoting Barfield v. Howard M. Smith Co. of Amarillo, 426 S.W.2d 834, 840 (Tex. 1968)). The party asserting laches has the burden of proving it. Brewer v. Nationsbank of Texas, N.A., 28 S.W.3d 801, 804 (Tex. App.—Corpus Christi 2000, no pet.).

If one party has deliberately made promises to induce the other to delay bringing a cause of action against him, equitable estoppel may be applied to prevent the party who induced the delay from asserting the defense of laches and the statute of limitations. See Hill v. Bartlett, 181 S.W.3d 541, 545–46 (Tex. App.—Texarkana 2005, no pet.); O’Dowd v. Johnson, 666 S.W.2d 619, 621 (Tex. App.—Houston [1st Dist.] 1984, writ ref’d n.r.e.).
Laches is an affirmative defense and must be specifically pleaded. Tex. R. Civ. P. 94.

§ 17.23  **Impossibility of Performance**

Under the doctrine of impossibility of performance, a party’s performance under a contract is discharged or excused when supervening circumstances make the performance impossible or impracticable: “Where, after a contract is made, a party’s performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary.” *Garcia v. Baumgarten*, No. 03-14-00267-CV, 2015 WL 4603866, at *5 (Tex. App.—Austin July 30, 2015, no pet.) (mem. op.) (quoting the *Restatement (Second) of Contracts* § 261 (1981)); see also *Centex Corp. v. Dalton*, 840 S.W.2d 952, 954 (Tex. 1992) (discussing the issue of foreseeability in deciding which party bore the risk of the supervening impossibility and must therefore bear the costs of nonperformance).

“Original impossibility” is impossibility of performance existing when the contract is entered into, so that the contract was for doing something that from the outset was impossible. “Supervening impossibility” is a condition that develops after the inception of the contract. The manual committee is not aware of any Texas cases that have enforced a contract against the defense of original objective impossibility because of facts existing when the promise is made that the promisor neither knows nor has reason to know. See, e.g., *Hollis v. Gallagher*, No. 03-11-00278-CV, 2012 WL 3793288, at *6-7 (Tex. App.—Austin Aug. 28, 2012, no pet.) (mem. op.) (restrictive covenant was not enforceable when it could only be waived by signatures of developers, both of whom died after instrument was executed; court also explained difference between objective and subjective impossibility: “Something is objectively impossible if ‘the thing cannot be done,’” whereas subjective impossibility is “due wholly to the inability of the individual promisor.”).

If the obligation to perform is absolute, impossibility of performance occurring after the contract is made is not an excuse for nonperformance if the impossibility might reasonably have been anticipated and guarded against in the contract. *Huffines v. Swor Sand & Gravel Co.*, 750 S.W.2d 38, 40 (Tex. App.—Fort Worth 1988, no writ). This is true even though the impossibility may subsequently have occurred by virtue of an “act of God” or some other circumstance over which the parties have no control. Impossibility is also not an excuse if it subsequently occurred by virtue of the act or default of the promisor or by the acts of a third party. *Metrocon Construction Co. v. Gregory Construction Co.*, 663 S.W.2d 460, 462 (Tex. App.—Dallas 1983, writ ref’d n.r.e.). But see *Erickson v. Rocco*, 433 S.W.2d 746, 752 (Tex. Civ. App.—Houston [14th Dist.] 1968, writ ref’d n.r.e.) (excusing nonperformance of covenant to maintain fire insurance policy when policy was cancelled after fire destroyed most of property).

The fact that a contract is more burdensome or economically impracticable to perform than originally anticipated does not excuse its nonperformance. *Reeder v. Wood County Energy, LLC*, 320 S.W.3d 433, 446 (Tex. App.—Tyler 2010, pet. granted), rev’d on other grounds, 395 S.W.3d 789 (Tex. 2012); *Huffines*, 750 S.W.2d at 40; *Alamo Clay Products, Inc. v. Gunn Tile Co.*, 597 S.W.2d 388, 392 (Tex. Civ. App.—San Antonio 1980, writ ref’d n.r.e.).

If impossibility of performance is because of the plaintiff’s wrongful interference, it excuses nonperformance by the injured party. *Atkinson Gas Co. v. Albrecht*, 878 S.W.2d 236, 239 (Tex. App.—Corpus Christi 1994, writ denied). The nonbreaching party will also be entitled to any damages sustained as a result of the interference. *Longview Construction & Development v. Loggins Construction Co.*, 523 S.W.2d 771, 779 (Tex. Civ. App.—Tyler 1975, writ dism’d by agr.).
§ 17.24 Illegality

The performance of a contract is excused by a supervening impossibility caused by the operation of a change in the law. *Cen- tex Corp. v. Dalton*, 840 S.W.2d 952, 954 (Tex. 1992); *Morales v. Hidalgo County Irrigation Dist. No. 6*, No. 13-14-00205-CV, 2015 WL 5655802, at *2 (Tex. App.—Corpus Christi Sept. 24, 2015, pet. denied) (mem. op.). When the illegality does not appear on the face of the contract, it will not be held void unless facts showing its illegality are before the court. If a contract could have been performed in a legal manner, the fact that it also may have been performed in an illegal manner does not make it void. *See Morales*, 2015 WL 5655802, at *2; *Lewis v. Davis*, 199 S.W.2d 146, 148–49 (Tex. 1947). When constructions of a contract are possible, courts must apply the construction that does not result in a violation of the law. *Morales*, 2015 WL 5655803, at *2.

If a contract is against public policy, it is illegal, void, and unenforceable. *Alma Investments, Inc. v. Bahia Mar Co-Owners Ass’n*, 999 S.W.2d 820, 824 (Tex. App.—Corpus Christi 1999, pet. denied); *Montgomery v. Browder*, 930 S.W.2d 772, 778 (Tex. App.—Amarillo 1996, writ denied); *Baron v. Mullinax, Wells, Mauzy & Baab, Inc.*, 623 S.W.2d 457, 461 (Tex. App.—Texarkana 1981, writ ref’d n.r.e.). In the absence of expressed direction from the legislature, whether a promise or agreement will be unenforceable on public policy grounds will be determined by weighing the interest in enforcing agreements versus the public policy interest against such enforcement. *Fairfield Insurance Co. v. Stephens Martin Paving, LP*, 246 S.W.3d 653, 663 (Tex. 2008). Texas has long recognized a strong public policy in favor of preserving the freedom of contract. *Tex. Const. art. I, § 16* (“No bill of attainder, ex post facto law, retroactive law, or any law impairing the obligation of contracts, shall be made.”); *Fairfield Insurance*, 246 S.W.3d at 664.

Illegality is an affirmative defense that ordinarily must be specifically pleaded. *Tex. R. Civ. P. 94*. Failure to plead illegality of a contract ordinarily constitutes a waiver of the defense; if the document shows illegality on its face, however, an affirmative pleading to that effect is unnecessary. *Lewkowicz v. El Paso Apparel Corp.*, 625 S.W.2d 301, 303 (Tex. 1981).

§ 17.25 Revocation of Acceptance

A buyer may revoke his acceptance of a lot or commercial unit whose nonconformity substantially impairs its value to him if he has accepted it either (1) on the reasonable assumption that its nonconformity would be cured and it has not been seasonably cured or (2) without discovery of the nonconformity if his acceptance was reasonably induced either by the difficulty of discovery before acceptance or by the seller’s assurances. *Tex. Bus. & Com. Code § 2.608(a); see Clipper Bulk Shipping, Ltd. v. Sun Coast Resources, Inc.*, No. 09-12-00478-CV, 2013 WL 5658375, at *2–3 (Tex. App.—Beaumont June 26, 2013, no pet.) (mem. op.).

Revocation of acceptance must occur within a reasonable time after the buyer discovers or should have discovered the ground for it and before any substantial change in condition of the goods which is not caused by their own defects. *See Clipper Bulk Shipping, Ltd.*, 2013 WL 5658375, at *3. It is not effective until the buyer notifies the seller of it. *Tex. Bus. & Com. Code § 2.608(b)*. A buyer who so revokes has the same rights and duties with regard to the goods involved as if he had rejected them. *Tex. Bus. & Com. Code § 2.608(c)*.

The right of a buyer to revoke exists only after the buyer has initially accepted the goods in question. Once a buyer has properly revoked acceptance of a product, the seller has no right to cure by repair or by replacement. In addition to recovery of the purchase price, including the full trade-in credit of any property traded in, the buyer who has properly exercised his right to
revoke may recover prejudgment interest, postjudgment interest, and attorney’s fees when the proper predicate for such recovery has been made. *Gappelberg v. Landrum*, 666 S.W.2d 88, 91 (Tex. 1984).

If the buyer has made substantial changes in the condition of the goods that increased their value, revocation is still available. *Village Mobile Homes v. Porter*, 716 S.W.2d 543, 551–52 (Tex. App.—Austin 1986, writ ref’d n.r.e.).

A buyer who accepts a nonconforming good and who has no right to revoke the acceptance is limited to recovering the difference between the value of the good as received and the value had the good been conforming. Tex. Bus. & Com. Code § 2.714(b); *Manon v. Tejas Toyota, Inc.* , 162 S.W.3d 743, 748 (Tex. App.—Houston [14th Dist.] 2005, no pet.).

§ 17.26 Rejection by Buyer

§ 17.26:1 Rejection Generally

If the goods fail to conform to the contract, the buyer may accept the whole, reject the whole, or accept any commercial unit(s) and reject the rest. Tex. Bus. & Com. Code § 2.601. For an installment contract, the buyer may reject any installment which is nonconforming if the nonconformity substantially impairs the value of that installment and cannot be cured, or if the nonconformity is a defect in the required documents. But if the nonconformity does not substantially impair the value of the whole contract and the seller gives adequate assurance of its cure, the buyer must accept that installment. Tex. Bus. & Com. Code § 2.612(b), (c). An “installment contract” is one which requires or authorizes the delivery of goods in separate lots to be separately accepted even though the contract contains a clause “each delivery is a separate contract” or its equivalent. Tex. Bus. & Com. Code § 2.612(a). Whenever nonconformity or default with respect to one or more installments substantially impairs the value of the whole contract there is a breach of the whole. But the aggrieved party reinstates the contact if he accepts a nonconforming installment without seasonably notifying of cancellation or if he brings an action with respect only to past installments or demand performance as to further installments. Tex. Bus. & Com. Code § 2.612(c).

§ 17.26:2 Notification of Rejection

Rejection of goods must be within a reasonable time after delivery or tender. It is ineffective unless the buyer seasonably notifies the seller. Tex. Bus. & Com. Code § 2.602(a). The buyer’s failure to state in connection with rejection a particular defect which is ascertainable by reasonable inspection precludes him from relying on the unstated defect to justify rejection or to establish breach (1) where the seller could have cured if it stated reasonably; or, (2) between merchants, when the seller has, after rejection made a request in writing for a full and final written statement of all defects on which the buyer proposes to rely. Tex. Bus. & Com. Code § 2.605(a). Payment against documents made without reservation of rights precludes recovery of the payment for defect apparent in the documents. Tex. Bus. & Com. Code § 2.605(b).

§ 17.26:3 Seller’s Right to Cure

If any tender or delivery by the seller is rejected because of nonconformity and the time for performance has not yet expired, the seller may seasonably notify the buyer of his intention to cure and may then within the contract time make a conforming delivery. Tex. Bus. & Com. Code § 2.508(a). If the buyer rejects a nonconforming tender which the seller has reasonable grounds to believe would be acceptable with or without money allowance the seller may, if he seasonably notifies the buyer, have a further reasonable time to substitute tender. Tex. Bus. & Com. Code § 2.508(b).
§ 17.26:4 Buyer’s Responsibility for Goods after Rejection

If the buyer has before rejection taken physical possession of goods in which he does not have a security interest under the provisions of Tex. Bus. & Com. Code § 2.711(c), he is under a duty after rejection to hold them with reasonable care at the seller’s disposition for a time sufficient to permit the seller to remove them. Tex. Bus. & Com. Code § 2.602(b)(2). The seller has no further obligations with regard to goods rightfully rejected. Tex. Bus. & Com. Code § 2.602(b)(3). If the seller does not reclaim them within a reasonable time after notification of rejection, the buyer may store the goods for the seller’s account, reship them to the seller, or resell them for the seller’s account, retaining a commission of not more than 10 percent. Tex. Bus. & Com. Code §§ 2.603–.604.

§ 17.27 Usury


A pleading asserting usury must be verified. Tex. R. Civ. P. 93(11).

§ 17.28 Discharge in Bankruptcy

A debtor’s discharge in bankruptcy operates as an injunction against the commencement or continuance of an action, the employment of process, or an act, to collect, recover, or offset any such debt as a personal liability of the debt, whether or not discharge of such debtor is waived. 11 U.S.C. § 524. Exceptions such as fraud are described in 11 U.S.C. § 523. See chapter 35 of this manual for a discussion of bankruptcy issues.

§ 17.29 Truth in Lending

See sections 2.71 through 2.73 in this manual regarding the federal truth-in-lending laws.

§ 17.30 Billing Errors

See section 2.74 in this manual regarding the federal Fair Credit Billing Act.

§ 17.31 Illiteracy

Absent proof of mental incapacity, a person who signs a contract is presumed to have read and understood the contract unless he was prevented from doing so by trick or artifice. Delfingen US-Texas, LP v. Valenzuela, 407 S.W.3d 791, 801 (Tex. App.—El Paso 2013, no pet.). Illiteracy will not relieve a party of the consequences of his contract. 407 SW.3d at 801; Nguyen Ngoc Giao v. Smith & Lamm, P.C., 714 S.W.2d 144, 146–47 (Tex. App.—Houston [1st Dist.] 1986, no writ). See also Amouri v. Southwest Toyota, Inc., 20 S.W.3d 165 (Tex. App.—Texarkana 2000, pet. denied) (illiteracy irrelevant where contract was procured by fraud).
II. Counterclaims

§ 17.41 Texas Deceptive Trade Practices–Consumer Protection Act (DTPA)

§ 17.41:1 Acts Violating DTPA

Violations of the Deceptive Trade Practices–Consumer Protection Act (DTPA) include—

1. a breach of an express or implied warranty;
2. an unconscionable act or course of action;
3. a violation of Texas Insurance Code chapter 541; or
4. the use or employment of a false, misleading, or deceptive act or practice, specifically enumerated in the “laundry list” provisions of Tex. Bus. & Com. Code § 17.46(b), that the consumer relies on to his detriment.


The most common “laundry list” violations are—

1. representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities that they do not have or that a person has a sponsorship, approval, status, affiliation, or connection that he does not have (Tex. Bus. & Com. Code § 17.46(b)(5));
2. representing that goods or services are of a particular standard, quality, or grade or that goods are of a particular style or model if they are of another (Tex. Bus. & Com. Code § 17.46(b)(7));
3. representing that an agreement confers or involves rights, remedies, or obligations that it does not have or involve or that are prohibited by law (Tex. Bus. & Com. Code § 17.46(b)(12));
4. representing that work or services have been performed on or parts replaced in goods if the work or services were not performed or the parts replaced (Tex. Bus. & Com. Code § 17.46(b)(22));
5. filing suit in a court of improper venue (Tex. Bus. & Com. Code § 17.46(b)(23)); and
6. failing to disclose information concerning goods or services that was known at the time of the transaction if the failure to disclose was intended to induce the consumer into a transaction into which he would not otherwise have entered (Tex. Bus. & Com. Code § 17.46(b)(24)).

§ 17.41:2 Incorporation of DTPA into Debt Collection Practices Act and Other Laws

Violation of a number of other statutes also constitutes a violation of the DTPA, including—

1. Tex. Fin. Code § 392.404(a) (Texas Debt Collection Practices Act; see sections 2.31 through 2.36 in this manual);
2. Tex. Bus. & Com. Code § 51.302 (Business Opportunity Act; see section 2.109); and
§ 17.41:3 Who Can Bring DTPA Action

Only a consumer may bring a DTPA action. See Tex. Bus. & Com. Code § 17.50(a). A “consumer” is an individual, partnership, corporation, the state of Texas, or a subdivision or agency of the state that seeks or acquires by purchase or lease any goods or services, except for a business consumer with assets of $25 million or more. Tex. Bus. & Com. Code § 17.45(4). A “business consumer” is an individual, partnership, or corporation who seeks or acquires by purchase or lease any goods or services for commercial or business use. Tex. Bus. & Com. Code § 17.45(10).

§ 17.41:4 Transactions Excluded from DTPA

The types of claims listed below cannot be brought under the DTPA.

Negotiated Contract: The DTPA does not apply to claims arising out of a written contract if (1) the contract relates to a transaction, project, or set of transactions related to the same project involving total consideration by the consumer of more than $100,000; (2) in negotiating the contract the consumer is represented by legal counsel not directly identified, suggested, or selected by the defendant or defendant’s agent; and (3) the cause of action does not involve the consumer’s residence. Tex. Bus. & Com. Code § 17.49(f).

Transaction Limit: The DTPA does not apply to claims arising out of a transaction, project, or set of transactions relating to the same project involving a total consideration by the consumer of more than $500,000, other than a cause of action involving the consumer’s residence. Tex. Bus. & Com. Code § 17.49(g).

Professional Services: The DTPA does not apply to claims for damages based on professional services, the essence of which is the providing of advice, judgment, opinion, or similar professional skill. This exemption does not apply to (1) an express misrepresentation of material fact that cannot be characterized as advice, judgment, or opinion; (2) a failure to disclose information in violation of Tex. Bus. & Com. Code § 17.46(b)(24); (3) an unconscionable act or course of action that cannot be characterized as advice, judgment, or opinion; (4) breach of an express warranty that cannot be characterized as advice, judgment, or opinion; or (5) a violation of Tex. Bus. & Com. Code § 17.46(b)(26). Tex. Bus. & Com. Code § 17.49(c).

Waiver: A consumer may waive his rights to a DTPA action if (1) the waiver is in writing, is signed by him, and is in the form prescribed by Tex. Bus. & Com. Code § 17.42(a); (2) he is not in a significantly disparate bargaining position; and (3) in negotiating the contract the consumer is represented by legal counsel not directly identified, suggested, or selected by the defendant or defendant’s agent. Tex. Bus. & Com. Code § 17.42(a).

§ 17.41:5 Presuit Notice by Consumer

Before filing suit, the consumer must give at least sixty days’ written notice to the prospective defendant, advising the defendant of the specific complaint and the amount of economic damages, damages for mental anguish, and expenses, including attorney’s fees, reasonably incurred by the consumer in asserting the claim. Tex. Bus. & Com. Code § 17.505(a). The consumer may give notice after filing suit, however, if the action is brought as a counterclaim or if the sixty-day-notice requirement would cause the applicable statute of limitations to bar the consumer’s claim. Tex. Bus. & Com. Code § 17.505(b).
During the sixty-day period, a written request to inspect the goods subject to dispute may be presented to the consumer. Tex. Bus. & Com. Code § 17.505(a).

If the defendant does not receive written notice, he may file a plea in abatement within thirty days after filing his original answer. Abatement is not available if Tex. Bus. & Com. Code § 17.505(b) applies. Tex. Bus. & Com. Code § 17.505(c). The suit shall be abated if the notice requirement was not met, and abatement will continue until sixty days after written notice is served. Tex. Bus. & Com. Code § 17.505(d), (e).

§ 17.41:6 Penalties for DTPA Violation

A consumer prevailing in a DTPA action can recover economic damages, court costs, and reasonable and necessary attorney’s fees. Tex. Bus. & Com. Code § 17.50(b), (d). If the defendant’s conduct is found to be knowing, the court may award additional damages of up to three times the amount of economic damages and may also award mental anguish damages. If the defendant’s conduct was intentional, the mental anguish damages may be trebled as well. Tex. Bus. & Com. Code § 17.50(b)(1).

If a DTPA judgment is not satisfied within three months of the date of final judgment, the court may appoint a receiver or revoke or suspend the defendant’s license to do business in this state. The court may not appoint a receiver or revoke or suspend a defendant’s license if the defendant is a licensee of or regulated by a state agency with statutory authority to revoke or suspend the license or appoint a receiver or trustee. Tex. Bus. & Com. Code § 17.50(b)(4).

§ 17.41:7 Groundless or Harassing DTPA Suit

If a consumer brings a suit that is groundless in fact or law, in bad faith, or for purposes of harassment, the court must award the defendant reasonable and necessary attorney’s fees and court costs. Tex. Bus. & Com. Code § 17.50(c).

§ 17.42 Fraud

§ 17.42:1 Common-Law Fraud

Fraud occurs if—

1. a material representation was made;
2. the representation was false;
3. the party made the representation knowing it was false when he made it or made it recklessly without any knowledge of its truth and as a positive assertion;
4. the party made the representation intending the complainant to act on it;
5. the complainant acted in reliance on it; and
6. the complainant suffered an injury as a result.

Trust Co. of Dallas, 516 S.W.2d 138, 143 (Tex. 1974); Mumphord v. First Victoria National Bank, 605 S.W.2d 701, 704 (Tex. Civ. App.—Corpus Christi 1980, no writ).

Common-law fraud may be pleaded as an affirmative cause of action (see, e.g., Trenholm v. Ratcliff, 646 S.W.2d 930 (Tex. 1983)) or as an affirmative defense (see, e.g., Oilwell Division, United States Steel Corp. v. Fryer, 493 S.W.2d 487, 490 (Tex. 1973)). As an affirmative defense, fraud must be properly and specifically pleaded. Tex. R. Civ. P. 94; Cranetex, Inc. v. Precision Crane & Rigging of Houston, Inc., 760 S.W.2d 298, 304 (Tex. App.—Texarkana 1988, writ denied).

To prevail on an actionable fraud cause of action, the party asserting the claim must satisfy all elements of the tort for each alleged misrepresentation. Stephanz v. Laird, 846 S.W.2d 895, 903 (Tex. App.—Houston [14th Dist.] 1993, no writ).

§ 17.42:2 Material Representation

Material information is that which a reasonable person would attach importance to and would be induced to act on in determining his choice of actions in the transaction in question. Italian Cowboy Partners, Ltd. v. Prudential Insurance Co. of America, 341 S.W.3d 323, 337 (Tex. 2011); Wilmot v. Bouknight, 466 S.W.3d 219, 227 (Tex. App.—Houston [1st Dist.] 2015, pet. denied); In re Media Arts Group, Inc., 116 S.W.3d 900, 910 (Tex. App.—Houston [14th Dist.] 2003, orig. proceeding [mand. denied]); Citizens National Bank v. Allen Rae Investments, Inc., 142 S.W.3d 459, 78–79 (Tex. App.—Fort Worth 2004, no pet.). In Town North National Bank v. Broaddus, 569 S.W.2d 489 (Tex. 1978), the court held that a promissory note that is clear and express in its terms cannot be varied or contradicted by parol agreements or by representations of the payee that the maker would not be held liable according to the tenor of the instrument. The court reasoned that a party to a written agreement is charged as a matter of law with knowledge of its provisions and as a matter of law cannot claim fraud when he is bound to the provisions unless he can demonstrate that he was tricked into its execution.

Misrepresentation can take the form of a false statement of a material fact, a promise of future performance made with no intent to perform, a statement of opinion based on a false statement of fact, a statement of opinion that the maker knows to be false, or a false expression of opinion made by one claiming or implying to have special knowledge of the subject matter of the opinion. Italian Cowboy Partners, Ltd., 341 S.W.3d at 337–38; Ernst & Young, L.L.P. v. Pacific Mutual Life Insurance Co., 51 S.W.3d 575, 577 (Tex. 2001); Trenholm v. Ratcliff, 646 S.W.2d 927, 930 (Tex. 1983); see also Tilton v. Marshall, 925 S.W.2d 672, 678 (Tex. 1996); T.O. Stanley Boot Co. v. Bank of El Paso, 847 S.W.2d 218, 222 (Tex. 1992).

§ 17.42:3 Opinion Is Not Fraud

“Puffery is an expression of opinion by a seller not made as a representation of fact.” Dowling v. NADW Marketing, Inc., 631 S.W.2d 726, 729 (Tex. 1982). Pure expressions of opinion generally are not actionable. Helena Chemical Co. v. Wilkins, 47 S.W.3d 486, 502 (Tex. 2001) (mere puffery not actionable under DTPA section 17.46(b)(5) or (b)(7) but may be actionable under section 17.46(b)(2) or 17.50(a)(3)); Trenholm v. Ratcliff, 646 S.W.2d 927, 931 (Tex. 1983); Angelo Broadcasting, Inc. v. Satellite Music Network, Inc., 836 S.W.2d 726, 733 (Tex. App.—Dallas 1992, writ denied), overruled on other grounds, Hines v. Hash, 843 S.W.2d 464, 469–70 (Tex. 1992).

A pure expression of opinion is not a representation of material fact and thus is not an actionable basis for a fraud claim. Italian Cowboy Partners, Ltd. v. Prudential Insurance Co. of America, 341 S.W.3d 323, 337–38 (Tex. 2011). Whether a statement is an actionable statement of “fact” or merely an innocuous statement of “opinion” often depends on the circumstances in which a statement is made. Italian Cowboy Partners, Ltd., 341 S.W.3d at 338; Transport Insurance Co. v. Faircloth, 898
§ 17.42:4 Statements of Value Are Not Fraud


§ 17.42:5 Silence as Misrepresentation

Silence can be misrepresentation if a party has an affirmative duty to speak. The duty to speak “arises when one party knows that the other party is relying on the [concealed] fact, provided that he knows the relying party is ignorant of the facts and does not have an equal opportunity to discover the truth.” *Libhart v. Copeland*, 949 S.W.2d 783, 801 (Tex. App.—Waco 1997, no writ) (quoting *New Process Steel Corp. v. Steel Corp. of Texas*, 703 S.W.2d 209, 214 (Tex. App.—Houston [1st Dist.] 1985, writ ref’d n.r.e.). A party typically has a duty to speak in fiduciary or confidential situations. *Wilson v. Sysco Food Services of Dallas, Inc.*, 940 F. Supp. 1003, 1014–15 (N.D. Tex. 1996); see also *Castillo v. Neely’s TBA Dealer Supply, Inc.*, 776 S.W.2d
Specific representations about a bonus plan give rise to the duty to disclose changes in the plan. *Spoljaric v. Percival Tours, Inc.*, 708 S.W.2d 432, 435 (Tex. 1986).

2. Once information is voluntarily disclosed, a party has the duty to disclose the whole truth. *State National Bank v. Farah Manufacturing Co.*, 678 S.W.2d 661, 681 (Tex. App.—El Paso 1984, writ dism’d by agr.).

3. When information is already disclosed, a party has the duty to disclose new information if he knows that new information will make the old representation wrong or misleading. *Metro National Corp. v. Dunham-Bush, Inc.*, 984 F. Supp. 538, 554 (S.D. Tex. 1997); *Susanoil, Inc. v. Continental Oil Co.*, 519 S.W.2d 230, 236 (Tex. Civ. App.—San Antonio 1975, writ ref’d n.r.e.).

§ 17.42:6 Ratification by Defrauded Party

A defrauded party can ratify the fraud if he has full knowledge of the fraud and of all material facts, clearly manifests his intention of abiding by the underlying intent of the contract, and waives all rights to recover for the deception. *Conoco, Inc. v. Fortune Production Co.*, 35 S.W.3d 23, 32–33 (Tex. App.—Houston [1st Dist.] 1998, pet. granted), rev’d 52 S.W.3d 671 (Tex. 2000); *Arroyo Shrimp Farm, Inc. v. Hung Shrimp Farm, Inc.*, 927 S.W.2d 146, 153–54 (Tex. App.—Corpus Christi 1996, no writ); *Texacadian Fuels, Inc. v. Lone Star Energy Storage, Inc.*, 896 S.W.2d 233, 237 (Tex. App.—Houston [1st Dist.] 1995, writ granted w.r.m.), vacated pursuant to settlement, 922 S.W.2d 549 (Tex. 1996).

§ 17.42:7 Contributory or Comparative Negligence of Defrauded Party

If a party has been induced to enter into a contract by fraudulent representations, the person committing the fraud cannot defeat a claim for damages based on a plea that the defrauded party might have discovered the truth by the exercise of due diligence or proper care. *Koral Industries v. Security-Connecticut Life Insurance Co.*, 802 S.W.2d 650, 651 (Tex. 1990) (per curiam); *Trenholm v. Ratcliff*, 646 S.W.2d 927, 933 (Tex. 1983); *Matis v. Golden*, 228 S.W.3d 301, 311 (Tex. App.—Waco 2007, no pet.). But see *Athey v. Mortgage Electronic Registration Systems*, 314 S.W.3d 161, 163–65 (Tex. App.—Eastland 2010, pet. denied) (applying more stringent rule when representation directly contradicted provision in promissory note).

§ 17.42:8 Statutory Fraud—Elements

Fraud in a transaction involving real estate or stock in a corporation or joint-stock company consists of—

1. a false representation of a past or existing material fact, if the representation is made to a person for the purpose of inducing that person to enter into a contract and is relied on by that person in entering into the contract;

2. a false promise to act, if the false promise is material, is made with the intention of not fulfilling it, is made to a person for the purpose of inducing that person to enter into a contract, and is relied on by that person in entering into the contract; or

3. having actual awareness of the falsity of a representation or promise made by another, failing to disclose the falsity, and benefiting from the false representation or promise.

*Tex. Bus. & Com. Code § 27.01(a), (d).*
§ 17.42:9 Statutory Fraud—Defendant’s State of Mind

A person who makes a false representation or promise is liable for actual damages, and a person making a false representation or promise with actual knowledge of its falsity is also liable for exemplary damages. Tex. Bus. & Com. Code § 27.01(b), (c).

§ 17.42:10 Statutory vs. Common-Law Fraud

Statutory fraud is distinguishable from common-law fraud in the following ways:

1. The failure to disclose another party’s fraud has no precise parallel in the Texas common law. See Tex. Bus. & Com. Code § 27.01(d).


3. Attorney’s fees and costs of suit are recoverable in a statutory fraud action. Tex. Bus. & Com. Code § 27.01(e).

§ 17.42:11 Pleading

Fraud is waived if not affirmatively pleaded. Tex. R. Civ. P. 94; Youmans v. Corpora, 552 S.W.2d 569, 570–71 (Tex. Civ. App.—Waco 1977, no writ). Fraud does not render a contract void; until the defrauded party initiates appropriate action to obtain relief, the transaction is merely voidable. Saunders v. Alamo Soil Conservation District, 545 S.W.2d 249, 251 (Tex. Civ. App.—San Antonio 1976, writ ref’d n.r.e.); see Fortune Production Co. v. Conoco, Inc., 52 S.W.3d 671, 676–77 (Tex. 2000). The presumption is in favor of the fairness of a transaction, and fraud is never presumed. See William B. Roberts, Inc. v. McDrilling Co., 579 S.W.2d 335, 339 (Tex. Civ. App.—Corpus Christi 1979, no writ); Neuhaus v. Kain, 557 S.W.2d 125, 136 (Tex. Civ. App.—Corpus Christi 1977, writ ref’d n.r.e.). Failure to plead or prove any element of fraud if a suit for specific performance rests solely on fraud will permit the granting of the plaintiff’s motion for instructed verdict. Neuhaus, 557 S.W.2d at 138; see Texas Farmers Insurance Co. v. Murphy, 996 S.W.2d 873, 879–80 (Tex. 1999).

§ 17.43 Usury

See sections 2.51 through 2.63 in this manual regarding usury generally. Usury penalties act as a setoff to the creditor’s claim. See Steves Sash & Door Co. v. Ceco Corp., 751 S.W.2d 473, 475–76 (Tex. 1988); Miller v. First State Bank, 551 S.W.2d 89, 95 (Tex. Civ. App.—Fort Worth 1977), aff’d as modified, 563 S.W.2d 572 (Tex. 1978).

A pleading asserting usury must be verified. Tex. R. Civ. P. 93(11).

§ 17.44 Other Violations

For Finance Code violations, see sections 2.81 through 2.90 in this manual. For consumer lease violations, see section 2.77. For home solicitation transactions violations, see section 2.108. For Business Opportunity Act violations, see section 2.109.
§ 17.45 Breach of Warranty

§ 17.45:1 Express Warranty

If, with reference to goods being sold, the seller makes to the buyer any promise, description, or affirmation of fact or uses a sample or model, he has created an express warranty that the goods will conform to it. Tex. Bus. & Com. Code § 2.313(a). A warranty can be created without the seller’s use of formal language of warranty and without an intent to make a warranty, but a warranty is not created merely by affirming the goods’ value, expressing an opinion about the goods, or commending them. Tex. Bus. & Com. Code § 2.313(b).


The buyer must show that the warranty was part of the basis of the bargain. Lyda Constructors, Inc. v. Butler Manufacturing Co., 103 S.W.3d 632, 637–38 (Tex. App.—San Antonio 2003, no pet.); Crosbyton Seed Co. v. Mechura Farms, 875 S.W.2d 353, 361 (Tex. App.—Corpus Christi 1994, no writ).


§ 17.45:2 Implied Warranty of Merchantability


Reliance on a misrepresentation is not an element of a claim for breach of the implied warranty of merchantability. Khan v. Velsicol Chemical Corp., 711 S.W.2d 310, 319 (Tex. App.—Dallas 1986, writ ref’d n.r.e.).

§ 17.45:3 Implied Warranty of Fitness for Particular Purpose

An implied warranty that the goods are fit for a particular purpose arises if the seller, at the time of contracting, has reason to know the particular purpose for which the goods are required and that the buyer is relying on the seller’s particular skill or judgment in selecting or furnishing suitable goods. Tex. Bus. & Com. Code § 2.315.

Reliance on a misrepresentation is not an element of a claim for breach of the implied warranty of fitness for a particular purpose. Khan v. Velsicol Chemical Corp., 711 S.W.2d 310, 319 (Tex. App.—Dallas 1986, writ ref’d n.r.e.).

§ 17.45:4 Implied Warranty of Good and Workmanlike Performance

Performance of some services carries an implied warranty of good and workmanlike performance. This implied warranty applies to—
1. new construction, *Centex Homes v. Buecher*, 95 S.W.3d 266, 272–73 (Tex. 2002); *Humber v. Morton*, 426 S.W.2d 554, 555 (Tex. 1968), and

2. repair or modification of existing tangible goods or other property, *Rocky Mountain Helicopters, Inc. v. Lubbock County Hospital District*, 987 S.W.2d 50, 52–53 (Tex. 1998); *Melody Home Manufacturing Co. v. Barnes*, 741 S.W.2d 349, 354 (Tex. 1987); *Trans-Gulf Corp. v. Performance Aircraft Services, Inc.*, 82 S.W.3d 691, 696–97 (Tex. App.—Eastland 2002, no pet.).

It does not, however, extend to the provision of purely professional services. *Dennis v. Allison*, 698 S.W.2d 94, 95–96 (Tex. 1985); *Hogue v. Propath Laboratory, Inc.*, 192 S.W.3d 641, 646–47 (Tex. App.—Fort Worth 2006, pet. denied); *Chapman v. Paul R. Wilson, Jr., D.D.S.*, 826 S.W.2d 214, 227–28 (Tex. App.—Austin 1992, writ denied). This warranty cannot be waived. *Melody Home Manufacturing Co.*, 741 S.W.2d at 355; *Welwood v. Cypress Creek Estates, Inc.*, 205 S.W.3d 722, 730 (Tex. App.—Dallas 2006, no pet.). It will not be imposed unless there is a demonstrated need for it, and it extends only to services provided to remedy defects existing at the time of the transaction. *Rocky Mountain Helicopters, Inc.*, 987 S.W.2d at 52–53; *Parkway Co. v. Woodruff*, 901 S.W.2d 434, 439 (Tex. 1995); *Humble National Bank v. DCV, Inc.*, 933 S.W.2d 224, 239 (Tex. App.—Houston [14th Dist.] 1996, pet. denied).

### § 17.45:5 Warranty of Title

A sale of goods automatically creates a warranty that the seller has good title to the goods sold, that their transfer is rightful, and that they are free of any security interest or other encumbrance of which the buyer at the time of contracting has no knowledge. Tex. Bus. & Com. Code § 2.312(a). The warranty can be excluded or modified by appropriate words or conduct. Tex. Bus. & Com. Code § 2.312(b).

### § 17.45:6 Disclaimer of UCC Implied Warranties

An implied warranty can be excluded or modified by the use of language such as “as is,” by an examination of the goods by the buyer (or by his refusal to examine) if the examination should have revealed the defect, “by course of dealing or course of performance or usage of trade,” or by other words or conduct tending to limit warranty. Tex. Bus. & Com. Code § 2.316(b), (c). See also *Prudential Insurance Co. of America v. Jefferson Associates, Ltd.*, 896 S.W.2d 156, 161 (Tex. 1995); *Welwood v. Cypress Creek Estates, Inc.*, 205 S.W.3d 722, 726–27 (Tex. App.—Dallas 2006, no pet.).


### § 17.45:7 Remedies

In addition to suing under breach of warranty, a consumer can bring suit under the Texas Deceptive Trade Practices–Consumer Protection Act (DTPA). Tex. Bus. & Com. Code § 17.50(a)(2). See section 17.41 above for a discussion of the DTPA.

### § 17.46 Fair Debt Collection Practices Act

See sections 2.11 through 2.20 in this manual regarding the Fair Debt Collection Practices Act.
§ 17.47 Texas Debt Collection Practices Act

See sections 2.31 through 2.36 in this manual regarding the Texas Debt Collection Practices Act.

§ 17.48 Sale and Leaseback of Homestead

Any sale or purported sale in whole or in part of a homestead for a fixed purchase price that is less than the appraised fair market value of the property at the time of the sale or purported sale, and in connection with which the buyer of the property executes a lease of the property to the seller at lease payments that exceed the fair rental value of the property, is considered to be a loan with all payments made from the seller to the buyer in excess of the sales price considered to be interest subject to provisions of the Texas Finance Code. Tex. Prop. Code § 41.006(a). Furthermore, the taking of any deed in connection with such a transaction is a deceptive trade practice and the deed is void, and no lien attaches to the homestead property as a result of the purported sale. Tex. Prop. Code § 41.006(b). This statute, however, does not apply to the sale of a family homestead to a parent, stepparent, grandparent, child, stepchild, brother, half brother, sister, half sister, or grandchild of an adult member of the family. Tex. Prop. Code § 41.006(c).

§ 17.49 Unreasonable Debt Collection Practices

If a creditor resorts to “cruel devices” to enforce collection with the intended effect of causing great mental anguish and those actions result in damages, the creditor will be liable for those damages. Duty v. General Finance Co., 273 S.W.2d 64, 65–66 (Tex. 1954); see Ware v. Paxton, 359 S.W.2d 897, 900 (Tex. 1962); Gonzalez v. Temple-Inland Mortgage Corp., 28 S.W.3d 622, 626 (Tex. App.—San Antonio 2000, no pet.).

Unfair collection practices is an intentional tort derived from the common law. Hidden Forest Homeowners Ass’n v. Hern, No. 04-10-00551-CV, 2011 WL 6089881, at *4 (Tex. App.—San Antonio Dec. 7, 2011, no pet.) (mem. op.) (citing General Finance Co., 273 S.W.2d at 66; EMC Mortgage Corp. v. Jones, 252 S.W.3d 857, 868 (Tex. App.—Dallas 2008, no pet.)). The Supreme Court of Texas has not directly addressed the elements to be proven in an action for unfair collection practices. Hidden Forest, 2011 WL 6089881, at *4 (“A decision of the case before us does not require that we undertake to outline the limits to which such a creditor may go, but we do hold that resort to every cruel device which his cunning can invent in order to enforce collection when that course of conduct has the intended effect of causing great mental anguish to the debtor, resulting in physical injury and causing his loss of employment, renders the creditor liable to respond in damages.”) (quoting General Finance Co., 273 S.W.2d at 66); Moore v. Savage, 362 S.W.2d 298, 298–99 (Tex. 1962) (per curiam) (refusing to review the definition of “unreasonable collection efforts” because the issue was not preserved for appeal), ref’g appeal from 359 S.W.2d 95, 96 (Tex. Civ. App.—Waco 1962, writ ref’d n.r.e.). While the elements are not clearly defined and the conduct deemed to constitute an unreasonable collection effort varies from case to case, a plaintiff must generally prove that “[a] defendant[‘s] debt collection efforts ‘amount to a course of harassment that was willful, wanton, malicious, and intended to inflict mental anguish and bodily harm.’” EMC Mortgage Corp., 252 S.W.3d at 868–69.

As discussed in Hidden Forest, 2011 WL 6089881, at *5, Texas courts have found the following evidence sufficient to state a cause of action for unreasonable debt collection: sending a large man to the plaintiff’s home, who “yelling and screaming, demanded the keys to the house, and told the [Plaintiff’s] family to get out.” (citing EMC Mortgage Corp., 252 S.W.3d at 864, 870); falsely accusing the plaintiff of committing a crime (citing Lloyd v. Myers, 586 S.W.2d 222, 227 (Tex. Civ. App.—Waco 1979, writ ref’d n.r.e.)); sending a large man to the plaintiff’s home, who stood over the plaintiff shouting, shaking his finger and calling him a liar (citing Credit Plan Corp. of Houston v. Gentry, 516 S.W.2d 471, 475 (Tex. Civ. App.—Houston [14th
Dist.] 1974), rev’d on other grounds by Gentry v. Credit Plan Corp. of Houston, 528 S.W.2d 571 (Tex. 1975)); sending a representative to the plaintiff’s home, confronting and embarrassing the plaintiff’s fiancée in front of social guests (citing Bank of North America v. Bell, 493 S.W.2d 633, 635 (Tex. Civ. App.—Houston [14th Dist.] 1973, no writ)); calling the plaintiff five times in one night, with the final call including a threat of personal violence (citing Pioneer Finance & Thrift Corp. v. Adams, 426 S.W.2d 317, 319 (Tex. Civ. App.—Eastland 1968, writ ref’d n.r.e.)). Additionally, Texas courts have held that it is unreasonable to persist in collection efforts once the debtor has informed the collector/lender that the debt has been paid in full. See Pullins v. Credit Exchange of Dallas, Inc., 538 S.W.2d 681, 682–83 (Tex. Civ. App.—Waco 1976, writ ref’d n.r.e.) (holding that repeated and harassing efforts to collect $50 debt were unreasonable where plaintiff consistently asserted debt was paid). The Fifth Circuit has observed that the tort of unreasonable collection is intended to deter “outrageous collection techniques.” McDonald v. Bennett, 674 F.2d 1080, 1089 n.8 (5th Cir. 1982).

Neither malice nor intent to cause mental or emotional pain is required, only a finding of reckless disregard for the debtor’s welfare. Moore v. Savage, 359 S.W.2d 95, 96 (Tex. Civ. App.—Waco 1962, writ ref’d n.r.e.); Western Guaranty Loan Co. v. Dean, 309 S.W.2d 857, 860 (Tex. Civ. App.—Dallas 1957, writ ref’d n.r.e.). But see EMC Mortgage Corp., 252 S.W.3d 868–69 (plaintiff must show that defendant’s conduct “amounted to a course of harassment which was willful, wanton, malicious, and intended to inflict mental anguish and bodily harm”) (quoting Montgomery Ward & Co. v. Brewer, 416 S.W.2d 837, 844 (Tex. Civ. App.—Waco 1967, writ ref’d n.r.e.)).

This cause of action appears to have been subsumed into the state and federal debt collection statutes. See parts II. and III. in chapter 2 of this manual.

§ 17.50 Remedies for Failure to Comply with Chapter 9

Under certain circumstances, a secured party who fails to comply with chapter 9 of the Texas Business and Commerce Code is subject to injunctive relief, restrictive or mandatory, and may be liable for resulting losses caused to the debtor, the obligor, or a secondary obligor. Tex. Bus. & Com. Code § 9.625. Note that the potential damages are those resulting from a failure to comply with the requirements imposed by all of chapter 9, not just those imposed by subchapter F relating to default and enforcement. The compensable loss may include that resulting from the debtor’s inability to obtain, or from increased costs of, alternative financing. Tex. Bus. & Com. Code § 9.625(b). As is the case throughout revised chapter 9, special rules are applicable if the collateral consists of consumer goods; a debtor or a secondary obligor on an obligation secured by consumer goods may recover from a secured party who fails to comply with subchapter F (Tex. Bus. & Com. Code §§ 9.601–.628) an amount not less than the credit service charge plus 10 percent of the principal amount of the obligation or the time-price differential plus 10 percent of the cash price. Tex. Bus. & Com. Code § 9.625(c)(2). In addition to the general provisions described above, special statutory damages of $500 are recoverable in each case from a person who—

1. fails to promptly release or transfer back to the debtor a deposit account after the debt it secured has been paid off, as required by Tex. Bus. & Com. Code § 9.208;

2. fails to promptly send an authenticated release to a debtor who has paid off a secured debt as required by Tex. Bus. & Com. Code § 9.209;

3. files a financing statement he is not entitled to file under Tex. Bus. & Com. Code § 9.509(a);

4. fails to cause the secured party of record to file or send the termination statement required by Tex. Bus. & Com. Code § 9.513(a) or (c);
5. fails to provide an explanation or calculation of surplus or deficiency as required by Tex. Bus. & Com. Code § 9.616(b)(1) as part of a pattern or practice of noncompliance; or


Likewise, a debtor or consumer may recover damages under Tex. Bus. & Com. Code § 9.625(b) as well as special statutory damages of $500 from a person who fails to comply with a request under Tex. Bus. & Com. Code § 9.210 without reasonable cause. Tex. Bus. & Com. Code § 9.625(f). Section 9.210 establishes the requirements of a communication in order for it to be considered a “request” and describes the types of requests that can be made and the contents and deadline (fourteen days after receipt) for a secured party to respond to a request. Section 9.210 also specifies how often a debtor may obtain a response to a request without charge (once every six months) and the statutory maximum a secured party may charge for more frequent requests ($25). Tex. Bus. & Com. Code § 9.210(g).

Section 9.625, together with the many sections it cross-references and the sections that limit recoveries against secured parties (Tex. Bus. & Com. Code §§ 9.605, 9.628), should be carefully studied by the attorney collecting for a secured lender.

For additional discussion of deficiency suits, see part X. in chapter 2, chapter 5, and section 14.29 in this manual.

§ 17.51 Tortious Interference with Existing Contract

§ 17.51:1 Elements

The elements of tortious interference with existing contract include that—

1. the plaintiff had a valid contract;

2. the defendant willfully and intentionally interfered with the contract;

3. the interference was a proximate cause of the plaintiff’s injury; and

4. the plaintiff incurred actual damage or loss.


Tortious interference with contract embraces all intentional invasions of contractual relations, including any act interfering with the performance of a contract, either by preventing that performance or by making its performance impossible or more burdensome, difficult, or expensive, regardless of whether breach of contract is induced. See Tippett v. Hart, 497 S.W.2d 606, 611 (Tex. Civ. App.—Amarillo 1973, writ ref’d n.r.e.).

Interference with a contract is tortious only if it is intentional. Southwestern Bell Telephone Co. v. John Carlo Texas, Inc., 843 S.W.2d 470, 472 (Tex. 1992); Seelbach v. Clubb, 7 S.W.3d 749, 756–57 (Tex. App.—Texarkana 1999, pet. denied). The intent required is an intent to interfere, not just an intent to do the particular acts that were done. Intentional interference does not
require the intent to injure; it requires only that the defendant wants to cause the consequences of its act or that the consequences are substantially certain to result from the act. *Southwestern Bell Telephone Co.*, 843 S.W.2d at 757.

§ 17.51:2 Defenses

There are two defenses to a tortious interference claim: (1) legal justification or excuse and (2) truth.

**Legal Justification or Excuse:** A party avoids liability for tortious interference if it has a legal justification or excuse for its act. *Sterner v. Marathon Oil Co.*, 767 S.W.2d 686, 689–90 (Tex. 1989). Legal justification or excuse for interference with another’s contractual relations is an affirmative defense for which the defendant has the burden of proof. *Sterner*, 767 S.W.2d at 690. Under the defense of legal justification or excuse, one is privileged to interfere with another's contract if (1) the interference is done in a bona fide exercise of one’s own rights or (2) one has a right in the subject matter equal or superior to that of the other party. *Southwestern Bell Telephone Co. v. John Carlo Texas, Inc.*, 843 S.W.2d 470, 472 (Tex. 1992); *Sakowitz, Inc. v. Steck*, 669 S.W.2d 105, 107 (Tex. 1984). See also the current edition of State Bar of Texas, *Texas Pattern Jury Charges—Business, Consumer, Insurance & Employment* PJC 106.2.

In *Texas Beef Cattle Co. v. Green*, the Texas Supreme Court held that a party is justified in interfering with another’s contract if it exercises (1) its own legal rights or (2) a good-faith claim to a colorable legal right, even though that claim ultimately proves to be mistaken. 921 S.W.2d 203, 211 (Tex. 1996). If the trial court finds as a matter of law that the defendant had a legal right to interfere with the contract, then the defendant has conclusively established the justification defense. The motivation behind assertion of that right is irrelevant. Improper motives cannot transform lawful actions into actionable torts. If a party has a legal right to do something, he may do so with impunity regardless of motive and, if in exercising that legal right in a legal way, damage results to another, there is no cause of action against him. Even if the defendant cannot establish a legal right as a matter of law, the defendant may nevertheless prevail on its justification defense if (1) the trial court determines that the defendant interfered while exercising a colorable right, and (2) the jury finds that although mistaken, the defendant exercised that colorable legal right in good faith. *Texas Beef Cattle*, 921 S.W.2d at 211. See also *Holloway v. Skinner*, 898 S.W.2d 793, 796 (Tex. 1995) (dislike of third party and taking pleasure in harm caused to him not a relevant motivation behind assertion of defendant’s legal rights); *Montgomery v. Phillips Petroleum Co.*, 49 S.W.2d 967, 972 (Tex. Civ. App.—Amarillo 1932, writ ref’d) (“Whatever a man has a legal right to do, he may do with impunity, regardless of motive, and if in exercising his legal right in a legal way damage results to another, no cause of action arises against him because of a bad motive in exercising the right.”) (quoting 1 R.C.L. § 6 at 319).

The decision in *Texas Beef Cattle*, however, left the term “colorable right” undefined. More recent court decisions have construed the term colorable right to mean having the appearance of truth, or seemingly valid and genuine, or having an appearance of right or justice. A right is colorable if it appears without further inquiry. That is, if it appears on its face genuine, truthful, valid, or existing. *Bennett v. Computer Associates International, Inc.*, 932 S.W.2d 197, 202 (Tex. App.—Amarillo 1996, writ denied).

**Truth:** A defendant who intentionally causes a third person not to perform a contract with the plaintiff is not liable for interfering with the contractual relation by giving the third person truthful information or honest advice within the scope of a request for advice. *Financial Review Service v. Prudential Insurance Co. of America*, 50 S.W.3d 495, 505 (Tex. App.—Houston [14th Dist.] 1998, pet. granted) (Prudential could communicate with insureds to acknowledge receipt of claim and advise of any actions taken with respect to claim but could not malign Financial Review Services, a hospital bill auditor, by accusing
it of fraud); Robles v. Consolidated Graphics, Inc., 965 S.W.2d 552, 561 (Tex. App.—Houston [14th Dist.] 1997, no pet.) (defendant informed business that its agent was taking double commissions).

[Sections 17.52 through 17.60 are reserved for expansion.]

III. Statutes of Limitation—General Considerations

§ 17.61 Limitations Periods

For a discussion of the periods applicable to specific causes of action, see chapter 14 of this manual.

§ 17.62 Pleading Requirements

As an affirmative defense, a statute of limitations must be affirmatively pleaded. Tex. R. Civ. P. 94. If the plaintiff affirmatively pleads compliance with the statute of limitations, the defendant is relieved of pleading it as an affirmative defense. Herrin Transportation Co. v. Parker, 425 S.W.2d 876, 879 (Tex. Civ. App.—Houston [1st Dist.] 1968) (refusing to extend the general rule); Raney v. White, 267 S.W.2d 199, 200 (Tex. Civ. App.—San Antonio 1954, writ ref’d).

There is a split in the courts of appeals regarding whether the defendant can raise a limitations defense by special exception instead of affirmative defense. Hubler v. City of Corpus Christi, 564 S.W.2d 816, 823 (Tex. Civ. App.—Corpus Christi 1978, writ ref’d n.r.e.) (special exception proper); contra InterFirst Bank San Antonio N.A. v. Murry, 740 S.W.2d 550, 550–51 (Tex. App.—San Antonio 1987, no writ) (special exception was wrong pleading; defendant should have filed plea in bar).

§ 17.63 Tolling of Limitations

§ 17.63:1 Commencing Suit

Filing a petition, coupled with a bona fide intention to serve process on the defendant at once, interrupts the running of the limitations period. Gant v. DeLeon, 786 S.W.2d 259, 260 (Tex. 1990) (when a plaintiff files suit within the limitations period but does not obtain service upon the defendant until after the period has expired, the date of service relates back to the date of filing only if the plaintiff has exercised diligence in obtaining service); Gore v. City of DeSoto, No. 05-07-01024-CV, 2008 WL 2454684, at *2, (Tex. App.—Dallas June 19, 2008, no pet.) (mem. op.). See also Proulx v. Wells, 235 S.W.3d 213, 215 (Tex. 2007) (“A timely filed suit will not interrupt the running of limitations unless the plaintiff exercises due diligence in the issuance and service of citation.”). The plaintiff must exercise diligence in the issuance and service of citation if the lawsuit was filed close to the deadline for the applicable statute of limitations. Ashley v. Hawkins, 293 S.W.3d 175, 179 (Tex. 2009). The mere filing of a suit, without diligence in effecting service, will not toll limitations. Proulx, 235 S.W.3d at 215 (citing Murray v. San Jacinto Agency, Inc., 800 S.W.2d 826, 830 (Tex. 1990)).

Although lack of diligence to procure service of process is generally a fact question, it may be determined as a matter of law if no excuse is offered for the delay in procuring service. See, e.g., City of DeSoto, 2008 WL 2454684, at *2; Ashley, 293 S.W.3d at 179; Perry v. Kroger Stores, Store No. 119, 741 S.W.2d 533, 534 (Tex. App.—Dallas 1987, no writ).
Filing a petition in a court that has no jurisdiction is not “commencing a suit” within the meaning of the statute of limitations and will not interrupt its running. See Brown v. Owens, 663 S.W.2d 30, 34 (Tex. App.—Houston [14th Dist.] 1983), aff’d in part, rev’d in part on other grounds, 674 S.W.2d 748 (Tex. 1984). But if an action is dismissed because the trial court lacked jurisdiction and the action is recommenced in a court of proper jurisdiction within sixty days from the date the dismissal or other disposition becomes final, the period between the first filing and the date of the second filing of the same action in a different court is not counted as part of the limitations period, unless the adverse party shows in abatement that the first filing was made with “intentional disregard of proper jurisdiction.” Tex. Civ. Prac. & Rem. Code § 16.064.

§ 17.63:2 Defendant Absent from Texas

Any period during which the defendant is absent from the state, for whatever purpose, while suit could be maintained will toll limitations for the period of the defendant’s absence. Tex. Civ. Prac. & Rem. Code § 16.063.

§ 17.63:3 Plaintiff’s Disability

If at the time the cause of action accrued the plaintiff was younger than eighteen years of age (whether married or not) or was of unsound mind, the period during which he was under that disability is not included in the limitations period. Tex. Civ. Prac. & Rem. Code § 16.001(a), (b). A person may not tack one legal disability to another to extend a limitations period. Tex. Civ. Prac. & Rem. Code § 16.001(c). A disability that arises after a limitations period starts does not toll limitations. Tex. Civ. Prac. & Rem. Code § 16.001(d).

§ 17.63:4 Plaintiff’s or Defendant’s Death

Limitations is tolled by the death of either the plaintiff or the defendant. It resumes running either twelve months after death or when an administrator or executor of the decedent’s estate qualifies, whichever is earlier. Tex. Civ. Prac. & Rem. Code § 16.062.

§ 17.63:5 Fraud

Fraud by the defendant will prevent the running of the limitations period until the fraud is discovered or should have been discovered by the exercise of reasonable diligence. Estate of Stonecipher v. Estate of Butts, 591 S.W.2d 806, 809 (Tex. 1979); see also Estate of Stonecipher v. Estate of Butts, 686 S.W.2d 101, 102 (Tex. 1985) (later proceeding after remand); Scott v. Furrow, No. 04-15-00074-CV, 2016 WL 889473, at *3 (Tex. App.—San Antonio Mar. 9, 2016, pet. denied).

§ 17.63:6 Estoppel

The defendant may be estopped from pleading limitations if he or his agent or representative makes a representation that induces the plaintiff to delay filing suit within the applicable limitations period. Dixon v. Lee, No. 14-97-00671-CV, 1998 WL 802460, at *2 (Tex. App.—Houston [14th Dist.] Nov. 19, 1998, no pet.); Villages of Greenbriar v. Torres, 874 S.W.2d 259, 264 (Tex. App.—Houston [1st Dist.] 1994, writ denied). Estoppel as a defense to a claim of limitations must be affirmatively pleaded. Tex. R. Civ. P. 94. See sections 17.11:3 and 17.11:4 above regarding estoppel and equitable estoppel.
§ 17.63:7  Defendant’s Bankruptcy

If an action is stayed by federal bankruptcy law, limitations on the action is tolled until the stay is terminated. 11 U.S.C. § 108(c).

§ 17.63:8  Limitations Expire on Weekend or Holiday

If the last day of the statute of limitations is a Saturday, Sunday, or holiday, the period for filing suit is extended to include the next day that county offices are open for business. Tex. Civ. Prac. & Rem. Code § 16.072.

§ 17.63:9  Suit against Defendant in Assumed Name

Limitations on a cause of action against a person or business operating under an assumed name may be tolled pending the filing of an amended pleading against the correct party to be sued. Tex. R. Civ. P. 28. Suit in the assumed name puts the real party in interest in court. University of Texas Health Science Center v. Bailey, 332 S.W.3d 395, 399–400 (Tex. 2009); Chilkewitz v. Hyson, 22 S.W.3d 825, 828–29 (Tex. 1999). But the plaintiff should amend the pleadings to substitute the correct legal name of the actual defendant before judgment. Chilkewitz, 22 S.W.3d at 828–29.

§ 17.63:10  Defendant’s Part Payment

Payment on a debt, by itself, neither interrupts the running of the limitations period nor acknowledges the justness of the debt by an implied promise to pay it. Gabriel v. Alhabbal, 618 S.W.2d 894, 897 (Tex. App.—Houston [1st Dist.] 1991, writ ref’d n.r.e.); Siegel v. McGavock Drilling Co., 530 S.W.2d 894, 896 (Tex. Civ. App.—Amarillo 1975, writ ref’d n.r.e.); Mandola v. Oggero, 508 S.W.2d 861, 863 (Tex. Civ. App.—Houston [14th Dist.] 1974, no writ). Certain writings may, however, constitute a new promise to pay an old debt. See section 17.64 below.

§ 17.63:11  Alter Ego or Subsidiary Corporation

Any claim against a corporation must be brought within the three-year period following the date of its dissolution. Tex. Bus. Orgs. Code § 11.359. The corporation may further limit the time available to bring a claim by giving notice to a person having or asserting such a claim by registered or certified mail to the claimant’s last known address. Tex. Bus. Orgs. Code § 11.358. Under section 11.358, the written claim must be in sufficient detail to reasonably inform the corporation of the nature and amount of the claim and must identify the claimant. The claimant has 120 days from the date this notice was sent to submit its written claim. If the claimant fails to submit the claim within the 120 days after notice is sent, the claim will be barred. If the claimant submits its claim, the corporation may, but is not obliged to, send notice of its rejection of the claim. If it rejects the claim and sends notice of its rejection to the claimant, the claimant has 180 days from the date the notice of rejection is sent to file suit, or the suit is barred. Tex. Bus. Orgs. Code § 11.359.

A suit against a corporation tolls limitations as to the alter ego of that corporation. Matthews Construction Co. v. Rosen, 796 S.W.2d 692, 693 (Tex. 1990); Gentry v. Credit Plan Corp. of Houston, 528 S.W.2d 571, 575 (Tex. 1975).

A suit against a subsidiary corporation will not toll limitations against the parent corporation, regardless of common stock ownership, a duplication of officers and directors, or common control resulting from stock ownership, unless management and
operation of the parent and subsidiary are so assimilated that the subsidiary is simply a name or conduit through which the parent conducts its business. *Wright v. Gifford-Hill & Co.*, 736 S.W.2d 828, 833–34 (Tex. App.—Waco 1987, writ ref’d n.r.e.).

§ 17.63:12 Misnamed Defendant

If a party misnames the defendant in a lawsuit but actually serves the correct party, an amended pleading that includes the correct party will relate back to the date of the original petition for purposes of limitations. *Enserch Corp. v. Parker*, 794 S.W.2d 2, 4–5 (Tex. 1990). However, if the plaintiff names and serves the correct party, nonsuits that party, and then seeks to replead against that party, limitations are not tolled. *Johnson v. Coca-Cola Co.*, 727 S.W.2d 756, 758–59 (Tex. App.—Dallas 1987, writ ref’d n.r.e.). See also *Pierson v. SMS Financial II, L.L.C.*, 959 S.W.2d 343 (Tex. App.—Texarkana 1998, no pet.) (explaining differences between serving wrong party and serving correct party under wrong name). A misnomer differs from a misidentification. *Enserch Corp. v. Parker*, 794 S.W.2d 2, 4–5 (Tex. 1990). Misidentification—the consequences of which are generally harsh—arises when two separate legal entities exist and a plaintiff mistakenly sues an entity with a name similar to that of the correct entity. In such a case, limitations is not tolled. *In re Greater Houston Orthopaedic Specialists, Inc.*, 295 S.W.3d 323, 325–26 (Tex. 2009) (orig. proceeding) (per curiam).

§ 17.63:13 Discovery Rule

Limitations will be tolled until the date the plaintiff’s injury was or should reasonably have been discovered. The plaintiff must show that injury was inherently undiscoverable and evidence of the injury is objectively verifiable. *HECI Exploration Co. v. Neel*, 982 S.W.2d 881, 886 (Tex. 1998); *Woods v. William M. Mercer, Inc.*, 769 S.W.2d 515, 517–18 (Tex. 1988); *Willis v. Maverick*, 760 S.W.2d 642, 644–45 (Tex. 1988); see also *Tate v. Goins, Underkofler, Crawford & Langdon*, 24 S.W.3d 627, 636 (Tex. App.—Dallas 2000); *Computer Associates International v. Altai, Inc.*, 918 S.W.2d 453, 455–56 (Tex. 1996) (superseded in part by Tex. Civ. Prac. & Rem. Code § 16.010).

§ 17.64 Acknowledgment or Extension of Debt

§ 17.64:1 Extension of Limitations through Signed Writing

The debtor’s acknowledgment of a debt barred by limitations will not revive the debt unless the acknowledgment is in writing and signed by the debtor. Tex. Civ. Prac. & Rem. Code § 16.065. Mere payment by itself does not interrupt the running of the statute of limitations or acknowledge the justness of the debt with an implicit promise to pay. *Sarikhanian v. Sarkissian*, No. 14-96-860-CV, 1997 WL 688948, at *2 (Tex. App.—Houston [14th Dist.] Nov. 6, 1997, no pet.) (per curiam) (not designated for publication); *Siegel v. McGavock Drilling Co.*, 530 S.W.2d 894, 896 (Tex. Civ. App.—Amarillo 1975, writ ref’d n.r.e.).

§ 17.64:2 Type and Specificity of Acknowledgment Required

The acknowledgment of the justness of a debt must be unequivocal and unconditional. *Alsheikh v. Arabian National Shipping Corp.*, No. 14-05-00787-CV, 2006 WL 1675384, at *2 (Tex. App.—Houston [14th Dist.] June 20, 2006, no pet.) (mem. op.); *Andrews v. Cohen*, 664 S.W.2d 826, 828–29 (Tex. App.—Tyler 1984, writ ref’d n.r.e.). See also *DeRoeck v. DHM Ventures, LLC*, No. 03-15-00713-CV, 2016 WL 427000, at *1 (Tex. App.—Austin Aug. 9, 2016, pet. filed) (mem. op.) (acknowledgment must be in writing and signed by party to be charged). However, if the debtor’s writing acknowledges the debt, promises to pay a portion of it, and does not express an unwillingness to pay, it impliedly admits the debtor’s promise to pay. See Han-
ley v. Oil Capital Broadcasting Ass’n, 171 S.W.2d 864, 865–66 (Tex. 1943); House of Falcon, Inc. v. Gonzalez, 583 S.W.2d 902, 905 (Tex. Civ. App.—Corpus Christi 1979, no writ).

The writing should specifically identify the debt, particularly if there is any question about the identity of the debt. Cotulla v. Urbahn, 135 S.W. 1159, 1162–63 (Tex. 1911); Parks v. Seybold, No. 03-99-00562-CV, 2015 WL 4481768, at *2 (Tex. App.—Dallas July 23, 2015, no pet.) (mem. op.); Murphy v. Fairfield Financial Group, Inc., No. 03-99-00562-CV, 2000 WL 689758, at *6 n.7 (Tex. App.—Austin May 31, 2000, pet. denied) (not designated for publication). The written acknowledgment can be quite brief (for example, “interest on note” or “partial payment on note dated August 30, 1998”), especially if it is accompanied by partial payment. First National Bank v. Gamble, 132 S.W.2d 100, 101–02 (Tex. 1939); Roadside Stations, Inc. v. 7HBF, Ltd., 904 S.W.2d 927, 931 (Tex. App.—Fort Worth 1995, no writ). To simplify matters, the creditor should seek to obtain a written acknowledgment of the justness of the debt with an express promise to pay. See form 4-5 in this manual for a form letter agreement setting forth an acknowledgment of the debt and agreement to pay.

§ 17.64:3 Pleading Requirements

For recovery on the new promise to pay embraced in the acknowledgment of the previous debt, the new promise to pay must be specifically pleaded as the cause of action to avoid a bar of limitation to the original debt. DeRoeck v. DHM Ventures, LLC, No. 03-15-00713-CV, 2016 WL 427000, at *2 (Tex. App.—Austin Aug. 9, 2016, pet. filed); Eldridge v. Collard, 834 S.W.2d 87, 90 (Tex. App.—Fort Worth 1992, no writ); Siegel v. McGavock Drilling Co., 530 S.W.2d 894, 896 (Tex. Civ. App.—Amarillo 1975, writ ref’d n.r.e.).

§ 17.64:4 Oral Agreements

If an oral agreement to extend the time for payment on a note is made after the due date and before the debt is barred by the statute of limitations and if the agreement is supported by new consideration, the extension constitutes a substitution of contracts, and limitations runs from the due date of the new contract. Heisch v. Adams, 16 S.W. 790, 791 (Tex. 1891); Manandhar v. Jamshed, No. 02-11-00027-CV, 2011 WL 3835980, at *3–4 (Tex. App.—Fort Worth Aug. 31, 2011, no pet.) (mem. op.). If the oral promise is made after limitations have expired on the original debt, however, the claim cannot be enforced, even though the oral promise was supported by consideration. Fuqua v. Fuqua, 750 S.W.2d 238, 241–42 (Tex. App.—Dallas 1988, writ denied).

§ 17.65 Agreement by Parties to Change Limitations

Parties cannot agree to limit a limitations period to a period shorter than two years, unless the agreement relates to a sale or purchase of a business entity in which one of the parties is agreeing to pay or receive at least $500,000. Tex. Civ. Prac. & Rem. Code § 16.070(a), (b). Also, parties to contracts for the sale of goods can agree to reduce the applicable limitations period to a period of not less than one year, but they cannot agree to extend the limitations period beyond four years. Tex. Bus. & Com. Code § 2.725(a).

An agreement that the creditor may extend the note without notice at the creditor’s option from time to time is void as against public policy, because it circumvents the applicable statute of limitations. Simpson v. McDonald, 179 S.W.2d 239, 242–43 (Tex. 1944). See also Duncan v. Lisenby, 912 S.W.2d 857, 858–59 (Tex. App.—Houston [14th Dist.] 1995, no writ) (“[a] general agreement in advance to waive or not to plead the statute of limitations on a particular obligation is void as against public policy.”(citing American Alloy Steel v. Armco, Inc., 777 S.W.2d 173, 177 (Tex. App.—Houston [14th Dist.] 1989, no writ).
§ 17.66 Amended Pleading

If a plaintiff files a petition before limitations bar it, no amendment or supplement will be subject to a plea of limitations, even if it changes any facts or grounds for liability or defense, unless the amendment or supplement is wholly based on a new, distinct, or different transaction or occurrence. Tex. Civ. Prac. & Rem. Code § 16.068; Vaughn Building Corp. v. Austin Co., 620 S.W.2d 678, 682 (Tex. Civ. App.—Dallas 1981), aff’d, 643 S.W.2d 113 (Tex. 1982); Inwood National Bank v. Hoppe, 596 S.W.2d 183, 186 (Tex. Civ. App.—Texarkana 1980, writ ref’d n.r.e.).

§ 17.67 Counterclaims and Cross-Claims

If a defendant has a counterclaim or cross-claim that arises out of the same transaction or occurrence as the plaintiff’s cause of action, it will not be barred by limitations, even if it would have been barred if filed as a separate action. The counterclaim or cross-claim must be filed no later than the thirtieth day after the date on which the party’s answer is due. Tex. Civ. Prac. & Rem. Code § 16.069(a), (b).

A setoff claim by the defendant against the plaintiff does not qualify as “arising out of the same transaction or occurrence,” unless the facts of the case otherwise qualify the defendant’s claim as a proper counterclaim or cross-claim. I.O.I. Systems v. City of Cleveland, 615 S.W.2d 786, 791 (Tex. Civ. App.—Houston [1st Dist.] 1980, writ ref’d n.r.e.).


§ 17.68 Limitations Issues for Defendant Recently Moved to Texas, Foreign Cause of Action

A claim cannot be brought against a person who moved to Texas if the claim is barred by the law of limitations of the state or country from which the person came. Tex. Civ. Prac. & Rem. Code § 16.067(a). Conversely, if the defendant is sued within the limitations period of the foreign state (or, presumably, country), the fact that the action has a shorter limitations period under Texas law will not protect the defendant; he may be sued under the foreign state’s statute of limitation. See State of California v. Copus, 309 S.W.2d 227, 231–32 (Tex.), cert. denied, 356 U.S. 967 (1958).

For a person who has moved to Texas to be able to assert the statute of limitations as a bar to recovery on a debt incurred before moving to Texas, he must have resided in Texas for twelve months. This statute does not affect the provisions of Tex. Civ. Prac. & Rem. Code § 16.067(a), discussed in the paragraph above. See Tex. Civ. Prac. & Rem. Code § 16.067(c).
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Discovery

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Chapter 18
Discovery

I. Discovery Generally

§ 18.1 Form and Scope of Pretrial Discovery

§ 18.1:1 Forms and Uses of Pretrial Discovery

Once suit has been filed, but before trial, several discovery vehicles are available. Permissible forms of discovery are—

1. requests for disclosure (see Tex. R. Civ. P. 190.2(b)(6), 194);
2. motions and requests for production, examination, and copying of documents and other tangible things (see Tex. R. Civ. P. 196.1–.6 and part VI. in this chapter);
3. requests and motions for entry and examination of property (see Tex. R. Civ. P. 196.7);
4. written interrogatories to parties (see Tex. R. Civ. P. 197 and part IV. in this chapter);
5. requests of a party for admission of any matter within the scope of discovery, including statements of opinion or fact or of the application of law to fact, or the genuineness of any documents served with the request or otherwise made available for inspection and copying (see Tex. R. Civ. P. 198 and part III. in this chapter);
6. oral or written depositions of any party or nonparty (see Tex. R. Civ. P. 199–203 and part II. in this chapter); and
7. motions for physical and mental examination of a party or person under the legal control of a party (see Tex. R. Civ. P. 204).


These devices are used to narrow the issues, to obtain evidence for use at trial, to secure information about the existence of evidence that may be used at trial, and to ascertain how and from whom the evidence may be procured. Great American Insurance Co. v. Murray, 437 S.W.2d 264, 267 (Tex. 1969). The ultimate purpose of discovery is to seek the truth so that disputes may be decided by what the facts reveal, not by what facts are concealed. Jampole v. Touchy, 673 S.W.2d 569, 573 (Tex. 1984), overruled on other grounds by Walker v. Packer, 827 S.W.2d 833 (Tex. 1992). Consequently, the objective of the Texas discovery rules is to prevent trial by ambush. Gutierrez v. Dallas Independent School District, 729 S.W.2d 691, 693 (Tex. 1987).

§ 18.1:2 Scope of Discovery

Subject to the limitations and protective orders explained below, discovery may be obtained about any relevant and nonprivileged matter of a claim or defense, even though the information sought may be inadmissible at trial, if the information appears reasonably calculated to lead to the discovery of admissible evidence. Tex. R. Civ. P. 192.3(a); see also Tex. R. Evid. 401–403; In re CSX Corp., 124 S.W.3d 149, 152 (Tex. 2003).
Because its purpose is to seek the truth, discovery is not limited to information that will be admissible at trial. This broad grant is limited, however, by the legitimate interests of the opposing party. Discovery may not be used for overly broad requests, harassment, or disclosure of privileged information. Jampole v. Touchy, 673 S.W.2d 569, 573 (Tex. 1984), overruled on other grounds by Walker v. Packer, 827 S.W.2d 833 (Tex. 1992). So-called “fishing expeditions” have been disapproved of by the supreme court. In re Ford Motor Co., 427 S.W.3d 396, 397 (Tex. 2014) (plaintiff sent deposition notices to two of defendant’s expert witnesses and sought detailed financial and business information for all cases that the expert witnesses’ companies had handled for Ford or any other automobile manufacturer from 2000 to 2011; the supreme court found this to be a fishing expedition and just the type of overbroad discovery the rules are intended to prevent); In re National Lloyds Insurance Co., 449 S.W.3d 486, 489 (Tex. 2014) (orig. proceeding) (per curiam) (requests for production of documents); K Mart Corp. v. Sanderson, 937 S.W.2d 429, 431 (Tex. 1996) (interrogatories); Dillard Department Stores, Inc. v. Hall, 909 S.W.2d 491, 492 (Tex. 1995) (requests for production of documents); Texaco, Inc. v. Sanderson, 898 S.W.2d 813, 815 (Tex. 1995) (requests for production of documents).

§ 18.1:3 Matters Discoverable

A party may obtain discovery of the items listed below.

Generally: Any matter that is not privileged and is relevant to the subject matter of the pending action, whether it relates to the claim or defense of any party. Tex. R. Civ. P. 192.3(a); see also Tex. R. Evid. 401; In re Ford Motor Co., 427 S.W.3d 396, 397 (Tex. 2014).

Documents and Tangible Things: The existence, description, nature, custody, condition, location, and contents of documents and tangible things that constitute or contain matters relevant to the subject matter of the action. Tex. R. Civ. P. 192.3(b).

Persons with Knowledge of Relevant Facts and Their Statements: The name, address, and telephone number of persons having knowledge of relevant facts, and a brief statement of each person’s connection with the case. “Knowledge of relevant facts” means that the person has or may have knowledge of any discoverable matter. Tex. R. Civ. P. 192.3(c). The person need not have admissible information or personal knowledge of the facts. Also, the statement of any person with knowledge of relevant facts, a “witness statement,” regardless of when the statement was made. Tex. R. Civ. P. 192.3(h).

Trial Witnesses: The name, address, and telephone number of any person who is expected to testify at trial, but not rebuttal or impeaching witnesses the necessity of whose testimony cannot reasonably be anticipated before trial. Tex. R. Civ. P. 192.3(d).

Testifying and Consulting Experts: See Tex. R. Civ. P. 192.7(c) for a definition of “testifying expert” and Tex. R. Civ. P. 192.7(d) for “consulting expert.” Although the following may be discovered as to a testifying expert, they may only be discovered as to a consulting expert whose mental impressions or opinions have been reviewed by a testifying expert. These discoverable materials include—

1. the expert’s name, address, and telephone number;
2. the subject matter on which the expert will testify;
3. the facts known by the expert that relate to or form the basis of his mental impressions or opinions formed or made in connection with the case, regardless of when and how the information was acquired;
4. the expert’s mental impressions and opinions formed or made in connection with the case and any methods used to derive them;

5. any bias of the expert;

6. all documents, tangible things, reports, models, or data compilations provided to, reviewed by, or prepared by or for the expert in anticipation of a testifying expert’s testimony; and

7. the expert’s current resume and bibliography.

Tex. R. Civ. P. 192.3(e).

**Indemnity and Insuring Agreements:** Except as otherwise provided by law, the existence and contents of any indemnity or insurance agreement under which any person may be liable to satisfy part or all of a judgment rendered in the action or to indemnify or reimburse for payments made to satisfy the judgment, although such disclosure does not make information concerning the agreement admissible in evidence at trial. Tex. R. Civ. P. 192.3(f).

**Settlement Agreements:** The existence and contents of any relevant portions of a settlement agreement, although such disclosure does not make information concerning the agreement admissible in evidence at trial. Tex. R. Civ. P. 192.3(g).

**Potential Parties:** The name, address, and telephone number of any potential party. Tex. R. Civ. P. 192.3(i).

**Contentions:** Any other party’s legal contentions and the factual bases for those contentions. Tex. R. Civ. P. 192.3(j).

**Net Worth:** Under section 41.0115 of the Texas Civil Practice and Remedies Code, a party seeking net worth discovery is required to first demonstrate and obtain a finding from the trial court that there is a substantial likelihood of success on the merits of a claim for exemplary damages. Tex. Civ. Prac. & Rem. Code § 41.0115(a). However, the legislature did not specifically define “substantial likelihood.” Evidence submitted by a party to a court in support of (or opposition to) a motion made under section 41.0115(a) may be made in the form of an affidavit or a response to discovery. (Note that the fact that the statute is silent on live testimony seems to suggest that live testimony is barred.)

The provisions of section 41.0115 did not become effective until September 1, 2015, and apply only to lawsuits filed on or after that date. Whether this statute is to be applied retroactively is still unclear because the Texas Supreme Court has yet to rule on the issue. See In re Michelin North America, Inc., No. 05-15-01480-CV, 2016 WL 890970, at *8 (Tex. App.—Dallas Mar. 9, 2016, orig. proceeding) (mem. op.); In re Robinson Helicopter Co., Inc., No. 01-15-00594-CV, 2015 WL 4623939, at *1 (Tex. App.—Houston [1st Dist.] Aug. 4, 2015, orig. proceeding [mand. denied]) (mem. op.); Pat Long-Weaver, Examining Texas’s Net Worth Discovery Statute, 79 Tex. B.J. 686 (2016).

§ 18.2 Discovery Control Plans and Discovery Period

§ 18.2:1 Levels of Discovery Control Plans

All civil cases must be governed by a discovery control plan as provided by the Texas Rules of Civil Procedure. Under the expedited actions rules, if a lawsuit seeks only monetary relief aggregating $100,000 or less excluding postjudgment interest (and is not a lawsuit governed by the Family Code, Property Code, Tax Code, or chapter 74 of the Civil Practice and Remedies Code), limitations on discovery are in place. Tex. R. Civ. P. 169.
All suits filed on or after March 1, 2013 (whether the suit is an original petition, counterclaim, cross-claim, or third-party claim), must include a statement specifying the damages sought. Tex. R. Civ. P. 47(c). A party that fails to comply with rule 47(c) may not conduct discovery until the party’s pleading is amended to comply. Tex. R. Civ. P. 47.

Every plaintiff’s original pleading must also allege in its first numbered paragraph whether control plan discovery is intended to be conducted under level 1, 2, or 3. Tex. R. Civ. P. 190.1. The three levels of discovery control plans follow:

1. A level 1 discovery control plan applies to civil cases filed under the expedited action rules process of Tex. R. Civ. P. 169 and divorces not involving children in which a party pleads that the value of the marital estate is more than zero but not more than $50,000. Tex. R. Civ. P. 190.2(a). Plaintiffs seeking to conduct discovery under a level 1 plan should, in the first numbered paragraph of their original pleading, include language such as the following:

   This lawsuit seeks only monetary relief aggregating $100,000 or less. Tex. R. Civ. P. 47(c)(1). Discovery is intended to be conducted under Level 1. Tex. R. Civ. P. 190.2.

2. A level 2 discovery control plan applies to civil cases not governed by a level 1 or level 3 plan. Tex. R. Civ. P. 190.3(a). Plaintiffs seeking to conduct discovery under a level 2 plan should, in the first numbered paragraph of their original pleading, include language such as the following:

   Plaintiff intends that discovery be conducted under Level 2 and affirmatively pleads that this suit is not governed by the expedited actions process in Tex. R. Civ. P. 169 because [specify]. Tex. R. Civ. P. 190.3.

3. A level 3 discovery control plan should be pleaded when a plan must be tailored to the circumstances of the suit. A level 3 plan can be instituted on motion of one party, by agreement of the parties, or on the court’s own initiative. Tex. R. Civ. P. 190.4(a). Note that a case can be conducted under a level 3 plan only by court order. Tex. R. Civ. P. 190, cmt. 1. Plaintiffs seeking to conduct discovery under a level 3 plan should, in the first numbered paragraph of their original pleading, include language such as the following:

   Plaintiff intends that discovery be conducted under Level 3. Tex. R. Civ. P. 190.4.

§ 18.2:2 Level 1 Discovery Control Plan

Discovery in a level 1 suit must be conducted within the discovery period, which begins when suit is filed and continues until 180 days after the date the first request for discovery of any kind is served on the party. Tex. R. Civ. P. 190.2(b)(1). Limitations on discovery in level 1 lawsuits are discussed in section 18.22 (depositions), section 18.43:2 (requests for admissions), section 18.53:3 (interrogatories), and section 18.73:3 (requests for production) below. Rules for requests for disclosure in level 1 lawsuits are discussed in section 18.63 below.

If a suit is removed from the expedited actions process in rule 169, the discovery period reopens, and discovery must be completed within the limitations provided in Tex. R. Civ. P. 190.3 or Tex. R. Civ. P. 190.4, whichever is applicable. Any person previously deposed may be redeposed. On motion of any party, the court should continue the trial date if necessary to permit completion of discovery. Tex. R. Civ. P. 190.2(c).

§ 18.2:3 Level 2 Discovery Control Plan

Discovery in a level 2 suit must be conducted within the discovery period, which begins when suit is filed and continues until the earlier of thirty days before the date set for trial or nine months after the earlier of the date of the first oral deposition or the
due date of the first response to written discovery. Tex. R. Civ. P. 190.3(b). Limitations on depositions in level 2 suits are discussed in section 18.22 below. Limitations on interrogatories in level 2 suits are discussed in section 18.53:3.

§ 18.2:4 Level 3 Discovery Control Plan

A level 3 discovery control plan may address any issue concerning discovery or the matters listed in Tex. R. Civ. P. 166 and may change any limitation on the time for or amount of discovery otherwise called for under the Texas Rules of Civil Procedure. If the matter is not covered in the plan, the applicable of Tex. R. Civ. P. 190.2 or 190.3 applies. Tex. R. Civ. P. 190.4(b).

The plan must include not only a discovery period and appropriate limits on the amount of discovery, but also a date either for trial or for a conference to determine a trial setting and deadlines for joining additional parties, amending or supplementing pleadings, and designating expert witnesses. Tex. R. Civ. P. 190.4(b).

§ 18.2:5 Modification of Discovery Control Plans

The court may modify a discovery control plan at any time and must do so when the interest of justice requires. Tex. R. Civ. P. 190.5. Unless a suit is governed by the expedited actions process in rule 169, the court must allow additional discovery related to new, amended, or supplemental pleadings or new information disclosed in a response or an amended or supplemental response if the pleadings or responses were made after the discovery deadline or so nearly before the deadline that an adverse party does not have an adequate opportunity to conduct discovery related to the new matters and the adverse party would be unfairly prejudiced without the additional discovery. The court must allow additional discovery regarding matters that have changed materially after the discovery cutoff if trial is set or postponed so that the trial date is more than three months after the discovery period ends. Tex. R. Civ. P. 190.5.

Also, except where specifically prohibited, discovery procedures and limitations may be modified by court order for good cause or by agreement of the parties. Such an agreement is enforceable if it complies with rule 11 or, as it affects an oral deposition, if it is made part of the deposition record. Tex. R. Civ. P. 191.1.

§ 18.2:6 Discovery Not Subject to Discovery Control Plans

Depositions before suit or to investigate claims, as provided under rule 202, and discovery to enforce judgment under rule 621a, as discussed in chapter 26 of this manual, are not covered by discovery control plans. Tex. R. Civ. P. 190.6.

§ 18.3 Exemptions from Discovery

§ 18.3:1 Work Product

The work product of an attorney or the attorney’s representative that contains that person’s mental impressions, opinions, conclusions, or legal theories (the “core work product”) is not discoverable. Tex. R. Civ. P. 192.5(b)(1); National Union Fire Insurance Co. v. Valdez, 863 S.W.2d 458, 461 (Tex. 1993); see also In re State ex rel. Skurka, 512 S.W.3d. 444, 453 (Tex. App.—Corpus Christi 2016, no pet., orig. proceeding) (applying the work product doctrine in the context of Tex. Code Crim. Proc. art. 39.14). The work product exemption is of continuing duration. Owens-Corning Fiberglass Co. v. Caldwell, 818 S.W.2d 749, 751–52 (Tex. 1991); In re Baptist Hospitals of Southeast Texas, 172 S.W.3d 136, 144 (Tex. App.—Beaumont 2005, orig. proceeding). See Tex. R. Civ. P. 192.5(a) for the definition of “work product.”
There is no presumption that documents are privileged. In re E.I. DuPont de Nemours & Co., 136 S.W.3d 218, 225 (Tex. 2004) (privilege log alleged that withheld documents were covered by the attorney-client and/or work product privileges). Therefore, the party who seeks to limit discovery by asserting a privilege has the burden of proof. To meet its burden, the party seeking to assert the privilege must make a prima facie showing of the applicability of the privilege and produce evidence to support the privilege. In re USA Waste Management Resources, L.L.C., 387 S.W.3d 92, 96 (Tex. App.—Houston [14th Dist.] 2012, orig. proceeding [mand. denied]) (affidavit about facts of litigation established that consultation with attorney was protected by attorney-client privilege). The prima facie standard requires showing only the minimum evidence necessary to support a rational inference that the allegation of fact is true. See In re Kristensen, No. 14-14-00448-CV, 2014 WL 3778903, at *2, 5 (Tex. App.—Houston [14th Dist.] July 13, 2014, no pet.) (per curiam) (mem. op.) (interpreting a trial judge’s handwritten comment on a typed order that assertions of privilege “must be established by evidence” to be a correct application of the law regarding the invocation of a privilege). This standard can be satisfied by filing an affidavit in support of the assertion of the privilege. A prima facie showing can also be made by testimony or, if deemed necessary, production of the documents to the court for in camera inspection. In re ExxonMobil Corp., 97 S.W.3d 353, 357 (Tex. App.—Houston [14th Dist.] 2003, orig. proceeding) (numerous documents reviewed in camera by trial court to determine applicability of attorney-client privilege).

Work product other than “core work product” is discoverable only on a showing that the party seeking discovery has substantial need of the materials and is unable without undue hardship to obtain the substantial equivalent of the material by other means. Tex. R. Civ. P. 192.5(b)(2) In re Larkin, No. 01-15-00392-CV, 2016 WL 1054729, at *2 (Tex. App.—Houston [1st Dist.] Mar. 17, 2016, no pet.) (mem. op.) (overturning trial court’s order to produce core work product when requesting party made no showing of a substantial need of the materials); see also Occidental Chemical Corp. v. Banales, 907 S.W.2d 488, 490 (Tex. 1995) (distinguishing between protection of core work product and noncore work product, before promulgation of Tex. R. Civ. P. 192.5); National Tank Co. v. Brotherton, 851 S.W.2d 193, 200–202 (Tex. 1993) (discussing the definition of “work product”).

§ 18.3:2 “Consulting-Only” Experts

The identity, mental impressions, and opinions of a consulting expert whose mental impressions and opinions have not been reviewed by a testifying expert are not discoverable. But if his mental impressions or opinions have been reviewed by a testifying expert, all the information discoverable regarding testifying experts is also discoverable regarding that consulting expert. Tex. R. Civ. P. 192.3(e). See Tex. R. Civ. P. 192.7(d) for the definition of “consulting expert.”

§ 18.3:3 Limitations on Scope of Discovery

The court may limit otherwise allowable discovery if either (1) the discovery sought is unreasonably cumulative or duplicative or is obtainable from some other source that is more convenient, less burdensome, or less expensive, or (2) the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties’ resources, the importance of the issues at stake, and the importance of the proposed discovery in resolving the issues. Tex. R. Civ. P. 192.4.
§ 18.4 Ethical Considerations in Pretrial Discovery

§ 18.4:1 Legal Advice to Adverse Party


§ 18.4:2 Permissible Communication

Any statement contained in the notice that discusses the legal effect of answering or not answering interrogatories or requests for admissions may constitute the giving of legal advice. See Tex. Disciplinary Rules Prof’l Conduct R. 4.03 & cmt. The notice may—

1. give instructions on answering the interrogatories or requests for admissions;
2. state the time periods within which the answers or admissions must be received; and
3. contain a statement to the effect that, if the requests are not to be admitted, the recipient either must specifically deny the requests or must state in detail the reasons for his inability to admit or deny them.

These statements are merely aids to help the party answer the interrogatories or requests and to get answers to the requesting party or his attorney within the relevant period; they are not statements of legal consequences.

§ 18.4:3 Impermissible Communication

The attorney must avoid including in notices to an unrepresented person statements going beyond mere instructions and purporting to give legal advice, such as that—

1. a party may be ordered to pay costs of proof, including attorney’s fees, if he denies a requested admission that is later proved to be true;
2. an admission applies only to the subject proceeding and may not be used against the party in any other proceeding; and
3. failure to respond may result in the entry of judgment or the imposition of other sanctions.

See Tex. Comm. on Prof’l Ethics, Op. 380 (1975) (collection letter that stated in extensive detail the legal results of nonpayment was improper), Op. 355 (1971) (attorney should not advise opposing party represented by counsel about the law through guise of deposition).

Discovery requests should not contain legal advice or threats about possible consequences of not replying. See Tex. Disciplinary Rules Prof’l Conduct R. 4.02, 4.04 (regarding communication with parties represented by another attorney and prohibiting use of threats of criminal or disciplinary charges to gain an advantage in a civil matter).
§ 18.5 Attorney’s Fees for Pretrial Discovery

Although there is no provision for the pretrial recovery of attorney’s fees for the mere undertaking of discovery, fees may be recovered if the other party does not cooperate when required to do so by the Texas Rules of Civil Procedure. See part VII in this chapter.

§ 18.6 Separate or Combined Submission of Interrogatories and Requests for Admissions

§ 18.6:1 Combined Submission Generally

Some attorneys combine interrogatories with requests for admissions in the hope of obtaining a tactical opportunity not available through separate use of these diverse methods of discovery. This practice is expressly allowed by Tex. R. Civ. P. 192.2. In theory, this hybrid type of discovery combines the automatic admissibility of evidence when facts are admitted with the probative effect of consequent answers to interrogatories requested in the same document for admissions that are denied. Although this combined discovery tactic appears to possess all the advantages available under both procedures, some factors should be considered before attempting to combine the two, and in this manual the two procedures are presented separately.

§ 18.6:2 Difference in Tactics

Interrogatories are intended to be used in discovering admissible evidence, whereas requests for admissions are used to isolate and refine those matters of fact that need to be tried. Logically, requests for admissions are useful after (not during) discovery by interrogatories or depositions. By separating the two kinds of procedures, one is able to use answers obtained from interrogatories or depositions to frame more meaningful requests for admissions, thereby improving the quality and quantity of information admissible for trial of the issues.

§ 18.6:3 Difference as Evidence

Answers to interrogatories are subject to the general rules of evidence and must be properly offered at trial or at an appropriate pretrial hearing to have probative value. Richards v. Boettcher, 518 S.W.2d 286, 288 (Tex. Civ. App.—Texarkana 1974, writ ref’d n.r.e.). Matters admitted under a request for admissions, however, are “conclusively established as to the party making the admission unless the court permits the party to withdraw or amend the admission.” Tex. R. Civ. P. 198.3. They need not be introduced into evidence to be properly before the trial or appellate court. See Red Ball Motor Freight, Inc. v. Dean, 549 S.W.2d 41, 43 (Tex. Civ. App.—Tyler 1977, writ dism’d w.o.j.). See also section 18.46 below. The practitioner should be aware, however, that admissions made pursuant to Tex. R. Civ. P. 198 may be introduced and read into evidence against the party making the admission. See Welch v. Gammage, 545 S.W.2d 223, 226 (Tex. Civ. App.—Austin 1976, writ ref’d n.r.e.) (“The better practice is to introduce the requests for admissions and the responses into evidence. Nevertheless, requests for admissions and responses may be considered as a part of the record if they were filed with the clerk of the court at trial time.”).

At trial, the party relying on admissions must protect the record by objecting to the controverting evidence and to the submission of any issue bearing on the facts admitted. Marshall v. Vise, 767 S.W.2d 699, 700 (Tex. 1989); USAA County Mutual Insurance Co. v. Cook, 241 S.W.3d 93, 102 (Tex. App.—Houston [1st Dist.] 2007, no pet.). Compare Beasley v. Burns, 7 S.W.3d 68, 770 (Tex. App.—Texarkana 1999, pet. denied) (declining to extend the rule in Marshall to summary judgment proceedings on the basis that such proceedings are not trials), with Acevedo v. Commission for Lawyer Discipline, 131 S.W.3d 99, 105 n.3 (Tex. App.—San Antonio 2004, pet. denied) (questioning Beasley’s characterization of a summary judgment pro-
ceeding as not a “trial”). Failure to promptly protect the record waives the right to rely on the controverted admissions. 

Marshall, 767 S.W.2d at 700. See also Acevedo, 131 S.W.3d at 104 (discussing waiver of right to rely on deemed admissions in the summary judgment and trial contexts).

§ 18.7 Supplementation of Discovery

§ 18.7:1 Supplementation Generally

If a party learns that his response to written discovery was incomplete or incorrect when made or has become incomplete or incorrect, he must generally amend or supplement his response unless the additional or corrective information has been made known to the other parties either in writing, on the record at a deposition, or through other discovery responses. Tex. R. Civ. P. 193.5(a)(2). If the written discovery sought the identification of persons with knowledge of relevant facts, trial witnesses, or expert witnesses, the party must amend or supplement the response. Tex. R. Civ. P. 193.5(a)(1).

The supplementation requirement applies, whether or not the evidence is to be used in a party’s case in chief or during rebuttal, if the party offering the evidence knows of the evidence before trial. See Alvarado v. Farah Manufacturing Co., 830 S.W.2d 911, 913–14 (Tex. 1992).

A party who fails to amend or supplement a discovery response in a timely manner may not introduce into evidence the discovery that was not timely disclosed or offer the testimony of a witness (other than a named party) who was not timely identified, unless the court finds that either there was good cause for the lack of timeliness or the failure to amend or supplement timely will not unfairly surprise or prejudice the other parties. Tex. R. Civ. P. 193.6(a); Montie v. Bastrop County, No. 03-16-00123-CV, 2016 WL 6156232, at *3 (Tex. App.—Austin Oct. 19, 2016, no pet.); Alvarado, 830 S.W.2d at 913–14. See also section 18.15 below. The burden of showing good cause or the absence of unfair surprise or prejudice is on the party seeking to introduce the witness or evidence. Tex. R. Civ. P. 193.6(b); Alvarado, 830 S.W.2d at 914.

§ 18.7:2 Time of Amended or Supplemental Response

The amended or supplemental response must be made reasonably promptly after the party discovers the need for it. An amended or supplemental response made less than thirty days before trial is presumed not to have been made reasonably promptly. Tex. R. Civ. P. 193.5(b).

See section 18.15 below regarding the consequences of failure to timely respond.

§ 18.7:3 Form of Amended or Supplemental Response

The amended or supplemental response must be in the same form as the initial response and must be verified if the original response had to be verified. Failure to comply with this form requirement will not make the response untimely unless the party making the response refuses to correct the form defect within a reasonable time after it is pointed out. Tex. R. Civ. P. 193.5(b).

See section 18.15 below regarding the consequences of failure to timely respond.
§ 18.7:4 Supplementation and Experts

A party’s duty to amend and supplement written discovery regarding a testifying expert is governed by rule 193.5. If an expert is retained by, employed by, or otherwise under the control of a party, that party must also amend or supplement any deposition testimony or written report by the expert but only with regard to the expert’s mental impressions or opinions and the basis for them. Tex. R. Civ. P. 195.6.

§ 18.8 Protective Orders

§ 18.8:1 Availability

A protective order is available to any person from whom discovery is sought and any other person affected by the discovery request. Tex. R. Civ. P. 192.6(a).

A party may also obtain a protective order if discovery is sought not from him personally but from an individual who is not a party. See Mahan v. Stover, 679 S.W.2d 707, 709–10 (Tex. App.—Beaumont 1984, writ dism’d w.o.j.) (court of appeals upheld protective order requiring defendant to pay plaintiff’s experts for depositions in advance by depositing $600 in court registry and additional $600 for each day depositions were to be taken).

§ 18.8:2 Grounds

Protective orders are intended to protect the movant from undue burden, unnecessary expense, harassment, annoyance, or invasion of personal, constitutional, or property rights. Tex. R. Civ. P. 192.6(b). A party seeking a protective order must specifically plead a particular privilege or immunity from discovery and produce evidence supporting the applicability of the privilege or immunity; otherwise the privilege or immunity is waived. Peeples v. Honorable Fourth Supreme Judicial District, 701 S.W.2d 635, 637 (Tex. 1985); Taylor v. Taylor, 747 S.W.2d 940, 945 (Tex. App.—Amarillo 1988, writ denied). The burden of requesting a hearing is now on the party seeking production. McKinney v. National Union Fire Insurance Co., 772 S.W.2d 72, 75 (Tex. 1989). If protection is sought regarding the time or place of discovery, the movant must state a reasonable time or place for discovery with which he will comply. Tex. R. Civ. P. 192.6(a).

A motion for a protective order should not be made when an objection to written discovery is appropriate. However, the filing of a motion for protective order does not waive an objection. A party must comply with the discovery request to the extent a protective order is not sought unless it is unreasonable under the circumstances to do so before obtaining a ruling on the motion. Tex. R. Civ. P. 192.6(a). The party that seeks a protective order must show particular, specific, and demonstrable injury by facts sufficient to justify the protective order. In re Wal-Mart Stores, Inc., No. 08-15-00126-CV, 2016 WL 7230399, at *7 (Tex. App.—El Paso Dec. 14, 2016, orig. proceeding [mand. pending]) (citing In re Collins, 286 S.W.3d 911, 919 (Tex. 2009) (orig. proceeding)).

§ 18.8:3 Burden of Proof under Rule 192.6(b)

Rule 192.6(b) permits a trial court to “make any order in the interest of justice,” including limiting the depositions in a manner designed to “protect the movant from undue burden, unnecessary expense, harassment, annoyance, or invasion of personal, constitutional, or property rights.” Tex. R. Civ. P. 192.6(b). However, a party resisting discovery cannot prevail simply by making conclusory allegations that the requested discovery is unduly burdensome or unnecessarily harassing. The resisting
party must produce some evidence that supports the request for a protective order. See Garcia v. Peeples, 734 S.W.2d 343, 345 (Tex. 1987). In the case of depositions, for instance, although “[m]any deponents consider any deposition harassing and burdensome and perhaps annoying, . . . unless the purpose of the deposition can be shown to be only for an improper purpose, or unless it is an undue burden, the trial court cannot limit the deposition on these bases.” In re Amaya, 34 S.W.3d 354, 358 (Tex. App.—Waco 2001, orig. proceeding). See also In re Issuance of Subpoenas of Bennett, 502 S.W.3d 373, 377 (Tex. App.—Houston [14th Dist.] 2016, orig. proceeding).

§ 18.8:4 Scope of Protection

The court may order that—

1. the requested discovery not be sought in whole or in part;
2. the extent or subject matter of discovery be limited;
3. the discovery not be undertaken at the time or place specified;
4. the discovery be undertaken only by the method or on the terms and conditions or at the time and place directed by the court; or
5. the results of discovery be sealed or otherwise protected, subject to the provisions of rule 76a.

Tex. R. Civ. P. 192.6(b).

§ 18.9 Objections to Written Discovery

§ 18.9:1 Written Discovery Defined

“Written discovery” means requests for disclosure, requests for production and inspection of documents and tangible things, requests for entry onto property, interrogatories, and requests for admissions. Tex. R. Civ. P. 192.7(a).

§ 18.9:2 Time and Form for Objection

The responding party must make his objection to written discovery in writing (either in the response or in a separate document) within the time for response. The objection must state specifically the legal or factual basis for the objection and the extent to which the party is refusing to comply with the request. Tex. R. Civ. P. 193.2(a). An objection that is not made within the time required is waived unless the court excuses the waiver for good cause shown. Tex. R. Civ. P. 193.2(e). See form 18-25 in this chapter.

§ 18.9:3 Partial Objection

If the responding party is objecting to part of the discovery request, he must comply with the unobjectionable part unless it is unreasonable under the circumstances to do so. Tex. R. Civ. P. 193.2(b). An example of such a situation would be if the requesting party asks for “all documents relevant to the lawsuit.” In that case, the responding party may object to the request as overly broad and refuse to comply with it entirely. Tex. R. Civ. P. 193 cmt. 2.
§ 18.9:4 Objection to Time or Place for Production

If the objection is to the requested time or place for production, the responding party must state a reasonable time or place for complying with the request and must comply at that time and place without further request or order. Tex. R. Civ. P. 193.2(b). See section 18.75:3 below for further discussion of objections to requests for production.

§ 18.9:5 Basis for Objection

The responding party must have a good-faith factual and legal basis for his objection that exists at the time the objection is made. Tex. R. Civ. P. 193.2(c). Furthermore, an objection obscured by numerous unfounded objections is waived unless the court excuses the waiver for good cause shown. Tex. R. Civ. P. 193.2(c).

§ 18.9:6 Hearing and Ruling on Objections

Any party may at any reasonable time request a hearing on an objection. The party making the objection must present any evidence necessary to support his objection. The evidence may be either live testimony or affidavits served at least seven days before the hearing or at such other reasonable time as the court permits. Tex. R. Civ. P. 193.4(a).

To the extent the court sustains the objection, the responding party has no further duty to respond to the discovery request. If the court overrules the objection, the responding party must produce the requested material or information within thirty days after the court’s ruling or at such time as the court orders. Tex. R. Civ. P. 193.4(b).

A party need not request a ruling on his own objection to preserve it. Tex. R. Civ. P. 193.4(b).

§ 18.10 Assertions of Privilege

§ 18.10:1 Only Written Discovery Governed

The rules set out in this section regarding privileges apply only to written discovery. See Tex. R. Civ. P. 193.3. See section 18.9:1 above for a definition of written discovery.

§ 18.10:2 How Privilege Is Asserted

The party claiming that information responsive to written discovery is privileged must state, either in the response or in a separate document—

1. that information or material responsive to the request is being withheld;
2. the request to which the information or material relates; and
3. the privilege(s) asserted.

Tex. R. Civ. P. 193.3(a). An exception to this requirement exists for privileged communications to or from a lawyer or lawyer’s representative or a privileged document of the lawyer or lawyer’s representative created or made from the point at which the party consults a lawyer with a view to obtaining professional legal services from the lawyer in the prosecution or defense of a specific claim in the litigation in which the discovery is requested and concerning the litigation in which the discovery is requested. Tex. R. Civ. P. 193.3(c). See also section 18.3:1 above. A privilege or exemption sought must be specifically
pleaded and supported by evidence (by either affidavit or testimony), and if necessary, the party asserting the privilege must submit the allegedly privileged items for an in camera inspection. See In re Insurance Placement Services, No. 03-11-00374-CV, 2011 WL 2768825, at *2 (Tex. App.—Austin July 14, 2011, no pet.) (mem. op.); Loftin v. Martin, 776 S.W.2d 145, 147 (Tex. 1989) (assertion of investigative privilege), disapproved on other grounds by Walker v. Packer, 827 S.W.2d 833, 842 (Tex. 1992).

§ 18.10:3 Requesting Party’s Response to Assertion of Privilege

After receiving a response indicating that material or information is being withheld on grounds of privilege, the requesting party may serve a written request that the withholding party identify the information and material withheld. Within fifteen days of service of that request, the withholding party must both—

1. describe the information or materials withheld, without revealing the privileged information itself or otherwise waiving the privilege, in a way that would enable another party to determine the applicability of the privilege; and

2. assert the applicable specific privilege for each item or group of items withheld.

Tex. R. Civ. P. 193.3(b). The same exception regarding specific communications to or from an attorney or attorney’s representative set out in section 18.10:2 above applies to the withholding party’s obligations set out in the paragraph above. Tex. R. Civ. P. 193.3(c).

§ 18.10:4 Hearing and Ruling on Assertion of Privilege

As with objections, any party may at any reasonable time request a hearing on a claim of privilege asserted under Tex. R. Civ. P. 193. The party making the claim of privilege must present any evidence necessary to support his claim; that evidence may be either live testimony or affidavits served at least seven days before the hearing or at such other reasonable time as the court permits. Tex. R. Civ. P. 193.4(a). Affidavits asserting a privilege must contain more than global reiterations of facts ascertainable from the face of the documents (or other evidence) themselves. Weisel Enterprises, Inc. v. Curry, 718 S.W.2d 56, 58 (Tex. 1986); In re Insurance Placement Services, No. 03-11-00374-CV, 2011 WL 2768825, at *2–3 (Tex. App.—Austin July 14, 2011, no pet., orig. proceeding) (mem. op.).

To the extent the court sustains the claim of privilege, the responding party has no further duty to respond to the discovery request. To the extent the court overrules the claim of privilege, the withholding party must produce the information or material within thirty days of the court’s ruling or at such time as the court orders. Tex. R. Civ. P. 193.4(b).

§ 18.10:5 In Camera Inspection

If the court determines that in camera review is necessary, the material or information must be segregated and produced to the court in a sealed wrapper within a reasonable time following the hearing. Tex. R. Civ. P. 193.4(a).

§ 18.10:6 Use of Material or Information Withheld under Claim of Privilege

A party may not use, at any hearing or trial, material or information withheld from discovery under a claim of privilege, including a claim sustained by the court, without timely amending or supplementing the party’s response to the discovery. Tex. R. Civ. P. 193.4(c).
§ 18.11  Cooperation in Discovery and Certification of Conference

Parties and their attorneys are expected to cooperate in discovery and to make any agreements reasonably necessary for the efficient disposition of the cause. All discovery motions or requests for hearings related to discovery must contain a certificate by the movant that reasonable efforts to resolve the discovery dispute without the necessity of court intervention have been made and have failed. Tex. R. Civ. P. 191.2.

§ 18.12  Signatures on Discovery Documents

§ 18.12:1  Requirement of Signature

Every disclosure, discovery request, notice, response, and objection must be signed by either the party’s attorney or the party, if he is proceeding pro se. The signature must be accompanied by the signatory’s address, telephone number, fax number, if any, and State Bar identification number if the signatory is an attorney. Tex. R. Civ. P. 191.3(a).

§ 18.12:2  Effect of Signature on Discovery Request, Notice, Response, or Objection

The signature on a discovery request, notice, response, or objection constitutes a certification that to the best of the signer’s knowledge, information, and belief, formed after reasonable inquiry, the request, notice, response, or objection—

1. is consistent with the rules of civil procedure and warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law;

2. has a good-faith factual basis;

3. is not interposed for any improper purpose, such as to harass or annoy or to cause unnecessary delay or needless increase in the cost of litigation; and

4. is not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation.

Tex. R. Civ. P. 191.3(c). If a request, notice, response, or objection is not signed, it must be struck unless it is signed promptly after the omission is called to the attention of the party proffering it. A party is not obligated to take any action with respect to a request or notice that is not signed. Tex. R. Civ. P. 191.3(d).

§ 18.12:3  Effect of Signature on Disclosure

The signature on a disclosure constitutes a certification that to the best of the signer’s knowledge, information, and belief, formed after reasonable inquiry, the disclosure is complete and correct when it is made. Tex. R. Civ. P. 191.3(b).

§ 18.12:4  Sanctions for False Certification

If the certification is false without substantial justification, the court may, on motion or its own initiative, impose on the person making the certification or the party on whose behalf the request, notice, response, or objection was made, or both, an appropriate sanction as for a frivolous pleading or motion under chapter 10 of the Texas Civil Practice and Remedies Code. Tex. R. Civ. P. 191.3(e).
§ 18.13 Filing and Service of Discovery Materials

§ 18.13:1 Materials That Must Be Filed

Discovery materials that must be filed are—

1. discovery requests, deposition notices, and subpoenas required to be served on nonparties;
2. motions and responses to motions pertaining to discovery matters; and
3. agreements concerning discovery matters, to the extent required to comply with rule 11.


§ 18.13:2 Materials Not to Be Filed

Discovery materials that are not filed are—

1. discovery requests, deposition notices, and subpoenas required to be served only on parties;
2. responses and objections to discovery requests and deposition notices, regardless of on whom the requests or notices were served;
3. documents and tangible things produced in discovery; and
4. certain statements prepared in connection with the assertion of privileges (under rule 193.3(b) or (d)).

Tex. R. Civ. P. 191.4(a). Certain exceptions exist. For example, the court may order these discovery materials to be filed, a person may file discovery materials in support of or in opposition to a motion or for other use in a court proceeding, and a person may file discovery materials necessary for a proceeding in an appellate court. Tex. R. Civ. P. 191.4(c).

For materials not required to be filed, the person required to serve them must keep the originals or exact copies during the pendency of the case and any related appellate proceedings begun within six months after judgment is signed, unless otherwise provided by the trial court. Tex. R. Civ. P. 191.4(d).

§ 18.13:3 Method of Service

Discovery requests may be served on any party at any time from after the commencement of the action until thirty days before the end of the discovery period. See Tex. R. Civ. P. 196.1(a) (requests for production), 197.1 (interrogatories), and 198.1 (requests for admissions). See section 18.2 above regarding the discovery period. If the party is represented by an attorney, the requests must be served on the attorney unless service on the party himself is ordered by the court. Copies of the requests must be served on all parties but not filed with the court clerk. Tex. R. Civ. P. 191.4(a)(1), 191.5.

Service of requests for discovery can be done either by serving through the electronic service system, in person, by mail (certified mail, return receipt requested is often best to prove delivery), by commercial delivery service, by fax, by e-mail, or by such other manner as a court instructs. Tex. R. Civ. P. 21a(a)(1)–(2).
Service of documents by e-mail is a 2013 amendment to rule 21a with at least one court enforcing service via this means. See University of Texas Medical Branch at Galveston v. Callas, 497 S.W.3d 58, 66 (Tex. App.—Houston [14th Dist.] 2016, pet. denied).

For service of requests for disclosure, see section 18.62 below.

§ 18.13:4   Presumption of Service

Sending notice or documents pursuant to rule 21a raises a rebuttable presumption that service was done properly. Mathis v. Lockwood, 166 S.W.3d 743, 745 (Tex. 2005). Under rule 21a, service is complete when (1) properly addressed and postpaid documents are deposited in the mail or with a commercial delivery service, (2) sent by fax with proof of receipt, or (3) done by electronic service and the documents are transmitted to the serving party’s electronic filing service provider. Tex. R. Civ. P. 21a(b)(1)–(3). The rule does not address when service by e-mail is complete.

Practice Note: Because the rule does not address when e-mail service is complete, consider using an additional method of service.

A certificate of service (or affidavit) is also prima facie evidence that service took place. Mocega v. Urquhart, 79 S.W.3d 61, 65 (Tex. App.—Houston [14th Dist.] 2002, pet. denied). However, the presumption can be rebutted when an opposing party offers proof of nonreceipt. Cliff v. Huggins, 724 S.W.2d 778, 780 (Tex. 1987).

§ 18.14   Availability of Mandamus

Mandamus is available to correct a clear abuse of discretion in a discovery matter. Walker v. Packer, 827 S.W.2d 833, 839 (Tex. 1992) (citing Johnson v. Fourth Court of Appeals, 700 S.W.2d 916, 917 (Tex. 1985)). The party seeking mandamus relief must establish that (1) the trial court abused its discretion and (2) no adequate remedy by appeal exists. In re Essex Insurance Co., 450 S.W.3d 524, 526 (Tex. 2014). See Dillard Department Stores, Inc. v. Hall, 909 S.W.2d 491, 492 (Tex. 1995); General Motors Corp. v. Lawrence, 651 S.W.2d 732, 733 (Tex. 1983) (discovery order was overly broad in scope, sought production of nonrelevant information, and would have caused undue burden and expense); but see Walker, 827 S.W.2d at 840–42 (Tex. 1992) (party seeking review of discovery order must show that remedy offered by ordinary appeal inadequate; appellate remedy not inadequate merely because it may involve more expense or delay than obtaining extraordinary writ). The court in Walker gave three specific situations in which mandamus is an appropriate remedy:

1. When the appellate court would not be able to cure the trial court’s error, as when the trial court erroneously orders the disclosure of privileged information that would materially affect the rights of the aggrieved party.

2. When the party’s ability to present a viable claim or defense at trial is vitiated or severely compromised by the trial court’s discovery error.

3. When the trial court disallows discovery and the missing discovery cannot be made part of the appellate record, or the trial court after later request refuses to make it part of the record, and the reviewing court is unable to evaluate the effect of the trial court’s error on the record before it.

Walker, 827 S.W.2d at 843–44.
§ 18.15 Failure to Timely Respond

A party who fails to make, amend, or supplement a discovery response in a timely manner may not introduce in evidence the material or information that was not timely disclosed or offer the testimony of a witness (other than a named party) who was not timely identified, unless the court finds that either there was good cause for the lack of timeliness or the failure to make, amend, or supplement timely will not unfairly surprise or prejudice the other parties. Tex. R. Civ. P. 193.6(a). The burden to establish good cause or lack of unfair surprise or unfair prejudice is on the party seeking to introduce the evidence or call the witness. A finding of unfair surprise or unfair prejudice must be supported by the record. Tex. R. Civ. P. 193.6(b).

§ 18.16 Discovery from Financial Institutions

A party seeking discovery (such as a third-party request for production pursuant to Tex. R. Civ. P. 176 and 205) from a bank, savings and loan, credit union, or trust company must comply with the provisions described in the Texas Finance Code, even if the financial institution is chartered under the laws of another state. Tex. Fin. Code §§ 59.001(5), 59.006(a). However, certain record requests or inquiries, mainly from a state or federal government agency, are not subject to the special rules described in the Code. Tex. Fin. Code § 59.006(a)(1)–(8).

If the financial information being requested concerns a customer who is a party to the lawsuit, the requesting party must serve the financial institution with a record request that provides a minimum of twenty-four days to comply and must pay the institution’s reasonable costs of reproduction, postage, research, delivery, and attorney’s fees or agree to post a bond in an amount estimated by the institution to cover such costs before the institution is required to comply with the request. Tex. Fin. Code § 59.006(b). The customer who is a party bears the burden of preventing or limiting the institution’s compliance with the record request by seeking an appropriate remedy, such as a motion to quash or motion for protective order. Tex. Fin. Code § 59.006(c). The customer must serve the motion on the financial institution and the requesting party not later than the date on which the institution’s compliance with the record request is required. Tex. Fin. Code § 59.006(e). Otherwise, once the requirements of section 59.006(b) are met, the institution must comply with the request. Tex. Fin. Code § 59.006(c).

If the financial information being requested concerns a customer who is not a party to the lawsuit, the requesting party must—

1. provide notice (by certified mail or personal service) to the nonparty stating the rights of the customer under section 59.006(e) and a copy of the request to each affected nonparty;
2. file a certificate of service of that notice both with the court and the institution; and
3. request the nonparty’s written consent authorizing the institution to comply with the request.


If the nonparty customer consents, the institution need not produce the record before the later of (1) the twenty-fourth day after the date that compliance with the record request is required or (2) the fifteenth day after the date of receipt of its customer’s consent. Tex. Fin. Code § 59.006(f).

If the nonparty customer does not execute the written consent or fails to respond to the requesting party’s request for compliance, the requesting party must file a written motion seeking an in camera inspection of the requested information with the court. Tex. Fin. Code § 59.006(d). In response to the motion for in camera inspection, the court may review the documents to determine their relevance to the underlying matter and can order that any part of the records be redacted and, furthermore, that a protective order be signed prohibiting disclosure to any nonparty as well as ordering that the documents be used only in the

For a notice to a nonparty customer of request for financial records, see form 18-1 in this chapter. For a motion to inspect non-party financial records, see form 18-2.

[Sections 18.17 through 18.20 are reserved for expansion.]

II. Depositions

§ 18.21 Source of Rule and Purpose of Deposition

§ 18.21:1 Source and Purpose Generally

Depositions are used for discovery and to perpetuate the testimony of any party or witness as evidence for later use at trial by means of a written transcript of oral or written questions and answers. Oral depositions are governed by Tex. R. Civ. P. 199, depositions on written questions are governed by Tex. R. Civ. P. 200, depositions outside Texas for use in Texas proceedings and depositions taken in Texas for use outside the state are governed by Tex. R. Civ. P. 201, and depositions before suit or to investigate a claim are governed by Tex. R. Civ. P. 202. Signing, certification, and use of depositions is governed by Tex. R. Civ. P. 203.

§ 18.21:2 Who May Be Deposed

A party may take the deposition of any person or entity before any officer authorized by law to take depositions. Tex. R. Civ. P. 199.1(a). Individuals, public or private corporations, partnerships, associations, governmental agencies, or other organizations may be deposed. Tex. R. Civ. P. 199.2(b)(1).

§ 18.22 Length of Examination

For suits filed on or after March 1, 2013, the time limits imposed by Tex. R. Civ. P. 190 apply. Unless modified by the court, level 1 suits allow each party up to six hours to depose all witnesses. The parties may agree to expand this limit up to ten hours total, but not more except by court order. Tex. R. Civ. P. 190.2(b)(2). Unless modified by the court, level 2 suits allow each side up to fifty hours to depose parties on the opposing side, experts designated by those parties, and persons subject to those parties’ control. However, if one side designates more than two experts, the opposing side has an additional six hours of deposition time for each additional expert designated. In level 2 suits, “side” refers to all litigants with generally common interests in the litigation. Tex. R. Civ. P. 190.3(b)(2). For level 3 suits, the discovery control plan must include appropriate limits on the amount of discovery. If no limit is placed on length of depositions, the appropriate limit according to Tex. R. Civ. P. 190.2 or 190.3 will be imposed. Tex. R. Civ. P. 190.4(b). See section 18.2 above regarding discovery control plans generally.

No side may examine or cross-examine a witness for more than six hours. Breaks taken during the deposition do not count toward this time limit. Tex. R. Civ. P. 199.5(c).
§ 18.23 Forms of Deposition

§ 18.23:1 Methods of Examination

Oral depositions may be taken in person or by telephone or “other remote electronic means.” Tex. R. Civ. P. 199.1(a), (b). These “remote” depositions are discussed in section 18.27 below. Depositions may also be taken by written questions, as discussed at section 18.29.

§ 18.23:2 Nature of Questions

Whatever deposition method is used, questions should elicit information about material evidence and witnesses within the witness’s knowledge. Written questions should be phrased to seek specific factual answers to each question. For sample written deposition questions to the client to establish certain favorable facts, see form 18-6 in this chapter; see also the interrogatories in forms 18-15 through 18-20.

§ 18.23:3 Production of Documents by Witness

One of the more valuable benefits of a deposition is the ability to require the witness to produce documents or tangible things within the scope of discovery and within the witness’s possession, custody, or control, and then elicit testimony regarding the items produced. Both oral depositions and depositions on written questions allow a party to demand that the witness bring these items with him to the deposition. See Tex. R. Civ. P. 199.2(b)(5), 200.1(b), 205.3. Such a demand is contained within a subpoena duces tecum. See section 18.30 below regarding subpoenas generally.

§ 18.24 Deposition before Suit Is Filed or to Investigate Claims

§ 18.24:1 When Permitted

A person may petition the court for an order authorizing taking an oral or written deposition, either to perpetuate or obtain the person’s own testimony or that of any other person in an anticipated suit or to investigate a potential claim or suit. Tex. R. Civ. P. 202.1.

§ 18.24:2 Petition

The person seeking the deposition must file a verified petition in the proper court of any county in which venue of the anticipated action may lie or in which the witness resides if no suit is yet anticipated. The petition must—

1. be in the name of the petitioner;
2. state that the petitioner either anticipates litigation in which he may be a party or seeks to investigate a potential claim by or against him;
3. state the subject matter of the anticipated litigation and the petitioner’s interest in it;
4. if suit is anticipated, either state the names, addresses, and telephone numbers of persons expected to have interests adverse to the petitioner or state that those names, addresses, and telephone numbers cannot be ascertained through diligent inquiry and describe those persons;
5. state the names, addresses, and telephone numbers of the persons to be deposed, the substance of the testimony expected, and the petitioner’s reason for desiring to obtain the testimony; and

6. request a court order authorizing the petitioner to take the depositions of the persons named in the petition.


§ 18.24:3 Notice and Service

At least fifteen days before the date of the hearing, the petitioner must serve, in accordance with Tex. R. Civ. P. 21a, a copy of the petition and notice of the hearing on the witnesses and, if suit is anticipated, on each anticipated adverse party named in the petition. Tex. R. Civ. P. 202.3(a).

Unnamed persons described in the petition whom the petitioner expects to have interests adverse to the petitioner may be served by publication with the petition and notice of hearing. This notice must be first published at least fourteen days before the date of the hearing and state its time and place. The petition and notice must be published once each week for two consecutive weeks in the newspaper of broadest circulation in the county in which the petition is filed or, if no such newspaper exists, in the newspaper of broadest circulation in the nearest county in which a newspaper is published. Tex. R. Civ. P. 202.3(b).

The court may modify the notice periods and may extend the notice period to permit service on any expected adverse party. Tex. R. Civ. P. 202.3(d).

§ 18.24:4 Suppression of Deposition to Perpetuate Testimony

After the filing of a deposition taken after notice by publication, an interested party may, in the proceeding or by bill of review, move to suppress all or part of the deposition and may also oppose the deposition by any other means available. Tex. R. Civ. P. 202.3(b)(2). The right to move to suppress is cumulative of all other rights to oppose the deposition.

§ 18.24:5 Order

The court must order a deposition to be taken if, but only if, it finds that allowing the requested deposition may prevent a failure or delay of justice in an anticipated suit or that the likely benefit of allowing the petitioner to take the deposition to investigate the potential claim outweighs the burden and expense of the procedure. Tex. R. Civ. P. 202.4(a). The court order must state whether a deposition will be oral or written and may also state the time and place at which a deposition will be taken. The order must also contain any protections the court finds necessary or appropriate to protect the witness or any person who may be affected by the procedure. Tex. R. Civ. P. 202.4(b).

§ 18.25 Depositions in Foreign Jurisdictions

§ 18.25:1 Method of Taking

A written or oral deposition of a person or entity that is to be taken in another state, a foreign country, or any other foreign or domestic jurisdiction for use in Texas may be taken by—

1. notice;
2. letter rogatory, letter of request, or other such device;  

3. agreement of the parties; or  

4. court order.

Tex. R. Civ. P. 201.1(a). A deposition in another jurisdiction may be taken by telephone, videoconference, teleconference, or other electronic means under the provisions of rule 199. Tex. R. Civ. P. 201.1(g).

§ 18.25:2 Deposition of Party by Notice

A party may take a deposition by notice as if the deposition were being taken in Texas, except that the deposition officer may be a person authorized to administer oaths where the deposition is being taken. Tex. R. Civ. P. 201.1(b).

§ 18.25:3 Letter Rogatory

A letter rogatory is a document addressed to a foreign court requesting that a witness be examined under that court’s jurisdiction. Letters rogatory are typically used to take a deposition in a country that is not a party to the Hague Evidence Convention. See section 18.25:4 below regarding letters of request. On motion by a party, the court in which an action is pending must issue a letter rogatory on just and appropriate terms, regardless of whether any other manner of obtaining the deposition is impractical or inconvenient. The letter must be addressed to the appropriate authority in the jurisdiction in which the deposition is to be taken, request and authorize that authority to summon the witness at a time and place stated in the letter for examination on oral or written questions, and request and authorize that authority to cause the witness’s testimony to be reduced to writing and returned, along with any items marked as exhibits, to the party requesting the letter rogatory. Tex. R. Civ. P. 201.1(c).

§ 18.25:4 Letter of Request, Applicable Treaty, or Convention

A letter of request is essentially the same as a letter rogatory (see section 18.25:3 above), except that it is addressed to a court in a country subscribing to the Hague Evidence Convention and is in the form prescribed by the Convention. See Convention on the Taking of Evidence Abroad in Civil and Criminal Matters, Mar. 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444. On motion by a party, the court or clerk of court must issue a letter of request or other such device in accordance with an applicable treaty or international convention on terms that are just and appropriate. The letter or other device must be issued regardless of whether any other manner of obtaining the deposition is impractical or inconvenient. The letter or other device must be in the form prescribed by the treaty or convention under which it is issued, as presented by the movant to the court or clerk, and must state the time, place, and manner of the examination of the witness. Tex. R. Civ. P. 201.1(d).

§ 18.25:5 Objections to Form of Letter

A party must make any objection to the form of the device in writing and serve it on all other parties by the time set by the court or the objection is waived. Tex. R. Civ. P. 201.1(e).
§ 18.25:6 Departures from Requirements of Deposition Taken in Texas

Evidence obtained in response to a letter rogatory, letter of request, or other device need not be excluded merely because it is not a verbatim transcript, or the testimony was not taken under oath, or for any similar departure from the requirements of depositions taken within Texas under the Texas Rules of Civil Procedure. Tex. R. Civ. P. 201.1(f).

§ 18.26 Deposition by Nonstenographic Recording

§ 18.26:1 Nonstenographic Recording Generally

Any party may take an oral deposition by nonstenographic means, including videotape recording. Tex. R. Civ. P. 199.1(c).

An audiotaped deposition taken without a court reporter is typically much less expensive than a stenographic one. Many attorneys use audiotaped depositions as a postjudgment discovery tool. See section 26.2:2 in this manual.

A videotaped deposition adds an obvious visual element to the deposition process. In a closely contested case, letting the jury see the witness’s behavior and reaction during the deposition could prove crucial—and favorable—to the case.

§ 18.26:2 Mechanics of Nonstenographic Deposition

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

The party requesting the nonstenographic recording is responsible for obtaining a person authorized to administer the oath and for assuring that the recording will be intelligible, accurate, and trustworthy. Tex. R. Civ. P. 199.1(c).

§ 18.26:3 Notice of Deposition by Nonstenographic Recording

At least five days’ notice must be given to the witness and all other parties. The notice must specify the type of nonstenographic recording that will be used and whether the deposition will also be recorded stenographically. Any other party may then serve written notice designating another method for recording in addition to the method specified, at the expense of that other party unless the court orders otherwise. Tex. R. Civ. P. 199.1(c).

§ 18.26:4 Use of Nonstenographic Deposition and Court Reporter’s Transcription

A nonstenographic deposition or a written transcription of such a recording may be used to the same extent as a stenographic deposition. But the court may, for good cause shown, require that the party seeking to use the nonstenographic deposition or written transcription first obtain a complete transcript of the deposition recording from a certified court reporter. The court reporter’s transcription must be made from the original or a certified copy of the deposition recording. Tex. R. Civ. P. 203.6(a).
The court reporter must deliver the original transcript to the attorney requesting the transcript, and the court reporter’s certificate must include a statement that it is a true record of the nonstenographic recording. The party to whom the court reporter delivered the transcript must make the transcript available for inspection and copying by the witness or any party. Tex. R. Civ. P. 203.6(a).

§ 18.27 Deposition by Telephone or Other Remote Electronic Means

A party may take an oral deposition by telephone or other remote electronic means (for example, videoconference) after giving reasonable prior written notice of his intent to do so. A deposition taken by telephone is considered as having been taken in the district and at the place where the deponent is located when answering the questions. The officer taking the deposition may be located with the party noticing the deposition instead of with the witness if the witness is placed under oath by a person present with the witness and authorized to administer oaths in that jurisdiction. Tex. R. Civ. P. 199.1(b).

A party may attend an oral deposition in person, even if it is being taken by telephone or other remote electronic means. The party taking a deposition by telephone or other remote electronic means must make arrangements for all persons to attend by the same means. If the party noticing the deposition appears in person, any other party may appear by remote electronic means if that party makes necessary arrangements with the deposition officer and the party noticing the deposition. Tex. R. Civ. P. 199.5(a)(2).

§ 18.28 Oral Deposition

§ 18.28:1 When Deposition May Be Taken

After commencement of the action, a party may take the testimony of any person or entity by deposition on oral examination. Tex. R. Civ. P. 199.1(a). Leave of court to take an oral deposition is required only if a party seeks to take a deposition outside the discovery period. Tex. R. Civ. P. 199.2(a). See section 18.2 above regarding the discovery period.

§ 18.28:2 Time and Place

The time and place for an oral deposition must be reasonable. Depositions may be taken—

1. in the county of the witness’s residence;
2. in the county where the witness is employed or regularly transacts business in person;
3. in the county of suit, if the witness is a party or a person designated by a party that is an organization;
4. in the county in which the witness was served with a subpoena or within 150 miles of service, if the witness either is not a Texas resident or is a transient person; or
5. at another convenient place directed by the court in which the cause is pending.

Tex. R. Civ. P. 199.2(b)(2). It can be an abuse of discretion to order a deposition taken in a place contrary to that stated in the Rules of Civil Procedure. See Wal-Mart Stores v. Street, 754 S.W.2d 153, 155 (Tex. 1988). But see First State Bank, Bishop v. Chappell & Handly, P.C., 729 S.W.2d 917, 922 (Tex. App.—Corpus Christi 1987, writ ref’d n.r.e.) (no abuse of discretion in ordering chairman of defendant bank to appear at deposition in place not designated by applicable rule).
If the potential for discovery abuse is very great, the trial judge must be especially sensitive to the actual need for the depositions as well as alternative means of taking them. *Dresser Industries v. Solito*, 668 S.W.2d 893, 895 (Tex. App.—Houston [14th Dist.] 1984, no writ) (order that corporate defendant produce for deposition in United States, at own expense, seven overseas witnesses whose testimony of dubious importance held to be abuse of discretion).

For a discussion of depositions in foreign jurisdictions, see section 18.25 above.

§ 18.28:3  **Modification of Deposition Rules or Procedures**

An agreement affecting an oral deposition is enforceable if the agreement is recorded in the deposition transcript or has been agreed to in writing as a rule 11 agreement. *Tex. R. Civ. P. 191.1*. See generally section 18.2:5 above regarding modification of discovery control plans.

§ 18.28:4  **Time for Notice of Deposition**

Reasonable notice must be given by a party proposing to take an oral deposition. *Tex. R. Civ. P. 199.2(a)*. Whether notice is reasonable is within the court’s discretion and determined on a case-by-case basis. See *Hycarbex, Inc. v. Anglo-Suisse, Inc.*, 927 S.W.2d 103, 111 (Tex. App.—Houston [14th Dist.] 1996, no writ); *Hogan v. Beckel*, 783 S.W.2d 307, 308–09 (Tex. App.—San Antonio 1989, writ denied); *Gutierrez v. Walsh*, 748 S.W.2d 27, 28 (Tex. App.—Corpus Christi 1988, no writ); *Bohm Falk v. Linwood*, 742 S.W.2d 518, 520 (Tex. App.—Dallas 1987, no writ).

§ 18.28:5  **Contents and Service of Notice**

A notice for oral deposition must state—

1. the name of the witness (see section 18.28:8 below if the witness is an organization);
2. the time and place of the deposition; and
3. whether the deposition is to be taken by telephone or other remote means and, if so, must identify the means.

*Tex. R. Civ. P. 199.2(b)(1)–(3)*. If persons other than the witness, parties, spouses of parties, counsel, and the deposition officer are to be present, their identities must be disclosed unless separate notice is given. *Tex. R. Civ. P. 199.2(b)(4), 199.5(a)(3)*. A notice may include a request that the witness bring documents or other tangible things with him. *Tex. R. Civ. P. 199.2(b)(5)*; see section 18.28:7 below. The notice must be served on the witness and all parties. *Tex. R. Civ. P. 199.2(a)*. For a notice, see form 18-3 in this chapter.

§ 18.28:6  **Subpoena**

The witness may be compelled to attend by being served with a subpoena under *Tex. R. Civ. P. 176*. If the witness is not a party but is not a hostile witness, it is good practice to notify the witness in writing that he will be receiving a subpoena and (if appropriate) to inform him of the nature of the questions to be asked at the deposition. If, however, the witness is a party or is retained by, employed by, or otherwise subject to the control of a party, service of the notice of deposition on the party’s attorney has the same effect as a subpoena served on the witness. *Tex. R. Civ. P. 199.3*. See section 18.30 below regarding subpoenas.
§ 18.28:7  Request for Production (Subpoena Duces Tecum); Subpoena to Compel Attendance

The notice of deposition may include a request that the witness produce documents or other tangible things within the scope of discovery and within his possession, custody, or control. If the witness is not a party, this request must comply with Tex. R. Civ. P. 205, and the designation of materials required to be identified in the subpoena must be attached to or included in the notice. Tex. R. Civ. P. 199.2(b)(5). If a subpoena duces tecum or subpoena to compel attendance on a nonparty is required, it can be issued by an officer authorized to take depositions, the clerk of the appropriate court, or an attorney authorized to practice law in Texas. Tex. R. Civ. P. 176.4. If the witness is a party or subject to the control of a party, document requests are governed by Tex. R. Civ. P. 193 and 196. Tex. R. Civ. P. 199.2(b)(5).

§ 18.28:8  If Witness Is Organization

If an organization is named as the witness, the notice must state with reasonable particularity the matters on which examination is requested. In response, the organization named in the notice must, within a reasonable time before the deposition, designate one or more individuals to testify on its behalf and set forth for each individual designated the matters on which the individual will testify. Each such individual must testify as to matters that are known or are reasonably available to the organization. Tex. R. Civ. P. 199.2(b)(1).

§ 18.28:9  Oath of Witness

Every person whose deposition is taken by oral examination must first be placed under oath. Tex. R. Civ. P. 199.5(b).

§ 18.28:10  Examination, Cross-Examination, and Written Cross-Questions of Witness

The oral deposition generally must be conducted in the same manner as if the testimony were being obtained in court during trial. Tex. R. Civ. P. 199.5(d). This requirement is a limit on the conduct of the attorneys and the witnesses in the deposition, not on the scope of the interrogation. Tex. R. Civ. P. 199 cmt. 3. An attorney may not ask a question solely to harass or mislead the witness, for any improper purpose, or without a good-faith legal basis for asking it. Tex. R. Civ. P. 199.5(h). Written cross-questions on oral examination will be propounded to the witness by the officer authorized to take the deposition. Tex. R. Civ. P. 199.5(b).

§ 18.28:11  Court Reporter’s Fee

The attorney taking the deposition of the witness is responsible (as is his firm) for paying the court reporter and will receive the original deposition from the reporter. Tex. Gov’t Code § 52.059(a).

§ 18.28:12  Objections

Objections to questions during deposition are limited to “objection, leading” and “objection, form.” Objections to testimony are limited to “objection, nonresponsive.” These objections are waived if not stated as phrased above during the deposition. All other objections need not be made or recorded during the deposition to be later raised with the court. The objecting party must, on request by the party taking the deposition, give a clear and concise explanation of his objection, or the objection is waived. Argumentative or suggestive objections or explanations waive the objection and may be grounds for either terminating the deposition or assessing costs or other sanctions. The officer taking the deposition may not rule on objections but must
record them for ruling by the court and may not fail to record testimony because an objection has been made. Tex. R. Civ. P. 199.5(e).

§ 18.28:13 Instructions Not to Answer

An attorney may instruct the witness not to answer only if necessary to preserve a privilege, comply with a court order or the rules of civil procedure, protect the witness from an abusive question or one for which an answer would be misleading, or secure a ruling on an alleged violation of the rules of civil procedure. The attorney so instructing must give a concise, nonargumentative, nonsuggestive explanation of the grounds for the instruction, if requested by the party asking the question. Tex. R. Civ. P. 199.5(f).

§ 18.28:14 Conferences between Witness and Attorney

Private conferences between the witness and his attorney during the actual taking of the deposition are improper except to determine whether a privilege should be asserted. These conferences may, however, be taken during recesses and adjournments. Failure to comply may result in the court’s allowing in evidence at trial statements, objections, discussions, and other occurrences during the deposition that reflect on the credibility of the witness or the testimony. Tex. R. Civ. P. 199.5(d).

§ 18.28:15 Hearings on Objections and Assertions of Privilege

Any party may, at any reasonable time, request a hearing on an objection or assertion of privilege by an instruction not to answer or by suspension of the deposition. The party seeking to avoid discovery must present any evidence necessary to support his objection or assertion of privilege, either by testimony or by affidavits served on opposing parties at least seven days before the hearing. If the court determines that an in camera review of some or all of the requested discovery is necessary to rule, answers to the deposition questions may be made in camera, to be transcribed and sealed if the privilege is sustained, or made in an affidavit produced to the court in a sealed wrapper. Tex. R. Civ. P. 199.6.

§ 18.29 Deposition on Written Questions

§ 18.29:1 When and Where Deposition May Be Taken

Depositions on written questions may be taken outside the discovery period only by leave of court or by agreement of the parties. Tex. R. Civ. P. 200.1(a). See section 18.2 above regarding the discovery period. The rules governing location of oral depositions also govern depositions on written questions. Tex. R. Civ. P. 199.2(b), 200.1(b). See section 18.28:2 above.

§ 18.29:2 Notice

A notice of intent to take a deposition on written questions must be served on the witness and all parties at least twenty days before the deposition is taken. Tex. R. Civ. P. 200.1(a). The content of the notice must comply generally with Tex. R. Civ. P. 199.2(b). See section 18.28:5 above. The direct questions to be propounded to the witness must also be attached to the notice. Tex. R. Civ. P. 200.3(a). If additional persons besides the witness, parties, spouses of parties, counsel, employees of counsel, and the deposition officer will be present at the deposition, their identities must also be included in the notice unless separate notice is given. Tex. R. Civ. P. 199.5(a)(3). The notice may also include a request for production of documents as permitted by Tex. R. Civ. P. 199.2(b)(5), which governs the request, service, and response. Tex. R. Civ. P. 200.1(b).
§ 18.29:3  Subpoena

If the witness is a party or is retained by, employed by, or otherwise subject to the control of a party, service of the notice on the party’s attorney has the effect of a subpoena served on the witness. Tex. R. Civ. P. 200.2. Nonparties may be compelled to testify by being served with a subpoena. Tex. R. Civ. P. 205. See section 18.30 below regarding subpoenas generally.

§ 18.29:4  Objections and Additional Questions

Within ten days after the notice and direct questions are served, any party may object to the direct questions and also serve cross-questions on all other parties. Tex. R. Civ. P. 200.3(b). Rule 200.3(b) has additional deadlines regarding objections to the cross-questions and service of redirect questions. Objections to the form of a question are waived unless asserted in accordance with rule 200.3(b). Tex. R. Civ. P. 200.3(c).

§ 18.29:5  Officers Who May Take Deposition


§ 18.29:6  Conducting Deposition

The deposition officer must—

1. take the deposition on written questions at the time and place set out in the notice;

2. record the testimony of the witness under oath in response to the questions; and

3. prepare, certify, and deliver the deposition transcript in accordance with rule 203.

Tex. R. Civ. P. 200.4. See section 18.31 below regarding preparation, certification, and delivery of the deposition transcript.

§ 18.29:7  Use of Deposition on Written Questions

Because depositions on written questions do not allow the examining attorney to follow up on the deponent’s responses or on documents the deponent has brought under a subpoena duces tecum, they are best used in situations in which the information sought is already known but needs to be proved for summary judgment or trial purposes. In collections litigation, a good use would be to prove up business records without having to bring the custodian of the records to court. A set of deposition questions for this purpose is found at form 18-6 in this chapter. Alternatively, an affidavit can be used for proving up a business record. See form 19-1 in this manual.
§ 18.30 Subpoenas

§ 18.30:1 Parties

Subpoenas are used to compel the witness’s attendance at either oral or written depositions. A subpoena is not necessary to compel the attendance of a party-witness or an agent or employee subject to control of the party. For such a witness, notice of the deposition has the same effect as a subpoena. Tex. R. Civ. P. 199.3, 200.2.

§ 18.30:2 Requirements

Every subpoena must be issued in the name of “the State of Texas” and must—

1. state the style of the suit and its cause number;
2. state the court in which the suit is pending;
3. state the date it is issued;
4. identify the person to whom it is directed;
5. state the time, place, and nature of the action required by the person to whom it is directed, as provided in rule 176.2;
6. identify the party who requested the subpoena and the party’s attorney, if any;
7. state the text of rule 176.8(a); and
8. be signed by the person issuing the subpoena.


§ 18.30:3 Nonparties

A subpoena duces tecum orders the nonparty witness to bring documents or other tangible items under the witness’s control to the deposition. The subpoena must designate with reasonable particularity the items or categories of items to be brought. Tex. R. Civ. P. 205. See form 18-4 in this chapter for a subpoena with duces tecum language. If the witness is not a party but is not a hostile witness, it is good practice to notify the witness in writing that he will be receiving a subpoena.

§ 18.30:4 Who May Issue Subpoena

The clerk of the appropriate district, county, or justice court, an attorney authorized to practice law in Texas, or an officer authorized to take depositions in Texas may issue a subpoena. Tex. R. Civ. P. 176.4.

§ 18.30:5 Subpoena to Organization

If the subpoena is directed to a corporation, partnership, association, government agency, or other organization and the matters on which examination is sought are described with reasonable particularity, the organization must designate one or more persons to testify on its behalf as to matters known or reasonably available to the organization. Tex. R. Civ. P. 176.6(b).
§ 18.30:6 Limitations of Subpoena Power and Protection of Person Served

A person is not required to appear in a county that is more than 150 miles from where he resides or is served. This limitation does not apply to witnesses (such as a party or a party’s representative) whose appearance may be compelled by notice alone under Tex. R. Civ. P. 199.3 or 200.2. Tex. R. Civ. P. 176.3(a). If the 150-mile limit impedes the taking of a necessary deposition, the attorney should arrange to conduct the deposition sufficiently close to the witness to satisfy this rule. Also, a subpoena may not be used for discovery to an extent, in a manner, or at a time other than as provided by the rules of discovery. Tex. R. Civ. P. 176.3(b). The issuing party must take reasonable steps to avoid imposing undue burden or expense on the person served. Tex. R. Civ. P. 176.7. A court may impose reasonable conditions on compliance with a subpoena, including compensating the witness for any undue hardship. Tex. R. Civ. P. 176.7; see, e.g., BASF FINA Petrochemicals L.P. v. H.B. Zachry Co., 168 S.W.3d 867, 875 (Tex. App.—Houston [1st Dist.] 2004, pet. denied).

§ 18.30:7 Service and Return of Service

A subpoena may be served at any place within the state of Texas by any sheriff or constable of Texas or any person who is not a party and is eighteen years of age or older. It must be served by delivering a copy to the witness and tendering to him any fees required by law. Tex. R. Civ. P. 176.5(a). For proof of service, see Tex. R. Civ. P. 176.5(b).

§ 18.31 Postdeposition Procedure

§ 18.31:1 Submission to Witness, Changes, and Signature

After transcription of the testimony, the deposition officer must provide the original deposition transcript to the witness or to his attorney of record if he has one. The witness is to examine and sign the transcript under oath. No erasures or obliterations are to be made to the original testimony in the transcript. Any changes must be made in writing on a separate sheet of paper, along with a statement of the witness’s reasons for the changes. If the witness does not sign and return the original transcript within twenty days of its submission to him (or to his attorney of record), he is deemed to have waived his right to make any changes to his testimony. Tex. R. Civ. P. 203.1(b). These submission and signature requirements may be waived by the witness and all parties, and they do not apply to depositions on written questions or nonstenographic depositions. Tex. R. Civ. P. 203.1(c).

§ 18.31:2 Transcription, Certification, and Delivery

The officer responsible for the deposition must certify the deposition transcript. See Tex. R. Civ. P. 203.2. The officer must deliver the deposition transcript to the party who asked the first question appearing in the transcript and must give notice of delivery to all other parties. Tex. R. Civ. P. 203.3. For a nonstenographic deposition, delivery is made to the party requesting it. Tex. R. Civ. P. 203.3(a). The officer must serve notice of delivery on all other parties. Tex. R. Civ. P. 203.3(b).

§ 18.31:3 Exhibits

On request of a party, the original documents and things produced at the deposition must be marked for identification and annexed to the transcript by the deposition officer. The person producing the materials may produce copies instead of originals if he gives all other parties fair opportunity at the deposition to compare the copies with the originals. If the person offers originals rather than copies, the deposition officer must make copies to be attached to the original deposition transcript and return
the originals to the person who produced them. The person who produced the originals must preserve them for hearing or trial and make them available for inspection or copying by any other party on seven days’ notice. Copies annexed to the original transcript may be used for all purposes. Tex. R. Civ. P. 203.4.

§ 18.31:4  Inspection and Copying

On reasonable request, the party receiving the original deposition transcript or nonstenographic recording must make it available for inspection or copying by any other party to the suit. On payment of a reasonable fee, the deposition officer must furnish a copy of the deposition to any party or to the witness. Tex. R. Civ. P. 203.3(c).

§ 18.31:5  Motion to Suppress

If a deposition transcript has been delivered and notice of delivery has been given at least one day before the case is called for trial, errors and irregularities in the manner in which the testimony is transcribed, signed, delivered, or otherwise dealt with by the deposition officer are waived unless a motion to suppress all or part of a deposition is filed and served before trial commences. Tex. R. Civ. P. 203.5.

§ 18.32  Necessity for and Form of Response

§ 18.32:1  Failure to Appear or Answer

After service of a subpoena, a witness who fails to appear for the taking of his deposition or refuses to answer a question during his deposition may incur sanctions. See Tex. R. Civ. P. 215.1(b); see also Wiley v. Browning, 670 S.W.2d 729, 731 (Tex. App.—Tyler 1984, no writ). See also part VII. in this chapter.

§ 18.32:2  Errors of Noticing Party

Reasonable attorney’s fees and expenses incurred for attending a deposition may be recovered if the noticing party fails to attend and proceed or if a witness does not attend because of fault of the noticing party. Tex. R. Civ. P. 215.5.

§ 18.33  Use and Effect of Deposition

§ 18.33:1  Use

A deposition may contain helpful, admissible evidence. Additionally, a deposition is useful for exploring the knowledge of the witness for the purpose of discovering evidence and determining the need for additional investigation; it may lay the groundwork for subsequent discovery procedures (such as requests for admissions) that will establish admissible evidence or isolate and refine matters of fact that need to be tried. For a discussion of requests for admissions, see part III. in this chapter.

§ 18.33:2  Inclusion in Evidence Generally

Depositions must be read into evidence at trial, not merely filed with the court, or introduced as exhibits in their entirety to be considered part of the record on appeal. Johnson by Johnson v. Li, 762 S.W.2d 307, 308–09 (Tex. App.—Fort Worth 1988, writ denied); Robertson Truck Lines v. Hogden, 487 S.W.2d 401, 402 (Tex. Civ. App.—Beaumont 1972, writ ref’d n.r.e.).
However, the deposition need not be read into the record or played in chronological order. *Jones v. Colley*, 820 S.W.2d 863, 866 (Tex. App.—Texarkana 1991, writ denied).

The proper method for introducing deposition testimony into evidence is for the practitioner to read the proffered questions in the deposition transcript while another person reads the answers from the deposition transcript from the witness stand. *See Fenn v. Boxwell*, 312 S.W.2d 536, 546 (Tex. Civ. App.—Amarillo 1958, writ ref’d n.r.e.). Nonetheless, nothing prevents offering and admitting the complete deposition transcript into evidence in the absence of an objection, even if it is not read at trial. *See Fenn*, 312 S.W.2d at 546.

All or part of a deposition may be used for any purpose in the same proceeding in which it was taken. “Same proceeding” includes a proceeding in a different court but involving the same subject matter and parties (or their representatives or successors in interest). The deposition is admissible against a party joined in the suit after the deposition was taken if the deposition is admissible under Tex. R. Evid. 804(b)(1) or the party has had a reasonable opportunity to redepose the witness and has failed to do so. *Tex. R. Civ. P. 203.6(b)*.

§ 18.33:3 Use in Summary Judgment

Depositions properly filed with the court may be used as summary judgment evidence. Also, depositions not filed with the court clerk may be used as summary judgment evidence if copies of the material, appendixes containing the evidence, or a notice containing specific references to the discovery or specific references to other instruments are filed and served on all parties together with a statement of intent to use the specified discovery as summary judgment proof at least twenty-one days before the hearing if the proof is to be used to support the summary judgment or at least seven days before the hearing if the proof is to be used to oppose the summary judgment. *Tex. R. Civ. P. 166a(d)*. Depositions properly submitted as summary judgment proof can be considered on appeal.

Conflicting inferences that can be drawn from a deposition and from an affidavit filed by the same party in opposition to a motion for summary judgment raise a fact issue precluding summary judgment. *Randall v. Dallas Power & Light Co.*, 752 S.W.2d 4, 5 (Tex. 1988) (deposition testimony cannot be given controlling effect over affidavit); *see also Highlands Insurance Co. v. Currey*, 773 S.W.2d 750, 752 (Tex. App.—Houston [14th Dist.] 1989, writ denied) (deposition of one party’s witness contradicted statements in adverse party’s affidavit, precluding partial summary judgment). However, in *Cantu v. Peacher*, 53 S.W.3d 5 (Tex. App.—San Antonio 2001, pet. denied), the court held that the preclusive effect depends on the nature and extent of the differences. *See also Dyer v. Shafer, Gilliland, Davis, McCollum & Ashley, Inc.*, 779 S.W.2d 474, 477 (Tex. App.—El Paso 1989, writ denied) (deposition testimony as reliable as, if not more reliable than, ex parte affidavit offered as summary judgment evidence).

[Sections 18.34 through 18.40 are reserved for expansion.]
III. Requests for Admissions

§ 18.41 Admissions Generally

§ 18.41:1 Purpose

The object of requests for admissions of facts and of genuineness of documents under rule 198 is not primarily discovery. See Gore v. Cunningham, 297 S.W.2d 287, 291 (Tex. Civ. App.—Beaumont 1956, writ ref’d n.r.e.). The main purpose is to simplify trials by eliminating the necessity of proving facts about which there is no real controversy. North River Insurance Co. v. Greene, 824 S.W.2d 697, 700 (Tex. App.—El Paso 1992, writ denied).

Many collections cases, in which the fact of the unpaid debt is not in dispute but the debtor has nonetheless filed an answer, are properly reduced to judgment by using requests for admissions to establish the elements of the cause of action, followed by a summary judgment. See part III. in chapter 19 of this manual regarding summary judgments.

§ 18.41:2 Source of Rule

The requests-for-admissions rules, Tex. R. Civ. P. 198, has its source in and is almost identical to Fed. R. Civ. P. 36.

§ 18.41:3 Who May Be Served

The rule governing requests for admissions does not provide for making such requests on non-parties. See Tex. R. Civ. P. 198.1. See also In re Anand, No. 01-12-01106-CV, 2013 WL 1316436, at *3 (Tex. App.—Houston [1st Dist.] Apr. 2, 2013, no. pet., orig. proceeding) (per curiam) (mem. op.) (“Rule 205 . . . governs discovery of nonparties . . . ”).

§ 18.42 Scope of Requests for Admissions

Subject to certain limitations and protective orders, requests for admissions may inquire about any relevant matter of claim or defense, even though it may be inadmissible at trial, if the information appears reasonably calculated to lead to the discovery of admissible evidence. Tex. R. Civ. P. 192.3(a). Requests for admissions may relate to statements of opinion or of fact or of the application of law to fact, including the genuineness of any document described in the request. Tex. R. Civ. P. 198.1. For a general discussion of the scope of discovery, see part I. in this chapter.

Requests may not be used to trap an opponent into admitting that he has no cause of action or ground of defense. Birdo v. Parker, 842 S.W.2d 699, 700 (Tex. App.—Tyler 1992, writ denied).

§ 18.43 Form of Requests for Admissions

§ 18.43:1 Nature of Requests

Requests should be specific statements that the recipient is asked to admit or deny. It is generally more effective to first use a more exploratory form of discovery (such as interrogatories) to uncover and develop evidence and then use requests for admissions to establish specific matters of fact.
For pattern requests, see forms 18-8 (sworn account), 18-9 (contract or revolving credit account), 18-10 (promissory note), 18-11 (foreclosure of security interest), 18-12 (lease of personality), and 18-13 (guaranty agreement) in this chapter.

§ 18.43:2 Format and Number of Requests

Requests are usually phrased as statements sought to be affirmed. Each request must be separately set forth. A copy of a document whose genuineness is sought to be established should be served with the request, even if a copy has already been made available. Questions should be short and simple and should lend themselves to unambiguous answers; confusing questions may lead to confusing answers that the court may construe against the proponent. The questions should address the proper subject matter for requests for admissions. See Tex. R. Civ. P. 198.1.

Level 1 discovery limits a party to no more than fifteen requests for admissions. Each discrete subpart of a request for admission is considered a separate request. Tex. R. Civ. P. 190.2(b)(5).

§ 18.43:3 Legal Advice or Threats

The instructions preceding the request, being a communication with an adverse party, should not contain legal advice or threats about possible consequences of not replying. See section 18.4:3 above. For a form set of instructions, see form 18-7 in this chapter.

§ 18.44 Method of Service

See sections 18.13:3 and 18.13:4 above for a discussion about serving requests for admissions.

§ 18.45 Responses

§ 18.45:1 No Response or Late Response

If a responding party fails to serve a sufficient written answer or objection on the requesting party within thirty days after service of the request or otherwise as agreed by the parties (or fifty days if the requests were served on a defendant before his answer day), each requested matter will be deemed admitted without the necessity of a court order. Tex. R. Civ. P. 198.2(a), (c); In re TT Fountains of Tomball, Ltd., No. 01-15-00817-CV, 2016 WL 3965117 (Tex. App.—Houston [1st Dist.] July 21, 2016, orig. proceeding); Skelton v. Commission for Lawyer Discipline, 56 S.W.3d 687, 692 (Tex. App.—Houston [14th Dist.] 2001, no pet.). The trial court has no discretion to refuse to deem the matters admitted. Curry v. Clayton, 715 S.W.2d 77, 79 (Tex. App.—Dallas 1986, no writ). Nevertheless, the defaulting party can file a motion to amend, withdraw, or strike previously admitted matters. Curry, 715 S.W.2d at 78 n.3. See section 18.46 below.

Tex. R. Civ. P. 21a extends by three days the time period for responding to requests for admissions that are served by mail. Further, Tex. R. Civ. P. 4 allows the last day of the time period to run to a day that is not a Saturday, Sunday, or legal holiday. Therefore, in a case in which the record contained evidence of mailing, a party’s response to requests for admissions was timely filed on the thirty-fifth day. Benger Builders, Inc. v. Business Credit Leasing, Inc., 764 S.W.2d 336, 337–38 (Tex. App.—Houston [1st Dist.] 1988, writ denied). The time for response runs from the date of mailing, not the date of receipt, of the requests. Cherry v. North American Lloyds, 770 S.W.2d 4, 5 (Tex. App.—Houston [1st Dist.] 1989, writ denied).
Due diligence should be exercised in seeking an extension of time to file answers to requests. See Boyter v. M.C.R. Construction Co., 673 S.W.2d 938, 940 (Tex. App.—Dallas 1984, writ ref’d n.r.e.). To avoid having requests deemed admitted, a party should move for permission to file late answers and obtain an order to that effect before the time for answering has expired. Tex. R. Civ. P. 5. The court has broad discretion to refuse or grant such a motion. See Hoffman v. Texas Commerce Bank, 846 S.W.2d 336, 338 (Tex. App.—Houston [14th Dist.] 1992, writ denied). But see Liberty Mutual Fire Insurance Co. v. Hayden, 805 S.W.2d 932, 935 (Tex. App.—Beaumont 1991, no writ) (trial court should have had full evidentiary hearing to determine date party received request for admissions).

§ 18.45:2 Effect of Objections

The party seeking an admission may move for a determination of the sufficiency of an objection. Unless the court determines that an objection is justified, it must order that an answer be served. Tex. R. Civ. P. 215.4(a). Any objection must be served within the time for response. Tex. R. Civ. P. 193.2(a). See section 18.9 above regarding objections to written discovery.

§ 18.45:3 Form of Response

Unless the responding party states an objection or asserts a privilege, he must either specifically admit or deny the request or explain in detail the reasons he cannot admit or deny it. A response must fairly meet the substance of the request. The responding party may qualify an answer or deny a request in part only when good faith requires. Tex. R. Civ. P. 198.2(b).

Lack of information or knowledge is not a proper response unless the responding party states that he has made a reasonable inquiry and that the information known or easily obtainable is insufficient to enable him to admit or deny the request. An assertion that the request presents an issue for trial is not a proper response. Tex. R. Civ. P. 198.2(b).

See section 18.9 above regarding objections to written discovery and section 18.10 regarding assertions of privilege.

§ 18.45:4 Inadequate Response

The party requesting the admission may move to determine the sufficiency of answers or objections. If the court determines that an answer is inadequate, it may order the matter admitted or it may order the respondent to serve an amended answer. Unless the court determines that an objection is justified, it must order that an answer be served. Incomplete or evasive answers may be treated as a failure to answer and may therefore be deemed admitted. Tex. R. Civ. P. 215.4(a); see First Title Co. of Corpus Christi v. Cook, 625 S.W.2d 814, 818 (Tex. Civ. App.—Fort Worth 1981, writ dism’d); see also Kansas City Title Insurance Co. v. Atlas Life Insurance Co., 336 S.W.2d 204, 207 (Tex. Civ. App.—Texarkana 1960, no writ). The proponent’s attorney’s fees and expenses in a proceeding to determine the sufficiency of answers or objections may be recoverable. See Tex. R. Civ. P. 215.4(b). See also section 18.45:6 below.

§ 18.45:5 Failure to Admit

The failure to serve a sufficient written answer or objection constitutes a violation of discovery. If the respondent fails to admit the genuineness of a document or the truth of a matter as requested and the proponent subsequently proves the genuineness of the document or truth of the matter, the proponent may request the court to order the respondent to pay for the reasonable expenses in making its proof, including reasonable attorney’s fees. The court must make this order unless it finds that (1) the request was held objectionable, (2) the admission sought was of no substantial importance, (3) the party failing to admit had a
reasonable ground to believe he might prevail on the matter, or (4) other good reason exists for the failure to admit. Tex. R. Civ. P. 215.4(b).

§ 18.45:6 Expenses

The provisions concerning the award of expenses in connection with a motion to compel are applicable to motions to determine the sufficiency of the answers or objections to requests for admissions. Tex. R. Civ. P. 215.4(a); see also section 18.83 below. Additionally, if a party fails to admit the truth of any matter or the genuineness of any document as requested under Tex. R. Civ. P. 198 and if the party requesting the admission thereafter proves the truth of the matter or the genuineness of the document, the requesting party may apply to the court for an order requiring the failing party to pay the reasonable expenses incurred in making that proof, including reasonable attorney’s fees. The court is required to make the order unless the request was held objectionable under rule 193, the admission sought was of no substantial importance, the party failing to admit had a reasonable ground to believe that he might prevail on the matter, or there was other good reason for the failure to admit. Tex. R. Civ. P. 215.4(b).

§ 18.45:7 Method of Service

Responses must be served on the requesting party and on all parties of record. Tex. R. Civ. P. 191.5.

§ 18.46 Withdrawal or Amendment of Admissions

The court may permit withdrawal or amendment of admissions on a showing of good cause and a finding that the party relying on the responses will not be unduly prejudiced and that the presentation of the merits of the case will be subserved by permitting the withdrawal or amendment. Tex. R. Civ. P. 198.3. Pitre v. Sharp, No. 05-15-00173-CV, 2016 WL 2967826, at *3 (Tex. App.—Dallas May 13, 2016, no pet.). Good cause is established by showing the failure to respond was an accident or mistake, not intentional or the result of conscious indifference. Marino v. King, 355 S.W.3d 629, 633 (Tex. 2011); Wheeler v. Green, 157 S.W.3d 439, 442 (Tex. 2005). Undue prejudice depends on whether withdrawing an admission will delay trial or significantly hamper the opposing party’s ability to prepare for trial. Marino, 355 S.W.3d at 633; Wheeler, 157 S.W.3d at 443.

The rules governing admissions are designed to bring about a fair disposition of litigation with a minimum of delay. They were never designed as traps for the unwary, nor should they be construed to deny a litigant the right to present the truth to the trier of the facts. Therefore, the right to amend answers on proper motion rests within the sound discretion of the trial court. Stelly v. Papania, 927 S.W.2d 620, 622 (Tex. 1996); Pitre, 2016 WL 2967826, at *3. That discretion may be exercised to preclude amendment if the proponent would be prejudiced. See Ice Service Co. v. Scruggs, 284 S.W.2d 185, 190–91 (Tex. Civ. App.—Fort Worth 1955, writ ref’d n.r.e.).

§ 18.47 Sanctions

Tex. R. Civ. P. 215 governs the sanctions applicable to discovery by requests for admissions, as well as other forms of discovery. Sanctions apply to any party abusing discovery. See part VII. below for a discussion of sanctions.
§ 18.48 Use, Effect, and Evidentiary Value of Requests and Responses

§ 18.48:1 Use and Effect

Under rule 198, admissions may be used only in the suit in which the requests were served, and in no other legal proceeding. Tex. R. Civ. P. 198.3. Admissions may be used by all parties to the suit, including parties that were joined after the admissions were made. Jolet v. García, No. 05-97-01461-CV, 2000 WL 276906, at *3 (Tex. App.—Dallas Mar. 15, 2000, pet. denied) (mem. op., not designated for publication). But an admission may be used against only the party making the admission. Tex. R. Civ. P. 198.3. See also Grimes v. Jalco, Inc., 630 S.W.2d 282, 284 (Tex. App.—Houston [1st Dist.] 1981, writ ref’d n.r.e.), overruled on other grounds by Medina v. Herrera, 927 S.W.2d 597, 605 (Tex. 1996) (finding that a judicial admission by defendant that plaintiff was an employee and not an independent contractor was not binding on plaintiff). Deemed admissions may be employed as summary judgment proof. Elkins v. Jones, 613 S.W.2d 533, 534 (Tex. Civ. App.—Austin 1981, no writ).

A matter admitted is conclusively established as to the party making the admission unless the court permits the party to withdraw or amend the admission. Tex. R. Civ. P. 198.3. Further, a party appearing in one capacity cannot be bound by an admission sent to it in another capacity, because admissions are binding against only the party making the admission. United States Fidelity & Guaranty Co. v. Goudeau, 272 S.W.3d 603, 610 (Tex. 2008).

§ 18.48:2 Matters Deemed Admitted Automatically

Unanswered requests for admissions are automatically deemed admitted unless the court, on motion, permits their withdrawal or amendment. No motion to have the matters deemed admitted is necessary. Tex. R. Civ. P. 198.2(c), 198.3. Nonetheless, local practice may require the filing of a motion before answers are deemed admitted.

Practice Note: The best practice is to refer to a court’s local rules for further guidance.

§ 18.48:3 Evidentiary Effect of Deemed Admissions

Admissions, deemed or otherwise, are considered judicial admissions. Sherman Acquisition II LP v. García, 229 S.W.3d 802, 812 (Tex. App.—Waco 2007, no pet.). Thus, matters deemed admitted cannot be controverted by live testimony, deposition testimony, or summary judgment affidavits. Marshall v. Vise, 767 S.W.2d 699, 700 (Tex. 1989). If a jury determines facts that are contrary to a judicial admission, the admission is controlling. See Marshall, 767 S.W.2d at 700 (citing Shaw v. National County Mutual Fire Insurance Co., 723 S.W.2d 236, 238 (Tex. App.—Houston [1st Dist.] 1986, no writ)).

If requests are deemed admitted, the court should not allow evidence to controvert the matters taken as true. However, it is the responsibility of the party relying on the admissions to prevent controverting evidence from being used. Marshall, 767 S.W.2d at 700. Neither can the court ignore judicial admissions on its own motion. Pathfinder Personnel Service v. Worsham, 619 S.W.2d 475, 476 (Tex. Civ. App.—Houston [14th Dist.] 1981, no writ). On the other hand, a court is not bound by deemed admissions if the matters requested to be admitted are appropriately within its discretion. See Satterfield v. Huff, 768 S.W.2d 839, 840–41 (Tex. App.—Austin 1989, writ denied).
§ 18.48:4  Offering Admissions in Evidence

Admissions need not be introduced in evidence to be properly before the trial court or court of appeals. Red Ball Motor Freight, Inc. v. Dean, 549 S.W.2d 41, 43 (Tex. Civ. App.—Tyler 1977, writ dism’d w.o.j.). In order to avoid confusion and promote clarity in the records, however, it is advisable to do so. Denials and objections to requests for admissions have no probative value. American Communications Telecommunications, Inc. v. Commerce North Bank, 691 S.W.2d 44, 48 (Tex. App.—San Antonio 1985, writ ref’d n.r.e.). At trial, a party relying on admissions must protect the record by objecting to controverting evidence and to the submission of any issue bearing on the facts admitted. Marshall v. Vise, 767 S.W.2d 699, 700 (Tex. 1989). Failure to properly protect the record waives the right to rely on the controverted admissions. See Marshall, 767 S.W.2d at 700 (holding that party waived right to rely on admissions controverted by testimony admitted at trial without objection); see also Acevedo v. Commission for Lawyer Discipline, 131 S.W.3d 99, 104–05 (Tex. App.—San Antonio 2004, pet. denied) (discussing waiver of right to rely on deemed admissions in summary judgment and trial contexts).

§ 18.48:5  Admissions as Summary Judgment Evidence

Admissions are proper summary judgment evidence. Wenco of El Paso/Las Cruces, Inc. v. Nazario, 783 S.W.2d 663, 665 (Tex. App.—El Paso 1989, no writ); Velchoff v. Campbell, 710 S.W.2d 613, 614 (Tex. App.—Dallas 1986, no writ). Answers to requests for admissions, however, may be used only against the party filing the answers and may not be used by the party answering the admissions to raise fact issues to defeat a summary judgment motion. Jeffrey v. Larry Plotnick Co., 532 S.W.2d 99, 102 (Tex. Civ. App.—Dallas 1975, no writ). Furthermore, neither denials to requests for admissions nor nonresponsive or self-serving responses may be used to raise a fact issue on a motion for summary judgment. Canutillo Independent School District v. Kennedy, 673 S.W.2d 407, 408 (Tex. App.—El Paso 1984, writ ref’d n.r.e.); Denton Construction Co. v. Mike’s Electric Co., 621 S.W.2d 846, 848 (Tex. App.—Fort Worth 1981, writ ref’d n.r.e.). A party who has failed to answer requests will not be allowed to present summary judgment proof contradictory to those admissions. Henke Grain Co. v. Keenan, 658 S.W.2d 343, 347 (Tex. App.—Corpus Christi 1983, no writ).

[Sections 18.49 and 18.50 are reserved for expansion.]

IV. Interrogatories

§ 18.51  Interrogatories Generally

§ 18.51:1  Purpose

Interrogatories are written questions directed solely to a party and answered by that party under oath. Tex. R. Civ. P. 197. Interrogatories are designed to elicit the basic facts of the case and to provide mutual knowledge of all relevant facts gathered by the parties. Texas Department of Corrections v. Herring, 513 S.W.2d 6, 8 (Tex. 1974); see also Hickman v. Taylor, 329 U.S. 495, 507 (1947) (discussing the value of pretrial discovery in helping the parties understand the facts and reducing the possibility of surprise). Some of the functions formerly performed by interrogatories are now fulfilled by requests for disclosure. See part V. below regarding requests for disclosure.
§ 18.51 Source of Rule

The Texas interrogatory rule, Tex. R. Civ. P. 197, has its source in Fed. R. Civ. P. 33, and there is substantial similarity in the language of the two rules. However, rule 197 and other rules governing interrogatories cover a number of matters not mentioned in the federal rule, such as the following:

1. The responding party’s answers, objections, and other responses must be preceded by the interrogatory. Tex. R. Civ. P. 193.1.

2. Answers, subject to any objections as to admissibility, may be used only against the party answering the interrogatory. Tex. R. Civ. P. 197.3; Palmer v. Espey Huston & Associates, 84 S.W.3d 345, 356 (Tex. App.—Corpus Christi 2002, pet. denied).

3. Answers based on public records may be supplied by specifying the records from which the answers may be derived, in such a manner as to permit the propounding party to locate and identify the records from which the answers may be ascertained as readily as can the party served. For business records, the responding party must produce the documents at the time and place stated or afford the propounding party reasonable opportunity to examine, audit, or inspect those records and to make copies, compilations, abstracts, or summaries. Tex. R. Civ. P. 197.2(c).

4. Objection may be made to portions of interrogatories.


§ 18.52 Scope of Interrogatories

Interrogatories may inquire into any matter within the scope of discovery except matters covered by Tex. R. Civ. P. 195 (testifying expert witnesses). They may inquire whether the party makes a specific factual or legal contention and may ask the party to state the factual theories and describe in general the factual bases for the party’s claims or defenses, but may not be used to require the party to marshal all of his available proof or the proof the party intends to offer at trial. Tex. R. Civ. P. 197.1. Interrogatories may not ask a party to state all his legal and factual assertions. Tex. R. Civ. P. 197 cmt. 1.

So-called “fishing expeditions” are not allowed in interrogatories. K Mart Corp. v. Sanderson, 937 S.W.2d 429, 431 (Tex. 1996). Interrogatories requesting a party to detail all relevant knowledge and opinions of each potential witness may be improper. Compare Housing Authority of El Paso v. Rodriguez-Yepez, 828 S.W.2d 499, 501 (Tex. App.—El Paso) (interrogatories held to be improper), writ denied per curiam, 843 S.W.2d 475 (Tex. 1992), with Gustafson v. Chambers, 871 S.W.2d 938, 945–46 (Tex. App.—Houston [1st Dist.] 1994, no writ) (interrogatories held to be proper).

§ 18.53 Form of Interrogatories

§ 18.53:1 Nature of Interrogatories

Interrogatories should be phrased to seek specific and precise answers in response to each question. They should be neither too narrow nor overbroad. For example, a narrowly drawn interrogatory that asked for the identities of fact witnesses who had “seen, heard, or known about” an accident was strictly interpreted so as not to include a request for disclosure of any potential witness with “knowledge of relevant facts,” and an undisclosed witness was allowed to testify. Robledo v. Grease Monkey, Inc., 758 S.W.2d 834, 835 (Tex. App.—Corpus Christi 1988, no writ). An interrogatory asking for the identity of any persons...
with knowledge of “any fact or record relating or pertaining to this cause of action” was found to be overbroad. *Lunsmann v. Spector*, 761 S.W.2d 112, 114 (Tex. App.—San Antonio 1988, no writ).

It is a good practice to establish specific matters of fact by requests for admissions (see part III. in this chapter), which often will be propounded after the receipt of (and based on information derived from) answers to interrogatories and requests for disclosure.

For pattern interrogatories, see forms 18-15 (sworn account), 18-16 (contract or revolving credit account), 18-17 (promissory note), 18-18 (foreclosure of security interest), 18-19 (lease of personalty), and 18-20 (guaranty agreement) in this chapter.

§ 18.53:2 Format of Interrogatories

Because answers must be preceded by the interrogatories, the proponent should leave room after each question to allow the respondent to answer in the space provided. See Tex. R. Civ. P. 193.1. If a question relates to a document in the plaintiff’s possession, it is a good practice to attach a copy to the interrogatories—even if a copy has been filed or furnished previously—to avoid confusion about the document to which the question refers.

§ 18.53:3 Number of Interrogatories

For cases controlled by level 1 discovery control plan, a party may serve no more than fifteen written interrogatories, excluding interrogatories asking a party only to identify or authenticate specific documents. Tex. R. Civ. P. 190.2(b)(3). For cases controlled by level 2, a party may serve no more than twenty-five written interrogatories, excluding interrogatories asking a party only to identify or authenticate specific documents. Tex. R. Civ. P. 190.2(b)(3). Each discrete subpart of an interrogatory is considered a separate interrogatory, but not every factual inquiry is such a discrete subpart. A “discrete subpart,” generally, is one that calls for information not logically or factually related to the primary interrogatory. Tex. R. Civ. P. 190.2(c)(3), 190.3(b)(3), 190 cmt. 3; see also *Braden v. Downey*, 811 S.W.2d 922, 927–28 (Tex. 1991). The attorney should avoid using interrogatories to ask about matters covered by requests for disclosure if there is any possibility of otherwise exceeding the interrogatory limit. See part V. below.

The court may modify the number of interrogatories and must do so when the interest of justice requires. Tex. R. Civ. P. 190.5. See forms 18-21 and 18-22 in this chapter for a motion and order enlarging or reducing the number of interrogatories.

§ 18.53:4 Legal Advice or Threats

Interrogatories, being communications with an adverse party, should not contain legal advice or threats about possible consequences of not replying. See section 18.4:3 above. For a form set of instructions, see form 18-14 in this chapter.

§ 18.53:5 Deadline for Propounding Interrogatories

Parties may serve interrogatories no later than thirty days before the end of the discovery period. Tex. R. Civ. P. 197.1.
§ 18.54 Service and Filing of Interrogatories

§ 18.54:1 Who May Be Served


§ 18.54:2 Method of Service

See sections 18.13:3 and 18.13:4 above for a discussion about service of interrogatories.

§ 18.54:3 Filing of Interrogatories

Interrogatories are not filed with the court. Tex. R. Civ. P. 191.4(a). Instead, the propounding party must keep the original or an exact copy during the pendency of the case and any related appellate proceedings begun within six months after judgment is signed, unless otherwise provided by the trial court. Tex. R. Civ. P. 191.4(d).

§ 18.55 Response

§ 18.55:1 Time for Response

The responding party must serve his written response on the requesting party within thirty days after service unless the interrogatories were served on the defendant before his answer was due. In that case, the defendant has fifty days after service to serve his response. Tex. R. Civ. P. 197.2(a).

§ 18.55:2 Contents of Response

A response must include the responding party’s answers to the interrogatories. The response may include objections and assertions of privilege, as applicable. Tex. R. Civ. P. 197.2(b). Objections are discussed at section 18.9 above, and privilege is discussed at section 18.10.

§ 18.55:3 Option to Produce Records

If public records, the responding party’s business records, or a compilation, abstract, or summary of those business records will supply the answer to an interrogatory and the burden of deriving or ascertaining the answer is substantially the same for the requesting party as for the responding party, the responding party may specify (and, if applicable, produce) those records or compilations, abstracts, or summaries. The records must be specified in sufficient detail to permit the requesting party to locate and identify the documents as readily as can the responding party. If the responding party has specified business records, he must state a reasonable time and place for examination of those records, must produce the documents at the time and place stated in the interrogatories (or as otherwise agreed by the parties or ordered by the court), and must afford the requesting party a reasonable opportunity to inspect them. Tex. R. Civ. P. 197.2(c).
§ 18.55:4  Form of Response

Each interrogatory must be answered fully in writing, based on all information readily available to the responding party or his attorney when the response is made. The response must be preceded by the question to which the answer pertains. Tex. R. Civ. P. 193.1. If the responding party’s answer is based on information obtained from other persons, his answer may state that fact. Tex. R. Civ. P. 197.2(d)(1).

§ 18.55:5  Verification

Answers must be made under oath, signed, and verified by the responding party (not his agent or attorney). The party need not sign answers to interrogatories about persons with knowledge of relevant facts, fact witnesses, and legal contentions. Tex. R. Civ. P. 197.2(d). It is an abuse of discretion for the trial court to dismiss a case with prejudice for failure to comply with the verification and signature requirements, without providing reasonable notice to the responding party of the defect and an opportunity to correct it. United States Leasing Corp. v. O’Neill, Price, Anderson & Fouchard, Inc., 553 S.W.2d 11, 13 (Tex. Civ. App.—Houston [14th Dist.] 1977, no writ) (interpreting former Texas Rules of Civil Procedure 215a(c)). See also State Farm Fire & Casualty Co. v. Morua, 979 S.W.2d 616 (Tex. 1998).

Amended or supplemental responses to interrogatories must also be verified by the responding party. Tex. R. Civ. P. 193.5(b); Morua, 979 S.W.2d at 620. (See section 18.7 above regarding amended and supplemental responses to discovery requests.) However, waiting until trial before objecting to a lack of verification may result in waiver of the objection. Morua, 979 S.W.2d at 621 (objection waived after thirteen months without objection).

§ 18.55:6  Method of Service


§ 18.56  Use and Effect of Interrogatories and Answers

§ 18.56:1  Use

Answers to interrogatories may be used against only the answering party. Tex. R. Civ. P. 197.3. The answers are hearsay as to other parties and should not be admitted in evidence against them following a proper and timely objection. In Price Pfister, Inc. v. Moore & Kimmey, Inc., 48 S.W.3d 341, 348–49 (Tex. App.—Houston [14th Dist.] 2001, pet. denied), the court permitted the answering party to use its own answer where, in addition to the answer itself, the party offering the answer testified during cross-examination that he prepared the interrogatory answer and swore to it under oath. See also United Services Automobile Ass’n v. Ratterree, 512 S.W.2d 30, 33 (Tex. Civ. App.—San Antonio 1974, writ ref’d n.r.e.). Once interrogatories are admitted and read into evidence, they become testimonial evidence. In re Marriage of Richards, 991 S.W.2d 32, 38 (Tex. App.—Amarillo 1999, pet. dism’d) (citing Eubanks v. Eubanks, 892 S.W.2d 181, 181–82 (Tex. App.—Houston [14th Dist.] 1994, no writ)). See also Bastida v. Aznaran, 444 S.W.3d 98, 105 (Tex. App.—Dallas 2014, no pet.) (upholding summary judgment on evidence presented in affidavit that could have been controverted by interrogatories but was not).

On a motion for summary judgment, the nonmoving party may not resort to his own answers to the moving party’s interrogatories as proof of the existence of a genuine issue of material fact. Thurman v. Frozen Food Express, 600 S.W.2d 369, 370
Neither may the moving party rely on his own answers to interrogatories in support of his motion for summary judgment. These answers may be used only against the party filing the answers. *Holmes v. Canlen Management Corp.*, 542 S.W.2d 199, 201 (Tex. Civ. App.—El Paso 1976, no writ).

In a multiparty case, any party may use interrogatories against the answering party. *Ticor Title Insurance Co. v. Lacy*, 803 S.W.2d 265, 266 (Tex. 1990); *Smith v. Christley*, 755 S.W.2d 525, 530 (Tex. App.—Houston [14th Dist.] 1988, writ denied). The answering party, however, is required to answer only the proponent of the interrogatories, not all parties, and he is not required to supplement the answers to interrogatories of a party who has settled, for the benefit of other parties who remain in the lawsuit. *See Austin Ranch Enterprises v. Wells*, 760 S.W.2d 703, 710 (Tex. App.—Fort Worth 1988, writ denied).

One party may rely on interrogatories and answers of another party in the same suit. *Lacy*, 803 S.W.2d at 266. Therefore, if one party asks an opponent for information, it is considered a request by all parties. A party, however, may not respond to an interrogatory seeking the identity of witnesses by referring to another party’s answer to a similar interrogatory. *See American Cyanamid Co. v. Frankson*, 732 S.W.2d 648, 655 (Tex. App.—Corpus Christi 1987, writ ref’d n.r.e.). A supplemental answer to one party, however, may be adequate supplementation to the same inquiry propounded by another party. *See Ward v. O’Connor*, 816 S.W.2d 446, 447 (Tex. App.—San Antonio 1991, no writ) (allowing plaintiff to supplement answers to interrogatories from multiple defendants in one document titled “Supplemental to All Other Discovery”).

**§ 18.56:2 Inclusion in Evidence**

To have probative value, answers to interrogatories must be properly offered at trial or at an appropriate hearing. *Sammons Enterprises, Inc. v. Manley*, 540 S.W.2d 751, 757 (Tex. Civ. App.—Texarkana 1976, writ ref’d n.r.e.); *Richards v. Boettcher*, 518 S.W.2d 286, 288 (Tex. Civ. App.—Texarkana 1974, writ ref’d n.r.e.).

[Sections 18.57 through 18.60 are reserved for expansion.]

**V. Requests for Disclosure**

**§ 18.61 Purpose and Nature of Requests for Disclosure**

The ability to make requests for disclosure improves efficiency; parties can make a single request for basic information common to all litigation by simply referencing the list of information and documents found in Tex. R. Civ. P. 194.2. Tex. R. Civ. P. 194.

Requests for disclosure are a hybrid of basic interrogatories and requests for production. *See Tex. R. Civ. P. 194*. They are similar to interrogatories in that the respondent may be required to disclose information such as the correct names of the parties, addresses and telephone numbers of persons having knowledge of relevant facts, and the legal theories and factual bases of the respondent’s defenses or claims. They are similar to requests for production in that the respondent may be required to produce documents or other things, such as insurance contracts or settlement agreements. *See Tex. R. Civ. P. 194.2.*

In an expedited action, a party may request disclosure of all documents, electronic information, and tangible items that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses. Tex. R. Civ. P. 190.2(b)(6). A request for disclosure under rule 190.2 is not considered a request for production.
§ 18.62 Who May Be Served

The rule governing requests for disclosure has no provisions for serving such requests on nonparties. See Tex. R. Civ. P. 194.1. See also In re Anand, No. 01-12-01106-CV, 2013 WL 1316436, at *3 (Tex. App.—Houston [1st Dist.] Apr. 2, 2013, no pet., orig. proceeding) (per curiam) (mem. op.) (“Rule 205 . . . governs discovery of nonparties . . . ”).

§ 18.63 Requesting and Using Requests for Disclosure

The procedure for submitting a request for disclosure is set out in Tex. R. Civ. P. 194.1, which simply requires that the requesting party serve another party with a written request seeking various information available under Tex. R. Civ. P. 194.2. Service of the request for disclosure must be made by the requesting party no later than thirty days before the end of the discovery period. Tex. R. Civ. P. 194.1. The party may obtain disclosure by serving the following request: “Pursuant to Rule 194, you are requested to disclose, within 30 days of service of this request, the information or material described in Rule [state rule, e.g., 194.2, or 194.2(a), (c), and (f), or 194.2(d)–(g)].” Tex. R. Civ. P. 194.1. See form 18-23 in this chapter for a sample request for disclosure. The following request may be made in an expedited action under rule 190.2: “Pursuant to Rule 190.2(b)(6), you are requested to disclose all documents, electronic information, and tangible items that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses.”

Responses to requests for disclosure should be introduced into evidence in the same manner as answers to interrogatories. No objections or assertions of work product may be made to requests for disclosure. Tex. R. Civ. P. 194.5. Responses to requests for disclosure under rule 194.2(c) and (d) that have been changed by an amended or supplemental response are not admissible and may not be used for impeachment. Tex. R. Civ. P. 194.6.

§ 18.64 Deadline for Response

Generally, the responding party must serve a written response on the requesting party within thirty days of being served with the request. However, if the request for disclosure was served on a defendant before the defendant’s answer day, that defendant has fifty days from the date of service to serve his response. A response to a request for disclosure for any testifying expert under rule 194.2(f) is governed by the deadlines set out in rule 195. Tex. R. Civ. P. 194.3.

§ 18.65 Form for Response

If documents or other items are responsive to the request for disclosure, those items must ordinarily be served with the written response. If the copies are voluminous, the response must state a reasonable time and place for production of them. Otherwise, the responding party must produce the items at the time and place stated in the request, unless the parties agree otherwise or the court orders otherwise, and must provide the requesting party a reasonable opportunity to inspect them. Tex. R. Civ. P. 194.4.

§ 18.66 No Objection or Claim of Work Product Privilege

The responding party may not object to a request for disclosure or assert a work product privilege. Tex. R. Civ. P. 194.5.

[Sections 18.67 through 18.70 are reserved for expansion.]
VI. Requests for Production

§ 18.71 Requests for Production Generally

§ 18.71:1 Purpose

Tex. R. Civ. P. 196 provides for the discovery and production of documents and things from parties. The appropriate method is to serve a request on the party from whom production is sought. If a party fails to comply with a proper request, sanctions may be sought under Tex. R. Civ. P. 215. For a discussion of sanctions, see part VII in this chapter.

Nonparties may be compelled by subpoena to produce documents without the necessity of a court order. See Tex. R. Civ. P. 205.3 and section 18.78 below. Sections 18.72 through 18.75 pertain only to requests for production from parties.

§ 18.71:2 Use of Requests for Production

A request for production is a simple and direct method of discovering tangible things and obtaining the inspection and copying of documents. A request for production may also be used to obtain access to documents that cannot be reached by a subpoena duces tecum, but in such a case the requests must not be overly broad, and the documents sought must be properly designated in accordance with Tex. R. Civ. P. 196.1(b). See section 18.73:1 below.

§ 18.71:3 Who May Be Served

Production requests may be served on parties and in certain circumstances on nonparties. See section 18.78 below for more information on production from nonparties.

§ 18.72 Scope of Requests for Production

Subject to certain exemptions and protective orders, requests for production may seek any tangible things that appear reasonably calculated to lead to the discovery of admissible evidence; see Tex. R. Civ. P. 192 and section 18.1 above. A party may obtain discovery of the existence, description, nature, custody, condition, location, and contents of any documents and tangible things constituting or containing matters relevant to the subject matter of the action. “Documents and tangible things” include books, papers, accounts, drawings, graphs, charts, photographs, electronic or videotape recordings, data, and data compilations. A person is required to produce a document or tangible thing that is within his possession, custody, or control. Tex. R. Civ. P. 192.3(b). Actual physical possession is not required. Constructive possession is sufficient. Possession, custody, or control of an item refers to a person having physical possession or a right to possession that is equal or superior to that of the person who has physical possession. Tex. R. Civ. P. 192.7(b). A request may also be directed to permit entry on designated land or other property. Tex. R. Civ. P. 196.7.
§ 18.73 Form of Requests for Production

§ 18.73:1 Nature of Requests

A request for production must designate by individual item or by category the items to be produced or inspected and must describe with reasonable particularity each item and category. The request must state a reasonable time and place for production. Tex. R. Civ. P. 196.1(b). For a sample request for production, see form 18-24 in this chapter.

To obtain discovery of data or information that exists in electronic or magnetic form, the requesting party must specifically request production of electronic or magnetic data and specify the form in which he wants it produced. Tex. R. Civ. P. 196.4.

§ 18.73:2 Testing or Examination

If testing or sampling of the items is requested, the requesting party must describe the means, manner, and procedure for testing with sufficient particularity to inform the producing party of that means, manner, and procedure. Tex. R. Civ. P. 196.1(b). Testing, sampling, or examination must not extend to destruction or material alteration of an item without authorization by the court. Tex. R. Civ. P. 196.5.

§ 18.73:3 Format and Number of Requests

There is no particular format required for a request for production. The proponent, however, should keep in mind the potential for imposition of sanctions if the court finds that a request for inspection or production is “unreasonably frivolous, oppressive, or harassing” under Tex. R. Civ. P. 215.3; see part VII. in this chapter regarding sanctions.

For an expedited action (level 1) case filed after March 1, 2013, a party may serve no more than fifteen requests for production. Each discrete subpart is considered a separate request for production. Tex. R. Civ. P. 190.2(b)(4).

§ 18.73:4 Legal Advice or Threats

The request for production, being a communication with an adverse party, should not contain legal advice or threats about possible consequences for not complying. See section 18.4:3 above. For a form set of instructions, see form 18-24 in this chapter.

§ 18.73:5 Drafting Requests Narrowly

Requests should be carefully drafted so as not to be too narrow or overbroad. For example, photographs and videotapes are considered separate types of documents; therefore, a request for “all photographs” was held not to include a videotape offered into evidence at trial. County of Dallas v. Harrison, 759 S.W.2d 530, 531 (Tex. App.—Dallas 1988, no writ). The request must be specific and state particularly what material is requested; “all notes, records, memoranda, documents, and communications” is overbroad. Loftin v. Martin, 776 S.W.2d 145, 148 (Tex. 1989); see also In re Shipmon, 68 S.W.3d 815, 821 (Tex. App.—Amarillo 2001, orig. proceeding) (requests for documents without any limitation on time deemed overbroad on their face).
§ 18.74 Method of Service

See sections 18.13:3 and 18.13:4 above for a discussion about serving requests for production.

§ 18.75 Responses and Objections to Requests for Production

§ 18.75:1 Deadline for Answering

Responses and objections must be served within thirty days after service of the request, except that if the request is served before a defendant’s answer day, that defendant may respond and object within fifty days after service of the request. Tex. R. Civ. P. 196.2(a); see also Hobson v. Moore, 734 S.W.2d 340, 341 (Tex. 1987) (objections not served within thirty days waived). Sanctions for failure to respond or permit discovery in accordance with rule 196 requests are discussed in part VII. in this chapter.

§ 18.75:2 Contents of Responses

Responses must be in writing and must state as appropriate, with respect to each item or category of items, that—

1. production, inspection, or other requested action will be permitted as requested;
2. the requested items are being served on the requesting party with the response;
3. production, inspection, or other requested action will occur at a specified time and place, if the responding party is objecting to the time and place of production; or
4. no items have been identified, after a diligent search, that are responsive to the request.

Tex. R. Civ. P. 196.2(b).

§ 18.75:3 Objections

Objections are discussed generally at section 18.9 above. A party objecting to production of documents on grounds of relevancy has the burden of pleading and proving that the documents are not relevant. Valley Forge Insurance Co. v. Jones, 733 S.W.2d 319, 321 (Tex. App.—Texarkana 1987, no writ). Relevance is determined by weighing the probative value of the information sought against the burden of production. Independent Insulating Glass/Southwest, Inc. v. Street, 722 S.W.2d 798, 803 (Tex. App.—Fort Worth 1987, writ dism’d); see, e.g., Lunsmann v. Spector, 761 S.W.2d 112, 114 (Tex. App.—San Antonio 1988, no writ) (request for copies of pleadings from all lawsuits involving defendant insurance company during past three years, in which defense asserted was same as in present case, denied as unduly burdensome; plaintiff could ascertain information from public records). Requests for production may not be used as “fishing expeditions.” Loftin v. Martin, 776 S.W.2d 145, 148 (Tex. 1989) (request for production that fails to identify a particular type of document is overbroad); but see Kern v. Gleason, 840 S.W.2d 730, 736 (Tex. App.—Amarillo 1992, no writ); Chamberlain v. Cherry, 818 S.W.2d 201, 204–05 (Tex. App.—Amarillo 1991, no writ) (use of words “any and all” did not invalidate otherwise proper request).

Failure to present evidence of objections requires production of the documents sought. See Wadley Research Institute v. Whittington, 843 S.W.2d 77, 86 (Tex. App.—Dallas 1992, no writ) (responding party must locate all documents requested and specifically state objections or exemptions that justify nonproduction).
§ 18.75:4  Service of Responses and Objections

Responses must be served on all parties to the action but not filed with the court. Tex. R. Civ. P. 191.4(a), 191.5. See Tex. R. Civ. P. 21a concerning methods of service.

§ 18.76  Production

§ 18.76:1  Production Generally

Subject to any objections stated in the response, the responding party must produce the requested documents or tangible things within the person’s possession, custody, or control at the time and place stated in the request or in the response, unless otherwise agreed or ordered, and must give the requesting party a reasonable opportunity to inspect them. Tex. R. Civ. P. 196.3(a).

§ 18.76:2  Form of Production

Copies may be produced in lieu of originals unless authenticity of the original is questioned or the substitution would be unfair in the circumstances. If originals are produced, the producing party may retain the originals while the requesting party inspects and copies them. Tex. R. Civ. P. 196.3(b).

A party who produces documents or tangible things for inspection must either produce them as they are kept in the usual course of business or organize and label them to correspond with the categories in the request. Tex. R. Civ. P. 196.3(c). The producing party cannot withhold production by requiring the requesting party to inspect documents at the office of the producing party’s attorney unless the documents are voluminous. Overall v. Southwestern Bell Yellow Pages, Inc., 869 S.W.2d 629, 631 (Tex. App.—Houston [14th Dist.] 1994, no writ).

Special rules for production of electronic or magnetic data are set out at rule 196.4.

§ 18.76:3  Cost of Production

The expense of producing items is borne by the responding party, and the expense of inspecting, copying, and so forth is borne by the requesting party, unless otherwise ordered. Tex. R. Civ. P. 196.6.

§ 18.77  Authentication of Documents Produced

A party’s production of a document in response to a request for production authenticates that document for use against that party in any pretrial proceeding or trial unless, within ten days (unless modified by the court) after the party has actual notice that the document will be used, the party objects to the authenticity of the document or any part of it, stating the specific basis for the objection. Such an objection must be either on the record or in writing and have a good-faith basis in both fact and law. An objection to the authenticity of only part of the document does not affect the authenticity of the remainder. If such an objection is made, the party attempting to use the document should be given a reasonable opportunity to establish its authenticity. Tex. R. Civ. P. 193.7. The ten-day period for objection to authenticity does not run from the date of production but from the party’s actual awareness that the document will be used. Tex. R. Civ. P. 193 cmt. 7.

The requesting party may identify before trial the documents intended to be offered, triggering the ten-day deadline for objection to their authenticity. Tex. R. Civ. P. 193 cmt. 7. The following notice may also be used to trigger the objection deadline:
“Pursuant to Rule 193.7, be advised that we will rely on documents produced by [producing party] in discovery in our pretrial motions and at trial.”

§ 18.78 Production from Nonparties

§ 18.78:1 Nonparty Production Generally

A party may compel production of documents and other tangible items from nonparties either by subpoena or by court order. Tex. R. Civ. P. 205.1(d); 205.3. The ability of attorneys to obtain documents from nonparties by subpoena and to issue their own subpoenas (see section 18.30:4 above) effectively gives them the power to demand production both from nonparties and parties without the need for court action.

A party may depose any person or entity. Tex. R. Civ. P. 199.1(a), 200.1(a). When requesting the mental health or medical records of a nonparty, the requesting party must serve the request on the nonparty. See Tex. R. Civ. P. 196.1(c). A party may gain entry on the land or other property of a nonparty to inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it. Tex. R. Civ. P. 196.7. A party may file a motion for physical or mental examination of a nonparty under the legal control of a party. Tex. R. Civ. P. 204. The rules governing requests for disclosure, interrogatories, and requests for admissions have no provisions for making such requests on nonparties. See Tex. R. Civ. P. 194.1, 197.1, 198.1. See also In re Anand, No. 01-12-01106-CV, 2013 WL 1316436, at *3 (Tex. App.—Houston [1st Dist.] Apr. 2, 2013, no pet., orig. proceeding) (per curiam) (mem. op.) (“Rule 205 . . . governs discovery of nonparties . . . .”).

Special rules apply to discovery sought from financial institutions. See section 18.16 above. Subpoenas are discussed in more detail at section 18.30.

§ 18.78:2 Limitations of Subpoena

A person may not be required by subpoena to produce documents in a county that is more than 150 miles from where he resides or is served. Tex. R. Civ. P. 176.3(a). If the documents are sufficiently important and the 150-mile requirement would otherwise prevent production, the documents may be produced at a location close to the nonparty.

§ 18.78:3 Procedure

A party seeking production from a nonparty must serve on the nonparty and all parties a subpoena and notice, using “the form of notice required under the rules governing the applicable form of discovery.” Tex. R. Civ. P. 205.2. Because rule 196 imposes no particular form of notice, the only guidelines are those set out in Tex. R. Civ. P. 205.3(b). See section 18.78:4 below.

The notice and subpoena must be served a reasonable time before the response is due but no later than thirty days before the end of any applicable discovery period. Tex. R. Civ. P. 205.3(a). A copy of the notice must be served on the nonparty and all parties at least ten days before the subpoena compelling production from the nonparty is served. Tex. R. Civ. P. 205.2.

§ 18.78:4 Contents of Notice

The notice must state—
1. the name of the person from whom production or inspection is sought to be compelled;

2. a reasonable time and place for the production or inspection; and

3. the items to be produced or inspected, either by individual item or category, describing each item and category with reasonable particularity and, if applicable, describing any desired testing or sampling with sufficient specificity to inform the nonparty of the means, manner, and procedure for testing or sampling.

Tex. R. Civ. P. 205.3(b).

§ 18.78:5 Response from Nonparty

The nonparty must respond to the notice and subpoena, but need not appear in person at the time and place of production unless he is also commanded to appear and give testimony, either in the same subpoena or a separate one. He must either produce the items as they are kept in the usual course of business or organize and label them to correspond with the categories in the request. Tex. R. Civ. P. 176.6(c), 205.3(d).

§ 18.78:6 Objections and Claims of Privilege

If the person commanded to produce documents under the subpoena wishes to object, he must do so before the time specified in the subpoena for performance. He need not comply with that part of the subpoena he has objected to unless ordered to do so by the court. The party requesting the subpoena may request such an order anytime after the objection is made. Tex. R. Civ. P. 176.6(d).

Similarly, the nonparty may withhold documents from production based on a claim of privilege, but if he does so he must comply with Tex. R. Civ. P. 193.3. See Tex. R. Civ. P. 176.6(c). See section 18.10 above for a discussion of privilege.

§ 18.78:7 Authentication of Document Produced

Production of a document from a nonparty authenticates the document for use against the nonparty to the same extent as a party’s production of a document authenticates it for use against the party under Tex. R. Civ. P. 193.7. See Tex. R. Civ. P. 176.6(c). See section 18.77 above for discussion.

§ 18.78:8 Cost of Production

If the recipient of the request for production could be considered to be the custodian of the records requested, he is entitled to payment of $1 for production of those records. He is not entitled to additional fees for production of more than one record. Tex. Civ. Prac. & Rem. Code § 22.004(a). If the recipient is the defendant, a check for $1 should be attached to the request; the bank endorsement on the canceled check could provide valuable information regarding the location of the defendant’s funds.

If the recipient is a nonparty but not the custodian of records, he is entitled to reasonable costs of production from the requesting party. Tex. R. Civ. P. 205.3(f).

[Sections 18.79 and 18.80 are reserved for expansion.]
VII. Sanctions

§ 18.81 Source of Rule and Purpose of Sanctions

The Texas sanctions rule, Tex. R. Civ. P. 215, is similar to Fed. R. Civ. P. 37, although the Texas rule is more expansive than the federal rule in the options provided to the trial court in the exercise of its discretionary control over discovery.


Sanctions also have been imposed to punish parties who violate discovery rules. See Carr v. Harris County, 745 S.W.2d 531, 532 (Tex. App.—Houston [1st Dist.] 1988, no writ). When ruling on a motion for sanctions, the trial court is not limited to considering only the violation for which sanctions are sought but may consider the entire record and other matters that have occurred throughout the litigation. See Van Es v. Frazier, 230 S.W.3d 770, 777–78 (Tex. App.—Waco 2007, pet. denied); Davenport v. Scheble, 201 S.W.3d 188, 194 (Tex. App.—Dallas 2006, pet. denied); Tidrow v. Roth, 189 S.W.3d 408, 412 (Tex. App.—Dallas 2006, no pet.); Garcia Distributing, Inc. v. Fedders Air Conditioning, U.S.A., Inc., 773 S.W.2d 802, 806–07 (Tex. App.—San Antonio 1989, writ denied); Larson v. H.E. Butt Grocery Co., 769 S.W.2d 694, 696–97 (Tex. App.—Corpus Christi 1989, writ denied); First State Bank, Bishop v. Chappell & Handy, P.C., 729 S.W.2d 917, 921 (Tex. App.—Corpus Christi 1987, writ ref’d n.r.e.).

Discovery sanctions barring introduction of certain evidence for failure to timely respond to discovery requests do not survive a nonsuit; thus, such evidence is admissible in a subsequent suit between the parties on the same issue. Schein v. American Restaurant Group, Inc., 852 S.W.2d 496, 497 (Tex. 1993).

§ 18.82 Abuse of Discovery

§ 18.82:1 Forms of Discovery Abuse and Sanctions Available

Abuse of the discovery process may include—

1. failure to designate an entity representative for deposition under rules 199.2(b)(1) or 200.1(b) (Tex. R. Civ. P. 215.1(b)(1));
3. failure to answer oral or written deposition questions (Tex. R. Civ. P. 215.1(b)(2)(B));
4. failure to serve answers or objections to properly served interrogatories under rule 197 (Tex. R. Civ. P. 215.1(b)(3)(A));
5. failure to answer an interrogatory under rule 197 (Tex. R. Civ. P. 215.1(b)(3)(B));
6. failure to serve a written response to a properly served request for inspection under rule 196 (Tex. R. Civ. P. 215.1(b)(3)(C));

7. failure to respond that discovery will be permitted as requested or to permit discovery under a request for inspection under rule 196 (Tex. R. Civ. P. 215.1(b)(3)(D));

8. failure to comply with any person’s written request for his own prior statement under rule 192.3(h) (Tex. R. Civ. P. 215.1(e));

9. failure to comply with proper discovery requests (Tex. R. Civ. P. 215.2(b));

10. failure to obey an order to provide or permit discovery, including an order under rule 204 or 215.1 (Tex. R. Civ. P. 215.2(b));

11. abuse of the discovery process in seeking, making, or resisting discovery (Tex. R. Civ. P. 215.3);

12. propounding interrogatories or requests for inspection or production that are “unreasonably frivolous, oppressive, or harassing” (Tex. R. Civ. P. 215.3);

13. submitting a response or answer that is “unreasonably frivolous or made for the purpose of delay” (Tex. R. Civ. P. 215.3);

14. failure to admit the genuineness of any document or the truth of the matter asserted in a request for admission and the requesting party thereafter proves the genuineness or truth of the matter (Tex. R. Civ. P. 215.4);

15. providing an evasive or incomplete answer (Tex. R. Civ. P. 215.1(c));

16. failure of the party to attend after giving notice of a deposition (Tex. R. Civ. P. 215.5(a)); and

17. failure of a witness to attend an oral deposition because of the fault of the party giving notice (Tex. R. Civ. P. 215.5(b)).

§ 18.82:2 Motion to Compel or Motion for Sanctions

Depending on the violation, a party, on reasonable notice to other parties and all other persons affected, may move for sanctions or an order compelling discovery. Tex. R. Civ. P. 215.1. However, the better practice is to seek a motion to compel before requesting sanctions. Motions or responses under rule 215 may have exhibits attached, including affidavits, discovery pleadings, or any other documents. Tex. R. Civ. P. 215.6. Like all discovery motions, these motions must contain a certificate by the movant stating that efforts to resolve the discovery dispute without the necessity of court intervention have been attempted and have failed. See Tex. R. Civ. P. 191.2. See section 18.84 below regarding available sanctions. See forms 18-25 through 18-28 in this chapter.

Practice Note: Some local rules require a party to include a certificate of conference with any motion filed to show either that the parties discussed the matter before the filing of the motion or that the party that filed the motion attempted to confer on the matter first but was unsuccessful.
§ 18.82:3 Court’s Discretion

A trial court may, after notice and hearing, impose sanctions on any party that abuses the discovery process. Tex. R. Civ. P. 215.3. The sanctions are within that court’s discretion and will be set aside only if the court clearly abused its discretion. Bodnow Corp. v. City of Hondo, 721 S.W.2d 839, 840 (Tex. 1986).

For a discussion of the standards for permissible sanctions under Tex. R. Civ. P. 215 within which the trial court is to exercise its discretion, see Spohn Hospital v. Mayer, 104 S.W.3d 878, 881–82 (Tex. 2003); Chrysler Corp. v. Blackmon, 841 S.W.2d 844 (Tex. 1992); and TransAmerican Natural Gas Corp. v. Powell, 811 S.W.2d 913 (Tex. 1991) (sanctions must be just—for example, they must relate directly to abuse found and must not be excessive). To ensure that a sanction is not excessive, the court must consider whether lesser sanctions would fully promote compliance. Chrysler Corp., 841 S.W.2d at 849; TransAmerican, 811 S.W.2d at 917. In TransAmerican, the supreme court also discussed the constitutional due-process limitations on severe sanctions. TransAmerican, 811 S.W.2d at 917–18. Before a court may deprive a party of its right to present the merits of its case because of discovery abuse, it must determine that the party’s hindrance of the discovery process justifies a presumption that its claims or defenses lack merit. GTE Communications Systems v. Tanner, 856 S.W.2d 725, 730 (Tex. 1993).

See section 18.84:3 below regarding the options available to the court regarding the exclusion of evidence not disclosed in discovery.

§ 18.83 Attorney’s Fees and Expenses on Motion to Compel

§ 18.83:1 If Motion Granted

If a party applies for an order compelling discovery, the court must, after opportunity for a hearing and on granting the motion, require the resisting party or deponent or the party or attorney advising the conduct, or both of them, to pay the moving party’s reasonable expenses incurred in obtaining the order, including attorney’s fees, unless the opposition to the motion was substantially justified or other circumstances make an award of expenses unjust. The court also has discretion to apportion the reasonable expenses incurred in relation to a motion that is granted in part and denied in part. Tex. R. Civ. P. 215.1(d).

Practice Note: It is good practice to include on the proposed order a date by which the moving party’s reasonable expenses must be paid by the other party and where payment must be made. Including this in a proposed order can clarify matters and avoid confusion, without having to bring the matter before the court again.

§ 18.83:2 If Motion Denied

If the motion to compel is denied, after opportunity for hearing, the court may order the moving party or the attorney advising that the motion be prosecuted to pay the opposing party or deponent the reasonable expenses incurred in opposing the motion, including attorney’s fees, unless there was substantial justification for making the motion or there are other circumstances making the award unjust. The court also has discretion to apportion the reasonable expenses incurred in relation to a motion that is granted in part and denied in part. Tex. R. Civ. P. 215.1(d).
§ 18.83:3 Amount of Reasonable Expenses

In determining the amount of reasonable expenses, including attorney’s fees, the court must award expenses that are reasonable in relation to the amount of work reasonably expended in obtaining an order compelling compliance or opposing a denied motion. Tex. R. Civ. P. 215.1(d). Attorney’s fees are discussed in part III. in chapter 1 of this manual.

§ 18.84 Sanctions against Parties

§ 18.84:1 Proper Court

Sanctions against a party for deposition abuse may be imposed by the court in which the action is pending or any district court in the district in which the deposition is taken. For all other discovery matters, sanctions for discovery abuse are imposed by the court in which the case is pending. Tex. R. Civ. P. 215.1(a).

§ 18.84:2 Available Sanctions

If a deponent fails to appear or to be sworn or to answer a question after being directed to do so by a district court in the district in which the deposition is being taken, the failure may be considered a contempt of that court. Tex. R. Civ. P. 215.2(a).

After notice and hearing, the court in which an action is pending may enter all such orders as are just with respect to the failure to comply with proper discovery requests or failure to obey an order of the court regarding discovery. Specifically, the court may enter an order that does the following:

1. Disallows any further discovery of any kind or of a particular kind by the disobedient party. Tex. R. Civ. P. 215.2(b)(1). This sanction is particularly applicable to the abuse of “burying the adversary in paperwork” by the party seeking discovery. See William Wayne Kilgarlin & Don Jackson, Sanctions for Discovery Abuse under New Rule 215, 15 St. Mary’s L.J. 767, 797 (1984).

2. Charges all or any portion of the expenses of discovery or taxable court costs, or both, against the disobedient party or the attorney advising him. Tex. R. Civ. P. 215.2(b)(2). This provision appears to permit the trial court to charge the abusing party with all reasonable expenses incurred during the entire discovery process.

3. Deems that the matters regarding which the order was made or any other designated facts will be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order. Tex. R. Civ. P. 215.2(b)(3).

4. Precludes the disobedient party from supporting or opposing designated claims or defenses or prohibits introduction of designated matters in evidence. Tex. R. Civ. P. 215.2(b)(4); see In re T.K.D-H., 439 S.W.3d 473, 479 (Tex. App.—San Antonio 2014, no pet.).

5. Strikes out pleadings or parts thereof, stays further proceedings until the order is obeyed, dismisses with or without prejudice the action or proceedings or any part thereof, or renders a judgment by default against the disobedient party (“death penalty” sanction). Tex. R. Civ. P. 215.2(b)(5).

6. In lieu of or in addition to any of the foregoing orders, treats as contempt the failure to obey any orders except an order to submit to a physical or mental examination. Tex. R. Civ. P. 215.2(b)(6). For a general discussion of contempt of court, see section 26.7 in this manual.
7. Applies any of the sanctions listed above for failure to comply with a rule 204 order requiring a party to appear or produce another for examination, unless the person failing to comply shows that he is unable to appear or to produce the person for examination. Tex. R. Civ. P. 215.2(b)(7).

8. In lieu of or in addition to any of the foregoing orders, requires the party failing to obey the order or the attorney advising him, or both, to pay reasonable expenses, including attorney’s fees, caused by the failure, unless the failure was substantially justified or other circumstances make the award unjust. Such an order shall be subject to review on appeal from the final judgment. Tex. R. Civ. P. 215.2(b)(8). Attorney’s fees are discussed in part III. in chapter 1 of this manual.

Notice is essential before sanctions can be imposed. However, a party who does not receive adequate notice must specifically object to lack of notice to preserve error for appeal. Prade v. Helm, 725 S.W.2d 525, 527 (Tex. App.—Dallas 1987, no writ). A trial court cannot sua sponte order sanctions if there is no motion for sanctions before that court. Zep Manufacturing Co. v. Anthony, 752 S.W.2d 687, 689–90 (Tex. App.—Houston [1st Dist.] 1988, no writ). However, on motion, a trial court can impose sanctions even though the party has not disobeyed a formal discovery request or a discovery order. Plorin v. Bedrock Foundation & House Leveling Co., 755 S.W.2d 490, 491 (Tex. App.—Dallas 1988, writ denied) (failure to comply with discovery agreement). A trial judge cannot impose sanctions for pretrial discovery abuses after the court loses plenary jurisdiction. Faherty v. Knize, 764 S.W.2d 922 (Tex. App.—Waco 1989, no writ) (more than thirty days after judgment signed, no motion for new trial filed and no appeal perfected).

§ 18.84:3 Automatic Exclusion of Evidence

Failure to properly respond to, amend, or supplement a discovery response in a timely manner results in the automatic exclusion of the evidence or testimony that is the subject of the request, unless the trial court finds either good cause for the failure or that the failure will not unfairly surprise or prejudice the other parties. Tex. R. Civ. P. 193.6(a). The burden of proof is on the party seeking admission of the evidence, and the finding of good cause or lack of unfair surprise or unfair prejudice must be supported by the record. Tex. R. Civ. P. 193.6(b).

Even if the party seeking to introduce the evidence or call the witness fails to carry the burden imposed by Tex. R. Civ. P. 193.6(a), (b), the court may grant a continuance or postpone the trial to allow a response to be made, amended, or supplemented and to allow opposing parties to conduct discovery regarding any new information presented by that response. Tex. R. Civ. P. 193.6(c).

§ 18.85 Sanctions against Nonparties

§ 18.85:1 Proper Court

An application for an order for sanctions against a deponent who is not a party must be made to the court in the district in which the deposition is being taken. Tex. R. Civ. P. 215.1(a).

§ 18.85:2 Contempt of Court Sanctions

Failure to appear or to be sworn or to answer a question after being directed to do so by a district court in the district in which the deposition is being taken may be considered a contempt of that court. Tex. R. Civ. P. 215.2(a). A nonparty may be incarcerated for contempt. See Hennessy v. Marshall, 682 S.W.2d 340, 343 n.1 (Tex. App.—Dallas 1984, no writ). The sanction of
contempt of court is applicable if a nonparty fails to comply with an order for production, inspection, copying, or photographing under rule 205.3 or an order for entry on property under rule 196.7. Tex. R. Civ. P. 215.2(c). For a general discussion of contempt of court, see section 26.7 in this manual.

§ 18.85:3 Award of Expenses

In addition to the sanctions discussed above, Tex. R. Civ. P. 215.1(d) apparently authorizes the charging of expenses and attorney’s fees on motion to compel to nonparties. See section 18.83 above for discussion of expenses on motion to compel. Attorney’s fees are discussed in part III. in chapter 1 of this manual.
Notice to Nonparty of Request for Financial Records

Form 18-1

This notice should be used to obtain discovery from a financial institution concerning its customer who is not a party to the suit. See Texas Finance Code section 59.006 regarding discovery of customer records and subsection (c), specifically, regarding requests to a nonparty. For discussion of discovery from financial institutions, see section 18.16 in this chapter. This notice should be sent by both certified and regular first-class mail.

Notice to Nonparty of Request for Financial Records

[Date]

[Name and address of nonparty customer]

Re: [style of case]
    Cause No. [number]
    [designation and location of court]

[Salutation]

Attached please find [name of requesting party]’s (“Requesting Party”) proposed [discovery request, e.g., Notice of Oral Deposition, Request for Production of Documents] (“Record Request”) to be served on [name of financial institution] in accordance with Texas Finance Code section 59.006. You have the right to prevent or limit the financial institution’s compliance with this Record Request by seeking an appropriate remedy, including filing a motion to quash the Record Request or a motion for a protective order. Any motion filed shall be served on [name of financial institution] and the Requesting Party before the date that compliance with the Record Request is required. A financial institution is not liable to its customer or another person for disclosure of a record in compliance with this section.

Before [name of financial institution] may release your records, you can choose to sign an authorization to release the records, as permitted by Texas Finance Code section 59.006(c)(3).
If you do not execute the authorization form by [date], the Requesting Party will ask the court to inspect the requested records in chambers, as permitted by Texas Finance Code section 59.006(d). The court may order [name of financial institution] to produce the requested records without your consent. Thus, if you do not wish those records to be produced, you bear the burden under Texas Finance Code section 59.006(e) of preventing or limiting [name of financial institution]’s compliance with the Record Request. You can fulfill that burden by seeking an appropriate remedy with the court, including filing a motion to quash the Record Request or a motion for a protective order.

If you choose to authorize the Requesting Party to inspect the records, please return the enclosed authorization to me, signed and notarized, in the self-addressed, stamped envelope provided.

Sincerely yours,

[Name of attorney]

Certified Mail No. [number]
Return Receipt Requested

Enc. [copy of record request]
Authorization to Release Financial Records

Date: ______________

To Whom It May Concern:

Re: [name and address of nonparty customer]

I, __________________________, authorize [name of attorney of requesting party] or the law firm of [name of law firm] or their agents to inspect the originals and to make copies of the following financial records maintained by [name of financial institution]:

[List records to be produced from discovery request.]

In making this authorization, I release [name of financial institution] and its officers, directors, and employees from legal responsibility or liability for releasing the requested records to the extent indicated and authorized in this document. [Name of financial institution] is expressly authorized to accept a copy of this authorization as though it were an original.

Information obtained by this authorization is for use in pending litigation and shall not be disseminated for any other purpose.

________________________________________
Signature

________________________________________
Printed or typed name

________________________________________
Address

________________________________________
City, state, zip
Form 18-2

This form should be used if the nonparty customer of the financial institution fails to return a signed authorization to release financial records. In accordance with Tex. Fin. Code § 59.006(d), the court, before ordering the requested records to be produced, may inspect the records to determine their relevance to the matter before the court. The court may also order redaction of portions of the records that the court determines should not be produced and must enter a protective order preventing the records that it orders produced from being (1) disclosed to a person who is not a party to the proceeding before the court and (2) used by a person for any reason other than resolving the dispute before the court. See Texas Finance Code section 59.006 regarding discovery of customer records and subsection (d), specifically, regarding nonexecution of written consent. For discussion of discovery from financial institutions, see section 18.16 in this chapter.

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

Motion to Inspect Financial Records of Nonparty

[Name of requesting party], Requesting Party, requests an in camera inspection of the records described in the [discovery request, e.g., Notice of Oral Deposition, Request for Production of Documents] attached as Exhibit [exhibit number/letter].

1. Facts. Pursuant to Texas Finance Code section 59.006(c), Requesting Party gave notice to [name of nonparty customer] of a request for financial records and a copy of the request in the manner and within the time provided by Rule 21a of the Texas Rules of Civil Procedure. [Include if applicable: A copy of the notice is attached as Exhibit [exhibit number/letter].]

Requesting Party also filed a certificate of service with the court and financial institution indicating that [name of nonparty customer] had been mailed or served with the notice and a copy of the request. [Include if applicable: A copy of the certified mail, return receipt requested card confirming service of notice in compliance with Texas Finance Code section 59.006(c)(1) on [name of nonparty customer] is included as Exhibit [exhibit number/letter].]
Requesting Party requested written consent from [name of nonparty customer] authorizing the financial institution to comply with the request. [Name of nonparty customer] did not execute the written consent as requested.

2. **Grounds.** Pursuant to Texas Finance Code section 59.006(d), Requesting Party seeks an in camera inspection of the requested records if [name of nonparty customer] does not execute a written consent.

3. **Prayer.** Requesting Party prays that an order granting this motion to inspect financial records be entered to permit Requesting Party an in camera inspection of the requested records and for all further relief to which Requesting Party may be entitled.

[Name]
Attorney for [name of requesting party]
State Bar No.: [E-mail address]
[Address]
[Telephone]
[Teletcopier]

Attach exhibit(s) if applicable. Include a certificate of service (form 19-1).
Form 18-3

This notice should be addressed to the defendant through his attorney if he is represented by one. Otherwise, the notice should be sent directly to the defendant, addressed “To: [name of defendant], Defendant.” For a form subpoena to be issued by an attorney, see form 18-4 in this chapter. For a notice of intention to take a deposition on written questions, see form 18-5.

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

Notice of Intention to Take Oral Deposition
[with Subpoena Duces Tecum]

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

Please take notice that [name of plaintiff], Plaintiff, intends to take the oral deposition of [name of witness] at [address, city, state], before a certified court reporter, commencing on [date and time]. [Include the following if the witness is not an individual: [Name of witness] is directed to designate the person or persons to testify on its behalf. The matters on which examination is requested are [list matters with reasonable particularity]. The person(s) designated by the witness must appear and testify before the officer taking this deposition at the time and place stated in this notice.]

Include the following if a subpoena duces tecum is desired.

[Name of witness] is instructed to produce at the time and place of the taking of this deposition, for use in conjunction with the taking of the deposition, all documents identified in the attached Exhibit [exhibit number/letter].

Include the following if the deposition will be transcribed non-stenographically.

This deposition will be taken by nonstenographic method of [describe method, e.g., videotape recording]. The deposition [will/will not] also be recorded stenographically.
Include the following if persons besides the parties, attorneys, employees of the attorneys, or spouses of parties will attend.

The following persons will attend the deposition: [name[s]].

Continue with the following.

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

Attach exhibit(s) if applicable. Include a certificate of service (form 19-1).
Form 18-4

Subpoenas can be served by any sheriff or constable in the state of Texas or by any person eighteen years old or older and not a party to the suit. Tex. R. Civ. P. 176.5(a). This form assumes that a process server other than a sheriff or constable will serve the subpoena. This form also shows the process server’s certification of the date and time of service and that service was accomplished personally. Tex. R. Civ. P. 176.5(b)(2). Alternatively, the witness’s signed written memorandum, showing acceptance of the subpoena, may be attached. Tex. R. Civ. P. 176.5(b)(1).

This form can order the recipient to (1) appear at a deposition; (2) appear at a deposition and produce documents or other tangible items at the deposition; or (3) produce documents or other tangible items only. Rule 176 should be read carefully before altering this form to command appearance at a hearing or trial. A notice to a nonparty to produce documents or tangible things under rule 205.3 must be served at least ten days before the subpoena compelling production is served. Tex. R. Civ. P. 205.2.

Subpoena
[with Duces Tecum Language]

THE STATE OF TEXAS

Style of Suit: [style]

Cause No.: [number]

Court: [designation and location of court]

Party Issuing Subpoena: [name of plaintiff]

Party’s Attorney of Record: [name of attorney]

To: [name of witness or person producing items]

Include the following if the recipient is to be deposed.

You are commanded to attend and give testimony at a deposition in the above-styled case on [date and time] at [address, city, state]. You must remain there until discharged by the court or the party summoning you.
You are [further] commanded to produce and permit inspection and copying on [date and time] at [address, city, state], of the following documents or tangible things in your possession, custody, or control: [list documents or other items].

The matters on which examination is requested are: [list matters with reasonable particularity]. You are to designate one or more persons to testify on your behalf as to matters known or reasonably available to you.

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

Date: [date]

[Name of attorney]

Return

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

[Name of process server]
Serve a copy of the subpoena on all parties. File a copy with the court showing the completed return of service, signed by the process server (see Tex. R. Civ. P. 191.4(b)). If only production of documents or other tangible things is sought from a nonparty, attach a request for production (form 18-24).
Form 18-5

This notice should be addressed to the defendant through his attorney if he is represented by one. Otherwise, the notice should be sent directly to the defendant, addressed “To: [name of defendant], Defendant.” See Tex. R. Civ. P. 21 and 21a for service requirements in specified situations.

See section 18.29:6 in this chapter regarding the procedure for taking a deposition on written questions, and section 18.29:7 for the uses of such depositions. Form 18-6 contains pattern deposition questions for a custodian of the creditor’s business records in a sworn account case.

Notice of Intention to Take Deposition on Written Questions
[with Subpoena Duces Tecum]

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

Please take notice that [name of plaintiff], Plaintiff, intends to take the deposition by written questions of [name of witness] at [address, city, state], before [name of court reporter or notary public], commencing on [date and time], to be used in the above-entitled and -numbered cause.

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

Or

Please take notice that [name of plaintiff], Plaintiff, intends to take the deposition by written questions of [name of witness] at [address, city, state], before [name of court reporter or notary public], commencing on [date and time], to be used in the above-entitled and -numbered cause. [Name of witness] is instructed to designate the person or persons to testify on its behalf with regard to matters pertaining to [describe matters with reasonable particularity].
The person(s) designated by the witness must appear and testify before the officer taking this deposition at the time and place stated in this notice.

Include the following if a subpoena duces tecum is desired.

[Name of witness] is instructed to produce at the time and place of the taking of this deposition, for use in conjunction with the taking of the deposition, all documents identified in the attached Exhibit [exhibit number/letter].

Continue with the following.

A copy of the written questions to be asked is attached as Exhibit [exhibit number/letter].

---

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

Attach exhibit(s) if applicable. Include a certificate of service (form 19-1).
Form 18-6

These questions may be used to establish the authenticity of business records or to establish through the client’s deposition a part or all of the claim that cannot be proved by affidavit. This form is particularly helpful if the client is out of state and it would be cumbersome or expensive to bring him to Texas to testify. For pattern interrogatories to the defendant, see forms 18-15 through 18-20 in this chapter. These questions are to be used only as a guide and cannot be considered appropriate for all litigation. Questions based on written documents should be drafted to conform to the specific terms and conditions of the documents giving rise to the creditor’s claim.

These questions are for a sworn account case in which the witness can prove up the written documentation supporting the account as business records, as well as the genuineness of the debt. Questions may be added to rebut any raised or anticipated defenses. The witness is to produce and attest to the accuracy of copies of (1) the creditor’s records showing what was sold to the defendant, the charges for those sales, and any payments from or credits otherwise made to the defendant’s account and (2) the invoice(s) sent to defendant.

Pattern Written Deposition Questions to Prove Up Business Records

1. Please state your name.

2. State where you reside.

3. By whom are you employed, and how long have you been so employed?

4. If your answer to question number 3. named [name of plaintiff], state whether or not that entity is the plaintiff in the case for which this deposition is being taken.

5. Describe the general nature of the business of your employer.

6. In what capacity are you employed by Plaintiff?

7. Describe the nature of your duties with Plaintiff.

8. Is it a part of the usual and regular course of business of Plaintiff to keep regular books, accounts, and records of all its financial transactions, accounts, and business dealings?
9. In connection with your employment by Plaintiff, are you familiar with the books, accounts, and records kept and maintained by Plaintiff in the usual and regular course of business?

10. Do you have any personal supervision, custody, or control over the books, accounts, and records kept and maintained by Plaintiff?

11. Have you examined the books, accounts, and records kept and maintained by Plaintiff in the regular course of business?

12. Do the books, accounts, and records kept by Plaintiff in the regular course of its business show that [name of defendant], Defendant, had or has an account with Plaintiff?

13. If you answered question number 12. in the affirmative, please state whether or not the entries in the books, accounts, and records of Plaintiff that show Defendant’s account with Plaintiff were made in the usual and regular course of business.

14. Are entries in the books, accounts, and records of Plaintiff regularly made at, near, or shortly after the time of the transactions, acts, or events recorded by the entries?

15. Is it part of the regular course of business of Plaintiff for an employee with personal knowledge to make entries or to furnish the information for making the entries in the books, accounts, and records kept by Plaintiff in the regular course of business?

16. Are the books, accounts, and records kept by Plaintiff in the regular course of business that show Defendant’s account with Plaintiff permanent records of Plaintiff?

17. Are the entries in the books, accounts, and records kept by Plaintiff in the regular course of business that show Defendant’s account with Plaintiff original entries of transactions between Plaintiff and Defendant?
18. Do the books, accounts, and records of Plaintiff kept in the regular course of business show Defendant to be indebted to Plaintiff?

19. Is it part of the regular course of business of Plaintiff in keeping its books, accounts, and records to record therein all payments, offsets, credits, and allowances chargeable against its accounts?

20. What is the amount now shown by Plaintiff’s books, accounts, and records to be due to Plaintiff by Defendant after the allowance of all offsets, payments, credits, and allowances shown on those books, accounts, and records?

21. Where are these books, accounts, and records of Plaintiff kept and maintained?

22. Do you have an exact copy of the account of Defendant with Plaintiff, as shown by Plaintiff’s books, accounts, and records kept in the regular course of business?

23. If you answered question number 22. in the affirmative, please state whether the copy of the account shown by the ledger sheet or other records referred to in question number 22. was prepared by you or under your personal supervision.

24. Please hand to the officer taking this deposition a copy of the ledger sheet or other record referred to in question number 23., and have the officer attach it to this deposition as Plaintiff’s Exhibit [exhibit number/letter].

25. State whether the permanent records of Plaintiff contain any of the following invoices showing merchandise sold by Plaintiff to Defendant: [list invoice numbers and amounts charged].

26. Are the original invoices referred to in your answer to question number 25. a part of the books, records, and accounts of Plaintiff kept in the regular course of business?
27. Were the original invoices referred to in your answer to question number 25. made by you or under your direct supervision?

28. Please state where the originals of the invoices referred to in your answer to question number 25. are presently located, and please state who has custody of the invoices.

29. Do you have photocopies of the original invoices referred to in your answer to question number 25.?

30. Are the photocopies of the original invoices referred to in your answer to question number 25. true and correct copies of the originals?

31. Were the photocopies of the invoices referred to in your answer to question number 25. made by you or under your direct supervision?

32. Please hand to the officer taking this deposition the true and correct copies of the invoices referred to in your answer to question number 25. and ask the officer to number them as Plaintiff’s exhibits and attach them to this deposition. Please state the exhibit numbers so assigned.

33. Do the permanent records of Plaintiff show that the merchandise referred to in the invoices was sold to Defendant?

34. Was the merchandise described in the invoices delivered to Defendant?

35. Please state how and when the merchandise was delivered to Defendant.

36. Please state where the merchandise was delivered to Defendant.

37. Please state how the merchandise was ordered from Plaintiff.

38. What amount of money, if any, did Defendant agree to pay to Plaintiff for the merchandise?
39. Based on your experience, what, in your opinion, was the reasonable market value of the merchandise?

40. Was a statement showing the amount owed to Plaintiff by Defendant sent to Defendant?

41. If you answered question number 40. in the affirmative, please state the date or the approximate date on which such a statement was sent to Defendant.

42. To what address was that statement sent?

43. How was that statement sent?

44. If your answer to question number 43. was that the statement was sent by mail, please state whether the envelope containing the statement bore the correct amount of postage to reach the addressee.

45. Please state whether the envelope containing the statement referred to in question number 40. was properly addressed, sealed, and mailed in the usual course of business of Plaintiff.

46. Did the envelope referred to in question number 45. bear the name and return address of Plaintiff?

47. Was the envelope containing the statement referred to in question number 40. returned to Plaintiff by the United States Postal Service as being unclaimed or undelivered or for any other reason?

Ensure that the deposition officer has copies of all the exhibits to be propounded to the witness.
Plaintiff’s Request for Admissions

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

Pursuant to rule 198 of the Texas Rules of Civil Procedure, you are requested to admit the truth of each of the relevant matters stated in the attached list of facts requested to be admitted [include if applicable: and to admit the genuineness of each of the relevant documents described in and exhibited with the attached requested admissions].

Each of the matters of which an admission is requested will be deemed admitted unless, within thirty days after service, you deliver or cause to be delivered to me a statement denying specifically each matter of which an admission is requested, objecting to the admission and stating the reason(s) for your objection, or stating in detail the reason(s) you cannot truthfully admit or deny the matter.

Please note that if, after you submit your responses to these requests for admissions, you learn that any such response was either incomplete when made, or, although complete and correct when made, it is no longer complete and correct, you must amend or supplement your
response reasonably promptly after you discover the necessity for such a response. Any amended or supplemental response made less than thirty days before trial will be presumed not to have been made reasonably promptly. A failure to make, amend, or supplement a response in a timely manner may result in your not being able to introduce into evidence the material or information not timely disclosed.

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

Attach list of facts requested to be admitted. Include a certificate of service (form 19-1).
Pattern Requests for Admissions—Sworn Account

1. **Admit or Deny**

that Plaintiff sold to Defendant the goods, wares, merchandise, or services described in the invoice attached as Exhibit [exhibit number/letter].

*Answer:*

2. **Admit or Deny**

that on [date], Plaintiff sold to Defendant the goods, wares, merchandise, or services described in the statement of account attached as Exhibit [exhibit number/letter].

*Answer:*

3. **Admit or Deny**

that Defendant received the goods, wares, merchandise, or services described in the invoice referred to in request number 1.

*Answer:*

4. **Admit or Deny**

that Defendant accepted the goods, wares, merchandise, or services delivered by Plaintiff and referred to in request number 1.

*Answer:*
5. **Admit or Deny**

that the goods, wares, merchandise, or services referred to in request number 1 were delivered to Defendant by Plaintiff in the quantities shown on the attached Exhibit [exhibit number/letter].

*Answer:*

6. **Admit or Deny**

that the price[s] charged for the goods, wares, merchandise, or services referred to in request number 1 were the price[s] agreed to by Defendant.

*Answer:*

7. **Admit or Deny**

that the balance shown on the invoices referred to in request number 1 represents the value of the goods, wares, merchandise, or services delivered to Defendant by Plaintiff.

*Answer:*

8. **Admit or Deny**

that the prices charged for the goods, wares, merchandise, or services referred to in request number 1 were the usual and customary prices therefor at the time when delivered and in the county where delivered.

*Answer:*
9. **Admit or Deny**

that the principal amount due to Plaintiff from Defendant for the goods, wares, merchandise, or services referred to in request number 1. was $[amount] as of the date of filing of Plaintiff’s original petition.

*Answer:*

10. **Admit or Deny**

that except for any credits or payments shown on the attached Exhibit [exhibit number/letter], Defendant has failed to pay the amount due Plaintiff on the account that is the subject of this suit.

*Answer:*

11. **Admit or Deny**

that on [date], Plaintiff presented to Defendant a claim for payment of the outstanding balance referred to in request number 9.

*Answer:*

12. **Admit or Deny**

that the goods, wares, merchandise, or services received by Defendant from Plaintiff conform to all representations and warranties made, if any.

*Answer:*

13. **Admit or Deny**

that the goods, wares, merchandise, or services referred to in request number 1. were never rejected, disputed, or returned by Defendant.
Answer:

Attach exhibit(s).
Form 18-9

This form is for an action on a written contract or revolving credit agreement. For a general discussion of the action on a written contract, see section 14.22 in this manual; see section 14.24 regarding revolving credit agreements. With modification, this sample set is suitable for use in actions on an oral contract; see section 14.23.

Pattern Requests for Admissions—Contract or Revolving Credit Agreement

1.  Admit or Deny

that on or about [date], Plaintiff and Defendant entered into a written contractual agreement.

Answer:

2.  Admit or Deny

that the document, a copy of which is attached as Exhibit [exhibit number/letter], is a genuine, true, and correct copy of the contractual agreement between Plaintiff and Defendant referred to in request number 1.

Answer:

3.  Admit or Deny

that Plaintiff performed the acts described in the contractual agreement referred to in request number 1. of delivering to Defendant the goods, wares, merchandise, or services described in the agreement.

Answer:
4. Admit or Deny

that under the contractual agreement referred to in request number 1., Defendant has made payments totaling $[amount].

Answer:

5. Admit or Deny

that on [date], under the terms of the contractual agreement, a copy of which is attached as Exhibit [exhibit number/letter], the principal amount due on the agreement referred to in request number 1. was $[amount].

Answer:

6. Admit or Deny

that Defendant received the contractual agreement, a copy of which is attached as Exhibit [exhibit number/letter].

Answer:

7. Admit or Deny

that on [date], Plaintiff presented to Defendant a claim for payment of the outstanding balance stated in request number 5.

Answer:

Attach exhibit(s).
Form 18-10

For a general discussion of the action on a promissory note, see section 14.25 in this manual. If foreclosure of the security interest is sought, combine these admissions with those at form 18-11.

Pattern Requests for Admissions—Promissory Note

1. *Admit or Deny*

that the document attached as Exhibit [exhibit number/letter] is a true and genuine copy of a promissory note.

*Answer:*

2. *Admit or Deny*

that the document attached as Exhibit [exhibit number/letter] was executed by Defendant [or by an agent of Defendant with full authority to bind Defendant to its terms].

*Answer:*

3. *Admit or Deny*

that Defendant received value in exchange for the promissory note referred to in request numbers 1. and 2. [if necessary, set out the nature of the “value” given, e.g., by paying cash to Defendant in the amount stated in the promissory note].

*Answer:*

4. *Admit or Deny*

that by the execution of the promissory note referred to in request numbers 1. and 2., Defendant unconditionally promised to pay $[amount] to the order of Plaintiff.
Answer:

5. Admit or Deny that Plaintiff is the owner of the promissory note referred to in request numbers 1. and 2.

Answer:

6. Admit or Deny that Plaintiff is the holder of the promissory note referred to in request numbers 1. and 2.

Answer:

7. Admit or Deny that the promissory note referred to in request numbers 1. and 2. is the basis for this suit.

Answer:

8. Admit or Deny that no payments have been made to retire the principal or accrued interest on the promissory note referred to in request numbers 1. and 2. for which Defendant has not been given credit.

Answer:

9. Admit or Deny that the debt evidenced by the promissory note referred to in request numbers 1. and 2. is now due and payable.

Answer:
10.  Admit or Deny

that on [date], the date this suit was filed, the amount of $[amount] was due to Plaintiff as principal on the promissory note referred to in request numbers 1. and 2.

Answer:

11.  Admit or Deny

that on [date], the date this suit was filed, the amount of $[amount] was due to Plaintiff as accrued interest on the promissory note referred to in request numbers 1. and 2.

Answer:

Attach exhibit(s).
Form 18-11

These requested admissions should be used with the requests for admissions for a promissory note at form 18-10 if the creditor has a security interest in collateral to foreclose. For a general discussion of the action to foreclose a security interest, see section 14.28 in this manual. See also section 14.29 for discussion of a deficiency suit.

Tex. Bus. & Com. Code § 9.203(b)(1) requires that, for a security interest to attach, value must be given. Request number 2. should be altered as appropriate if “value” other than consideration given to the defendant is involved.

Pattern Requests for Admissions—Foreclosure of Security Interest or Deficiency Judgment

1. **Admit or Deny**

   that Defendant executed the original security agreement, a copy of which is attached as Exhibit [exhibit number/letter].

   *Answer:*

2. **Admit or Deny**

   that Defendant received valuable consideration for the execution of the security agreement.

   *Answer:*

3. **Admit or Deny**

   that Plaintiff is the owner of the security interest in the collateral described in the security agreement.

   *Answer:*
4. **Admit or Deny**

that Defendant executed the original financing statement, a copy of which is attached as Exhibit [exhibit number/letter].

*Answer:*

5. **Admit or Deny**

that the debt described in the security agreement has not been paid in full by Defendant.

*Answer:*

6. **Admit or Deny**

that on the date of the execution of the security agreement, Defendant owned the collateral described in it.

*Answer:*

7. **Admit or Deny**

that no other person or entity has a claim to or right to the collateral described in the security agreement.

*Answer:*

8. **Admit or Deny**

that no other person or entity has a lien on the collateral described in the security agreement.

*Answer:*
9. *Admit or Deny*

that Defendant has not performed all covenants and conditions contained in the security agreement.

*Answer:*

Include requests 10.–12. if applicable.

10. *Admit or Deny*

that Defendant received both notice of intent to accelerate and notice of acceleration from Plaintiff, copies of which are attached as Exhibits [exhibit numbers/letters].

*Answer:*

11. *Admit or Deny*

that the default referred to in the notices attached as Exhibits [exhibit numbers/letters] has not been cured or corrected by Defendant.

*Answer:*

12. *Admit or Deny*

that Defendant, to secure payment to Plaintiff of an obligation owed by Defendant, delivered the collateral described in the security agreement.

*Answer:*

Include requests 13.–15. for a deficiency suit.

13. *Admit or Deny*

that the collateral was repossessed lawfully.
14. **Admit or Deny**

that the collateral was disposed of in a commercially reasonable manner by [public/private] sale.

**Answer:**

15. **Admit or Deny**

that after the disposition of the collateral and all other credits and offsets applicable to the obligation secured by the security agreement, the amount of $[amount] remains due on that obligation.

**Answer:**

Attach exhibit(s).
Pattern Requests for Admissions—Lease of Personal Property

1. **Admit or Deny**

that on or about [date], Plaintiff and Defendant entered into a written contractual agreement entitling Defendant to the use and enjoyment of [describe leased personal property] for an initial period of [number] months.

*Answer:*

2. **Admit or Deny**

that the document attached as Exhibit [exhibit number/letter] is a genuine, true, and correct copy of the agreement referred to in request number 1.

*Answer:*

3. **Admit or Deny**

that the document attached as Exhibit [exhibit number/letter] contains all the terms and conditions agreed to by and between Plaintiff and Defendant with respect to the lease of the personal property described in request number 1.

*Answer:*
4. **Admit or Deny**

that under the terms of the agreement referred to in request number 1., Defendant was obligated and bound to pay to Plaintiff the total amount of $[amount], which was to be paid in [number] equal monthly installments of $[amount].

*Answer:*

5. **Admit or Deny**

that Defendant has made only [number] of the monthly payments called for by the agreement referred to in request number 1.

*Answer:*

6. **Admit or Deny**

that the balance due to Plaintiff by Defendant under the agreement referred to in request number 1. is $[amount] as of [date].

*Answer:*

7. **Admit or Deny**

that Plaintiff has declared Defendant to be in default under the terms of the agreement referred to in request number 1. and has called for the payment of the outstanding balance.

*Answer:*

8. **Admit or Deny**

that the agreement referred to in request number 1. was not subject to cancellation by any party except as expressly provided for in the agreement.
Answer:

9.  Admit or Deny

that the Defendant acquired no right, title, or interest in the personal property described in request number 1. except as expressly stated in the agreement referred to in request number 1.

Answer:

10. Admit or Deny

that the property leased by Defendant under the agreement referred to in request number 1. has performed and operated in accordance with any representations or warranties made by or on behalf of Plaintiff with respect to the suitability or durability of the property.

Answer:

11. Admit or Deny

that Plaintiff performed all its obligations under the agreement referred to in request number 1.

Answer:

Attach exhibit(s).
Form 18-13

For a general discussion of the action on a guaranty, see section 14.31 in this manual.

Pattern Requests for Admissions—Guaranty Agreement

1.  Admit or Deny

that on or about [date], Defendant executed and delivered to Plaintiff a written contractual agreement.

Answer:

2.  Admit or Deny

that the document attached as Exhibit [exhibit number/letter] is a true and correct copy of the agreement referred to in request number 1.

Answer:

3.  Admit or Deny

that on or about [date], [name of person or entity incurring debt whose liability was guaranteed] executed a [describe underlying obligation guaranteed by defendant] in the amount of $[amount], a copy of which is attached as Exhibit [exhibit number/letter].

Answer:

4.  Admit or Deny

that under the terms of the agreement referred to in request number 1, Defendant unconditionally guaranteed the payment of the obligation referred to in request number 3.
Section 5. Admit or Deny

that there is presently due on the obligation referred to in request number 3, the principal amount of $\{\text{amount}\}$, plus accrued interest as provided for in the debt agreement.

Section 6. Admit or Deny

that the instrument referred to in request number 1, has never been revoked by Defendant and remains in full force and effect.

Section 7. Admit or Deny

that Plaintiff is the present owner and holder of the obligation referred to in request number 3.

Section 8. Admit or Deny

that on [\text{date}], Plaintiff presented to Defendant a claim for payment of the outstanding balance stated in request number 5.

Answer:

Attach exhibit(s).
Form 18-14

Attach a copy of the interrogatories to this form. Pattern interrogatories are at forms 18-15 through 18-20 in this chapter.

If the defendant is a corporation or other entity, two sets of interrogatories should be prepared. One set should be addressed to the corporation and the other set to a named individual, so that if the defendant fails to answer the interrogatories and the remedy of contempt rather than some other sanction is desired, the court will be able to order the incarceration of the noncomplying individual. See section 26.4:3. The interrogatories should be addressed to the defendant through his attorney if he is represented by one. If the defendant is not represented, the interrogatories should be sent directly to him, addressed “To: [name of defendant], Defendant.”

The pattern interrogatories listed in forms 18-15 through 18-20 are to be used only as a guide and cannot be considered appropriate for all litigation. These sample sets include elements of commonly encountered situations. Interrogatories based on written documents should be drafted to conform to the specific terms and conditions of the documents giving rise to the creditor’s claim. Information developed by the use of these questions may suggest further questions to be propounded in subsequent interrogatories or by other kinds of pretrial discovery.

For cases controlled by a level 1 discovery control plan, no more than fifteen written interrogatories can be served on any party. Unless the court has authorized additional interrogatories, no more than twenty-five written interrogatories can be served on a party in a level 2 case. See section 18.53:3. Therefore, the attorney should plan and draft interrogatories with caution and use the requests for disclosure allowed by Tex. R. Civ. P. 190.2(b)(6) and 194 to elicit basic information. This form assumes that requests for disclosure have already been served on the defendant or are being served contemporaneously with these interrogatories.

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

Plaintiff’s Written Interrogatories

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

Pursuant to rule 197 of the Texas Rules of Civil Procedure, you are to answer the attached interrogatories separately, fully, in writing, and under oath. You should deliver a true copy of your answers to me within thirty days after the date of service of these interrogatories.

Please note that if, after you submit your responses to these interrogatories, you learn that any such response was either incomplete when made, or, although complete and correct
when made, it is no longer complete and correct, you must amend or supplement your response reasonably promptly after you discover the necessity for such a response. Any amended or supplemental response made less than thirty days before trial will be presumed not to have been made reasonably promptly. A failure to make, amend, or supplement a response in a timely manner may result in your not being able to introduce into evidence the material or information not timely disclosed.

Definitions

As used in these interrogatories, the following definitions apply:

“You” or “your” refers to the person answering these interrogatories.

“Defendant” refers to the named Defendant, its officers, agents, representatives, and employees.

“Identify,” with regard to a person, means to provide the following: (1) the person’s full name; (2) any other names the person uses or has used in the past; (3) the person’s residential address and telephone number; (4) the person’s business address(es) and telephone number(s); (5) the person’s employer and job title; (6) if the person is a former employee of Defendant, the person’s last job title while so employed, and the date of termination; and (7) if the person is not an employee of Defendant but has some other connection with Defendant, for example, agent, independent contractor, officer, director, or customer, the person’s connection with Defendant.

“Identify,” with regard to a document, means to describe it with sufficient particularity so that a person never having seen it could comply with the requirements of rule 196 of the Texas Rules of Civil Procedure when designating the document in a request for production.
Plaintiff’s Written Interrogatories

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

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

1. Identify the person answering these interrogatories.

2. State the manner of organization of Defendant—for example, corporation, partnership, limited partnership, sole proprietorship, or individual.
   a. If Defendant is a corporation, identify each officer and director.
   b. If Defendant is a partnership, identify each partner and state whether he is a general or limited partner.

3. Did Defendant receive the goods, wares, merchandise, or services described in each invoice attached as Exhibit [exhibit number/letter]? If not, identify separately by invoice which goods, wares, merchandise, or services were not received.

4. Did Defendant reject, dispute, or return any of the goods, wares, merchandise, or services received by Defendant and described in Exhibit [exhibit number/letter]? If so, state the date and manner of that rejection, dispute, or return. Alternatively, if you will do so without a formal request to produce, attach a genuine copy of each document or other written memorandum in support thereof; if you will not, identify each item of documentation or memorandum.

5. State the date, amount, and nature of every payment, credit, or offset against the account made the subject of Plaintiff’s original petition that Defendant alleges Plaintiff has not allowed to Defendant. If you will do so without a request to produce, attach to your answer a copy of each document or written memorandum in support of each such payment,
credit, or offset (for example, front and back of each check or cash receipt evidencing each payment) claimed by Defendant; or if you will not, state the date, amount, and nature of each such payment, credit, or offset and identify each piece of supporting documentation.

6. State whether Defendant or Defendant’s attorney on behalf of Defendant has ever denied, either orally or in writing, the account made the subject of Plaintiff’s original petition and state whether Defendant or Defendant’s attorney on behalf of Defendant has ever claimed, either orally or in writing, any payment, credit, or offset to the account. If any such communication was in writing and if you will do so without a formal request to produce, attach a genuine copy of each writing; or if you will not, identify each writing. If any such communication was oral, state the date and substance of the communication, state the manner of its delivery, and state the name of the agent, representative, or employee of Plaintiff to whom such communication was directed.

7. Did Plaintiff present to Defendant a demand for payment of the claim made the subject of this suit? If so, state the date it was received, the name of the person receiving it, the relationship to Defendant of the person receiving it, and the amount of the demand.

8. Identify all persons whom you intend to call as witnesses at trial, other than rebuttal or impeaching witnesses the necessity of whose testimony cannot reasonably be anticipated before trial.

9. If Defendant contends or believes that the debt that is the subject of this suit is the obligation of any person or entity other than Defendant, identify such other persons or entities and state the fact and identify the documents on which that contention or belief is based.

Attach exhibit(s).
Form 18-16

For a general discussion of the action on a written contract, see section 14.22 in this manual. With modification, this sample set is suitable for use in actions on an oral contract (section 14.23) or on a consumer revolving credit account (section 14.24).

Pattern Interrogatories—Contract or Consumer Revolving Credit Account

1. Identify the person answering these interrogatories.

2. State the manner of organization of Defendant—for example, corporation, partnership, limited partnership, sole proprietorship, or individual.
   a. If Defendant is a corporation, identify each officer and director.
   b. If Defendant is a partnership, identify each partner and state whether he is a general or limited partner.

3. Did Defendant enter into a written contractual agreement with Plaintiff on or about [date]?

4. Is the document attached as Exhibit [exhibit number/letter] a true and correct copy of the agreement referred to in interrogatory number 3.? If it is not, state all the terms of every agreement relating to the subject matter of this lawsuit. Alternatively, if you will do so without a formal request to produce, attach a genuine copy of each document relating the terms; or if you will not, identify each such agreement.

5. Did Plaintiff perform the acts described in the agreement referred to in interrogatory number 3.? If not, specifically describe the acts Plaintiff did not perform as required by the agreement.
6. If Defendant contends or believes that the balance claimed by Plaintiff is not correct, state all the facts and identify all the documents on which that contention or belief is based.

7. Did Defendant receive the document attached as Exhibit [exhibit number/letter]? If so, state the date it was received, the name of the person receiving it, and the relationship to Defendant of the person receiving it.

8. Did Plaintiff present to Defendant a demand for payment of the claim that is the subject of this suit? If so, state the date it was received, the name of the person receiving it, the relationship to Defendant of the person receiving it, and the amount of the demand by Plaintiff.

9. Identify all persons whom you intend to call as witnesses at trial, other than rebuttal or impeaching witnesses the necessity of whose testimony cannot reasonably be anticipated before trial.

10. If Defendant contends or believes that the debt that is the subject of this suit is the obligation of any person or entity other than Defendant, identify such other persons or entities and state the facts and identify the documents on which that contention or belief is based.

Attach exhibit(s).
Form 18-17

For a general discussion of the action on a promissory note, see section 14.25 in this manual. If foreclosure of a security interest is sought, combine these interrogatories with those at form 18-18.

Pattern Interrogatories—Promissory Note

1. Identify the person answering these interrogatories.

2. State the manner of organization of Defendant—for example, corporation, partnership, limited partnership, sole proprietorship, or individual.
   a. If Defendant is a corporation, identify each officer and director.
   b. If Defendant is a partnership, identify each partner and state whether he is a general or limited partner.

3. Is the document attached as Exhibit [exhibit number/letter] (the “Note”) a true and genuine copy of a promissory note?

4. If the answer to interrogatory number 3. is not affirmative, state clearly each detail in the Note that Defendant contends makes it something other than a promissory note.

Practice Note: As each discrete subpart is considered a separate interrogatory, interrogatory number 5. may be construed as eight interrogatories. Interrogatories are limited to fifteen in a level 1 case.

5. With reference to the Note, state or identify:
   a. The party signing the Note.
   b. The date the Note was signed.
   c. The place where the Note was signed.
d. Each person present at the time the Note was signed.

e. The person to whom the Note was delivered.

f. The date and amount of each payment made under the Note, the form of each payment, the party making each payment, and the party to whom each payment was made.

g. The principal balance due on the date of last payment under the terms of the Note, and the mathematical computations used to compute the amount.

h. The date, amount, and nature of each offset or credit Defendant claims against the balance due.

6. Was the Note signed by Defendant?

7. If the answer to interrogatory number 6. is not affirmative, state whether Defendant knows the individual whose signature appears on the Note, then state the nature of every relationship Defendant has had with that individual, the inclusive dates of each such relationship, and the title or terminology that best describes each such relationship.

8. By reason of the execution of the Note, did Defendant unconditionally promise to pay the sum of $[amount] to Plaintiff?

9. If the answer to interrogatory number 8. is not affirmative, state each and every reason for executing the Note and whether you contend or believe the obligations created were satisfied.

10. If you do not believe that Plaintiff is the owner and/or holder of the Note, identify the individual, corporation, or other business entity that Defendant contends is the present owner and/or holder of the Note.
11. If the answer to interrogatory number 10. is not Plaintiff, state the date on which the named individual or entity acquired the Note and the manner by which the Note was acquired.

12. Has Defendant made any payments to retire the principal or accrued interest on the Note?

13. If the answer to interrogatory number 12. is affirmative, state the date, method, and amount of each such payment made by Defendant and state the name and business and residence addresses of each person or entity to whom each such payment was made.

14. Has the Note been accelerated by Plaintiff?

15. Identify all persons whom you intend to call as witnesses at trial, other than rebuttal or impeaching witnesses the necessity of whose testimony cannot reasonably be anticipated before trial.

Attach exhibit(s).
For a general discussion of the action to foreclose a security interest, see section 14.28 in this manual. A deficiency suit is discussed at section 14.29. Interrogatory number 3. may be used if another party claims a security interest in the same collateral.

Pattern Interrogatories—Foreclosure of Security Interest or Deficiency Judgment

1. With reference to the original of the attached document titled “Security Agreement,” a copy of which is attached as Exhibit [exhibit number/letter], state or identify:
   
   a. The party executing the Security Agreement.
   
   b. The date of its execution.
   
   c. The place of its execution.
   
   d. The name and address of each person present at the time of its execution.
   
   e. The name of the person to whom the Security Agreement was delivered or, if the Security Agreement was not delivered, what was done with the Security Agreement after its execution.
   
   f. The person owning the collateral described in the Security Agreement at the time of its execution.
   
   g. Each person claiming an interest in the collateral described in the Security Agreement, the date when each such interest was created, and the nature of each interest.
   
   h. The present location of the collateral described in the Security Agreement and the person who presently has control over the collateral.
i. The name and address of every company insuring the collateral described in the Security Agreement, the date of each policy of insurance, the number of each policy of insurance, the kind of insurance, the name and address of the insured and the loss payee of each policy, the amount of each policy, and the present status of each policy.

j. The date and amount of each payment made on the obligation described in the Security Agreement, the form of each payment, the name and address of the party making each payment, and the name and address of the party to whom each payment was made.

2. With reference to the original of the document titled “Financing Statement,” a copy of which is attached as Exhibit [exhibit number/letter], state or identify:

a. The party executing the Financing Statement.

b. The date of its execution.

c. The place of its execution.

d. Each person present at the time of its execution.

e. The person to whom the Financing Statement was delivered after execution.

The following may be used if another party claims a security interest in the same collateral.

3. With reference to the collateral described in the Security Agreement, state or identify:

a. Each person having an interest in the collateral on [date of execution of security agreement].
b. The person having possession of the collateral on [date of execution of security agreement].

c. Each date on which possession of the collateral was transferred, each transferee, the purpose of each transfer, and each person present at the time each transfer occurred.

d. Each person claiming any interest in the collateral at the time of answering these interrogatories and the nature of the interest claimed by each such person.

Attach exhibit(s).
Form 18-19

For a general discussion of the action on a lease of personal property, see section 14.6 in this manual.

Pattern Interrogatories—Lease of Personal Property

1. Identify the person answering these interrogatories.

2. State the manner of organization of Defendant—for example, corporation, partnership, limited partnership, sole proprietorship, or individual.
   a. If Defendant is a corporation, identify each officer and director.
   b. If Defendant is a partnership, identify each partner and state whether he is a general or limited partner.

3. Did Defendant execute the written agreement attached as Exhibit [exhibit number/letter] (the “Lease”)?

4. If the answer to interrogatory number 3. is not affirmative, state whether Defendant agreed to lease the personal property described in the Lease, the date of the agreement, whether the agreement was oral or in writing, and the terms and conditions of the agreement. In the alternative, if you will do so without a request to produce, attach a genuine copy of each such written agreement; or if you will not, identify each agreement.

5. Did Defendant lease the following personal property from Plaintiff: [describe leased property]?

6. State the exact time period during which Defendant was to be entitled to the use and enjoyment of the personal property described in interrogatory number 5.
7. Did Defendant agree to pay Plaintiff a specified amount of money each month as rent for the personal property described in interrogatory number 5.?

8. If the answer to interrogatory number 7. is affirmative, state the amount of money that Defendant agreed to pay each month to Plaintiff and state the exact number of months that Defendant agreed to pay that amount.

9. State the date, method, and amount of each payment made to Plaintiff under the terms of the Lease or agreement and the person or entity to whom each payment was made.

10. Was any express warranty or representation made by Plaintiff to Defendant concerning the personal property referred to in interrogatory number 5. that was not honored?

11. If the answer to interrogatory number 10. is affirmative, state the character or nature of each warranty or representation made or given, the identity of the individual making or giving that warranty or representation, and the capacity in which that person was employed by or associated with Plaintiff.

12. Has the personal property leased by Defendant under the written agreement referred to in interrogatory number 3. failed to operate in accordance with any representation or warranty made or given by Plaintiff?

13. If the answer to interrogatory number 12. is affirmative, state in detail the nature of any malfunction or other defect in operation on which Defendant bases the contention that the personal property failed to operate in accordance with the warranty or representation allegedly made or given by Plaintiff, the date of each such malfunction, and the name of each person having knowledge of the facts.

14. Did Plaintiff present to Defendant a demand for payment of the claim made the subject of this suit? If so, state the date it was received, the name of the person receiving it, the
relationship to Defendant of the person receiving it, and the amount of the demand by Plaintiff.

15. Identify all persons whom you intend to call as witnesses at trial, other than rebuttal or impeaching witnesses the necessity of whose testimony cannot reasonably be anticipated before trial.

Attach exhibit(s).
Pattern Interrogatories—Guaranty Agreement

1. Identify the person answering these interrogatories.

2. State the manner of organization of Defendant—for example, corporation, partnership, limited partnership, sole proprietorship, or individual.
   a. If Defendant is a corporation, identify each officer and director.
   b. If Defendant is a partnership, identify each partner and state whether he is a general or limited partner.

3. Did Defendant execute the written agreement attached as Exhibit [exhibit number/letter]?

4. If the answer to interrogatory number 3. is not affirmative, state whether Defendant otherwise agreed to guarantee any obligations, orally or in writing, the date of the agreement, and a verbatim recitation of the terms and conditions of the agreement. In the alternative, if you will do so without a request to produce, attach a genuine copy of each written agreement; or if you will not, identify each written agreement.

5. Did [name of person or entity whose liability is being guaranteed] execute the [describe obligation guaranteed by defendant] attached as Exhibit [exhibit number/letter]?

6. If the answer to interrogatory number 5. is not affirmative, state every difference existing between the attached Exhibit [exhibit number/letter] and the original document referred to in interrogatory number 5.
7. Who does Defendant contend or believe is the present owner and holder of the obligation guaranteed by Defendant and referred to in interrogatory number 5.?

8. If the answer to interrogatory number 7. is not Plaintiff, state the name and residence and business addresses of the person or entity that Defendant believes is the owner and present holder of the obligation guaranteed by Defendant and referred to in interrogatory number 5., the date on which such person or entity acquired its ownership, and the manner of the acquisition.

9. Identify all persons whom you intend to call as witnesses at trial, other than rebuttal or impeaching witnesses the necessity of whose testimony cannot reasonably be anticipated before trial.

10. If Defendant contends or believes that there is any reason why Defendant is not liable on the guaranty that is the subject of this suit, state the reason and identify all the facts and documents on which those contentions or beliefs are based.

Attach exhibit(s).
Form 18-21

This motion to enlarge the number of interrogatories is governed by Tex. R. Civ. P. 190.5, which sets out the circumstances under which a level 2 or level 3 discovery control plan may be modified. All discovery motions must contain a certificate by the party filing the motion that efforts to resolve the discovery dispute without the necessity of court intervention have been attempted and have failed. Tex. R. Civ. P. 191.2. Local practice varies in the procedure for setting the hearing and filing the certificate of service and on whether a judge must sign the order setting the hearing or whether the signature by the court clerk or attorney is sufficient.

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

Plaintiff’s Motion to Enlarge Number of Written Interrogatories

[Name of plaintiff], Plaintiff, pursuant to rule 190.5 of the Texas Rules of Civil Procedure, requests that the Court modify the discovery control plan governing this case, to allow Plaintiff to enlarge the number of interrogatories to be served on [name of defendant], Defendant, to [number], not including subparts.

1. Original Discovery Control Plan. This suit was filed on [date]. The suit is subject to a [level 2/level 3] discovery control plan, as described in rule 190 of the Texas Rules of Civil Procedure. As a result, each party was limited to serving on each other party no more than [twenty-five/[number set out in court-mandated discovery control plan]] written interrogatories, excluding interrogatories asking a party only to identify or authenticate specific documents.

2. Need for Additional Interrogatories. Plaintiff requests additional interrogatories because [state reason(s) for necessity for asking for additional interrogatories, e.g., in his responses to Plaintiff’s first set of interrogatories, Defendant alleges that his twin brother, and not Defendant, signed the promissory note in question. Additional discovery is required to investigate this claim]. The interest of justice requires the Court to enlarge the number of interrogatories Plaintiff may ask Defendant.
3. **Efforts to Resolve.** A reasonable effort to resolve this discovery dispute without the necessity of Court intervention has been made and has failed.

4. **Prayer.** Plaintiff prays that—

   a. the Court modify the discovery control plan in this case to enlarge the number of interrogatories Plaintiff be permitted to serve on Defendant to [number] interrogatories, not including subparts, for good cause shown in this motion; and

   b. Plaintiff be granted all further relief to which Plaintiff may be entitled.

__________________________________________________________________________________________________________________________

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

Certificate of Conference

I certify that a reasonable effort has been made to resolve the discovery dispute without the necessity of court intervention and has failed.

__________________________________________________________________________________________________________________________

[Name]
Attorney for [name of movant]

Include a certificate of service (form 19-1) and notice of hearing (form 19-2). Prepare the order enlarging the number of interrogatories (form 18-22).
Order Enlarging Number of Interrogatories

On [date] the motion of [name of plaintiff], Plaintiff, was presented to modify the discovery control plan in this case, specifically to enlarge the number of interrogatories Plaintiff is allowed to serve on [name of defendant], Defendant, to [number] interrogatories, not including subparts.

The Court finds that justice requires that the number of interrogatories allowed to be served on Defendant by Plaintiff be enlarged to [number], not including subparts, based on [state particular circumstances alleged in the motion], as prescribed by the Texas Rules of Civil Procedure. Accordingly, the Court finds that Plaintiff’s Motion to Enlarge Number of Written Interrogatories should be granted.

It is therefore ORDERED that Plaintiff’s Motion to Enlarge Number of Written Interrogatories is hereby granted in all respects and the number of interrogatories that Plaintiff will be permitted to serve on Defendant is ordered enlarged to [number] interrogatories, not including subparts.

SIGNED on ________________________________.

JUDGE PRESIDING
APPROVED AS TO FORM:

[Name]
Attorney for Plaintiff

[Name]
Attorney for Defendant

Attach the order to the motion at form 18-21 and file with the court clerk.
Form 18-23

This notice should be addressed to the defendant through his attorney if he is represented by one. Otherwise, the notice should be sent directly to the defendant, addressed “To: [name of defendant], Defendant.” Requests for disclosure are discussed generally at part V. in this chapter.

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

Plaintiff’s Requests for Disclosure

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

Pursuant to rule 194 of the Texas Rules of Civil Procedure, you are requested to disclose, within thirty days of service of this request, the information or material described in rule 194.2(a)–(i).

Pursuant to rule 190.2(b)(6), you are requested to disclose all documents, electronic information, and tangible items that you have in your possession, custody, or control and may use to support your claims or defenses.

Include the following for level 1 discovery control plan only.

Continue with the following.

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

Serve a copy on the responding party and all other parties. Include a certificate of service (form 19-1).
Form 18-24

This notice should be addressed to the defendant through his attorney if he is represented by one. Otherwise, send it directly to the defendant, addressed “To: [name of defendant], Defendant.” This form assumes that it is not being served before answer day.

If production is being sought from a nonparty, this form should be coupled with a subpoena commanding production. A notice to produce documents or tangible things under rule 205.3 must be served at least ten days before the subpoena is served. See section 18.30 in this chapter regarding subpoenas and form 18-4 for a subpoena. Also, unless the nonparty is also giving his deposition, he need not appear in person to produce the documents. Tex. R. Civ. P. 176.6(c). This form assumes that the party being served is the defendant.

See sections 18.71 through 18.77 regarding requests for production from parties and section 18.78 regarding production from nonparties.

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

Plaintiff’s Request for Production of Documents and Tangible Things

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

Pursuant to rule 196 of the Texas Rules of Civil Procedure, you are requested to produce and permit the inspection and copying of each of the items or categories of items identified in the attached Exhibit A. You are to produce these items or categories of items at [time and place for production] no later than thirty days from the date you receive this request.

Please note that if, after you submit your responses to these requests for production, you learn that any such response was either incomplete when made, or, although complete and correct when made, it is no longer complete and correct, you must amend or supplement your response reasonably promptly after you discover the necessity for such a response. Any amended or supplemental response made less than thirty days before trial will be presumed not to have been made reasonably promptly. A failure to make, amend, or supplement a
response in a timely manner may result in your not being able to introduce into evidence the material or information not timely disclosed.

**Definitions**

“You” or “your” refers to you, your attorneys, accountants, bookkeepers, agents, employees, and/or representatives.

“Defendant” means [name of defendant] and all agents, employees, and other persons acting on [his/her/its] behalf.

“Documents and tangible things” means the existence, description, nature, custody, condition, location, and contents of papers, books, accounts, drawings, graphs, charts, photographs, electronic or videotape recordings, data, and data compilations in your possession, custody, or control or known to you or your counsel, whether printed, computerized, microfilmed, reproduced by any other mechanical process or medium of expression, or written or produced by hand and whether or not claimed to be privileged, confidential, or personal, including but not limited to the final versions and all prior drafts of contracts; agreements; notes (including secretarial notes); business records; notebooks; work notes; work papers; communications (including intradepartmental communications and intercompany communications); facsimiles; telecopies; telefaxes; electronic mail; correspondence; statements; reports; telegrams; agendas; forms; memoranda; bulletins; appointment books; logs; messages; diaries; texts; manuals; reference works and materials; samples of materials; depositions; analyses; projections; damage projections; forecasts; statistical statements; financial records; reports; charts; brochures; purchase orders; estimates; computer inputs and outputs; calculations; compilations of data; demonstrative evidence (including physical models, sketches, charts, graphs, plans, drawings, etc.); journals; billings; billing statements and records; receipts; invoices; data compilations; slides; sketches; graphics; charts; movies; videotapes; photographs and the negatives thereof; summaries, records, or minutes of meetings.
or conferences; expressions of statements of policy; lists of people attending meetings or conferences; summaries, records, or reports of personal conversations or investigations; summaries, records, or reports of interviews; and all other writings, and any other similar matter, now or formerly in your possession, custody, or control or that of your counsel or of any other agent, representative, employee, bookkeeper, accountant, expert, or anyone else acting on your behalf, and includes documents used to support any conclusions or opinions reached. Any marginal comments appearing on any documents and any handwritten or other notations on any copy of a document render it original, requiring production of it or a true copy of it with such notations.

“Financial record” means, by way of example and without limitation, the original or true copies of the following items, whether printed, computerized, recorded, or reproduced by any other mechanical process or written or produced by hand: monthly unaudited statements and/or other periodic income and profit and loss statements; periodic balance sheets; financial statements or other statements regarding, relating to, or referring to your financial condition; federal and state income tax returns; volume of sales records; sales tax records and returns; payroll tax records and returns; cash disbursement journal(s); general ledger(s); receipts journal(s); accounts payable journal(s); and accounts receivable journal(s). If you are a partnership or limited partnership the phrase “financial record” also includes partnership agreement(s) and any amendments thereto and forms K-1 provided to the partners. Any marginal comments appearing on any financial record and any handwritten or other notations on any copy of a financial record render it original, requiring production of it or a true copy of it with such notations.

“Relate to” means to name, refer to either directly or indirectly, comment on, analyze, review, report on, form the basis of, be considered in the preparation of, result from, or have any logical relation or relevance to the entity, person, document, event, or action pertaining to the subject matter on which inquiry is made.
“Knowledge” means not only the personal and present knowledge of the person inquired of, but also the present knowledge of any officers, directors, agents, servants, employees, attorneys, and representatives of the person inquired of and information available to them.

“The Claims” means the claims that are the subject of this lawsuit, as alleged in Plaintiff’s original petition and amended or supplemental petition.

“Statement” is a written statement signed or otherwise adopted or approved by the person making it or a stenographic, mechanical, electrical, or other type of recording, or any transcription thereof that is a substantially verbatim recital of a statement made by the person and contemporaneously recorded.

“The Contract” means the contract dated [date] that is the subject of this lawsuit, as alleged in Plaintiff’s original petition and amended or supplemental petition.

“The Note” means the promissory note dated [date] that is the subject of this lawsuit, as alleged in Plaintiff’s original petition and amended or supplemental petition.

“The Guaranty” means the personal guaranty that is the subject of this lawsuit, as alleged in Plaintiff’s original petition and amended or supplemental petition.

Instructions

If any document or response to these requests is withheld or objected to under a claim of attorney-client privilege, under a claim of limitation on scope of discovery pursuant to rule 192.4 or 193 of the Texas Rules of Civil Procedure, under a claim of work product pursuant to rule 192.5, under any other qualified privilege, or for any other reason, you are instructed to identify each such document with the following items:

1. the date of the document;
2. the author and addressee(s);

3. all persons indicated as recipients of copies;

4. all persons known to you to have received the document and/or information or to have learned the substance of its contents;

5. the subject matter of the document and/or response; and

6. the specific privilege or objection alleged to be applicable or other reason for its being withheld or not answered.

If you or any of your attorneys, agents, or representatives at any time had possession or control of a document requested and that document has been lost, destroyed, or purged or is not presently in your possession, custody, or control, identify the document and describe the circumstances surrounding the loss, destruction, purge, or separation from your possession, custody, or control, indicating the dates that those circumstances occurred.

If you allege that any request is in any manner ambiguous, you are instructed to describe in detail the reasons for your allegations that the request is ambiguous, including but not limited to each interpretation that you allege the specific request for discovery is subject to. Notwithstanding, you are instructed to respond, to the best of your ability, to the request for production and produce the documents requested.

If you object to any request, you are instructed to identify, with specificity, the specific procedural rule(s) or substantive law(s) on which you base your objection.

When producing documents and tangible things responsive to a request, you must either produce them as they are kept in the usual course of business or organize and label them to correspond with the categories in the request.
[Name]
Attorney for Plaintiff
State Bar No.:  
[E-mail address] 
[Address] 
[Telephone] 
[Telexcopier]

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

1. All documents and tangible things that discuss, relate to, or refer to [specify, e.g., the Note, the Guaranty, the Contract, or the services to be performed by you in connection with the Claims that are the subject matter of this litigation].

2. All documents and tangible things that discuss, relate to, or refer to any communication between you and Plaintiff regarding [specify, e.g., the Note, the Guaranty, the Contract, or the services to be performed by you in connection with the Claims that are the subject matter of this litigation].

3. All contracts or agreements entered into between you and Plaintiff pertaining to the Claims asserted in this litigation.

4. All documents and tangible things that discuss, relate to, or refer to communications, including but not limited to correspondence, sent by you to Plaintiff or any nonprivileged third party or received by you from Plaintiff or any nonprivileged third party that discuss, relate to, or refer to the Claims [specify, e.g., the Note, the Guaranty, or the Contract] that are the subject matter of this litigation.

5. All documents and tangible things that discuss, relate to, or refer to any and all Claims, counterclaims, allegations, and defenses you may have against Plaintiff.

6. All documents and tangible things written or reviewed by any testifying expert or by any consulting expert whose mental impressions or opinions have been reviewed by a testifying expert, in connection with this case, including but not limited to—

   a. all reports, models, data compilations, documents, communications, bills, reports, and writings that have been reviewed by the testifying and/or consulting expert in anticipation of a testifying expert’s testimony;
b. all reports, models, data compilations, documents, communications, bills, reports, and writings generated by and/or received from the testifying and/or consulting expert in anticipation of a testifying expert’s testimony;

c. all publications or other documents, communications, reports, and writings that will be used in the trial of this lawsuit to substantiate the opinions or allegations of the testifying expert and/or that were or will be relied on by the testifying expert in reaching opinions or conclusions of fact or law;

d. all nonprivileged documents containing the names, addresses, and telephone numbers of any and all persons whose opinions the testifying and/or consulting expert is relying on in reaching opinions or conclusions of fact or law;

e. all reports and nonprivileged documents that describe the subject matter about which the testifying expert witness is expected to testify;

f. the facts known by the testifying expert and/or consulting expert that relate to or form the basis of the expert’s mental impressions and opinions formed or made in connection with this case;

g. the testifying and/or consulting expert’s mental impressions and opinions formed or made in connection with this case;

h. evidence of bias on the part of the testifying or consulting expert;

i. each testifying and consulting expert’s current resume and bibliography;

j. each testifying and consulting expert’s entire file for this case; and

k. all documents evidencing any agreement you have with your testifying and consulting experts regarding the method by which they are paid and any arrangements for payment for their services, including any contingency
agreements, assignments of claims or an interest therein, and any lien agreements.

7. All documents and tangible things identified in your answers to interrogatories, if any.

8. Any documents and tangible things, including but not limited to photographs or other physical evidence, that will be used or offered at trial.

9. Any statements obtained from any person pertaining to the Claims, counterclaims, allegations, and defenses asserted in this lawsuit.

10. Any documents and tangible things describing, summarizing, or recording a history of payments, credits, deductions, interest charged, interest paid, principal paid, and charges pertaining to Plaintiff’s account with you.

11. All documents and tangible things that discuss, relate to, or refer to each and every fact, reason, allegation, or theory under which you deny that you are liable to Plaintiff for the Claims that are the subject of this litigation.

12. All documents and tangible things that discuss, relate to, or refer to any basis for asserting that the amounts charged for items purchased from Plaintiff were not the usual and customary price(s) in [county] County, Texas.

13. All documents that discuss, relate to, or refer to your claim that the amounts charged for items purchased from Plaintiff were not the reasonable price(s) in [county] County, Texas.
14. If you are claiming damages, produce all documents and tangible things that you relied on or used to support each element of your claim, including the source of your figures for arriving at that amount and how you arrived at that amount.

15. If you are requesting attorney’s fees in this case, produce a copy of the contract or fee agreement between you and every attorney who was or is currently representing you, including all bills, statements, and/or invoices showing services rendered, the amounts charged, and all other charges for costs and expenses.

If production is sought from a nonparty, serve a copy of this request on the nonparty by personal service, along with a subpoena (form 18-4). Attach a check to the recipient for $1, if applicable (see section 18.78:8).
Form 18-25
Objections and Assertions of Privilege
to Discovery Requests

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Form 18-25

1. Adding Requests for Admission/Requests for Disclosure/Requests for Production to Interrogatories

Clause 18-25-1

Objection. Instruction No. [no.] impermissibly seeks to add [Requests for Admission/Requests for Disclosure/Requests for Production] to the proponent’s Interrogatories and is thus outside the proper scope of the rules of discovery. See Tex. R. Civ. P. 197.

2. Adding Interrogatories/Requests for Admission/Requests for Disclosure to Requests for Production

Clause 18-25-2

Objection. Instruction No. [no.] impermissibly seeks to add [Interrogatories/Requests for Admission/Requests for Disclosure] to the proponent’s Requests for Production and is thus outside the proper scope of the rules of discovery. See Tex. R. Civ. P. 196.

3. Amount and Method of Calculating Economic Damages

Clause 18-25-3

Objection. This [Request/Interrogatory] improperly seeks discovery pertaining to the amount and method of calculating economic damages. See Tex. R. Civ. P. 194.2(d) (stipulating that information pertaining to the amount and method of calculating economic damages must be disclosed pursuant to a Request for Disclosure). Moreover, this [Request/Interrogatory] is overly broad, vague, and ambiguous in failing to limit its inquiry by scope of subject matter and time. This [Request/Interrogatory] also attempts to require Respondent to marshal all of its available proof or the proof it intends to offer at trial, contrary to the rules of discov-
ery. See Tex. R. Civ. P. 197.1, cmt. 1. Further, this Interrogatory is unduly burdensome and harassing, calls for material not relevant to any claims or defenses, and is not reasonably calculated to lead to the discovery of admissible evidence.

4. **Burdensome**

Clause 18-25-4

**Objection.** This [Request/Interrogatory] is unduly burdensome.

5. **Consulting Experts**

Clause 18-25-5

**Objection.** This [Request/Interrogatory] improperly seeks discovery pertaining to consulting experts, in violation of the rules of discovery. See Tex. R. Civ. P. 192.3(e); Tex. R. Civ. P. 195.1.

**Assertion of Privilege.** This [Request/Interrogatory] seeks information subject to the consulting-expert privilege. See Tex. R. Civ. P. 192.3(e). Therefore, the requested information may not be discovered. See Tex. R. Civ. P. 192.3(a) (“In general, a party may obtain discovery regarding any matter that is not privileged . . . ”)

6. **Contentions**

Clause 18-25-6

**Objection.** This [Request/Interrogatory] improperly seeks discovery pertaining to contentions, in violation of the rules of discovery. See Tex. R. Civ. P. 192.3(j); Tex. R. Civ. P. 197.1 (“An interrogatory may inquire whether a party makes a specific legal or factual contention and may ask the responding party to state the legal theories and to describe in general the factual bases for the party’s claims or defenses, but interrogatories may not be used to require the responding party to marshal all of its available proof or the proof the party intends to offer . . . ”).
Objections and Assertions of Privilege to Discovery Requests

7. Definitions and Instructions
   a. Generally Broad Terms

   Use the following objection for an undefined, vague, or ambiguous term, e.g., “communication,” “communications,” “concerning,” “person,” and “persons.”

   Clause 18-25-7

   Objection. The terms “[insert term]” and “[insert term]” are undefined, vague, and ambiguous.

   Use the following objection for an overly expansive definition of a term.

   Objection. This definition attempts to require Respondent to marshal all of its available proof or the proof it intends to offer at trial, contrary to the rules of discovery. See Tex. R. Civ. P. 197.1, cmt. 1. The definition expands the natural meaning of the words to an extent that makes responding to the Interrogatories extremely difficult, if not impossible.

   Use the following objection for a definition of a term that is overly broad, burdensome, or harassing.

   Objections. Definition No. [no.] of “[insert term]” is overly broad, unduly burdensome, and harassing and thus beyond the scope of the rules of discovery. See Tex. R. Civ. P. 192.3.
b. “Consulting Expert”

**Objection.** Definition No. [no.] of “consulting expert” seeks to circumvent the definition of the phrase provided in Texas Rule of Civil Procedure 192.7(d) and thus seeks documents beyond the scope of discovery. This definition is also overly broad, unduly burdensome, and harassing and thus beyond the scope of the rules of procedure. See Tex. R. Civ. P. 192.3(e).

c. “Contentions”

**Objection.** Definition No. [no.] of “contentions” is overly broad, unduly burdensome, and harassing and thus beyond the scope of the rules of discovery. See Tex. R. Civ. P. 192.3(j).

d. “Documents and Tangible Things”

**Objection.** Definition No. [no.] of “documents and tangible things” is overly broad, unduly burdensome, and harassing, and thus beyond the scope of the rules of discovery. See Tex. R. Civ. P. 192.3(b). A party must describe with reasonable particularity the item sought. See Tex. R. Civ. P. 196.1(b) (“The request must specify the items to be produced or inspected, either by individual item or by category, and describe with reasonable particularity each item and category.”) (emphasis added)); Davis v. Pate, 915 S.W.2d 76, 79 n.2 (Tex. App.—Corpus Christi 1996, orig. proceeding) (distinguishing between “specificity” and “overbreadth” and explaining that appropriate objections to requests for production include both “specificity” and “overbreadth”); Texaco, Inc. v. Dominguez, 812 S.W.2d 451, 454 (Tex. App.—San Antonio 1991, orig. proceeding) (explaining that request for production “must be specific, must establish materiality, and must recite precisely what is wanted”). Respondent does not know what documents are being requested, because the Request does not describe the items requested with any reasonable particularity. See Chamberlain v. Cherry, 818 S.W.2d 201, 204 (Tex. App.—Amarillo 1991, orig. proceeding) (certain requests for production were proper only because they were “set forth . . . with reasonable particularity”).
Objections and Assertions of Privilege to Discovery Requests

Form 18-25

e.  “Electronic or Magnetic Data”

   **Objection.** Definition No. [no.] of “electronic or magnetic data” seeks to circumvent the rules of discovery and thus seeks documents beyond the scope of discovery. See Tex. R. Civ. P. 196.4. This definition is also overly broad, unduly burdensome, and harassing and thus beyond the scope of the rules of discovery. See Tex. R. Civ. P. 192.3.

f.  “Indemnity Agreements”

   **Objection.** Definition No. [no.] of “indemnity agreements” is overly broad, unduly burdensome, and harassing and thus beyond the scope of the rules of discovery. See Tex. R. Civ. P. 192.3(f).

g.  “Insuring Agreements”

   **Objection.** Definition No. [no.] of “insuring agreements” is overly broad, unduly burdensome, and harassing and thus beyond the scope of the rules of discovery. See Tex. R. Civ. P. 192.3(f).

h.  **Persons with Knowledgeable Facts**

   **Objection.** Definition No. [no.] of “persons with knowledge of relevant facts” is overly broad, unduly burdensome, and harassing and thus beyond the scope of the rules of discovery. See Tex. R. Civ. P. 192.3(c).

i.  **Possession, Custody, or Control**

   **Objection.** Definition No. [no.] of “possession, custody, or control” seeks to circumvent the definition of the phrase provided in Texas Rule of Civil Procedure 192.7(b) and thus seeks documents beyond the scope of discovery.

j.  **Potential Parties**

   **Objection.** Definition No. [no.] of “potential parties” is overly broad, unduly burdensome, and harassing and thus beyond the scope of the rules of discovery. See Tex. R. Civ. P. 192.3(i).
k. Persons with Knowledge of Relevant Facts

Objection. Definition No. [no.] of “statements of persons with knowledge of relevant facts” is overly broad, unduly burdensome, and harassing and thus beyond the scope of the rules of discovery. See Tex. R. Civ. P. 192.3(h).

l. Settlement Agreements

Objection. Definition No. [no.] of “settlement agreements” is overly broad, unduly burdensome, and harassing and thus beyond the scope of the rules of discovery. See Tex. R. Civ. P. 192.3(g).

m. Testifying Expert

Objection. Definition No. [no.] of “testifying expert” seeks to circumvent the definition of the phrase provided in Texas Rule of Civil Procedure 192.7(d) and thus seeks documents beyond the scope of discovery. This definition is also overly broad, unduly burdensome, and harassing and thus beyond the scope of the rules of procedure. See Tex. R. Civ. P. 192.3(e).

n. Trial Witness

Objection. Definition No. [no.] of “trial witnesses” is overly broad, unduly burdensome, and harassing and thus beyond the scope of the rules of discovery. See Tex. R. Civ. P. 192.3(d).

o. Written Discovery

Objection. Definition No. [no.] of “written discovery” seeks to circumvent the definition of the phrase provided in Texas Rule of Civil Procedure 192.7(a) and thus seeks documents beyond the scope of discovery. This definition is also overly broad, unduly burdensome, and harassing and thus beyond the scope of the rules of discovery. See Tex. R. Civ. P. 192.3.
8. **Documents and Tangible Things**

**Clause 18-25-8**


9. **Duplicative**

**Clause 18-25-9**

**Objection.** This [Request/Interrogatory] is duplicative of [Interrogatory/Request for Admission/Request for Disclosure/Request for Production] No. [no.].

10. **Equal or Superior Access**

**Clause 18-25-10**

**Objection.** [Describe items] are subject to the equal or superior access of the proponent.

11. **Exceeds Number of Permissible Interrogatories**

**Clause 18-25-11**

a. **If under Level 1:**

**Objection.** This Interrogatory exceeds the number of interrogatories allowed to be propounded on Respondent. *See Tex. R. Civ. P. 190.2(b)(3) (providing that written interrogatories under Discovery Control Plan Level 1 are limited to fifteen in number and that “[e]ach discrete subpart of an interrogatory is considered a separate interrogatory”).*

b. **If under Level 2:**

**Objection.** This Interrogatory exceeds the number of interrogatories allowed to be propounded on Respondent. *See Tex. R. Civ. P. 190.3(b)(3) (providing that written interrogatories under Discovery Control Plan Level 2 are limited to twenty-five in number and that “[e]ach discrete subpart of an interrogatory is considered a separate interrogatory”).*
c. If under Level 3—where order addresses number of interrogatories:

**Objection.** This Interrogatory exceeds the number of interrogatories allowed to be propounded on Respondent. See Scheduling Order dated [date].

d. If under Level 3—where order does NOT address number of interrogatories and Discovery Control Plan Level 1 would otherwise be applicable:

**Objection.** This Interrogatory exceeds the number of interrogatories allowed to be propounded on Respondent. See Tex. R. Civ. P. 190.4(b) (providing that under Discovery Control Plan Level 3, “[t]he discovery limitations of Rule 190.2, if applicable, or otherwise of Rule 190.3 apply unless specifically changed in the discovery control plan ordered by the court”); Tex. R. Civ. P. 190.2(c)(3) (providing that written interrogatories are limited to twenty-five in number, and that “[e]ach discrete subpart of an interrogatory is considered a separate interrogatory”).

e. If under Level 3—where order does NOT address number of interrogatories and Discovery Control Plan Level 2 would otherwise be applicable:

**Objection.** This Interrogatory exceeds the number of interrogatories allowed to be propounded on Respondent. See Tex. R. Civ. P. 190.4(b) (providing that under Discovery Control Plan Level 3, “[t]he discovery limitations of Rule 190.2, if applicable, or otherwise of Rule 190.3 apply unless specifically changed in the discovery control plan ordered by the court”); Tex. R. Civ. P. 190.3(b)(3) (providing that written interrogatories are limited to twenty-five in number, and that “[e]ach discrete subpart of an interrogatory is considered a separate interrogatory”).
12. Fishing Expedition

Clause 18-25-12

Objection. This [Request/Interrogatory] is overly broad, vague, and ambiguous in failing to limit its inquiry by scope of subject matter and time. Indeed, this [Request/Interrogatory] is nothing more than a fishing expedition, which is not permitted under the rules of discovery. See K Mart Corp. v. Sanderson, 937 S.W.2d 429, 431 (Tex. 1996) (clarifying that no discovery devices may be used for fishing expeditions (citing Loftin v. Martin, 776 S.W.2d 145, 148 (Tex. 1989) (explaining that requests for production may not be used for fishing expeditions, but implying that interrogatories and depositions may be so used)).

13. Improper Discovery Tool

Clause 18-25-13

Objection. This Interrogatory improperly seeks to add [Requests for Admission/Requests for Disclosure/Requests for Production] to Interrogatories, and is thus outside the proper scope of the rules of discovery. See Tex. R. Civ. P. 197.

14. Indemnity and Insuring Agreements

Note: Such a request/interrogatory is likely duplicative of a request for disclosure (g). See Tex. R. Civ. P. 194.2(g).

Clause 18-25-14

Objection. This [Request/Interrogatory] improperly seeks discovery pertaining to indemnity and insuring agreements, in violation of the rules of discovery. See Tex. R. Civ. P. 192.3(f); Tex. R. Civ. P. 194.2(g) (stipulating that information pertaining to indemnity and insuring agreements must be disclosed pursuant to a request for disclosure).

15. Legal Theories and Factual Bases of Claims or Defenses

Note: Such a request or interrogatory is likely duplicative of a request for disclosure (c). See Tex. R. Civ. P. 194.2(c).
Clause 18-25-15

Objection. This [Request/Interrogatory] improperly seeks discovery pertaining to legal theories and factual bases of claims or defenses, in violation of the rules of discovery. See Tex. R. Civ. P. 194.2(c) (stipulating that information pertaining to legal theories and factual bases of claims or defenses must be disclosed pursuant to a request for disclosure); see also Tex. R. Civ. P. 197.1).

16. Limits by Scope or Time

Clause 18-25-16

Objection. This [Request/Interrogatory] is overly broad, vague, and ambiguous in failing to limit its inquiry by scope of subject matter and time.

17. Marshaling Evidence

Clause 18-25-17

Objection. This Interrogatory attempts to require this Defendant to marshal all of this Defendant’s available proof or the proof this Defendant intends to offer at trial, contrary to the rules of discovery. See Tex. R. Civ. P. 197.1.

18. Medical Records and Bills—Obtained via Authorization of Requesting Party

Clause 18-25-18

Note: Such a request or interrogatory is likely duplicative of request for disclosure (k). See Tex. R. Civ. P. 194.2(k).

Objection. This [Request/Interrogatory] improperly seeks discovery pertaining to medical records and bills obtained by virtue of an authorization furnished by the requesting party. See Tex. R. Civ. P. 194.2(k) (stipulating that information pertaining to medical records and bills obtained by virtue of an authorization furnished by the requesting party must be disclosed pursuant to a request for disclosure).
19. Medical Records and Bills—Related to Injuries or Damages Asserted

Clause 18-25-19

Objection. This [Request/Interrogatory] improperly seeks discovery pertaining to medical records and bills related to injuries or damages asserted. See Tex. R. Civ. P. 194.2(j) (stipulating that information pertaining to medical records and bills related to injuries or damages asserted must be disclosed pursuant to a request for disclosure).

20. Names of Parties

Clause 18-25-20

Objection. This [Request/Interrogatory] improperly seeks discovery pertaining to the correct names of parties to the lawsuit. See Tex. R. Civ. P. 194.2(a) (stipulating that information pertaining to the correct names of parties to a lawsuit must be disclosed pursuant to a request for disclosure).

21. Outside the Scope of Discovery

Clause 18-25-21


22. Persons with Knowledge of Relevant Facts

Clause 18-25-22

Note: Such a request or interrogatory is likely duplicative of a request for disclosure (j). See Tex. R. Civ. P. 194.2(j).
Objection. This [Request/Interrogatory] improperly seeks discovery pertaining to persons with knowledge of relevant facts, in violation of the rules of discovery. See Tex. R. Civ. P. 192.3(c); Tex. R. Civ. P. 194.2(e) (stipulating that information pertaining to persons with knowledge of relevant facts must be disclosed pursuant to a request for disclosure).

23. Potential Parties
Clause 18-25-23

Note: Such a request or interrogatory is likely duplicative of a request for disclosure (b).

Objection. This [Request/Interrogatory] improperly seeks discovery pertaining to potential parties, in violation of the rules of discovery. See Tex. R. Civ. P. 192.3(i); see also Tex. R. Civ. P. 194.2(b) (stipulating that information pertaining to a potential party must be disclosed pursuant to a request for disclosure).

24. Privilege
Clause 18-25-24

Note: Privilege is asserted pursuant to Texas Rule of Civil Procedure 193.3.

a. Clergy-Penitent

Assertion of Privilege. This [Request/Interrogatory] seeks information subject to the clergy-penitent privilege. See Tex. R. Evid. 505.

b. Consulting Expert

Assertion of Privilege. This [Request/Interrogatory] seeks information subject to the consulting-expert privilege. See Tex. R. Civ. P. 192.3(e)

c. Identity of Informer

Assertion of Privilege. This [Request/Interrogatory] seeks information subject to the identity-of-informer privilege. See Tex. R. Evid. 508.
d. **Lawyer-Client**

   **Assertion of Privilege.** This [Request/Interrogatory] seeks information subject to the lawyer-client privilege. *See* Tex. R. Evid. 503.

e. **Mental Health**

   **Assertion of Privilege.** This [Request/Interrogatory] seeks information subject to the mental health privilege. *See* Tex. R. Evid. 510.

f. **Party Communication**

   **Assertion of Privilege.** This [Request/Interrogatory] seeks information subject to the party-communication privilege. *See* Tex. R. Civ. P. 192.3 cmt. 8 (“Party Communication” included in definition of “Work Product” in rule 192.5).

g. **Peer Review**

   **Assertion of Privilege.** This [Request/Interrogatory] seeks information protected by statute, see, e.g., Tex. R. Evid. 502, including state and federal statutes pertaining to medical committees and medical peer review committees.

h. **Physician-Patient**


i. **Political Vote**

   **Assertion of Privilege.** This [Request/Interrogatory] seeks information subject to the political-vote privilege. *See* Tex. R. Evid. 506.

j. **Required Reports Privileged by Statute**

   **Assertion of Privilege.** This [Request/Interrogatory] seeks information privileged by statute. *See* Tex. R. Evid. 502.
k. **Spousal Privilege**

**Assertion of Privilege.** This [Request/Interrogatory] seeks information subject to spousal privileges. *See Tex. R. Evid. 504.*

l. **Third-Person Privacy**

**Assertion of Privilege.** This [Request/Interrogatory] seeks information subject to the personal and proprietary privileges of a third person, including that person’s constitutional rights of privacy. Respondent will not unilaterally produce such information absent motion, hearing, and order of the Court or without proper authorization of the interested third person.

m. **Trade Secrets**

**Assertion of Privilege.** This [Request/Interrogatory] seeks confidential and proprietary information subject to the trade-secrets privilege. *See Tex. R. Evid. 507.*

n. **Work Product**

**Assertion of Privilege.** This [Request/Interrogatory] seeks information subject to the work-product privilege. *See Tex. R. Civ. P. 192.5.*

25. **Relevance**

**Clause 18-25-25**

**Objection.** This [Request/Interrogatory] calls for information not relevant to any claim or defense and not reasonably calculated to lead to the discovery of admissible evidence.

26. **Settlement Agreements**

**Clause 18-25-26**

**Objection.** This [Request/Interrogatory] improperly seeks discovery pertaining to settlement agreements, in violation of the rules of discovery. *See Tex. R. Civ. P. 192.3(g); Tex. R. Civ. P. 194.2(h).*
27. Specificity

Clause 18-25-27

Objection. This Request fails to specify the items to be produced with reasonable particularity as required by the rules of discovery. In making a Request for Production, a party must describe with reasonable particularity the item sought. See Tex. R. Civ. P. 196.1(b) (“The request must specify the items to be produced or inspected, either by individual item or by category, and describe with reasonable particularity each item and category.”) (emphasis added); Davis v. Pate, 915 S.W.2d 76, 79 n.2 (Tex. App.—Corpus Christi 1996, orig. proceeding) (distinguishing between “specificity” and “overbreadth,” and explaining that appropriate objections to requests for production include both “specificity” and “overbreadth”); Texaco, Inc. v. Dominguez, 812 S.W.2d 451, 454 (Tex. App.—San Antonio 1991, orig. proceeding) (explaining that a request for production “must be specific, must establish materiality, and must recite precisely what is wanted”). Defendant does not know what documents are being requested, because the Request is not specific as to the items sought. See Chamberlain v. Cherry, 818 S.W.2d 201, 204 (Tex. App.—Amarillo 1991, orig. proceeding) (holding that certain requests for production were proper only because they were “set forth . . . with reasonable particularity”).

28. Statements of Persons with Knowledge of Relevant Facts

Clause 18-25-28

Objection. This [Request/Interrogatory] improperly seeks discovery pertaining to statements of persons with knowledge of relevant facts, in violation of Texas Rule of Civil Procedure 192.3(h); see also Tex. R. Civ. P. 194.2(i) (stipulating that information pertaining to witness statements must be disclosed pursuant to a request for disclosure).
29. **Testifying Experts**

*Clause 18-25-29*

**Objection.** This [Request/Interrogatory] improperly seeks discovery pertaining to testifying expert witnesses, in violation of the rules of discovery. See Tex. R. Civ. P. 192.3(e); Tex. R. Civ. P. 194.2(f) (stipulating that information pertaining to testifying experts must be disclosed pursuant to a request for disclosure); Tex. R. Civ. P. 195.1.

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30. **Third-Party Personal Information**

*Clause 18-25-30*

**Objection.** This [Request/Interrogatory] calls for information not relevant to any claim or defense and is not reasonably calculated to lead to the discovery of admissible evidence.

**Assertion of Privilege.** This [Request/Interrogatory] calls for matters subject to the proprietary privilege of a third party, including that party’s individual rights of privacy.

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31. **Trial Exhibits**

*Clause 18-25-31*

**Objection.** This [Request/Interrogatory] is premature and exceeds the permissible scope of discovery. See Tex. R. Civ. P. 166, 190, 192.3. Respondent will respond to this [Request/Interrogatory] pursuant to the Rules of Civil Procedure and the Court’s Orders, including without limitation, any scheduling orders entered in this case.

**Assertion of Privilege.** This [Request/Interrogatory] seeks information subject to the work-product privilege. See Tex. R. Civ. P. 192.5. Respondent will not produce any trial exhibits without a court order.
32. Trial Witnesses

Clause 18-25-32

Objection. This [Request/Interrogatory] is premature and exceeds the permissible scope of discovery. See Tex. R. Civ. P. 166, 190, 192.3(d). Respondent will respond to this Interrogatory pursuant to the Rules of Civil Procedure and the Court’s Orders, including without limitation, any scheduling Orders entered in this case.

Assertion of Privilege. This [Request/Interrogatory] seeks information subject to the work-product privilege. See Tex. R. Civ. P. 192.5. Respondent will not produce a list of trial witnesses without a court order.

33. Witness Statements

Clause 18-25-33

Note: Such an interrogatory is likely duplicative of a request for disclosure (i). See Tex. R. Civ. P. 194.2(i).

Objection. This [Request/Interrogatory] improperly seeks discovery pertaining to witness statements, in violation of the rules of discovery. See Tex. R. Civ. P. 194.2(i) (stipulating that information pertaining to witness statements must be disclosed pursuant to a Request for Disclosure).

34. Objections to Form

Clause 18-25-34

Ambigious

Argumentative

Asked and Answered (see section entitled “Duplicative”)

Assumes Facts Not in Evidence

Compound
Confusing

General (i.e., too general)

Harassing

Leading

Misquoting (e.g., a deponent)

Narrative (i.e., calls for a narrative)

Repetitious (see section entitled “Duplicative”)

Speculation (i.e., calls for speculation)

Unintelligible

Vague

(For example: Objection. This [Request/Interrogatory] is vague, ambiguous, utterly unintelligible, and harassing, and it assumes facts not in evidence.)
If the defendant does not respond to the plaintiff’s discovery request or does so inadequately or inappropriately, the plaintiff should file a motion to compel discovery. Most likely the court will simply order that discovery be completed and delivered on a date certain. However, Tex. R. Civ. P. 215 provides a listing of potential sanctions for noncompliance.

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

Plaintiff’s Motion to Compel Discovery

[Name of plaintiff], Plaintiff, moves that [name of defendant], Defendant, be required to respond to discovery and shows the Court as follows:

1. **Facts.** Plaintiff served discovery on Defendant consisting of [describe type of discovery requested, e.g., interrogatories] in accordance with the Texas Rules of Civil Procedure. Defendant [failed to produce all the documents requested/failed to answer the interrogatories/asserted objections] within the time specified. Defendant’s refusal to respond completely to or otherwise comply with Plaintiff’s discovery requests is without substantial justification. [Include if required by local rules: True and correct copies of the discovery requests and responses are attached as Exhibit[s] [exhibit number[s]/letter[s]]].

2. **Grounds.** Pursuant to rule 215, Defendant’s refusal to comply with Plaintiff’s discovery request[s] is grounds for this Court to enter an order compelling Defendant to respond as required.

3. **Attorney’s Fees and Expenses.** Defendant’s refusal to comply has made it necessary for Plaintiff to employ the undersigned attorney to bring this proceeding to compel a response. Pursuant to rule 215, Plaintiff is entitled to recover reasonable expenses, including reasonable attorney’s fees incurred in obtaining an order to compel. Reasonable attorney’s
fees and expenses for the services rendered and to be rendered in this regard are at least $[amount].

4.  **Prayer.**  Plaintiff prays that—

   a.  the Court set this matter for hearing;

   b.  Defendant, after notice of hearing, be ordered to respond to the discovery requested;

   c.  Plaintiff be granted reasonable attorney’s fees and expenses of at least $[amount] incurred in obtaining the order; and

   d.  Plaintiff be granted all further relief to which Plaintiff may be entitled.

__________________________________________________________________________________________________________________________ ... __________________________________________________________________________________________________________________________

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

**Certificate of Conference**

I certify that a reasonable effort has been made to resolve the discovery dispute without the necessity of court intervention and has failed.

__________________________________________________________________________________________________________________________ ... __________________________________________________________________________________________________________________________

[Name]
Attorney for [name of movant]

Include a certificate of service (form 19-1) and notice of hearing (form 19-2). Prepare the order compelling discovery (form 18-27).
On [date], a hearing was held on Plaintiff’s motion to compel discovery in the above-styled and -numbered cause. The Court finds that [name of plaintiff], Plaintiff, served on [name of defendant], Defendant, [describe type of discovery request involved, e.g., interrogatories] in the time and manner prescribed in the Texas Rules of Civil Procedure. The Court further finds that Defendant failed to respond to Plaintiff’s discovery request[s] in the time and manner prescribed by the rules.

Accordingly, the Court finds that Plaintiff’s motion to compel discovery should be sustained.

It is therefore ORDERED that Defendant shall forward to Plaintiff by and through Plaintiff’s attorney on or before [date] [describe type of discovery requested, e.g., a set of full and complete sworn answers to Plaintiff’s interrogatories].

The Court further finds that Plaintiff is entitled to $[amount] as reasonable attorney’s fees for preparing and presenting this motion. Defendant is ORDERED to pay the attorney’s fees to the attorney of record for Plaintiff on or before thirty days from the date this order is signed.

It is further ORDERED that Defendant’s failure to comply with this order shall subject Defendant to sanctions, including striking Defendant’s pleadings and entering judgment in favor of Plaintiff and against Defendant for all the relief prayed for in Plaintiff’s petition.
SIGNED on ________________________________.

JUDGE PRESIDING

APPROVED AS TO FORM:

[Name]
Attorney for Plaintiff

[Name]
Attorney for Defendant

Attach the order to the motion at form 18-26 and file with the court.
Form 18-28

If the defendant fails to comply with the order compelling discovery, the next step is to file a motion for sanctions against the defendant. The range of sanctions permitted is described in Tex. R. Civ. P. 215. If contempt is sought, section 26.7 in this manual should be consulted. A motion for contempt is at form 26-12.

Prepare both this motion for sanctions and the order at form 18-29. Once the court has set a hearing, ensure that the notice of hearing is complete and send a copy of the motion and notice to the defendant or his attorney. Local practice or rules may vary on whether a judge must sign the order setting the hearing or whether the signature by the court clerk or attorney is sufficient and in the procedure for setting the hearing and filing the certificate of service.

Plaintiff’s Motion for Sanctions

1. Parties. Plaintiff is [name of plaintiff]. Defendant is [name of defendant].

2. Facts. Plaintiff served [interrogatories/requests for admissions/requests for production/notice of intention to take oral or written deposition] on Defendant in the time and manner required by the Texas Rules of Civil Procedure. On [date], this Court ordered Defendant to [specify, e.g., prepare and forward to Plaintiff, by and through this attorney of record, a full and complete sworn set of written answers to Plaintiff’s interrogatories in full compliance with rule 197 of the Texas Rules of Civil Procedure]. However, as of this date, Defendant has failed to comply with the order as described above.

3. Grounds. Pursuant to rule 215 of the Texas Rules of Civil Procedure, Plaintiff requests the Court to set this matter for hearing and that the Court disallow any further discovery by Defendant.
disallow any further discovery through [state particular type of discovery, e.g., interrogatories] by Defendant.

And/Or

charge [all/a portion of] [discovery/taxable court costs] against [Defendant/Defendant’s attorney] as follows: [set forth and identify items to be charged against the defendant or his attorney].

And/Or

order that the following facts be taken as established for purposes of this lawsuit: [list facts].

And/Or

refuse to allow Defendant to [support/oppose] the following [claims/defenses]: [list claims or defenses].

And/Or

prohibit Defendant from introducing into evidence the following: [list matters sought to be prohibited].

And/Or

strike the following pleadings or portions of pleadings: [identify pleadings or portions of pleadings to be struck].

And/Or

stay further proceedings in this cause.

And/Or

dismiss [with/without] prejudice the following actions or proceedings: [identify with specificity the actions or proceedings].
enter default judgment against Defendant.

And

enter all orders in regard to Defendant’s failure as the Court deems just.

4.  Attorney’s Fees and Expenses.  Defendant’s failure to [state appropriate grounds, e.g., answer interrogatories] has made it necessary for Plaintiff to employ the undersigned attorney to bring this proceeding for sanctions. Under rule 215.2(b)(8) of the Texas Rules of Civil Procedure, Plaintiff is entitled to recover reasonable expenses, including reasonable attorney’s fees, incurred in obtaining an order for sanctions. These fees are recoverable either from Defendant or his attorney, or both. Reasonable attorney’s fees for the services rendered and to be rendered in this regard are at least $[amount]. In addition, Plaintiff has incurred expenses of at least $[amount].

5.  Prayer.  Plaintiff prays that—

a.  the Court set this matter for hearing;

b.  after notice and hearing, the Court impose sanctions on Defendant in accordance with rule 215 of the Texas Rules of Civil Procedure;

c.  Plaintiff be granted reasonable attorney’s fees from Defendant or his attorney, or both, in the amount of at least $[amount] incurred in obtaining the Court’s order; and

d.  Plaintiff be granted all further relief to which Plaintiff may be entitled.
[Name]
Attorney for Plaintiff
State Bar No.:
[E-mail address]
[Address]
[Telephone]
[Telex copier]

Certificate of Conference

I certify that a reasonable effort has been made to resolve the discovery dispute without the necessity of court intervention and has failed.

[Name]
Attorney for [name of movant]

Include a certificate of service (form 19-1) and notice of hearing (form 19-2). Prepare the order imposing sanctions (form 18-29).
Form 18-29

For a motion for sanctions on which this order is based, see form 18-28 in this chapter. If requesting that the defendant’s pleadings be struck, prepare a judgment to be entered by the court at the sanction hearing. Depending on local practice, it may be necessary to afford the defendant an opportunity to comply with discovery before sanctions may be imposed.

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

Order Imposing Sanctions

On [date], a hearing was held on Plaintiff’s Motion for Sanctions in the above-styled and -numbered cause. The Court finds that Plaintiff, [name of plaintiff], served on Defendant, [name of defendant], [describe type of discovery request involved, e.g., interrogatories] in the time and manner prescribed by the Texas Rules of Civil Procedure. The Court further finds that Defendant has failed to respond to Plaintiff’s discovery request in the time and manner prescribed by the Rules of Civil Procedure.

It is therefore ORDERED that [state ground[s] prayed for in motion, e.g., Defendant’s pleadings be struck for failure to make discovery, and judgment will be entered as prayed for in Plaintiff’s petition]. The Court further finds that Plaintiff is entitled to $[amount] as reasonable expenses and $[amount] as reasonable attorney’s fees in bringing this proceeding and hereby ORDERS that these fees and expenses be paid by Defendant.

Or

It is therefore ORDERED that on or before [date], Defendant [state appropriate relief, e.g., serve on Plaintiff and file with the Clerk of this Court a set of full and complete sworn written answers to Plaintiff’s Interrogatories that were addressed to Defendant on [date]].
The Court further finds that Plaintiff is entitled to $[amount] as reasonable expenses and $[amount] as reasonable attorney’s fees in bringing this proceeding and ORDERS that Defendant pay to Plaintiff the sum of $[amount] for such expenses and attorney’s fees on or before [date].

The Court further ORDERS that if Defendant fails to comply with this order, the following sanction[s] will be entered against Defendant without further hearing of the Court: [list sanctions].

SIGNED on ________________________________.

JUDGE PRESIDING

APPROVED AS TO FORM:

[Name]
Attorney for Plaintiff

[Name]
Attorney for Defendant

Attach the order to the motion at form 18-28 and file with the court clerk.
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Chapter 19

Trial Procedure

I. Pretrial and Trial Procedure Generally

§ 19.1 Filing and Notice Requirement

Every pleading, plea, motion, or application to the court for an order, unless presented during a hearing or trial, must be filed with the clerk of the court in writing, must state the grounds therefor, and must set forth the relief or order sought. At the same time a true copy must be served on all other parties and must be noted on the docket. Tex. R. Civ. P. 21(a).

§ 19.2 Service

If the e-mail address of the party or attorney to be served is on file with the electronic file manager, a document filed under rule 21 must be served electronically. Otherwise, the document may be served in person, by mail, by commercial delivery service, by fax, by e-mail, or by such other manner as the court in its discretion may direct. Tex. R. Civ. P. 21(a).

An application to the court for an order and notice of any hearing thereon not presented during a hearing or trial must be served in accordance with rule 21a(a) on all other parties not less than three days before the time specified for the hearing, unless otherwise provided by the Texas Rules of Civil Procedure or unless the time is shortened by the court. Tex. R. Civ. P. 21(b). See form 19-2 for the notice of hearing.

§ 19.3 Multiple Parties

If there is more than one other party represented by different attorneys, one copy of each pleading must be served on each attorney in charge. Tex. R. Civ. P. 21(c).

§ 19.4 Certificate of Service

The party or attorney of record must certify to the court compliance with the rules in writing over signature on the filed pleading, plea, motion, or application. Tex. R. Civ. P. 21(d), 21a(e). See form 19-1 for certificate of service. The certificate of service raises a rebuttable presumption that service was done properly. Tex. R. Civ. P. 21a(c); Mathis v. Lockwood, 166 S.W.3d 743, 745 (Tex. 2005). See section 18.13:3 for service of discovery requests and documents.

Practice Note: Because the rules do not address when e-mail service is complete, consider using an additional method of service.

§ 19.5 Additional Copies

After one copy is served on a party, that party may obtain another copy of the same pleading on tendering reasonable payment for copying and delivering. Tex. R. Civ. P. 21(e).
§ 19.6 Electronic Filing

**Requirement:** Except in juvenile cases under Title 3 of the Family Code, attorneys must electronically file documents in courts where electronic filing has been mandated. Attorneys practicing in courts where electronic filing is available but not mandated and unrepresented parties may electronically file documents, but it is not required. Tex. R. Civ. P. 21(f)(1). Although they are rarely encountered in collections matters, there are exceptions to the electronic filing requirement. See Tex. R. Civ. P. 21(f)(4).

**E-Mail Address:** The e-mail address of an attorney or unrepresented party who electronically files a document must be included on the document. Tex. R. Civ. P. 21(f)(2).

**Mechanism:** Electronic filing must be done through the electronic filing manager established by the Office of Court Administration and an electronic filing service provider certified by the Office of Court Administration. Tex. R. Civ. P. 21(f)(3).

**Timely Filing:** Unless a document must be filed by a certain time of day, a document is considered timely filed if it is electronically filed at any time before midnight (in the court’s time zone) on the filing deadline. An electronically filed document is deemed filed when transmitted to the filing party’s electronic filing service provider, except:

1. if a document is transmitted on a Saturday, Sunday, or legal holiday, it is deemed filed on the next day that is not a Saturday, Sunday, or legal holiday; and

2. if a document requires a motion and an order allowing its filing, the document is deemed filed on the date that the motion is granted.


**Technical Failure:** If a document is untimely due to a technical failure or a system outage, the filing party may seek appropriate relief from the court. If the missed deadline is one imposed by these rules, the filing party must be given a reasonable extension of time to complete the filing. Tex. R. Civ. P. 21(f)(6).

**Electronic Signature:** A document that is electronically served, filed, or issued by a court or clerk is considered signed if the document includes (1) a “/s/” and a name typed in the space where the signature would otherwise appear, unless the document is notarized or sworn or (2) an electronic image or scanned image of the signature. Tex. R. Civ. P. 21(f)(7).

**Format:** An electronically filed document must (1) be in text-searchable portable document format (PDF); (2) be directly converted to PDF rather than scanned, if possible; (3) not be locked; and (4) otherwise comply with the technology standards set by the Judicial Committee on Information Technology and approved by the supreme court. Tex. R. Civ. P. 21(f)(8).

**Paper Copies:** Unless required by local rule, a party need not file a paper copy of an electronically filed document. Tex. R. Civ. P. 21(f)(9).

**Electronic Notices from Court:** The clerk may send notices, orders, or other communications about the case to the party electronically. A court seal may be electronic. Tex. R. Civ. P. 21(f)(10).
Nonconforming Documents: The clerk may not refuse to file a document that fails to conform with this rule. But the clerk may identify the error to be corrected and state a deadline for the party to resubmit the document in a conforming format. Tex. R. Civ. P. 21(f)(11).

Official Record: The clerk may designate an electronically filed document or a scanned paper document as the official court record. The clerk is not required to keep both paper and electronic versions of the same document unless otherwise required by local rule. Tex. R. Civ. P. 21(f)(13).

§ 19.7 Sensitive Data

“Sensitive data” is defined in the rules and consists of: (1) a driver’s license number, passport number, Social Security number, tax 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. Tex. R. Civ. P. 21c; Tex. R. App. P. 9.9(a), 9.10(a). Sensitive data in a document must be redacted before that document is filed. There is an exception for sensitive data that is required by statute, court rule, or administrative regulation to be included in the filing. Tex. R. Civ. P. 21c(b); Tex. R. App. P. 9.9(b). Documents that are filed under seal are not required to be redacted. Tex. R. Civ. P. 21c(b); Tex. R. App. P. 9.2(c)(3), 9.10(f).

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

1. Use the letter X in place of each omitted digit or character.

2. Remove the sensitive data in a manner indicating that the data has been redacted.

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

The filing party must retain an unredacted version of the filed document during the pendency of the case and any related appellate proceedings filed within six months of the date the judgment is signed. Tex. R. Civ. P. 21c(c). The length of retention depends on the stage and type of proceeding. Tex. R. Civ. P. 21c(c).

§ 19.8 Filing and Serving Pleadings and Motions

Filing and Service Required: Every notice required by the rules, and every pleading, plea, motion, or other form of request required to be served under rule 21, other than the citation to be served on the filing of a cause of action and except as otherwise expressly provided in the rules, may be served by delivering a copy to the party to be served or the party’s duly authorized agent or attorney of record. Tex. R. Civ. P. 21(a).

Service of Notice of Hearing: An application to the court for an order and notice of any hearing thereon, not presented during a hearing or trial, must be served on all other parties not less than three days before the time specified for the hearing, unless otherwise provided by these rules or shortened by the court. Tex. R. Civ. P. 21(b).
Who May Serve: Service of notice may be made by a party to the suit or his attorney of record, by a sheriff or constable, or by any other person competent to testify. Tex. R. Civ. P. 21a(d).

Multiple Parties: If there is more than one other party represented by different attorneys, one copy of each pleading must be served on each attorney in charge. Tex. R. Civ. P. 21(c).

Certificate of Service: The party or attorney of record must certify to the court compliance with this rule in writing over signature on the application. Tex. R. Civ. P. 21(d), see also Tex. R. Civ. P. 21(e). Rule 21 does not require that the certificate of service detail the method of service used. See Tex. R. Civ. P. 21; Smith v. Mike Carlson Motor Co., 918 S.W.2d 669, 673 (Tex. App.—Fort Worth 1996, no writ). Likewise, rule 21 does not require a showing of actual receipt of notice by opposing counsel. Gonzales v. Surplus Insurance Services, 863 S.W.2d 96, 101–02 (Tex. App.—Beaumont 1993, writ denied) (intended recipient engaged in instances of selective acceptance and refusal of certified mail related to case); Costello v. Johnson, 680 S.W.2d 529, 531 (Tex. App.—Dallas 1984, writ. ref’d n.r.e.) (record not required to affirmatively show receipt of notice).

Rule 21a creates a presumption that a document that is properly sent is received by the addressee. Although the presumption may be rebutted by an offer of proof of nonreceipt, the presumption has the force of a rule of law in the absence of proof to the contrary. Thomas v. Ray, 889 S.W.2d 237, 238 (Tex. 1994) (orig. proceeding); Meek v. Bishop Peterson & Sharp, P.C., 919 S.W.2d 805, 809 (Tex. App.—Houston [14th Dist.] 1996, writ denied). Although not required by rules 21 and 21a, the better practice is to recite in the certificate of service the particular mode used to effect service and have available for the court’s review evidence of service (for example, courier receipt, facsimile confirmation, certified mail receipt, domestic return receipt, certificate of mailing, or postal receipt). Rule 21a lists the methods of service.

Documents Filed Electronically: A document filed electronically under rule 21 must be served electronically through the electronic filing manager if the e-mail address of the party or attorney to be served is on file with the electronic filing manager. If the e-mail address of the party or attorney to be served is not on file with the electronic filing manager, the document may be served on that party or attorney as provided in rule 21a(a)(2). Tex. R. Civ. P. 21a(a)(1).

Documents Not Filed Electronically: A document not filed electronically may be served in person, by mail, by commercial delivery service, by fax, by e-mail, or by such other manner as the court in its discretion may direct. Tex. R. Civ. P. 21a(a)(2).

§ 19.9 Completion of Service

Service by Mail: Service by mail or commercial delivery service shall be complete on deposit of the document, postpaid and properly addressed, in the mail or with a commercial delivery service. Tex. R. Civ. P. 21a(b)(1).

Service by Facsimile: Service by fax is complete on receipt. Service completed after 5:00 P.M. local time of the recipient shall be deemed served on the following day. Tex. R. Civ. P. 21a(b)(2).

Electronic Service: Electronic service is complete on transmission of the document to the serving party’s electronic filing service provider. The electronic filing manager will send confirmation of service to the serving party. Tex. R. Civ. P. 21a(b)(3).

E-Mail Service: Because the rule does not address when e-mail service is complete, the attorney should consider using an additional method of service.
§ 19.10  Time for Action after Service

Whenever a party has the right or is required to do some act within a prescribed period after the service of a notice or other paper on him and the notice or paper is served on him by mail, three days shall be added to the prescribed period. The amended rule grants additional time only when service is made by mail. Tex. R. Civ. P. 21a(c).

§ 19.11  Proof of Service

The party or attorney of record shall certify to the court compliance with this rule in writing over signature and on the filed instrument. A certificate by a party or an attorney of record, or the return of the officer, or the affidavit of any other person showing service of a notice shall be prima facie evidence of the fact of service. Nothing in the rule precludes any party from offering proof that the document was not received or, if service was by mail, that the document was not received within three days from the date that it was deposited in the mail, and on so finding, the court may extend the time for taking the action required of such party or grant such other relief as it deems just. Tex. R. Civ. P. 21a(e); see also Tex. R. Civ. P. 21(d) (requiring signed certificate of compliance with rule 21).

§ 19.12  Prima Facie Evidence of Service

The certificate of service is prima facie evidence of service. Tex. R. Civ. P. 21a(e). See form 1-6 in this manual for a certificate of service.

§ 19.13  Time for Service

Unless a specific rule provides otherwise and unless the application is presented during a hearing or trial, any application for a court order and notice of hearing must be served on all other parties at least three days before the time specified for the hearing. Tex. R. Civ. P. 21(b). See Tex. R. Civ. P. 4.

§ 19.14  Setting of Pretrial Hearings

The minimum time required for setting a matter for hearing varies both with the matter being heard and with local rules and practice. Once the court clerk sets a hearing date and time, all parties must be notified in writing of the setting as soon as possible.

§ 19.15  Notice of Hearing

An application to the court for an order and notice of any hearing thereon not presented during a hearing or trial must be served on all other parties not less than three days before the time specified for the hearing, unless otherwise provided by these rules or shortened by the court. Tex. R. Civ. P. 21(b).

Practice Note:  When a motion is to be presented to the court for hearing, it is good practice to include a notice of hearing. The notice should be included at the end of the motion, before the certificate of service, or, depending on local practice, it may be filed as a separate document. A notice of hearing is at form 19-2 in this chapter.
§ 19.16 Hearing; Submission

An increasing number of courts are handling pretrial motions with a submission docket. Instead of oral argument, the court considers only the motion and response submitted. There is no right to present argument for or against a motion for summary judgment; all party participation necessary in a summary judgment proceeding occurs prior to the date set for hearing. See Guereque v. Thompson, 953 S.W.2d 458, 465 (Tex. App.—El Paso 1997, pet. denied) (no right to present oral argument at hearing); Adamo v. State Farm Lloyds Co., 853 S.W.2d 673, 677 (Tex. App.—Houston [14th Dist.] 1993, writ denied) cert. denied, 511 U.S. 1053 (1994) (because oral hearing on summary judgment is “little more than argument of counsel,” it is not reversible error for trial court to deny request for hearing; decision to grant oral hearing on summary judgment motion is purely within discretion of trial judge, and court of appeals cannot mandate that trial court hold oral hearing on summary judgment). The trial court is not required to conduct an oral hearing on a motion for summary judgment and may rule on the motion based solely on written submission. Rorie v. Goodwin, 171 S.W.3d 579, 583 (Tex. App.—Tyler 2005, no pet.). Therefore a supporting brief may often prove useful.

The procedure regarding submission dockets varies among courts, but generally the procedure is to obtain a submission date and time, which is the official date and time when the court will consider the motion and response. This submission date is the functional equivalent of a hearing date for purposes of filing motions and responses.

§ 19.17 Affidavits

§ 19.17:1 Definition

The Texas Government Code defines an “affidavit” as a statement in writing of a fact or facts signed by the party making it, sworn to before an officer authorized to administer oaths, and officially certified by the officer under his seal of office. See Tex. Gov’t Code § 312.011. Normally an affidavit contains a jurat signed by an authorized officer (e.g., a notary), which certifies that the written statement was taken under oath before the officer. But a jurat is not essential for a written statement to meet the statutory definition of “affidavit”; proof that the writing was sworn to before an authorized officer may be supplied by other evidence. See Mansions in the Forest, L.P. v. Montgomery County, 365 S.W.3d 314, 316–17 (Tex. 2012) (per curiam) review granted, judgment rev’d on other grounds, 365 S.W.3d 314 (Tex. 2012) (in summary judgment, affidavit is proper when it contains acknowledgment by notary and recites that affiant was duly sworn and on oath stated contents of affidavit); Asset Liquidation Group v. Wadsworth, No. 01-15-00614-CV, 2016 WL 4375419, at *3 (Tex. App.—Houston [1st Dist.] Aug. 16, 2016, no pet.) (mem. op.). Likewise, an acknowledgment by a notary (that an instrument was executed for the purposes therein expressed) will not by itself support a finding that a writing is an affidavit, but it will suffice “when coupled with language that the affiant personally appeared before the authorized officer, was duly sworn, and was deposed as follows.” Mansions in the Forest, L.P., 365 S.W.3d at 358–59 (citing Perkins v. Crittenden, 462 S.W.2d 525, 567 (Tex. 1970); Ford Motor Co. v. Leggat, 904 S.W.2d 643, 645–46) (Tex. 1995)). See also Residential Dynamics, LLC v. Loveless, 186 S.W.3d 192, 197 (Tex. App.—Forth Worth 2006, no pet.) (in summary judgment, affidavit without jurat held to be proper when it contained notary’s acknowledgment; statement that affiant personally appeared, swore on oath, and deposed and stated information that followed; and affiant stated in affidavit that he had personal knowledge of facts stated therein).

§ 19.17:2 Contents of Affidavit

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

An affidavit must disclose the basis of the personal knowledge. Radio Station KSCS v. Jennings, 750 S.W.2d 760, 761–62 (Tex. 1988) (per curiam) (summary judgment); M.G.M. Grand Hotel, Inc. v. Castro, 8 S.W.3d 403, 406–07 (Tex. App.—Corpus Christi 1999, no pet.) (special appearance). It need not expressly state that its contents are true or that the affiant is competent to testify about the contents if competence is established by the facts in the affidavit. Cook v. Frazier, 765 S.W.2d 546, 551–52 (Tex. App.—Fort Worth 1989, no writ) (summary judgment). See also Kyle v. Countrywide Home Loans, Inc., 232 S.W.3d 355, 361 (Tex. App.—Dallas 2007, pet. denied) (summary judgment; affiant not required to state all facts contained in affidavit are true when, considering affidavit in its entirety, affiant is clearly representing that facts stated therein are true and correct).

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

§ 19.17:3 Caveat: “Knowledge and Belief”

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

Some affidavits, such as those supporting a sworn account petition, may be executed by the party, his agent, or his attorney. Tex. R. Civ. P. 185. The attorney should not execute any such affidavit unless the attorney has personal knowledge of the facts contained in it. See Tex. Disciplinary R. Prof’l Conduct 3.03. See also State Bar of Texas, Op. 405 (1983) (to knowingly verify false pleading may subject attorney to discipline and constitutes perjury).

§ 19.17:4 Affidavits and Business Records

An affidavit made under Tex. R. Civ. P. 185 and Tex. R. Evid. 902(10) may be used to authenticate and identify business records, and such an affidavit will support a summary judgment based on the pleadings. Special Marine Products, Inc. v. Weeks Welding & Construction, Inc., 625 S.W.2d 822, 826–27 (Tex. App.—Houston [14th Dist.] 1981, no writ); see also Hudspeth v. Investor Collection Services Ltd. Partnership, 985 S.W.2d 477, 479 (Tex. App.—San Antonio 1998, no pet.) (lender need not file detailed proof reflecting calculations of balance due on note; affidavit of bank employee setting forth total balance due is sufficient). See section 19.50:1 below for the use of affidavits in summary judgment proceedings.
§ 19.17:5 Affidavits in Sworn Account Cases

See section 14.21:4 in this manual regarding the contents of an affidavit in a sworn account case.

§ 19.18 Verified Pleadings

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

1. defect of the parties (Tex. R. Civ. P. 93(4));
2. denial of partnership as alleged in any pleading (Tex. R. Civ. P. 93(5));
3. that any party alleged in any pleading to be a corporation is not incorporated as alleged (Tex. R. Civ. P. 93(6));
4. denial of the execution of a written instrument (Tex. R. Civ. P. 93(7));
5. denial of genuineness of the indorsement or assignment of a written instrument upon which suit is brought by an indorsee or assignee (Tex. R. Civ. P. 93(8));
6. allegation that a written instrument on which a pleading is founded is without consideration or that the consideration has failed in whole or in part (Tex. R. Civ. P. 93(9));
7. denial of a sworn account (Tex. R. Civ. P. 93(10)); and
8. that a contract is usurious (Tex. R. Civ. P. 93(11)).

§ 19.19 Unsworn Declaration

An unsworn declaration may be used in lieu of an “affidavit required by statute or required by rule, order, or requirement adopted as provided by law.” Tex. Civ. Prac. & Rem. Code § 132.001. The unsworn declaration must be (1) in writing; (2) subscribed by person making the declaration as true under penalty of perjury; and (3) must include a jurat in prescribed form. The substantial form of the required jurat is set forth in Tex. Civ. Prac. & Rem. Code § 132.001(d)–(f). See form 19-5. The second requirement (subscription under penalty of perjury) appears to supplant an affidavit’s requirements showing affirmatively that it is based on personal knowledge, that the facts sought to be proved would be “admissible in evidence” at a conventional trial, and that the facts recited therein are “true and correct.” See, e.g., Bahm v. State, 219 S.W.3d 391, 394 (Tex. Crim. App. 2007) (inmate’s unsworn declaration found to be proper when it included the “vital phrase” “under penalty of perjury” while also reciting facts “according to my belief”).

§ 19.20 Exhibits

Parties may incorporate into their pleadings documentary exhibits such as promissory notes, accounts, mortgages, and other records and written instruments constituting, in whole or part, the claim sued on or the matter set up in defense by attaching copies or the originals to the pleadings, by filing copies or originals and referring to them, or by copying the documents into the body of the pleadings. Such documents will be deemed part of the pleadings. Tex. R. Civ. P. 59. A document is not put into evidence merely by attaching it to a pleading. If an exhibit is a necessary element of proof, it must be separately introduced into evidence at trial. Johnson v. Mohammed, No. 03-10-00763, 2013 WL 1955862, at *2 (Tex. App.—Austin May 10, 2013,
pet. dism’d w.o.j.) (mem. op.); National Medical Financial Services, Inc. v. Irving Independent School District, 150 S.W.3d 901, 905 (Tex. App.—Dallas 2004, no pet.).

§ 19.21 Adoption by Reference

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

§ 19.22 Amended and Supplemental Pleadings

The distinction between amended and supplemental pleadings is clearly stated in Tex. R. Civ. P. 62–70, but the difference frequently becomes blurred in actual practice. See, e.g., Hawkins v. Anderson, 672 S.W.2d 293, 294–96 (Tex. App.—Dallas 1984, no writ) (plaintiff initially filed negligence action in county court at law, then filed “first supplemental petition” adding a deceptive trade practice claim asking for treble damages and incorporating by reference the first pleading, thereby putting damages over jurisdictional maximum for the court; appeals court construed new petition as an amended pleading that superseded the original petition and alleged a new ground of recovery, and upheld dismissal of DTPA claim but overturned dismissal of negligence claim, holding that incorporating first pleading by reference was improper but did not make amended pleading void). An amended pleading adds to or takes from a previously filed pleading, whereas a supplemental pleading is addressed to a pleading of another party and is designed to answer allegations. Tex. R. Civ. P. 62, 69. For example, if the plaintiff must allege that the defendant waived the statute of limitations because the defendant raised the defense in his answer, he would do so in a supplemental petition. An amended pleading must identify the instrument being amended; it must be titled, for example, “Plaintiff’s First Amended Petition” and is a complete substitute for the earlier pleading. Tex. R. Civ. P. 64.

§ 19.23 Misnamed Pleadings

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

§ 19.24 Response

Failing to respond to a pleading subjects a party to the risk of default judgment. See part II. in chapter 20 of this manual.

§ 19.25 Dismissal for Baseless Causes of Action

Texas Rule of Civil Procedure 91a governs dismissal of baseless causes of action (sometimes referred to as “early dismissal”). Rule 91a applies to all cases except those governed by the Family Code and inmate litigation. Tex. R. Civ. P. 91a.1. The procedures outlined in rule 91a are cumulative of other procedures that authorize dismissal in Texas. Tex. R. Civ. P. 91a.9. Moreover, the procedures of rule 91a are not exceptions to the special appearance rules of Texas Rule of Civil Procedure 120a or the challenge of venue rules of Texas Rule of Civil Procedure 86. Tex. R. Civ. P. 91a.8. A special appearance and/or motion to transfer venue should be filed in the correct sequence to prevent waiver of objections to jurisdiction or venue. A litigant who
files a motion to dismiss under rule 91a submits to the court’s jurisdiction for the purposes contained in the motion and is bound by the court’s ruling, including an award of attorney’s fees and costs. Tex. R. Civ. P. 91a.8.

§ 19.25:1 Motion and Grounds for Dismissal

A party may move to dismiss a cause of action on the grounds that it has no basis in law or fact. A cause of action has no basis in law if the allegations, taken as true, together with inferences reasonably drawn from them do not entitle the claimant to the relief sought. A cause of action has no basis in fact if no reasonable person could believe the facts pleaded. Tex. R. Civ. P. 91a.1.

§ 19.25:2 Contents of Motion

A motion to dismiss must—

1. state that it is made pursuant to Tex. R. Civ. P. 91a;
2. identify each cause of action to which it is addressed; and
3. state specifically the reasons the cause of action has no basis in law, no basis in fact, or both.

Tex. R. Civ. P. 91a.2.

§ 19.25:3 Time for Filing Motion to Dismiss, Response Thereto, Hearing, and Ruling

A motion to dismiss must be—

1. filed within sixty days after the first pleading containing the challenged cause of action is served on the movant;
2. filed at least twenty-one days before the motion is heard; and
3. ruled on within forty-five days after the motion is filed.

Tex. R. Civ. P. 91a.3.

Although a motion to dismiss must be filed at least twenty-one days before the hearing, the parties need only receive notice of the hearing fourteen days before the hearing. Tex. R. Civ. P. 91a.6. A response to a motion to dismiss is not required, but the deadline to file a response is not later than seven days before the date of the hearing. Tex. R. Civ. P. 91a.4.

The court may allow oral argument, but is not required to do so. With the exception of pleading exhibits permitted by Tex. R. Civ. P. 59, the court cannot consider evidence in ruling on the substance of the motion. Tex. R. Civ. P. 91a.6. (Note the contrast with Fed. R. Civ. P. 12(b)(6), which allows evidence to be submitted with the motion, but if evidence is submitted, the motion becomes a motion for summary judgment; furthermore there is no requirement that the motion to dismiss be filed before or contemporaneously with a responsive pleading as required by Fed. R. Civ. P. 12(b)(6).) Tex. R. Civ. P. 59 allows documentary exhibits such as notes, contracts, and records to be attached to a pleading in support of a claim or defense, and moreover, if an exhibit is attached, the pleading will not be defective if it fails to allege facts which can be supplied from the exhibit.

If a motion to dismiss a baseless claim is filed immediately on receipt of same, the baseless claim could be dismissed not earlier than twenty-one days after such baseless claim is filed. Tex. R. Civ. P. 91a.3(b). But, in no event will the baseless claim be dismissed more than 105 days after it is filed (i.e., the motion to dismiss is filed on the last day allowed by the rules and the
court rules on the last day allowed by the rules). Tex. R. Civ. P. 91a.3(a), (b). By any modern day standard this constitutes “early dismissal.”

§ 19.25:4 Effect of Nonsuit, Pleading Amendment, or Withdrawal of Motion to Dismiss

A nonsuit of a claim that is the subject of a motion to dismiss may be filed not later than three days before a hearing scheduled on the motion to dismiss. Similarly, a motion to dismiss may be withdrawn not later than three days before a hearing scheduled on the motion to dismiss. See Tex. R. Civ. P. 91a.5(a). Unless the parties agree that the motion to dismiss should not be heard, the court must rule on the motion unless the challenged cause of action is nonsuited or the motion to dismiss is withdrawn. In ruling on the motion to dismiss, the court cannot consider an unfiled nonsuit or amendment. Conversely, if claims are timely nonsuited or a motion to dismiss is timely withdrawn, the court cannot rule on the motion to dismiss. Tex. R. Civ. P. 91a.5(c).

A challenged cause of action may also be amended not later than three days before the date of the hearing on the motion to dismiss. Tex. R. Civ. P. 91a.5(a). If the challenged cause of action is amended, the motion to dismiss may be withdrawn or it may be amended to be directed at the amended cause of action. Tex. R. Civ. P. 91a.5(b). If the motion to dismiss is amended, the applicable time periods of rule 91a are restarted. Tex. R. Civ. P. 91a.5(d).

§ 19.25:5 Award of Costs and Attorney’s Fees to Prevailing Party

Excepted as noted below, the court must award costs, and reasonable and necessary attorney’s fees incurred with respect to the challenged cause of action to the prevailing party. The court must consider evidence in awarding attorney’s fees and costs. The court may not award attorney’s fees and costs to parties in a suit brought by or against a governmental entity or in a suit by or against a public official acting in his official capacity or under color of law. Tex. R. Civ. P. 91a.7. There is no requirement in Fed. R. Civ. P. 12(b)(6) that the prevailing party must be awarded attorney’s fees and costs. However, a litigant whose 12(b)(6) motion is granted may be able to petition the court for his attorney’s fees pursuant to Fed. R. Civ. P. 54.

§ 19.26 Failure to Respond to, Amend, or Supplement Discovery Response

Failure to properly respond to, amend, or supplement a discovery response in a timely manner results in the automatic exclusion of the evidence or testimony that is the subject of the request, unless the trial court finds either good cause for the failure or that the failure will not unfairly surprise or prejudice the other parties. Tex. R. Civ. P. 193.6(a). The burden of proof is on the party seeking admission of the evidence, and the finding of good cause or lack of unfair surprise or unfair prejudice must be supported by the record. Tex. R. Civ. P. 193.6(b).

Even if the party seeking to introduce the evidence or call the witness fails to carry the burden imposed by Tex. R. Civ. P. 193.6(a), (b), the court may grant a continuance or postpone the trial to allow a response to be made, amended, or supplemented and to allow opposing parties to conduct discovery regarding any new information presented by that response. Tex. R. Civ. P. 193.6(c).

[Sections 19.27 through 19.30 are reserved for expansion.]
II. Expedited Actions

§ 19.31 Expedited Actions

Tex. R. Civ. P. 169 was added to rules effective March 31, 2013, to promote the prompt, efficient, and cost-effective resolution of civil actions. See 76 Tex. B.J. 221 (2013). The expedited actions process applies in a suit in which all claimants, other than counter-claimants, affirmative plead that they seek only monetary relief aggregating $100,000 or less, including damages of any kind, penalties, costs, expenses, prejudgment interest, and attorney’s fees. Tex. R. Civ. P. 169(a)(1). The expedited process does not apply to actions filed pursuant to the Family Code, the Property Code, the Tax Code, or to medical liability claims governed by chapter 74 of the Texas Civil Practice and Remedies Code. Tex. R. Civ. P. 169(a)(2). Tex. R. Civ. P. 47 and 190.2 were revised to conform to the expedited actions procedures. Tex. R. Civ. P. 190.2(a)(1) was added to include in the Level 1 discovery control plan “any suit that is governed by the expedited actions process in Rule 169” and the rule was recaptioned as “Discovery Control Plan—Expedited Actions and Divorces Involving $50,000 or Less (Level 1).” See 76 Tex. B.J. 221 (2013). Rule 47(c), by requiring a statement of monetary relief sought, now expressly requires the plaintiff to plead into the requirements of the rule or describe relief that falls outside the rule. Tex. R. Civ. P. 47(c).

See section 14.24 in this manual for information about expedited action considerations when drafting pleadings.

§ 19.31:1 Trial, Alternative Dispute Resolution, and Potential Recovery in Expedited Actions

On request by any party, the court must set the trial date within ninety days after the discovery period ends. The court may continue the case twice, but such continuances cannot be more than a total of sixty days cumulatively. Tex. R. Civ. P. 169(d)(2).

Unless the parties have agreed not to engage in alternative dispute resolution, the court may refer a case in the expedited action process to alternative dispute resolution once. The alternative dispute resolution must—

1. not exceed a half day in duration, excluding scheduling time;
2. not exceed a total cost of twice the amount of the applicable civil filing fees; and
3. be completed not more than sixty days before the first trial setting.


If a plaintiff properly pleads into the expedited action process, and serves discovery with his petition, the case could be set for trial the day after discovery closes or 181 days after suit is filed. A maximum timeframe for taking the case to trial cannot be ascertained since the closure of the discovery period is calculated from the date that the first discovery requests are served. But, a diligent party will act quickly in serving discovery, and the case should be taken to trial on or about 330 days after the date the case is filed. See Tex. R. Civ. P. 169, 190.2(b)(1).

The rule requires economy in the use of time in trial. Each side in a case is allowed no more than eight hours to complete jury selection, opening statements, presentation of evidence, and examination and cross-examination of witnesses. Tex. R. Civ. P. 169(d)(3). “Side” has the same definition as set forth in Texas Rule of Civil Procedure 233 and means “one or more litigants...
who have common interests on matters with which the jury is concerned.” Tex. R. Civ. P. 169(d)(3)(A), 233. Time spent on objections, bench conferences, bills of exception, and challenges for cause to a juror under rule 8 of the Texas Rules of Civil Procedure are not included in the time limit. Tex. R. Civ. P. 169(d)(3)(B). The eight-hour time limit for trial may be extended to no more than twelve hours per side on motion and a showing of good cause by any party. Tex. R. Civ. P. 169(d)(3). In determining whether good cause exists to extend the time allowed for trial, the court should consider the same factors listed above pertaining to removing the suit from the expedited action process. Tex. R. Civ. P. 169, cmt. 3.

A party that prosecutes a suit under rule 169 may not recover a judgment in excess of $100,000, excluding postjudgment interest. Tex. R. Civ. P. 169(b).

§ 19.31:2 Expert Testimony and Potential Recovery

_Daubert_ and _Havner_ challenges to expert testimony are not allowed pretrial except on request of the party offering the expert or as an objection to motion for summary judgment evidence. However, _Daubert_ and _Havner_ challenges may be made at the time of trial. A motion to strike an expert for late designation is also available. Tex. R. Civ. P. 169(d)(5). In terms of actual practice, the short timeframes for trial provided in rule 169 and limited discovery available under rule 190.2 may wholly prevent pretrial challenges to the admissibility of expert witnesses. _See Daubert v. Merrell Dow Pharmaceutical, Inc._, 509 U.S. 579 (1993); _Havner v. E-Z Mart Stores_, 825 S.W.2d 456 (Tex. 1992).

§ 19.32 Discovery under Expedited Action Process

**Application of Discovery Control Plan (Level 1):** Discovery under the expedited action process is governed by Tex. R. Civ. P. 190.2 (also known as the “Level 1” discovery control plan). Tex. R. Civ. P. 190.2(a)(1). The rules generally do not allow the parties to agree to another discovery control plan. Tex. R. Civ. P. 190.1, 190.2(a)(2).

**Discovery Control Plan (Level 1) Limitations:**

*Discovery Period*—Begins when the suit is filed, and ends 180 days after the date that the first discovery request of any kind is served on any party. Tex. R. Civ. P. 190.2(b)(1).

*Total Time for Oral Deposition*—Each party may have no more than six hours in total to examine and cross-examine all witness. Note that deposition time is per “party,” while trial time is per “side.” The parties may agree to extend this time to ten hours, but no more except by court order. The court may modify (increase or decrease) the deposition hours so that no party is given an unfair advantage. Tex. R. Civ. P. 190.2(b)(2).

*Interrogatories*—Limited to fifteen excluding interrogatories asking a party to identify or authentic documents. Each discreet subpart of an interrogatory is a separate interrogatory. Tex. R. Civ. P. 190.2(b)(3).

*Requests for Production*—Limited to fifteen. Each discreet subpart of a request for production is a separate request for production. Tex. R. Civ. P. 190.2(b)(4).

*Requests for Admission*—Limited to fifteen. Each discreet subpart of a request for admission is a separate request for admission. Tex. R. Civ. P. 190.2(b)(5).

*Requests for Disclosure*—The standard requests for disclosure under rule 194.2 apply to expedited actions. Tex. R. Civ. P. 190.2(b)(6). Importantly, a party may request as an additional request for disclosure, “all documents, electronic information,
and tangible items that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses.” Such a request for disclosure is not considered a request for production. See Tex. R. Civ. P. 190.2(b)(6).

The Level 1 discovery control plan rules do not specifically address requests for production and/or subpoenas duces tecum served with a deposition notice (whether oral or on written questions). See, generally, Tex. R. Civ. P. 190.2. Under rules 199 and 200, a party may serve requests for production with a notice of deposition. Tex. R. Civ. P. 199.2(b)(5), 200.1(b). Rules 193 and 196 govern requests for production served in conjunction with notices of deposition on parties or witnesses controlled by parties, and those rules do not contain a limitation on the number of requests for production that may be served on a party. Tex. R. Civ. P. 199.2(b)(5); see also Tex. R. Civ. P. 193, 196. If a party seeks to serve more than fifteen requests for production while under a Level 1 discovery control plan, they may do so by serving those requests for production with a notice of deposition.

[Sections 19.33 through 19.40 are reserved for expansion.]

III. Motion for Summary Judgment

§ 19.41 Purpose of Summary Judgment

The purpose of summary judgment is to eliminate patently unmeritorious claims or untenable defenses and to avoid delays of trial if there is no genuine issue of fact. Swilley v. Hughes, 488 S.W.2d 64, 68 (Tex. 1972). Summary judgment is not intended to deprive litigants of their right to a full hearing on the merits of any real issue of fact. An answer or response to an unsuccessful motion for summary judgment may produce the defendant’s sworn testimony regarding his defenses, without need for further discovery on those defenses.

Summary judgment is a harsh remedy with complex and unclear procedural rules. All inferences are resolved in the nonmovant’s favor. The judge (who does not risk reversal for denying a motion for summary judgment) may be hesitant to award a summary judgment because of the great statistical likelihood of reversal. See David Hittner & Lynne Liberato, Summary Judgments in Texas, 34 Hous. L. Rev. 1303, 1364 (1998). Summary judgments are well suited for commercial litigation in which the facts are more easily established by documentary evidence; see sections 19.45 (sworn accounts) and 19.46 (promissory notes) below. The attorney should carefully weigh these considerations in determining whether filing a motion for summary judgment is warranted.

§ 19.42 Availability of Summary Judgment

§ 19.42:1 Requirement of No Genuine Issue of Material Fact

The creditor can obtain a summary judgment against the debtor if—

(i) the deposition transcripts, interrogatory answers, and other discovery responses referenced or set forth in the motion or response, and (ii) the pleadings, admissions, affidavits, stipulations of the parties, and authenticated or certified public records, if any, on file at the time of the hearing, or filed thereafter and before judgment with permission of the court, show that, except as to the amount of damages, there is no genuine issue as to any material
fact and the moving party is entitled to judgment as a matter of law on the issues expressly set out in the motion or in an answer or any other response.

Tex. R. Civ. P. 166a(c) (emphasis added).

The question “is not whether the summary judgment proof raises fact issues with reference to the essential elements of a plaintiff’s claim or cause of action, but is whether the summary judgment proof establishes as a matter of law that there is no genuine issue of fact as to one or more of the essential elements of the plaintiff’s cause of action.” Gibbs v. General Motors Corp., 450 S.W.2d 827, 828 (Tex. 1970).

§ 19.42:2 Requirement of Defendant’s Appearance

The plaintiff may move for summary judgment at any time after the adverse party has appeared or answered. Tex. R. Civ. P. 166a(a). Summary judgment probably ceases to be available once the trial has begun. Many courts issue a docket control order that sets a specified deadline for filing dispositive motions, normally well before the date set for trial. See Comment, Summary Judgment in Texas: A Selective Survey, 14 Hous. L. Rev. 854, 861–62 (1977). Summary judgment should not be confused with judgment by default, which is available if the defendant has failed to appear and answer within certain time limits. See Tex. R. Civ. P. 239.

§ 19.43 Motion for Summary Judgment Generally

§ 19.43:1 Grounds

The motion must state specific grounds. Tex. R. Civ. P. 166a(c). The language of rule 166a(c) requiring that “the motion for summary judgment shall state the specific grounds” requires literal compliance. The grounds must be expressly presented in the motion. The grounds for summary judgment may not be raised only in an accompanying brief or memorandum in support. Sysco Food Services, Inc. v. Trapnell, 890 S.W.2d 796, 805 (Tex. 1994). The motion for summary judgment must state the specific grounds on which the judgment is sought, so that the issues will be defined and the respondent will be provided adequate information to oppose it. Westchester Fire Insurance Co. v. Alvarez, 576 S.W.2d 771, 772 (Tex. 1978), overruled on other grounds by City of Houston v. Clear Creek Basin Authority, 589 S.W.2d 671, 673 (Tex. 1979). The movant is confined to the specific grounds set forth in the motion. See Clear Creek Basin Authority, 589 S.W.2d at 677–78. It is unsettled what degree of specificity is required; the form motion in this chapter (form 19-9) summarizes the elements of the cause and directs the court’s attention to the specific admission, answer, or other response by which the defendant has admitted each fact establishing that element for the plaintiff.

A court may not grant summary judgment relief for more than was specifically requested in the motion. Mafrige v. Ross, 866 S.W.2d 590, 591 (Tex. 1993), overruled on other grounds by Lehmann v. Har-Con Corp., 39 S.W.3d 191, 192 (Tex. 2001).

§ 19.43:2 Affirmative Defenses

An affirmative defense must be pleaded in a responsive pleading, or the defense will be waived. *F-Star Socorro, L.P. v. City of El Paso*, 281 S.W.3d 103, 108 (Tex. App.—El Paso 2008, no pet.). “If the party opposing a summary judgment relies on an affirmative defense, he must come forward with summary judgment evidence sufficient to raise an issue of fact on each element of the defense to avoid summary judgment.” *Brownlee v. Brownlee*, 665 S.W.2d 111, 112 (Tex. 1984) (citing *City of Houston v. Clear Creek Basin Authority*, 589 S.W.2d 671, 678–79 (Tex. 1979)). The movant is not required to negate affirmative defenses. *Brownlee*, 665 S.W.2d at 112 (Tex. 1984). However, an unpled affirmative defense can be a proper basis for a summary judgment “when it is raised in the summary judgment motion, and the opposing party does not object to the lack of a rule 94 pleading in either its written response or before the rendition of judgment.” *Roark v. Stallworth Oil & Gas, Inc.*, 813 S.W.2d 492, 494 (Tex. 1991) (petitioner sued for specific performance of contracts; in summary judgment motion, nonmovant relied on affirmative defense not included in earlier pleadings).

§ 19.43:3 Notice

The motion and any supporting affidavits must be filed with the court and served on the respondent at least twenty-one days before the time specified for hearing, except on leave of court, with notice to opposing counsel. Tex. R. Civ. P. 166a(c); *Ready v. Alpha Building Corporation*, 467 S.W.3d 580, 584 (Tex. App.—Houston [1st Dist.] 2015, no pet.). Service should be made in accordance with rules 21 and 21a.

The notice of summary judgment must include a specific submission date. *Ready*, 467 S.W.3d at 585–86 (notices stating motion would be submitted “after” date certain contained indefinite language that did not inform respondent of specific submission date or establish deadline for response), citing *Martin v. Martin, Martin & Richards, Inc.*, 989 S.W.2d 357, 359 (Tex. 1998) (per curiam) (trial court must give notice of submission date for a motion for summary judgment, because this date determines the date nonmovant’s response is due); *Aguirre v. Phillips Properties, Inc.*, 111 S.W.3d 328, 332 (Tex. App.—Corpus Christi 2003, pet. denied) (op. on reh’g) (“failure to give notice of the submission date for a motion for summary judgment constitutes error.”). The notice provisions associated with summary-judgment procedure under rule 166a are strictly construed. *Ready*, 467 S.W.3d at 585; see also *Nexen Inc. v. Gulf Interstate Engineering Co.*, 224 S.W.3d 412, 423 n.14 (Tex. App.—Houston [1st Dist.] 2006, no pet.) (appellate courts hold summary judgment movants to strict procedural and substantive standards). Notice of hearing for submission of a summary judgment motion is mandatory and essential to due process. See Tex. R. Civ. P. 166a(c); *Martin*, 989 S.W.2d at 359. “The failure to give notice of the submission date for a motion for summary judgment constitutes error . . . .” *Aguirre*, 111 S.W.3d at 332 (citing *Martin*, 989 S.W.2d at 359).


“A certificate of service creates a rebuttable presumption that the requisite notice [of the hearing] was [given],” *overruled on other grounds by Lewis v. Blake*, 876 S.W.2d 314, 315 (Tex. 1994) (per curiam); *Krchnak v. Fulton*, 759 S.W.2d 524, 528 (Tex. App.—Amarillo 1988, writ denied) (rule regarding certificate of service “creates a presumption that the requisite notice was served and . . . has the force of a rule of law”).

The certificate of service may be modified to include a statement that the motion for summary judgment and all supporting affidavits were filed and served at least twenty-one days before the time specified for hearing. See Tex. R. Civ. P. 166a(c). If service is made by mail rather than by personal service, three days must be added to the prescribed period for notice. Tex. R. Civ. P. 21a(c). Effective Jan. 1, 2014, Tex. R. Civ. P. 21a was amended to provide that three additional days are added only when notice or paper is served by mail; three additional days are no longer added when service is made by facsimile. See Tex. R. Civ. P. 21a(b), (c); Texas Supreme Court, Order Adopting and Amending Texas Rule of Civil Procedure, Misc. Docket No. 13-9165 (Dec. 13, 2013); 76 Tex. B.J. 809 (2013). Also, rule 4 applies to the calculation of the time periods prescribed by rule 166a(c) so that the day of service is not to be counted and the day of hearing is. See Tex. R. Civ. P. 4.

Except with leave of court, responsive pleadings (such as a sworn denial superseding the defendant’s original unsworn answer) and evidence must be filed not later than seven days before the hearing. Tex. R. Civ. P. 63, 166a(c); see Goswami v. Metropolitan Savings & Loan Ass’n, 751 S.W.2d 487, 490 (Tex. 1988) (amended pleadings must be filed at least seven days before trial in accordance with rule 63; summary judgment hearing is “trial” for purposes of rule 63).

§ 19.43:4 Judgment Nihil Dicit as Alternative

If seeking a judgment without supporting affidavits, the attorney should consider a motion for judgment nihil dicit as a speedier alternative. See section 20.23 in this manual. The better practice is to state an additional ground for summary judgment and support that ground with an appropriate affidavit. If the defendant then amends his answer to include a sworn denial, the movant can proceed on the additional summary judgment ground.

§ 19.44 Responding to Motion for Summary Judgment

Responding to a traditional motion for summary judgment is not mandatory. See Tex. R. Civ. P. 166a(a). Once the movant with the burden of proof has established the right to a summary judgment on the issues presented, the nonmovant’s response should present to the trial court a genuine issue of material fact that would preclude summary judgment. Affordable Motor Co., Inc. v. LNA, LLC, 351 S.W.3d 515, 519, 522 (Tex. App.—Dallas, 2011, pet. denied) (respondent established genuine issue of material fact precluding summary judgment when its response included controverting affidavit in opposition to movant’s claim for attorney’s fees); Abdel-Fattah v. PepsiCo, Inc., 948 S.W.2d 381, 383 (Tex. App.—Houston [14th Dist.] 1997, no writ). If the movant does not establish the right to summary judgment on the issues presented, the burden of proof does not shift and the nonmovant is not required to respond. M.D. Anderson Hospital & Tumor Institute v. Willrich, 28 S.W.3d 22, 23 (Tex. 2000) (per curiam); Rhône-Poulenc, Inc. v. Steel, 997 S.W.2d 217, 222–23 (Tex. 1999); Cove Investments, Inc. v. Manges, 602 S.W.2d 512, 514 (Tex. 1980) (noting that, technically, no response is required when movant’s proof is legally insufficient); City of Houston v. Clear Creek Basin Authority, 589 S.W.2d 671, 678 (Tex. 1979) (in absence of competent summary judgment proof by movant, no burden shifts to nonmovant). Failure to file a response does not authorize summary judgment by default in a traditional motion for summary judgment. Wheeler v. Green, 157 S.W.3d 439, 442 (Tex. 2005) (per curiam); Rhône-Poulenc, 997 S.W.2d at 222–23; Cotton v. Ratholes, Inc., 699 S.W.2d 203, 205 (Tex. 1985) (per curiam) (stating Clear Creek did not shift burden of proof and thus, trial court cannot grant summary judgment by default). Even if the nonmovant does not file a response and the motion for summary judgment is uncontroverted, the movant must still carry the burden of proof. See generally Clear Creek, 589 S.W.2d at 675–77 (explaining history of traditional summary judgment rules in Texas).
In contrast to a traditional motion for summary judgment, responding to a no-evidence motion for summary judgment is mandatory; summary judgment may be granted by default in a no-evidence motion for summary judgment when the respondent fails to present evidence on the essential elements of its claim or defense for which it has the burden of proof at trial that are identified in the no-evidence motion. The court must grant the motion unless the respondent produces summary judgment evidence raising a genuine issue of material fact. Tex. R. Civ. P. 166a(i). Roventini v. Ocular Sciences, Inc., 111 S.W.3d 719, 722–23 (Tex. App.—Houston [1st Dist.] 2003, no pet.) (traditional prohibition against summary judgment by default is inapplicable to motions filed under Tex. R. Civ. P. 166a(i)). See also Ford Motor Co. v. Ridgway, 135 S.W.3d 598, 602 (Tex. 2004) (upholding no-evidence summary judgment when plaintiffs offered less than a scintilla of evidence in support of product liability claim); Gabriel v. Associated Credit Union of Texas, 14-12-00349-CV, 2013 WL 865577, at *4–5 (Tex. App.—Houston [14th Dist.] Mar. 7, 2013, pet. denied) (mem. op.) (lender’s no-evidence motion for summary judgment was properly granted when the borrower failed to produce a scintilla of damage evidence in the form of economic loss, damage to his credit, wrongful repossession, mental anguish damages, and damages stemming from mistakenly assessed late fees); Flores v. Appler, No. 05-09-01523-CV, 2011 WL 1994113, at *1 (Tex. App.—Dallas May 24, 2011) (mem. op.) (no-evidence summary judgment that asserted both traditional and no-evidence grounds was granted when respondent did not attach any evidence to response to motion for summary judgment and did not direct trial court to any evidence attached to motion for summary judgment); Preston National Bank v. Stuttgart Auto Center Inc., No. 05-09-00020-CV, 2010 WL 3310727, at *3 (Tex. App.—Dallas Aug. 24, 2010, no pet.) (mem. op.) (no-evidence summary judgment was granted when bank did not offer any evidence of challenged elements of breach of duty and causation in its response).

Issues not expressly presented to the trial court during summary judgment proceedings by written motion, answer, or other response shall not be considered on appeal as grounds for reversal. City of Houston v. Clear Creek Basin Authority, 589 S.W.2d 671, 676 (Tex. 1979) (quoting Tex. R. Civ. P. 166a(c)). A late-filed response is inadmissible without leave of court. See Benchmark Bank v. Crowder, 919 S.W.2d 657, 663 (Tex. 1996) (summary judgment evidence was not properly before trial court when it was filed two days before hearing and record contained no order granting leave to file late evidence); Kuntner & Kuntner v. Wells Fargo Bank, N.A., No. 02-14-00238-CV, 2015 WL 3523156, at *1–2 (Tex. App.—Fort Worth June 4, 2015) (mem. op.) (no-evidence motion for summary judgment properly granted when respondents filed response on date of summary judgment hearing, attached no evidence to their response, and asked for ten-day extension of time “to file a more complete response” or alternatively for their response to be deemed timely filed); Desrochers v. Thomas, No. 04-12-00120-CV, 2013 WL 1223854, at *3 (Tex. App.—San Antonio Mar. 27, 2013, pet. denied) (mem. op.) (concluding summary judgment evidence was not properly before trial court when filed three days before hearing and record contained no order granting leave to file late evidence); Trevino & Associates Mechanical, L.P. v. The Frost National Bank, 400 S.W.3d 139, 145 (Tex. App.—Dallas 2013, no pet.) (grant of no-evidence summary judgment on counterclaim was proper when nonmovant failed to file response).

§ 19.45 Use of Summary Judgment in Suit on Sworn Account

§ 19.45:1 Based on Defendant’s Unsworn Denial

Normally a summary judgment may not be obtained on the ground of deficiencies in pleadings or on the nonmovant’s failure to file a response (see section 19.50:1 below). However, a summary judgment is proper if the plaintiff’s sworn account petition is supported by an affidavit based on the personal knowledge of the affiant that conforms with rule 185 and the defendant fails to file a sworn denial in his answer as required by rule 93(10). Tex. R. Civ. P. 93(10), 166a(f), 185; Notgrass v. Equilease Corp., 666 S.W.2d 635, 639 (Tex. App.—Houston [1st Dist.] 1984, writ ref’d n.r.e.); see also Brightwell v. Barlow, Gardner, Tucker & Garsek, 619 S.W.2d 249, 252–53 (Tex. Civ. App.—Fort Worth 1981, no writ); Zemaco, Inc. v. Navarro, 580 S.W.2d 616, 620 (Tex. Civ. App.—Tyler 1979, writ dism’d).

Sworn account cases are an exception to the general rule that pleadings are not summary judgment proof. If the respondent has failed to file a proper verified denial of a suit on sworn account, the pleadings can be the basis for summary judgment. Enernational Corp. v. Exploitation Engineers, Inc., 705 S.W.2d 749, 750 (Tex. App.—Houston [1st Dist.] 1986, writ ref’d n.r.e.); Waggoners’ Home Lumber Co. v. Bendix Forest Products Corp., 639 S.W.2d 327, 328 (Tex. App.—Texarkana 1982, no writ); see also Hidalgo v. Surety Savings & Loan Ass’n, 462 S.W.2d 540, 543 n.1 (Tex. 1971) (summary judgment could be granted on pleadings for suit on sworn account).

A sworn general denial is not sufficient to prevent a summary judgment in a suit on a sworn account. Espinoza v. Wells Fargo Bank, N.A., No. 02-13-00111-CV, 2013 WL 6046611 (Tex. App.—Fort Worth Nov. 14, 2013, pet. denied) (mem. op.); Huddleston v. Case Power & Equipment Co., 748 S.W.2d 102, 103 (Tex. App.—Dallas 1988, no writ). The “written denial, under oath” required by rule 185 must also comply with Tex. R. Civ. P. 93(10), which requires a special sworn denial in the defendant’s answer to put the plaintiff’s claim at issue. Cooper v. Scott Irrigation Construction, Inc., 838 S.W.2d 743, 746 (Tex. App.—El Paso 1992, no writ); Huddleston, 748 S.W.2d at 103. “In the absence of a sworn denial meeting the requirements of the rule, the account is received as prima facie evidence as against a defendant sued thereon, and the defendant may not dispute the receipt of the items or services, or the correctness of the stated charges although he may defend on other grounds.” Rizk v. Financial Guardian Insurance Agency, Inc., 584 S.W.2d 860, 862 (Tex. 1979). When a party suing on a sworn account files a motion for summary judgment on the singular ground that the nonmovant’s pleading is insufficient under rules 185 and 93(10) because no proper sworn denial is filed, the nonmovant may amend and file a proper sworn denial. Requipco, Inc. v. Am-Tex Tank & Equipment, Inc., 738 S.W.2d 299, 303 (Tex. App.—Houston [14th Dist.] 1987, writ ref’d n.r.e.) (where party suing on sworn account theory files its motion for summary judgment on sole ground that defendant has failed to file proper sworn denial, defendant may file amended answer to suit containing proper sworn denial as late as day of trial, but before he announces ready for trial), citing Magnolia Fruit & Produce Co. v. Unicopy Corp. of Texas, 649 S.W.2d 794, 797 (Tex. App.—Tyler 1983, writ dism’d w.o.j.). The nonmovant is not precluded from amending and filing a proper sworn denial to the suit by the time allowed under rule 63. See Magnolia Fruit & Produce Co., 649 S.W.2d at 797; but see John C. Flood of DC, Inc. v. Supermedia, LLC, 408 S.W.3d 645, 653–54 (Tex. App.—Dallas 2013, pet. denied) (amended answer filed less than an hour before scheduled start of summary judgment hearing and without leave of court not considered in summary judgment proceeding).

§ 19.45:2 Plaintiff’s Pleadings

There is no requirement that an account be pleaded with particularity or description of the nature of its component parts unless special exceptions to the pleadings have been raised by the defendant and sustained by the trial court. Tex. R. Civ. P. 185. In
the repleading of such cases, the account pleaded should show the nature of the item sold, the date, and the charge. David Hittner & Lynne Liberato, *Summary Judgment in Texas*, 34 Hous. L. Rev. 1303, 1379–80 (1998). The court in one case found the pleadings to be legally insufficient to support summary judgment because they did not include a key to abbreviations or other explanations of the meanings of the items listed. *See Price v. Pratt*, 647 S.W.2d 756, 757 (Tex. App.—Corpus Christi 1983, no writ). A key or explanation of invoicing and billing done with computer numbers or abbreviations should be attached to the pleadings or be readily available if repleading is necessary. Hittner & Liberato at 1380.

If the motion for summary judgment is filed after the defendant timely files a proper, verified denial, the plaintiff will be required to submit summary judgment proof that establishes as a matter of law that no genuine issue of material fact exists as to the essential elements of the plaintiff’s common-law cause of action. *See Gibbs v. General Motors Corp.*, 450 S.W.2d 827, 828 (Tex. 1970). The essential elements of a common-law action on a sworn account are that (1) there was a sale and delivery of merchandise; (2) the amount of the account is just—that is, the prices charged are in accordance with an agreement and are the usual, customary, and reasonable prices for that merchandise; and (3) the amount is unpaid. *Pat Womack, Inc. v. Weslaco Aviation, Inc.*, 688 S.W.2d 639, 641 (Tex. App.—Corpus Christi 1985, no writ); Hittner & Liberato at 1382; *see also Airborne Freight Corp. v. CRB Marketing, Inc.*, 566 S.W.2d 573, 574 (Tex. 1978) (per curiam). See the discussion of summary judgment proof at section 19.50 below.

See form 19-10 for an example of grounds to use when filing a motion for summary judgment on a sworn account.

§ 19.46 Use of Summary Judgment in Suit on Promissory Note

Summary judgment may be appropriate in a suit on a promissory note if no defense is offered or if the defendant does not present evidence in proper form to raise a fact issue on the elements necessary to his affirmative defense. *See Seale v. Nichols*, 505 S.W.2d 251, 254 (Tex. 1974). Summary judgment may also be available if the defendant’s answers to requests for admissions judicially admit the necessary elements of the action. *See, e.g., Costello v. Johnson*, 680 S.W.2d 529, 530–31 (Tex. App.—Dallas 1984, writ ref’d n.r.e.) (answers to requests admitted execution of promissory notes, their validity, demand, and acceleration).

In a promissory note case, the motion for summary judgment and supporting evidence must prove—

1. that the note was executed by the defendant and delivered to the plaintiff by the defendant,

2. the plaintiff gave value for the note to the defendant,

3. the plaintiff was the holder and owner of the note,

4. the defendant defaulted or the note was not paid in full at maturity, and

5. the amount due.

was owner and holder of note and guarantee under assignment from original lender); Energico Production, Inc. v. Frost National Bank, No. 02-11-00148-CV, 2012 WL 254093, at *5 (Tex. App.—Fort Worth Jan. 26, 2012, pet. denied) (mem. op.).

It is not necessary to attach the original of the note to the affidavit. A photocopy is proper summary judgment evidence if the party introducing the copy swears it is a true and correct copy of the original note. Life Insurance Co. of Virginia v. Gar-Dal, Inc., 570 S.W.2d 378, 380 (Tex. 1978); see Zargas v. Bevan, 652 S.W.2d 368, 369 (Tex. 1983) (real estate lien note). If a sworn or certified copy is attached, the motion or affidavit must clearly establish that the plaintiff is in possession of the note and is its present owner and holder. Texas National Corp. v. United Systems International, Inc., 493 S.W.2d 738, 741 (Tex. 1973); see Tex. R. Civ. P. 166a(f). If the note is valid and complete on its face, the parol evidence rule excludes the nonmovant’s oral statements that allege fraud or other extrinsic representations related to the contractual agreement. Town North National Bank v. Broaddus, 569 S.W.2d 489, 491–92 (Tex. 1978). See also Tex. Bus. & Com. Code § 26.02.

In a deficiency suit, the burden of pleading that the disposition of collateral was commercially reasonable is on the creditor. This burden may be satisfied by averring generally that all conditions precedent have been met. In that case, the creditor is required to prove commercial reasonableness only if the debtor specifically denies it in his answer. Greathouse v. Charter National Bank-Southwest, 851 S.W.2d 173, 176–77 (Tex. 1992).

In a suit on a promissory note, a movant for summary judgment could discharge the burden of proof without producing the note if its terms were established by affidavit or other proper summary judgment proof. The relevant terms of the note are the original principal amount, payment schedule, maturity date, interest rate (prematurity and postmaturity), default provisions, acceleration terms or notice, demand, and presentment requirements. Sorrells v. Giberson, 780 S.W.2d 936, 938 (Tex. App.—Austin 1989, writ denied).


See form 19-11 in this chapter for an example of the grounds to use when filing a motion for summary judgment in a suit on a promissory note.

§ 19.47 Use of Summary Judgment in Suit for Breach of Contract

In breach of contract cases, the motion for summary judgment and supporting evidence must prove—

1. the existence of a valid contract;
2. performance or tendered performance by the plaintiff creditor;
3. breach of the contract by the defendant debtor; and
4. damages sustained by the plaintiff creditor as a result of the breach.

County Real Estate Venture v. Farmers & Merchants Bank, No. 01-13-00530-CV, 2015 WL 5911646, at *2–3 (Tex. App.—Houston [1st Dist.] Feb. 12, 2015, no pet.) (mem. op.) (bank’s summary-judgment evidence failed to conclusively establish its claim for credit card balance owed when attachments to bank officer’s affidavit contained no statement of account showing past-due charges or any calculation for claimed balance due that included offsets and credits); SLT Dealer Group, Ltd. v. Americredit Financial Services, Inc., 336 S.W.3d 822, 828 (Tex. App.—Houston [1st Dist.] 2011, no pet.); see also Mott v. Kellar, No. 03-14-00291-CV, 2015 WL 4718996, at *2 (Tex. App.—Austin Aug. 5, 2015, no pet.) (mem. op.) (breach of con-
tract for deed; summary judgment reversed on appeal when maker raised genuine issue of material fact as to whether he made required payments under contract for deed).

The universal rule for measuring damages for the breach of a contract is just compensation for the loss or damage actually sustained. *Qaddura v. Indo-European Foods, Inc.*, 141 S.W.3d 882, 888 (Tex. App.—Dallas 2004, pet. denied) (citing *Stewart v. Basey*, 245 S.W.2d 484, 486 (Tex. 1952)). The most common interest protected in breach of contract cases is the expectation, or benefit-of-the-bargain, interest. *Qaddura*, 141 S.W.3d at 888–89. The supporting evidence most often includes documents and affidavits, each of which must satisfy standards for admissibility.

See form 19-14 in this chapter for an example of the grounds to use when filing a motion for summary judgment in a suit for breach of contract.

§ 19.48 Use of Summary Judgment in Suit on Account Stated

In an account stated case, the motion for summary judgment and supporting evidence must prove—

1. transactions between the parties gave rise to the indebtedness of one party to the other;
2. there was an agreement, express or implied, between the parties that fixed the amount due; and
3. the party to be charged made an express or implied promise to pay the indebtedness.

Marc Core v. Citibank, N.A., No. 13-12-00648-CV, 2015 WL 1631680, at *6, 8 (Tex. App.—Corpus Christi Apr. 9, 2015, pet. denied) (mem. op.) (upholding summary-judgment where bank offered affidavit stating that monthly statements were sent to defendant and defendant paid minimum payments on many occasions, which showed that he actually received statements and agreed as to amount owed, “i.e., fixing the amount due”). *McFarland v. Citibank (S.D.), N.A.*, 293 S.W.3d 759, 763 (Tex. App.—Waco 2009, no pet.); *Dulong v. Citibank (S.D.), N.A.*, 261 S.W.3d 890, 893 (Tex. App.—Dallas 2008, no pet.).

Summary judgment on an account stated claim is proper if the evidence shows account statements were sent to the debtor, charges and payments were made on the account, fees and interest were charged on the account, and there is no evidence debtor ever disputed the fees or charges reflected on the statements. *Hays v. Citibank (South Dakota), N.A.*, No. 05-11-00187-CV, 2012 WL 929673 (Tex. App.—Dallas Mar. 16, 2012, no pet.) (mem. op.). Judgment may be rendered on less than all the relief sought. *Pegasus Transportation Group, Inc. v. CSX Transportation, Inc.*, No. 05-12-00465-CV, 2013 WL 4130899 (Tex. App.—Dallas, Aug. 14, 2013, no pet.) (mem. op.); see also Tex. R. Civ. P. 166a(e).

See form 19-13 in this chapter for an example of the grounds to use when filing a motion for summary judgment in a suit on an account stated.

§ 19.49 Use of Summary Judgment in Suit on Guaranty

In a suit on a guaranty, the motion for summary judgment and supporting evidence must establish—

1. the existence and ownership of the guaranty contract;
2. the terms of the underlying contract by the builder;
3. the occurrence of the conditions on which liability is based; and
4. the failure or refusal to perform the promise by the guarantor.

The terms of a guaranty agreement determine whether the lender is required to collect from the borrower or on the collateral before looking to the guarantor to satisfy the debt. See, e.g., Berry v. Encore Bank, No. 01-14-00246-CV, 2015 WL 3485970, at *2 (Tex. App—Houston [1st Dist.] June 2, 2015, pet. denied) (mem. op.).

A signature followed by corporate office will result in personal liability in which the individual is clearly designated within the instrument as personal surety for the principal. Material Partnerships, Inc. v. Ventura, 102 S.W.3d 252, 259 (Tex. App.—Houston [14th Dist.] 2003, pet. denied); see also American Petrofina Co. of Texas v. Bryan, 519 S.W.2d 484, 487 (Tex. Civ. App.—El Paso 1975, no writ). The fact that a person is under an agency relation to another that is disclosed does not prevent him from becoming personally liable if the terms of the contract clearly establish the personal obligation. American Petrofina, 519 S.W.2d at 487. The addition of the corporate office by the signature may be construed as description personae of the signator rather than an indication of the capacity in which he signs. Material Partnerships, 102 S.W.3d at 259. “If the guaranty instrument is so worded that it can be given a certain or definite legal meaning or interpretation, it is not ambiguous and the court will construe the contract as a matter of law.” Western Bank-Downtown v. Carline, 757 S.W.2d 111, 114 (Tex. App.—Houston [1st Dist.] 1988, writ ref’d) (citing Coker v. Coker, 650 S.W.2d 391 (Tex. 1983)).

See form 19-12 in this chapter for an example of the grounds to use when filing a motion for summary judgment in a suit on a guaranty.

§ 19.50 Summary Judgment Proof

§ 19.50:1 Evidence Generally

The mere filing of a pleading or a response to a summary judgment motion does not satisfy the burden of coming forward with sufficient evidence to prevent summary judgment from being granted. American Petrofina, Inc. v. Allen, 887 S.W.2d 829, 830 (Tex. 1994). Summary judgment evidence is not required to be described or set out in the motion in order to be considered. Wilson v. Burford, 904 S.W.2d 628, 629 (Tex. 1995) (per curiam). The usual practice is to describe in the motion or in a supporting brief the summary judgment proof relied on. To be considered by the trial or reviewing court, summary judgment evidence must be presented in a form that would be admissible at trial, although affidavit testimony is proper summary judgment evidence. See Hidalgo v. Surety Savings & Loan Ass’n, 462 S.W.2d 540, 545 (Tex. 1971).

The requirement to object to summary judgment evidence depends on whether the defect is formal or substantive. A defect is formal if the summary judgment proof is competent, but inadmissible. Hearsay and lack of personal knowledge are frequently raised objections to form. See Washington DC Party Shuttle, LLC v. IGuide Tours, LLC, 406 S.W.3d 723, 733–36 (Tex. App.—[14th Dist.] 2013, pet. denied) (en banc) (lack of personal knowledge); Wakefield v. Wells Fargo Bank, N.A., No. 14-12-00686-CV, 2013 WL 6047031, at *2 (Tex. App.—Houston [14th Dist.] Nov. 14, 2013, no pet.) (mem. op.) (objection that affidavit was not based on personal knowledge was form defect that must be raised in trial court and objecting party should seek ruling on objection to preserve right on appeal). Texas Rule of Evidence 802 provides that “[i]nadmissible hearsay admitted without objection shall not be denied probative value merely because it is hearsay.” As applied to summary judgment evi-
Evidence, rule 802 has been held to mean that a hearsay objection is a defect in form that must be raised in a response or reply to a response. See Stewart v. Sanmina Tex. L.P., 156 S.W.3d 198, 207 (Tex. App.—Dallas 2005, no pet.); Rizkallah v. Conner, 952 S.W.2d 580, 589 n.7 (Tex. App.—Houston [1st Dist.] 1997, no writ).

Failure to object to evidence at the trial court level waives any defects concerning form. See Page v. State Farm Lloyds, 259 S.W.3d 257, 265 (Tex. App.—Waco 2008), rev’d on other grounds, 315 S.W.3d 525 (Tex. 2010). Failure to object to the form of an affidavit results in a waiver of the complaint. See, e.g., Alphaville Ventures, Inc. v. First Bank, 429 S.W.3d 150, 159 (Tex. App.—Houston [14th Dist.] 2014, no pet.); In re Evolution Petroleum Co., 359 S.W.3d 710, 713 n.2 (Tex. App.—San Antonio 2001, orig. proceeding). A defect is substantive if the summary judgment proof is incompetent: “any objections relating to substantive defects (such as lack of relevancy, conclusory) can be raised for the first time on appeal and are not waived by the failure to obtain a ruling from the trial court.” McMahen v. Greenwood, 108 S.W.3d 467, 498 (Tex. App.—Houston [14th Dist.] 2003, pet. denied). “A complete absence of authentication is a defect of substance that is not waived by a party failing to object and may be urged for the first time on appeal.” In re Estate of Guerrero, 465 S.W.3d 693, 706 (Tex. App.—Houston [14th Dist.] 2015, pet. denied). A substantive defect supporting or opposing a motion for summary judgment cannot be waived by failing to bring it to the trial court’s attention. Sanmina Texas L.P., 156 S.W.3d at 207; Garcia v. John Hancock Variable Life Insurance Co., 859 S.W.2d 427, 434 (Tex. App.—San Antonio 1993, writ denied). There are inconsistencies among the courts concerning whether certain defects are formal or substantive. The safest practice is to present all objections in writing.

A party must object in writing to the form of summary judgment evidence and place the objections before the trial court, or the objection will be waived. Grand Prairie Independent School District v. Vaughan, 792 S.W.2d 944, 945 (Tex. 1990) (per curiam); see also Tex. R. Civ. P. 166a(f). The objection must be specific. Womco, Inc. v. Navistar International Corp., 84 S.W.3d 272, 281 n.6 (Tex. App.—Tyler 2002, no pet.). The objecting party must also obtain a ruling on the objections. Chance v. Elliott & Lilly, PC, 462 S.W.3d 276, 282 (Tex. App.—El Paso 2015, no pet.) (ruling required on objection for failure to produce under Tex. R. Civ. P. 193.6); Trusty v. Strayhorn, 87 S.W.3d 756, 763–64 (Tex. App.—Texarkana 2002, no pet.). There is a split of authority regarding whether, pursuant to Tex. R. App. P. 33.1(a)(2)(A), an objection to summary judgment evidence can be preserved by an implicit ruling in the absence of a written, signed order. See Sanmina Texas L.P., 156 S.W.3d at 206 (Tex. App.—Dallas 2005, no pet.). The better practice is to procure an order from the trial court on all evidence, especially the objections to hearsay evidence, before the time it enters the order granting or denying summary judgment. If such objections are made, the adverse party must seek an opportunity to amend its summary judgment proof. See Strachan v. FIA Card Services, No. 14-09-01004-CV, 2011 WL 794958, at *2 (Tex. App.—Houston [14th Dist.] Mar. 8, 2011, pet. denied). To be effective and preserve error for appeal, most courts of appeals have held that an order of a trial court sustaining an objection to summary judgment evidence must be reduced to writing, signed by the trial court, and entered of record. Utilities Pipeline Co. v. American Petrofina Marketing, 760 S.W.2d 719, 723 (Tex. App.—Dallas 1988, no writ).

Rule 196.3 allows the producing party to offer a copy of the document unless the authenticity of the document is under scrutiny or because fairness under the circumstances of the case requires production of the original. Tex. R. Civ. P. 196.3(b). See Tex. R. Evid. 902(4) for certified copies of public records and Tex. R. Evid. 902(10) for business records accompanied by affidavit.

A nonmovant is not required to produce evidence to avoid summary judgment unless the movant has proved its case as a matter of law. Priesmeyer v. Pacific Southwest Bank, F.S.B., 917 S.W.2d 937, 940 (Tex. App.—Austin 1996, no writ).
Summary judgment evidence must be properly before the court to be considered. *See Walker v. Sharpe, 807 S.W.2d 442, 447* (Tex. App.—Corpus Christi 1991, no writ). Summary judgment evidence may be filed late, but only with leave of court. *Benchmark Bank v. Crowder, 919 S.W.2d 657, 663* (Tex. 1996). A trial court can consider only evidence on file at the time of the hearing or filed after the hearing and before judgment with permission of the court. *Leinen v. Buffington’s Bayou City Service Co., 824 S.W.2d 682, 685* (Tex. App.—Houston [14th Dist.] 1992, no writ). Summary judgment evidence must be submitted, at the latest, by the date summary judgment is rendered. *Priesmeyer, 917 S.W.2d at 939.*

§ 19.50:2  Discovery Documents

Deposition transcripts, answers to interrogatories, admissions, affidavits, stipulations of the parties, and authenticated or certified public records can support a summary judgment. *Tex. R. Civ. P. 166a(c); see generally Hidalgo v. Surety Savings & Loan Ass’n, 462 S.W.2d 540* (Tex. 1971). Any document offered in a summary judgment proceeding or on which summary judgment is rendered must be on file at the time of the hearing or filed thereafter and before judgment with permission of the court. *Tex. R. Civ. P. 166a(c).* Such documents need not be formally introduced at the summary judgment hearing; it is sufficient if they are on file. *Tex. R. Civ. P. 166a(c); Perry v. Aggregate Plant Products Co., 786 S.W.2d 21, 23* (Tex. App.—San Antonio 1990, writ denied); *Able Finance Co. v. Whitaker, 388 S.W.2d 437, 439* (Tex. Civ. App.—Tyler 1965, writ dism’d by agr.).

*Tex. R. Civ. P. 166a(d)* provides a mechanism for using as summary judgment proof discovery evidence that previously had not been filed with the clerk. Deposition excerpts submitted as summary judgment evidence need not be authenticated. *McConathy v. McConathy, 869 S.W.2d 341, 342* (Tex. 1994) (holding that rule 166a(d) supersedes prior case law authentication requirements, including former requirement to include copy of court reporter’s certificate as well as original affidavit certifying authenticity of copied excerpts); *see also E.B. Smith Co. v. United States Fidelity & Guaranty Co., 850 S.W.2d 621, 624* (Tex. App.—Corpus Christi 1993, writ denied) (interpreting term “specific references” in rule 166a(d); *but see Blanche v. First Nationwide Mortgage Corp., 74 S.W.3d 444, 452* (Tex. App.—Dallas 2002, no pet.) (holding that the rationale in *McConathy* is limited to depositions). See *Tex. R. Evid. 901(b)(7), 902*, regarding authentication of public documents and records.

§ 19.50:3  Witness Testimony

Oral testimony cannot be received at the hearing. Affidavits of interested witnesses and expert witnesses may support a summary judgment, which “may be based on uncontroverted testimonial evidence of an interested witness, or of an expert witness as to subject matter concerning which the trier of fact must be guided solely by the opinion testimony of experts, if the evidence is clear, positive and direct, otherwise credible and free from contradictions and inconsistencies, and could have been readily controverted.” *Tex. R. Civ. P. 166a(c).* For an interested witness’s testimony to establish fact, as a matter of law, it must “[have] no circumstances in evidence tending to discredit or impeach such testimony.” *Swilley v. Hughes, 488 S.W.2d 64, 67* (Tex. 1972) (quoting *Great American Reserve Insurance Co. v. San Antonio Plumbing Supply Co., 391 S.W.2d 41* (Tex. 1965)).

The supreme court has held:

“[C]ould have been readily controverted” does not simply mean that the movant’s summary judgment proof could have been easily and conveniently rebutted. Rather, it means that testimony at issue is of a nature which can be effectively countered by opposing evidence. If the credibility of the affiant or deponent is likely to be a dispositive factor in the resolution of the case, then summary judgment is inappropriate. On the other hand, if the non-movant
must, in all likelihood, come forth with independent evidence to prevail, then summary judgment may well be proper in the absence of such controverting proof.


§ 19.50:4 Affidavits

A motion for summary judgment need not be supported by affidavits. _Teer v. Duddlesten_, 641 S.W.2d 569, 576 (Tex. App.—Houston [14th Dist.] 1982), _rev’d on other grounds_, 664 S.W.2d 702 (Tex. 1984). The court may consider depositions, the answers to interrogatories, admissions, and certified copies of documents without the necessity of a supporting affidavit by a witness. _Teer_, 641 S.W.2d at 576; _Citizens State Bank of Dickinson v. Shapiro_, 575 S.W.2d 375, 383 (Tex. Civ. App.—Tyler 1978, writ ref’d n.r.e.). It is unusual, however, for a summary judgment to be granted without supporting affidavits. David Hit-tner & Lynne Liberato, _Summary Judgments in Texas_, 34 Hous. L. Rev. 1303, 1335 (1998).

Affidavits may be used as summary judgment proof. _Tex. R. Civ. P. 166a(c)_. If all material facts are established by other competent evidence (depositions, admissions, answers to interrogatories, stipulations of the parties, authenticated or certified public records, and in some cases pleadings), an affidavit is not strictly necessary; in practice, however, it is often required or expected by the court, and every summary judgment motion should have attached one or more affidavits (not executed by the attorney) establishing all elements of the cause and an affidavit by the attorney to support attorney’s fees. For sample affidavits, see forms 19-16 (sworn account), 19-17 (promissory note), and 19-18 (attorney’s fees) in this chapter; affidavits for other kinds of actions can be drafted by stating the elements pleaded in the petition or motion, using these affidavit forms as a model.

An affidavit must show affirmatively that it is based on personal knowledge and that the facts sought to be proved would be “admissible in evidence” at a conventional trial. _Tex. R. Civ. P. 166a(f); see also Ryland Group, Inc. v. Hood_, 924 S.W.2d 120, 122 (Tex. 1996) (per curiam) (quoting rule 166a(f)); _Brown v. Mesa Distributors, Inc._, 414 S.W.3d 279, 287 (Tex. App.—Houston [1st Dist.] 2013, no pet.) (affidavit from company officer claiming personal knowledge of issue and company’s records is sufficient evidence for summary judgment); _Espinoza v. Wells Fargo Bank, N.A._, No. 02-13-00111-CV, 2013 WL 6046611, at *2 (Tex. App.—Fort Worth Nov. 14, 2013, pet. denied) (mem. op.) (bank records custodian’s statement in affidavit that explained her relationship to bank and averred that her duties as records custodian included handling and management of this particular note was sufficient to show her personal knowledge of transaction). The mere statement in an affidavit that the affiant is a representative of the creditor (bank, lender, credit card issuer) is not sufficient to establish that the affiant has personal knowledge of the statement concerning the debt made therein. The affiant must affirmatively state in the affidavit how he gained personal knowledge in the scope of his employment of the statements concerning the debt. _Marc Core v. Citibank, N.A._, No. 13-12-00648-CV, 2015 WL 1631680, at *3 (Tex. App.—Corpus Christi Apr. 9, 2015, pet. denied) (mem. op.); _Rose Core v. Citibank (S. Dakota), N.A._, No. 11-13-00040-CV, 2015 WL 1004344, at *3 (Tex. App.—Eastland Feb. 27, 2015, no pet.) (mem. op.). The affidavit of an issuer of credit card debt is legally insufficient when it contains only unsupported conclusions as to the present balance due and owing. _See Akins v. FIA Card Services, N.A._, No. 07-13-00244-CV, 2015 WL 780531, at * (Tex. App.—Amarillo Feb. 23, 2015, no pet.) (mem. op.). While affidavits customarily state that the facts recited therein are “true and correct,” that recitation is not necessarily required. For example, when an affidavit is based on personal knowledge and is subscribed to and sworn before a notary public, it is not defective if, when considered in its entirety, its obvious effect is that the affiant is representing that the facts stated therein are true and correct. _See Kyle v. Countrywide Home Loans, Inc._, 232 S.W.3d 355, 361 (Tex. App.—Dallas 2007, pet. denied) (citing _Federal Financial Co. v. Delgado_, 1 S.W.3d
Business records affidavits under Tex. R. Evid. 902(1) are frequently used in collections cases to prove up the debt. Rule 902(10)(b) sets out a form of affidavit for use when business records are introduced under rule 803(6). The form is not exclusive. Tex. R. Evid. 902(10)(b). The rule provides that a business records affidavit “shall be sufficient if it follows [the prescribed form] though [the prescribed form] shall not be exclusive, and an affidavit which substantially complies with [the rule] shall suffice.” Tex. R. Evid. 902(10)(b). An affidavit must only substantially comply with the sample provided within the rule. See Rockwall Commons Associates, Ltd. v. MRC Mortgage Grantor Trust I, 331 S.W.3d 500, 509 (Tex. App.—El Paso 2010, no pet.); Kyle, 232 S.W.3d at 360–61. Consequently, a business records affiant is not required to recite the exact words that appear in rule 902(10)(b).

The rules of evidence do not require that the qualified witness who lays the predicate for the admission of business records be their creator or have personal knowledge of the contents of the record; the witness is required only to have personal knowledge of the manner in which the records were kept. Damron v. Citibank (S.D.), N.A., No. 03-09-00438-CV, 2010 Tex. App. LEXIS 7054, at *10–11 (Tex. App.—Austin Aug. 25, 2010, pet. denied); Nice v. Dodeka, L.L.C., No. 09-10-00014-CV, 2010 Tex. App. LEXIS 8922, at *12–13 (Tex. App.—Beaumont Nov. 10, 2010, no pet.). Once a successor is assigned the rights to contracts in a case, it is not necessary that the predecessor verify those records through a separate custodian of records affidavit. See Rockwall Commons Associates, Ltd., 331 S.W.3d at 511.

The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits. In order for defects in the form of affidavits or attachments to be grounds for reversal, they must be specifically identified by objection and the movant must be given the opportunity to amend. If the movant refuses to amend, the defects will constitute grounds for reversal. Tex. R. Civ. P. 166a(f).

A party can recover reasonable attorney’s fees and other reasonable expenses incurred by the filing of affidavits by his opponent under rule 166a if it appears to the court’s satisfaction that they were presented in bad faith or solely for the purpose of delay, and any offending party or attorney may be adjudged guilty of contempt. Tex. R. Civ. P. 166a(h).

A recent applicable amendment to the Civil Practices and Remedies Code authorizes the use of an unsworn declaration in lieu of an “affidavit required by statute or required by rule, order, or requirement adopted as provided by law.” Tex. Civ. Prac. & Rem. Code § 132.001; Act of May 25, 2011, 82nd Leg., R.S., ch. 847, § 1, Tex. Gen. Laws 2119–20. The unsworn declaration (1) must be in writing; (2) must be subscribed by person making the declaration as true under penalty of perjury; and (3) must include a jurat in prescribed form. The substantial form of the required jurat is set forth in Tex. Civ. Prac. & Rem. Code § 132.001(d). See form 19-5. The second requirement (subscription under penalty of perjury) appears to supplant an affidavit’s requirements showing affirmatively that it is based on personal knowledge, that the facts sought to be proved would be “admissible in evidence” at a conventional trial, and that the facts recited therein are “true and correct.”

§ 19.50:5 Competence of Evidence

Expert opinion does not establish fact as a matter of law. Gibbs v. General Motors Corp., 450 S.W.2d 827, 829 (Tex. 1970); Broussard v. Moon, 431 S.W.2d 534, 537 (Tex. 1968). The mere assertion of a legal conclusion will not establish a fact in support of a motion for summary judgment or raise an issue of fact in opposition to a motion. Mercer v. Daoran Corp., 676 S.W.2d 580, 583 (Tex. 1984); Hidalgo v. Surety Savings & Loan Ass’n, 487 S.W.2d 702, 703 (Tex. 1972) (per curiam). Nor
will hearsay statements discharge the burden of establishing fact. *Box v. Bates,* 346 S.W.2d 317, 319 (Tex. 1961). However, *Tex. R. Evid. 802* states, “Inadmissible hearsay admitted without objection shall not be denied probative value merely because it is hearsay.” *Tex. R. Evid. 802.* In *INA of Texas v. Bryant,* 686 S.W.2d 614 (Tex. 1985), the court of appeals considered hearsay evidence admitted without objection in reversing the trial court’s grant of summary judgment. In affirming the decision, the supreme court expressly did not address the issue of the appellate court’s consideration of hearsay statements. See *INA of Texas,* 686 S.W.2d at 615.

§ 19.50:6 Burden of Proof

**Traditional Motion:** The movant for summary judgment has the burden of showing that there is no genuine issue of material fact and that he is entitled to judgment as a matter of law. *Teer v. Duddlesten,* 664 S.W.2d 702, 703 (Tex. 1984); *Gibbs v. General Motors Corp.*, 450 S.W.2d 827, 828 (Tex. 1970); *Fulenwider v. City of Teague,* 680 S.W.2d 582, 584 (Tex. App.—Waco 1984, no writ); see also *Tex. Civ. P. 166a(c).* In deciding whether there is a disputed material fact issue, evidence favorable to the nonmovant will be taken as true; every reasonable inference must be indulged in favor of the nonmovant and any doubts resolved in the nonmovant’s favor; the nonmovant opposing summary judgment is not required to establish his right to prevail. *Montgomery v. Kennedy,* 669 S.W.2d 309, 311 (Tex. 1984); *Fulenwider,* 680 S.W.2d at 584.

Summary judgment is proper if the movant conclusively proves all the essential elements of his cause of action or defense as a matter of law. *Odeneal v. Van Horn,* 678 S.W.2d 941 (Tex. 1984); *City of Houston v. Clear Creek Basin Authority,* 589 S.W.2d 671, 678 (Tex. 1979).

The Supreme Court of Texas, in distinguishing Texas law from federal law, has stated that “we never shift the burden of proof to the non-movant unless and until the movant has ‘establish[ed] his entitlement to a summary judgment on the issues expressly presented to the trial court by conclusively proving all essential elements of his cause of action or defense as a matter of law.’” *Casso v. Brand,* 776 S.W.2d 551, 556 (Tex. 1989) (quoting *Clear Creek Basin Authority,* 589 S.W.2d at 678 n.5).

Once the movant has presented proper and sufficient summary judgment proof, the burden shifts to the nonmovant to come forward by written motion and sworn proof to controvert the summary judgment proof. *Clear Creek Basin Authority,* 589 S.W.2d at 678. A summary judgment cannot be granted on the failure of the nonmovant’s proof if the movant has not conclusively established his cause of action. *Clear Creek Basin Authority,* 589 S.W.2d at 678. “If the party opposing a summary judgment relies on an affirmative defense, he must come forward with summary judgment evidence sufficient to raise an issue of fact on each element of the defense to avoid summary judgment.” *Brownlee v. Brownlee,* 665 S.W.2d 111, 112 (Tex. 1984) (citing *Clear Creek Basin Authority,* 589 S.W.2d at 678–79).

**No Evidence Motion:** *Tex. R. Civ. P. 166a(e)* provides that “[a]fter adequate time for discovery, a party without presenting summary judgment evidence may move for summary judgment on the ground that there is no evidence of one or more essential elements of a claim or defense on which an adverse party would have the burden of proof at trial.” The movant must specify the elements of the claim on which there is no evidence. A global no evidence claim that “there is no evidence of one or more essential elements of each of the claims made” is wholly deficient to put the respondent on notice about which element(s) the motion attacks. The rule is unequivocal; “(t)he motion must state the elements as to which there is no evidence.” *Tex. R. Civ. P. 166a(i); Torres v. Saylor Marine, Inc.*, No. 13-10-00566-CV, 2011 WL 3855733, at *4 (Tex. App.—Corpus Christi Aug. 31, 2011, no pet.) (mem. op.); *Cornwell v. Dick Woodward & Associates,* No. 14-09-00940-CV, 2011 WL 166922, at *2 (Tex. App.—Houston [14th Dist.] Jan. 11, 2011, no pet.) (mem. op.) (no-evidence motion that merely cha-
lenges sufficiency of nonmovant’s case and fails to state specifically elements for which there is no evidence is fundamentally
defective and insufficient to support summary judgment as matter of law).

The movant is not required to negate affirmatively an element of a claim for which evidence is lacking. Tex. R. Civ. P. 166a(i).

In determining a “no-evidence” issue, the courts consider only the evidence and inferences that tend to support the finding and

A party may not properly urge a no-evidence summary judgment on the claims or defenses on which it has the burden of
Memorial Medical Center of East Texas, 105 S.W.3d 122, 125 (Tex. App.—Corpus Christi 2003, no pet.).

§ 19.51 Partial Summary Judgment

§ 19.51:1 Uncontroverted Facts

A partial summary judgment may be granted if there is no genuine issue of material fact on some issues—for example,
liability—reserving all controverted issues for trial. Tex. R. Civ. P. 166a(a), (e).

§ 19.51:2 Controverted Facts

If practicable, the court at a summary judgment hearing may, by examining the pleadings and evidence before it and interro-
gating attorneys, ascertain those material facts that exist and make an order specifying the facts that are established as a matter
of law, and direct such further proceedings in the action as are just. Tex. R. Civ. P. 166a(e). For a form for such a partial sum-
mary judgment, see form 20-7 in this manual.

§ 19.52 Attorney’s Fees

Attorney’s fees must be specifically pleaded to be recovered. Reintsma v. Greater Austin Apartment Maintenance, 549 S.W.2d
434, 437 (Tex. Civ. App.—Austin 1977, writ dism’d). Attorney’s fees included in a motion for summary judgment must be
proved by the same summary judgment standards as the underlying cause. Bakery Equipment & Service Co. v. Aztec Equip-
ment Co., 582 S.W.2d 870, 873 (Tex. Civ. App.—San Antonio 1979, no writ). The notice and time requirements of chapter 38

Rule 166a(c) authorizes a summary judgment based on “uncontroverted testimonial evidence of an . . . expert witness as to
subject matter concerning which the trier of fact must be guided solely by the opinion testimony of experts, if the evidence is
clear, positive and direct, otherwise credible and free from contradictions and inconsistencies, and could have been readily
controverted.” Tex. R. Civ. P. 166a(c). An affidavit filed by the movant’s attorney setting forth his opinion regarding reason-
able attorney’s fees is sufficient to support an award of attorney’s fees, if uncontroverted by the nonmovant. Sunbelt Construc-
tion Corp. v. S&D Mechanical Contractors, Inc., 668 S.W.2d 415, 418 (Tex. App.—Corpus Christi 1983, writ ref’d n.r.e.);
Bado Equipment Co. v. Ryder Truck Lines, 612 S.W.2d 81, 83 (Tex. Civ. App.—Houston [14th Dist.] 1981, writ ref’d n.r.e.),
disapproved of on other grounds by McConnell v. Southside Independent School District, 858 S.W.2d 337, 340 n.3 (Tex.
1993). Use of an affidavit is recommended; see form 19-18 in this chapter.
IV. Law of Other Jurisdictions

§ 19.61 When Foreign Law Used

In collections litigation, the need to apply the law of another jurisdiction may arise in either of two situations:

1. The plaintiff’s suit may be based on a contract enforceable under the laws of another jurisdiction. (Judicial notice of the law of another jurisdiction is discussed in sections 19.62 through 19.64 in this chapter.)

2. The plaintiff may be attempting to enforce a judgment obtained in another jurisdiction and, in response to the defendant’s plea that the foreign court did not have jurisdiction, may need to prove the validity of the service of process or the validity of the jurisdiction on which the judgment is based. (Enforcement of foreign judgments is discussed at sections 14.32 through 14.34 in this manual.)

§ 19.62 Proving Up Law of Foreign State

§ 19.62:1 Motion for Judicial Notice

A motion for judicial notice under rule 202 can be used to establish the law of a sister state. Under Tex. R. Evid. 202—

A court upon its own motion may, or upon the motion of a party shall, take judicial notice of the constitutions, public statutes, rules, regulations, ordinances, court decisions, and common law of every other state . . . . A party requesting that judicial notice be taken of such matter shall furnish the court sufficient information to enable it properly to comply with the request . . . . A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken. Judicial notice of such matters may be taken at any stage of the proceeding. The court’s determination shall be subject to review as a ruling on a question of law.


The Texas Supreme Court has held that it is unnecessary to plead foreign law that differs from Texas law if a motion has been made for judicial notice. See Daugherty v. Southern Pacific Transportation Co., 772 S.W.2d 81, 83 (Tex. 1989). However, because notice is an important consideration in cases involving foreign law, the better practice is to plead the law of the sister state.

A motion for judicial notice under rule 202 cannot be used to establish the law of another nation (see section 19.64 below). See form 19-7 in this chapter for a motion for judicial notice and form 19-8 for an order taking judicial notice.

§ 19.62:2 Sufficient Information

Rule 202 requires the moving party to furnish sufficient information to the trial court for it to determine the foreign law’s applicability to the case and to furnish all parties any notice that the court finds necessary. . . . The determination of compliance with these requirements is within the discretion of the trial court.
The motion should contain a significant recitation of the foreign state’s law and a citation to where the law can be found. Pittsburgh Corning Corp. v. Walters, 1 S.W.3d 759, 769–70 (Tex. App.—Corpus Christi 1999, pet. denied). The better practice is to attach copies of the statutes or decisions to the motion. See Tex. R. Evid. 901(b)(7) regarding authentication and identification of public records, documents, and publications and Tex. R. Evid. 902 regarding self-authentication of domestic public documents and records.

§ 19.62:3 Notice

It is recommended that notice of the motion for judicial notice be given to the adverse party, although Tex. R. Evid. 202 provides that necessity for such notice is left to the discretion of the judge. See also Daugherty v. Southern Pacific Transportation Co., 772 S.W.2d 81, 83 (Tex. 1989). Under rule 202, absent prior notification, the request for an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed may be made after notice has been taken.

§ 19.62:4 Effect of Granted Motion

If the motion is granted, the court is presumed to have the same judicial knowledge of foreign laws as it has of its own state’s laws. Marsh v. Millward, 381 S.W.2d 110, 112 (Tex. Civ. App.—Austin 1964, writ ref’d n.r.e.).

§ 19.62:5 Review of Motion

Tex. R. Evid. 202 expressly states that the determination of sister-state law by motion for judicial notice shall be subject to review as a question of law. But see section 19.63 below for a discussion of review of sister-state law under the common-law rule.


In addition to proof of sister-state law by a motion for judicial notice under Tex. R. Evid. 202, the existence of sister-state law may be brought before the court by the common-law method of formal pleading and proof. Under the common-law method, whether the law of another state exists is a fact question for the jury. Once the fact of the law is established, the questions of the applicability, competency, and construction of the sister-state law are for the court. Commercial Credit Equipment Corp. v. West, 677 S.W.2d 669, 673 (Tex. App.—Amarillo 1984, writ ref’d n.r.e.), abrogated on other grounds by Greathouse v. Charter National Bank-Southwest, 851 S.W.2d 173, 175 (Tex. 1992). In one case, the court ruled that if the sister-state law consists entirely of statutes and reports of judicial decisions, the construction and effect of the law are issues for the court; however, if judicial decisions of a sister state are conflicting, or inferences of fact must be drawn, or if the only proof offered is the parol testimony of expert witnesses as to the construction of a sister-state statute, the question of what the foreign law is becomes one of fact for the jury. St. Louis & Santa Fe Railway v. Conrad, 99 S.W. 209, 210–11 (Tex. Civ. App. 1906, no writ). The court in one case found that where the pleading gave sufficient notice to the opposing party of the intent to rely on sister-state law, the court could properly take judicial notice of such law. Gould v. Awapara, 365 S.W.2d 671, 673–74 (Tex. Civ. App.—Houston 1963, no writ). The trend in Texas is to treat determinations of foreign law as questions of law; however, it appears that the determination of sister-state law by pleading and proof is limited to appellate review as a question of fact. Common-law pleading and proof of sister-state law should be rejected whenever possible in favor of a motion for judicial notice. See Tex. R. Evid. 901(b)(7) regarding identification and authentication of public records, documents, and publications and Tex. R. Evid. 902 regarding self-authentication of domestic public documents and records.
Rule 203 states:

A party who intends to raise an issue concerning the law of a foreign country shall give notice in the pleadings or other reasonable written notice, and at least 30 days prior to the date of trial such party shall furnish all parties copies of any written materials or sources that the party intends to use as proof of the foreign law. If the materials or sources were originally written in a language other than English, the party intending to rely upon them shall furnish all parties both a copy of the foreign language text and an English translation. The court, in determining the law of a foreign nation, may consider any material or source, whether or not submitted by a party or admissible under the rules of evidence, including but not limited to affidavits, testimony, briefs, and treatises. If the court considers sources other than those submitted by a party, it shall give all parties notice and a reasonable opportunity to comment on the sources and to submit further materials for review by the court. The court, and not a jury, shall determine the laws of foreign countries. The court’s determination shall be subject to review as a ruling on a question of law.

Tex. R. Evid. 203. The law of a foreign country cannot be determined by a motion for judicial notice under rule 203; it must be pleaded and proved. However, the rule greatly relaxes the evidentiary proof requirements and creates a procedure comparable to judicial notice. It states that a court’s determination of the law of a foreign country shall be reviewed as a question of law by appellate courts. When there is a failure of pleading or proof of the law of a foreign country, the majority of Texas decisions presume the foreign law to be identical to Texas law. Pauska v. Daus, 31 Tex. 67 (1868). See Tex. R. Evid. 901(b)(7) regarding identification and authentication of public records, documents, and publications and Tex. R. Evid. 902 regarding self-authentication of domestic public documents and records.
Form 19-1

Most documents must now be filed electronically. See sections 19.4 and 19.6; Tex. R. Civ. P. 21, 21a.

Certificate of Service

I certify that a true copy of this [name of document] was served in accordance with rule 21a of the Texas Rules of Civil Procedure on the following on [date]:

[Name of attorney of record or party to be served] by [electronic filing manager/e-mail at [e-mail address]/fax at [fax number]/personal delivery at [address]/commercial delivery service at [address]/certified mail at [address]/first-class mail at [address]]. [Repeat for each attorney of record or party to be served.]

[Name]
Attorney for [name]
Form 19-2

Notice of Hearing

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

SIGNED on ________________________________.

__________________________________________________________________________________________________________________________ ... __________________________________________________________________________________________________________________________

Judge or Clerk
Form 19-3

Certain business memoranda and records may be admitted in evidence based on this affidavit without the necessity of proving them by a witness at trial or by a deposition; certain notice requirements must be met, and the affidavit and records must be filed with the clerk at least fourteen days before trial. Tex. R. Evid. 902(10). For a notice to other parties, see form 19-4 in this chapter. If a copy of this affidavit is served on the defendant or the defendant’s attorney, it should not be necessary to serve form 19-4 in addition to serving the affidavit. For a discussion of business records introduced by affidavit, see section 19.17:4.

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

Business Records Affidavit

BEFORE ME, the undersigned authority, on this day personally appeared [name of affiant], who swore on oath that the following facts are true:

“My name is [name of affiant]. I am of sound mind, capable of making this affidavit, and personally acquainted with the facts herein stated.

“I am the custodian of the records of [name of employer]. Attached hereto are [number] pages of records from [name of employer]. These records are kept by [name of employer] in the regular course of business, and it was the regular course of business of [name of employer] for an employee or representative of [name of employer] with knowledge of the act, event, condition, opinion, or diagnosis recorded to make the record or to transmit information thereof to be included in the record, and the record was made at or near the time or reasonably soon thereafter. The records attached hereto are the original or exact duplicates of the original.”

[Name of affiant]
Affiant

SIGNED under oath before me on ______________________________.
Notary Public, State of Texas

Attach a copy of each memorandum or record.
Form 19-4

If business records are sought to be admitted in evidence on affidavit at trial, a business records affidavit and the accompanying records must be filed with the clerk of the court at least fourteen days before trial commences, and the other parties to the suit, including the defendant or the defendant’s attorney, if he has one, must be given prompt notice of the filing of the records and affidavit. Tex. R. Evid. 902(10). Service of the notice may be made by any method authorized by rule 21a. Tex. R. Evid. 902(10). For a business records affidavit, see form 19-3 in this chapter. If a copy of form 19-3 is served on the defendant or the defendant’s attorney, it should not be necessary to serve this notice in addition to serving the affidavit. For a discussion of business records introduced by affidavit, see section 19.17:4.

Notice to Other Party of Filing of Business Records Affidavit

[Date]

[Name and address of defendant's attorney]

Re: [style of case]
   Cause No. [number]
   [designation and location of court]

[Salutation]

Pursuant to the provisions of rule 902 of the Texas Rules of Civil Procedure, [name of affiant], an employee of [name of employer], has executed an affidavit in support of certain business memoranda or records relevant to the referenced cause.

The affidavit and copies of the records have been filed with the court clerk for inclusion with the papers in the referenced cause and are available for your inspection and copying. The business records are to be used as evidence at the trial of the referenced cause.

Sincerely yours,

__________________________________________________________________________________________________________________________ ... __________________________________________________________________________________________________________________________

[Name of attorney]
Certified Mail No. [number]
Return Receipt Requested
c: [court clerk]
Form 19-5

An unsworn declaration may be used in lieu of a written sworn declaration, verification, certification, oath, or affidavit required by statute or required by a rule, order, or requirement adopted as provided by law, but not for a lien required to be filed with a county clerk, an instrument concerning real or personal property required to be filed with a county clerk, or an oath of office or an oath required to be taken before a specified official other than a notary public. See Tex. Civ. Prac. & Rem. Code § 132.001.

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

Jurat for Unsworn Declaration

“My name is [name], my date of birth is [date], and my address is [address, city, state, zip code] and [country]. I declare under penalty of perjury that the foregoing is true and correct.

Executed in [county] County, State of [state], on the [day] day of [month], [year].

__________________________________________________________________________________________________________________________ ...

Declarant”
Affidavit Concerning Cost and Necessity of Services

BEFORE ME, the undersigned authority, on this day personally appeared [name of affiant], who swore on oath that the following facts are true:

“My name is [name of affiant]. I am of sound mind and capable of making this affidavit.

On [date] I provided a service to [name of person who received service]. An itemized statement of the service and the charge for the service is attached to this affidavit and is a part of this affidavit.

I am the person in charge of the records of [name of person who provided service]. Attached to this affidavit are records that provide an itemized statement of the service and the charge for the service that [name of person who provided service] provided to [name of person who received service] on [date]. The attached records are a part of this affidavit.

The attached records are kept by me in the regular course of business. The information contained in the records was transmitted to me in the regular course of business by [name of person who provided service] or an employee or representative of [name of person who provided service] who had personal knowledge of the information. The records were made at or
near the time or reasonably soon after the time that the service was provided. The records are the original or an exact duplicate of the original.

Continue with the following.

“The service [I] provided was necessary, and the amount that [I/was] charged for the service was reasonable at the time and place that the service was provided.”

________________________
[Name of affiant]

SIGNED under oath before me on ________________________________.

________________________
Notary Public, State of Texas
Motion to Take Judicial Notice of Law of [name of state]

1. Parties. Movant is [name of plaintiff], Plaintiff in this cause, who moves the Court to take judicial notice of the law of another state, as described below. Movant intends to use that law in this cause because it applies to and controls law and fact relevant to this cause. Respondent is [name of defendant], Defendant in this cause.

2. Facts. Under the law of [name of state], [state foreign law, e.g., the maximum interest rate applicable to this suit is 21 percent], as shown by the copies of authorities attached hereto and incorporated by reference.

3. Grounds. The attached authorities and the law as stated therein are entitled to judicial notice by this Court under rule 202 of the Texas Rules of Evidence.

4. Prayer. Movant prays that—

   a. the Court set this matter for hearing;

   b. Respondent be given due notice as contemplated by rule 202 of the Texas Rules of Evidence;

   c. the Court take judicial notice of the above-stated law of another jurisdiction; and
d. the Court apply that law to the trial of this cause.

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

Include a certificate of service (form 19-1) and notice of hearing (form 19-2). Attach a copy of the statute, court opinion, etc., supporting the foreign law sought to be used. Prepare the order (form 19-8) to file with the motion.
Order Taking Judicial Notice of Law of [name of state]

On [date] a hearing was held on Plaintiff’s Motion to Take Judicial Notice of Law of [name of state] and to apply that law to this cause.

The Court finds that the law of [name of state] is as shown in copies attached to Plaintiff’s motion, on file in this cause, specifically that the principle of law is [state foreign law, e.g., that the maximum interest rate applicable to this suit is 21 percent].

It is therefore ORDERED that Plaintiff’s Motion to Take Judicial Notice of Law of [name of state] is hereby sustained in all things and that the principle of law stated above shall apply to the trial of this case.

SIGNED on ________________________________.

JUDGE PRESIDING
Order Taking Judicial Notice of Law of [name of state]

APPROVED AS TO FORM:

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

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

Attach the order to the motion (form 19-7) and file with the court clerk.
Ordinary summary judgment for a claimant is appropriate if pleadings and admissible summary judgment evidence demonstrate that there is no genuine issue of material fact (see sections 19.41 and 19.42 in this chapter) and the plaintiff is entitled to judgment as a matter of law. Tex. R. Civ. P. 166a(c). The motion is discussed at section 19.43.

Alternative grounds for paragraph 3. of this form are at forms 19-10 through 19-15. The grounds should be amended as appropriate to fit the facts of the case.

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

Plaintiff’s Motion for Summary Judgment

1. Parties. Plaintiff is [name of plaintiff], who, pursuant to the provisions of rule 166a(a) of the Texas Rules of Civil Procedure, moves for summary judgment against [name of defendant], Defendant in this cause.

2. Nature of Suit. This cause is a suit [describe action, e.g., on a written debt and for foreclosure of a security interest] plus interest, attorney’s fees, and costs of court, as shown in Plaintiff’s original petition on file in this cause, which is incorporated by reference in this motion.


Insert as paragraph 3. specific grounds appropriate to the cause of action. See forms 19-10 (sworn account), 19-11 (promissory note and foreclosure), 19-12 (guaranty), 19-13 (consumer charge account), 19-14 (personal property lease), or 19-15 (suit on oral debt).

Continue with the following.

Because there is no genuine issue of any material fact in this cause, Plaintiff is entitled to a summary judgment herein as a matter of law.
4. **Alternative Partial Summary Judgment.** If summary judgment for Plaintiff is not rendered on the entire cause or for all relief requested, and if a trial is necessary on some of the issues in this cause, Plaintiff requests the Court, after examining the pleadings and summary judgment evidence before it and interrogating counsel to ascertain those material facts that are in good faith actually controverted, to make an order specifying those facts that appear to be without substantial controversy and directing such further proceedings in the action that are just.

5. **Attorney’s Fees.** As shown by Plaintiff’s original petition on file in this cause, Plaintiff has pleaded for attorney’s fees

   Select one of the following.

   in a reasonable amount as provided by applicable statute.

   Or

   based on the provision for reasonable attorney’s fees contained in the note or agreement on which this cause is founded.

   Or

   in the amount of [percent] percent of principal and interest due as provided in the note or agreement on which this cause is founded.

   Or

   in the amount of $[amount] as specifically provided in the note or agreement on which this cause is founded.

   Select one of the following.

   There is no genuine issue of fact about the basis for recovery of attorney’s fees in this cause or about the amount thereof, and as a matter of law Plaintiff is entitled to recover attor-
Plaintiff is entitled to recover attorney’s fees as alleged in Plaintiff’s original petition on file herein and as evidenced by Attorney’s Affidavit in Support of Fees attached hereto, and the issue of attorney’s fees should be set for hearing and should be heard by the Court immediately following the hearing on this Motion for Summary Judgment.

6. Use of Unfiled Discovery Documents. Plaintiff hereby gives notice of his intent to use unfiled discovery documents attached hereto as Exhibit [exhibit number(letter)].

7. Prayer. Plaintiff prays that—

a. the Court set this matter for hearing;

b. Plaintiff be granted summary judgment for $[amount] on the debt owed Plaintiff; or alternatively, should the Court find some facts to be controverted, Plaintiff be granted a partial summary judgment specifying those facts that appear to be without substantial controversy;

c. Plaintiff be granted summary judgment for prejudgment interest, postjudgment interest, and costs of court, all as prayed for in Plaintiff’s original petition on file herein;

d. Plaintiff be granted summary judgment for attorney’s fees as prayed for in Plaintiff’s original petition on file herein; or alternatively, the Court set a hearing on the matter of attorney’s fees, to be held immediately following the hearing on this Motion for Summary Judgment.
summary judgment on this cause, and after the hearing Plaintiff be granted an order setting the amount of attorney’s fees to be awarded; and

e. Plaintiff be granted all further relief to which Plaintiff may be entitled.

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

Include a notice of hearing (form 19-2) and a certificate of service (form 19-1). Attach any necessary affidavit(s); see forms 19-16 (sworn account), 19-17 (promissory note), and 19-18 (attorney’s fees).
Grounds for Summary Judgment—Sworn Account

If applicable, incorporate one of the two alternatives below as paragraph 3. of form 19-9 in this chapter. See section 19.45 regarding motions for summary judgment on sworn accounts.

3. **Grounds.** This motion is based on the pleadings on file in this cause. Defendant has failed to comply with the requirements of rules 93(10) and 185 of the Texas Rules of Civil Procedure in that Defendant’s answer is not a timely filed sworn pleading, verified by and supported by affidavit, denying the account that is the foundation of Plaintiff’s cause of action. As a matter of law, therefore, there is no genuine issue of any material fact with respect to Plaintiff’s cause of action on sworn account, and Plaintiff is entitled to a judgment against Defendant as prayed for in Plaintiff’s original petition.

3. **Grounds.** The pleadings, affidavits, and discovery documents, such as deposition transcripts, answers to interrogatories, and admissions, on file herein or attached hereto show that there is no genuine issue as to any material fact in this cause, in that—

a. In the usual course of business, Plaintiff sold and delivered to Defendant certain goods or services, as evidenced by [describe evidence, e.g., Defendant’s answers to Plaintiff’s Written Interrogatories numbers 6 and 7].

b. The statement of account attached to Plaintiff’s original petition on file herein accurately describes each item of goods or services delivered by Plaintiff to
Defendant, the price of each such item, and the delivery date of each such item, as evidenced by [describe evidence].

c. The price for each item of goods or services was [agreed to by Defendant/the usual and customary price for similar items], as evidenced by [describe evidence].

d. The above-described account has not been paid, as evidenced by [describe evidence].
Form 19-11

If applicable, incorporate the promissory note text as paragraph 3. of form 19-9 in this chapter. See section 19.46 regarding motions for summary judgment on promissory notes.

Grounds for Summary Judgment—Promissory Note and Foreclosure

3. Grounds. The pleadings, affidavits, and discovery documents, such as deposition transcripts, answers to interrogatories, and admissions, on file herein or attached hereto show that there is no genuine issue as to any material fact in this cause, in that—

   a. The note made the subject of this cause was executed by Defendant and was delivered to Plaintiff by Defendant, as evidenced by [describe evidence].

   b. Plaintiff gave value for the note to Defendant, as evidenced by [describe evidence].

   c. Plaintiff is the owner and holder of the note, as evidenced by [describe evidence].

   d. The note matured, as evidenced by [describe evidence].

   e. Defendant defaulted in payment of the note, as evidenced by [describe evidence].

   f. The amount of $[amount] is due by Defendant to Plaintiff on the note, as evidenced by [describe evidence].

   g. Defendant, through the security agreement described in Plaintiff’s original petition on file herein, granted to Plaintiff a security interest in the collateral therein described, as evidenced by [describe evidence].

Continue with the following if foreclosure is sought.
h. The collateral is presently in Defendant’s possession, as evidenced by [describe evidence].

i. Defendant has failed to surrender possession of the collateral when demanded to do so by Plaintiff, as evidenced by [describe evidence].
Grounds for Summary Judgment—Guaranty

3. **Grounds.** The pleadings, affidavits, and discovery documents, such as deposition transcripts, answers to interrogatories, and admissions, on file herein or attached hereto show that there is no genuine issue as to any material fact in this cause, in that—

a. The note guaranteed by the agreement made the subject of this cause was executed by [name of borrower], Borrower, and was delivered to Plaintiff by Borrower, as evidenced by [describe evidence].

b. Plaintiff gave value for the note to Borrower, as evidenced by [describe evidence].

c. Plaintiff is the owner and holder of the note, as evidenced by [describe evidence].

d. The note matured, as evidenced by [describe evidence].

e. Borrower defaulted in payment of the note, as evidenced by [describe evidence].

f. The amount of $[amount] is due by Borrower to Plaintiff on the note, as evidenced by [describe evidence].

g. Defendant guaranteed payment of the note, as evidenced by [describe evidence].
h. Defendant defaulted in payment of the note under the guaranty agreement, as evidenced by [describe evidence].
Grounds for Summary Judgment—Consumer Charge Account

3. **Grounds.** The pleadings, affidavits, and discovery documents, such as deposition transcripts, answers to interrogatories, and admissions, on file herein or attached hereto show that there is no genuine issue as to any material fact in this cause, in that—

a. Plaintiff and Defendant entered into an agreement, as described in Plaintiff’s original petition on file herein, under which Defendant became obligated to pay Plaintiff for certain goods or services sold to Defendant by Plaintiff, as evidenced by [describe evidence].

b. Plaintiff performed all his obligations under the agreement by delivering the specified goods or services to Defendant, as evidenced by [describe evidence].

c. Defendant defaulted in payment of the debt created by the agreement, as evidenced by [describe evidence].

d. The amount of $[amount] is due by Defendant to Plaintiff under the agreement, as evidenced by [describe evidence].
Form 19-14

If applicable, incorporate the personal property lease text as paragraph 3. of form 19-9 in this chapter.

Grounds for Summary Judgment—Personal Property Lease

3. *Grounds.* The pleadings, affidavits, and discovery documents, such as deposition transcripts, answers to interrogatories, and admissions, on file herein or attached hereto show that there is no genuine issue as to any material fact in this cause, in that—

   a. Plaintiff and Defendant entered into a lease agreement, as described in Plaintiff’s original petition on file herein, under which Defendant became obligated to pay Plaintiff for the use of certain property furnished to Defendant by Plaintiff, as evidenced by [describe evidence].

   b. Plaintiff performed all his obligations under the agreement by furnishing the specified property to Defendant, as evidenced by [describe evidence].

   c. Defendant defaulted in payment of the debt created by the agreement, as evidenced by [describe evidence].

   d. The amount of $[amount] is due by Defendant to Plaintiff under the agreement, as evidenced by [describe evidence].
Form 19-15

If applicable, incorporate the oral debt text as paragraph 3. of form 19-9 in this chapter.

Grounds for Summary Judgment—Oral Debt

3. **Grounds.** The pleadings, affidavits, and discovery documents, such as deposition transcripts, answers to interrogatories, and admissions, on file herein or attached hereto show that there is no genuine issue as to any material fact in this cause, in that—

   a. Plaintiff and Defendant entered into an oral agreement, as described in Plaintiff’s original petition on file herein, under which Defendant became obligated to pay Plaintiff for certain goods, services, or money furnished to Defendant by Plaintiff, as evidenced by [describe evidence].

   b. Plaintiff performed all his obligations under the agreement by delivering the specified goods, services, or money to Defendant, as evidenced by [describe evidence].

   c. Defendant defaulted in payment of the debt created by the agreement, as evidenced by [describe evidence].

   d. The amount of $[amount] is due by Defendant to Plaintiff under the agreement, as evidenced by [describe evidence].
Plaintiff’s Summary Judgment Affidavit for Suit on Sworn Account

BEFORE ME, the undersigned authority, on this day personally appeared [name of affiant], who swore on oath that the following facts are true:

“My name is [name of affiant]. I am of sound mind, capable of making this affidavit, and fully competent to testify to the matters stated herein, and I have personal knowledge of each of the matters stated herein.

Include the following paragraph if the affiant is an employee of the plaintiff.

“I am presently employed by [name of plaintiff], Plaintiff, in the capacity of [capacity], and I have been so employed since [date]. As part of my duties in such employment, I am custodian of the business records of Plaintiff.

Continue with the following.

“Attached to this affidavit as Exhibit [exhibit number/letter] is a true and correct copy of the statement of Defendant’s account with Plaintiff. Attached to this affidavit as Exhibit [exhibit number/letter] is a true and correct copy of each invoice or other record for each sales transaction and each credit on Defendant’s account. The attached exhibits are incorporated by reference into this affidavit.
“Each such record was kept by Plaintiff in the regular course of business. It was the regular course of Plaintiff’s business for Plaintiff or an employee or representative of Plaintiff, with personal knowledge of the act, event, or condition recorded, to make the record or to transmit information thereof to be included in the record. Each such record attached hereto was made at or near the time of the act, event, or condition recorded or reasonably soon thereafter. Each copy attached hereto is an exact duplicate of the original record, and each copy was made under my personal supervision.

“In the usual course of business, Plaintiff sold to Defendant certain goods, wares, merchandise, or services, as described in Exhibit [exhibit number/letter] of this affidavit. Defendant accepted the goods, wares, merchandise, or services.

“Exhibits [exhibit number/letter] and [exhibit number/letter] of this affidavit describe each such item delivered, the price of each such item, and the date each such item was delivered to Defendant.

“The price of each such item, as stated in Exhibits [exhibit number/letter] and [exhibit number/letter] of this affidavit, was [agreed to by Defendant/the usual and customary price for such an item].

“Defendant defaulted in paying this account. The balance of the account as stated in Exhibit [exhibit number/letter] of this affidavit is the amount owed to Plaintiff by Defendant after every just and lawful offset, credit, or payment has been allowed.

“On [date], Plaintiff demanded that Defendant pay the account. Because of Defendant’s failure to do so, Plaintiff has been forced to employ [name of attorney], a licensed attorney, to file suit on the account.”

__________________________________________________________________________________________________________________________
[Name of affiant]
Affiant
SIGNED under oath before me on ________________________________.

__________________________________________________________

Notary Public, State of Texas

Attach exhibit(s).
Plaintiff’s Summary Judgment Affidavit for Suit on Promissory Note

BEFORE ME, the undersigned authority, on this day personally appeared [name of affiant], who swore on oath that the following facts are true:

“My name is [name of affiant]. I am of sound mind, capable of making this affidavit, and fully competent to testify to the matters stated herein, and I have personal knowledge of each of the matters stated herein.

Attached to this affidavit as Exhibit [exhibit number/letter] is a true and correct copy of a note executed by Defendant and delivered to Plaintiff by Defendant. Exhibit [exhibit number/letter] is incorporated by reference into this affidavit. Plaintiff is the owner and holder of the note, is presently in possession of the note, and is entitled to payment thereon.

Plaintiff obtained the note by paying cash to Defendant in the amount stated in the note as principal.

The note matured under its terms in that the due date stated in the note passed, and Plaintiff presented the note to Defendant for payment.

Defendant defaulted in paying the total of principal and interest due on the note under its terms. After every payment has been applied, Defendant owes Plaintiff $[amount] as prin-
Principal and $\text{amount}$ as interest on the note as of $\text{date}$. Interest continues to accrue thereafter at the rate of $\text{amount}$ per day.

“On $\text{date}$, Plaintiff demanded that Defendant pay the note. Because of Defendant’s failure to do so, Plaintiff was forced to employ [name of attorney], a licensed attorney, to file suit on the note.”

“To secure payment of the note, Defendant executed the security agreement included with the note in Exhibit [exhibit number/letter] of this affidavit, granting to Plaintiff a security interest in the collateral described in the security agreement.

“I have observed firsthand that the collateral is in Defendant’s possession by visiting Defendant’s premises on $\text{date}$.

“On $\text{date}$, Plaintiff demanded that Defendant surrender possession of the collateral to Plaintiff, which Defendant refused to do.”

[Name of affiant]
Affiant

SIGNED under oath before me on ______________________________.

________________________________________
Notary Public, State of Texas

[Attach exhibit(s).]
Form 19-18

Summary judgment for attorney’s fees can be granted if an affidavit is filed by the movant’s attorney stating his opinions regarding reasonable attorney’s fees and this affidavit is not controverted by the opposing party. Use of an affidavit similar to this form is recommended as proof supporting the prayer for fees. For discussions of attorney’s fees in summary judgment proceedings, see section 19.52 in this chapter.

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

Plaintiff’s Summary Judgment Affidavit for Attorney’s Fees

BEFORE ME, the undersigned authority, on this day personally appeared [name of affiant], who swore on oath that the following facts are true:

“My name is [name of affiant]. I am of sound mind, capable of making this affidavit, and fully competent to testify to the matters stated herein, and I have personal knowledge of each of the matters stated herein.

“On [date] Plaintiff employed me to collect the claim on which this suit is based. Between then and the date of this affidavit, I performed [number] hours of work on this matter, including doing or causing to be done the following:

Describe the work done; one or more of the following examples may be appropriate.

“Defendant’s whereabouts were investigated.

“Defendant’s assets were investigated.

“Demand was made on Defendant.

“The disputed claim was discussed with Defendant and with Plaintiff.

“Payment arrangements were made with Defendant.
“One or more writs of [attachment/sequestration/prejudgment garnishment] were obtained.

“Prejudgment relief was obtained.

“Suit was filed.

“Requests for disclosure were served on one or more parties.

“Written interrogatories were served on one or more parties.

“Requests for production of documents were served on one or more parties.

“One or more orders compelling answers to written interrogatories and production of documents were obtained.

“Requests for admissions were served on one or more parties.

“One or more persons were deposed.

“An affidavit controverting Defendant’s motion to transfer venue was prepared, and Plaintiff’s position was argued at a venue hearing.

“A motion for judicial notice of the law of another state was prepared and presented at a hearing.

“A motion for summary judgment was prepared.

“[continue with the following]

“If Plaintiff’s Motion for Summary Judgment is granted, I am of the opinion that $[amount] would be a reasonable fee for services required to perform postjudgment discovery and to satisfy the judgment by writ of execution and other procedures.”
If Plaintiff’s Motion for Summary Judgment is granted and Defendant makes an unsuccessful appeal from this judgment, I am of the opinion that $[amount] would be a reasonable fee for services performed in this cause on appeal to the court of appeals.["]

And/or

If Plaintiff’s Motion for Summary Judgment is upheld by the court of appeals and Defendant makes an unsuccessful appeal from this judgment and the judgment of the court of appeals, I am of the opinion that $[amount] would be a reasonable fee for services performed in this cause on appeal to the Texas Supreme Court.

[Name of attorney]
Affiant

SIGNED under oath before me on ______________________________.

Notary Public, State of Texas
# Chapter 20
## Judgment

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Chapter 20
Judgment

I. Judgments Generally

§ 20.1 Written Orders

All judgments, decisions, and orders of any kind should be reduced to writing and signed by the trial judge with the date of signing stated. Tex. R. Civ. P. 306a(2). The date that the judgment was signed, as opposed to the date the judgment was rendered or entered, is the operative date for purposes of postjudgment motions and appeal. Rule 306a provides that time commences to run for appellate steps when the judge signs the judgment. See Tex. R. Civ. P. 306a(1). Also see section 20.12 below.

§ 20.2 Proposed Judgments

Any party may prepare and submit a proposed judgment to the court for signature. Tex. R. Civ. P. 305. In doing so, the party must serve it on all other parties who have appeared and remain in the case, in accordance with rule 21a. Failure to comply with rule 305 does not affect the time for perfecting an appeal. Tex. R. Civ. P. 305.

The most common issue with proposed judgments is whether the submission of one waives the party’s right to challenge the judgment later in whole or in part. Caution must be exercised here. A motion for judgment on the verdict is an affirmation by the moving party that the jury findings are supported by the evidence. See Sun Power, Inc. v. Adams, 751 S.W.2d 689, 696 (Tex. App.—Fort Worth 1988, no writ). Generally, a party who moves for judgment on the verdict cannot complain of the part of the judgment based on those findings. See Litton Industrial Products, Inc. v. Gammage, 668 S.W.2d 319, 321–22 (Tex. 1984); Andrew Shebay & Co. v. Bishop, 429 S.W.3d 644, 647 (Tex. App.—Houston [1st Dist.] 2013, pet. denied). To preserve the right to complain about the judgment on appeal, the moving party should state in its motion for judgment that it agrees only with the form of the judgment and disagrees with the content and result. See Hooks v. Samson Lone Star, L.P., 457 S.W.3d 52, 67 (Tex. 2015) (motion for judgment stating it was filed “without waiving any rights to contest or appeal” and signed “Approved as to Form” sufficient to preserve error); First National Bank of Beeville v. Fojtik, 775 S.W.2d 632, 633 (Tex. 1989) (per curiam); Soon Phat, L.P. v. Alvarado, 396 S.W.3d 78, 95–96 (Tex. App.—Houston [14th Dist.] 2013, pet. denied) (proposed judgment “approved as to form only” was sufficient to preserve right to appeal). The failure of a party to prepare and submit a proposed judgment to the court for signature does not preclude the party from challenging the judgment. In re Marriage of Ames, 860 S.W.2d 590, 592 (Tex. App.—Amarillo 1993, no writ).

§ 20.3 Caption

The judgment should contain the full names of the parties, as stated in the pleadings, for and against whom the judgment is rendered. Tex. R. Civ. P. 306. The rule does not require that all parties be included in the caption. Accordingly, if there are multiple defendants, only the first party need be identified in the caption, so long as all parties are identified by full name in the body of the judgment (see also section 20.4 below). Care should be exercised in identifying the parties to insure accuracy and avoid later difficulty in seeking to enforce the judgment.
§ 20.4  Recitals—Appearances of Parties

The recital section of the judgment should identify the full name of the parties and their participation in the proceeding, for example, who appeared, how the party appeared (in person, through counsel of record, or pro se), who defended at trial, who answered but failed to defend further, who defaulted, and what method of service was used on any defendant who defaulted. With rare exception, judgment may not be granted in favor of or against a party not named in the suit as a plaintiff or a defendant. See Mapco, Inc. v. Carter, 817 S.W.2d 686, 687 (Tex. 1991) (per curiam); Exito Electronics, Co. v. Trejo, 166 S.W.3d 839, 852 (Tex. App.—Corpus Christi 2005, no pet.). There may be instances, however, when the failure to name a party in the body of the judgment is not fatal, if the party’s identity can be established from the caption of the case, the record, the pleadings, and the process. Gomez v. Bryant, 750 S.W.2d 810, 811 (Tex. App.—El Paso 1988, no writ). See also Elliott v. Hamilton, 767 S.W.2d 262, 263 (Tex. App.—Beaumont 1989, writ denied) (probate proceeding; “Persons, though not nominal parties to a lawsuit, may, by their active and open participation, so connect themselves with the litigation to have the legal effect of making them a party.”).

§ 20.5  Recitals—Nature of Proceedings

Texas judgments typically also identify the nature and date of the proceedings. The rules do not require such a statement but it is helpful in providing the context for the decision. The judgment should therefore state the dates during which the case was tried and whether the case proceeded by bench or jury trial. If a part of the case has been resolved by dismissal, summary judgment, instructed verdict, or judgment notwithstanding the verdict, the judgment should reflect so. See the following forms: Motion for Entry of Default Judgment (Form 20-1) with supporting Certificate of Last Known Mailing Address (Form 20-2), Nonmilitary Affidavit (Form 20-3), Attorney’s Fees Affidavit (Form 20-4), Default Judgment (Forms 20-5 and 20-6), Judgment Nihil Dicit (Form 20-7), Final Summary Judgment (Form 20-8), Partial Summary Judgment (Form 20-9), Partial Summary Judgment and Trial (Form 20-10), Agreed Judgment (Form 20-11), Judgment on Foreign Judgment (Form 20-12), and Judgment (Forms 20-13, 20-14, and 20-15).

§ 20.6  Evidence

The judgment need not describe the evidence on which it is based but should include a statement that the court heard evidence and is of the opinion that judgment should be rendered for the successful party.

§ 20.7  Conformity to Pleadings

The judgment of the court must conform to the pleadings, the nature of the case proved, and the verdict, if any. Tex. R. Civ. P. 301. When issues not raised by the pleadings are tried by express or implied consent of the parties, they will be treated in all respects as if they had been raised in the pleadings. Tex. R. Civ. P. 67. A pleading defect not properly raised before the charge to the jury or, in a nonjury case before judgment is signed, may be waived. Tex. R. Civ. P. 90.

§ 20.8  Findings of Fact

Findings of fact shall not be recited in a judgment; rather, they shall be filed as a separate document. Tex. R. Civ. P. 299a. In any case tried in a district court or county court without a jury, any party may request the court to state in writing its findings of fact and conclusions of law. Tex. R. Civ. P. 296. The procedures to request findings of fact and conclusions of law are set forth in Tex. R. Civ. P. 296–298. If findings of fact are not requested by the losing party, it is implied that the trial court made
all findings necessary to support its judgment. Worford v. Stamper, 801 S.W.2d 108, 109 (Tex. 1990); In re Crumbley, 404 S.W.3d 156, 162 (Tex. App.—Texarkana 2013, orig. proceeding). When findings of fact are filed by the trial court, they form the basis of the judgment on all grounds of recovery and of defense stated therein. Tex. R. Civ. P. 299.

§ 20.9 Decretal Language in Judgment

The decretal language in a judgment determines the rights of the parties; it is the section in the judgment that begins “It is hereby ordered, adjudged and decreed” or “It is ordered.” The judgment should determine the rights of all parties and dispose of all issues. Felderhoff v. Knauf, 819 S.W.2d 110, 111 (Tex. 1991) (per curiam). A court’s judgment is its announcement of the resolution of the issues in the lawsuit. State v. Naylor, 466 S.W.3d 783, 788 (Tex. 2015). If the subject of the judgment is property, the judgment should describe the property with reasonable certainty. See Dellana v. Walker, 866 S.W.2d 355, 358 (Tex. App.—Austin 1993, writ denied) (trespass to try title). The judgment must be framed so as to give the prevailing party all the relief to which that party may be entitled in law or in equity. Tex. R. Civ. P. 301. If no relief is granted to a party, that party cannot recover under the judgment. See section 20.15 below (discussing language of finality in the judgment disposing of all parties and claims).

The following subsections discuss various forms of relief.

§ 20.9:1 Money Damages Awarded

Almost every judgment based on a creditor’s claim will include the following as elements of damages:

1. principal debt (including net amount in case of counterclaim or other setoff or credit);
2. prejudgment interest (see section 20.10 below);
3. postjudgment interest at the highest rate allowed by law (see section 20.11 below);
4. attorney’s fees (see part III. in chapter 1 of this manual); and
5. costs (usually recovered under Tex. R. Civ. P. 131 but may be allocated differently under rule 141 for good cause). See Furr’s Supermarkets, Inc. v. Bethune, 53 S.W.3d 375, 378 (Tex. 2001) (“Rule 141’s good cause exception to the mandate of Rule 131 is designed to account for a prevailing party’s questionable conduct that occurs during litigation, permitting the trial judge some discretion to reassess costs so that the cost attendant to that conduct is not visited on an innocent, but losing party.”). See also State v. B&L Landfill, Inc., 758 S.W.2d 297, 300 (Tex. App.—Houston [1st Dist.] 1988, no writ) (trial court abused discretion in allotting costs contrary to rule 131 without explanation as required by rule 141).

An award of money damages should clearly state the amount recovered or otherwise furnish the means by which the damages can be ascertained. See El Universal, Compania Periodistica Nacional, S.A. de C.V. v. Phoenician Imports, Inc., 802 S.W.2d 799, 802 (Tex. App.—Corpus Christi 1990, writ denied). Generally, a judgment for money damages in excess of the amount pleaded is erroneous, even though a higher amount might be warranted by the evidence. Borden v. Guerra, 860 S.W.2d 515, 525 (Tex. App.—Corpus Christi 1993, writ dism’d by agr.). The Texas Supreme Court, however, has held that such a pleading problem may be remedied by a postverdict pleading amendment increasing the amount of the damages sought to the amount awarded by the jury, unless the opposing party establishes surprise or prejudice. Greenhalgh v. Service Lloyds Insurance Co., 787 S.W.2d 938, 939 (Tex. 1990).
§ 20.9:2 Judgment Involving Property

When property is the subject of a judgment, the judgment should describe the property with reasonable certainty. For land, the description must be sufficient so that an officer executing a writ of possession could ascertain the boundaries of the land. See *Dellana v. Walker*, 866 S.W.2d 355, 358 (Tex. App.—Austin 1993, writ denied) (trespass to try title). The rules of procedure governing execution should be consulted to assist in determining the requisite specificity for different types of judgment. See *Tex. R. Civ. P. 630* (judgment for money), *Tex. R. Civ. P. 631* (judgment for sale of particular property), *Tex. R. Civ. P. 632* (judgment for the delivery of certain property), and *Tex. R. Civ. P. 633* (judgment for the recovery of personal property or its value).

§ 20.9:3 Foreclosure of Lien

All judgments foreclosing mortgages and other liens shall be that the plaintiff recover “his debt, damages and costs, with a foreclosure of the plaintiff's lien on the property subject thereto.” *Tex. R. Civ. P. 309*. Unless the judgment is against a personal representative of an estate (see section 20.9:5 below), the judgment must further direct that an order of sale issue—

> to any sheriff or any constable within [Texas], directing him to seize and sell [the collateral] as under execution, in satisfaction of the judgment; and, if the property cannot be found, or if the proceeds . . . be insufficient to satisfy the judgment, then to take the money . . . remaining unpaid, out of any other property of the defendant, as in . . . ordinary executions.


§ 20.9:4 Alternative Recoveries

If a plaintiff prevails on more than one theory, the judgment cannot award relief on all of them; to do so would violate the “one satisfaction” rule. *Tony Gullo Motors, Inc. v. Chapa*, 212 S.W.3d 299, 303 (Tex. 2006). If the trier of fact finds for the plaintiff on more than one theory, the party is entitled to the recovery providing it the greatest relief. See *Tony Gullo*, 212 S.W.3d at 314; *Transport Insurance Co. v. Faircloth*, 898 S.W.2d 269, 274 (Tex. 1995). The successful party may make its election after it knows the amount it will recover under each of the alternative theories. *Tony Gullo*, 212 S.W.2d at 314. If the party does not make the election, the trial court is to render judgment affording the greatest recovery. *Birchfield v. Texarkana Memorial Hospital*, 747 S.W.2d 361, 367 (Tex. 1987).

§ 20.9:5 Judgment against Personal Representative

Each judgment for the recovery of money against an executor, administrator, or guardian must state that “it is to be paid in the due course of administration.” *Tex. R. Civ. P. 313*. Instead of levying by execution, the judgment creditor is to certify the judgment to the probate court for enforcement, except that a “judgment against an executor appointed and acting under a will dispensing with the action of the county court [sitting in matters of probate] in reference to such estate shall be enforced against the property of the testator in the hands of such executor, by execution, as in other cases.” *Tex. R. Civ. P. 313*. 
§ 20.9:6 Judgment for Attorney’s Fees

If attorney’s fees are recoverable, a judgment should state a specific sum for legal work performed through trial. See, e.g., Borg-Warner Protective Services Corp. v. Flores, 955 S.W.2d 861, 865, 870 (Tex. App.—Corpus Christi 1997, no pet.) (judgment set forth specific sum for attorney fees based on lodestar method). The fees should be for a specific amount, not a percentage of the judgment. See Arthur Andersen & Co. v. Perry Equipment Corp., 945 S.W.2d 812, 818–19 (Tex. 1997). The judgment may also allow for additional specified amounts in the event of appeal “provided they are conditioned on ultimate appellate success.” Borg-Warner, 955 S.W.2d at 870; see also A.G. Edwards & Sons, Inc. v. Beyer, 235 S.W.3d 704, 707 n.1 (Tex. 2007) (court of appeals properly reformed trial court’s unconditional grant of attorney’s fees to condition award on unsuccessful appeal). Recently, the Texas Supreme Court has opined that a prevailing party at trial may be entitled to appellate attorney’s fees as a successful appellant. Ventling v. Johnson, 466 S.W.3d 143, 154–55 (Tex. 2015).

§ 20.9:7 Judgment for Costs

In general, the successful party is entitled to recover from its adversary all of the taxable court costs it has incurred in the prosecution or defense of the lawsuit. Tex. R. Civ. P. 131; Furr’s Supermarkets, Inc. v. Bethune, 53 S.W.3d 375, 376 (Tex. 2001); Martinez v. Pierce, 759 S.W.2d 114, 114 (Tex. 1988) (per curiam). The judgment can either state the amount of costs or state generally that costs are awarded against a particular party.

Practice Note: The preferred manner of addressing costs in a judgment is to use general language awarding costs and, thereafter, rely on the bill of costs prepared by the clerk to itemize the recoverable costs. If a bill of costs fails to include a recoverable cost, the issue is frequently resolved with a phone call to the clerk. If the issue cannot be resolved that way, a motion should be filed with the court to correct the bill of costs. Under rule 629, a correct bill of costs is required to be attached to a writ of execution, so diligence in review of the bill of costs may avoid a later problem in execution. Keep in mind that a writ of execution serves to recover not only taxable costs but the “further costs of executing the writ.” Tex. R. Civ. P. 629.

Pursuant to rule 141, the court may allocate costs otherwise than against the losing party “for good cause, to be stated on the record.” The trial court may also apportion the costs if it determines that neither side entirely prevailed. See Mobil Producing Texas & New Mexico, Inc. v. Cantor, 93 S.W.3d 916, 920 (Tex. App.—Corpus Christi 2002, no pet.) (without citing rule 141, court allocated costs to both parties: “A trial court does not abuse its discretion in taxing costs against both sides where neither party was wholly successful in that one expected to receive more while the other expected to pay less.”).

By statute, recoverable court costs include clerk fees; service fees; fees of the court reporter for the original stenographic transcripts necessarily obtained for use in the suit; fees for masters, interpreters, and guardians ad litem; and “such other costs and fees as may be permitted by these rules and state statutes.” Tex. Civ. Prac. & Rem. Code § 31.007; In re Nalle Plastics Family L.P., 406 S.W.3d 168, 175–76 (Tex. 2013) (orig. proceeding). Other fees required by statute include court-appointed auditor fees (Tex. R. Civ. P. 172), alternative dispute resolution fees for an impartial third-party (Tex. Civ. Prac. & Rem. Code § 154.054), and witness fees (Tex. Civ. Prac. & Rem. Code § 22.001).

The cost of the transcript on appeal is recoverable as a cost. *Bayoud v. Nassour*, 408 S.W.2d 344, 345 (Tex. Civ. App.—Dallas 1966, writ ref’d n.r.e.). An appellant’s fee for the original transcript covers the cost of an original and one copy. *Tex. Gov’t Code § 52.047(c).*

In general, expert fees are not recoverable as a cost. *Headington Oil Co. v. White*, 287 S.W.3d 204, 212 (Tex. App.—Houston [14th Dist.] 2009, no pet.). Nor are miscellaneous expenses which are incurred in the representation of the client. *See Shenandoah Associates v. J & K Properties, Inc.*, 741 S.W.2d 470, 487 (Tex. App.—Dallas 1987, writ denied) (expenses, such as delivery services, travel, long-distance calls, bond premiums, postage, reproduction expenses, brief binding, office air conditioning, and secretarial time are not recoverable as costs); *see also Crescendo Investments*, 61 S.W.3d at 480–81 (noting that *Shenandoah* was decided before *Tex. Civ. Prac. & Rem. Code § 31.007* became effective, which allows the recovery of costs for trial testimony transcripts).

### § 20.10 Prejudgment Interest Generally

Prejudgment interest is “compensation allowed by law as additional damages for lost use of the money due as damages during the lapse of time between the accrual of the claim and the date of judgment.” In Texas, there are two bases for the recovery of prejudgment interest: (1) an enabling statute or (2) principles of equity. *Johnson & Higgins of Texas, Inc. v. Kenneco Energy, Inc.*, 962 S.W.2d 507, 528 (Tex. 1998) (citations omitted). These bases will be discussed further below. Once the appropriate basis for prejudgment interest has been determined, the interest amount should be calculated and stated in the judgment if possible. The mere recitation of the rate and accrual period often leads to later confusion. If a plaintiff’s claim is based on a statutory or contractual right, a prayer for general relief will support the recovery of prejudgment interest. *See Benavidez v. Isles Construction Co.*, 726 S.W.2d 23, 25 (Tex. 1987); *Republic National Bank v. Northwest National Bank*, 578 S.W.2d 109, 117 (Tex. 1978) (written contract); *Olympia Marble & Granite v. Mayes*, 17 S.W.3d 437, 441 (Tex. App.—Houston [1st Dist.] 2000, no pet.) (statute). If, however, a party seeks to recover equitable prejudgment interest at common law as an element of damages, a general claim for relief is not sufficient. The party must specifically plead for it. *Bufkin v. Bufkin*, 259 S.W.3d 343, 358 (Tex. App.—Dallas 2008, pet. denied). A spreadsheet for calculating costs, attorney’s fees, and interest accrued is at form 20-17.

**Practice Note:** The law regarding prejudgment interest is not always clear. Accordingly, the practitioner should always consider pleading for equitable prejudgment interest as an alternative; equitable prejudgment interest requires a pleading to support it. If the practitioner does not plead for equitable prejudgment interest, the result could well be that no prejudgment interest is awarded. See *Bufkin*, 259 S.W.3d at 357–58 (plaintiff failed to show that agreement provided for interest and failed to show that prejudgment interest was available under Texas Finance Code; had plaintiff pleaded for equitable prejudgment interest, it was probably available).

### § 20.10.1 Equitable Prejudgment Interest

In *Johnson & Higgins of Texas, Inc. v. Kenneco Energy, Inc.*, 962 S.W.2d 507, 532 (Tex. 1998) the Texas Supreme Court extended the reach of *Tex. Fin. Code § 304.102* to provide that equitable prejudgment interest in a common law claim was to be calculated in the same manner as under the statute.
§ 20.10:2 Contract Provides for Interest

Parties may contract for interest, provided that the interest is not usurious. “The right to interest is statutory and regulated, but, within such statutory framework, parties are at liberty to contract for the payment of conventional interest.” Triton Oil & Gas Corp. v. E.W. Moran Drilling Co., 509 S.W.2d 678, 687 (Tex. Civ. App.—Fort Worth 1974, writ ref’d n.r.e.). If a contract between the parties provides for interest or time-price differential, prejudgment interest may be recovered at the lesser of the interest rate in the contract or 18 percent per year. Tex. Fin. Code § 304.002.

§ 20.10:3 Contract Does Not Provide for Interest

If a contract between the parties does not provide for interest or time-price differential, section 304.003 of the Texas Finance Code applies and provides for a variable interest rate of between 5 and 15 percent per annum depending on the prime rate as of the date of the judgment. See Meridian Hotels, Inc. v. LHO Financing Partnership I, L.P., 255 S.W.3d 807, 823 (Tex. App.—Dallas 2008, no pet.) (if the contract does not provide for interest, prejudgment interest and postjudgment interest are set by section 304.003); ExxonMobil Corp. v. Valence Operating Co., 174 S.W.3d 303, 319 (Tex. App.—Houston [1st Dist.] 2005, pet. denied.) (where contract did not specify interest, prejudgment interest governed by section 304.003). Interest under section 304.003 is computed as simple interest and accrues 180 days after the date the defendant receives written notice of the claim or the date suit is filed, whichever occurs first. Tex. Fin. Code § 304.104.

In the past, if the parties had not agreed to a specified rate of interest, prejudgment interest at the rate of 6 percent per annum was available on open accounts and contracts “ascertaining the sum payable.” Tex. Rev. Civ. Stat. Ann. art. 5069–1.03. The interest commenced on the thirtieth day from and after the time when the sum was due and payable. The statute, however, was later amended twice and ultimately incorporated into the Texas Finance Code as follows:

If a creditor has not agreed with an obligor to charge the obligor any interest, the creditor may charge and receive from the obligor legal interest at the rate of six percent a year on the principal amount of the credit extended beginning on the 30th day after the date on which the amount is due.


As a result of the amendments, several courts have held that section 302.002 does not apply to an award of prejudgment interest, and therefore cannot be the basis for such an award. See Walden v. Affiliated Computer Services, Inc., 97 S.W.3d 303, 329–31 (Tex. App.—Houston [14th Dist.] 2003, pet. denied) (examining history of statute and amendments, noting that section 301.002 specifically excludes “judgment interest” from the definition of “legal interest,” “judgment creditor” from the definition of “creditor,” and “judgment debtor” from the definition of “obligor,” and holding that statute does not apply to an award of prejudgment interest); Lamajak, Inc. v. Frazier, 230 S.W.3d 786, 798 (Tex. App.—Dallas 2007, no pet.) (same statement); Natural Gas Clearinghouse v. Midgard Energy Co., 113 S.W.3d 400, 413–14 (Tex. App.—Amarillo 2003, pet. denied) (by amending the statute and replacing the old language with new words, the legislature effectively repealed the provision regarding “contracts ascertaining the sum payable”); Lucke v. Kimball, No. 13-01-00362-CV, 2004 WL 102830, at *9 (Tex. App.—Corpus Christi Jan. 22, 2004, pet. denied) (mem. op.) (breach of fiduciary duty claim; section 302.002 did not apply because party was a “judgment debtor,” not an “obligor”; prejudgment interest awarded under common law); Cumberland Casualty & Surety Co. v. Nkwazi, L.L.C., No. 03-02-00270, 2003 WL 21354608, at *6 (Tex. App.—Austin June 12, 2003, no pet.) (mem. op.) (section 302.002 does not provide a basis to award prejudgment interest in breach of contract claim).

Finally, one court has interpreted section 302.002 to authorize prejudgment interest at six percent per annum provided that the action involved an extension of credit. See Bufkin v. Bufkin, 259 S.W.3d 343, 357 (Tex. App.—Dallas 2008, pet. denied) (section 302.002 is silent on contracts not involving extensions of credit; accordingly, it applies only to contracts involving the extension of credit).

Nonetheless, some courts, in dictum, have, without much analysis, interpreted section 302.002 to authorize prejudgment interest at 6 percent per annum. See Mobil Producing Texas & New Mexico, Inc. v. Cantor, 93 S.W.3d 916, 920 (Tex. App.—Corpus Christi 2002, no pet.) (section 302.002 would have provided basis for prejudgment interest had the recovery been based on breach of contract); Wallace v. Ramon, 82 S.W.3d 501, 505–06 (Tex. App.—San Antonio 2002, no pet.) (without discussion, applying former version of section 302.002 to support prejudgment interest award on contract claim); Roach v. Dicken-son, 50 S.W.3d 709, 714 n.2 (Tex. App.—Eastland 2001, no pet.) (citing amended section 302.002 to award 6 percent prejudgment interest on contract claim where parties agreed that 6 percent was correct amount). The issue of whether section 302.002 authorizes prejudgment interest at a rate of 6 percent when a contract does not specify an interest rate has not been resolved by the Texas Supreme Court.

§ 20.10:4 Prejudgment Interest in Personal Injury, Wrongful Death, or Property Damage Case

Prejudgment Interest Required: A judgment in a wrongful death, personal injury, or property damage case earns prejudgment interest. Tex. Fin. Code § 304.102. The Texas Supreme Court has held that “property damage” means “claims for damage to tangible property, not economic loss or loss of economic opportunity.” Johnson & Higgins of Texas, Inc. v. Kenneco Energy, Inc., 962 S.W.2d 507, 530 (Tex. 1998).

Prejudgment Interest Rate: The prejudgment interest rate is equal to the postjudgment interest rate applicable at the time of judgment. Tex. Fin. Code § 304.103. Judgments in these cases earn interest at a rate that is calculated monthly and that is not less than 5 percent nor more than 15 percent, as determined by the Texas consumer credit commissioner. Tex. Fin. Code § 304.003.

Accrual of Prejudgment Interest: Except as otherwise provided by statute, prejudgment interest accrues on the amount of a judgment during the period beginning on the 180th day after the date the defendant receives written notice of a claim or on the date the suit is filed, whichever is earlier, and ending on the day preceding the date judgment is rendered. Prejudgment interest is computed as simple interest and is not compounded. Tex. Fin. Code § 304.104.

Effect of Settlement Offers: If a judgment for a claimant is less than the amount of a settlement offer of the defendant, prejudgment interest does not accrue on the amount of the judgment during the period that the offer may be accepted. Tex. Fin. Code § 304.105(a). If a judgment for a claimant is more than the amount of a settlement offer of the defendant, prejudgment interest does not accrue on the amount of the settlement during the period that the offer may be accepted. Tex. Fin. Code § 304.105(b). To prevent the accrual of prejudgment interest, a settlement offer must be in writing and delivered to the claimant or the claimant's attorney or representative. Tex. Fin. Code § 304.106. If a settlement offer does not provide for cash pay-
ment at the time of settlement, the amount of the settlement offer for the purpose of computing prejudgment interest is the cost or fair market value of the settlement offer at the time it is made. Tex. Fin. Code § 304.107.

§ 20.10:5 Prejudgment Interest and Attorney’s Fees

Generally, prejudgment interest is not available on an award of attorney’s fees. See C&H Nationwide, Inc. v. Thompson, 903 S.W.2d 315, 325–26 (Tex. 1994) (interpreting Tex. Rev. Civ. Stat. art. 5069–1.05, § 2 (now Tex. Fin. Code § 304.104), the court stated, “we disagree that our approach would allow prejudgment interest on costs and attorney’s fees. These awards cannot fairly be considered a part of the ’amount of the judgment.’”); Ellis County State Bank v. Keever, 888 S.W.2d 790, 797 n.13 (Tex. 1994) (attorney’s fees and costs are not part of the judgment for the purpose of prejudgment interest). See also Harvey v. Passero, 658 S.W.2d 148, 149 (Tex. 1983) (per curiam) (“An award of pre-judgment interest on attorney’s fees is contrary to the clear language of article 5069–1.03.” The attorney fees are not an account or contract “ascertaining the sum payable.”) Alma Investments, Inc. v. Bahia Mar Co-Owners Ass’n, Inc., 497 S.W.3d 137, 146 (Tex. App.—Corpus Christi 2016, pet. denied) (recognizing general rule); Sentinel Integrity Solutions, Inc. v. Mistras Group, Inc., 414 S.W.3d 911, 931 (Tex. App.—Houston [1st Dist.] 2013, pet. denied) (prejudgment interest not allowed on paid attorney’s fees in covenants not to compete act; the act preempted any additional recovery); Carbona v. CH Medical, Inc., 266 S.W.3d 675, 688 (Tex. App.—Dallas 2008, no pet.) (breach of contract action; citing C&H Nationwide: “This Court has held, and the supreme court has stated, that prejudgment interest cannot be recovered on attorney’s fees.”); Berry Property Management, Inc. v. Bliskey, 850 S.W.2d 644, 670 (Tex. App.—Corpus Christi 1993, writ dism’d by agr.) (DTPA action: “Prejudgment interest is not recoverable on attorney’s fees awarded.”); Southwestern Bell Telephone Co. v. Vollmer, 805 S.W.2d 825, 834 (Tex. App.—Corpus Christi 1991, writ denied) (DTPA action: prejudgment interest is not allowed on an award of attorney’s fees).

In contrast, however, other appellate courts have recognized an exception to the general rule when the attorney’s fees were paid before judgment: “The answer to the question of whether prejudgment interest may be calculated on attorneys’ fees that have been paid prior to judgment, as in this case, is less than clear, with our sister states splitting on the issue, and the supreme court silent. . . . [W]e reaffirm our Court’s holding that prejudgment interest is not recoverable on attorneys’ fees awarded. However, we join our sister courts in holding that as an exception to this general rule, prejudgment interest is recoverable on attorneys’ fees that have been paid prior to the entry of judgment.” Alma Investments, 497 S.W.3d at 146. See also A.V.I. Inc. v. Heathington, 842 S.W.2d 712, 717–18 (Tex. App.—Amarillo 1992, writ denied) (permitting award of prejudgment interest on paid attorney fees in DTPA action); Nova Casualty Co. v. Turner Construction Co., 335 S.W.3d 698, 706 (Tex. App.—Houston [14th Dist.] 2011, no pet.) (upholding award of prejudgment interest on attorney’s fees paid before judgment); Kurtz v. Kurtz, No. 14-08-00351-CV, 2010 WL 1293769, at *12 (Tex. App.—Houston [14th Dist.] Apr. 6, 2010, no pet.) (mem. op.) (trial court did not abuse its discretion in awarding prejudgment interest on attorney’s fees that had been paid prior to judgment); Williams v. Colthurst, 253 S.W.3d 353, 362 (Tex. App.—Eastland 2008, no pet.) (allowing award of prejudgment interest on attorney’s fees paid prior to judgment in a breach of lease action).

§ 20.10:6 Prejudgment Interest and Future Damages

§ 20.11 Postjudgment Interest

A judgment of a Texas court must state the postjudgment interest rate applicable to that judgment. Tex. Fin. Code § 304.001. Judgment interest is defined as “interest on a money judgment, whether the interest accrues before, on, or after the judgment is rendered.” Tex. Fin. Code § 301.002(a)(7). Interest is defined as “compensation for the use, forbearance, or detention of money.” Tex. Fin. Code § 301.002(a)(4). The award of postjudgment interest should be as specific as possible so that it may be readily calculated. A stated per diem amount is frequently used to accomplish this objective. If postjudgment interest is not specifically awarded in the judgment, the prevailing party is still entitled to recover it as a matter of law; the right to postjudgment interest is a creation of statute. McDonald v. Taber, No. 05-03-01642-CV, 2014 WL 2915312, at *4 (Tex. App.—Dallas Dec. 17, 2004, pet. denied) (mem. op.) (citing Tex. Fin. Code § 304.001). A spreadsheet for calculating costs, attorney’s fees, and interest accrued is at form 20-17.

§ 20.11:1 Interest Rate or Time-Price Differential in Contract

A judgment of a Texas court on a contract that provides for a specific interest rate or time-price differential earns interest at a rate equal to the lesser of the rate specified in the contract, which may be a variable rate or 18 percent per year. Tex. Fin. Code § 304.002.

§ 20.11:2 Interest Rate or Time-Price Differential Not in Contract

A Texas court judgment to which Texas Finance Code section 304.002 does not apply, including court costs awarded in the judgment and any prejudgment interest, earns post-judgment interest at a rate determined by the prime rate as published by the Federal Reserve Bank of New York on the date of the computation. However, if that rate is less than 5 percent, the postjudgment interest rate is 5 percent; if that rate is more than 15 percent, the postjudgment interest rate is 15 percent. Tex. Fin. Code § 304.003. The current applicable rate can be found on the website of the Texas Office of Consumer Credit Commissioner at www.occc.texas.gov.

§ 20.11:3 Accrual of Postjudgment Interest

Postjudgment interest on a judgment of a Texas court accrues during the period beginning on the day the judgment is rendered and ending on the day the judgment is satisfied. Tex. Fin. Code § 304.005(a). Postjudgment interest compounds annually. Tex. Fin. Code § 304.006. Postjudgment interest on a conditional award of appellate attorney’s fees, however, does not commence to accrue interest until the award is made final by the appropriate appellate court’s judgment. Ventling v. Johnson, 466 S.W.3d 143, 156 (Tex. 2015).

§ 20.12 Date of Signing

All judgments should state the date of signing. Tex. R. Civ. P. 306a(2). The date that the judgment was signed, as opposed to the date the judgment was rendered or entered, is the operative date for purposes of postjudgment motions and appeal. See Tex. R. Civ. P. 306a(1); Burrell v. Cornelius, 570 S.W.2d 382, 384 (Tex. 1978). For this reason, the judgment should be presented for signature as soon as possible after rendition so that execution or other collection steps will not be delayed. See also Louvien v. Dowell, 534 S.W.2d 421, 422 (Tex. Civ. App.—Dallas 1976, orig. proceeding) (judgment can be changed at any time if it has not been signed); Tex. R. Civ. P. 627 (clerk upon request shall issue execution after thirty days after judgment
signed, or after thirty days after motion for new trial or motion in arrest of judgment is overruled by order or by operation of law).

There is a limited exception to this general rule, however. If within twenty days after the judgment is signed, a party adversely affected by it or his attorney has not received notice under rule 306a(3), and does not have actual knowledge of the judgment, the periods for filing postjudgment motions and appeal commence on the date of receipt of notice under rule 306a(3), or on the date that actual knowledge of the signing was acquired, whichever occurs first, but in no event will such periods begin more than ninety days after the original judgment or other appealable order was signed. Tex. R. Civ. P. 306a(4).

§ 20.13 Notice of Judgment

When the final judgment is signed, the clerk must immediately notify the parties or their attorneys by first-class mail. Tex. R. Civ. P. 306a(3). The clerk’s failure to send the notice, however, does not affect the timetable for filing an appeal, unless the party establishes that it did not receive the notice or acquire actual knowledge of the judgment within twenty days after the judgment was signed. In that case, the time to appeal begins on the date of actual receipt of the notice or the date actual knowledge of the judgment was acquired, whichever occurred first, but in no event shall the period begin more than ninety days after the judgment was signed. Tex. R. Civ. P. 306a(4). See Board of Trustees of Bastrop I.S.D. v. Toungate, 958 S.W.2d 365, 367 (Tex. 1997) (appellate timetable did not commence to run until party received notice); Western Import Motors v. Mechanus, 739 S.W.2d 125, 126 (Tex. App.—San Antonio 1987, no writ) (per curiam) (letter from adverse party’s attorney containing proposed judgment, requesting that any objections be raised in seventy-two hours, and stating that if no objections were raised in that time court would be requested to sign judgment on certain date did not give actual knowledge of judgment so as to preclude extension of timetable under rule 306a(4)).

Practice Note: To attempt to protect against a claim of “no notice” of a final judgment, the plaintiff’s attorney may want to send a copy of the signed judgment to the defendant’s attorney of record by certified or registered mail, return receipt requested.

§ 20.14 Execution on Judgment

The clerk of the court “shall issue execution to enforce [the] judgment.” Tex. R. Civ. P. 622. Although no statute or rule specifically requires language of execution in the judgment, the better practice is to include in the judgment a statement specifically authorizing execution (and, as appropriate, such other writs as a writ of possession or an order of sale) to satisfy the judgment. Some clerks will not issue writs of execution without such language.

§ 20.15 Finality of Judgment

For a judgment to be final, it must dispose of all parties and claims in the case. Farm Bureau County Mutual Insurance Co. v. Rogers, 455 S.W.3d 161, 163 (Tex. 2015) (per curiam) (“the language of a judgment can make it final, even though it should have been interlocutory, if [the] language expressly disposes of all claims and all parties”) (quoting Lehmann v. Har-Con Corp., 39 S.W.3d 191, 200 (Tex. 2001); Ford v. Exxon Mobil Chemical Co., 235 S.W.3d 615, 617 (Tex. 2007) (per curiam). The manner in which a judgment is reviewed for finality depends on whether or not the judgment followed a conventional trial, that is, a bench trial or a jury trial. Generally, if a judgment is rendered after a conventional trial on the merits, it will be presumed, for appeal purposes, that the court intended to and did dispose of all parties and issues. Vaughn v. Drennon, 324 S.W.3d 560, 562–63 (Tex. 2010) (per curiam); Moritz v. Preiss, 121 S.W.3d 715, 718–19 (Tex. 2003); Good v. Baker, 339
S.W.3d 260, 265 (Tex. App.—Texarkana 2011, pet. denied). Hence, no language of finality is required in a judgment following a conventional trial. Nonetheless, prudent practice dictates that language of finality should be included in such a judgment.

If, on the other hand, the judgment did not follow a conventional trial, but instead was a default judgment, a summary judgment, a nonsuit, a determination of a plea to the jurisdiction, a plea in abatement, a dismissal for want of prosecution, or similar order, the standard is different. In such cases, the judgment or order is final for purposes of appeal if, and only if, it either actually disposes of all claims and parties before the court, regardless of its language, or states with unmistakable clarity that it is a final judgment as to all claims and all parties. A judgment or order does not dispose of all claims and parties merely because it is titled “final” or because the word “final” appears elsewhere in the judgment or order, or because it awards costs. Nor does a judgment or order completely dispose of a case merely because it states that it is appealable; even interlocutory orders may sometimes be appealable. The inclusion of a “Mother Hubbard” clause (“all relief not granted is denied” or similar language) does not indicate that a judgment rendered without a conventional trial is final for purposes of appeal. Farm Bureau, 455 S.W.3d at 163; Lehmann, 39 S.W.3d at 203–04 (overruling Mafrige v. Ross, 866 S.W.2d 590 (Tex. 1993)). See also Bovee v. Houston Press LLP, No. 10-16-00051-CV, 2016 WL 1274755, at *1–2 (Tex. App.—Waco Mar. 31, 2016, no pet.) (mem. op.) (order entitled “Final Judgment” and including the language that “All relief not expressly granted herein is denied” was not a final judgment; it was clear that the order did not adjudicate all claims); Youngblood & Associates, P.L.L.C. v. Duhon, 57 S.W.3d 63, 65 (Tex. App.—Houston [14th Dist.] 2001, no pet.) (order entitled “final summary judgment” that included “Mother Hubbard” clause did not dispose of all claims and parties and was therefore not final appealable order).

For a judgment or order to be final, there must be some clear indication that the trial court intended the judgment or order to completely dispose of the entire case. Farm Bureau, 455 S.W.3d at 163; Lehmann, 39 S.W.3d at 205. “A statement like ‘This judgment finally disposes of all parties and all claims and is appealable,’ would leave no doubt about the court’s intention.” Lehmann, 39 S.W.3d at 206. But see Texas Political Subdivision v. Pharr San Juan Alamo I.S.D., No. 13-13-00691-CV, 2015 WL 4141217, at *2–3 (Tex. App.—Corpus Christi July 9, 2015, no pet.) (mem. op.) (order entitled “Final Order” did not dispose of claims for attorney fees and was therefore not final despite the inclusion of the following language: “All relief requested in this case and not expressly granted is denied. This instrument is a final and appealable Order disposing of all parties and claims herein.”).

[Sections 20.16 through 20.20 are reserved for expansion.]

II. Default Judgment

§ 20.21 Default Judgment in General

A defendant who does not file a timely response to a petition risks entry of default judgment against him. At any time after a defendant is required to answer, the plaintiff may in turn take judgment by default against such defendant if he has not previously filed an answer, provided the return of service has been on file with the clerk for the required length of time required by rule. Tex. R. Civ. P. 107(h), 239. See also Gentry v. Gentry, 550 S.W.2d 167, 167 (Tex. Civ. App.—Austin 1977, no writ) (default judgment reversed when granted on same day return filed).

Practice Note: The mechanics of obtaining a default judgment vary from court to court. Some courts allow a default judgment to be taken after 10:00 A.M. on appearance day simply by presenting the default judgment in person. Other courts require that a default judgment be filed and submitted to the court on a submission docket without oral hearing. Still others require
that a motion for default judgment be filed and set either on a submission docket or for oral hearing. The practitioner should review the local rules for the county and the particular court before seeking the default judgment. If there are any potential problems with the default judgment, for example the record is unclear as to effective service, the practitioner should file a motion for default judgment and attach to it the evidence that resolves the problem and clarifies the record.

§ 20.22 Return on File for Ten Days

For a default judgment to be granted, the return of service must have been on file for ten days before judgment, excluding the day of filing and the day of judgment. *Gentry v. Gentry*, 550 S.W.2d 167 (Tex. Civ. App.—Austin 1977, no writ); *Tex. R. Civ. P. 107, 239*. Under rule 103, citation may be served, and under rule 107 returned, by any person at least eighteen years old who is authorized by law or court order to serve citations. The return of service must be signed by such an authorized person, and if signed by a person other than a sheriff, constable, or clerk of the court, the return must either be verified or be signed under penalty of perjury. *Tex. R. Civ. P. 107(e)*. A return signed under penalty of perjury must include the statement prescribed in *Tex. R. Civ. P. 107(e)*.

§ 20.23 Certificate of Last Known Mailing Address

At or immediately before rendition of an interlocutory or final default judgment, the prevailing party or his attorney must certify to the clerk in writing the last known mailing address of the party against whom the judgment is taken. Immediately after the judgment is signed, the clerk must mail written notice to the party against whom the judgment was rendered at the address shown in the certificate. *Tex. R. Civ. P. 239a*. See form 20-2 in this chapter for a certificate of last known mailing address.

§ 20.24 Compliance with Servicemembers Civil Relief Act

If the defendant has defaulted in appearing, before entering judgment the plaintiff must file an affidavit, commonly referred to as a nonmilitary affidavit, “stating whether or not the defendant is in military service and showing necessary facts to support the affidavit” or “stating that the plaintiff is unable to determine whether or not the defendant is in military service.” *50 U.S.C. § 3931(b)(1)*. The failure to file such an affidavit renders a default judgment voidable if the record reflects that the defendant was in military service. *Goshorn v. Brown*, No. 14-02-00852-CV, 2003 WL 22176976, at *3 (Tex. App.—Houston [14th Dist.] Sept. 23, 2003, no pet.) (mem. op.). If it appears that the defendant is in military service, the court may not enter a judgment without appointing an attorney to represent the defendant. *50 U.S.C. § 3931(b)(2)*. If the court is unable to determine whether the defendant is in military service, the court may require the plaintiff to file a bond to indemnify the defendant against any loss he may suffer by reason of the judgment should it thereafter be set aside. *50 U.S.C. § 3931(b)(3)*. There are no Texas cases, statutes, or rules on this requirement, and it is not consistently enforced throughout the state. The Department of Defense Manpower Data Center (DMDC) hosts a Servicemembers Civil Relief Act website that will provide the current active military status of an individual. To obtain certificates of service or nonservice, the practitioner can access the public website at [www.sera.dmde.osd.mil](http://www.sera.dmde.osd.mil). The website is of relatively limited value without a Social Security number. Social Security numbers may be obtained through the use of various services, such as [TLO.com](http://www.tlo.com) or [Accurint.com](http://www.accurint.com). There is no charge for a certificate. The certificate should then be attached to the nonmilitary affidavit. If there is insufficient personal information to use this site, an individual’s active duty status may be verified through the military services. Contact information for each service headquarters is listed on the Department of Defense website at [www.defense.gov](http://www.defense.gov).

See form 20-3 in this chapter for a nonmilitary affidavit. See section 2.78:9 in this manual for additional discussion of default judgments against service members.
§ 20.25 Citation

See chapter 16 of this manual regarding citation and service.

§ 20.26 Damages and Record

§ 20.26:1 Liquidated Damages

Damages will be assessed by the court in a default judgment “if the claim is liquidated and proved by an instrument in writing.” Tex. R. Civ. P. 241. Damages may not be assessed without presenting evidence unless the claim is liquidated—that is, if the amount due can with sufficient certainty be calculated by the court solely from the instrument sued on and the factual, as opposed to conclusory, allegations of the petition. Fears v. Mechanical & Industrial Technicians, 654 S.W.2d 524, 530 (Tex. App.—Tyler 1983, writ ref’d n.r.e.); Burrows v. Bowden, 564 S.W.2d 474, 475 (Tex. Civ. App.—Corpus Christi 1978, no writ); see Michael Pohl & David Hittner, Judgments by Default in Texas, 37 Sw. L.J. 421, 436 (1983).

§ 20.26:2 Unliquidated Damages

To support a default judgment, the court must hear sufficient evidence on all unliquidated damages. Holt Atherton Industries v. Heine, 835 S.W.2d 80, 83 (Tex. 1992); Tex. R. Civ. P. 243. See also Otis Elevator Co. v. Parmeelee, 850 S.W.2d 179, 181 (Tex. 1993) (trial court, on imposing case-determinative discovery sanctions, improperly awarded unliquidated damages without hearing evidence). A party seeking a default judgment should therefore always request a transcript be taken of the hearing. Unliquidated damages include the following:

1. Any damages not proved by an instrument in writing. See Tex. R. Civ. P. 243. Typically, a balance on a promissory note is a liquidated damage because the difference between the amount of indebtedness alleged to be due and the face amount of the note does not create ambiguity or raise a question of fact regarding payment credits. In re Northern Natural Gas Co., 327 S.W.3d 181, 187 (Tex. App.—San Antonio 2010, orig. proceeding). There may be situations, however, when the pleadings and written instrument are not sufficient to enable the court to make an accurate calculation of the amount due. See Irlbeck v. John Deere Co., 714 S.W.2d 54, 57 (Tex. App.—Amarillo 1986, writ ref’d n.r.e.) (neither notes nor pleadings showed credits or offsets to which defendant was allowed).

2. Attorney’s fees “actually incurred”: “Attorney’s fees are by their very nature unliquidated unless the exact amount is fixed by agreement.” Freeman v. Leasing Associates, 503 S.W.2d 406, 408 (Tex. Civ. App.—Houston [14th Dist.] 1973, no writ).

3. “Reasonable” attorney’s fees. Odom v. Pinkston, 193 S.W.2d 888, 891 (Tex. Civ. App.—Austin 1946, writ ref’d n.r.e.).

4. “Collection expenses” (in addition to attorney’s fees) if the written instrument does not fix the exact amount. Odom, 193 S.W.2d at 891. Note: some trial courts will not allow the recovery of additional attorney’s fees for postjudgment collection.

If a party is not present or represented by counsel when testimony is taken on damages the trial court must require the court reporter to make a record of the evidence. *Houston Pipe Coating Co. v. Houston Freightways*, 679 S.W.2d 42, 45 (Tex. App.—Houston [14th Dist.] 1984, writ ref’d n.r.e.). The plaintiff’s attorney should request the reporter’s presence if the court fails to do so. Otherwise, the defendant may seek a new trial on unliquidated damages on the ground that the testimony on which the judgment was based was not recorded, and consequently no statement of facts is available for review of the sufficiency of the evidence. *Houston Pipe Coating*, 679 S.W.2d at 45; see also *Rogers v. Rogers*, 561 S.W.2d 172, 173 (Tex. 1978) (former provisions of statute governing court reporter’s duty considered not of controlling significance). The rule that, absent a statement of facts, the appellate court must presume that the evidence was sufficient does not apply on direct review of a default judgment if no statement of facts is available. *Morgan Express, Inc. v. Elizabeth-Perkins, Inc.*, 525 S.W.2d 312, 314 (Tex. Civ. App.—Dallas 1975, writ ref’d); see also Michael Pohl & David Hittner, *Judgments by Default in Texas*, 37 Sw. L.J. 421 (1983).

§ 20.26:3  Pleadings

A default judgment must be in accord with the pleadings. It is impermissible in a default judgment to render judgment for damages in excess of the damages specifically pleaded. *Simon v. BancTexas Quorum, N.A.*, 754 S.W.2d 283, 286 (Tex. App.—Dallas 1988, writ denied).

§ 20.27  Judgment Nihil Dicit

Judgment nihil dicit, wherein no answer placing the merits in issue is on file, is a form of default judgment. *Stoner v. Thompson*, 578 S.W.2d 679, 683 (Tex. 1979). Although there is a difference between a no-answer default judgment and a judgment nihil dicit, they are so similar that the same rules generally apply to each with respect to the effect and validity of the judgment. In both instances the non-answering party has admitted the facts properly pleaded and the justice of the opponent’s claim, though a judgment nihil dicit carries a stronger confession than does a default judgment. *Stoner*, 578 S.W.2d at 682. But see *Roberts v. Mullen*, 446 S.W.2d 86, 89 (Tex. Civ. App.—Dallas 1969, writ ref’d n.r.e.) (such implied admission not always absolute and subject to rebuttal).

Judgment nihil dicit is usually limited to situations in which the defendant has entered some plea, usually dilatory, which has not placed the merits of the plaintiff’s case in issue, or the defendant has placed the merits in issue by filing an answer, but the answer has been withdrawn. *Frymire Engineering Co. v. Grantham*, 524 S.W.2d 680, 681 (Tex. 1975).

A party who permits a judgment nihil dicit implicitly confesses judgment and waives all errors in pleading or proof that are not fundamental or jurisdictional, except those that the record shows were not intended to be waived. *O’Quinn v. Tate*, 187 S.W.2d 241, 245 (Tex. Civ. App.—Texarkana 1945, writ ref’d).

A judgment nihil dicit must accord with the pleadings so that the amount and terms of the judgment are ascertainable by reference to the petition. *Mullen v. Roberts*, 423 S.W.2d 576, 579 (Tex. 1968). Although the rules of procedure do not address how to obtain a judgment nihil dicit, a motion for entry of such a judgment is an effective method. Alternatively, the party should consider filing a motion for summary judgment.

A judgment nihil dicit is at form 20-7 in this chapter.
Form 20-1

Some courts require a written motion before entertaining entry of default judgment.

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

Motion for Entry of Default Judgment

1. Parties. Movant is [name of plaintiff], Plaintiff, who moves the Court to enter a default judgment against [name of defendant], Defendant, pursuant to rule 239 of the Texas Rules of Civil Procedure.

2. Grounds. Plaintiff is entitled to be granted a default judgment against Defendant and as grounds would show the Court the following:
   
a. Defendant continues to be indebted to Plaintiff as specifically pleaded in Plaintiff’s original petition on file in this cause.

   Include the following if applicable.

b. Plaintiff has not repossessed the collateral and foreclosed its lien described in Plaintiff’s original petition.

   Continue with the following.

c. Defendant has been duly served with citation in this cause, and the citation with the officer’s return thereon has been on file with the clerk of this Court for ten days, exclusive of the day of filing and the day of judgment.

d. Defendant has neither answered nor appeared within the time allowed by law and has wholly defaulted.

3. Attachments. Plaintiff has attached the following documents to this motion:
a. Plaintiff’s Certificate of Last Known Mailing Address.

Include the following if the defendant is an individual.

b. Plaintiff’s Nonmilitary Affidavit.

Continue with the following.

c. Plaintiff’s Attorney’s Fee Affidavit.

4. Prayer. Plaintiff prays that the Court enter a default judgment in Plaintiff’s favor against Defendant for the relief prayed for in Plaintiff’s original petition and for all further relief to which Plaintiff may be entitled.

[Name]
Attorney for [name of movant]
State Bar No.:
[E-mail address]
[Address]
[Telephone]
[Telexcopier]

Prepare and attach a certificate of last known mailing address (form 20-2); if the defendant is an individual, a nonmilitary affidavit (form 20-3); and an attorney’s fees affidavit (form 20-4) and its exhibit(s). Prepare a default judgment (form 20-5 or form 20-6).
Certificate of Last Known Mailing Address

I certify that the last known mailing address of [name of defendant], Defendant, against whom judgment is taken in the above-entitled and -numbered cause, is [mailing address, city, state, zip code].

[Name]
Attorney for [name of plaintiff]
State Bar No.:
[E-mail address]
[Address]
[Telephone]
[Telexcopier]

Attach to the motion for entry of default judgment (form 20-1).
Nonmilitary Affidavit

Form 20-3

If the defendant is an individual, this affidavit must be filed before a default judgment may be entered. There are no Texas cases, statutes, or rules on this requirement, and it is not consistently enforced throughout the state. See section 20.24 in this chapter. The affidavit may be signed by the plaintiff or the plaintiff’s attorney, but the party signing the affidavit should not swear to any facts about which he does not have personal knowledge. The Servicemembers Civil Relief Act imposes penalties including fines, imprisonment, or both on a person who knowingly makes or uses a false affidavit concerning a defendant’s military service. 50 U.S.C. § 3912(c). See the caveat at section 19.17:3 in this manual.

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

Nonmilitary Affidavit

BEFORE ME, the undersigned authority, on this day personally appeared [name of affiant], who swore on oath that the following facts are true:

“I am [Plaintiff/attorney of record for Plaintiff] in the above-entitled and -numbered cause. To my knowledge, based on a review of records related to this case [include if applicable: , the attached Military Status Report from the Department of Defense Manpower Data Center,] and my involvement in this case, [name of defendant], Defendant, was not in military service when this suit was filed, has not been in military service at any time since then, and is not now in any military service of the United States of America.”

[Name of affiant]
Affiant

SIGNED under oath before me on ________________________________.

__________________________________________________________________________________________________________________________

Notary Public, State of Texas

Attach to the motion for entry of default judgment (form 20-1).
Attach military status report if applicable.
Affidavit of [name of attorney] [for Attorney’s Fees]

Form 20-4

When appropriate, attach supporting attorney’s fees documentation as exhibits. The practitioner should review recent opinions from the Texas Supreme Court to ensure that the required degree of specificity is included in the attorney’s fees affidavit. See Long v. Griffin, 442 S.W.3d 253 (Tex. 2014), and El Apple I Ltd. v. Olivas, 370 S.W.3d 757 (Tex. 2012).

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

Affidavit of [name of attorney] [for Attorney’s Fees]

BEFORE ME, the undersigned authority, on this day personally appeared [name of affiant], who swore under oath that the following facts are true:

“My name is [name of attorney]. I am more than eighteen years of age, of sound mind, and fully competent to make this affidavit. I am the attorney of record for Plaintiff in the above-styled and -numbered cause, and in that capacity I have personal knowledge of the matters set forth below.

“I am a graduate of [specify undergraduate institution and degree]. I am a graduate of [specify legal education]. I have been licensed to practice law in the state of Texas since [date]. I am admitted to practice before [specify court[s]].

“[List any board certifications.]

“[List any professional memberships and/or professional activities.]

“Presently, I am employed by [name of law firm], a law firm having its principal place of business in [city], Texas. I have been with the firm since [date]. My prior employment history as an attorney is as follows: [specify].
“To the extent that I have specialized legal knowledge, it is in the areas of [specify]. My practice, throughout the time that I have been licensed, has included the representation of creditors in suits to collect debts. I am familiar with the types of fees usually and customarily charged in cases of this type in [city, county] County, Texas. It is my testimony that an hourly rate of $[amount] per hour is a reasonable and necessary rate in [city, county] County, Texas, for an attorney with my experience and expertise.

“The attached Exhibit [exhibit number/letter] is a summary of my time in this case before the default judgment hearing. It is taken from the original records, of which I am a custodian, of [name of law firm], and it is a summary of records kept in the usual course of business. The records are [specify, e.g., electronic timeslips] entered at or near the time of the events they describe by a person with knowledge of those events. Specifically, they are records of my time in this case, and I am the person who made the entries. It is a part of the regular course of business of [name of law firm] to make and keep such records.

“I have reviewed the summary of my time in this case, and I find that all the work I have performed in this case has been reasonable and necessary. My fees in the case are reasonable and necessary if considered in light of the following factors:

“1. The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform legal services properly: [describe factor].

“2. The likelihood that the acceptance of this case has precluded and will preclude me from accepting other employment: [describe factor].

“3. The fees customarily charged in this locality for similar legal services: [describe factor, e.g., the fees charged by me are usual and customary in [city, county] County, Texas, for a case of this type involving the issues before the Court. A reasonable hourly rate in this matter would be $[amount] per hour. I have expended [number] hours in this matter and anticipate expending an additional [number] hours in postjudgment collection.]
“4. The amount involved and the results obtained: [describe factor].

“5. Time limitations imposed by my client or the circumstances: [describe factor].

“6. The nature and length of my professional relationship with my client: [describe factor].

“7. Any experience, reputation, or ability that I may have: [describe factor].

“8. Whether the fee is fixed or contingent: [describe factor].

“It is further my opinion that, if a default judgment in this case were to be appealed, it would be reasonable and necessary for Plaintiff to incur the following additional fees: $[amount] for the time to be incurred in making or responding to an appeal or an application for writ of error to the court of appeals and arguing such an appeal; $[amount] for the time to be incurred in making or responding to an application for writ of error to the Texas Supreme Court; and an additional $[amount] if any such application for writ of error were granted and oral argument had to be made before the Texas Supreme Court.

“The foregoing matters are, within my personal knowledge, true and correct.”

__________________________________________________________________________________________________________________________ ...

[Name of affiant]
Affiant

SIGNED under oath before me on ________________________________.

__________________________________________________________________________________________________________________________ ...

Notary Public, State of Texas

[Attach to the motion for entry of default judgment (form 20-1).]
Form 20-5

For a list of some requisites that should be met before a default judgment is obtained, see sections 20.22 through 20.26 in this chapter. See also sections 20.10 and 20.11 on judgment interest. See section 1.29 in this manual for a discussion of attorney’s fees for appellate proceedings.

Default Judgment

[Providing for Additional Attorney’s Fees for Unsuccessful Appeals]

At the hearing on this cause, Plaintiff appeared through his attorney of record. Defendant, although duly cited to appear and answer herein, has failed to file an answer within the time allowed by law. The citation with the officer’s return thereon has been on file with the clerk of this Court for ten days, exclusive of the day of filing and the day of judgment.

The Court has considered the pleadings and records on file in this cause and the evidence and is of the opinion that judgment should be rendered for Plaintiff.

It is accordingly ADJUDGED that [name of plaintiff], Plaintiff, recover from [name of defendant], Defendant, judgment for—

1. $[amount] as the principal amount due;

2. $[amount] as interest on the principal amount to the date of judgment;

3. $[amount] as attorney’s fees for services rendered through the trial of this case;

4. $[amount] as additional attorney’s fees if Defendant files an appeal in the court of appeals that is ultimately unsuccessful, $[amount] as additional attorney’s fees if Defendant files a petition for review in the Supreme Court of Texas that is ultimately denied, and $[amount] as additional attorney’s fees if Defendant’s petition for review is granted but relief is not ultimately granted to Defendant;
5. $[\text{amount}]$ for costs of court; and

6. interest at the rate of $[\text{percent}]$ percent per year on the total judgment from the date of judgment until paid.

Include foreclosure language if appropriate (see form 20-16).
Continue with the following.

It is ORDERED that Plaintiff shall have all writs of execution and other process necessary to enforce this judgment.

This judgment finally disposes of all parties and all claims and is appealable.

SIGNED on ________________________________.

__________________________________________________________________________________________________________________________ ... __________________________________________________________________________________________________________________________

JUDGE PRESIDING

APPROVED AS TO FORM:

__________________________________________________________________________________________________________________________ ... __________________________________________________________________________________________________________________________

[Name]
Attorney for [\text{name of plaintiff}]
State Bar No.:
[E-mail address]
[Address]
[Telephone]
[Telexcopier]

__________________________________________________________________________________________________________________________ ... __________________________________________________________________________________________________________________________

[Name]
Attorney for [\text{name of defendant}]
State Bar No.:
[E-mail address]
[Address]
[Telephone]
[Telexcopier]
Form 20-6

For a list of some requisites that should be met before a default judgment is obtained, see sections 20.22 through 20.26 in this chapter. See also sections 20.10 and 20.11 on judgment interest. See section 1.29 in this manual for a discussion of attorney’s fees for appellate proceedings.

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

Default Judgment
[Remittitur]

At the hearing on this cause, Plaintiff appeared through his attorney of record. Defendant, although duly cited to appear and answer herein, has failed to file an answer within the time allowed by law. The citation with the officer’s return thereon has been on file with the clerk of this Court for ten days, exclusive of the day of filing and the day of judgment.

The Court has considered the pleadings and records on file in this cause and the evidence and is of the opinion that judgment should be rendered for Plaintiff.

It is accordingly ADJUDGED that [name of plaintiff], Plaintiff, recover from [name of defendant], Defendant, judgment for—

1. $[amount] as the principal amount due;

2. $[amount] as interest on the principal amount to the date of judgment;

3. $[amount] as attorney’s fees; however, if Defendant does not appeal this judgment to the court of appeals and time for appeal to that court has expired, Defendant shall be entitled to a remittitur of $[amount] against the judgment for attorney’s fees; and if Defendant does not appeal from the court of appeals to the Supreme Court of Texas and time for that appeal has expired, Defendant shall be entitled to a remittitur of $[amount] against the judgment for attorney’s fees;
4. $[\text{amount}]$ for costs of court; and

5. interest at the rate of $[\text{percent}]$ percent per year on the total judgment from the date of judgment until paid.

Include foreclosure language if appropriate (see form 20-16). Continue with the following.

It is ORDERED that Plaintiff shall have all writs of execution and other process necessary to enforce this judgment.

This judgment finally disposes of all parties and all claims and is appealable.

SIGNED on ________________________________.

JUDGE PRESIDING

APPROVED AS TO FORM:

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

[Name]
Attorney for [name of defendant]
State Bar No.:
[E-mail address]
[Address]
[Telephone]
[Telecopier]
Form 20-7

For a list of some requisites that should be met before a judgment nihil dicit is obtained, see sections 20.22 through 20.27 in this chapter. See also sections 20.10 and 20.11 on judgment interest. Some courts require a motion for entry of a judgment nihil dicit. See section 1.29 in this manual for a discussion of attorney’s fees for appellate proceedings.

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

Judgment Nihil Dicit

At the hearing on this cause, Plaintiff appeared through his attorney of record. Defendant, although duly cited to appear and answer herein, has filed an answer but [that answer does not join issue with Plaintiff’s claim on the merits/has withdrawn the answer before trial].

The Court has considered the pleadings and records on file in this cause and the evidence and is of the opinion that judgment should be rendered for Plaintiff.

It is accordingly ADJUDGED that [name of plaintiff], Plaintiff, recover from [name of defendant], Defendant, judgment for—

1. $[amount] as the principal amount due;

2. $[amount] as interest on the principal amount to the date of judgment;

3. $[amount] as additional attorney’s fees if Defendant files an appeal in the court of appeals that is ultimately unsuccessful, $[amount] as additional attorney’s fees if Defendant files a petition for review in the Supreme Court of Texas that is ultimately denied, and $[amount] as additional attorney’s fees if Defendant’s petition for review is granted but relief is not ultimately granted to Defendant;

4. $[amount] for costs of court; and
5. interest at the rate of [percent] percent per year on the total judgment from the date of judgment until paid.

Include foreclosure language if appropriate (see form 20-16). Continue with the following.

It is ORDERED that Plaintiff shall have all writs of execution and other process necessary to enforce this judgment.

This judgment finally disposes of all parties and all claims and is appealable.

SIGNED on ________________________________ .

__________________________________________________________________________________________________________________________ ... __________________________________________________________________________________________________________________________

JUDGE PRESIDING

APPROVED AS TO FORM:

__________________________________________________________________________________________________________________________ ... __________________________________________________________________________________________________________________________

[Name]
Attorney for [name of plaintiff]
State Bar No.:
[E-mail address]
[Address]
[Telephone]
[Telex number]

__________________________________________________________________________________________________________________________ ... __________________________________________________________________________________________________________________________

[Name]
Attorney for [name of defendant]
State Bar No.:
[E-mail address]
[Address]
[Telephone]
[Telex number]
Prepare and file a certificate of last known mailing address (form 20-2) and, if the defendant is an individual, a nonmilitary affidavit (form 20-3). See the affidavit for attorney’s fees (form 20-4).
This form may be used for a final summary judgment disposing of all parties and issues. For other summary judgment forms, see forms 20-9 (partial summary judgment) and 20-10 (judgment after trial of some issues) in this chapter. For a motion for summary judgment, see form 19-9 in this manual. See also sections 20.10 and 20.11 on judgment interest. See section 1.29 for a discussion of attorney’s fees for appellate proceedings.

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

Final Summary Judgment

On this date, the Court considered Plaintiff’s Motion for Summary Judgment. [Recite appearances, e.g., All parties appeared through their attorneys of record.]

The Court has considered the motion; the response, if any; the pleadings and official records on file in this cause; the evidence; and the arguments of counsel and finds that there is no genuine issue about any material fact and that Plaintiff is entitled to judgment as a matter of law.

It is accordingly ADJUDGED that [name of plaintiff], Plaintiff, recover from [name of defendant], Defendant, judgment for—

1. $[amount] as the principal amount due;

2. $[amount] as interest on the principal amount to the date of judgment;

3. $[amount] as additional attorney’s fees if Defendant files an appeal in the court of appeals that is ultimately unsuccessful, $[amount] as additional attorney’s fees if Defendant files a petition for review in the Supreme Court of Texas that is ultimately denied, and $[amount] as additional attorney’s fees if Defendant’s petition for review is granted but relief is not ultimately granted to Defendant;
4. $[amount] for costs of court; and

5. interest at the rate of [percent] percent per year on the total judgment from the date of judgment until paid.

Include foreclosure language if appropriate (see form 20-16). Continue with the following.

It is ORDERED that Plaintiff shall have all writs of execution and other process necessary to enforce this judgment.

This judgment finally disposes of all parties and all claims and is appealable.

SIGNED on ________________________________.

__________________________________________________________________________________________________________________________

JUDGE PRESIDING

APPROVED AS TO FORM:

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

[Name]
Attorney for [name of defendant]
State Bar No.:
[E-mail address]
[Address]
[Telephone]
[Telecopier]
Partial Summary Judgment

At the hearing on Plaintiff’s Motion for Summary Judgment in this cause, [recite appearances, e.g., all parties appeared through their attorneys of record].

Having examined the pleadings and the evidence before it and having interrogated counsel, the Court has ascertained that some material facts are actually and in good faith controverted and that the following material facts exist without substantial controversy: [state facts].

It is accordingly ORDERED that a trial be held in this cause and that the facts specified above be deemed established at that trial.

SIGNED on ________________________________.

__________________________________________________________________________________________________________________________ ... __________________________________________________________________________________________________________________________

JUDGE PRESIDING
APPROVED AS TO FORM:

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

[Name]
Attorney for [name of defendant]
State Bar No.:
[E-mail address]
[Address]
[Telephone]
[Telecopier]
Form 20-10

This form may be used for the occasional situation in which the court disposes of some matters by summary judgment and resolves controverted issues (usually attorney’s fees) by later trial (see section 19.52 in this manual). If the controverted issues were not tried immediately after the hearing on the motion for summary judgment, the judge should have signed an interlocutory “partial summary judgment” (form 20-9), which will be replaced by this final judgment. For a motion for summary judgment, see form 19-9. See sections 20.10 and 20.11 on judgment interest. See section 1.29 for a discussion of attorney’s fees for appellate proceedings.

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

Final Summary Judgment

At the hearing on Plaintiff’s Motion for Summary Judgment in this cause, [recite appearances, e.g., all parties appeared through their attorneys of record].

On [date], the Court entered its interlocutory summary judgment after it examined the pleadings and evidence before it, interrogated counsel, and found that there were no genuine issues of material fact concerning [summarize material fact areas, e.g., the fact of Defendant’s debt to Plaintiff and the amount of principal and interest owed] and that Plaintiff was entitled to judgment as a matter of law on these issues. Thereafter, a trial was held on the remaining genuine issues of material fact regarding [summarize controverted material fact areas, e.g., the amount of attorney’s fees for which Defendant should be liable to Plaintiff]. All parties appeared through their attorneys of record and announced that they were ready for trial.

Because a jury was not requested, the Court decided all fact questions at the trial. The Court considered the pleadings and records on file in this cause, the evidence, and the arguments of counsel and is of the opinion that judgment should be rendered for Plaintiff on the controverted facts.

It is accordingly ADJUDGED that [name of plaintiff], Plaintiff, recover from [name of defendant], Defendant, judgment for—
1. $[\text{amount}]$ as the principal amount due;

2. $[\text{amount}]$ as interest on the principal amount to the date of judgment;

3. $[\text{amount}]$ as additional attorney’s fees if Defendant files an appeal in the court of appeals that is ultimately unsuccessful, $[\text{amount}]$ as additional attorney’s fees if Defendant files a petition for review in the Supreme Court of Texas that is ultimately denied, and $[\text{amount}]$ as additional attorney’s fees if Defendant’s petition for review is granted but relief is not ultimately granted to Defendant;

4. $[\text{amount}]$ as costs of court; and

5. interest at the rate of $[\text{percent}]$ percent per year on the total judgment from the date of judgment until paid.

Include foreclosure language if appropriate (see form 20-16). Continue with the following.

It is ORDERED that Plaintiff shall have all writs of execution and other process necessary to enforce this judgment.

This judgment finally disposes of all parties and all claims and is appealable.

SIGNED on ________________________________.

JUDGE PRESIDING

APPROVED AS TO FORM:
[Name]
Attorney for [name of plaintiff]
State Bar No.:
[E-mail address]
[Address]
[Telephone]
[Telecopier]

[Name]
Attorney for [name of defendant]
State Bar No.:
[E-mail address]
[Address]
[Telephone]
[Telecopier]
[Caption. See § 3 of the Introduction in volume 1 of this manual.]

Agreed Judgment

At the hearing on this cause, the attorneys for Plaintiff and Defendant announced to the Court that Plaintiff and Defendant have agreed that judgment should be rendered for Plaintiff as requested.

The Court has considered the pleadings and records on file in this cause and the evidence and is of the opinion that judgment should be rendered for Plaintiff as agreed.

It is accordingly ADJUDGED that [name of plaintiff], Plaintiff, recover from [name of defendant], Defendant, judgment for—

1. $[amount] as the principal amount due;

2. $[amount] as interest on the principal amount to the date of judgment;

3. $[amount] as attorney’s fees;

4. $[amount] for costs of court; and

5. interest at the rate of [percent] percent per year on the total judgment from the date of judgment until paid.

Include foreclosure language if appropriate (see form 20-16). Continue with the following.

It is ORDERED that Plaintiff shall have all writs of execution and other process necessary to enforce this judgment.
This judgment finally disposes of all parties and all claims and is appealable.

SIGNED on ________________________________.

JUDGE PRESIDING

APPROVED AS TO FORM AND SUBSTANCE:

[Name]
Attorney for [name of plaintiff]
State Bar No.:
[E-mail address]
[Address]
[Telephone]
[Telexcopier]

[Name]
Attorney for [name of defendant]
State Bar No.:
[E-mail address]
[Address]
[Telephone]
[Telexcopier]
Form 20-12

For discussion of reducing a foreign judgment to a Texas judgment and the simplified filing procedure available under the Uniform Enforcement of Foreign Judgments Act, see section 14.32 and forms 14-12 and 14-13 in this manual. See sections 20.10 and 20.11 on judgment interest. See section 1.29 for a discussion of attorney’s fees for appellate proceedings.

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

Judgment  
[on Foreign Judgment]

At the hearing on this cause, [recite appearances, e.g., all parties appeared through their attorneys of record]. The Court has considered the pleadings and official records on file in this cause and the evidence. It appears to the Court that Plaintiff is the owner of a final, valid, and subsisting judgment; that the judgment has not been satisfied; that the judgment was rendered by a court of general jurisdiction created under the laws of [name of state] and has been properly authenticated by the rendering jurisdiction; and that the judgment is entitled to be accorded full faith and credit by this Court. The Court is therefore of the opinion that judgment should be rendered for Plaintiff.

It is accordingly ADJUDGED that [name of plaintiff], Plaintiff, recover from [name of defendant], Defendant, judgment for—

1. $[amount] as the principal amount due;

2. $[amount] for all postjudgment costs incurred in the jurisdiction in which Plaintiff obtained the judgment that is the subject of this action;

3. $[amount] as interest on the foreign judgment from the date of that judgment until the date of judgment in this Court;
4. $[\text{amount}]$ as additional attorney’s fees if Defendant files an appeal in the court of appeals that is ultimately unsuccessful, $[\text{amount}]$ as additional attorney’s fees if Defendant files a petition for review in the Supreme Court of Texas that is ultimately denied, and $[\text{amount}]$ as additional attorney’s fees if Defendant’s petition for review is granted but relief is not ultimately granted to Defendant;

5. $[\text{amount}]$ for costs incurred in this Court; and

6. interest at the rate of $[\text{percent}]$ percent per year on this judgment in its entirety from the date of this judgment until paid.

It is ORDERED that Plaintiff shall have all writs of execution and other process necessary to enforce this judgment.

This judgment finally disposes of all parties and all claims and is appealable.

SIGNED on ________________________________.

__________________________________________________________________________________________________________________________ ... __________________________________________________________________________________________________________________________

JUDGE PRESIDING

APPROVED AS TO FORM:

[Name]
Attorney for [name of plaintiff]
State Bar No.:
[E-mail address]
[Address]
[Telephone]
[Telecopier]
[Name]
Attorney for [name of defendant]
State Bar No.:
[E-mail address]
[Address]
[Telephone]
[Telecopier]
Form 20-13

See form 20-14 in this chapter for a judgment based on a jury verdict and form 20-15 for a directed verdict judgment. See sections 20.10 and 20.11 on judgment interest. See section 1.29 in this manual for a discussion of attorney’s fees for appellate proceedings.

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

Judgment
[Bench Trial]

At the hearing on this cause, all parties appeared through their attorneys of record and announced that they were ready for trial. Because a jury was not requested, the Court decided all fact questions.

The Court has considered the pleadings and official records on file in this cause, the evidence, and the arguments of counsel and is of the opinion that judgment should be rendered for Plaintiff.

It is accordingly ADJUDGED that [name of plaintiff], Plaintiff, recover from [name of defendant], Defendant, judgment for—

1. $[amount] as the principal amount due;

2. $[amount] as interest on the principal amount to the date of judgment;

3. $[amount] as additional attorney’s fees if Defendant files an appeal in the court of appeals that is ultimately unsuccessful, $[amount] as additional attorney’s fees if Defendant files a petition for review in the Supreme Court of Texas that is ultimately denied, and $[amount] as additional attorney’s fees if Defendant’s petition for review is granted but relief is not ultimately granted to Defendant;

4. $[amount] for costs of court; and
5. interest at the rate of [percent] percent per year on the total judgment from the date of judgment until paid.

Include foreclosure language if appropriate (see form 20-16). Continue with the following.

It is ORDERED that Plaintiff shall have all writs of execution and other process necessary to enforce this judgment.

This judgment finally disposes of all parties and all claims and is appealable.

SIGNED on ________________________________.

JUDGE PRESIDING

APPROVED AS TO FORM:

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

[Name]
Attorney for [name of defendant]
State Bar No.:
[E-mail address]
[Address]
[Telephone]
[Telecopier]
Judgment [Based on Jury Verdict]

At the hearing on this cause, all parties appeared through their attorneys of record and announced that they were ready for trial.

A jury was duly accepted, impaneled, and sworn. The jury returned its verdict after hearing evidence, arguments of counsel, and the Court’s instructions and after receiving questions to be answered.

Based on the jury’s verdict, it is ADJUDGED that [name of plaintiff], Plaintiff, recover from [name of defendant], Defendant, judgment for—

1. $[amount] as the principal amount due;

2. $[amount] as interest on the principal amount to the date of judgment;

3. $[amount] as additional attorney’s fees if Defendant files an appeal in the court of appeals that is ultimately unsuccessful, $[amount] as additional attorney’s fees if Defendant files a petition for review in the Supreme Court of Texas that is ultimately denied, and $[amount] as additional attorney’s fees if Defendant’s petition for review is granted but relief is not ultimately granted to Defendant;

4. $[amount] as costs of court; and
5. interest at the rate of [percent] percent per year on the total judgment from the date of judgment until paid.

Include foreclosure language if appropriate (see form 20-16). Continue with the following.

It is ORDERED that Plaintiff shall have all writs of execution and other process necessary to enforce this judgment.

This judgment finally disposes of all parties and all claims and is appealable.

SIGNED on ________________________________.

__________________________________________________________________________________________________________________________ ...

JUDGE PRESIDING

APPROVED AS TO FORM:

__________________________________________________________________________________________________________________________ ...

[Name]
Attorney for [name of plaintiff]
State Bar No.:
[E-mail address]
[Address]
[Telephone]
[Telexcopier]

__________________________________________________________________________________________________________________________ ...

[Name]
Attorney for [name of defendant]
State Bar No.:
[E-mail address]
[Address]
[Telephone]
[Telexcopier]
Judgment [Based on Directed Verdict]

At the hearing on this cause, all parties appeared through their attorneys of record and announced that they were ready for trial.

A jury was duly accepted, impaneled, and sworn. After [Plaintiff/both sides] rested, Plaintiff moved for a directed verdict. The Court has considered the pleadings and official records on file in this cause, the evidence, and the arguments of counsel and is of the opinion that Plaintiff’s motion should be granted and that judgment should be rendered for Plaintiff as a matter of law.

It is accordingly ADJUDGED that [name of plaintiff], Plaintiff, recover from [name of defendant], Defendant, judgment for—

1. $[amount] as the principal amount due;

2. $[amount] as interest on the principal amount to the date of judgment;

3. $[amount] as additional attorney’s fees if Defendant files an appeal in the court of appeals that is ultimately unsuccessful, $[amount] as additional attorney’s fees if Defendant files a petition for review in the Supreme Court of Texas that is ultimately denied, and
$[amount] as additional attorney’s fees if Defendant’s petition for review is granted but relief is not ultimately granted to Defendant;

4. $[amount] for costs of court; and

5. interest at the rate of [percent] percent per year on the total judgment from the date of judgment until paid.

Include foreclosure language if appropriate (see form 20-16). Continue with the following.

It is ORDERED that Plaintiff shall have all writs of execution and other process necessary to enforce this judgment.

This judgment finally disposes of all parties and all claims and is appealable.

SIGNED on ________________________________.

JUDGE PRESIDING

APPROVED AS TO FORM:

[Name]
Attorney for [name of plaintiff]
State Bar No.:
[E-mail address]
[Address]
[Telephone]
[Teletypewriter]
[Name]
Attorney for [name of defendant]
State Bar No.:
[E-mail address]
[Address]
[Telephone]
[Telecopier]
Form 20-16

The following paragraph must be included in every judgment foreclosing a security interest or other lien, except judgments against executors, administrators, or guardians. See sections 20.9:3 and 20.9:5 in this chapter. The collateral should be described as explicitly as possible so that the levying officer will be able to identify it. The description should not differ materially from that in the petition.

Additional Language to Foreclose Lien

It is further ADJUDGED that the security interest of [name of plaintiff], Plaintiff, in [describe collateral] is foreclosed; that an order of sale shall issue to any sheriff or any constable in the state of Texas, directing him to seize and sell the collateral as under execution, in satisfaction of this judgment; and that, if the collateral cannot be found or if the proceeds of the sale are insufficient to satisfy the judgment, the officer shall take the money, or any balance thereof remaining unpaid, out of any property of [name of defendant], Defendant, as in the case of ordinary executions.
Form 20-17

This working spreadsheet is available as part of the Texas Collections Manual digital download and may be used to calculate total costs, including attorney’s fees and interest accrued at the time satisfaction of a judgment is made. There are two tabs in the spreadsheet—one uses compound interest and the other uses simple interest. It may be accessed at the URL provided to licensed users. The numbers included are examples; the practitioner should enter figures relevant to the case.

Costs and Interest Rate Calculator

Payoff and Interest Calculation

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<th>Date of Judgment</th>
<th>Prejudgment Interest</th>
<th>Postjudgment Interest</th>
</tr>
</thead>
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<td>Annual Int 655.00</td>
</tr>
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<td>Daily Int 1.32</td>
</tr>
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<tr>
<td>Postjudgment Rate</td>
<td>5.00%</td>
<td>Total Total Postjudgment Int</td>
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</tr>
<tr>
<td>Attorney’s Fee</td>
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<td>Total Judgment Amount</td>
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</tr>
<tr>
<td>Court Costs</td>
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<td></td>
</tr>
</tbody>
</table>

Payoff Date: 1/1/2017

Total Payoff Amount: $16,628.64

Payoff Amortization

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<th>Date</th>
<th>Payoff Amount</th>
<th>Date</th>
<th>Payoff Amount</th>
</tr>
</thead>
<tbody>
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Postjudgment Discovery

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§ 26.1 Purpose and Scope of Postjudgment Discovery

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

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

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

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


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

§ 26.2 Depositions

§ 26.2:1 Depositions Generally

It is often preferable to take the judgment debtor’s oral deposition instead of using written interrogatories, because questioning him in person allows the creditor immediately to ask additional questions based on the debtor’s responses. A subpoena or a notice duces tecum combines a documents request with the scheduled deposition. If substantial documents are expected, it may be more practical to first proceed with a request for production so the documents can be reviewed before the time the deposition is scheduled. The discussion in part II. in chapter 18 of this manual regarding pretrial depositions applies as well to postjudgment depositions. Postjudgment deposition notices and subpoenas with duces tecum language are at forms 26-1 through 26-3 in this chapter. Note that the subpoena must state the text of rule 176.8(a), which warns the witness that failure to obey the subpoena may be a contempt of court. Tex. R. Civ. P. 176.1(g). Rule 176.8(b) provides that a person served with a subpoena cannot be attached for failure to comply without proof by affidavit of the party requesting the subpoena or the
party’s attorney of record that all fees due the person by law were paid or tendered. Tex. R. Civ. P. 176.8(b). Civil Practice and Remedies Code section 22.001 provides for $10 per day for each day the witness “attends court,” and section 22.004 provides for $1 for production of documents. See Tex. Civ. Prac. & Rem. Code §§ 22.001, 22.004. The $10 per day witness fee requirement applies to subpoenas for depositions. Tex. Att’y Gen. Op. No. DM-342 (1995). These fees need to be paid when the subpoena is served so the typical procedure is to attach $11 in cash to the subpoena. See Tex. Civ. Prac. & Rem. Code § 22.001(b). The pattern interrogatories at forms 26-5 through 26-8 can serve as an outline for the scope of a deposition. See form 26-21 for a checklist of deposition topics.

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

§ 26.2:2 Nonstenographic Depositions

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

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

A nonstenographic deposition is especially useful for postjudgment discovery. It eliminates the expense of a court reporter; its scope and length are limited only by the general scope of discovery; and it affords, under color of civil procedure rule, a judicially enforceable means of meeting the debtor face-to-face to discuss the debt and the debtor’s ability to satisfy it. See section 18.26 in this manual for additional information regarding nonstenographic depositions.
§ 26.3 Requests for Production

§ 26.3:1 Scope of Requests

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

§ 26.3:2 Service of Requests and Responses

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

§ 26.4 Interrogatories

§ 26.4:1 Interrogatories Generally

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

§ 26.4:2 Service of Interrogatories

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

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

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

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

§ 26.6 Sanctions for Failure to Respond to Discovery

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

§ 26.7 Enforcement of Discovery Orders by Contempt

§ 26.7:1 Statutory Basis of Contempt

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

§ 26.7:2 Preliminary Considerations

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

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

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

Because of the trouble and expense involved in transferring an individual from one county to another, some courts will not order attachment of a person who is not within the county in which the court sits. If a defendant who is located in another county is held in contempt, attachment will require the coordinated efforts of sheriffs and constables in both counties. It is advisable to ascertain the costs involved and the logistics for attaching the defendant before proceeding with a motion for contempt involving an out-of-county defendant.
§ 26.7:3  Motion and Order to Compel as Preliminary to Contempt Action

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

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

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

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

§ 26.7:5  Contempt Judgment

It is well settled that to satisfy due-process requirements, both a written judgment of contempt and a written commitment order are necessary to imprison a person for civil constructive contempt of court. Ex parte Hernandez, 827 S.W.2d 858, 858 (Tex. 1992); Ex parte Barnett, 600 S.W.2d 252, 256 (Tex. 1980). A contempt judgment that confines the contemner until he complies with a previous court order should clearly state in what respect that order has been violated. Ex parte Proctor, 398 S.W.2d 917, 918 (Tex. 1966). It must be definite as to punishment, defining what is required of the contemner in order to purge himself of the contempt. Ex parte Kottwitz, 8 S.W.2d 508, 509–10 (Tex. 1928). Collection of attorney’s fees by contempt is not allowed and constitutes imprisonment for debt. The contempt judgment can provide for recovery of attorney’s fees but should not provide for payment as a condition of release. Ex parte Dolenz, 893 S.W.2d 677 (Tex. Civ. App.—Dallas 1995, orig. proceeding). See form 26-15 in this chapter for a contempt judgment.
It is rare that the court will place a defendant in jail, unless the defendant is openly disrespectful to the court or states that he has no intention of complying with the court’s order. Should the court choose to grant additional time to allow the defendant to comply with the discovery order, the best practice is to ask the court to recess the show cause hearing to allow the defendant to comply with the discovery order.

§ 26.7:6 Commitment Order

A person may not be imprisoned for contempt without a written order of commitment. Ex parte Martinez, 331 S.W.2d 209, 210 (Tex. 1960). The commitment order must clearly specify actions that the contemner must perform to gain release. Ex parte Hart, 520 S.W.2d 952, 954 (Tex. Civ. App.—Dallas 1975, no writ). To the extent that the punishment directed in a commitment order varies from the punishment directed by the contempt judgment, the commitment order is unauthorized and will not be enforced. See Ex parte Port, 674 S.W.2d 772, 777 (Tex. Crim. App. 1984) (when commitments directed punishment of incarceration, fine, and costs, whereas contempt judgments authorized only fine and costs, alleged contemners entitled to relief from portion of commitments directing incarceration), overruled on other grounds by Ex parte Edone, 740 S.W.2d 446 (Tex. Crim. App. 1987). Most courts will require a provision in the contempt judgment permitting the defendant to be released from jail on payment of a bond, conditioned that on or before a certain date he will comply with the requirements of the contempt judgment and that if he does not the bond will be forfeited and the defendant jailed under the contempt judgment. See form 26-16 in this chapter for a writ of attachment and commitment order to be issued by the clerk and transmitted to law enforcement. The defendant is typically held in jail until the judgment of contempt, writ of attachment, and commitment order can be issued and served. Drafts of the documents should be prepared before the contempt hearing. Fourteen and even three days have been held to be too long to be confined without a written commitment order. In re Stout, 367 S.W.3d 523, 524 (Dallas—2012, orig. proceeding) (fourteen-day delay too long, citing court’s ruling in In re White); In re White, No. 05-06-00318-CV, 2006 WL 1000228, at *1 (Tex. App.—Dallas Apr. 18, 2006, orig. proceeding) (three days too long).

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

If the defendant is held in contempt, he can be ordered incarcerated until he complies with the court’s orders. Ex parte Proctor, 398 S.W.2d 917, 918 (Tex. 1966); Ex parte Kottwitz, 8 S.W.2d 508, 509 (Tex. 1928). In addition to ordering indefinite commitment to coerce compliance, the district or county court can punish the defendant in contempt by a fine of not more than $500 ($100 in justice court), confinement in the county jail for not more than six months (three days in justice court), or both. Tex. Gov’t Code §§ 21.001, 21.002(b), (c), (e). A nonparty who fails to comply with discovery may be incarcerated for contempt. See Hennessy v. Marshall, 682 S.W.2d 340, 343 n.1 (Tex. App.—Dallas 1984, no writ). Although commitment to coerce compliance may be for an indefinite time, the contemner must have a means to purge himself and secure his release. Ex parte De Wees, 210 S.W.2d 145, 146–47 (Tex. 1948); In re Anderson, 604 S.W.2d 338, 339 (Tex. Civ. App.—Tyler 1980, no writ).

§ 26.7:8 Due-Process Requirements

Contempt may be civil or criminal, direct or constructive. See Ex parte Werblud, 536 S.W.2d 542, 545–46 (Tex. 1976). Contempt proceedings are quasi-criminal in nature, and alleged contemners are entitled to certain procedural safeguards, including reasonable notice, assistance of counsel, jury trial for serious contempt, and the requirement that if violation of a court order is alleged, the order must have been in writing, clear, and unambiguous. Ex parte Johnson, 654 S.W.2d 415, 420 & n.2 (Tex. 1983). If the alleged contempt carries a possible punitive deprivation of personal liberty, regardless of whether the pro-
ceeding is labeled “civil,” “criminal,” or “quasi-criminal,” due-process requirements apply. *Ex parte Johnson*, 654 S.W.2d at 420. A person charged with constructive criminal contempt must therefore be advised that he has the right to an attorney and the right to have an attorney appointed if he cannot afford one. *Ex parte Goodman*, 742 S.W.2d 536, 541 (Tex. App.—Fort Worth 1987, no writ). A contemnor must therefore be advised that he has the right to an attorney and the right to have an attorney appointed if he cannot afford one. A person charged with constructive criminal contempt must therefore be advised that he has the right to an attorney and the right to have an attorney appointed if he cannot afford one. *Ex parte Goodman*, 742 S.W.2d 536, 541 (Tex. App.—Fort Worth 1987, no writ). A contemnor “knowingly and intelligently” waived his right to counsel. *Ex parte Linder*, 783 S.W.2d 754, 759–61 (Tex. App.—Dallas 1990, no writ) (overruling *Ex parte Martinez*, 775 S.W.2d 455 (Tex. App.—Dallas 1989, no writ)). Persons charged with constructive criminal contempt are constitutionally guaranteed the right to be present at trial and to confront witnesses. If the alleged contemnor fails to personally appear at the show-cause hearing after personal service, it is the burden of the party moving for contempt to demonstrate affirmatively that the alleged contemnor’s absence at the contempt hearing was due to a voluntary, knowing, and intelligent waiver of his right to be present and participate at trial. Appearance by the attorney is not sufficient. If an individual is cited for criminal contempt and fails to appear at the appointed time and place, the proper procedure is to bring him into court under a capias or writ of attachment. *Johnson*, 654 S.W.2d at 421–22. In *Ex parte Alloju*, the court held that even though the defendant was assessed only coercive incarceration, the guidelines in *Johnson* should apply because the defendant could have been punished with punitive confinement. The court held that the trial court should not have proceeded on the contempt charges in his absence without a waiver of his rights. *Ex parte Alloju*, 907 S.W.2d 486, 487 (Tex. 1995) (orig. proceeding) (per curiam). Rarely will a waiver be available. Instead, a writ of attachment should issue and the defendant brought before the court. See form 26-17 in this chapter for an order for writ of attachment and form 26-18 for a writ of attachment.
Form 26-1

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

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

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

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

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

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

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

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

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

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

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

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

Select the following for a corporate defendant.

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

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

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

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

Continue with the following.

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

Include a certificate of service (form 19-1).
Notice of Intention to Take Oral Deposition in Aid of Judgment [Long] Form 26-2

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

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

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

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

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

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

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

[Name of judgment debtor] is instructed to produce at the time and place of the taking of this deposition, for use in conjunction with the taking of the deposition, the following:
1. All income tax and any other tax returns filed by [name of judgment debtor] for the last five years.

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

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

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

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

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

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

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

9. All documents that contain or refer in any way, directly or indirectly, to the names and addresses of persons who have served as bookkeepers or financial advisers for [name of judgment debtor] in the last five years.
10. All documents that refer in any way, directly or indirectly, to each person or entity to whom [name of judgment debtor] has paid, given, or conveyed any real or personal property of a value more than $200 in the last five years, not in the regular course of business.

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

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

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

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

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

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

17. All documents that refer in any way, directly or indirectly, to the anticipated amount of recovery in any legal cause of action, either real or anticipated, by [name of judgment debtor].
18. All documents that refer in any way, directly or indirectly, to each person who has served as the banker or entity that has served as the bank for [name of judgment debtor] in the last two years.

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

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

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

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

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

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

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

26. All documents that refer in any way, directly or indirectly, to any real estate that [name of judgment debtor] owns or in which [name of judgment debtor] claims an interest.
27. All documents that refer in any way, directly or indirectly, to any interest [name of judgment debtor] may have in any businesses, partnerships, corporations, or joint ventures.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

45. All check stubs, canceled checks, and account statements for the last two years for accounts in which [name of judgment debtor] claims an interest.
46. All documents that evidence any trusts and the assets contained therein for trusts of which [name of judgment debtor] is a grantor, beneficiary, or trustee.

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

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

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

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

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

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

53. All documents that refer to any divorce of [name of judgment debtor] within the last five years.
54. [Name of judgment debtor]’s stock certificates that evidence his ownership in [name of corporation] and all corporate records of that corporation.

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

Or

Include the following as applicable for a corporate defendant.

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

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

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

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

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

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

53. All documents filed with the Internal Revenue Service including but not limited to IRS Form 941, pertaining to quarterly earnings, tax withholdings, FICA withheld, and [name of judgment debtor]’s portion of FICA withheld.
54. All documents filed with the Texas Workforce Commission for unemployment tax paid to the state of Texas.

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

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

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

Continue with the following.

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

Include a certificate of service (form 19-1).
Form 26-3

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

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

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

Subpoena Duces Tecum
[Nonparty Witness, Postjudgment Deposition]

THE STATE OF TEXAS )

Style of suit: [style]

Cause No.: [number]

Court: [designation and location of court]

Party Issuing Subpoena: [name of plaintiff]

Party’s Attorney of Record: [name of attorney]

To: [name of witness or person producing items]

You are commanded to attend and give testimony at a deposition in the above-styled case on [date and time] at [address, city, state]. You must remain there until discharged by the court or the party summoning you. The deposition will be tape-recorded. The deposition will not also be recorded stenographically.
You are further commanded to produce and permit inspection and copying of the following documents or tangible things in your possession, custody, or control:

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

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

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

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

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

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

Failure by any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of the court from which the subpoena is issued or a district court in the county in which the subpoena is served, and may be punished by fine or confinement, or both.
Subpoena Duces Tecum [Nonparty Witness, Postjudgment Deposition]

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

Date: [date]

[Name of attorney]

Return

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

[Name of process server]
Form 26-4

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

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

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

Plaintiff’s Interrogatories in Aid of Judgment

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

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

Or

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

Continue with the following.

Pursuant to rules 197.2 and 621a of the Texas Rules of Civil Procedure, you are to answer the attached interrogatories separately, fully, in writing, and under oath. You should deliver a true copy of your answers to me within thirty days after the date of service of these interrogatories.
See form 18-14 for definitions that may be included.

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

Attach the interrogatories. Serve a copy of the interrogatories on the defendant and all other parties. Include a certificate of service (form 1-6).
Form 26-5

Pattern Interrogatories in Aid of Judgment—Individual Debtor
[Short Form]

1. State the following information.
   a. Full legal name; please also include any other names you have ever used:
   b. Date of birth:
   c. Social Security number:
   d. Driver’s license number and issuing state:
   e. Business address and telephone number:
      City, state, zip:
   f. Residence address and telephone number:
      City, state, zip:

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

3. Is any of the real property owned by you encumbered by any type of lien or real
   estate mortgage?
If so, then state, with respect to each parcel, a description of the property encumbered, the nature or type of encumbrance, the date of encumbrance, the name and address of the holder of the encumbrance, the amount of consideration received for the encumbrance, and the date and place of recordation of the encumbrance.

4. If you own your own home, please state the date of purchase, the purchase price, and the amount of the monthly payment. If you rent, state the amount of your monthly rent payment.
   a. Date of purchase:
   b. Purchase price:
   c. Monthly house/rent payment:

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

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

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

7. Please state the following information about each checking or savings account that you maintain:
   a. Name and address of institution:
   b. Account number:
   c. Authorized signatures:
   d. Present balance:
8. Have you deposited funds or had anyone deposit your funds in any savings, trust, or checking account, whether such account is personal, for business, or held jointly with someone else?

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

a. Name and address of institution:

b. Account number:

c. Name on account:

d. Authorized signatures:

e. Present balance:

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

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

10. Do you have any claims for money against others by reason of notes, personal loans, claims for damage, or the like?
If so, please give a complete description of each claim, the name and address of the person indebted to you, and the amount claimed due.

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

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

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

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

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

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

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

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

15. Do you have any accounts receivable, including any assigned or disposed of in the last year?
If so, please give the name and address of each person owing you and the amount due from each, the extent to which future accounts receivable were covered, and the amount of consideration received.

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

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

17. Do you have any debts?

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

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

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

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

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

20. Using the information on your income tax returns for the past two years, please state the source and amount of each item of income listed, the address of the IRS office where
the return was filed and the date of filing, the total income received for each year, amounts of any income received but not shown on any tax return, sources of other income shown on each tax return, and the date of receipt of income not shown on the tax returns.

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

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

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

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

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

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

<table>
<thead>
<tr>
<th>Expense</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Rent/house payment</td>
<td>$</td>
</tr>
<tr>
<td>Utilities</td>
<td>$</td>
</tr>
<tr>
<td>Telephone</td>
<td>$</td>
</tr>
<tr>
<td>Food</td>
<td>$</td>
</tr>
<tr>
<td>Car payment</td>
<td>$</td>
</tr>
<tr>
<td>Gas and oil</td>
<td>$</td>
</tr>
</tbody>
</table>
Other (please specify, for example, charge cards, child support, alimony):

______________________________ $______________________________
______________________________ $______________________________
______________________________ $______________________________
______________________________ $______________________________
______________________________ $______________________________
______________________________ $______________________________

TOTAL: $______________________________

[Name of debtor]

SIGNED under oath before me on ________________________________

______________________________
Notary Public, State of Texas
Form 26-6

Pattern Interrogatories in Aid of Judgment—Corporate Debtor
[Short Form]

1. State the following information about yourself.
   a. Full legal name:
   b. Business address:
   c. Residence address:

2. State the following information about the corporation.
   a. Exact corporate name:
   b. Each trade name or assumed name used by the corporation:

3. With respect to each person who has been a director of the corporation during the past four years, please state that person’s—
   a. Name:
   b. Residence address:

4. With respect to each person who has been an officer of the corporation during the past four years, please state that person’s—
   a. Name:
   b. Office held:
   c. Residence address:
5. Please state the following information about each of the holders of any stocks, bonds, or securities issued by the corporation.
   a. Name of holder:
   b. Residence address:

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

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

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

9. Please state the following information about each checking or savings account maintained by the corporation.
   a. Name and address of institution:
   b. Account number:
   c. Name on account:
   d. Authorized signatures:
   e. Present balance:

10. Please state the value of any stocks, bonds, or other securities of any class issued by any government, governmental agency, company, firm, or corporation owned by the corporation.
11. Please state the following information for each claim for money against others by reason of notes, claims for damages, casualty losses from fire, wind, theft, or otherwise, and accounts receivable or the like.

   a. Description of claim:

   b. Name and address of debtor:

   c. Amount claimed due:

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

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

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

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

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

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

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

18. If the corporation cannot start monthly payments within the next thirty days, please state why not.
19. Please state how much the corporation is able and willing to pay per month toward satisfaction of this debt.

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

21. Please state your daytime and nighttime telephone numbers.

__________________________________________________________________________________________________________________________ ... __________________________________________________________________________________________________________________________

[Name of debtor]

SIGNED under oath before me on ________________________________.

__________________________________________________________________________________________________________________________ ... __________________________________________________________________________________________________________________________

Notary Public, State of Texas
Form 26-7

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

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

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

Pattern Interrogatories in Aid of Judgment—Individual Debtor [Long Form]

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

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

     a. the full assumed or partnership name used;

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

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

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

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

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

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

* 5. Please state your Social Security number.

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

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

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

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

   a. your spouse’s full name; and

   b. your spouse’s complete present address.

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

   a. whether the former spouse is still living;

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

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

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

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

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

a. the date the agreement was signed;

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

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

13. Regarding your father, please state—

a. his full name;

b. whether he is now living;

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

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

e. if he is not living, the date of his death and his complete residential address when he died.
14. Regarding your mother, please state—
   a. her full name;
   b. whether she is now living;
   c. if she is alive, her complete present address;
   d. if she is alive, her present occupation and employer’s name; and
   e. if she is not living, the date of her death and her complete residential address when she died.

15. Regarding your spouse’s parents, for each parent please state—
   a. the parent’s full name;
   b. whether he or she is now living;
   c. the complete present address of the parent if living;
   d. the present occupation and employer’s name of the parent if living; and
   e. the date of death and complete residential address at death if the parent is deceased.

16. Do you have one or more children now living? If you do, for each child please state—
   a. the present full name of the child;
   b. whether he or she is now married;
   c. the date of birth of the child; and
d. the complete present residential address of the child.

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

a. his or her full name;

b. the person’s relationship to you; and

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

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

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

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

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

c. whether the residence is mortgaged;

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

e. the present balance of each mortgage;

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

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

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

a. the complete address of the residence;

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

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

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

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

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

a. the person’s full name;

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

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

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

e. the amount of any deposit made by the person to you.
* 22. What is your usual occupation?

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

   a. the nature of your occupation, in detail;

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

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

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

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

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

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

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

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

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

   c. if you work for commissions, the average monthly amount of your commissions;
d. the day of the week on which you are paid or the date or dates on which you are paid every month or the other regular day or dates on which you are paid; and

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

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

a. whether any income is from self-employment;

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

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

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

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

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

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

b. your relationship to the contributor;

c. the amount of each contribution and when it is normally made; and
d. the full name and complete address of each person or entity from whom the contributor acquires the assets to make the contribution.

27. Do you receive income or benefits from any source other than your employment or family contributions listed above? If you do, for each source please state—
   a. the full name and complete address of the source;
   b. the amount of the income or benefits;
   c. precisely when each payment is received throughout the year; and
   d. the full name, complete address, and telephone number of each person, financial institution, or other entity with which you deposit the payments.

28. For each of your expenses that recurs on a monthly or other regular basis and exceeds $100, please state—
   a. the frequency with which payments are made;
   b. the amount of each payment and either that this amount is the same for each payment or that this amount is an average for the past year;
   c. the full name and complete address of the recipient of the payments; and
   d. the full name and complete address of each person or entity from whom you acquire the assets to make payments.

29. For each of your spouse’s expenses that recurs on a monthly or other regular basis and exceeds $100, please state—
   a. the frequency with which payments are made;
b. the amount of each payment and either that this amount is the same for each payment or that this amount is an average for the past year;

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

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

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

a. the frequency with which payments are made;

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

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

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

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

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

a. the date and amount of the payment;

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

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

d. the date on which the payment was due;
e. the balance due the recipient after the payment was made; and

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

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

a. a complete description of the property or inheritance;

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

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

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

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

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

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

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

33. Within the last year, have you or your spouse received as a gift any money or property worth more than $100? If so, for each gift please state—
a. the full name, complete address, and telephone number of the person or entity that made the gift;

b. the date it was received;

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

d. a complete description of the gift;

e. the present estimated market value of the gift;

f. the gift’s present location; and

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

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

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

b. the size of the property;

c. a description of every improvement on the property;

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

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

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

g. Whether the property is encumbered; if it is, also please state—
(1) the nature of the encumbrance;

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

(3) the amount of the encumbrance;

h. the cost of the property, excluding improvements;

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

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

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

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

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

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

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

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

c. the full name and complete address of the person or entity holding the fund;
d. the present balance in the account; and

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

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

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

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

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

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

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

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

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

a. a complete description of the property removed;

b. the date it was removed;
c. why it was removed;

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

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

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

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

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

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

c. a detailed description of the property;

d. the value of the property;

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

f. the relationship between the person or entity holding the property and the person for whose benefit it is held; and
g. a detailed description of the arrangements under which the property is being held, including a description of the interest you, your spouse, or your family member has in the property.

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

   a. the full name and complete address of each person or entity to whom it was furnished;
   b. the date it was furnished;
   c. the contents of the statement, copying it verbatim or, if you will do so without a court order, attaching a copy of the statement to your answers; and
   d. the name(s) of the person(s) (you, your spouse, or both) who furnished the statement.

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

   a. the source and amount of each item of income listed;
   b. the total income received for each year, whether reported or not;
   c. the date each return was filed and the address of the Internal Revenue Service office where it was filed;
   d. the amount and source of each amount of income received but not shown on any of the returns that you are attaching to your answers; and
e. the full name and complete address of each person who worked on or helped prepare each return.

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

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

b. the policy number;

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

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

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

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

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

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

b. the number of the policy;

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

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

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

   a. the date the change took place;

   b. the name of the new beneficiary;

   c. the name of the old beneficiary; and

   d. why the change was made.

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

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

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

   b. the general condition of the vehicle;

   c. the complete address of its current location;

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

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

   f. the name(s) of the person(s) (you, your spouse, or both) having title to or an interest in the vehicle and the nature of the interest.
* 46. Do you or your spouse now own, claim any interest in, or have title to any firearm? If so, for each firearm please state—

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

b. the general condition of the firearm;

c. the complete address of its current location;

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

e. its present estimated market value; and

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

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

a. a complete description of the object;

b. the complete address of its current location;

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

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

e. the name(s) of the person(s) (you, your spouse, or both) having title to or an interest in the object and the nature of the interest.
*48. Do you or your spouse now own, claim any interest in, or have title to any collection, including but not limited to stamp collections and coin collections, that has not been described in a previous answer? If so, for each collection please state—

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

   b. the complete address of its current location;

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

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

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

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

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

   b. the general condition of the item;

   c. the complete address of its current location;
Pattern Interrogatories in Aid of Judgment—Individual Debtor [Long Form] Form 26-7

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

e. the present estimated market value of the item;

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

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

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

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

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

   b. the complete address of its present location;

   c. the present estimated market value of the animal;

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

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

   f. the amount of any lien against the animal and the full name and complete address of the holder or owner of the lien; and
g. the name(s) of the person(s) (you, your spouse, or both) having title to or an interest in the animal and the nature of the interest.

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

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

b. the complete address of its present location;

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

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

e. the present estimated market value of the item;

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

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

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

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

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

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

e. the present estimated market value of the aircraft;

f. the date and cost of its acquisition;

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

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

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

a. stocks, bonds, or other securities;

b. mortgages or liens on real or personal property;

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

d. judgments;

e. savings bonds or other government-issued bonds;

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

g. certificates of deposit, letters of credit, money orders, cashier’s checks, traveler’s checks, bank deposits, or escrow funds;
h. Keogh plans, individual retirement accounts, profit-sharing plans, deferred compensation plans, pension plans, prepaid funeral plans, retirement benefits, or other retirement plans;

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

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

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

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

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

c. the present value of the item;

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

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

*54. Do you or your spouse now own, claim any interest in, or have title to any personal property including but not limited to household effects, furniture, tools, appliances, clothing, and jewelry that is worth more than $500 and that has not been described in a previous answer? If so, for each item please state—
a. a complete description of the item, including as applicable the year, make, model, serial number, and other permanent identification numbers;

b. the complete address of its present location;

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

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

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

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

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

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

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

d. the date the debt is to be paid;

e. the date the debt was incurred; and

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

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

b. the complete address of its present location;

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

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

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

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

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

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

d. the date, manner, and cost of acquisition of the interest;
e. a detailed description of the interest;

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

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

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

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

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

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

a. a description of the relationship or interest;

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

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

d. the nature, amount, method, and date of payment of compensation received from the corporation by you or a family member at any time; and
e. the nature and extent of your or your family member’s duties or responsibilities in the relationship.

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

   a. the full name of the trust;

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

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

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

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

   f. the total amount presently held in trust;

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

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

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

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

   k. the date and period when trust disbursements are regularly made; and
1. the contents of every one of the trust’s tax returns for the last five years, copying the returns verbatim or, if you will do so without a court order, attaching copies of the returns to your answers.

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

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

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

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

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

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

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

   b. a description of the interest owned;

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

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

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

   a. a detailed description of all the property held in trust;
b. the full name and complete address of each beneficiary of the trust;

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

d. the date the trust was created; and

e. the full name of the trust.

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

a. the date the trust was created;

b. a description of the property contributed;

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

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

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

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

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

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

a. the full name of the account;

b. the kind of disposition;
c. the date of the disposition;

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

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

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

g. the amount of payment received in exchange; and

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

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

a. a full description of the property disposed of;

b. the date of the disposition;

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

d. the payment or other consideration received in exchange;

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

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

g. the name of the person(s) (you, your spouse, or both) who owned the property;
h. the estimated market value of the property when you or your spouse acquired it; and

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

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

   a. a full description of the property involved;

   b. the date of the disposition;

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

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

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

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

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

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

   a. a full description of the property disposed of;

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

a. a full description of the property transferred;

b. the date the transfer occurred;

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

d. a detailed description of the transaction; and

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

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

a. a complete description of the property lost or damaged;
b. the date of the loss;

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

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

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

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

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

a. the date of the agreement;

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

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

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

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

72. Have you or your spouse ever been a plaintiff or defendant in a lawsuit? If so, for each suit please state—
a. the party designation (plaintiff, defendant, etc.) of you or your spouse;

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

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

d. the date the suit was filed;

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

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

g. the present status of the suit; and

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

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

  a. the date of the judgment;

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

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

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

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

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

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

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

   a. the nature of the proceeding or agreement;

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

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

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

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

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

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

   b. the date it was filed;

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

   d. the grounds alleged;

   e. the disposition of the proceeding or its present status; and
f. the name(s) of the person(s) (you, your spouse, or both) against whom it was filed.

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

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

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

c. when they were first maintained;

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

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

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

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

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

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

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

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

b. the date of the disposition;

c. the reason for the disposition;

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

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

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

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

b. the reason you are owed the money;

c. the amount owed;
d. the date it will be paid; and

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

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

a. the date of the inventory;

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

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

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

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

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

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

b. the date of the disposition;

c. the reason for the disposition;

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

e. if theft occurred, whether it was reported to the police; and
f. the name(s) of the person(s) (you, your spouse, or both) whose inventory was disposed of.

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

a. the legal and common descriptions of the property;

b. the present estimated value of the property;

c. your reason for claiming the property is exempt;

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

e. the complete address of its location;

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

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

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

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

b. the present value of the interest that you or your spouse has in the plan;
c. a detailed description of the terms under which you or your spouse may receive money or property under the plan; and
d. the name(s) of the person(s) (you or your spouse) having the interest.

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

a. the full name and complete address of the person;
b. the dates during which the services were employed;
c. a description of the services the person performed;
d. the contents of resulting reports, copying them verbatim or, if you will do so without a court order, attaching a copy of each report to your answers; and
e. the name(s) of the person(s) (you, your spouse, or both) for whom the services were performed.

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

a. the full name and complete address of the establishment carrying the account or issuing the card;
b. the account number or credit card number;
c. the name in which the account or card is listed; and
d. the balance now owed on the account or card.
85. Is any state or federal tax lien filed or outstanding against you or your spouse? If so, for each lien please state—

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

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

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

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

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

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

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

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

__________________________________________________________________________________________________________________________ ...

[Name of debtor]

SIGNED under oath before me on ________________________________.

__________________________________________________________________________________________________________________________ ...

Notary Public, State of Texas
Form 26-8

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

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

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

Pattern Interrogatories in Aid of Judgment—Corporate Debtor [Long Form]

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

   a. your date and place of birth;

   b. your Social Security number;

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

   d. your complete residential address and telephone number; and

   e. your complete business address and telephone number.

2. Other than the full name listed above, what names have you used in business or otherwise at any time in your life? Please include all nicknames and aliases. If appropriate, please include your name before your marriage and all married names.
* 3. Please state the full legal name of the corporation and each other name by which it has ever been known.

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

   a. the name used; and

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

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

* 6. On what date was the corporation incorporated?

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

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

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

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

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

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

b. his or her complete present address;

c. the date of election as a director;

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

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

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

a. the date of the meeting;

b. where the meeting was held; and

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

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

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

b. the form of payment; and

c. the date of payment.

15. Has any stock of the corporation been sold? If so, for each person or entity that has bought stock please state—
a. the full name and complete address of the buyer;

b. the number of shares purchased;

c. the amount paid for each share; and

d. the date of the purchase.

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

a. the date of publication;

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

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

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

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

b. the date the minutes were received; and

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

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

a. the officer’s full name;

b. his or her complete present address;
c. the title of the office held;

d. the date of selection as an officer; and

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

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

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

  a. the full name of the person or entity;

  b. the complete address of the person or entity;

  c. a complete description of the security;

  d. the number of shares involved;

  e. the face value of each share;

  f. the present market value of each share;

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

  h. the date the security was issued.

21. Please state the full name and complete address of each institution or business organization with which the corporation has engaged in any joint venture or partnership at any time within the last five years and the nature of the corporation’s involvement.
22. Has the corporation furnished or exhibited a statement of its financial condition to any person or entity in the last five years? If it has, for each occurrence please state—

   a. the full name and complete address of the person or entity receiving the information;
   
   b. the date and place the information was received; and
   
   c. the contents of the financial statement, copying it verbatim or, if you will do so without a court order, attaching a copy of the statement to your answers.

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

   a. the source and amount of each item of income listed;
   
   b. the total income received for each year, whether reported or not;
   
   c. the date each return was filed and the address of the Internal Revenue Service office where filed;
   
   d. the amount and source of each receipt of income that is not shown on any of the returns that you are attaching to your answers; and
   
   e. the full name and complete address of each person who worked on or helped prepare each return.

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

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

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

   b. the size of the property;

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

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

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

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

   g. the present market value of the property; and

   h. the amount paid for the property.

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

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

c. the complete address of its present location.

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

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

b. the nature of the encumbrance;

c. the date the property was encumbered;

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

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

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

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

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

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

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

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

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

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

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

a. the full name of the business;

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

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

d. the type of business it conducts;

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

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

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

h. the corporation’s duties in the business;
i. the full name and complete address of each partner, officer, and director of the business; and

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

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

   a. the nature of the document;

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

   c. the date it was filed; and

   d. the assumed name used, if applicable.

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

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

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

   c. the serial number of each security;

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

   e. how each security was acquired by the corporation (purchase, gift, etc.);
f. the full name and complete address of each person or entity from whom the security was acquired, regardless of the means of acquisition;

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

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

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

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

   b. the date the interest was acquired; and

   c. a complete description of the interest.

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

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

   b. a complete description of the security;

   c. the present market value of the security;

   d. the date the broker acquired possession of the security; and
e. the balance of the corporation’s account with the broker five calendar days before these interrogatories were received by the corporation.

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

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

b. where the account is located;

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

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

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

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

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

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

b. the amount of the payment; and

c. the date it was paid.

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

a. the type of account;
b. where the account is maintained;

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

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

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

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

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

a. where the account is maintained;

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

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

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

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

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

a. where it is located;

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

c. the full name and number under which the account is maintained; and
* 41. Does the corporation hold any real or personal property in trust for any person or entity? If it does, for each trust please state—

   a. a complete description of the property held in trust;
   b. the complete address of the property’s location;
   c. the date the trust was created;
   d. the source of the trust assets; and
   e. the full name and complete address of each beneficiary who has an interest in the trust.

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

   a. the date the trust was created;
   b. a complete description of the property contributed to the trust by the corporation and the property’s present market value;
   c. each trustee’s full name and complete address;
   d. each beneficiary’s full name and complete address; and
   e. whether any of the beneficiaries are related to each other and, if they are, the full names of the related beneficiaries and the nature of their relationship.

* 43. Does any person or entity hold any real or personal property in trust for the corporation? If so, for each trust please state—
Pattern Interrogatories in Aid of Judgment—Corporate Debtor [Long Form]  Form 26-8

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

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

c. the date the trust was created;

d. the source of the trust assets; and

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

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

a. the full name of the testator;

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

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

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

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

f. whether the corporation has renounced any bequest or legacy and, if so, the date of each renunciation and the full name and complete address of each person or entity whose interest in the estate was enhanced as a result of the renunciation.
* 45. Does the corporation have the right to enter any depository, including but not limited to safes, vaults, and safe-deposit boxes, for securities, cash, or other valuables? If so, for each depository please state—

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

   b. the full name and complete address of the bank or other institution in which the depository is located;

   c. the full name and complete address of each person having access to the depository;

   d. a complete description of the property contained in the depository on the date you are answering these interrogatories;

   e. the date of each inventory of the depository;

   f. the complete contents of each inventory, copying the inventories verbatim or, if you will do so without a court order, attaching copies of them to your answers; and

   g. the date on which any person last opened the depository on behalf of the corporation.

* 46. Has anything been removed from any above-mentioned depository during the last twelve months? If it has, for each thing removed please state—

   a. a complete description of the property removed;

   b. the date it was removed;

   c. why it was removed;
d. the full name and complete address of each person who removed it; and

e. the full name and complete address of each person or entity now having the property in its possession.

47. Does the corporation own any interest in a patent or copyright? If so, for each interest please state—

a. a complete description of the patent or copyright;

b. its registration number;

c. the full name and complete address of each person sharing an interest in the patent or copyright;

d. the extent of the corporation’s share, expressed as a fraction or percentage; and

e. the annual income derived by the corporation from the patent or copyright.

* 48. At any time in the last five years has the corporation paid a premium on any life insurance policy? If it has, for each policy please state—

a. the full name, complete address, and telephone number of the issuing company;

b. the number of the policy;

c. the face value of the policy on the death of the insured;

d. the present cash value of the policy;

e. the date the policy was issued;
f. the name of the insured;

g. each date on which a payment was made;

h. the amount of each payment;

i. the complete address of the present location of each document or contract of insurance issued to the corporation in connection with or as evidence of the policy;

j. the full name of the owner of the policy;

k. the full name, complete address, and telephone number of each person having custody of a copy of the document or contract; and

l. the complete contents of the policy, copying it verbatim or, if you will do so without a court order, attaching a copy of the policy to your answers. If these policies amount to more than one hundred pages for all of them, you may comply by stating that they may be inspected or will be made available without a court order.

49. Has any beneficiary designation of any above-described insurance policy been changed in the last five years? If so, for each change please state—

a. the date on which the beneficiary designation was changed;

b. the name of the new beneficiary;

c. the name of the old beneficiary; and

d. why the change was made.
* 50. Does the corporation now have any right to payment of money from any person or entity for any reason, including but not limited to promissory notes, accounts receivable, certificates of deposit, securities, foreign currency, traveler’s checks, treasury checks, treasury bills, and savings bonds? If so, for each claim please state—

a. a complete description of the claim;

b. the full name and complete address of the debtor;

c. the amount of the claim; and

d. whether any suit or action has been brought to reduce the claim to judgment; if so, please state—

(1) the title and number of the case;

(2) the name, number, and location of the court in which it was filed or is now pending; and

(3) the present status of the case.

* 51. In the last five years, has any above-described right of the corporation to receive money been assigned or disposed of other than by collection in full? If so, for each such account please state—

a. the full name of the account;

b. the kind of disposition;

c. the date of the disposition;

d. the full name and complete address of the person or entity taking the account;

e. the amount of reserve due the corporation;
f. the extent to which future accounts receivable were covered; and

 g. the amount of payment received in exchange.

* 52. Has the corporation sold or assigned any account receivable and set up any reserve fund for its benefit out of that account receivable? If so, for each account please state—

 a. the full name of the account;

 b. the conditions for receiving reserves;

 c. the full name and complete address of each person or entity holding the funds; and

 d. the amount of the funds.

* 53. At any time in the last five years, has the corporation disposed of any real or personal property by sale, gift, or other action? If so, for each disposition please state—

 a. a full description of the property disposed of;

 b. the date of the disposition;

 c. the full name and complete address of each person or entity to whom disposition was made;

 d. the payment or other consideration received in exchange;

 e. the manner of disposition (gift, sale, etc.);

 f. the date the corporation acquired the property;

 g. the estimated market value of the property when the corporation acquired it; and
h. the complete address of the property’s present location.

* 54. At any time in the last five years, has the corporation made any disposition, by conveyance, transfer, gift, or otherwise, of property with any reservation of rights, benefits, or options for the reacquisition of the property at some future date? If so, for each disposition please state—

a. a full description of the property involved;

b. the date of the disposition;

c. the transferee’s full name and complete address;

d. the nature of the reservation, benefit, or option;

e. the cost of the property when the corporation acquired it; and

f. the market value of the property at the time of disposition or the payment or other consideration received in exchange.

55. Has the corporation in the last five years assigned any thing or right to collect money? If it has, for each assignment please state—

a. a description of the thing or right assigned;

b. the date the assignment was made;

c. the full name and complete address of the assignee; and

d. the payment or other consideration received in exchange.

* 56. At any time in the last five years, has the corporation transferred, conveyed, or assigned any property or any rights in any property under any condition or made any loan or pledged any property to any officer, director, or shareholder, or to any relative, spouse,
spouse’s relative, friend, or acquaintance of such a person? If so, for each transaction please state—

a. a complete description of the transaction;

b. the date of the transaction;

c. the full name and complete address of each person involved in the transaction; and

d. the payment or other consideration received or paid by the corporation in exchange.

* 57. Has the corporation at any time sold, transferred, or assigned all or a substantial part of its stock in trade or any trade fixtures in bulk? If it has, for each transaction please state—

a. the date the transaction occurred;

b. a complete description of the property disposed of;

c. the full name and complete address of each transferee or assignee;

d. the payment or other consideration received as the sales price;

e. whether any notice of the transaction was given and, if so, when and where the notice was recorded; and

f. whether any notice of the transaction was published in a newspaper and, if so, the name and location of the newspaper and the date of publication.
* 58. At any time in the last five years, has the corporation given consideration for any property that has been conveyed or transferred and is now being held for the corporation in the name of some person or other entity? If so, for each occurrence please state—

   a. the full name and complete address of each title holder;
   
   b. the date the conveyance or transfer was made;
   
   c. a complete description of each item of property involved; and
   
   d. the amount of payment or consideration given for the property.

59. In the last five years, has the corporation suffered any casualty loss from fire, wind, theft, or other cause? If it has, for each loss please state—

   a. a description of the property lost or damaged;
   
   b. the date of the loss;
   
   c. the cause, nature, and amount of the loss;
   
   d. whether the loss was covered by insurance and, if it was, the name of the insurance carrier, the policy number, the policy limits, and whether a claim was filed; and
   
   e. if a claim was filed, the amount of the claim, the full name and address of the agent who processed it, and how much of the claim was paid.

* 60. At any time in the last five years, has the corporation been a party to any contract or other agreement by which the corporation granted an option to any person or other entity to purchase any or all of its assets? If so, for each agreement please state—

   a. the date of the agreement;
b. where the agreement was made;

c. the full name and complete address of each person or entity that was a party to the agreement;

d. the payment or other consideration the corporation received in exchange for the agreement;

e. the full name and complete address of each person or entity furnishing the consideration;

f. a complete description of the property covered by the agreement; and

g. the terms of the agreement, copying it verbatim or, if you will do so without a court order, attaching a copy of the agreement to your answers.

* 61. At any time in the last five years, has the corporation made any payment in extension or compromise of a debt? If it has, for each payment please state—

   a. the date of payment;

   b. the debt’s original amount and its current amount;

   c. the full name and complete address of the owner of the debt; and

   d. the basis for the debt.

62. Is any of the corporation’s property rented, leased, or otherwise in another party’s possession? If so, for each such piece of property please state—

   a. a description of the property;

   b. the full name and complete address of the person or entity having possession of the property;
c. the basis for the third party’s possession (lease, rental, etc.); and

d. the payment or other consideration the corporation received in exchange for the arrangement.

* 63. Does the corporation presently owe more than $500 to any creditor? If it does, for each such debt please state—

a. the creditor’s full name and complete address;

b. the amount of the debt owed by the corporation;

c. the date the debt was incurred;

d. the payment or other consideration the corporation received in exchange for the debt; and

e. a description of the security given by the corporation to secure the debt.

* 64. Has the corporation made any payment exceeding $500 to any creditor within the last four months? If it has, for each payment please state—

a. the date and amount of the payment; and

b. the full name and complete address of the recipient.

65. Is any state or federal tax lien filed or outstanding against the corporation? If so, for each lien please state—

a. the amount of the lien;

b. whether the tax has been paid;

c. the name of the governmental agency that filed the lien; and
d. the date it was filed.

66. Has the corporation received any notice of a tax deficiency? If it has, for each deficiency please state—
   a. the amount of the alleged deficiency;
   b. the full name and complete address of the governmental agency claiming the deficiency; and
   c. the date of the notice.

67. At any time in the last five years, has the corporation made any payment as an extension or compromise of a tax claim? If it has, for each claim please state—
   a. the date and amount of each payment; and
   b. the full name and complete address of the governmental agency claiming the deficiency.

* 68. Is there any judgment against the corporation that is unpaid? If there is, for each unpaid judgment please state—
   a. the date of the judgment;
   b. its amount and how much remains unpaid;
   c. the name of the party having the judgment against the corporation;
   d. the name of the present holder of the judgment if different from the plaintiff;
   e. the name, number, and location of the court in which the judgment was obtained; and
f. the cause number of the judgment.

69. Does the corporation have any abstract of judgment filed against it? If so, for each judgment please state—

a. the date of the judgment;

b. its amount and how much remains unpaid; and

c. the name of each county and the volume and page numbers of the record book where the abstract is recorded in each county.

* 70. Does the corporation claim that any real or personal property, tangible or intangible, is protected from the claims of its creditors? If it does, for each piece of property so claimed, please state—

a. the legal and common descriptions of the property;

b. the estimated value of the property;

c. the reason for claiming that it is exempt; and

d. the complete address of the property’s location.

71. Does the corporation have any financing statement or UCC statement filed against it? If it does, for each statement please state—

a. the date and place of filing;

b. the full name and complete address of the party filing the statement;

c. the amount of the debt to which it pertains;
d. a complete description of the collateral securing the debt, as shown on the security agreement;

e. the date of maturity of the debt; and

f. the complete contents of the statement, copying it verbatim or, if you will do so without a court order, attaching a copy of the statement to your answers.

* 72. Does any person or entity now keep records (including but not limited to check-books, books, ledgers, memoranda, other written documents, tape recordings, and computer records) of receipts, disbursements, and other business transactions of the corporation, or have they been kept at any time in the last five years? If so, please attach copies of the records for the last five years if you will do so without a court order; if the records amount to more than one hundred pages for all of them, you may comply by stating that they may be inspected or will be made available without a court order. Further, please state—

a. the form in which the records are or were kept;

b. the accounting basis (cash or accrual) used;

c. the date they were first maintained;

d. the full name and complete address of each person or entity that prepared them;

e. the full name and complete address of each person or entity now having custody of them;

f. the complete address of each location of any such records relating to the last five years; and
g. whether the records accurately reflect the income reported in the corporation’s federal income tax returns for each year during which the records were kept.

* 73. Has any record of the corporation’s income, disbursements, or business affairs been stolen or disposed of in the last five years? If so, for each disposition please state—

a. the nature of the disposition, such as theft or intentional destruction;

b. the date of the disposition;

c. the reason for the disposition;

d. the full name and complete address of the person making the disposition; and

e. if theft occurred, whether it was reported to the police.

74. At any time in the last five years, has the corporation employed or used the services of an accountant, bookkeeper, or certified public accountant? If so, for each such person please state—

a. the full name and complete address of the person;

b. the dates during which the services were employed;

c. a description of the services the person performed;

d. the reason the person’s services were employed; and

e. the contents of resulting reports, copying them verbatim or, if you will do so without a court order, attaching copies of the reports to your answers. If the reports amount to more than one hundred pages for all of them, you may
comply by stating that they may be inspected or will be made available without a court order.

* 75. At any time in the last five years, has anyone taken an inventory of the corporation’s property? If so, for each inventory please state—

a. the date of the inventory;

b. the full name and complete address of each person who made the inventory or supervised it;

c. the full name and complete address of each person or entity having a copy of the inventory;

d. the total dollar value of the property as stated in the inventory;

e. the means used to evaluate the inventory;

f. the reason for making the inventory; and

g. a complete description of each item of property included in the inventory, copying it verbatim or, if you will do so without a court order, attaching a copy of the inventory to your answers. If the copies amount to more than one hundred pages, you may comply by stating that they may be inspected or will be made available without a court order.

* 76. In the last five years, has the corporation furnished a financial statement to any person or entity? If it has, for each financial statement please state—

a. why it was prepared;

b. the full name and complete address of each person or entity to whom it was furnished;
c. the date it was furnished;

d. the full name and complete address of the person or entity now owning each asset shown on the statement; and

e. the contents of the statement, copying it verbatim or, if you will do so without a court order, attaching a copy of the statement to your answers.

* 77. Does the corporation or any employee, officer, director, or shareholder of the corporation have any interest in any pension plan, retirement fund, annuity fund, or profit-sharing plan? If so, for each plan please state—

   a. the full name and complete address of the plan’s administrator;

   b. the present value of the corporation’s interest in the plan;

   c. the present value of the interest belonging to any person in any of the above-described categories; and

   d. a description of the terms under which the corporation or any person in any of the above-described categories can receive money or property under the plan.

78. Has any money, real property, or other personal property heretofore belonging wholly or partly to the corporation been transferred to, or is it in the possession of, any present or former shareholder, employee, agent, officer, or director of the corporation or any relative by blood or marriage, friend, or acquaintance of any of them? If so, for each transaction please state—

   a. a complete description of the transaction;

   b. a complete description of the property involved;

   c. the full name and complete address of each person involved; and
d. the payment or other consideration the corporation received in exchange.

* 79. Is the corporation presently entitled to receive any money from a governmental office, such as a utility deposit, income tax refund, or security deposit? If so, for each payment please state—

a. the full name and complete address of the office owing the money;

b. the reason the corporation is owed the money;

c. the amount owed; and

d. the date it will be paid.

80. Has the corporation ever filed a petition in bankruptcy, entered into an assignment for the benefit of creditors, or been a party to a composition arrangement? If so, for each occurrence please state—

a. the nature of the proceeding or arrangement;

b. the date the proceeding began or the arrangement was made;

c. the name, number, and location of any court that was involved; and

d. the disposition or present status of the proceeding or arrangement.

81. Has any person or entity ever filed an insolvency proceeding against the corporation, including a state receivership action or a federal bankruptcy proceeding? If so, for each proceeding please state—

a. the full name and complete address of the person or entity that filed it;

b. the date it was filed;
c. the name, number, and location of the court in which it was filed;

d. the grounds alleged; and

e. the disposition of the proceeding or its present status.

* 82. In the last five years, has any person or entity paid or transferred to the corporation assets in any form, including money, worth more than $1,000? If so, for each transfer please state—

a. the full name and complete address of the person or entity making the transfer;

b. the date of the transfer;

c. a complete description of the assets transferred; and

d. the value of each asset transferred.

83. For each expense of the corporation that recurs on a monthly or other regular basis and exceeds $100, please state—

a. a complete description of the debt or expense;

b. the amount of each payment and either that this amount is the same for each payment or that this amount is an average for the past year;

c. the full name and complete address of the recipient of the payments;

d. whether each debt is paid;

e. the manner of payment (cash payment, transfer of inventory, etc.); and
f. if the debt is paid in cash, the full name and complete address of the source from which the cash is obtained.

84. For each bank or other financial or lending institution with which the corporation has transacted any type of business or maintained any account in the last five years, please state—

   a. the full name and complete address of the institution;

   b. the account or transaction number involved; and

   c. a complete description of the transaction.

85. Please state all reasons why [name of corporate debtor] has not paid its debt to [name of judgment creditor].

86. If [name of judgment creditor] is willing to accept less than the full amount of the claim against [name of corporate debtor], would the corporation be able to obtain a lump sum of money to pay [name of judgment creditor]?

87. How much money would [name of corporate debtor] be able and willing to pay to [name of judgment creditor] in the next thirty days to settle this matter?

88. If arrangements for a lump-sum settlement cannot be made, please state when the corporation could start making monthly or other periodic payments and how much the corporation is able and willing to pay each month toward satisfying its debt to [name of judgment creditor].

89. If the corporation cannot start making monthly payments within the next thirty days, please state why not.
90. Why is the corporation unable or unwilling to pay more than the amounts listed in the answers to questions 87. and 88.?

__________________________________________________________ ... __________________________________________________________________________________________________________________________

[Name of debtor]

SIGNED under oath before me on ____________________________.

__________________________________________________________

Notary Public, State of Texas
Form 26-9

For a discussion of sanctions for failure to respond to interrogatories, see section 26.6 in this chapter and part VII. in chapter 18. Once the court has set a hearing, the attorney should ensure that the notice of hearing is complete and should send a copy of the motion and notice to the defendant or his attorney.

Motion to Compel Answers to Interrogatories in Aid of Judgment

1. **Parties.** Movant is [name of plaintiff], Plaintiff and judgment creditor in this cause, who moves that Respondent, [name of individual judgment debtor], Defendant and judgment debtor in this cause, Respondent, [name of individual to whom interrogatories were addressed], as representative of Defendant and judgment debtor [name of entity judgment debtor], be required to answer written interrogatories in aid of judgment pursuant to the provisions of rules 621a and 215 of the Texas Rules of Civil Procedure.

Select one of the following. Select the first option if the respondent is an individual. Select the second option if the respondent is a corporation, governmental agency, partnership, or association.

Or

Continue with the following.

be required to answer written interrogatories in aid of judgment pursuant to the provisions of rules 621a and 215 of the Texas Rules of Civil Procedure.

2. **Facts.** Judgment in this cause was rendered for [name of judgment creditor] against [name of judgment debtor] on [date]. The judgment has not been suspended by a supersedeas bond or by order of a proper court, and it has not become dormant under section 34.001 of the Texas Civil Practice and Remedies Code. On [date], Movant served written
interrogatories in aid of judgment on Respondent in the time and manner required by law. Respondent did not answer the interrogatories within the time specified, and Movant has not received any communication from Respondent regarding any reason for this refusal to answer. Neither a motion for an extension of time nor an objection to any interrogatory has been filed as provided for by rules 191.1 and 193.2 of the Texas Rules of Civil Procedure. Respondent’s refusal to answer is without substantial justification.

3. **Grounds.** Under rule 215 of the Texas Rules of Civil Procedure, Respondent’s refusal to answer Movant’s interrogatories is grounds for this Court to enter an order compelling Respondent to answer.

4. **Attorney’s Fees.** As a result of Respondent’s failure to answer the interrogatories, Movant has been forced to employ the undersigned attorney to bring this proceeding to compel answers. Under rules 215 and 621a of the Texas Rules of Civil Procedure, Movant is entitled to recover reasonable expenses, including reasonable attorney’s fees, incurred in obtaining an order to compel answers to these interrogatories. Reasonable attorney’s fees for the services rendered and to be rendered in this regard are at least $[amount].

5. **Prayer.** Movant prays that—

   a. the Court set this matter for hearing;

   b. Respondent, after notice and hearing, be ordered to answer Movant’s written interrogatories in aid of judgment and to forward the written answers to Movant’s attorney of record within the time specified by the Court;

   c. Movant be granted reasonable attorney’s fees of at least $[amount] incurred in obtaining the order;

   d. Movant be granted reasonable expenses incurred in obtaining the order; and
e. Movant be granted all further relief to which Movant may be entitled.

[Name]
Attorney for Movant
State Bar No.:
[E-mail address]
[Address]
[Telephone]
[Telecopier]

Include a certificate of service (form 19-1) and a notice of hearing (form 19-2). Prepare the order compelling answers (form 26-10).
On [date], a hearing was held on the motion of [name of plaintiff], Movant, to compel [name of respondent], Respondent, to answer Movant’s written interrogatories in aid of judgment.

The Court finds that the interrogatories were served on Respondent in the time and manner prescribed by law. The Court further finds that Respondent has not answered Movant’s interrogatories within the time and in the manner required by law and has not objected to the interrogatories or moved for an extension of time to answer them.

Accordingly the Court finds that the Motion to Compel Answers to Interrogatories in Aid of Judgment should be sustained. The Court further finds that Respondent’s refusal to answer the interrogatories was without substantial justification, and accordingly the Court finds that Movant is entitled to recover $___________ as reasonable expenses incurred in obtaining this order and $___________ as reasonable attorney’s fees.

It is therefore ORDERED that the Motion to Compel Answers to Interrogatories in Aid of Judgment is hereby sustained in all things; and

Respondent is ORDERED to forward to Movant’s attorney on or before _____________ a complete, sworn set of written answers to Movant’s interrogatories that were addressed to Respondent and served on [date]; and

It is further ORDERED that Movant recover from Respondent $___________ for expenses and $___________ for reasonable attorney’s fees, for which execution may issue.
SIGNED on ________________________________.

JUDGE PRESIDING

APPROVED AS TO FORM:

[Name]
Attorney for Movant
State Bar No.:  
[E-mail address]  
[Address]  
[Telephone]  
[Telecopier]

[Name]
Attorney for Respondent
State Bar No.:  
[E-mail address]  
[Address]  
[Telephone]  
[Telecopier]

Attach the order to the motion (form 26-9) and file with the court clerk. Send a copy of the order as approved by the court to the defendant, using the transmittal letter at form 26-11.
Form 26-11

This form may be used to encourage the respondent’s compliance with the order compelling cooperation with discovery in aid of judgment by informing him that contempt will be sought if he does not comply. This form should be sent by both certified and regular first-class mail.

Transmittal Letter to Respondent Following Hearing on Motion to Compel

[Date]

[Name and address of respondent]

Re: [style of case]
Cause No. [number]
[designation and location of court]

[Salutation]

Enclosed is a copy of the court order signed by the judge at the hearing on the motion to compel [answers to interrogatories/give deposition] in aid of judgment.

Please be sure your answers are in our offices on the date indicated in the order. If you fail to do so, we will have no alternative but to ask the court to hold you in contempt.

Sincerely yours,

__________________________________________________________________________________________________________________________

[Name of attorney]

Certified Mail No. [number]
Return Receipt Requested

Enc.
Form 26-12

The defendant’s disobedience of an order compelling answers to interrogatories or to give deposition is punishable by contempt. Tex. R. Civ. P. 215.2(b)(6). See sections 26.6 and 26.7 in this chapter. Once the court has set a show-cause hearing, the attorney should have a copy of the show-cause order and motion personally served on the respondent. See section 26.7:4.

[Caption. See § 3 of the Introduction in volume 1 of this manual.]

Motion to Hold [name of respondent] in Contempt and for Show-Cause Order for Failure to [Answer Interrogatories/Give Deposition] in Aid of Judgment

1. Parties. Movant is [name of plaintiff], Plaintiff and judgment creditor in this cause, who moves that

Select one of the following. Select the first option if the respondent is an individual. Select the second option if the respondent is a corporation, governmental agency, partnership, or association.

Respondent, [name of individual judgment debtor], Defendant and judgment debtor in this cause,

Or

Respondent, [name of individual ordered to answer interrogatories], as representative of Defendant and judgment debtor [name of corporate judgment debtor],

Continue with the following.

be held in contempt of court for disobeying this Court’s order to [answer interrogatories/give deposition]. Respondent may be served with process at [address, city, state].

Select one of the following.

2. Facts. On [date], this Court ordered Respondent to forward to Movant’s attorney of record on or before [date] a complete, sworn set of written answers to Movant’s interroga-
tories in aid of judgment that were addressed to Respondent and served on [date]. Respondent has not forwarded to Movant’s attorney answers to Movant’s interrogatories.

2. **Facts.** On [date], this Court ordered Respondent to appear and give a deposition and produce certain documents at [address, city, county] County, Texas, on [date], at [time]. Respondent, although having had proper notice of the order of the Court, has willfully failed and refused to obey the lawful orders of this Court. Respondent failed to appear at the offices of Movant’s attorneys, produce the requested documents, and give a deposition at the time ordered to do so and has not contacted Movant’s attorneys to schedule another time agreeable to the parties to give the deposition and produce the requested documents.

3. **Grounds.** Under rule 215 of the Texas Rules of Civil Procedure, Respondent’s refusal to comply with this Court’s order is a contempt of court. Respondent should be punished for contempt and jailed thereafter until Respondent complies with this Court’s order.

4. **Attorney’s Fees.** As a result of Respondent’s failure to obey the order of this Court entered on [date], Movant has brought this Motion to Hold [name of respondent] in Contempt. Under rule 215 of the Texas Rules of Civil Procedure, Movant is entitled to reasonable expenses and attorney’s fees incurred in bringing this motion. Reasonable attorney’s fees for the services rendered in this matter are at least $[amount].

5. **Prayer.** Movant prays that—

   a. the Court set this matter for hearing;

   b. Respondent be ordered to appear and show cause why Respondent should not be held in contempt of court for refusing to comply with the Court’s order [compelling answers to interrogatories in aid of judgment/compelling
Respondent to appear and give a deposition and to produce certain documents;

c. Respondent, after notice and hearing, be held in contempt of court;

d. a writ of attachment be issued for Respondent;

e. Respondent be fined $[amount];

f. Respondent be confined in jail for [time period] and thereafter until Respondent purges himself of contempt by complying with the orders of this Court;

g. Respondent be required to post bond payable to Movant to ensure Respondent’s appearance if released from confinement;

h. Respondent be ordered to pay all court costs of this proceeding;

i. Respondent be required to pay reasonable expenses incurred by Movant in making this motion and obtaining an order for contempt;

j. Respondent be required to pay at least $[amount] as reasonable attorney’s fees incurred by Movant in making this motion and obtaining an order for contempt; and

k. Movant be granted all further relief to which Movant may be entitled.

__________________________________________________________________________________________________________________________

[Name]
Attorney for Movant
State Bar No.:
[E-mail address]
[Address]
[Telephone]
[Telexcopier]
If contempt is sought for failure to obey a subpoena, attach the following affidavit.

Before me, the undersigned authority, on this day personally appeared [name of attorney], who, being by me duly sworn, did on oath state:

I am over the age of twenty-one years, have never been convicted of a criminal offense, and am competent to testify. I am the attorney of record for [name of plaintiff], have personal knowledge of the facts in this affidavit, and they are true and correct. All fees due [name of person subpoenaed], as a witness, by law were paid or tendered.

__________________________
[Name of attorney]

SIGNED under oath before me on ________________________________.

__________________________
Notary Public, State of Texas
Motion to Hold [name of respondent] in Contempt and for Show-Cause Order

Order

It is ORDERED that the clerk issue notice to Respondent, [name of respondent], to appear, and Respondent is hereby ORDERED to appear before this Court on ________________ at _____ M., at [location of court], to show cause why Respondent should not be held in contempt for disobedience of this Court’s order as alleged in the attached Motion to Hold [name of respondent] in Contempt.

SIGNED on ____________________________.

JUDGE PRESIDING

File the motion with the court clerk. Ask the clerk to issue a show-cause notice (form 26-13) to be served on the respondent along with this motion. Set the hearing date for the show-cause hearing. Do not mail the show-cause order to the respondent; instead send it to the officer for service, using the transmittal letter at form 26-14. If the respondent is represented by an attorney, send a copy of the motion, show-cause order, and notice to the attorney for the respondent.
Form 26-13

Note that in some counties, this form may also be called a show-cause order. If the clerk does not prepare his own show-cause notice, this form may be used.

Show-Cause Notice

STATE OF TEXAS )
COUNTY OF )

To: [name and address of respondent]

WHEREAS, in Cause No. [number], pending in the [designation] Court of [county] County, Texas, in which [name of plaintiff] is Plaintiff and [name of defendant] is Defendant, a Motion to Hold [name of respondent] in Contempt has been filed. A copy is attached and reference is made to it for the relief sought. On presentation and consideration of the motion, the Honorable [name of presiding judge], Judge of the Court, has entered an Order to Show Cause;

AND WHEREAS the motion has been set for hearing;

THEREFORE you, [name of respondent], are hereby notified to appear before the Judge of the Court at the [county] County Courthouse, in the city of [city], Texas, on [date of hearing] at [time] to show cause why the motion should not be granted.

HEREIN FAIL NOT to obey this writ.

Witness my hand and seal of office at [city, county] County, Texas, on

_________________________________________.

Clerk of the [designation] Court of
[county] County, Texas
By ________________________________
Deputy

Officer’s Return

I received this writ on ________________ at ____ __.M. and executed it on
________________ at ____ __.M. by _____________________________________________
____________________________________________________________________________
____________________________________________________________________________
____________________________________________________________________________

I actually and necessarily traveled ________ miles in executing this writ, and my fees
are $____________.

This original returned on ____________________________.

[Name of officer if known]
[Identification of officer]
__________________ County, Texas

By ________________________________
Deputy
Form 26-14

The show-cause notice, order, and motion should be personally served on the respondent rather than being mailed to him (see section 26.7:4 in this chapter), and the attorney should inspect the order and send it to the sheriff or constable rather than having the clerk do so. See section 27.13 regarding writs of execution. Additional information, such as directions to help locate the defendant, should be included in the motion for contempt to the extent feasible but could also be included in this cover letter, although the cover letter might get lost during processing. In addition, fees may be charged for services by sheriffs or constables. See Tex. Loc. Gov’t Code § 118.131. The officer should be contacted to determine the correct fee. In some counties, the clerk collects the fee; if so, it is unnecessary to send payment with this letter.

Letter to Officer Transmitting Show-Cause Notice, Order, and Motion for Personal Service

[Date]

[Name, title, and address of officer]

Re: Defendant: [name of defendant]
   [style of case]
   Cause No. [number]
   [designation and location of court]

[Salutation]

Enclosed is a show-cause notice, order, and motion for contempt in the referenced cause.

Include any appropriate special instructions.

Please serve the respondent with a copy of the show-cause notice, order, and motion and complete your return on the original notice by inserting the hour and date of receipt, the hour and date of service, and the manner of service and by signing it in your official capacity.

Please mail the completed return to me in the enclosed addressed, stamped envelope.
My check for your fee is enclosed. If you have a question or need additional information, please telephone me (collect if long distance).

Thank you for your prompt attention to this matter.

Sincerely yours,

[Name of attorney]

Certified Mail No. [number]
Return Receipt Requested

Enc.
Form 26-15

The respondent may not be incarcerated for contempt unless he personally appeared at the show-cause hearing. If the respondent did not appear, he may be brought into court under a capias or writ of attachment. See section 26.7:8 in this chapter. This form assumes that the respondent appeared at the hearing. A writ of attachment and commitment order is at form 26-16. For the motion on which this order is based, see form 26-12. See also section 26.7:5 regarding contempt judgments generally.

[Caption. See § 3 of the Introduction in volume 1 of this manual.]

Contempt Judgment

On [date], a hearing was held on the motion of [name of plaintiff], Movant, to hold [name of respondent], Respondent, in contempt of court for refusing to obey this Court’s order to [answer interrogatories/give deposition].

Movant appeared [by attorney/in person and by attorney].

Respondent appeared [in person/in person and by attorney].

The Court considered the pleadings and official records on file in this cause and the evidence and argument of counsel.

The Court finds that on [date], this Court ordered [name of respondent], Respondent, to forward to Movant’s attorney of record on or before [date] a complete, sworn set of written answers to the interrogatories in aid of judgment that Movant addressed to Respondent and served on [date].

The Court further finds that Respondent did not forward to Movant’s attorney of record any answers to Movant’s interrogatories.
The Court finds that on [date], this Court ordered [name of respondent], Respondent, to appear and give [his/her] deposition and produce certain documents at [address, city, county] County, Texas, on [date], at [time].

The Court further finds that Respondent did not appear and give [his/her] deposition and did not produce certain documents as ordered.

The Court further finds that Respondent’s refusal to comply with this Court’s order was without substantial justification.

The Court further finds that, under rule 215 of the Texas Rules of Civil Procedure, Respondent’s refusal to comply with this Court’s order is a contempt of court and that Respondent should be punished for contempt and jailed until Respondent complies with this Court’s order.

The Court further finds that Respondent should pay all court costs of this proceeding.

It is accordingly ADJUDGED that [name of respondent], Respondent, is in contempt of this Court.

It is ORDERED that Respondent be fined $[amount] and confined in the county jail of [county] County, Texas, for a period of [period of time].

It is further ORDERED that Respondent thereafter be further confined in that jail until Respondent has fully purged himself of this contempt by forwarding to Movant’s attorney of record, [name of attorney], at [address, city, state] a complete, sworn set of written answers to
the interrogatories in aid of judgment that Movant addressed to Respondent and served on [date].

Or

It is further ORDERED that Respondent thereafter be further confined in that jail until Respondent has fully purged [himself/herself] of this contempt by

1. giving [his/her] deposition to Plaintiff’s attorneys at a time agreed on by Plaintiff’s attorney between the hours of 8:00 A.M. and 5:30 P.M., on any Monday, Tuesday, Wednesday, Thursday, or Friday, the deposition to take place within seventy-two hours of notification of Plaintiff’s attorneys of Respondent’s desire to give the deposition. Respondent may orally notify Plaintiff’s attorney by telephone between the hours of 8:00 A.M. and 5:30 P.M. at [phone number] by speaking with or leaving a message for [name]. Respondent may notify Plaintiff’s attorneys in writing by mail at [address], with notice to [name];

2. delivering to [name of attorney], Movant’s attorney of record, at [address, city, state], the following documents: [list documents as in subpoena or deposition notice]

Continue with the following.

It is further ORDERED that Respondent—

1. pay to the clerk of this Court $[amount] as costs of this proceeding; and

2. pay to Movant $[amount] as attorney’s fees and $[amount] as expenses incurred by Movant in bringing this proceeding.

It is further ORDERED that [name of respondent], Respondent, be committed to the custody of the sheriff of [county] County, Texas, to be confined in the county jail of [county] County, Texas, as herein ordered.
It is further ORDERED that Respondent may be released on execution of a surety bond in the amount of $[amount] executed by a corporate surety licensed to do business as such in Texas, payable to [name of judgment plaintiff], and delivered to the officer executing the attachment, conditioned that on or before [date], Respondent will comply with all requirements of this contempt judgment against Respondent, and that if Respondent does not do so Respondent’s bond will be forfeited and Respondent will be arrested and jailed under this contempt judgment. Personal recognizance in lieu of bond will not be permitted.

It is further ORDERED that all commitments, writs, attachments, and other process necessary for the enforcement of this order be issued.

A certified copy of this judgment is to be attached to the order of commitment to show the authority of the clerk for issuance.

SIGNED on ________________________________.

__________________________________________________________________________________________________________________________ ...
__________________________________________________________________________________________________________________________ ...

JUDGE PRESIDING

APPROVED AS TO FORM:

__________________________________________________________________________________________________________________________ ...
__________________________________________________________________________________________________________________________ ...

[Name]
Attorney for Movant
State Bar No.: [E-mail address]
[Address] [Telephone]
[Telecopier]
[Name]
Attorney for Respondent
State Bar No.:
[E-mail address]
[Address]
[Telephone]
[Telecopier]

Attach the judgment to the motion (form 26-12) and file with the court clerk.
Form 26-16

Usually the court clerk will prepare the writ of attachment on a printed form. In some counties it may be necessary for the plaintiff’s attorney to provide it, in which case this form may be used.

Writ of Attachment and Commitment Order

STATE OF TEXAS                      
COUNTY OF                           

TO ANY SHERIFF OR ANY CONSTABLE WITHIN THE STATE OF TEXAS:

[Name of respondent], Respondent, was adjudged to be in contempt of court on [date] by the [designation] Court in Cause No. [number], styled “[style of case].” Therefore, in obedience to an order of this Court made and entered on [date]:

You are hereby COMMANDED to take into your custody and commit to the jail of your county and safely keep [name of respondent] until, as required by the contempt judgment, [name of respondent] [has forwarded to Movant’s attorney of record, [name of attorney], at [address, city, state], a complete sworn set of answers to interrogatories in aid of judgment that Movant addressed to Respondent and served on [date],/has given [his/her] deposition at the set time as set out in the contempt judgment; and delivered to [name of attorney] at [address, city, state], the documents set out in the contempt judgment] or been otherwise legally ordered discharged.

It is ORDERED that Respondent may be released on execution of a surety bond executed by a corporate surety licensed to do business as such in Texas, in the amount of $[amount], payable to [name of judgment plaintiff], conditioned that on or before [date] Respondent will comply with all requirements of the contempt judgment against Respondent signed by this Court on [date], and that if Respondent does not do so Respondent’s bond will be forfeited and Respondent will be arrested and jailed under the contempt judgment.
HEREIN FAIL NOT, but make due return of this writ, showing how you have executed it.

Witness my hand and seal of office at [city, county] County, Texas, on ________________.

__________________________________________________________________________________________________________________________ ...

Clerk of the [designation] Court of [county] County, Texas

By _____________________________________________
Deputy

Officer’s Return

I received this writ on ________________ at ____ __.M. and executed it on ________________ at ____ __.M. by __________________________

__________________________________________________________________________________________________________________________ ...

__________________________________________________________________________.

I actually and necessarily traveled ________ miles in executing this writ, and my fees are $__________.

This original returned on ____________________________.

__________________________________________________________________________________________________________________________ ...

[Name of officer if known]
[Identification of officer]
______________ County, Texas

By _____________________________________________
Deputy
Form 26-17

This form may be used if the respondent fails to appear at the show-cause hearing and the movant is unable to show a voluntary, knowing, and intelligent waiver.

[Caption. See § 3 of the Introduction in volume 1 of this manual.]

Order for Writ of Attachment

On [date], a hearing was held on the motion of [name of plaintiff], Movant, to hold [name of respondent], Respondent, in contempt of court for refusing to obey this Court’s order to [answer interrogatories/give deposition].

Movant appeared by attorney. The Court finds that Respondent, although having been personally served with a copy of the Motion to Hold [name of respondent] in Contempt, the Show-Cause Order, and the Show-Cause Notice on [date], failed to appear.

The Court finds that on [date], this Court ordered [name of respondent], Respondent, to [forward to Movant’s attorney of record on or before [date] a complete, sworn set of written answers to Movant’s interrogatories that were addressed to Respondent on [date]/appear and give [his/her] deposition and produce certain documents at the offices of Movant’s attorney of record on or before [date]] and that Movant recover reasonable attorney’s fees in the sum of $[amount] against Respondent.

The Court further finds that Respondent did not [deliver a complete copy of answers to Movant’s interrogatories/appear and give [his/her] deposition and produce certain documents] to Movant’s attorney of record and did not pay the attorney’s fees as ordered.

As it appears to the Court that Respondent may have committed contumacious acts by Respondent’s refusal to obey this Court’s order to [answer interrogatories/appear and give [his/her] deposition and produce certain documents]:

© STATE BAR OF TEXAS
It is therefore ORDERED that a writ of attachment be issued and served on Respondent; that Respondent be personally attached; and that the attaching officer be directed to notify the Court and Movant’s attorney immediately on attaching Respondent so that a hearing may be immediately scheduled for the purpose of Respondent’s showing cause why [he/she] should not be held in contempt for refusing to obey this Court’s order to [answer interrogatories/appear and give [his/her] deposition and produce certain documents].

It is further ORDERED that in no event shall the writ of attachment be served so as to require Respondent to be detained overnight before the show-cause hearing.

It is further ORDERED that in lieu of detainment in the custody of the officer executing this writ, Respondent may be released on posting a bond in the sum of $[amount], payable to Movant, with two or more good and sufficient sureties, to be approved by the Court, conditioned that on [date], Respondent appear before the Court and remain in attendance until discharged by the Court. Personal recognizance in lieu of bond will not be permitted.

A copy of this Order is to be attached to the writ of attachment to show the authority of the clerk for such issuance.

SIGNED on ________________________________.

JUDGE PRESIDING
Form 26-18

This form may be used if the respondent fails to appear at the show-cause hearing, allowing a sheriff or constable to bring the respondent to the court so the judge can hold the respondent in contempt.

Writ of Attachment

STATE OF TEXAS  )
COUNTY OF  )

TO ANY SHERIFF OR ANY CONSTABLE WITHIN THE STATE OF TEXAS:

[Name of respondent], Respondent, although personally served with notice, did not appear on [date] for a hearing held on the motion of [name of plaintiff], Movant, to hold [name of respondent] in contempt of court in the [designation] Court of [county] County, Texas, in Cause No. [number], styled “[style of case].” Therefore, in obedience to an order of this Court made and entered on [date]:

You are hereby COMMANDED to take immediately into your custody and bring before this Court [name of respondent], Respondent, for the purposes of Respondent’s showing cause why [he/she] should not be held in contempt for refusing to obey this Court’s order to [answer interrogatories/give [his/her] deposition].

The attaching officer is directed to notify the Court and Movant’s attorney immediately on attaching Respondent so that a hearing may be immediately scheduled.

Select one of the following.

In no event shall this Writ of Attachment be served so as to require Respondent to be detained overnight before the show-cause hearing.

Or
In lieu of detainment, Respondent may be released on posting a bond in the amount of \$[amount], payable to Movant, with two or more good and sufficient sureties, to be approved by the Court, conditioned that on [date], Respondent appear before the Court and remain in attendance until discharged by the Court. Personal recognizance in lieu of bond will not be permitted.

HEREIN FAIL NOT, but make due return of this writ, showing how you have executed it.

Witness my hand and seal of office at [city, county] County, Texas, on

__________________________.

Clerk of the [designation] Court of
[county] County, Texas

By __________________________
Deputy

Officer’s Return

I received this writ on ________________ at ____ __.M. and executed it on

__________________________ at ____ __.M. by __________________________

__________________________

__________________________

I actually and necessarily traveled ________ miles in executing this writ, and my fees are $__________.

This original returned on __________________________.
[Name of officer if known]  
[Identification of officer]  
___________________________ County, Texas  

By ____________________________  
Deputy
Motion to Compel [name of respondent] to Give Deposition in Aid of Judgment

Form 26-19

For a discussion of sanctions for failure to appear to give deposition, see section 26.6 in this chapter and part II. in chapter 18 of this manual. Once the court has set a hearing, the attorney should ensure that the notice of hearing is complete and should send a copy of the motion and notice to the defendant or his attorney.

[Caption. See § 3 of the Introduction in volume 1 of this manual.]

Motion to Compel [name of respondent] to Give Deposition in Aid of Judgment

Select one of the following.

1. *Service of Subpoena Duces Tecum.* Respondent, [name of respondent], was personally served with a subpoena duces tecum to appear for deposition and to produce certain documents at such time.

Or

1. *Service of Notice for Oral Deposition in Aid of Judgment.* Respondent, [name of respondent], was given notice to appear for deposition and to produce certain documents at such time.

Continue with the following.

2. *Failure to Depose.* Respondent failed to appear for the deposition and produce the documents required by the [subpoena/notice].

3. *Attorney’s Fees.* As a result of Respondent’s failure to appear for deposition and produce the documents required by the [subpoena/notice], Movant, [name of movant], has been forced to employ the undersigned attorney to bring this proceeding to compel deposition. Under rules 215 and 621a of the Texas Rules of Civil Procedure, Movant is entitled to recover reasonable expenses, including reasonable attorney’s fees, incurred in obtaining an order to
compel Respondent to appear for deposition and produce the documents described in the [subpoena/notice]. Reasonable attorney’s fees for the services rendered and to be rendered in this regard are at least $[amount].

4. **Prayer.** Movant prays that—

   a. the Court set this matter for hearing;

   b. Respondent, after notice and hearing, be ordered to produce all documents described in the [subpoena duces tecum/notice], which was served on Respondent at [location] and to give deposition in aid of judgment to Movant’s attorneys; and,

   c. Movant be granted reasonable attorney’s fees of at least $[amount] incurred in obtaining such order.

   d. Movant be granted reasonable expenses incurred in obtaining the order; and

   e. Movant be granted all further relief to which Movant may be entitled.

---

Include a certificate of service (form 19-1) and a notice of hearing (form 19-2). Prepare the order compelling deposition (form 26-20).
Order Compelling [name of respondent] to Give Deposition in Aid of Judgment

On [date], a hearing was held on the motion of [name of movant], Movant, to compel [name of respondent], Respondent, to give [his/her] deposition in aid of judgment.

Movant having appeared by and through [its/his/her] attorney of record, and the Respondent having had notice of such hearing but having failed to appear, and the Court having considered such Motion and the evidence, and being of the opinion that same should be granted:

It is therefore, ORDERED that Respondent, [name of respondent], appear at the offices of [name of attorney] [address, city, county] County, Texas, on [date], at 9:00 A.M., and at such time, Respondent is ordered to:

(a) Produce the following documents: [list documents in original notice or subpoena, for example]:

1. All canceled checks, bank statements, check stub records, and other banking records pertaining to Defendant’s, [name of defendant], financial affairs and those of his spouse, or for any account upon which Defendant has had signatory authority within the last two years.

2. Copies of all books, records and financial statements kept or issued by Defendant for the last two years.

3. Copies of Defendant’s income tax returns and those of his spouse, for the last two years.
4. All papers and records pertaining to debts owed Defendant by others, and ANY OTHER PAPERS OF ANY SORT PERTAINING TO DEFENDANT’S BUSINESS OR FINANCIAL AFFAIRS FOR THE PERIOD OF TWO YEARS IMMEDIATELY PRECEDING DATE HEREOF, including but not limited to any and all certificates of title to vehicles, share certificates, deeds or contracts concerning real estate, or other indications of ownership of real or personal property.

   (b) Give deposition to Movant’s attorneys at that time.

   It is further ORDERED that Movant recover reasonable attorney’s fees in the sum of $[amount] against Respondent and that such fees be taxed as costs of court.

   SIGNED on ________________________________.

   JUDGE PRESIDING

   APPROVED AS TO FORM:

   [Name]
   Attorney for Movant
   State Bar No.:
   [E-mail address]
   [Address]
   [Telephone]
   [Telecopier]
Order Compelling [name of respondent] to Give Deposition in Aid of Judgment

[Name]
Attorney for Respondent
State Bar No.:
[E-mail address]
[Address]
[Telephone]
[Telecopier]

Attach the order to the motion (form 26-19) and file with the court clerk. Send a copy of the order as approved by the court to the defendant, using the transmittal letter at form 26-14.
Form 26-21

Checklist of Deposition Topics

A. Identification

1. Full legal name
2. Name debtor uses
3. Aliases
4. Social Security number
5. Driver’s license number
6. Date of birth
7. Names of immediate family members (if divorced, obtain details of divorce(s) filing and property division)
8. Home address and phone numbers (landline, if any, and mobile)
9. E-mail address and website URLs

B. Employment (for both debtor and spouse)

1. Employers and addresses
2. Manner of compensation—wages, commissions, independent contract
3. When paid, i.e., monthly, every Friday
4. When any bonuses paid
5. Any ownership interest in the company

6. Job descriptions, any licenses required

C. Real Property

1. Lease/Rent: landlord identification; monthly rent; any rent-to-own options

2. Ownership
   
   a. Homestead
      
      i. address and property description
      
      ii. when acquired, purchase price, monthly payment, status of payments, mortgagee, current balance
      
      iii. rural vs. urban homestead; number of acres; if urban, whether adjacent lots
      
      iv. occupied or abandoned
      
      v. additional principal reductions; payments in fraud of creditors
      
      vi. names on title
      
      vii. if the homestead was acquired less than 1,215 days before the deposition, it is good practice to inquire about previous homestead ownership to gain information to analyze vulnerability of the homestead in the event of bankruptcy
   
   b. Other Real Property
      
      i. addresses and property descriptions
Checklist of Deposition Topics

D. Personal Property

1. Vehicles (including two-, three-, or four-wheeled motor vehicles)
   a. model
   b. license plate numbers/VINs
   c. when acquired
   d. purchase prices
   e. monthly payments
f. lienholders

g. name on titles

h. number of individuals in family who can drive or who relies on another to drive

i. usual locations of vehicles

2. Banks/Savings Accounts/Checking Accounts/Safe-Deposit Boxes/CDs/Cash

   a. names of the institutions

   b. account numbers

   c. names on account and signatories

   d. whether owe debt to the institution

   e. review bank statements with cancelled checks

   f. whether direct deposit of paycheck and when

   g. contents of safe-deposit boxes and ownership of contents

   h. any cash or cash equivalent in hand not in the accounts

3. Stocks, Bonds, Securities

   a. locations of certificates or accounts

   b. names on certificates or stock accounts

   c. identity of securities
d. whether pledged

e. review monthly statement from securities accounts

4. Boats and RVs

a. descriptions

b. identification numbers

c. locations

d. values

e. liens

f. whether boats used in debtor’s business

5. Planes

a. descriptions

b. identification numbers

c. locations

d. values

e. liens

6. Claims against Third Parties

a. does anyone owe you money?—accounts receivable, notes receivable; identify and determine status

b. do you have any lawsuits or judgments against anyone?
c. do you have any claims that would make the basis for a lawsuit?

d. any expected claims in the future?

e. expected inheritances?

f. expected insurance proceeds?

7. Collections (i.e., stamp, gun, coin)

   a. descriptions

   b. values

   c. locations

   d. liens

8. Additional Exempt Property Information: get description; location; value; liens on

   a. home furnishings (including art work)

   b. farming and ranching vehicles and implements

   c. tools, equipment, books, and apparatuses used in a trade or business

   d. wearing apparel

   e. jewelry

   f. firearms (limit to two exempt)

   g. athletic and sporting equipment

   h. household pets
i. animals and forage for their consumption

i. horses, mules, and donkeys with bridles (limit two)

ii. cattle (limit twelve)

iii. other livestock (limit sixty)

iv. fowl (limit 120)

9. Insurance

a. companies issuing

b. policy numbers

c. dates issued

d. types of insurance

e. beneficiaries

f. capacity to borrower against policies

g. large premium payments made in fraud of creditors

10. Retirement Accounts and IRAs

a. review plan documents to determine if qualified

b. account value and history of contributions

11. Trusts

a. beneficiary or trustor
b. property held in the trust

c. whether trust is spendthrift (insist on review of trust documents)

12. Other Intangibles: patents, trademarks, licenses, franchises, etc.; country club memberships

E. Business Interests

1. Sole Proprietorship

   a. assets used in business

   b. liens on assets

   c. checking, savings, etc. accounts for business

   d. cash flow analysis

2. Partnerships and LLCs

   a. assets used in business

   b. liens on assets

   c. checking, savings, etc. accounts for business

   d. cash flow analysis

   e. partners (members) and their percentage ownerships

   f. review partnership (LLC) documents

3. Corporations

   a. assets used in business
b. liens on assets

c. checking, savings, etc. accounts for business

d. cash flow analysis

e. other shareholders and their share ownership

f. review corporate documentation

F. Transfers, Conversions, Third Parties

1. Property Transferred (within four years)
   a. identify property transferal and current location
   
   b. transferee
   
   c. consideration given (or was it a gift)
   
   d. date of transfer
   
   e. review historical financial statements to detect transfers

2. Personal Property Converted from Nonexempt to Exempt
   a. exempt property purchased (or traded for) within two years
   
   b. review historical financial statements to detect conversions

3. Property Held by Someone Else
   a. real property
   
   b. personal property
c. bank and savings accounts

d. other intangibles

4. Marital Property Agreements

a. prenuptial/postnuptial

b. partitions

5. Closely Held Business That Closed

a. who got assets, phone number, client lists

b. payments to insiders for antecedent debts

c. accounts and note receivable

G. Debts

1. amounts owed

2. whether suit filed or judgment taken

3. collateral

4. when incurred

5. status of payments and if any extraordinary payments made

H. Other Income/Sources of Cash

1. review tax returns for sources of income
2. tax refunds

3. anticipated inheritances

I. Cash Flow Analysis/Monthly Receipts and Expenses

J. Payment Proposals

1. monthly

2. lump sum

3. bankruptcy—past filings, intent to file in future

K. Documents Review—go over documents requested in notice or subpoena duces tecum

L. If Corporate Debtor (remember: corporations have no exempt property)

1. name, assumed names

2. incorporation date, whether $1,000 paid in

3. shareholders, directors, officers

4. status of franchise tax payments

5. location(s) of business

6. nature of business

7. identify deponent (see A above)

8. review property issues (see C through K above)
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Chapter 27

Postjudgment Remedies

I. Judgment Lien and Abstract of Judgment

§ 27.1 Creation of Judgment Lien

A judgment lien is created only when an abstract of judgment is properly filed and indexed in the appropriate county records. The judgment itself creates no lien. *C.I.T. Corp. v. Haynie*, 135 S.W.2d 618, 622 (Tex. Civ. App.—Eastland 1939, no writ).

§ 27.2 Availability of Judgment Lien

§ 27.2:1 Judgment Lien Generally

The judgment on which the lien is based must be final; it cannot be interlocutory. *Blankenship & Buchanan v. Herring*, 132 S.W. 882 (Tex. Civ. App. 1910, no writ). The abstract should be filed immediately after rendition of judgment, to perfect the lien as soon as possible.

§ 27.2:2 Pending Appeal

An abstract can be obtained and filed, even if the judgment is being appealed or a supersedeas bond has been filed. If the plaintiff has taken the necessary steps to obtain a lien before the judgment is appealed, the appeal does not impair the judgment, and the lien is preserved pending the appeal. *Roman v. Goldberg*, 7 S.W.2d 899 (Tex. Civ. App.—Waco 1928, writ ref’d).

If the defendant wants to prevent enforcement of the judgment lien pending appeal, he must obtain a finding from the trial court that the creation of the lien would not substantially increase the security of the plaintiff’s recovery when balanced against the cost to the defendant after all appeals have been exhausted. Recording a certified copy of this finding in the judgment records in which the abstract of judgment is filed neutralizes the lien pending appeal. The defendant must also post appropriate security. Tex. Prop. Code § 52.0011(a); see also Tex. R. Civ. P. 24. The court may withdraw its finding at any time. If it does so, the filing of a certified copy of the withdrawal reinstates the lien. Tex. Prop. Code § 52.0011(b).

See section 27.25 below regarding enforcement of the judgment itself pending appeal and how the defendant may postpone that enforcement.

§ 27.3 Property to Which Lien Attaches

§ 27.3:1 Real Property

A properly recorded and indexed abstract of judgment creates a lien on the defendant’s nonexempt real property in the county in which the abstract is recorded, if the judgment itself is not dormant. Tex. Prop. Code § 52.001; see *Donley v. Youngstown*
Sheet & Tube Co., 328 S.W.2d 192, 197 (Tex. Civ. App.—Eastland 1959, writ ref’d n.r.e.). The lien continues for ten years from the date of recording and indexing, as long as the judgment does not become dormant (although a judgment in favor of the state or a state agency is treated differently). Tex. Prop. Code § 52.006. The defendant’s homestead is exempt, as discussed in section 27.3:3 below. The judgment lien also attaches to after-acquired real property of the defendant. Tex. Prop. Code § 52.001. The judgment lien does not attach to the defendant’s personal property. Donley, 328 S.W.2d at 197.

§ 27.3:2 Inherited Real Property

When a person dies, whether testate or intestate, his property vests immediately in his legatees or heirs, subject to payment of his debts. Tex. Est. Code §§ 101.001, 101.051. A properly filed and indexed abstract of judgment against such a legatee or heir creates a lien against the inherited real property. An executor or administrator can sell the property free of the lien, however, to satisfy debts of the estate. Woodward v. Jaster, 933 S.W.2d 777, 780–82 (Tex. App.—Austin 1996, no writ).

§ 27.3:3 Homestead

A recorded judgment lien against the owner of homestead property will attach to the property when it ceases to be his homestead, if it is still owned by him. Walton v. Stinson, 140 S.W.2d 497, 499 (Tex. Civ. App.—Dallas 1940, writ ref’d). The homestead is discussed at sections 27.34 through 27.40 below.

Although the abstract does not create a lien on the defendant’s homestead, it can still create a cloud on the title. The defendant may have a claim for damages against a plaintiff who refuses to release the lien as to the homestead when requested to do so by the defendant. Tarrant Bank v. Miller, 833 S.W.2d 666, 667–68 (Tex. App.—Eastland 1992, writ denied).

The Texas Property Code sets out requirements for a release of record of lien on homestead property. See Tex. Prop. Code § 52.0012. For a homestead affidavit as release of judgment lien, see form 27-26 in this chapter.

§ 27.4 Burden for Compliance with Abstract of Judgment Statutes

A judgment lien is a statutory creation and therefore must comply with the governing statutes. Day v. Day, 610 S.W.2d 195, 197 (Tex. Civ. App.—Tyler 1980, writ ref’d n.r.e.). The attorney should be absolutely certain that the abstract is properly prepared, recorded, and indexed and that all requirements of law are met. The party attempting to establish a judgment lien has the burden of proving that all statutory requirements have been met. See Alkas v. United Savings Ass’n, 672 S.W.2d 852, 859 (Tex. App.—Corpus Christi 1984, writ ref’d n.r.e.); McGlothlin v. Coody, 59 S.W.2d 819, 821 (Tex. Comm’n App. 1933, holding approved). The requirements for preparing and recording the abstract of judgment are discussed at sections 27.5 and 27.6 below.

§ 27.5 Contents of Abstract of Judgment

An abstract of judgment must contain—

1. a mailing address for each plaintiff or judgment creditor;
2. the name of each plaintiff and defendant;
3. the date of birth of each defendant, if available to the clerk;
4. the last three numbers of the driver’s license of each defendant, if available;
5. the last three numbers of the Social Security number of each defendant, if available;
6. the cause number of the suit in which the judgment was rendered;
7. the address of each defendant if shown in the suit in which the judgment was rendered or, if not shown in the suit, the nature of the citation and the date and place it was served;
8. the date the judgment was rendered;
9. the amount of the judgment as rendered and the balance due on the judgment;
10. the amount of the balance due, if any, for child support arrearage; and
11. the interest rate specified in the judgment.

Tex. Prop. Code §§ 52.003(a), 52.0041.

In justice or small claims courts, the justice of the peace or the attorney of a person in whose favor a judgment is rendered prepares the abstract. In all other state courts, the plaintiff or his agent or attorney may either prepare the abstract himself or have the court clerk prepare it. If someone other than a clerk or justice of the peace prepares the abstract, it must be verified. Tex. Prop. Code § 52.002.

The attorney should review the abstract before recording to make sure it complies with all statutory requirements. Any error may invalidate the abstract and preclude the lien. See, e.g., Bonner v. Grigsby, 19 S.W. 511 (Tex. 1892) (cause number omitted); Evans v. Frisbie, 19 S.W. 510 (Tex. 1892) (credits on judgment not shown); Allied First National Bank v. Jones, 766 S.W.2d 800 (Tex. App.—Dallas 1988, no writ) (debtor’s address omitted); Texas American Bank/Fort Worth v. Southern Union Exploration Co., 714 S.W.2d 105 (Tex. App.—Eastland 1986, writ ref’d n.r.e.) (no debtor’s address or nature of citation); Reynolds v. Kessler, 669 S.W.2d 801 (Tex. App.—El Paso 1984, no writ) (no date of judgment or interest rate); Rushing v. Willis, 28 S.W. 921 (Tex. Civ. App. 1894, no writ) (incorrect date).

The standard for meeting the requirements of Tex. Prop. Code § 52.003 is substantial compliance. Citicorp Real Estate, Inc. v. Banque Arabe Internationale D’Investissement, 747 S.W.2d 926, 929 (Tex. App.—Dallas 1988, writ denied); see also Hoffman, McBryde & Co. v. Heyland, 74 S.W.3d 906, 912–13 (Tex. App.—Dallas 2002, pet. denied) (if abstract reflects balance due when issued, credits to judgment before abstract is filed need not be shown); Smith v. Adams, 333 S.W.2d 892, 895–96 (Tex. Civ. App.—Eastland 1960, writ ref’d n.r.e.) (discrepancy of one day between actual date of judgment and date shown on abstract did not affect lien’s validity). Omission of mandatory information such as the defendant’s address or citation information is not substantial compliance, however, even if other parties, such as a competing lien claimant, have actual knowledge of the missing information. Citicorp Real Estate, Inc., 747 S.W.2d at 929–30.

The clerk must include the defendant’s date of birth and driver’s license number only if that information is reasonably available. If the information is not available, the clerk is not required to state that fact on the face of the abstract. Fred Rizk Construction Co. v. Cousins Mortgage & Equity Investments, 627 S.W.2d 753, 756 (Tex. App.—Houston [1st Dist.] 1981, writ ref’d n.r.e.). The requirement that the abstract contain the defendant’s address also applies to prevailing counterplaintiffs. Allied First National Bank, 766 S.W.2d at 803.

For an abstract of judgment, see form 27-1 in this chapter. For a letter explaining the judgment lien to the client, see form 27-2.
§ 27.6 Recording of Abstract of Judgment

The county clerk must, on request, immediately record a properly authenticated abstract of judgment in the judgment records. The clerk must note the day and hour of recording on the abstract and enter it in an alphabetical index to the judgment records, showing the name of each plaintiff and defendant in the judgment and the volume and number of the page in the records where the abstract is recorded. Tex. Prop. Code § 52.004. Failure to properly index the abstract can destroy the lien. City State Bank v. Bailey, 214 S.W.2d 901, 903–04 (Tex. Civ. App.—Amarillo 1948, writ ref’d) (lien failed because judgment for City State Bank indexed under “B” as “Bank, City State”); but see Houston Investment Bankers Corp. v. First City Bank of Highland Village, 640 S.W.2d 660, 662 (Tex. App.—Houston [14th Dist.] 1982, no writ) (abbreviation of “First City Bank of Highland Village” to “First City Bank HV” did not invalidate lien).

The name of each plaintiff and defendant named in the judgment must be indexed; omission of any name can destroy the lien on the other defendants. Reynolds v. Kessler, 669 S.W.2d 801, 805 (Tex. App.—El Paso 1984, no writ); McGlothlin v. Coody, 59 S.W.2d 819 (Tex. Comm’n App. 1933, holding approved).

Suggested counties in which to record the abstract include those of the defendant’s residence; his principal place of business or employment; his previous residence; his family’s residence (for inheritance possibilities); and a former ownership of property, because he may reside or invest there again.

The attorney should ascertain the correct filing fee from the county clerk’s office before filing the abstract. After the abstract is recorded, the county clerk will return it to the address indicated at the end of the document.

§ 27.7 Discharge and Cancellation of Judgment

If the defendant pays the judgment, the plaintiff or his attorney should execute a release of the judgment lien and send it to the defendant. When doing so, he should advise the defendant of all counties in which the abstract was recorded, so that the defendant may record the release in those counties. A release of judgment lien is at form 27-3 in this chapter.

A judgment and judgment lien may also be discharged and canceled if the defendant obtains a discharge in bankruptcy. If the abstract of judgment was recorded before September 1, 1993, the defendant must apply to the court rendering the judgment for an order discharging and canceling the judgment and judgment lien. Tex. Prop. Code §§ 52.021–.025. For judgments for which abstracts were recorded on or after September 1, 1993, the defendant’s discharge in bankruptcy automatically cancels the judgment and the lien, unless the debt was not discharged or the property was not exempted in the bankruptcy and was abandoned during the bankruptcy. Tex. Prop. Code §§ 52.041–.043.

If the judgment creditor refuses to accept payment of the judgment or accepts payment and refuses to execute a release, the judgment debtor has a statutory remedy to obtain a release. Tex. Civ. Prac. & Rem. Code § 31.008(g).

§ 27.8 Keeping Judgment and Lien Alive

§ 27.8:1 Expiration of Judgment Lien

Once a lien is created, it continues for ten years following the date of recording and indexing the abstract, unless the judgment becomes dormant during that period (although a judgment favoring the state or a state agency is treated differently, as is a judgment for child support under the Family Code). Tex. Prop. Code § 52.006; see also Tex. Civ. Prac. & Rem. Code
§ 34.001(c). It is essential both to keep the judgment lien alive and to keep its priority in place by recording and indexing a new abstract before the expiration of ten years from the date the last abstract was recorded and executing on the judgment to keep it from becoming dormant. Because each abstract creates a new lien, recording and indexing an abstract more than ten years after the immediately preceding one was recorded and indexed creates a new lien, but the break causes a loss of the preceding lien and its priority in the chain of title. See Burton Lingo Co. v. Warren, 45 S.W.2d 750 (Tex. Civ. App.—Eastland 1931, writ ref’d). Revival of dormant judgments is discussed at section 27.16 below.

The following table illustrates how the interaction of the dates of judgment, recording, and execution affect the duration of the lien. Note that judgments favoring the state or a state agency are treated differently. See Tex. Prop. Code § 52.006.

<table>
<thead>
<tr>
<th>Judgment Signed</th>
<th>Abstract Recorded</th>
<th>Writ of Execution Issued</th>
<th>New AJ Recorded?</th>
<th>Lien Expires</th>
</tr>
</thead>
<tbody>
<tr>
<td>a. 1/2/10</td>
<td>1/2/10</td>
<td>none</td>
<td>no</td>
<td>1/2/20</td>
</tr>
<tr>
<td>Lien lasts for ten years from date of recording (Tex. Prop. Code § 52.006); judgment went dormant ten years from date of rendition (Tex. Civ. Prac. &amp; Rem. Code § 34.001(a)).</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>b. 1/2/10</td>
<td>6/2/10</td>
<td>12/1/19</td>
<td>no</td>
<td>6/2/20</td>
</tr>
<tr>
<td>Judgment did not go dormant because of execution within ten years from date of rendition; judgment lien lasted ten years from date of recording.</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>c. 1/2/10</td>
<td>6/1/15</td>
<td>none</td>
<td>no</td>
<td>1/2/20</td>
</tr>
<tr>
<td>Even though judgment lien ordinarily lasts for ten years from date of recording, this judgment went dormant ten years from date of rendition; lien expired on date of dormancy.</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>d. 1/2/10</td>
<td>6/1/15</td>
<td>12/1/19</td>
<td>no</td>
<td>6/1/25</td>
</tr>
<tr>
<td>Lien lasts for ten years from date of recording; it was kept alive by execution within ten years of rendition.</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>e. 1/2/10</td>
<td>6/2/10</td>
<td>12/1/19</td>
<td>6/1/20</td>
<td>12/1/29</td>
</tr>
<tr>
<td>Recording of new abstract within ten years of recording first abstract perpetuated judgment lien; judgment lien went dormant ten years after execution. Another execution within ten years of first execution could have kept lien alive until 6/1/30. Tex. Civ. Prac. &amp; Rem. Code § 34.001(b).</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>f. 1/2/10</td>
<td>6/2/10</td>
<td>12/1/19</td>
<td>8/3/20</td>
<td>12/1/29</td>
</tr>
<tr>
<td>Lien expires 12/1/29 as in example e., but plaintiff loses lien priority because he did not record new abstract within ten years of recording first abstract. Any lien or claim against property recorded before rerecorded abstract takes priority over it.</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

§ 27.8:2 Effect of Limitations on Life of Judgment Lien

In Jones v. Harrison, 773 S.W.2d 759 (Tex. App.—San Antonio 1989, writ denied), the plaintiff abstracted his lien. Later, the defendant conveyed real property to third parties. When the plaintiff tried to enforce his judgment lien, the court held that his action was barred by limitations title in the grantees of the defendant. Harrison, 773 S.W.2d at 760. This holding suggests that regular postjudgment discovery may be required in order to ensure the life of the lien, so that a transfer of property can be discovered before limitations title is perfected. If the defendant and his transferee seek to remove a judgment lien by claiming limitations title in this manner, the transaction should be scrutinized as a possible fraudulent transfer. See Tex. Bus. & Com. Code § 24.005 and section 14.10 in this manual. Furthermore, Harrison may be subject to challenge because the judgment creditor has no right of possession.
§ 27.8:3 Responsibilities of Attorney and Client in Keeping Judgment and Lien Alive

The attorney and his client should agree on who has the responsibility for keeping the judgment and all judgment liens alive. It is the better practice to place these responsibilities with the client. A suggested letter to this effect is at form 27-4 in this chapter. If the attorney undertakes these responsibilities, he must be careful to keep an accurate tickler system and to keep up with the whereabouts of both the defendant and the client. See section 27.16 below for a discussion of dormancy of judgments and expiration of liens.

§ 27.8:4 Tolling Limitations on Judgment

Fraud or concealment by the defendant will toll the ten-year dormancy rule under Tex. Civ. Prac. & Rem. Code § 34.001. Limitations will begin to run from the time the fraud is discovered or could have been discovered by the defrauded party using reasonable diligence. Estate of Stonecipher v. Estate of Butts, 591 S.W.2d 806, 809 (Tex. 1979).

§ 27.9 Unclaimed Judgment

If the plaintiff cannot be found, the defendant can obtain a release of the judgment by paying the amount of the judgment into the registry of the court. Tex. Civ. Prac. & Rem. Code § 31.008. This procedure allows defendants to clear judgment liens from the title to their real property and to update their credit histories when the plaintiff cannot be located.

[Section 27.10 is reserved for expansion.]

II. Execution

§ 27.11 Purpose and Use of Execution

A writ of execution is a judicial writ directing the enforcement of a district, county, or justice court judgment. See Tex. R. Civ. P. 621. The writ typically directs the sheriff or constable to levy on a defendant’s nonexempt property, sell it, and deliver the sale proceeds to the plaintiff to be applied toward satisfaction of the judgment. See Tex. R. Civ. P. 637. Property subject to and exempt from execution is discussed in part III. in this chapter. Garnishment, another judgment collection procedure, is discussed in part IV.

§ 27.12 Issuance of Writ of Execution

§ 27.12:1 Time for Issuance

A judgment creditor has the right, as a matter of law, to have a writ of execution issued unless and until the defendant files a proper supersedeas bond. Tex. R. Civ. P. 627; see Merrell v. Fanning & Harper, 597 S.W.2d 945, 950 (Tex. Civ. App.—Tyler 1980, no writ). If no supersedeas bond is filed and approved, a writ of execution must be issued if the plaintiff applies for it after the expiration of thirty days from the time final judgment is signed. If a motion for new trial is timely filed but is denied, the clerk must issue the writ after the expiration of thirty days from the time the order overruling the motion is signed or from the time the motion is overruled by operation of law. Tex. R. Civ. P. 627; see also Tex. R. Civ. P. 329b.
The writ may issue before the thirtieth day if the plaintiff files an affidavit that the defendant is about to (1) remove his nonexempt personal property from the county or (2) transfer or secrete his nonexempt personalty to defraud his creditors. Tex. R. Civ. P. 628. For the first ground, it is not necessary that the defendant be trying to defraud his creditors. Clifford v. Lee, 23 S.W. 843, 844 (Tex. Civ. App. 1893, no writ). If the defendant received a hearing on the sufficiency of the plaintiff’s affidavit, the sufficiency of the affidavit may not be challenged on appeal, even if the hearing was held after execution was granted. See Perfection Casting Corp. v. Aluminum Alloys, Inc., 733 S.W.2d 385, 386 (Tex. App.—San Antonio 1987, no writ) (no statement of facts appeared in appellate record; appellate court assumed evidence at hearing was sufficient).

§ 27.12:2 Diligence in Issuance

The attorney must make sure that the writ is prepared and issued by the clerk, placed in the officer’s hands, and executed by the officer, all in a timely and proper manner. The burden is on the plaintiff to prove that the writ was issued on his judgment within the statutory period. See Boyd v. Ghent, 64 S.W. 929, 930 (Tex. 1901). Issuance means more than mere clerical preparation; it includes unconditional delivery to an officer for enforcement. See Harrison v. Orr, 296 S.W. 871, 875–76 (Tex. Comm’n App. 1927, judgm’t adopted), modified, 10 S.W.2d 381 (Tex. Comm’n App. 1928). The same diligence must be exercised in obtaining issuance of a writ of execution on a judgment as when obtaining service of citation when a suit is originally brought. Execution is not said to have “issued,” even though the writ has been prepared and attested, if it has not been actually and unconditionally delivered to the officer for enforcement. There must be reasonable diligence in making delivery to the officer. Ross v. American Radiator & Standard Sanitary Corp., 507 S.W.2d 806, 809 (Tex. Civ. App.—Dallas 1974, writ ref’d n.r.e.).

The question of issuance of execution turns on the diligence and good faith of the plaintiff. See Williams v. Short, 730 S.W.2d 98, 99–100 (Tex. App.—Houston [14th Dist.] 1987, writ ref’d n.r.e.); R.B. Spencer & Co. v. Harris, 171 S.W.2d 393, 395 (Tex. Civ. App.—Amarillo 1943, writ ref’d). When the sheriff was instructed to return the writ on the last day for return without actually attempting to execute it, there was no valid issuance of execution. Harrison, 296 S.W. at 875. See also Hughes v. Rutherford, 201 F.2d 161, 163 (5th Cir. 1953). But when the writ was delivered to the sheriff with the request that it be returned nulla bona and the sheriff searched the tax rolls, found no property subject to the writ, and returned it nulla bona, there was valid issuance, because there was no want of diligence or lack of good faith. R.B. Spencer & Co., 171 S.W.2d at 395.

§ 27.12:3 Presumption That Officer Performed His Duty

Proof of delivery of the writ to the officer creates a presumption that he performed his duty. The absence of a return does not negate issuance. If there is no showing that the officer was in any way thwarted or deterred from performing his duty, issuance is complete on unconditional delivery to the officer for enforcement. Carpenter v. Probst, 247 S.W.2d 460, 461–62 (Tex. Civ. App.—San Antonio 1952, writ ref’d); cf. Cotten v. Stanford, 147 S.W.2d 930, 933 (Tex. Civ. App.—Amarillo 1941, no writ).

§ 27.13 Requisites of Writ of Execution

§ 27.13:1 Inspection of Writ by Attorney

The writ is usually prepared by the clerk of the court that rendered the judgment. The attorney should request the clerk to send the completed writ of execution to him for review; see form 27-5 in this chapter. Before sending it to the officer, the attorney
should check the writ to make sure that the information has been entered correctly, the correct form was used, and all legal requirements have been met.

§ 27.13:2 General Requirements

Every writ of execution must—

1. be styled “The State of Texas”;

2. be directed to any sheriff or any constable within the state, not to a particular county (see also Tex. R. Civ. P. 622);

3. describe the judgment, stating—
   a. the court in which it was rendered;
   b. the time when it was rendered; and
   c. the names of the parties in whose favor and against whom it was rendered;

4. contain a correct copy of the bill of costs taxed against the defendant in execution (see also Tex. R. Civ. P. 622);

5. require the officer to execute it according to its terms and to recover the costs adjudged against the defendant in execution and the further costs of executing the writ;

6. require the officer to return it within thirty, sixty, or ninety days as directed by the plaintiff or his attorney (see section 27.13:7 below);

7. be signed officially by the clerk or justice of the peace; and

8. bear the seal of the court if issued from a district or county court.

Tex. R. Civ. P. 629. Additional requirements for particular kinds of writs are discussed in the following sections.

§ 27.13:3 Money Judgment

If an execution is issued on a judgment for an amount of money, or directing the payment simply of an amount of money, the writ must specify the amount of money recovered or directed to be paid, the amount actually due when the writ was issued, and the interest rate on that amount. The writ must order the officer to satisfy the judgment and costs out of the property of the defendant subject to execution. Tex. R. Civ. P. 630.

§ 27.13:4 Sale of Particular Property

If the judgment orders the sale of particular property, the writ must particularly describe the property and direct the officer to make the sale by giving the required public notice of sale. Tex. R. Civ. P. 631.

§ 27.13:5 Delivery of Certain Personal Property

If the judgment orders the delivery of possession of property, the writ must particularly describe the property and the person entitled to possession and order the officer to deliver the property to that person. Tex. R. Civ. P. 632.
§ 27.13:6 Possession or Value of Personal Property

If the judgment is for the recovery of personal property or its value, the writ must order the officer either to recover the property or, if the property cannot be recovered, to levy on the defendant’s property subject to execution and collect the value of the property. Tex. R. Civ. P. 633.

§ 27.13:7 Request for Return of Execution in Less Than Ninety Days

The plaintiff can ask the clerk to make the execution returnable within thirty, sixty, or ninety days. Tex. R. Civ. P. 629. Without such a request, the full ninety days will be allowed, and many form writs of execution are so printed. The plaintiff’s attorney will usually have no need to require a return in less than ninety days. But a shorter period may be desired if, for example—

1. before seeking a writ of garnishment, the attorney wants to establish evidence that there is insufficient property to satisfy the execution, or
2. there is some reason to levy against one defendant before levying against another defendant and a ninety-day execution might unduly delay the second levy.

§ 27.14 Suspending Execution

A justice court execution can be stayed for three months from the date of judgment if, within ten days after rendition, the defendant and one or more sureties appear before the justice and acknowledge themselves bound to the plaintiff for the full amount of the judgment plus interest and costs. The acknowledgment must be entered on the docket in writing and signed by the sureties. In addition, the party seeking the stay must file an affidavit that he does not have enough money to pay the judgment and that enforcement before three months’ time would be a hardship and would cause a sacrifice of his property that likely would not be caused if the execution were stayed. At the end of three months, execution will issue if the judgment is not paid. See Tex. R. Civ. P. 635.

See also section 27.25 below.

§ 27.15 Execution against Estate

If a money judgment is against the personal representative of an estate acting in that capacity, the judgment must state that it is to be paid in the course of administration, and no execution may issue on it. The judgment is to be certified to the probate court or county court sitting in probate and paid in the course of administration. This procedure does not apply if the decedent’s will dispenses with the need for court-supervised administration; in that case, the plaintiff may execute on property of the testator held by the executor of the estate. Tex. R. Civ. P. 313. A judgment against a personal representative acting as such must state that it is to be paid in the course of administration. An erroneous recitation in the judgment to “let execution issue” will not render the judgment void, however, nor will it subject the judgment to collateral attack, if the court rendering the judgment had jurisdiction over the subject matter and parties and had the power to adjudicate the extent of liability. Furthermore, a personal representative who has full knowledge of the judgment has the duty to present it to the county or probate court for inclusion in the distribution of the estate. See State v. Blair, 629 S.W.2d 148, 150 (Tex. App.—Dallas), aff’d, 640 S.W.2d 867 (Tex. 1982). A judgment against a judgment defendant who later dies is not enforceable as a judgment against the estate. The judgment creditor must pursue it as any other claim against the estate. See generally chapter 29 in this manual regarding claims in probate.
§ 27.16 Dormant Judgment

If a writ of execution has not been issued within ten years after rendition of judgment, the judgment will become dormant, and execution may not issue on it unless it is revived. A second writ may issue at any time within ten years after issuance of the first writ. If the writ is issued within ten years after rendition of judgment, but a second writ is not issued within ten years after issuance of the first writ, the judgment then becomes dormant. This, however, does not apply to a judgment for child support under the Family Code. Tex. Civ. Prac. & Rem. Code § 34.001. See section 27.8:1 above regarding how the interaction of the dormancy and abstract of judgment statutes affects the duration of the judgment lien.

A dormant judgment may be revived by scire facias or by an action of debt brought not later than the second anniversary of the date that the judgment becomes dormant. Tex. Civ. Prac. & Rem. Code § 31.006. See forms 27-8 and 27-9 in this chapter for a petition to revive a judgment and a judgment reviving a dormant judgment.

§ 27.17 Recovery of Seized Property and Plaintiff's Liability

A defendant may recover property that has been seized through execution if the judgment on which the execution is issued is later reversed or set aside and the property has not been sold at execution sale. Tex. Civ. Prac. & Rem. Code § 34.021. If the property has been sold, the person is entitled to recover from the plaintiff its market value at the time of sale. Tex. Civ. Prac. & Rem. Code § 34.022.

§ 27.18 Court Proceedings to Reach Nonexempt Property Not Readily Levied On

If the defendant owns nonexempt property, the plaintiff may obtain injunctive, turnover, or other relief in reaching the property. Tex. Civ. Prac. & Rem. Code § 31.002(a). See parts V. and VI. in this chapter for discussion.

§ 27.19 Method of Levy on Particular Kinds of Property

§ 27.19:1 Real Property

To levy on real property, the officer need not go on the property but can merely endorse the levy on the writ. Tex. R. Civ. P. 639. The sale procedure is discussed at section 27.21:1 below.

§ 27.19:2 Personal Property

If the defendant is entitled to possession of personal property, the officer levies on it by taking possession of it. If the defendant has an interest in the personal property but is not entitled to possession of it, levy is made by giving notice to the person who is entitled to possession or, if several persons are entitled to possession, to one of them. Tex. R. Civ. P. 639.

§ 27.19:3 Immovable or Bulky Property

In the case of immovable or bulky property that is so cumbersome that it may not be moved except at great expense and effort, the levying officer need only go on the premises, point out the property, assume dominion over it, and forbid its removal by the person against whom the writ has issued. Beaureline v. Sinclair Refining Co., 191 S.W.2d 774, 777 (Tex. Civ. App.—San...
Antonio 1945, writ ref’d n.r.e.). The officer will likely require the judgment creditor to advance the cost of a bonded guard until the property can be sold.

§ 27.19:4 Collateral

Property that has been assigned, mortgaged, or pledged as collateral can be levied on and sold at execution sale. If the collateral is held by the assignee, mortgagee, or pledgee, the buyer at execution sale can take possession of the property by complying with the terms of the mortgage or security agreement. Tex. R. Civ. P. 643. See section 27.41:6 below regarding property subject to a security interest or mortgage.

§ 27.19:5 Corporate Shares


§ 27.19:6 Livestock

An officer can levy on livestock that are running at large on the range and cannot be herded and penned without great inconvenience and expense by making a reasonable estimate of the number of animals and describing them by their marks or brands. The levy must be made in the presence of two or more credible persons, and written notice of the levy must be given to the owner, his herder, or his agent, if they reside within the county and are known to the officer. Tex. R. Civ. P. 640.

§ 27.20 Defendant’s Right to Designate Property for Levy

Unless the writ of execution orders the sale of specific property, the officer must first call on the defendant to designate the property the defendant prefers to have sold. If the officer believes the designated property will not sell for enough to satisfy the execution and costs of sale, he must require the defendant to designate additional property.

If the defendant does not designate any property, the officer must levy on any of the defendant’s property subject to execution. If the defendant cannot be found to make a designation or if the defendant is absent, the officer may call on any known agent of the defendant in the county to make the designation. Tex. R. Civ. P. 637.

§ 27.21 Sale of Property under Writ of Execution

§ 27.21:1 Real Property

Realty is sold at public auction held at the courthouse door of the county in which it is located between 10:00 A.M. and 4:00 P.M. on the first Tuesday of the month, although the court may order the sale to be held at the site of the property. Tex. R. Civ. P. 646a. If the property consists of several lots in a city or town, each lot must be offered for sale separately, unless the lots are not susceptible to separate sale because of the character of improvements. Tex. Civ. Prac. & Rem. Code § 34.042. See also Tex. Civ. Prac. & Rem. Code § 34.043 regarding the sale of rural property.
Before sale, the officer must advertise the time and place of sale. The advertisement must be published once a week for three consecutive weeks before the sale in a newspaper published in the county in which the property is located, with the first publication appearing not less than twenty days before the sale. He must also give the defendant or his attorney written notice of the sale, by mail or in person. The notice given to the defendant or his attorney must substantially conform to the requirements of the published advertisement of the sale. Tex. R. Civ. P. 647. For purposes of calculating twenty days before the sale, the date the first notice is published counts as the first day. The twentieth and last day counted is the day before the day of the sale. Concrete, Inc. v. Sprayberry, 691 S.W.2d 771, 772 (Tex. App.—El Paso 1985, no writ).

The advertisement must contain—

1. a statement of the authority by which the sale will be made;
2. the time of levy;
3. the time and place of sale;
4. a brief description of the property;
5. the number of acres, original survey, and location in the county; and
6. the name by which the land is most generally known.

It is not necessary that the advertisement contain field notes. Tex. R. Civ. P. 647. The officer prepares the notice; the plaintiff’s attorney should request a copy. See the letter at form 27-7 in this chapter.

Persons eligible to purchase real property at execution sales must present the officer conducting the sale with a written statement from the county tax assessor-collector that they owe no delinquent taxes. See Tex. Tax Code § 34.015 (prescribing the form of the required statement). The deed executed by the officer conducting the sale must recite that this requirement was met by the successful bidder. Tex. Civ. Prac. & Rem. Code § 34.0445(c). In counties with a population of less than 250,000, this requirement applies only if the commissioners court has by order adopted the requirement. Tex. Civ. Prac. & Rem. Code § 34.0445.

Due to the length of time it often takes to advertise an execution sale of real estate, the writ of execution may expire. To continue the life of the writ beyond the usual ninety days, the court clerk can issue a venditioni exponas, referenced in Tex. R. Civ. P. 647 and defined in Black's Law Dictionary (10th ed. 2014). See form 27-10 for a venditioni exponas.

§ 27.21:2 Personal Property

Personalty is to be sold at the premises where it was taken in execution, the courthouse door of the county in which it is located, or some other place if it is more convenient to exhibit it to purchasers at that place because of the nature of the property. Except for shares of stock, property in which the defendant has only an interest without the right to exclusive possession, and livestock running at large on the range, personal property cannot be sold without being presented for viewing by those attending the sale. Tex. R. Civ. P. 649. Notice of the sale must be given by posting a notice for ten successive days immediately before the sale, at the courthouse door of any county and at the place where the sale is to be made. Tex. R. Civ. P. 650. The officer prepares the notice; the plaintiff’s attorney should request a copy. See the letter at form 27-7 in this chapter.
§ 27.21:3  Penalty for Sale of Property without Notice

If the officer sells property without giving the required notice or sells property in a manner other than that prescribed by law, the officer is liable only for actual damages sustained by the injured party, who has the burden to prove that the sale was improper and any actual damages suffered. Tex. Civ. Prac. & Rem. Code § 34.066.

§ 27.21:4  Irregularities of Sale

The execution sale can be set aside on a showing that the bid price was grossly inadequate and that there were irregularities involved with the sale. See Collum v. DeLoughter, 535 S.W.2d 390, 392–93 (Tex. Civ. App.—Texarkana 1976, writ ref’d n.r.e.) (failure to notify defendant of sale, failure to allow defendant to designate property to be sold, and misdescription of property were sufficient irregularities); Pantaze v. Slocum, 518 S.W.2d 407, 409 (Tex. Civ. App.—Fort Worth 1974, writ ref’d n.r.e.) (slight irregularities in sale, coupled with gross inadequacy of bid price, justified setting aside sale); but see Brimberry v. First State Bank of Avinger, 500 S.W.2d 675, 676–77 (Tex. Civ. App.—Texarkana 1973, writ ref’d n.r.e.) (slight irregularities not sufficient to set aside sale, because bid price not grossly inadequate).

§ 27.21:5  Purchaser’s Failure to Comply with Terms of Sale

If the purchaser at execution sale fails to comply with the terms of sale, he will be liable to the plaintiff for 20 percent of the value of the property bid for, plus costs. The plaintiff must file a motion to recover this amount, and the defaulting purchaser is entitled to at least five days’ notice of a hearing on the motion. Also, if the property sells for less at a later sale than the high bid price at the first sale, the defaulting purchaser is liable for the difference. Tex. R. Civ. P. 652. See also Jackson v. Universal Life Insurance Co., 582 S.W.2d 207, 209 (Tex. Civ. App.—Eastland 1979, writ ref’d n.r.e.); Childress v. Ely & Walker, 489 S.W.2d 628, 631 (Tex. Civ. App.—Texarkana 1973, no writ).

§ 27.22  Defendant’s Right to Replevy

§ 27.22:1  Return of Property to Defendant

Personal property taken in execution may be returned to the defendant by the officer if the defendant gives the officer a delivery bond payable to the plaintiff, with two or more sureties approved by the officer. The defendant must agree in the bond to pay the officer the fair value of the property, as stated in the bond, or return the property to the officer at the time and place stated in the bond, to be sold. Tex. R. Civ. P. 644. The defendant may dispose of the property and pay the officer the amount stated in the bond. Tex. R. Civ. P. 645.

§ 27.22:2  Forfeiture of Delivery Bond

If the defendant does not return the property or pay the stated value under the terms of the delivery bond, the officer is to mark the bond as forfeited and return it to the clerk or justice of the peace who issued it, who will then issue a writ of execution against the principal defendant and his sureties. Tex. R. Civ. P. 646.
§ 27.23 Duties and Liabilities of Officer

§ 27.23:1 Duty of Officer to Levy

When an officer receives a writ of execution, he is required to proceed without delay to levy on the defendant’s nonexempt property found in his county, unless directed otherwise by the plaintiff or his agent or attorney. Tex. R. Civ. P. 637. The sheriff must execute all process and precepts directed to him by legal authority and must return the process or precept to the proper court on or before the date the process or precept is returnable. Tex. Loc. Gov’t Code § 85.021(a). Constables have a similar duty. See Tex. Loc. Gov’t Code § 86.021(a).

The officer must endorse the writ when he receives it with the day and hour of receipt. If the officer receives more than one execution on the same day against the same person, he must number them as received. Tex. R. Civ. P. 636. Improper or false endorsement renders the officer and the officer’s sureties liable for damages suffered by the plaintiff. Tex. Civ. Prac. & Rem. Code § 34.063(a). The plaintiff has the burden to prove that the officer failed to properly number or endorse the writ, the officer’s failure precluded the levy of executable property owned by the judgment debtor, such property was not exempt from execution or levy, and the plaintiff suffered actual damages. Tex. Civ. Prac. & Rem. Code § 34.063(b).

An officer receiving a writ of execution does not have a duty to (1) search for property belonging to the judgment debtor, (2) determine whether property belongs to a judgment debtor, (3) determine whether property belonging to the judgment debtor is exempt property not subject to levy, (4) determine the priority of liens asserted against property subject to execution, or (5) make multiple levies for cash or multiple levies at the same location. Tex. Civ. Prac. & Rem. Code § 34.071. An officer also does not have a duty to levy on or sell property not within the officer’s county, unless it is real property that is partially in the officer’s county and partially within a contiguous county. Tex. Civ. Prac. & Rem. Code § 34.073(b).

§ 27.23:2 Timing of Execution and Return

An officer receiving a writ of execution may return the writ after the first levy or attempted levy if the judgment creditor cannot designate any more executable property currently owned by the judgment debtor at the time of the first levy or first attempted levy. Tex. Civ. Prac. & Rem. Code § 34.072(a). Notwithstanding rule 637 of the Texas Rules of Civil Procedure, an attempt to levy on property may begin any time during the life of the writ, provided that the officer allows enough time for completing the sale of the property.

§ 27.23:3 Transfer of Writ

An officer receiving a writ may transfer the writ to another officer in another precinct or to another law enforcement agency authorized to perform executions within the county of the first officer who received the writ. Tex. Civ. Prac. & Rem. Code § 34.073(a).

§ 27.23:4 Wrongful Levy

Whenever a distress warrant or a writ of execution, sequestration, attachment, or other like writ is levied on personal property and the property, or any part of the property, is claimed by any claimant who is not a party to the writ, the only remedy against a sheriff or constable for wrongful levy on the property is by trial of right of property under part VI, section 9, of the Texas Rules of Civil Procedure. Tex. Civ. Prac. & Rem. Code § 34.075.
§ 27.23:5 Failure to Execute Process Generally

A sheriff who fails to return a process or precept or who makes a false return will be liable to the injured party for all damages sustained, and he can be punished as for contempt by a fine of up to $100 by the court to which the process is returnable. Tex. Loc. Gov’t Code § 85.021(b), (c), (d). A constable may be fined $10 to $100 for contempt and costs for failing to execute and return any process lawfully directed and delivered to him, on motion of the injured party with ten days’ notice to the constable, although this does not apply to actions brought under chapter 34 of the Texas Civil Practice and Remedies Code. Tex. Loc. Gov’t Code § 86.024. An officer also commits an offense if, with intent to obtain a benefit or with intent to harm or defraud another, he intentionally or knowingly violates a law relating to his office or employment. Tex. Penal Code § 39.02(a)(1).

Falsely endorsing the writ renders the officer liable for damages plus 20 percent of the amount of the execution. Tex. Civ. Prac. & Rem. Code § 34.063.

See section 16.15 in this manual for further discussion of the officer’s responsibilities and liability for failure to perform them.

§ 27.23:6 Failure to Levy or to Return Writ of Execution

If the officer fails to levy on or sell property subject to execution, if the levy or sale could have taken place, the officer and the officer’s sureties are liable only for actual damages suffered. See Tex. Civ. Prac. & Rem. Code § 34.065(a). The judgment creditor seeking relief has the burden of proof. See Tex. Civ. Prac. & Rem. Code § 34.065(b)–(d). If an officer receives actual notice of an error on a return or of failure to file a return, the officer must amend or file the return no later than thirty days after receiving the notice or the officer may be subject to contempt under section 7.001(b) of the Texas Civil Practice and Remedies Code. Tex. Civ. Prac. & Rem. Code § 34.064.

§ 27.23:7 When Defendant Files Bankruptcy

Because bankruptcy operates as an automatic stay of any proceeding against the defendant, an officer will not be held liable for failure to hold an execution sale after a bankruptcy is filed. See 11 U.S.C. § 362(a)(1), (2), (6); Ortiz v. M.&M. Sales Co., 656 S.W.2d 554, 556 (Tex. App.—Corpus Christi 1983, writ ref’d n.r.e.) (defendant filed for bankruptcy between time sheriff first could have levied and date sale could have been held; sheriff not liable).

§ 27.23:8 Failure to Deliver Money Collected

The officer must deliver to the plaintiff money collected by execution at the earliest opportunity, and failure to do so is ground for the plaintiff to recover from the officer and the officer’s sureties the amount collected, with damages at a rate of 1 percent per month on that amount if proved by the injured party. Tex. Civ. Prac. & Rem. Code §§ 34.047(a), 34.067.

§ 27.23:9 No Indemnity Bond Permitted

An officer may not require that bond be posted for his indemnification before executing a writ. He is not liable for damages resulting from execution of a writ if he executes or attempts to execute the writ in good faith as provided by law. Tex. Civ. Prac. & Rem. Code § 7.003.
§ 27.23:10 Officer’s Duty to Keep Seized Property Secure

Once the officer has levied on personal property, he is charged with the duty of keeping it secure unless the defendant has furnished a delivery bond. If an interested party is injured or suffers loss as a result of the officer’s negligence toward seized property, the officer and his sureties are liable for the value of the property lost or damaged. The injured party has the burden to prove that the officer took actual possession of the property and the actual value of the lost or damaged property. Tex. Civ. Prac. & Rem. Code § 34.061.

§ 27.23:11 Suit against Officer or Officer’s Sureties

Suits must be brought in the form of a lawsuit filed against the officer in the county in which the officer holds office and must be filed no later than the first anniversary of the date on which the injury accrues. Tex. Civ. Prac. & Rem. Code § 34.068(b), (c). An officer or a surety may defend the action by stating and proving any defenses provided by law, including any defense that would mitigate damages. Tex. Civ. Prac. & Rem. Code § 34.068(d).

An officer’s surety may be liable only for the penal sum of the surety bond minus any amounts already paid out under the bond. In no event may an officer’s surety be liable for more than the penal sum of the officer’s surety bond. Tex. Civ. Prac. & Rem. Code § 34.074(a). If the officer and the officer’s surety are both defendants, the surety may deposit in the court’s registry the amount unpaid under the surety bond, and the court will determine the proper disposition of this sum or order the return of the deposit to the surety in the court’s final judgment. Tex. Civ. Prac. & Rem. Code § 34.074(b). A prevailing party under these provisions may bring a separate action against a surety failing to pay the amount remaining under the bond on a final judgment. This action must be brought on or before 180 days after the date all appeals are exhausted in the underlying action. Tex. Civ. Prac. & Rem. Code § 34.074(c).

§ 27.23:12 Payment of Damages

A county, at the discretion of the commissioners court, may pay any judgment taken against an officer, unless the officer is finally convicted under sections 39.02 or 39.03 of the Texas Penal Code. Tex. Civ. Prac. & Rem. Code § 34.069.

An officer against whom a judgment has been taken or a county that has paid the judgment on behalf of the officer has a right of subrogation against the debtor or person against whom the writ was issued. Tex. Civ. Prac. & Rem. Code § 34.070.

§ 27.23:13 Remedies

Subchapter D, chapter 34, of the Texas Civil Practice and Remedies Code is the exclusive remedy for violations of an officer’s duties with regard to the execution and return of writs without regard to the source of the duty prescribed by law. Tex. Civ. Prac. & Rem. Code § 34.076.

§ 27.24 Receipt of Proceeds of Execution

When money has been collected from an execution sale, the common procedure is for the officer to send the proceeds and the completed return to the plaintiff’s attorney. The officer may retain from the proceeds reasonable expenses he incurred in making the levy and keeping the property. If more money is received from the sale than is necessary to satisfy the execution, the officer must immediately pay the excess to the defendant or his attorney. Tex. Civ. Prac. & Rem. Code § 34.047.
When the plaintiff’s attorney receives the net proceeds, he should send them to the client under their agreement and send the completed return to the clerk. If the judgment is completely satisfied, the defendant will probably request a release; see form 27-3 in this chapter.

§ 27.25 Suspension of Enforcement Pending Appeal

A defendant may suspend execution of the judgment by filing a bond approved by the clerk. The bond is subject to review by the court on hearing. Tex. R. App. P. 24; see also Tex. R. Civ. P. 634, 635. The bond must be payable to the plaintiff and conditioned as set forth in Tex. R. App. P. 24.1. The trial court may make orders that will adequately protect the plaintiff against any loss or damage caused by appeal. Tex. R. App. P. 24.1.

The security required to appeal money judgments is governed by chapter 52 of the Texas Civil Practice and Remedies Code. To the extent these provisions conflict with the Texas Rules of Appellate Procedure, the procedures set out in the Civil Practice and Remedies Code apply. The amount of the bond must be equal to the sum of the compensatory damages awarded in the judgment, interest for the estimated duration of the appeal, and costs awarded in the judgment. Tex. Civ. Prac. & Rem. Code § 52.006(a). The amount of security must not exceed the lesser of 50 percent of the judgment debtor’s net worth or $25 million. Tex. Civ. Prac. & Rem. Code § 52.006(b). Under certain circumstances, however, the trial court may make an order deviating from this rule if it finds that posting the amount of the bond would cause the judgment debtor to suffer substantial economic harm. See Tex. Civ. Prac. & Rem. Code § 52.006(c).

The trial court has continuing jurisdiction during an appeal, even after expiration of its plenary power, to order the amount and type of security and the sufficiency of sureties. It may also modify, in the event of changed circumstances, the amount or the type of security required to continue the suspension of execution. If the security or sufficiency of sureties is ordered or altered by the trial court after the court of appeals obtains jurisdiction, the defendant must notify the court of appeals of the trial court’s determination. Tex. R. App. P. 24.3. The trial court’s exercise of discretion under this rule is subject to review under Tex. R. App. P. 24.4.

§ 27.26 Entities Protected from Execution

No attachment, injunction, or execution may be issued against a national banking association or its property before a final judgment in any suit, action, or proceeding, in any state, county, or municipal court. 12 U.S.C. § 91. “Final judgment” means a judgment from which no further appeal can be taken. National banks are therefore exempt from execution until all appellate remedies have been exhausted. United States v. Lemaire, 826 F.2d 387 (5th Cir. 1987), cert. denied, 485 U.S. 960 (1988). Thus a national bank should not have to post a supersedeas bond to prevent execution pending disposition of its appeal. State banks do not enjoy the same protection. Bank of East Texas v. Jones, 758 S.W.2d 293 (Tex. App.—Tyler 1988, orig. proceeding [leave denied]).

Public policy exempts political subdivisions of the state performing governmental functions from execution or garnishment proceedings. Delta County Levee Improvement District No. 2 v. Leonard, 516 S.W.2d 911, 912 (Tex. 1974); City of Victoria v. Hoffman, 809 S.W.2d 603, 604 (Tex. App.—Corpus Christi 1991, writ denied); see also Tex. Loc. Gov’t Code §§ 101.021, 101.023 (regarding home-rule municipalities). Also, the real property of the state, including real property held in the name of state agencies and funds as well as the real property of a political subdivision of the state, is exempt from attachment, execution, or forced sale. Tex. Prop. Code § 43.002.
The collection of judgments against political subdivisions is not entirely prohibited, however. A political subdivision can be directed through mandamus to levy and collect sufficient taxes to satisfy judgments outstanding against the entity if there are not sufficient funds available. Delta County Levee Improvement District No. 2, 516 S.W.2d at 912; Salvaggio v. Davis, 727 S.W.2d 329 (Tex. App.—Houston [1st Dist.] 1987, no writ); Hawthorne v. La-Man Constructors, 672 S.W.2d 255 (Tex. App.—Beaumont 1984, no writ).

§ 27.27 Wrongful Execution

Damages for wrongful execution are potentially severe, and a plaintiff may be held liable for the conduct of both attorneys and officers who participate in a wrongful execution.

A cause of action for wrongful execution will arise for the benefit of parties injured by the execution in a number of instances including but not limited to a levy—

1. to enforce a judgment that has been satisfied;
2. on exempt property;
3. that is excessive;
4. on property not owned by the defendant; or
5. to enforce a judgment that has been superseded by an appeal.

The action inures to the benefit of the party injured and will lie against those causing the injury. Damages are recoverable from—

1. a plaintiff who directs or participates in the wrongful execution;
2. the plaintiff’s attorney who advises and directs the wrongful execution; or
3. the officer conducting the levy if the officer did not act in good faith. See Tex. Civ. Prac. & Rem. Code §§ 7.003(a), 34.061(b) regarding officer liability.

For cases discussing wrongful execution, see Vackar v. Patterson, Boyd, Lowery, Anderholt & Peterson, P.C., 866 S.W.2d 817 (Tex. App.—Beaumont 1993, no writ), and Southwestern Bell Telephone Co. v. Wilson, 768 S.W.2d 755 (Tex. App.—Corpus Christi 1988, writ denied). Before attempting to execute on property, the attorney should be familiar with federal and state laws governing debt collection practices. For a discussion of these statutes, see parts II. and III. in chapter 2 of this manual.

§ 27.28 Plaintiff’s Purchase at Execution Sale

The purchaser at an execution sale receives only the right, title, interest, and claim that the defendant in execution had in the property. Tex. Civ. Prac. & Rem. Code § 34.045. The purchaser therefore takes subject to any and all liens attaching to the property at sale. If the plaintiff is considering purchasing the property at execution he should run a lien search, including tax liens, to determine exactly what he is getting.

Plaintiffs who purchase at execution sale are not required to pay cash but can merely credit their bid to the judgment. Blum v. Rogers, 9 S.W. 595 (Tex. 1888). This allows the plaintiff to obtain what may be the defendant’s only property available to satisfy the judgment and also avoid additional out-of-pocket expenses, except for the constable’s costs and commissions.
To be eligible to purchase real property at an execution sale, a purchaser must present the officer conducting the sale with a written statement from the county tax assessor-collector that he owes no delinquent taxes or a written registration statement showing the person is a registered bidder. Tex. Civ. Prac. & Rem. Code § 34.0445(a). These provisions apply only in counties of 250,000 or more or in which the commissioners court has adopted the provision. Tex. Civ. Prac. & Rem. Code § 34.0445(g).

[Sections 27.29 and 27.30 are reserved for expansion.]

III. Property Subject to and Exempt from Execution

§ 27.31 Property Subject to Execution

§ 27.31:1 Property Generally

The judgment debtor’s property is subject to levy and execution if it is not exempted by constitution, statute, or other rule of law. See Tex. Const. art. XVI, §§ 49–51; Tex. Prop. Code §§ 41.001–.006; Tex. R. Civ. P. 637. Categories of exempt property are listed in section 27.32 below and discussed in subsequent sections.

§ 27.31:2 Child Support Obligations

There are a number of exceptions to the general exemption statutes, if the debt being collected is based on a child support obligation. For example, see Tex. Prop. Code § 42.001(b)(1). Attorneys seeking to collect such an obligation should check the applicable exemption statute before assuming that the property sought is exempt.

§ 27.32 Property Exempt from Execution

Property exempt from execution, whether for a family or for a single adult, includes—

1. the homestead (see section 27.35 below);

2. personal property of various categories specified by statute, up to the aggregate fair market value, exclusive of any charges encumbering the property, of $100,000 for a family or $50,000 for a single adult who is not a member of a family (Tex. Prop. Code §§ 42.001, 42.002; see section 27.41:1 below);

3. current wages for personal services, except for the enforcement of court-ordered child support (Tex. Prop. Code § 42.001(b)(1));

4. professionally prescribed health aids of a debtor or his dependent (Tex. Prop. Code § 42.001(b)(2));

5. certain retirement benefits and funds (see section 27.41:3 below);

6. workers’ compensation payments (Tex. Lab. Code § 408.201);

7. cemetery lots held for purposes of sepulchre (Tex. Prop. Code § 41.001);

8. property that the judgment debtor sold, mortgaged, or conveyed in trust if the purchaser, mortgagee, or trustee points out other property of the debtor sufficient to satisfy the execution (see section 27.41:6 below);
9. assets in the hands of the trustee of a spendthrift trust for the benefit of the judgment debtor (Tex. Prop. Code § 112.035; see also Hines v. Sands, 312 S.W.2d 275, 278 (Tex. Civ. App.—Fort Worth 1958, no writ));

10. insurance benefits (Tex. Ins. Code §§ 1108.051–.053);

11. alimony, support, or separate maintenance payments received or to be received by the debtor for his support or the support of his dependents (Tex. Prop. Code § 42.001(b)(3));

12. a religious bible or other book containing sacred writings of a religion seized by a creditor other than a lessor of real property who is exercising the lessor’s contractual or statutory right to seize personal property after a tenant breaches a lease agreement for or abandons the real property (Tex. Prop. Code § 42.001(b)(4)); and

13. judgments of Texas courts. See Visage v. Marshall, 763 S.W.2d 17, 18 (Tex. App.—Tyler 1988, no writ). Turnover may be an effective remedy to reach a judgment owned by the debtor (see part V. in this chapter regarding turnover).

This nonexclusive list of exemptions covers only those most likely to be encountered when levying against an individual.

§ 27.33 Community and Separate Property

§ 27.33:1 Availability of Community and Separate Property to Satisfy Judgment

A spouse’s separate property cannot be seized to satisfy a judgment against the other spouse unless both spouses are liable under other rule of law. Tex. Fam. Code § 3.202(a). Community property that is subject to one spouse’s sole management, control, and disposition is not subject to liabilities that the other spouse incurred before marriage or to a nontortious liability that the other spouse incurred during marriage, unless both spouses are personally liable under Code sections 3.201, 3.202, and 3.203. See Tex. Fam. Code § 3.202(b). A person is personally liable for the acts of the person’s spouse only if the spouse acts as agent for the person or the spouse incurs a debt for necessaries under section 2.501. See Tex. Fam. Code § 3.201(a).

Except under Tex. Fam. Code § 3.202, community property is not subject to a liability that arises from an act of a spouse. A marriage relationship does not in and of itself create an agency relationship between spouses. Tex. Fam. Code § 3.201(b), (c).

Sole-management community property is subject to liabilities incurred by that spouse before or during marriage, and joint-management community property is subject to the liabilities incurred by either spouse before or during marriage. Tex. Fam. Code § 3.202(b); Carlton v. Estate of Estes, 664 S.W.2d 322, 323 (Tex. 1983) (wife’s interest in joint-management community property was liable for debts of husband). But see Nelson v. Citizens Bank & Trust Co., 881 S.W.2d 128, 130–31 (Tex. App.—Beaumont 1994, no writ) (nonsigning spouse not personally liable for corporate debt guaranteed by other spouse). The plaintiff with a judgment against one spouse should therefore try to locate, in this order—

1. that spouse’s separate property;

2. community property subject to that spouse’s sole management, control, and disposition;

3. community property subject to the other spouse’s control, if the conditions of Tex. Fam. Code § 3.201(a)(1) or (a)(2) are met; and

4. joint-management community property.

If the judgment is against both spouses for joint liability, all community property and both spouses’ separate property can be reached. A specific item of property might be exempt under some other rule of law, such as the general personal property exemption statute. See Tex. Prop. Code § 42.002. See section 27.41:1 below. Money and other various assets in the public
retirement system accounts of Texas that are community property subject to the participating spouse’s sole management, control, and disposition are not subject to any claim for payment of a criminal restitution judgment entered against the nonparticipant spouse (except to the extent of any interest as determined in a qualified domestic relations order). Tex. Fam. Code § 3.202(d). Tex. Fam. Code § 3.203 provides for judicial determination of the order in which property is subject to execution.

§ 27.33:2 “Community Debts”


§ 27.33:3 Effect of Divorce on Creditors’ Rights


§ 27.33:4 Classification of Property as Community or Separate

Property possessed by either spouse during or on dissolution of marriage is presumed to be community property. Tex. Fam. Code § 3.003(a); see Panozzo v. Panozzo, 904 S.W.2d 780, 786 (Tex. App.—Corpus Christi 1995, no writ); Celso v. Celso, 864 S.W.2d 652, 654 (Tex. App.—Tyler 1993, no writ); Brooks v. Sherry Lane National Bank, 788 S.W.2d 874, 876 (Tex. App.—Dallas 1990, no writ). The degree of proof necessary to establish that property is separate property is clear and convincing evidence. Tex. Fam. Code § 3.003(b). Sole-management community property is that community property that the spouse would have owned if single, including but not limited to—

1. personal earnings;
2. separate-property revenues;
3. personal injury recoveries; and
4. increases of, mutations of, and revenues from his or her sole-management property.

Tex. Fam. Code § 3.102(a). The spouses can agree in writing or by other agreement that other community property will be sole-management community property. Tex. Fam. Code § 3.102(c). An oral agreement falls within this provision. LeBlanc v. Waller, 603 S.W.2d 265, 267–68 (Tex. Civ. App.—Houston [14th Dist.] 1980, no writ). Unless otherwise provided, mixed community property is joint-management community property. Tex. Fam. Code § 3.102(b). Community property not included in one of these exceptions is joint-management community property. Tex. Fam. Code § 3.102(c).

The Texas Family Code discusses the classification of certain employee benefits and certain insurance proceeds. See Tex. Fam. Code §§ 3.007–.008.
§ 27.34 Basis for Debtor’s Homestead Exemption

The debtor’s homestead is exempt from forced sale to satisfy a debt, except for (1) a purchase-money obligation, (2) taxes due, (3) an owelty of partition imposed against the property either by court order or by written agreement of all the owners of the property, (4) the refinancing of a lien against the homestead, (5) labor and material used to construct improvements under a written contract signed by both spouses if held as a family homestead, (6) certain approved home equity loans, (7) a reverse mortgage, or (8) the conversion and refinance of a personal property lien secured by a manufactured home to a lien on real property. Tex. Const. art. XVI, § 50. Additionally, a lien already existing against the property at the time the homestead claimant took title, such as a homeowners association maintenance lien, will not be defeated by a homestead claim. Inwood North Homeowners’ Ass’n v. Harris, 736 S.W.2d 632, 635–36 (Tex. 1987).

§ 27.35 Property That Constitutes Homestead

§ 27.35:1 Homestead Generally

The Texas Constitution distinguishes a rural from an urban homestead by describing it as “not in a town or city.” See Tex. Const. art. XVI, § 51. One cannot simultaneously claim both a rural homestead and an urban one. Ran v. City National Bank, 272 S.W. 510, 515 (Tex. Civ. App.—Fort Worth 1925, writ dism’d). The homestead must be used as a home or for the claimant’s business; temporarily renting out the homestead does not affect its status if another homestead has not been acquired. Tex. Const. art. XVI, § 51; Tex. Prop. Code § 41.003. The definitions of “homestead” found in Tex. Prop. Code § 41.002 apply to all Texas homesteads, whenever they were created. Tex. Prop. Code § 41.002(d).

§ 27.35:2 Rural Homestead

The rural homestead includes improvements and may be in one or more parcels. A family’s rural homestead cannot exceed two hundred acres; the rural homestead of a single adult who is not a member of a family cannot exceed one hundred acres. Tex. Const. art. XVI, § 51; Tex. Prop. Code § 41.002(b).

Although actual residence on the property is required, one need not reside on all the parcels of the property claimed under the homestead exemption as long as the other tracts are used for the support of the family. Fajkus v. First National Bank, 735 S.W.2d 882, 884 (Tex. App.—Austin 1987, writ denied). Whether all rural tracts will be impressed with the homestead character will be determined by whether they are used for the purposes of a home. PaineWebber, Inc. v. Murray, 260 B.R. 815, 822–23 (Bankr. E.D. Tex. 2001); In re Webb, 263 B.R. 788, 791 (Bankr. W.D. Tex. 2001). Tex. Prop. Code § 41.002, which provides a different acreage limit for family homesteads than for the homesteads of single adults, has withstood a challenge that it impermissibly modifies the requirements of Tex. Const. art. XVI, § 51, that a rural homestead consists of not more than two hundred acres. In response to a challenge that Code section 41.002 is unconstitutional on equal protection grounds, the district court refused to intervene in state legislation without evidence of violations that reach constitutional magnitude. In re Moody, 77 B.R. 580 (S.D. Tex. 1987), aff’d, 862 F.2d 1194, 1201 (5th Cir. 1989), cert. denied, 503 U.S. 960 (1992).

§ 27.35:3 Urban Homestead

The urban homestead consists of one or more contiguous lots amounting to not more than ten acres of land, together with any improvements on the land, regardless of whether it is a family homestead or one of a single adult not a constituent of a family. Tex. Const. art. XVI, § 51; Tex. Prop. Code § 41.002(a). A homestead is considered to be urban if at the time the designation
is made the property is located within the limits of a municipality or its extraterritorial jurisdiction or a platted subdivision. Tex. Prop. Code § 41.002(c)(1). The property must also be served by police and fire protection and at least three of the following services provided by a municipality or under contract to a municipality: electric, natural gas, sewer, storm sewer, and water. Tex. Prop. Code § 41.002(c)(2).

§ 27.35:4  Business Homestead

A business homestead is a place in a city, town, or village at which a single adult or the head of a family exercises his calling or business. Tex. Const. art. XVI, § 51; see also Exall v. Security Mortgage & Trust Co., 39 S.W. 959 (Tex. Civ. App. 1897, writ ref’d). A person cannot reside in a rural homestead and also claim a business homestead. Williams v. Willis, 19 S.W. 683, 684 (Tex. 1892). The business homestead must be located in a city, town, or village; it cannot be rural. Also, the business homestead must be in the same city, town, or village in which the claimant has his residential homestead. Clem Lumber Co. v. Elliott Lumber Co., 254 S.W. 935 (Tex. Comm’n App. 1923, judgm’t adopted). Claiming both an urban residential and an urban business homestead may be difficult because the lots must be contiguous. See Tex. Const. art. XVI, § 51; Tex. Prop. Code § 41.002(a).

The extent that one can claim an urban business homestead is limited to that necessary for the operations of the business. In re Kang, 243 B.R. 666 (Bankr. N.D. Tex. 1999).

§ 27.35:5  Homestead in Qualifying Trust


§ 27.36  Designation of Homestead

The statutory provisions for the voluntary designation of homestead are as follows:

1. The designation must be by an instrument “signed and acknowledged or proved in the manner required for the recording of other instruments.” Tex. Prop. Code § 41.005(c).

2. The designation must be filed in the county in which all or part of the property is located. There are specific requirements for the instrument’s contents. Tex. Prop. Code § 41.005(c).

3. Boundaries set forth in the voluntary designation may be changed by filing and recording an instrument in the manner provided for a voluntary designation. Tex. Prop. Code § 41.005(d).

4. If at the time a writ of execution is issued the defendant has not made a voluntary designation, then any designation must be made in accordance with Tex. Prop. Code §§ 41.021–.024, portions of which are discussed below in this section. Tex. Prop. Code § 41.005(f).

5. If a voluntary designation was made by instrument on file under prior law, it is considered a voluntary designation under Tex. Prop. Code § 41.005. Tex. Prop. Code § 41.005(g).

6. If a person has not made a designation as set out in items 1. through 5. above but receives a homestead exemption for tax purposes on the property in question, that property is considered to be designated as his homestead if it is listed as his residence homestead on the most recent tax appraisal roll. Tex. Prop. Code § 41.005(e).
If an execution is issued against a holder of an interest in land of which a homestead may be a part and the defendant has not made a voluntary designation as discussed above, the plaintiff may give the defendant notice to designate his homestead. Tex. Prop. Code § 41.021. The notice must state that if the defendant fails to make the designation within the time permitted by statute, the court will appoint a commissioner to do so at the defendant’s expense. Tex. Prop. Code § 41.021. The defendant has until 10:00 A.M. on the first Monday after the expiration of twenty days from the date he is served with notice to file his written designation with the court. Tex. Prop. Code § 41.022.

If the defendant fails to designate, the plaintiff may, within ninety days after issuance of the writ of execution, move the court to appoint the commissioner to designate the homestead. Tex. Prop. Code § 41.023(a). On such a motion, the court must appoint a commissioner and may appoint a surveyor and others to assist the commissioner. The commissioner must designate the homestead in a written report, with a plat of the designated area, and file it with the court no more than sixty days after the appointment order is signed or within such time as the court may allow. Tex. Prop. Code § 41.023(a). Within ten days after the commissioner files his report, the defendant or the plaintiff may request a hearing to confirm, reject, or modify the report. Exceptions to all or part of the report must be filed before the hearing; otherwise, evidence may not be submitted to contradict the report. After the hearing, or if no hearing is requested, the court must designate the homestead and order sale of the excess. Tex. Prop. Code § 41.023(b).

A homestead claimant is not estopped from asserting homestead rights in residential property on the basis of contrary declarations if, at the time of the declarations, the claimant was in actual use and possession of the property. In re Niland, 825 F.2d 801, 807 (5th Cir. 1987).

§ 27.37 Creation and Abandonment of Homestead

To create the homestead right, there must be both overt acts of homestead occupancy and the intent to dedicate the property to homestead usage. Gregory v. Sunbelt Savings, F.S.B., 835 S.W.2d 155, 158 (Tex. App.—Dallas 1992, writ denied); Lifemark Corp. v. Merritt, 655 S.W.2d 310, 314 (Tex. App.—Houston [14th Dist.] 1983, writ ref’d n.r.e.). No specific writing is necessary. Dodd v. Harper, 670 S.W.2d 646, 649 (Tex. App.—Houston [1st Dist.] 1983, no writ). See also Farrington v. First National Bank, 753 S.W.2d 248, 251 (Tex. App.—Houston [1st Dist.] 1988, writ denied) (summary judgment affidavit stating appellant’s intent to occupy rural property and stating certain actions short of actually building home was sufficient to create fact questions on intent to create homestead even though appellant lived on urban property claimed as homestead).

Once the homestead right vests, it is presumed to continue until there is affirmative proof of abandonment. The evidence relied on to establish abandonment must be undeniably clear that there has been a total abandonment with an intention not to return and claim the exemption before a homestead, once occupied as such, can be subjected to a forced sale. McFarland v. Rousseau, 667 S.W.2d 929, 931 (Tex. App.—Corpus Christi 1984, no writ) (citing West v. Austin National Bank, 427 S.W.2d 906, 912 (Tex. Civ. App.—San Antonio 1968, writ ref’d n.r.e.)). Abandonment is an affirmative defense. Denmon v. Atlas Leasing, 285 S.W.3d 591, 596 (Tex. App.—Dallas 2009, no pet.). The burden of proof of abandonment is on the plaintiff. Exocet, Inc. v. Cordes, 815 S.W.2d 350, 355 (Tex. App.—Austin 1991, no writ), abrogated on other grounds by Fairfield Financial Group, Inc. v. Synnott, 300 S.W.3d 316, 320 (Tex. App.—Austin 2009, no pet.). In order to prove abandonment, the practitioner must prove (1) the debtor discontinued use of the tract by overt acts and (2) the debtor intended to permanently abandon the tract as the homestead. Driver v. Conley, 320 S.W.3d 516, 519 (Tex. App.—Texarkana 2010, cert denied, 131 S. Ct. 1685 (U.S. 2011)). If a homestead claimant is married, the homestead cannot be abandoned without consent of the claimant’s spouse. Tex. Const. art. XVI, § 50(b); Tex. Prop. Code § 41.004.
§ 27.38 Effect of Death on Homestead Rights

Death of a party protected by homestead rights extinguishes those rights. Homestead rights cannot be inherited or transferred by will. The court, however, will set apart the homestead for the use and benefit of the surviving spouse and minor children if no affidavit is filed under Tex. Est. Code § 353.051(a)(1), (b). Exempt property of a decedent’s estate other than the homestead will be set apart for the use and benefit of the surviving spouse, minor children, unmarried adult children remaining with the family, and any adult child who is incapacitated. Tex. Est. Code § 353.051(a)(2); National Union Fire Insurance Co. of Pittsburgh v. Olson, 920 S.W.2d 458, 461 (Tex. App.—Austin 1996, no writ). See also section 29.10 in this manual regarding exempt property in probate.

§ 27.39 Sale and Leaseback of Homestead

See section 17.48 in this manual regarding the consequences of making a purchase of the debtor’s homestead for less than fair market value, followed by a leaseback of the property.

§ 27.40 Fraudulent Transfer of Homestead

The homestead exemption may be lost only by death, abandonment, or alienation. A fraudulent transfer of the homestead by the debtor to his own holding company to avoid creditors will not result in forfeiture of the homestead exemption. Also, because creditors have no right of recovery against a debtor’s homestead, such a conveyance of the homestead cannot be in fraud of their rights as creditors. In re Moody, 862 F.2d 1194 (5th Cir. 1989), cert. denied, 503 U.S. 960 (1992). See section 14.10 in this manual regarding fraudulent transfer generally.

§ 27.41 Exempt Personal Property

§ 27.41:1 List of Exemptions

Except for properly fixed encumbrances, personal property exempt from forced sale up to an aggregate fair market value of $100,000 for a family or $50,000 for a single adult person who is not a member of a family includes—

1. home furnishings, including family heirlooms;
2. provisions for consumption;
3. farming or ranching vehicles and implements;
4. tools, equipment, books, and apparatus, including boats and motor vehicles, used in a trade or profession;
5. wearing apparel;
6. jewelry, not to exceed 25 percent of the $100,000/$50,000 limit;
7. two firearms;
8. athletic and sporting equipment, including bicycles;
9. a two-wheeled, three-wheeled, or four-wheeled motor vehicle for each member of the family who holds a driver’s license or who is not licensed but relies on another person to drive the vehicle for him;
10. the following animals and forage on hand for their consumption:
a. two horses, mules, or donkeys, and a saddle, blanket, and bridle for each;

b. twelve head of cattle;

c. sixty head of other livestock;

d. 120 fowl; and

11. household pets.

Tex. Prop. Code §§ 42.001, 42.002. Also exempt and not included in the aggregate limitations are current wages for personal services; professionally prescribed health aids; alimony, support, or separate maintenance; and certain religious books. Tex. Prop. Code § 42.001(b). Unpaid commissions for personal services not exceeding 25 percent of the aggregate limitation are also exempt. Tex. Prop. Code § 42.001(d). Qualified college savings plans are also exempt. Tex. Prop. Code § 42.0022.

§ 27.41:2 Tools of Trade

Texas courts have held that, in order to qualify as a tool of the debtor’s trade or profession, a tool or apparatus must be peculiarly essential to the practice of that trade. Segraves v. Weitzel, 734 S.W.2d 773, 775–76 (Tex. App.—Fort Worth 1987, no writ) (citing Simmang v. Pennsylvania Fire Insurance Co., 112 S.W. 1044 (Tex. 1908), and McMillan v. Dean, 174 S.W.2d 737 (Tex. Civ. App.—Austin 1943, writ ref’d w.o.m.)). Holdings of the Texas bankruptcy courts, however, have interpreted the statute differently, holding that the tool must merely be useful in the debtor’s trade, not peculiarly adapted to it. In re Erwin, 199 B.R. 628 (Bankr. S.D. Tex. 1996); In re Legg, 164 B.R. 69 (Bankr. N.D. Tex. 1994).

§ 27.41:3 Certain Savings Plans and Social Security Benefits

There are additional personal property exemptions for several forms of assets in which the debtor holds a right to receive payments, whether the right is vested or not. These include—

1. rights under a stock bonus;

2. pension, annuity, deferred compensation, profit-sharing, or similar plans, including retirement plans for self-employed persons;

3. simplified employee pension plans;

4. individual retirement accounts or annuities, including inherited individual retirement accounts or annuities;

5. health savings accounts; and

6. annuities or similar contracts purchased with assets distributed from any of the above.

Tex. Prop. Code § 42.0021(a).

The savings plans listed in Texas Property Code section 42.0021(a) are exempt to the extent they are exempt from federal income tax or to the extent federal income tax on the person’s interest is deferred until actual payment of benefits to the person under section 223, 401(a), 403(a), 403(b), 408(a), 408A, 457(b), or 501(a) of the Internal Revenue Code of 1986, including a government plan or church plan described by section 414(d) or (e) of the Internal Revenue Code of 1986. Tex. Prop. Code § 42.0021(a).
Contributions to an individual retirement account that exceed the amounts permitted under the applicable provisions of the Internal Revenue Code of 1986 and any accrued earnings on such contributions are not exempt under this section unless otherwise exempt by law. Tex. Prop. Code § 42.0021(b).

Federally based retirement or pension benefits are also exempt under various federal statutes. These include—

1. Social Security benefits, 42 U.S.C. § 407(a);
2. veterans benefits, 38 U.S.C. § 5301; and

In addition, a number of federally created pension or retirement benefits are also exempt, such as those for longshoremen and railroad workers.

§ 27.41:4 Insurance Benefits

The cash value and proceeds of an insurance policy or annuity contract issued by a life, health, or accident insurance company, including a mutual company or fraternal benefit society or an annuity or benefit plan used by an employer or individual, are exempt from execution, attachment, garnishment or other seizure. Tex. Ins. Code § 1108.051. The exemption is unlimited and is in addition to the exemptions listed in chapter 42 of the Texas Property Code. Tex. Ins. Code § 1108.001. Exceptions to this exemption are for premium payments made in fraud of creditors, for debt secured by the policy or proceeds, or for child support liens under chapter 157 of the Texas Family Code. Tex. Ins. Code § 1108.053.

§ 27.41:5 Designation of Exempt Property

If the number or amount of a type of personal property exceeds the exemption allowed by Tex. Prop. Code § 42.002 or if the aggregate value of a debtor’s personal property exceeds the limitation set out at Tex. Prop. Code § 42.001(a), the defendant may, under certain circumstances, specify the property to be levied on. Under other circumstances, the levying officer or the court may make the designation. Tex. Prop. Code § 42.003.

§ 27.41:6 Property Subject to Security Interest or Mortgage

When the defendant points out property on which the officer is to levy, he cannot point out property that he has sold, mortgaged, or conveyed in trust or that is exempt from forced sale. Tex. R. Civ. P. 638. Property that has been pledged, assigned, or mortgaged as security for a debt or contract, however, can be levied on and sold under execution against the person making the pledge, assignment, or mortgage. Tex. R. Civ. P. 643. If the purchaser, mortgagee, or trustee of property that the defendant has sold, mortgaged, or conveyed in trust points out other property of the defendant in the county that is sufficient to satisfy the execution, the property sold, mortgaged, or conveyed in trust may not be seized in execution. Tex. Civ. Prac. & Rem. Code § 34.004. Only that interest owned by the defendant can be sold. See Tex. Civ. Prac. & Rem. Code § 34.045. Before the revision of chapter 9 of the Texas Business and Commerce Code that took effect in 2001, section 9.311 of the Code provided that the defendant’s rights in the collateral could be sold under execution even if the security agreement prohibited transfer by the defendant. Mortgaged property could therefore be sold, but the buyer purchased it subject to the mortgage debt or security interest. Liquid Carbonic Co. v. Logan, 79 S.W.2d 632 (Tex. Civ. App.—Austin 1935, no writ). The secured party may try to stop the sale. The value of the defendant’s equity, reduced by expenses of sale, may not be worth the trouble of a levy. The
sales value will typically be reduced further when the buyer must consider satisfying or continuing to carry the security interest.

Although Tex. R. Civ. P. 643 provides for the execution sale of property subject to a security interest, and former section 9.311 provided for involuntary transfer of the defendant’s property through levy, the court in *Grocers Supply v. Intercity Investment Properties, Inc.*, 795 S.W.2d 225 (Tex. App.—Houston [14th Dist.] 1990, no writ), nonetheless held that a prior perfected security interest holder who had a right to possession of the property had superior rights over a “mere” judgment creditor. The security agreement at issue provided that a judgment against the debtor or the levy, seizure, or attachment of the collateral would constitute a default, making the entire obligation immediately due and payable to the secured creditor. The court ordered possession for the secured party and recovery of all of its costs. *Grocers Supply*, 795 S.W.2d at 227. Revised chapter 9 of the Texas Business and Commerce Code, which took effect July 1, 2001, does not have a similar provision to former section 9.311, which provided that collateral could be sold under execution even if a security agreement prohibited transfer by the debtor. Instead, revised chapter 9 simply provides that “whether a debtor’s rights in collateral may be voluntarily or involuntarily transferred is governed by law other than this chapter.” *Tex. Bus. & Com. Code § 9.401(a).* The comments explain that—

>[d]ifficult problems may arise with respect to attachment, levy, and other judicial procedures under which a debtor’s creditors may reach collateral subject to a security interest. For example, an obligation may be secured by collateral worth many times the amount of the obligation. If a lien creditor has caused all or a portion of the collateral to be seized under judicial process, it may be difficult to determine the amount of the debtor’s “equity” in the collateral that has been seized. The section leaves resolution of this problem to the courts. The doctrine of marshaling may be appropriate.

*Tex. Bus. & Com. Code § 9.401 cmt. 6.* The comments appear to leave open the possibility of seizure of property subject to security interests, with resolution in the courts. Caution should therefore be exercised if seized property is subject to a prior perfected security interest and the secured party demands possession of the property.

§ 27.42 Fraudulent Conveyance to Avoid Judgment Lien or Execution

If the debtor has used nonexempt property to acquire, obtain any interest in, improve, or pay indebtedness on property that would be exempt under Texas Property Code sections 42.001–.002 with the intent to defraud, delay, or hinder an interested person, the property or interest so acquired and the improvements so made will not be exempt from seizure for the satisfaction of liabilities. *Tex. Prop. Code § 42.004(a).* If any property, interest, or improvement is acquired by the discharge of an encumbrance held by another, any person who is defrauded, delayed, or hindered by the acquisition is subrogated to the rights of the prior encumbrancer. *Tex. Prop. Code § 42.004(a).* The plaintiff must assert this claim within two years after the transaction. A person with a claim that is unliquidated or contingent at the time of the transaction must assert a claim under this section within one year after the claim is reduced to judgment. *Tex. Prop. Code § 42.004(b).* It is a defense to a claim under *Tex. Prop. Code § 42.004* that the transfer was made in the ordinary course of business by the person making the transfer. *Tex. Prop. Code § 42.004(c).*


*Sections 27.43 through 27.50 are reserved for expansion.*
IV. Postjudgment Garnishment

§ 27.51 Purpose and Use

Garnishment is a remedy allowing a judgment creditor (garnisher) either to recover property of the judgment debtor in the hands of a third party (garnishee) or to collect a debt owed by the garnishee to the debtor. See Tex. Civ. Prac. & Rem. Code §§ 63.001–.005; Orange County v. Ware, 819 S.W.2d 472, 474 (Tex. 1991).

The creditor should not use garnishment as a discovery device but should proceed in garnishment only if he cannot satisfy his judgment by execution and is confident that the garnishment action will return more than it will cost. If the creditor brings a garnishment action and the garnishee establishes that he neither has the judgment debtor’s property nor is indebted to the judgment debtor, the costs of the proceeding, including a reasonable compensation to the garnishee, will be taxed against the creditor. Tex. R. Civ. P. 677. For a discussion of wrongful garnishment, see section 27.71 below.

§ 27.52 Applicable Statutes and Rules

Postjudgment garnishment is governed by Tex. Civ. Prac. & Rem. Code §§ 63.001–.008 and by Tex. R. Civ. P. 657–679. The attorney may find some of the material discussing prejudgment garnishment in sections 8.11 through 8.15 in this manual to be useful when considering postjudgment garnishment.

Caveat: Many of the cases cited in this part of this chapter were decided under former Texas Revised Civil Statutes articles 4076, 4084, 4096, and 4099, which have been codified at Tex. Civ. Prac. & Rem. Code §§ 63.001–.005.

§ 27.53 Strict Compliance Required

Garnishment is a harsh remedy, and strict compliance with all requirements is necessary. El Periodico, Inc. v. Parks Oil Co., 917 S.W.2d 777, 779 (Tex. 1996); Walnut Equipment Leasing Co. v. J-V Dirt & Loam, 907 S.W.2d 912, 915 (Tex. App.—Austin 1995, writ denied). Clerical errors in the garnishment documents may be corrected and amended as the court directs. Tex. R. Civ. P. 679. Certain defects in the garnishment procedure that are neither fundamental nor jurisdictional are waived if the garnishee fails to answer the writ. Failure to substantially comply with the statutes and rules will, however, void the garnishment judgment. Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Allied Bank of Texas, 704 S.W.2d 919, 920 (Tex. App.—Houston [14th Dist.] 1986, writ ref’d n.r.e.).

§ 27.54 Availability of Postjudgment Garnishment

§ 27.54:1 Availability Generally

A writ of garnishment is available after judgment only in the following circumstances:

1. The plaintiff has a valid, final, and subsisting judgment against the defendant. Tex. Civ. Prac. & Rem. Code § 63.001(3). The garnisher must establish ownership of the underlying judgment. See, e.g., Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Allied Bank of Texas, 704 S.W.2d 919 (Tex. App.—Houston [14th Dist.] 1986, writ ref’d n.r.e.). See section 27.54:2 below regarding when a judgment is final for garnishment purposes.

3. The plaintiff swears that, to his knowledge, the defendant does not possess in Texas sufficient property subject to execution to satisfy the judgment. Tex. Civ. Prac. & Rem. Code § 63.001(3). It is not necessary, however, for the plaintiff to prove that the defendant lacks sufficient property in the state to satisfy the judgment. Black Coral Investments v. Bank of the Southwest, 650 S.W.2d 135, 136 (Tex. App.—Houston [14th Dist.] 1983, writ ref’d n.r.e.). See also section 8.12:6 in this manual for a discussion of the corresponding affidavit requirement for prejudgment garnishment. It is not necessary to have had a writ of execution returned nulla bona to use garnishment. Cantwell v. Wilson, 241 S.W.2d 366, 368 (Tex. Civ. App.—Austin 1951, no writ).

§ 27.54:2 Finality of Judgment

A judgment is final and subsisting for garnishment purposes from and after the date it is signed. Tex. R. Civ. P. 657. Therefore, a postjudgment action is available as soon as the underlying judgment is signed, if all other bases for the garnishment are met.

§ 27.55 Jurisdiction and Parties

Although garnishment is brought as a separate action, it is ancillary to the underlying suit and should be brought in the court that rendered the judgment to be enforced. King & King v. Porter, 252 S.W. 1022 (Tex. 1923). A garnishment action is brought against the garnishee as defendant. Tex. R. Civ. P. 659. In some counties the garnishment action will be numbered as an “a” case, such as “97-1010a,” whereas in other counties it will be given a new number. The judgment debtor is not a party to the suit but must be served with notice along with a copy of the writ of garnishment, the application and accompanying affidavits, and the orders of the court as soon as practicable after service of the writ on the garnishee. Tex. R. Civ. P. 663a.

The fact that the judgment debtor is not a party to the garnishment action is particularly relevant if the garnisher and garnishee enter into an agreed judgment. Because the debtor is not a party, his assent is not necessary to the enforceability of the agreed judgment.

§ 27.56 Property Subject to and Exempt from Garnishment

§ 27.56:1 Property and Debts Subject to Garnishment

Generally, all debts and all nonexempt personal property of the defendant held by the garnishee may be reached by the judgment plaintiff through postjudgment garnishment. Nonexempt property is discussed in part III. in this chapter. To be subject to garnishment, a debt must be absolute and not subject to any contingency. Clapper v. Petrucci, 497 S.W.2d 120, 122 (Tex. Civ. App.—Austin 1973, writ ref’d n.r.e.). For a discussion of property subject to garnishment, see George Ann Miller, The Garnishment Process, in Student Symposium, Creditor’s Post-Judgment Remedies in Texas, 5 St. Mary’s L.J. 719, 722 (1974).

Some commonly sought debts subject to garnishment are as follows:

1. Bank account. A bank account is the most commonly garnished debt. Bank deposits can be reached regardless of the account name if the funds are owed to the judgment debtor. Frankfurt’s Texas Investment Corp. v. Trinity Savings & Loan Ass’n, 414 S.W.2d 190, 195 (Tex. Civ. App.—Dallas 1967, writ ref’d n.r.e.). Community funds can also be

2. Safe-deposit box. A bank can be sued in garnishment to reach the contents of a safe-deposit box holding the judgment debtor’s property, even if the bank does not know what the box contains. *Blanks v. Radford*, 188 S.W.2d 879, 886 (Tex. Civ. App.—Eastland 1945, writ ref’d w.o.m.).

3. Stock. Stock is expressly subject to garnishment under *Tex. R. Civ. P. 669*.


§ 27.56:2 Property Exempt from Garnishment

Exempt property is discussed generally in part III. in this chapter. Some of the more important exemptions are as follows:

1. Real property. Only effects of the debtor are subject to garnishment; “effects” do not include real property. See *Fitzgerald v. Brown, Smith & Marsh Bros.*, 283 S.W. 576, 578 (Tex. Civ. App.—Texarkana 1926, writ dism’d). Also, the proceeds of a sale of a homestead are exempt from seizure for six months. *Tex. Prop. Code § 41.001(c)*.


6. Trust or other funds in debtor’s name belonging to third party. Neither trust funds nor funds of another deposited in a defendant’s name are subject to garnishment by the defendant’s creditors. Failure of the garnishee to raise this
defense may subject the garnishee to liability to the defendant. *Southwest Bank & Trust Co. v. Calmark Asset Management*, 694 S.W.2d 199, 200–01 (Tex. App.—Dallas 1985, writ ref’d n.r.e.).


8. Pensions, profit-sharing, retirement, and similar plans. With some exceptions, property designated under Tex. Prop. Code § 42.0021 is exempt from attachment, execution, and seizure for the satisfaction of debts. Property exempt under this statute is discussed at section 27.41:3 above.


11. Property held in custodia legis. Property held in custodia legis may not be garnished. However, when the court enters a decree of distribution or when nothing more remains for the custodian to do but make delivery of the property or payment of the money, the reason for custodia legis is satisfied, and the property becomes subject to levy. *Gonzales v. Daniel*, 854 S.W.2d 253, 256–57 (Tex. App.—Corpus Christi 1993, no writ).

12. Money due original contractors and subcontractors. Creditors of original contractors may not garnish money due the original contractor or the contractor’s surety; also, a creditor of a subcontractor may not garnish money due the subcontractor, to the prejudice of the subcontractors, mechanics, laborers, materialmen, or their sureties. Tex. Prop. Code § 53.151.

§ 27.56:3 Alter Ego

A garnishment proceeding may be used to reach the defendant’s property when it is found in the possession of another entity that is the alter ego of the defendant. *Valley Mechanical Contractors v. Gonzales*, 894 S.W.2d 832, 834–35 (Tex. App.—Corpus Christi 1995, no writ).

§ 27.56:4 Fraudulent Transfer

If the plaintiff specifically pleads and proves a fraudulent transfer, he can garnish property found to have been transferred improperly from the defendant to the garnishee. *Englert v. Englert*, 881 S.W.2d 517, 519–20 (Tex. App.—Amarillo 1994, no writ); *see* Tex. Bus. & Com. Code § 24.005(a)(1). See section 14.10 in this manual regarding fraudulent transfer.

§ 27.56:5 Debtor’s Property Held by Third Party

If the plaintiff wants to challenge title to property held by a third party (for example, if the defendant’s funds have been placed in a bank account held by a nominal owner on behalf of the defendant), the plaintiff should seek a writ of garnishment naming the nominal owner, not the true owner. *Bank One Texas, N.A. v. Sunbelt Savings, F.S.B.*, 824 S.W.2d 557, 558 (Tex. 1992). The court did not make it clear how to “name” the third party. If the applicant for the writ of garnishment alleges that the defen-
dant’s funds are in a third party’s account, the garnishee typically will freeze the account and interplead. See also Newsome v. Charter Bank Colonial, 940 S.W.2d 157 (Tex. App.—Houston [14th Dist.] 1996, writ denied); Overton Bank & Trust, N.A. v. PaineWebber, Inc., 922 S.W.2d 311 (Tex. App.—Fort Worth 1996, no writ).

§ 27.57 Application for Writ of Garnishment

Form 27-11 in this chapter is an application for writ of garnishment after judgment. Form 27-12 is the affidavit in support of the application. No hearing is required on a postjudgment application. The clerk will issue a writ when the application is filed. Tex. R. Civ. P. 658.

§ 27.58 No Bond for Postjudgment Garnishment


§ 27.59 Service of Writ of Garnishment

§ 27.59:1 Service on Garnishee

The writ of garnishment is to be served on the garnishee. Tex. R. Civ. P. 659. Service must be by a sheriff or constable, not by a private process server. Lawyers Civil Process, Inc. v. State, 690 S.W.2d 939, 942–43 (Tex. App.—Dallas 1985, no writ).

§ 27.59:2 Service on Financial Institutions

Service of a writ of garnishment on a financial institution is governed by section 59.008 of the Texas Finance Code. Tex. Civ. Prac. & Rem. Code § 63.008. A claim against a customer—defined in Finance Code section 59.001(2) to include writs of garnishment and notices of receivership, among other actions—must be delivered to the address designated as the address of the registered agent of the financial institution in its registration statement filed with the secretary of state pursuant to section 201.102 or 201.103 of the Finance Code. Tex. Fin. Code § 59.008(a). Out-of-state financial institutions must file an application for registration with the secretary of state by complying with the laws of Texas for foreign corporations doing business in Texas, that is, designating an agent for process. Tex. Fin. Code § 201.102. Texas financial institutions may file a statement with the secretary of state appointing an agent for process. Tex. Fin. Code § 201.103. The Texas secretary of state’s office may be called at 512-463-5555 to ascertain the name of the agent for process. This information may also be available online through SOSDirect, the secretary of state’s web access system, at www.sos.state.tx.us/corp/sosda/index.shtml.

If a financial institution complies with section 201.102 or 201.103, a claim against a customer of the financial institution (for example, a writ of garnishment) is not effective if served or delivered to an address other than the address designated. Tex. Fin. Code § 59.008(b). The financial institution’s customer bears the burden of preventing or limiting a financial institution’s compliance with or response to a claim subject to section 59.008. Tex. Fin. Code § 59.008(c). It appears then that a financial institution complying with the provisions regarding designation of a registered agent can elect to declare the claim against its customer ineffective if the claimant fails to properly serve the financial institution. Further, if the financial institution inadvertently honors a claim against its customer that is incorrectly served, it appears to have no exposure to its customer, who has the burden to prevent or suspend the financial institution’s response to the claim.
If the financial institution does not comply with section 201.102 or 201.103, the financial institution is subject to service of claims against its customers as otherwise provided by law. Tex. Fin. Code § 59.008(d).

Citation may be served on a financial institution (as defined in section 201.101 of the Texas Finance Code) by serving the registered agent of the financial institution or, if there is no registered agent, serving the president or a branch manager at any office located in Texas. Tex. Civ. Prac. & Rem. Code § 17.028(a), (b). If citation has not been properly served, a financial institution may maintain an action to set aside the default judgment or any sanctions entered against it. Tex. Civ. Prac. & Rem. Code § 17.028(d).

For credit unions, citation may be served by serving the registered agent of the credit union or, if the credit union does not have a registered agent, serving the president or vice president. Tex. Civ. Prac. & Rem. Code § 17.028(c). However, a citation served on a credit union that is located in a place of worship may not be served during a worship service. Tex. Civ. Prac. & Rem. Code § 17.028(e).

Most financial institutions will tell who their designated agent for service of process is, especially if it is explained that the institution is being sued only as garnishee.

§ 27.59:3 Service on Defendant

The judgment defendant must be served with copies of the writ of garnishment, the application, the accompanying affidavits, and the orders of the court as soon as practical after service of the writ on the garnishee. This service can be in any manner prescribed for service of citation or as provided in Tex. R. Civ. P. 21a. Tex. R. Civ. P. 663a. It is recommended that, instead of serving the defendant personally, his copy of the application and affidavit be served by certified mail, return receipt requested, and by regular mail. The copy of the writ served on the defendant must include, in ten-point type and in a manner calculated to advise a reasonably attentive person of its contents, the following statement:

To ______________________, Defendant:

You are hereby notified that certain properties alleged to be owned by you have been garnished. If you claim any rights in such property, you are advised:

YOU HAVE A RIGHT TO REGAIN POSSESSION OF THE PROPERTY BY FILING A REPLEVY BOND. YOU HAVE A RIGHT TO SEEK TO REGAIN POSSESSION OF THE PROPERTY BY FILING WITH THE COURT A MOTION TO DISSOLVE THIS WRIT.

Tex. R. Civ. P. 663a. Some court clerks provide additional copies of the writs with the notice language. Others do not; in that case, it is necessary to photocopy the writ and type the notice language on the face of the copy before serving it on the defendant.

Failure of the garnisher to properly serve the defendant is fatal to the plaintiff’s garnishment action, even though the defendant may have actual notice of the garnishment action. Walnut Equipment Leasing Co. v. J-V Dirt & Loam, 907 S.W.2d 912, 915 (Tex. App.—Austin 1995, writ denied); Hering v. Norbanco Austin I, Ltd., 735 S.W.2d 638, 641–42 (Tex. App.—Austin 1987, writ denied); Small Business Investment Co. of Houston v. Champion International Corp., 619 S.W.2d 28, 30 (Tex. Civ. App.—Houston [1st Dist.] 1981, no writ); but see Del-Phi Engineering Associates v. Texas Commerce Bank-Conroe, N.A., 771 S.W.2d 589, 591 (Tex. App.—Beaumont 1989, no writ) (defendant waived lack of service by setting agreed hearing).
Although the defendant must be served with notice of the garnishment proceedings, the garnishee does not have standing to sue or appeal based on failure to serve the defendant. *Sherry Lane National Bank v. Bank of Evergreen*, 715 S.W.2d 148, 151–52 (Tex. App.—Dallas 1986, writ ref’d n.r.e.); see also *Tex. R. Civ. P. 663a.*

The forms of the writ and notice are prescribed in *Tex. R. Civ. P. 661, 663a.* For a writ to be served on the garnishee, see form 8-5 in this manual; for a notice to the defendant, see form 27-13 in this chapter. The notice at form 27-13 is to be used as a cover sheet only and not as a substitute for the writ with notice language included on it. The writ of garnishment is usually prepared by the clerk of the court.

§ 27.60 Officer’s Return

The officer who executes a writ of garnishment must make his return as with any other citation. *Tex. R. Civ. P. 663.* Texas Civil Practices and Remedies Code section 17.030 requires the Supreme Court of Texas to adopt rules of civil procedure requiring a person who serves process to complete a return of service. See *Tex. Civ. Prac. & Rem. Code § 17.030(a).* The officer or authorized person executing the citation must complete a return of service, and the return may be endorsed on or attached to the citation. *Tex. R. Civ. P. 107(a).* The return, along with any document to which it is attached, must be filed with the court. *Tex. R. Civ. P. 107(g).*

The attorney should inspect the return before obtaining a garnishment judgment, especially a default judgment. Returns in garnishment proceedings are governed by the rules for citations generally. *Curry Motor Freight v. Ralston Purina Co.*, 565 S.W.2d 105, 106 (Tex. Civ. App.—Amarillo 1978, no writ). Returns have been held fatally defective for failing to show the manner of service on a corporate garnishee and for failing to show the place of service. See *Jacksboro National Bank v. Signal Oil & Gas Co.*, 482 S.W.2d 339, 341–42 (Tex. Civ. App.—Tyler 1972, no writ). *But see Hudler-Tye Construction, Inc. v. Pettijohn & Pettijohn Plumbing, Inc.*, 632 S.W.2d 219, 221 (Tex. App.—Fort Worth 1982, no writ) (return that does not show place of service presumed served in county in which officer is authorized to act “until the contrary appears”). For a discussion of service of process, see chapter 16 in this manual, especially section 16.8 (list for officer’s return). See form 27-14 in this chapter for the officer’s return.

§ 27.61 Garnishee’s Answer

§ 27.61:1 Form of Garnishee’s Answer

The garnishee’s answer must be under oath, in writing, and signed by him. *Tex. R. Civ. P. 665.*

§ 27.61:2 Garnishee Indebted to Defendant or Possesses Defendant’s Property

If the garnishee answers that he is now indebted to the judgment debtor (or was so indebted when served) or now has effects of the debtor (or had the debtor’s effects when served), the court will enter a judgment for the plaintiff in the amount so admitted. *Tex. R. Civ. P. 668, 669.* For a discussion of the steps the plaintiff can take if dissatisfied with the garnishee’s answer, see section 27.63 below.
§ 27.61:3 Garnishee Not Indebted to Defendant

If the garnishee answers that (1) he is not now indebted to the debtor and was not when served (or, as applicable, does not have any of the debtor’s effects and did not have them when served) and (2) does not know of anyone who does have the debtor’s effects, and the plaintiff does not dispute these allegations, the garnishee will be discharged. Tex. R. Civ. P. 666. The plaintiff may controvert the garnishee’s answer; see section 27.63 below.

§ 27.61:4 No Answer

If the garnishee does not file an answer to the writ of garnishment by the answer date stated in the writ, the court can render a default judgment for the plaintiff against the garnishee. For garnishees that are not financial institutions, the default judgment is for the full amount of the judgment in the original cause plus all interest and costs in both the original cause and the garnishment action. Tex. R. Civ. P. 667. Before obtaining the default judgment, the attorney should make certain that the officer’s return will support a default judgment if later attacked. See United National Bank v. Travel Music of San Antonio, 737 S.W.2d 30 (Tex. App.—San Antonio 1987, writ ref’d n.r.e.); see also section 27.60 above.

A default judgment against a financial institution can be rendered “solely as to the existence of liability and not as to the amount of damages.” Tex. Fin. Code § 276.002(a). The garnisher has the burden to prove “the amount of actual damages proximately caused by the financial institution’s default.” Tex. Fin. Code § 276.002(c). For good cause shown, the garnisher can also recover reasonable attorney’s fees incurred in establishing damages. Tex. Fin. Code § 276.002(d).

§ 27.62 Funds Trapped by Writ

The writ, once served on the garnishee, impounds or “traps” funds owed or held by the garnishee on the date of service, as well as funds owed or held from the time the garnishee is served through the date of answer. Newsome v. Charter Bank Colonial, 940 S.W.2d 157, 162–63 (Tex. App.—Houston [14th Dist.] 1996, writ denied); First National Bank in Dallas v. Banco Longoria, S.A., 356 S.W.2d 192, 195–96 (Tex. Civ. App.—San Antonio 1962, writ ref’d n.r.e.); Cooper v. Cocke, 145 S.W.2d 275, 279 (Tex. Civ. App.—Amarillo 1940, no writ); Consolidated Gasoline Co. v. Jarecki Manufacturing Co., 72 S.W.2d 351, 352 (Tex. Civ. App.—Eastland 1934), aff’d, 105 S.W.2d 663 (Tex. 1937). The garnishee pays trapped monies to the debtor at his peril. Westridge Villa Apartments v. Lakewood Bank & Trust Co., 438 S.W.2d 891, 894 (Tex. Civ. App.—Fort Worth 1969, writ ref’d n.r.e.).

The garnishee may file an answer before answer day, but the garnisher may controvert the garnishee’s answer, requesting that the court require the garnishee to disclose what funds were held or owed on answer day. Banco Longoria, 356 S.W.2d at 196. If the garnishee files an answer after answer day but before the garnisher obtains a default judgment, the garnishee need only disclose what monies were held or owed from date of service through answer day; the writ does not trap funds held or owed after that day. Jarecki Manufacturing Co., 72 S.W.2d at 353.

§ 27.63 Plaintiff’s Controverting Plea to Garnishee’s Answer

A plaintiff or defendant who is dissatisfied with the garnishee’s answer can file an affidavit stating why he believes for good reason that the answer is incorrect. Tex. R. Civ. P. 673. The issues raised will be tried as in other cases. Tex. Civ. Prac. & Rem. Code § 63.005(a); Tex. R. Civ. P. 674, 676. If the plaintiff controverts the answer of a garnishee who does not reside in the county in which the garnishment action is pending, jurisdiction is removed from the court in which the action is pending, and

If the garnishee’s answer raises doubt about the ownership of the funds, the garnisher must then affirmatively establish that the debtor owns the funds. Any other person claiming ownership of or an interest in the funds must intervene and overcome the presumption that the funds belong to the debtor. The fact that a garnisher may have failed to establish that the debtor is the owner of the funds will not benefit the intervening party. It will simply show that ownership of the funds is in doubt. The intervenor must himself affirmatively prove his ownership of the funds in order to recover. *Putman & Putman, Inc. v. Capitol Warehouse, Inc.*, 775 S.W.2d 460, 463 (Tex. App.—Austin 1989, writ denied). See also section 27.70 below regarding the garnishee’s right of offset.

§ 27.64 Defendant’s Right to Replevy

A defendant may replevy garnished property if it has not yet been sold. If it has been sold, he may replevy the proceeds of the sale. The defendant will be required to post bond in order to replevy. *Tex. R. Civ. P. 664.*

§ 27.65 Dissolution or Modification of Writ of Garnishment

A defendant may also seek dissolution or modification of the writ of garnishment. *Tex. R. Civ. P. 664a.* At the hearing on a motion to dissolve or modify, the plaintiff must prove the grounds relied on for the writ’s issuance. These grounds are set forth in *Tex. Civ. Prac. & Rem. Code § 63.001(3)* and are discussed at section 27.54:1 above. Otherwise, the party seeking to modify or dissolve the writ bears the burden of proof. *Walnut Equipment Leasing Co. v. J-V Dirt & Loam*, 907 S.W.2d 912, 915 (Tex. App.—Austin 1995, writ denied). The plaintiff need not prove that the garnishee is indebted to the defendant. *Swiderski v. Victoria Bank & Trust Co.*, 706 S.W.2d 676, 678 (Tex. App.—Corpus Christi 1986, writ ref’d n.r.e.).

§ 27.66 Costs and Attorney’s Fees

If the garnishee’s answer is not controverted and the plaintiff obtains a garnishment judgment against him, costs will be taxed against the judgment debtor and included in the execution in garnishment. *Tex. R. Civ. P. 677.* The garnishee’s costs will be taken from the amount the garnishee owes the defendant, and the remainder will be applied to the plaintiff’s judgment. *Pan American National Bank v. Ridgway*, 475 S.W.2d 808 (Tex. Civ. App.—San Antonio 1972, writ ref’d n.r.e.). If the answer is contested, “the costs shall abide the issue.” *Tex. R. Civ. P. 677.* If the garnishee is discharged on his answer, costs of the garnishment proceeding, including a reasonable compensation to the garnishee, will be taxed against the plaintiff. *Tex. R. Civ. P. 677.*

The successful plaintiff is not entitled to recover attorney’s fees for prosecuting a postjudgment garnishment action. *Henry v. Insurance Co. of North America*, 879 S.W.2d 366, 368–69 (Tex. App.—Houston [14th Dist.] 1994, no writ). The garnishee, however, can recover costs, which include attorney’s fees. If the garnishee answers that he is indebted to the judgment debtor, the garnishee’s costs, including attorney’s fees, will be deducted from the amount paid the garnisher and charged to the defendant. *Pan American National Bank*, 475 S.W.2d at 809. If the garnishee is discharged on his answer, his costs will be taxed against the plaintiff. *Tex. R. Civ. P. 677.* Those costs include attorney’s fees. *J.C. Hadsell & Co. v. Allstate Insurance Co.*, 516 S.W.2d 211, 213 (Tex. Civ. App.—Texarkana 1974, writ dism’d).
§ 27.67 Garnishment Judgment

If the garnishee answers that he is indebted to the defendant in any amount or was so indebted when the writ of garnishment was served on him, or if the court so finds, the garnishment judgment will be for the amount the garnishee admits he owes the defendant or the amount found by the court to be due the defendant from the garnishee. The garnishment judgment may not, however, exceed the amount of the plaintiff’s judgment in the original suit against the defendant with interest and costs in both the original suit and in the garnishment proceedings. Tex. R. Civ. P. 668. If the answer or verdict was that the garnishee has in his possession, or had when the writ was served, any of the defendant’s effects liable to execution, the decree will order the sale of the effects under execution to satisfy the plaintiff’s original judgment and will direct the garnishee to deliver to the officer for sale as much of the effects as necessary to satisfy the judgment. Tex. R. Civ. P. 669. The garnishee will probably want the garnishment judgment to order his debt to the defendant discharged. See form 27-15 in this chapter for a garnishment judgment.

The officer making a sale of personal property must execute a transfer of the property to the purchaser, with a brief recital of the judgment of the court under which the property was sold. Tex. R. Civ. P. 672.

§ 27.68 Enforcement of Garnishment Judgment

The garnishee adjudged to be indebted to the defendant will usually pay the garnishment judgment on request. If the garnishee will not pay the judgment, execution can be used as in the case of other judgments. Tex. R. Civ. P. 668. If the garnishee has any of the defendant’s effects, the judgment should order them sold under execution and should order the garnishee to deliver the appropriate amount of effects to the officer to be sold in satisfaction of the judgment. Tex. R. Civ. P. 669, 672. If the garnishee does not deliver the effects to the officer on demand, the garnishee can be cited to show cause why he should not be attached for contempt of court and, failing to show cause, can be fined for contempt and imprisoned until he delivers the property. Tex. R. Civ. P. 670.

Because this default situation rarely occurs, forms for contempt proceedings in a garnishment action are not included in this chapter. For a general discussion of contempt of court, see section 26.7 in this manual.

§ 27.69 Garnishee as Stakeholder

If the garnishee is served with a writ and is unsure whether the funds sought are owned by the defendant or a third party, he can file a bill of interpleader and place the funds into the registry of the court. If this action is justified, the garnishee avoids liability to the garnisher for releasing the funds and avoids liability to the account holder for wrongfully freezing the funds. See Thompson v. Fulton Bag & Cotton Mills, 286 S.W.2d 411, 414 (Tex. 1956) (scope of inquiry in writ of garnishment is broad enough to impound funds of defendant held by garnishee even though title thereto stands in name of third party); First Realty Bank v. Ehrle, 521 S.W.2d 295, 298–99 (Tex. Civ. App.—Dallas 1975, no writ) (bank’s fear of exposure to multiple liability was reasonable and bank was entitled to protect itself by interpleader). If the garnishee’s answer puts into doubt the defendant’s ownership of the funds, the garnisher then has the burden of proof to show that the defendant owns the funds. Putman & Putman, Inc. v. Capitol Warehouse, Inc., 775 S.W.2d 460, 463 (Tex. App.—Austin 1989, writ denied).
§ 27.70 Garnishee’s Offset Rights

Locating a defendant’s account for garnishment may be only half the plaintiff’s battle. In addition to the timing of withdrawals by the defendant, the plaintiff is faced with the prospect of offset by the defendant’s bank if the defendant is indebted to his bank, both before and in some instances after service of the writ of garnishment.


If the bank has a right to mature the indebtedness at the time the writ is served, it may take steps to accelerate and offset after service of the writ. This right may be due to a default in the installment payment, events of default defined in the note separate from nonpayment (for example, attachment of the account), or even an insecurity clause. The attorney should use discovery before garnishment to learn whether the debtor is indebted to the garnishee and, if indebted, the terms of the indebtedness. See also Holt’s Sporting Goods Co. of Lubbock v. American National Bank, 400 S.W.2d 943 (Tex. Civ. App.—Amarillo 1966, writ dism’d); Home National Bank v. Barnes-Piazzeck Co., 278 S.W. 299 (Tex. Civ. App.—Fort Worth 1925, writ ref’d).

§ 27.71 Liability for Wrongful Postjudgment Garnishment

The plaintiff can be liable for wrongful garnishment if in his affidavit he makes an untrue allegation of a statutory ground for garnishment, possibly even though he had probable cause to believe the ground was true and he did not act maliciously. Peerless Oil & Gas Co. v. Teas, 138 S.W.2d 637, 640 (Tex. Civ. App.—San Antonio 1940), aff’d, 158 S.W.2d 758 (Tex. 1942). If the plaintiff knows that the defendant actually has property within the state subject to execution sufficient to satisfy the debt, wrongful garnishment can occur if the plaintiff alleges otherwise in his affidavit. See King v. Tom, 352 S.W.2d 910, 913 (Tex. Civ. App.—El Paso 1961, no writ); Griffin v. Cawthon, 77 S.W.2d 700, 702 (Tex. Civ. App.—Fort Worth 1934, writ ref’d). The plaintiff has a duty to make a reasonable inquiry whether any such property exists. Massachusetts v. Davis, 160 S.W.2d 543, 554 (Tex. Civ. App.—Austin), aff’d in part and rev’d in part on other grounds, 168 S.W.2d 216 (Tex. 1942), cert. denied, 320 U.S. 210 (1943).

A valid, subsisting judgment that is not suspended supports a garnishment. The fact that it is later set aside does not in itself support an action for wrongful garnishment. Biering v. First National Bank, 7 S.W. 90 (Tex. 1888); Hobson & Associates v. First Print, Inc., 798 S.W.2d 617 (Tex. App.—Amarillo 1990, no writ). Failure of the plaintiff to state in his application that he was not aware of property owned by the defendant subject to execution sufficient to satisfy the judgment did not support a wrongful garnishment action. Canyon Lake Bank v. Townsend, 649 S.W.2d 809, 810–11 (Tex. App.—Austin 1983, writ ref’d n.r.e.). See generally Glenn Jarvis, Comment, Creditor’s Liability in Texas for Wrongful Attachment, Garnishment, or Execution, 41 Texas L. Rev. 692, 704–07, 711–16 (1963).
§ 27.72 Locating Bank Accounts

Bank account location services should be utilized with extreme caution. If the information has been gained by false pretenses, criminal penalties apply pursuant to subchapter II of the Gramm-Leach-Bliley Act, 15 U.S.C. §§ 6821–6827. See generally chapter 3 in this manual for further information on locating a debtor’s assets.

[Sections 27.73 through 27.80 are reserved for expansion.]

V. Turnover

§ 27.81 Origin of Turnover Statutes

The Texas turnover statutes are found at Tex. Civ. Prac. & Rem. Code §§ 31.002–.0025, 31.010. These statutes, with the post-judgment discovery devices under Tex. R. Civ. P. 621a, give creditors the statutory equivalent of what was previously known in equity as a creditor’s bill. Ex parte Johnson, 654 S.W.2d 415, 417 (Tex. 1983). Section 31.002(a) was amended effective 2017, eliminating the need to show that the debtor owns property that cannot be readily levied upon by ordinary legal process. Acts 2017, 85th Leg., R.S., ch. 996, § 1 (H.B. 1066), eff. Sept. 1, 2017.

§ 27.82 Purpose, Function, and Effect of Turnover

Turnover is a procedural device by which judgment creditors may reach assets of a debtor. Beaumont Bank, N.A. v. Buller, 806 S.W.2d 223, 224 (Tex. 1991). The purpose of the turnover statutes is to aid the diligent judgment creditor in reaching the judgment debtor’s property. Cross, Kieschnick & Co. v. Johnston, 892 S.W.2d 435, 438 (Tex. App.—San Antonio 1994, no writ). Turnover aids the plaintiff if the defendant owns property that cannot readily be attached or levied on by ordinary legal process. Buller, 806 S.W.2d at 224; Hennigan v. Hennigan, 666 S.W.2d 322, 323 (Tex. App.—Houston [14th Dist.], writ ref’d n.r.e. per curiam, 677 S.W.2d 495 (Tex. 1984). See section 27.89 below regarding property subject to and exempt from turnover.

The turnover statutes place the burden on the defendant to produce documents or property used to satisfy a judgment. They are deliberately open-ended to aid the diligent plaintiff. See House Comm. on Judicial Affairs, Bill Analysis, Tex. S.B. 965, 66th Leg., R.S. (1979).

§ 27.83 When to Seek Turnover Relief

Seeking turnover relief is appropriate if the judgment debtor owns nonexempt property or property rights. Tex. Civ. Prac. & Rem. Code § 31.002(a). See Hennigan v. Hennigan, 666 S.W.2d 322, 323 (Tex. App.—Houston [14th Dist.], writ ref’d n.r.e. per curiam, 677 S.W.2d 495 (Tex. 1984) (attorney’s income from retainers and hourly fee billing; defendant stated he would not pay voluntarily); Arndt v. National Supply Co., 650 S.W.2d 547, 549 (Tex. App.—Houston [14th Dist.] 1983, writ ref’d n.r.e.) (accounts receivable, stocks). The court may order the judgment debtor to turn over realty located outside the state of Texas. Reeves v. Federal Savings & Loan Insurance Corp., 732 S.W.2d 380 (Tex. App.—Dallas 1987, no writ). By extension, personal property outside the state may also be subject to turnover.

There is no requirement that a judgment creditor first exhaust other legal remedies, such as attachment, execution, or garnishment, before seeking turnover relief. Universe Life Insurance Co. v. Giles, 982 S.W.2d 488, 492–93 (Tex. App.—Texarkana
Turnover is cumulative of other lawful remedies available to a judgment creditor for collection of a judgment. *Matrix, Inc. v. Provident American Insurance Co.*, 658 S.W.2d 665, 668 (Tex. App.—Dallas 1983, no writ). Because Tex. Civ. Prac. & Rem. Code § 31.002(b) states that the court may grant the relief stated in section 31.002(b)(1), (2), or (3), the statute is viewed as discretionary. Therefore, a court may set additional requirements before granting turnover relief, such as showing that discovery has been ignored or that the creditor obtain a writ of execution and have it returned *nulla bona* before granting turnover relief.

A waiting period of thirty days after entry of judgment or overruling of a motion for new trial is not required as it is before levy and execution. *Childre*, 700 S.W.2d at 286–87. Also, the court can consider a turnover application even if the judgment is on appeal, as long as a supersedeas bond has not been filed. *Anderson v. Lykes*, 761 S.W.2d 831, 833–34 (Tex. App.—Dallas 1988, no writ), *overruled on other grounds as recognized in In re Crow-Billingsley Air Park, Ltd.*, 98 S.W.3d 178, 180 (Tex. 2003).

### § 27.84 Jurisdiction and Choice of Forum

A judgment creditor may bring a turnover action either in the same suit in which the judgment against the debtor is rendered or in a new and independent proceeding. Tex. Civ. Prac. & Rem. Code § 31.002(d). If the creditor moves for turnover relief in the same suit in which the judgment was rendered, the trial court must conduct a hearing on the application, even if an appeal is pending. *Anderson v. Lykes*, 761 S.W.2d 831 (Tex. App.—Dallas 1988, no writ), *overruled on other grounds as recognized in In re Crow-Billingsley Air Park, Ltd.*, 98 S.W.3d 178, 180 (Tex. 2003). See section 27.94 below for a discussion of the trial court's discretion to grant or deny turnover relief.

An independent proceeding for turnover relief may be brought in a court of appropriate jurisdiction. See Tex. Civ. Prac. & Rem. Code § 31.002(a). A creditor may, therefore, choose a different court of competent jurisdiction that is best able to handle the particular relief sought, such as the appointment of a receiver or the issuance of an injunction. For more extensive discussions of jurisdiction and venue in collections cases, see chapter 15 in this manual.

**Practice Note:** Since turnover orders are enforceable by contempt, an independent action filed in the debtor’s county of residence may facilitate enforcement if attachment of the debtor becomes necessary. Transferring debtors in custody across county lines can be problematic, and law enforcement is not readily cooperative in transferring civil contemners.

### § 27.85 Pleadings

#### § 27.85:1 Creditor’s Pleadings

The application should generally—

1. recite that the judgment remains unsatisfied;

2. identify the present or future rights to property or types of property owned by the judgment debtor that the judgment creditor seeks to have turned over;
3. state that the property is not exempt (it is permissible to state only that the defendant owns property that is not exempt, without identifying the specific property or types of property; the attorney should consider this option if requesting a turnover receivership);

4. if injunctive relief is requested, follow the requirements for obtaining an injunction or temporary restraining order (pleadings such as no adequate remedy at law, and verifying petition);

5. request that the property, along with related documents and records, be turned over to the sheriff or constable for execution or to a receiver or provide that it otherwise be applied to the satisfaction of the judgment;

6. request the appointment of a receiver, if one is being sought; and

7. request attorney’s fees.


The plaintiff’s failure to plead that the defendant’s property could not be readily attached or levied on is not fatal to the turnover application. The defendant’s response is to file a special exception. *Pace v. McEwen*, 617 S.W.2d 816, 819 (Tex. Civ. App.—Houston [14th Dist.] 1981, no writ). See form 27-16 in this chapter for an application for turnover relief.

§ 27.85:2  **Debtor’s Pleadings**

The defendant may challenge an order for turnover by motion or on appeal. *See Ex parte Johnson*, 654 S.W.2d 415, 418 (Tex. 1983) (orig. proceeding) (motion to modify); *Scheel v. Alfaro*, 406 S.W.3d 216, 222 (Tex. App.—San Antonio 2013, pet. denied) (motion to set aside); *Lozano v. Lozano*, 975 S.W.2d 63, 69 (Tex. App.—Houston [14th Dist.] 1998, pet. denied) (appeal). An affirmative defense such as payment must be pleaded and proved by the defendant. If the defendant has neither responded to an application for turnover nor pleaded payment as an affirmative defense, he is precluded on appeal from contending that the plaintiff failed to prove that the judgment was unsatisfied. *Ross v. 3D Tower Ltd.*, 824 S.W.2d 270, 273 (Tex. App.—Houston [14th Dist.] 1992, writ denied); *Matrix, Inc. v. Provident American Insurance Co.*, 658 S.W.2d 665, 667 (Tex. App.—Dallas 1983, no writ); Tex. R. Civ. P. 94.

§ 27.86  **Notice and Hearing**

§ 27.86:1  **Notice**

Notice to the defendant and opportunity to be heard are not required by the turnover statute. *Ross v. 3D Tower Ltd.*, 824 S.W.2d 270 (Tex. App.—Houston [14th Dist.] 1992, writ denied). Courts routinely grant ex parte orders for turnover but, in the court’s discretion, may first require that notice be given to the defendant. One factor the court may consider in proceeding ex parte is the likelihood that the debtor will dispose of the property if notice is given.

§ 27.86:2 Hearing


There is a split in authority over whether the defendant has the burden to prove that particular property is exempt from turnover. *Burns v. Miller, Hiersche, Martens & Hayward, P.C.*, 948 S.W.2d 317, 324 (Tex. App.—Dallas 1997, writ denied) (noting that *Tex. Civ. Prac. & Rem. Code § 31.002* does not specify who has burden and that courts were split, but citing *Roosth v. Roosth*, 889 S.W.2d 445, 459 (Tex. App.—Houston [14th Dist.] 1994, writ denied), to place burden on beneficiary of spendthrift trust to prove distributions were exempt); *Jacobs v. Adams*, 874 S.W.2d 166, 167–68 (Tex. App.—Houston [14th Dist.] 1994, no writ) (burden on party claiming property is exempt); *Rucker v. Rucker*, 810 S.W.2d 793, 795–96 (Tex. App.—Houston [14th Dist.] 1991, writ denied) (burden on party claiming property is exempt); *Sloan v. Douglass*, 713 S.W.2d 436, 441 (Tex. App.—Fort Worth 1986, writ ref’d n.r.e.) (burden on party seeking turnover).

§ 27.87 Turnover Orders Generally

Texas Civil Practice and Remedies Code section 31.002(b) provides for the three types of turnover orders available under the statute. While the provision for appointment of a receiver is often used, the practitioner should not overlook the provisions for turnover of property to a sheriff or constable or for otherwise applying the property to the satisfaction of the judgment.

A turnover proceeding can and should be used to determine whether the defendant’s particular property is subject to turnover. *See, e.g.*, *Owen v. Porter*, 796 S.W.2d 265 (Tex. App.—San Antonio 1990, no writ) (whether community property was joint management or sole management); *Sloan v. Douglass*, 713 S.W.2d 436 (Tex. App.—Fort Worth 1986, writ ref’d n.r.e.); *Pace v. McEwen*, 617 S.W.2d 816, 819 (Tex. Civ. App.—Houston [14th Dist.] 1981, no writ) (homestead); *but see Republic Insurance Co. v. Millard*, 825 S.W.2d 780 (Tex. App.—Houston [14th Dist.] 1992, no writ); *Steenland v. Texas Commerce Bank, N.A.*, 648 S.W.2d 387 (Tex. App.—Tyler 1983, writ ref’d n.r.e.) (court could not determine excess nonexempt value of homestead; creditor must seek separate trial and finding).

A turnover order should not provide for delivery of the debtor’s property directly into the hands of the judgment creditor or his attorney. *Ex parte Johnson*, 654 S.W.2d 415, 418 (Tex. 1983) (orig. proceeding). The same rule applies for cash as for tangible personal property. *Copher v. First State Bank of Pittsburg*, 852 S.W.2d 738, 739 (Tex. App.—Fort Worth 1993, no writ) (relying on *Ex parte Johnson* and legislative history).

The Code allows a court to enter or enforce an order without identifying specifically the property subject to turnover. *See Tex. Civ. Prac. & Rem. Code § 31.001(h)*. This keeps the attorney from having to give the defendant notice of which assets to hide, and it allows the attorney to avoid the problem of having to identify specific assets to be turned over to the receiver. The property to be turned over may be stated in the form of a category, for example, “all accounts receivable.”
The court may appoint a receiver to “take possession of” nonexempt property belonging to the judgment debtor, “sell it and pay the proceeds to the judgment creditor to the extent required to satisfy the judgment.” Tex. Civ. Prac. & Rem. Code § 31.002(b)(3).

**Practice Note:** An order to turn over specific property by itself does not enable a constable or sheriff’s deputy to take possession of the property or to sell it; a writ of execution should therefore accompany the turnover order. The writ also provides a way for the officer to report to the court the outcome of serving the order. Providing the officer with both documents should not result in being charged two fees, as each document assists the officer in handling the other. See forms 27-5 through 27-7 regarding writs of execution. See form 27-17 in this chapter for an order for turnover relief.

§ 27.88 Receiverships in Turnover Actions

§ 27.88:1 Authority of Receiver under Turnover Statutes

The court may appoint a receiver of the judgment debtor’s property with the authority to take possession of and sell the nonexempt property and pay the proceeds to the judgment creditor to the extent required to satisfy the judgment. Tex. Civ. Prac. & Rem. Code § 31.002(b)(3). Chapter 64 of the Civil Practice and Remedies Code does not apply to a receivership under section 31.002.

§ 27.88:2 Appointment of Receiver


§ 27.88:3 Qualifications of Receiver

Although neither the turnover statute nor the case law interpreting the statute establishes requirements for who can serve as a receiver, it is suggested that the receiver (1) be a citizen and qualified voter of the state of Texas at the time of appointment; (2) maintain actual residence in the state during the receivership; and (3) not be a party, attorney, or other person interested in the action for appointment of a receiver. Tex. Civ. Prac. & Rem. Code § 64.021; *Swate v. Johnston*, 981 S.W.2d 923, 925 (Tex. App.—Houston [1st Dist.] 1998, orig. proceeding). Earning fees payable from the estate of the receivership does not disqualify the receiver as an interested person. *Swate*, 981 S.W.2d at 926 n.1. If the applicant seeks to give the receiver the powers of a master, the person to be appointed should also not be related to any party. Tex. R. Civ. P. 171.

§ 27.88:4 Application of Appointment of Receiver

In addition to requesting that a receiver be appointed as discussed herein, the attorney should make sure the application is pleaded in accordance with section 31.002(a) of the Texas Civil Practices and Remedies Code. The court may appoint a receiver only if the judgment creditor meets the requirements of section 31.002(a) of the Code. For a discussion of what the pleadings should contain, see section 27.85:1 above. See form 27-18 in this chapter for a motion for postjudgment receivership.
§ 27.88:5  Receivership Provision in Turnover Order

The order appointing a receiver determines what powers are available to a receiver. *Ex parte Hodges*, 625 S.W.2d 304, 306 (Tex. 1981). The order should be “definite, clear and concise in order to give the person to whom it is directed sufficient information as to his duties and should not be such as would call on him for interpretations, inferences or conclusions.” *Thomas v. Thomas*, 917 S.W.2d 425, 434 (Tex. App.—Waco 1996, no writ). Great care should be taken in drafting the order appointing the receiver to ensure that all the powers necessary for the receiver to perform his duties are included.

A comprehensive order not only turns over property belonging to the judgment debtor to the receiver but also empowers the receiver to take possession of the property and sell it for the benefit of the judgment debtor. The order should be specific enough to support a contempt action against the judgment debtor in case the debtor fails to comply with the order.

The order appointing a receiver should tax the receiver’s fees and reasonable expenses against the judgment debtor as a cost. Furthermore, the court must approve payment of a receiver’s fee by separate written order. Texas Supreme Court, *Second Amended Order Regarding Mandatory Reports of Judicial Appointments and Fees*, Misc. Docket No. 07-9188 (Oct. 30, 2007); *Moyer v. Moyer*, 183 S.W.3d 48 (Tex. App.—Austin 2005, no pet.).

In drafting the order, consider that third parties will look to the order in determining whether the receiver is authorized to make demand on them.

See form 27-19 in this chapter for an order appointing a receiver.

§ 27.88:6  Master in Chancery

The attorney may consider adding to the order powers of a master in chancery under rule 171 of the Texas Rules of Civil Procedure. If the receiver also wants to serve as a master in chancery, the receiver should (1) be a citizen of the state of Texas, (2) not be an attorney for either party to the action, and (3) not be related to any party. Tex. R. Civ. P. 171. The master in chancery has all the powers of a court of equity. Powers of a master in chancery include requiring the production of evidence, ruling on the admissibility of evidence, and placing a witness under oath for the purposes of examination by the master or a party. The order may limit or specify the master’s powers. Tex. R. Civ. P. 171. But see *Academy of Model Aeronautics, Inc. v. Packer*, 860 S.W.2d 419 (Tex. 1993) (pretrial appointment of master for pending and future discovery matters was abuse of discretion); *Simpson v. Canales*, 806 S.W.2d 802 (Tex. 1991) (appointment of master only in exceptional case, for good cause); *Sheikh v. Sheikh*, 248 S.W.3d 381 (Tex. App.—Houston [1st Dist.] 2007, no pet.) (good cause/exceptional circumstances and whether a conflict arises); *Roebuck v. Horn*, 74 S.W.3d 160, 163–64 (Tex. App.—Beaumont 2002, no pet.) (conflict may arise where master and receiver are same person).


§ 27.88:7  Bond and Oath for Appointment of Receiver

The turnover statute does not require a bond. Although Tex. R. Civ. P. 695a provides that a bond must be filed before a receiver can be appointed, rule 695a did not envision a turnover receiver. Courts have held that no receiver’s bond is required in a turnover receivership. *Schultz v. Cadle Co.*, 825 S.W.2d 151 (Tex. App.—Dallas 1992), *writ denied per curiam*, 852
S.W.2d 499 (Tex. 1993) (bond requirements of rule 695a do not apply to postjudgment receiver appointed under turnover statute, and decision whether to require bond is in court’s discretion); In re Estate of Herring, 983 S.W.2d 61, 64 (Tex. App.—Corpus Christi 1998, no pet.); Childre v. Great Southwest Life Insurance Co., 700 S.W.2d 284, 285 (Tex. App.—Dallas 1985, no writ). “Any bond which may be required should be carefully framed so as not to indemnify the judgment debtor in the traditional sense, as the righteousness of the appointment should have been fully litigated in any hearing pursuant to the new statutes.” Childre, 700 S.W.2d at 289 (citing David Hittner, Texas Post-Judgment Turnover and Receivership Statutes, 45 Tex. B.J. 417 (1982)). The judgment debtor bears the burden of showing any extraordinary circumstances requiring the bond to be increased. Childre, 700 S.W.2d at 289. If the application for turnover seeks both a receiver and an injunction, one bond may serve both purposes. Childre, 700 S.W.2d at 288–89. See form 27-20 for a bond.

The turnover statute does not provide that an oath be taken or filed by a receiver. However, practice has evolved to include the taking of an oath. See form 27-21 for an oath.

§ 27.88:8 Effect of Order Appointing Receiver on Prior Existing Liens

Receivership property is held in custodia legis as of the date the turnover order is signed. Any transfer or encumbrance after the turnover order is signed, including a trustee’s sale under a deed of trust, is void. First Southern Properties, Inc. v. Vallone, 533 S.W.2d 339, 341 (Tex. 1976) (citing Ellis v. Vernon Ice, Light & Water Co., 23 S.W. 858 (Tex. 1893), and Texas Trunk Railway Co. v. Lewis, 16 S.W. 647 (Tex. 1891)); Pratt v. Amrex, Inc., 354 S.W.3d 502, 506 (Tex. App.—San Antonio 2011, pet. denied). However, custodia legis does not destroy any prior vested rights. First Southern Properties, 533 S.W.2d at 343.

§ 27.88:9 Receiver’s Fees and Expenses

Tex. Civ. Prac. & Rem. Code § 31.002(e) provides that the judgment creditor is entitled to costs. The receiver’s fee is typically taxed against the judgment debtor as a cost in the order appointing the receiver. See, e.g., Sheikh v. Sheikh, 248 S.W.3d 381, 386 (Tex. App.—Houston [14th Dist.] 2007, no pet.).

Practice Note: For receivers serving on a contingent fee basis, the order appointing the receiver should state the fee calculation (typically 25 percent of recovery) and that the rate is usual and customary. A finding that the fee is reasonable would be made in a later order. The court must approve payment of an hourly receiver’s fee by separate written order because it is not proper to approve an hourly fee before any work has been done.

A problem occurs when the receivership estate does not possess any assets or has insufficient assets to satisfy a judgment or the receiver’s fees and expenses. In such cases, a conflict may occur between the receiver and the judgment creditor. The attorney should make it very clear to the judgment creditor that if the receiver is unable to locate any assets or sufficient assets to satisfy the judgment, the judgment creditor may be responsible for the receiver’s fees and expenses. The practitioner is encouraged to reach an agreement with the proposed receiver before the receiver is appointed. If the order is silent about fees and expenses, the court may be petitioned to make a ruling through the use of an application.

See form 27-22 in this chapter for an order approving the receiver’s fees.
§ 27.88:10 Immunity of Receiver

Texas uses the “functional approach.” “Once an individual is cloaked with derived judicial immunity because of a particular function being performed for a court, every action taken with regard to that function—whether good or bad, honest or dishonest, well-intentioned or not—is immune from suit. Once applied to the function, the cloak of immunity covers all acts, both good and bad.” *Davis v. West*, 317 S.W.3d 301, 307 (Tex. App.—Houston [1st Dist.] 2009, no pet.) (quoting *Spigener v. Wallis*, 80 S.W.3d 174, 183 (Tex. App.—Waco 2002, no pet.)).

Some cases hold that judicial immunity is an immunity from suit, not just from the ultimate assessment of damages. *Bradt v. West*, 892 S.W.2d 56, 71 (Tex. App.—Houston [1st Dist.] 1994, writ denied).

Practice Note: The receiver’s immunity does not extend to the creditor or the creditor’s attorney. The practitioner should let the receiver make his own decision about taking a particular course of action.

§ 27.89 Property Subject to and Exempt from Turnover

§ 27.89:1 Property Generally


For a discussion of property subject to and exempt from execution, see part III. in this chapter.

§ 27.89:2 Property Subject to Turnover


Practice Note: The practitioner should not confuse what has to be proved up in order to obtain relief (that the debtor has at least one piece of nonexempt property) with what property may be turned over (any nonexempt property). See Tex. Civ. Prac. & Rem. Code § 31.002(h).
The following list of property subject to turnover is illustrative, not exclusive. The court may also order that all documents or records related to the property be delivered. Tex. Civ. Prac. & Rem. Code § 31.002(b)(1).

1. Income from business. Nonexempt income from the judgment debtor’s business (for example, income from a sole proprietorship or funds due an independent contractor) is subject to turnover. *Thomas v. Thomas*, 917 S.W.2d 425, 434–35 (Tex. App.—Waco 1996, no writ) (law practice income); *DeVore v. Central Bank & Trust*, 908 S.W.2d 605, 610 (Tex. App.—Fort Worth 1995, no writ) (attorney’s nonwage income); *Brink v. Ayre*, 855 S.W.2d 44, 45 (Tex. App.—Houston [14th Dist.] 1993, no writ) (attorney’s fees earned); *Ross v. 3D Tower Ltd.*, 824 S.W.2d 270, 272 (Tex. App.—Houston [14th Dist.] 1992, writ denied) (attorney’s accounts receivable).


§ 27.89:3 Property Not Subject to Turnover

The following property is not subject to turnover.


Practice Note: The practitioner should bear in mind the “current” in the “current wages” exemption. “Current” has been interpreted as wages for the current pay period. Courts focus on whether the debtor controls when the
wages are paid. Money that was paid to a bankruptcy trustee by the debtor’s employer pursuant to a wage order remained exempt when the Chapter 13 bankruptcy was dismissed, because the debtor never had control of the money. See Marrs v. Marrs, 401 S.W.3d 122, 127 (Tex. App.—Houston [14th Dist.] no pet.).


4. Periodic payments unless there is a finding that payments are from a nonexempt source, such as business income. Ex parte Prado, 911 S.W.2d 849, 850 (Tex. App.—Austin 1995, orig. proceeding) (defendant ordered to turn over $500 per month, without court’s first identifying specific source of nonexempt property or right); see Ross v. 3D Tower Ltd., 824 S.W.2d 270, 272–73 (Tex. App.—Houston [14th Dist.] 1992, writ denied) (turnover order mandating monthly payments upheld).


7. Unasserted denied causes of action for legal malpractice for failure to settle under the Stowers doctrine. Charles, 878 S.W.2d at 208.


§ 27.89:4 Property Held by Financial Institution

With respect to turnover of property held by a financial institution in the name of or on behalf of the judgment debtor as a customer of the financial institution, the rights of a receiver appointed under Texas Civil Practice and Remedies Code section 31.002(b)(3) do not attach until the financial institution receives service of a certified copy of the order of receivership in the manner specified by Texas Finance Code section 59.008. See Tex. Civ. Prac. & Rem. Code § 31.002(g). The service provisions of section 59.008 also apply to service of writs of garnishment, discussed at section 27.59:2 above.

A financial institution that receives a request to turn over assets or financial information of a judgment debtor to a judgment creditor or a receiver under a turnover order or receivership under section 31.002 shall be provided and may rely on a certified copy of the order or injunction of the court. Tex. Civ. Prac. & Rem. Code § 31.010(a)(1).
§ 27.90 Disposition of Property

Rather than appoint a receiver, the court may order the defendant’s property and related documents and records to be turned over to a designated sheriff or constable for sale by execution or may otherwise apply the property to the satisfaction of the judgment. Tex. Civ. Prac. & Rem. Code § 31.002(b)(1), (2).

In addition, the court may apply the property to the satisfaction of the judgment by turning it over to the registry of the court. 


If a receiver has been appointed, the receiver can sell the nonexempt property and pay the proceeds to the judgment creditor to the extent required to satisfy the judgment. Tex. Civ. Prac. & Rem. Code § 31.002(b)(3). Citing preturnover case law, the court in Salaymeh held that the sale of property by a receiver is generally not effective until the sale is reported by the receiver and confirmed by the court after notice to the parties. Salaymeh v. Plaza Centro, LLC, 258 S.W.3d 236, 240 (Tex. App.—Houston [1st Dist.] 2008, no pet.) (referring to a sale of real property). The turnover statute itself, however, does not contain specific procedures for the sale of property by the receiver.

§ 27.91 Who May Be Ordered to Turn Over Property

The statute is a procedural remedy not to be applied against someone who is not the judgment debtor. Beaumont Bank, N.A. v. Buller, 806 S.W.2d 223, 227 (Tex. 1991). Courts differ on whether it may be used to compel a third party in possession of the debtor’s assets to turn them over, if the property is subject to the debtor’s control. Those in favor include Schultz v. Fifth Judicial District Court of Appeals at Dallas, 810 S.W.2d 738, 740 (Tex. 1991) (orig. proceeding), abrogated on other grounds by In re Sheshtawy, 154 S.W.3d 114 (Tex. 2004); Beaumont Bank, 806 S.W.2d at 227.

Those against it reason that it is enough that the judgment debtor can be held in contempt for failure to turn over property that he controls but that is in the hands of a third party. Parks v. Parker, 957 S.W.2d 666, 668–69 (Tex. App.—Austin 1997, no pet.).

Third parties who have been ordered to turn over property include—

1. corporations holding the debtor’s stock, Norsul Oil & Mining Ltd. v. Commercial Equipment Leasing Co., 703 S.W.2d 345, 348–49 (Tex. App.—San Antonio 1985, no writ);

2. representatives of the debtor’s estate, Buller, 806 S.W.2d at 227; First City National Bank of Beaumont v. Phelan, 718 S.W.2d 402 (Tex. App.—Beaumont 1986, writ ref’d n.r.e.); and


If the third party claims an interest in the property, turnover should not be used. See, e.g., Plaza Court, Ltd. v. West, 879 S.W.2d 271 (Tex. App.—Houston [14th Dist.] 1994, no writ) (turnover order improperly placed third parties into receivership); Republic Insurance Co. v. Millard, 825 S.W.2d 780 (Tex. App.—Houston [14th Dist.] 1992, no writ) (third party may not be included as party defendant for first time in postjudgment turnover petition); Cravens, Dargan & Co. v. Peyton L. Travers Co., 770 S.W.2d 573 (Tex. App.—Houston [1st Dist.] 1989, writ denied) (defendant’s bond held by State Board of Insur-
United Bank Metro v. Plains Overseas Group, Inc., 670 S.W.2d 281 (Tex. App.—Houston [1st Dist.] 1983, no writ) (creditor sought to establish that corporation wholly owned by defendant was defendant’s alter ego).

Other creative but unsuccessful attempts to reach property in the hands of third parties include Detox Industries, Inc. v. Gullett, 770 S.W.2d 954 (Tex. App.—Houston [1st Dist.] 1989, no writ) (creditor sought order compelling corporation to cancel defendant’s stock certificates and reissue stock in creditor’s name); Cross, Kieschnick & Co. v. Johnston, 892 S.W.2d 435 (Tex. App.—San Antonio 1994, no writ) (creditor obtained judgment against misnamed party, then sought turnover order against correctly named party); and Burns v. Miller, Hiersche, Martens & Hayward, P.C., 948 S.W.2d 317 (Tex. App.—Dallas 1997, writ denied) (debtor ordered to turn over distributions from spendthrift trust paid by the trustee to third parties).

The court may order the judgment creditor to turn over property to a sheriff or constable, otherwise apply the property to satisfaction of the judgment, or appoint a receiver. See Tex. Civ. Prac. & Rem. Code § 31.002(b)(1)–(3). The property should not be turned over directly to the creditor. See Ex parte Johnson, 654 S.W.2d 415, 419 (Tex. 1983) (orig. proceeding) (debtor may be denied opportunity to assert defenses if creditor promptly or improperly disposes of property); Lozano v. Lozano, 975 S.W.2d 63, 69 (Tex. App.—Houston [14th Dist.] 1998, pet. denied) (turnover statute allows ex parte entry of turnover orders without notice and hearing; direct turnover could deny debtor opportunity to assert defenses).

If turnover relief is sought against a third party, jurisdiction over the third party should be obtained by proper service of citation. See generally Ex parte Swate, 922 S.W.2d 122, 125 (Tex. 1996) (noting potential due-process problems in ordering third parties to turn over assets without notice and hearing to them).

§ 27.92 Costs and Attorney’s Fees


The court may refuse to grant attorney’s fees to an unsuccessful turnover applicant. See Great Global Assurance Co., 904 S.W.2d at 776; Boudreaux Civic Ass’n v. Cox, 882 S.W.2d 543 (Tex. App.—Houston [14th Dist.] 1994, no writ); Dallas Power & Light Co. v. Loomis, 672 S.W.2d 309, 312 (Tex. App.—Dallas 1984, writ ref’d n.r.e.); see also Tex. R. Civ. P. 131, 141.

While a judgment creditor’s failure to make sufficient attempts to collect a judgment through other legal process can be considered in determining the reasonableness of the amount of attorney’s fees and costs, it is not a basis to deny such a request under section 31.002. Great Global Assurance Co., 904 S.W.2d at 776.

§ 27.93 Enforcement of Turnover Order

The court may enforce its orders under the turnover statutes by contempt or by other means in case of refusal or disobedience. Tex. Civ. Prac. & Rem. Code § 31.002(c); Ex parte Buller, 834 S.W.2d 622, 626–27 (Tex. App.—Beaumont 1992, no writ) (contemner may be imprisoned to coerce compliance with turnover order if she possesses means to satisfy judgment). A motion for contempt brought during an appeal may be filed in either the trial court or the court of appeals. In re Sheshtawy, 154 S.W.3d 114 (Tex. 2004) (abrogating Schultz v. Fifth Judicial District Court of Appeals at Dallas, 810 S.W.2d 738 (Tex. 1991) (orig. proceeding)). For a general discussion of contempt of court, see section 26.7 in this manual. When using the dis-
covery contempt forms as a starting point for holding a judgment debtor in contempt for violating a turnover order, the practitioner should take care to change the grounds paragraph to refer to Texas Civil Practice and Remedies Code section 31.002 and not Texas Rule of Civil Procedure 215.

§ 27.94 Court’s Discretion

The standard of review of a turnover order is whether the trial court abused its discretion. *Beaumont Bank, N.A. v. Buller*, 806 S.W.2d 223, 226 (Tex. 1991). It is unclear, however, if the trial court’s discretion applies to the determination of whether to grant relief under the entire turnover statute or merely applies to the determination of the manner of the turnover. Compare *Buttles v. Navarro*, 766 S.W.2d 893, 894 (Tex. App.—San Antonio 1989, no writ), and *Barlow v. Lane*, 745 S.W.2d 451, 453–54 (Tex. App.—Waco 1988, writ denied) (statute’s use of “may” gives court discretion to grant or deny turnover relief), with *Anderson v. Lykes*, 761 S.W.2d 831, 834 (Tex. App.—Dallas 1988, no writ) (statute’s use of “entitled” gives creditor right to hearing on application for turnover relief), *overruled on other grounds as recognized in In re Crow-Billingsley Air Park, Ltd.*, 98 S.W.3d 178, 180 (Tex. 2003). See also *Charles v. Tamez*, 878 S.W.2d 201, 205 (Tex. App.—Corpus Christi 1994, no writ).

§ 27.95 Appeal of Turnover Order

A turnover order is in the nature of a mandatory injunction. Therefore, an appeal can be taken from a final turnover order. *Schultz v. Fifth Judicial District Court of Appeals at Dallas*, 810 S.W.2d 738 (Tex. 1991) (orig. proceeding), *abrogated on other grounds by In re Sheshtawy*, 154 S.W.3d 114 (Tex. 2004); *Burns v. Miller, Hiersche, Martens & Hayward, P.C.*, 909 S.W.2d 505, 506 (Tex. 1995). If, however, certain requests for relief are left undecided by the order, such as an award or denial of attorney’s fees, or the turnover order requires further orders of the court, the order may be merely interlocutory and therefore nonappealable. See *Brecheisen v. Johnson*, 665 S.W.2d 191, 192 (Tex. App.—Dallas 1984, writ ref’d n.r.e.) (defendant ordered to turn over property to registry of court; further order releasing funds to creditor required). A turnover order that is contrary to statute or contains errors is only voidable, not void. It must be attacked directly. *In re Wiese*, 1 S.W.3d 246 (Tex. App.—Corpus Christi 1999) (orig. proceeding). The appellate timetable for a final judgment applies. *Burns*, 909 S.W.2d 505.

A motion for contempt brought during an appeal may be filed in either the trial court or the court of appeals. *In re Sheshtawy*, 154 S.W.3d 114.

If the turnover order requires further orders of the court, the order is interlocutory and not appealable. The remedy is mandamus. See *Brecheisen*, 665 S.W.2d at 192. Otherwise, the order is a final order subject to appeal. See *International Paper Co. v. Garza*, 872 S.W.2d 18, 19 (Tex. App.—Corpus Christi 1994, no writ).

§ 27.96 Serial Receiverships

The turnover order places the debtor’s nonexempt assets described in the order *in custodia legis*. *First Southern Properties, Inc. v. Vallone*, 533 S.W.2d 339, 341 (Tex. 1976). If a turnover order is entered in another action, there are no assets available to that action because the property is in control of the first court. The receiver in the second case could demand documents and perform discovery, but the assets are in control of the court that issued the first order.
§ 27.97 Practice Tips

The practitioner should draft the order so that it both compels the judgment debtor to turn over its nonexempt property to the receiver and empowers the receiver to take possession. The attorney should consider a receivership order as a road map for third parties. It is helpful to third parties to see in the order that the receiver has been authorized to make a particular request of them. If the order compels the debtor to make periodic payments, include a finding of fact stating the source of the money and that it is nonexempt. See Ex parte Prado, 911 S.W.2d 849, 850 (Tex. App.—Austin 1995, orig. proceeding) (order that debtor pay $500 per month without identifying specific nonexempt asset held unconstitutional).

The attorney should not include in the order appointing a receiver a finding that the receiver’s fee is reasonable. Obtain a finding that the fee is reasonable later, as part of a separate application and order. See Moyer v. Moyer, 183 S.W.3d 48, 57–58 (Tex. App.—Austin 2005, no pet.).

The attorney should provide the receiver with a copy of the judgment and any other postjudgment orders that award fees and let the receiver know of any postjudgment credits that are due and of recoverable costs of court. This allows the receiver to properly calculate the judgment amount.

The attorney also should provide the receiver with whatever documentation and information he has that identifies leviable assets and provide the receiver with the debtor’s and the debtor’s counsel’s contact information.

Once a receiver is appointed, the creditor’s counsel should instruct the plaintiff that the debtor might reach out to the plaintiff but that the debtor should be instructed to contact the receiver instead.

[Sections 27.98 through 27.100 are reserved for expansion.]

VI. Other Postjudgment Collection Devices

§ 27.101 Partnership Charging Order

§ 27.101:1 Purpose and Effect of Charging Order

A charging order allows a judgment creditor to reach a debtor’s interest in a partnership to satisfy the judgment. In this situation, the judgment creditor has the right only to receive any distribution to which the debtor would otherwise have been entitled in the partnership interest. A charging order constitutes a lien on the debtor’s partnership interest and is the exclusive remedy by which a judgment creditor of a partner or any other owner of a partnership interest may satisfy a judgment out of the debtor’s partnership interest. Tex. Bus. Orgs. Code §§ 152.308(a)–(d), 153.256(a)–(d). Note that sections 152.308 and 153.256 of the Texas Business Organizations Code do not deprive a partner or other owner of a partnership interest of a right under exemption laws with respect to the judgment debtor’s partnership interest. Tex. Bus. Orgs. Code §§ 152.308(e), 153.256(e). Also, a creditor of a partner or of any other owner of a partnership interest does not have the right to obtain possession of, or otherwise exercise legal or equitable remedies with respect to, the property of the partnership. Tex. Bus. Orgs. Code §§ 152.308(f), 153.256(f).

The court’s grant of a charging order is discretionary. Commerce Savings Ass’n v. Welch, 783 S.W.2d 668, 671 (Tex. App.—San Antonio 1989, no writ).
§ 27.101:2 Procedure

The attorney should file the application for a charging order in the court that rendered the underlying judgment unless jurisdictional or venue considerations force filing in another court.

It is the better practice to serve the partnership with citation, although there is no express requirement to do so. If the application is filed in a court other than the one rendering the underlying judgment, the attorney should serve citation on the judgment debtor as well. Service of citation brings the party served within the court’s jurisdiction, allowing a judgment ordering the partnership to obey the charging order. Tex. R. Civ. P. 124.

For an application and charging order, see forms 27-23 and 27-24 in this chapter.

§ 27.102 Temporary Restraining Orders and Injunctions

A judgment creditor may use injunctions or other means to reach property to satisfy a judgment. Tex. Civ. Prac. & Rem. Code § 31.002(a). Injunctive relief is appropriately used as part of a turnover action to preserve the status quo pending final action. For example, the judgment debtor could be enjoined from disposing of or secreting the property in question pending final orders. See sections 8.33 through 8.40 in this manual for further discussion of injunctions.

If the judgment creditor seeks any form of injunctive relief, care should be taken to comply with all applicable requirements including equitable pleading, verification, bond, filing, citation, and writ requirements. See David Hittner, Texas Post-Judgment Turnover and Receivership Statutes, 45 Tex. B.J. 417, 418 (1982). But see Roosth v. Roosth, 889 S.W.2d 445, 460 (Tex. App.—Houston [14th Dist.] 1994, writ denied); Childre v. Great Southwest Life Insurance Co., 700 S.W.2d 284, 288 (Tex. App.—Dallas 1985, no writ) (traditional requirements for appointing receiver or granting injunction do not apply when relief is granted under turnover statute).

If the application for turnover seeks both a receiver and an injunction, one bond may serve both purposes. See Childre, 700 S.W.2d at 288–89.

§ 27.103 Receivership under Texas Deceptive Trade Practices–Consumer Protection Act

The Texas Deceptive Trade Practices–Consumer Protection Act (DTPA) authorizes the appointment of a receiver if a money judgment entered under the Act remains unsatisfied thirty days after it becomes final. The DTPA creates a set of presumptions entitling the judgment creditor to the appointment of a receiver over the defendant’s business unless the defendant proves that all the presumptions do not apply. Tex. Bus. & Com. Code § 17.59. If the conditions for the appointment are met, the court must appoint a receiver. Dudley v. E.W. Hable & Sons, 683 S.W.2d 102, 103–04 (Tex. App.—Tyler 1984, no writ).

§ 27.104 Investment Securities

A creditor whose debtor is the owner of an investment security may obtain aid from the courts, by injunction or otherwise, in reaching the security. Tex. Bus. & Com. Code § 8.112(e).
§ 27.105 Assignment of Judgment

The judgment creditor may sell its interest in a judgment in lieu of collecting the judgment. The formal requirements for transfers of judgments (or transfers of a cause of action) are found in Tex. Prop. Code § 12.014. The assignment must be in writing, acknowledged or sworn to in the form and manner required by law for acknowledgment or swearing of deeds, and filed among the papers of the suit. Tex. Prop. Code § 12.014(a), (b). Additionally, the assignment may be filed in the real property records where the abstract of judgment is filed so that the real property records reflect the owner of the judgment and any liens related thereto. See Tex. Prop. Code § 12.014(c). See form 27-25 in this chapter.
Form 27-1

If multiple parties are named in the judgment, they all must be listed and their addresses shown. Tex. Prop. Code § 52.0041. If anyone besides the court clerk prepares the abstract, it must be verified. Tex. Prop. Code § 52.002. The attorney should be careful not to exclude any of the required contents of Tex. Prop. Code §§ 52.003 and 52.0041. See the discussion at section 27.5 in this chapter.

Abstract of Judgment

STATE OF TEXAS )

COUNTY OF )

I, [name of attorney], attorney of record for [name of plaintiff], Judgment Plaintiff, certify that in Cause No. [number] in [designation and location of court], wherein [name of plaintiff] is Plaintiff and [name of defendant] is Defendant, Judgment Plaintiff recovered a judgment against [name of defendant], Judgment Defendant. Judgment Plaintiff’s mailing address is [address, city, state].

Judgment Defendant’s address is [address, city, state].

Or

Judgment Defendant was served with citation by [nature of citation, e.g., substituted service on Don Davis] on [date], at [place where citation was served].

Continue with the following.

Judgment Defendant’s birthdate is [birthdate, if available].

The last three numbers of Judgment Defendant’s driver’s license number are [last three numbers of driver’s license number, if available].
The last three numbers of Judgment Defendant’s Social Security number are [last three numbers of Social Security number, if available].

Judgment was rendered on [date], in the amount of $[amount in figures, e.g., $10,000.00] ([amount spelled out, e.g., Ten Thousand and NO/100 Dollars]), attorney’s fees in the amount of $[amount], and costs in the amount of $[amount].

The interest rate on the judgment is [percent] percent per year, from date of judgment until paid.

The judgment is entitled to the following credits: [list each credit].

There is now still due on this judgment the amounts set out above.

[Name]
Attorney for Judgment Plaintiff
State Bar No.:
[E-mail address]
[Address]
[Telephone]
[Telecopier]

BEFORE ME, the undersigned authority, on this ______________ day of ______________ personally appeared [name of attorney], who swore on oath that the information in this abstract of judgment is true and correct.

__________________________________________________________________________________________________________________________ ...

Notary Public, State of Texas

After recording, return to: [name and address of attorney for judgment plaintiff]
Letter to Client Explaining Judgment Lien

[Date]

[Name and address of creditor-client]

Re: Defendant: [name of debtor]
   Amount of claim: $[amount]
   [style of case]
   Cause No. [number]
   [designation and location of court]

[Salutation]

Enclosed is a copy of the abstract of judgment that has been filed in [name of each county in which abstract was filed] County[ies], which created a judgment lien on any nonexempt real property in which the debtor owns an interest in [that/those] county[ies]. The lien is effective for ten years from the date of signing of the judgment, but it can be extended by renewal of the judgment and filing of subsequent abstracts. If you want to renew the judgment, please contact my office at least six months before the judgment expires.

The lien attaches only to nonexempt real property in the county in which an abstract was filed. Please notify me if you know of any other Texas county in which the debtor owns an interest in realty or may acquire one in the future, and I will file an abstract in each such county to obtain a lien on that property.

Sincerely yours,

__________________________________________________________________________________________________________________________ ... __________________________________________________________________________________________________________________________

[Name of attorney]

Enc.
Release of Judgment Lien

When the judgment has been satisfied, the defendant should be sent a release of the judgment for filing wherever an abstract of the judgment was filed. The release must be signed by the party entitled to receive payment of the judgment or his agent or attorney of record, and it must be acknowledged or proved for record as required for deeds. Tex. Prop. Code § 52.005.

Release of Judgment Lien

On [date], in Cause No. [number] in [designation and location of court], [name of plaintiff] recovered judgment for $[amount], plus interest and costs, from [name of defendant]. The judgment has been satisfied. THEREFORE, as authorized attorney of record for [name of plaintiff], who is the party entitled to receive payment of the judgment, I hereby release [name of defendant] from any lien existing because of the judgment.

SIGNED on ________________________________.

[Name]
Attorney for Judgment Plaintiff
State Bar No.:
[E-mail address]
[Address]
[Telephone]
[Telex]pier]

This instrument was acknowledged before me on ________________________ by

[name of attorney].

Notary Public, State of Texas

Send the original document(s) to the defendant, advising him to record the release in every county in which the abstract was filed.
Form 27-4

If the judgment cannot be satisfied at this time, the attorney should not promise to follow up ten years later to extend the life of the judgment lien but should place that responsibility with the creditor; see section 27.8:3 in this chapter.

Letter to Client Reporting That Judgment Cannot Be Collected

[Date]

[Name and address of creditor-client]

Re: Defendant: [name of debtor]
   Amount of claim: $[amount]
   [style of case]
   Cause No. [number]
   [designation and location of court]

[Salutation]

Judgment was rendered in the referenced case on [date], and an abstract of judgment has been filed in [name of each county in which abstract was filed] County[ies]. I have not been able to completely collect the judgment and believe that at this time additional efforts would be fruitless.

Filing the abstract of judgment created a judgment lien on the debtor’s nonexempt real property in that county. To keep the judgment lien alive under present Texas law, within ten years of the date of judgment a new writ of execution must be issued and levied and a new abstract of judgment must be recorded.

I suggest that you periodically have the law checked to determine whether it has changed and that you calendar this matter for nine years from the date of judgment so that you can make sure at that time that the judgment lien is not allowed to expire. I will not act further
on this matter unless you direct me to do so. If you wish me to renew the judgment you must let me know at least six months before the judgment is to expire.

Sincerely yours,

__________________________________________________________________________________________________________________________ ...

[Name of attorney]
Form 27-5

This letter asks the clerk to send the writ to the plaintiff’s attorney for forwarding to the officer, which is recommended so that the attorney can check the writ and its return for accuracy; see section 27.13 in this chapter. The clerk should be contacted to ascertain the correct fee.

The attorney should request an order of sale if the judgment orders foreclosure on specific property; see section 27.13:4. The writ can issue before thirty days after judgment if the defendant is about to remove or hide his property; see section 27.12:1. In such a situation, the attorney will probably want to request the writ in person to avoid delay. For an affidavit, see form 27-6.

See section 27.13:7 for situations in which a thirty-day or sixty-day return may be advisable.

Letter to Clerk Requesting Writ of Execution or Order of Sale

[Date]

[Name or identification and address of clerk]

Re: [style of case]

Cause No. [number]

[designation and location of court]

[Salutation]

Please issue [a writ of execution/an order of sale] in the referenced cause. [Include if seeking the writ before the thirtieth day after rendition of judgment: Execution can issue based on the enclosed affidavit.] The judgment debtor’s last known address is [address, city, state]. [Include if applicable: Please show the following credits to the judgment: [amounts and dates of credits].]

Please mark the writ to be returned within [thirty/sixty/ninety] days and send it to me for forwarding to the appropriate officer. My check for your fee is enclosed.

Thank you for your service.
Sincerely yours,

[Name of attorney]

Enc.

Include an affidavit (form 27-6) if applicable.
Affidavit for Immediate Issuance of Writ of Execution

BEFORE ME, the undersigned authority, on this day personally appeared [name of affiant], who swore on oath that the following facts are true:

“I am [Plaintiff/[other capacity, e.g., credit manager of Plaintiff]] in this cause. [Include if affiant is agent: I am authorized to make this affidavit and to apply for immediate issuance of a writ of execution in this cause.]

“In this Court on [date], judgment was rendered for [name of plaintiff], Plaintiff, against [name of defendant], Defendant.

“[State specific facts relied on to warrant immediate execution, e.g., Defendant has stated to me that ‘within a few days’ he is going to move to another county, taking all his personal property with him.]

“Execution should issue immediately because Defendant

is about to remove his personal property subject to execution by law out of the county.”
is about to [transfer/secrete] his personal property subject to execution by law for the purpose of defrauding Defendant’s creditors.”

[Name of affiant]
Affiant

SIGNED under oath before me on ________________________________.

_______________________________________
Notary Public, State of Texas
Form 27-7

The attorney should inspect the writ of execution and send it to the sheriff or constable rather than having the clerk do so; see section 27.13:1 in this chapter. The officer should be contacted to ascertain the correct fee. Local practices vary; in some counties, the clerk collects the officer’s fee when the writ is issued. In such a case, it is unnecessary to send payment with this letter, and the letter should be modified accordingly.

The attorney may want to attend the sale to make sure it is conducted properly and to assist the officer if needed. The plaintiff may also want to attend to bid on the property.

Letter to Officer Transmitting Writ of Execution or Order of Sale

[Date]

[Name, title, and address of officer]

Re: Defendant in execution: [name of defendant]  
[style of case]  
Cause No. [number]  
[designation and location of court]

[Salutation]

Enclosed is [a writ of execution/an order of sale] in the referenced cause.

Please endorse the [writ/order] with the hour and date you received it and try to obtain from the defendant immediate payment of the total judgment, interest, court costs, and your costs. If the defendant will not pay the judgment and costs, please immediately levy on the defendant’s property subject to the writ, remove the property to a place of safekeeping unless impossible to do so without large expense and effort, post your notice, and conduct a sale according to law.

Please send me a copy of the notice of sale.

The last known address in your county of the defendant in execution is [address, city, state].
If a problem arises, or if you need additional information, please telephone me (collect if long distance).

Please do not give the defendant notice of your intent to levy. Please do not negotiate a payment agreement. If the defendant wishes to make payment arrangements, have the defendant contact me immediately. Please let me know the date and time of the intended levy so that I can be available by phone to respond to any offers by the defendant or to any questions regarding the levy.

My check for your fee is enclosed. Please mail your completed return to me. For your convenience I am enclosing two addressed, stamped envelopes, and I will appreciate hearing from you promptly.

Thank you for your immediate attention to this matter.

Sincerely yours,

[Name of attorney]
Attorney for Plaintiff in Execution

Certified Mail No. [number]
Return Receipt Requested
Enc.
c: [name of client]
Plaintiff’s Original Petition to Revive Judgment

Plaintiff, [name of plaintiff], makes this Original Petition to Revive Judgment. Defendant[s] [is/are] [name[s] of defendant[s]]. Plaintiff shows as follows:

1. Discovery Control Plan. This suit is governed by [describe discovery control plan as required by rule 190 of the Texas Rules of Civil Procedure].

2. Parties. Plaintiff is [a [state] corporation and has its principal place of business in [city], [county] County, [state]/Plaintiff is an individual residing in [county] County, [state], and may be served with citation at [address]/[describe plaintiff]]. Defendant is [a [state] corporation and has its principal place of business in [city], [county] County, [state]/an individual residing in [county] County, [state], and may be served with citation at [address]/[describe defendant]].

3. Facts. This is an action brought pursuant to section 31.006 of the Texas Civil Practice and Remedies Code. Plaintiff is the current owner and holder of a judgment [include if applicable: , by virtue of the Assignment of Judgment attached as Exhibit [exhibit number/letter],] against Defendant[s], which was taken [date] in the [name of court], [county] County, Texas, in Cause No. [cause number], styled “[style of case].” A true copy of the Abstract of Judgment is attached as Exhibit [exhibit number/letter] and incorporated herein.

This action is brought before the second anniversary of the date that the judgment became dormant.
4. **Credits Due on Judgment.** [There are no credits due on this judgment/[describe any credits due on judgment]].

5. **Dormancy.** The judgment is dormant but is otherwise valid and unpaid to the extent set forth in this petition. Plaintiff is entitled to a writ of scire facias reviving the judgment and an order from this Court that this action for debt revives the judgment for a period of ten years from the date the judgment became dormant.

6. **Prayer.** Plaintiff prays that the judgment be revived by writ of scire facias or an order reviving judgment pursuant to section 31.006 of the Texas Civil Practice and Remedies Code and for all further relief to which Plaintiff may be entitled.

Respectfully submitted,

[Name]
Attorney for Plaintiff
State Bar No.:
[E-mail address]
[Address]
[Telephone]
[Telemcoier]

Attach exhibit(s).
Form 27-9

Judgment Reviving Dormant Judgment

On [date] the Court heard the Original Petition to Revive Judgment of [name of plaintiff], Plaintiff, requesting scire facias to revive judgment against Defendant[s], [name[s] of defendant[s]], pursuant to Texas Civil Practice and Remedies Code section 31.006.

The Court takes judicial notice that the judgment was entered on [date] in [this/[name of court]] Court against Defendant[s] in the amount of $[amount], with postjudgment interest at the rate of [percent] percent per annum from the date of judgment until paid, plus costs of court.

The Court further finds that the judgment is dormant and that this action was brought before the second anniversary of the date that the judgment became dormant.

In light of the findings, the Court is of the opinion that the Original Petition to Revive Judgment is well taken and that this judgment reviving dormant judgment should issue.

It is therefore ORDERED that Plaintiff’s judgment is hereby revived for ten years from the date the judgment became dormant, and the clerk of this Court shall treat the judgment as revived and shall hereafter issue such executions or other writs and processes in this cause as needed or requested to enforce Plaintiff’s judgment.

SIGNED on ________________________________.

Recite appearances of counsel and parties as appropriate.

JUDGE PRESIDING
Judgment Reviving Dormant Judgment

APPROVED AS TO FORM:

[Name]
Attorney for Plaintiff
State Bar No.:
[E-mail address]
[Address]
[Telephone]
[Teletypewriter]

[Name]
Attorney for Defendant
State Bar No.:
[E-mail address]
[Address]
[Telephone]
[Teletypewriter]
Form 27-10

For discussion of the sale of real property under a writ of execution, see section 27.21:1 in this chapter.

Venditioni Exponas

VENDITIONI EXPONAS §
§ TO ANY SHERIFF OR CONSTABLE
§ IN THE STATE OF TEXAS
THE STATE OF TEXAS §

WHEREAS, in Cause No. [number], styled “[style of case],” in the [designation] Court of [county] County, Texas, on [date], Plaintiff recovered judgment against Defendant in the sum of [number] dollars ($[amount]), with interest at the rate of [percent] percent ([percent]%) per year from [date] and all costs of suit as per the bill of costs attached to the writ of execution;

AND WHEREAS, [name of constable or sheriff], [Constable, Precinct [number],/Sheriff of] [county] County, Texas, has by virtue of an execution issued on that judgment levied on the property of Defendant described in the attached list and incorporated herein by reference, and that execution will expire before the sale of the property can occur, and levy on the real property having been made on [date], at [time] [A.M./P.M.];

AND WHEREAS, no part of that judgment, interest, or costs has been paid except as has been heretofore set out,

Therefore, you are hereby commanded to proceed according to law to sell the above-described property under execution and apply the proceeds thereof to the payment and satisfaction of the aforesaid sum of $[amount] with interest due thereon from [date] and all costs of court in this behalf expended, together with the further costs of executing this writ.
Herein fail not, and have you said money, together with this writ showing how you have executed same, before said Court at the courthouse of said county in the city of [city], Texas, within sixty days.

Witness [name of court clerk], [designation of court] clerk of [county] County, Texas.

Given under my hand and seal of office at [city], Texas, this the [day] day of [month], [year].

[Name of court clerk]
[Designation of court] Clerk
[County] County, Texas

By ______________________________
Deputy

Attach list of property to be sold.
Form 27-11

The application must be accompanied with one or more affidavits and served on the garnishee. Copies of the application, affidavit(s), and writ must also be served on the defendant in the original suit, but they can be served in any manner allowed by Tex. R. Civ. P. 21a. Tex. R. Civ. P. 663a. See form 27-12 in this chapter for a sample affidavit.

This form contains an allegation that the garnishment is not sought to injure either the judgment debtor or the garnishee. Although this allegation and finding is not specifically required by statute for post-judgment garnishment cases, at least one court has required it in a case involving more than one defendant. See Kisro v. Heard, 547 S.W.2d 322 (Tex. Civ. App.—Houston [1st Dist.] 1977, no writ).

Application for Writ of Garnishment after Judgment

1. Parties. [Name of plaintiff], Plaintiff in garnishment, whose address is [address, city, state], makes this Application for Writ of Garnishment after Judgment. Garnishee is [name of garnishee], who may be served with citation at [address, city, state].

2. Facts. Plaintiff has a valid, subsisting judgment against Defendant, [name of defendant], whose address is [address, city, state], in Cause No. [number] in this Court. Within Plaintiff’s knowledge, Defendant does not possess property in Texas subject to execution sufficient to satisfy the judgment. This garnishment is not sought to injure Defendant or Garnishee.

3. Affidavit. Plaintiff is entitled to the issuance of a writ of garnishment on the grounds stated in the attached affidavit. The affidavit is incorporated in this application by reference.

4. Prayer. Plaintiff prays that—

a. a writ of garnishment be issued directed to Garnishee;
b. Plaintiff be granted judgment against Garnishee for the amount now due on Plaintiff’s judgment already rendered against Defendant, together with interest and costs of the suit in the original case and in this garnishment proceeding;

c. Plaintiff be granted judgment for prejudgment and postjudgment interest at the highest rate allowed by law; and

d. Plaintiff be granted all further relief to which Plaintiff may be entitled.

[Name]
Attorney for Plaintiff
State Bar No.:
[E-mail address]
[Address]
[Telephone]
[Telecopier]

Attach affidavit(s) (form 27-12). Prepare the garnishment judgment (form 27-15).
Form 27-12

The affidavit is to be executed by the plaintiff, his agent, his attorney, or someone having knowledge of relevant facts. Tex. R. Civ. P. 658; see also Tex. Civ. Prac. & Rem. Code § 63.001. The affidavit is to be attached to the application for writ of garnishment (form 27-11). The manual committee recommends that the attorney not execute any affidavit for a client; see section 19.17:3 in this manual.

This form contains language not specifically required by rule or statute but that the manual committee finds prudent to include. This language includes (1) a statement that the garnishment is not sought to injure either the judgment debtor or the garnishee; (2) the statement “I have reason to believe and do believe that Garnishee has property belonging to Defendant or is indebted to Defendant”; and (3) the affiant’s statement of the specific grounds for any belief he may have that is stated in the affidavit. See El Periodico, Inc. v. Parks Oil Co., 917 S.W.2d 777, 779 (Tex. 1996); Tex. R. Civ. P. 658.

[Caption. See § 3 of the Introduction in volume 1 of this manual.]

Affidavit for Writ of Garnishment after Judgment

BEFORE ME, the undersigned authority, on this day personally appeared [name of affiant], who swore on oath that the following facts are true:

“I am [Plaintiff/[other capacity, e.g., credit manager of Plaintiff]] in this cause. [Include if affiant is agent: “I am authorized to make this affidavit and application for a writ of garnishment in this cause.]"

“I have personal knowledge of the facts stated in this affidavit, and they are true and correct.

“Plaintiff owns a judgment against [name of defendant], Defendant, which was rendered on [date] by this Court. The judgment is valid and subsisting, and a supersedeas bond has not been approved and filed to suspend execution of the judgment. The amount now due and unpaid on the judgment is $[amount].
“Within my knowledge, Defendant does not possess property in Texas subject to execution sufficient to satisfy the judgment. This garnishment is not sought to injure Defendant or Garnishee.

“I have reason to believe and do believe that Garnishee has property belonging to Defendant or is indebted to Defendant. This belief is based on [state facts supporting belief, which may include specific bank account numbers acquired through discovery or from previous payments made by the defendant].”

[Name of affiant]
Affiant

SIGNED under oath before me on ________________________________.

______________________________
Notary Public, State of Texas
Form 27-13

Proof of service of the writ of garnishment in accordance with Tex. R. Civ. P. 663a may be documented with this form. Note, however, that this form is not a substitute for service of the writ of garnishment on the defendant but is in addition thereto and for purposes of documentation. This notice is to be used as a cover sheet for the writ (form 8-5 in this manual); see section 27.59:3.

[Caption. See § 3 of the Introduction in volume 1 of this manual.]

Use the same caption as in the application for writ of garnishment at form 27-11.

Notice of Garnishment

To [name of defendant], Defendant:

You are hereby notified that certain properties alleged to be owned by you have been garnished. If you claim any rights in such property, you are advised:

YOU HAVE A RIGHT TO REGAIN POSSESSION OF THE PROPERTY BY FILING A REPLEVY BOND. YOU HAVE A RIGHT TO SEEK TO REGAIN POSSESSION OF THE PROPERTY BY FILING WITH THE COURT A MOTION TO DISSOLVE THIS WRIT.

[Name]
Attorney for Plaintiff
State Bar No.:
[E-mail address]
[Address]
[Telephone]
[Telecopier]

Attach a copy of the writ (form 8-5). Include a certificate of service (form 19-1).
Form 27-14

The officer receiving the writ “shall make return thereof as of other citations.” Tex. R. Civ. P. 663. Texas Civil Practices and Remedies Code section 17.030 and Tex. R. Civ. P. 107 generally discuss the requirements for a return of service. The return and any document to which it is attached must be filed with the court and may be filed electronically or by facsimile, if available. Tex. R. Civ. P. 107(g). See the discussions of the officer’s return at sections 16.8 and 27.60 in this manual.

For a writ of garnishment before judgment to be served on the garnishee, see form 8-5. For a notice of garnishment to be served on the defendant, see form 27-13.

[Caption. See § 3 of the Introduction in volume 1 of this manual.]

Officer’s Return for Postjudgment Writ of Garnishment

CAME TO HAND at ________ __.M. on the ______ day of ________________ and executed at ________ __.M. on the ______ day of ________________ at ________________, ________________ County, Texas, by delivering to [name of person or entity], at [address, city, state], [describe manner of service or attempted service], a true copy of this Writ of Garnishment.

The distance actually traveled by me in execution of this process was ______ miles, and my fees are $____________.

[Name]

SHERIFF OR CONSTABLE
Form 27-15

For a discussion of the judgment and its enforcement, see sections 27.67 and 27.68 in this chapter. Chapter 20 should provide helpful information, particularly section 20.11 regarding determining the rate of postjudgment interest to be earned.

[Caption. See § 3 of the Introduction in volume 1 of this manual.]

Use the same caption as in the application for writ of garnishment at form 27-11 unless the garnishment proceeding has been transferred.

Judgment in Garnishment

At the hearing on Plaintiff’s action for postjudgment garnishment in this cause,

Select the following if the garnishee’s answer admits debt.

it appeared that Garnishee had filed an uncontroverted answer admitting that Garnishee [is indebted to Defendant/possesses effects of Defendant liable to execution/is indebted to Defendant and possesses effects of Defendant liable to execution]. The Court considered the pleadings and official records on file in this cause and the evidence and believes that judgment should be rendered for Plaintiff.

Or

Select the following if this is an agreed judgment.

the attorneys for Plaintiff and Garnishee announced to the Court that Plaintiff and Garnishee have agreed that judgment should be rendered for Plaintiff. The Court considered the pleadings and official records on file in this cause and the evidence and believes that judgment should be rendered for Plaintiff as agreed.

Or
Plaintiff appeared through his attorney of record. Garnishee, although duly cited to appear and answer, failed to file an answer within the time allowed by law and did not appear. The Court considered the pleadings and official records on file in this cause and the evidence and believes that judgment should be rendered for Plaintiff.

Select the following if there is default by the garnishee; before seeking a default judgment, be sure the record will support it. See part II. in chapter 20 (requisites for default judgment) and sections 27.60 (officer’s return) and 27.61:4 (no answer).

Or

Select the following if there is trial to the court.

all parties appeared through their attorneys of record and announced ready for trial. Because a jury was not requested, the Court decided all fact questions. The Court considered the pleadings and official records on file in this cause, the evidence, and the arguments of counsel and believes that judgment should be rendered for Plaintiff.

Or

Select the following if there is trial by jury.

all parties appeared through their attorneys of record and announced ready for trial. A jury was duly accepted, impaneled, and sworn. The jury returned its verdict after hearing the evidence, the arguments of counsel, and the Court’s instructions and after receiving questions to be answered. This judgment is based on the jury’s verdict.

Continue with the following.

Select one or both of the following. Select the first paragraph if the garnishee is indebted to the judgment debtor. Select the second paragraph if the garnishee has the judgment debtor’s effects. See sections 20.11 and 27.67.
It is ADJUDGED that [name of plaintiff], Plaintiff, recover from [name of garnishee], Garnishee, judgment for $____________ plus interest at the rate of ________ percent per year on this garnishment judgment from the date of judgment until paid.

It is ORDERED that Garnishee deliver to the sheriff or constable on demand the following effects of Defendant or as much of them as necessary to satisfy this judgment: [specify nonexempt property to be delivered for sale]. The officer is ORDERED to sell the effects under execution and to apply the proceeds toward satisfaction of this judgment.

If costs are awarded to the garnishee, include the following paragraph; this paragraph should be included if the judgment is on an uncontroverted answer or by agreement. If the answer is contested, the court might award costs differently. The garnishee will not be awarded costs if he does not answer. See section 27.66.

It is [further] ADJUDGED that Garnishee recover Garnishee’s costs of this proceeding and $____________ as attorney’s fees from Defendant, [for which execution may issue/to be paid from the property of Defendant in Garnishee’s possession].

It is [further] ADJUDGED that Garnishee be discharged from liability to Defendant for payment of debt or delivery of effects to the extent of the amount consumed in satisfying this judgment.

This judgment finally disposes of all parties and all claims and is appealable.

SIGNED on ________________________________.

______________________________
JUDGE PRESIDING
File the proposed judgment with the application (form 27-11) and affidavit (form 27-12) with the court.
Form 27-16

This application should be accompanied with an order for turnover relief. See form 27-17 in this chapter for an order.

A certificate of service may be included, although Tex. Civ. Prac. & Rem. Code § 31.002 permits ex parte entry of a turnover order. See sections 27.86 and 27.87 for discussion.

An application for turnover relief can be filed separately or as an original action. If this application is filed as an original action, it should contain all allegations required for every new lawsuit filed. See part 1. in chapter 14 and section 27.85 in this manual.

Application for Turnover Relief

1. **Parties.** Applicant [name of plaintiff], Plaintiff and judgment creditor in this cause, requests that the Court grant this Application for Turnover Relief against [name of defendant], Defendant and judgment debtor.

2. **Judgment.** Plaintiff recovered judgment against Defendant on [date] in this cause. The judgment remains unsatisfied.

3. **Property Subject to Turnover.** Defendant owns property described as [describe property]. This property cannot readily be attached or levied on by ordinary legal process. This property is not exempt under any statute from attachment, execution, or seizure for the satisfaction of liabilities.

If a receiver or an injunction is sought, modify the application accordingly; see section 27.88 concerning receivership and sections 27.102 and 8.33 through 8.36 concerning injunctions.
4. **Motion for Turnover.** Plaintiff moves the Court to order Defendant to turn over the property identified above, with all documents and records related to that property, to [name or title of sheriff or constable] at [officer's address, city, state], on or before [date].

5. **Attorney’s Fees.** Plaintiff is entitled to recover reasonable attorney’s fees and costs. Reasonable fees for the attorney’s services rendered and to be rendered are at least $[amount].

6. **Prayer.** Plaintiff prays that the Court—

   a. set this matter for hearing;

   b. issue the orders requested in this application;

   c. grant Plaintiff at least $[amount] as reasonable attorney’s fees;

   d. grant Plaintiff reasonable expenses incurred in obtaining these orders; and

   e. grant all further relief to which Plaintiff may be entitled.

   [Name]
   Attorney for Plaintiff
   State Bar No.:

   [E-mail address]
   [Address]
   [Telephone]
   [Teletyper]

Include a notice of hearing (form 19-2). Include a certificate of service (form 19-1) unless ex parte relief is sought. Attach a supporting affidavit of the judgment creditor if an injunction is sought. Prepare the turnover order (form 27-17). Send a copy of the application, order, and notice of hearing to the opposing party unless ex parte relief is sought.
Form 27-17

For an application for turnover relief to accompany this order, see form 27-16 in this chapter. If the property is to be turned over to a sheriff or constable for execution sale, the attorney should make certain that the court clerk issues a writ of execution, that the writ is delivered to the sheriff or constable, and that the officer is informed that the judgment debtor will be turning property over to him for levy of execution. See part II. in this chapter.

This order assumes that the plaintiff has given notice to the defendant of his intention to seek turnover relief. See sections 27.86 and 27.87 regarding ex parte relief.

[Caption. See § 3 of the Introduction in volume 1 of this manual.]

Use the same caption as in the application for turnover relief at form 27-16.

Order for Turnover Relief

On [date] the Court considered Plaintiff’s Application for Turnover Relief.

Recite appearances of counsel and parties as appropriate.

The Court considered the pleadings, the evidence, and the argument of counsel and finds that—

1. Defendant is the owner of [describe property as in form 27-16];

2. the property in question is not exempt under any statute from attachment, execution, or seizure; and

3. the property in question cannot readily be attached or levied on by ordinary legal process.

It is therefore ORDERED that Defendant, [name of defendant], turn over for levy to [name or title of levying officer] at [address, city, state] on or before [date property is to be]
[describe property], with all documents and records related to the property.

Include other appropriate orders, such as issuance of an injunction or appointment of a receiver, with orders concerning any required bond. See section 8.39 regarding injunction orders, forms 8-11 through 8-16, and sections 27.88 and 27.102 regarding receivership and injunctions in turnover actions.

It is further ORDERED that Plaintiff recover from Defendant reasonable and necessary attorney’s fees in the amount of $____________ and all costs of this proceeding.

SIGNED on ________________________________.

__________________________________________
JUDGE PRESIDING

APPROVED AS TO FORM:

__________________________________________
[Name]
Attorney for Plaintiff
State Bar No.:
[E-mail address]
[Address]
[Telephone]
[Telexcopier]

__________________________________________
[Name]
Attorney for Defendant
State Bar No.:
[E-mail address]
[Address]
[Telephone]
[Telexcopier]
Form 27-18

Tex. Civ. Prac. & Rem. Code § 31.002 discusses the collection of judgments through a court proceeding, allowing the court to appoint a receiver to take the proceeds from the sale of nonexempt property to satisfy the judgment. See Tex. Civ. Prac. & Rem. Code § 31.002(b)(3). See section 27.88 in this chapter for a discussion of receiverships. The following is merely a sample form for seeking the appointment of a receiver, and the practitioner should be careful to tailor it as needed for each set of facts.

[Caption. See § 3 of the Introduction in volume 1 of this manual.]

Motion for Postjudgment Receivership

Movant is [name of plaintiff], Plaintiff and judgment creditor, who moves the Court to appoint a receiver to collect the judgment in this cause.

1. **Facts.** Plaintiff obtained a final judgment against [name of defendant], Defendant, in this cause on [date] in the amount of $[amount]. The judgment is final, has not been superseded, and remains fully payable. [Include if applicable: A copy of the judgment is attached as Exhibit [exhibit number/letter].]

2. **Grounds.** Pursuant to Texas Civil Practice and Remedies Code section 31.002, Plaintiff requests the Court to appoint [name of receiver], a resident of Texas, as a receiver to collect the judgment. Defendant owns property, including present or future rights to property, that cannot readily be attached or levied on by ordinary legal process and that is not exempt from attachment, execution, or seizure for the satisfaction of liabilities, to wit [describe non-exempt property] (the “Property”).

3. **Extended Notice.** This motion is being filed with extended notice to Defendant to allow Defendant time to make arrangements to pay the judgment. Defendant is notified of Plaintiff’s willingness to consider an installment payment plan. If this matter is heard by the
Court, the parties were unable to reach an agreement and Plaintiff respectfully submits that it is entitled to aid from the Court to collect the judgment.

4. **Receivership.** Plaintiff requests that the Court appoint a receiver over the Property and authorize broad powers but require the receiver to obtain further court order, or approval of Defendant, before any disbursement of funds. The Court will continue to monitor the receivership, and no funds will be paid without either Defendant’s written agreement or further court order. [Include if applicable: Attached as Exhibit [exhibit number/letter] is information on [name of receiver requested].]

5. **Prayer.** Movant prays that—

a. the Court set this matter for hearing;

b. the Court appoint a receiver to collect the judgment in this cause, subject to further supervision of the Court;

c. Movant be awarded attorney’s fees of $[amount];

d. the Court provide for payment of fees and costs to the receiver; and

e. Movant be granted all further relief to which Movant may be entitled.

[Name]
Attorney for Plaintiff
State Bar No.:
[E-mail address]
[Address]
[Telephone]
[Telexcopier]
Certificate of Conference

I certify that I contacted [name of defendant or of attorney for defendant], [Defendant/ Counsel for Defendant], on [date[s]] and that [Defendant/Counsel for Defendant] was unavailable. Further attempts will be made to discuss this motion with [Defendant/Counsel for Defendant] before the hearing, although it is believed [Defendant/Counsel for Defendant] will oppose the receivership, and this motion should be scheduled for hearing.

[Name]
Attorney for [name of movant]

Include a notice of hearing (form 19-2) and a certificate of service (form 19-1). Attach exhibit(s).
Order Appointing Receiver [and Compelling Discovery]  

On [date] the Court considered Plaintiff’s Motion for Postjudgment Receivership. The Court, after hearing pleadings, evidence, and argument of counsel, finds that the motion should be granted and a receiver should be appointed to take possession of and sell the leviable assets of [name of defendant], Defendant. The Court also finds that Defendant owns non-exempt property that cannot readily be attached or levied on by ordinary legal process, to wit [describe nonexempt property]. [Include if applicable: Notwithstanding any contrary language, this order does not compel turnover of Defendant’s homestead, checks for current wages, or other exempt property.]

It is therefore ORDERED that [name of receiver], whose address is [address, city, state], [telephone and fax numbers of receiver], is hereby appointed Receiver in this cause pursuant to Texas Civil Practice and Remedies Code section 31.002 with the power and authority to take possession of all leviable property of Defendant, including, but not limited to, the following nonexempt property:

1. all documents and records, including financial records, related to such property that is in actual or constructive possession or control of Defendant;
2. all financial accounts, certificates of deposit, money-market accounts, and accounts held by any third party;

3. all securities;

4. all real property, equipment, vehicles, boats, and planes;

5. all safe-deposit boxes or vaults;

6. all cash;

7. all negotiable instruments, including promissory notes, drafts, and checks;

8. all causes of action or choses in action;

9. all contract rights, whether present or future; and

10. all accounts receivable.

It is further ORDERED that all such property shall be held in custodia legis of Receiver as of the date of this order.

It is further ORDERED that, in addition to the powers of Receiver set forth herein, Receiver shall have the following right, authority, and power with respect to Defendant’s property, to—

1. collect all accounts receivable of Defendant and all rents due Defendant from any tenant;

2. change locks to all premises at which any property is situated;

3. direct the delivery of Defendant’s mail and the mail of any business of Defendant to Receiver’s address and open all mail directed to Defendant and any business of Defendant;
4. endorse and cash all checks and negotiable instruments payable to Defendant, except paychecks for current wages;

5. hire a real estate broker to sell any real property and mineral interest belonging to Defendant;

6. hire any person or company to move and store the property of Defendant;

7. insure, but without the obligation to insure, any property belonging to Defendant;

8. obtain from any financial institution, bank, credit union, credit bureau, savings and loan, title company, or any other third party any financial records belonging to or pertaining to Defendant;

9. obtain from any landlord, building owner, or building manager where Defendant or Defendant’s business is a tenant, copies of Defendant’s lease, lease application, credit application, and payment history and copies of Defendant’s checks for rent or other payments;

10. hire any person or company necessary to accomplish any right or power under this order; and

11. take all action necessary to gain access to all storage facilities, safe-deposit boxes, real property, and leased premises wherein any property of Defendant may be situated and to review and obtain copies of all documents related to the property.

Include the following if applicable.

It is further ORDERED that, in addition to the powers of Receiver set forth herein, Receiver shall have the right, authority, and power to request and obtain from all providers of utilities, telecommunications, telephone, cell phone, cable, Internet, database, Internet Web site hosting, satellite television, and all similar services, including Internet blogs and chat
rooms, discovery compelling the production of any information regarding Defendant’s payments, payment history, and financial information, including account information, telephone numbers, names, service addresses, telephone numbers, IP addresses, call detail records, payment records, and bank and credit card information. This order specifically serves as the court order required by 47 U.S.C. § 551 and satisfies all obligations of the responding party to obtain or receive a court order before disclosing material containing personally identifiable information of the subscriber or customer.

It is further ORDERED that any sheriff or constable of any county of this state and their deputies and any other peace officer of this state are hereby directed and ordered to assist Receiver in carrying out his duties and exercising his powers hereunder and to prevent any person from interfering with Receiver in taking control and possession of the property of Defendant, without the necessity of a writ of execution. Receiver is authorized to direct any constable or sheriff to seize and sell property under a writ of execution.

It is further ORDERED that Defendant immediately turn over to Receiver within five (5) days of Defendant’s receipt of a copy of this order (1) the documents contained in Exhibit [exhibit number/letter] attached hereto, (2) all documents and financial records that may be requested by Receiver, and (3) all checks, cash, securities, promissory notes, documents of title, and contracts owned by or in the name of Defendant.

It is further ORDERED that Defendant identify and turn over to Receiver all interests of Defendant in any business or venture and all agreements, stock certificates, and other documents pertaining to Defendant’s ownership in the business or venture.

It is further ORDERED that Defendant continue, until the judgment in this cause is fully paid, to turn over to Receiver at Receiver’s address all checks, cash, securities, promissory notes, documents of title, and contracts within three days of Defendant’s receipt and pos-
session of such property if, as, and when Defendant comes into receipt and possession of any such property. Paychecks for current wages are exempt from this order.

Include the following if discovery was served and was unanswered.

It is further ORDERED that Defendant shall fully answer, within thirty days, postjudgment interrogatories previously served.

Continue with the following.

It is further ORDERED that Plaintiff recover against Defendant judgment in the sum of $[amount] as additional attorney’s fees for the presentation of this motion.

It is further ORDERED that Receiver post bond in the amount of $[amount] payable to this Court and conditioned on the faithful discharge of Receiver’s duties in accordance with this order. Receiver’s fee is taxed as costs against Defendant. Receiver is FURTHER ORDERED to take the oath of his office.

It is further ORDERED that Receiver shall not disburse to Plaintiff funds or proceeds from property sold by Receiver without Defendant’s written consent or order of this Court.

SIGNED on ________________________________.

__________________________________________

JUDGE PRESIDING
APPROVED AS TO FORM:

[Name]
Attorney for Plaintiff
State Bar No.:
[E-mail address]
[Address]
[Telephone]
[Telecopier]

[Name]
Attorney for Defendant
State Bar No.:
[E-mail address]
[Address]
[Telephone]
[Telecopier]

Attach exhibit.
Form 27-20

For discussion of a bond of a receiver, see section 27.88:7 in this chapter.

---

[Caption. See § 3 of the Introduction in volume 1 of this manual.]

Bond of Receiver

[Name of receiver] has been appointed Receiver in this cause. The order appointing [name of receiver] requires that [he/she] execute a bond in the amount of $[amount].

Select the following if a cash bond.

Therefore, I, [name of receiver], Receiver, as principal, acknowledge myself bound to pay to the Judge of the Court the sum of $[amount], which has been tendered in cash, conditioned that I will faithfully discharge the duties of Receiver in this cause and obey the orders of the Court.

Or

Select the following if a surety bond.

I have enclosed an original and a copy of Receiver’s oath, bond, and order and the original bond in the amount of $[amount].

Therefore, I, [name of receiver], Receiver, as principal, acknowledge myself bound to pay to the Judge of the Court the sum of $[amount], which bond has been tendered herewith, conditioned that I will faithfully discharge the duties of Receiver in this cause and obey the orders of the Court.

Continue with the following.
Form 27-20

Bond of Receiver

SIGNED on ________________________________.

__________________________________________________________________________________________________________________________ ...

[Name of receiver]
Receiver

Select the following if a cash bond.

Filed and approved on ________________________________.

__________________________________________________________________________________________________________________________ ...

[Name of clerk], Clerk
[Designation of court]

Or

Select the following if a surety bond.

Order

It is ORDERED that Receiver’s Bond is hereby approved.

SIGNED on ________________________________.

__________________________________________________________________________________________________________________________ ...

JUDGE PRESIDING

Attach exhibits if applicable.
Oath of Receiver

Form 27-21

For discussion of an oath of a receiver, see section 27.88:7 in this chapter.

[Caption. See § 3 of the Introduction in volume 1 of this manual.]

Oath of Receiver

I, [name of receiver], swear that I will faithfully perform and discharge the duties of Receiver in this cause and will obey the orders of the Court. I am a citizen and qualified voter of the State of Texas and am registered to vote. My actual residence is within the State of Texas. I am not a party, attorney, or other person interested in the action giving rise to the judgment that forms the basis of the receivership.

__________________________________________
[Name of receiver]
Receiver

SIGNED under oath before me on ____________________________.

__________________________________________
Notary Public, State of Texas

Filed with the Court on ____________________________.

__________________________________________
[Name of clerk], Clerk
[Designation of court]
Form 27-22

In Texas Supreme Court, Second Amended Order Regarding Mandatory Reports of Judicial Appointments and Fees, Misc. Docket No. 07-9188 (Oct. 30, 2007), as discussed in sections 27.88:5 and 27.88:9 in this chapter, the court requires approval of a receiver’s fees to be accomplished by separate written order. This form provides an example of such an order. Note that the order customarily accompanies a request for approval of a receiver’s fees, whether in a separate application or as part of an application, such as one that also requests the authority to disburse funds. An affidavit from the receiver regarding his fees may also be included in an application.

[Caption. See § 3 of the Introduction in volume 1 of this manual.]

Order Approving Receiver’s Fees

On [date] the Court considered [describe document requesting approval of receiver’s fees, e.g., Receiver’s Application for Approval of Receiver’s Fees]. The Court, after hearing pleadings, evidence, and argument of counsel, finds that the time and expenses spent by Receiver and the fees charged as shown in the application are reasonable and were necessary in the performance of Receiver’s duties, and they are approved.

It is therefore ORDERED that $[amount] is approved as reasonable and necessary Receiver’s fees for the period reflected in the application. Receiver is authorized to pay [himself/his firm] $[amount] from the funds currently on hand.

SIGNED on ________________________________.

________________________________________________________________________________________________________________________

JUDGE PRESIDING
Application for Charging Order

1. **Parties.** Applicant [name of plaintiff], Plaintiff and judgment creditor in this cause, requests that the Court grant this Application for Charging Order against the nonexempt interest of [name of defendant], Defendant and judgment debtor, a partner in the limited partnership of [name of limited partnership], which has its principal place of business in [county] County, Texas. Service on [name of limited partnership] can be made by delivering citation to [name of general partner], a general partner, at [address, city, state].

2. **Judgment.** Plaintiff obtained a judgment against Defendant on [date] in this cause. A true and correct copy of the judgment is attached to this application as Exhibit [exhibit number/letter] and included by reference. The judgment remains unsatisfied.

3. **Grounds.** Plaintiff has reason to believe that Defendant is a partner with [name of limited partnership]. Plaintiff is entitled by reason of its judgment against Defendant to a charging order against the nonexempt interest of Defendant in [name of limited partnership].

4. **Prayer.** Plaintiff prays that the Court—

   a. set this matter for hearing;
b. order Defendant to produce in court and to turn over to Plaintiff true copies of the partnership agreement and true copies of any other agreements or documents evidencing the interest of Defendant in [name of limited partnership] and any amounts due or to become due to Defendant by reason of Defendant’s interest in [name of limited partnership];

c. enter its order charging Defendant’s interest in [name of limited partnership], as requested in this application, in the amount of the unsatisfied judgment;

d. grant Plaintiff reasonable expenses incurred in obtaining the orders; and

e. grant Plaintiff all further relief to which Plaintiff may be entitled.

[Name]
Attorney for Plaintiff
State Bar No.: [E-mail address]
[Address]
[Telephone]
[Telexoier]

Include a notice of hearing (form 19-2) and a certificate of service (form 19-1). Prepare the charging order (form 27-24). File the original of this application, with order attached, with the court clerk. Arrange for service of citation on all parties required to be served; see section 27.101.2.
Form 27-24

For an application for a charging order, see form 27-23 in this chapter. This order assumes that the debtor and any other adverse parties have been given notice of the creditor’s application for a charging order and that a hearing will be held.

[Caption. See § 3 of the Introduction in volume 1 of this manual.]

Use the same caption as in the application for charging order found at form 27-23.

Charging Order

On [date] the Court considered Plaintiff’s Application for Charging Order.

Recite appearances of counsel and parties as appropriate.

The Court considered the pleadings, the evidence, and the argument of counsel and finds that—

1. Defendant is a partner in [name of limited partnership]; and

2. Plaintiff is entitled to a charging order against Defendant’s interest in [name of limited partnership].

It is therefore ORDERED that—

1. the interest of Defendant in [name of limited partnership] is subjected to a charging order in favor of and for the benefit of Plaintiff;

2. distributions owed or payable to Defendant by [name of limited partnership] be paid directly to Plaintiff; and
3. [name of limited partnership] will be discharged from its obligations to Defendant to the extent of any amounts so paid to Plaintiff, until the judgment against [name of defendant] entered in this cause is paid in full.

It is further ORDERED that Defendant deliver to Plaintiff true copies of the partnership agreement and true copies of any other agreements or documents evidencing the interest of Defendant in [name of limited partnership] and any distributions due or to become due to Defendant by reason of Defendant’s interest in [name of limited partnership].

SIGNED on ________________________________.

________________________________________

JUDGE PRESIDING

When the order is entered, send a copy to the general partner of the limited partnership.
Form 27-25

For a discussion of assignment of judgments, see section 27.105 in this chapter.

[Caption. See § 3 of the Introduction in volume 1 of this manual.]

Assignment of Judgment and Judgment Lien

For valuable consideration, the receipt and adequacy of which are hereby acknowledged, [name of assignor], Assignor, transfers and assigns to [name of assignee], Assignee, all of Assignor’s right, title, and interest in the hereinafter described judgment and any judgment liens created thereby:

Court and county: [designation and location of court]

Cause No. [number], “[style of case]”

Date and amount of judgment: [date], in the amount of $[amount]

Assignor makes no representation, warranty, or guaranty as to the collectibility or validity of the judgment assigned, and in the case of nonpayment or noncollectibility of the assigned judgment, no recourse shall be had against Assignor, except, however, that Assignor expressly warrants that it is the owner and holder of the judgment and judgment lien assigned herein.

Executed on [date].

__________________________________________________________________________________________________________________________
[Name of assignor]

By ______________________________
[Title]

ACKNOWLEDGMENT

STATE OF TEXAS

COUNTY OF

This instrument was acknowledged before me on ____________ by [name of officer], [title of officer] of [name of assignor] corporation, on behalf of said corporation.

Notary Public, State of Texas
Form 27-26

A judgment debtor may file an affidavit in the real property records of the county in which the judgment debtor’s homestead is located that must be in substantially the following form. Tex. Prop. Code § 52.0012(b). Before execution of the affidavit, the affiant must send a letter and a copy of the affidavit by registered or certified mail, return receipt requested, thirty or more days before the affidavit is filed, notifying the judgment creditor of the affidavit and the affiant’s intent to file for record the affidavit. Tex. Prop. Code § 52.0012(f).

Homestead Affidavit as Release of Judgment Lien

BEFORE ME, the undersigned authority, on this day personally appeared [name[s] of affiant[s]] (“Affiant[s]”), who, being first duly sworn, upon oath state[s]:

1. My name is [name of affiant]. I own the following described land (“Land”): [describe property claimed as homestead].

2. This affidavit is made for the purpose of effecting a release of that judgment lien recorded in [describe judgment lien as described in recording information] (“Judgment Lien”) as to the Land.

3. The Land includes as its purpose use for a home for Affiant[s] and is the homestead of Affiant[s], as “homestead” is defined in section 41.002 of the Texas Property Code. The Land does not exceed—

   a. ten acres of land, if used for the purposes of an urban home or as both an urban home and a place to exercise a calling or business; or
b. two hundred acres for a family or one hundred acres for a single, adult person not otherwise entitled to a homestead, if used for the purposes of a rural home.

4. Attached to this affidavit is evidence that—

a. Affiant[s] sent a letter and a copy of this affidavit, without attachments and before execution of the affidavit, notifying the judgment creditor in the Judgment Lien of this affidavit and the Affiant[’s/s’] intent to file for record this affidavit; and

b. the letter and this affidavit were sent by registered or certified mail, return receipt requested, thirty or more days before this affidavit was filed, to—

i. the judgment creditor’s last known address;

ii. the address appearing in the judgment creditor’s pleadings in the action in which the judgment was rendered or another court record, if that address is different from the judgment creditor’s last known address;

iii. the address of the judgment creditor’s last known attorney as shown in those pleadings or another court record; and

iv. the address of the judgment creditor’s last known attorney as shown in the records of the State Bar of Texas, if that address is different from the address of the attorney as shown in those pleadings or another court record.

5. This affidavit serves as a release of the Judgment Lien as to the Land in accordance with section 52.0012 of the Texas Property Code.
Homestead Affidavit as Release of Judgment Lien

[Name of affiant]
Affiant

SIGNED under oath before me on ________________________________.

Notary Public, State of Texas

Attach evidence of notice to judgment creditor as described in statement 4. above and in Tex. Prop. Code § 52.0012(f).
Sheriff’s Deed

THE STATE OF TEXAS )

COUNTY OF )

By virtue of execution issued by the clerk of the [designation] Court of [county] County, Texas, which was delivered to me as [Sheriff/Constable] of [county] County, Texas, I was commanded to seize and sell the property of Defendant, [name of defendant].

The real property hereinafter described was pointed out to me as being subject to sale under execution.

On [date], at [time] [A.M./P.M.], I levied on all the estate, right, title, claim, and interest that Defendant had in the premises hereafter described. On the first Tuesday of [month], [date], between the hours of 10:00 A.M. and 4:00 P.M., as prescribed by law, I did sell the property at the [designation] courthouse in [city], Texas, having first given public notice of the authority under which the sale was to be made, the time of levy, the time and place of sale, and a description of the property that was to be sold.

At the sale, the property was sold to the highest bidder, [name of buyer], for the sum of [amount] dollars ($[amount]) subject, however, to the superior lien indebtedness on the property.

[Name of buyer] has paid to me the sum of [amount] dollars ($[amount]), the receipt of which is hereby acknowledged.

Therefore, in consideration of the property in the judgment and execution and of the payment of the sum of [amount] dollars ($[amount]), I, [name], [Sheriff/Constable] of
[county] County, Texas, do grant, sell, and convey to [name of buyer] all the estate, right, title, interest, and claim that Defendant had on [date], or at any time afterwards, in and to the property described in the execution, and further described as follows: [legal description].

To have and to hold the above-described property unto [name of buyer], [his/her/its] heirs and assigns, forever, as fully and absolutely as I can convey.

In testimony whereof, I hereunto set my hand this [date].

__________________________________________________________
[Name], [Sheriff/Constable]
[County] County, Texas

SIGNED under oath before me on ________________.

__________________________________________________________
Notary Public, State of Texas
Form 27-28

Some clerks do not have forms for orders of sale, and you may be required to draft one yourself. The order of sale is needed when a judgment provides for judicial foreclosure of a lien on certain property described therein. The order of sale also provides for seizure of additional nonexempt property if the property foreclosed on is not sufficient to satisfy the judgment.

Order of Sale

STATE OF TEXAS

COUNTY OF [county]

TO ANY SHERIFF OR CONSTABLE WITHIN THE STATE OF TEXAS:

[Name(s) of plaintiff(s)], Plaintiff(s), on [date], in the [County Court at Law No. [number]/[number] Judicial District Court] of [county] County, Texas, recovered judgment against [name(s) of defendant(s)], Defendant(s), for the sum of $[amount] with interest from that date at the rate of [percent] percent per year, until paid, and the further sum of $[amount] as costs of suit, as shown in the itemized bill of costs attached and made a part hereof and for the foreclosure of Plaintiff’s lien on [describe personal property] as the lien existed on the judgment day; that property should be sold as under execution in satisfaction of judgment.

You are hereby ORDERED to proceed to levy on, seize, and sell the above-described property in satisfaction of judgment, interest, costs, and the added cost of executing this writ. If the property cannot be found or if the proceeds derived from the sale are insufficient to satisfy the judgment, interest, and costs together with your fees and commissions for executing this writ, you are hereby commanded to make the money or any balance remaining unpaid out of any other property of Defendant(s) as in ordinary execution. If more money is received from the sale than is sufficient to pay off the judgment, interest, and above costs, as directed by law, you shall pay the surplus to Defendant(s). You are further directed to execute and
deliver to the purchaser(s) of the property the proper deed of conveyance of all the right, title, interest, and claim that Defendant(s) had in the property at the time of the execution of this writ and at the time of the sale and to apply the proceeds to the payment and satisfaction of the judgment, and costs of suit, together with your legal fees and commissions for executing this writ. You will execute this writ, according to law.

The judgment is entitled to the following credits: [list credits].

Herein fail not and have you this writ showing how you have executed it, together with the money collected as herein directed, before the above Court at the courthouse in [county], Texas, within ninety days from the date of the issuance of this writ.

Issued and given under my hand and seal of the Court at my office in [county], Texas on [date].

ATTEST:

[Name]
[County] County Clerk

Or

[Name]
[County] County District Clerk

By

[Name]
Deputy
Order of Sale

<table>
<thead>
<tr>
<th>Description</th>
<th>Amount</th>
<th>Description</th>
<th>Amount</th>
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<tbody>
<tr>
<td>Sheriff’s/Constable’s Fee</td>
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<td>Clerk’s Fee</td>
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<tr>
<td>Levy</td>
<td>____________</td>
<td>Clerk’s fees</td>
<td>____________</td>
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<tr>
<td>Ads</td>
<td>____________</td>
<td>Library fee</td>
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<td>Dispute fund</td>
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<td>Judge’s fee</td>
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<td>Sheriff’s fee</td>
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STATE OF TEXAS  

COUNTY OF [county]  

I, [name], clerk of the [[county] County/[county] County District] Court, do certify that the above is a true and correct bill of costs in the above entitled cause up to this date.
WITNESS MY HAND AND OFFICIAL SEAL, on [date].

__________________________________________________________________________________________________________________________ ...

[Name]
[County] County Clerk

Or

__________________________________________________________________________________________________________________________ ...

[Name]
[County] County District Clerk

By ______________________________
[Name]
Deputy

OFFICER’S RETURN

Came to hand on the ____ day of _________________, at __.M. and executed on the ____

day of _________________ at __.M.

__________________________________________________________________________________________________________________________ ...

SHERIFF OR CONSTABLE
[County] County, Texas
Chapter 28
Landlord-Tenant Law

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I. Landlord-Tenant Law Generally

§ 28.1 Scope of Chapter

This chapter focuses on the landlord’s judicial and nonjudicial remedies for a tenant’s default under a lease for real property; this chapter does not cover personal property leases.

Practice Note: The Texas Supreme Court has appointed a task force to promulgate plain-language forms for pro se individuals to use in landlord-tenant matters. Courts will be required to accept these forms once they become available to the public. See Tex. Gov’t Code § 22.019; Acts 2015, 84th Leg., R.S., ch. 600, § 1 (S.B. 478), eff. Sept. 1, 2015; Texas Supreme Court, Order Creating Landlord-Tenant Forms Task Force, Misc. Docket No. 17-9046 (May 2, 2017).

§ 28.2 Typical Fact Scenario

A tenant fails to pay rent or other sums due under a lease, fails to comply with a nonmonetary obligation under a lease, or abandons the leased premises; each of these scenarios potentially creates an event of default for which the landlord may exercise judicial or nonjudicial remedies. Before exercising a remedy, the landlord must establish that an event of default has occurred.

§ 28.3 Events of Default

An event of default may be monetary or nonmonetary. The type of default and the manner in which it is addressed in the lease will determine the contractual, statutory, prejudgment, or judicial remedies the landlord may seek. Additionally, the type of default may be subject to a grace period or right of the tenant to cure the default. What constitutes an event of default regarding the violation of the payment and nonmonetary obligations of the tenant is governed by the parties’ agreement.

§ 28.3:1 Monetary Defaults

Rent: The lease should have an unequivocal covenant to timely pay rent on or in advance of a specific date. A review of the lease should be conducted to confirm that the tenant’s failure to timely pay rent by a date certain is an unconditional event of default and not subject to demand, notice, and right to cure or other action required of the landlord.

Other Monetary Obligations: Insufficient funds fees and late fees are examples of monetary obligations that are not within the classic definition of rent but are usually subject to a covenant to pay by a date certain, after notice, or after a specified time period.
§ 28.3:2 Nonmonetary Defaults

There are numerous bases on which a landlord may assert a default under the lease that do not arise from the payment of a sum of money. Nonmonetary defaults may or may not be subject to a right of the tenant to cure the default. Examples of typical nonmonetary defaults that may be contractually required of the tenant may include failure to maintain the premises; conduct of residents, occupants, or guests that is in violation of the lease; or criminal conduct.

[Sections 28.4 through 28.10 are reserved for expansion.]

II. Nonjudicial (Self-Help) Remedies

§ 28.11 Contractual Landlord’s Liens in Commercial Tenancies

Most commercial leases provide boilerplate language for the imposition of a landlord’s lien. This contractual lien, as opposed to the commercial statutory lien provided in the Texas Property Code, gives the landlord much more latitude. See Bank of North America v. Kruger, 551 S.W.2d 63, 65 (Tex. Civ. App.—Houston [1st Dist.] 1977, writ ref’d n.r.e.) (holding that contractual landlord’s liens are subject to provisions of the Uniform Commercial Code but that statutory landlord’s liens are not). Perfection under UCC article 9 may cut off any subsequent creditor’s security interest. See Tex. Bus. & Com. Code §§ 9.301–.343. Once a financing statement is filed, subsequent annual filings are subject to Tex. Bus. & Com. Code § 9.515(a), providing that the filing of a financial statement is good for five years. The landlord’s lien is not satisfied until the landlord’s claim for rent advances and furnishings has been paid. Green v. Scales, 219 S.W. 274, 275 (Tex. Civ. App.—Fort Worth 1919, no writ). A tenant cannot free himself or the products of the leased premises unless this is done by contract with the landlord for payment of rent. Forrest v. Durnell, 26 S.W. 481, 482 (Tex. 1894); Granville v. Rauch, 335 S.W.2d 799, 803 (Tex. Civ. App.—Fort Worth 1968, no writ). The landlord’s lien is not affected by subletting or assignment of the lease. Forrest, 26 S.W. at 482–83; Mauritz v. Markloff, 268 S.W. 230, 231 (Tex. Civ. App.—Galveston 1925, no writ); Green, 219 S.W. at 275; Edwards v. Anderson, 82 S.W. 659, 659–60 (Tex. Civ. App.—Austin 1904, no writ). One who has seized property from the leased premises may be held liable by the landlord for the full value thereof or for the amount of debt owed by the tenant and for exemplary damages if he acted with knowledge of the circumstances. Guaranty Bond State Bank of Timpson v. Redding, 24 S.W.2d 457, 461 (Tex. Civ. App.—Beaumont 1929, no writ); Ward v. Gibbs, 30 S.W. 1125, 1128 (Tex. Civ. App.—Galveston 1895, no writ). To give effect to the landlord’s lien, the landlord is afforded the remedy of foreclosure. Anderson v. Owen, 269 S.W. 454, 455 (Tex. Civ. App.—Galveston 1924, no writ). The lien, however, does not attach to property belonging to others that is located on the leased premises. West Development Co. v. Crown Bottling Co., 90 S.W.2d 887, 890 (Tex. Civ. App.—Waco 1936, writ dism’d).

In addition to a contractual landlord’s lien in a commercial tenancy, a commercial landlord also has a statutory lien; similarly, an agricultural landlord has a statutory lien. Statutory liens of commercial landlords and agricultural landlords are addressed in section 28.32 below, as enforcement of a statutory lien requires the filing of an application for a distress warrant.

§ 28.11:1 Contractual Landlord’s Lien Must Be in Lease

A security interest attaches to the tenant’s personal property pursuant to a landlord’s lien provision in a commercial lease and is subject to article 9 of the Uniform Commercial Code. See Tex. Bus. & Com. Code §§ 1.201(35), 9.109. The lien provision in a commercial lease must expressly convey to the landlord a security interest in the tenant’s personal property. See Bank of
§ 28.11:2  Perfection of Commercial Landlord’s Security Interest


§ 28.11:3  Foreclosure of Contractual Landlord’s Liens

A landlord may foreclose a contractual landlord’s lien judicially or nonjudicially. A judicial foreclosure is required when the landlord cannot obtain possession of the tenant’s personal property through either self-help or the tenant’s voluntary delivery of the personal property to the landlord.

An agreement to subordinate a landlord’s lien is enforceable; consequently, the practitioner must confirm that the landlord has not executed a subordination agreement in favor of another secured party of the tenant. See, e.g., In re Doctors Hospital 1997, L.P., 351 B.R. 813, 832 n.14 (Bankr. S.D. Tex 2006).

The tenant has a right to redeem the personal property at any time before the landlord has disposed of the property by foreclosure sale by tendering to the landlord payment of all obligations secured by the personal property and the reasonable expenses and attorney’s fees of the landlord authorized under Tex. Bus. & Com. Code § 9.615(a)(1). Tex. Bus. & Com. Code § 9.623.

After the tenant’s default, the landlord may sell the tenant’s personal property subject to the landlord’s lien. Tex. Bus. & Com. Code § 9.610(a). Notification of the sale must be delivered to the tenant unless the tenant has waived the right to notification. Tex. Bus. & Com. Code § 9.611(a). Every aspect of the disposition of the personal property, including the method, manner, time, place, and other terms, must be commercially reasonable. If the disposition is commercially reasonable, a secured party may dispose of collateral by public or private proceedings, by one or more contracts, as a unit or in parcels, and at any time and place and on any terms. Tex. Bus. & Com. Code § 9.610(b).

After payment of the rent arrearage, the landlord must deliver any balance of the sale proceeds to the tenant. Myers v. Ginsburg, 735 S.W.2d 600, 605 (Tex. App.—Dallas 1987, no writ).

§ 28.12  Contractual Landlord’s Liens in Residential Tenancies

A landlord of a single or multifamily residence has a lien on nonexempt property of the tenant for rent due, but not for other charges. Tex. Prop. Code § 54.041. Note that a lease may provide a formula for allocation of payments received that may result in “rent” remaining unpaid. For instance, many standardized leases contain a provision that all payments received by the landlord are applied first to non-rent obligations, then to the rent obligation.

For a residential landlord’s lien to be effective, the lease must have the lien provision underlined or printed in conspicuous bold print and a provision authorizing the sale or disposition of the property subject to the lien. Tex. Prop. Code §§ 54.043(a), 54.045(a).

North America v. Kruger, 551 S.W.2d 63, 65 (Tex. Civ. App.—Houston [1st Dist.] 1977, writ ref’d n.r.e.) (holding that contractual landlord’s liens are subject to provisions of the Uniform Commercial Code but that statutory landlord’s liens are not).
A residential landlord may seize only nonexempt property subject to the lien and must do so without a breach of the peace. 

**Tex. Prop. Code § 54.044(a).** The residential landlord’s sale of unredeemed property must be for cash to the highest bidder after a minimum thirty-day written notice to the tenant. **Tex. Prop. Code § 54.045.** A residential landlord’s lien may not be exercised against a tenant of a property financed with tax credits without a court order. **Tex. Gov’t Code § 2306.6738(a).**

### § 28.13 Exclusion (Lockout) of Commercial Tenant


#### § 28.13:1 Bases for Lockout

A commercial landlord may not intentionally prevent a commercial tenant from entering leased premises except by judicial process unless the exclusion results from (1) bona fide repairs, construction, or an emergency; (2) removing the contents of premises abandoned by a commercial tenant; or (3) changing the door locks of a commercial tenant who is delinquent in paying at least part of the rent. **Tex. Prop. Code § 93.002(c).**

#### § 28.13:2 Procedure

If a commercial tenant is delinquent in paying at least part of the rent, the landlord may change the door locks and must place a written notice on the tenant’s front door stating the name and address or telephone number of the individual or company from which the new key may be obtained. If the tenant pays the delinquent rent, the landlord must provide a key to the tenant during the tenant’s regular business hours. **Tex. Prop. Code § 93.002(f).**

#### § 28.13:3 Wrongful Lockout

If a commercial landlord or a landlord’s agent violates the Texas Property Code and improperly locks out a tenant, the tenant may (1) either recover possession of the premises or terminate the lease and (2) recover from the commercial landlord an amount equal to the sum of the tenant’s actual damages, one month’s rent, or $500, whichever is greater, reasonable attorney’s fees, and court costs, less any delinquent rents or other sums for which the tenant is liable to the landlord. **Tex. Prop. Code § 93.002(g).**

#### § 28.13:4 Writ of Reentry

If the tenant has been locked out of the leased premises illegally, the tenant may recover possession of the premises. See **Tex. Prop. Code § 93.003.** To regain possession, the tenant must file a sworn complaint seeking reentry with the justice court in the precinct in which the premises are located. The complaint must specify the facts of the unlawful lockout, and the tenant or its representative must also state orally under oath to the justice the facts of the unlawful lock-out. **Tex. Prop. Code § 93.003(b).** If the tenant has complied with subsection (b) of section 93.003, and the court believes the tenant, the court may issue, ex parte, a writ of reentry that entitles the tenant to immediate and temporary possession of the premises. **Tex. Prop. Code § 93.003(c).** The writ of reentry must be served on the landlord or the landlord’s management company. **Tex. Prop. Code § 93.003(d).** The landlord is entitled to a hearing, and the writ of reentry must notify the landlord of its right to a hearing. The hearing is required to be held between the first and not later than the seventh day after the landlord requests a hearing. **Tex.**
Prop. Code § 93.003(e). To avoid a judgment for costs against the landlord, the landlord must request a hearing before the eighth day after service of the writ of reentry. Tex. Prop. Code § 93.003(f). Any party may appeal from the court’s judgment in the same manner as an appeal in a forcible detainer suit. Tex. Prop. Code § 93.003(g). If the court rules that possession should remain with the tenant, a writ of possession is issued superseding the writ of reentry. Tex. Prop. Code § 93.003(h). If the landlord fails to comply with the writ of reentry, the landlord may be held in contempt of court. Tex. Prop. Code § 93.003(i). Upon the landlord’s disobedience of the writ, the tenant may file an affidavit stating the name of the person who is disobedient and describing the act or omission. Upon receipt of the affidavit, the court shall issue a show-cause order. If the court finds disobedience to the writ, it may commit the person to jail without bail until the person purges himself of the contempt in a manner and form as the court may direct. If the landlord obeys the writ before a show-cause order is served, the court may nevertheless still find the person in contempt and assess further punishment. Tex. Prop. Code § 93.003(i).

§ 28.14 Exclusion (Lockout) of Residential Tenant

The “exclusion of a residential tenant,” or “lockout,” is solely a creature of statute and is governed by Tex. Prop. Code § 92.0081. It is primarily used by a landlord as a tool for collection of rent; however, the effectiveness of the remedy is limited, as the landlord must provide a key on two hours’ notice, twenty-four hours a day, without the requirement of any rent being tendered.

§ 28.14:1 Bases for Lockout

A residential landlord may not intentionally prevent a tenant from entering leased premises except by judicial process unless the lockout results from (1) bona fide repairs, construction, or an emergency; (2) removing the contents of premises abandoned by a tenant; or (3) changing the door locks on the door to the tenant’s individual unit of a tenant who is delinquent in paying at least part of the rent. Tex. Prop. Code § 92.0081(b).

§ 28.14:2 Prerequisites to Exercise of Remedy

The residential landlord’s right to change locks must be included in a written lease. Tex. Prop. Code § 92.0081(d)(1). A residential lease may not waive or exempt a residential landlord from liability or the landlord's duties under the lockout statute. Tex. Prop. Code § 92.0081(j).

Lockout is available only against tenants; the lockout statute addresses the lockout of a tenant. See Tex. Prop. Code § 92.0081(b). “Tenant” is defined as a person who is authorized by a residential lease to occupy a dwelling to the exclusion of others. Tex. Prop. Code § 92.001(6).

§ 28.14:3 Advance Notice Required

The residential landlord must deliver, in advance, written notice of the intent to change the locks. If notice is delivered by mail, delivery must be at least five days before the day the locks are changed. If notice is hand-delivered, delivery must be at least three days before the day on which locks are changed. Tex. Prop. Code § 92.0081(d)(3).

The notice must state—

1. the earliest date that the landlord proposes to change the door locks;
2. the amount of rent the tenant must pay to prevent changing of the door locks;

3. the name and street address of the individual to whom, or the location of the on-site management office at which, the delinquent rent may be discussed or paid during the landlord’s normal business hours; and

4. in underlined or bold print, the tenant’s right to receive a key to the new lock at any hour, regardless of whether the tenant pays the delinquent rent.


§ 28.14:4 Limitations on Lockout

A residential lockout may not be performed on a day, or a day immediately before a day, the landlord or designated individual is not available or the management office is not open. Tex. Prop. Code § 92.0081(e).

A landlord who performs a lockout on an individual rental unit may not change the locks or otherwise prevent a tenant from entering a common area of residential real property. Tex. Prop. Code § 92.0081(e–1).

Lockouts may not be performed on a dwelling unit when the tenant or any other legal occupant is in the dwelling, more than once during a rental payment period, or on a property financed with tax credits without a court order. Tex. Prop. Code § 92.0081(k); Tex. Gov’t Code § 2306.6738(a).

§ 28.14:5 Performing Lockout; Written Notice of Change of Locks

If after delivery of the advance written notice the residential tenant remains delinquent in paying part of the rent, the residential landlord may change the door locks and must place a written notice on the tenant’s front door stating—

1. an on-site location where the tenant may go twenty-four hours a day to obtain the new key or a telephone number that is answered twenty-four hours a day that the tenant may call to have a key delivered within two hours after calling the number;

2. the fact that the residential landlord must provide the new key to the tenant at any hour, regardless of whether the tenant pays any of the delinquent rent; and

3. the amount of rent and other charges for which the tenant is delinquent.


§ 28.14:6 Return of Key

The residential landlord must provide a key within two hours after request of the tenant, twenty-four hours a day, without regard to whether the tenant pays the delinquent rent. Tex. Prop. Code § 92.008(c)(1), (f). If the residential landlord responds to a tenant’s telephone call and the tenant is not present when the landlord arrives with the key, the residential landlord must leave a notice on the front door of the dwelling stating the time the residential landlord arrived with the key and the street address to which the tenant may go to obtain the key during the landlord’s normal office hours. Tex. Prop. Code § 92.0081(g).
§ 28.14:7 Tenant’s Remedy; Writ of Reentry

A residential tenant may apply to the justice court to obtain a writ of reentry for wrongful lockout. Tex. Prop. Code § 92.009.

[Sections 28.15 through 28.20 are reserved for expansion.]

III. Judicial Remedies

§ 28.21 Evictions (Suits for Possession)

The forcible detainer and forcible entry and detainer proceedings (“eviction”) are summary, speedy, and inexpensive remedies for the determination of who is entitled to immediate possession of the premises. McGlothlin v. Klieber, 672 S.W.2d 231, 232 (Tex. 1984) (citing Scott v. Hewitt, 90 S.W.2d 816, 818–19 (Tex. 1936)). The action is not exclusive but is cumulative of any other remedy that a party may have in Texas courts. McGlothlin, 672 S.W.2d at 233; Scott, 90 S.W.2d at 819. An eviction suit does not bar a suit for trespass, damages, waste, rent, or mesne profits. Tex. Prop. Code § 24.008.

§ 28.21:1 Right to Possession

For the purposes of considering suits for possession, the right to possession of real property occurs in the following scenarios.

Fee Simple: The owner holds the title in fee simple.

Foreclosure: The owner holds title pursuant to a trustee’s deed.

Contracts for Deed: The owner holds title after default by the purchaser under a contract for deed.

Landlord-Tenant Relationships: Landlord-tenant relationships giving rise to a party’s right to possession are defined by the particular tenancy.

Specific Term: The lease has a primary term with a specific ending date and no reversion to a periodic tenancy. Example: the primary term is from January 1, 2020, to June 30, 2021; the tenancy and right to possession end as a matter of law at midnight, June 30, 2021.

Specific Term with Reversion: The primary term ends but reverts to a periodic tenancy. Example: the primary term is from January 1, 2020, to June 30, 2021, and a lease provision provides that the lease continues month to month thereafter until either party delivers written thirty-day notice of termination before the end of the renewal period. The tenancy ends as a matter of law only after proper advance written notice is delivered by one of the parties.

Tenancy at Will: A tenant at will is one who holds possession of premises by permission of an owner but without a fixed term. Fandey v. Lee, 880 S.W.2d 164, 169 (Tex. App.—El Paso 1994, writ denied). Example: an on-site employee is provided an apartment as part of his compensation package, but the employee’s right to possession of the apartment is expressly contingent on his continued employment.

Tenancy at Sufferance: A tenant at sufferance is one who wrongfully continues in naked possession of property after his right to possession has ceased. ICM Mortgage Corp. v. Jacob, 902 S.W.2d 527, 530 (Tex. App.—El Paso 1994, writ denied);
Holdover: A new tenancy commences when a tenant fails to vacate at the end of a specific term or after expiration of timely notice of termination delivered by either party before the end of the current lease term or renewal period.

Under the common-law holdover rule, a landlord may elect to treat a tenant holding over as either a trespasser or as a tenant holding over under the terms of the original lease. Bockelmann, 788 S.W.2d at 571; Howeth v. Anderson, 25 Tex. 557, 571 (1860). Most standardized leases will include express holdover provisions, for example, “Rent is payable daily prorated over one month at 125% of the monthly rent.”

§ 28.21:2  Forcible Entry and Detainer vs. Forcible Detainer

Understanding the distinction between the causes of action for forcible entry and detainer and forcible detainer is critical to the determination of the type and manner of the delivery of the notice to vacate required under Tex. Prop. Code § 24.005 before filing suit. The two causes of action for possession are as follows.

Forcible Entry and Detainer: The party in possession never had a contractual or common-law right of possession. Absent a legally enforceable lease, someone other than the owner who is the occupier of the premises is at best a tenant at sufferance and at worst a trespasser. Fandey v. Lee, 880 S.W.2d 164, 169 (Tex. App.—El Paso 1994, writ denied). Specifically, a person commits a forcible entry and detainer if the person enters the real property of another without legal authority or by force and refuses to surrender possession on demand. Tex. Prop. Code § 24.001(a). Forcible entry is statutorily defined as (1) an entry without the consent of the person in actual possession of the property, (2) an entry without the consent of a tenant at will or sufferance, or (3) an entry without the consent of a person who acquired possession by forcible entry. Tex. Prop. Code § 24.001(b).

Forcible Detainer: A forcible detainer occurs when the party in possession originally had a contractual or common-law right of possession and loses the right to possession by default. By statute, a person who refuses to surrender possession of real property on demand commits a forcible detainer if the person—

1. is a tenant or a subtenant willfully and without force holding over after the termination of the tenant’s right of possession;
2. is a tenant at will or by sufferance, including an occupant at the time of foreclosure of a lien superior to the tenant’s lease; or
3. is a tenant of a person who acquired possession by forcible entry.


§ 28.21:3  Notice to Vacate

A notice to vacate is the statutory condition precedent to the filing of an action for either forcible detainer or forcible entry and detainer. It must be in writing (with one exception), delivered to the premises, and include a specific time deadline for delivery

Each notice to vacate should include an unequivocal demand for possession of the premises. The content is critical, as the bases articulated in the notice must correspond to the proof at trial. See Jessie v. Jerusalem Apartments, No. 12-06-00113-CV, 2006 WL 3020368, at *3 (Tex. App.—Tyler Oct. 25, 2006, no pet.) (mem. op.); Nealy v. Southlawn Palms Apartments, 196 S.W.3d 386, 390–91 (Tex. App.—Houston [1st Dist.] 2006, no pet.) (notice to vacate merely stated “[o]wner desires possession” and “undesirable tenant behavior”). In the context of federally subsidized housing, federal regulations and due process require the notice to adequately detail the grounds for termination. Moon v. Spring Creek Apartments, 11 S.W.3d 427, 433, 435 (Tex. App.—Texarkana 2000, no pet.) (holding that at trial the court must determine whether the due-process goals for notice have been sufficiently satisfied: (1) adequate notice is provided so as to enable the tenant to prepare a defense; (2) the tenant is allowed to be represented by counsel; (3) the tenant is given an opportunity to present evidence, cross-examine witnesses, and present a defense; and (4) the decision is rendered on the merits). Affordable housing leases subject to HUD regulations may have additional requirements such as contractually defined “good cause,” a ten-day opportunity to “discuss,” Violence Against Women Act notification, and other requirements for the notice to vacate. See, e.g., 34 U.S.C. § 12491 (Violence Against Women Act); 24 C.F.R. § 966.4(a)(1), (2)(iii) (good cause); United States Department of Housing and Urban Development, Handbook 4350.3, Rev-1, Occupancy Requirements of Subsidized Multifamily Housing Programs ch. 8, para. 8-13-B-2(c)(4), https://www.hud.gov/sites/documents/43503C8HSGH.PDF. If the lease does not require prior notice and demand for payment, the landlord is not required to make demand for payment before serving a notice to vacate. Santos v. City of Eagle Pass, 727 S.W.2d 126, 128–29 (Tex. App.—San Antonio 1987, no writ). However, a letter advising the tenant that if a default in rent payment is not cured within ten days the landlord will file a forcible entry and detainer suit does not suffice as a notice to vacate if the suit is never filed. Schecter v. Folsom, 417 S.W.2d 180, 182–83 (Tex. Civ. App.—Dallas 1967, no writ).

§ 28.21:4 Method of Delivery of Notice to Vacate

Tex. Prop. Code § 24.005(f) establishes the method required for delivery of the notice to vacate. The method chosen depends on the cause of action to be pursued and whether the underlying agreement includes the right to recover attorney’s fees and the desire of the plaintiff to recover attorney’s fees at the time of trial; the consideration for the landlord is the additional week’s notice required to perfect the right to recover attorney’s fees at the time of trial when there is no agreement or an agreement is silent about the recovery of attorney’s fees. When the underlying agreement allows for recovery of attorneys’ fees, or there is no agreement for attorneys’ fees and the plaintiff does not intend to recover attorney’s fees, the notice must be delivered (1) in person to the tenant or any person residing at the premises who is sixteen years of age or older, (2) by affixing the notice to the inside of the main entry door of the premises, or (3) by regular mail, registered mail, or certified mail, return receipt requested, to the premises in question. Tex. Prop. Code § 24.005(f). An alternative form of delivery exists if (1) the dwelling has no mailbox and has a keyless bolting device, alarm system, or dangerous animal that prevents the landlord from entering the premises to leave the notice on the inside of the main entry door or (2) the landlord reasonably believes that harm to any person would result from personal delivery to the tenant or a person residing at the premises or from personal delivery to the premises by affixing the notice to the inside of the main entry door. In such a case, the landlord may securely affix the notice on the outside of the main entry door in a sealed envelope on which is written the tenant’s name, address, and “IMPORTANT DOCUMENT” or substantially similar language in capital letters, and also must deposit in the mail in the same county in which the premises are located a copy of the notice to the tenant not later than 5:00 P.M. of the same day the notice is posted at the premises. Tex. Prop. Code § 24.005(f–1).
Practice Note: Posting the notice to vacate on the outside of the main entry door under Tex. Prop. Code § 24.005(f–1) has multiple requirements, each of which constitute an element of proof for the landlord to prevail at trial; the practitioner should determine that each element can be established at trial. When there is no agreement for attorney’s fees and the plaintiff seeks to recover attorney’s fees, the notice must be delivered by registered or certified mail, return receipt requested. Tex. Prop. Code § 24.006(a).

§ 28.21:5 Notice Periods for Notices to Vacate

Written Leases: Two time periods are applicable for notices to vacate delivered for the breach of a written lease; the time period is determined by whether the lease includes a provision allowing for the recovery of attorney’s fees and whether attorney’s fees are to be requested at trial.

If the agreement provides for recovery of attorney’s fees, the landlord must give at least three days’ written notice to vacate the premises before filing suit, unless the written lease or agreement provides for a longer or shorter time period. See Tex. Prop. Code §§ 24.005(a), 24.006(b). A longer or shorter notice period expressly agreed to in the lease is controlling. Tex. Prop. Code § 24.005(a). Certain HUD form leases for subsidized housing require a ten-day opportunity for the tenant to discuss the default with the landlord and additional default and notice requirements. Relying on Tex. Prop. Code § 24.005(e), the Fourteenth Court of Appeals has held that the three-day notice period required for a notice to vacate may not run concurrently with the ten-day discussion period required in the HUD lease; the notice must be delivered subsequent to the expiration of the original ten-day discussion period. Kennedy v. Andover Place Apartments, 203 S.W.3d 495, 498 (Tex. App.—Houston [14th Dist.] 2006, no pet.). However, some HUD leases have been revised to now allow the time to run concurrently.

If the lease does not include language entitling the landlord to recover attorney’s fees, and the landlord intends to seek attorney’s fees at the time of trial, the notice must state that if the tenant does not vacate the premises before the eleventh day after receipt of the notice, the landlord may recover attorney’s fees. The demand must be sent by registered or certified mail, return receipt requested, at least ten days before the date suit is filed. Tex. Prop. Code § 24.006(a).

Oral Leases: If the landlord does not seek recovery of attorney’s fees at trial, written notice to vacate must be given at least three days before filing a forcible detainer suit. Tex. Prop. Code § 24.005(a). If the landlord does seek recovery of attorney’s fees, the notice must state that if the tenant does not vacate the premises before the eleventh day after receipt of the notice, the landlord may recover attorney’s fees. The demand must be sent by registered or certified mail, return receipt requested, at least ten days before the date suit is filed. Tex. Prop. Code § 24.006(a).

Tenancies at Will: Two time periods are applicable for notices to vacate delivered to terminate a tenancy at will; the time period is determined by whether attorney’s fees are to be requested at trial. The general notice rule requires a three-day written notice period before filing suit unless the parties have contracted for a shorter or longer notice period in a written lease or agreement. Tex. Prop. Code § 24.005(b). If the lease or agreement does not include language allowing for the recovery of attorney’s fees, and the landlord intends to seek recovery of attorney’s fees at the time of trial, the notice must state that if the tenant does not vacate the premises before the eleventh day after receipt of the notice, the landlord may recover attorney’s fees. The demand must be sent by registered or certified mail, return receipt requested, at least ten days before the date suit is filed. Tex. Prop. Code § 24.006(a).

Tenancies at Sufferance: When the former owner wrongfully retains possession after a foreclosure, and the plaintiff has no intention to seek attorney’s fees, a three-day written notice requirement applies before filing suit unless the parties have con-
traced for a shorter or longer notice period in a written lease or agreement. \textit{Tex. Prop. Code \S\ 24.005(b)}. If the lease or agreement does not include language allowing for the recovery of attorney’s fees, and the landlord intends to seek recovery of attorney’s fees at the time of trial, the notice must state that if the tenant does not vacate the premises before the eleventh day after receipt of the notice, the landlord may recover attorney’s fees. The demand must be sent by registered or certified mail, return receipt requested, at least ten days before the date suit is filed. \textit{Tex. Prop. Code \S\ 24.006(a)}.

Thirty-day written notice to a residential tenant is required if the purchaser chooses not to continue the lease and the tenant timely pays rent and is not otherwise in default under the tenant’s lease after foreclosure. \textit{Tex. Prop. Code \S\ 24.005(b)}. The tenant is considered to timely pay the rent if, during the month of the foreclosure sale, the tenant pays the rent for that month to the landlord before receiving any notice that a foreclosure sale is scheduled during the month, or pays the rent for that month to the foreclosing lienholder or the purchaser at foreclosure not later than the fifth day after the date of receipt of a written notice of the name and address of the purchaser that requests payment. \textit{Tex. Prop. Code \S\ 24.005(b)}. If the purchaser intends to collect attorney’s fees at trial, the notice must state that if the tenant does not vacate the premises before the eleventh day after receipt of the notice, the landlord may recover attorney’s fees, and the demand must be sent by registered or certified mail, return receipt requested, at least ten days before the date suit is filed. \textit{Tex. Prop. Code \S\ 24.006(a)}.

\textbf{Holdover:} If the landlord does not seek recovery of attorney’s fees at trial, written notice to vacate must be given at least three days before filing a forcible detainer suit unless the parties have contracted for a shorter or longer notice period in a written lease or agreement. \textit{Tex. Prop. Code \S\ 24.005(a)}. If the lease does not include language entitling the landlord to recover attorney’s fees, and the landlord intends to seek attorney’s fees at the time of trial, the notice must state that if the tenant does not vacate the premises before the eleventh day after receipt of the notice, the landlord may recover attorney’s fees. The demand must be sent by registered or certified mail, return receipt requested, at least ten days before the date suit is filed. \textit{Tex. Prop. Code \S\ 24.006(a)}.

The landlord must also comply with the tenancy termination notice requirements of \textit{Tex. Prop. Code \S\ 91.001}. A monthly tenancy or a tenancy from month to month may be terminated by the tenant or the landlord giving notice of termination to the other. \textit{Tex. Prop. Code \S\ 91.001(a)}. If a notice of termination is given under section 91.001(a) and the rent-paying period is at least one month, the tenancy terminates on the later of (1) the day given in the notice for termination or (2) one month after the day on which the notice is given. \textit{Tex. Prop. Code \S\ 91.001(b)}. If a notice of termination is given under section 91.001(a) and the rent-paying period is less than a month, the tenancy terminates on the later of (1) the day given in the notice for termination or (2) the day following the expiration of the period beginning on the day on which notice is given and extending for a number of days equal to the number of days in the rent-paying period. \textit{Tex. Prop. Code \S\ 91.001(c)}. If a tenancy terminates on a day that does not correspond to the beginning or end of a rent-paying period, the tenant is liable for rent only up to the date of termination. \textit{Tex. Prop. Code \S\ 91.001(d)}.

The tenancy termination notice requirements of \textit{Tex. Prop. Code \S\ 91.001(a)}--(d) do not apply if the landlord and tenant have agreed in an instrument signed by both parties on a different period of notice to terminate the tenancy or that no notice is required, or there is a breach of contract recognized by law. \textit{Tex. Prop. Code \S\ 91.001(e)}.

\textbf{Forcible Entry:} When no attorney’s fees are sought, oral or written notice to vacate may demand that the party in possession vacate either immediately or by a specified deadline. \textit{Tex. Prop. Code \S\ 24.005(d)}. If the owner intends to seek attorney’s fees at the time of trial, the notice must state that if the tenant does not vacate the premises before the eleventh day after receipt of the notice, the owner may recover attorney’s fees. The demand must be sent by registered or certified mail, return receipt requested, at least ten days before the date suit is filed. \textit{Tex. Prop. Code \S\ 24.006(a)}.
Tenant of a Person Who Acquired Possession by Forcible Entry: When no attorney’s fees are sought, a three-day written notice period applies. Tex. Prop. Code § 24.005(c). If the plaintiff intends to seek attorney’s fees at the time of trial, the notice to vacate must state that if the tenant does not vacate the premises before the eleventh day after receipt of the notice, the plaintiff may recover attorney’s fees. The demand must be sent by registered or certified mail, return receipt requested, at least ten days before the date suit is filed. Tex. Prop. Code § 24.006(a).

Practice Note: The practitioner should make certain that the notice to vacate terminates solely the right to possession; avoid notices that terminate the lease. If a landlord terminates the lease as opposed to solely the right to possession of the premises, the tenant can take the position that all duties of the tenant, including the duty to maintain the premises in good condition, are terminated.

[Sections 28.22 through 28.25 are reserved for expansion.]

IV. Trial Procedure

§ 28.26 New Rules for Justice Courts


§ 28.27 Trial Procedure Generally

An eviction case is a lawsuit brought to recover possession of real property under chapter 24 of the Texas Property Code. The owner or any authorized agent may represent the owner in justice court. Tex. R. Civ. P. 500.4; Tex. Prop. Code § 24.011.

A claim for rent may be joined with an eviction case if the amount of rent due and unpaid is not more than $10,000, excluding statutory interest and court costs but including attorney’s fees, if any. Eviction cases are governed by rules 500–507 and 510 of part V of the Texas Rules of Civil Procedure. To the extent of any conflict between rule 510 and the rest of part V, rule 510 applies. Tex. R. Civ. P. 500.3(d).

The other Rules of Civil Procedure and the Rules of Evidence do not apply except when the judge hearing the case determines that a particular rule must be followed to ensure that the proceedings are fair to all parties or when otherwise specifically provided by law or the rules. Tex. R. Civ. P. 500.3(e).

§ 28.27:1 Time Periods

The filing deadlines of the parties in Tex. R. Civ. P. 510 no longer follow the mailbox rule; if a document is filed by mail and not received by the court by the due date, the court may take any action authorized by the rules, including issuing a writ of possession requiring a tenant to leave the property. Tex. R. Civ. P. 510.2.
§ 28.27:2 Jurisdiction

The justice court in the precinct in which the real property is located has exclusive original jurisdiction for eviction suits. Tex. Gov’t Code § 27.031(a)(2); Tex. Prop. Code § 24.004. “An insufficient description [of the property] in the complaint in forcible entry and detainer is not such a defect as to deprive the court of jurisdiction. The complaint can be amended in the Justice of the Peace Court.” *Family Investment Co. of Houston v. Paley*, 356 S.W.2d 353, 355–356 (Tex. Civ. App.—Houston 1962, writ dism’d). The limited concurrent probate court jurisdiction of repealed Texas Probate Code section 5A(b) did not directly carry over to the new Texas Estates Code; however, Tex. Est. Code § 32.001(b) may still vest some jurisdiction in the probate court for an eviction relating to an estate: “A probate court may exercise pendent and ancillary jurisdiction as necessary to promote judicial efficiency and economy.” It is well settled in Texas that justice courts have exclusive jurisdiction over suits for possession unless the determination of title is required to determine the issue of possession. See *McGlothlin v. Kliebert*, 672 S.W.2d 231, 232–33 (Tex. 1984); *Rice v. Pinney*, 51 S.W.3d 705, 709 (Tex. App.—Dallas 2001, no pet.). The merits of title are not adjudicated in justice courts. Tex. R. Civ. P. 510.3(e).

Certain allegations of an issue with title will not divest the justice court of jurisdiction in a suit for possession. For example, defaults leading to foreclosure under deeds of trust having language to the effect that if the property is sold under deed of trust the prior owner becomes a tenant at will or tenant at sufferance will not divest the court of jurisdiction. *Dormady v. Dinero Land & Cattle Co., L.L.C.*, 61 S.W.3d 555, 558–59 (Tex. App.—San Antonio 2001, pet. dism’d w.o.j.) (deed of trust provision stated: “If any of the property is sold under this deed of trust, [prior owner] shall immediately surrender possession to the purchaser. If [prior owner] fails to do so, [prior owner] shall become a tenant at sufferance of the purchaser, subject to an action for forcible detainer.”); see also *Falcon v. Ensignia*, 976 S.W.2d 336, 338 (Tex. App.—Corpus Christi 1998, no pet.) (“Justice courts may adjudicate possession even where issues related to the title of real property are tangentially or collaterally related to possession.”). Likewise, a justice court will not be divested of jurisdiction when a wrongful foreclosure proceeding is pending in district court after nonjudicial foreclosure sale after default under a deed of trust. *Rice*, 51 S.W.3d at 713 (holding that when deed of trust had tenant-at-sufferance reversion language, a justice or county court is not deprived of jurisdiction by existence of a title dispute but is deprived of jurisdiction only if “the right to immediate possession necessarily requires the resolution of a title dispute”) (quoting *Haith v. Drake*, 596 S.W.2d 194 (Tex. Civ. App.—Houston [1st Dist.] 1980, writ ref’d n.r.e.). A justice court will also not be divested of jurisdiction in defaults under contracts for deed that include language to the effect that after default the purchaser becomes a tenant at sufferance or tenant at will. See *Martinez v. Daccarett*, 865 S.W.2d 161, 163–64 (Tex. App.—Corpus Christi 1993, no writ).

On the other hand, other kinds of allegations of title issues will divest the justice court of jurisdiction in a suit for possession; for example, defaults under contracts for deed that do not include language to the effect that “after default, purchaser becomes a tenant at will or tenant at sufferance.” *Ward v. Malone*, 115 S.W.3d 267, 271 (Tex. App.—Corpus Christi 2003, pet. denied); *Aguilar v. Weber*, 72 S.W.3d 729, 735 (Tex. App.—Waco 2002, no pet.). Likewise, a justice court will be divested of jurisdiction when it is necessary to determine the existence of a marital life estate in the real property at issue. *Fernandez v. Mendoza*, No. 05-03-01680-CV, 2005 WL 110349, at *2–3 (Tex. App.—Dallas Jan. 20, 2005, pet. denied).

A justice court does not have jurisdiction in a forcible entry and detainer or forcible detainer suit and must dismiss if the defendant files a sworn statement alleging that the suit is based on a deed executed in violation of chapter 21A of the Texas Business and Commerce Code. Tex. Prop. Code § 24.004(b).

**Practice Note:** If a temporary restraining order issues to enjoin a suit for possession and resolution of a title dispute is not necessary to determine the issue of possession, the attorney should consider immediately moving for dissolution of the tempo-

§ 28.27:3 Venue

Mandatory venue is in the justice precinct in which all or part of the premises are located. Tex. Civ. Prac. & Rem. Code § 15.084. If the petition is filed in the wrong precinct, the court must dismiss the case; the plaintiff will not be entitled to a refund of the filing fee but will be refunded any service fees paid if the case is dismissed before service is attempted. Tex. R. Civ. P. 510.3(b).

§ 28.27:4 Sworn Complaint

The allegations of the complaint must be sworn to. Tex. R. Civ. P. 510.3(a). The complaint must include—

1. the name of the plaintiff;
2. the name, address, telephone number, and fax number, if any, of the plaintiff’s attorney, if applicable, or the address, telephone number, and fax number, if any, of the plaintiff;
3. the name, address, and telephone number, if known, of the defendant;
4. the amount of rent due and unpaid at the time of filing and within the jurisdictional limits of the court and the amount of money, if any, the plaintiff seeks;
5. the basis for the plaintiff’s claim against the defendant, including the facts and grounds for eviction, and when the eviction is based on a written residential lease the plaintiff must name all tenants obligated under the lease whom the plaintiff seeks to evict;
6. a statement about whether the plaintiff consents to e-mail service of the answer and any other motions or pleadings;
7. a description, including the address, if any, of the premises that the plaintiff seeks possession of;
8. a description of when and how the notice to vacate was delivered; and
9. a statement that attorney’s fees are being sought, if applicable.

Tex. R. Civ. P. 502.2, 510.3. The complaint must list all home and work addresses of the defendant known to the plaintiff and must state that the plaintiff knows of no other home or work addresses of the defendant in the county where the premises are located to support a judgment based on substituted service. Tex. R. Civ. P. 510.4(c). Since Tex. R. Civ. P. 510.4(c) contemplates a defendant having more than one home address, it is reasonable to require a plaintiff relying on substituted service to state that it knows that a defendant is currently living somewhere other than on the leased premises before obtaining a judgment based on substituted service by delivery to the leased premises. Thomas v. Olympus/Nelson Property Management, 148 S.W.3d 395, 400 (Tex. App.—Houston [14th Dist.] 2004, no pet.) (holding that service under former concomitant Tex. R. Civ. P. 510.4(c) would not support default judgment when sworn complaint failed to list hospital address where tenant was receiving inpatient treatment).
Additional bases for an action other than retaliatory eviction are found in the statute describing acts of the landlord that do not constitute retaliation. An eviction or lease termination based on the following circumstances, which are valid grounds for eviction or lease termination in any event, does not constitute retaliation:

1. the tenant is delinquent in rent when the landlord gives notice to vacate or files an eviction action;

2. the tenant, a member of the tenant’s family, or a guest or invitee of the tenant intentionally damages property on the premises or by word or conduct threatens the personal safety of the landlord, the landlord’s employees, or another tenant;

3. the tenant has materially breached the lease, other than by holding over, by an action such as violating written lease provisions prohibiting serious misconduct or criminal acts, except as provided by this section;

4. the tenant holds over after giving notice of termination or intent to vacate;

5. the tenant holds over after the landlord gives notice of termination at the end of the rental term and the tenant does not take action for retaliation until after the landlord gives notice of termination; or

6. the tenant holds over and the landlord’s notice of termination is motivated by a good-faith belief that the tenant, a member of the tenant’s family, or a guest or invitee of the tenant might (a) adversely affect the quiet enjoyment by other tenants or neighbors; (b) materially affect the health or safety of the landlord, other tenants, or neighbors; or (c) damage the property of the landlord, other tenants, or neighbors.


See form 28-3 in this chapter for a suit on sworn complaint.

§ 28.27:5 May Join Suit for Rent

A suit for rent may be joined with an action for forcible entry and detainer whenever the suit for rent is within the jurisdiction of the justice court and must be brought in the county and precinct in which all or part of the property is located. Tex. Civ. Prac. & Rem. Code § 15.091; Tex. R. Civ. P. 510.3(b), (d). Late fees, “insufficient funds” fees, and other amounts due under the lease may not be included in the suit for possession.

**Practice Note:** Some leases include provisions that all payments received may be applied first to nonrent monetary obligations and then to rent. When representing the landlord, the attorney should determine whether the landlord’s accounting practices and the lease allow the “carry” of a rent obligation. When representing the tenant, review the provisions of the lease and petition to determine whether the landlord is entitled to the amounts requested.

**Practice Note:** When representing the landlord, the prayer in the petition should always request all rent due as of the date of judgment.

**Practice Note:** A lease provision providing that the full month’s rent is due and owing on the first of the month should not be prorated through the day of trial unless a written lease provides otherwise. When representing the landlord and a court attempts to prorate the rent to the date of the hearing, the attorney should vigorously argue that—

1. a judgment for possession will not become final for five days and is subject to appeal for trial de novo;
2. if a writ of possession must issue and be served for the plaintiff to obtain possession, it could take up to three additional weeks during which the tenant will continue to have possession; and

3. the client has a contractual right to the full month of rent as of the rental due date under the lease.

**Practice Note:** If rent through the date of judgment would exceed the maximum jurisdictional limits of the justice court (currently $10,000), the best practice is to plead an express reservation of the right to seek rents due in a court of competent jurisdiction.

**Practice Note:** If a landlord loses an eviction suit, has joined a suit for rent, and then fails to appeal, the tenant can take the position that res judicata applies and the take-nothing judgment against the landlord created a waiver of all rent due through the time of judgment. Since the joinder of a suit for rent is optional, a landlord may elect not to take the risk of losing rent with an adverse ruling, particularly if there are notice or fact issues making the landlord’s burden of proof at trial problematic. In fact, some landlords no longer include rent with the eviction suit, as there may be additional delinquent amounts due and owing on the tenant’s account (e.g., late fees, insufficient funds fees, damages to the premises) that the landlord will send to collections after the tenant surrenders the unit.

§ 28.27:6 Request for Immediate Possession after Trial; Bond

In exigent circumstances, the party filing the suit for possession may file an immediate possession bond under the provisions of Tex. R. Civ. P. 510.5. The sole benefit to a plaintiff filing an immediate possession bond is the right to the issuance of a writ of possession on the date of trial but only if the defendant fails to appear or file a written answer and a judgment for possession is rendered by default. Tex. Prop. Code § 24.0061(b); Tex. R. Civ. P. 510.5.

The bond may be filed at any time before the final judgment in a forcible detainer action; however, the defendant must have seven days’ notice of the filing of the bond before a writ of possession issues. Tex. R. Civ. P. 510.5(a), (c).

The bond must be in an amount to be approved by the judge in the probable amount of costs of suit and damages that may result to the defendant in the event that the suit has been improperly instituted and be conditioned that the plaintiff will pay the defendant all costs and damages that are adjudged against the plaintiff. Tex. R. Civ. P. 510.5(a). The court must notify the defendant that the plaintiff has filed a possession bond in the same manner as service of citation; the notice must inform the defendant that if the defendant does not file an answer or appear for trial, and judgment for possession is granted by default, an officer will place the plaintiff in possession of the property on or after the seventh day after the date the defendant is served with the notice. Tex. R. Civ. P. 510.5(b). The court may grant immediate possession only after a bond for possession is filed and timely served after the defendant fails to answer or appear for trial and a default judgment for possession issues. Tex. Prop. Code § 24.0061(b); Tex. R. Civ. P. 510.5(c).

**Practice Note:** If the practitioner intends to file an immediate possession bond, always file it with the petition.

§ 28.27:7 Citation

After filing the sworn complaint, the justice of the peace is required to immediately issue citation directed to each defendant. Tex. R. Civ. P. 510.4. The citation must—

1. be styled “The State of Texas”;
2. be signed by the clerk under seal of court or by the judge;
3. contain the name, location, and address of the court;
4. state the date of filing of the petition;
5. state the date of issuance of the citation;
6. state the file number and the names of the parties;
7. state the plaintiff’s cause of action and relief sought;
8. be directed to the defendant;
9. state the name and address of the attorney for the plaintiff, or if the plaintiff does not have an attorney, the address of the plaintiff;
10. state the date the defendant must appear in person for trial at the court issuing citation, which must not be less than ten days nor more than twenty-one days after the petition is filed;
11. notify the defendant that if the defendant fails to appear in person for trial, judgment by default may be rendered for the relief demanded in the petition;
12. inform the defendant that, upon timely request and payment of a jury fee no later than three days before the day set for trial, the case will be heard by a jury;
13. contain all warnings required by chapter 24 of the Texas Property Code; and
14. include the following statement: “For further information, consult Part V of the Texas Rules of Civil Procedure, which is available online and also at the court listed on this citation.”

Tex. R. Civ. P. 510.4.

Personal service of citation is required by Tex. R. Civ. P. 510.4(b)(2). Alternative service by delivery to the premises is allowed when the constable, sheriff, or other person authorized by written court order is unsuccessful in serving the citation under Tex. R. Civ. P. 510.4(b); the petition lists all home and work addresses of the defendant that are known to the plaintiff (e.g., if a tenant is incarcerated, the petition must include the address of the place of incarceration) and states that the plaintiff knows of no other home or work addresses of the defendant in the county where the premises are located; and the constable, sheriff, or other person authorized files a sworn statement that it has made diligent efforts to serve such citation on at least two occasions at all addresses of the defendant in the county where the premises are located, stating the times and places of attempted service. Tex. R. Civ. P. 510.4(c)(1). A judge must promptly consider a sworn statement filed under Tex. R. Civ. P. 510.4(c)(1) and determine whether citation may be served by delivery to the premises. The plaintiff is not required to make a request or motion for alternative service. Tex. R. Civ. P. 510.4(c)(2).

If the judge authorizes service by delivery to the premises, the constable, sheriff, or other person authorized by written court order must, at least six days before the day set for trial, (1) deliver a copy of the citation with a copy of the petition attached to the premises by placing it through a door mail chute or slipping it under the front door; if neither method is possible, the officer may securely affix the citation on the front door or main entry to the premises; and (2) deposit in the mail a copy of the citation with a copy of the petition attached, addressed to defendant at the premises and sent by first-class mail. Tex. R. Civ. P. 510.4(c)(3). The constable, sheriff, or other person authorized by written court order to deliver citation must note on the return of service the date the citation was delivered and the date it was deposited in the mail. Tex. R. Civ. P. 510.4(c)(4); see also Tex.
§ 28.27:8  Defendant’s Pleadings

The defendant should always file a written answer, including a general denial. Notwithstanding Tex. R. Civ. P. 500.3(e), which provides that other rules of procedure and evidence do not apply, the defendant should always consider filing additional defensive pleadings since the court may determine that a particular rule must be followed “to ensure that the proceedings are fair to all parties.” These include the following.

**Plea to the Jurisdiction:** Although a plea to the jurisdiction can be raised for the first time on appeal, the best practice is to raise the issue in the trial court. See *Waco I.S.D. v. Gibson*, 22 S.W.3d 849, 850 (Tex. 2000) (orig. proceeding). Two of the most common pleas to the jurisdiction in response to a suit for possession are title disputes (claims that determination of title is necessary for resolution of the right to possession) and claims that the premises in question are not in the justice precinct in which the case is filed. See Tex. Gov’t Code § 27.031(a)(2); Tex. Prop. Code § 24.004; Tex. R. Civ. P. 510.3(b).

**Motion to Transfer Venue:** A traditional Tex. R. Civ. P. 86 motion to transfer venue is not the appropriate vehicle if all or part of the premises at issue are not in the justice court precinct in which the suit for possession was filed. In that event, the court must dismiss the matter for lack of jurisdiction. See Tex. Civ. Prac. & Rem. Code § 15.084; Tex. R. Civ. P. 510.3(b).

If a party in justice court believes it cannot get a fair trial before a specific judge and files a sworn motion to that effect supported by the sworn statement of two other credible persons, change is mandatory. Tex. R. Civ. P. 502.4(e).

On the written consent of all parties or their attorneys, filed with the court, venue must be transferred to the court of any other justice of the peace of the county, or any other county. Tex. R. Civ. P. 502.4(f). **Caveat:** The use of this procedure in an eviction case may create a jurisdictional issue unless the new court sits in the precinct where all or part of the premises are located.

**Motion to Abate:** A motion to abate is used to prevent the plaintiff’s case from going forward on the pleadings until the plaintiff corrects the defect. *Martin v. Dosohs I, Ltd.*, 2 S.W.3d 350, 354 (Tex. App.—San Antonio 1999, pet. denied). It must be verified. *Sparks v. Bolton*, 335 S.W.2d 780, 785 (Tex. Civ. App.—Dallas 1960, no writ). The two most common bases for abatement are that the plaintiff has no assumed name certificate (or an incorrect or expired certificate) and that the Servicemembers Civil Relief Act applies.

If the plaintiff has no, or an incorrect or expired, assumed name certificate on file, it cannot prosecute an action in the courts of Texas. Tex. Bus. & Com. Code § 71.201; *Sixth RMA Partners v. Sibley*, 111 S.W.3d 46, 55 (Tex. 2003).

Where the Servicemembers Civil Relief Act applies, at any time after the filing of the suit for possession, the court, the servicemember, or someone on behalf of the servicemember, for premises occupied or intended to be occupied primarily as a residence and for which the monthly rent does not exceed $2,400 (as adjusted for inflation after 2003), may move the court for a stay of the proceedings on the grounds that the servicemember’s ability to pay the rent is materially affected by military service. On such application, the court must stay the proceedings for a period of ninety days unless, in the opinion of the court, justice and equity require a longer or shorter period of time, or adjust the obligation under the lease to preserve the interests of all parties. 50 U.S.C. § 3951.
Death of Defendant: A suggestion of death should be filed. Thereafter, the clerk is to issue a *scire facias* to the representative of the estate to appear and defend. *Tex. R. Civ. P. 152.*

Bankruptcy of Defendant: A suggestion of bankruptcy should be filed.

Jury Demand: Request must be made three days before the trial date, and the party demanding the jury must pay the jury fee. *Tex. R. Civ. P. 510.7(b).*

Special Exceptions: The defendant, even if he is pro se, should specially except to defects in the plaintiff’s pleadings, or the defects are waived. *Tex. R. Civ. P. 90; Moore v. Sieber*, No. 06-06-00030-CV, 2006 WL 3290895, at *1 (Tex. App.—Texarkana Nov. 21, 2006, no pet.) (mem. op.).

Special Denials: The defendant should file verified denials if there is a misnomer, the plaintiff has no legal capacity to sue, the plaintiff is not entitled to recover in the capacity in which the plaintiff sues, there is a defect of parties, or any other ground under *Tex. R. Civ. P. 93.*

**§ 28.27:9 Defendant’s Affirmative Defenses**

Even though the new rules of procedure in eviction cases in justice court are limited to rule 510, the defendant may attempt to affirmatively plead affirmative and avoidance defenses it may have or the court, on objection, should disallow the defendant from introducing evidence on the defense. *Tex. R. Civ. P. 94.* Because the only issue to be decided is whether the landlord or the tenant is entitled to have possession of the premises, questions of legal title to the property, fraud, negligence, deceptive trade practices, and other theories of law not relating to the question of possession are not properly asserted in an eviction proceeding.

The defendant in one eviction proceeding offered as a defense proof of the following facts: the property owners had entered into an oral contract to sell the property to the occupants, the occupants had entered into possession of the property and made valuable improvements to it, the owners were attempting to perpetrate a fraud on the occupants through a forcible detainer suit, and the owners had filed the suit in retaliation for the occupants having brought a disciplinary proceeding against the owners’ son, who was an attorney. The court of appeals held that these questions had no relevancy to the question in the forcible detainer suit of which party had the right to immediate possession of the premises, and evidence pertaining to those affirmative defenses was inadmissible in that suit. *Fandey v. Lee*, 880 S.W.2d 164, 169–70 (Tex. App.—El Paso 1994, writ denied).

The most common affirmative defenses to a suit for possession are the following.

**Insufficient Notice:** The landlord failed to expressly comply with all the notice-to-vacate requirements under *Tex. Prop. Code § 24.005.*

**Payment:** The defendant includes an account stating distinctly the nature of the payments and the payments made. *Tex. R. Civ. P. 95.*

**Release; Estoppel; Waiver:** Where the appellant housing authority entered into a new lease two days after it perfected appeal by filing an appeal bond, the housing authority waived the right to sue for possession. *Joseph v. Beaumont Housing Authority*, 99 S.W.3d 765, 766 (Tex. App.—Beaumont 2003, no pet.) (per curiam).
Most standard commercial leases contain a nonwaiver clause. In such cases the contract controls, and acts of the landlord may not constitute a waiver of any other covenants the tenant is required to perform. In *Shields Ltd. Partnership v. Bradberry*, 526 S.W.3d 471, 475 (Tex. 2017), the court held that a party by its conduct may waive a nonwaiver clause but that engaging in the very conduct disclaimed as a basis for waiver is insufficient as a matter of law to nullify a nonwaiver provision. Absent such a paragraph, a landlord should be aware that only slight acts on his part may waive his right to enforce the lease. See *G. Murphy Co. v. Lack*, 404 S.W.2d 853, 858–59 (Tex. Civ. App.—Corpus Christi 1966, writ ref’d n.r.e.). If the landlord has notice of a breach of the lease, any recognition by the landlord of the continued tenancy of the tenant will have the effect of a waiver of the landlord’s right to terminate the lease. The refusal of the landlord to accept timely tender of rent may constitute a waiver of the landlord’s right to declare the lease in default unless there is a new breach. *Harris v. Ware*, 93 S.W.2d 598, 599–600 (Tex. Civ. App.—Waco 1936, writ ref’d). The landlord who accepts rent from a tenant after full notice of a breach of a covenant or condition in the lease for which a forfeiture might have been demanded waives his right to declare a forfeiture for the breach until a new breach occurs. *Theophilakos v. Costello*, 54 S.W.2d 203, 205 (Tex. Civ. App.—Waco 1932, no writ). The right to terminate a lease for failure to make payments when due is waived by assurances from the landlord that the tenant need not worry about timely payments. *Ada Oil Co. v. Logan*, 447 S.W.2d 205, 209 (Tex. Civ. App.—Houston [14th Dist.] 1969, no writ). The landlord’s acceptance of partial payment of rent does not necessarily preclude his right to terminate the lease. *Jowell v. Pearsall*, 331 S.W.2d 514, 515 (Tex. Civ. App.—Texarkana 1959, no writ). Acceptance of rent for the premises after taking proper legal steps to terminate the lease for cause is not a waiver of the landlord’s right to repossess the premises unless the facts show an intent to waive. *Crawford v. Texas Improvement Co.*, 196 S.W. 195, 197 (Tex. Civ. App.—El Paso 1917, writ dism’d). A landlord who has been very indulgent in allowing rents to become overdue cannot be precluded from terminating the lease. *McCray v. Kelly*, 130 S.W.2d 458, 462 (Tex. Civ. App.—Galveston 1939, writ dism’d).


**Failure of Condition Precedent:** An example is the failure to deliver the prior notification when the plaintiff uses a conditional notice to vacate with a right to cure by payment. See Tex. Prop. Code § 24.005(i).


**Usury:** Though often attempted as a defense by tenants, usury does not apply to real property leases because the lease is not for the retention or forbearance of money. *Apparel Manufacturing Co., Inc. v. Vantage Properties, Inc.*, 597 S.W.2d 447, 449 (Tex. Civ. App.—Dallas 1980, writ ref’d n.r.e.). The court held that a lease transaction is not a lending transaction and therefore does not meet the definition of usury. In *River Oaks Shopping Center v. Pagan*, 712 S.W.2d 190, 192 (Tex. App.—Houston [14th dist.] 1986, writ ref’d n.r.e.), the court found that all rent due under the lease was incurred at the time of the execution of the lease and the subsequent rental payments were merely the time in which the tenant had to repay it.

**Deceptive Trade Practices:** In a commercial lease there exists an implied warranty that the premises are suitable for their intended commercial purposes. *Davidow v. Inwood North Professional Group—Phase I*, 747 S.W.2d 373, 377 (Tex. 1988). The Davidow court held that the tenant’s obligation to pay rent and the landlord’s implied warranty of suitability are mutually dependent. That is, a breach of the warranty authorizes an abatement of rent. *Davidow*, 747 S.W.2d at 377. See Tex. Prop. Code §§ 92.052, 92.056 for a landlord’s duty to repair in residential lease contexts.

**Covenant of Quiet Enjoyment:** Most leases provide an express covenant of quiet enjoyment of the premises. If the lease does not provide it, the law implies such a covenant. The covenant, then, is best defined as one in which the tenant shall not be evicted or disturbed by the lessor. In *Goldman v. Alkek*, 850 S.W.2d 568, 570–72 (Tex. App.—Corpus Christi 1993, no writ),
the court held that the landlord breached the covenant of quiet enjoyment when the landlord made demands for additional amounts of money not required by the lease, the tenant paid the additional amounts, and the landlord attempted to terminate the lease, because such an action would sufficiently show that actions of the landlord hindered the tenant and his occupation in the enjoyment of the leased premises.

By virtue of the covenant of quiet enjoyment, a legal duty has been found on the part of the landlord to protect the tenant from disturbance that may be created by the acts of tenants of an adjoining portion of the building. *Maple Terrace Apartment Co. v. Simpson*, 22 S.W.2d 698, 700 (Tex. Civ. App.—Texarkana 1929, no writ).

**Constructive Eviction:**  Constructive eviction is an intentional act or omission of the landlord permanently depriving a tenant, without his consent, of the use and beneficial enjoyment of the premises or any substantial part thereof so that the tenant abandons the premises. *Hoover v. Wukasch*, 274 S.W.2d 458, 460 (Tex. Civ. App.—Austin 1955, writ ref’d n.r.e.). Constructive eviction has been defined as having four distinct elements: (1) intent on the landlord’s part that the tenant no longer enjoy the premises, (2) a material act by the landlord substantially interfering with the use and enjoyment of the premises for the purpose for which they were let, (3) an act that permanently deprives the tenant of the use and enjoyment of the premises, and (4) an abandonment of the premises by the tenant within a reasonable time of the commission of the act. *Briargrove Shopping Center v. Vilar Joint Venture, Inc.*, 647 S.W.2d 329, 334 (Tex. App.—Houston [1st Dist.] 1982, no writ). The landlord’s intent may be inferred from the circumstances. *Lazell v. Stone*, 123 S.W.3d 6, 12 (Tex. App.—Houston [1st Dist.] 2013, pet. denied) (changing locks and informing commercial tenant that she is not welcome on property was evidence of intent to constructively evict). Cf. *Quitta v. Fossati*, 808 S.W.2d 636, 643 (Tex. App.—Corpus Christi 1991, writ denied) (landlord’s threat to “get the sheriff” was not evidence of constructive eviction). A tenant cannot complain that the landlord constructively evicted him when the eviction results from the actions of third parties acting without the landlord’s authority or permission; the act or omission complained of must be that of the landlord. *Fidelity Mutual Life Insurance Co. v. Kaminsky*, 768 S.W.2d 818, 820, 822 (Tex. App.—Houston [14th Dist.] 1989, no writ) (landlord is not responsible for actions of third parties when landlord does not permit third party to act; act or omission complained of must be that of landlord and not merely of third party acting without landlord’s authority or permission).

The proper measure of general damages for wrongful eviction of a tenant by a landlord is the difference between the market rental value of the leasehold for the unexpired term of the lease and stipulated rentals. It is the object and purpose of the law to compensate a tenant who has been wrongfully evicted from the premises for the actual loss sustained. This does not include special damages, such as lost profits. *Briargrove Shopping Center*, 647 S.W.2d at 336.

Texas law relieves tenants of contractual liability for any remaining rentals due under the lease if they can establish constructive eviction by the landlord. *Downtown Realty v. 509 Tremont Building, Inc.*, 748 S.W.2d 309, 312 (Tex. App.—Houston [14th Dist.] 1988, no writ). A landlord’s acts or omissions can form the basis of a constructive eviction. See *Steinberg v. Medical Equipment Rental Services, Inc.*, 505 S.W.2d 692, 677 (Tex. Civ. App.—Dallas 1974, no writ).

S.W.2d 813, 817 (Tex. App.—Galveston 1956, writ ref’d n.r.e.). If the lease calls for written notice to the landlord before the landlord has the duty to make repairs, and the tenant fails to give written notice, the tenant cannot rely on the landlord’s failure to make the repairs as constructive eviction. Hoover v. Wukasch, 274 S.W.2d 458, 460 (Tex. Civ. App.—Austin 1955, writ ref’d n.r.e.). An eviction is not established where it appears that the tenant vacated the premises voluntarily or left for reasons other than the conduct of the landlord. Nabors v. Johnson, 51 S.W.2d 1081, 1082 (Tex. Civ. App.—Waco 1932, no writ); Ogus, Rabinovich & Ogus Co. v. Foley Bros. Dry Goods Co., 252 S.W. 1048, 1052 (Tex. Comm’n App. 1923).

**Termination:** If the landlord elects to terminate a lease because of some default by the tenant, the landlord may not recover future rentals from the lease. Glasscock v. Console Drive Joint Venture, 675 S.W.2d 590, 592 (Tex. App.—San Antonio 1984, writ ref’d n.r.e.). This case is interesting in that it was submitted on an agreed statement of facts. The landlord stipulated in open court that the exhibits were true and correct copies of the instruments and to the truth of the matters contained in them. One of the exhibits was the landlord’s verified petition for forcible detainer, which contained a statement consistent with the lease agreement that the landlord may exercise the option to terminate the lease. The landlord lost its future rentals claim.

A tenant cannot unilaterally terminate a lease absent a breach of the landlord. Abandonment by the tenant does not terminate a contract. Stubbs v. Stuart, 469 S.W.2d 311, 312–13 (Tex. Civ. App.—Houston [14th Dist.] 1971, no writ). In Crawford v. Haywood, 392 S.W.2d 387, 389 (Tex. Civ. App.—Corpus Christi 1965, no writ), the court held that mere abandonment and declaration of intention not to pay rent does not abrogate the landlord’s rights under the lease. Suing under the lease for rents is an affirmation of the lease. Meehan v. Pickett, 463 S.W.2d 481, 484 (Tex. Civ. App.—Beaumont 1971, writ ref’d n.r.e.).

A tenant vacating the leased premises has a duty to notify the landlord of its departure. Until notification is effective and terminates the tenancy, the tenant remains in legal possession of the premises and is responsible for damages to the leasehold. Flores v. Rizik, 683 S.W.2d 112, 116 (Tex. App.—San Antonio 1984, no writ).

Surrender of a lease held by the tenant and acceptance of possession by the landlord ordinarily releases the tenant from liability for rents that would thereafter accrue. Whether there has been an acceptance by the landlord that releases the tenant from further obligations under the lease involves determining the intent of the parties. Southmark Management Corp. v. Vick, 692 S.W.2d 157, 159 (Tex. App.—Houston [1st Dist.] 1985, writ ref’d n.r.e.). A landlord, of course, can agree to release a tenant from liability under a lease. Franchise Stores Realty Corp. v. Dakri, 721 S.W.2d 397, 398 (Tex. App.—Houston [1st Dist.] 1986, no writ); but see Schecter v. Folsom, 417 S.W.2d 180, 182–83 (Tex. Civ. App.—Dallas 1967, no writ) (letter advising tenant that if tenant did not cure default and payment of rent within ten days landlord would file forcible entry and detainer suit did not constitute notice by landlord that lease was forfeited when suit was never filed).

**Election of Remedies:** Generally, the filing of a forcible detainer suit or the removal of a tenant is not an election of remedies. See McHaney v. Hackleman, 347 S.W.2d 822, 826–27 (Tex. Civ. App.—San Antonio 1961, writ ref’d n.r.e) (“[T]he law is well settled that the mere institution of suit, which is not prosecuted to judgment, or the application for a remedy, does not constitute an election of remedies, unless the litigant has received some benefit or his opponent has suffered some loss or detriment.”); but see Carter v. Long, 455 S.W.2d 812 (Tex. Civ. App.—Texarkana 1970, writ ref’d n.r.e.) (landlord’s action of filing forcible detainer suit had effect of evicting tenant from premises, and by landlord’s action of eviction, he terminated lease by retaking possession of premises; those acts constituted an election of remedies in that landlord elected to terminate agreement and retook exclusive possession rather than seek remedies under agreement).

**Disposal of Property or Conversion (Commercial Tenancies):** Tex. Prop. Code § 93.002(e) gives the commercial landlord the right to remove and store any abandoned property of the tenant that remains on the premises. In addition to the com-
ercial landlord’s other rights, the landlord may dispose of the property sixty days after the date the property is stored. To do this, the landlord must deliver, by certified mail to the tenant at the tenant’s last known address, a notice stating that the landlord may dispose of the tenant’s property if the tenant does not claim the property within sixty days of the date the property is stored. Tex. Prop. Code § 93.002(e).

In Wilson v. Moore, 122 S.W. 577, 579 (Tex. Civ. App. 1909, no writ), the court held that conversion of the tenant’s property was not found because the tenant was requested to take the property. The tenant voluntarily left the property and the landlord did not make any claim on or assume any ownership over it. In Alsbury v. Linville, 214 S.W. 492, 495 (Tex. Civ. App.—San Antonio 1919, writ dism’d w.o.j.), the court held that landlords are authorized to take possession of the premises upon abandonment by tenants.

Landlords taking possession of abandoned premises are required to safely care for the property left at the premises by the tenant. When a landlord, upon abandonment of the premises, retook possession to remove personal belongings of the tenant without intent to appropriate the belongings and so held the property subject to the tenant’s order, he was not guilty of conversion of the belongings. See American Cotton Co-op Ass’n v. Plainview Compress & Warehouse Co., 114 S.W.2d 689 (Tex. Civ. App.—Amarillo 1938, writ dism’d). The court held that one who is rightfully in possession of property, although the legal title thereto may be in another, is not guilty of conversion. To establish allegations of conversion it must be shown that the person charged unlawfully exercised dominion and control over the property of another to the exclusion of the exercise of the right of possession by the owner or some other person entitled to its possession. American Cotton Co-op Ass’n, 114 S.W.2d at 692–94. Assuming a valid initial taking of the property by the landlord, it is well settled that there is a corresponding obligation on the part of the landlord to safely care for such property and keep it for the benefit of the owner until the demanded rent has been paid. Johnson v. Lane, 524 S.W.2d 361, 364 (Tex. Civ. App.—Dallas 1975, no writ). In Prewitt v. Branham, 643 S.W.2d 122, 123 (Tex. 1982), the supreme court held that where there was a forged signature on a lease agreement for realty, there could be a conversion of the document in which the rights were conferred.

In forcible detainer suits the landlord, in removing a tenant’s property after a successful suit, has no duty to protect or store the property of the tenant. When the tenant was served with process and notice to vacate the premises, the notice required that the tenant remove the person and the personal property. When the tenant failed to remove property as required under a forcible detainer suit, the tenant placed its property at risk. Conroy v. Manos, 679 S.W.2d 124, 126 (Tex. App.—Dallas 1984, writ ref’d n.r.e.).

Time of the Essence: Generally in contracts, and specifically in real estate transactions, time is not of the essence unless the express agreement of the parties makes it so. When time is not of the essence a contract need not necessarily be performed precisely at the agreed time. A party has a reasonable time in which to perform the contract. Montgomery v. Montgomery, 99 S.W. 1145, 1147 (Tex. Civ. App.—Dallas), aff’d, 105 S.W. 38 (Tex. 1907). When time is of the essence in a contract, a party must perform or tender performance in literal compliance with the provisions about time to avoid a forfeiture or to entitle him to enforce a contract in a suit for specific performance. Heffington v. Gillespie, 176 S.W.2d 205, 211–12 (Tex. Civ. App.—Fort Worth 1943, no writ); see also Maxwell v. Lake, 674 S.W.2d 795 (Tex. App.—Dallas 1984, no writ). Language clearly showing an intention that time be of the essence is required to be in the contract. See Nicholason v. Whyte, 236 S.W. 770, 773 (Tex. Civ. App.—Dallas 1921, no writ). However, where time is of the essence as expressly shown in the contract, such performance may be extended by the parties’ waiver of strict compliance. Hage v. Westgate Square Commercial, 598 S.W.2d 709, 711 (Tex. Civ. App.—Waco 1980, writ ref’d n.r.e.). The waiver may be shown by parol evidence or course of dealing. Hage, 598 S.W.2d at 712. Most lease contracts contain time-is-of-the-essence clauses.
Failure of Consideration: In conjunction with a breach of the covenant of quiet enjoyment or a breach of warranty of suitability, tenants can plead a failure of consideration. Failure of consideration occurs when, because of some supervening cause after an agreement is reached, the promised performance fails. *Sutters v. Thomas Bearden Co.*, 152 S.W.3d 607 (Tex. App.—Houston [1st Dist.] 2004, no pet.). Failure of consideration may result as a consequence of fraud, mutual mistake, or failure of one party to perform its obligation under an agreement that the purported property is not what it was represented by the buyer. 14 Tex. Jur. 3d *Contracts* § 107. However, breach of a covenant in a contract for the sale of land will not necessarily amount to a failure of consideration. *Lozano v. Meyers*, 8 S.W.2d 785, 787 (Tex. Civ. App.—San Antonio 1928), aff’d, 18 S.W.2d 588 (Tex. Comm’n App. 1929).

Exercising Option to Renew: Exercise of an option to renew, unless excused in rare cases of equity, must be unqualified, unambiguous, and strictly in accordance with the terms of the agreement. *Zeidman v. Davis*, 342 S.W.2d 555, 558 (Tex. 1961); *Meadows v. Midland Super Block Joint Venture*, 255 S.W.3d 739, 743 (Tex. App.—Eastland 2008, no pet.). Generally, when a contract requires only that one party notify the other, and the matter is not defined in the contract, notice occurs when it is mailed. *Brown v. Swift-Eckrich, Inc.*, 787 S.W.2d 599, 600 (Tex. App.—El Paso 1990, writ denied). But see *Meadows*, 255 S.W.3d at 743–45 (where lease required that renewal notice in form of next month’s rent check for month-to-month lease be received by first day of the month, renewal was untimely, even though it had been accepted in this fashion for fourteen years).

§ 28.27:10 Postponement

Trial in an eviction case must not be postponed for more than seven days unless both parties agree in writing. Tex. R. Civ. P. 510.7(c).

§ 28.28 Trial

The issues to be adjudicated at trial in a forcible-detainer proceeding are—

1. possession—the right to actual possession;
2. rent—the amount of delinquent rent due at the time of judgment (if pleaded);
3. attorney’s fees—the attorney’s fees incurred by the plaintiff; and
4. court costs—court costs.


In a forcible-entry-and-detainer proceeding, the plaintiff has the burden to prove the additional element that the defendant “entered the real property of another without legal authority or force.” *Yarto v. Gilliland*, 287 S.W.3d 83, 87 n.3 (Tex. App.—Corpus Christi 2009, no pet.).

The plaintiff must prove facts corresponding to the bases stated in the notice to vacate delivered to the defendant. *Nealy v. Southlawn Palms Apartments*, 196 S.W.3d 386, 395 (Tex. App.—Houston [1st Dist.] 2006, no pet.) (where notice to vacate listed “owner desires possession” and “undesirable tenant behavior” as grounds, proof that defendant loitered on the premises, police responded to two assault incidents at defendant’s unit, defendant rode a four-wheeler in pedestrian area of the apartments, and that there were two police reports that defendant “mooned” other tenants and maintenance personnel did not fit into the grounds stated in the notice to vacate and defendant properly objected). The failure to object to the introduction of facts outside the provisions of the notice to vacate results in trial by consent in a suit for possession. *Torres v. Corpus Christi*
Counterclaims and the joinder of suits against third parties are not permitted in an eviction case, Tex. R. Civ. P. 510.3(d), however, attorney’s fees for defending possession may be awarded on appeal to county court. Tex. R. Civ. P. 510.11.

§ 28.28:1 Selected Issues at Trial

No Innocent Tenant Defense in Publicly Subsidized Housing: A public housing agency may, in its discretion, evict a tenant for drug-related activity whether or not tenant knew, or should have known, about the activity as there is no exception in 42 U.S.C. § 1437d(l)(6) for innocent tenants. Department of Housing and Urban Development v. Rucker, 535 U.S. 125, 130–31 (2002).


Forty-Nine-Day Period between Notice to Vacate after Foreclosure and Filing of Suit for Possession Not Unreasonable: After foreclosure sale, a forty-nine-day period between the notice to vacate and the filing of the suit for possession is not unreasonable where there is no testimony that there was a lease between the parties and that rent was paid. See Potter v. Mullen, No. 05-04-00014-CV, 2005 WL 1316122, at *3 (Tex. App.—Dallas June 3, 2005, pet. denied).

Interpreters: By failing to object to proceeding without an interpreter, a party waives the right to challenge the issue on appeal. Martinez v. Cherry Avenue Mobile Home Park, 134 S.W.3d 246, 248–50 (Tex. App.—Amarillo 2003, no pet.).


§ 28.28:2 Judgment

If the judgment is in favor of the plaintiff, the judge must render judgment for possession of the premises, costs, delinquent rent as of the date of entry of the judgment, if any, and attorney’s fees if recoverable by law. Tex. R. Civ. P. 510.8(b). If the judgment or verdict is in favor of the defendant, the judge must render judgment against the plaintiff for costs and attorney’s fees if recoverable by law. Tex. R. Civ. P. 510.8(c). A judgment in a proceeding for forcible detainer does not have res judicata effect with respect to other issues related to the lease other than the right to immediate possession of the property. Buttery v. Bush, 575 S.W.2d 144, 146 (Tex. Civ. App.—Tyler 1978, writ ref’d n.r.e.); see also McGlothlin v. Kliebert, 672 S.W.2d 231, 233 (Tex. 1984) (“The forcible entry and detainer action is not exclusive, but cumulative, of any other remedy that a party may have in the courts of this state.”); Aguilar v. Weber, 72 S.W.3d 729, 732 (Tex App.—Waco 2002, no pet.) (“[F]orcible detainer actions in justice court may be brought and prosecuted concurrently with suits to try title in district court.”); Dormady v. Diner Land & Cattle Co., L.L.C., 61 S.W.3d 555, 558 (Tex. App.—San Antonio 2001, pet. dism’d w.o.j.) (“[P]arties may pursue both a forcible detainer action in justice court and a suit to quiet title in district court.”).
Each judgment in a nonpayment-of-rent case involving residential property must include a finding of the amount of rent due by the tenant for each rental pay period during an appeal, and, where a portion of rent is paid by a government agency, the portion of rent paid by the tenant and the portion of the rent paid by the government agency. Tex. Prop. Code § 24.0053(a).

If an eviction case is based on nonpayment of rent and the tenant’s rent during the rental agreement term has been paid wholly or partly by a government agency, either party may contest the portion of the rent that the justice court determines must be paid into the county court registry by the tenant under Tex. Prop. Code § 24.0053. The contest must be filed on or before the fifth day after the date the justice signs the judgment. If a contest is filed, not later than the fifth day after the date the contest is filed the justice court shall notify the parties and hold a hearing to determine the amount owed by the tenant in accordance with the terms of the rental agreement and applicable laws and regulations. After hearing the evidence, the justice court shall determine the portion of the rent that must be paid by the tenant under Tex. Prop. Code § 24.0053. Tex. Prop. Code § 24.0053(c). If the tenant objects to the court’s ruling, the tenant must pay into the court registry only the portion of the rent the tenant claims to be due until the issue is decided de novo at the hearing on the merits in county court or upon the landlord’s motion to reconsider in county court. Tex. Prop. Code § 24.0053(d).

§ 28.28:3 Attorney’s Fees

Leases usually provide for reasonable attorney’s fees for enforcing a lien or collecting delinquent rent. Also, Tex. Civ. Prac. & Rem. Code § 38.001 allows for recovery of attorney’s fees in suits based on contract. For a discussion of attorney’s fees, see part III. in chapter 1 of this manual.

§ 28.28:4 No Motion for New Trial

No motions for new trial are allowed. Tex. R. Civ. P. 510.8(e). The erroneous filing of a motion for new trial does not extend the time period for appeal. RCJ Liquidating Co. v. Village, Ltd., 670 S.W.2d 643, 644 (Tex. 1984) (per curiam).

§ 28.29 Appeal

§ 28.29:1 Perfecting Appeal

An appeal is perfected when a bond, cash deposit, or sworn statement of inability to pay is timely filed. Tex. R. Civ. P. 510.9(f). The bond, cash deposit, or sworn statement of inability to pay must be filed with the justice court within five days after the judgment is signed. Tex. R. Civ. P. 510.9(a). The failure to timely file an appeal bond is jurisdictional. State v. Jones, 220 S.W.3d 604, 608 (Tex. App.—Texarkana 2007, no pet.).

The judge is to set the amount of the bond to be filed or cash deposit to be made to include the damages accruing during the appeal (rents), attorney’s fees, and court costs. Tex. R. Civ. P. 510.9(b), 510.11. The rules no longer promulgate a form of bond; under former and now repealed Tex. R. Civ. P. 750, the supreme court had promulgated a form that may still be accepted by many courts:

The State of Texas, County of __________

Whereas, upon a writ of forcible entry (or forcible detainer) in favor of A.B., and against C.D., tried before ________, a Justice of the Peace of __________ County, a judgment was rendered in favor of A.B. on the ___ day of __, A.D., and against the said C.D., from which the C.D. has appealed to the county court; now therefore, the said
C.D. and his sureties, covenant that he will prosecute his said appeal with effect and pay all costs and damages which may be adjudged against him, provided the sureties shall not be liable in an amount greater than $____, said amount being the amount of the bond herein.

Given under our hands this ____ day of ____, A.D.

Signature of Principal

Signatures of Sureties

Tex. R. Civ. P. 750, repealed 2013. See Texas Supreme Court, Final Approval of Rules for Justice Court Cases, Misc. Docket No. 13-9049 (Apr. 15, 2013), 76 Tex. B.J. 440 (2013). Other courts may require specific affidavits of the sureties listing non-exempt property subject to execution. Within five days of the filing of the bond or cash deposit, the appellant must serve notice of the appeal via hand delivery, mail, courier with receipt, fax, e-mail if the party consented to service by e-mail, or any other method authorized by the court. Tex. R. Civ. P. 510.9(d), 501.4. Failure to serve notice of the filing of the appeal bond is not jurisdictional. Mitchell v. Armstrong Capital Corp., 877 S.W.2d 481, 481–82 (Tex. App.—Houston [14th Dist.] 1994, no writ).

A defective appeal bond vests jurisdiction in the county court subject to amendment of the bond. Family Investment Co. of Houston v. Paley, 356 S.W.2d 353, 355 (Tex. Civ. App.—Houston 1962, writ dism’d). A bond may be contested by the same procedure as in a sworn statement of inability to pay; see the following paragraphs.

**Sworn Statement of Inability to Pay:** In addition to perfecting the tenant’s appeal, the filing of a sworn statement of inability to pay perfects the right of the tenant to remain in possession of the leased premises during the pendency of the appeal. See Tex. Prop. Code § 24.0054(a–3); Tex. R. Civ. P. 510.9(c)(5)(B). In nonpayment-of-rent cases in which a sworn statement of inability to pay is filed, the tenant has the additional requirement to deposit into the court registry the amount of the tenant’s monthly rent on a regular basis. Tex. Prop. Code § 24.0053(a–3), (b). The justice court must make available a blank form of the sworn statement of inability to pay for the use of an appealing tenant. Tex. Prop. Code § 24.0052(b).

The affidavit must contain—

1. the tenant’s identity;
2. the nature and amount of the tenant’s employment income;
3. the income of the tenant’s spouse, if applicable and available to the tenant;
4. the nature and amount of any government entitlement income of the tenant;
5. all other income of the tenant;
6. the amount of available cash and funds available in savings or checking accounts of the tenant;
7. real and personal property owned by the tenant;
8. the tenant’s debts and monthly expenses;
9. the number and age of the tenant’s dependents and where those dependents reside; and
10. the following statement: “I am unable to pay court fees. I verify that the statements made in this statement are true and correct.”

Tex. Prop. Code § 24.0052(a); Tex. R. Civ. P. 510.9(c), 502.3(b).
The court must promptly notify all other parties of the filing of a sworn statement of inability to pay, Tex. Prop. Code § 24.0052(c), no later than the next business day. Tex. R. Civ. P. 510.9(d). A landlord may contest the sworn statement of inability to pay on or before the fifth day after the date the affidavit is filed. If the landlord contests the affidavit, the justice court shall notify the parties and hold a hearing to determine whether the tenant is unable to pay the costs of appeal or file an appeal bond. The hearing shall be held no later than the fifth day after the date the landlord notifies the court clerk of the landlord’s contest. At the hearing, the tenant has the burden to prove by competent evidence, including documents or credible testimony of the tenant or others, that the tenant is unable to pay the costs of appeal or file an appeal bond. Tex. Prop. Code § 24.0052(d).

If the justice court approves the affidavit, the tenant does not have to pay the filing fee of the county court or file an appeal bond to perfect the appeal. Tex. Prop. Code § 24.0052(e). If the justice court disapproves the affidavit, the tenant may, within five days, appeal the disapproval to the county court for resolution. The county court must set the hearing within five days and hear the contest de novo. If the affidavit is approved by the county court, the court must direct the justice court to transmit to the county clerk the transcript, records, and papers of the case. Tex. R. Civ. P. 510.9(c)(3). If the county court disapproves the affidavit, the tenant may still perfect the appeal by posting an appeal bond or making a cash deposit within one business day. Tex. R. Civ. P. 510.9(c)(4).

Practice Note: When representing the landlord, the attorney should consider not contesting the affidavit of inability to pay as it will inordinately delay final judgment.

Once an appeal is perfected, the judge must stay all further proceedings on the judgment and must immediately send to the clerk of the county court a certified copy of all docket entries, a certified copy of the bill of costs, and the original papers in the case together with any money in the court registry, including the sums deposited after the filing of the sworn statement of inability to pay. Tex. R. Civ. P. 510.10(a).

Payment of Filing Fee in County Court: If a bond or cash deposit was filed to perfect the appeal, the appellant must pay the filing fee in county court within twenty days of notification that the transcript was received; otherwise the appeal is deemed not perfected and the transcript and file documentation is returned to the justice court, which may proceed as though no appeal had been perfected. Tex. R. Civ. P. 143a. If an affidavit of inability to pay is not contested or is otherwise approved after being contested by the landlord, no filing fee is due in the county court.

Practice Note: A tenant/appellant may file an appeal bond solely to extend his right to possession and then fail to pay the filing fee in county court to extend that right for the twenty days that Tex. R. Civ. P. 143a allows. When representing the landlord, the attorney should consider immediately paying the filing fee and immediately set the trial de novo in county court.

§ 28.29:2 Tenant’s Right to Maintain Possession during Appeal

If the appeal was perfected on the basis of an appeal bond, the tenant is entitled to maintain possession of the property during the appeal.

Appeal Based on Sworn Statement of Inability to Pay: If the breach is for nonpayment of rent and the tenant has appealed by filing a sworn statement of inability to pay, the justice court must provide to the tenant a written notice at the time the sworn statement of inability to pay is filed that contains the following information in bold or conspicuous type:
1. the amount of the initial deposit of rent, equal to one rental period’s rent under the terms of the rental agreement, that the tenant must pay into the justice court registry;

2. whether the initial deposit must be paid in cash, cashier’s check, or money order, and to whom the cashier’s check or money order, if applicable, must be made payable;

3. the calendar date by which the initial deposit must be paid into the justice court registry, which must be within five days of when the sworn statement of inability to pay was filed; and

4. a statement that failure to pay the required amount into the justice court registry may result in the court issuing a writ of possession without hearing.


A tenant who files a sworn statement of inability to pay is entitled to stay in possession of the premises during the pendency of the appeal by complying with the following procedure:

1. Within five days of the date that the tenant/appellant files a sworn statement of inability to pay, the tenant/appellant must pay into the justice court registry the amount set forth in the notice provided at the time the tenant/appellant filed the statement.

2. During the appeal process as rent becomes due under the rental agreement, the tenant/appellant must pay the designated amount into the court registry within five days of the rental due date under the terms of the rental agreement.

3. If the tenant/appellant fails to pay the rent into the court registry within the time limits prescribed by these rules, the appellee may file a notice of default in county court. Upon sworn motion by the appellee and a showing of default to the judge, the court shall issue a writ of possession.

4. The landlord/appellee may withdraw any or all rent in the county court registry upon (a) sworn motion and hearing, prior to final determination of the cause, showing just cause; (b) dismissal of the appeal; or (c) order of the court upon final hearing.

5. All hearings and motions under this rule shall be entitled in precedence in the county court.

Tex. R. Civ. P. 510.9(c)(5)(B).

Some justice courts and some attorneys mistakenly believe the timely payment of the designated amount into the registry of the court is a jurisdictional prerequisite to perfect the tenant’s appeal of a nonpayment-of-rent case. The sole effect of the timely payment of the designated sum into the registry of the court is to perfect the tenant’s right to maintain possession of the premises during the pendency of the appeal, as a default judgment on the case in chief is not authorized by a tenant/appellant’s default under Tex. R. Civ. P. 510.9(c)(5)(B). Kennedy v. Highland Hills Apartments, 905 S.W.2d 325, 327 (Tex. App.—Dallas 1995, no writ) (examining the predecessor to Tex. R. Civ. P. 510.9(c)(5)(B)).

Recovering Possession for Tenant/Appellant’s Failure to Pay Rent into Court Registry (Nonpayment-of-Rent Cases Only):  When the tenant/appellant fails to comply with the requirements to pay rent into the registry of the court in nonpayment-of-rent cases, the procedure for the landlord/appellee to recover possession is as follows:

1. Limited jurisdiction of justice court. If the tenant/appellant was provided with notice under Tex. R. Civ. P. 510.9(c)(5)(A), fails to pay the designated amount into the justice court registry within five days, and the transcript has not been transmitted to the county clerk, the landlord is entitled, upon request and payment of the applicable fee,
to a writ of possession, which the justice court must issue immediately and without hearing. Tex. R. Civ. P. 510.9(c)(5)(B)(i)

2. Jurisdiction vested in county court. Once the transcript has been transmitted by the justice court clerk to the county clerk, the only court having jurisdiction of the determination of the failure of the tenant/appellant to timely deposit the designated amounts into the registry of either the justice court or the county court is the county court. See Tex. Prop. Code § 24.0054(b). Some justice courts mistakenly “hold” the tenant’s appeal, in violation of the requirement to immediately deliver the transcript to county court under Tex. R. Civ. P. 510.10(a), “waiting” on the tenant to pay the designated amount into the registry of the justice court. See Tex. R. Civ. P. 510.10(a).

3. Motion to obtain possession in county court for failure to deposit the designated amount. If the tenant/appellant fails to pay the designated amount into either court registry within the proper time limits set forth in Tex. R. Civ. P. 510.9(c)(5)(B), the landlord may file a sworn motion in county court that the tenant/appellant is in default. The landlord must notify the defendant of the motion and hearing date. Upon a showing that the tenant/appellant is in default, the county court must issue a writ of possession, unless on or before the day of the hearing the tenant/appellant pays into the court registry all rent not paid into the court registry pursuant to Tex. R. Civ. P. 510.9(c)(5)(B)(iv), and the landlord’s reasonable attorney’s fees in filing the sworn motion. Tex. Prop. Code § 24.0054(b); Tex. R. Civ. P. 510.9(c)(5)(B)(iv).

4. Issuance and service of writ of possession issued under Tex. Prop. Code § 24.0054(c). If the tenant has not paid into the court registry all rent and the attorney’s fees in filing the sworn motion under Tex. Prop. Code § 24.0054(b) before the Tex. R. Civ. P. 510.9(c)(5)(B)(iv) default, the writ of possession issues immediately. Tex. Prop. Code § 24.0054(b). If the tenant complies with Tex. Prop. Code § 24.0054(b) on one occasion and then fails a second time to timely deposit sums into the registry of the court, the writ issues immediately but not may be executed before the sixth day after the date the writ is issued. Tex. Prop. Code § 24.0054(c), (d).

5. Governmental assistance payments not paid by agency. When a governmental entity fails to pay the tenant subsidy to the landlord or into the registry of either the justice or county court, the landlord may file a motion to require the tenant to regularly pay the full amount of rent into the registry of the court, which motion, after notice and hearing, must be granted if the landlord proves by credible evidence that (1) a portion of the rent is owed by a government agency, (2) the portion of the rent paid by the government agency is unpaid, (3) the landlord did not cause wholly or partly the agency to cease making payments, (4) the landlord did not cause wholly or partly the agency to pay the wrong amount, and (5) the landlord is not able to take reasonable action that will cause the agency to resume making the payments of its portion of the total rent due under the rental agreement. Tex. Prop. Code § 24.0054(f).

Practice Note: When representing the landlord on a Tex. R. Civ. P. 510.9(c)(5)(B)(iv) default, the attorney should always request the immediate issuance of the writ of possession so that the ministerial act of the county clerk’s issuance occurs as soon as possible.

Practice Note: While a writ of possession that issued under Tex. Prop. Code § 24.0054(b) could arguably be served on the date of the hearing, the most conservative practice for a landlord is to always have the writ of possession issued but not served until the sixth day after issuance to avoid the conflicts under Tex. Prop. Code §§ 24.0054, 24.0061(b).

Sums Deposited into the Registry of the Court: The landlord/appellee may withdraw any or all rent in the county court registry upon a sworn motion and hearing before final determination of the case showing just cause, dismissal of the appeal, or by order of the court after final hearing. Tex. R. Civ. P. 510.9(c)(5)(B)(v).
§ 28.29:3 Trial De Novo

The appeal of a suit for possession is heard by the county court de novo. Tex. R. Civ. P. 510.10(c). All aspects of the appeal of a suit for possession are entitled to precedence in the county court. Tex. R. Civ. P. 510.10(c).

The county clerk is to notify both parties of receipt of the transcript and the docket number in county court. Tex. R. Civ. P. 510.10(b). If the appellant perfected the appeal by filing an appeal bond, the notification will usually include notice that the appellant must pay the filing fee. See Tex. R. Civ. P. 143a. The notice to the defendant must also advise the defendant of the requirement to file a written answer within eight days if one was not filed in the justice court. Tex. R. Civ. P. 510.10.

The only counterclaim allowed in an appeal of a suit for possession is for the recovery of attorney’s fees incurred for defending the right to possession. See Tex. Prop. Code § 92.335; Tex. R. Civ. P. 510.3(e), 510.11. The fee for the counterclaim must be paid, or the introduction of proof on the counterclaim may be subject to the objection of the plaintiff. See Tex. Gov’t Code § 51.317(b).

If the defendant failed to file a written answer in the justice court and fails to file a written answer within eight days after the transcript is filed in county court, a judgment by default may be issued by the county court. Tex. R. Civ. P. 510.12.


A jury demand delivered in an eviction appeal on less than the thirty-day notice required in Tex. R. Civ. P. 216.a may be reasonable; the (now three)-day requirement in the predecessor to Tex. R. Civ. P. 510.7(b) applies only in justice court. Collins v. Cleme Manor Apartments, 37 S.W.3d 527, 531–32 (Tex. App.—Texarkana 2001, no pet.).

At the trial on the merits in county court, a prevailing landlord is entitled to recover rentals (if requested), attorney’s fees (provided that the landlord complied with Tex. Prop. Code § 24.006), and court costs through trial but may not recover damages for other causes of action. Tex. R. Civ. P. 510.11; Krull v. Somoza, 879 S.W.2d 320, 322 (Tex. App.—Houston [14th Dist.] 1994, writ denied). A prevailing tenant may recover attorney’s fees from the landlord for defending the right to possession. Only the party prevailing in the county court may recover damages and court costs. Tex. Prop. Code § 24.006(d).

§ 28.29:4 Appeal to Court of Appeals


The county court must set a supersedeas bond in an amount that provides protection for the appellee to the same extent as in any other appeal, taking into consideration the value of rents likely to accrue during appeal, damages that may occur as a result of the stay during appeal, and other damages or amounts as the court may deem appropriate. Tex. Prop. Code § 24.007.
The supersedeas bond must be filed within ten days of the date the judgment was signed. Tex. Prop. Code § 24.007; Tex. R. Civ. P. 510.13. If the supersedeas bond is not timely filed, a writ of possession may issue and be executed. Kemper v. Stonegate Manor Apartments, Ltd., 29 S.W.3d 362, 362 (Tex. App.—Beaumont 2000, pet. dism’d w.o.j.), disapproved on other grounds by Marshall v. Housing Authority of City of San Antonio, 198 S.W.3d 782, 786 n.2 (Tex. 2006).

If the tenant perfects an appeal but vacates his unit during the pendency of appeal, the issue of the tenant’s right to possession becomes moot at lease expiration. Marshall, 198 S.W.3d at 782.

§ 28.30 Writ of Possession

If a judgment or verdict is in favor of the plaintiff, a justice court must issue a writ of possession on or after the sixth calendar day after the date the judgment for possession was signed. Tex. R. Civ. P. 510.8(d). If judgment for possession is rendered by default, a justice court must issue a writ of possession immediately if the plaintiff has filed and timely served a possession bond under Tex. R. Civ. P. 510.5, but only on or after the seventh day after the date the tenant was served with notice of the filing of the possession bond. Tex. Prop. Code § 24.0061(b); Tex. R. Civ. P. 510.5(c).

When the tenant/appellant files a bond or cash deposit pursuant to Tex. R. Civ. P. 510.9 and fails to pay the filing fee in county court within twenty days, the county clerk must return the transcript to the justice court, and the justice court may issue the writ of possession upon return of the transcript. Tex. R. Civ. P. 143a.

In appeals of nonpayment-of-rent cases where the tenant/appellant has filed a sworn statement of inability to pay under Tex. R. Civ. P. 510.9(c), the county clerk issues a writ of possession immediately after the plaintiff/appellee establishes default under Tex. R. Civ. P. 510.9(c)(5)(B)(iv). Provided no supersedeas bond is filed by the tenant/appellant within ten days after the judgment is signed under Tex. Prop. Code § 24.007, the county clerk issues the writ of possession on or after the eleventh day. Tex. R. Civ. P. 510.13. When the tenant timely appeals but fails to file a supersedeas bond within ten days after the judgment is signed, writ of possession may issue and be served. Compare Kemper v. Stonegate Manor Apartments, Ltd., 29 S.W.3d 362, 362 (Tex. App.—Beaumont 2000, pet. dism’d w.o.j.) (holding case is moot once landlord takes possession), with Marshall v. Housing Authority of City of San Antonio, 198 S.W.3d 782, 786 (Tex. 2006) (appeal not moot when tenant timely and clearly expresses intent to exercise right of appeal and if appellate relief is not futile; disapproving of Kemper to the extent it conflicts).

The prevailing plaintiff must pay the fee for the issuance of the writ of possession by the county clerk or justice court and the fee for service by the constable or sheriff set by the commissioners court. Tex. Loc. Gov’t. Code § 118.0545(d).

The officer executing the writ must post a written warning of at least 8-1/2 by 11 inches on the exterior of the front door of the rental unit notifying the tenant that the writ has been issued and that the writ will be executed on or after a specific date and time stated in the warning not sooner than twenty-four hours after the warning is posted. Tex. Prop. Code § 24.0061(d)(1).

The officer executing the writ of possession may use reasonable force to execute the writ. Tex. Prop. Code § 24.0061(h). The officer shall—

1. deliver possession of the premises to the landlord, Tex. Prop. Code § 24.0061(d)(2)(A);

2. instruct the tenant and all persons claiming under the tenant to leave the premises immediately, and if the persons fail to comply, physically remove them, Tex. Prop. Code § 24.0061(d)(2)(B);
3. instruct the tenant to remove or to allow the landlord, the landlord’s representatives, or other persons acting under the officer’s supervision to remove all personal property from the rental unit other than personal property claimed to be owned by the landlord, Tex. Prop. Code § 24.0061(d)(2)(C); and

4. place, or have an authorized person place, the removed personal property outside the rental unit at a nearby location but not blocking a public sidewalk, passageway, or street, Tex. Prop. Code § 24.0061(d)(2)(D).


Warehouseman’s Lien: Tex. Prop. Code § 24.0062 discusses warehouseman’s liens. If the property is stored by the sheriff or constable in a bonded or insured public warehouse, the warehouseman has a lien on the property for his reasonable moving and storage charges. The lien does not attach to any property until the property has been stored by the warehouseman. Tex. Prop. Code § 24.0062(a). The officer must send a written notice to the tenant of the address and telephone number of the warehouse and the tenant’s right to redeem the property by paying the warehouseman’s charges. See Tex. Prop. Code § 24.0062(b), (c) for notice requirements. If the tenant does not redeem the property within thirty days, the warehouseman may sell the property to satisfy his charges. Tex. Prop. Code § 24.0062(b)(5).

Practice Note: When obtaining a writ of possession issued by the county clerk after appeal, the best practice is to deliver the writ to the constable of the justice precinct in which the premises are located for execution, as the constable is usually more experienced in execution than the sheriff.

§ 28.31 Implications of Tenant Bankruptcy

The automatic stay under 11 U.S.C. § 362 that goes into effect the moment a tenant files a petition for relief affects the prosecution of a suit for possession; however, the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 specifically limited the effect of the stay in suits for possession in certain circumstances. In the very limited circumstances below, no motion for relief from stay is necessary to continue the prosecution of an eviction.

Specifically, the filing of a petition for relief under the Bankruptcy Code does not operate as a stay in the following scenarios.

Final Judgment: Bankruptcy proceedings will not operate as a stay when the landlord’s judgment for possession for residential property has become final before the tenant files the petition for relief in bankruptcy. 11 U.S.C. § 362(b)(22).

Suit Based on Endangerment of Property: When the suit for possession is based on the tenant’s endangerment of residential property, bankruptcy proceedings will not act as an automatic stay beginning fifteen days after the landlord files with the bankruptcy court and serves on the tenant/debtor a certification that such a suit for possession has been filed or a certification that the tenant/debtor has endangered property during the thirty-day period preceding the date of the filing of the certification. 11 U.S.C. § 362(m), (b)(23). The tenant/debtor must file an objection to the certification under 11 U.S.C. § 362(m) within fifteen days after the filing and service of the certification. If no objection is timely filed, or if an objection is timely filed and
rejected by the bankruptcy court at a hearing held within ten days of the filing of the objection, then the stay is of no further effect. 11 U.S.C. § 362(m).

**Suit Based on Illegal Use of Controlled Substances:** When the suit for possession is based on the illegal use of controlled substances on the premises, bankruptcy proceedings will not act as an automatic stay beginning fifteen days after the landlord files with the bankruptcy court and serves on the tenant/debtor a certification that such a suit for possession has been filed or a certification that the tenant/debtor has endangered property during the thirty-day period preceding the date of the filing of the certification. 11 U.S.C. § 362(m), (b)(23). The tenant/debtor must file an objection to the certification under 11 U.S.C. § 362(m) within fifteen days after the filing and service of the certification. If no objection is timely filed, or if an objection is timely filed and rejected by the bankruptcy court at a hearing held within ten days of the filing of the objection, then the stay is of no further effect. 11 U.S.C. § 362(m).

§ 28.32  **Distress Warrants (Commercial and Agricultural Leases)**

A distress warrant is a judicial remedy filed in justice court that perfects the landlord’s statutory commercial or agricultural lien by having the constable seize the tenant’s personal property subject to the lien; after seizure, the distress warrant is returnable to the court in which the commercial landlord’s suit for rent is pending. Distress warrants are covered in Tex. R. Civ. P. 610–620 and section 54.025 of the Texas Property Code. They are not available for enforcement of a residential landlord’s lien.

The landlord may seek a distress warrant directing a sheriff or constable to attach and hold specified property. The person to whom rent or an advance is payable or the person’s agent, attorney, assign, or other legal representative may apply to an appropriate justice court for a distress warrant under any of three circumstances: (1) if the tenant owes any rent or, for an agricultural lien, any advance; (2) if the tenant is about to abandon the premises; or (3) if the tenant is about to remove the tenant’s property from the premises. Tex. Prop. Code §§ 54.006, 54.025. Enforcing a landlord’s lien by having property seized before final judgment is also called “distrain.” In place of a distress warrant, a landlord may seek a writ of prejudgment attachment or sequestration as its remedy. Generally, the application for a distress warrant must be filed with an appropriate justice court at the commencement of a suit or at any time during its progress. Tex. R. Civ. P. 610 outlines the requirements for the application and affidavits. If the warrant is to issue before final judgment, the court must hold a hearing, which may be ex parte, and require a bond of the landlord. See Tex. R. Civ. P. 610, 611. If the suit is based on an agricultural landlord’s lien, the application must be filed with a justice court in the precinct in which the leasehold is located or in which the property subject to the lien is located or with the justice court that has jurisdiction of the cause of action. Tex. Prop. Code § 54.006. If the suit is based on a building landlord’s lien, the application must be filed with a justice court in the precinct in which the building is located. Tex. Prop. Code § 54.025.

§ 28.32:1  **Commercial Landlord’s Statutory Lien**

The landlord of a building leased for nonresidential purposes has a statutory preference lien on a tenant’s property for rent that becomes due during the twelve-month period succeeding the date of the beginning of the rental agreement or the anniversary of the date. Tex. Prop. Code § 54.021. By way of priority, unless a landlord perfects its security interest on an annual basis, beginning on the date the lease commences, an intervening security interest of another creditor will have priority over the landlord’s lien. See Tex. Bus. & Com. Code § 9.203; *Bank of North America v. Kruger*, 551 S.W.2d 63, 66 (Tex. Civ. App.—Houston [1st Dist.] 1977, writ ref’d n.r.e.). For example, the building landlord’s lien loses priority to the security interest of another creditor if the lease covers the period between January 1, 2020, and December 31, 2020, and the security interest is
perfected after December 31, 2020. Tex. Prop. Code § 54.021, therefore, effectively divides a lease into contract years for purposes of determining whether a perfected secured creditor’s security interest will supersede a statutory landlord’s lien. Each year of the contract is viewed separately. At the beginning of each contract year, if the secured creditor’s UCC financing statement has been filed during the previous year, its lien will be superior to the landlord’s lien. FDIC v. Sears, Roebuck & Co., 743 S.W.2d 772, 773 (Tex. App.—El Paso 1988, no writ). The lien does not attach to property exempted by statute from forced sale. Tex. Prop. Code § 54.023.

For an affidavit and lien statement, see form 28-5 in this chapter.

§ 28.32:2 Perfection of Commercial Landlord’s Statutory Lien

The statutory lien is unenforceable for rent on a commercial building that is more than six months past due unless the commercial landlord files a verified lien statement with the county clerk of the county in which the building is located that contains (1) an account, itemized by month, of the rent for which the lien is claimed; (2) the name and address of the tenant or sub-tenant, if any; (3) a description of the leased premises; and (4) the beginning and termination dates of the lease. Tex. Prop. Code § 54.022.

Filing the statement presumably makes the lien enforceable against the tenant regardless of when it is filed, but the time of filing can be crucial in protecting the lien’s priority against intervening liens. For this reason the statement should be filed no later than six months after rent for any given month becomes due. See Industrial State Bank v. Oldham, 221 S.W.2d 912, 914 (Tex. 1949).

§ 28.32:3 Duration of Commercial Landlord’s Statutory Lien

The lien exists while the tenant occupies the building and until one month after the day the tenant abandons it. Tex. Prop. Code § 54.024. For an affidavit and lien statement, see form 28-5 in this chapter.

§ 28.32:4 Agricultural Landlord’s Statutory Lien

An agricultural landlord acquires a lien on an agricultural tenant’s property for rent due and for “the money and the value of property that the landlord furnishes or causes to be furnished to the tenant to grow a crop on the leased premises and to gather, store, and prepare the crop for marketing.” Tex. Prop. Code § 54.001. The lien does not arise if the rent charged by the agricultural landlord exceeds certain percentages of the value of grain or cotton crops grown on the premises. Tex. Prop. Code § 54.003. The agricultural lien is effective against a purchaser of the tenant’s crops regardless of actual notice or lack of notice to the purchaser, and the landlord may enforce the lien by foreclosing on the crops or by suing the purchaser for conversion. Dill v. Graham, 530 S.W.2d 157, 160 (Tex. Civ. App.—Amarillo 1975, writ ref’d n.r.e.).

§ 28.32:5 Attachment of Agricultural Landlord’s Statutory Lien

This lien attaches to property on the leased premises that the landlord directly or indirectly furnishes to a tenant on which to grow crops, and it attaches to those crops grown in the year that the rent accrues or the property is furnished. However, if the landlord provides everything except labor, the lien attaches only to the crops grown in the year that the property is furnished. The lien does not attach to the goods of a merchant, trader, or mechanic if the tenant sells and delivers the goods in good faith
in the regular course of business. Agricultural products, animals, and tools subject to a statutory agricultural lien may not be exempted from forced sale by other statutes. Tex. Prop. Code § 54.002(d).

In addition to filing suit to foreclose the lien, the landlord may secure a distress warrant. See section 28.32 above and sections 28.32:6 through 28.32:16 below regarding distress warrants, form 28-1 in this chapter for a petition to foreclose the lien, and forms 28-3 through 28-11 for forms applicable to distress warrants. Sequestration may also be appropriate if the landlord fears the tenant may dispose of property subject to the lien. See sections 8.16 through 8.24 in this manual regarding sequestration.

§ 28.32:6 Availability

A distress warrant may be requested either at the beginning of the suit or at any time during its progress. Tex. R. Civ. P. 610.

§ 28.32:7 Application for Distress Warrant

The application for a distress warrant may be supported by affidavits of the plaintiff, the plaintiff’s agent, the plaintiff’s attorney, or other persons having knowledge of the relevant facts but must include a statement that the amount sued for is rent or advances described by statute or must produce a writing signed by the tenant to that effect and must further swear that the distress warrant is not sued out for the purpose of vexing or harassing the defendant. The application must meet all statutory requirements and must state grounds for issuing the warrant and specific facts relied on by the plaintiff to warrant the required findings by the justice of the peace. Two or more grounds for the warrant may be stated conjunctively or disjunctively. Tex. R. Civ. P. 610.

“The application and any affidavits shall be made on personal knowledge and shall set forth such facts as would be admissible in evidence provided that facts may be stated based upon information and belief if the grounds of such belief are specifically stated.” Tex. R. Civ. P. 610. Attorneys generally should not execute affidavits on their clients’ behalf. See section 19.17:3 in this manual. See form 28-9 in this chapter for an application for a distress warrant and form 28-10 for an affidavit.

§ 28.32:8 Hearing

No warrant may issue before final judgment except on written order of the justice of the peace after a hearing, which may be ex parte. Tex. R. Civ. P. 610.

§ 28.32:9 Order

Tex. R. Civ. P. 610 specifies the required elements of the order granting the application for the distress warrant, which include findings of fact supporting the statutory grounds, the maximum value of the property to be seized, the amount of bond required of the plaintiff, the amount of bond required of the debtor to replevy, and a commandment that the property be kept safe and preserved subject to further orders of the court having jurisdiction. See form 28-11 in this chapter for an order for issuance of distress warrant.
§ 28.32:10 Plaintiff’s Bond

No distress warrant can issue before final judgment until the plaintiff has filed a bond with the justice of the peace in an amount to adequately compensate the defendant if the plaintiff fails to prosecute his suit to effect and pay all damages and costs as may be adjudged against him for wrongfully suing out the warrant. Tex. R. Civ. P. 610, 611.

§ 28.32:11 Requisites of Warrant

The warrant must be directed to the sheriff or any constable within the state, commanding him to attach and hold as much of the defendant’s property, not exempt by statute, of reasonable value in approximately the amount fixed by the justice of the peace, as is found within the county. Tex. R. Civ. P. 612.

On the face of the warrant, “in 10-point type and in a manner calculated to advise a reasonably attentive person of its contents,” the following notice must be displayed.

To __________, Defendant:

You are hereby notified that certain properties alleged to be owned by you have been seized. If you claim any rights in such property, you are advised:

YOU HAVE A RIGHT TO REGAIN POSSESSION OF THE PROPERTY BY FILING A REPLEVY BOND. YOU HAVE A RIGHT TO SEEK TO REGAIN POSSESSION OF THE PROPERTY BY FILING WITH THE COURT A MOTION TO DISSOLVE THIS WARRANT.


§ 28.32:12 Service and Return of Warrant

The defendant must be served with a copy of the distress warrant, the application, accompanying affidavits, and orders of the justice of the peace in any manner prescribed for service of citation or as provided in rule 21a. Tex. R. Civ. P. 613. If the value of the property subject to the warrant falls within the jurisdictional limits of the justice court, the warrant will be returned to that court; otherwise the warrant is made returnable to the district court with jurisdiction over the action. Tex. R. Civ. P. 619. See form 28-14 in this chapter for an officer’s return.

§ 28.32:13 Tenant’s Right to Replevy

If the seized property has not been claimed or sold, the tenant may replevy all or part of the property at any time before judgment by filing a bond in double the amount of the landlord’s debt; the amount of the judgment rendered and any costs assessed against the tenant shall be first satisfied, to the extent possible, out of the bond. Tex. Prop. Code § 54.048; Tex. R. Civ. P. 614. If the property has been sold by court order, the defendant can replevy the proceeds of the sale. Tex. R. Civ. P. 614.

§ 28.32:14 Wrongful Distraint

A landlord who wrongfully obtains a distress warrant may be liable for wrongful distraint. See McKee v. Sims, 45 S.W. 564, 565 (Tex. 1898); see also McAfee v. Chandler, 7 S.W.2d 623, 624 (Tex. Civ. App.—Amarillo 1928, no writ) (exemplary damages may be levied where distress warrant issued without probable cause and for purpose of harassing defendant). Liability for
wrongful distraint may arise from levying a distress warrant on property in excess of the amount sued, making false allegations in the landlord’s affidavit about the amount of rent due, or levying on property not subject to the landlord’s lien. In *McVea v. Verkins*, the court held that to enforce a contractual landlord’s lien and to obtain possession of the property subject to the lien absent consent by the tenant, the landlord must foreclose the lien by judicial proceedings and in no other way. 587 S.W.2d 526, 531 (Tex. Civ. App.—Corpus Christi 1979, no writ) (citing *Schwulst v. Neely*, 50 S.W. 608, 609 (Tex. Civ. App.—Dallas 1899, no writ)). In *Bank of North America v. Kruger*, the court held that contractual landlord’s liens are subject to provisions of the Uniform Commercial Code but that statutory landlord’s liens are not. 551 S.W.2d 63, 65 (Tex. Civ. App.—Houston [1st Dist.] 1977, writ ref’d n.r.e.).

§ 28.32:15  Dissolution or Modification of Distress Warrant

After issuance of the warrant, the defendant or any intervening party who claims an interest in the seized property may seek to vacate, dissolve, or modify the seizure by sworn written motion. Tex. R. Civ. P. 614a.

§ 28.32:16  Emergency Sale of Perishable Property

If property seized under a distress warrant is “in danger of serious and immediate waste or decay” or if keeping it until trial will greatly reduce its value, the court may order an emergency sale. Tex. R. Civ. P. 615. Procedures for determining whether the property is perishable and for selling it are prescribed in Tex. R. Civ. P. 616–618. For an application for emergency sale, see form 28-6 in this chapter; for an affidavit for emergency sale, see form 28-7; and for an order for emergency sale, see form 28-8.

[Sections 28.33 through 28.40 are reserved for expansion.]

V. Remedies and Damages After Tenant Abandons Premises

§ 28.41  Common-Law Remedies

The case of *Speedee Mart Inc. v. Stovall*, 664 S.W.2d 174, 177 (Tex. Civ. App.—Amarillo 1983, no writ), outlines the four common-law remedies available to a landlord when a tenant breaches a lease by abandoning a property and terminating rental payments:

1. *Decline to repossess property.* The landlord may decline to repossess the property, electing instead to maintain the lease in full force and effect. Under this option, he can sue on the contract for the rent as it comes due. This option, however, is now somewhat suspect with the supreme court’s indication of a requirement to mitigate damages. See section 28.42 below regarding mitigation.

2. *Anticipatory breach/own purposes.* The landlord may treat the tenant’s conduct as an anticipatory breach of contract and repossess and retain the property for his own purposes. Under this option, he recovers the present value of the rentals that accrue under the lease contract reduced by the reasonable cash market value of the lease for the unexpired term.
Anticipatory breach/relet. The landlord may treat the tenant’s conduct as an anticipatory breach of contract, repossess the property, and lease it to another tenant. Under this option, he can recover the actual rental reduced by the amount to be received from the new tenant.

Forfeiture. The landlord may declare the lease forfeited. Under this option, he relieves the tenant of liability for future rental payments.


The common-law remedies are available unless the parties contract otherwise. Speedee Mart, 664 S.W.2d at 177 n.1. In Speedee Mart, the court of appeals reversed the trial court’s judgment because at the time of trial the damages model was based on future rent calculated from the time of trial, not the future rent calculated from the time of breach. The court held that the proper calculation should be future rent from the time of breach to the end of the lease reduced to its present value, then further reduced by the reasonable cash market value of the lease for the unexpired term. See Speedee Mart, 664 S.W.2d at 178.

In Look, 590 S.W.2d at 527, the court held that, based on the testimony given at trial, the leased premises had a market value only in the event of reletting. Therefore, since the space had not been relet, the market value was zero.

§ 28.42 Mitigation and Damages

Monetary damages under a commercial lease contract are not easily calculated. The question of mitigation further complicates this analysis. Texas has both a judicial and legislative approach to mitigation. The concurring opinion in Brown v. Republic-Bank First National Midland, 766 S.W.2d 203, 204–05 (Tex. 1988), notes that on the question of whether a landlord should mitigate its damages, there is a pronounced disagreement among the states springing from the fact of the dual nature of a lease as both a contract and a conveyance of an interest in land. While the Brown court did not decide the issue of whether there should be an implied duty to mitigate placed on a landlord, in Austin Hill Country Realty, Inc. v. Palisades Plaza, Inc., 948 S.W.2d 293 (Tex. 1997), the court explicitly held that a landlord has a duty to mitigate. The duty to mitigate is not absolute but requires the landlord to use reasonable efforts to fill the premises or the landlord is barred from recovery from the breaching tenant to the extent the landlord could have reasonably avoided damages. Austin Hill Country Realty, Inc., 948 S.W.2d at 299.

When the tenant contends that the landlord has failed to mitigate damages, the tenant must plead the landlord’s failure to mitigate as an affirmative defense; otherwise, the tenant may not offer evidence of the landlord’s failure to mitigate. Austin Hill Country Realty, Inc., 948 S.W.2d at 299–300. The tenant has the burden of proof to demonstrate whether or not the landlord has mitigated. Austin Hill Country Realty, Inc., 948 S.W.2d at 299–300.

In 1997, the legislature added a mitigation rule, which provides that (1) a landlord has a duty to mitigate damages if a tenant abandons the leased premises in violation of the lease and (2) a provision of a lease that purports to waive this right or to exempt a landlord from liability under it is void. Tex. Prop. Code § 91.006. By its terms, Code section 91.006 is applicable only to leases that were entered into on or after September 1, 1997, and where the tenant abandoned the leased premises. The statute uses the term abandon and therefore should not be applicable to situations in which (1) the tenant’s right to possession of the leased premises has been terminated for default (before the tenant abandons) or (2) the tenant has been removed from the leased premises via lockout or court order. If there is no termination of the tenant’s right to possession of the leased premises, lockout, or court order, abandonment likely occurred. Abandonment is a fact issue, but see Tex. Prop. Code § 93.002(d),
which defines abandonment in the context of a commercial lease as follows: “A tenant is presumed to have abandoned the premises if goods, equipment or other property, in an amount substantial enough to indicate a probable intent to abandon the premises, is being or has been removed from the premises and the removal is not within the normal course of the tenant’s business.” If section 91.006 is not applicable, Austin Hill Country Realty, Inc., provides the Texas law.


In Cash America, the commercial landlord brought an action against the tenant for anticipatory breach of lease. The court stated that the mitigation instructions sanctioned by the supreme court ask the jury to reduce damages not only for the reasonable cash market value of the unexpired term but also by the amount of damages that could have been avoided had the landlord used reasonable care in attempting to relet the leased premises.

In Stucki, the commercial landlord brought an action against the tenant to recover amounts due under a lease. The tenant argued that the summary judgment granted at the trial court level should be set aside on the grounds that the landlord failed to mitigate damages and because fact issues remained regarding mitigation. The lease specifically provided that the landlord had no obligation to “relet or attempt to relet the premises” in the event of the tenant’s default. The court of appeals upheld the contractual waiver, citing Austin Hill Country Realty, Inc.: “[A] landlord’s duty to mitigate his damages arises only when the landlord and the tenant have not contracted otherwise.” Stucki, 963 S.W.2d at 781. The court also noted that the burden of proving failure to mitigate was on the tenant and that it had been waived it in this case because the tenant had offered no evidence to support his allegations of failure to mitigate. Stucki, 963 S.W.2d at 781.

The two major differences between the judicial and legislative approaches are that (1) the statutory provision, which applies only if the tenant abandons the premises, may not be waived by agreement of the landlord and tenant, and (2) the statutory provision does not qualify the landlord’s duty to mitigate on whether or not the landlord has a contractual right to reenter without forfeiting the lease.
Form 28-1

A petition to foreclose a lien, such as the one below, should be used with actions to seize property.

This form assumes that the lien being enforced is a commercial landlord’s lien, as described in Tex. Prop. Code §§ 54.021–.025. It should be modified as appropriate for residential or agricultural landlord’s liens. It also assumes that attorney’s fees are recoverable under a provision in the lease. If there is no such provision, attorney’s fees are recoverable under chapter 38 of the Texas Civil Practices and Remedies Code if timely demand is made. See section 1.23 in this manual.

See section 14.10 for other forms of party designation. See also section 14.2 regarding exercising caution in pleading conditions precedent.

[Caption. See § 3 of the Introduction in volume 1 of this manual.]

Petition and Application to Foreclose Landlord’s Lien

1. Parties. Plaintiff is [name of plaintiff] (“Plaintiff”), whose address is [address, city, state]. Defendant is [name of defendant] (“Defendant”), who can be served with citation at [address, city, state].

2. Jurisdiction. This [District] Court has jurisdiction of this matter under Tex. Const. art. V, § 8, and Tex. Gov’t Code § 24.008.

3. Venue. Venue is proper in [county] County, Texas, under Tex. Civ. Prac. & Rem. Code § 15.0115(a) as all or part of the real property the subject of the parties’ lease is located in [county] County, Texas.

4. State of Claim for Relief. Pursuant to Tex. R. Civ. P. 47, Plaintiff states that it is seeking monetary relief of $[amount] and nonmonetary relief.

5. Facts. On [date], Plaintiff as landlord and Defendant as tenant entered into a lease by which Plaintiff leased to Defendant the real property located at [address, city, county] County, Texas. Defendant agreed to pay Plaintiff $[amount] per [time period] as rent. Defendant now owes Plaintiff $[amount] but has failed to pay Plaintiff. [Include any other relevant
facts, such as dates of demand letters.] A copy of the lease is attached as Exhibit [exhibit number/letter] and incorporated by reference.

6. **Lien.** Plaintiff holds a landlord’s lien on [describe property] under section 54.021 of the Texas Property Code [include if applicable: and a security interest in the property under section 9.203 of the Texas Business and Commerce Code]. Plaintiff has the right to foreclose the lien as prescribed by law to satisfy Plaintiff’s claim for rent due and unpaid.

7. **Conditions Precedent.** All conditions precedent have been performed or have occurred.

8. **Attorney’s Fees.** Defendant’s failure to pay the rent due Plaintiff has made it necessary for Plaintiff to employ the undersigned attorney to file suit. The lease provides that Defendant is liable for Plaintiff’s attorney’s fees in the event of default. Reasonable fees for the attorney’s services rendered and to be rendered through trial and appeal are in the minimum amount of $[amount].

9. **Prayer.** Plaintiff prays that—

   a. Defendant be cited to appear and answer;

   b. Plaintiff be granted judgment for $[amount] as the principal amount due on the debt;

   c. Plaintiff be granted foreclosure of the landlord’s lien against the property described in this petition;

   d. Plaintiff be granted judgment for prejudgment and postjudgment interest at the highest legal or contractual rate allowed by law;
e. Plaintiff be granted judgment for at least $[amount] as reasonable attorney’s fees, with additional contingent amounts in the event of appellate proceedings;

f. Plaintiff be granted judgment for all costs of court; and

g. Plaintiff be granted all further relief to which Plaintiff may be entitled.

[Name]
Attorney for Plaintiff
State Bar No.:
[E-mail address]
[Address]
[Telephone]
[Telecopier]

Attach exhibit(s). Prepare an application for a distress warrant (form 28-3) or writ of sequestration (form 8-8).
Form 28-2

Affidavit and Lien Statement for Commercial Building Landlord’s Lien under Tex. Prop. Code § 54.022

BEFORE ME, the undersigned authority, on this day personally appeared [name of affiant], who swore on oath that the following facts are true:

“I am the owner of [describe property, e.g., a six-room office suite] located at [address, city, county] County, Texas. I have personal knowledge of all of the facts set forth herein and they are all true and correct. I claim a lien on the nonexempt personal property of [name of tenant or subtenant] located on the above-described premises.

“On [date], I entered into a contract to lease the above-described premises to [name of tenant or subtenant], whose address is [address, city, county, state]. The term of the lease began on [date] and [expires/expired] on [date].

“The amount of $[amount] is rent due. The account is itemized by month as follows: [itemize the specific amount due for each period].

“My address is [address, city, county, state].”

[Name of affiant]
Affiant

SIGNED under oath before me on ________________________________.

__________________________________________________________________________________________________________________________ ...

__________________________________________________________________________________________________________________________ ...

[Name of Notary Public, State of Texas]
Notary Public, State of Texas

File the affidavit with the county clerk of the county in which the building is located.
Application for Distress Warrant

1. **Parties.** [Name of plaintiff], Plaintiff, whose address is [address, city, state], makes this Application for Distress Warrant. Defendant is [name of defendant], who can be served with citation at [address, city, state].

2. **Facts.** Plaintiff leased [describe leased premises] to Defendant for a term extending from [term of lease], for a monthly rental of $[amount], which Plaintiff and Defendant agreed to be due on [date] during the term of the lease. Defendant has not paid monthly rental for [time period], even though Plaintiff has made timely demand for payment. Plaintiff claims a building landlord’s lien on Defendant’s personal property in the leased premises to the extent of the $[amount] now past due.

3. **Grounds.** Plaintiff seeks this distress warrant because Defendant [owes rent/is about to abandon the building/is about to remove his property from the building] to the detriment of Plaintiff’s lien on Defendant’s personal property.

The amount sued for is rent past due, and the distress warrant is not sued out for the purpose of vexing and harassing Defendant.
4. **Conditions Precedent.** All conditions precedent have been performed or have occurred.

5. **Affidavit.** Plaintiff is entitled to the issuance of a distress warrant before judgment on the grounds stated in the attached affidavit. The affidavit is incorporated in this application by reference.

6. **Prayer.** Plaintiff prays that—
   
   a. a distress warrant issue immediately;
   
   b. the warrant specify the maximum value of Defendant’s property to be seized and the amount of bond required of Plaintiff and that the warrant command that the property be kept safe and preserved subject to further orders of the court having jurisdiction; and
   
   c. Plaintiff be granted all further relief to which Plaintiff may be entitled.

---

[Name]
Attorney for Plaintiff
State Bar No.:
[E-mail address]
[Address]
[Telephone]
[Telexcopier]

Attach affidavit(s) (form 28-4). Prepare the following, as necessary, to take to the hearing: form 28-5 (order for issuance of distress warrant), form 28-6 (bond to defendant), form 28-7 (distress warrant), and form 28-8 (officer’s return).
The affidavit must be attached to the application, form 28-3 in this chapter. The distress warrant is discussed generally at section 28.32.

Affidavit for Distress Warrant

BEFORE ME, the undersigned authority, on this day personally appeared [name of affiant], who swore on oath that the following facts are true:

“I am [Plaintiff/other capacity, e.g., leasing agent of Plaintiff] in this cause. [Include if affiant is agent: I am authorized to make this affidavit and to apply for a distress warrant in this cause.]

“I have personal knowledge of the facts stated in this affidavit, and they are all true and correct.

Select one of the following.

“I make this affidavit on information and belief. The basis for that belief is the following: [state specific grounds for belief].

Continue with the following.

“Plaintiff has filed an action for a distress warrant in this Justice Court in support of an action seeking enforcement of Plaintiff’s landlord’s lien against Defendant’s property. Plaintiff’s lien is for rent owed by Defendant, and this warrant is necessary because Defendant
Form 28-4  Affidavit for Distress Warrant

[owes rent/is about to abandon the building/is about to remove his property from the building].

“Plaintiff does not seek this warrant for the purpose of vexing and harassing Defendant.”

__________________________________________________________________________________________________________________________ ...

[Name of affiant]
Affiant

SIGNED under oath before me on ________________________________.

__________________________________________________________________________________________________________________________ ...

Notary Public, State of Texas
Form 28-5

Tex. R. Civ. P. 610 specifies the required elements of the order granting the application for the distress warrant. This form assumes that the hearing was conducted ex parte, without notice to the defendant. If the defendant receives notice and/or appears, the form should be modified accordingly.

[Caption. See § 3 of the Introduction in volume 1 of this manual.]

Use the same caption as in the application for distress warrant at form 28-3.

Order for Issuance of Distress Warrant

At the hearing on Plaintiff’s Application for Distress Warrant in this cause, Plaintiff appeared by and through his attorney of record. The hearing was conducted without notice to Defendant.

The Court finds that—

Specific findings of fact must be made; findings 1.–4. are examples only.

1. Plaintiff rented to Defendant [describe premises], for which Defendant agreed to pay Plaintiff $[amount] per month as rent. The lease began [date], and it specified that rental payments were due on the [date] of each month.

2. Defendant has not paid monthly rental for [time period], even though Plaintiff has made timely demand for payment.

3. Plaintiff claims a building landlord’s lien on Defendant’s personal property in the [describe premises] to the extent of the $[amount] now past due.

4. Defendant has [basis on which plaintiff believes personal property will be removed], so Plaintiff justly fears that Defendant may remove from the premises personal property subject to Plaintiff’s lien.
5. The maximum value of property that may be seized is $____________.

6. The amount of bond required of Plaintiff is $____________.

7. The amount of bond required for Defendant to replevy is $____________.

8. The property must be kept safe and preserved subject to further orders of the court having jurisdiction.

   It is therefore ORDERED that a distress warrant be issued against [name of defendant] for property in the maximum amount of $____________, conditioned that Plaintiff must post a bond in the amount of $____________, payable to Defendant, conditioned as required by law.

   It is further ORDERED that Defendant may replevy part or all of the property taken by posting a bond in the amount of $____________, payable to Plaintiff, conditioned and approved as required by law.

SIGNED on ________________________________.

__________________________________________________________________________________________________________________________ ...

__________________________________________________________________________________________________________________________

JUDGE PRESIDING
APPROVED AS TO FORM:

[Name]
Attorney for Plaintiff
State Bar No.: [State Bar No.]
[E-mail address]
[Address]
[Telephone]
[Telecopier]

If the application is granted, have the clerk issue a distress warrant (with application, affidavit, and order) for service on the defendant.
Bond to Defendant for Distress Warrant

The form of the bond is suggested by Tex. R. Civ. P. 592b. Bonds for distress warrants are discussed at section 28.32 in this chapter. A surety company may be used in lieu of one or more individual sureties. See Tex. Ins. Code §§ 3503.001–.005. If individual sureties are used, two will probably be required, and the form should be so modified. Duplicate originals should be prepared and executed, one for the clerk and the other for the sheriff or constable.

[Caption. See § 3 of the Introduction in volume 1 of this manual.]

Bond to Defendant for Distress Warrant

WE, THE UNDERSIGNED, [name of plaintiff], Plaintiff, as principal and [name of surety] as surety, acknowledge ourselves bound to pay [name of defendant], Defendant, up to the sum of [number] dollars, conditioned that Plaintiff will prosecute this cause to effect and that Plaintiff will pay to the extent of the penal amount of this bond all damages and costs as may be adjudged against Plaintiff for wrongfully suing out this distress warrant.

SIGNED on ________________________________.

[Name of plaintiff]
Principal

[Name of surety company]
Surety

By ________________________________
Agent for Surety

APPROVED on ________________________________.
[Name of clerk], Clerk
[Designation of court]

By ______________________________________
    Deputy
Form 28-7

Tex. R. Civ. P. 612 sets out the requisites for a distress warrant, and Tex. R. Civ. P. 613 discusses service on the defendant. See section 28.32 in this chapter regarding distress warrants generally.

[Caption. See § 3 of the Introduction in volume 1 of this manual.]

Use the same caption as in the application for distress warrant at form 28-3.

Distress Warrant to Be Served on Defendant

To the sheriff or any constable of any county within the state of Texas, greetings:

Plaintiff has applied for and given bond for a distress warrant. You are therefore commanded to take into your possession, if it is found in your county, the following personal property: [describe property]. You are commanded to keep the property safe and preserved, subject to further orders of the court having jurisdiction, unless it is replevied.

Herein fail not, but have you this warrant, with your return showing how you have executed it, before this Court on the first day of the next succeeding term of court at [date and time] at [address of court].

Or

Herein fail not, but have you this warrant, with your return showing how you have executed it, before [designation of court to which warrant is returnable] on or before the Monday next after the expiration of twenty days from the date the warrant is served.

Continue with the following.
You are to display to the interested persons present at the time of the levy the following:

To [name of defendant], Defendant:

You are hereby notified that certain properties alleged to be owned by you have been seized. If you claim any rights in such property, you are advised:

YOU HAVE A RIGHT TO REGAIN POSSESSION OF THE PROPERTY BY FILING A REPLEVY BOND. YOU HAVE A RIGHT TO SEEK TO REGAIN POSSESSION OF THE PROPERTY BY FILING WITH THE COURT A MOTION TO DISSOLVE THIS WARRANT.

ISSUED on ________________________________.

[Name of clerk], Clerk
[Designation of court]

Include a certificate of service (form 19-1). Prepare the officer’s return (form 28-8).
Officer’s Return for Distress Warrant

Form 28-8

A return is usually included in the form warrant furnished by the clerk. If the attorney prepares the warrant, a return should be provided. For the caption, use the same docket number, style, and court designation as in the application for the distress warrant if the justice court retains jurisdiction. However, if the value of the property exceeds the jurisdictional limits of the justice court, the distress warrant is returned to the district court with proper jurisdiction. In that case this officer’s return will bear the docket number and court designation appropriate for the district court.

[Caption. See § 3 of the Introduction in volume 1 of this manual.]

Use the caption designating the appropriate court to which the distress warrant should be returned.

Officer’s Return for Distress Warrant

CAME TO HAND at ________ __.M. on the ______ day of ________________ and executed at ________ __.M. on the ______ day of ________________ at ________________, ________________ County, Texas, by taking into possession the following property:
__________________________________________________________________________________________________________________________ ...
__________________________________________________________________________________________________________________________ ...
__________________________________________________________________________________________________________________________ ...

This property remains in my custody, subject to the further order of the court having jurisdiction.

The distance actually traveled by me in execution of this process was ____ miles, and my fees are $____________.

SHERIFF OR CONSTABLE
Form 28-9

If the plaintiff applies for an emergency sale, the application must be accompanied by a bond, for which form 28-6 in this chapter may be adapted. An affidavit is usually required also; see form 28-10. For the caption, use the same docket number, style, and court designation as in the application for the distress warrant (form 28-3) if the justice court retains jurisdiction. However, if the value of the property exceeds the jurisdictional limits of the justice court, the distress warrant is returned to a district court with jurisdiction, and this application for emergency sale is directed to that court instead.

[Caption. See § 3 of the Introduction in volume 1 of this manual.]

Application for Emergency Sale of Perishable Property
[under Distress Warrant]

[Name of plaintiff], Plaintiff in this action, makes this Application for Emergency Sale of Perishable Property.

The [sheriff/constable] of [county] County, Texas, under a distress warrant has seized and holds [describe property], which is wasting, decaying, or greatly depreciating in value and will continue to do so before the underlying cause enforcing a lien on the property can be heard on its merits. The interest of justice will be served by selling the property and placing the proceeds in the registry of this Court.

An affidavit stating that the condition of the property requires its sale is attached to and incorporated in this application. Also attached is a bond to Defendant making Plaintiff responsible to Defendant in case the sale is illegally or unjustly applied for or made.

Plaintiff requests that the described property be sold as under ordinary execution and that the proceeds be placed in the registry of this Court.
Attach an affidavit (form 28-10) and a bond (adapt form 28-6). Prepare form 28-11 (order for emergency sale).
Form 28-10

[Caption. See § 3 of the Introduction in volume 1 of this manual.]

Affidavit for Emergency Sale of Perishable Property
[under Distress Warrant]

BEFORE ME, the undersigned authority, on this day personally appeared [name of affiant], who swore on oath that the following facts are true:

“I am [Plaintiff/[other capacity, e.g., leasing agent of Plaintiff]] in this action. [Include if affiant is agent: I am authorized to make this affidavit and to apply for an order for emergency sale.] I have personal knowledge of the facts set forth herein, and they are all true and correct.

“The following property was seized under a distress warrant: [describe property as in form 28-9]. Defendant has not claimed or replevied it or dissolved the warrant, and the property is in danger of [serious waste or decay/great depreciation in value] if kept until trial. [Include facts supporting allegations of waste or decline in value.]”

__________________________________________________________________________________________________________________________ ...

[Name of affiant]
Affiant

SIGNED under oath before me on ________________________________.

__________________________________________________________________________________________________________________________ ...

Notary Public, State of Texas
Order for Emergency Sale of Perishable Property [under Distress Warrant]

The Court has heard Plaintiff’s Application for Emergency Sale of Perishable Property in this action. The Court finds that good cause exists for the issuance of an order to sell the property described in this Order.

It is therefore ORDERED that an order of sale be issued directing the officer to sell, as under execution, the following property: [describe property as in form 28-9].

It is further ORDERED that the proceeds of the sale be placed in the registry of this Court pending a trial of the cause underlying this action. The officer will return the order of sale, sign it, and state on it the time and place of sale, name of the purchaser, amount of money received, and expenses of the sale.

SIGNED on ________________________________.

________________________________________________________________________________________________________________________

[JUSTICE/JUDGE] PRESIDING
If the application is granted, the clerk should issue an order of sale.
Form 28-12

Consideration of facts and circumstances is essential in determining the contents, method of delivery, and notice periods for notices to vacate. The practitioner should carefully read the relevant statutes, in particular Tex. Prop. Code §§ 24.005 and 24.006, and modify this form appropriately. See the discussion at sections 28.21:3–:5 in this manual and form 28-13.

Notice to Vacate for Nonpayment of Rent

[Date]

[Name of lessee] [Address] Via Certified Mail, Return Receipt
Requested No. [number],
First-Class Mail and Hand Delivery

RE: Notice to vacate for nonpayment of rent under lease (the “Lease”) dated [date] between
[parties to lease] for [describe leased premises] (the “Property”)

[Salutation]:

Because you have not paid rent on the Property under your Lease, your rights to occupancy and possession of the Property are hereby terminated under the provisions of the Lease. You are still liable for rent and other charges you may owe under the Lease.

Demand for possession of the Property is hereby made. You are hereby given notice to vacate the Property on or before midnight on [date], which is at least three days from the delivery of this notice to you and to the Property as required by Tex. Prop. Code § 24.005(a) and § 24.005(f). Your failure to vacate will result in appropriate legal action before the justice of the peace. Delay or postponement of such action shall not constitute waiver.
Sincerely,

[Name of attorney]
Attorney for Plaintiff
State Bar No.: 
[E-mail address] 
[Address] 
[Telephone] 
[Telecopier]
Form 28-13

Consideration of facts and circumstances is essential in determining the contents, method of delivery, and notice periods for notices to vacate. The practitioner should carefully read the relevant statutes, in particular Tex. Prop. Code § 24.005 and § 24.006, and modify this form appropriately. See discussion at sections 28.21:3--:5 in this manual and form 28-12.

Notice to Vacate for Nondelinquency Breach of Lease

[Date]

[Name of lessee]
[Address] Via Certified Mail, Return Receipt Requested No. [number]
First-Class Mail and Hand Delivery

RE: Notice to vacate for nondelinquency breach of lease dated [date] (the “Lease”),

between [parties to lease], for [describe leased premises] (the “Property”)

[Salutation]:

You have violated paragraph number[s] [number[s]] of the Lease, in that you [describe default(s)]. This is a substantial breach of the Lease. This is to notify you that my client is therefore exercising [his/her] right under the Lease to terminate your rights of occupancy and possession, effective immediately. You are still liable for rent and other charges you may owe under the Lease.

If you have not already moved out, demand for possession is hereby made and you are hereby given notice to vacate the Property on or before midnight on [date], which is at least one day from the delivery of this notice to you or to the Property. Failure to move out by then will result in legal action before the Justice of the Peace. Delay or postponement of such action shall not constitute waiver.
Sincerely,

[Name of attorney]
Attorney for Plaintiff
State Bar No.: [State Bar No.]
[E-mail address]
[Address]
[Telephone]
[Telecopier]
Sworn Complaint for Forcible Detainer

Form 28-14

See section 28.27:4 in this chapter for requirements for sworn complaints for forcible detainer actions.

[Caption. See § 3 of the Introduction in volume 1 of this manual.]

Sworn Complaint for Forcible Detainer

Plaintiff, [name of landlord], ("Plaintiff") would respectfully show the Court as follows:

1. **Jurisdiction.** Pursuant to Tex. Gov’t Code § 27.031(a)(2) and Tex. Prop. Code § 24.004, this Court has jurisdiction over this matter because the real property the subject matter of this suit is located in this justice precinct.

2. **Parties.** Plaintiff, [name of landlord], is [an/a] [individual/[type of entity]] authorized to do business in the state of Texas. Plaintiff’s address is [address, city, state]. [The last three numbers of Plaintiff’s driver’s license number are [numbers]./Plaintiff has not been issued a driver’s license.] [The last three digits of Plaintiff’s Social Security number are [numbers]./Plaintiff has not been issued a Social Security number.] Defendant is [an/a] [individual/[type of entity]] in [county] County Justice Precinct [insert number]. Defendant’s telephone number is [number].

3. **E-mail Service.** Plaintiff [does/does] not consent to e-mail service.

4. **Nonmilitary.** Defendant [is/is not] in active duty military service.

5. **Service of Process.** Defendant may be served by personal service at the premises under Tex. R. Civ. P. 510.4(b) or, if required, Tex. R. Civ. P. 510.4(c). Defendant’s address is
listed in paragraph 7(a) below. Plaintiff knows of no other home or work addresses of Defendant in the county in which the Property is located.


7. **Facts.**

   a. Plaintiff and Defendant entered into a written lease (the “Lease”) for [describe leased premises] (the “Property”) on [date].

   b. Plaintiff has owned and managed the Property at all dates mentioned herein and owns and manages the Property as of this date.

   c. Plaintiff has complied with all provisions of the Lease.

   d. Defendant has materially breached the Lease in that Defendant has failed to timely make rental payments. Defendant is currently in arrears in the amount of [insert amount].

   And/Or

   d. Defendant has substantially violated [describe lease provisions violated] of the Lease, to wit, [describe breach].

8. **Plaintiff’s Right to Possession.** Under Tex. Civ. Prac. & Rem. Code §§ 15.001, 15.011, and 15.0115, venue is proper in [county] County Precinct [number] because all or part of the Property complained of is located in [county] County Precinct [number]. On [date], Plaintiff [form(s) of delivery of notice to vacate; e.g., hand delivered] to Defendant at the Property written notice to vacate and demand for possession pursuant to Tex. Prop. Code § 24.005(a). Defendant has failed to surrender possession of the Property to Plaintiff. There-
fore, pursuant to Tex. Prop. Code § 24.002, Defendant has committed a forcible detainer, and Plaintiff is entitled to immediate possession of the Property.

9. **Attorney’s Fees.** Pursuant to Tex. Prop. Code § 24.006(b) and the Lease, Plaintiff is entitled to recover attorney’s fees in the event Plaintiff prevails in this action. As a result of Defendant’s default under the Lease, Plaintiff has found it necessary to employ [name of firm] to bring suit. Consequently, Plaintiff is entitled to recover reasonable attorney’s fees and expenses for the services of its attorneys through a rehearing before the Texas Supreme Court.

10. **Reservation of Rights.** Plaintiff seeks only possession of the Property, court costs, and attorney’s fees; Plaintiff expressly reserves the right to seek all rent and amounts due under the Lease in a court of competent jurisdiction.

11. **Prayer.** Plaintiff prays that—

   a. Defendant be cited to appear and answer;

   b. Plaintiff have judgment against Defendant for Possession of the Property, including removal of Defendant, removal of Defendant’s possessions, and removal of all other occupants;

   c. Plaintiff be granted judgment for all rent due and owing under the Lease as of the date of judgment;

   d. Plaintiff be granted judgment for all reasonable and necessary attorney’s fees through a motion for rehearing before the Texas Supreme Court;
e. Plaintiff be granted judgment for prejudgment and postjudgment interest on the above sums at the highest rate allowed by law;

f. Plaintiff be granted judgment for all costs of court; and

g. Plaintiff be granted such other and further relief as Plaintiff may be justly entitled.

DATED [date].

Respectfully submitted,

[Name of attorney]
Attorney for Plaintiff
State Bar No.: [E-mail address]
[Address]
[Telephone]
[Telexcopier]

STATE OF TEXAS )
COUNTY OF )

BEFORE ME, the undersigned authority, on this day personally appeared ____________________________, the authorized agent for [name of lessor], and stated that [he/she] has read the above and foregoing Sworn Complaint for Forcible Detainer and that each and every statement contained therein is within [his/her] personal knowledge and is true and correct.

SIGNED under oath before me on ______________.

__________________________________________________________
Notary Public, State of Texas
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Probate and Guardianship

I. Probate Generally

§ 29.1 Decedent’s Estate in Probate

When a person dies, his estate remains subject to payment of his debts unless the property is exempted by law and provided
that procedural guidelines are satisfied. Tex. Est. Code § 101.051. Claims against the estate will be paid in whole or on a pro
rata basis to the extent the estate’s assets will allow. Tex. Est. Code §§ 355.107–.108. Estate administration is the process of
determining the relative rights of creditors and beneficiaries.

Some assets of the deceased can pass outside probate through methods such as rights of survivorship and trusts. See part VI. in
this chapter.

Practice Note: The Texas Supreme Court has appointed a task force to promulgate plain language forms for pro se individ-
uals to use in certain probate matters, such as small estate affidavit proceedings and muniments of title. Probate courts will be
required to accept these forms once they become available to the public. See Tex. Gov’t Code § 22.020; Acts 2015, 84th Leg.,
R.S., ch. 602, § 1 (S.B. 512), eff. Sept. 1, 2015; Texas Supreme Court, Order Creating Landlord-Tenant Forms Task Force,

§ 29.2 Passage of Title through Probate

§ 29.2:1 Property Passed by Will

A mentally competent person having testamentary capacity and being of legal age (or having been emancipated) may pass his
estate and all his rights to property by will. Tex. Est. Code § 251.001. When a person dies leaving a lawful will, he is said to
have died “testate,” and title and beneficial ownership of all his property devised or bequeathed by the will immediately vests
in the respective devisees or legatees. The right of any beneficiary of the estate is subject to the payment of all claims against
the estate and other limitations provided by law. Tex. Est. Code § 101.051. Additionally, on the issuance of letters testamen-
tary or of administration, the personal representative has the right to possession of the real estate assets for purposes of admin-
Worth 1967, writ ref’d n.r.e.).

§ 29.2:2 Intestate Succession

If a decedent owns or has a right to property in Texas but he dies without a will, he is said to have died “intestate,” and his
property vests immediately in his heirs at law. Tex. Est. Code § 101.001. Determination of heirs at law and passage of title
through intestate succession is governed by Tex. Est. Code §§ 201.001–205.009. Title and inheritance rights of real property
situated in another state are governed by the law of that state. See Pellow v. Cade, 990 S.W.2d 307, 313 (Tex. App.—
Texarkana 1999, no pet.); see also Restatement (Second) of Conflict of Laws §§ 59, 223 (1971).
§ 29.2:3 Heirship Proceeding

If a decedent’s property passes by intestate succession, either the personal representative, a party seeking the appointment of an independent administrator under Texas Estates Code section 401.003, the trustee of a trust holding assets for the benefit of the decedent, a person claiming to be a creditor, or the owner of part of the decedent’s estate may apply for a determination of the decedent’s heirs and the interests the respective heirs have in the decedent’s property. Tex. Est. Code §§ 202.001–.002, 202.004. This proceeding must be brought in the appropriate court of the county in which venue would be proper as set out in Tex. Est. Code § 33.004, except where the proceeding is brought by the guardian of the decedent’s estate. In such a case, the proceeding must be brought in the probate court where the guardianship was pending. Tex. Est. Code § 202.004(3).

§ 29.2:4 Affidavit of Heirship

Any affidavit or other sworn or acknowledged document concerning heirship recorded for five years or longer in the deed records of a county in which a decedent’s property is located is prima facie evidence of the facts it states when introduced in an heirship proceeding. Tex. Est. Code § 203.001(a). Otherwise, such affidavits carry no significance, although third parties have traditionally relied on them. The statutory affidavit of heirship is different from the long-standing Texas procedure of transferring title to property based upon the filing of affidavits of heirship executed by two disinterested persons. See Stanley M. Johanson, Johanson’s Texas Estates Code Annotated 185–186 (Thomson Reuters 2015). An affidavit of heirship should not be confused with a small estate affidavit; the latter is a statutory method of probating qualifying estates. See section 29.6:4 below.

§ 29.3 Administration of Estates

§ 29.3:1 Who May Apply for Administration

An executor named in the will, an independent administrator designated by all of the distributees of the decedent under sections 401.002(b) and 401.003 of the Texas Estates Code, or any interested person may apply for the appointment of a personal representative. Tex. Est. Code § 301.051. “Interested persons” include heirs, devisees, spouses, creditors, or any others having a property right in or claim against the estate. Tex. Est. Code § 22.018. The application must be filed within four years of the decedent’s death, unless administration is necessary to receive or recover funds or other property due the estate or to prevent real property owned by the estate from becoming a danger to public health, safety, or welfare and the applicant is a home-rule municipality that is a creditor of the estate. Tex. Est. Code § 301.002. Letters testamentary will not be issued if a will is admitted to probate after four years of the decedent’s death. Tex. Est. Code § 256.003(b). See section 29.6:3 below for a discussion of probate of will as muniment of title.

§ 29.3:2 When Administration Necessary

Administration is deemed necessary if two or more debts exist against an estate, if partition of the estate among the distributees is sought, if the administration is necessary to receive or recover funds or other property due the estate, or if the administration is necessary to prevent real property in the estate from becoming a danger to public health, safety, or welfare; a court may, however, authorize administration for other reasons. Tex. Est. Code § 306.002(c). See part VI. in this chapter for a discussion of assets that pass outside of probate at death.
An estate may be administered with or without court supervision (called “dependent” and “independent” administration, respectively). See Tex. Est. Code §§ 351.051, 401.001–.008; Eastland v. Eastland, 273 S.W.3d 815, 822–23 (Tex. App.—Houston [14th Dist.] 2008, no pet.). The principal difference is that the claim requirements and time frames are stricter in a dependent administration, and it is therefore easier for the creditor’s claim to be rejected, disapproved, or barred. See sections 29.35 (dependent administrations) and 29.54 (independent administrations) below. Additionally, in an independent administration, the creditor may skip the claims process and immediately initiate suit for the collection of the debt. See sections 29.54:1 and 29.55:2.

§ 29.4 Personal Representative

§ 29.4:1 Personal Representative Generally

In this chapter, “personal representative” is used as a generic term including independent executor, independent or dependent administrator, temporary administrator, successor executor or administrator, administrator with will annexed, and guardian. See Tex. Est. Code § 22.031. These are the parties with whom a creditor will most likely have contact during the claims process. Generally, the difference between an executor and an administrator is that the former was named in the decedent’s will.

§ 29.4:2 Duties of Personal Representative

A personal representative has a duty to exercise the same care for estate property as a prudent person would for his own property. Tex. Est. Code § 351.101. The representative has a fiduciary duty to the heirs or devisees. Humane Society of Austin & Travis County v. Austin National Bank, 531 S.W.2d 574, 580 (Tex. 1975), cert. denied, 425 U.S. 976 (1976).

After receiving letters testamentary or of administration, the personal representative must collect and take into possession the personal property, record books, title papers, and other business papers of the estate and must deliver these items to the persons entitled to receive them when administration is complete. Tex. Est. Code § 351.102.

§ 29.4:3 Duties and Obligations of Personal Representative to Creditors

It has been held that a personal representative stands in a fiduciary relationship to creditors. Cochran’s Administrators v. Thompson, 18 Tex. 652 (1857); Ex parte Buller, 834 S.W.2d 622, 626 (Tex. App.—Beaumont 1992, no writ); but see FCLT Loans, L.P. v. Estate of Bracher, 93 S.W.3d 469, 481–82 (Tex. App.—Houston [14th Dist.] 2002, no pet.) (holding that appointment as an independent executor does not necessarily give rise to a fiduciary duty to creditors); Mohseni v. Hartman, 363 S.W.3d 652, 657 (Tex. App.—Houston [1st Dist.] 2011, no pet.) (executor does not owe duty of due care to creditor who alleges executor’s mismanagement impaired estate’s ability to pay creditor’s claim). There are specific statutory duties for independent personal representatives; see section 29.52:2 below.

§ 29.4:4 Bond

Unless a decedent’s will expressly dispenses with the need for a bond or a corporate fiduciary is appointed, a personal representative must post bond. Tex. Est. Code § 305.101. The judge shall set the bond in an amount sufficient to protect the estate and its creditors in accordance with Tex. Est. Code §§ 305.001–.257. Any interested person, including a creditor, may petition the court to raise the bond if it appears inadequate. Tex. Est. Code § 305.251(b). On a showing of just cause, bond may be
required of the personal representative if the representative has not otherwise been required to post bond, particularly in adversarial proceedings in which malfeasance is at issue. Tex. Est. Code § 305.002.

§ 29.5  Ascertaining Debtor’s Death and Status of Probate

If no one associated with a debtor informs the creditor of the debtor’s death, the creditor will have to ascertain the fact of death and the opening of probate administration, if any, by other means. All deaths in Texas are reported to the vital statistics unit; the time between the date of death and when it is reported varies from two weeks to several months. For a fee the unit will search its archives for a death record. A request may be sent by mail to Texas Vital Statistics, Department of State Health Services, 1100 West 49th Street, Austin, TX 78756-3101, by fax to 512-458-7711, or a certified copy of a death certificate may be ordered online at www.texasonline.state.tx.us/tolapp/ovra. A schedule of fees and an explanation of the application process is available on the Department of State Health Services website at www.dshs.texas.gov/vs/reqproc/Ordering-a-Birth-or-Death-Verification-by-Mail. A death verification can be ordered online at www.dshs.texas.gov/vs/reqproc/verification.shtm. The unit also sells microfilmed death records to private research databases such as LEXIS-NEXIS. See section 3.8 in this manual regarding using private research sources for finding debtors generally.

To ascertain whether an administration has been opened on a decedent’s estate, the attorney should start by asking the clerk of the court having probate jurisdiction in the county in which the decedent last lived. For a county with a large population whose probate court may be unable or unwilling to search for this information on request, the attorney should look to see if the status of probate cases can be found on the county’s website. Finally, the attorney should contact the customer service department of a title company. If a probate proceeding has been opened, the title company should be able to find the cause number of the proceeding.

§ 29.6  Special Administrations

§ 29.6:1  Temporary Administrator

The court may, by written order, immediately appoint a temporary administrator with limited powers. Tex. Est. Code § 452.001; see also Tex. Est. Code § 452.003. The purpose of temporary administration is to preserve the estate until it can pass into the hands of a person fully authorized to administer it. A temporary administration cannot exceed 180 days, but the court may make the temporary administrator a permanent one. Tex. Est. Code §§ 452.003, 452.008. A temporary administration is somewhat like a temporary injunction, preserving the status quo while the situation is assessed.

As a practical matter, a creditor should apply for the appointment of a temporary administrator only if no estate has been opened and it appears that assets are being disposed of or are in danger of being depleted by third parties. See section 29.8 below regarding the responsibilities of a creditor acting as personal representative. A better option may be a fraudulent transfer action coupled with a request for injunctive relief to stop the transfer or wastage. See section 14.30 in this manual regarding fraudulent transfer and sections 8.33 through 8.40 regarding injunctions.

The court may also appoint a temporary administrator with limited powers pending the contest of a will or administration. Tex. Est. Code § 452.051. This appointment can continue until the termination of the contest and the appointment of an administrator or executor with full powers. Tex. Est. Code § 452.051(b). At any time during the pendency of the contest, the court may confer on the temporary administrator all the powers and authority of a permanent administrator with regard to claims against the estate, but the temporary administrator must give sufficient bond. Tex. Est. Code § 452.052.
A temporary administrator has only those rights and powers conferred by the court, and the court may require an additional bond at any time it extends the rights and powers of the temporary administrator. Any acts not expressly authorized are void. Tex. Est. Code §§ 452.101, 452.102; see also Bandy v. First State Bank, 835 S.W.2d 609, 615 (Tex. 1992). Before filing a claim in a temporary administration, a creditor should determine if the order appointing the temporary administrator grants the authority to act on claims against the estate. If the order does not confer this power, filing a claim may be fruitless. Texas law is unclear regarding the effect of filing a claim if the administrator lacks authority to act on it.

§ 29.6:2  Administration of Community Property

When a husband or wife dies intestate and the community property passes to the surviving spouse, no administration is necessary. Tex. Est. Code § 453.002. Although the surviving spouse need not qualify before a court, the community property subject to sole and joint management of a spouse during marriage continues to be subject to the liabilities of the now-deceased spouse. In addition, any nonexempt property that passes to that spouse’s heirs or devisees remains subject to liabilities against it while the spouse was alive. Tex. Est. Code § 101.052. The surviving spouse or informal administrator must keep a distinct account of all community debts allowed or paid in the settlement of the estate. Tex. Est. Code § 453.006. The surviving spouse, in addition to other powers, may sue or be sued for the recovery of community property and may sell, mortgage, lease, and otherwise dispose of community property to pay community debts. Tex. Est. Code § 453.003(a).

§ 29.6:3  Probate of Will as Muniment of Title

A probated will is documentary evidence of a person’s right to the devised property, otherwise known as a muniment of title. See Ochoa v. Miller, 59 Tex. 460 (1883). For a will to be probated as a muniment of title, there must be no debts owed by the estate except for those secured by liens against real estate, and there must be no other necessity for administration of the estate. Tex. Est. Code § 257.001.

The order admitting a will to probate as a muniment of title acts as legal authority that the devisee or legatee is entitled to receive the decedent’s assets without administration of the estate. Tex. Est. Code § 257.102. No representative will be appointed by the court, and no letters testamentary will issue. If the decedent’s estate is handled in this manner, the attorney for any creditor of the decedent should proceed to collect directly against the heirs as established in the will. See section 29.9 below.

Except for foreign wills, a will cannot be admitted to probate after four years from the decedent’s death unless it is proved that the applicant was not in default in failing to apply for probate sooner. Letters testamentary may not be issued if a will is admitted to probate after four years from the decedent’s death. Tex. Est. Code § 256.003. Consequently, after the fourth anniversary of death, the decedent’s domestic will can only be admitted to probate as a muniment of title.

§ 29.6:4  Small Estate Affidavit

If the value of an estate’s assets, not including homestead and exempt property, does not exceed $75,000, and no application for an administration has been filed, the distributees of the estate may complete and file a small estate affidavit. Tex. Est. Code § 205.001. This affidavit must list the estate’s known assets, liabilities, distributees, and the respective shares of each distributee. Tex. Est. Code § 205.002. It will not transfer title to the decedent’s real property, except for the decedent’s homestead (and then only if the affidavit is recorded in the deed records of the county in which the homestead is located). Tex. Est. Code § 205.006. If the decedent left a will, the affidavit does not affect the disposition of property left under the will. Tex. Est. Code
§ 205.008. Many probate courts have local rules that greatly restrict the use of small estate affidavits. If the decedent’s estate is dealt with in this manner, the attorney for the creditor should proceed directly against the heirs as shown on the affidavit. See section 29.9 below.

§ 29.7 No Probate

If a decedent’s heirs do not need a probate proceeding to pass title to the decedent’s property or if they wish to avoid the probate process for another reason, they may simply choose not to probate the decedent’s estate. Several devices, such as living trusts and survivorship agreements, take a decedent’s property out of probate. See section 29.9 below regarding successor liability for a decedent’s debts and part VI. in this chapter regarding nonprobate assets.

§ 29.8 Creditor’s Ability to Institute Administration of Debtor’s Estate

A creditor of a decedent may open probate administration and receive letters testamentary or letters of administration. If a named executor, the surviving spouse, any beneficiary, or any next of kin also applies for letters, their applications will take priority over the creditor’s application. Tex. Est. Code § 304.001.

If appointed personal representative of the estate, the creditor will be held to the same duties and standards as any other personal representative. He will be charged with dealing with the decedent’s property as a prudent person would take care of his own property. See Tex. Est. Code § 351.101. He will be held to a fiduciary’s standard of care in the administration of the estate. Humane Society of Austin & Travis County v. Austin National Bank, 531 S.W.2d 574, 577 (Tex. 1975), cert. denied, 425 U.S. 976 (1976). A corporate fiduciary may be held to an even higher standard. Ertel v. O’Brien, 852 S.W.2d 17, 20 (Tex. App.—Waco 1993, writ denied); but see FCLT Loans, L.P. v. Estate of Bracher, 93 S.W.3d 469, 481–82 (Tex. App.—Houston [14th Dist.] 2002, no pet.) (appointment as independent executor does not necessarily give rise to fiduciary duty to creditors). Furthermore, the creditor will have to post bond. See Tex. Est. Code § 305.101.

If an interested person wants to prevent the creditor from becoming personal representative of the estate, he can either pay the claim; prove that the creditor’s claim is fictitious, fraudulent, illegal, or barred by limitation; or post bond of double the amount of the debt. The bond is secured by a lien against all the estate in the hands of the distributees. Tex. Est. Code §§ 301.201, 301.203.

Other creditors may have priority for being paid out of the estate; the creditor—personal representative should be wary of volunteering payment of any estate debt without prior provision of reimbursement and prioritization. See Tex. Est. Code § 355.103.

As personal representative, the creditor can play an active role in expediting the claims process. Also, the personal representative is entitled to a compensation of 5 percent of amounts received and paid out in cash, subject to certain limitations, and to recover all reasonable expenses incurred in administering the estate. See Tex. Est. Code §§ 352.002, 352.051.
§ 29.9 Beneficiary’s Liability for Decedent’s Debts

§ 29.9:1 No Liability in General

While an estate is in administration the heirs or distributees are generally not liable for the decedent’s debts. Bailey v. Cherokee County Appraisal District, 862 S.W.2d 581, 583 (Tex. 1993).

§ 29.9:2 No Administration or Administration Ceased

If an estate is distributed without any administration, the distributees are individually liable for a pro rata share of a claim against the decedent. Blinn v. McDonald, 46 S.W. 787 (Tex. 1898); Potts v. W.Q. Richards Memorial Hospital, 558 S.W.2d 939, 945 (Tex. Civ. App.—Amarillo 1977, no writ); Perkins v. Cain’s Coffee Co., 466 S.W.2d 801, 802–03 (Tex. Civ. App.—Corpus Christi 1971, no writ). The pro rata share is of assets actually received by the distributees or, if the property has been disposed of, is of the value of the disposed property. Chadwick v. Watkins, 258 S.W.2d 194, 197–98 (Tex. Civ. App.—Texarkana 1953, no writ). Additionally, the decedent’s creditors have priority over claims against the distributees that arose after the distribution from the estate. Wallace v. Republic National Bank & Trust Co., 80 F.2d 787, 789 (5th Cir. 1936), cert. denied, 298 U.S. 683. This pro rata liability also applies when the estate is withdrawn from administration. Tex. Est. Code § 354.058.

§ 29.9:3 After Final Distribution

No claim for money against a decedent’s estate may be allowed after final distribution of the estate. If the action is not barred by limitations, however, a creditor may sue the distributees directly, but his recovery will be limited to the value of the property received by them. Tex. Est. Code § 355.063. An independent executor may determine for himself when an estate is ready for distribution, though there are unpaid claims against the estate; the creditor’s remedy is against the devisees or legatees who, as distributees, take the property subject to debts owed by the estate. Anderson v. Huie, 266 S.W.2d 410, 412 (Tex. Civ. App.—Dallas 1954, no writ). A “legatee” includes a person entitled to a legacy under a will. Tex. Est. Code § 22.021. A “devisee” includes a legatee. Tex. Est. Code § 22.009. The creditor must plead and prove the distribution of the property. Perkins v. Cain’s Coffee Co., 466 S.W.2d 801, 803 (Tex. Civ. App.—Corpus Christi 1971, no writ).

§ 29.10 Exempt Property in Probate

§ 29.10:1 Homestead

If a decedent left a surviving spouse or minor child, his homestead is not liable for debts of the estate, except for purchase money, taxes due on it, work and material used in constructing improvements on it, an owelty of partition imposed against the entirety of the property, the refinance of a lien against the homestead, an extension of credit on the homestead, or a reverse mortgage. Tex. Est. Code § 102.004; National Union Fire Insurance Co. of Pittsburgh v. Olson, 920 S.W.2d 458, 461–62 (Tex. App.—Austin 1996, no writ). This applies regardless of whether the surviving family member occupies the property; it even applies if the decedent devised the property to someone other than the surviving family member. Milner v. McDaniel, 36 S.W.2d 992, 993 (Tex. 1931); National Union Fire Insurance, 920 S.W.2d at 462; see also Stanley M. Johanson, Johanson’s Texas Estates Code Annotated 73–75 (Thomson Reuters 2015). See sections 27.34 through 27.40 in this manual for a discussion of the homestead.
§ 29.10:2 Personal Property

The personal property of a decedent that is exempt from forced sale at his death remains exempt from forced sale to satisfy debts of his estate, except for payment of funeral expenses and the expenses of his last illness, if claims for those expenses are timely presented. Tex. Est. Code §§ 353.155, 355.102, 403.001, 403.051(a)(3). See sections 27.32 and 27.41 in this manual for a discussion of exempt personal property.

§ 29.11 Allowances

§ 29.11:1 Allowance in Lieu of Exempt Property

If a decedent did not leave property exempted from forced sale, the court will make a reasonable allowance to substitute for the property and order it paid to the surviving spouse and children. The allowance in lieu of a homestead may not exceed $45,000, and the allowance in lieu of all other exempt property may not exceed $30,000, exclusive of the allowance for the support of the surviving spouse, minor children, and adult incapacitated children. Tex. Est. Code § 353.053; see also Tex. Est. Code § 403.001 (independent executor to set aside and deliver to those entitled exempt property and allowances for support).

§ 29.11:2 Family Allowance to Spouse, Minor Children, and Adult Incapacitated Children

The surviving spouse or any person authorized to act on behalf of minor children or adult incapacitated children of a deceased may petition the court for payment of a family allowance sufficient to provide support and maintenance for one year from the time of the decedent’s death. Tex. Est. Code §§ 353.101, 353.102; see also Tex. Est. Code § 403.001. Payment of this allowance takes precedence over all claims against the estate except those for funeral expenses and expenses of the decedent’s last illness. Tex. Est. Code §§ 353.104, 355.102; see also Tex. Est. Code § 403.051(a)(3) (independent executor classifies and pays approved and established claims). The family allowance is in addition to the passage of homestead and exempt property or an allowance in lieu of that property.

§ 29.12 Monitoring Probate Court Proceedings

§ 29.12:1 Request for Notice

A creditor may request notification of all motions, applications, and proceedings. The request must be filed with the county clerk, and the requesting party must pay the fees and costs for such notices. Tex. Est. Code § 51.202. It is generally more advantageous for the creditor’s attorney to enter an appearance in the estate proceeding.

§ 29.12:2 Inventory and Appraisement; Affidavit in Lieu of Inventory, Appraisement, and List of Claims

A personal representative must file an inventory, appraisement, and list of claims of the estate within ninety days of qualifying unless the court shortens or extends the time for filing. Tex. Est. Code §§ 309.051(a), (b), 309.052. Alternatively, in the case of an independent administration, if there are no unpaid debts at the time the inventory is due, except for secured debts, taxes, and administration expenses, the personal representative may file in lieu of the inventory, appraisement, and list of claims an affidavit stating that all debts, except for secured debts, taxes, and administration expenses, are paid and that all beneficiaries, have received a verified, full, and detailed inventory. The affidavit must be filed within ninety days, unless the court changes
the time period. Tex. Est. Code § 309.056(b). Besides sending copies of the full, verified, detailed inventory to all persons or entities entitled to receive property from the estate, the personal representative must also send a copy of the inventory, appraisement, and list of claims to any interested person who requests it in writing or obtains an order from the court compelling the personal representative to provide a copy. Tex. Est. Code § 309.056(c). Unless requested in writing, the personal representative does not have to provide a copy of the full, verified, detailed inventory to devisees who are to receive property valued at $2,000 or less, who have received all property to which they are entitled under the will before the affidavit is filed, or who have waived their right to receive the inventory and appraisement. Tex. Est. Code § 309.056(b–1). Personal representatives often seek an extension of time to file an inventory, and the extension is routinely granted. But this information could be critical to the creditor’s strategy, particularly for secured creditors choosing between matured secured claim status and preferred debt and lien status; see section 29.23 below. In an appropriate case, therefore, the attorney should consider opposing the representative’s request for an extension to file an inventory.

§ 29.12:3 Contesting Probate Proceedings Generally

Any person interested in an estate may contest any proposed action to be decided by the probate court by filing its opposition in writing. Tex. Est. Code § 55.001. Proceedings that could be opposed include the prioritization, classification, and payment of claims; the granting of fees or commissions; the authorization of sales of property; the designation of exempt property; and the determination of family allowances.

[Sections 29.13 through 29.20 are reserved for expansion.]

II. Claims Procedure Generally

§ 29.21 Notice

§ 29.21:1 Methods of Notice—Publication, Posting, Mail

Personal representatives are required to give notice to creditors and other interested persons of the opening of administration by publication, certified or registered mail, or posting. Published notices must be printed in a newspaper of general circulation in the county in which letters of administration or letters testamentary are issued. Tex. Est. Code § 51.054. Mailed notices must be sent by certified or registered mail, return receipt requested, to the last known post office address of the creditor. Tex. Est. Code § 51.052. Posted notices are posted by the sheriff or constable at the courthouse door or the location in or near the courthouse where public notices are customarily posted in the county in which the proceedings occur, for not less than ten days before return day. Tex. Est. Code § 51.053.

§ 29.21:2 One Notice Sufficient

If a former representative, co-representative, or guardian has already given the required notices, a successor representative or guardian does not have to give repeated or additional notice. Tex. Est. Code §§ 308.055, 1153.005.
§ 29.21:3 Failure of Personal Representative to Give Notice

If a representative or guardian fails to give any required notice, the representative, guardian, and the sureties on their bonds, if any, will be liable for any damages suffered by any person because of that failure unless it appears that the creditor had actual notice. Tex. Est. Code §§ 308.056, 1153.005.

§ 29.21:4 Notice Requirements

Specific notice requirements are discussed below at section 29.34 (dependent administrations), section 29.53 (independent administrations), and section 29.63 (guardianships).

§ 29.22 Claims Generally

§ 29.22:1 Claim for Money vs. Contingent or Unliquidated Claim

A claim for money is a claim for a definite amount based on specific data, not a claim for an undetermined amount. *Anderson v. First National Bank*, 38 S.W.2d 768, 769–70 (Tex. 1931); *Connelly v. Paul*, 731 S.W.2d 657, 659 (Tex. App.—Houston [1st Dist.] 1987, writ ref’d n.r.e.). A contingent or unliquidated claim is not a claim for money. A tort claim not reduced to judgment, for instance, would be a contingent or unliquidated claim. *Anderson*, 38 S.W.2d at 769–70; *Wilder v. Mossler*, 583 S.W.2d 664, 667 (Tex. Civ. App.—Houston [1st Dist.] 1979, no writ). Also, a claim for equitable relief is not a claim for money. *Lusk v. Mintz*, 625 S.W.2d 774, 776 (Tex. App.—Houston [14th Dist.] 1981, no writ).

§ 29.22:2 Claim Reduced to Judgment before Death

If a defendant dies after judgment is rendered against him, execution may not issue on the judgment; the debt must be presented and proved in the course of administration. Tex. R. Civ. P. 625. It appears that an alternative method of presentment is to file a certified copy of the judgment with the probate court. *Conrad v. Judson*, 465 S.W.2d 819, 827 (Tex. Civ. App.—Dallas 1971, writ ref’d n.r.e.).

If the judgment has not been abstracted by the time the judgment debtor dies, subsequent abstracting of the judgment will not convert the claim into a secured claim. *First National Bank v. Cone*, 170 S.W.2d 782 (Tex. Civ. App.—Fort Worth 1943, writ ref’d). If the judgment lien did not attach to the decedent’s homestead during his life, it does not attach to the homestead property on death. *Harms v. Ehlers*, 179 S.W.2d 582 (Tex. Civ. App.—Austin 1944, writ ref’d). Otherwise, a properly abstracted judgment that attached to the decedent’s property before death is a valid lien against the nonexempt real property owned by the decedent at death, and the judgment creditor should proceed as a secured creditor. See Tex. Est. Code § 22.024, defining “mortgage” or “lien” as including a judgment, attachment, or garnishment lien.

§ 29.22:3 Attorney’s Fees

If a document evidencing or supporting a claim provides for attorney’s fees, the creditor may include in his claim the portion of the fee he has already paid or contracted to pay the attorney to prepare, present, and collect the claim. Tex. Est. Code §§ 355.003, 1157.003. Attorney’s fees ordinarily recoverable under chapter 38 of the Civil Practice and Remedies Code may also be collected. *Childs v. Taylor Cotton Oil Co.*, 612 S.W.2d 245 (Tex. Civ. App.—Tyler 1981, writ ref’d n.r.e.).
§ 29.23  Secured Claim

A secured claim is presented by the creditor as either a matured secured claim or a preferred debt and lien. See Tex. Est. Code §§ 403.052–.054. The failure of the creditor to make a timely and effective election results in the claim being treated as a preferred debt and lien. Tex. Est. Code § 403.052.

§ 29.23:1  Matured Secured Claim

A secured creditor holding a matured secured claim can elect to have the debt allowed and approved as fully matured, even if it has not yet matured under the terms of the original obligation; however, the personal representative will still pay the allowed and approved claim in the due course of administration. See Tex. Est. Code §§ 355.151–.160, 403.052–.054; see Tex. Est. Code §§ 1157.151–.153 for secured claim procedures in guardianships. The creditor has priority against the collateral over all other creditors and claims of the estate, except for (1) funeral expenses and expenses of the last illness, in an aggregate amount not exceeding $15,000; (2) allowances made to the surviving spouse and children, or to either of them; and (3) expenses of administration. Tex. Est. Code § 355.103. If the value of the collateral is not sufficient to fully pay the debt, the creditor holding a matured secured claim may collect any deficiency as a Class 8 unsecured claim. Tex. Est. Code §§ 355.102, 355.153, 403.053, 1157.151. See section 29.24:1 below regarding handling of matured secured claims by the personal representative and the court generally.

§ 29.23:2  Preferred Debt and Lien

A secured creditor electing as a preferred debt and lien may have the debt paid according to the terms of the instrument (typically a note) secured by the lien. The creditor may look only to the property for satisfaction of the debt; the debt cannot be collected from any other estate assets. If the debt is not paid by the deceased’s successors in interest, the creditor must foreclose on the collateral to collect what he can from the proceeds of foreclosure. See Tex. Est. Code §§ 355.151(a)(2), 355.154, 355.155, 1157.151. See section 29.24:2 below regarding handling of preferred debts and liens by the personal representative and the court generally.

§ 29.23:3  Choice of Matured Secured Claim or Preferred Debt and Lien

A creditor should opt for matured secured claim status if either (1) the value of the property is substantially less than the debt or is rapidly declining in value, but there appear to be other assets from which to pay any deficiency, after allowances and Class 1 and Class 2 claims are paid or (2) the creditor deems it worthwhile to accelerate any outstanding installments. If the estate is in dependent administration and the creditor wants to actually foreclose his lien (as opposed to obtaining an order for the personal representative to sell the collateral), the claim must be a preferred debt and lien. See section 29.40:2 below.

§ 29.24  Handling of Secured Claims by Personal Representative and Court Generally

§ 29.24:1  Matured Secured Claim

If a secured claim is a matured secured claim, the court in a dependent administration, or the personal representative in an independent administration must treat it as a Class 3 claim and pay it to the extent of the value of the collateral, after Class 1 and Class 2 claims but before lower-priority claims are paid. Tex. Est. Code ch. 355, subch. C, D; ch. 403, subch. B (decedent’s estate); Tex. Est. Code ch. 1157, subch. C, D (guardianship). See section 29.26 below regarding claim priority. If there
are not enough funds elsewhere in the estate to pay Class 1 and Class 2 claims, the representative must invade the collateral to pay those claims. If the collateral does not satisfy the entire claim, the representative must pay the deficiency as a Class 8 claim out of other assets of the estate, to the extent those assets are available. Tex. Est. Code § 355.102; see also Wyatt v. Morse, 102 S.W.2d 396, 398–99 (Tex. 1937).

Texas Estates Code sections 355.153 and 403.053 state that the secured creditor is not entitled to exercise any remedies in a manner that prevents the payment of the higher priority claims and allowances and, during the administration of the estate, is not entitled to exercise any contractual collection rights, including the power to foreclose, without either the prior written approval of the independent executor or court approval. Tex. Est. Code §§ 355.153(a), 403.053(a).

Section 403.053(a) may not be construed to suspend or otherwise prevent a creditor with a matured secured claim from seeking judicial relief of any kind or from executing any judgment against an independent executor. Except with respect to real property, any third party acting in good faith may obtain good title with respect to an estate asset acquired through a secured creditor’s extrajudicial collection rights, without regard to whether the creditor had the right to collect the asset or whether the creditor acted improperly in exercising those rights during an estate administration due to having elected matured secured status. Tex. Est. Code § 403.053(b).

If a claim approved or established by suit as a matured secured claim is secured by property passing to one or more devisees in accordance with Texas Estates Code chapter 225, subchapter G, the independent executor shall collect from the devisees the amount of the debt and pay that amount to the creditor or shall sell the property and pay out of the sale proceeds the claim and associated expenses of sale consistent with the provisions of Tex. Est. Code § 355.153(b), (c), (d), and (e) applicable to court supervised administrations. Tex. Est. Code § 403.053(c).

§ 29.24:2 Preferred Debt and Lien

If a secured claim is a preferred debt and lien, the court or the personal representative in an independent administration may either pay off the debt or continue making payments. The creditor has priority over all other claims in the collateral, including Class 1 and Class 2 claims, but can look only to the collateral for satisfaction. See Cessna Finance Corp. v. Morrison, 667 S.W.2d 580 (Tex. App.—Houston [1st Dist.] 1984, no writ).

During an independent administration, a secured creditor whose claim is a preferred debt and lien against property securing the indebtedness under Tex. Est. Code § 403.052 is free to exercise any judicial or extrajudicial collection rights, including the right to foreclosure and execution, provided, however, the creditor does not have the right to conduct a nonjudicial foreclosure sale within six months after letters are granted. Tex. Est. Code §§ 403.052, 403.054.

§ 29.25 Claim Not Required for Offset

If a creditor, such as a bank, has a right of offset against funds of a decedent it is holding, it may exercise that right (assuming it has the right to do so otherwise) without having to file a claim in probate. Bandy v. First State Bank, 835 S.W.2d 609, 617 (Tex. 1992).

§ 29.26 Classification of Claims, Allowances, and Expenses of Decedent’s Estate

Claims, allowances, and expenses are classified and have priority of payment as follows:
1. Class 1—funeral expenses and expenses of the last illness for a reasonable amount not exceeding $15,000 (any excess shall be paid as Class 8 claim);

2. allowances paid to the surviving spouse, the children, or both;

3. Class 2—expenses of estate administration, preservation, safekeeping, and management, including fees and expenses awarded under section 352.052 of the Texas Estates Code, and unpaid expenses of administration awarded in a guardianship of the decedent;

4. Class 3—secured claims, as far as they can be paid from the proceeds of property subject to the lien; if property is encumbered by more than one lien, the oldest is paid first, but no other preference is given to that lien;

5. Class 4—claims for the principal amount of and accrued interest on delinquent child support and child support arrearages that have been confirmed as a judgment or a determination of arrearages by a court under title 5 of the Texas Family Code or administratively determined by the Title IV-D agency, and claims for unpaid child support obligations under section 154.015 of the Texas Family Code;

6. Class 5—claims for taxes, penalties, and interest owed the state;

7. Class 6—claims for cost of confinement in the Texas Department of Criminal Justice;

8. Class 7—claims for repayment of medical assistance payments made by the state; and

9. Class 8—all other claims.


§ 29.27 Foreclosure Generally

The death of a mortgagor or pledgor does not in itself revoke the ability of a secured creditor to conduct a nonjudicial foreclosure sale if the creditor already had that right; however, the creditor should avoid foreclosing on the property after the death of the debtor and before the administration of his estate is opened. See Pearce v. Stokes, 291 S.W.2d 309, 310–11 (Tex. 1956). See sections 29.40, 29.56, and 29.68 below regarding foreclosure sales in dependent administrations, independent administrations, and guardianships.

[Sections 29.28 through 29.30 are reserved for expansion.]

III. Dependent Administration

§ 29.31 Dependent Administration Generally

In a dependent administration, the judge of the court in which the estate is pending is responsible for ensuring that the administrator acts in compliance with court orders. A dependent administration allows the court to supervise and control the sale of estate property and assets, payment of debts, execution of contracts, settlement of lawsuits, and distribution of the estate. See Tex. Est. Code ch. 351, subch. B, D. Any interested person, including a creditor of the estate, may apply for a dependent administration. Tex. Est. Code §§ 256.051, 301.051.
§ 29.32 When Dependent Administration Instituted

Letters of administration will be granted if the will fails to name an executor. Letters of administration may also be granted, if necessary, if all the executors named in the will decline to serve, fail to qualify within twenty days after letters testamentary have been issued, or fail to present the will for probate within thirty days after the testator’s death, unless there is good cause. This type of administration is often referred to as administration with will annexed. The court may also order dependent administration on any other proof that administration is necessary or when the person dies intestate. Tex. Est. Code § 306.002.

§ 29.33 Administrator

Although it is possible for a personal representative in a dependent administration to be a party named in a will admitted to probate, the representative will more likely be an administrator, not an executor. For convenience, the term “administrator” will be used in this part III. to refer to the personal representative in a dependent administration.

See section 29.4 above regarding the rights and duties of personal representatives generally and whether bond will be required.

§ 29.33:1 Powers of Administrator

The administrator has a number of statutory powers, some of which may be exercised only with the court’s permission. For collections purposes, they include the power to—

1. renew or extend any obligation owed by the estate;
2. make compromises or settlements in relation to property or claims in dispute or litigation;
3. compromise or pay in full any secured claim that has been allowed and approved by conveying the collateral to the secured creditor in satisfaction of the claim; and
4. abandon the administration of property of the estate that is burdensome or worthless. If the abandoned property is collateral securing a claim, it may be foreclosed on without further order of court.

These powers may be exercised only after written application to the probate court and authorization by court order. Tex. Est. Code § 351.051.

§ 29.33:2 Duties of Administrator

For purposes of creditors’ claims against the estate, an administrator must—

1. give notice of his appointment (as described in section 29.34 below) (Tex. Est. Code §§ 308.051, 308.053);
2. prepare and file an inventory, appraisement, and list of claims or affidavit in lieu of inventory, appraisement, and list of claims with the probate court within ninety days of qualifying as administrator (Tex. Est. Code §§ 309.051–.052);
3. report to the court annually regarding the claims allowed, paid, rejected, or sued on, as well as a variety of other matters incident to the estate (Tex. Est. Code §§ 359.001–.002);
4. pay claims allowed and approved or established by suit, in order of priority (Tex. Est. Code §§ 355.101–.106);
5. close the administration when all debts known to exist against the estate have been paid in full or as far as the assets in the administrator’s hands permit, and there is no further need for administration (Tex. Est. Code § 362.001); and


§ 29.34 Notice

§ 29.34:1 Notice by Publication or Posting

An administrator must, within one month of receiving letters, publish a notice of administration. If no newspaper of general circulation in the county in which letters were issued, notice must be posted. Tex. Est. Code § 308.051. A copy of the notice together with the publisher’s affidavit must be filed with the court. Tex. Est. Code § 308.052.

§ 29.34:2 Notice to Secured Creditors

An administrator must, within two months of receiving letters, give notice by certified or registered mail, return receipt requested, to each creditor known to have a claim against the estate that is secured by property of the estate. If the administrator later learns of another secured creditor, he must send notice to that creditor within a reasonable time. The administrator must file with the court a copy of each notice and return receipt along with the administrator’s affidavit stating the notice was mailed as required. Tex. Est. Code § 308.053.

§ 29.34:3 Permissive Notice to Unsecured Creditors

Although not required, an administrator may at any time before administration is closed give notice by mail to an unsecured creditor. This notice must contain the date of issuance of letters, the address where claims may be presented, an identification of how the claim should be addressed, and a notice that, unless the claim is presented within 120 days of receipt of the notice, it will be barred. Tex. Est. Code § 308.054. The creditor must give notice of its claim within 120 days of receiving this notice, or the claim will be barred. Tex. Est. Code §§ 355.060–.061. If the administrator chooses to send this notice, it must be mailed by certified or registered mail, return receipt requested. Tex. Est. Code § 308.054. No proof of this permissive notice need be filed with the court.

§ 29.35 Claims in Dependent Administration

§ 29.35:1 Claim for Money vs. Contingent or Unliquidated Claim

If a claim is not a claim for money, the creditor need not present it within six months of death or present it in statutorily prescribed form. Carter v. Kahler, 902 S.W.2d 85, 87 (Tex. App.—Houston [1st Dist.] 1995, no writ); Donaldson v. Taylor, 713 S.W.2d 716 (Tex. App.—Beaumont 1986, no writ).

A claim for money is a claim for a definite amount based on specific data, not a claim for an undetermined amount. See section 29.22:1 above.
§ 29.35:2  **Form of Claim**

A claim for money against an estate in dependent administration must be authenticated (i.e., supported by an affidavit that the claim is just and that all legal offsets, payments, and credits known to the affiant have been allowed). The attorney should attach a copy of the relevant instrument, account, or voucher if one is available, and the affiant should state the facts on which the claim is founded. Tex. Est. Code §§ 355.004, 355.059. See form 29-1 in this chapter for a form claim.

§ 29.35:3  **Evidence of Claim Lost or Destroyed**

If evidence of the claim has been lost or destroyed, the affiant must state facts regarding loss or destruction of that evidence, as well as the amount, date, and nature of the claim, the due date of the claim, and that the creditor is still the owner of the claim. The claim must also be proved by disinterested testimony given either in open court or by deposition. If a claim is approved or allowed without this disinterested proof, the approval or allowance is void. Tex. Est. Code §§ 355.006, 355.062.

§ 29.35:4  **Claim of Corporation**

A claim presented on behalf of a corporation or other entity must include an affidavit made by an authorized officer or representative. In addition to the requirements set out in section 29.35:2 above, the affidavit must also state that the affiant has made diligent inquiry and examination. Tex. Est. Code § 355.005.

§ 29.36  **Presentment**

§ 29.36:1  **Procedure Generally**

A creditor may either present a claim for money directly to the administrator or deposit the claim with the court clerk. If it is deposited with the clerk, the clerk must notify the representative of the claim. Tex. Est. Code §§ 355.001–.002. A claim for money that is not barred by the statute of limitations may be presented at any time during the pendency of administration. Tex. Est. Code § 355.001.

§ 29.36:2  **Deadline for Presentation of Unsecured Claim after Permissive Notice**

A creditor holding an unsecured claim against an estate in a dependent administration who has received permissive notice regarding claims against the estate must present his claim within 120 days of receipt of the notice or the claim will be barred. Tex. Est. Code §§ 308.054, 355.060–.061.

§ 29.36:3  **Deadline for Presentation of Secured Claim**

If a secured creditor wants matured secured claim status, he must present his claim electing that status within six months from the date of issuance of letters or four months after receiving notice of the issuance of letters, whichever is later. Failure to present the claim with proper election within this period makes the secured claim a preferred debt and lien. Tex. Est. Code § 355.152.
§ 29.37 Handling of Claims by Administrator and Court

§ 29.37:1 Allowance or Rejection of Claims by Administrator

Once a creditor presents or files his claim, the administrator has thirty days to either allow or reject the claim in its entirety or to reject part and indicate which part is allowed or rejected. Tex. Est. Code § 355.051. The failure to timely allow or reject the claim constitutes a rejection. Tex. Est. Code § 355.052. The administrator is not required to notify the creditor that the claim has been rejected. Russell v. Dobbs, 354 S.W.2d 373, 376 (Tex. 1962). See section 29.38:1 below regarding strategies for creditors in this situation. If the claim is rejected through inaction but is subsequently proved through suit, the creditor can recover the costs of suit from the administrator individually and can seek the removal of the administrator. Tex. Est. Code § 355.052.

The administrator also has thirty days to object to the form of the claim. Tex. Est. Code § 355.007.

§ 29.37:2 Action by Court

Once an administrator has filed an allowance or rejection of a claim, the court clerk enters the claim on the court’s claim docket. Tex. Est. Code § 355.053. If the administrator has allowed the claim and it has been entered on the claims docket for ten days, it will be either approved in whole or in part or disapproved by the court, and the court will also classify approved claims. Tex. Est. Code § 355.055. See section 29.26 above regarding classification of claims. Judgment cannot be rendered favoring a creditor on a claim for money that has not been presented to the administrator and either rejected or disapproved. Tex. Est. Code § 355.065.

If the claim is barred by limitations, the administrator is not supposed to allow it. If he does, the court should not approve it. Tex. Est. Code § 355.061. Even when a claim is in proper form and allowed, if the court is not satisfied that the claim is just, it must hold a hearing and receive evidence on the issue to determine the justness of the claim. Tex. Est. Code § 355.056.

If the administrator rejects the claim, the court cannot act on the claim until it is established by suit. See section 29.39 below regarding suit on a rejected claim.

§ 29.38 Claims Handling and Payment

§ 29.38:1 Rejected Claim

If a claim is rejected in whole or in part by the administrator, the creditor must institute suit within ninety days of the rejection or the claim is barred. Tex. Est. Code § 355.064. See section 29.37:1 above regarding how claims can be either actively rejected or rejected through the inaction of the administrator. Although the administrator has thirty days in which to allow or reject the claim, he is free to file his rejection anytime after receiving it and does not have to inform the creditor of his rejection. Russell v. Dobbs, 354 S.W.2d 373, 376 (Tex. 1962). Also, if the administrator allows the claim after the thirty-day period expires, the claim is still deemed rejected. Lusk v. Mintz, 625 S.W.2d 774, 776 (Tex. App.—Houston [14th Dist.] 1981, no writ).

Administrators have been known to reject a claim immediately, starting the ninety-day limitations period before the unwary creditor knows it has begun. Therefore, after the thirty-day period expires, the attorney should check the court file to determine the administrator’s disposition, if any, of the claim. It is recommended that the petition be prepared at the same time the
claim is prepared so it can be filed as soon as possible after ascertaining that the claim has been rejected. See section 29.39 below regarding suits on rejected claims.

If the creditor’s suit is barred by the ninety-day rule, the creditor may still proceed against any joint debtor. See Albiar v. Arguello, 612 S.W.2d 219, 220 (Tex. Civ. App.—Eastland 1980, no writ).

The ninety-day limitation does not apply to claims other than claims for money. Lusk, 625 S.W.2d at 776; National Guaranty Loan & Trust Co. v. Fly, 69 S.W. 231 (Tex. Civ. App. 1902, no writ).

§ 29.38:2 Collection of Approved Claims

If a creditor’s claim has been approved or established by suit and the administrator does not pay the claim, the creditor may petition the court to be paid at any time after twelve months from the granting of letters testamentary. Tex. Est. Code § 355.107(a). If the estate has sufficient funds on hand, and after the administrator has been cited to appear and show cause why the creditor should not be paid, the court may order payment to the creditor from those funds. Tex. Est. Code § 355.107(c)

§ 29.39 Suit on Rejected Claim

§ 29.39:1 Jurisdiction

A suit on a rejected claim should be brought in the court in which administration of the estate is pending. Tex. Est. Code § 355.064(a); Bailey v. Cherokee County Appraisal District, 862 S.W.2d 581, 585 (Tex. 1993); Howe State Bank v. Crookham, 873 S.W.2d 745 (Tex. App.—Dallas 1994, no writ); but see Phifer v. Nacogdoches County Central Appraisal District, 45 S.W.3d 159, 169–70 (Tex. App.—Tyler 2000, pet. denied) (exception exists for suit to collect delinquent taxes on property located in different county from where probate located).

§ 29.39:2 Pleading Requirements

The suit should be filed against the administrator of the estate and should be styled, for example, “Jane Doe, Administrator of the estate of John Doe, deceased.” An estate is not a legal entity and may not be sued. See Henson v. Estate of Crow, 734 S.W.2d 648, 649 (Tex. 1987); Price v. Estate of Anderson, 522 S.W.2d 690, 691 (Tex. 1975).

The petition should state the elements supporting the underlying cause of action—for example, a sworn account. Several additional elements must also be pleaded: the presentation of the claim to the administrator, its rejection, and the fact that ninety days have not elapsed since its rejection. Butler v. Summers, 253 S.W.2d 418, 422 (Tex. 1952); Podgoursky v. Frost, 394 S.W.2d 185 (Tex. Civ. App.—San Antonio 1965, writ ref’d n.r.e.). Although pleading that all conditions precedent have occurred or have been performed would seem to fulfill these pleading requirements (see Tex. R. Civ. P. 54), the manual committee is not aware of Texas case law in support. The better practice, therefore, is to plead the specific procedural acts or omissions giving rise to the suit. See form 29-2 in this chapter for a petition that not only pleads the elements specifically but also contains an “all conditions precedent” allegation.
No execution may issue on a claim established by suit. The creditor should request that the final judgment in his favor state that it is to be paid in the due course of administration; he should also request that the judgment be entered in the claims docket as if originally approved for classification and payment. Tex. Est. Code § 355.066; Tex. R. Civ. P. 313.

§ 29.39:3 Cost Allocation

Costs for suits on claims are allocated as follows:

1. If the claim is allowed and approved, the estate pays.

2. If the claim is allowed but disapproved, the creditor pays.

3. If the claim is rejected but established by suit, the estate pays, unless the claim was rejected by operation of law because the administrator failed to act timely, in which case the administrator, individually, pays the costs (see Tex. Est. Code § 355.052).

4. If the claim is rejected but not established by suit, the creditor pays.

5. In suits to establish a claim after rejection in part, if the creditor fails to recover a judgment for a greater amount than was allowed or approved, the creditor pays.


§ 29.40 Foreclosure and Other Court-Supervised Sales

§ 29.40:1 Generally

A creditor holding a claim secured by a valid lien that has been allowed and approved or established by suit may apply to the probate court to sell the property or as much of it as is necessary to satisfy the claim. The clerk will issue citation requiring the administrator to appear and show cause why the application should not be granted. If it appears advisable to discharge the lien out of the general assets of the estate or to refinance the claim, the court will so order; otherwise, the property will be ordered sold at public or private sale. Tex. Est. Code §§ 356.201–.203. Although the sale is to be performed “as in ordinary cases of sales of real estate,” there is no other statutory reference regarding its limitation to real property; a creditor holding a security interest in personal property might consider using this statute to force the sale of the property.

The property can be either real or personal, but if real property is selected to be sold, it will be that which the court deems most advantageous to the estate to sell. Tex. Est. Code § 356.257. No property of any kind may be sold without court order. Tex. Est. Code § 356.001. If the court orders a sale, the proceeds will be used to pay the claim to the extent that it is not needed to discharge the liabilities of higher-priority claims—unless the lien is a preferred debt and lien. Tex. Est. Code § 355.104. In that event, higher-priority claims are not paid before the lien claimant is paid. See Tex. Est. Code § 355.154. An application and an order for court-ordered sale of collateralized property are at forms 29-3 and 29-4 in this chapter.

The deed that conveys title to real property must refer to and identify the decree of the court confirming the sale. See Tex. Est. Code § 356.557.
§ 29.40:2 Preferred Debt and Lien

If a lien is considered as a preferred debt and lien and the property is not sold within six months after the granting of letters, the administrator is supposed to pay all accrued maturities and perform all other contractual terms. If he fails to do so, the creditor may apply to have the property sold or foreclosed. Tex. Est. Code § 355.155. If the creditor requests foreclosure, the application must be supported by the creditor’s affidavit. Tex. Est. Code § 355.156. See form 29-5 in this chapter for an application and affidavit. The clerk must issue citation to the administrator and any other person described in the application as having a debt secured by the property; these people must be personally served. Tex. Est. Code § 355.157.

At the hearing, after determining that there is a default, the court must—

1. require the sale of the property subject to the unmatured part of the debt and apply the proceeds of the sale to the liquidation of the maturities;
2. require the sale of the property free of the lien and apply the proceeds to the payment of the whole debt; or
3. authorize foreclosure by the creditor as allowed by the terms of the mortgage instrument or security agreement or as authorized by law. The court may fix a minimum price for the property that does not exceed the property’s fair market value.

Tex. Est. Code §§ 355.158–.159. See forms 29-6 through 29-8 for an order authorizing sale of property, a report of sale, and a decree confirming sale.

If foreclosure is authorized and the property is not sold because no bid for the minimum amount was made, the creditor may file another application. The court, in its discretion, may eliminate or modify the minimum price requirement and permit another foreclosure sale. Tex. Est. Code § 355.160.

§ 29.41 Claims by Administrator

The provisions of the Texas Estates Code regarding presentment of claims do not apply to any claim of an administrator. However, the administrator must file a verified claim within six months after his qualification, or the claim is barred. Tex. Est. Code § 355.201(a)–(b).

[Sections 29.42 through 29.50 are reserved for expansion.]

IV. Independent Administration

§ 29.51 Nature of Independent Administration

Independent administration is the administration of an estate with limited court involvement. See Tex. Est. Code §§ 401.001–.002; Cunningham v. Parkdale Bank, 660 S.W.2d 810 (Tex. 1983). It is usually created if the decedent providing in his will that no action shall be had in relation to the settlement of his estate other than the probate and recording of his will and the return of any required inventory, appraisement, and list of claims of the estate. Tex. Est. Code § 401.001. However, no special language is required so long as it shows the decedent’s intent that the administration be free of court supervisions. See Long v. Long, 169 S.W.2d 763, 764 (Tex. Civ. App.—San Antonio 1943, writ ref’d); see also In re Dulin’s Estate, 244 S.W.2d 242, 244 (Tex. Civ. App.—Galveston 1951, no writ) (holding that merely naming a person “as independent executor” was suffi-
cient). Also, the distributees of a decedent, testate or intestate, may consent to independent administration. Tex. Est. Code §§ 401.002–.004.

If the decedent dies intestate and the heirs desire independent administration, they must first obtain a determination of heirship by judgment to avoid dependent administration. Tex. Est. Code § 401.003(b). The heirship proceeding and appointment of independent administrator are often done in the same hearing. An independent personal representative appointed by will is an independent executor, whereas one appointed in another manner is an independent administrator. See Tex. Est. Code § 22.017.

§ 29.52 Independent Executor

Just as it is possible for an executor to be named in a dependent administration, an administrator may be named in an independent administration. Generally, though, the personal representative in an independent administration is an executor named in the will. For convenience, the term “executor” will be used in this part IV. to refer to the personal representative in an independent administration.

See section 29.4 above regarding the rights and duties of personal representatives generally and whether bond will be required.

§ 29.52:1 Powers of Executor

An executor has the power to perform any act that a court-supervised executor or administrator could perform only under court order. Tex. Est. Code § 402.002; see also Rowland v. Moore, 174 S.W.2d 248 (Tex. 1943). An independent executor or administrator therefore has full authority to deal with creditors and resolve claims. See Tex. Est. Code § 351.051. See section 29.33:1 above regarding powers of an administrator.

§ 29.52:2 Duties of Executor

An executor has the duty to give proper notice to creditors and to approve, classify, and pay or reject claims against the estate in order of priority. Tex. Est. Code § 403.051. See section 29.53 below regarding notice to creditors. See section 29.26 above for classification of claims.

§ 29.52:3 Liabilities of Executor

An executor is not required to give bond if the will states that no bond is necessary, unless it is shown that he has mismanaged the estate, has betrayed or is about to betray his trust, or is disqualified in some other way. Tex. Est. Code § 404.002. If the executor is not required to give bond, the heirs or other beneficiaries of an estate under independent administration may be required to do so if requested by any person having a claim against the estate. If bond is not given as ordered, the court can order a dependent administration. A creditor may sue on the bond if a claim goes unsatisfied. Tex. Est. Code § 403.060. Heirs and beneficiaries are rarely required to give bond. See Kauffman v. Wooters, 13 S.W. 549 (Tex. 1890).
§ 29.53 Notice

§ 29.53:1 Notice by Publication or Posting

An executor must, within one month of receiving letters, publish a notice of administration. If there is no newspaper of general circulation in the county in which letters were issued, notice must be posted. Tex. Est. Code §§ 308.051, 403.051(a)(1). A copy of the notice together with the publisher’s affidavit must be filed with the court. Tex. Est. Code § 308.052.

§ 29.53:2 Notice to Secured Creditors

An executor must, within two months of receiving letters, give notice by certified or registered mail, return receipt requested, to each creditor known to have a claim against the estate that is secured by property of the estate. If the executor later learns of another secured creditor, he must send notice to that creditor within a reasonable time. Tex. Est. Code §§ 308.053, 403.051(a)(1). The administrator must file with the court a copy of each notice and return receipt along with the administrator’s affidavit stating the notice was mailed as required. Tex. Est. Code § 308.053.

§ 29.53:3 Permissive Notice to Unsecured Creditors

Although not required, an executor may at any time before administration is closed give notice by mail to an unsecured creditor. This notice must contain the date of issuance of letters, the address where claims may be presented, an identification of how the claim should be addressed, and a notice that, unless the claim is presented within 120 days of receipt of the notice, it will be barred. Tex. Est. Code § 308.054, 403.051(a)(2). The creditor must give notice of its claim within 120 days of receiving this notice, or the claim will be barred. Unlike the permissive notices in dependent administrations, in order to effectively bar the claim within 120 days the notice to unsecured creditors in independent administrations must include a statement that a claim must be presented by one of the methods prescribed in Texas Estates Code chapter 403, subchapter B (i.e., by an authenticated written instrument that is hand-delivered with proof of receipt or mailed by certified mail, return receipt requested, to the executor or the executor’s attorney; by a pleading filed in a lawsuit; or by an authenticated written instrument or a pleading that is filed in the court in which the estate is pending). Tex. Est. Code § 403.051(b); see also Tex. Est. Code § 403.056. If the administrator chooses to give this notice, it must be mailed by certified or registered mail, return receipt requested. Tex. Est. Code § 308.054. No proof of this permissive notice need be filed with the court.

§ 29.54 Claims in Independent Administration

§ 29.54:1 Presentment

Although presentment of claims in an independent administration is permitted, it is not required, except by specific provisions of the Texas Estates Code. Tex. Est. Code ch. 403, subch. B; see Ditto Investment Co. v. Ditto, 293 S.W.2d 267, 269 (Tex. Civ. App.—Fort Worth 1956, no writ). For example, see sections 29.54:2 and 29.54:3 below.

Where notice to the independent executor is required, it must be contained in (1) an authenticated written instrument that is hand-delivered with proof of receipt or mailed by certified mail, return receipt requested, to the independent executor or the executor’s attorney, (2) a pleading filed in a lawsuit with respect to the claim, or (3) an authenticated written instrument or pleading filed in the court in which the administration of the estate is pending. Tex. Est. Code § 403.056.
The creditor may enforce payment by filing suit against the independent executor. *Bunting v. Pearson*, 430 S.W.2d 470 (Tex. 1968); *El Paso National Bank v. Leeper*, 538 S.W.2d 803, 806 (Tex. Civ. App.—El Paso 1976, writ ref’d n.r.e.). If such a suit is filed, the executor is not required to plead until after six months from the creation of the independent administration and the issuance of letters testamentary. Tex. Est. Code § 403.059.

In independent administrations, the statute of limitations is not tolled by the presentment of a claim, notice, or statement to the executor; it is only tolled by the written approval of the claim by the executor, a pleading filed in a suit pending at the decedent’s death, or the filing of a suit against the executor. Tex. Est. Code § 403.057.

**Practice Note:** Generally, the procedures for establishing claims and suits on rejected claims that apply to dependent administrations do not apply to independent administrations. See Tex. Est. Code § 403.058; see also *Bunting*, 430 S.W.2d at 473. In an independent administration, there is no requirement that the creditor’s claim be presented before it can be sued on, and the ninety-day requirement before filing suit does not apply. Tex. Est. Code §§ 403.058–.059. For a detailed explanation of the difference between claims against independently and dependently administered estates, see Stanley M. Johanson, *Johanson’s Texas Estates Code Annotated* 359–60 (Thomson Reuters 2015).

### § 29.54:2 Deadline for Presentation of Unsecured Claim after Permissive Notice

A creditor holding an unsecured claim against an estate in independent administration who has received permissive notice regarding claims against the estate must give notice to the executor of the nature and amount of his claim within 120 days of receipt of the notice or the claim will be barred. Tex. Est. Code §§ 403.055–.056.

### § 29.54:3 Deadline for Presentation of Secured Claim

If a secured creditor wants matured secured claim status, he must present his claim electing that status within six months from the date of issuance of letters or four months after receiving notice of the issuance of letters, whichever is later. Tex. Est. Code § 403.052. In addition to giving the notice, a creditor whose claim is secured by real property and who seeks matured secured claim status must record a notice of the creditor’s election in the deed records of the county in which the real property is located. Tex. Est. Code § 403.052. If no election to be a matured secured claim is made, or the election is made but not within the prescribed period or is made within the prescribed period but the creditor has lien against real property and fails to record notice of the claim in the deed records, the claim will be treated as a preferred debt and lien. Tex. Est. Code § 403.052.

See section 29.23 above regarding matured secured claim and preferred debt and lien status generally.

### § 29.55 Suits against Independent Estate

#### § 29.55:1 Jurisdiction

In counties with a statutory probate court, all suits against an independent executor or administrator regarding a claim against the estate must be filed in the probate court. In counties without a statutory probate court, the suits must be filed in the county courts with jurisdiction over probate proceedings, if any. Tex. Est. Code §§ 31.001(4), 31.002(4), 32.001–.005.
§ 29.55:2  Creditor’s Pleading Requirements

There is no requirement that a creditor present his claim against an independently administered estate before it can be sued on. With one exception, a suit against an independent executor should look essentially like any other collections suit. See Tex. Est. Code §§ 403.058–.059. See also Bunting v. Pearson, 430 S.W.2d 470 (Tex. 1968); Collins v. State, 506 S.W.2d 293 (Tex. Civ. App.—San Antonio 1973, no writ). The exception is in the prayer, in which the creditor should pray that execution issue against property of the estate in the hands of the executor (or his successor) in the due course of administration. Tex. Est. Code § 403.059; Tex. R. Civ. P. 313. See form 29-9 in this chapter for a sample petition.

§ 29.55:3  Executor’s Pleading Requirements

Although the suit may be brought at any time not otherwise barred by limitations, the executor does not have to plead until after six months from the date independent administration was created and the order appointing an executor was entered. Tex. Est. Code § 403.059.

§ 29.56  Foreclosure

A secured creditor has the same right of nonjudicial foreclosure that he would have if the debtor were alive. See Pearce v. Stokes, 291 S.W.2d 309, 310–11 (Tex. 1956). The executor, however, can enjoin such a foreclosure sale if the estate is insolvent and if the sale would result in claims being paid out of statutory priority. Farmers’ & Merchants’ National Bank v. Bell, 71 S.W. 570 (Tex. Civ. App. 1902, writ ref’d).

If the creditor elects matured secured claim status, his right to foreclose may be limited if foreclosure would prevent the preferential payment of allowances or Class 1 or Class 2 claims. Tex. Est. Code § 355.153. If the secured claim is classed as a preferred debt and lien, the creditor may not seek a deficiency. See Wyatt v. Morse, 102 S.W.2d 396, 398–99 (Tex. 1937). Additionally, the creditor whose claim is a preferred debt and lien cannot conduct a nonjudicial foreclosure sale in the first six months after letters are issued. Tex. Est. Code § 403.054.

For a judicial foreclosure, the creditor should sue both the executor and the distributees or heirs taking title to the collateral as determined by the court sitting in probate, either by will or heirship determination. The suit should be brought in a court having jurisdiction over matters relating to a probate proceeding. In counties with a statutory probate court, the suit should be brought in the probate court. See Tex. Est. Code chs. 31, 32.

[Sections 29.57 through 29.60 are reserved for expansion.]

V. Guardianship

§ 29.61  Guardianship Generally

If a person is totally without capacity to care for himself, to manage his property, to operate a motor vehicle, to make personal decisions regarding his residence, and to vote in a public election, the court may appoint a guardian of his person, estate, or both. Tex. Est. Code § 1101.151. If he lacks capacity to do some but not all tasks necessary to care for himself or to manage his property, with or without supports and services, the court can appoint a guardian with limited powers. Tex. Est. Code § 1101.152. The person for whom a guardian is appointed is referred to as a “ward.” Tex. Est. Code §§ 22.033, 1002.030.
§ 29.62    Guardian

§ 29.62:1  Powers of Guardian

A guardian has a number of statutory powers. For collections purposes, they include the power to—

1. renew or extend any obligation owed by the ward;
2. make compromises or settlements in relation to property or claims in dispute or litigation;
3. compromise or pay in full any secured claim that has been allowed and approved by conveying the collateral to the secured creditor in satisfaction of the claim; and
4. abandon the administration of property of the estate that is burdensome or worthless. If the abandoned property is collateral securing a claim, it may be foreclosed on without further order of court.

These powers may be exercised only after written application to the probate court and authorization by court order. Tex. Est. Code § 1151.102.

§ 29.62:2  Duties of Guardian

For purposes of creditors’ claims against the estate, a guardian must—

1. give notice of his appointment (as described in section 29.63 below) (Tex. Est. Code §§ 1153.001–.004);
2. prepare and file an inventory, appraisement, and list of claims with the probate court within thirty days of qualifying as guardian (Tex. Est. Code §§ 1154.051–.052);
3. report to the court annually regarding the claims allowed, paid, rejected, or sued on, as well as a variety of other matters incident to the estate (Tex. Est. Code ch. 1163, subch. A);
4. pay claims allowed and approved or established by suit, in order of priority (Tex. Est. Code §§ 1157.101, 1157.103);
5. settle and close the guardianship when (a) the ward dies; (b) a minor ward becomes an adult by age, emancipation, or marriage; (c) the ward is decreed by the court to be restored to full capacity; (d) the spouse of a married ward qualifies as survivor in community and the ward does not own separate property; (e) the estate is fully expended; (f) the foreseeable income to the ward or the estate is so negligible as to make the guardianship burdensome; (g) the assets are placed in a management trust or pooled trust; or (h) the court otherwise determines the guardianship is unnecessary (Tex. Est. Code § 1204.001); and

§ 29.63    Notice

§ 29.63:1  Notice by Publication

A guardian must, within one month of receiving letters, publish a notice of guardianship. If no newspaper of general circulation is published in the county in which letters were issued, notice must be posted. Tex. Est. Code § 1153.001. A copy of the notice together with the publisher’s affidavit must be filed with the court. Tex. Est. Code § 1153.002.
§ 29.63:2  Secured Creditors and Claims of Which Guardian Has Actual Knowledge

Notice by certified or registered mail, return receipt requested, must be given to all persons having a claim for money against a ward’s estate if either the claim is secured by a deed of trust, mortgage, or vendor’s, mechanic’s, or other contractor’s lien on real estate belonging to the estate, or the guardian has actual knowledge of the claim. This notice must be given within four months of the receipt of letters. The guardian must file with the court a copy of each notice to a secured creditor and return receipt along with the guardian’s affidavit stating the notice was mailed as required. Tex. Est. Code § 1153.003. Additionally, although not required, a guardian may include in the required notice to an unsecured creditor that his claim will be barred unless presented within 120 days of receipt of the notice. Tex. Est. Code § 1153.004. The creditor must give notice of its claim within 120 days of receiving this notice, or the claim will be barred. Tex. Est. Code § 1157.060. No proof of this permissive notice need be filed with the court.

§ 29.63:3  One Notice Sufficient

If notice has been given by a former or co-guardian, repeated or additional notice need not be given. Tex. Est. Code § 1153.005(a).

§ 29.63:4  Failure of Guardian to Give Notice

If a guardian fails to give any required notice, the guardian and any sureties on his bond will be liable for damages suffered by any person because of that failure unless it appears that the creditor had actual notice. Tex. Est. Code § 1153.005(b).

§ 29.64  Claims in Guardianship

§ 29.64:1  Claim Defined

A “claim” includes a liability against the estate of a ward. Tex. Est. Code § 1002.005. Except in the notice provisions set out in section 29.63:2 above, there is no distinction in guardianships between claims for money and contingent or unliquidated claims.

§ 29.64:2  Form of Claim

Except as provided by section 1157.102 of the Texas Estates Code, a claim for money against a guardianship must be authenticated (i.e., supported by an affidavit that the claim is just and that all legal offsets, payments, and credits known to the affiant have been allowed). The attorney should attach a copy of the relevant instrument, account, or voucher if one is available, and the affiant should state the facts on which the claim is founded. Tex. Est. Code § 1157.004. See form 29-1 in this chapter for a form claim. See also section 29.64:5 below for a short discussion of section 1157.102 of the Texas Estates Code.

§ 29.64:3  Evidence of Claim Lost or Destroyed

If evidence of a claim has been lost or destroyed, the affiant must state facts regarding loss or destruction of that evidence, as well as the amount, date, and nature of the claim, the due date of the claim, and that the creditor is still the owner of the claim. The claim must also be proved by disinterested testimony given either in open court or by deposition. If a claim is approved or allowed without this disinterested proof, the approval or allowance is void. Tex. Est. Code §§ 1157.006, 1157.062.
§ 29.64:4 Claim of Corporation

A claim presented on behalf of a corporation must include an affidavit made by the cashier, treasurer, or managing official of the corporation. In addition to the requirements set out in section 29.64:2, the affidavit must also state that the affiant has made diligent inquiry and examination. Tex. Est. Code § 1157.005.

§ 29.64:5 Unauthenticated Claim

A guardian may pay an unauthenticated claim if he believes it to be just, but he and his sureties will be liable for the amount paid if the court subsequently determines the claim is unjust. Tex. Est. Code § 1157.102. Claims for daily living expenses and utility bills, for instance, might be paid in this manner without submission of an authenticated claim to the guardian or the court.

§ 29.65 Presentment

§ 29.65:1 When Claims May Be Presented

A claim against a guardianship estate may be presented at any time before the closing of the guardianship if suit on the claim would not be barred by limitation. Tex. Est. Code § 1157.001.

§ 29.65:2 Presentation of Secured Claim

A secured creditor desiring matured secured claim status must present a claim electing that status within the time provided by law, or the claim will be treated as a preferred debt and lien. The creditor may choose to elect preferred debt and lien status. Tex. Est. Code § 1157.151.

§ 29.66 Handling of Claims by Guardian and Court

§ 29.66:1 Allowance or Rejection of Claims by Guardian

Once a creditor presents or files his claim, the guardian has thirty days to either allow or reject the claim in its entirety or reject part and indicate which part is allowed or rejected. Tex. Est. Code § 1157.051. The failure to timely allow or reject the claim constitutes a rejection. Tex. Est. Code § 1157.052. The guardian is not required to notify the creditor that the claim has been rejected. See Russell v. Dobbs, 354 S.W.2d 373, 376 (Tex. 1962) (decedent’s estate). If the claim is rejected through inaction but subsequently proved through suit, the creditor can recover the costs of suit from the guardian individually, and can seek to have the guardian removed. Tex. Est. Code § 1157.052.

The guardian also has thirty days to object to the form of the claim. Tex. Est. Code § 1157.007.

§ 29.66:2 Action by Court

Once a guardian has filed an allowance or rejection of the claim, the court clerk enters the claim on the court’s claim docket. Tex. Est. Code § 1157.053. If the guardian has allowed the claim and it has been entered on the claims docket for ten days, it will be either approved in whole or in part or disapproved by the court, and the court will also classify approved claims. Tex.
Est. Code § 1157.055. See section 29.66:3 below regarding classification of claims. Judgment cannot be rendered favoring a creditor on a claim for money that has not been presented to the guardian and wholly or partly rejected. Tex. Est. Code § 1157.064(a).

If the claim is barred by limitations, the guardian is not supposed to approve it. If he does, the court should not allow it. Tex. Est. Code § 1157.061. Even though the claim is in proper form and approved by the guardian, if the court is not satisfied that the claim is just, it must hold a hearing and receive evidence on the issue to determine the justness of the claim. Tex. Est. Code § 1157.056.

If the guardian rejects the claim, the court cannot act on the claim until it is established by suit. See section 29.67 below regarding suit on a rejected claim.

§ 29.66:3 Order of Payment of Claims

Guardians must pay claims that are allowed and approved or established by suit in the following order:

1. expenses for the care, maintenance, and education of the ward or the ward’s dependents;
2. funeral expenses and expenses of the last illness of a deceased ward, subject to prior payment of claims allowed and approved or established by suit before the ward’s death;
3. expenses of administration; and
4. other claims against the ward or the ward’s estate.


If the estate is insolvent, the guardian must give first priority to the payment of claims relating to administration of the guardianship. Tex. Est. Code § 1157.103(b).

§ 29.67 Suit on Rejected Claim

§ 29.67:1 Jurisdiction

A suit on a rejected claim should be brought in the court with jurisdiction over the guardianship. Tex. Est. Code § 1157.063; see also Tex. Est. Code § 1022.002.

§ 29.67:2 Deadline for Filing Suit

As with a dependent administration, a creditor has ninety days to file suit after the guardian rejects the claim in whole or in part; otherwise, the claim will be barred. Tex. Est. Code § 1157.063.

§ 29.67:3 Pleading Requirements

The suit should be filed against the guardian in that capacity and should be styled, for example, “Jane Doe, Guardian of the Estate of John Doe.” See form 29-2 in this chapter for a petition. Otherwise, the pleadings should follow the form used for suing a dependent administrator. See Tex. Est. Code § 1157.063. See also section 29.39:2 above.
§ 29.67:4 Cost Allocation

Costs for suits on claims are allocated as follows:

1. If the claim is allowed and approved, the guardianship estate pays.
2. If the claim is allowed but disapproved, the creditor pays.
3. If the claim is rejected but established by suit, the estate pays, unless the claim was rejected by operation of law because the guardian failed to act timely, in which instance the guardian, individually, pays (see Tex. Est. Code § 1157.052).
4. If the claim is rejected but not established by suit, the creditor pays.
5. In suits to establish a claim after rejection in part, if the creditor fails to recover a judgment for a greater amount than was allowed or approved, the creditor pays.


§ 29.68 Sale of Guardianship Property

On written application of a creditor who holds a secured claim or lien that has been allowed and approved, the court may order the sale of as much of the property as necessary to satisfy the creditor’s claim unless the guardian can show cause why it should not be sold. If it appears to the court that it would be advisable to discharge the lien out of the general assets of the estate or that it be refinanced, the court may so order. Tex. Est. Code ch. 1158, subch. E.

A nonjudicial foreclosure sale during the pendency of a guardianship is void. Crowley v. Redmond, 41 S.W.2d 274, 278 (Tex. Civ. App.—Fort Worth 1931), aff’d, 70 S.W.2d 1113 (Tex. 1934).

[Sections 29.69 and 29.70 are reserved for expansion.]

VI. Nonprobate Assets

§ 29.71 Multiple-Party Accounts

§ 29.71:1 Accounts Generally

Multiple-party accounts are joint accounts, convenience accounts, pay-on-death accounts, and trust accounts and include checking accounts, savings accounts, certificates of deposit, share accounts, and other similar arrangements. Tex. Est. Code §§ 113.001, 113.004.

§ 29.71:2 Joint Account

A joint account is an account payable on request to one or more parties whether there is a right of survivorship or not. Tex. Est. Code § 113.004(2). A joint account belongs to the parties, during their lifetimes, in proportion to the net contributions each party makes, unless there is clear and convincing evidence of a different intent. Tex. Est. Code § 113.102. “Net contribution”
is defined at Tex. Est. Code § 113.003. If the joint account contains a written agreement for right of survivorship, the interest of the party who dies vests immediately in the surviving cosigner(s). Tex. Est. Code § 113.151.

§ 29.71:3 Convenience Account

If an account is established by one or more parties in the names of the parties and one or more convenience signers and the terms of the account provide that the amounts on deposit are paid or delivered to the parties or to the convenience signers “for the convenience” of the parties, the account is a convenience account. Tex. Est. Code § 113.004(1).

The making of a deposit in a convenience account does not affect title to the deposit. A party establishing a convenience account is not considered to have made a gift of any portion of the deposit to the convenience signer. Tex. Est. Code § 113.105. Otherwise, ownership of a convenience account is established by each account holder’s net contributions, as in other joint accounts. See Tex. Est. Code § 113.102.

§ 29.71:4 Pay-on-Death Account

A pay-on-death (P.O.D.) account (including a transfer on death or T.O.D. account) is payable on request to one person during his lifetime, then, on that person’s death, to one or more persons, called “P.O.D. payees.” Tex. Est. Code § 113.004(4). The account belongs to the original payee during his lifetime and not to the P.O.D. payees. Tex. Est. Code § 113.103. If there are two or more original payees, then each payee’s interest is proportional to the amount of his net contribution, as in other joint accounts. Tex. Est. Code § 113.102.

§ 29.71:5 Trust Account

A trust account, for purposes of the multiple-party account provisions of the Estates Code, is an account in the name of one or more parties as trustee for one or more beneficiaries in which the relationship is established by the form of the account and the deposit agreement with the financial institution and there is no subject of the trust other than the amounts on deposit in the account. It does not include a regular trust account under a testamentary trust or a trust agreement having significance apart from the account or a fiduciary account arising from a fiduciary relationship such as attorney and client. Tex. Est. Code § 113.004(5). Unless a contrary intent is shown by the terms of the account or deposit agreement or there is other clear and convincing evidence of an irrevocable trust, a trust account belongs beneficially to the trustee during his lifetime. If there are two or more trustees, beneficial ownership is determined by their net contributions to the account. Tex. Est. Code § 113.104.

§ 29.71:6 Rights of Creditors, Survivors, and Personal Representatives to Reach Deceased’s Interest in Multiple-Party Account

A multiple-party account is not effective against the claim of a secured creditor who has a lien on the account, but it may be liable for certain estate taxes. Tex. Est. Code § 113.252(a). Except for a convenience signer, a party to a multiple-party account may pledge it without joinder of other parties with a substantial interest in the account. Tex. Est. Code § 113.251(a), (b). If a secured interest is perfected, a secured creditor that is an FDIC-insured financial institution must send written notice of the account’s pledge to the other parties to the multiple-party account; however, notice does not have to be given to a P.O.D. payee, beneficiary, or convenience signer. Tex. Est. Code § 113.251(c), (d).
Generally, however, if other assets of a deceased party’s estate are insufficient to pay debts, taxes, claims, and expenses of administration, including surviving spouse and minor children allowances, the deceased’s interest in a multiple-party account can be recovered by the personal representative from either the account itself or the subsequent payee of the account according to the account’s terms. Tex. Est. Code § 113.252(a), (b). Until the financial institution receives written notice from the representative stating the amounts needed to pay debts, taxes, claims, and expenses of administration, it is free to pay account proceeds according to the terms and nature of the account and agreement. Payees are liable only to the extent of funds actually received from the account. Tex. Est. Code § 113.253.

To recover these amounts, the representative must first have received a demand for payment from either a surviving spouse, a creditor of the decedent, or one acting for the decedent’s minor child. No recovery proceeding may commence more than two years after death. Amounts recovered by the representative are distributed as part of the decedent’s estate. Tex. Est. Code § 113.252(c), (d).

If the creditor is aware of amounts passing outside probate to payees under any of these multiple-party accounts, he should consider demanding that the personal representative take steps to recover these funds into the probate estate. The efficacy of taking this action must be balanced against the amount of money the creditor will recover after expenses of administration and statutory allowances are paid.

§ 29.71:7 Liability of and Offset to Financial Institutions

A detailed discussion of the rights and liabilities of financial institutions regarding payment of funds from multiple-party accounts to various payees is beyond the scope of this manual. In general, the financial institution will not be liable for disbursements made in good faith to parties appearing to have rights in the account. Tex. Est. Code ch. 113, subch. E. Without having to present a claim, a financial institution has a right to offset debt against the account of any amount in proportion to that to which the party was entitled. Tex. Est. Code § 113.210; Bandy v. First State Bank, 835 S.W.2d 609, 622 (Tex. 1992).

§ 29.72 Community Property with Right of Survivorship

Spouses may agree at any time that title to all or part of their community property, then existing or to be acquired, will vest in the surviving spouse on death. Tex. Est. Code § 112.051. A detailed discussion of how this right of survivorship is created, proved, or revoked is beyond the scope of this manual. Property passing to a surviving spouse in this manner is removed from the probate estate. See Tex. Est. Code §§ 112.001—.253

As with a multiple-party account, the personal representative of a deceased spouse can demand recovery of amounts paid to a surviving spouse under such a survivorship arrangement if the estate is otherwise unable to pay debts, taxes, or expenses of administration. Otherwise, the community property subject to the sole or joint management, control, or disposition of a spouse during marriage continues to be subject to the liabilities of that spouse on death without regard to a right of survivorship in the decedent’s spouse. Tex. Est. Code §§ 112.252—.253.
§ 29.73  Trusts

§ 29.73:1  Generally

Although a trustee holds legal title to trust property, that property is not liable for the trustee’s obligations. Tex. Prop. Code § 114.0821; Adams v. Williams, 248 S.W. 673 (Tex. 1923). The beneficiary holds equitable title in trust property; unless the instrument creating the trust made it a spendthrift trust, the trust property will be liable for the beneficiary’s debts. See Estes v. Estes, 267 S.W. 709 (Tex. 1924).

§ 29.73:2  Spendthrift Trust


§ 29.73:3  Living Trust

A living trust is an inter vivos trust taking effect during the settlor’s lifetime, with vesting provisions for the trust property at his death. Because the settlor no longer owns the property—the trust owns it—the property is not part of his estate at death.

§ 29.73:4  Notice to Trust Beneficiaries

In an action brought on a contract executed by a trustee or against a trustee as representative of the trust for a tort committed in the course of the trust’s administration, the plaintiff must give notice to each beneficiary known to have a present or contingent interest. This notice must be given either within thirty days after the action is commenced or at any other time fixed by the court that is more than thirty days before judgment. Tex. Prop. Code § 115.015(a). It must be sent by registered or certified mail, return receipt requested. The plaintiff should make a written request to the trustee-defendant for the names and addresses of all such beneficiaries; the trustee must provide this list within ten days from the date of the request. Tex. Prop. Code § 115.015(b).

§ 29.74  Life Insurance Proceeds

Life insurance proceeds are exempt from execution, attachment, garnishment, or other process. Tex. Ins. Code §§ 1108.051–.053.

§ 29.75  Qualified Plan Benefits

A person’s right to the assets held in or to receive payments from a pension or other retirement plan is exempt from execution, attachment, or seizure if the plan qualifies under applicable provisions of the Internal Revenue Code of 1986. Tex. Prop. Code § 42.0021. The exemption, however, does not apply to voluntary contributions by the beneficiary in excess of those provided by the qualified plan.
§ 29.76 Transfer on Death Deeds

Texas law has never recognized a right of survivorship in real property; consequently, when a person dies owning a house or land, there typically has to be an estate administration, minutement of title, or affidavit of heirship. Beginning September 1, 2015, a person owning real property may execute a transfer on death deed and file it in the deed records of the county where the real property is located. See Tex. Est. Code §§ 114.001–.152; Acts 2015, 84th Leg., R.S., ch. 841, § 1 (S.B. 462), eff. Sept. 1, 2015. In the deed, the transferor may name one or more primary beneficiaries and one or more contingent beneficiaries and state that the transfer of the property to the beneficiaries is to occur upon the transferor’s death. The deed is revocable, nontestamentary, and must be recorded before the transferor’s death. At the transferor’s death, the property passes to the surviving beneficiary or beneficiaries subject to all encumbrances, mortgages and liens in place against the property at the transferor’s death; however, the personal representative of the transferor’s estate could enforce higher-priority claims or family allowances against the property. See Tex. Est. Code §§ 114.104, 114.106.

[Sections 29.77 through 29.80 are reserved for expansion.]

VII. Special Situations

§ 29.81 Debtor as Beneficiary of Estate

§ 29.81:1 Generally

A creditor may discover that a debtor is a beneficiary or an heir of an estate and has not yet received his bequest. The creditor should research the probate file to ascertain the status of the estate, what the debtor is entitled to receive, and when the bequest might be paid.

If the creditor learns that the debtor has inherited or will inherit assets, he should consider using turnover or injunctive relief as a means of reaching those assets. See part V. in chapter 27 of this manual regarding turnover and sections 8.33 through 8.40 regarding injunctions.

The debtor may offer to assign his inherited interest in order to satisfy his debt. See Tex. Est. Code § 122.201. The creditor should use extreme caution in deciding whether to accept any such assignment. For instance, the will may contain a “spendthrift clause” that prohibits the assignment of an inheritance expectancy or the debtor may have previously disclaimed his interest in the estate. This would present a problem to the creditor who releases the debtor from his liability only to discover that the assignment is invalid and there is no other means of recovery, although the creditor may seek to vitiate the transaction based on absence of consideration, mutual mistake, or otherwise.

§ 29.81:2 Disclaimer of Interest in Estate by Beneficiary

A beneficiary under a will, including the guardian of an incapacitated beneficiary, an heir at law, or anyone who would receive property from a decedent through other means such as right of survivorship or contract, has an absolute right to disclaim any portion of the property received through intestate succession or by will. Tex. Est. Code § 122.002; Tex. Prop. Code ch. 240. The 2015 Texas legislature removed disclaimers from the Estates Code and added a new chapter 240 to the Property Code. Acts 2015, 84th Leg., R.S., ch. 562, § 3, 15 (H.B. 2428), eff. Sept. 1, 2015. Under these rules, a person intending to disclaim
an interest under a will or intestate succession must deliver the disclaimer to the personal representative of the decedent’s
estate; however, if no personal representative is then serving, the person may file the disclaimer in the official public records
of the county in which the decedent was domiciled at his death or in which he owned real property. **Tex. Prop. Code
§ 240.102.** The effect of the disclaimer is to divest the beneficiary or heir of any liability to creditors of the estate. **Tex. Prop.
Code § 240.051.**

**§ 29.82 Effect of Death on Litigation**

**§ 29.82:1 Suggestion of Death**

When a party to a suit dies, entry of a suggestion of death into the court record permits the suit to proceed. **Tex. R. Civ. P. 151,
152.** If there are surviving defendants and no action is taken regarding the deceased defendant, the suit can proceed against the
survivors, but any judgment will have no effect on the estate of the decedent and will bar any subsequent proceeding against
the estate or the decedent’s heirs. **Tex. R. Civ. P. 155; First National Bank v. Hawn, 392 S.W.2d 377** (Tex. Civ. App.—Dallas
1965, writ ref’d n.r.e.).

To bring the heirs or personal representative of a deceased debtor into litigation already filed, the attorney should file a sug-
gestion of death and request the clerk to issue a scire facias against the heirs or personal representative requiring him or them
to appear. If the debtor’s family has not instituted probate, the attorney should consider having a scire facias issued against the
surviving spouse and any other known heirs; taking this action will either encourage the family to open probate or identify the
decedent’s heirs. See form 29-10 in this chapter for a suggestion of death and scire facias.

**§ 29.82:2 Tolling of Limitations by Defendant’s Death**

The death of a person against whom there may be a cause of action suspends the running of the applicable statute of limitation
for either twelve months from death or until an executor or administrator is appointed, whichever comes first. **Tex. Civ. Prac.
& Rem. Code § 16.062.**

In a dependent administration, limitations are also tolled on the date a claim is filed or deposited with the clerk. **Tex. Est. Code
§ 355.008.** In an independent administration, limitations are tolled only by the executor’s written approval of the claim, the fil-
ing of a pleading in a suit already pending at the time of the debtor’s death, or the filing of a suit against the executor regarding
the claim. **Tex. Est. Code § 403.057.**

If suit is brought against a personal representative, a successor personal representative cannot claim a limitations defense if he
knows of the suit against the prior representative. **Rooke v. Jenson, 838 S.W.2d 229** (Tex. 1992).

**§ 29.83 Death or Incapacity of Creditor**

If a creditor dies, the claims owned by the creditor may still be pursued. The personal representative of an estate may recover
all property belonging to the estate, including all claims and debts due. **Tex. Est. Code §§ 351.151, 351.054.** To recover on the
claim, a person interested in the creditor’s estate should open administration, and the administrator or executor should file the
claim. If the claim is in litigation, the petition on the claim should be amended to substitute the personal representative in
place of the creditor. **See Tex. R. Civ. P. 63.** Similarly, if the creditor becomes incapacitated, the guardian of the creditor’s
estate may pursue the claim or continue the suit on the claim on the creditor’s behalf. **Tex. Est. Code §§ 1151.104–.105.**
§ 29.84 Ongoing Business

If the decedent owned a farm, ranch, factory, or other business, the court may grant the personal representative the powers to operate the business that the court determines are appropriate if the disposition of the business was not specifically directed by the decedent’s will, it is not necessary to sell the business for the payment of debts or other lawful purposes, and the operation of the business by the personal representative is in the best interest of the estate. Tex. Est. Code §§ 351.201–.202(a). In deciding which powers to grant the personal representative, the court will consider the condition of the estate and the business, the necessity that may exist for the future sale of the business or its assets to pay debts or claims against the estate, the effect on the speedy settlement of the estate, and the best interests of the estate. Tex. Est. Code § 351.202(b).

If the decedent was a partner in a general partnership and the articles of partnership provide that the personal representative will be entitled to the deceased partner’s place, the representative may assume that position, liable only to the extent of the deceased partner’s share in the partnership and the estate’s assets held by the representative. Tex. Est. Code § 351.104.
Form 29-1

This form may be used to submit a claim to the personal representative of a decedent’s or ward’s estate. The claim may be either presented directly to the personal representative or filed with the court. The attorney should not execute the affidavit unless he has personal knowledge of the facts asserted. See section 19.17:3 in this manual regarding attorneys executing affidavits.

NO. [cause number]

In re Estate of §
[Name of debtor], § [Court designation]
[Deceased/Ward] §

Authenticated Claim of [name of creditor]

[Name of creditor], Claimant, presents this claim to the [executor/administrator/guardian] of the estate of [name of debtor], [Deceased/Ward].

1. Basis for Claim. This claim is based on [state facts on which claim is based].

Include the following if the claim is supported by a document such as a note.

A true and correct copy of the [supporting document] evidencing this claim is attached as Exhibit [exhibit number/letter] and incorporated by reference.

Continue with the following.

2. Amount of Claim. The amount of the claim is $[amount].

Include the following if the claim bears interest.

3. Interest. The claim bears interest at the rate of [percent] percent per year from [date].

Include the following if the contract provides for attorney’s fees.
4. **Attorney’s Fees.** The contract provides for recovery of attorney’s fees if the account is placed with an attorney for collection. Reasonable attorney’s fees for preparing, presenting, and collecting this claim are $[amount].

Include the following if the claim is secured by a written security agreement or other document.

5. **Security.** The claim is secured by a [describe lien instrument], granting [name of creditor] a security interest in [describe collateral]. A copy of the security agreement is attached as Exhibit [exhibit number/letter] and incorporated by reference.

Select one of the following if the claim is a secured claim.

6. **Matured Secured Claim.** Claimant elects to have the claim allowed and approved as a matured secured claim to be paid in the course of administration.

Or

6. **Preferred Debt and Lien.** Claimant elects to have the claim allowed, approved, and fixed as a preferred debt and lien against the property described above, to be paid according to the terms of the security agreement.

Continue with the following.

[Name]
Attorney for Claimant
State Bar No.:
[E-mail address]
[Address]
[Telephone]
[Telecoper]

**Affidavit**

BEFORE ME, the undersigned authority, on this day personally appeared [name of affiant], who swore on oath that the following facts are true:
1. My full name is [name of affiant].

Select one of the following. Select the first option if the creditor is an individual. Select the second option if the creditor is a corporation or other entity.

2. I am the owner of the claim described above.

Or

2. I am [representative capacity] of [name of creditor]. I have made diligent inquiry and examination, and [name of creditor] is the owner of the claim.

Continue with the following.

3. The claim described above is just, and all lawful offsets, payments, and credits known to me have been allowed.

__________________________________________________________________________________________________________________________ ...
__________________________________________________________________________________________________________________________ ...

[Name of affiant]
Affiant

SIGNED under oath before me on ________________________________.

______________________________________________________________
Notary Public, State of Texas

Memorandum of Allowance

This claim was presented to me on ______________________________. I have examined it, and I ALLOW it in full according to the terms of the claim.

Date of allowance: ______________________________.

__________________________________________________________________________________________________________________________ ...
__________________________________________________________________________________________________________________________ ...

[Name of personal representative]
[Title of personal representative]
Order

This claim was presented and allowed by the personal representative, entered on the claims docket for at least ten days, and examined by the Court. The Court is satisfied that the claim is just and therefore APPROVES the claim according to its terms.

SIGNED on ________________________________.

________________________________________________________________________________________________________________________

JUDGE PRESIDING

Attach exhibit(s).
This petition may be used to bring suit against either a dependent personal representative of a decedent’s estate or a guardian. The form is based on the petition for suit on note at form 14-7 in this manual and assumes suit is against a dependent personal representative of a decedent’s estate; it should be altered as appropriate, depending on the nature of the debt or for suit against a guardian. If foreclosure or court-supervised sale of collateral is sought, an application to sell the property must be filed after the judgment is entered on the claims docket and the secured claim is classified. See section 29.40 regarding foreclosure sales and form 29-3 for an application for sale. See also the following sections: 14.28 regarding foreclosure of a security interest, 2.111 regarding acceleration, part II. in chapter 15 regarding venue, 1.21 through 1.29 regarding attorney’s fees, and 14.2 regarding exercising caution in pleading conditions precedent.

The suit should be filed in the court in which the administration of the estate or the guardianship is pending. See sections 29.39:1 and 29.67:1 regarding jurisdiction and sections 29.39:2 and 29.67:3 regarding pleading requirements. Texas Civil Practice and Remedies Code section 30.014 requires each party to include partial identification information in its initial pleading in a civil action filed in district court, county court, or statutory county court.

---

**NO. [cause number]**

[Name of creditor] §

§

v.

§

§

[Name of personal representative or guardian], [Personal Representative/ Guardian] of the Estate of §

§

[Name of debtor], [Deceased/Ward] §

---

**Petition for Suit against Dependent Personal Representative or Guardian**

1. **Parties.** Plaintiff is [name of plaintiff], whose address is [address, city, state]. Defendant is [name of personal representative or guardian], [representative capacity], who can be served with citation at [address, city, state].

2. **Note [and Security Agreement].** Attached to this petition as Exhibit [exhibit number/letter] is a true and correct copy of a note executed by Decedent. Plaintiff is the owner
and holder of this note and is entitled to receive all money due under its terms. [Include if applicable: Plaintiff is a holder in due course.] The note is incorporated in this petition by reference.

To secure the debt created by the note, Decedent executed a security agreement granting Plaintiff a security interest in [describe collateral]. The security agreement is attached as Exhibit [exhibit number/letter] and incorporated by reference.

3. Default. Decedent defaulted in paying the note. [Include if applicable: Plaintiff has accelerated the debt according to the terms of the note.] There is currently due the sum of $[amount], plus accrued interest as provided for in the note.

4. Presentation and Rejection of Claim. A claim for this debt against Decedent’s estate was made and presented to Defendant in proper time, form, and manner. A copy of the claim is attached to this petition as Exhibit [exhibit number/letter] and incorporated by reference.

Defendant failed to allow or reject Plaintiff’s claim within thirty days of presentation.

Or

Defendant rejected Plaintiff’s claim.

Or

Defendant rejected Plaintiff’s claim to the extent of $[amount].
5. **Suit Timely Filed.** Plaintiff is filing this suit within ninety days of Defendant’s rejection of the claim.

6. **Conditions Precedent.** All conditions precedent have been performed or have occurred.

7. **Attorney’s Fees.** Decedent’s default has made it necessary for Plaintiff to employ the undersigned attorney to file suit.

   Select one of the following.

   This claim was timely presented to [Decedent/Defendant] and remains unpaid.

   Or

   Decedent agreed to pay reasonable attorney’s fees for collection in case of default, as shown on Exhibit [exhibit number/letter].

   Continue with the following.

   Reasonable fees for the attorney’s services rendered and to be rendered through trial and appeal are at least $[amount].

8. **Prayer.** Plaintiff prays that—

   a. Defendant be cited to appear and answer;

   b. Plaintiff be granted judgment for $[amount] as the principal amount due on the note;

   c. Plaintiff be granted judgment for accrued and unpaid interest on the debt before maturity;
d. Plaintiff be granted judgment for prejudgment and postjudgment interest on the matured, unpaid debt at the highest legal or contractual rate allowed by law;

e. Plaintiff be granted judgment for at least $[amount] as reasonable attorney’s fees, with additional contingent amounts in the event of appellate proceedings;

f. Plaintiff be granted judgment for all costs of court;

Include the following if foreclosure is sought.

g. Plaintiff be granted foreclosure of Plaintiff’s security interest in the collateral;

h. the Court order that execution of the judgment issue against property of Decedent’s estate in the hands of Defendant; and

Continue with the following.

[g./i.] the Court enter the judgment on the claims docket for classification and further handling as if it were originally allowed and approved in the course of administration; and

[h./j.] Plaintiff be granted all further relief to which Plaintiff may be entitled.

[Name]
Attorney for Plaintiff
State Bar No.:
[E-mail address]
[Address]
[Telephone]
[Telecopier]

Attach exhibit(s).
Application for Sale of Collateralized Property

Form 29-3

This form may be used to request an order to sell property of the estate held as security by the creditor. See Tex. Est. Code §§ 356.201-.203 and 1158.001-.706. See the discussion at sections 29.40:1 and 29.68 in this chapter. This form assumes the application is for sale of property of a decedent’s estate; it should be modified as appropriate for sale of guardianship property.

[Caption. See § 3 of the Introduction in volume 1 of this manual.]

Use the same caption as in the petition at form 29-2.

Application for Sale of Collateralized Property

[Name of creditor], Movant, requests that the Court enter an order to sell property of the estate of [name of debtor], Decedent, and shows as follows:

1. **Security Interest.** Movant has a security interest in the following property: [describe collateral as specifically as possible]. This security interest is evidenced by [describe security agreement]. A copy of this instrument is attached as Exhibit [exhibit number/letter] and incorporated by reference.

2. **Claim Approved and Entered.** Movant’s secured claim has been [allowed/established by suit] and approved.

3. **Reason for Sale.** Movant requests the sale of this property because [list reasons].

4. **Method of Sale.** It is in the best interest of the estate to have the property sold at public [include if applicable: or private] sale [include additional terms of sale if applicable].

5. **Not Exempt Property.** The property is not exempt property.

6. **Prayer.** Movant requests that—
a. the personal representative of Decedent’s estate be cited to appear and show
cause why the property should not be sold;

b. the Court enter its order of sale of the property; and

c. the Court grant all further relief to which Movant may be entitled.

Notice of Hearing

It is ORDERED that the clerk issue notice to [name of personal representative],
Respondent, and Respondent is ORDERED to appear before this Court on [date and time], at
[address], to show cause why [describe collateral] should not be sold as requested in the
attached motion.

SIGNED on ________________________________.

JUDGE PRESIDING

Attach exhibit(s) and order authorizing sale of collaterized property (form 29-4).
Order Authorizing Sale of Collateralized Property

On this date the Court considered [name of creditor]’s Application for Sale of Collateralized Property. The Court finds that citation was issued and served according to law; the property sought to be sold is not exempt property; and it is in the best interests of the estate to sell the property.

It is therefore ORDERED that the following property of the estate be sold: [describe property as in form 29-3]. The property is to be sold at [public/private] sale. The terms of sale are: [describe terms of sale].

SIGNED on ________________________________.

__________________________________________________________________________________________________________________________ ... __________________________________________________________________________________________________________________________

JUDGE PRESIDING
Application for Foreclosure Sale of Mortgaged Property

Form 29-5

This form may be used to request a foreclosure sale of collateral securing a debt classed as a preferred debt and lien. After the sale is ordered and completed, a report of sale must be filed with the probate court, and a decree confirming the sale must be obtained. See forms 29-6 through 29-8 in this chapter.

The affidavit included in this form should not be executed by the attorney unless he has personal knowledge of the facts asserted. See section 19.17:3 regarding execution of affidavits by attorneys.

If the property is sought to be sold at public sale, notice of the sale must be posted as in the case of original proceedings in probate unless the court directs otherwise. Tex. Est. Code § 356.103.

See section 29.40:2 for discussion of preferred debt and lien foreclosure sales.

[Caption. See § 3 of the Introduction in volume 1 of this manual.]

Use the same caption as in the petition at form 29-2.

Application for Foreclosure Sale of Mortgaged Property

[Name of creditor], Movant, requests that the Court enter an order authorizing foreclosure of Movant’s lien against property of the estate of [name of debtor], Decedent, and shows as follows:

1. **Security Interest.** Movant has a security interest in the following property:

   [describe collateral as specifically as possible]. This security interest is evidenced by [describe security agreement]. A copy of this instrument is attached as Exhibit [exhibit number/letter] and incorporated by reference.

2. **Claim Approved and Entered.** Movant’s secured claim has been [allowed/established by suit], approved, and fixed according to law.

3. **Property Still in Estate.** The property has not been sold or distributed within six months from the date letters of administration were granted.

Select one of the following.
4. **Administrator Has Not Performed All Terms of Contract.** The Administrator has failed to perform the following terms of the debt: [describe default(s)].

Or

4. **Administrator Has Not Performed.** The Administrator has not paid all maturities accruing on the debt secured by the security interest described above.

5. **Method of Sale.** It is in the best interest of the estate to have the property [sold at foreclosure sale, according to the terms of the security agreement/[describe other method of sale or disposition]].

6. **Not Exempt Property.** The property is not exempt property.

7. **Prayer.** Movant requests that—

   a. the personal representative of Decedent’s estate and all other lienholders listed on the attached affidavit of [name of affiant] be cited to appear and show cause why the property should not be foreclosed;

   b. the Court enter its order granting Movant the right to foreclosure of its lien; and

   c. the Court grant all further relief to which Movant may be entitled.
Notice of Hearing

It is ORDERED that the clerk issue notice to [name of personal representative], Respondent, and Respondent is ORDERED to appear before this Court on [date and time], at [address], to show cause why [describe collateral] should not be sold as requested in the attached motion.

SIGNED on ________________________________.

JUDGE PRESIDING

Affidavit

BEFORE ME, the undersigned authority, on this day personally appeared [name of affiant], who swore on oath that the following facts are true:

“1. My full name is [name of affiant]. I am the [claimant/authorized representative of the claimant].

“2. The property securing the claim is described as follows: [describe property].

“3. The amount of the outstanding debt owed is $[amount].
4. The maturities that have accrued on this debt, according to its terms, are [describe all matured, unpaid obligations due on the debt].

5. I am aware of the following other liens or claims against the property: [list other lienholders]. I have no knowledge of the existence of any debts secured by the property other than the ones listed.

6. [I request/Creditor requests] permission to foreclose the lien described in the attached motion.

______________________________
[Name of affiant]
Affiant

SIGNED under oath before me on ________________________________.

______________________________
Notary Public, State of Texas

Attach exhibit(s).
Order Authorizing Sale of Mortgaged Property

Form 29-6

This order accompanies the application for foreclosure of mortgaged property at form 29-5 in this chapter. The order allows the creditor to conduct a foreclosure sale of the property. See section 29.40:2 for discussion of preferred debt and lien foreclosure sales.

[Caption. See § 3 of the Introduction in volume 1 of this manual.]

Use the same caption as in the petition at form 29-2.

Order Authorizing Sale of Mortgaged Property

On this date the Court considered [name of creditor]’s application to foreclose its lien on property of the estate. The Court finds that—

1. citation was issued and served according to law on the administrator of the estate and on all persons known to [name of creditor] to hold a lien against the property;

2. more than six months have elapsed from the time the Court issued letters of administration to [name of administrator];

3. [name of administrator] has failed to pay all accrued maturities as they have come due;

    Select one of the following.

3. [name of administrator] has failed to perform the following terms of the debt:

    [describe default(s)];

    Continue with the following.

4. the property sought to be sold is not exempt property; and

5. it is in the best interests of the estate to sell the property.
It is therefore ORDERED that [name of creditor] be allowed to foreclose its lien on the following property of the estate: [describe property as in form 29-5]. The property is to be sold at foreclosure sale according to the terms of the security agreement creating the lien and applicable law. The minimum acceptable bid at the foreclosure sale will be $_______________. The property will be sold at [private sale/public auction] at [place of sale] on [date and time]. It is further ORDERED that, after the sale is made, a report of the sale be returned to this Court in accordance with law.

SIGNED on ________________________________.

________________________________________________________________________________________________________________________

JUDGE PRESIDING

Arrange with the clerk for posting of a notice of sale.
Report of Sale of [Personal/Real] Property

Form 29-7

After the foreclosure sale approved by the court is conducted (see form 29-6 in this chapter), this report must be filed with the court and a hearing scheduled at least five days after the report is filed to receive the court’s confirmation of the sale. See form 29-8 for a decree confirming the sale.

If personal property is sold in more than one lot or unit, the price of each lot or unit should be shown. If real property is sold in more than one parcel, the price of each parcel must be shown. See Tex. Est. Code § 356.551(2)(E).

[Caption. See § 3 of the Introduction in volume 1 of this manual.]

Use the same caption as in the petition at form 29-2.

Report of Sale of [Personal/Real] Property

[Name of creditor], a secured creditor of this estate, reports as follows:

On [date], this Court ordered the foreclosure sale of certain [personal/real] property of the estate. This property is described as follows: [describe property as in form 29-5].

1. The property was sold on [date] at [time].

2. The name of the purchaser is [name of purchaser].

3. The sale price of the property was $[amount].

4. The terms of sale were [describe terms].

5. The sale was [at public auction/privately held].

6. The purchaser is ready to comply with the order of sale.

7. All the facts herein are true and correct.
[Name]
Attorney for Plaintiff
State Bar No.:
[E-mail address]
[Address]
[Telephone]
[Telexcopier]

SIGNED under oath before me on ________________________________.

Notary Public, State of Texas

Set a hearing for confirmation of sale at least five days after filing the report of sale.
Decree Confirming Sale

The probate court must confirm any sale of property in a dependent administration. See section 29.40:1 in this chapter for discussion of court-supervised sales.

[Caption. See § 3 of the Introduction in volume 1 of this manual.]

Decree Confirming Sale

On this date the Court considered the report of sale of certain [personal/real] property of the estate. The property is described as [describe property as in form 29-7], and the Court finds that—

1. at least five days have elapsed since the filing of the report;

2. the sale was made in accordance with applicable law; and

3. the property was sold at a fair price.

Accordingly, the sale described in the report of sale is hereby APPROVED and CONFIRMED.

SIGNED on ________________________________.

__________________________________________________________________________________________________________________________ ...

__________________________________________________________________________________________________________________________

JUDGE PRESIDING
Form 29-9

This petition may be used to bring suit against an independent executor or administrator for an obligation incurred by a decedent during his lifetime. The form is based on the petition for suit on note at form 14-7 in this manual and should be altered as appropriate depending on the nature of the debt. See also the following sections: 14.28 regarding foreclosure of a security interest, 2.111 regarding acceleration, part II. in chapter 15 regarding venue, 1.21 through 1.29 regarding attorney’s fees, and 14.2 regarding exercising caution in pleading conditions precedent.

Texas Civil Practice and Remedies Code section 30.014 requires each party to include partial identification information in its initial pleading in a civil action filed in district court, county court, or statutory county court.

NO. [cause number]

[Name of creditor] §
§
v. § [Court designation]
§
[Name of independent executor or administrator], [Independent Executor/Administrator] of the Estate of [Name §
of debtor], [Deceased/Ward] §

Petition for Suit against Independent Executor or Administrator

1. Parties. Plaintiff is [name of plaintiff], whose address is [address, city, state]. Defendant is [name of independent executor or administrator], Independent [Executor/Administrator] of the estate of [name of debtor], Decedent, who can be served with citation at [address, city, state].

2. Note [and Security Agreement]. Attached to this petition as Exhibit [exhibit number/letter] is a true and correct copy of a note executed by Decedent. Plaintiff is the owner and holder of this note and is entitled to receive all money due under its terms. [Include if applicable: Plaintiff is a holder in due course.] The note is incorporated in this petition by reference.
To secure the debt created by the note, Decedent executed a security agreement granting Plaintiff a security interest in [describe collateral]. The security agreement is attached as Exhibit [exhibit number/letter] and incorporated by reference.

3. Default. Decedent defaulted in paying the note. [Include if applicable: Plaintiff has accelerated the debt according to the terms of the note.] There is currently due the sum of $[amount], plus accrued interest as provided for in the note.

4. Conditions Precedent. All conditions precedent have been performed or have occurred.

5. Attorney’s Fees. Decedent’s default has made it necessary for Plaintiff to employ the undersigned attorney to file suit.

   This claim was timely presented to [Decedent/Defendant] and remains unpaid.

   Or

Decedent agreed to pay reasonable attorney’s fees for collection in case of default, as shown on Exhibit [exhibit number/letter].

Reasonable fees for the attorney’s services rendered and to be rendered through trial and appeal are at least $[amount].

6. Prayer. Plaintiff prays that—
a. Defendant be cited to appear and answer;

b. Plaintiff be granted judgment for $[amount] as the principal amount due on the note;

c. Plaintiff be granted judgment for accrued and unpaid interest on the debt before maturity;

d. Plaintiff be granted judgment for prejudgment and postjudgment interest on the matured, unpaid debt at the highest legal or contractual rate allowed by law;

e. Plaintiff be granted judgment for at least $[amount] as reasonable attorney’s fees, with additional contingent amounts in the event of appellate proceedings;

f. Plaintiff be granted judgment for all costs of court[; and]

Include the following if foreclosure is sought.

g. Plaintiff be granted foreclosure of Plaintiff’s security interest in the collateral;

h. the Court order that execution of the judgment issue against property of Decedent’s estate in the hands of Defendant; and

Continue with the following.

[g./i.] Plaintiff be granted all further relief to which Plaintiff may be entitled.
[Name]
Attorney for Plaintiff
State Bar No.:
[E-mail address]
[Address]
[Telephone]
[Telexcopier]

Attach exhibit(s).
Form 29-10

This form may be used if the defendant dies after suit is commenced. See Tex. R. Civ. P. 151–152. This form may be altered as appropriate if there is more than one defendant and the plaintiff elects to proceed against only the defendant(s) remaining alive. See section 29.82:1 in this chapter, however, regarding the consequences of electing to proceed against only the remaining defendant(s).

Also, if the plaintiff dies, this form may be used to notify the court of the substitution of the plaintiff’s heirs or personal representative. In that case, replace paragraph 2. with a statement of the plaintiff’s intent.

[Caption. See § 3 of the Introduction in volume 1 of this manual.]

Suggestion of Death and Scire Facias

1. Plaintiff, [name of plaintiff], informs the Court that Defendant, [name of defendant], has died. A certified copy of Defendant’s death certificate is attached as Exhibit [exhibit number/letter] and incorporated in this suggestion by reference.

2. Plaintiff requests that this suit proceed against [name[s] and [capacity/capacities] of heir[s] or personal representative]. Plaintiff further requests that the clerk of the Court issue scire facias for [name[s] of heir[s] or personal representative] requiring [him/her/them] to appear and defend this suit.

[Name]
Attorney for Plaintiff
State Bar No.:
[E-mail address]
[Address]
[Telephone]
[Telexcopier]

Attach a certificate of service (form 19-1) and exhibit(s).
Chapter 35
Bankruptcy

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I. Overview

§ 35.1 Bankruptcy in General

§ 35.1:1 Federal Bankruptcy Code

Title 11 of the United States Code governs bankruptcies and is generally referred to as the Bankruptcy Code. Chapters 1, 3, and 5 of the Bankruptcy Code apply to all bankruptcies; Chapter 7 governs liquidation bankruptcies; Chapter 11 applies to reorganization or liquidation for businesses and is also available for certain individuals who do not qualify under Chapter 13; and Chapter 13 applies to reorganization for individuals with limited debts and regular income and is not available for businesses. Chapters 9 and 12 of the Code, which are not dealt with specifically in this chapter, cover municipal debt and family farm debt.

§ 35.1:2 Bankruptcy Courts in Texas

Texas has four federal bankruptcy districts: the Northern District (covering Dallas, Fort Worth, Amarillo, Abilene, Lubbock, San Angelo, and Wichita Falls), the Southern District (covering Houston, Galveston, Victoria, Corpus Christi, Brownsville, McAllen, and Laredo), the Eastern District (covering Tyler, Plano, Texarkana, Beaumont, and Lufkin), and the Western District (covering Austin, El Paso, Midland, San Antonio, and Waco). Each district has its own local rules governing such issues as the format of pleadings, deadlines for certain filings, and the procedure for requesting a hearing. The practitioner should check the local rules and practice guides for each district and each court before filing any document in bankruptcy court. The websites for each district are www.txnb.uscourts.gov (Northern District), www.txss.uscourts.gov (Southern District), www.txwb.uscourts.gov (Western District), and www.txeb.uscourts.gov (Eastern District).

§ 35.1:3 Property of Estate

Commencement of a case under the Bankruptcy Code creates an estate composed of all legal or equitable interests of the debtor in property as of the commencement of the case. See 11 U.S.C. § 541(a). The estate includes all interests of the debtor and the debtor’s spouse in community property to the extent that the interest is under the sole, equal, or joint management and control of the debtor or is liable for an allowable claim against the debtor or the debtor’s spouse. 11 U.S.C. § 541(a)(2).

Among other exceptions, the estate does not include a power that the debtor may exercise solely for the benefit of an entity other than the debtor. 11 U.S.C. § 541(b)(1). And property in which the debtor holds legal title but not an equitable interest becomes property of the estate only to the extent of the debtor’s legal title to the property. 11 U.S.C. § 541(d).
§ 35.1:4 Debtor and Debtor-in-Possession

The Bankruptcy Code sets forth who qualifies to be a debtor under each bankruptcy chapter. See 11 U.S.C. § 109. A person who does not meet the requirements set forth cannot be a debtor. For instance, only an individual, not an entity, can be a debtor under Chapter 13. 11 U.S.C. § 109(e).

For cases under Chapter 11, the debtor is also a “debtor-in-possession” or “DIP” unless a trustee is appointed. 11 U.S.C. § 1101(1). The DIP is not just the old debtor now in bankruptcy. The DIP is a fiduciary to the debtor’s bankruptcy estate. The DIP is given the rights and powers and duties imposed on it that a trustee would have, except the right to trustee compensation and except the duty to investigate the debtor itself. 11 U.S.C. § 1107.

§ 35.1:5 Role and Duties of United States Trustee

The United States Trustee Program is a component of the U.S. Department of Justice charged with the administrative oversight of bankruptcy cases. The U.S. trustee is the entity charged with policing the bankruptcy system, that is, monitoring the activities and reporting of the debtor or debtor-in-possession, appointing various official committees and overseeing their operation, and managing the debtor’s trip through bankruptcy using a series of guidepost measurements designed to keep the case on track. The U.S. trustee is required to supervise the trustees and the administration of bankruptcy cases under Chapters 7, 11, 12, 13, and 15. 28 U.S.C. § 586. These duties are administrative in nature as they relate to the panel trustee. In Chapter 11 cases, the U.S. trustee appoints and monitors the operation of the official committees and appoints examiners or trustees as directed by the court. 11 U.S.C. §§ 1102, 1104; see also 28 U.S.C. § 586. Additionally, the U.S. trustee reviews and objects to fee applications, disclosure statements, and plans that fail to meet the minimum standards under the Bankruptcy Code. See In re Parsley, 384 B.R. 138, 146 (Bankr. S.D. Tex. 2008). The U.S. trustee has standing to appear and be heard on any issue. 11 U.S.C. § 307. A U.S. trustee is not authorized to promulgate rules or impose substantive or administrative requirements on bankruptcy debtors. In re Johnson, 106 B.R. 623, 624 (Bankr. D. Neb. 1989).

§ 35.1:6 Official Committees

The official committees are created by statute. 11 U.S.C. § 1102. The Bankruptcy Code authorizes the U.S. trustee to appoint committees of creditors or of equity security holders as the U.S. trustee deems appropriate. 11 U.S.C. § 1102(a)(1). Committee members have a fiduciary responsibility to act on behalf of the entire class of creditors represented. Among the duties assumed by committee members are fiduciary duties of undivided loyalty and impartial service to all creditors. See In re Pierce, 237 B.R. 748, 758 (Bankr. E.D. Cal. 1999).

§ 35.1:7 Role and Duties of Bankruptcy Trustee

Except in Chapter 11 cases where there is a debtor-in-possession, the bankruptcy trustee is generally the central figure in the bankruptcy case. The bankruptcy trustee is separate and distinct from the U.S. trustee. It is the bankruptcy trustee with whom the debtor has the most contact during the course of the case. The trustee examines the debtor, verifies and evaluates exemptions, gathers property of the estate, liquidates such property, and ultimately distributes such property to the creditors. The trustee makes sure the debtor complies with the requirements of the Bankruptcy Code. The duties of a Chapter 7 trustee are set forth in 11 U.S.C. § 704.
Generally, a trustee has a fiduciary duty to conserve the assets of the estate and to maximize distribution to creditors. *In re Rigden*, 795 F.2d 727, 730 (9th Cir. 1986). He also has the equitable responsibility to act with the care and diligence of an ordinary prudent person. *In re Rigden*, 795 F.2d at 730. Trustees, in their official capacity, are officers of the court and as such are held to high fiduciary standards of conduct. *In re Topco, Inc.*, 894 F.2d 727, 739 n.16 (5th Cir. 1990).

In addition to statutory duties, under rule 2015(a) of the Federal Rules of Bankruptcy Procedure, a trustee must—

1. in a Chapter 7 or, in some cases, a Chapter 11 case, file and transmit to the U.S. trustee a complete inventory of the property of the debtor within thirty days after qualifying as a trustee or debtor-in-possession, unless such an inventory has already been filed;

2. keep a record of receipts and the disposition of money and property received;

3. file the reports and summaries required by section 704(a)(8) of the Bankruptcy Code, which shall include a statement, if payments are made to employees, of the amounts of deductions for all taxes required to be withheld or paid for and on behalf of employees and the place where these amounts are deposited;

4. as soon as possible after the commencement of the case, give notice of the case to every entity known to be holding money or property subject to withdrawal or order of the debtor, including every bank, savings or building and loan association, public utility company, and landlord with whom the debtor has a deposit, and to every insurance company that has issued a policy having a cash surrender value payable to the debtor, except that notice need not be given to any entity who has knowledge or has previously been notified of the case; and

5. in a Chapter 11 reorganization case, on or before the last day of the month after each calendar quarter until a plan is confirmed or the case is converted or dismissed, file and transmit to the U.S. trustee a statement of disbursements made during the calendar quarter and a statement of the amount of the fee required pursuant to 28 U.S.C. § 1930(a)(6) that has been paid for such calendar quarter.

Additionally, the local rules of the bankruptcy court may impose other duties that the trustee must perform. In any bankruptcy case, it is crucial to review the local bankruptcy rules that apply to that jurisdiction.

§ 35.1:8 Party in Interest

The Bankruptcy Code defines “party in interest” to include “the debtor, the trustee, a creditors’ committee, an equity security holders’ committee, a creditor, an equity security holder, or any indenture trustee.” 11 U.S.C. § 1109(b). This list is nonexclusive. See, e.g., *In re Sullivan Central Plaza I, Ltd.*, 935 F.2d 723, 726 (5th Cir. 1991). And courts have broadly interpreted the term to include “any other person with a sufficient stake in [the] outcome of a proceeding so as to require representation.” *International Transactions, Ltd. v. Embotelladora Agral Regiomontana, S.A. de C.V.*, 347 F.3d 589, 595 (5th Cir. 2003). Put another way, “persons whose pecuniary interests are directly affected by the bankruptcy proceedings” are parties in interest. *In re Orchard at Hansen Park, LLC*, 347 B.R. 822, 825 (Bankr. N.D. Tex. 2006) (quoting *In re E.S. Bankest*, 321 B.R. 590, 594 (Bankr. S.D. Fla. 2005)).

§ 35.1:9 Rooker-Feldman Doctrine

The Rooker-Feldman doctrine is a rule of civil procedure enunciated by the U.S. Supreme Court in two cases, *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923), and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983). The doctrine holds that lower U.S. federal courts other than the Supreme Court have no subject-matter jurisdiction to sit in direct review of
state court decisions unless Congress has enacted legislation that specifically authorized such relief. *Feldman*, 460 U.S. at 476 (citing *Rooker*, 263 U.S. at 415). Put more basically, a federal court, other than the U.S. Supreme Court, has no jurisdiction to set aside a state court judgment.

In 2005, the Supreme Court revisited the doctrine in *Exxon Mobil Corp. v. Saudi Basic Industries Corp.*, 544 U.S. 280 (2005). The Court noted that the U.S. Supreme Court has exclusive appellate jurisdiction to reverse or modify a state-court judgment based on the certiorari jurisdiction statute, 28 U.S.C. § 1257. The Court also confined the Rooker-Feldman doctrine to cases “brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments. . . . [The Rooker-Feldman doctrine] does not otherwise override or supplant preclusion doctrine or augment the circumscribed doctrines that allow federal courts to stay or dismiss proceedings in deference to state-court actions.” *Exxon Mobil Corp.*, 544 U.S. at 283–85.

The Rooker-Feldman doctrine, although mentioned often, usually is inapplicable. Rather, claim and issue preclusion doctrines, or res judicata and collateral estoppel, are generally more helpful to litigants in bankruptcy. The Rooker-Feldman doctrine generally arises in the context of a creditor seeking its debt to be nondischargeable based on prior state court judgment.

§ 35.2 Bankruptcy Procedure

§ 35.2:1 Local Procedural Rules

In addition to the Federal Rules of Bankruptcy Procedure, each of the four federal districts in Texas has its own local rules (and sometimes each judge in the district has rules specific to that judge’s court). Each federal district maintains a website that includes the local rules for that district as well as other instructions and requirements. The practitioner should check a court’s website before filing any documents in an unfamiliar court. See section 35.1:2 above for the Web addresses for each federal district. See also section 35.2:2 below concerning local rules regarding negative notice.

§ 35.2:2 Motion Practice

Under the Federal Rules of Bankruptcy Procedure (found in title 11 of the U.S. Code), a request for an order from the bankruptcy court must be made by written motion unless an application is authorized by the rules or unless the motion is made during a hearing. See *Fed. R. Bankr. P. 9013*. The motion must state with particularity the grounds and set forth the relief or order sought. *Fed. R. Bankr. P. 9013*. Unless the motion is one that may be considered ex parte, it must be served by the moving party on the trustee or debtor-in-possession and on those entities specified by the Rules of Bankruptcy Procedure or on the entities that the court directs. *Fed. R. Bankr. P. 9013*.

When the Bankruptcy Code indicates that an action must be taken “after notice and hearing,” it means after notice that is appropriate in the particular circumstances and after the opportunity for a hearing. 11 U.S.C. § 102(1)(A). The court may act without an actual hearing if notice is properly given and a hearing is not timely requested by a party in interest. 11 U.S.C. § 102(1)(B)(i). To fulfill the notice requirement, the motion must contain certain specific language alerting the debtor to the period within which he must respond to the motion. This language is commonly referred to as “negative notice.” See *In re Stogsdill*, 102 B.R. 587, 588 (Bankr. W.D. Tex. 1989). The time frame for responding to the motion varies depending on the type of motion and the local rules. Each district has specific negative-notice language that is required in that district. The practitioner should consult the local rules for the specific language required and the applicable time frame before filing any
motion. See form 35-18 in this chapter for sample notice language. See also section 35.2:1 above regarding the local rules for each district.

§ 35.3 PACER

Public Access to Court Electronic Records (PACER) is an electronic public access service that allows users to obtain case and docket information from federal appellate, district, and bankruptcy courts and from the U.S. Party/Case Index. PACER is a service of the U.S. Judiciary. The PACER Service Center is run by the administrative office of the U.S. courts. Currently, most courts have their own websites, and links to these sites are provided on the PACER website at www.pacer.gov. Electronic access is available for most courts by registering with the PACER Service Center, the judiciary’s centralized registration, billing, and technical support center.

A user can request information about a particular individual or case through the PACER system. The data is displayed directly on the user’s computer. Training on using the PACER system is available through the PACER website. All registered agencies and individuals are charged a user fee for access to the site. Users are also charged on a per-page or per-minute basis for each search. A schedule of fees is available on the PACER website.

§ 35.4 Admission to Practice before Bankruptcy Court

To practice before a particular bankruptcy court, the attorney must be admitted in such court. An attorney generally may obtain admission pro hac vice to appear for a specific case if the attorney does not otherwise regularly appear before the court. The courts have a form motion and order available on their websites for admission pro hac vice. For the Northern District of Texas, even if admitted, an attorney is required to have local counsel unless the attorney obtains leave from the court to proceed without local counsel. N.D. Tex. L.B.R. 2090-4.

Practice Note: To receive notice of all matters in a case, the attorney needs to appear in the case. See form 35-23 for a sample notice of appearance.

§ 35.5 Electronic Filing

The bankruptcy courts for all districts in Texas require that all documents be filed electronically as Adobe PDF files. The practice generally requires participation in a training course. On completion of the training course, the court issues the practitioner a login ID and a password, which is an electronic “signature.” All the bankruptcy courts in the four federal districts in Texas have adopted Appendix 5005, the “Administrative Procedures for the Filing, Signing, and Verifying of Documents by Electronic Means in Texas Bankruptcy Courts.” A copy can be located online at http://www.txeb.uscourts.gov/sites/txeb/files/TXEB_Appendix_5005.pdf.

Posting a credit card for filing documents requiring a fee may also be part of the procedure in some courts. The practitioner should consult the specific court for filing requirements. See section 35.1:2 above for a list of the official Web addresses for the bankruptcy courts in Texas.

Practice Note: Registration for electronic filing constitutes consent to receive notices electronically. The practitioner is advised to check frequently for filings involving matters in which the practitioner has an interest. Once an appearance has been entered in a case, copies of all documents filed in the case will automatically be sent to the practitioner by e-mail.
II. Automatic Stay

§ 35.11 Scope

On the filing of a bankruptcy petition, the debtor receives automatic injunctive relief that broadly prohibits creditors from taking further action against the debtor, the property of the debtor, or the property of the estate to collect their claims or enforce their liens. 11 U.S.C. § 362.

The stay arises at the time of filing, not when notice is given to or received by the creditor. 11 U.S.C. § 362(a); In re Sumpter, 171 B.R. 835, 841–42 (Bankr. N.D. Ill. 1994). The stay is often effective before creditors learn of it. A creditor may innocently obtain a default judgment or hold a foreclosure sale in violation of the automatic stay. See, e.g., In re Abusaad, 309 B.R. 895 (Bankr. N.D. Tex. 2004). The Fifth Circuit Court of Appeals has held that an action taken in violation of the automatic stay is voidable. See In re Coho Resources, Inc., 345 F.3d 338, 344 (5th Cir. 2003); contra In re Elder, 12 B.R. 491 (Bankr. M.D. Ga. 1981) (action is void).

The scope of the automatic stay is extremely broad. The stay prohibits—

1. commencing or continuing an action or proceeding that was or could have been commenced before the bankruptcy case began;
2. commencing or continuing an action to recover a claim that arose prebankruptcy;
3. enforcing a judgment obtained prebankruptcy;
4. obtaining possession of property of or from the estate or exercising control over such property;
5. creating, perfecting, or enforcing against the property of the debtor any lien to the extent that the lien secures a claim that arose prebankruptcy;
6. collecting, assessing, or recovering a prebankruptcy claim against the debtor;
7. setting off any prebankruptcy debt owing to the debtor against any claim against the debtor; or
8. commencing or continuing a proceeding before the U.S. Tax Court concerning a corporate debtor’s tax liability for a taxable period that may be determined by the bankruptcy court or concerning the tax liability of an individual debtor for a taxable period ending before the date of the order for relief.


However, a counterclaim asserted by the debtor is not an action “against the debtor” under 11 U.S.C. § 362(a) and, therefore, is not subject to the automatic stay. In re United States Abatement Corp., 39 F.3d 563, 568 (5th Cir. 1994); see also In re Voluntary Purchasing Groups, Inc., 205 B.R. 80, 80–81 (Bankr. E.D. Tex. 1996).

§ 35.12 Codebtor’s Stay

The codebtor stay refers to a stay of collection against codebtors who are not in bankruptcy if they are codebtors with a debtor filed bankruptcy. Except for consumer debt in a Chapter 12 or 13 case, the automatic stay of section 362 of the Bankruptcy
Code does not prohibit demands, suits, or any other action by the creditor against guarantors or other codebtors of the bankrupt debtor. See Winters ex rel. McMahon v. George Mason Bank, 94 F.3d 130, 133 (4th Cir. 1996); Lynch v. Johns-Manville Sales Corp., 710 F.2d 1194 (6th Cir. 1983); Pitts v. Unarco Industries, Inc., 698 F.2d 313 (7th Cir. 1983); In re Devine Ripe, LLC, 538 B.R. 300, 302 (Bankr. S.D. Tex. 2015).

In a Chapter 13 case, a codebtor’s stay applies. 11 U.S.C. § 1301. The codebtor’s stay under Chapter 13 stays enforcement of consumer debts against a codebtor. It does not stop the creditor from pursuing the codebtor if the codebtor became liable on or secured the debt in the ordinary course of the codebtor’s business or if the Chapter 13 case is closed, dismissed, or converted to a case under Chapter 7 or 11. 11 U.S.C. § 1301(a).

Streamlined provisions are added for a creditor to obtain relief from the codebtor’s stay. A motion for relief of the codebtor’s stay should be granted if—

1. the codebtor received the consideration for the creditor’s claim;
2. the debtor’s plan proposes not to pay the claim; or
3. the creditor’s interest would be irreparably harmed by the continuation of the codebtor’s stay.

11 U.S.C. § 1301(c). Unless a written opposition is filed to the motion within twenty days after it is filed, the codebtor’s stay lifts without the necessity of a court order. 11 U.S.C. § 1301(d).

Practice Note: If the stay does not apply to a nonbankrupt codebtor automatically by statute as discussed above, the debtor could file a motion seeking extension of the stay by court order. As a court of equity, the court can order to extend the stay or enjoin action against a codebtor. A creditor needs to object to such motion if the creditor wants to pursue the nonbankrupt codebtor. In general, the court should not protect any nonbankrupt codebtor unless the debtor can show that protecting the codebtor will provide a benefit to the bankruptcy estate and its creditors.

§ 35.13 Exceptions to Automatic Stay

Despite the broad reach of the automatic stay, there are exceptions. Some of the exceptions are—

1. the commencement or continuation of a criminal action or proceeding against the debtor (11 U.S.C. § 362(b)(1));
2. the commencement or continuation of an action for paternity, modification of domestic support obligations, child custody or visitation, dissolution of marriage (unless the action seeks to determine division of property), domestic violence, collection of a domestic support obligation from property that is not included in the bankruptcy estate, or the withholding of income that is property of the estate or of the debtor for payment of a domestic support obligation (11 U.S.C. § 362(b)(2)(A)–(C));
4. certain acts to perfect or maintain the perfection of an interest in property (11 U.S.C. § 362(b)(3));
5. the commencement or continuation of proceedings under the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction and pursuant police and regulatory powers (11 U.S.C. § 362(b)(4));
6. certain contractual rights exercised by commodity brokers, forward contract merchants, stockbrokers, financial institutions, or securities clearing agencies (11 U.S.C. § 362(b)(6));

7. certain contractual rights exercised by repo participants or financial participants (11 U.S.C. § 362(b)(7));

8. action by the secretary of Housing and Urban Development to foreclose a mortgage or deed of trust covering property consisting of five or more living units (11 U.S.C. § 362(b)(8));

9. certain actions by tax authorities, including—
   a. an audit to determine tax liability;
   b. issuance of a notice of tax deficiency;
   c. a demand for tax returns; and
   d. a tax assessment and issuance of a notice and demand for payment of such an assessment (11 U.S.C. § 362(b)(9));

10. an act by a lessor under a lease of nonresidential real property that has terminated by expiration of the stated term of the lease to obtain possession of the property (11 U.S.C. § 362(b)(10));

11. presentation of a negotiable instrument and giving notice of and protesting dishonor of a negotiable instrument (11 U.S.C. § 362(b)(11));

12. certain acts by the U.S. secretary of education regarding the eligibility of the debtor to participate in education loan programs (11 U.S.C. § 362(b)(16));

13. certain contractual rights exercised by swap participants or financial participants (11 U.S.C. § 362(b)(17));

14. the creation or perfection of a statutory lien for an ad valorem property tax or other special tax or special assessment on real property imposed by a government unit if the tax comes due after the petition was filed (11 U.S.C. § 362(b)(18)); and

15. the continuation of any eviction, unlawful detainer action, or similar proceeding by a lessor against a debtor involving residential property in which the debtor resides as a tenant if the lessor has obtained before the date of the filing of the bankruptcy petition a judgment for possession of the property (11 U.S.C. § 362(b)(22)).

§ 35.14 Termination of Automatic Stay

An automatic stay terminates automatically against acts against property of the estate when such property is no longer property of the estate. 11 U.S.C. § 362(c)(1). The stay also terminates automatically against all other actions and proceedings subject to the automatic stay when the bankruptcy proceeding is closed or dismissed or when the debtor receives or is denied a discharge. 11 U.S.C. § 362(c)(2). While the automatic stay in a Chapter 7 case has a limited duration, the automatic stay in a Chapter 12 or Chapter 13 case may not terminate for years. However, it is possible to obtain an earlier termination of the automatic stay.

If the debtor is an individual and the debtor was a debtor in a prior bankruptcy case that was pending within the preceding one year but was dismissed, the automatic stay expires thirty days after the filing of the subsequent case unless the debtor files a motion to continue the stay and obtains an order from the court continuing the stay. 11 U.S.C. § 362(c)(3). A presumption exists that a filing is not in good faith, and the debtor must rebut the presumption with clear and convincing evidence when seeking the stay to be extended past the thirty days. 11 U.S.C. § 362(c)(3)(C). If two or more cases were pending for an indi-
individual debtor within the previous year but were dismissed, the automatic stay does not go into effect. 11 U.S.C. § 362(c)(4)(A).

Relief from Automatic Stay for Secured Creditors: A secured party or a mortgagee may obtain relief from the automatic stay if he can establish that the debtor does not have equity in the encumbered property and the property is not necessary for an effective reorganization. 11 U.S.C. § 362(d)(2).

A secured creditor may also obtain relief from the bankruptcy stay by showing that the creditor’s interest in the property is not adequately protected. 11 U.S.C. § 362(d)(1). See section 35.16 below for a discussion of adequate protection.

The party requesting relief from the stay has the burden of establishing the debtor’s lack of equity in the encumbered property. The party opposing the relief from the stay has the burden of proof on all other issues. 11 U.S.C. § 362(g).

§ 35.15 Adequate Protection

“Adequate protection” is a critical issue in controversies under Bankruptcy Code sections 362 (relief from the automatic stay), 363 (use, sale, or lease of property), and 364 (obtaining credit). Unfortunately, the Code does not define adequate protection.

When adequate protection is required under Bankruptcy Code sections 362, 363, and 364, the three nonexclusive methods of providing adequate protection are—

1. requiring the trustee to make periodic cash payments to the lien creditor equal to the decrease in value of the creditor’s interest in the collateral;
2. providing to the entity an additional or replacement lien; and
3. granting such other relief (except allowing the creditor to claim an administrative expense under section 503(b)(1)) as will compensate the creditor for the decrease in value of the creditor’s interest in the collateral.


§ 35.16 Prepetition Repossession

An important issue that has generated sharp controversy is whether a creditor that has lawfully repossessed a debtor’s property prepetition violates the automatic stay simply by retaining possession of that property postpetition until adequate protection is assured. Most courts have held that the repossessing secured creditor must turn over the lawfully repossessed property on demand, even without adequate protection, or be in violation of the stay. See, e.g., Thompson v. General Motors Acceptance Corp., 566 F.3d 699, 701–03 (7th Cir. 2009); In re Bunton, 246 B.R. 851 (Bankr. N.D. Ohio 2000); In re Zaber, 223 B.R. 102 (Bankr. N.D. Tex. 1998); In re Bersheidt, 223 B.R. 579 (Bankr. D. Wyo. 1998); but see In re Fitch, 217 B.R. 286 (Bankr. S.D. Cal. 1998) (refusal of creditor to return vehicle without adequate protection did not violate automatic stay).

§ 35.17 Consequences of Violating Stay

An individual injured by a willful violation of the automatic stay is entitled to recover actual damages, including costs and attorney’s fees, and, in appropriate circumstances, may recover punitive damages. 11 U.S.C. § 362(k)(1). If, however, the violation was made in good faith, the damages may be limited to actual damages. 11 U.S.C. § 362(k)(2). “Individual” in this con-

Typically, the debtor or other party must bear the damages unless the violation is, in fact, willful. Willfulness is proven if the violator knew of the automatic stay and his actions were intentional. Mitchell v. BankIllinois, 316 B.R. 891, 901 (S.D. Tex. 2004). Willfulness may also occur even if the stay is violated before notice of the bankruptcy if the violator does not act to restore the status quo when he does receive notice. In re Wariner, 16 B.R. 216, 218 (Bankr. N.D. Tex. 1981); see also In re Zaber, 223 B.R. 102, 107 (Bankr. N.D. Tex. 1998).

Actual damages are not necessary to bring and maintain a violation of the stay. See In re Hill, 19 B.R. 375 (Bankr. N.D. Tex. 1982). Damages for emotional distress and relational injuries are part of “actual damages.” If property of the debtor is taken and held, actual damages may be measured by the value of the property at the time it is taken plus a rate per day for every day the property was out of the debtor’s possession. Further, the court must award attorney’s fees in a successful action for violation of the stay, and such fees are not limited to the amount of the debtor’s damages. See 11 U.S.C. § 362(k).

[Sections 35.18 through 35.20 are reserved for expansion.]

III. Claims

§ 35.21 Types of Claims

General Unsecured Claims: The Bankruptcy Code determines the order in which unsecured claims will be paid if there is not enough money to pay all unsecured claims in full. See 11 U.S.C. §§ 502, 507.

Priority Claims: A priority claim is an unsecured claim that is entitled to be paid ahead of other unsecured claims that are not entitled to priority status. 11 U.S.C. § 507.

Secured Claims: A creditor may have a secured claim either through a security interest in property in the bankruptcy estate or because of a lien or a right of setoff. “Security interest” means a lien created by an agreement. 11 U.S.C. § 101(51). A lien is a charge against or interest in property to secure payment of a debt or performance of an obligation. 11 U.S.C. § 101(37). A judicial lien is a lien obtained by judgment, levy, sequestration, or another legal or equitable process or proceeding. 11 U.S.C. § 101(36).

A claim is secured only to the extent of the value of the collateral securing the claim. See 11 U.S.C. § 506(a).

Practice Note: If the collateral’s value is less than the claim amount, the claim is bifurcated into a secured claim up the amount of the collateral and an unsecured claim for the remainder. If the collateral exceeds the value of the claim, then the claim is “oversecured” and the secured claimant is entitled to interest and costs and attorney’s fees if allowed by agreement or state law. See 11 U.S.C. § 506(b).

Practice Note: Determining and proving “value” of collateral requires evidence. An expert witness is helpful to prove value. Review 11 U.S.C. § 506(a) as to the type of “value” that is considered depending on the case, such as replacement value or value for proposed disposition or use of collateral.
Administrative Expense Claims: Claims incurred in the administration of a bankruptcy case are considered administrative expense claims that are paid before priority and general unsecured claims. 11 U.S.C. § 503. These claims include actual and necessary expenses of preserving the estate, professional fees for the estate, and value of goods received by the debtor within 20 days prior to the bankruptcy filing. 11 U.S.C. § 503.

A party that agrees to postpetition financing of the debtor may seek priority status on such financing, including—

1. credit with priority over any or all administrative expenses of the kind specified in 11 U.S.C. §§ 503(b), 507(b);
2. credit secured by a lien on property of the estate that is not otherwise subject to a lien; or
3. credit secured by a junior lien on property of the estate that is subject to a lien.


The bankruptcy court may authorize the obtaining of credit or the incurring of debt secured by a senior or equal lien on property of the estate that is subject to a lien only if the trustee is unable to obtain such credit otherwise, and there is adequate protection of the interest of the holder of the lien on the property of the estate on which the senior or equal lien is proposed to be granted. 11 U.S.C. § 364(d).

§ 35.22 Proof of Claim

The proof of claim is a written statement describing the reason a debtor owes a creditor money. There is an official form for this purpose (see Fed. R. Bankr. P. 3001, 3003, and 3005 and Official Bankruptcy Form No. 10), which is reproduced at form 35-6 in this chapter. A creditor or its lawyer can file a proof of claim without being admitted to the particular bankruptcy court.

For Chapter 7, 12, or 13 cases, the proof of claim must be filed within ninety days after the first date set for the creditors meeting; however, some exceptions apply:

1. A governmental unit has 180 days after the entry of the order for relief to file a proof of claim.
2. An infant or incompetent may have the deadline extended at the court’s discretion.
3. An unsecured claim that is the result of a judgment may be filed within thirty days after the judgment becomes final.
4. A claim arising from the rejection of an executory contract or lease “may be filed within such time as the court may direct.”
5. If a no-asset notice was served, and thereafter a notice of distribution is served, parties have ninety days after the mailing of the notice of distribution to file proofs of claim.


Several courts have held that the bankruptcy court does not have authority in a case under Chapter 7, 12, or 13 to allow a late-filed proof of claim outside the exceptions listed in Fed. R. Bankr. P. 3002(c). See, e.g., In re McLarry, 273 B.R. 753 (Bankr. S.D. Tex. 2002); In re Kelley, 259 B.R. 580 (Bankr. E.D. Tex. 2001); In re Duarte, 146 B.R. 958 (Bankr. W.D. Tex. 1992). A debtor or trustee may file a proof of claim for a creditor that fails to timely file within thirty days after the rule 3002(c) deadline passes. Fed. R. Bankr. P. 3004.
The filing of a proof of claim in a case under Chapter 9 or 11 of the Bankruptcy Code is governed by Fed. R. Bankr. P. 3003. In cases under Chapter 9 or 11, the court may extend the time to file a proof of claim for cause. Fed. R. Bankr. P. 3003(c)(3); see also In re Eagle Bus Manufacturing, Inc., 62 F.3d 730, 737 (5th Cir. 1995) (creditor’s late-filed proof of claim was allowed where there was no evidence of bad faith and neither other creditors nor debtor would be prejudiced by allowing claim); In re AMWC, Inc., 109 B.R. 210, 214 (Bankr. N.D. Tex. 1989) (court reviewed motion to file late proof of claim under “excusable neglect” test). See form 35-7 for a sample creditor’s motion to allow late filing of proof of claim.

Practice Note: In a no-asset case, many practitioners will file a proof of claim on receipt of the initial notice of the bankruptcy in the event that assets are later discovered.

Practice Note: Effective December 1, 2015, the Official Bankruptcy Forms were superseded with new forms with new numbering and format. The forms and instructions can be found at http://www.uscourts.gov/forms/bankruptcy-forms.

Practice Note: The filing of a proof of claim for a claim outside of limitations might be a violation of the Federal Debt Collection Practices Act (FDCPA). The court of appeals for the Fifth Circuit has not yet ruled, and other circuits are split on the issue. See Trevino v. HSBC Mortgage Services, Inc. (In re Trevino), 535 B.R. 176, 203 n. 7 (Bankr. S.D. Tex. 2015).

§ 35.23 Objections to Claim

A proof of claim is deemed “allowed” unless a party objects to the claim. 11 U.S.C. § 502(a). At any time before the case is closed, the trustee, the debtor-in-possession, or a party in interest may file an objection to a proof of claim. 11 U.S.C. § 502. To oppose an objection to its claim, the creditor must file a written response to the objection with the bankruptcy court. At the hearing, the creditor will need to prove the validity of his claim.

§ 35.24 Setoffs

A creditor may offset a mutual debt owing by the creditor to the debtor that arose before the commencement of the case against a claim the creditor has against the debtor that arose before the commencement of the case. However, a setoff will not be allowed if—

1. the claim of the creditor against the debtor is disallowed;
2. the claim was transferred, by an entity other than the debtor, to the creditor after commencement of the case;
3. the claim was transferred, by an entity other than the debtor, to the creditor after ninety days before the date the petition was filed and while the debtor was insolvent; or
4. the debt owed to the debtor by the creditor was incurred by the creditor after ninety days before the date of filing, while the debtor was insolvent, and for the purpose of obtaining a right of setoff against the debtor.


Practice Note: The setoff of a claim is automatically stayed. 11 U.S.C. § 362(a)(7). The attorney needs to seek relief from the stay to exercise setoff rights.
§ 35.25 Executory Contracts and Unexpired Leases

The bankruptcy trustee is authorized to assume or reject executory contracts and unexpired leases; the decision to assume or reject a contract or lease must be approved by the court. 11 U.S.C. § 365(a). The statute does not define the term *executory contract*, but legislative history indicates that the term generally includes contracts on which performance remains due to some extent on both sides. See H.R. Rep. No. 95-595, at 347 (1977); S. Rep. No. 95-989, at 58 (1978) (quoted in NLRB v. Bildisco & Bildisco, 465 U.S. 513 (1984) superseded by statute on other grounds, 11 U.S.C. § 1113.). Section 365 contains provisions allowing the trustee to cure certain defaults before assumption and to provide adequate assurance of future performance of contracts that are in default. See 11 U.S.C. § 365(b). Section 365 permits not only the assumption but also the assignment of most contracts, notwithstanding contractual provisions that might otherwise limit assumption or assignment. See 11 U.S.C. § 365(f).

For a more detailed discussion of executory contracts and unexpired leases, see part VII. in this chapter.

[Sections 35.26 through 35.30 are reserved for expansion.]

IV. Chapter 7 Bankruptcy

§ 35.31 Introduction

A bankruptcy under Chapter 7 of the Bankruptcy Code is often referred to as liquidation bankruptcy. The goal is straightforward: to allow an individual debtor to obtain a discharge, keep exempt property allowed by law, and provide an orderly liquidation. The typical debtor in a Chapter 7 bankruptcy is one who has primarily unsecured debts, who does not have significant problems with secured creditors, and who does not have potential problems with discharge, dischargeability, or substantial abuse.

A debtor who filed a Chapter 7 bankruptcy and received a discharge within the previous eight years is ineligible for Chapter 7 relief. 11 U.S.C. § 727(a)(8); see also 11 U.S.C. § 727(a)(9).

Under the federal Fair Credit Reporting Act, a bankruptcy under Chapter 7 remains on an individual’s credit record for ten years. 15 U.S.C. § 1681c(a)(1).

§ 35.32 Exemptions

Under Chapter 7, the individual debtor selects exempt property on Official Bankruptcy Form 106C, better known as Schedule C. If no one objects to the claim of exemptions within thirty days after the conclusion of the first meeting of creditors, the debtor keeps the property listed on Schedule C. See Taylor v. Freeland & Kronz, 503 U.S. 638 (1992). In Texas, the debtor may choose between two potential lists of exempt property: the Texas state exemptions and the federal exemptions. See section 35.33:1 below for discussion of the Texas state exemptions and section 35.33:3 for discussion of the federal exemptions.

§ 35.32:1 Texas State Exemptions

When the Bankruptcy Code was passed in 1979, states were given the option to “opt out” of the federal exemptions and prohibit their citizens from claiming the list of federal exemptions. Texas is one of sixteen states that chose not to opt out; there-
fore, debtors in Texas may choose between the Texas state exemptions and the federal exemptions. In most cases, the Texas state exemptions are more generous than the federal exemptions.

**Homestead Exemption:** The Texas homestead exemption allows unlimited value as long as the homestead is located on not more than ten acres in the city or not more than 200 acres for a family in the country. Tex. Prop. Code § 41.002. In contrast, the federal exemption allows equity not to exceed $23,675 per spouse as of April 1, 2016, with slight readjustment for inflation every three years. 11 U.S.C. § 522(d). A million-dollar house on ten urban acres would be exempt under Texas law, while only $47,350 in equity would be available to a couple under the federal exemptions. For a more detailed discussion of the Texas homestead exemption, see sections 27.35 through 27.40 in this manual. Some limits, however, are placed on the amount of the state homestead exemption that may be allowed to a debtor in bankruptcy. A debtor electing state exemptions may not exempt any interest in real or personal property that the debtor or a dependent of the debtor uses as a residence that was acquired by the debtor during the 1,215-day period (three years plus 120 days) preceding the date of the filing of the petition that exceeds, in the aggregate, $160,375 in value. This limit does not include any interest transferred from the debtor’s previous principal residence. 11 U.S.C. § 522(p)(2)(B).

**Personal Property Exemptions:** See sections 27.41 and 27.42 for a full discussion of the Texas personal property exemptions.

§ 35.32:2 **Federal Exemptions**

Most of the federal exemptions place strict limits on each type of property and, in some cases, the value of each specific item under a type of property. 11 U.S.C. § 522(d). The federal exemptions have some aspects, however, that benefit a small class of debtors who do not have to worry about excess equity in their homestead.

**“Wild Card” Exemption:** The exemptions include what is known as the “wild card.” With this exemption, each debtor can claim $1,250 plus up to $11,850 of any unused amount of the homestead exemption for any property. 11 U.S.C. § 522(d)(5). In contrast, cash is not exempt under Texas law. Tex. Prop. Code § 42.002.

**Crime Victim’s Awards:** The federal exemptions include provisions for awards under crime victim’s reparation laws, payment on account of wrongful death, and personal injury awards. 11 U.S.C. § 522(d)(11). None of these is exempt under Texas law.

§ 35.32:3 **Objecting to Exemptions**

It is the duty of the trustee to review the debtor’s claim of exempt property and to file an objection if the claimed exemptions exceed the lawful items or amount.

§ 35.33 **Discharge**

The bankruptcy discharge makes certain debts unenforceable. The discharge has the effect of an injunction prohibiting enforcement of the discharged debt. Any judgments against the debtor with respect to discharged debts become void. 11 U.S.C. § 524(a).
Section 727 of the Bankruptcy Code defines which debtors are entitled to a discharge. See 11 U.S.C. § 727. Discharge under this section is an all-or-nothing proposition; either the debtor receives a discharge, or he does not. Whereas under section 523, specific claims can be excepted from discharge as discussed below.

Certain debtors are not entitled to a Chapter 7 discharge regardless of the debtor’s culpability. A debtor is not eligible for discharge under Chapter 7 if—

1. the debtor is not an individual (corporations and partnerships may receive a discharge only under Chapter 11 or 12) (11 U.S.C. § 727(a)(1));
2. the debtor has been granted a discharge under Chapter 7 or 11 in a case filed within the preceding eight years (11 U.S.C. § 727(a)(8)); or
3. the debtor received a discharge under Chapter 12 or 13 in a case commenced within the preceding six years that paid less than 70 percent of the debts (although in some instances the debtor may be eligible to receive a discharge under Chapter 13) (11 U.S.C. § 727(a)(9)).

A debtor may also be ineligible for discharge because of an infraction against the bankruptcy system. These infractions often constitute criminal offenses as well. See 18 U.S.C. § 152. Grounds for denying discharge based on the debtor’s culpability include—

1. the transfer, removal, mutilation, or concealment of the debtor’s property with intent to hinder, delay, or defraud a creditor or the trustee within one year before filing for bankruptcy (11 U.S.C. § 727(a)(2)(A));
2. the transfer, removal, mutilation, or concealment of property of the estate with intent to hinder, delay, or defraud a creditor or the trustee (11 U.S.C. § 727(a)(2)(B));
3. the concealment, destruction, mutilation, falsification, or failure to keep or preserve financial records sufficient to determine the debtor’s financial condition (11 U.S.C. § 727(a)(3));
4. knowingly and fraudulently making a false oath or account or presenting a false claim in connection with the case (11 U.S.C. § 727(a)(4)(A), (B));
5. bribery (11 U.S.C. § 727(a)(4)(C));
6. withholding recorded information, books, documents, records, and papers relating to the debtor’s property or financial affairs from the trustee or a court officer (11 U.S.C. § 727(a)(4)(D));
7. failure to satisfactorily explain any loss of assets or deficiency of assets to meet the debtor’s liabilities (11 U.S.C. § 727(a)(5));
8. refusal to obey any lawful order of the court or refusal to answer a question (except where there is a proper claim of the privilege against self-incrimination and no immunity is granted) (11 U.S.C. § 727(a)(6)); and

No action is required to deny discharge under 11 U.S.C. § 727(a)(1), (8), or (9); these provisions are self-executing. See Fed. R. Bankr. P. 4004(c)(1). A timely filed complaint is necessary, however, to deny discharge under 11 U.S.C. § 727(a)(2)–(7). See Fed. R. Bankr. P. 4004(a), (b). A complaint objecting to discharge must be filed not later than sixty days following the first date set for the meeting of creditors pursuant to section 341(a). Fed. R. Bankr. P. 4004(a). In a Chapter 11 case, the complaint
must be filed not later than the first date set for the hearing on confirmation. Fed. R. Bankr. P. 4004(a). The court may extend
this deadline as long as the request is made before the deadline. Fed. R. Bankr. P. 4004(b).

See form 35-16 in this chapter for a sample complaint to determine dischargeability.

A discharge may be revoked in some instances. Within one year of discharge, the discharge can be revoked if the debtor
obtains his discharge through fraud and the party requesting revocation did not know of the fraud until after the discharge was
granted. 11 U.S.C. § 727(d)(1), (e)(1). The discharge may be revoked before the later of one year after granting the discharge
or the date the case is closed if—

1. the debtor knowingly and fraudulently acquires or becomes entitled to acquire property of the estate and fails to dis-
   close it;

2. the debtor fails to obey a lawful order or respond to a material question; or

3. the debtor fails to explain satisfactorily a material misstatement in an audit or fails to make records and documents
   available for inspection, as referred to in section 586(f) of title 28.


The trustee, a creditor, or the U.S. trustee may request revocation of a discharge. The discharge may be revoked only after
notice and a hearing. 11 U.S.C. § 727(d).

Waiver of Discharge: The debtor may choose to waive his discharge under 11 U.S.C. § 727(a)(10).

Time between Successive Cases: A debtor cannot receive a discharge under Chapter 7 if the debtor has received a dis-
charge under Chapter 7 or Chapter 11 during the preceding eight years or under Chapter 13 during the preceding six years. 11
U.S.C. § 727(a)(8), (a)(9). A debtor cannot receive a discharge under Chapter 13 if the debtor received a discharge under
Chapter 13 during the previous two years or under Chapter 7, 11, or 12 during the previous four years. 11 U.S.C. § 1328(f).

Practice Tip: The deadline for Chapter 7 dischargeability complain runs from the date set for the first meeting of creditors.
If the meeting of creditors is rescheduled, it does not affect the deadline; the deadline is still from the first date set for the
meeting of creditors.

§ 35.34 Nondischargeability of Specific Debts

Automatically Nondischargeable: Certain debts require no action to ensure their nondischargeability. A creditor may
attempt to enforce these debts long after the bankruptcy is discharged without seeking permission from the bankruptcy court.
Some debts that are automatically nondischargeable include—

1. most debts for taxes, although some income taxes may be discharged under certain circumstances (11 U.S.C.
   § 523(a)(1));

2. debts that are neither listed nor scheduled if they were not listed in time to file a proof of claim or in time to file a
timely nondischargeability complaint (11 U.S.C. § 523(a)(3));
3. a domestic support obligation (including some debts for attorney’s fees used to establish the obligation) (11 U.S.C. § 523(a)(5); see also In re Hudson, 107 F.3d 355 (5th Cir. 1997); In re Fulton, 236 B.R. 626 (Bankr. E.D. Tex. 1999));

4. most debts for fines, penalties, or forfeitures payable to and for the benefit of a governmental unit (11 U.S.C. § 523(a)(7));

5. student loans, unless the debtor obtains a determination that failure to discharge the debt would impose an undue hardship on the debtor and the debtor’s dependents (11 U.S.C. § 523(a)(8); see also In re Gerhardt, 348 F.3d 89 (5th Cir. 2003) (outlining test for “undue hardship”));

6. debts for death or personal injury caused by the debtor’s operation of a motor vehicle or boat while intoxicated from using alcohol, a drug, or another substance (although a debt for property damage caused while intoxicated may be dischargeable) (11 U.S.C. § 523(a)(9));

7. debts the debtor waived or was denied a discharge for in a prior case (11 U.S.C. § 523(a)(10));

8. instances of fiduciary fraud against an insured bank or savings and loan (11 U.S.C. § 523(a)(11));

9. malicious or reckless failure to maintain a commitment to maintain the capital of an insured depository institution (11 U.S.C. § 523(a)(12));


11. debts incurred to pay a nondischargeable tax (11 U.S.C. § 523(a)(14)); and

12. condominium fees and homeowners association dues incurred after filing the bankruptcy case as long as the debtor received an actual benefit (such as residing there or renting the property out to a tenant) (11 U.S.C. § 523(a)(16)).

In some instances, the debtor or the creditor may want to obtain a determination that the debt is or is not dischargeable. This is absolutely necessary to establish a hardship discharge of a student loan. In re Gerhardt, 348 F.3d 89. There also may be questions concerning the nature of domestic support obligations or fact issues surrounding a hardship discharge that require litigation in the bankruptcy proceeding. Because the rules relating to dischargeability of tax debts are quite complicated, it may be preferable to obtain a ruling from the bankruptcy court than to bring the issue before a state court. Except for dischargeability under section 523(a)(2), (4), and (6), state courts share concurrent jurisdiction with bankruptcy courts to determine dischargeability issues. In re Bingham, 163 B.R. 769, 772 (Bankr. N.D. Tex. 1994).

There may be questions concerning the nature of domestic support obligations or fact issues surrounding a hardship discharge that require litigation in the bankruptcy proceeding.

Debts that Must Be Timely Proven to Be Nondischargeable: Three categories of nondischargeable debt require the creditor to file a timely complaint in the bankruptcy court seeking a determination of nondischargeability. 11 U.S.C. § 523(c). The bankruptcy court has exclusive jurisdiction for these three categories. The creditor’s failure to file a timely complaint could result in the loss of the ability to collect the debt. The three categories of debt are—

1. debts for money or property obtained through fraud or false pretenses including money obtained or renewals or extensions obtained through use of a false written financial statement (11 U.S.C. § 523(a)(2));

2. debts incurred as a result of fraud or defalcation while acting in a fiduciary capacity, larceny, or embezzlement (11 U.S.C. § 523(a)(4)); and
debts for willful and malicious injury (11 U.S.C. § 523(a)(6)).

The court determines the dischargeability of these debts after notice and hearing. 11 U.S.C. § 523(c)(1).

§ 35.35 Abuse

If the court finds that a debtor’s case would constitute an “abuse,” the court has the authority to dismiss the case. 11 U.S.C. § 707(b)(1). A motion for dismissal may be brought by the court on its own motion, by the U.S. trustee, the trustee (or bankruptcy administrator), or any party in interest. The abuse concept applies to only an individual debtor who owes primarily consumer debts. 11 U.S.C. § 707(b)(1).


A finding of abuse will generally not close the door on bankruptcy completely. The court may also, with the debtor’s consent, convert the case to Chapter 11 or 13.

§ 35.36 Reaffirmation

Reaffirmation relates to both exempt property and discharge. If a debt is reaffirmed, the debtor does not get the benefit of the discharge of the debt. Reaffirmation is frequently used in the case of secured or nondischargeable debts.

Reaffirmation is sometimes used for secured debts. With a secured debt, the liability on the debt may be dischargeable, but the lien is not discharged. This means that the creditor is still free to enforce its lien once the bankruptcy case is over. The Bankruptcy Code gives debtors three options for dealing with property subject to a lien in Chapter 7: reaffirmation, redemption, or surrendering the collateral. See 11 U.S.C. § 521.

The debtor must file with the clerk of the court a statement of his intentions for the retention or surrender of a secured creditor’s collateral and to specify whether the debtor intends to redeem (for cash) the collateral or reaffirm the debt secured by the collateral. 11 U.S.C. § 521.

The Fifth Circuit Court has held that the choices under section 521—surrendering the collateral, redeeming it, or reaffirming the debt—are unambiguous and mandatory and that, therefore, there are no other choices. See In re Johnson, 89 F.3d 249 (5th Cir. 1996).

Of the three options, reaffirmation and surrender are the most commonly used. Redemption requires paying the value of the property in cash. Obviously, this may be difficult if the collateral is a house or a car. If the debtor wants to keep collateral that has a high value, the only practical option is likely to be reaffirmation of the debt.

The reaffirmation agreement must—

1. be entered into before the discharge is granted; and
2. be filed with the court and either contain a certification from the debtor’s attorney that the agreement is voluntary, it does not impose undue hardship, and the debtor has been advised on the legal effect and consequences of the agreement or, if the individual is not represented by an attorney during negotiation of the agreement, the court approves that the agreement does not impose an undue hardship and is in the best interest of the debtor.

Also, the agreement is enforceable only if—

1. the debtor received the disclosures described in 11 U.S.C. § 524(k) at or before the time the debtor signed the agreement;
2. the debtor has not rescinded the agreement before discharge or within sixty days after the agreement is filed with the court (whichever occurs later); and
3. provisions of 11 U.S.C. § 524(d) have been complied with.


See form 35-9 for a sample reaffirmation agreement.

§ 35.37   Lien Avoidance

A debtor may completely avoid certain types of liens on property in which the debtor has an interest if the lien impairs an exemption on that property to which the debtor would otherwise be entitled. 11 U.S.C. § 522(f).


Garnishment Lien: As described above, a garnishment creates a judicial lien. Under Texas law, the garnishment lien attaches at the date of service of the summons. In re Latham, 823 F.2d 108, 110 (5th Cir. 1987). The date of attachment is used for determining whether the garnishment falls within statutory time frame to be clawed back as an avoidable preference. In re Latham, 823 F.2d at 110.

Nonpossessory, Non-Purchase-Money Security Interests: The debtor may avoid nonpossessory, non-purchase-money security interests in—

1. household furnishings, household goods, wearing apparel, appliances, books, animals, crops, musical instruments, or jewelry that are primarily for the personal or household use of the debtor or the debtor’s dependents;
2. implements, professional books, or tools of the trade of the debtor or debtor’s dependents; and
3. professionally prescribed health aids for the debtor or the debtor’s dependents.

11 U.S.C. § 522(f)(1)(B). Non-purchase-money liens on motor vehicles are not avoidable under section 522(f) because motor vehicles are not considered household goods. A lien on property in which the security interest was taken not only for purchase but for additional funds advanced is not avoidable. Consolidation, renewal, and refinancing loans, however, can transmute a nonavoidable lien into one that is avoidable.

Trustee’s Power to Avoid Liens: The trustee may avoid liens and transfers of the debtors. 11 U.S.C. § 544. The trustee can avoid transfers and liens on the debtor’s property that could have been avoided by a creditor under the applicable state statute and liens arising by statute (such as a landlord’s lien). The individual debtor may also use these powers when the trustee
refuses to do so. 11 U.S.C. § 522(h). The purpose of the “strong arm powers” under section 544 is to cut off unperfected security interests, secret liens, and undisclosed prepetition claims against the debtor’s property as of the commencement of the case.

Under section 544, the trustee is granted the following powers:

**Status of Creditor with Judicial Lien:** The trustee has the status of a creditor with a judicial lien on all property on which a creditor could have obtained a judicial lien. Thus, the trustee has the rights and powers, as of the date of the commencement of the case, to avoid any transfer or obligation of the debtor that is avoidable by a hypothetical creditor and may subdivide any other creditor who holds a security interest in the debtor’s property but failed to take the necessary steps to perfect his security interest under applicable state law. 11 U.S.C. § 544(a)(1).

**Right of Creditor with Unsatisfied Writ of Execution:** The trustee has the rights of a creditor who obtains a writ of execution against the debtor that is returned unsatisfied. The effect of this provision is to vest the trustee with the equitable rights of a hypothetical creditor that has exhausted its legal remedies. The trustee may raise a presumption that the debtor is insolvent and has the ability, in some states, to invoke the equitable doctrine of marshaling. 11 U.S.C. § 544(a)(2).

**Right of Bona Fide Purchaser of Real Property:** The trustee has the rights of a bona fide purchaser of real property (but not of personal property) if, at the time of the commencement of the case, a hypothetical buyer could have obtained bona fide purchaser status. 11 U.S.C. § 544(a)(3). The trustee has the right to avoid an unrecorded transfer of land. A debtor-in-possession may also prosecute such a cause of action because the test is whether the trustee, not the debtor, qualifies as a bona fide purchaser. Thus, the mortgage valid between the debtor and a mortgagee, which could not be avoided before bankruptcy, may be avoided after bankruptcy. 11 U.S.C. § 544(a)(3).

**Right to Avoid Voidable Transfers:** The trustee has the right to avoid any transfer of the debtor or obligation incurred by the debtor that is voidable under applicable law by a creditor holding an unsecured claim. This includes any cause of action under state law for a fraudulent transfer or to avoid a bulk transfer in violation of state law. An actual unsecured creditor must be in existence; otherwise, if there are no creditors against whom the transfer is voidable under state law, the trustee is powerless. 11 U.S.C. § 544(b).

[Sections 35.38 through 35.40 are reserved for expansion.]

### V. Chapter 13 Bankruptcy

#### § 35.41 Overview

Chapter 13 allows an individual with regular income to file a plan for the reorganization of debts. The three main issues in Chapter 13 are—

1. eligibility to file;
2. confirmation of a plan; and
3. the extent of the discharge.
A complete discussion of Chapter 13 is beyond the scope of this manual. The following is intended to provide the collections practitioner with an idea of the structure of a bankruptcy under Chapter 13 and some indication of the issues that may arise.

§ 35.42 Eligibility to File

To file for bankruptcy under Chapter 13, a debtor must—

1. be an individual or an individual and the individual’s spouse;
2. have regular income; and
3. owe, on the date of filing of the petition, noncontingent, liquidated unsecured debts of less than $394,725 and non-contingent, liquidated secured debts of less than $1,184,200.


The requirement that a debtor be an individual or an individual and a spouse eliminates corporations and partnerships from filing for bankruptcy under Chapter 13. These entities may reorganize under Chapter 11 or, in rare circumstances, under Chapter 12.

An additional requirement for staying in Chapter 13 is filing all necessary income tax returns. See In re Koval, 205 B.R. 72 (Bankr. N.D. Tex. 1996).

§ 35.42:1 “Regular Income”

The requirement that the debtor have regular income simply means that the debtor must have some level of income on a recurring basis. Social Security payments, welfare payments, disability payments, and pension income have all been held to satisfy the regular income test. See In re Hammonds, 729 F.2d 1391, 1394–95 (11th Cir. 1984); In re Howell, 138 B.R. 484, 489 (E.D. Pa. 1992). Support from family members, however, standing alone, will not be sufficient to constitute “regular” income because such support can cease at any time.

Practice Note: The “regular income” test is independent of the feasibility test for confirming a plan. Thus, a debtor may qualify for filing under Chapter 13 but still not have enough income to confirm a plan. In that instance, the case would subsequently be dismissed or converted to Chapter 7.

§ 35.42:2 Debt Limits

The debt limits under Chapter 13 pose another restriction on eligibility. A debtor’s eligibility to file under Chapter 13 may depend on whether the debt was contingent or unliquidated.

The Bankruptcy Code does not define the terms contingent or unliquidated, but the courts have supplied definitions. A debt is “noncontingent, if all events giving rise to liability occurred prior to the filing of the bankruptcy petition.” In re Loya, 123 B.R. 338, 340 (B.A.P. 9th Cir. 1991). A debt is “liquidated” if the amount can be readily determined with precision and is capable of ascertainment by reference to an agreement or a simple mathematical computation. In re Elrod, 178 B.R. 5 (Bankr. N.D. Okla. 1995). Thus, a claim on a promissory note will generally be liquidated, while a tort claim may well be unliquidated. Contingent and unliquidated debts do not count toward the debt limits. See 11 U.S.C. § 109(e).
§ 35.43  Codebtor’s Stay

In Chapter 13, the automatic stay can apply to nonbankrupt codebtors of a debtor. 11 U.S.C. § 1301. The codebtor’s stay, however, does not apply to debts that a codebtor became liable on or secured in the ordinary course of the codebtor’s business, or after the Chapter 13 case is closed or dismissed or converted to a case under Chapter 7 or 11. 11 U.S.C. § 1301(a).

Streamlined provisions are added for a creditor to obtain relief from the codebtor’s stay. A motion for relief of the codebtor’s stay should be granted if—

1. the codebtor received the consideration for the creditor’s claim;
2. the debtor’s plan proposes not to pay the claim; or
3. the creditor’s interest would be irreparably harmed by the continuation of the codebtor’s stay.

11 U.S.C. § 1301(c). Unless a written opposition is filed to the motion within twenty days after it is filed, the codebtor’s stay lifts without the necessity of a court order. 11 U.S.C. § 1301(d).

§ 35.44  Confirmation of Chapter 13 Plan

To confirm a Chapter 13 plan, a debtor must meet the following requirements:

1. The debtor must pay all of his “projected disposable income” into a plan for the applicable commitment period to unsecured creditors under the plan if the trustee or holder of an allowed unsecured claim objects to the confirmation (11 U.S.C. § 1325(b)(4)).
2. All priority claims must be paid in full without interest.
3. For secured claims, the debtor must make equal monthly periodic payments that equal at least an amount sufficient to provide the creditor with adequate protection (11 U.S.C. § 1325(a)(5)).
4. Unsecured creditors must receive at least as much as they would receive under a Chapter 7 liquidation (11 U.S.C. § 1325(a)(4)).
5. The plan is submitted in good faith (11 U.S.C. § 1325(a)(7)).
6. All amounts required under a domestic support obligation are paid (11 U.S.C. § 1325(a)(8)).
7. All tax returns are filed (11 U.S.C. § 1325(a)(9)).

See generally 11 U.S.C. §§ 1322, 1325 for more about contents of the plan and confirmation.

See forms 35-14 and 35-15 in this chapter for sample objections to confirmation of a plan under Chapter 13 of the Bankruptcy Code.

§ 35.44:1  Disposable Income

The Bankruptcy Code defines “disposable income” as current monthly income that is received by the debtor (other than certain child support payments, foster care payments, or disability payments for a dependent child) less amounts reasonably necessary to be expended for the maintenance or support of the debtor or his dependents, a domestic support obligation, or certain
charitable contributions. For debtors engaged in business, it does not include income that is necessary for the continuation of
the debtor’s business. 11 U.S.C. § 1325(b)(2).

Thus, “disposable income” is the debtor’s total income less reasonable living expenses and domestic support obligations (and
less business expenses for an individual with a business). This includes charitable contributions of up to 15 percent of the
debtor’s income. 11 U.S.C. § 1325(b)(2)(A)(ii). Other types of expenses that constitute living expenses include food, housing,
clothing, laundry and cleaning, utilities and telephone, medical, insurance, taxes, support, and transportation. Generally, vol-
untary contributions to a retirement plan are not considered reasonable living expenses. See In re Johnson, 241 B.R. 394, 402
(Bankr. E.D. Tex. 1999).

Private school tuition will probably not be allowed as a reasonable living expense. Univest-Coppell Village, Ltd. v. Nelson,
204 B.R. 497 (Bankr. E.D. Tex. 1996). Additionally, payments on secured claims for luxury items, such as a boat, may be
objected to by the Chapter 13 trustee. See, e.g., In re Samadi, No. 02-30336-H2-13, 2002 WL 31833254 (Bankr. S.D. Tex.
Sept. 30, 2002).

Practice Note: Disposable income is initially based on the schedule of income and expenses submitted by the debtor. If no
party objects to this schedule, the amount listed by the debtor will be presumed to be reasonable. Any questionable areas will
usually be resolved by negotiation with the Chapter 13 trustee. Only rarely will a creditor object to the proposed budget.

§ 35.44:2 Good Faith

To be entitled to confirmation, the Chapter 13 plan must have been proposed in good faith. 11 U.S.C. § 1325(a)(3). Good faith
is generally a fact-specific inquiry into whether the debtor is using Chapter 13 for its intended purpose or is attempting to
manipulate the system unfairly. See, e.g., In re Cedar Shore Resort, Inc., 235 F.3d 375, 380 (8th Cir. 2000); In re Elmwood
Development Co., 964 F.2d 508, 510 (5th Cir. 1992); In re Little Creek Development Co., 779 F.2d 1068, 1072 (5th Cir. 1986).

Serial Filings: The court shall not grant a discharge under Chapter 13 if the debtor has received a discharge in a case filed
under Chapter 7, 11, or 12 during the four-year period preceding the filing of the Chapter 13 petition or if the debtor has
received a discharge in a case filed under Chapter 13 during the two-year period preceding the filing of the Chapter 13 peti-
tion. 11 U.S.C. § 1328(f). Some courts have found that a “serial filer” has filed in bad faith. See, e.g., In re Thomas, 123 B.R.
552 (Bankr. W.D. Tex. 1991). If the court finds that the debtor has acted in bad faith, the court can either lift the stay to allow
a secured creditor to foreclose its lien on its collateral or dismiss the case with prejudice. An individual or family farmer who
previously filed a petition under the Bankruptcy Code is ineligible for relief if the earlier case had been pending within 180
days before the date on which the newer petition was filed and the earlier case either was dismissed by the court on the ground
that the debtor disobeyed orders or failed to appear to prosecute the case or was dismissed when the debtor’s motion for relief
from the automatic stay was filed. 11 U.S.C. § 109(g).

Practice Note: Section 109(g), related to a bankruptcy filing 180 days after prior dismissal, is usually invoked by a creditor
filing a motion to dismiss the subsequent case. The court then decides if the debtor in the earlier case either dismissed the case
voluntarily after a motion for relief had been filed or if the debtor intentionally disobeyed an order of the court.

Automatic Termination of Stay in Subsequent Case: If the debtor is an individual and the debtor was a debtor in a prior
bankruptcy case that was pending within the preceding one year but was dismissed, the automatic stay expires thirty days after
the filing of the subsequent case unless the debtor files a motion to continue the stay and obtains an order from the court con-
tinuing the stay. 11 U.S.C. § 362(c)(3). If two or more cases were pending for an individual debtor within the previous year
but were dismissed, the automatic stay does not go into effect. 11 U.S.C. § 362(c)(4)(A). A party in interest, however, can seek to impose a stay by filing a request within thirty days and showing that the bankruptcy filing is in good faith as to the creditors to be stayed. 11 U.S.C. § 362(c)(4)(B).

**Practice Note:** For second bankruptcy filings within a year, debtors almost always seek the extension of the stay. A rebuttable presumption exists that the filing was not in good faith. The presumption can be rebutted with clear and convincing evidence to the contrary. 11 U.S.C. § 362(c)(3)(C). Courts, however, routinely grant the extension of the stay.

§ 35.44:3 Payment of Claims

**Secured Claims:** There are two options for payment of secured claims. One option is to surrender the collateral to the creditor. In this instance, the secured claim is extinguished by surrendering the collateral, and the remaining balance is treated as an unsecured claim. If the debtor wishes to keep the collateral, the debtor must provide for the creditor to retain its lien and be paid the value of its claims with interest. See 11 U.S.C. § 1325(a)(5). To pay the secured claim, the debtor may continue to make the regular contractual payments outside the plan and make payments to cure the arrearages within the plan (this is the only option allowed for home mortgages) or make equal monthly periodic payments that equal at least an amount sufficient to provide the creditor adequate protection. 11 U.S.C. § 1325(a)(5).

The entire secured claim to be paid under the plan (whether it is the arrearage or the entire claim) must be paid in full with interest over the life of the plan. Rather than the contract rate on the debt, the interest rate to be paid will be a “prime-plus” rate calculated by the bankruptcy court based on the circumstances of the estate using the national prime rate adjusted to reflect the additional risk of the bankrupt debtor’s nonpayment. *Till v. SCS Credit Corp.*, 541 U.S. 465, 478–79 (2004); *see also Drive Financial Services, L.P. v. Jordan*, 521 F.3d 343, 347 (5th Cir. 2008).

**Unsecured Claims:** Unsecured creditors get whatever is left over. The two requirements for payment of unsecured creditors are—

1. that the unsecured creditors receive at least as much as they would receive in a Chapter 7 liquidation; and

2. that the debtor pays all of his projected disposable income into the plan for the applicable commitment period.


As long as these two tests are satisfied, it does not matter what percentage unsecured creditors receive back on their claims.

**Practice Note:** In Texas, where exemptions are generous, unsecured creditors will frequently receive no distribution in a Chapter 7 case. Therefore, it is frequently easy to satisfy the Chapter 7 liquidation test. However, for a debtor with a business or significant nonexempt property, the Chapter 7 liquidation test may require a much higher distribution to creditors.

**Payments:** Payments into a Chapter 13 plan are typically made on a monthly basis by payroll deduction. A pay order may be waived if the debtor is self-employed. However, the presumption is that debtors with third-party employers will have their plan payments withheld from their paychecks. If the amount of monthly payments under the plan is insufficient to pay the priority claims, the secured claims, and the minimum required payment to unsecured creditors, the plan will not be confirmable unless the debtor shows an ability to make a balloon payment either at the end of the plan or during the plan term. See 11 U.S.C. § 1325(a)(6).
§ 35.44:4 Super Discharge

The super discharge formerly available in Chapter 13 was eliminated effective October 17, 2005. The Chapter 13 discharge is essentially the same as the Chapter 7 one except that the debtor does not receive his discharge until he has completed making all payments under his Chapter 13 plan. 11 U.S.C. § 1328.

[Sections 35.45 through 35.50 are reserved for expansion.]

VI. Avoidance Actions

§ 35.51 Preferential Transfers

A preferential transfer or preference is a transfer made within ninety days (or one year if made to an insider of debtor) on an antecedent debt before the bankruptcy filing while the debtor was insolvent. The transfer is of an interest of the debtor in property, typically money paid to a creditor or a lien on debtor’s collateral. Unless a defense exists, a creditor that received a preferential transfer may be liable for turning over the money received or having any lien obtained set aside. The policy behind preferences is that one creditor that obtains payment or a lien shortly before bankruptcy should not get “preferred” over other creditors of the debtor. Instead, the money or property is clawed back and distributed pro rata to all equally situated creditors.

A preference is defined as any transfer of an interest of the debtor in property that—

1. is to or for the benefit of a creditor;
2. is for or on account of an antecedent debt owed by the debtor before the transfer was made;
3. is made while the debtor was insolvent;
4. is made on or within ninety days before the date of the filing of the petition or between ninety days and one year before the date of the filing of the petition if the creditor at the time of the transfer was an insider; and
5. enables the creditor to receive more than the creditor would receive if the case were a case under Chapter 7, the transfer had not been made, and the creditor received payment of the debt to the extent provided by the provisions of the Bankruptcy Code.


§ 35.52 Defenses to Recovery of Preference

There are nine statutory defenses to recovery of a preference under section 547 of the Bankruptcy Code. See 11 U.S.C. § 547(c).

§ 35.52:1 Transfers in Exchange for New Value

A preference will not be avoided if it was intended by the debtor and the creditor to or for whose benefit the transfer was made to be a contemporaneous exchange for new value given to the debtor and if it was in fact a substantially contemporaneous exchange. 11 U.S.C. § 547(c)(1).
§ 35.52:2 Transfers in Ordinary Course of Business

If the transfer was made in payment of a debt incurred by the debtor in the ordinary course of the business or financial affairs of the debtor and the transferee or was made according to ordinary business terms, the transfer will not be avoided. 11 U.S.C. § 547(c)(2).

Practice Note: The ordinary course of business defense is most often relied on; however, it is fact driven by things such as whether it was normal or not for a debtor to pay invoices thirty days late, thirty-one days late, fifty days late, etc. In many cases, debtors payments are varied and inconsistent, thus finding the “ordinary course” is not clear cut and can lead to extensive litigation. The vast majority of preference claims are settled. Consider using an experienced preference litigator to assist you due to nuances associated with litigating preferences and negotiating an appropriate settlement amount.

§ 35.52:3 Purchase-Money Lien Perfected within Thirty Days

A security interest in property acquired by the debtor will not create an avoidable preference to the extent that—

1. the security interest secures new value given;
2. a security agreement describing the property was signed at or before the time the new value was advanced;
3. the new value was given by or on behalf of the secured party under the agreement;
4. the new value was given to enable the debtor to acquire the property;
5. the debtor used the new value to acquire the property; and
6. the security interest was perfected within thirty days after the debtor received possession of the property.


§ 35.52:4 New Value

A preference will not be avoided if it is to or for the benefit of a creditor, to the extent that, after the transfer, the creditor gave new value to or for the benefit of the debtor not secured by an otherwise unavoidable security interest and, on account of the new value, the debtor did not make an otherwise unavoidable transfer to or for the benefit of the creditor. 11 U.S.C. § 547(c)(4).

Practice Note: The new value defense is more straightforward than some other defenses and is often applicable. This defense should be first analyzed when addressing the value of a preference claim.

§ 35.52:5 Perfected Interest in Inventory or Receivables

A preference will not be avoided if it creates a perfected security interest in inventory or a receivable or the proceeds of either, except to the extent that the aggregate of all such transfers to the transferee caused a reduction, as of the date of the filing of the petition and to the prejudice of other creditors holding unsecured claims, of any amount by which the debt secured by such security interest exceeded the value of all security interest for such debt on the later of—

1. ninety days before the date of the filing of the petition or, with respect to a transfer to an insider, one year before the date of the filing of the petition; or
2. the date on which new value was first given under the security agreement creating the security interest.

11 U.S.C. § 547(c)(5).

§ 35.52:6 Unavoidable Statutory Lien

A preference will not be avoided if it is the fixing of a statutory lien that is not avoidable under section 545 of the Bankruptcy Code. 11 U.S.C. § 547(c)(6). A statutory lien is avoidable under section 545 if it first becomes effective on the filing of a bankruptcy, is not perfected or enforceable at the time of filing bankruptcy, is for rent, or is a lien of distress for rent. 11 U.S.C. § 545. A perfected Texas mechanic’s lien is an example of a statutory lien that may not be avoided under section 545 and therefore qualifies for the defense under section 547(c)(6).

§ 35.52:7 Domestic Support Payments

A preference will not be avoided to the extent a transfer was a bona fide payment of a debt for a domestic support obligation. 11 U.S.C. § 547(c)(7).

§ 35.52:8 Consumer Payments under $600

A preference will not be avoided if, in a case filed by an individual debtor whose debts are primarily consumer debts, the aggregate value of all property that constitutes or is affected by the transfer is less than $600. 11 U.S.C. § 547(c)(8).

§ 35.52:9 Nonconsumer Payments under $6,425

A preference will not be avoided if, in a case filed by a debtor whose debts are not primarily consumer debts, the aggregate value of all property that constitutes or is affected by the transfer is less than $6,425. 11 U.S.C. § 547(c)(9). The amount is adjusted every three years on April 1st based on the Consumer Price Index, with the next adjustment scheduled for April 1, 2019, with such adjustments not applying to cases filed prior to the date of the adjustment. 11 U.S.C. § 104.

§ 35.53 Statute of Limitations for Recovery of Preferences

A case to recover a preference must be filed before the later of two years after the entry of the order for relief or one year after the appointment of the first trustee in the case as long as the trustee was appointed less than two years after the case was filed or the time the case is closed or dismissed. 11 U.S.C. § 546(a).

§ 35.54 Fraudulent Conveyances

The trustee can recover transfers made within two years before bankruptcy has been filed if they meet the definition of a fraudulent conveyance. 11 U.S.C. § 548. Fraudulent conveyances may also be recovered under applicable state law.

The two types of fraudulent conveyances under the Bankruptcy Code are—

1. an actual fraudulent conveyance, and
2. a constructive fraudulent conveyance.


§ 35.54:1 Actual Intent Standard

The trustee may avoid a transfer made or obligation incurred “with actual intent to hinder, delay or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted.” 11 U.S.C. § 548(a)(1)(A). See, e.g., In re Major Funding Corp., 126 B.R. 504, 508 (Bankr. S.D. Tex. 1990) (there was requisite intent to defraud where debtor commingled various corporate accounts and used corporate funds for personal benefit); In re Missionary Baptist Foundation of America, Inc., 24 B.R. 973, 976 (Bankr. Tex. 1982) (no intent where debtor continued to make charitable contributions while creditors were not paid).

§ 35.54:2 Financial Standard

The trustee may avoid a transfer that was made for “less than a reasonably equivalent value” and the debtor—

1. was insolvent or became insolvent as a result of the transfer;
2. was about to engage in a business or transaction for which the debtor’s remaining property was an unreasonably small capital;
3. intended to incur or believed the debtor would incur debts beyond the debtor’s ability to repay; or
4. made the transfer or incurred the obligation to or for the benefit of an insider under an employment contract and not in the ordinary course of business.


Securing Existing Debt: The definition of “value” under section 548 includes the securing of a present or antecedent debt. 11 U.S.C. § 548(d)(2)(A).

Foreclosures: The consideration paid at a foreclosure sale conducted in accordance with state law conclusively establishes “reasonably equivalent value.” BFP v. RTC, 511 U.S. 531, 545 (1994).

Charitable Contributions: Charitable contributions made by an individual are protected from recovery as long as the contribution did not exceed 15 percent of the annual gross income of the debtor or, if the transfer was greater than 15 percent of the annual gross income of the debtor, it was “consistent with the practices of the debtor in making charitable contributions.” 11 U.S.C. § 548(a)(2). See also 11 U.S.C. § 548(d)(3).

§ 35.54:3 Protection for Good-Faith Transferees

If a transfer is recovered from a good-faith transferee who gave value, the transferee is entitled to a lien on the property recovered or may retain the property to the extent of the value given. 11 U.S.C. § 548(c).
§ 35.54:4  Statute of Limitations for Actions to Recover Fraudulent Conveyances

An action to recover a fraudulent conveyance must be brought before the later of two years after the entry of the order for relief or one year after the first trustee is appointed, as long as the trustee is appointed before the expiration of two years; or the time the case is closed or dismissed, whichever is earlier. 11 U.S.C. § 546(a).

[Sections 35.55 through 35.60 are reserved for expansion.]

VII. Executory Contracts and Unexpired Leases

§ 35.61  Scope of Executory Contract Provisions

The trustee is authorized to assume or reject executory contracts. 11 U.S.C. § 365(a). The trustee is empowered to cure certain defaults before assumption and to provide adequate assurance of future performance of contracts that are in default. 11 U.S.C. § 365(b)(1). The trustee may also assign most contracts, notwithstanding contractual provisions that might otherwise limit assumption or assignment. 11 U.S.C. § 365(f). The nondebtor party to the contract may still insist on performance from the debtor rather than a trustee. 11 U.S.C. § 365(c).


§ 35.62  Deadlines for Assumption or Rejection

Section 365(d) of the Bankruptcy Code fixes the time within which the trustee must assume or reject an unexpired lease or executory contract. See 11 U.S.C. § 365(d). In a case under Chapter 7 of the Bankruptcy Code, the trustee must assume or reject an executory contract or unexpired lease of residential real property or of the debtor’s personal property within sixty days after the order for relief (there is a different time frame for nonresidential real property; see 11 U.S.C. § 365(d)(4)). An extension of this deadline can be accomplished only by filing a motion with the court and obtaining the court’s approval. See 11 U.S.C. § 365(d)(3), (d)(4). If the trustee fails to act within the period established by section 365, the contract or lease is deemed rejected by operation of law. 11 U.S.C. § 365(d)(1), (d)(4).

In a case under Chapter 9, 11, 12, or 13 of the Bankruptcy Code, the trustee may assume or reject an executory contract or unexpired lease of residential real property or of personal property of the debtor any time before confirmation of the plan. But the court, on the request of any party to the contract or lease, may order the trustee to determine within a specified period whether to assume or reject the contract or lease. 11 U.S.C. § 365(d)(2). See forms 35-19 and 35-20 in this chapter for a motion compelling assumption or rejection of an unexpired lease and its corresponding order.

A lease of nonresidential real property is governed by section 365(d)(4), and the trustee must assume or reject the lease within the specified time frame or obtain a court order extending the deadline. Otherwise, the lease will be deemed rejected. 11 U.S.C. § 365(d)(4).
§ 35.63    Effects of Existing Defaults

The bankruptcy trustee may not assume an executory contract or unexpired lease on which there has been a default unless the trustee complies with three requirements. The trustee must—

1. cure the default or provide adequate assurance that the default will be promptly cured (with certain exceptions);
2. compensate or provide adequate assurance that the trustee will promptly compensate the other party to the contract or lease for any pecuniary loss to the party resulting from the default; and
3. provide adequate assurance of future performance under the contract or lease.


§ 35.64    Effect of Rejection

If the trustee rejects the executory contract or lease, the rejection generally constitutes a breach of the contract or lease. 11 U.S.C. § 365(g), (h). The other party in a rejected lease will be allowed to keep any money held as deposit and may also seek reimbursement for any amounts due under the lease agreement, subject to the limits of the Bankruptcy Code. The claim of a lessor for damages resulting from the termination of a lease of real property cannot exceed the rent reserved under the lease for the greater of one year or 15 percent, not to exceed three years of the remaining term of the lease plus any unpaid rent due under the lease. 11 U.S.C. § 502(b)(6).

§ 35.65    Allowance of Administrative Expense

A creditor may be entitled to an administrative priority claim for the “actual, necessary costs and expenses of preserving the estate.” 11 U.S.C. § 503(b)(1)(A). A motion and order, not a proof of claim, is required to allow an administrative expense claim. Unless a trustee immediately rejects an unexpired lease for nonresidential real property, the landlord has what amounts to a superpriority administrative claim for the first sixty days after the debtor has filed for relief under the Bankruptcy Code. 11 U.S.C. § 365(d)(1), (3); see also 11 U.S.C. § 503(b)(1).

§ 35.66    Reclamation Rights

Under the Uniform Commercial Code, a seller of goods is entitled to reclaim the goods if the buyer is insolvent. Tex. Bus. & Comm. Code § 2.702. Ordinarily, a seller of goods has only ten days from buyer’s receipt to assert a reclamation demand. If the buyer of goods files bankruptcy, the Bankruptcy Code provides a larger time frame to reclaim goods. Under the Bankruptcy Code, a seller can reclaim goods received by the debtor in the forty-five days prior to the bankruptcy. The seller must make demand in writing to reclaim such goods either within the forty-five days after debtor received the goods, or if the forty-five day period expires after the bankruptcy filing, within twenty days after the bankruptcy filing. 11 U.S.C. § 546(c). If a lender holds a security interest and floating lien over the goods being reclaimed, the seller’s reclamation rights are eliminated if the value of the goods is less than the amount secured by the lender’s lien. See In re Dana Corp., 367 B.R. 409, 419 (Bankr. S.D.N.Y. 2007); In re Circuit City Stores, Inc., 441 B.R. 496, 509–10 (Bankr. E.D. Va. 2010). See form 35-21 in this chapter for a sample reclamation demand.
§ 35.67  Goods Received by Debtor within Twenty Days before Bankruptcy

The Bankruptcy Code provides an administrative expense claim for creditors who sold goods that were received by a debtor within twenty days prior to the debtor’s bankruptcy case. 11 U.S.C. § 503(b)(9). The purpose is to encourage suppliers to continue to sell goods to struggling businesses. The seller of such goods must file a motion seeking approval and allowance of its administrative expense claim through a court order. An allowed administrative expense is generally paid in full on the effective date of a Chapter 11 plan or in the order of priority of claim under a Chapter 7 case if distributions are made at all. See forms 35-22 and 35-23 in this chapter for a sample motion and order for allowance of administrative expense claim.
Form 35-1

The practitioner should use this form to analyze a creditor’s initial position in a pending bankruptcy. Note: This checklist represents a preliminary review of a client’s position at the beginning of a bankruptcy. It primarily identifies issues under Chapter 7 of the Bankruptcy Code; however, issues regarding Chapters 11 and 13 are addressed where applicable. Postconfirmation issues have not been addressed here. All references to the “Code” refer to the United States Bankruptcy Code, Title 11 of the United States Code. References to “Rule” refer to the Bankruptcy Rules.

Checklist

General Questions

☐ 1. Is your client a creditor? Does your client have a claim against the debtor? See Code § 101(10) and (5) for definitions of “creditor” and “claim.”

☐ 2. What type of claim does the creditor have (secured/unsecured/administrative)? See section 35.21 in this chapter for a discussion of the types of claims.

☐ 3. Does your client have a priority claim? See Code § 507(a) for a list of priority claims. See Code §§ 726, 1129(a)(9), and 1322(a)(2) for treatment of priority claims.

☐ 4. Was the creditor’s claim against the debtor incurred during the bankruptcy? See Code §§ 507(a)(1) and 503.

☐ 5. Did the creditor deliver goods to the debtor? See Code § 546(c).

☐ 6. Is the claim for prepetition wages or commissions earned by the creditor within 180 days of bankruptcy? See Code § 507(a)(4) for wage claim amount limitations.
| □ 7. | Is the claim arising from the deposit, before bankruptcy, of money in connection with the purchase, lease, or rental of property or the purchase of services for personal, family, or household use that were not delivered or provided? | See Code § 507(a)(7). |
| □ 8. | Is there a claim for debts to a spouse, former spouse, or child of the debtor for domestic support obligations? | See Code § 507(a)(1). |
| □ 9. | Does your client have a secured claim, consensual lien, or judicial lien or hold a security interest? | See Code § 101(36), (37), and (51) for definitions of “judicial lien,” “lien,” and “security interest.” See Code § 506(a) for the mechanics of determining the value of a secured claim. |
| □ 10. | Does your client hold a trade claim against the debtor? | See Code § 363(b) if your client continues to do business with the debtor during the bankruptcy. |
| □ 11. | Has the debtor committed a personal injury, fraud, or intentional tort? | See Code § 523(a)(2), (4), (6), and (9) for dischargeability exemptions for an individual in a Chapter 7 case; see also Code § 523(c). File a dischargeability complaint within sixty days of the first date set for the creditor’s meeting. See Rule 4004(a). |
| □ 12. | Is your client a financier of the debtor? | See Code §§ 363(b), (c), and 364 for possible effects to a secured position. See Code § 552 for the applicability of a prepetition security interest on postpetition events. |
| □ 13. | Is your client the single asset real estate mortgage holder? | See Code § 101(51B) for a definition and Code § 362(d)(3) for the applicability of the automatic stay. |
☐ 14. Is your client in a landlord-tenant relationship with the debtor? 
   See Code § 365. See also section 35.25 in this chapter for a discussion on executory contracts and unexpired leases.

☐ 15. Is your client continuing a business relationship with the debtor? 
   See Code § 365. See also section 35.25 in this chapter for a discussion on executory contracts and unexpired leases.

☐ 16. Is your client subject to a subordination agreement with the debtor? Is your client a target of equitable subordination under state law? 
   See Code § 510.

☐ 17. Is your client related to the debtor? 
   See Code § 101(31) for a definition of “insider.”

☐ 18. Is your client a spouse or family member of the debtor? 
   See Code § 1301 regarding the codebtor stay in Chapter 13 and Code §§ 362(b)(2), 507(a)(7), and 523(a)(15) for treatment of domestic support obligations.

☐ 19. Request documentation of the claim from your client for attachment to the proof of claim. 
   See Rule 3001(c), (d), and (e).

☐ 20. Retrieve PACER docket sheet on the case. Is there a claims bar date? 
   If so, prepare and file the claim and serve the claim on the court and debtor’s attorney. See Rules 3001-3005.

☐ 21. Has the claim’s bar date passed, but your client failed to get a notice of the bankruptcy? 
   File a motion to extend the claim’s bar date. See Code §§ 502(b)(9) and 726(a)(1).

☐ 22. Retrieve the local rules for the specific court and judge. 
   See section 35.1:2 in this chapter for a list of the courts’ Web sites where local rules can be found.

☐ 23. Review the court’s Web site for updated information. 
   See section 35.1:2 in this chapter for a list of the courts’ Web sites.
<table>
<thead>
<tr>
<th></th>
<th>Question</th>
<th>Answer</th>
</tr>
</thead>
<tbody>
<tr>
<td>24</td>
<td>Has the debtor failed to cooperate with your client prior to bankruptcy?</td>
<td>If so, attend the creditors’ meeting and examine the debtor under oath. Consult the PACER docket sheet for the time and place of the meeting. See Code §§ 341 and 343; see also Rules 2002 and 2003.</td>
</tr>
<tr>
<td>25</td>
<td>Is your client currently taking legal action against the debtor?</td>
<td>The automatic stay prevents commencement or continuation of most actions against the debtor. See Code § 362(a) and (b). See section 35.13 in this chapter for a discussion of exceptions to the automatic stay.</td>
</tr>
<tr>
<td>26</td>
<td>If your client is prevented from taking action by the automatic stay, does the stay need to be lifted to allow your client to act?</td>
<td>See Code § 362(d). See form 35-10.</td>
</tr>
<tr>
<td>27</td>
<td>Is your client a secured creditor of the debtor?</td>
<td>If so, answer numbers 27 through 29. If not, proceed to number 30.</td>
</tr>
<tr>
<td>28</td>
<td>Does the debtor have any equity in your client’s collateral?</td>
<td>See Code § 362(d)(2).</td>
</tr>
<tr>
<td>29</td>
<td>Does your client lack adequate protection of his collateral?</td>
<td>See Code § 361 for an explanation of adequate protection; see Code § 362(d)(1) for an explanation of lifting the automatic stay. See also section 35.15 in this chapter for a discussion of adequate protection.</td>
</tr>
<tr>
<td>30</td>
<td>Is your client the secured creditor of real property? Is the real property collateral the only substantial asset of the debtor?</td>
<td>See Code § 362(d)(3).</td>
</tr>
<tr>
<td></td>
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<tr>
<td>---</td>
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</tr>
<tr>
<td>31.</td>
<td><strong>Has the court lifted the automatic stay as to a specific piece of property or as to a creditor?</strong></td>
<td>Check the PACER sheet for applicable orders.</td>
</tr>
<tr>
<td>32.</td>
<td><strong>If the debtor is an individual filing under Chapter 7, has he received his discharge?</strong></td>
<td>See Code § 362(c)(2)(C) (terminating the automatic stay) and § 524 (permanent discharge injunction).</td>
</tr>
<tr>
<td>33.</td>
<td><strong>If the debtor is an individual filing under Chapter 13, does your client have a postpetition claim against the debtor? Has confirmation of the Chapter 13 plan occurred?</strong></td>
<td>See Code §§ 362(c)(1) and 1327(b) (terminating the stay).</td>
</tr>
<tr>
<td>34.</td>
<td><strong>If the debtor is filing under Chapter 11, does your client have a post-confirmation claim against the debtor?</strong></td>
<td>If so, the automatic stay may no longer apply; see Code §§ 362(c)(1) and 1141(b).</td>
</tr>
<tr>
<td>35.</td>
<td><strong>Has the debtor’s bankruptcy been dismissed?</strong></td>
<td>See Code §§ 362(c)(2)(B) and 349.</td>
</tr>
<tr>
<td>36.</td>
<td><strong>Has the debtor’s bankruptcy been converted to a case under another chapter in the Bankruptcy Code?</strong></td>
<td>See Code § 348.</td>
</tr>
<tr>
<td>37.</td>
<td><strong>Has the debtor’s bankruptcy been closed by the court?</strong></td>
<td>See Code § 350.</td>
</tr>
<tr>
<td>38.</td>
<td><strong>Does your client have an interest in the debtor’s cash collateral?</strong></td>
<td>See Code § 363 (adequate protection of cash collateral); see also Code § 363(a) (definition of “cash collateral”).</td>
</tr>
<tr>
<td>39.</td>
<td><strong>Is the debtor trying to use cash collateral in which your client has an interest?</strong></td>
<td>See Code § 363(b) and (c) (creditor’s remedies).</td>
</tr>
<tr>
<td>40.</td>
<td><strong>Is the debtor seeking postpetition credit from your client?</strong></td>
<td>See Code § 364(a) (postpetition unsecured credit in the ordinary course of business) and § 364(b) (postpetition credit outside the ordinary course of business).</td>
</tr>
</tbody>
</table>
### Executory Contracts and Unexpired Leases

1. **Is the client in a continuing contractual relationship with the debtor?**
   - See Code § 365 (executory contracts).

2. **Has the debtor assumed or rejected the client’s executory contract or unexpired lease?**
   - See Code § 365(a) and Rule 6006.

3. **Has the deadline passed for the debtor to assume or reject your client’s executory contract or unexpired lease?**
   - See Code § 365(d) for applicable deadlines. See section 35.62 in this chapter.

4. **Is there a default in your client’s executory contract or unexpired lease?**
   - See Code § 365(b) (curing default); see also section 35.63 in this chapter.

5. **Is your client a landlord of a shopping center in which the debtor is a tenant?**
   - See Code § 365(b)(3).

### Dischargeability

See generally section 35.33 in this chapter.

6. **Is your client’s claim the result of the debtor’s false representation or fraud?**
   - See Code § 523(a)(2).

7. **Is your client the victim of the debtor’s fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny?**

8. **Does your client’s claim arise out of the debtor’s willful and malicious injury to another entity or the property of another entity?**
   - See Code § 523(a)(6).
☐ 49. Does your client’s claim arise out of a death or personal injury caused by the debtor’s illegal operation of a motor vehicle while intoxicated or under the influence of drugs?  
See Code § 523(a)(9).

☐ 50. Does your client have a claim for a fee or assessment due and payable to the membership association for a condominium or cooperative housing corporation?  

☐ 51. Is your client subject to contractual or equitable subordination of his claim?  
See Code § 510.

☐ 52. If the debtor has received a discharge, has your client observed the discharge and permanent injunction provisions of Code § 524?  
See Code § 524.

☐ 53. Is your client the debtor’s employer?  
See Code § 525 (discrimination against employees on the basis of bankruptcy).

☐ 54. Does your client possess property that belongs to the debtor?  
See Code §§ 541 and 542.

☐ 55. Is your client a custodian of property belonging to the debtor’s bankruptcy estate?  
See Code § 101(11) (definition of “custodian”) and § 543.

☐ 56. Does your client hold an unperfected security interest against the debtor?  
See Code § 544 (an unperfected security interest is probably voidable).

☐ 57. Does your client hold a statutory lien against the debtor’s property?  
See Code § 545 (a statutory lien may be voidable).
Avoidance Actions

58. Did your client receive any payments from the debtor within ninety days of filing for bankruptcy? See Code § 547 (avoidable preferences); see also part VI. in this chapter for a discussion of avoidance actions.

59. If the debtor or bankruptcy trustee has filed an avoidance action against your client, is the action timely? See Code § 546(a).

60. Are there other defenses to the avoidance action that are available to your client? See Code § 546; see also section 35.52 in this chapter for a discussion of defenses to avoidance actions.

61. Was the preferential transfer intended by the debtor and your client to be a contemporaneous exchange for new value given to the debtor? See Code § 547(e)(1); see also section 35.52:4 in this chapter.

62. Was the preferential transfer made in payment of a debt incurred by the debtor in the ordinary course of business between the debtor and your client? See Code § 547(e)(2); see section 35.52:2 in this chapter.

63. Did your client give new value to the debtor in exchange for the preferential transfer? See Code § 547(e)(4); see also section 35.52:4 in this chapter.

64. Did the preferential transfer create a perfected security interest in inventory or a receivable or the proceeds of either? See Code § 547(c)(5); see also section 35.52:5 in this chapter.

65. Did the preferential transfer fix a statutory lien that is not avoidable? See Code §§ 545 and 547(c)(6); see also section 35.52:6 in this chapter.
☐ 66. Was the preferential transfer a bona fide payment of a debt for a domestic support obligation? See Code § 547(c)(7); see also section 35.52:7 in this chapter.

☐ 67. Were the debtor’s debts primarily consumer debts? Is the aggregate of the property that constitutes or is affected by the transfer less than $600? See Code § 547(c)(8); see also section 35.52:8 in this chapter.

☐ 68. Did your client receive a fraudulent transfer within one year of the bankruptcy? See Code § 548 (fraudulent transfers within one year of filing for bankruptcy can be avoided); see also section 35.54 in this chapter.

☐ 69. Did your client receive fair value for the potentially fraudulent transfer? See Code § 548(c).

☐ 70. Has your client received any transfers of property from the debtor postbankruptcy filing? See Code § 549(a) (a transfer of property made after the bankruptcy filing may be avoidable).

☐ 71. Does your client hold a claim against the debtor that can be set off against the debtor’s claim against the client? See Code § 553(a) (mutual debts may be offset).

☐ 72. Has your client offset a mutual debt with the debtor within ninety days prior to the bankruptcy filing? See Code § 553(b) (some or all of the setoff may be recoverable by the trustee or the debtor-in-possession).
Form 35-2

Note: Parts of the following form—the generic pleading descriptions and Bankruptcy Code and rule references—are applicable to bankruptcy courts in all four districts of Texas, but the negative notice references and service requirements are specific to the Eastern District. The practitioner should consult the court for the district in which he intends to file for any additional requirements. This form is © 2017 Hon. Bill Parker and is used with permission.
# GUIDE TO PRACTICE AND PROCEDURES

## UNITED STATES BANKRUPTCY COURT

### FOR THE EASTERN DISTRICT OF TEXAS

(Revised December 1, 2017)

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<th>Applicable Federal and Local Rules</th>
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<th>Applicable Negative Notice (Suspense) Language</th>
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<td>§ 554(a)</td>
<td>BR 6007 LBR 6007</td>
<td>Notice</td>
<td>14 - Day</td>
<td>Matrix</td>
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<td>§ 554(b)</td>
<td>BR 6007 LBR 6007</td>
<td>Motion</td>
<td>14 - Day</td>
<td>Matrix</td>
</tr>
</tbody>
</table>

1. This guide reflects the provisions of the Local Rules of Bankruptcy Procedure (LBR) which became effective on December 1, 2017. The Local Rules are now available on the Eastern District Bankruptcy Court’s website — [www.txeb.uscourts.gov](http://www.txeb.uscourts.gov).

2. For general guidelines governing motion practice and preparation for hearings on contested matters, you should consult LBR 9013 and LBR 9014.

3. Pleadings requiring 21-day negative notice language should be accompanied by a proposed order substantially conforming with TXEB Local Form 9007-a. Additionally, pleadings requiring 14-day negative notice language should be accompanied by a proposed order substantially conforming with TXEB Local Form 4001.

4. LBR 9013(f) requires service, not merely upon certain specified parties in specified chapters, but also upon: (1) any party entitled to such under the Federal Rules of Bankruptcy Procedure and (2) any party who has requested notice.

5. Pleadings requiring service on the matrix must be served upon all parties listed on the master mailing list (matrix) as constituted by the Court on the date of service. An updated matrix sufficient to meet this standard may be downloaded in a particular case from the “Reports” section of the CM-ECF system.

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<td>Accounting by Custodian</td>
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<td>BR 6002</td>
<td>Motion</td>
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<tr>
<td>Administrative Expense, Allowance of</td>
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<td>None</td>
<td>Motion</td>
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<tr>
<td>Adversary Complaint</td>
<td>Various</td>
<td>BR 7001</td>
<td>Complaint</td>
<td>None</td>
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<td>Adversary Proceedings: Motion Practice in</td>
<td>None</td>
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<td>Motion</td>
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<td>Adversary Proceedings: Obtaining Default Judgment</td>
<td>None</td>
<td>BR 7055 BR 7055</td>
<td>Motion</td>
<td>None</td>
<td>None</td>
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<tr>
<td>Adversary Proceedings: Obtaining Injunctive Relief / TRO</td>
<td>None</td>
<td>BR 7065 BR 7065</td>
<td>Application</td>
<td>None</td>
<td>Adv. Parties</td>
</tr>
<tr>
<td>Adversary Proceedings: Removal to Bankruptcy Court</td>
<td>28 USC § 1452(a)</td>
<td>BR 9027 LBR 9027</td>
<td>Notice w/ required attachments</td>
<td>None</td>
<td>All parties in removed case</td>
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<tr>
<td>Adversary Proceedings: Remand of Removed Case</td>
<td>28 USC § 1452(b)</td>
<td>BR 9027</td>
<td>Motion</td>
<td>14 - Day</td>
<td>All parties in removed case</td>
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<tr>
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<td>Pleading Required</td>
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<td>Pleading Notice Required</td>
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<tr>
<td>Adequate Protection</td>
<td>§ 361</td>
<td>BR 4001 LBR 4001</td>
<td>Motion</td>
<td>14 - Day</td>
<td>LBR 9013(f)</td>
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<tr>
<td>Admission <em>Pro Hac Vice</em></td>
<td>None</td>
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<td>Application</td>
<td>None</td>
<td>None</td>
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<td>Alter or Amend Judgment: Adversary</td>
<td>None</td>
<td>BR 9023</td>
<td>Motion</td>
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<td>Alter or Amend Judgment: Contested Matter</td>
<td>None</td>
<td>BR 9023</td>
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<td>21 - Day</td>
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<td>Appeals: Extend Time to File Notice of Appeal</td>
<td>None</td>
<td>BR 8002(d)</td>
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<td>Appeals: For Leave to Appeal</td>
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<td>BR 8004</td>
<td>Motion</td>
<td>14 - Day</td>
<td>LBR 9013(f)</td>
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<tr>
<td>Appeals: For Stay Pending Appeal</td>
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<td>Matrix</td>
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<td>Appeals: Request For Certification to Court of Appeals</td>
<td>28 U.S.C. §158(d)(2) BR 8006</td>
<td>Motion</td>
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<td>Bk Rule 8006(f)(2)</td>
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<tr>
<td>Approval of Trustee’s Final Report</td>
<td>§ 704(9)</td>
<td>BR 5009</td>
<td>Report</td>
<td>30 - Day</td>
<td>Matrix</td>
</tr>
<tr>
<td>Authority to Operate Business [by Trustee]</td>
<td>§ 721</td>
<td>None</td>
<td>Motion</td>
<td>21 - Day</td>
<td>Matrix</td>
</tr>
<tr>
<td>Description of Desired Action</td>
<td>Bankr. Code Section</td>
<td>Applicable Rules &amp; Regs</td>
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</tr>
<tr>
<td>Automatic Stay: Continuation of Stay in Consecutive Case [individual chapter 7-11-13 case only] (^6)</td>
<td>§362(c)(3)(B)</td>
<td>LBR 4000(a)</td>
<td>Motion</td>
<td>None</td>
<td>Matrix or any affected party</td>
</tr>
<tr>
<td>Automatic Stay: Continuation of Stay by Trustee on Personal Property of Individual Debtor</td>
<td>§362(h)(2) §521(a)(6)</td>
<td>LBR 4000(a)</td>
<td>Motion</td>
<td>None</td>
<td>LBR 9013(f)</td>
</tr>
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<td>Automatic Stay: Debtor’s Petition Date Certification of Compliance to Invoke Automatic Stay Regarding Lease of Residential Real Property</td>
<td>§362(l)(1)</td>
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<td>Certification</td>
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</tr>
<tr>
<td>Automatic Stay: Debtor’s Post-Petition Certification of Compliance to Continue Automatic Stay Regarding Lease of Residential Real Property</td>
<td>§362(l)(2)</td>
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<td>Certification</td>
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</tr>
<tr>
<td>Automatic Stay: Imposition of Stay by Small Business Debtor</td>
<td>§362(n)(2)</td>
<td>LBR 4000(a)</td>
<td>Motion</td>
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<td>Matrix or any affected party</td>
</tr>
<tr>
<td>Automatic Stay: Imposition of Stay (^7)</td>
<td>§362(c)(4)(B)</td>
<td>LBR 4000(a)</td>
<td>Motion</td>
<td>None</td>
<td>Matrix or any affected party</td>
</tr>
</tbody>
</table>

\(^6\) A motion for continuation of the stay should be accompanied by a proposed deadline order substantially conforming with TXEB Local Form 4000-a and a proposed order granting the requested relief substantially conforming to TXEB Local Form 4000-b.

\(^7\) A motion for imposition of the stay should be accompanied by a proposed deadline order substantially conforming with TXEB Local Form 4000-a and a proposed order granting the requested relief substantially conforming to TXEB Local Form 4000-b.
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</tr>
<tr>
<td>Automatic Stay: Request to Confirm Status(^8)</td>
<td>§ 362(c)(4)(A); §362(j)</td>
<td>LBR 4000(d)</td>
<td>Request</td>
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<td>Automatic Stay: Damages for Willful Violation</td>
<td>§ 362(k)</td>
<td>None</td>
<td>Motion</td>
<td>21 - Day</td>
<td>LBR 9013(f)</td>
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<td>Avoidance of Lien</td>
<td>§ 522(f)</td>
<td>BR 4003(d); LBR 4003(e)</td>
<td>Motion</td>
<td>21 - Day</td>
<td>LBR 9013(f)</td>
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<tr>
<td>Bankruptcy Petition Preparer: Recover Excessive Fees from</td>
<td>§110(h)(3)</td>
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<td>Motion</td>
<td>21 - Day</td>
<td>LBR 9013(f)</td>
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<tr>
<td>Bankruptcy Petition Preparer: To Enjoin Practices of</td>
<td>§110(j)(3)</td>
<td></td>
<td>Motion</td>
<td>21 - Day</td>
<td>LBR 9013(f)</td>
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<td>Bankruptcy Petition Preparer: To Impose Fine Upon</td>
<td>§110(l)(3)</td>
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<td>Motion</td>
<td>21 - Day</td>
<td>LBR 9013(f)</td>
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</table>

\(^8\) A request to confirm status of automatic stay should be accompanied by a proposed order substantially conforming with TXEB Local Form 4000-d.
<table>
<thead>
<tr>
<th>Description of Desired Action</th>
<th>Bankr. Code Section</th>
<th>Applicable Rules &amp; Regs</th>
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<th>Neg. Notice Language</th>
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<tbody>
<tr>
<td>Budget Analysis and Credit Counseling: Damages for Willful or Negligent Failure of Agency to Comply with Requirements</td>
<td>§111(g)(2)</td>
<td></td>
<td>Complaint</td>
<td>None</td>
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<tr>
<td>Budget Analysis and Credit Counseling: Obtain 14-Day Extension of Temporary Exemption</td>
<td>§109(h)(3)</td>
<td>BR 1007(b)(3)</td>
<td>Motion</td>
<td>None</td>
<td>Case trustee; UST</td>
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<td>Budget Analysis and Credit Counseling: Certification for 30-Day Temporary Exemption From</td>
<td>§109(h)(3)</td>
<td>BR 1007(b)(3)</td>
<td>Certification</td>
<td>None</td>
<td>LBR 9013(f)</td>
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<td>Budget Analysis and Credit Counseling: Permanent Exemption From</td>
<td>§109(h)(4)</td>
<td>BR 1007(b)(3)</td>
<td>Motion</td>
<td>21 - Day</td>
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<tr>
<td>Cash Collateral: Authority to Use</td>
<td>§ 363(c)</td>
<td>BR 4001 LBR4001(c)(1)</td>
<td>Motion</td>
<td>14 - Day</td>
<td>Matrix</td>
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<tr>
<td>Cash Collateral: Request for Emergency Hearing [seeking authority to use]</td>
<td>§ 363(c)</td>
<td>BR 4001 LBR4001(c)(2) LBR 9007(c)</td>
<td>Motion</td>
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<td>LBR 9013(f)</td>
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<td>Cash Collateral: To Prohibit Use</td>
<td>§ 363(c)</td>
<td>BR 4001 LBR 4001</td>
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<td>LBR 9013(f)</td>
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<td>Claim, Allowance of Late-Filed</td>
<td>§502(b)(9)</td>
<td>BR 3002(c) BR 3004</td>
<td>Motion</td>
<td>21 - Day</td>
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<td>Description of Desired Action</td>
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<td>Neg. Notice Language</td>
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<td>Claim, Objection to 9</td>
<td>§ 502</td>
<td>BR 3007 LBR 3007</td>
<td>Objection</td>
<td>30 - Day</td>
<td>LBR 9013(f)</td>
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<td>Chapter 7: Objection to Discharge (Due to Prior Discharge)</td>
<td>§ 727(a)(8) § 727(a)(9)</td>
<td>BR 4004(a)</td>
<td>Motion</td>
<td>28 - Day</td>
<td>LBR 9013(f)</td>
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<td>Chapter 11: Committee, Appoint or Request for Additional</td>
<td>§ 1102</td>
<td>None</td>
<td>Motion</td>
<td>21 - Day</td>
<td>LBR 9013(f)</td>
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<td>Chapter 11: Committee, Change Composition of</td>
<td>§ 1102</td>
<td>None</td>
<td>Motion</td>
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<td>LBR 9013(f)</td>
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<tr>
<td>Chapter 11: Disclosure Statement, For Conditional Approval [only by plan proponent in small business case]</td>
<td>§ 1125</td>
<td>BR 3017.1 LBR 3017.1(a)</td>
<td>Motion</td>
<td>None</td>
<td>Matrix</td>
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<tr>
<td>Chapter 11: Disclosure Statement, To Waive Requirement [only by plan proponent in small business case]</td>
<td>§ 1125</td>
<td>BR 3017.1 LBR 3017.1(b)</td>
<td>Motion</td>
<td>14 - Day</td>
<td>Matrix</td>
</tr>
</tbody>
</table>

9 Any objection to claim should be accompanied by a proposed order substantially conforming with TXEB Local Form 3007.

10 This motion for conditional approval should be accompanied by a proposed order substantially conforming with TXEB Local Form 3017.1.

11 This motion for waiver should be accompanied by a proposed order substantially conforming with TXEB Local Form 3017.1.
<table>
<thead>
<tr>
<th>Description of Desired Action</th>
<th>Bankr. Code Section</th>
<th>Applicable Rules &amp; Regs</th>
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<th>Neg. Notice Language</th>
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<tbody>
<tr>
<td>Chapter 11: Approve Discharge of Individual Debtor Upon Confirmation</td>
<td>§1141(d)(5)(A)</td>
<td>None</td>
<td>Motion</td>
<td>21 - Day</td>
<td>Matrix</td>
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<tr>
<td>Chapter 11: Examiner, Appointment of</td>
<td>§ 1104</td>
<td>BR 2007.1</td>
<td>Motion</td>
<td>21 - Day</td>
<td>Matrix</td>
</tr>
<tr>
<td>Chapter 11: Entry of Final Decree [corporation or partnership cases only]</td>
<td>§ 350</td>
<td>BR 3022 LBR 2015(c)(1)</td>
<td>Application</td>
<td>21 - Day</td>
<td>Matrix</td>
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<tr>
<td>Chapter 11: Hearing to Consider Approval of Disclosure Statement</td>
<td>§ 1125</td>
<td>BR 3017 LBR 3017</td>
<td>Notice from Court</td>
<td>None</td>
<td>Matrix</td>
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<tr>
<td>Chapter 11: Hearing on Confirmation of Chapter 11 Plan</td>
<td>§ 1121</td>
<td>BR 3018 LBR 3018</td>
<td>Notice from Court</td>
<td>None</td>
<td>Matrix</td>
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<tr>
<td>Chapter 11: Notice of Plan Completion (individual debtor)</td>
<td>§1141(d)(5) LBR 4004(b)</td>
<td>Notice</td>
<td>None</td>
<td>None</td>
<td>None</td>
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<tr>
<td>Chapter 11: Post-Confirmation Modification of Plan</td>
<td>§ 1127</td>
<td>BR 3019 LBR 3019</td>
<td>Motion w/ proposed plan attached</td>
<td>28 - Day (individual) 21 - Day (others)</td>
<td>Matrix</td>
</tr>
</tbody>
</table>

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12 This notice of plan completion for Chapter 11 individual debtors should substantially conform with TXEB Local Form 4004-b.
<table>
<thead>
<tr>
<th>Description of Desired Action</th>
<th>Bankr. Code Section</th>
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<th>Neg. Notice Language</th>
<th>Pleading Notice Required</th>
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<tbody>
<tr>
<td>Chapter 11: Post-Confirmation Report</td>
<td>None</td>
<td>LBR 2015(c)(1) or 2015(c)(2)(A)</td>
<td>Report</td>
<td>None</td>
<td>Matrix</td>
</tr>
<tr>
<td>Chapter 11: Post-Confirmation Request for Hardship Discharge</td>
<td>§1141(d)(5)(b)</td>
<td>BR 4007(d) LBR 4004(d)</td>
<td>Motion</td>
<td>21 - Day</td>
<td>Matrix</td>
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<tr>
<td>Chapter 11: Trustee, Appointment of</td>
<td>§ 1104</td>
<td>BR 2007.1</td>
<td>Motion</td>
<td>21 - Day</td>
<td>Matrix</td>
</tr>
<tr>
<td>Chapter 11: Trustee, Approval of Appointment</td>
<td>§ 1104</td>
<td>BR 2007.1(C)</td>
<td>Application</td>
<td>None</td>
<td>Matrix</td>
</tr>
<tr>
<td>Chapter 11: Trustee, to Resolve Disputed Election</td>
<td>§ 1104</td>
<td>BR 2007.1(b)(3)(B)</td>
<td>Motion</td>
<td>21 - Day</td>
<td>Matrix</td>
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<td>Chapter 11: Trustee, Termination of</td>
<td>§ 1105</td>
<td>None</td>
<td>Motion</td>
<td>21 - Day</td>
<td>Matrix</td>
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<tr>
<td>Chapter 12: Approval of Trustee’s Final Report</td>
<td>§ 1202(b)</td>
<td>BR 5009</td>
<td>Report</td>
<td>30 - Day</td>
<td>Matrix</td>
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<tr>
<td>Chapter 12: Co-Debtor Stay Relief</td>
<td>§1201(c)-(d)</td>
<td>None</td>
<td>Motion</td>
<td>14 - Day</td>
<td>LBR 9013(f)</td>
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<tr>
<td>Chapter 12: Hearing on Confirmation of Chapter 12 Plan</td>
<td>§ 1221</td>
<td>BR 2002(a)(8) LBR 3015(d)</td>
<td>Notice from Court</td>
<td>None</td>
<td>Matrix</td>
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<tr>
<td>Description of Desired Action</td>
<td>Bankr. Code Section</td>
<td>Applicable Rules &amp; Regs</td>
<td>Pleading Required</td>
<td>Neg. Notice Language</td>
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<td>Chapter 12: Plan &amp; Plan Summary (Pre-Confirmation)</td>
<td>§ 1221</td>
<td>BR 3015 LBR 3015(b)</td>
<td>Plan</td>
<td>None</td>
<td>Matrix</td>
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<tr>
<td>Chapter 12: Post-Confirmation Modification of Plan</td>
<td>§ 1229</td>
<td>BR 3015(g) LBR 3015(h)</td>
<td>Motion w/ proposed plan attached</td>
<td>28 - Day</td>
<td>Matrix</td>
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<tr>
<td>Chapter 12: Post-Confirmation Request for Hardship Discharge</td>
<td>§ 1228(b)</td>
<td>LBR 4004(d)</td>
<td>Motion</td>
<td>21 - Day</td>
<td>Matrix</td>
</tr>
<tr>
<td>Chapter 13: Approval of Trustee’s Final Report</td>
<td>§ 1302(b)</td>
<td>BR 5009</td>
<td>Report</td>
<td>30 - Day</td>
<td>Matrix</td>
</tr>
<tr>
<td>Chapter 13: Co-Debtor Stay Relief</td>
<td>§1301(c)-(d)</td>
<td>LBR 4001(a)</td>
<td>Motion</td>
<td>14 - Day</td>
<td>LBR 9013(f)</td>
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<tr>
<td>Chapter 13: Compel Amendment of TRCC</td>
<td>None</td>
<td>LBR 3015(g)</td>
<td>Motion</td>
<td>14 - Day</td>
<td>LBR 9013(f)</td>
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<tr>
<td>Chapter 13: Debtor’s Attorney’s Fees in ...</td>
<td>§330(a)(4)(B)</td>
<td>LBR 2016(h)</td>
<td>Application (if required)</td>
<td>21 - Day (if req.)</td>
<td>Matrix, (if required)</td>
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<tr>
<td>Chapter 13: Determine Mortgage Fees, Expenses &amp; Charges</td>
<td>§1322(b)(5)</td>
<td>BR 3002.1(e)</td>
<td>Motion</td>
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<td>LBR 9013(f)</td>
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<tr>
<td>Chapter 13: Determine Final Cure of Mortgage Defaults and Status of Post-Petition Payments</td>
<td>§1322(b)(5)</td>
<td>BR 3002.1(h)</td>
<td>Motion</td>
<td>21 - Day</td>
<td>LBR 9013(f)</td>
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<td>Chapter 13: Notice of Final Cure Payment by Trustee</td>
<td>§1322(b)(5)</td>
<td>BR 3002.1(c)</td>
<td>Notice</td>
<td>None</td>
<td>LBR 9013(f)</td>
</tr>
<tr>
<td>Chapter 13: Objection to Discharge (Due to Prior Discharge)</td>
<td>§ 1328(f)</td>
<td>BR 4004(a)</td>
<td>Motion</td>
<td>28 - Day</td>
<td>LBR 9013(f)</td>
</tr>
<tr>
<td>Chapter 13: Plan &amp; Plan Summary (Pre-Confirmation)</td>
<td>§ 1321 BR 3015 LBR 3015(a)</td>
<td>Plan</td>
<td>None</td>
<td>Matrix</td>
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<tr>
<td>Chapter 13: Post-Confirmation Request for Hardship Discharge</td>
<td>§ 1328(b) BR 4007(d) LBR 4004(d)</td>
<td>Motion</td>
<td>21 - Day</td>
<td>Matrix</td>
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<tr>
<td>Chapter 13: Post-Confirmation Modification of Plan</td>
<td>§ 1329 BR 3015(g) LBR 3015(h)</td>
<td>Motion</td>
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<td>Matrix</td>
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<tr>
<td>Compel Action or Enforce Order: Adversary</td>
<td>None BR 9023</td>
<td>Motion</td>
<td>14 - Day</td>
<td>Adv. Parties</td>
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<tr>
<td>Compel Action or Enforce Order: Contested Matter</td>
<td>Various None</td>
<td>Motion</td>
<td>21 - Day</td>
<td>LBR 9013(f)</td>
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<tr>
<td>Compensation of Professionals</td>
<td>§ 330 § 331 BR 2016 LBR 2016</td>
<td>Application</td>
<td>21 - Day</td>
<td>Matrix</td>
<td></td>
</tr>
</tbody>
</table>

13 A proposed Chapter 13 plan should substantially conform with *TXEB Local Form 3015-a*.

14 A motion to modify a confirmed Chapter 13 plan should substantially conform with *TXEB Local Form 3015-d*, accompanied by a proposed order that substantially conforms to *TXEB Local Form 3015-e*.

15 In lieu of sending the complete fee application with exhibits to all parties on the matrix, a summary of the fee application containing (1) the relevant facts regarding the application, (2) the 21-day negative notice language, and (3) a notification that a complete copy of the application will be sent upon request at no charge, may be sent to the matrix, subject to the requirements of LBR 2016(c).
<table>
<thead>
<tr>
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<th>Bankr. Code Section</th>
<th>Applicable Rules &amp; Regs</th>
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<th>Neg. Notice Language</th>
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<tr>
<td>Compromise or Settlement Agreement, Approval of</td>
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<td>Motion</td>
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<td>Matrix</td>
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<tr>
<td>Consolidation, Substantive</td>
<td>§ 302(b)</td>
<td>BR 1015(a) LBR 1015</td>
<td>Motion</td>
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<td>Matrix</td>
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<tr>
<td>Contempt, Civil</td>
<td>None</td>
<td>BR 9020</td>
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<td>LBR 9013(f)</td>
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<tr>
<td>Continuance of Hearing</td>
<td>None</td>
<td>None</td>
<td>Motion</td>
<td>None</td>
<td>LBR 9013(f)</td>
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<tr>
<td>Continued Case Admin Following Debtor Death</td>
<td>None</td>
<td>BR 1016</td>
<td>Motion</td>
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<td>Matrix</td>
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<tr>
<td>Conversion: Chapter 7 case to Ch. 12 or 13 [by debtor]</td>
<td>§ 706(a)</td>
<td>BR 1017 LBR 1017(d)</td>
<td>Motion</td>
<td>14 - Day</td>
<td>Matrix</td>
</tr>
<tr>
<td>Conversion: Chapter 7 case to Chapter 11 [by trustee or creditor]</td>
<td>§ 706(b)</td>
<td>BR 1017 LBR 1017(d)</td>
<td>Motion</td>
<td>14 - Day</td>
<td>Matrix</td>
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<tr>
<td>Conversion: Chapter 11 case to Chapter 7 [by debtor]</td>
<td>§ 1112(a)</td>
<td>BR 1017 LBR 1017(d)</td>
<td>Motion</td>
<td>14 - Day</td>
<td>Matrix</td>
</tr>
<tr>
<td>Conversion: Chapter 11 case to Ch. 7-12-13 [by trustee or creditor]</td>
<td>§ 1112(b)</td>
<td>BR 1017 LBR 1017(d)</td>
<td>Motion</td>
<td>14 - Day</td>
<td>Matrix</td>
</tr>
<tr>
<td>Conversion: Chapter 11 case to Ch. 12 or 13 [by debtor]</td>
<td>§ 1112(d)</td>
<td>BR 1017 LBR 1017(d)</td>
<td>Motion</td>
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<tr>
<td>Conversion: Chapter 12 case to Chapter 7</td>
<td>§ 1208(a)</td>
<td>BR 1017 LBR 1017(d)</td>
<td>Notice of Conversion</td>
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<td>Matrix</td>
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<tr>
<td>Conversion: Chapter 12 case to Ch. 7</td>
<td>§ 1208(d)</td>
<td>BR 1017 LBR 1017(d)</td>
<td>Motion</td>
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<td>Matrix</td>
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<td>[by trustee or creditor]</td>
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<tr>
<td>Conversion: Chapter 13 case to Chapter 7</td>
<td>§ 1307(a)</td>
<td>BR 1017 LBR 1017</td>
<td>Notice of Conversion</td>
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<td>[by debtor]</td>
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<tr>
<td>Conversion: Chapter 13 case to Ch. 7-11-12</td>
<td>§ 1307(c)</td>
<td>BR 1017 LBR 1017(d)</td>
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<td>[by trustee or creditor]</td>
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<tr>
<td>Conversion: Chapter 13 case to Ch. 11 or 12</td>
<td>§ 1307(d)</td>
<td>BR 1017 LBR 1017</td>
<td>Motion</td>
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<td>Matrix</td>
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<tr>
<td>[by debtor]</td>
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<tr>
<td>Core Proceeding, Determine Existence of</td>
<td>28 USC § 157(b)(3)</td>
<td>None</td>
<td>Motion</td>
<td>21 - Day</td>
<td>adv. parties</td>
</tr>
<tr>
<td>Corporate Ownership Statement</td>
<td>None</td>
<td>BR 7007.1 Statement</td>
<td>None</td>
<td>adv. parties</td>
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<tr>
<td>Credit, to Obtain [a/k/a motion to incur debt outside of the ordinary course of business]</td>
<td>§ 364</td>
<td>BR 4001 LBR 4001</td>
<td>Motion</td>
<td>14 - Day</td>
<td>Matrix</td>
</tr>
<tr>
<td>Creditor Representation Disclosure, Determine Compliance with...</td>
<td>None</td>
<td>BR 2019 Motion</td>
<td>21 - Day</td>
<td>LBR 9013(f)</td>
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<td>Description of Desired Action</td>
<td>Bankr. Code Section</td>
<td>Applicable Rules &amp; Regs</td>
<td>Pleading Required</td>
<td>Neg. Notice Language</td>
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</tr>
<tr>
<td>Declaration for Release of Lien Based Upon Satisfaction of Secured Claim (by debtor)</td>
<td>None</td>
<td>BR 5009(d) LBR 5009</td>
<td>Motion</td>
<td>21 - Day</td>
<td>LBR 9013(f)</td>
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<td>Delay Discharge (by debtor)</td>
<td>None</td>
<td>BR 4004(c)(2)</td>
<td>Motion</td>
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<td>Deposit Funds in Court Registry [a/k/a ... for Disposition of Funds]</td>
<td>None</td>
<td>None</td>
<td>Motion</td>
<td>None</td>
<td>Per Court Directive</td>
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<td>Disclosure of Names of Minor Children [by UST, case trustee or auditor]</td>
<td>§ 112</td>
<td>None</td>
<td>Motion</td>
<td>21 - Day</td>
<td>LBR 9013(f)</td>
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<tr>
<td>Dismissal: Chapter 7 Case [for failure to file schedules]</td>
<td>§ 707(a)(3)</td>
<td>BR 1017 LBR 1017(b)</td>
<td>Motion</td>
<td>14 - Day or directly set by Trustee</td>
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<tr>
<td>Dismissal: Chapter 7 Case [by debtor, trustee or creditor]</td>
<td>§ 707(a)</td>
<td>BR 1017 LBR 1017(b)</td>
<td>Motion</td>
<td>14 - Day or directly set by Trustee</td>
<td>Matrix</td>
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<tr>
<td>Dismissal: Chapter 7 Case for Abuse</td>
<td>§ 707(b)</td>
<td>BR 1017(e) LBR 1017(b)</td>
<td>Motion</td>
<td>14 - Day</td>
<td>LBR 9013(f)</td>
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<td>Description of Desired Action</td>
<td>Bankr. Code Section</td>
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<td>Dismissal: Chapter 12 Case [for failure to file schedules]</td>
<td>§ 1208</td>
<td>BR 1017 LBR 1007(a)</td>
<td>Motion</td>
<td>14 - Day or directly set by UST or Trustee</td>
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<tr>
<td>Dismissal: Chapter 11 Case [for failure to file schedules]</td>
<td>§ 1112(e)</td>
<td>BR 1017 LBR 1007(a)</td>
<td>Motion</td>
<td>14 - Day or directly set by UST</td>
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<tr>
<td>Dismissal: Chapter 11 Case [by debtor, trustee or creditor]</td>
<td>§ 1112(b)</td>
<td>BR 1017 LBR 1017(b)</td>
<td>Motion</td>
<td>14 - Day or directly set by UST or Trustee</td>
<td>Matrix</td>
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<tr>
<td>Dismissal: Chapter 12 Case [by debtor, trustee or creditor]</td>
<td>§ 1208(b) § 1208(c)</td>
<td>BR 1017 LBR 1017(b)</td>
<td>Motion</td>
<td>14 - Day or directly set by UST or Trustee</td>
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<tr>
<td>Dismissal: Chapter 13 Case [by trustee]</td>
<td>§1307(c)</td>
<td>BR 1017 LBR 1017(b)</td>
<td>Motion</td>
<td>14 - Day or directly set by Trustee</td>
<td>LBR 9013(f)</td>
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<tr>
<td>Dismissal: Chapter 13 Case [by debtor or creditor]</td>
<td>§ 1307(b) § 1307(c)</td>
<td>BR 1017 LBR 1017(b)</td>
<td>Motion</td>
<td>14 - Day</td>
<td>LBR 9013(f)</td>
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<td>Disposition of Books &amp; Records, Intent of Trustee Regarding</td>
<td>None</td>
<td>LBR 2015(b)</td>
<td>Notice</td>
<td>21 - Day</td>
<td>LBR 2015(d)</td>
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<td>Emergency Hearing, Request for [Need hearing within 7 days or less]16</td>
<td>None</td>
<td>LBR 9007(b)</td>
<td>Motion w/ affidavit</td>
<td>None</td>
<td>LBR 9013(f)</td>
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<tr>
<td>Employment of Professional Person17</td>
<td>§ 327</td>
<td>BR 2014 LBR 2014</td>
<td>Application</td>
<td>14 - Day</td>
<td>LBR 9013(f)</td>
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<td>Employment of Professional Person Nunc Pro Tunc</td>
<td>§ 327</td>
<td>BR 2014 LBR 2014(d)</td>
<td>Motion</td>
<td>21 - Day</td>
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<tr>
<td>Examine Debtor’s Transactions with Debtor’s Attorney</td>
<td>§ 329</td>
<td>BR 2017</td>
<td>Motion</td>
<td>21 - Day</td>
<td>LBR 9013(f)</td>
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<tr>
<td>Executory Contract: Establish Deadline to Assume or Reject</td>
<td>§ 365(d)</td>
<td>BR 6006</td>
<td>Motion</td>
<td>21 - Day</td>
<td>LBR 9013(f)</td>
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<td>Executory Contract: Assumption of ... or Rejection of</td>
<td>§ 365</td>
<td>BR 6006</td>
<td>Motion</td>
<td>21 - Day</td>
<td>LBR 9013(f)</td>
</tr>
</tbody>
</table>

16 This request should be accompanied by a proposed order substantially conforming with TXEB Local Form 9007-b.

17 An application to employ a professional person should be accompanied by a proposed order substantially conforming with TXEB Local Form 2014.
<table>
<thead>
<tr>
<th>Description of Desired Action</th>
<th>Bankr. Code Section</th>
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<tr>
<td>Executory Contract: Extension of Deadline to Assume or Reject</td>
<td>§ 365(d)</td>
<td>None</td>
<td>Motion</td>
<td>21 - Day</td>
<td>LBR 9013(f)</td>
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<td>Exemptions, Objection to</td>
<td>§ 522</td>
<td>BR 4003</td>
<td>Objection</td>
<td>21 - Day</td>
<td>LBR 9013(f)</td>
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<td>Expunging Records: False Involuntary Petition [Dismissed]</td>
<td>§303(l)(3)</td>
<td>None</td>
<td>Motion</td>
<td>None</td>
<td>LBR 9013(f)</td>
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<td>Extension of Time: Claims Bar Date in Chapters 7-12-13 [limited grounds]</td>
<td>§ 501</td>
<td>BR 3002(c)</td>
<td>Motion</td>
<td>None</td>
<td>LBR 9013(f)</td>
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<td>Extension of Time: Claims Bar Date in Chapter 11 Case</td>
<td>§ 501</td>
<td>BR 3003(c)(3)</td>
<td>Motion</td>
<td>None</td>
<td>LBR 9013(f)</td>
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<td>Extension of Time: Chapter 11 Plan Exclusivity Periods</td>
<td>§ 1121(d)</td>
<td>None</td>
<td>Motion</td>
<td>21 - Day</td>
<td>LBR 9013(f)</td>
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<td>Extension of Time: Filing Chapter 12 Plan</td>
<td>§ 1221</td>
<td>BR 3015(a)</td>
<td>Motion</td>
<td>21 - Day</td>
<td>LBR 9013(f)</td>
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Any request for an expedited hearing should be accompanied by a proposed order substantially conforming with TXEB Local Form 9007-c.
<table>
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<tr>
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<th>Bankr. Code Section</th>
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<tr>
<td>Extension of Time: Filing Schedules, Statements &amp; Other Required Documents [initial request]</td>
<td>§ 521</td>
<td>BR 1007(c) LBR 1007(b)</td>
<td>Motion</td>
<td>None</td>
<td>LBR 1007(b)</td>
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<tr>
<td>Extension of Time: Filing Schedules, Statements &amp; Other Required Documents [subsequent request]</td>
<td>§ 521</td>
<td>BR 1007(c) LBR 1007(b)</td>
<td>Motion</td>
<td>None (but requires declaration)</td>
<td>LBR 1007(b)</td>
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<tr>
<td>Extension of Time: Deadline to File Complaints to Determine Dischargeability of Debt [by trustee or creditor]</td>
<td>§ 523(c)</td>
<td>BR 4007(c) LBR 4007(a)</td>
<td>Motion</td>
<td>21 - Day</td>
<td>Matrix</td>
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<td>Extension of Time: Deadline to File Complaints to Determine Dischargeability of Debt [by debtor]</td>
<td>§ 523(c)</td>
<td>BR 4007(c) LBR 4007(a)</td>
<td>Motion</td>
<td>None</td>
<td>LBR 9013(f)</td>
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<td>Extension of Time: Deadline to File Objections to Discharge [by debtor]</td>
<td>§ 727</td>
<td>BR 4004 LBR 4004</td>
<td>Motion</td>
<td>None</td>
<td>LBR 9013(f)</td>
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<td>Extension of Time: Deadline to File New Chapter 13 Plan Under Order Denying Confirmation</td>
<td>None</td>
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<td>Extension of Time: Deadline to File Objections to Debtor’s Claim of Exemptions</td>
<td>§ 522(l)</td>
<td>BR 4003(b) LBR 4003</td>
<td>Motion</td>
<td>21 - Day</td>
<td>LBR 9013(f)</td>
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<tr>
<td>Extension of Time: Deadline to File Objections to Discharge [by trustee or creditor]</td>
<td>§ 727</td>
<td>BR 4004 LBR 4004</td>
<td>Motion</td>
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<tr>
<td>Filing Fee: Request by Individual Debtor for Permission to Pay in Installments</td>
<td>None</td>
<td>BR 1006(b)</td>
<td>Application</td>
<td>None</td>
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<td>BR 1006(c)</td>
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<td>Filing Fee: Request by Chapter 7 Individual Debtor To Waive Filing Fee</td>
<td>28 USC § 1930(f)</td>
<td>BR 1006(c)</td>
<td>Application</td>
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<td>BR 4001 LBR 4001</td>
<td>Motion</td>
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<tr>
<td>Filing Fee: Request for Refund</td>
<td>§ 364</td>
<td>BR 1021(b)</td>
<td>Motion</td>
<td>21 - Day</td>
<td>Matrix</td>
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<tr>
<td>Financing Agreement, Approval of</td>
<td>§101(27A)</td>
<td>BR 1021(b)</td>
<td>Motion</td>
<td>21 - Day</td>
<td>Matrix</td>
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<tr>
<td>Health Care Business: Determination of Status</td>
<td>§101(27A)</td>
<td>BR 1021(b)</td>
<td>Motion</td>
<td>21 - Day</td>
<td>Matrix</td>
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<tr>
<td>Incur Secured Debt [see “Credit, to Obtain”]</td>
<td>§341(e)</td>
<td>BR 1015(b)</td>
<td>Motion</td>
<td>21 - Day</td>
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<td>Joint Administration of Cases</td>
<td>None</td>
<td>BR 1015(b)</td>
<td>Motion</td>
<td>21 - Day</td>
<td>Matrix</td>
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<td>Meeting of Creditors (§341): Waive Debtor’s Appearance</td>
<td>None</td>
<td>BR 1015(b)</td>
<td>Motion</td>
<td>None</td>
<td>Matrix</td>
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<tr>
<td>Meeting of Creditors (§341): Waive Meeting Due to Pre-Petition Solicitation of Plan</td>
<td>§341(e)</td>
<td>Motion</td>
<td>21 - Day</td>
<td>Matrix</td>
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<td>Description of Desired Action</td>
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<tr>
<td>New Trial [see “alter/amend judgment”]</td>
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<tr>
<td>Notice to Parties, to Limit or Restrict....</td>
<td>None</td>
<td>BR 9007 LBR 9007</td>
<td>Motion</td>
<td>21 - Day</td>
<td>Matrix</td>
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<tr>
<td>Patient Care: [chapters 7-9-11 only] To Waive Appointment of Patient Care Ombudsman</td>
<td>§ 333(a)(1)</td>
<td>BR 2007.2(a)</td>
<td>Motion</td>
<td>14 - Day</td>
<td>Matrix</td>
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<tr>
<td>Patient Care: [chapters 7-9-11 only] For Appointment of Patient Care Ombudsman</td>
<td>§ 333</td>
<td>BR 2007.2(b)</td>
<td>Motion</td>
<td>14 - Day</td>
<td>Matrix</td>
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<tr>
<td>Patient Care: [chapters 7-9-11 only] To Terminate Appointment of Patient Care Ombudsman</td>
<td>§ 333</td>
<td>BR 2007.2(c)</td>
<td>Motion</td>
<td>14 - Day</td>
<td>Matrix</td>
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<tr>
<td>Patient Care: [chapters 7-9-11 only] Notice of Ombudsman’s Intent to File 60-Day Report</td>
<td>§ 333(b)(2)</td>
<td>BR 2015.1(a)</td>
<td>Notice</td>
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<td>LBR 9013(f) &amp; all patients</td>
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<tr>
<td>Patient Care: [chapters 7-9-11 only] For Authority to Review Confidential Patient Records [by Patient Care Ombudsman]</td>
<td>§ 333(c)(1)</td>
<td>BR 2015.1(b)</td>
<td>Motion</td>
<td>14 - Day</td>
<td>BR 2015.1(b)</td>
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<td>Patient Care: [chapters 7-9-11 only] For Authority to Dispose of Patient Records [by Trustee]</td>
<td>§ 351</td>
<td>BR 6011</td>
<td>Notice</td>
<td>None</td>
<td>BR 6011(b)</td>
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<td>Pay Pre-Petition Claims or Pay Taxes [pre- or post-petition]</td>
<td>§ 105</td>
<td>None</td>
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<td>Bankr. Code Section</td>
<td>Applicable Rules &amp; Regs</td>
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<td>Protection Against Disclosure of Personal Information</td>
<td>§ 107(c)(1)</td>
<td>None</td>
<td>Motion</td>
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<td>LBR 9013(f)</td>
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<td>Property of the Estate: Approval of Agreed Property Division Upon Divorce</td>
<td>None</td>
<td>None</td>
<td>Motion</td>
<td>21 - Day Matrix</td>
<td>LBR 9013(f)</td>
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<td>Property of the Estate: Approval of Bidding Procedures for Sale of Property</td>
<td>None</td>
<td>None</td>
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<td>LBR 9013(f)</td>
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<td>Property of the Estate: Authority to Use, Sell, or Lease</td>
<td>§ 363(b)</td>
<td>BR 6004 BR 6004 LBR 6004</td>
<td>Motion or Notice</td>
<td>21 - Day Matrix</td>
<td>LBR 9013(f)</td>
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<td>Property of the Estate: Sell Personally Identifiable Information</td>
<td>§363(b) (1)(B)</td>
<td>BR 6004 LBR 6004(b)</td>
<td>Motion</td>
<td>None (auto hrg)</td>
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<td>Property of the Estate: Prohibit or Condition Use, Sale or Lease of...</td>
<td>§ 363(e)</td>
<td>BR 4001 BR 4001</td>
<td>Motion</td>
<td>14 - Day LBR 9013(f)</td>
<td>LBR 9013(f)</td>
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<tr>
<td>Property of the Estate: Sell Free &amp; Clear of Liens</td>
<td>§ 363(f)</td>
<td>BR 6004 LBR 6004</td>
<td>Motion</td>
<td>21 - Day Matrix</td>
<td>LBR 9013(f)</td>
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<td>Reconsideration of Order [see “alter or amend judgment”]</td>
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<td>Redemption of Property from Lien or Sale</td>
<td>§ 722</td>
<td>BR 6008 LBR 6008</td>
<td>Motion</td>
<td>21 - Day LBR 6008(b)</td>
<td>LBR 6008(b)</td>
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<td>Relief from Judgment or Order [when beyond 10-day filing period for m/amend or alter judgment]</td>
<td>None</td>
<td>BR 9024</td>
<td>Motion</td>
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<td>Same as orig. doc.</td>
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<td>Removal of Trustee or Examiner</td>
<td>§ 324</td>
<td>BR 2012</td>
<td>Motion</td>
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<td>Reopen Case</td>
<td>§ 350</td>
<td>BR 5010 LBR 5010</td>
<td>Motion</td>
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<td>Retainer: for Distribution of... [chapter 11 or 12 only]</td>
<td>None</td>
<td>LBR 2016(g)</td>
<td>Motion</td>
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<td>LBR 2016(g)</td>
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<td>Retainer: for Payment of Post-Petition</td>
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<td>Motion</td>
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<td>BR 2004 LBR 2004</td>
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<td>Sanctions [Contested Matter]</td>
<td>Various</td>
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<td>Schedules &amp; Statements, Original</td>
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<td>BR 1007 LBR 1007</td>
<td>Schedule</td>
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<td>LBR 1009</td>
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<td>Schedules &amp; Statements, Amended</td>
<td>§ 521</td>
<td>BR 1009 LBR 1009</td>
<td>Schedule</td>
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<td>LBR 1009</td>
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<td>Sealing of Documents:</td>
<td>BR 9018 LBR 9018</td>
<td>Motion</td>
<td>None</td>
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<td>Sealing of Documents:</td>
<td>§303(l)(1) BR 9006 LBR 9007</td>
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<td>False Involuntary Petition [Dismissed]</td>
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<td>Severance of Case</td>
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<td>Motion</td>
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<tr>
<td>Shorten Notice Period</td>
<td>BR 9006 LBR 9007</td>
<td>Application</td>
<td>None</td>
<td>same as affected pleading</td>
<td></td>
</tr>
<tr>
<td>Small Business: Determination of Status of Unsecured Creditors' Committee</td>
<td>§101 (51D)(A) BR 1020 LBR 1020(b)</td>
<td>Motion</td>
<td>21 - Day</td>
<td>LBR 9013(f)</td>
<td></td>
</tr>
<tr>
<td>Small Business: Determination of Small Business Debtor Status</td>
<td>§101 (51D)(A) BR 1020 LBR 1020(a)</td>
<td>Motion</td>
<td>21 - Day</td>
<td>LBR 9013(f)</td>
<td></td>
</tr>
<tr>
<td>Stipulation, to Approve Rule 4001</td>
<td>Various BR 4001(d)</td>
<td>Motion</td>
<td>14 - Day</td>
<td>Matrix</td>
<td></td>
</tr>
<tr>
<td>Substitution of Attorney</td>
<td>LBR 2014(c)</td>
<td>Motion</td>
<td>14 - Day</td>
<td>LBR 9013(f)</td>
<td></td>
</tr>
<tr>
<td>Suspension or Dismissal of Case</td>
<td>§ 305 BR 1017(c)</td>
<td>Motion</td>
<td>21 - Day</td>
<td>Matrix</td>
<td></td>
</tr>
<tr>
<td>Description of Desired Action</td>
<td>Bankr. Code Section</td>
<td>Applicable Rules &amp; Regs</td>
<td>Pleading Required</td>
<td>Neg. Notice Language</td>
<td>Pleading Notice Required</td>
</tr>
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</tr>
<tr>
<td>Tax Information: Request for Debtor to File with Court [individual chapter 7-11-13 case only]</td>
<td>§521(f)</td>
<td>LBR 4002(c)</td>
<td>Request</td>
<td>None</td>
<td>Debit &amp; counsel</td>
</tr>
<tr>
<td>Tax Information: Access to Information Filed with Court [individual chapter 7-11-13 case only]</td>
<td>§521(g)(2)</td>
<td>LBR 4002(d)</td>
<td>Motion</td>
<td>14 - Day</td>
<td>Debit &amp; counsel</td>
</tr>
<tr>
<td>Tax Liability [Determination of]</td>
<td>§ 505</td>
<td>None</td>
<td>Motion</td>
<td>21 - Day</td>
<td>LBR 9013(f)</td>
</tr>
<tr>
<td>Utility Service Deposit, Determine Adequacy of...</td>
<td>§ 366</td>
<td>None</td>
<td>Motion</td>
<td>21 - Day</td>
<td>LBR 9013(f)</td>
</tr>
<tr>
<td>Vacate Order [see “alter/amend judgment”]</td>
<td>--------</td>
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</tr>
<tr>
<td>Valuation of Property or Secured Status, Determination of</td>
<td>§ 506</td>
<td>BR 3012 LBR 3012</td>
<td>Motion</td>
<td>21 - Day</td>
<td>LBR 9013(f) LBR 3012</td>
</tr>
<tr>
<td>Venue, Change of</td>
<td>28 USC § 1412</td>
<td>BR 1014</td>
<td>Motion</td>
<td>21 - Day</td>
<td>Matrix</td>
</tr>
<tr>
<td>Venue: Stay Proceedings in Related Case Filed in Another District</td>
<td>--------</td>
<td>BR 1014(b)</td>
<td>Motion</td>
<td>21 - Day</td>
<td>BR 1014(b)</td>
</tr>
<tr>
<td>Waive Automatic Dismissal of Case [by Ch 7 or 13 trustee]</td>
<td>§521(i)(4)</td>
<td>LBR 1017(c)</td>
<td>Motion</td>
<td>14 - Day</td>
<td>Matrix</td>
</tr>
<tr>
<td>Description of Desired Action</td>
<td>Bankr. Code Section</td>
<td>Applicable Rules &amp; Regs</td>
<td>Pleading Required</td>
<td>Neg. Notice Language</td>
<td>Pleading Notice Required</td>
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<tr>
<td>Withdrawal of Attorney</td>
<td>--------------</td>
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<td>Motion</td>
<td>21 - Day</td>
<td>LBR 9013(f)</td>
</tr>
<tr>
<td>Withdrawal of Pleading</td>
<td>--------------</td>
<td>-----------------------</td>
<td>Notice</td>
<td>None</td>
<td>LBR 9013(f)</td>
</tr>
</tbody>
</table>
Form 35-3

The captions in form 35-3 are adapted from Official Bankruptcy Forms 16A, 16B, and 16D found in the appendix of title 11 of the U.S. Code. The practitioner should consult 11 U.S.C. § 342 to determine which caption to use for a specific pleading. For the caption for a complaint in an adversary proceeding, see Form 16C. For the caption for a notice of appeal under 28 U.S.C. § 158(a) or (b) or from a judgment, order, or decree of a bankruptcy judge, see Form 17. Before filing any pleading with the court, the practitioner should also consult the local rules for the bankruptcy court in which he will appear.

All documents and proposed orders filed in the bankruptcy courts for the four districts in Texas must be filed electronically by means of the CF/ECF system as PDF files, with one exception: the local rules of the bankruptcy courts for the Northern District of Texas require that proposed orders be filed in Word format.

Warning: The local rules of the Bankruptcy Courts for the four districts in Texas have specific requirements for the content of the captions of pleadings and orders, and they are all different. The practitioner should consult the local rules of the bankruptcy court for the district in which he intends to file for the specific requirements as to the content of captions. See section 35.1:2 in this chapter.

Official Captions

Full Caption

Clause 35-3-1

UNITED STATES BANKRUPTCY COURT
[District] DISTRICT OF TEXAS
[Division] DIVISION

In re [include all names, §
including married, maiden, and trade
names, used by debtor within last
eight years], Debtor §

[Address, city, state] §

[Last four digits of Social Security or
individual-tax-payer-identification
(ITIN) no.[s] (if any)] §

[Employer tax-identification
(EIN) no.[s] (if any)] §

Case No. [case number] §

Chapter [chapter]
Short Caption

Clause 35-3-2

UNITED STATES BANKRUPTCY COURT
[District] DISTRICT OF TEXAS
[Division] DIVISION

In re [name of debtor], Debtor § No. [number]
§ Chapter [chapter]

Caption for Use in Adversary Proceeding Other Than Complaint Filed by Debtor

Clause 35-3-3

UNITED STATES BANKRUPTCY COURT
[District] DISTRICT OF TEXAS
[Division] DIVISION

In re [name of debtor], Debtor § Case No. [case number]
§ § Chapter [chapter]
[Name of plaintiff], Plaintiff § Adv. No. [number]
v. § §
[Name of defendant], Defendant §
Form 35-4

Warning: The local rules of the Bankruptcy Courts for the four districts in Texas have specific requirements for the content of the captions of pleadings and orders, and they are all different. The practitioner should consult the local rules of the bankruptcy court for the district in which he intends to file for the specific requirements as to the content of captions. See section 35.1:2 in this chapter.

[Caption. See form 35-3 in this chapter.]

Notice of Appearance

Pursuant to Fed. R. Bankr. P. 2002 and 9007, the undersigned appears for [name of client], a party in interest in this case, and requests that all notices given and papers served in this case be given to and served on the undersigned at [name, office, address, phone, fax, and e-mail].

Please take further notice that, pursuant to section 1109(b) of the Bankruptcy Code, this request includes the notices and papers referred to in the rules specified above and also includes, without limitation, notices of any orders, applications, complaints, demands, hearings, motions, petitions, pleadings, or requests and any other documents brought before this Court in this case.

[Name]
Attorney for [name of client]
State Bar No.:
[E-mail address]
[Address]
[Telephone]
[Telecopier]

Include a certificate of service (form 19-1). Send a copy of the notice of appearance to the debtors, debtors’ counsel, and the bankruptcy trustee.
Form 35-5

The suggestion of bankruptcy is usually filed in state court by the debtor to put the court on notice of the pending bankruptcy and the automatic stay; however, the creditor may choose to file a suggestion of bankruptcy to make the court aware of the stay. There is no requirement that the bankruptcy trustee be served with a copy of the suggestion of bankruptcy, but the preferred practice is to serve the bankruptcy trustee.

Warning: The local rules of the Bankruptcy Courts for the four districts in Texas have specific requirements for the content of the captions of pleadings and orders, and they are all different. The practitioner should consult the local rules of the bankruptcy court for the district in which he intends to file for the specific requirements as to the content of captions. See section 35.1:2 in this chapter.

[Caption of the state court lawsuit or other proceeding in which the suggestion of bankruptcy will be filed.]

Suggestion of Bankruptcy

[Name of party], [Defendant/Plaintiff], files this suggestion of bankruptcy and notice of the automatic stay imposed by 11 U.S.C. § 362 and states:

On [date bankruptcy petition was filed], [name of debtor], Debtor, filed a petition for relief under Chapter [7/11/13] of the United States Bankruptcy Code (Title 11) in Case No. [number], currently pending in the United States Bankruptcy Court for the [district number] District of Texas, [division number] Division.

[Defendant/Plaintiff] prays that [Defendant/Plaintiff] and this Court take notice of this bankruptcy filing and of the automatic stay of 11 U.S.C. § 362.

Dated: ________________________________.
[Name]
Attorney for [name of client]
State Bar No.:
[E-mail address]
[Address]
[Telephone]
[Teletypewriter]

Include a certificate of service (form 19-1). Send a copy of the suggestion of bankruptcy to all parties in the state court action.
Form 35-6

Proof of Claim

Fill in this information to identify the case:

Debtor 1 ____________________________________________

Debtor 2 ____________________________ (Spouse, if filing)

United States Bankruptcy Court for the: __________ District of __________

Case number ____________________________________

Official Form 410

Proof of Claim 12/15

Read the instructions before filling out this form. This form is for making a claim for payment in a bankruptcy case. Do not use this form to make a request for payment of an administrative expense. Make such a request according to 11 U.S.C. § 503.

Filers must leave out or redact information that is entitled to privacy on this form or on any attached documents. Attach redacted copies of any documents that support the claim, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, judgments, mortgages, and security agreements. Do not send original documents; they may be destroyed after scanning. If the documents are not available, explain in an attachment.

A person who files a fraudulent claim could be fined up to $500,000, imprisoned for up to 5 years, or both. 18 U.S.C. §§ 152, 157, and 3571.

Fill in all the information about the claim as of the date the case was filed. That date is on the notice of bankruptcy (Form 309) that you received.

<table>
<thead>
<tr>
<th>Part 1: Identify the Claim</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Who is the current creditor?</td>
</tr>
<tr>
<td>Name of the current creditor (the person or entity to be paid for this claim)</td>
</tr>
<tr>
<td>Other names the creditor used with the debtor</td>
</tr>
<tr>
<td>2. Has this claim been acquired from someone else?</td>
</tr>
<tr>
<td>☐ No</td>
</tr>
<tr>
<td>☐ Yes. From whom? ____________________________</td>
</tr>
<tr>
<td>3. Where should notices and payments to the creditor be sent?</td>
</tr>
<tr>
<td>Name</td>
</tr>
<tr>
<td>Number</td>
</tr>
<tr>
<td>Street</td>
</tr>
<tr>
<td>City</td>
</tr>
<tr>
<td>Contact phone</td>
</tr>
<tr>
<td>Contact email</td>
</tr>
<tr>
<td>Uniform claim identifier for electronic payments in chapter 13 (if you use one): — — — — — — — — — — — — — — — — — — — — — —</td>
</tr>
<tr>
<td>4. Does this claim amend one already filed?</td>
</tr>
<tr>
<td>☐ No</td>
</tr>
<tr>
<td>☐ Yes. Claim number on court claims registry (if known) ________ Filed on MM/DD/YYYY</td>
</tr>
<tr>
<td>5. Do you know if anyone else has filed a proof of claim for this claim?</td>
</tr>
<tr>
<td>☐ No</td>
</tr>
<tr>
<td>☐ Yes. Who made the earlier filing? ____________________________</td>
</tr>
</tbody>
</table>
## Part 2: Give Information About the Claim as of the Date the Case Was Filed

6. Do you have any number you use to identify the debtor?  
   - No  
   - Yes. Last 4 digits of the debtor’s account or any number you use to identify the debtor: ____  ____  ____  ____

7. How much is the claim?  
   - $_____________________________. Does this amount include interest or other charges?  
     - No  
     - Yes. Attach statement itemizing interest, fees, expenses, or other charges required by Bankruptcy Rule 3001(c)(2)(A).

8. What is the basis of the claim?  
   Examples: Goods sold, money loaned, lease, services performed, personal injury or wrongful death, or credit card. Attach redacted copies of any documents supporting the claim required by Bankruptcy Rule 3001(c). Limit disclosing information that is entitled to privacy, such as health care information.

9. Is all or part of the claim secured?  
   - No  
   - Yes. The claim is secured by a lien on property.  
     - Nature of property:  
       - Real estate. If the claim is secured by the debtor’s principal residence, file a Mortgage Proof of Claim Attachment (Official Form 410-A) with this Proof of Claim.  
       - Motor vehicle  
       - Other. Describe: _____________________________________________________________
     - Basis for perfection: ____________________________________________________________________
     - Attach redacted copies of documents, if any, that show evidence of perfection of a security interest (for example, a mortgage, lien, certificate of title, financing statement, or other document that shows the lien has been filed or recorded.)

     - Value of property: $___________  
     - Amount of the claim that is secured: $___________  
     - Amount of the claim that is unsecured: $___________  
       (The sum of the secured and unsecured amounts should match the amount in line 7.)

     - Amount necessary to cure any default as of the date of the petition: $___________  

     - Annual Interest Rate (when case was filed)_______%  
       - Fixed  
       - Variable

10. Is this claim based on a lease?  
    - No  
    - Yes. Amount necessary to cure any default as of the date of the petition: $___________

11. Is this claim subject to a right of setoff?  
    - No  
    - Yes. Identify the property: ____________________________________________
12. Is all or part of the claim entitled to priority under 11 U.S.C. § 507(a)?
   ☐ No
   ☐ Yes. Check one:
   ☐ Domestic support obligations (including alimony and child support) under 11 U.S.C. § 507(a)(1)(A) or (a)(1)(B).
   ☐ Up to $2,775* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use. 11 U.S.C. § 507(a)(7).
   ☐ Wages, salaries, or commissions (up to $12,475*) earned within 180 days before the bankruptcy petition is filed or the debtor’s business ends, whichever is earlier. 11 U.S.C. § 507(a)(4).
   ☐ Taxes or penalties owed to governmental units. 11 U.S.C. § 507(a)(8).
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Form 35-7


Warning: Some courts have held that a bankruptcy court does not have authority under the Bankruptcy Code to allow a late-filed proof of claim. See section 35.23 in this chapter for a discussion of late-filed proofs of claim.

Warning: The local rules of the Bankruptcy Courts for the four districts in Texas have specific requirements for the content of the captions of pleadings and orders, and they are all different. The practitioner should consult the local rules of the bankruptcy court for the district in which he intends to file for the specific requirements as to the content of captions. See section 35.1:2.

[Caption. See form 35-3 in this chapter.]

Creditor’s Motion to Allow Late Filing of Proof of Claim

1. Parties. [Name of creditor], Creditor, files this Motion to Allow Late Filing of Creditor’s Proof of Claim.

2. Facts. [Name of debtor], Debtor, filed this case on [date]. Creditor did not receive notice of the bankruptcy until after the deadline to file proofs of claim.


   a. Debtor’s Chapter 13 plan includes Creditor as a secured creditor. The amount of the claim is listed as $[amount] and is a fully secured claim. Creditor shows the actual net balance to be $[amount].

   b. The claim is founded on a retail installment contract dated [date of contract] covering [description of collateral].
c. Debtor’s Chapter 13 plan provides for monthly payments of $[amount] to Creditor with [percent] percent interest on the claim.

d. Unless and until Debtor pays Creditor its secured claim, Creditor will retain its lien on the collateral and will not release title to the collateral to Debtor. Therefore, allowing Creditor’s proof of claim will facilitate an effective reorganization for Debtor.

e. Since Debtor has provided for Creditor in the plan, Creditor’s late filing of a proof of claim will not adversely affect any other creditors.

f. A copy of the proof of claim filed is attached as Exhibit [exhibit number/letter].

4. **Prayer.** Creditor prays that this Court allow the late filing of Creditor’s proof of claim in this case and that Creditor be granted all further relief to which Creditor is entitled.

   Creditor prays that [Creditor/Debtor] and this Court take notice of this bankruptcy filing and of the automatic stay of 11 U.S.C. § 362.

   [Name]
   Attorney for [name of client]
   State Bar No.:
   [E-mail address]
   [Address]
   [Telephone]
   [Telexcopier]

Attach a copy of the proof of claim (form 35-6). Attach exhibit(s). Include a certificate of service (form 19-1). Send a copy of the motion to allow late filing of proof of claim to the debtors, debtors’ counsel, the bankruptcy trustee, and all other parties in interest.
Form 35-8

**Warning:** Some courts have held that a bankruptcy court does not have authority under the Bankruptcy Code to allow a late-filed proof of claim. See section 35.22 in this chapter for a discussion of late-filed proofs of claim.

Note: The judge will insert an image of his signature and the date of signing electronically. In the bankruptcy courts for the Western District of Texas, the practitioner should leave four inches of blank space at the top of the first page for insertion of the judge’s signature. In other bankruptcy courts in the other districts in Texas, the image of the judge’s signature will be inserted below the last line of text, so the practitioner should leave adequate space on the form. It is good practice to refer to the local rules and procedures of each district for any updates or changes.

**Warning:** The local rules of the Bankruptcy Courts for the four districts in Texas have specific requirements for the content of the captions of pleadings and orders, and they are all different. The practitioner should consult the local rules of the bankruptcy court for the district in which he intends to file for the specific requirements as to the content of captions. See section 35.1:2.

---

[Caption. See form 35-3 in this chapter.]

**Order Granting Creditor’s Motion to Allow Late Filing of Proof of Claim**

At the hearing on [name of creditor]’s Motion to Allow Late Filing of Proof of Claim, the Court, having considered the Motion, finds that it should be granted.

It is therefore ORDERED that [name of creditor]’s Proof of Claim is allowed as filed.
Form 35-9

This form is Official Bankruptcy Form 2400A, a reaffirmation agreement. This agreement is enforceable only if the debtor received the disclosures described in 11 U.S.C. § 524(k) at or before the time the debtor signs the agreement. See 11 U.S.C. § 524(c), (2), (4), (5). The practitioner should consult the local rules for the court in which he will appear to adapt the form. If the debtor is represented by counsel, the debtor’s attorney must sign the certification in part C of the form. See 11 U.S.C. § 524(c)(3). If the debtor isn’t represented by counsel, the court will set a hearing to consider the reaffirmation agreement. See section 35.37 in this chapter regarding reaffirmation agreements.

Warning: The local rules of the Bankruptcy Courts for the four districts in Texas have specific requirements for the content of the captions of pleadings and orders, and they are all different. The practitioner should consult the local rules of the bankruptcy court for the district in which he intends to file for the specific requirements as to the content of captions. See section 35.1:2.

Reaffirmation Agreement
UNITED STATES BANKRUPTCY COURT

District of _______________________

In re ____________________________, Case No. ____________________
Debtor Chapter __________________

REAFFIRMATION AGREEMENT

[Indicate all documents included in this filing by checking each applicable box.]

☐ Part A: Disclosures, Instructions, and Notice to Debtor (pages 1 - 5)
☐ Part B: Reaffirmation Agreement
☐ Part C: Certification by Debtor’s Attorney
☐ Part D: Debtor’s Statement in Support of Reaffirmation Agreement
☐ Part E: Motion for Court Approval

[Note: Complete Part E only if debtor was not represented by an attorney during the course of negotiating this agreement. Note also: If you complete Part E, you must prepare and file Form 2400C ALT - Order on Reaffirmation Agreement.]

Name of Creditor: _______________________________________

☐ [Check this box if] Creditor is a Credit Union as defined in §19(b)(1)(a)(iv) of the Federal Reserve Act

PART A: DISCLOSURE STATEMENT, INSTRUCTIONS AND NOTICE TO DEBTOR

1. DISCLOSURE STATEMENT

Before Agreeing to Reaffirm a Debt, Review These Important Disclosures:

SUMMARY OF REAFFIRMATION AGREEMENT

This Summary is made pursuant to the requirements of the Bankruptcy Code.

AMOUNT REAFFIRMED

The amount of debt you have agreed to reaffirm: $__________________

The amount of debt you have agreed to reaffirm includes all fees and costs (if any) that have accrued as of the date of this disclosure. Your credit agreement may obligate you to pay additional amounts which may come due after the date of this disclosure. Consult your credit agreement.
ANNUAL PERCENTAGE RATE

[The annual percentage rate can be disclosed in different ways, depending on the type of debt.]

a. If the debt is an extension of “credit” under an “open end credit plan,” as those terms are defined in § 103 of the Truth in Lending Act, such as a credit card, the creditor may disclose the annual percentage rate shown in (i) below or, to the extent this rate is not readily available or not applicable, the simple interest rate shown in (ii) below, or both.

(i) The Annual Percentage Rate disclosed, or that would have been disclosed, to the debtor in the most recent periodic statement prior to entering into the reaffirmation agreement described in Part B below or, if no such periodic statement was given to the debtor during the prior six months, the annual percentage rate as it would have been so disclosed at the time of the disclosure statement: ______%.

--- And/Or ---

(ii) The simple interest rate applicable to the amount reaffirmed as of the date this disclosure statement is given to the debtor: __________%. If different simple interest rates apply to different balances included in the amount reaffirmed, the amount of each balance and the rate applicable to it are:

$ _________@ _________%;
$_________ @ _________%;
$_________ @ _________%.

b. If the debt is an extension of credit other than under an open end credit plan, the creditor may disclose the annual percentage rate shown in (i) below, or, to the extent this rate is not readily available or not applicable, the simple interest rate shown in (ii) below, or both.

(i) The Annual Percentage Rate under §128(a)(4) of the Truth in Lending Act, as disclosed to the debtor in the most recent disclosure statement given to the debtor prior to entering into the reaffirmation agreement with respect to the debt or, if no such disclosure statement was given to the debtor, the annual percentage rate as it would have been so disclosed: _________%.

--- And/Or ---

(ii) The simple interest rate applicable to the amount reaffirmed as of the date this disclosure statement is given to the debtor: __________%. If different simple interest rates apply to different balances included in the amount reaffirmed, the amount of each balance and the rate applicable to it are:
c. If the underlying debt transaction was disclosed as a variable rate transaction on the most recent disclosure given under the Truth in Lending Act:

The interest rate on your loan may be a variable interest rate which changes from time to time, so that the annual percentage rate disclosed here may be higher or lower.

d. If the reaffirmed debt is secured by a security interest or lien, which has not been waived or determined to be void by a final order of the court, the following items or types of items of the debtor’s goods or property remain subject to such security interest or lien in connection with the debt or debts being reaffirmed in the reaffirmation agreement described in Part B.

<table>
<thead>
<tr>
<th>Item or Type of Item</th>
<th>Original Purchase Price or Original Amount of Loan</th>
</tr>
</thead>
</table>

Optional---At the election of the creditor, a repayment schedule using one or a combination of the following may be provided:

**Repayment Schedule:**

Your first payment in the amount of $___________ is due on _________ (date), but the future payment amount may be different. Consult your reaffirmation agreement or credit agreement, as applicable.

— Or —

Your payment schedule will be: _________ (number) payments in the amount of $___________ each, payable (monthly, annually, weekly, etc.) on the _________ (day) of each _________ (week, month, etc.), unless altered later by mutual agreement in writing.

— Or —

A reasonably specific description of the debtor’s repayment obligations to the extent known by the creditor or creditor’s representative.

2. **INSTRUCTIONS AND NOTICE TO DEBTOR**
Reaffirmation Agreement

B2400A/B ALT (Form 2400A/B ALT) (12/15)

Reaffirming a debt is a serious financial decision. The law requires you to take certain steps to make sure the decision is in your best interest. If these steps are not completed, the reaffirmation agreement is not effective, even though you have signed it.

1. Read the disclosures in this Part A carefully. Consider the decision to reaffirm carefully. Then, if you want to reaffirm, sign the reaffirmation agreement in Part B (or you may use a separate agreement you and your creditor agree on).

2. Complete and sign Part D and be sure you can afford to make the payments you are agreeing to make and have received a copy of the disclosure statement and a completed and signed reaffirmation agreement.

3. If you were represented by an attorney during the negotiation of your reaffirmation agreement, the attorney must have signed the certification in Part C.

4. If you were not represented by an attorney during the negotiation of your reaffirmation agreement, you must have completed and signed Part E.

5. The original of this disclosure must be filed with the court by you or your creditor. If a separate reaffirmation agreement (other than the one in Part B) has been signed, it must be attached.

6. If the creditor is not a Credit Union and you were represented by an attorney during the negotiation of your reaffirmation agreement, your reaffirmation agreement becomes effective upon filing with the court unless the reaffirmation is presumed to be an undue hardship as explained in Part D. If the creditor is a Credit Union and you were represented by an attorney during the negotiation of your reaffirmation agreement, your reaffirmation agreement becomes effective upon filing with the court.

7. If you were not represented by an attorney during the negotiation of your reaffirmation agreement, it will not be effective unless the court approves it. The court will notify you and the creditor of the hearing on your reaffirmation agreement. You must attend this hearing in bankruptcy court where the judge will review your reaffirmation agreement. The bankruptcy court must approve your reaffirmation agreement as consistent with your best interests, except that no court approval is required if your reaffirmation agreement is for a consumer debt secured by a mortgage, deed of trust, security deed, or other lien on your real property, like your home.
YOUR RIGHT TO RESCIND (CANCEL) YOUR REAFFIRMATION AGREEMENT

You may rescind (cancel) your reaffirmation agreement at any time before the bankruptcy court enters a discharge order, or before the expiration of the 60-day period that begins on the date your reaffirmation agreement is filed with the court, whichever occurs later. To rescind (cancel) your reaffirmation agreement, you must notify the creditor that your reaffirmation agreement is rescinded (or canceled).

Frequently Asked Questions:

What are your obligations if you reaffirm the debt? A reaffirmed debt remains your personal legal obligation. It is not discharged in your bankruptcy case. That means that if you default on your reaffirmed debt after your bankruptcy case is over, your creditor may be able to take your property or your wages. Otherwise, your obligations will be determined by the reaffirmation agreement which may have changed the terms of the original agreement. For example, if you are reaffirming an open end credit agreement, the creditor may be permitted by that agreement or applicable law to change the terms of that agreement in the future under certain conditions.

Are you required to enter into a reaffirmation agreement by any law? No, you are not required to reaffirm a debt by any law. Only agree to reaffirm a debt if it is in your best interest. Be sure you can afford the payments you agree to make.

What if your creditor has a security interest or lien? Your bankruptcy discharge does not eliminate any lien on your property. A “lien” is often referred to as a security interest, deed of trust, mortgage or security deed. Even if you do not reaffirm and your personal liability on the debt is discharged, because of the lien your creditor may still have the right to take the property securing the lien if you do not pay the debt or default on it. If the lien is on an item of personal property that is exempt under your State’s law or that the trustee has abandoned, you may be able to redeem the item rather than reaffirm the debt. To redeem, you must make a single payment to the creditor equal to the amount of the allowed secured claim, as agreed by the parties or determined by the court.

NOTE: When this disclosure refers to what a creditor “may” do, it does not use the word “may” to give the creditor specific permission. The word “may” is used to tell you what might occur if the law permits the creditor to take the action. If you have questions about your reaffirming a debt or what the law requires, consult with the attorney who helped you negotiate this agreement reaffirming a debt. If you don’t have an attorney helping you, the judge will explain the effect of your reaffirming a debt when the hearing on the reaffirmation agreement is held.
PART B: REAFFIRMATION AGREEMENT.

I (we) agree to reaffirm the debts arising under the credit agreement described below.

1. Brief description of credit agreement:

2. Description of any changes to the credit agreement made as part of this reaffirmation agreement:

SIGNATURE(S):

Borrower:  

________________________________________  

(Print Name)  

________________________________________  

(Signature)  

Date: ________________  

Co-borrower, if also reaffirming these debts:  

________________________________________  

(Print Name)  

________________________________________  

(Signature)  

Date: ________________  

Accepted by creditor:  

________________________________________  

(Printed Name of Creditor)  

________________________________________  

(Address of Creditor)  

________________________________________  

(Signature)  

(Date of creditor acceptance:  

________________________________________
PART C: CERTIFICATION BY DEBTOR’S ATTORNEY (IF ANY).

[To be filed only if the attorney represented the debtor during the course of negotiating this agreement.]

I hereby certify that (1) this agreement represents a fully informed and voluntary agreement by the debtor; (2) this agreement does not impose an undue hardship on the debtor or any dependent of the debtor; and (3) I have fully advised the debtor of the legal effect and consequences of this agreement and any default under this agreement.

☐ [Check box, if applicable and the creditor is not a Credit Union.] A presumption of undue hardship has been established with respect to this agreement. In my opinion, however, the debtor is able to make the required payment.

Printed Name of Debtor’s Attorney: ______________________________

Signature of Debtor’s Attorney: __________________________________

Date: ______________
PART D: DEBTOR’S STATEMENT IN SUPPORT OF REAFFIRMATION AGREEMENT

[Read and complete sections 1 and 2. OR, if the creditor is a Credit Union and the debtor is represented by an attorney, read section 3. Sign the appropriate signature line(s) and date your signature. If you complete sections 1 and 2 and your income less monthly expenses does not leave enough to make the payments under this reaffirmation agreement, check the box at the top of page 1 indicating “Presumption of Undue Hardship.” Otherwise, check the box at the top of page 1 indicating “No Presumption of Undue Hardship"]

1. I believe this reaffirmation agreement will not impose an undue hardship on my dependents or me. I can afford to make the payments on the reaffirmed debt because my monthly income (take home pay plus any other income received) is $________, and my actual current monthly expenses including monthly payments on post-bankruptcy debt and other reaffirmation agreements total $________, leaving $________ to make the required payments on this reaffirmed debt.

I understand that if my income less my monthly expenses does not leave enough to make the payments, this reaffirmation agreement is presumed to be an undue hardship on me and must be reviewed by the court. However, this presumption may be overcome if I explain to the satisfaction of the court how I can afford to make the payments here: ________________

________________________________________
(Debtor)

________________________________________
(Joint Debtor, if any)

Date: ___________________ — Or —

[If the creditor is a Credit Union and the debtor is represented by an attorney]

2. I received a copy of the Reaffirmation Disclosure Statement in Part A and a completed and signed reaffirmation agreement.

Signed: ______________________________

(Debtor)

________________________________________
(Joint Debtor, if any)

Date: ___________________

3. I believe this reaffirmation agreement is in my financial interest. I can afford to make the payments on the reaffirmed debt. I received a copy of the Reaffirmation Disclosure Statement in Part A and a completed and signed reaffirmation agreement.

Signed: ______________________________

(Debtor)

________________________________________
(Joint Debtor, if any)

Date: ___________________
PART E: MOTION FOR COURT APPROVAL
[To be completed and filed only if the debtor is not represented by an attorney during the course of negotiating this agreement.]

MOTION FOR COURT APPROVAL OF REAFFIRMATION AGREEMENT

I (we), the debtor(s), affirm the following to be true and correct:

I am not represented by an attorney in connection with this reaffirmation agreement.

I believe this reaffirmation agreement is in my best interest based on the income and expenses I have disclosed in my Statement in Support of this reaffirmation agreement, and because (provide any additional relevant reasons the court should consider):

Therefore, I ask the court for an order approving this reaffirmation agreement under the following provisions (check all applicable boxes):

☐ 11 U.S.C. § 524(c)(6) (debtor is not represented by an attorney during the course of the negotiation of the reaffirmation agreement)

☐ 11 U.S.C. § 524(m) (presumption of undue hardship has arisen because monthly expenses exceed monthly income)

Signed: ____________________________
(Debtor)

_______________________________
(Joint Debtor, if any)

Date: ____________________________
Motion for Relief from Automatic Stay

Form 35-10

Form 35-11 (affidavit in support of motion for relief from automatic stay) in this chapter should accompany this motion. See form 35-12 for an order granting motion for relief from automatic stay.

**Warning:** The local rules of the Bankruptcy Courts for the four districts in Texas have specific requirements for the content of the captions of pleadings and orders, and they are all different. The practitioner should consult the local rules of the bankruptcy court for the district in which he intends to file for the specific requirements as to the content of captions. See section 35.1:2.

[Caption. See form 35-3 in this chapter.]

**Motion for Relief from Automatic Stay**

Insert negative notice as required under local rules. See form 35-18.

1. **Parties.** This Motion for Relief from Automatic Stay against property of the estate is filed on behalf of [name of creditor], Creditor, pursuant to 11 U.S.C. § 362(d)(1), for cause, by reason of a lack of adequate protection of Creditor’s rights as a secured creditor [include if applicable: and alternatively, pursuant to 11 U.S.C. § 362(d)(2) by reason of [the Debtor’s lack of equity in the collateral described in Exhibit exhibit number/letter] [and]/the collateral’s not being necessary for an effective reorganization].

2. **Nature of Suit.**

   a. This Motion is filed pursuant to Fed. R. Bankr. P. 9014 and constitutes a contested matter.

   b. [Name of debtor], Debtor, filed a Petition for Relief under Chapter [7/9/11/13] of title 11 of the United States Code on [date].
3. **Facts.**

   a. Creditor is a secured creditor of Debtor with respect to the collateral described in Exhibit [exhibit number/letter] (the “Collateral”).

   b. The Collateral is in possession of Debtor.

   c. Debtor purchased the Collateral under a [deed of trust/retail installment contract/lease] (the “Contract”). A copy of the Contract is attached as Exhibit [exhibit number/letter] and incorporated by reference for all purposes.

   d. Creditor is the holder of the Contract.

   e. Creditor’s security interest is properly shown by the [deed of trust/security agreement/financing statement].

4. **Grounds.**

   Include specific grounds as appropriate to the case. Examples of appropriate supporting grounds follow.

   a. Under the terms of Debtor’s plan, monthly payments are to be paid to the trustee for distribution in accordance with the terms of the plan.

   b. Debtor is in arrears in his payments to the trustee, and Creditor is not receiving payments from the trustee.

   c. Debtor has had the full use of the Collateral described in the attached exhibits.
d. The Collateral has depreciated and continues to depreciate in value.

And/Or

e. Debtor has no equity in the Collateral described in the attached exhibits.

And/Or

f. The Collateral is exposed to risks of damage or loss through accident, theft, fire, and weather, and Debtor has not maintained insurance on the Collateral to insure it against such risks.

Continue with the following.

g. Under the circumstances described above, good cause exists for lifting the stay, including, but not limited to, Creditor’s lack of adequate protection.

5. **Prayer:** Creditor prays that—

a. an Order Granting Motion for Relief from Automatic Stay be entered to permit Creditor to repossess the Collateral, to sell or otherwise dispose of the Collateral, and to apply the proceeds from the sale or other disposition against the outstanding indebtedness, less all unearned finance charges and less all other charges that have not yet become due and payable, owed by Debtor under the contract;

b. the stay be immediately lifted on entry of an Order Granting Motion for Relief from Automatic Stay, notwithstanding Fed. R. Bankr. P. 4001(a)(3);

c. Creditor be awarded reasonable attorney’s fees; and

d. Creditor be awarded all further relief to which Creditor may be entitled.
[Name]
Attorney for [name of client]
State Bar No.:
[E-mail address]
[Address]
[Telephone]
[Telecopier]

Attach exhibit(s). Include a certificate of service (form 19-1). Send a copy of the motion for relief from automatic stay to the debtors, debtors' counsel, the bankruptcy trustee, and all other parties in interest.
Form 35-11

The practitioner should use this form along with form 35-10 (motion for relief from automatic stay) in this chapter. See form 35-12 for the order granting motion for relief from automatic stay.

Warning: The local rules of the Bankruptcy Courts for the four districts in Texas have specific requirements for the content of the captions of pleadings and orders, and they are all different. The practitioner should consult the local rules of the bankruptcy court for the district in which he intends to file for the specific requirements as to the content of captions. See section 35.1:2.

[Caption. See form 35-3 in this chapter.]

Affidavit in Support of Motion for Relief from Automatic Stay

BEFORE ME, the undersigned authority, on this day personally appeared [name of affiant], who swore on oath that the following facts are true:

“My name is [name of affiant]. I am the [title] of [name of company]. I am over the age of 18 years and am fully competent to give this affidavit.

“I am responsible for and am personally familiar with the account that Debtor, [name of debtor], has at [name of creditor], Creditor.

“Creditor is the holder of a [deed of trust/retail installment contract/financing statement] for the purchase of [describe property] (the “Contract”), a copy of which is attached as Exhibit [exhibit number/letter]. Debtor executed the Contract to purchase the [describe property] described in the Contract (the “Property”). A copy of Creditor’s security interest in the Property is attached as Exhibit [exhibit number/letter]. Creditor’s rights in the Property were perfected by filing the [deed of trust/retail installment contract/financing statement] with the [county clerk of [county] County, Texas/secretary of state of Texas], a copy of which is attached as Exhibit [exhibit number/letter].
“The fair market value of the Property is $[amount]. The fair market value was derived from [provide source for fair market value, e.g., the Kelley Blue Book; auction records].

Include facts supporting the creditor’s request to set aside the automatic stay. Examples of possible supporting facts follow.

“Because there is no insurance on the Property, Creditor is at serious risk. Creditor will be liable for any damage to the Property arising from accidents involving the Property.”

[Name of affiant]
Affiant

SIGNED under oath before me on ______________________________.

Notary Public, State of Texas

Attach exhibit(s).
Form 35-12

See forms 35-10 (motion for relief from automatic stay) and 35-11 (affidavit in support of motion for relief from automatic stay) in this chapter.

Note: The judge will insert an image of his signature and the date of signing electronically. In the bankruptcy courts for the Western District of Texas, the practitioner should leave four inches of blank space at the top of the first page for insertion of the judge’s signature. In other bankruptcy courts in the other districts in Texas, the image of the judge’s signature will be inserted below the last line of text, so the practitioner should leave adequate space on the form. It is good practice to refer to the local rules and procedures for any updates or changes.

Warning: The local rules of the Bankruptcy Courts for the four districts in Texas have specific requirements for the content of the captions of pleadings and orders, and they are all different. The practitioner should consult the local rules of the bankruptcy court for the district in which he intends to file for the specific requirements as to the content of captions. See section 35.1:2.

[Caption. See form 35-3 in this chapter.]

Order Granting Motion for Relief from Automatic Stay

On [date], a Motion for Relief from Automatic Stay (the “Motion”) was filed by [name of movant], Creditor, in this case. The Court finds that the Motion was properly served pursuant to the Federal and Local Rules of Bankruptcy Procedure and that it contained the appropriate negative notice language, pursuant to Local Rule of Bankruptcy Procedure 4001, that directs any party opposed to the granting of the relief sought by the Motion to file a written response within [number] days or the Motion will be deemed by the Court to be unopposed. The Court finds that no objection or other written response to the Motion has been timely filed by any party. Due to the failure of any party to file a timely written response, the allegations contained in the Motion stand unopposed; therefore, the Court finds that good cause exists for the entry of the following order.

It is therefore ORDERED that the Motion for Relief from Automatic Stay filed by Creditor on [date] is GRANTED so as to modify the automatic stay to allow Creditor to immediately repossess the [describe property] (the “Property”), to sell or otherwise dispose of
the Property, and to apply the proceeds against the outstanding indebtedness, less all unearned finance charges and less all other charges that have not yet become due and payable, owed by [name of debtor], Debtor, to Creditor.

It is further ORDERED that the Chapter [7/9/11/13] trustee shall continue making disbursements to Creditor until such time as [he/she] receives notification from Debtor that Creditor has possession of the Property.

It is further ORDERED that Creditor, if [he/she/it] cannot repossess the Property, may resort to any other procedure allowable under state law to obtain possession of the Property, including procurement of a writ of sequestration.

It is further ORDERED that if Creditor needs to procure a writ of sequestration, the automatic stay is modified so as to allow Creditor to file suit against Debtor in order to obtain the writ of sequestration.

And it is further ORDERED that, since the Motion was unopposed by any party, the fourteen-day stay period otherwise imposed by Fed. R. Bankr. P. 4001(a)(3) shall not apply to this Order, and the stay shall lift immediately on entry of this Order.
Form 35-13

The practitioner should use this form when the creditor and debtor have reached an agreement to modify the automatic stay. See forms 35-10 (motion for relief from automatic stay), 35-11 (affidavit in support of motion for relief from automatic stay), and 35-12 (order granting motion for relief from automatic stay) in this chapter. See section 35.15 regarding adequate protection. See also 11 U.S.C. § 361.

Note: The judge will insert an image of his signature and the date of signing electronically. In the bankruptcy courts for the Western District of Texas, the practitioner should leave four inches of blank space at the top of the first page for insertion of the judge’s signature. In other bankruptcy courts in the other districts in Texas, the image of the judge’s signature will be inserted below the last line of text, so the practitioner should leave adequate space on the form. It is good practice to refer to the local rules and procedures for any updates or changes.

Warning: The local rules of the Bankruptcy Courts for the four districts in Texas have specific requirements for the content of the captions of pleadings and orders, and they are all different. The practitioner should consult the local rules of the bankruptcy court for the district in which he intends to file for the specific requirements about the content of captions. See section 35.1:2.

[Caption. See form 35-3 in this chapter.]

Agreed Order Providing for Adequate Protection of Collateral

The undersigned agree that [name of creditor], Creditor, filed its Motion for Relief from Automatic Stay, a settlement has been reached with respect to the Motion, and Creditor has a valid security interest in the [describe property] (the “Property”) by virtue of the [describe agreement creating the security interest, e.g., retail installment contract] entered into by Creditor and [name of debtor], Debtor, on [date] (the “Contract”).

Creditor agrees, in lieu of its right to enforce its security interest, obtain relief from the automatic stay, and take possession of the Property, to accept adequate protection from Debtor and Debtor agrees to provide it to Creditor.

It is therefore ORDERED that Creditor is entitled to adequate protection of its interests as a secured creditor of Debtor.
It is further ORDERED that Debtor shall make timely monthly payments to the trustee under Debtor’s Chapter [11/13] plan so that Creditor shall be able to receive payments every month from the trustee. The payments represent Creditor’s allowed secured claim, which is secured by the Property owned by and presently in the possession of Debtor.

It is further ORDERED that Debtor shall at all times maintain physical damage insurance issued by a company authorized to transact business in Texas on the Property as required by and in accordance with the terms and conditions of the Contract that pertain to required physical damage insurance; that Creditor shall be named as a loss payee on the policy or policies of physical damage insurance to be procured by Debtor; that Creditor shall be provided by Debtor with certificates of insurance or other written documentation from the insurer selected by Debtor showing that the Property is, in fact, covered by required physical damage insurance and that such insurance coverage is for a term of not less than 180 days; and Debtor shall notify Creditor of any change in insurance companies within ten days of the execution of any new policy.

And it is further ORDERED that (1) should Debtor default in making any payments to the trustee as provided for in Debtor’s plan, or (2) should Debtor fail to provide Creditor with written documentation of the physical damage insurance required by the terms of this Order, or (3) should Creditor receive notice of cancellation of any policy of physical damage insurance procured by Debtor and the default or failure is not cured within ten days of written notice to Debtor and Debtor’s attorney (the “Default Notice”), the automatic stay is hereby lifted without need for further order of this Court.
Agreed Order Providing for Adequate Protection of Collateral

APPROVED AS TO FORM AND SUBSTANCE:

[Name]
Attorney for [name of debtor]
State Bar No.:
[E-mail address]
[Address]
[Telephone]
[Telecopier]

[Name]
Attorney for [name of creditor]
State Bar No.:
[E-mail address]
[Address]
[Telephone]
[Telecopier]

[Name]
Trustee
State Bar No.:
[E-mail address]
[Address]
[Telephone]
[Telecopier]
Objection to Confirmation of Debtor’s Chapter 13 Plan by Secured Creditor

Form 35-14

The practitioner should use this form to object to confirmation of a Chapter 13 plan on behalf of a secured creditor.

Warning: The local rules of the Bankruptcy Courts for the four districts in Texas have specific requirements for the content of the captions of pleadings and orders, and they are all different. The practitioner should consult the local rules of the bankruptcy court for the district in which he intends to file for the specific requirements as to the content of captions. See section 35.1:2 in this chapter.

Objection to Confirmation of Debtor’s Chapter 13 Plan by Secured Creditor

[Caption for an adversary proceeding. See form 35-3 in this chapter.]

Insert negative notice as required under local rules. See form 35-18.

[Name of creditor], Creditor, a secured creditor in this case, files this Objection to Confirmation of Debtor’s Chapter 13 Plan and, in support of this Objection, states as follows:

1. [Name of debtor], Debtor, filed for protection under Chapter 13 of the Bankruptcy Code on [date].

2. Confirmation of Debtor’s Chapter 13 plan is scheduled for [date].

3. Creditor is the holder of a claim against Debtor that is secured by the [describe collateral, including any identification number] (the “Property”).

Include specific grounds for denying confirmation of the Chapter 13 plan. Examples of appropriate grounds follow.

4. The value of the Property, as of the effective date of Debtor’s Chapter 13 plan, is $[amount]. The value of the Property shown on Debtor’s schedule is only $[amount]. Creditor, therefore, objects because Debtor is undervaluing the amount of Debtor’s allowed secured claim.
5. Debtor’s Chapter 13 plan proposes that Debtor retain the Property, that Creditor retain his lien thereon, and that Creditor receive monthly distributions of $[amount] from the trustee. Creditor objects because the plan does not propose to pay Debtor the full amount of the value of its secured claim as of the effective date of the plan to which Debtor is entitled under 11 U.S.C. § 1325(a)(5)(B)(ii).

6. Debtor’s Chapter 13 plan provides that Debtor will make monthly payments of $[amount] to the trustee over a period of [number] months. Creditor objects because, under 11 U.S.C. § 1322(c), the plan may not provide for payments over a period that is longer than thirty-six months unless this Court, for cause, approves a longer period. Creditor respectfully submits that Debtor has failed to show good cause for extending the plan beyond thirty-six months.

7. Debtor’s plan proposes to pay Creditor interest of [percent] percent on his claim. Creditor objects to confirmation of Debtor’s plan because, as of the effective date of the plan, the value of the Property to be distributed is less than the allowed amount of Debtor’s claim in direct violation of 11 U.S.C. § 1325(a)(5)(B)(ii).

8. Creditor demands a rate of interest equivalent to the rate that could have been obtained had it foreclosed on the Property and reinvested the proceeds in loans of equivalent duration and risk or, alternatively, the contract rate of interest of [percent] percent.

9. Creditor objects because Debtor’s Chapter 13 plan fails to provide a “drop dead” clause, which would allow Creditor at some point in time to exercise its rights as a secured
Objection to Confirmation of Debtor’s Chapter 13 Plan by Secured Creditor

Credit should Debtor default under the terms of the Chapter 13 plan, specifically if Debtor fails to make the required monthly payments to the trustee or fails to keep proper insurance on the Property.

Creditor respectfully prays for an Order denying confirmation of the Debtor’s Chapter 13 plan and granting all further relief to which Creditor may be entitled.

[Name]
Attorney for [name of client]
State Bar No.:
[E-mail address]
[Address]
[Telephone]
[Telexopier]

Include a certificate of service (form 19-1). Send a copy of the objection to Chapter 13 plan to the debtors, debtors’ counsel, the bankruptcy trustee, and all other parties in interest.
Form 35-15

The practitioner should use this form to object to confirmation of a Chapter 13 plan on behalf of an unsecured creditor.

Warning: The local rules of the Bankruptcy Courts for the four districts in Texas have specific requirements for the content of the captions of pleadings and orders, and they are all different. The practitioner should consult the local rules of the bankruptcy court for the district in which he intends to file for the specific requirements as to the content of captions. See section 35.1:2 in this chapter.

[Caption for an adversary proceeding. See form 35-3 in this chapter.]

Objection to Confirmation of Debtor’s Chapter 13 Plan by Unsecured Creditor

[Name of creditor], Creditor, an unsecured creditor in the above-styled case, files its Objection to Confirmation of Debtor’s Chapter 13 Plan and states as follows:

1. [Name of debtor], Debtor, filed for protection under Chapter 13 of the Bankruptcy Code on [date]. The first meeting of creditors was held on [date], and a hearing on confirmation is scheduled for [date]. [Include if applicable: The plan before the Court is Debtor’s [describe version of plan], and this is the [number, e.g., third] hearing on confirmation.]

2. Creditor has an allowed unsecured claim in the instant case in the amount of $[amount], arising out of [describe circumstances]. Creditor timely filed a proof of claim on or about [date] in the above-stated amount. [No objection has been filed to Creditor’s proof of claim./An objection to Creditor’s claim was filed by [name] and was resolved with a claim allowed in the stated amount.]

3. Debtor’s proposed Chapter 13 plan proposes to pay $[amount] for [number] months [include if applicable: and $[amount of additional payments] for [number of additional]
payments]] for a total of $[amount] over [number] months. The distribution to unsecured creditors under this plan, per the Debtor’s estimates in the plan, is [percent] percent.

Include specific grounds for objecting to confirmation of the Chapter 13 plan. Examples of appropriate grounds follow.

4. Creditor objects to confirmation of Debtor’s plan because it does not provide for the submission of all or such portion of future earnings or other future income of Debtor to the supervision and control of the trustee as is necessary to meet the payment obligations of the plan as required by 11 U.S.C. § 1322(a)(1). More particularly, [include additional facts in support].

And/Or

5. Creditor objects to Debtor’s Chapter 13 plan because it does not provide for full payment of claims entitled to priority under 11 U.S.C. § 507 as required by 11 U.S.C. § 1322(a)(2). In particular, [include specific facts in support].

And/Or

6. Creditor objects to the Chapter 13 plan on the grounds that, while Debtor has classified his claims as permitted by 11 U.S.C. § 1322(b)(2), Debtor has not provided for similar treatment for each claim in a particular class in violation of 11 U.S.C. § 1322(a)(3). More particularly [include specific facts in support]. [Include if applicable: Debtor’s plan discriminates unfairly against one or more of its proposed classes in that [include specific facts in support].]

And/Or

7. Debtor’s schedules reflect nonexempt assets sufficient to pay unsecured creditors approximately [percent] percent of their allowed claims if the bankruptcy estate were liquidated under Chapter 7. Debtor’s plan, which proposed to pay only [percent] percent of allowed unsecured claims, is in violation of 11 U.S.C. § 1325(a)(4), which requires that the
value of the Property, as of the effective date of the plan, to be distributed under the plan on
account of each allowed unsecured claim is in an amount not less than the amount that would
be paid on such claim if the estate of Debtor were to liquidate under Chapter 7.

And/Or

8. Pursuant to 11 U.S.C. § 1325(b), the Court may not approve a Chapter 13 plan
over the objection of a creditor with an allowed unsecured claim unless—

a. the value of the property to be distributed under the plan on account of such
   claim is not less than the amount of such claim; or

b. the plan provides that all of Debtor’s projected disposable income for three
   years beginning on the date the first payment is due under the plan will be
   applied to make payments under the plan.

Creditor is not scheduled to receive the full amount of his allowed claim. Therefore, the pro-
posed Chapter 13 plan cannot be approved because Debtor is proposing to pay less than all of
his disposable income into the plan for the thirty-six months beginning [date]. In particular:

Select as applicable.

a. Debtor’s budget does not include all of Debtor’s current or projected dispos-
   able income. In particular, [include specific facts].

And/Or

b. Debtor’s budget does not reflect all the sources of income that must be con-
   sidered for determining disposable income. In particular, [include specific
   facts].

And/Or
c. Debtor’s expenses are not reasonably necessary for the support or maintenance of Debtor or a dependent of Debtor. In particular, [list specific expenses] are unnecessary.

And/Or

d. The expenses listed by Debtor as being incurred on a monthly basis for the continuation, preservation, and operation of Debtor’s business are excessive in that [list specific expenses] are [excessive/unnecessary/excessive and unnecessary] because [list specific reasons].

Continue with the following if applicable.

9. Creditor objects to confirmation of Debtor’s Chapter 13 plan in that it is not proposed in good faith as specified by 11 U.S.C. § 1325(a)(3). In particular:

Select as applicable.

a. Debtor has filed [number] bankruptcies in the last [number] years; [include other relevant facts].

And/Or

b. Debtor’s petition, schedules, and statement of affairs are vague or inaccurate in that [include supporting facts].

And/Or

c. Debtor’s motivation for filing the instant Chapter 13 case are suspect in that [include supporting facts].

And/Or
d. Debtor’s [schedules [and]/testimony] at the first meeting of creditors reflect a consistent pattern of overspending and spending on items not reasonably necessary for support or maintenance.

And/Or

e. Notwithstanding a substantial income, Debtor is proposing to pay only \( \text{percent} \) percent of unsecured allowed claims.

And/Or

f. Debtor’s budget reflects a surplus even after the proposed plan payments that could, but is not, being utilized to repay creditors, nor has Debtor provided any explanation of this failure.

And/Or

g. It is clear from Debtor’s [schedules [and]/testimony] at the first meeting of creditors that the reason for filing Chapter 13 is to discharge debt that would otherwise not be dischargeable in a Chapter 7 case, to wit \( \text{include specific debts} \). Debtor is seeking to benefit from the “superdischarge” of Chapter 13 without a concomitant benefit to Debtor’s creditors.

And/Or

h. \[ \text{Include any special circumstances that indicate that debtor’s bankruptcy filing was made in bad faith.} \]

Continue with the following if applicable.

10. Creditor objects to Debtor’s proposed Chapter 13 plan because Debtor cannot make all payments under the plan and comply with the plan as required by 11 U.S.C. § 1325(a)(6). This is evidenced by the fact that [Debtor did not commence making the payments proposed by Debtor’s plan within thirty days after the plan was filed as required by 11
U.S.C. § 1326(a)(1)/Debtor has only sporadically made the payments required by Debtor’s plan between the time the first payment was due and the filing of the instant objection/[include other supporting facts as appropriate]].

11. Creditor respectfully requests that the Chapter 13 plan proposed by Debtor be denied and asks for such other relief as may be just.

[Name]
Attorney for [name of client]
State Bar No.:
[E-mail address]
[Address]
[Telephone]
[Teletypewriter]

Include a certificate of service (form 19-1). Send a copy of the objection to Chapter 13 plan to the debtors, debtors’ counsel, the bankruptcy trustee, and all other parties in interest.
Form 35-16

The practitioner should use this form to object to the discharge of the debtor under Chapter 7 of the Bankruptcy Code. See sections 35.34 and 35.35 in this chapter for a discussion of discharge.

Warning: The local rules of the Bankruptcy Courts for the four districts in Texas have specific requirements for the content of the captions of pleadings and orders, and they are all different. The practitioner should consult the local rules of the bankruptcy court for the district in which he intends to file for the specific requirements as to the content of captions. See section 35.1:2 in this chapter.

[Caption for an adversary proceeding. See form 35-3 in this chapter.]

Objection to Discharge of Debtor

[Name of creditor], Creditor, a creditor in the above-styled case, files this Objection to Discharge of Debtor. Creditor states as follows:

1. Creditor is a creditor and a party in interest. [Name of debtor], Debtor, is the debtor in this case and may be served with process at [address, city, state] and by serving its attorney of record, [name of attorney], at [address, city, state]. The Court has jurisdiction over this proceeding pursuant to 28 U.S.C. § 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2).

2. [Insert facts supporting the causes of action.]

Include the following paragraphs 3.–6. if applicable under 11 U.S.C. § 727(a)(2).

3. Under 11 U.S.C. § 727(a)(2), the Court may deny the debtor a discharge if the debtor, with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this title, has transferred, removed, destroyed, mutilated, or concealed property of the debtor or permitted such acts within one year before the date the
petition was filed. Likewise, the Court may deny the debtor a discharge if the debtor permitted such acts against the property of the estate after the date the petition was filed.

4. As set forth above, Debtor transferred, removed, and concealed property of Debtor within one year before the date the petition was filed with intent to hinder, delay, or defraud Creditor. Specifically, before the petition date, Debtor [describe debtor's actions]. These actions were taken with intent to hinder, delay, or defraud Creditor.

5. After the petition was filed, Debtor [transferred, removed, and concealed/continued to transfer, remove, and conceal] property of the estate with the intent to hinder, delay, or defraud creditors and the Chapter 7 trustee.


And/Or

Include the following paragraph if applicable under 11 U.S.C. § 727(a)(3).

7. Under 11 U.S.C. § 727(a)(3), the court may deny Debtor’s discharge if Debtor has concealed, destroyed, mutilated, falsified, or failed to keep or preserve any recorded information, including books, documents, records, and papers from which Debtor’s financial condition or business transactions might be ascertained, unless such act or failure to act was justified under all of the circumstances of the case. Debtor’s discharge should be denied for the reason that it failed to preserve documents and records with regard to [describe specific facts], and Debtor’s failure to do so was not justified under all of the circumstances of the case.

And/Or

Include the following paragraph if applicable under 11 U.S.C. § 727(a)(4).
8. Under 11 U.S.C. § 727(a)(4), the Court may deny Debtor’s discharge if Debtor knowingly and fraudulently, in or in connection with the case, made a false oath or account. On or about [date], Debtor executed schedules and a statement of financial affairs in this case. These documents were executed under penalty of perjury. The schedules and statement of financial affairs were false and incomplete in the following respects: [include specific facts]. Therefore, Debtor’s discharge should be denied under 11 U.S.C. § 727(a)(4).

9. Under 11 U.S.C. § 727(a)(5), the Court may deny Debtor’s discharge if Debtor has failed to explain satisfactorily, before determination of denial of discharge, any loss of assets or deficiency of assets to meet the debtor’s liabilities. As set forth above, Debtor has failed to account for more than $[amount] in funds that it received from [source]. No satisfactory explanation has ever been given for what happened to these funds.

10. Debtor’s discharge should be denied in its entirety.

11. Creditor prays that it be granted judgment that Debtor be denied a discharge pursuant to 11 U.S.C. § 727(a) and for all other relief to which Creditor may be entitled.
Form 35-17

The practitioner should use this form to object to the discharge of debts under Chapter 7 of the Bankruptcy Code. See section 35.35 in this chapter for a list of categories of debts that must be proven to be nondischargeable.

Warning: The local rules of the Bankruptcy Courts for the four districts in Texas have specific requirements for the content of the captions of pleadings and orders, and they are all different. The practitioner should consult the local rules of the bankruptcy court for the district in which he intends to file for the specific requirements as to the content of captions. See section 35.1:2.

[Caption for an adversary proceeding. See form 35-3 in this chapter.]

Objection to Discharge of a Specific Debt

[Name of creditor], Creditor, a creditor in the above-styled case, files this Objection to Discharge of a Specific Debt. Creditor states as follows:

1. Creditor is a creditor and a party in interest. [Name of debtor], Debtor, is the debtor in this case and may be served with process at [address, city, state] and by serving its attorney of record, [name of attorney], at [address, city, state]. The Court has jurisdiction over this proceeding pursuant to 28 U.S.C. § 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2).

2. [Insert facts supporting the causes of action.]

3. Under 11 U.S.C. § 523(a)(2), an individual debtor is not entitled to a discharge from any debt for money, property, or services or an extension, renewal, or refinancing of credit to the extent obtained by false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor’s or insider’s financial condition.
4. The debt incurred with regard to [describe debt] is a debt that is nondischargeable based on false pretenses, a false representation, and/or actual fraud. Debtor represented to Creditor [describe representations]. This representation was false as shown by [describe facts]. Creditor justifiably relied on Debtor’s false representation as shown by [describe facts]. Had Creditor known [describe facts], Creditor would not have [describe actions]. Creditor has been damaged by the justifiable reliance on Debtor’s false representation in the amount of $[amount].

5. Creditor requests that the Court determine that the damages sustained by Creditor in the amount of $[amount] as set forth in paragraphs [paragraph numbers], plus interest and attorney’s fees and such other damages as may be established, be determined to be nondischargeable under 11 U.S.C. § 523(a)(2).

Include the following paragraphs 6.–10. if applicable under 11 U.S.C. § 523(a)(4).


7. [Describe circumstances creating fiduciary relationship] created a fiduciary relationship between the parties. Debtor was required to [describe requirements].

8. Debtor has failed to account for more than $[amount], which he received in the fiduciary relationship. As a result of such failure, Creditor was damaged in the amount of at least $[amount] as set forth in paragraphs [paragraph numbers].

9. Creditor’s losses arise from Debtor’s fraud or defalcation in a fiduciary capacity. Debtor committed fraud by [describe actions]. [Include if applicable: Debtor also committed defalcation by receiving funds in a fiduciary capacity and failing to satisfactorily account for such funds.]
10. Creditor requests that the Court determine that the damages sustained by Creditor on both prepetition and postpetition actions in the amount of $[amount] as set forth in paragraphs [paragraph numbers], plus interest and attorney’s fees and such other damages as may be established, be determined to be nondischargeable under 11 U.S.C. § 523(a)(4).

And/Or

Include the following paragraphs 11.—13. if applicable under 11 U.S.C. § 523(a)(6).

11. Under 11 U.S.C. § 523(a)(6), a debtor may not receive a discharge from a debt for willful and malicious injury by the debtor to another entity or the property of another entity. Conversion falls within 11 U.S.C. § 523(a)(6).

12. Before filing the bankruptcy petition, Debtor converted more than $[amount] in proceeds received from [source]. Debtor’s actions were willful because Debtor intentionally failed to remit those proceeds to Creditor. Debtor’s actions were malicious because Debtor specifically intended to convert the funds to Debtor’s own use without remitting the funds to Creditor and knew that such action would necessarily result in harm to Creditor.

13. Creditor requests that the Court determine that the damages sustained by Creditor in the amount of $[amount] as set forth in paragraphs [paragraph numbers], plus interest and attorney’s fees and such other damages as may be established, be determined to be nondischargeable under 11 U.S.C. § 523(a)(6).

Continue with the following.

14. Creditor prays that the Court determine that the debts described above are nondischargeable pursuant to 11 U.S.C. § 523(a) and for all other relief to which Creditor may be entitled.
Objection to Discharge of a Specific Debt

[Name]
Attorney for [name of client]
State Bar No.:
[E-mail address]
[Address]
[Telephone]
[Telecopier]

Include a certificate of service (form 19-1).
Form 35-18

The form and time requirements for negative notice vary, and the practitioner should check the local rules before filing a pleading that requires inclusion of negative notice. The following are the negative notice provisions that are applicable to most motions and applications from the Local Rules of the Bankruptcy Courts for the Northern, Southern, Eastern, and Western Districts of Texas. Different negative notice language applies to certain specific motions and applications such as motions for relief from the automatic stay. The negative notice language provisions of the local rules are changed from time to time, so consult the courts’ Web sites for the current form. See section 35.1:2 in this chapter for the individual Web sites for each district. This negative notice language should be placed on the motion or application immediately below the caption and title of the motion or application, unless otherwise specified by local rules.

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Negative Notice Language

Select the following for the Northern District of Texas (Local Rule 9007-1(c)).

Select one of the following.

NO HEARING WILL BE CONDUCTED HEREON UNLESS A WRITTEN RESPONSE IS FILED WITH THE CLERK OF THE UNITED STATES BANKRUPTCY COURT AT (ADDRESS OF CLERK’S OFFICE) BEFORE CLOSE OF BUSINESS ON (MONTH) (DAY), (YEAR), WHICH IS 24 DAYS FROM THE DATE OF SERVICE HEREOF.

Or

(wher sales free and clear are involved)

HEARING DATE ON SUCH SALE IS SET FOR (MONTH, DAY, YEAR), WHICH IS 24 DAYS FROM THE DATE OF SERVICE HEREOF. NO OBJECTION TO SUCH SALE WILL BE CONSIDERED UNLESS A WRITTEN RESPONSE IS FILED WITH THE CLERK OF THE UNITED STATES BANKRUPTCY COURT AT (ADDRESS OF CLERK’S OFFICE) AT LEAST 4 DAYS IN ADVANCE OF SUCH HEARING DATE.
NO HEARING WILL BE CONDUCTED ON THIS OBJECTION TO CLAIM UNLESS A WRITTEN RESPONSE IS FILED WITH THE CLERK OF THE UNITED STATES BANKRUPTCY COURT AT (ADDRESS OF CLERK’S OFFICE) BEFORE CLOSE OF BUSINESS ON (MONTH, DAY, YEAR), WHICH IS 33 DAYS FROM THE DATE OF SERVICE HEREOF.

ANY RESPONSE MUST BE IN WRITING AND FILED WITH THE CLERK, AND A COPY SHALL BE SERVED UPON COUNSEL FOR THE MOVING PARTY PRIOR TO THE DATE AND TIME SET FORTH HEREIN. IF A RESPONSE IS FILED A HEARING MAY BE HELD WITH NOTICE ONLY TO THE OBJECTING PARTY.

IF NO HEARING ON SUCH NOTICE OR MOTION IS TIMELY REQUESTED, THE RELIEF REQUESTED SHALL BE DEEMED TO BE UNOPPOSED, AND THE COURT MAY ENTER AN ORDER GRANTING THE RELIEF SOUGHT OR THE NOTICED ACTION MAY BE TAKEN.

This motion seeks an order that may adversely affect you. If you oppose the motion, you should immediately contact the moving party to resolve the dispute. If you and the moving party cannot agree, you must file a response and send a copy to the moving party. You must file and serve your response within 21 days of the date this was served on you. Your response must state why the motion should not be granted. If you do not file a timely response, the relief may be granted without further notice to you. If you oppose the motion and have not reached an agreement, you must attend the hearing. Unless the
parties agree otherwise, the court may consider evidence at the hearing and may decide the motion at the hearing.

Represented parties should act through their attorney.

Select the following for the Eastern District of Texas (Local Rule 9007(a)).

**NO HEARING WILL BE CONDUCTED ON THIS MOTION/OBJECTION/APPLICATION UNLESS A WRITTEN OBJECTION IS FILED WITH THE CLERK OF THE UNITED STATES BANKRUPTCY COURT AND SERVED UPON THE PARTY FILING THIS PLEADING WITHIN TWENTY-ONE (21) DAYS FROM DATE OF SERVICE UNLESS THE COURT SHORTENS OR EXTENDS THE TIME FOR FILING SUCH OBJECTION. IF NO OBJECTION IS TIMELY SERVED AND FILED, THIS PLEADING SHALL BE DEEMED TO BE UNOPPOSED, AND THE COURT MAY ENTER AN ORDER GRANTING THE RELIEF SOUGHT. IF AN OBJECTION IS FILED AND SERVED IN A TIMELY MANNER, THE COURT WILL THEREAFTER SET A HEARING. IF YOU FAIL TO APPEAR AT THE HEARING, YOUR OBJECTION MAY BE STRICKEN. THE COURT RESERVES THE RIGHT TO SET A HEARING ON ANY MATTER.**

Select the following for the Western District of Texas (Local Rule 9014(a)).

**THIS PLEADING REQUESTS RELIEF THAT MAY BE ADVERSE TO YOUR INTERESTS.**

**IF NO TIMELY RESPONSE IS FILED WITHIN TWENTY (20) DAYS FROM THE DATE OF SERVICE, THE RELIEF REQUESTED HEREIN MAY BE GRANTED WITHOUT A HEARING BEING HELD.**

**A TIMELY RESPONSE IS NECESSARY FOR A HEARING TO BE HELD.**
Form 35-19

**Warning:** The local rules of the Bankruptcy Courts for the four districts in Texas have specific requirements for the content of the captions of pleadings and orders, and they are all different. The practitioner should consult the local rules of the bankruptcy court for the district in which he intends to file for the specific requirements as to the content of captions. See section 35.1:2 in this chapter.

[Caption. See form 35-3 in this chapter.]

**Motion to Compel Assumption or Rejection of Lease and Payment of Administrative Claim**

Insert negative notice as required under local rules. See form 35-18.

1. **Parties.** [Name of creditor], Creditor, files this Motion to Compel Assumption or Rejection of Leases and Payment of Administrative Claim.


3. **Facts.**

   a. Debtor filed for protection under Chapter [11/13] of the Bankruptcy Code on [date]. The first meeting of creditors was held on or about [date]. [Include if applicable: Debtor filed a Chapter 13 plan on or about [date].]

   b. Debtor entered into a lease with Creditor (the “Lease”) on or about [date]. The effective date of the Lease was [date]. The Lease was a [term of lease, e.g., twelve-month] lease for [list lease items]. Debtor was to make monthly payments pursuant to the Lease in the sum of $[amount] per month. The Lease is attached as Exhibit [exhibit number/letter].
c. At the time this case was filed, Debtor was [number] month[s] in arrears or $[amount] (payment plus tax and late charges) in arrears on the Lease. No payments have been received by Creditor since this case was filed on [date], and postpetition arrearages total $[amount].

4. **Grounds.**

a. Section 365(d)(2) of the Bankruptcy Code provides:

   In a case under chapter 9, 11, 12 or 13 of this title, the trustee may assume or reject an executory contract or unexpired lease of residential real property or of personal property of the debtor at any time before the confirmation of a plan but the court, on the request of any party to such contract or lease, may order the trustee to determine within a specified period of time whether to assume or reject such contract or lease.

   Creditor requests that the Court require the Debtor to assume or reject the Lease within [number, e.g., thirty] days of the entry of an order by this Court.

b. Debtor has effectively failed to make at least [number] of the [number] payments due to date. Moreover, the property leased to Debtor by Creditor is equipment that will depreciate in value with the passage of time and development of new technology. To the best of Creditor’s knowledge, Debtor is still using the property, and the depreciation of the property is accelerated by use.

5. **Assumption of Lease.** Section 365(b)(1) of the Bankruptcy Code provides that, if there has been a default in an executory contract or unexpired lease, the contract or lease may not be assumed unless the trustee, at the time of the assumption, cures or provides adequate assurance that the trustee will promptly cure such default and provides adequate assurance of
future performance under the contract or lease. Creditor therefore requests Debtor, should [he/she] elect to assume the Lease with Creditor, tender payment of the arrearages in full within [number, e.g., thirty] days of Debtor’s filing to assume the Lease, including the attorney’s fees incurred by Creditor. Should Debtor fail to cure the arrearages as required by 11 U.S.C. § 365(b)(1), Creditor requests that the order entered in response to this motion include a provision that Debtor surrender Creditor’s equipment at a place to be designated by Creditor.

6. Assurances of Future Performance. Creditor also requests, pursuant to 11 U.S.C. § 365(b)(1), that should Debtor be required, in any motion to assume the Lease, to provide adequate assurance of future performance, that such adequate assurances may be by way of Debtor providing a request for automatic bank drafts to Creditor or some similar evidence.

7. Administrative Expenses. At least [number] lease payments have accrued postpetition and at least [number] additional payments will come due by the time this matter is heard. Even assuming that Debtor elects to reject the Lease with Creditor, Creditor requests that the Court find that the payments that have become due postpetition and before rejection are administrative expenses as defined in 11 U.S.C. § 503(b)(1) and require Debtor to pay the same within [number, e.g., thirty] days of a motion rejecting the Lease as provided in 11 U.S.C. § 503(a).

8. Prayer. Creditor prays that—

a. this Court enter an order compelling Debtor to assume or reject the Lease within [number, e.g., thirty] days of the entry of the order;

b. the order require Debtor, should Debtor file a motion to assume the Lease, to cure all arrearages, including late charges and attorney’s fees, within [number, e.g., thirty] days after filing the motion or to surrender the property within the same period;
c. if Debtor elects to reject the Lease, this Court find that all postpetition payments that came due prior to the entry of the Order rejecting the Lease be deemed to be administrative expenses and paid within [number, e.g., thirty] days of the entry of the Court’s order; and

d. Creditor be granted all other relief to which it may be entitled.

Dated: ________________________________.

[Name]
Attorney for [name of client]
State Bar No.:
[E-mail address]
[Address]
[Telephone]
[Telecopier]

Attach exhibit(s). Include a certificate of service (form 19-1). Send a copy of the motion to compel assumption or rejection of lease and payment of administrative claim to the debtors, debtors’ counsel, the bankruptcy trustee, and all other parties in interest.
Order Granting Motion to Compel Assumption or Rejection of Lease

At the hearing on Creditor [name of creditor]’s Motion to Compel Assumption or Rejection of Lease and Payment of Administrative Claim, the Court, having considered the Motion, the arguments of counsel, and the papers on file in this case, finds that it should be granted.

It is therefore ORDERED that—

1. Debtor, [name of debtor], shall assume or reject the lease dated [date of lease] (the “Lease”) within [number, e.g., thirty] days from the date of entry of this Order;

2. Should Debtor file a motion to assume the Lease, Debtor shall—

   a. cure all arrearages, including late charges and attorney’s fees, within [number, e.g., thirty] days after filing the motion or surrender the leased property within the same period; and
b. provide adequate assurance of future performance in the form of [select from the following: certified funds/a letter of credit/a third-party guarantee acceptable to Creditor/an automatic bank draft] or some similar protection; and

3. Should Debtor elect to reject the Lease, all postpetition payments that came due prior to the entry of the Order rejecting the Lease shall be deemed to be administrative expenses and shall be paid by Debtor within [number, e.g., thirty] days of the entry of the Order.
Form 35-21
Reclamation Demand

[ date ]

Via [ method of delivery ]
[ Debtor’s Counsel ]

[ and/or ]

Via [ method of delivery ]
Debtor

[ Include claims agent if one exists ]

Re: In re [ name of debtor ], Case No. [ number ], in the United States Bankruptcy Court for the [ Northern/Southern/Western/Eastern ] District of Texas, [ city ] Division

NOTICE AND DEMAND TO RECLAIM GOODS

Dear Debtor’s Representative:

Our firm represents [ name of vendor ] (“Vendor”) regarding its reclamation demand against [ name of debtor ] (“Debtor”). Vendor demands that goods delivered to Debtor in the amount of $ [ amount ] (the “Reclaimed Goods”) be returned immediately to Vendor. A copy of the invoice and delivery information for the Reclaimed Goods is enclosed as Exhibit [ number / letter ].

Pursuant to the provisions of sections 546(c)(1) of Chapter 11 of the United States Code (“Bankruptcy Code”), section 2-702(2) of the Uniform Commercial Code, and any other applicable law, Vendor files this demand to reclaim the goods shipped by Vendor to Debtor and received by Debtor within the forty-five-day period immediately preceding the filing of Debtor’s bankruptcy petition as provided under section 546 of the Bankruptcy Code.
Vendor is entitled to and does reclaim the Reclaimed Goods shipped to Debtor. The quantity and value of the Reclaimed Goods is set forth in the enclosed Exhibit [number/letter] and represents goods shipped by Vendor and received by Debtor. The applicable shipping terms, the date of delivery to, and/or acceptance by Debtor of the Reclaimed Goods and other supporting documentation is set forth in Exhibit [number/letter].

Vendor demands that Debtor segregate and identify the Reclaimed Goods and that Debtor refrain from using the Reclaimed Goods pending the return of the Reclaimed Goods to Vendor or until this matter has been otherwise resolved. If Debtor’s records of the property received from Vendor during the applicable periods are different, please promptly provide an accounting to us within ten calendar days of the date of receipt of the letter. Otherwise, we will assume that the Reclaimed Goods were received by Debtor during the applicable periods and that all of the Reclaimed Goods are in Debtor’s possession and have been identified and segregated.

Nothing herein shall constitute a waiver of rights by Vendor, and Vendor specifically reserves all rights and remedies, including but not limited to its right to (1) assert secured claims, (2) receive payment of goods delivered in the ordinary course of Debtor’s business, (3) assert administrative expense claims under section 503(b)(9) of the Bankruptcy Code, and (4) assert additional claims pursuant to any applicable law.

Please contact me with any questions.

Very truly yours,

[Name]
Attorney for [name of vendor]

Enclosure
cc:  Via [method of delivery]
     Counsel for Unsecured Creditor’s Committee

cc:  Via [method of delivery]
     US Trustee
Form 35-22

Warning: The local rules of the bankruptcy courts for the four districts in Texas have specific requirements for the content of the captions of pleadings and orders, and they are all different. The practitioner should consult the local rules of the bankruptcy court for the district in which he intends to file for the specific requirements as to the content of captions. See section 35.1:2 in this chapter.

Motion of [name of creditor] for Allowance of Administrative Expense Claim under 11 U.S.C. § 503(b)(9)

[Name of creditor] (“Claimant”) files its Motion of [name of creditor] for Allowance of Administrative Expense Claim under 11 U.S.C. § 503(b)(9) (the “Motion”) and shows:

Summary of Relief Requested

1. Claimant seeks entry of an order allowing Claimant an administrative expense claim in the amount of $[amount] under section 503(b)(9) of the Bankruptcy Code for goods received by the debtor within twenty days prior to the petition date.

Background

2. On [date] (the “Petition Date”), [name of debtor] (the “Debtor”) filed a voluntary petition for relief under Chapter 11 of title 11 of the United States Code (the “Bankruptcy Code”) in the United States Bankruptcy Court for the [Northern/Southern/Western/Eastern] District of Texas, [city] Division (the “Bankruptcy Court”).

3. Debtor is operating its businesses and managing its affairs as a debtor and debtor in possession under sections 1107(a) and 1108 of the Bankruptcy Code.

4. Claimant was a supplier of [describe goods] to Debtor prior to Petition Date.
5. Within twenty days before the petition date, Debtor received goods, as identified in the attached Exhibit [number/letter], that were sold to Debtor by the claimant in the ordinary course of Debtor’s business (the “Goods”). The value of the Goods was $[amount].

**Argument and Authorities**

1. Section 503 of the Bankruptcy Code provides for the allowance of administrative expense claims. Section 503(a) provides that an entity may file a request for the payment of an administrative expense claim. Administrative expense claims are granted priority of payment pursuant to section 507 of the Bankruptcy Code. Further, in a bankruptcy case under Chapter 11, a plan of reorganization may not be confirmed without payment of allowed administrative expense claims. 11 U.S.C. § 1129(a)(9)(A). The term “administrative expense” is not defined in the Bankruptcy Code. Section 503(b) provides a nonexclusive list of categories of administrative expense claims. In 2005, Congress added three new categories of claims entitled to administrative expense priority under section 503(b) of the Bankruptcy Code. Among them, section 503(b)(9) was added. In pertinent part, section 503(b)(9) provides that:

   (b) After notice and a hearing, there shall be allowed administrative expenses, other than claims allowed under section 502(f) of this title, including—

   ... 

   (9) the value of any goods received by the debtor within 20 days before the date of commencement of a case under this title in which the goods have been sold to the debtor in the ordinary course of such debtor’s business.

2. Claimant sold the Goods to Debtor in the ordinary course of Debtor’s business, and Debtor received the Good within twenty days before the petition date. The value of the Goods sold by Claimant to Debtor was $[amount]. Under section 503(b)(9) of the Bankruptcy Code, Claimant is entitled to an administrative expense claim in the amount of $[amount]. On allowance, Claimant requests the Court to order Debtor to immediately pay Claimant’s administrative expense claim.

3. Claimant expressly reserves its right to assert additional claims against Debtor and to amend, modify, or supplement this request.

WHEREFORE, Claimant requests that the Court enter an Order allowing Claimant an administrative expense claim under section 503(b)(9) of the Bankruptcy Code in the amount of $[amount], requiring payment of the administrative expense claim immediately, and granting such other relief as the Court deems just and proper.

Date: [date].

Respectfully submitted,

[Name]
Attorney for [name of client]
State Bar No.: [E-mail address]
[Address]
[Telephone]
[Telexcopier]
Order Granting Motion of [name of creditor] for Allowance of Administrative Expense Claim under 11 U.S.C. § 503(b)(9)

The Court considered the Motion of [name of creditor] (“Claimant”) for Allowance of Administrative Expense Claim under 11 U.S.C. § 503(b)(9) (the “Motion”) and finds that this Court has jurisdiction over this matter, that this matter is a core proceeding, and that notice of the Motion was sufficient. This Court, after determining the legal and factual bases set forth in the Motion, hereby finds good cause for granting the relief requested in the Motion exists and hereby GRANTS the Motion.

IT IS THEREFORE ORDERED that the Motion is GRANTED.

IT IS FURTHER ORDERED that Claimant is allowed an administrative expense claim under 11 U.S.C. § 503(b)(9) in the amount of $[amount] (the “Administrative Claim”) and further ORDERED that the Administrative Claim shall be paid by [name of debtor] (“Debtor”) on entry of this Order.

Dated: [date].

UNITED STATES BANKRUPTCY JUDGE
Form 35-24

Warning: The local rules of the bankruptcy courts for the four districts in Texas have specific requirements for the content of the captions of pleadings and orders, and they are all different. The practitioner should consult the local rules of the bankruptcy court for the district in which he intends to file for the specific requirements as to the content of captions. See section 35.1:2 in this chapter.

[Caption. See form 35-3 in this chapter.]

Notice of Appearance and Request for Service of Papers

PLEASE TAKE NOTICE of the appearance of [name of attorney] as counsel for [name of creditor], a creditor in this bankruptcy case who requests notice of all matters and pleadings in this case. Notice should be sent to [name of counsel, address, city, state].

Date: [date]. Respectfully submitted,

[Name]
Attorney for [name of client]
State Bar No.: [E-mail address]
[Address]
[Telephone]
[Telecopier]
Appendix

New Justice Court Rules and Rules Related to Expedited Trials

By Michael J. Scott

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1. This was originally presented at the 11th Annual Advanced Collections and Creditor’s Rights Course in Dallas, May 2–3, 2013.
New Justice Court Rules and Rules Related to Expedited Trials

A. A Brief Orientation

The 82nd Texas legislative session resulted in a variety of statutory mandates to the Supreme Court of Texas for the formulation of new rules and the restructuring of the Texas court system as it relates to the justice and small claims courts. This tour is intended to highlight the key features of each of the new rules. The text of the rule will be presented in parallel with specific highlighted points.

B. Dismissal for Baseless Causes of Action

Rule 91a, Dismissal of Baseless Causes of Action, came about as the result of an Act of May 25, 2011, 82nd Leg., R.S., ch. 203, §§ 1.01, 2.01 (H.B. 274). In section 22.004(g) of the Government Code, the legislature instructed the Supreme Court of Texas to:

[A]dopt rules to provide for the dismissal of causes of action that have no basis in law or fact on motion and without evidence. The rules shall provide that the motion to dismiss shall be granted or denied within 45 days of the filing of the motion to dismiss. The rules shall not apply to actions under the Family Code.

Further section 30.021 provided for the award of attorney’s fees, stating:

In a civil proceeding, on a trial courts’ granting or denial, in whole or in part, of a motion to dismiss filed under the rules adopted by the supreme court under Section 22.004(g), Government Code, the court shall award costs and reasonable and necessary attorneys’ fees to the prevailing party. This section does not apply to actions by or against the state, other governmental entities, or public officials acting in their official capacity or under color of law.

C. Expedited Actions and Related Rule Changes

Rule 169, Expedited Actions, came about as the result of an Act of May 25, 2011, 82nd Leg., R.S., ch. 203, §§ 1.01, 2.01 (H.B. 274). In section 22.004(h) of the Government Code, the legislature instructed the Supreme Court of Texas to:

[A]dopt rules to promote the prompt, efficient, and cost-effective resolution of civil actions. The rules shall apply to civil actions in district courts, county courts at law, and statutory probate courts in which the amount in controversy, inclusive of all claims for damages of any kind, whether actual or exemplary, a penalty, attorneys’ fees, expenses, costs, interest, or any other type of damage of any kind, does not exceed $100,000. The rules shall address the need for lowering discovery costs in these actions and the procedure for ensuring that these actions will be expedited in the civil justice system.

The Task Force appointed by the Supreme Court engaged in substantial debate as to whether the Expedited Civil Actions rule was to be elective or mandatory, ultimately resulting in two independent recommendations. Those advocating a voluntary system believed that significant opportunity existed to control both trial costs (smaller juries) and appeal cost (through limitations and waivers). There was, however, a concern that the system would not be utilized, thereby defeating the purpose of the statute. Ultimately, the Supreme Court adopted a mandatory approach. Texas Rules of Civil Procedure rules 47 and 190.2 were revised to be consistent with the Expedited Civil Actions Rule, with rule 47 expressly requiring the plaintiff to plead into the requirements of the rule, or describe relief that fell outside the rule.

D. Level 1 Discovery Control Plan

Changes to rule 190.2 (Level 1 Discovery Control Plan) were not directly mandated by the legislature, but arose out of the challenges associated with the implementation of the Expedited Actions rule. The Supreme Court had observed that the Level 1 Discovery Control Plan called for by rule 190.2 was (1) little used and (2) allowed for a certain degree of discovery abuse by the parties (there is no limit to requests for production of admissions). As such, the Court saw the rule as failing to fulfill its intended purpose. This, combined with the need to have some form of discovery limitation which would promote the objectives of the Expedited Actions rule, resulted in a modification to rule 190.2. A
key feature of rule 190.2 is the inability of the parties or the court to relax the yoke of restraint imposed by the rule.

E. The Justice Court Rules

The new Justice Court Rules came about as the result of an Act of June 29, 2011, 82nd Leg., 1st C.S., ch. 3, §§ 5.02, 5.07 (H.B. 79). As of the writing of this “tour,” the justices of the peace oversee two distinct court systems, mandated by the Government Code. Chapter 27 pertains to Justice Courts and chapter 28 pertains to Small Claims Courts. As of May 1, 2013, the Small Claims Courts are dissolved and those cases are effectively transferred to the Justice Courts. Specifically, the legislature instructed the Supreme Court to handle small claim matters in Justice Court (Tex. Gov’t Code § 27.060) and to promulgate rules to “define cases that constitute small claims cases” (H.B. 79, § 5.06) so as to ensure “the fair, expeditious, and inexpensive resolution” of these cases (Tex. Gov’t Code § 27.060(a)).

The legislation also required the Supreme Court to provide specific procedures for an action by:

(1) an assignee of a claim or other person seeking to bring an action on an assigned claim;
(2) a person primarily engaged in the business of lending money at interest; or
(3) a collection agency or collection agent.

These cases are collectively described as Debt Claim Cases and are ultimately the object of two specific rules.

Finally, the legislature wanted these new rules to be understandable to a lay person. To this end, the statute provides:

The rules adopted by the supreme court may not:

(1) require that a party in a case be represented by an attorney;
(2) be so complex that a reasonable person without legal training would have difficulty understanding or applying the rules; or
(3) require that discovery rules adopted under the Texas Rules of Civil Procedure or the Texas Rules of Evidence be applied except to the extent the justice of the peace hearing the case determines that the rules must be followed to ensure that the proceeding is fair to all parties.

In essence, the Supreme Court was to write an entirely new set of rules of civil procedure . . . but keep it simple.
# RULE 91a. DISMISSAL OF BASELESS CAUSES OF ACTION

**Effective Date:** March 1, 2013  
**Applies to:** Pending Cases

<table>
<thead>
<tr>
<th>Text of Rule of Civil Procedure</th>
<th>Summary of Rule Elements</th>
</tr>
</thead>
</table>
| 91a.1 Motion and Grounds.  
Except in a case brought under the Family Code or a case governed by Chapter 14 of the Texas Civil Practice and Remedies Code, a party may move to dismiss a cause of action on the grounds that it has no basis in law or fact. A cause of action has no basis in law if the allegations, taken as true, together with inferences reasonably drawn from them do not entitle the claimant to the relief sought. A cause of action has no basis in fact if no reasonable person could believe the facts pleaded. | **The Rule Does Not Apply To**  
- Family Code Cases  
- Inmate Litigation  

**Grounds for Dismissal**  
- No basis in Law - the allegations, together with inferences reasonably drawn from them do not entitle the claimant to the relief sought  
- No basis in Facts - no reasonable person could believe the facts pled |

| 91a.2 Contents of Motion.  
A motion to dismiss must state that it is made pursuant to this rule, must identify each cause of action to which it is addressed, and must state specifically the reasons the cause of action has no basis in law, no basis in fact, or both. | **Motion Must State**  
- It is made pursuant to TRCP 91a  
- Each cause of action it addresses  
- The reasons the cause of action has no basis in law, no basis in fact, or both |

| 91a.3 Time for Motion and Ruling.  
A motion to dismiss must be:  
(a) filed within 60 days after the first pleading containing the challenged cause of action is served on the movant;  
(b) filed at least 21 days before the motion is heard; and  
(c) granted or denied within 45 days after the motion is filed. | **Timing of Motion**  
- Filed within 60 days of when the cause of action was first served  
- Filed 21 days before the motion is heard  

**Court Ruling**  
- Must be determined within 45 days after motion is filed |

| 91a.4 Time for Response.  
Any response to the motion must be filed no later than 7 days before the date of the hearing. | **Response**  
- Filed 7 days before the motion is heard  
- Not required |

| 91a.5 Effect of Nonsuit or Amendment; Withdrawal of Motion.  
(a) The court may not rule on a motion to dismiss if, at least 7 days before the date of the hearing, the respondent files a nonsuit of the challenged cause of action, or the movant files a withdrawal of the motion. | **Court May Not Rule on Motion to Dismiss**  
- If claimant nonsuits the challenged cause of action 7 days before the motion is heard  
- If Movant files a withdrawal of the motion |
<table>
<thead>
<tr>
<th>Text of Rule of Civil Procedure</th>
<th>Summary of Rule Elements</th>
</tr>
</thead>
</table>
| (b) If the respondent amends the challenged cause of action at least 7 days before the date of the hearing, the movant may, before the date of the hearing, file a withdrawal of the motion or an amended motion directed to the amended cause of action.  
(c) Except by agreement of the parties, the court must rule on a motion unless it has been withdrawn or the cause of action has been nonsuited in accordance with (a) or (b). In ruling on the motion, the court must not consider a nonsuit or amendment not filed as permitted by paragraphs (a) or (b).  
(d) An amended motion filed in accordance with (b) restarts the time periods in this rule. | **Amending the Challenged Cause**  
• Claimant may amend a challenged cause up to 7 days before the motion is heard  
• In the event of an amendment, Movant may withdraw or amend the motion before the date of hearing  
**Court Must Rule**  
• The Court is required to rule on a Motion unless:  
  – The Challenged Cause of Action is nonsuited  
  – The Motion to Dismiss is withdrawn  
**Effect of Amended Motion**  
• An Amended Motion to Dismiss filed in response to an amended cause of action restarts the time periods prescribed by the rule |

91a.6 Hearing; No Evidence Considered.  
Each party is entitled to at least 14 days’ notice of the hearing on the motion to dismiss. The court may, but is not required to, conduct an oral hearing on the motion. Except as required by 91a.7, the court may not consider evidence in ruling on the motion and must decide the motion based solely on the pleading of the cause of action, together with any pleading exhibits permitted by Rule 59.  
**Hearing**  
• Parties entitled to 14 days’ notice of hearing  
• May be by Submission  
**Evidence**  
• Court may not consider evidence; Motion decided based solely on the pleadings  
• Court may consider evidence for purposes of awarding attorney’s fees under Rule 91a.7 |

91a.7 Award of Costs and Attorney Fees Required.  
Except in an action by or against a governmental entity or a public official acting in his or her official capacity or under color of law, the court must award the prevailing party on the motion all costs and reasonable and necessary attorney fees incurred with respect to the challenged cause of action in the trial court. The court must consider evidence regarding costs and fees in determining the award.  
**Mandatory Award of Cost and Attorney Fees**  
• Prevailing party entitled to recover costs and fees incurred  
• Governmental entities and public officials are exempt
Comment to Rule 91a

Rule 91a is a new rule implementing section 22.004(g) of the Texas Government Code, which was added in 2011 and calls for rules to provide for the dismissal of causes of action that have no basis in law or fact on motion and without evidence. A motion to dismiss filed under this rule must be ruled on by the court within 45 days unless the motion, pleading, or cause of action is withdrawn, amended, or nonsuited as specified in 91a.5. If an amended motion is filed in response to an amended cause of action in accordance with 91a.5(b), the court must rule on the motion within 45 days of the filing of the amended motion and the respondent must be given an opportunity to respond to the amended motion. The term “hearing” in the rule includes both submission and oral hearing. Attorney fees awarded under 91a.7 are limited to those associated with challenged cause of action, including fees for preparing or responding to the motion to dismiss.
**RULE 169. EXPEDITED ACTIONS**

**Effective Date:** March 1, 2013

**Applies to:** Cases Filed After Effective Date

<table>
<thead>
<tr>
<th>Text of Rule of Civil Procedure</th>
<th>Summary of Rule Elements</th>
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<tbody>
<tr>
<td><strong>RULE 47. CLAIMS FOR RELIEF</strong></td>
<td><strong>Comment to Rule 47</strong></td>
</tr>
<tr>
<td>(a) An original pleading which sets forth a claim for relief, whether an original petition, counterclaim, cross-claim, or third party claim, shall contain (a) a short statement of the cause of action sufficient to give fair notice of the claim involved; (b) a statement that the damages sought are within the jurisdictional limits of the court; (c) except in suits governed by the Family Code, a statement that the party seeks: (1) only monetary relief of $100,000 or less, including damages of any kind, penalties, costs, expenses, pre-judgment interest, and attorney fees; or (2) monetary relief of $100,000 or less and non-monetary relief; or (3) monetary relief over $100,000 but not more than $200,000; or (4) monetary relief over $200,000 but not more than $1,000,000; or (5) monetary relief over $1,000,000; and (d) a demand for judgment for all the other relief to which the party deems himself entitled. Relief in the alternative or of several different types may be demanded; provided, further, that upon special exception the court shall require the pleader to amend so as to specify the maximum amount claimed. A party that fails to comply with (c) may not conduct discovery until the party's pleading is amended to comply.</td>
<td>Rule 47 is amended to require a more specific statement of the relief sought by a party. The amendment requires parties to plead into or out of the expedited actions process governed by Rule 169. The further specificity in paragraphs (c)(2)–(5) is to provide information regarding the nature of cases filed and does not affect a party’s substantive rights.</td>
</tr>
</tbody>
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<thead>
<tr>
<th><strong>RULE 169. EXPEDITED ACTIONS</strong></th>
<th><strong>Pleading Requirements</strong></th>
</tr>
</thead>
</table>
| (a) Application. | • All claimants affirmatively plead that they seek only monetary relief
• Aggregate relief does not exceed $100,000, including:
  – damages of any kind
  – penalties |
<table>
<thead>
<tr>
<th>Text of Rule of Civil Procedure</th>
<th>Summary of Rule Elements</th>
</tr>
</thead>
<tbody>
<tr>
<td>(2) The expedited actions process does not apply to a suit in which a party has filed a claim governed by the Family Code, the Property Code, the Tax Code, or Chapter 74 of the Civil Practice &amp; Remedies Code.</td>
<td>- costs</td>
</tr>
<tr>
<td></td>
<td>- expenses</td>
</tr>
<tr>
<td></td>
<td>- pre-judgment interest, and</td>
</tr>
<tr>
<td></td>
<td>- attorney fees.</td>
</tr>
<tr>
<td><strong>The Rule Does Not Apply To</strong></td>
<td></td>
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<tr>
<td>- Family Code Case</td>
<td></td>
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<tr>
<td>- Property Code Case</td>
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<tr>
<td>- Tax Code Case</td>
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<tr>
<td>- Medical Liability Cases</td>
<td></td>
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<tr>
<td>(b) <strong>Recovery.</strong></td>
<td></td>
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<td></td>
<td><strong>Limit on Total Recovery</strong></td>
</tr>
<tr>
<td>In no event may a party who prosecutes a suit under this rule recover a judgment in excess of $100,000, excluding post-judgment interest.</td>
<td>- $100,000</td>
</tr>
<tr>
<td></td>
<td>- Plus Post-Judgment Interest</td>
</tr>
<tr>
<td>(c) <strong>Removal from Process.</strong></td>
<td></td>
</tr>
<tr>
<td>(1) A court must remove a suit from the expedited actions process:</td>
<td><strong>Removal from Process Required</strong></td>
</tr>
<tr>
<td>- (A) on motion and a showing of good cause by any party; or</td>
<td>- On Motion and Showing of Good Cause by any party, or</td>
</tr>
<tr>
<td>- (B) if any claimant, other than a counter-claimant, files a pleading or an amended or supplemental pleading that seeks any relief other than the monetary relief allowed by (a)(1).</td>
<td>- Any claimant amends or supplements pleading to seek relief other than the monetary relief allowed by (a)(1).</td>
</tr>
<tr>
<td></td>
<td>- Claims of counter-claimant and relief sought are not relevant to the issue of removal other than in the context of “Good Cause”</td>
</tr>
<tr>
<td>(2) A pleading, amended pleading, or supplemental pleading that removes a suit from the expedited actions process may not be filed without leave of court unless it is filed before the earlier of 30 days after the discovery period is closed or 30 days before the date set for trial. Leave to amend may be granted only if good cause for filing the pleading outweighs any prejudice to an opposing party.</td>
<td><strong>Pleading Amendments and Supplements that Operate to Remove a Case from Expedited Actions</strong></td>
</tr>
<tr>
<td></td>
<td>- If Timely Filed - removes the case automatically</td>
</tr>
<tr>
<td></td>
<td>- If Not Timely Filed - requires leave of court prior to filing</td>
</tr>
<tr>
<td></td>
<td><strong>Timeliness; the Earlier of:</strong></td>
</tr>
<tr>
<td></td>
<td>- Before 30 days after close of discovery period</td>
</tr>
<tr>
<td></td>
<td>- Before 30 days prior to trial date</td>
</tr>
<tr>
<td></td>
<td><strong>Leave of Court</strong></td>
</tr>
<tr>
<td></td>
<td>- Must show Good Cause for filing outweighs any prejudice to an opposing party</td>
</tr>
<tr>
<td>(3) If a suit is removed from the expedited actions process, the court must reopen discovery under Rule 190.2(c).</td>
<td><strong>Discovery Rules Following Removal</strong></td>
</tr>
<tr>
<td></td>
<td>- Case proceeds under Level 1 Discovery Control Plan, including Level 1 limitations (as revised)</td>
</tr>
<tr>
<td>(d) <strong>Expedited Actions Process.</strong></td>
<td></td>
</tr>
<tr>
<td>(1) Discovery.</td>
<td><strong>Level 1 Discovery Control Plan</strong></td>
</tr>
<tr>
<td>Discovery is governed by Rule 190.2.</td>
<td></td>
</tr>
</tbody>
</table>
### Appendix

#### Justice Courts and Expedited Trials

<table>
<thead>
<tr>
<th>Text of Rule of Civil Procedure</th>
<th>Summary of Rule Elements</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>(2) Trial Setting; Continuances.</strong>&lt;br&gt;On any party’s request, the court must set the case for a trial date that is within 90 days after the discovery period in Rule 190.2(b)(1) ends. The court may continue the case twice, not to exceed a total of 60 days.</td>
<td><strong>Trial Setting</strong>&lt;br&gt;• Rule requires that trial be set if requested by party&lt;br&gt;• Upon request, trial must be set within 90 days after close of discovery period (180 days after the first request for discovery of any kind is served)&lt;br&gt;<strong>Continuances</strong>&lt;br&gt;• Limited to 2 Continuances&lt;br&gt;• Not to exceed 60 days combined</td>
</tr>
<tr>
<td><strong>(3) Time Limits for Trial.</strong>&lt;br&gt;Each side is allowed no more than eight hours to complete jury selection, opening statements, presentation of evidence, examination and crossexamination of witnesses, and closing arguments. On motion and a showing of good cause by any party, the court may extend the time limit to no more than twelve hours per side.&lt;br&gt;  (A) The term “side” has the same definition set out in Rule 233.&lt;br&gt;  (B) Time spent on objections, bench conferences, bills of exception, and challenges for cause to a juror under Rule 228 are not included in the time limit.</td>
<td><strong>Time Limit Is Eight (8) Hours per Side</strong>&lt;br&gt;• The following activities count against the time allotment:&lt;br&gt;  – Jury selection&lt;br&gt;  – Opening statements&lt;br&gt;  – Presentation of evidence&lt;br&gt;  – Examination&lt;br&gt;  – Crossexamination of witnesses, and&lt;br&gt;  – Closing arguments&lt;br&gt;<strong>Time Limit May Be Extended</strong>&lt;br&gt;• On Motion and showing of good cause&lt;br&gt;• Cannot be extended to more than 12 hours per side&lt;br&gt;<strong>Housekeeping Matters</strong>&lt;br&gt;• “Side” defined&lt;br&gt;  • The following activities do not count against the time allotment:&lt;br&gt;    – Objections&lt;br&gt;    – Bench conferences&lt;br&gt;    – Bills of exception, and&lt;br&gt;    – Challenges for cause to a juror</td>
</tr>
<tr>
<td><strong>(4) Alternative Dispute Resolution.</strong>&lt;br&gt;  (A) Unless the parties have agreed not to engage in alternative dispute resolution, the court may refer the case to an alternative dispute resolution procedure once, and the procedure must:&lt;br&gt;    (i) not exceed a half-day in duration, excluding scheduling time;&lt;br&gt;    (ii) not exceed a total cost of twice the amount of applicable civil filing fees; and&lt;br&gt;</td>
<td><strong>Alternative Dispute Resolution Allowed</strong>&lt;br&gt;• Court may refer the case to ADR only once&lt;br&gt;<strong>ADR Requirements/Limitations</strong>&lt;br&gt;• Time not to exceed one-half day&lt;br&gt;• Cost not to exceed twice the civil filing fee&lt;br&gt;• Completed at least 60 days prior to initial trial setting</td>
</tr>
</tbody>
</table>
Comments to 2013 change:

1. Rule 169 is a new rule implementing section 22.004(h) of the Texas Government Code, which was added in 2011 and calls for rules to promote the prompt, efficient, and cost effective resolution of civil actions when the amount in controversy does not exceed $100,000.

2. The expedited actions process created by Rule 169 is mandatory; any suit that falls within the definition of 169(a)(1) is subject to the provisions of the rule.

3. In determining whether there is good cause to remove the case from the process or extend the time limit for trial, the court should consider factors such as whether the damages sought by multiple claimants against the same defendant exceed in the aggregate the relief allowed under 169(a)(1), whether a defendant has filed a compulsory counterclaim in good faith that seeks relief other than that allowed under 169(a)(1), the number of parties and witnesses, the complexity of the legal and factual issues, and whether an interpreter is necessary.

4. Rule 169(b) specifies that a party who prosecutes a suit under this rule cannot recover a judgment in excess of $100,000. Thus, the rule in *Greenhalgh v. Service Lloyds Insurance Co.*, 787 S.W.2d 938 (Tex. 1990), does not apply if a jury awards damages in excess of $100,000 to the party. **The limitation of 169(b) does not apply to a counter-claimant that seeks relief other than that allowed under 169(a)(1).**

5. The discovery limitations for expedited actions are set out in Rule 190.2, which is also amended to implement section 22.004(h) of the Texas Government Code.
### RULE 190.2 DISCOVERY CONTROL PLAN

**Expedited Actions and Divorces Involving $50,000 or Less (Level 1)**

**Effective Date:** March 1, 2013

**Applies to:** Cases Filed On or After Effective Date

<table>
<thead>
<tr>
<th>Text of Rule of Civil Procedure</th>
<th>Summary of Rule Elements</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>(a) Application.</strong> This subdivision applies to:</td>
<td><strong>Scope</strong></td>
</tr>
<tr>
<td>(1) any suit in which all plaintiffs affirmatively plead that they seek only monetary relief aggregating $50,000 or less, excluding costs, pre-judgment interest and attorney's fee any suit that is governed by the expedited actions process in Rule 169; and (2) any suit for divorce not involving children in which a party pleads that the value of the marital estate is more than zero but not more than $50,000.</td>
<td>• Any suits governed by the expedited action process</td>
</tr>
</tbody>
</table>

| **(b) Exceptions.** This subdivision does not apply if: | **Agreed Opt-Out** |
| (1) the parties agree that Rule 190.3 should apply; (2) the court orders a discovery control plan under Rule 190.4; or any party files a pleading or an amended or supplemental pleading that seeks relief other than that to which this subdivision applies. A pleading, amended pleading (including trial amendment), or supplemental pleading that renders this subdivision no longer applicable may not be filed without leave of court less than 45 days before the date set for trial. Leave may be granted only if good cause for filing the pleading outweighs any prejudice to an opposing party. | • No longer allowed |

| | **Modification by Court Order** |
| | • No longer allowed |
**Text of Rule of Civil Procedure**

<table>
<thead>
<tr>
<th>(b) Limitations. Discovery is subject to the limitations provided elsewhere in these rules and to the following additional limitations:</th>
</tr>
</thead>
<tbody>
<tr>
<td>(1) Discovery Period. All discovery must be conducted during the discovery period, which begins when the suit is filed and continues until 180 days after the date the first request for discovery of any kind is served on a party.</td>
</tr>
<tr>
<td>(2) Total Time for Oral Depositions. Each party may have no more than six hours in total to examine and cross-examine all witnesses in oral depositions. The parties may agree to expand this limit up to ten hours in total, but not more except by court order. The court may modify the deposition hours so that no party is given unfair advantage.</td>
</tr>
<tr>
<td>(3) Interrogatories. Any party may serve on any other party no more than 25 written interrogatories, excluding interrogatories asking a party only to identify or authenticate specific documents. Each discrete subpart of an interrogatory is considered a separate interrogatory.</td>
</tr>
<tr>
<td>(4) Requests for Production. Any party may serve on any other party no more than 15 written requests for production. Each discrete subpart of a request for production is considered a separate request for production.</td>
</tr>
<tr>
<td>(5) Requests for Admissions. Any party may serve on any other party no more than 15 written requests for admissions. Each discrete subpart of a request for admission is considered a separate request for admission.</td>
</tr>
<tr>
<td>(6) Requests for Disclosure. In addition to the content subject to disclosure under Rule 194.2, a party may request disclosure of all documents, electronic information, and tangible items that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses. A request for disclosure made pursuant to this paragraph is not considered a request for production.</td>
</tr>
</tbody>
</table>

**Summary of Rule Elements**

<table>
<thead>
<tr>
<th>Calculation of Discovery Period</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Old: 30 days before trial date</td>
</tr>
<tr>
<td>• New: 180 days after service of first request for discovery</td>
</tr>
</tbody>
</table>

**Old Scope of Limitation**

| • Limit on Interrogatories (25, including sub-parts) |
| • Limit on Depositions |

**New Scope of Limitations**

| • Changes limit on Interrogatories (15) |
| • Adds limit on Requests for Production (15) |
| • Adds limit on Admissions (15) |
| • Expands Disclosures |

**Expanded Disclosures**

<p>| • Not mandatory; must be requested by party |
| • If to be used at trial, it must be produced |
| • Does not constitute a Request for Production |</p>
<table>
<thead>
<tr>
<th>Text of Rule of Civil Procedure</th>
<th>Summary of Rule Elements</th>
</tr>
</thead>
<tbody>
<tr>
<td>(c) Reopening Discovery. When the filing of a pleading or an amended or supplemental pleading renders this subdivision no longer applicable, if a suit is removed from the expedited actions process in Rule 169 or, in a divorce, the filing of a pleading renders this subdivision no longer applicable, the discovery period reopens, and discovery must be completed within the limitations provided in Rules 190.3 or 190.4, whichever is applicable. Any person previously deposed may be redeposed. On motion of any party, the court should continue the trial date if necessary to permit completion of discovery.</td>
<td>Effect of Removal from Expedited Action</td>
</tr>
<tr>
<td></td>
<td>• Court must reopen discovery</td>
</tr>
<tr>
<td></td>
<td>• Witnesses can be redeposed</td>
</tr>
</tbody>
</table>
TEXAS RULES OF CIVIL PROCEDURE  
PART V. RULES OF PRACTICE IN JUSTICE COURTS  
Effective Date: May 1, 2013  
Applies to: Pending Case, but does not contravene existing obligations and rights

<table>
<thead>
<tr>
<th>Text of Rule of Civil Procedure</th>
<th>Summary of Rule Elements</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Note:</strong> Rules of Civil Procedure 500–510 govern cases filed on or after August 31, 2013, and cases pending on August 31, 2013, except to the extent that in the opinion of the court their application in a case pending on August 31, 2013, would not be feasible or would work injustice, in which event the formerly applicable procedure applies. An action taken before August 31, 2013, in a case pending on August 31, 2013, that was done pursuant to any previously applicable procedure must be treated as valid. Where citation or other process was issued or served prior to August 31, 2013, in compliance with any previously applicable procedure, the party served has the time provided for under the previously applicable procedure to answer or otherwise respond.</td>
<td></td>
</tr>
</tbody>
</table>

**RULE 500. GENERAL RULES**

**RULE 500.1. CONSTRUCTION OF RULES**  
Unless otherwise expressly provided, in Part V of these Rules of Civil Procedure:  
(a) the past, present, and future tense each includes the other;  
(b) the term “it” includes a person of either gender or an entity; and  
(c) the singular and plural each includes the other.

**RULE 500.2. DEFINITIONS**  
In Part V of these Rules of Civil Procedure:  
(a) “Answer” is the written response that a party who is sued must file with the court after being served with a citation.  
(b) “Citation” is the court-issued document required to be served upon a party to inform the party that it has been sued.  
(c) “Claim” is the legal theory and alleged facts that, if proven, entitle a party to relief against another party in court.  
(d) “Clerk” is a person designated by the judge as a justice court clerk, or the judge if there is no clerk available.  
(e) “Counterclaim” is a claim brought by a party who has been sued against the party who filed suit, for example, a defendant suing a plaintiff.  
(f) “County court” is the county court, statutory county court, or district court in a particular county with jurisdiction over appeals of civil cases from justice court.  
(g) “Cross-claim” is a claim brought by one party against another party on the same side of a lawsuit. For example, if a plaintiff sues two defendants, the defendants can seek relief against each other by means of a cross-claim.  
(h) “Default judgment” is a judgment awarded to a plaintiff when the defendant fails to answer and dispute the plaintiff’s claims in the lawsuit.
### Text of Rule of Civil Procedure

<table>
<thead>
<tr>
<th>Text of Rule of Civil Procedure</th>
<th>Summary of Rule Elements</th>
</tr>
</thead>
<tbody>
<tr>
<td>(i) “Defendant” is a party who is sued, including a plaintiff against whom a counterclaim is filed.</td>
<td>Included to help guide pro se parties</td>
</tr>
<tr>
<td>(j) “Defense” is an assertion by a defendant that the plaintiff is not entitled to relief from the court.</td>
<td></td>
</tr>
<tr>
<td>(k) “Discovery” is the process through which parties obtain information from each other in order to prepare for trial or enforce a judgment. The term does not refer to any information that a party is entitled to under applicable law.</td>
<td></td>
</tr>
<tr>
<td>(l) “Dismissed without prejudice” means a case has been dismissed but has not been finally decided and may be refiled.</td>
<td></td>
</tr>
<tr>
<td>(m) “Dismissed with prejudice” means a case has been dismissed and finally decided and may not be refiled.</td>
<td></td>
</tr>
<tr>
<td>(n) “Judge” is a justice of the peace.</td>
<td></td>
</tr>
<tr>
<td>(o) “Judgment” is a final order by the court that states the relief, if any, a party is entitled to or must provide.</td>
<td></td>
</tr>
<tr>
<td>(p) “Jurisdiction” is the authority of the court to hear and decide a case.</td>
<td></td>
</tr>
<tr>
<td>(q) “Motion” is a request that the court make a specified ruling or order.</td>
<td></td>
</tr>
<tr>
<td>(r) “Notice” is a document prepared and delivered by the court or a party stating that something is required of the party receiving the notice.</td>
<td></td>
</tr>
<tr>
<td>(s) “Party” is a person or entity involved in the case that is either suing or being sued, including all plaintiffs, defendants, and third parties that have been joined in the case.</td>
<td></td>
</tr>
<tr>
<td>(t) “Petition” is a formal written application stating a party’s claims and requesting relief from the court. It is the first document filed with the court to begin a lawsuit.</td>
<td></td>
</tr>
<tr>
<td>(u) “Plaintiff” is someone who sues, including a defendant who files a counterclaim.</td>
<td></td>
</tr>
<tr>
<td>(v) “Pleading” is a written document filed by a party, including a petition and an answer, that states a claim or defense and outlines the relief sought.</td>
<td></td>
</tr>
<tr>
<td>(w) “Relief” is the remedy a party requests from the court, such as the recovery of money or the return of property.</td>
<td></td>
</tr>
<tr>
<td>(x) “Serve” and “service” are delivery of citation as required by Rule 501.2, or of a document as required by Rule 501.4.</td>
<td></td>
</tr>
<tr>
<td>(y) “Sworn” means signed in front of someone authorized to take oaths, such as a notary, or signed under penalty of perjury. Filing a false sworn document can result in criminal prosecution.</td>
<td></td>
</tr>
<tr>
<td>(z) “Third party claim” is a claim brought by a party being sued against someone who is not yet a party to the case.</td>
<td></td>
</tr>
</tbody>
</table>
RULE 500.3. APPLICATION OF RULES IN JUSTICE COURT CASES

(a) Small Claims Case. A small claims case is a lawsuit brought for the recovery of money damages, civil penalties, personal property, or other relief allowed by law. The claim can be for no more than $10,000, excluding statutory interest and court costs but including attorney fees, if any. Small claims cases are governed by Rules 500–507 of Part V of the Rules of Civil Procedure.

(b) Debt Claim Case. A debt claim case is a lawsuit brought to recover a debt by an assignee of a claim, a debt collector or collection agency, a financial institution, or a person or entity primarily engaged in the business of lending money at interest. The claim can be for no more than $10,000, excluding statutory interest and court costs but including attorney fees, if any. Debt claim cases in justice court are governed by Rules 500–507 and 508 of Part V of the Rules of Civil Procedure. To the extent of any conflict between Rule 508 and the rest of Part V, Rule 508 applies.

(c) Repair and Remedy Case. A repair and remedy case is a lawsuit filed by a residential tenant under Chapter 92, Subchapter B, of the Texas Property Code to enforce the landlord’s duty to repair or remedy a condition materially affecting the physical health or safety of an ordinary tenant. The relief sought can be for no more than $10,000, excluding statutory interest and court costs but including attorney fees, if any. Repair and remedy cases are governed by Rules 500–507 and 509 of Part V of the Rules of Civil Procedure. To the extent of any conflict between Rule 509 and the rest of Part V, Rule 509 applies.

(d) Eviction Case. An eviction case is a lawsuit brought to recover possession of real property under Chapter 24 of the Texas Property Code, often by a landlord against a tenant. A claim for rent may be joined with an eviction case if the amount of rent due and unpaid is not more than $10,000, excluding statutory interest and court costs but including costs and attorney fees, if any. Eviction cases are governed by Rules 500–507 and 510 of Part V of the Rules of Civil Procedure. To the extent of any conflict between Rule 510 and the rest of Part V, Rule 510 applies.

(e) Application of Other Rules. The other Rules of Civil Procedure and the Rules of Evidence do not apply except:

1. when the judge hearing the case determines that a particular rule must be followed to ensure that the proceedings are fair to all parties; or
2. when otherwise specifically provided by law or these rules.

(f) Examination of Rules. The court must make the Rules of Civil Procedure and the Rules of Evidence available for examination, either in paper form or electronically, during the court’s business hours.

Jurisdictional Limit of $10,000

- Includes:
  - Damages
  - Penalties
  - Property
  - Attorney’s Fees
- Excludes:
  - Statutory Interest
  - Court Cost

Debt Claim Case Defined

- Assignee of a Claim
- A Financial Institution
- A Debt Collector or Collection Agency
- A person or entity primarily engaged in the business of lending money at interest

Repair and Remedy Case Defined

- Alleged failure of a landlord to remedy or repair a condition as required by Chapter 92 of the Texas Property Code

Eviction Cases

- lawsuit brought to recover possession of real property
- May include a claim for rent
RULE 500.4. REPRESENTATION IN JUSTICE COURT CASES

(a) Representation of an Individual. An individual may:
   (1) represent himself or herself;
   (2) be represented by an authorized agent in an eviction case; or
   (3) be represented by an attorney.

(b) Representation of a Corporation or Other Entity. A corporation or other entity may:
   (1) be represented by an employee, owner, officer, or partner of the entity who is not an attorney;
   (2) be represented by a property manager or other authorized agent in an eviction case; or
   (3) be represented by an attorney.

(c) Assisted Representation. The court may, for good cause, allow an individual representing himself or herself to be assisted in court by a family member or other individual who is not being compensated.

RULE 500.5. COMPUTATION OF TIME; TIMELY FILING

(a) Computation of Time. To compute a time period in these rules:
   (1) exclude the day of the event that triggers the period;
   (2) count every day, including Saturdays, Sundays, and legal holidays; and
   (3) include the last day of the period, but
      (A) if the last day is a Saturday, Sunday, or legal holiday, the time period is extended to the next day that is not a Saturday, Sunday, or legal holiday; or
      (B) if the last day for filing falls on a day during which the court is closed before 5:00 p.m., the time period is extended to the court’s next business day.

(b) Timely Filing by Mail. Any document required to be filed by a given date is considered timely filed if deposited in the U.S. mail on or before that date, and received within 10 days of the due date. A legible postmark affixed by the United States Postal Service is evidence of the date of mailing.

(c) Extensions. The judge may, for good cause shown, extend any time period under these rules except those relating to new trial and appeal.

RULE 500.6. JUDGE TO DEVELOP THE CASE

In order to develop the facts of the case, a judge may question a witness or party and may summon any person or party to appear as a witness when the judge considers it necessary to ensure a correct judgment and a speedy disposition.
### RULE 500.7. EXCLUSION OF WITNESSES

The court must, on a party’s request, or may, on its own initiative, order witnesses excluded so that they cannot hear the testimony of other witnesses. This rule does not authorize the exclusion of:

- (a) a party who is a natural person or the spouse of such natural person;
- (b) an officer or employee designated as a representative of a party who is not a natural person; or
- (c) a person whose presence is shown by a party to be essential to the presentation of the party’s case.

### RULE 500.8. SUBPOENAS

(a) **Use.** A subpoena may be used by a party or the judge to command a person or entity to attend and give testimony at a hearing or trial. A person may not be required by subpoena to appear in a county that is more than 150 miles from where the person resides or is served.

(b) **Who Can Issue.** A subpoena may be issued by the clerk of the justice court or an attorney authorized to practice in the State of Texas, as an officer of the court.

(c) **Form.** Every subpoena must be issued in the name of the “State of Texas” and must:

1. state the style of the suit and its case number;
2. state the court in which the suit is pending;
3. state the date on which the subpoena is issued;
4. identify the person to whom the subpoena is directed;
5. state the date, time, place, and nature of the action required by the person to whom the subpoena is directed;
6. identify the party at whose instance the subpoena is issued, and the party’s attorney of record, if any;
7. state that “Failure by any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of court from which the subpoena is issued and may be punished by fine or confinement, or both”; and
8. be signed by the person issuing the subpoena.

(d) **Service: Where, By Whom, How.** A subpoena may be served at any place within the State of Texas by any sheriff or constable of the State of Texas, or by any person who is not a party and is 18 years of age or older. A subpoena must be served by delivering a copy to the witness and tendering to that person any fees required by law. If the witness is a party and is represented by an attorney of record in the proceeding, the subpoena may be served on the witness’s attorney of record. Proof of service must be made by filing either:

1. the witness’s signed written memorandum attached to the subpoena showing that the witness accepted the subpoena; or
2. a statement by the person who made the service stating the date, time, and manner of service, and the name of the person served.
<table>
<thead>
<tr>
<th>Text of Rule of Civil Procedure</th>
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</thead>
<tbody>
<tr>
<td><em>(e)</em> Compliance Required. A person commanded by subpoena to appear and give testimony must remain at the hearing or trial from day to day until discharged by the court or by the party summoning the witness. If a subpoena commanding testimony is directed to a corporation, partnership, association, governmental agency, or other organization, and the matters on which examination is requested are described with reasonable particularity, the organization must designate one or more persons to testify on its behalf as to matters known or reasonably available to the organization.</td>
</tr>
<tr>
<td><em>(f)</em> Objection. A person commanded to attend and give testimony at a hearing or trial may object or move for a protective order before the court at or before the time and place specified for compliance. A party causing a subpoena to issue must take reasonable steps to avoid imposing undue burden or expense on the person served. In ruling on objections or motions for protection, the court must provide a person served with a subpoena an adequate time for compliance and protection from undue burden or expense. The court may impose reasonable conditions on compliance with a subpoena, including compensating the witness for undue hardship.</td>
</tr>
<tr>
<td><em>(g)</em> Enforcement. Failure by any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of the court from which the subpoena is issued or of a district court in the county in which the subpoena is served, and may be punished by fine or confinement, or both. A fine may not be imposed, nor a person served with a subpoena attached, for failure to comply with a subpoena without proof of service and proof by affidavit of the party requesting the subpoena or the party’s attorney of record that all fees due the witness by law were paid or tendered.</td>
</tr>
</tbody>
</table>

**RULE 500.9. DISCOVERY**

*(a)* Pretrial Discovery. Pretrial discovery is limited to that which the judge considers reasonable and necessary. Any requests for pretrial discovery must be presented to the court for approval by written motion. The motion must be served on the responding party. Unless a hearing is requested, the judge may rule on the motion without a hearing. The discovery request must not be served on the responding party unless the judge issues a signed order approving the request. Failure to comply with a discovery order can result in sanctions, including dismissal of the case or an order to pay the other party’s discovery expenses.

**Summary of Rule Elements**

<table>
<thead>
<tr>
<th>No Automatic Right to Discovery</th>
</tr>
</thead>
<tbody>
<tr>
<td>Discovery only available after court order</td>
</tr>
<tr>
<td>- Request presented by written motion, served on all parties</td>
</tr>
<tr>
<td>- Requires signed order</td>
</tr>
<tr>
<td>- Limited to what is reasonable and necessary</td>
</tr>
<tr>
<td>Text of Rule of Civil Procedure</td>
</tr>
<tr>
<td>--------------------------------</td>
</tr>
</tbody>
</table>
| (b) Post-judgment Discovery. Post-judgment discovery is not required to be filed with the court. The party requesting discovery must give the responding party at least 30 days to respond to a post-judgment discovery request. The responding party may file a written objection with the court within 30 days of receiving the request. If an objection is filed, the judge must hold a hearing to determine if the request is valid. If the objection is denied, the judge must order the party to respond to the request. If the objection is upheld, the judge may reform the request or dismiss it entirely. | Discovery Order enforceable by sanctions  
Post-Judgment Discovery allowed without necessity of Court Order |

**RULE 501. CITATION AND SERVICE**

**RULE 501.1. CITATION**

(a) Issuance. When a petition is filed with a justice court to initiate a suit, the clerk must promptly issue a citation and deliver the citation as directed by the plaintiff. The plaintiff is responsible for obtaining service on the defendant of the citation and a copy of the petition with any documents filed with the petition. Upon request, separate or additional citations must be issued by the clerk. The clerk must retain a copy of the citation in the court’s file.

(b) Form. The citation must:

1. be styled “The State of Texas”;
2. be signed by the clerk under seal of court or by the judge;
3. contain the name, location, and address of the court;
4. show the date of filing of the petition;
5. show the date of issuance of the citation;
6. show the file number and names of parties;
7. be directed to the defendant;
8. show the name and address of attorney for plaintiff, or if the plaintiff does not have an attorney, the address of plaintiff;
9. notify defendant that if the defendant fails to file an answer, judgment by default may be rendered for the relief demanded in the petition.

(c) Notice. The citation must include the following notice to the defendant in boldface type:

| Generally follows District Court rules, except -  
• Answer Date is 14 days from service date |
“You have been sued. You may employ an attorney to help you in defending against this lawsuit. But you are not required to employ an attorney. You or your attorney must file an answer with the court. Your answer is due by the end of the 14th day after the day you were served with these papers. If the 14th day is a Saturday, Sunday, or legal holiday, your answer is due by the end of the first day following the 14th day that is not a Saturday, Sunday, or legal holiday. Do not ignore these papers. If you do not file an answer by the due date, a default judgment may be taken against you. For further information, consult Part V of the Texas Rules of Civil Procedure, which is available online and also at the court listed on this citation.”

(d) Copies. The plaintiff must provide enough copies to be served on each defendant. If the plaintiff fails to do so, the clerk may make copies and charge the plaintiff the allowable copying cost.

RULE 501.2. SERVICE OF CITATION

(a) Who May Serve. No person who is a party to or interested in the outcome of the suit may serve citation in that suit, and, unless otherwise authorized by written court order, only a sheriff or constable may serve a citation in an eviction case, a writ that requires the actual taking of possession of a person, property or thing, or process requiring that the enforcement action be physically enforced by the person delivering process. Other citations may be served by:

(1) a sheriff or constable;
(2) a process server certified under order of the Supreme Court;
(3) the clerk of the court, if the citation is served by registered or certified mail; or
(4) a person authorized by court order who is 18 years of age or older.

(b) Method of Service. Citation must be served by:

(1) delivering a copy of the citation with a copy of the petition attached to the defendant in person, after endorsing the date of delivery on the citation; or
(2) mailing a copy of the citation with a copy of the petition attached to the defendant by registered or certified mail, restricted delivery, with return receipt or electronic return receipt requested.

(c) Service Fees. A plaintiff must pay all fees for service unless the plaintiff has filed a sworn statement of inability to pay the fees with the court. If the plaintiff has filed a sworn statement of inability to pay, the plaintiff must arrange for the citation to be served by a sheriff, constable, or court clerk.

Generally follows District Court rules, except -
• Request for Alternative Service may come from the constable, sheriff or process server.
Text of Rule of Civil Procedure

(d) Service on Sunday. A citation cannot be served on a Sunday except in attachment, garnishment, sequestration, or distress proceedings.

(e) Alternative Service of Citation. If the methods under (b) are insufficient to serve the defendant, the plaintiff, or the constable, sheriff, process server certified under order of the Supreme Court, or other person authorized to serve process, may make a request for alternative service. This request must include a sworn statement describing the methods attempted under (b) and stating the defendants’ usual place of business or residence, or other place where the defendant can probably be found. The court may authorize the following types of alternative service:

1. mailing a copy of the citation with a copy of the petition attached by first class mail to the defendant at a specified address, and also leaving a copy of the citation with petition attached at the defendant’s residence or other place where the defendant can probably be found with any person found there who is at least 16 years of age; or

2. mailing a copy of the citation with a copy of the petition attached by first class mail to the defendant at a specified address, and also serving by any other method that the court finds is reasonably likely to provide the defendant with notice of the suit.

(f) Service by Publication. In the event that service of citation by publication is necessary, the process is governed by the rules in county and district court.

RULE 501.3. DUTIES OF OFFICER OR PERSON RECEIVING CITATION

(a) Endorsement; Execution; Return. The officer or authorized person to whom process is delivered must:

1. endorse on the process the date and hour on which he or she received it;
2. execute and return the same without delay; and
3. complete a return of service, which may, but need not, be endorsed on or attached to the citation.

(b) Contents of Return. The return, together with any document to which it is attached, must include the following information:

1. the case number and case name;
2. the court in which the case is filed;
3. a description of what was served;
4. the date and time the process was received for service;
5. the person or entity served;
6. the address served;
7. the date of service or attempted service;
8. the manner of delivery of service or attempted service;
9. the name of the person who served or attempted service;

Generally follows District Court rules
### Text of Rule of Civil Procedure

<table>
<thead>
<tr>
<th>Rule 501.2(b)</th>
<th>Summary of Rule Elements</th>
</tr>
</thead>
<tbody>
<tr>
<td>(10) if the person named in (9) is a process server certified under Supreme Court Order, his or her identification number and the expiration date of his or her certification; and (11) any other information required by rule or law.</td>
<td></td>
</tr>
<tr>
<td>(c) Citation by Mail. When the citation is served by registered or certified mail as authorized by Rule 501.2(b)(2), the return by the officer or authorized person must also contain the receipt with the addressee’s signature.</td>
<td></td>
</tr>
<tr>
<td>(d) Failure to Serve. When the officer or authorized person has not served the citation, the return must show the diligence used by the officer or authorized person to execute the same and the cause of failure to execute it, and where the defendant is to be found, if ascertainable.</td>
<td></td>
</tr>
<tr>
<td>(e) Signature. The officer or authorized person who serves or attempts to serve a citation must sign the return. If the return is signed by a person other than a sheriff, constable, or clerk of the court, the return must either be verified or be signed under penalty of perjury. A return signed under penalty of perjury must contain the statement below in substantially the following form: “My name is (First) (Middle) (Last), my date of birth is (Month) (Day), (Year), and my address is (Street), (City), (State) (Zip Code), (Country). I declare under penalty of perjury that the foregoing is true and correct. Executed in ________ County, State of ________, on the _______ day of (Month), (Year). __________________ Declarant”</td>
<td></td>
</tr>
<tr>
<td>(f) Alternative Service. Where citation is executed by an alternative method as authorized by 501.2(e), proof of service must be made in the manner ordered by the court.</td>
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</tr>
<tr>
<td>(g) Filing Return. The return and any document to which it is attached must be filed with the court and may be filed electronically or by fax, if those methods of filing are available.</td>
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</tr>
<tr>
<td>(h) Prerequisite for Default Judgment. No default judgment may be granted in any case until proof of service as provided by this rule, or as ordered by the court in the event citation is executed by an alternative method under 501.2(e), has been on file with the clerk of the court 3 days, exclusive of the day of filing and the day of judgment.</td>
<td></td>
</tr>
</tbody>
</table>

### RULE 501.4. SERVICE OF PAPERS OTHER THAN CITATION

(a) Method of Service. Other than a citation or oral motions made during trial or when all parties are present, every notice required by these rules, and every pleading, plea, motion, application to the court for an order, or other form of request, must be served on all other parties in one of the following ways.

| Generally follows District Court rules |  |
## Text of Rule of Civil Procedure

(1) In person. A copy may be delivered to the party to be served, or the party’s duly authorized agent or attorney of record, in person or by agent.

(2) Mail or courier. A copy may be sent by courier-receipted delivery or by certified or registered mail, to the party’s last known address. Service by certified or registered mail is complete when the document is properly addressed and deposited in the United States mail, postage prepaid.

(3) Fax. A copy may be faxed to the recipient’s current fax number. Service by fax after 5:00 p.m. local time of the recipient will be deemed to have been served on the following day.

(4) Email. A copy may be sent to an email address expressly provided by the receiving party, if the party has consented to email service in writing. Service by email after 5:00 p.m. local time of the recipient will be deemed to have been served on the following day.

(5) Other. A copy may be delivered in any other manner directed by the court.

(b) **Timing.** If a document is served by mail, 3 days will be added to the length of time a party has to respond to the document. Notice of any hearing requested by a party must be served on all other parties not less than 3 days before the time specified for the hearing.

(c) **Who May Serve.** Documents other than a citation may be served by a party to the suit, an attorney of record, a sheriff or constable, or by any other person competent to testify.

(d) **Certificate of Service.** The party or the party’s attorney of record must include in writing on all documents filed a signed statement describing the manner in which the document was served on the other party or parties and the date of service. A certificate by a party or the party’s attorney of record, or the return of the officer, or the sworn statement of any other person showing service of a notice is proof of service.

(e) **Failure to Serve.** A party may offer evidence or testimony that a notice or document was not received, or, if service was by mail, that it was not received within 3 days from the date of mailing, and upon so finding, the court may extend the time for taking the action required of the party or grant other relief as it deems just.

## Summary of Rule Elements

<table>
<thead>
<tr>
<th>Text of Rule of Civil Procedure</th>
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<tr>
<td>(4) Email. A copy may be sent to an email address expressly provided by the receiving party, if the party has consented to email service in writing. Service by email after 5:00 p.m. local time of the recipient will be deemed to have been served on the following day.</td>
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<td>(5) Other. A copy may be delivered in any other manner directed by the court.</td>
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<tr>
<td>(b) <strong>Timing.</strong> If a document is served by mail, 3 days will be added to the length of time a party has to respond to the document. Notice of any hearing requested by a party must be served on all other parties not less than 3 days before the time specified for the hearing.</td>
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<td>(c) <strong>Who May Serve.</strong> Documents other than a citation may be served by a party to the suit, an attorney of record, a sheriff or constable, or by any other person competent to testify.</td>
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<tr>
<td>(d) <strong>Certificate of Service.</strong> The party or the party’s attorney of record must include in writing on all documents filed a signed statement describing the manner in which the document was served on the other party or parties and the date of service. A certificate by a party or the party’s attorney of record, or the return of the officer, or the sworn statement of any other person showing service of a notice is proof of service.</td>
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<tr>
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</tbody>
</table>
### Text of Rule of Civil Procedure

<table>
<thead>
<tr>
<th>Rule</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>RULE 502. INSTITUTION OF SUIT</td>
<td></td>
</tr>
<tr>
<td>RULE 502.1. PLEADINGS AND MOTIONS MUST BE WRITTEN, SIGNED, AND FILED</td>
<td>Except for oral motions made during trial or when all parties are present, every pleading, plea, motion, application to the court for an order, or other form of request must be written and signed by the party or its attorney and must be filed with the court. A document may be filed with the court by personal or commercial delivery, by mail, or electronically, if the court allows electronic filing. Electronic filing is governed by Rule 21.</td>
</tr>
<tr>
<td>RULE 502.2. PETITION</td>
<td></td>
</tr>
<tr>
<td>(a) Contents. To initiate a lawsuit, a petition must be filed with the court. A petition must contain:</td>
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<tr>
<td>(1) the name of the plaintiff;</td>
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<tr>
<td>(2) the name, address, telephone number, and fax number, if any, of the plaintiff’s attorney, if applicable, or the address, telephone number, and fax number, if any, of the plaintiff;</td>
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<tr>
<td>(3) the name, address, and telephone number, if known, of the defendant;</td>
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<tr>
<td>(4) the amount of money, if any, the plaintiff seeks;</td>
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<tr>
<td>(5) a description and claimed value of any personal property the plaintiff seeks;</td>
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<tr>
<td>(6) a description of any other relief requested;</td>
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<tr>
<td>(7) the basis for the plaintiff’s claim against the defendant; and</td>
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<tr>
<td>(8) if the plaintiff consents to email service of the answer and any other motions or pleadings, a statement consenting to email service and email contact information.</td>
<td></td>
</tr>
<tr>
<td>(b) Justice Court Civil Case Information Sheet. A justice court civil case information sheet, in the form promulgated by the Supreme Court of Texas, must accompany the filing of a petition and must be signed by the plaintiff or the plaintiff’s attorney. The justice court civil case information sheet is for data collection for statistical and administrative purposes and does not affect any substantive right. The court may not reject a pleading because the pleading is not accompanied by a justice court civil case information sheet.</td>
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<tr>
<td>RULE 502.3. FEES; INABILITY TO PAY</td>
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</tr>
<tr>
<td>(a) Fees and Statement of Inability to Pay. On filing the petition, the plaintiff must pay the appropriate filing fee and service fees, if any, with the court. A plaintiff who is unable to afford to pay the fees must file a sworn statement of inability to pay. Upon filing the statement, the clerk must docket the action, issue citation, and provide any other customary services.</td>
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</tbody>
</table>
(b) Contents of Statement of Inability to Pay.

1. The statement must contain complete information as to the party’s identity, nature and amount of governmental entitlement income, nature and amount of employment income, other income (interest, dividends, etc.), spouse’s income if available to the party, property owned (other than homestead), cash or checking account, dependents, debts, and monthly expenses.

2. The statement must contain the following: “I am unable to pay court fees. I verify that the statements made in this statement are true and correct.” The statement must be sworn before a notary public or other officer authorized to administer oaths or be signed under penalty of perjury.

(c) IOLTA Certificate. If the party is represented by an attorney who is providing free legal services because of the party’s indigence, without contingency, and the attorney is providing services either directly or by referral from a program funded by the Interest on Lawyers Trust Accounts (IOLTA) program, the attorney may file an IOLTA certificate confirming that the IOLTA funded program screened the party for income eligibility under the IOLTA income guidelines. A party’s statement of inability to pay accompanied by an attorney’s IOLTA certificate may not be contested under (d).

(d) Contest. Unless an IOLTA certificate is filed, the defendant may file a contest of the statement of inability to pay at any time within 7 days after the day the defendant’s answer is due. If the statement attests to receipt of government entitlement based on indigence, the statement may only be contested with regard to the veracity of the attestation. If contested, the judge must hold a hearing to determine the plaintiff’s ability to pay. At the hearing, the burden is on the party who filed the statement to prove its inability to pay. The judge may, regardless of whether the defendant contests the statement, examine the statement and conduct a hearing to determine the plaintiff’s ability to pay. If the judge determines that the plaintiff is able to afford the fees, the judge must enter a written order listing the reasons for the determination, and the plaintiff must pay the fees in the time specified in the order or the case will be dismissed without prejudice.

RULE 502.4. VENUE — WHERE A LAWSUIT MAY BE BROUGHT

(a) Applicable Law. Laws specifying the venue – the county and precinct where a lawsuit may be brought – are found in Chapter 15, Subchapter E of the Texas Civil Practice and Remedies Code, which is available online and for examination during the court’s business hours.

(b) General Rule. Generally, a defendant in a small claims case as described in Rule 500.3(a) or a debt claim case as described in Rule 500.3(b) is entitled to be sued in one of the following venues:

Generally follows Civil Practice and Remedies Code Chapter 15

- The rule makes it clear that it does not replace CPRC Chapter 15; merely summarizes the basic venue issues for purposes of a pro se litigant

No Substantial Change from prior venue process
### Text of Rule of Civil Procedure

(1) the county and precinct where the defendant resides;
(2) the county and precinct where the incident, or the majority of incidents, that gave rise to the claim occurred;
(3) the county and precinct where the contract or agreement, if any, that gave rise to the claim was to be performed; or
(4) the county and precinct where the property is located, in a suit to recover personal property.

(c) Non-Resident Defendant; Defendant’s Residence Unknown. If the defendant is a non-resident of Texas, or if defendant’s residence is unknown, the plaintiff may file the suit in the county and precinct where the plaintiff resides.

(d) Motion to Transfer Venue. If a plaintiff files suit in an improper venue, a defendant may challenge the venue selected by filing a motion to transfer venue. The motion must be filed before trial, no later than 21 days after the day the defendant’s answer is filed, and must contain a sworn statement that the venue chosen by the plaintiff is improper and a specific county and precinct of proper venue to which transfer is sought. If the defendant fails to name a county and precinct, the court must instruct the defendant to do so and allow the defendant 7 days to cure the defect. If the defendant fails to correct the defect, the motion will be denied, and the case will proceed in the county and precinct where it was originally filed.

1. Procedure.
   - (A) Judge to Set Hearing. If a defendant files a motion to transfer venue, the judge must set a hearing on the motion.
   - (B) Response. A plaintiff may file a response to a defendant’s motion to transfer venue.
   - (C) Hearing. The parties may present evidence at the hearing. A witness may testify at a hearing, either in person or, with permission of the court, by means of telephone or an electronic communication system.
   - (D) Judge’s Decision. If the motion is granted, the judge must sign an order designating the court to which the case will be transferred. If the motion is denied, the case will be heard in the court in which the plaintiff initially filed suit.
   - (E) Review. Motions for rehearing and interlocutory appeals of the judge’s ruling on venue are not permitted.
   - (F) Time for Trial of the Case. No trial may be held until at least the 14th day after the judge’s ruling on the motion to transfer venue.

<table>
<thead>
<tr>
<th>Text of Rule of Civil Procedure</th>
<th>Summary of Rule Elements</th>
</tr>
</thead>
<tbody>
<tr>
<td>(1) the county and precinct where the defendant resides;</td>
<td></td>
</tr>
<tr>
<td>(2) the county and precinct where the incident, or the majority of incidents, that gave rise to the claim occurred;</td>
<td></td>
</tr>
<tr>
<td>(3) the county and precinct where the contract or agreement, if any, that gave rise to the claim was to be performed; or</td>
<td></td>
</tr>
<tr>
<td>(4) the county and precinct where the property is located, in a suit to recover personal property.</td>
<td></td>
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<tr>
<td>(c) Non-Resident Defendant; Defendant’s Residence Unknown. If the defendant is a non-resident of Texas, or if defendant’s residence is unknown, the plaintiff may file the suit in the county and precinct where the plaintiff resides.</td>
<td></td>
</tr>
<tr>
<td>(d) Motion to Transfer Venue. If a plaintiff files suit in an improper venue, a defendant may challenge the venue selected by filing a motion to transfer venue. The motion must be filed before trial, no later than 21 days after the day the defendant’s answer is filed, and must contain a sworn statement that the venue chosen by the plaintiff is improper and a specific county and precinct of proper venue to which transfer is sought. If the defendant fails to name a county and precinct, the court must instruct the defendant to do so and allow the defendant 7 days to cure the defect. If the defendant fails to correct the defect, the motion will be denied, and the case will proceed in the county and precinct where it was originally filed.</td>
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</tr>
</tbody>
</table>
### Text of Rule of Civil Procedure

<table>
<thead>
<tr>
<th>(G) Order. An order granting a motion to transfer venue must state the reason for the transfer and the name of the court to which the transfer is made. When such an order of transfer is made, the judge who issued the order must immediately make out a true and correct transcript of all the entries made on the docket in the case, certify the transcript, and send the transcript, with a certified copy of the bill of costs and the original papers in the case, to the court in the precinct to which the case has been transferred. The court receiving the case must then notify the plaintiff that the case has been received and, if the case is transferred to a different county, that the plaintiff has 14 days after receiving the notice to pay the filing fee in the new court, or file a sworn statement of inability to pay. The plaintiff is not entitled to a refund of any fees already paid. Failure to pay the fee or file a sworn statement of inability to pay will result in dismissal of the case without prejudice.</th>
</tr>
</thead>
<tbody>
<tr>
<td>(e) <strong>Fair Trial Venue Change.</strong> If a party believes it cannot get a fair trial in a specific precinct or before a specific judge, the party may file a sworn motion stating such, supported by the sworn statements of two other credible persons, and specifying if the party is requesting a change of location or a change of judge. Except for good cause shown, this motion must be filed no less than 7 days before trial. If the party seeks a change of judge, the judge must exchange benches with another qualified justice of the peace, or if no judge is available to exchange benches, the county judge must appoint a visiting judge to hear the case. If the party seeks a change in location, the case must be transferred to the nearest justice court in the county that is not subject to the same or some other disqualification. If there is only one justice of the peace precinct in the county, then the judge must exchange benches with another qualified justice of the peace, or if no judge is available to exchange benches, the county judge must appoint a visiting judge to hear the case. In cases where exclusive jurisdiction is within a specific precinct, as in eviction cases, the only remedy available is a change of judge. A party may apply for relief under this rule only one time in any given lawsuit.</td>
</tr>
<tr>
<td>(f) <strong>Transfer of Venue by Consent.</strong> On the written consent of all parties or their attorneys, filed with the court, venue must be transferred to the court of any other justice of the peace of the county, or any other county.</td>
</tr>
</tbody>
</table>

### Summary of Rule Elements

<table>
<thead>
<tr>
<th><strong>Defendant’s Answer</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>• Due 14 days from date of service</td>
</tr>
<tr>
<td>• Must be in writing</td>
</tr>
<tr>
<td>• Rule allows for a general denial</td>
</tr>
</tbody>
</table>
### Text of Rule of Civil Procedure

| (3) if the defendant consents to email service, a statement consenting to email service and email contact information. |
| (b) General Denial. An answer that denies all of the plaintiff’s allegations and demands that they be proven without specifying the reasons is sufficient to constitute an answer or appearance and does not bar the defendant from raising any defense at trial. |
| (c) Answer Docketed. The defendant’s appearance must be noted on the court’s docket. |
| (d) Due Date. Unless the defendant is served by publication, the defendant’s answer is due by the end of the 14th day after the day the defendant was served with the citation and petition, but |
| (1) if the 14th day is a Saturday, Sunday, or legal holiday, the answer is due on the next day that is not a Saturday, Sunday, or legal holiday; or |
| (2) if the 14th day falls on a day during which the court is closed before 5:00 PM, the answer is due on the court’s next business day. |
| (e) Due Date When Defendant Served by Publication. If a defendant is served by publication, the defendant’s answer is due by the end of the 42nd day after the day the citation was issued, but |
| (1) if the 42nd day is a Saturday, Sunday, or legal holiday, the answer is due on the next day that is not a Saturday, Sunday, or legal holiday; or |
| (2) if the 42nd day falls on a day during which the court is closed before 5:00 PM, the answer is due on the court’s next business day. |

### RULE 502.6. COUNTERCLAIM; CROSS-CLAIM; THIRD-PARTY CLAIM

| (a) Counterclaim. A defendant may file a petition stating as a counterclaim any claim against a plaintiff that is within the jurisdiction of the justice court, whether or not related to the claims in the plaintiff’s petition. The defendant must file a counterclaim petition as provided in Rule 502.2, and must pay a filing fee or provide a sworn statement of inability to pay the fees. The court need not generate a citation for a counterclaim and no answer to the counterclaim need be filed. The defendant must serve a copy of the counterclaim as provided by Rule 501.4. |
| (b) Cross-Claim. A plaintiff seeking relief against another plaintiff, or a defendant seeking relief against another defendant may file a cross-claim. The filing party must file a cross-claim petition as provided in Rule 502.2, and must pay a filing fee or provide a sworn statement of inability to pay the fees. A citation must be issued and served as provided by Rule 501.2 on any party that has not yet filed a petition or an answer, as appropriate. If the party filed against has filed a petition or an answer, the filing party must serve the cross-claim as provided by Rule 501.4. |

### Summary of Rule Elements

<table>
<thead>
<tr>
<th>What is Not Required</th>
</tr>
</thead>
<tbody>
<tr>
<td>- Affirmative Defenses need not be pled</td>
</tr>
</tbody>
</table>

### Counterclaims

| - Must follow pleading requirements set forth in 502.2 |
| - Must pay a fee or file an sworn statement of inability to pay |
### Text of Rule of Civil Procedure

<table>
<thead>
<tr>
<th>Rule</th>
<th>Description</th>
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<tbody>
<tr>
<td>(c) Third Party Claim.</td>
<td>A defendant seeking to bring another party into a lawsuit who may be liable for all or part of the plaintiff’s claim against the defendant may file a petition as provided in Rule 502.2, and must pay a filing fee or provide a sworn statement of inability to pay the fees. A citation must be issued and served as provided by Rule 501.2.</td>
</tr>
</tbody>
</table>

### RULE 502.7. AMENDING AND CLARIFYING PLEADINGS

(a) **Amending Pleadings.** A party may withdraw something from or add something to a pleading, as long as the amended pleading is filed and served as provided by Rule 501.4 not less than 7 days before trial. The court may allow a pleading to be amended less than 7 days before trial if the amendment will not operate as a surprise to the opposing party.

(b) **Insufficient Pleadings.** A party may file a motion with the court asking that another party be required to clarify a pleading. The court must determine if the pleading is sufficient to place all parties on notice of the issues in the lawsuit, and may hold a hearing to make that determination. If the court determines a pleading is insufficient, the court must order the party to amend the pleading and set a date by which the party must amend. If a party fails to comply with the court’s order, the pleading may be stricken.

### RULE 503. DEFAULT JUDGMENT; PRE-TRIAL MATTERS; TRIAL

### RULE 503.1. IF DEFENDANT FAILS TO ANSWER

(a) **Default Judgment.** If the defendant fails to file an answer by the date stated in Rule 502.5, the judge must ensure that service was proper, and may hold a hearing for this purpose. If it is determined that service was proper, the judge must render a default judgment in the following manner:

1. Claim Based on Written Document. If the claim is based on a written document signed by the defendant, and a copy of the document has been filed with the court and served on the defendant, along with a sworn statement from the plaintiff that this is a true and accurate copy of the document and the relief sought is owed, and all payments, offsets or credits due to the defendant have been accounted for, the judge must render judgment for the plaintiff in the requested amount, without any necessity for a hearing. The plaintiff’s attorney may also submit affidavits supporting an award of attorney fees to which the plaintiff is entitled, if any.

### Pleading Amendments

- Up until 7 days before trial without leave of Court
- 7 days before trial or sooner, upon a showing that the amendment would not operate as a surprise

### Special Exception

- The issue is the sufficiency of pleading to place all parties on notice of the issues
- A hearing is **not** required
## Text of Rule of Civil Procedure

(2) Other Cases. Except as provided in (1), a plaintiff who seeks a default judgment against a defendant must request a hearing, orally or in writing. The plaintiff must appear at the hearing and provide evidence of its damages. If the plaintiff proves its damages, the judge must render judgment for the plaintiff in the amount proven. If the plaintiff is unable to prove its damages, the judge must render judgment in favor of the defendant. With the permission of the court, a party may appear at a hearing by means of telephone or an electronic communication system.

(b) Appearance. If a defendant files an answer or otherwise appears in a case before a default judgment is signed by the judge, the judge must not enter a default judgment and the case must be set for trial as described in Rule 503.3.

(c) Post-Answer Default. If a defendant who has answered fails to appear for trial, the court may proceed to hear evidence on liability and damages and render judgment accordingly.

(d) Notice. The plaintiff requesting a default judgment must provide to the clerk in writing the last known mailing address of the defendant at or before the time the judgment is signed. When a default judgment is signed, the clerk must immediately mail written notice of the judgment to the defendant at the address provided by the plaintiff, and note the fact of such mailing on the docket. The notice must state the number and style of the case, the court in which the case is pending, the names of the parties in whose favor and against whom the judgment was rendered, and the date the judgment was signed. Failure to comply with the provisions of this rule does not affect the finality of the judgment.

## RULE 503.2. SUMMARY DISPOSITION

(a) Motion. A party may file a sworn motion for summary disposition of all or part of a claim or defense without a trial. The motion must set out all supporting facts. All documents on which the motion relies must be attached. The motion must be granted if it shows that:

1. there are no genuinely disputed facts that would prevent a judgment in favor of the party;
2. there is no evidence of one or more essential elements of a defense which the defendant must prove to defeat the plaintiff’s claim; or
3. there is no evidence of one or more essential elements of the plaintiff’s claim.

(b) Response. The party opposing the motion may file a sworn written response to the motion.

(c) Hearing. The court must not consider a motion for summary disposition until it has been on file for at least 14 days. The judge may consider evidence offered by the parties at the hearing. By agreement of the parties, the judge may decide the motion and response without a hearing.

## Summary of Rule Elements

### Judge Must Render Judgment
- Rule makes no allowances for curing a deficiency in plaintiff’s proof of damages

### Clerk to Mail Notice of Judgment

### Summary Judgment Procedure
- Requires “sworn motion”
- Requires evidence be attached
- Provides for “sworn written response”

### Hearing
- After Motion on file for 14 days
- Response time line not stated, only required prior to hearing
- May be on submission if agreed to by the parties

### Motion to be Granted if:
- There are no “genuinely disputed facts”
- There is “no evidence” of one or more essential elements of a defense
### Text of Rule of Civil Procedure

- **Rule 503.3. SETTINGS AND NOTICE; POSTPONING TRIAL**
  
  (a) **Settings and Notice.** After the defendant answers, the case will be set on a trial docket at the discretion of the judge. The court must send a notice of the date, time, and place of this setting to all parties at their address of record no less than 45 days before the setting date, unless the judge determines that an earlier setting is required in the interest of justice. Reasonable notice of all subsequent settings must be sent to all parties at their addresses of record.

  (b) **Postponing Trial.** A party may file a motion requesting that the trial be postponed. The motion must state why a postponement is necessary. The judge, for good cause, may postpone any trial for a reasonable time.

### Summary of Rule Elements

- There is “no evidence” of one or more essential elements of a plaintiff’s claim.

### Rule 503.4. PRETRIAL CONFERENCE

- **Conference Set; Issues.** If all parties have appeared in a lawsuit, the court, at any party’s request or on its own, may set a case for a pretrial conference. Reasonable notice must be sent to all parties at their addresses of record. Appropriate issues for the pretrial conference include:
  
  1. discovery;
  2. the amendment or clarification of pleadings;
  3. the admission of facts and documents to streamline the trial process;
  4. a limitation on the number of witnesses at trial;
  5. the identification of facts, if any, which are not in dispute between the parties;
  6. mediation or other alternative dispute resolution services;
  7. the possibility of settlement;
  8. trial setting dates that are amenable to the court and all parties;
  9. the appointment of interpreters, if needed;
  10. the application of a Rule of Civil Procedure not in Part V or a Rule of Evidence; and
  11. any other issue that the court deems appropriate.

- **Eviction Cases.** The court must not schedule a pretrial conference in an eviction case if it would delay trial.

### Notice of Trial Date Required

- Requires 45 day notice
- Resetting of trial date only requires “reasonable notice”

### Continuances

- Requires sworn motion
- Requires showing of “good cause”

### Pre-Trial Conference

- Court may set on own motion or that of a party

### Conference Topic List

- (See Rule)
### Text of Rule of Civil Procedure

#### RULE 503.5. ALTERNATIVE DISPUTE RESOLUTION

(a) **State Policy.** The policy of this state is to encourage the peaceable resolution of disputes through alternative dispute resolution, including mediation, and the early settlement of pending litigation through voluntary settlement procedures. For that purpose, the judge may order any case to mediation or another appropriate and generally accepted alternative dispute resolution process.

(b) **Eviction Cases.** The court must not order mediation or any other alternative dispute resolution process in an eviction case if it would delay trial.

#### RULE 503.6. TRIAL

(a) **Docket Called.** On the day of the trial setting, the judge must call all of the cases set for trial that day.

(b) **If Plaintiff Fails to Appear.** If the plaintiff fails to appear when the case is called for trial, the judge may postpone or dismiss the suit.

(c) **If Defendant Fails to Appear.** If the defendant fails to appear when the case is called for trial, the judge may postpone the case, or may proceed to take evidence. If the plaintiff proves its case, judgment must be awarded for the relief proven. If the plaintiff fails to prove its case, judgment must be rendered against the plaintiff.

#### RULE 504. JURY

#### RULE 504.1. JURY TRIAL DEMANDED

(a) **Demand.** Any party is entitled to a trial by jury. A written demand for a jury must be filed no later than 14 days before the date a case is set for trial. If the demand is not timely, the right to a jury is waived unless the late filing is excused by the judge for good cause.

(b) **Jury Fee.** Unless otherwise provided by law, a party demanding a jury must pay a fee of $22.00 or must file a sworn statement of inability to pay the fee at or before the time the party files a written request for a jury.

(c) **Withdrawal of Demand.** If a party who demands a jury and pays the fee withdraws the demand, the case will remain on the jury docket unless all other parties present agree to try the case without a jury. A party that withdraws its jury demand is not entitled to a refund of the jury fee.

(d) **No Demand.** If no party timely demands a jury and pays the fee, the judge will try the case without a jury.

### Summary of Rule Elements

#### Alternative Dispute Resolution
- Court may order ADR

#### Failure to Appear
- Court may continue the case
- Court may proceed and call the case to trial
  - If plaintiff fails to prove its case, the Court must enter a take-nothing judgment

#### No Substantive Change from Prior Rules
### Text of Rule of Civil Procedure

**RULE 504.2. EMPANELING THE JURY**

(a) **Drawing Jury and Oath.** If no method of electronic draw has been implemented, the judge must write the names of all prospective jurors present on separate slips of paper as nearly alike as may be, place them in a box, mix them well, and then draw the names one by one from the box. The judge must list the names drawn and deliver a copy to each of the parties or their attorneys.

(b) **Oath.** After the draw, the judge must swear the panel as follows: “You solemnly swear or affirm that you will give true and correct answers to all questions asked of you concerning your qualifications as a juror.”

(c) **Questioning the Jury.** The judge, the parties, or their attorneys will be allowed to question jurors as to their ability to serve impartially in the trial but may not ask the jurors how they will rule in the case. The judge will have discretion to allow or disallow specific questions and determine the amount of time each side will have for this process.

(d) **Challenge for Cause.** A party may challenge any juror for cause. A challenge for cause is an objection made to a juror alleging some fact, such as bias or prejudice, that disqualifies the juror from serving in the case or that renders the juror unfit to sit on the jury. The challenge must be made during jury questioning. The party must explain to the judge why the juror should be excluded from the jury. The judge must evaluate the questions and answers given and either grant or deny the challenge. When a challenge for cause has been sustained, the juror must be excused.

(e) **Challenges Not for Cause.** After the judge determines any challenges for cause, each party may select up to 3 jurors to excuse for any reason or no reason at all. But no prospective juror may be excused for membership in a constitutionally protected class.

(f) **The Jury.** After all challenges, the first 6 prospective jurors remaining on the list constitute the jury to try the case.

(g) **If Jury Is Incomplete.** If challenges reduce the number of prospective jurors below 6, the judge may direct the sheriff or constable to summon others and allow them to be questioned and challenged by the parties as before, until at least 6 remain.

(h) **Jury Sworn.** When the jury has been selected, the judge must require them to take substantially the following oath: “You solemnly swear or affirm that you will render a true verdict according to the law and the evidence presented.”


### Summary of Rule Elements

<table>
<thead>
<tr>
<th>Rule</th>
<th>Summary of Rule Elements</th>
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<tbody>
<tr>
<td><strong>RULE 504.2. EMPANELING THE JURY</strong></td>
<td>No Substantive Change from Prior Rules</td>
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<tr>
<th>Rule</th>
<th>Summary of Rule Elements</th>
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<tbody>
<tr>
<td><strong>RULE 504.3. JURY NOT CHARGED</strong></td>
<td>No Substantive Change from Prior Rules</td>
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</tbody>
</table>

The judge must not charge the jury.
### RULE 504.4. JURY VERDICT FOR SPECIFIC ARTICLES
When the suit is for the recovery of specific articles and the jury finds for the plaintiff, the jury must assess the value of each article separately, according to the evidence presented at trial.

**No Substantive Change from Prior Rules**

### RULE 505. JUDGMENT; NEW TRIAL

#### RULE 505.1. JUDGMENT

(a) **Judgment Upon Jury Verdict.** Where a jury has returned a verdict, the judge must announce the verdict in open court, note it in the court’s docket, and render judgment accordingly. The judge may render judgment on the verdict or, if the verdict is contrary to the law or the evidence, judgment not withstanding the verdict.

(b) **Case Tried by Judge.** When a case has been tried before the judge without a jury, the judge must announce the decision in open court, note the decision in the court’s docket, and render judgment accordingly.

(c) **Form.** A judgment must:
   - (1) clearly state the determination of the rights of the parties in the case;
   - (2) state who must pay the costs;
   - (3) be signed by the judge; and
   - (4) be dated the date of the judge’s signature.

(d) **Costs.** The judge must award costs allowed by law to the successful party.

(e) **Judgment for Specific Articles.** Where the judgment is for the recovery of specific articles, the judgment must order that the plaintiff recover such specific articles, if they can be found, and if not, then their value as assessed by the judge or jury with interest at the prevailing post-judgment interest rate.

**No Substantive Change from Prior Rules**

### RULE 505.2. ENFORCEMENT OF JUDGMENT
Justice court judgments are enforceable in the same method as in county and district court, except as provided by law. When the judgment is for personal property, the court may award a special writ for the seizure and delivery of such property to the plaintiff, and may, in addition to the other relief granted in such cases, enforce its judgment by attachment or fine.

**No Substantive Change from Prior Rules**

### RULE 505.3. MOTION TO SET ASIDE; MOTION TO REINSTATE; MOTION FOR NEW TRIAL

(a) **Motion to Reinstate after Dismissal.** A plaintiff whose case is dismissed may file a motion to reinstate the case no later than 14 days after the dismissal order is signed. The plaintiff must serve the defendant with a copy of the motion no later than the next business day using a method approved under Rule 501.4. The court may reinstate the case for good cause shown.

**No Substantive Change from Prior Rules, Except**
- **Enlarges time period for request to 14 days**

**Motion Denied as a Matter of Law if no Order is signed within 21 days after the Judgment was signed**
(b) **Motion to Set Aside Default.** A defendant against whom a default judgment is granted may file a motion to set aside the judgment no later than 14 days after the judgment is signed. The defendant must serve the plaintiff with a copy of the motion no later than the next business day using a method approved under Rule 501.4. The court may set aside the judgment and set the case for trial for good cause shown.

(c) **Motion for New Trial.** A party may file a motion for a new trial no later than 14 days after the judgment is signed. The party must serve all other parties with a copy of the motion no later than the next business day using a method approved under Rule 501.4. The judge may grant a new trial upon a showing that justice was not done in the trial of the case. Only one new trial may be granted to either party.

(d) **Motion Not Required.** Failure to file a motion under this rule does not affect a party’s right to appeal the underlying judgment.

(e) **Motion Denied as a Matter of Law.** If the judge has not ruled on a motion to set aside, motion to reinstate, or motion for new trial, the motion is automatically denied at 5:00 p.m. on the 21st day after the day the judgment was signed.

### RULE 506. APPEAL

#### RULE 506.1. APPEAL

(a) **How Taken; Time.** A party may appeal a judgment by filing a bond, making a cash deposit, or filing a sworn statement of inability to pay with the justice court within 21 days after the judgment is signed or the motion to reinstate, motion to set aside, or motion for new trial, if any, is denied.

(b) **Amount of Bond; Sureties; Terms.** A plaintiff must file a $500 bond. A defendant must file a bond in an amount equal to twice the amount of the judgment. The bond must be supported by a surety or sureties approved by the judge. The bond must be payable to the appellee and must be conditioned on the appellant’s prosecution of its appeal to effect and payment of any judgment and all costs rendered against it on appeal.

(c) **Cash Deposit in Lieu of Bond.** In lieu of filing a bond, an appellant may deposit with the clerk of the court cash in the amount required of the bond. The deposit must be payable to the appellee and must be conditioned on the appellant’s prosecution of its appeal to effect and payment of any judgment and all costs rendered against it on appeal.

(d) **Sworn Statement of Inability to Pay.**

1. Filing. An appellant who cannot furnish a bond or pay a cash deposit in the amount required may instead file a sworn statement of inability to pay. The statement must meet the requirements of Rule 502.3 and may be the same one that was filed with the petition.

### Timetable for Appeal is Enlarged
- Within 21 days after the judgment is signed

### Bond Requirements for Appeal
- **Plaintiff:** $500
- **Defendant:** Twice the amount of the judgment
- **Payable to Appellee**
- Pauper’s Bond described
<table>
<thead>
<tr>
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<th>Summary of Rule Elements</th>
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<tbody>
<tr>
<td>(2) Contest. The statement may be contested as provided in Rule 502.3(d) within 7 days after the opposing party receives notice that the statement was filed.</td>
<td></td>
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<tr>
<td>(3) Appeal If Contest Sustained. If the contest is sustained, the appellant may appeal that decision by filing notice with the justice court within 7 days of that court’s written order. The justice court must then forward all related documents to the county court for resolution. The county court must set the matter for hearing within 14 days and hear the contest de novo, as if there had been no previous hearing, and if the appeal is granted, must direct the justice court to transmit to the clerk of the county court the transcript, records, and papers of the case, as provided in these rules.</td>
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</tr>
<tr>
<td>(4) If No Appeal or If Appeal Overruled. If the appellant does not appeal the ruling sustaining the contest, or if the county court denies the appeal, the appellant may, within five days, post an appeal bond or make a cash deposit in compliance with this rule.</td>
<td></td>
</tr>
<tr>
<td>(e) Notice to Other Parties Required. If a statement of inability to pay is filed, the court must provide notice to all other parties that the statement was filed no later than the next business day. Within 7 days of filing a bond or making a cash deposit, an appellant must serve written notice of the appeal on all other parties using a method approved under Rule 501.4.</td>
<td></td>
</tr>
<tr>
<td>(f) No Default on Appeal Without Compliance With Rule. The county court to which an appeal is taken must not render default judgment against any party without first determining that the appellant has fully complied with this rule.</td>
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</tr>
<tr>
<td>(g) No Dismissal of Appeal Without Opportunity for Correction. An appeal must not be dismissed for defects or irregularities in procedure, either of form or substance, without allowing the appellant, after 7 days’ notice from the court, the opportunity to correct such defect.</td>
<td></td>
</tr>
<tr>
<td>(h) Appeal Perfected. An appeal is perfected when a bond, cash deposit, or statement of inability to pay is filed in accordance with this rule.</td>
<td></td>
</tr>
<tr>
<td>(i) Costs. The appellant must pay the costs on appeal to a county court in accordance with Rule 143a.</td>
<td></td>
</tr>
</tbody>
</table>

**RULE 506.2. RECORD ON APPEAL**

When an appeal has been perfected from the justice court, the judge must immediately send to the clerk of the county court a certified copy of all docket entries, a certified copy of the bill of costs, and the original papers in the case.

**RULE 506.3. TRIAL DE NOVO**

The case must be tried de novo in the county court. A trial de novo is a new trial in which the entire case is presented as if there had been no previous trial.
**Text of Rule of Civil Procedure**

<table>
<thead>
<tr>
<th>RULE 506.4. WRIT OF CERTIORARI</th>
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<tbody>
<tr>
<td>(a) <strong>Application.</strong> Except in eviction cases, after final judgment in a case tried in justice court, a party may apply to the county court for a writ of certiorari.</td>
</tr>
<tr>
<td>(b) <strong>Grounds.</strong> An application must be granted only if it contains a sworn statement setting forth facts showing that either:</td>
</tr>
<tr>
<td>(1) the justice court did not have jurisdiction; or</td>
</tr>
<tr>
<td>(2) the final determination of the suit worked an injustice to the applicant that was not caused by the applicant’s own inex- cusable neglect.</td>
</tr>
<tr>
<td>(c) <strong>Bond, Cash Deposit, or Sworn Statement of Indigency to Pay Required.</strong> If the application is granted, a writ of certiorari must not issue until the applicant has filed a bond, made a cash deposit, or filed a sworn statement of indigency that complies with Rule 145.</td>
</tr>
<tr>
<td>(d) <strong>Time for Filing.</strong> An application for writ of certiorari must be filed within 90 days after the date the final judgment is signed.</td>
</tr>
<tr>
<td>(e) <strong>Contents of Writ.</strong> The writ of certiorari must command the justice court to immediately make and certify a copy of the entries in the case on the docket, and immediately transmit the transcript of the proceedings in the justice court, together with the original papers and a bill of costs, to the proper court.</td>
</tr>
<tr>
<td>(f) <strong>Clerk to Issue Writ and Citation.</strong> When the application is granted and the bond, cash deposit, or sworn statement of indigency have been filed, the clerk must issue a writ of certiorari to the justice court and citation to the adverse party.</td>
</tr>
<tr>
<td>(g) <strong>Stay of Proceedings.</strong> When the writ of certiorari is served on the justice court, the court must stay further proceedings on the judgment and comply with the writ.</td>
</tr>
<tr>
<td>(h) <strong>Cause Docketed.</strong> The action must be docketed in the name of the original plaintiff, as plaintiff, and of the original defendant, as defendant.</td>
</tr>
<tr>
<td>(i) <strong>Motion to Dismiss.</strong> Within 30 days after the service of citation on the writ of certiorari, the adverse party may move to dismiss the certiorari for want of sufficient cause appearing in the affida- vit, or for want of sufficient bond. If the certiorari is dismissed, the judgment must direct the justice court to proceed with the execution of the judgment below.</td>
</tr>
<tr>
<td>(j) <strong>Amendment of Bond or Oath.</strong> The affidavit or bond may be amended at the discretion of the court in which it is filed.</td>
</tr>
<tr>
<td>(k) <strong>Trial De Novo.</strong> The case must be tried de novo in the county court and judgment must be rendered as in cases appealed from justice courts. A trial de novo is a new trial in which the entire case is presented as if there had been no previous trial.</td>
</tr>
</tbody>
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<table>
<thead>
<tr>
<th>Summary of Rule Elements</th>
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<tr>
<td>No Substantive Change from Prior Rules</td>
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</tbody>
</table>
### RULE 507. ADMINISTRATIVE RULES FOR JUDGES AND COURT PERSONNEL

#### RULE 507.1. PLENARY POWER
A justice court loses plenary power over a case when an appeal is perfected or if no appeal is perfected, 21 days after the later of the date judgment is signed or the date a motion to set aside, motion to reinstate, or motion for new trial, if any, is denied.

**Expanded Plenary Powers**
- Plenary Power enlarged to 21 days, consistent with enlarged appeal time frame

#### RULE 507.2. FORMS
The court may provide forms to enable a party to file documents that comply with these rules. No party may be forced to use the court’s forms.

**No Substantive Change from Prior Rules**

#### RULE 507.3. DOCKET AND OTHER RECORDS
(a) **Docket.** Each judge must keep a civil docket in a permanent record containing the following information:
   1. the title of all suits commenced before the court;
   2. the date when the first process was issued against the defendant, when returnable, and the nature of that process;
   3. the date when the parties, or either of them, appeared before the court, either with or without a citation;
   4. a description of the petition and any documents filed with the petition;
   5. every adjournment, stating at whose request and to what time;
   6. the date of the trial, stating whether the same was by a jury or by the judge;
   7. the verdict of the jury, if any;
   8. the judgment signed by the judge and the date the judgment was signed;
   9. all applications for setting aside judgments or granting new trials and the orders of the judge thereon, with the date;
   10. the date of issuing execution, to whom directed and delivered, and the amount of debt, damages and costs and, when any execution is returned, the date of the return and the manner in which it was executed; and
   11. all stays and appeals that may be taken, and the date when taken, the amount of the bond and the names of the sureties.

(b) **Other Records.** The judge must also keep copies of all documents filed; other dockets, books and records as may be required by law or these rules; and a fee book in which all costs accruing in every suit commenced before the court are taxed.

(c) **Form of Records.** All records required to be kept under this rule may be maintained electronically.

**No Substantive Change from Prior Rules**
### Text of Rule of Civil Procedure

**RULE 507.4. ISSUANCE OF WRITS**

Every writ from the justice courts must be in writing and be issued and signed by the judge officially. The style thereof must be “The State of Texas.” It must, except where otherwise specially provided by law or these rules, be directed to the person or party upon whom it is to be served, be made returnable to the court, and note the date of its issuance.

### Summary of Rule Elements

| No Substantive Change from Prior Rules |

### Text of Rule of Civil Procedure

**RULE 508. DEBT CLAIM CASES**

**RULE 508.1. APPLICATION**

Rule 508 applies to a claim for the recovery of a debt brought by an assignee of a claim, a financial institution, a debt collector or collection agency, or a person or entity primarily engaged in the business of lending money at interest.

**RULE 508.2. PETITION**

(a) **Contents.** In addition to the information required by Rule 502.2, a petition filed in a suit governed by this rule must contain the following information:

1. Credit Accounts. In a claim based upon a credit card, revolving credit, or open account, the petition must state:
   - (A) the account or credit card name;
   - (B) the account number (which may be masked);
   - (C) the date of issue or origination of the account, if known;
   - (D) the date of charge-off or breach of the account, if known;
   - (E) the amount owed as of a date certain; and
   - (F) whether the plaintiff seeks ongoing interest.

2. Personal and Business Loans. In a claim based upon a promissory note or other promise to pay a specific amount as of a date certain, the petition must state:
   - (A) the date and amount of the original loan;
   - (B) whether the repayment of the debt was accelerated, if known;
   - (C) the date final payment was due;
   - (D) the amount due as of the final payment date;
   - (E) the amount owed as of a date certain; and
   - (F) whether plaintiff seeks ongoing interest.

3. Ongoing Interest. If a plaintiff seeks ongoing interest, the petition must state:
   - (A) the effective interest rate claimed;
   - (B) whether the interest rate is based upon contract or statute; and

---

**Debt Claim Case Defined**

- Assignee of a Claim
- A Financial Institution
- A Debt Collector or Collection Agency
- A person or entity primarily engaged in the business of lending money at interest

**All Pleadings to Include the Information Described in Rule 502.2**

**Pleading Standards (Credit Acct)**

- Account or card name;
- Account number (masked)
- Date of issue (if known)
- Date of charge-off (if known)
- Amount owed on date certain; and
- Whether plaintiff seeks interest

**Pleading Standard (Loan)**

- Date and amount of original loan;
- Whether loan was accelerated;
- Date final payment was due;
- Amount due on payment date;
- Amount owed on date certain; and
- Whether plaintiff seeks interest
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<td>(C) the dollar amount of interest claimed as of a date certain.</td>
<td><strong>Ongoing Interest</strong></td>
</tr>
<tr>
<td>(4) Assigned Debt. If the debt that is the subject of the claim has been assigned or transferred, the petition must state:</td>
<td>- The effective interest rate;</td>
</tr>
<tr>
<td>(A) that the debt claim has been transferred or assigned;</td>
<td>- Whether interest rate is based upon contract or statute; and</td>
</tr>
<tr>
<td>(B) the date of the transfer or assignment;</td>
<td>- The dollar amount of interest claimed as of a date certain</td>
</tr>
<tr>
<td>(C) the name of any prior holders of the debt; and</td>
<td><strong>Assigned Debt Cases</strong></td>
</tr>
<tr>
<td>(D) the name or a description of the original creditor.</td>
<td>- Statement that debt claim has been transferred or assigned;</td>
</tr>
<tr>
<td></td>
<td>- Date of the transfer/assignment;</td>
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<tr>
<td></td>
<td>- Names of any prior holders; and</td>
</tr>
<tr>
<td></td>
<td>- Name or description of the original creditor</td>
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**RULE 508.3. DEFAULT JUDGMENT**

(a) *Generally.* If the defendant does not file an answer to a claim by the answer date or otherwise appear in the case, the judge must promptly render a default judgment upon the plaintiff’s proof of the amount of damages.

(b) *Proof of the Amount of Damages.*

1. *Evidence Must Be Served or Submitted.* Evidence of plaintiff’s damages must either be attached to the petition and served on the defendant or submitted to the court after defendant’s failure to answer by the answer date.

2. *Form of Evidence.* Evidence of plaintiff’s damages may be offered in a sworn statement or in live testimony. The evidence offered may include documentary evidence.

3. *Establishment of the Amount of Damages.* The amount of damages is established by evidence:

   (A) that the account or loan was issued to the defendant and the defendant is obligated to pay it;

   (B) that the account was closed or the defendant breached the terms of the account or loan agreement;

   (C) of the amount due on the account or loan as of a date certain after all payment credits and offsets have been applied; and

4. *Documentary Evidence Offered By Sworn Statement.* Documentary evidence may be considered if it is attached to a sworn statement made by the plaintiff or its representative, a prior holder of the debt or its representative, or the original creditor or its representative, that attests to the following:

   (A) the documents were kept in the regular course of business;

   Requires the court to “promptly render a default judgment”

   Requires that Proof of Damage Amount be either:

   - Served on the Defendant
   - Submitted to the Court

   **Forms of Evidence**

   - Sworn Statement
   - Live Witness
   - Documents

   **Requirements of Proof**

   - Defendant’s Account and obligation to pay
   - Breach
   - Amount Due
   - Plaintiff if Owner of the Account
     - If Acquired, then How

   **If Proof Relies on Documents**

   - Requires a Business Records Affidavit (BRA)

   **Requirements of a BRA**

   - Affidavit may be made by person *other than the original issuer*
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<tr>
<td>(B) it was the regular course of business for an employee or representative with knowledge of</td>
<td>• Attests to:</td>
</tr>
<tr>
<td>the act recorded to make the record or to transmit information to be included in such record;</td>
<td>– Documents kept in regular course of business</td>
</tr>
<tr>
<td>(C) the documents were created at or near the time or reasonably soon thereafter; and</td>
<td>– Employee obligation to make the record</td>
</tr>
<tr>
<td>(D) the documents attached are the original or exact duplicates of the original.</td>
<td>– Records created at or near the time of the event</td>
</tr>
<tr>
<td>(5) Consideration of Sworn Statement. A judge is not required to accept a sworn statement if</td>
<td>– Documents attached are originals or exact duplicates of the original.</td>
</tr>
<tr>
<td>the source of information or the method or circumstances of preparation indicate lack of trustworthiness. But a judge may not reject a sworn statement only because it is not made by the original creditor or because the documents attested to were created by a third party and subsequently incorporated into and relied upon by the business of the plaintiff.</td>
<td></td>
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<tr>
<td>(c) Hearing. The judge may enter a default judgment without a hearing if the plaintiff submits sufficient written evidence of its damages and should do so to avoid undue expense and delay. Otherwise, the plaintiff may request a default judgment hearing at which the plaintiff must appear, in person or by telephonic or electronic means, and prove its damages. If the plaintiff proves its damages, the judge must render judgment for the plaintiff in the amount proven. If the plaintiff is unable to prove its damages, the judge must render judgment in favor of the defendant.</td>
<td></td>
</tr>
<tr>
<td>(d) Appearance. If the defendant files an answer or otherwise appears in a case before a default judgment is signed by the judge, the judge must not render a default judgment and must set the case for trial.</td>
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<tr>
<td>(e) Post-Answer Default. If a defendant who has answered fails to appear for trial, the court may proceed to hear evidence on liability and damages and render judgment accordingly.</td>
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</table>

Sworn Statements
- Judge **is not required to accept** if source of information or method/circumstance of preparation indicates lack of trustworthiness
- Judge **cannot reject** simply because the sworn statement is not made by the original creditor

Hearing May Be by Submission, but Court Is Not Required to Do So
- May be telephonic (Court is encouraged to minimize cost)
- Hearing must result in a judgment (No Continuance??)
Bibliography


Bibliography


Bibliography


Bibliography


Treu, Steven B. “Multiplying Defendants to Increase Collectability.” In Mastering the Art of Collecting Debts and Judgments, 2010. Austin: University of Texas School of Law, 2010.

Turbyfill, Donald L. “Service Member Civil Relief Act.” In Mastering the Art of Collecting Debts and Judgments, 2010. Austin: University of Texas School of Law, 2010.


Statutes and Rules Cited

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