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Dealing with Default Judgements.

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ARTICLES

DEALING WITH DEFAULT JUDGMENTS

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I. Introduction

This Article analyzes a most unwelcome legal challenge—a default judgment—and discusses the methods available to a defendant to directly attack a default judgment taken because of: (1) a failure to answer when served with a lawsuit; or (2) a post-answer failure to appear at a scheduled dispositive hearing or trial setting. This Article primarily focuses on Texas state court proceedings, with a brief section on federal court procedures, and examines the various processes and procedures available to defendants under the Texas Rules of Civil Procedure and Texas Rules of Appellate Procedure for directly attacking default judgments—namely, motions for new trial, restricted appeals, and petitions for bill of review.

In addition, this Article discusses some of the pertinent issues in default judgment practice with respect to filing an answer, eviden-

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tiary support as to the causal nexus, notice/knowledge of the signing of the default judgment, jurisdiction, and sufficiency of the citation, service, and return. This Article further provides insights into circumstances under which plaintiffs may defeat challenges to default judgments. Although this Article analyzes the formative rules and cases in the text and provides citations to numerous other pertinent rules and published cases, practitioners should consider researching and reviewing unpublished opinions issued by Texas courts of appeals due to the recent amendments to Rule 47.7 of the Texas Rules of Appellate Procedure.[1]

II. Judgment by Default and Notice of Default Judgment

A. *Judgment by Default*

Rule 239 of the Texas Rules of Civil Procedure, titled "Judgment by Default," provides as follows:

> Upon such call of the docket, or at any time after a defendant is required to answer, the plaintiff may in term time take judgment by default against such defendant if he has not previously filed an answer, and provided that the citation with the officer's return thereon shall have been on file with the clerk for the length of time required by Rule 107.[2]

Rule 107 of the Texas Rules of Civil Procedure mandates that "[n]o default judgment shall be granted in any cause until the citation . . . with proof of service . . . shall have been on file with the clerk of the court ten days, exclusive of the day of filing and the day of judgment."[3]

In cases remanded from federal court to state court, Rule 237a of the Texas Rules of Civil Procedure provides as follows:

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1. Tex. R. App. P. 47.7 (stating that "[o]pinions not designated for publication by the court of appeals under these or prior rules have no precedential value but may be cited with the notation, '(not designated for publication)'").

2. Tex. R. Civ. P. 239; *see also* Maldonado v. Puente, 694 S.W.2d 86, 90 (Tex. App.—San Antonio 1985, no writ) (construing Rule 239).

3. Tex. R. Civ. P. 107; *see also* Union Pac. Corp. v. Legg, 49 S.W.3d 72, 78 (Tex. App.—Austin 2001, no pet.) (discussing the application of Rule 107); Onyx TV v. TV Strategy Group, LLC, 990 S.W.2d 427, 429-30 (Tex. App.—Texarkana 1999, no pet.) (addressing the entering of a default judgment when the citation is not on file); Webb v. Oberkampf Supply, Inc., 831 S.W.2d 61, 64 (Tex. App.—Amarillo 1992, no writ) (requiring strict compliance with the Rule or the default judgment is void).

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> When any cause is removed to the Federal Court and is afterwards remanded to the state court, the plaintiff shall file a certified copy of the order of remand with the clerk of the state court and shall forthwith give written notice of such filing to the attorneys of record for all adverse parties. All such adverse parties shall have fifteen days from the receipt of such notice within which to file an answer. No default judgment shall be rendered against a party in a removed action remanded from federal court if that party filed an answer in federal court during removal.[4]

B. *Motion and Hearing on Default Judgment*

Although default judgments may be granted upon motion, it is not necessary to file a motion for default judgment.[5] When the defendant does not file an answer or otherwise make an appearance in the case, such failure represents an admission of all facts properly set forth in the plaintiff's petition.[6] Moreover, the plaintiff is not required to provide notice of the default-judgment hearing to the defendant before the trial court renders the default judgment.[7] However, in a post-answer situation, the answering defendant is entitled to notice of all subsequent hearings, as a matter of constitutional due process, upon filing an answer or otherwise

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4. TEX. R. CIV. P. 237a; *see also* Quaestor Investors, Inc. v. State of Chiapas, 997 S.W.2d 226, 229 (Tex. 1999) (per curiam) (holding that "jurisdiction revests in the state court when the federal district court executes the remand order and mails a certified copy to the state court"); HBA E., Ltd. v. JEA Boxing Co., 796 S.W.2d 534, 538 (Tex. App.—Houston [1st Dist.] 1990, writ denied) (stating that "a default judgment cannot be granted against a defendant following remand of a case from federal to state court until fifteen days have expired from the defendant's receipt of the remand notice").

5. MICHOL O'CONNOR ET AL., O'CONNOR'S TEXAS RULES CIVIL TRIALS 430 (2002).

6. Morgan v. Compugraphic Corp., 675 S.W.2d 729, 732 (Tex. 1984); Jackson v. Gutierrez, 77 S.W.3d 898, 901 (Tex. App.—Houston [14th Dist.] 2002, no pet.).

7. *See* Novosad v. Cunningham, 38 S.W.3d 767, 772-73 (Tex. App.—Houston [14th Dist.] 2001, no pet.) (finding that the trial court did not err in denying a motion for new trial where the defendant received proper service of process but did not receive notice of default prior to judgment); Cont'l Carbon Co. v. Sea-Land Serv., Inc., 27 S.W.3d 184, 189 (Tex. App.—Dallas 2000, pet. denied) (finding that, where the defendant fails to answer, notice of intent to take default is not required); Long v. McDermott, 813 S.W.2d 622, 624 (Tex. App.—Houston [1st Dist.] 1991, no writ) (holding that the rules also do not require notice of a hearing on unliquidated damages); Olivares v. Cauthorn, 717 S.W.2d 431, 434 (Tex. App.—San Antonio 1986, writ dism'd) (agreeing with Helfman Motors, Inc. v. Stockman, 616 S.W.2d 394 (Tex. Civ. App.—Fort Worth 1981, writ ref'd n.r.e.), that no notice is required).

entering an appearance.[8] A post-answer default judgment will be valid only if the defendant received notice of the setting for the trial or other dispositive hearing at which the default judgment was rendered.[9]

C. *Liquidated and Unliquidated Damages*

When damages are liquidated, it is not necessary to hold a hearing to present evidence of damages, as the trial court can assess the damages according to the instrument in writing attached to the petition.[10] If damages are unliquidated, the record before the trial court must include evidence of damages, such as by affidavit or testimony on the record, before a final default judgment may be

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8. TEX. R. CIV. P. 21a, 245; LBL Oil Co. v. Int'l Power Servs., Inc., 777 S.W.2d 390, 390-91 (Tex. 1989); *In re* Brilliant, 86 S.W.3d 680, 693 (Tex. App.—El Paso 2002, no pet.); Coastal Banc, SSB v. Helle, 48 S.W.3d 796, 801 (Tex. App.—Corpus Christi 2001, pet. denied); Bradford v. Bradford, 971 S.W.2d 595, 597 (Tex. App.—Dallas, 1998, no pet.); Green v. McAdams, 857 S.W.2d 816, 819 (Tex. App.—Houston [1st Dist.] 1993, no writ); *see also* Peralta v. Heights Med. Ctr., Inc., 485 U.S. 80, 84-86 (1988) (holding that a default judgment entered against the appellant, without proper notice, violated due process); Lopez v. Lopez, 757 S.W.2d 721, 722 (Tex. 1988) (discussing that once an appearance is made, the defendant is entitled to notice of the trial as a matter of Fourteenth Amendment due process).

9. TEX. R. CIV. P. 21a; $429.30 In U.S. Currency v. State, 896 S.W.2d 363, 366 (Tex. App.—Houston [1st Dist.] 1995, no writ); Masterson v. Cox, 886 S.W.2d 436, 438 (Tex. App.—Houston [1st Dist.] 1994, no writ).

10. TEX. R. CIV. P. 241. Note, however, that Rule 241 specifically states that a judgment will not be rendered if the defendant demands and is entitled to a jury trial on damages. *Id.*; *see also* McCluskey v. State, 64 S.W.3d 621, 624 (Tex. App.—Houston [1st Dist.] 2001, no pet.) (declaring that the judgment nisi and bail bond proved liquidated damages); Aavid Thermal Techs of Tex. v. Irving Indep. Sch. Dist., 68 S.W.3d 707, 711 (Tex. App.—Dallas 2001, no pet.) (stating that tax rolls and tax statements attached to the petition constitute written instruments of liquidated damages); *Novosad*, 38 S.W.3d at 773 (explaining that "[a] claim is liquidated if the amount of damages can be accurately calculated by the court from the factual, as opposed to the conclusory, allegations in the petition and an instrument in writing"); Mantis v. Resz, 5 S.W.3d 388, 392 (Tex. App.—Fort Worth 1999, pet. denied) (holding that no evidence was required because the claim was based on a sworn account and therefore was liquidated), *overruled in part on other grounds by* Sheldon v. Emergency Med. Consultants I, P.A., 43 S.W.3d 701, 702 n.2 (Tex. App.—Fort Worth 2001, no pet.); Hanners v. State Bar, 860 S.W.2d 903, 911 (Tex. App.—Dallas 1993, no writ) (providing that "when a default judgment is rendered against a defendant and the claim is liquidated or proven by a written instrument, the court shall assess the damages"); Pentes Design, Inc. v. Perez, 840 S.W.2d 75, 79-80 (Tex. App.—Corpus Christi 1992, writ denied) (affirming the trial court's award of damages based on the fact that the appellant did not show the damages were unliquidated); Abcon Paving, Inc. v. Crissup, 820 S.W.2d 951, 953 (Tex. App.—Fort Worth 1991, no writ) (reversing the trial court's grant of damages in the absence of support by a written instrument).

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rendered.[11] In addition, when damages are unliquidated or not proved by an instrument in writing,[12] the plaintiff must present evidence of the causal nexus between the occurrence at issue and the claimed injuries and damages, as the defaulting defendant only admits that it caused the occurrence in question, and not necessarily the causation of the pleaded damages.[13] Unliquidated damages may be proved by testimony at a hearing[14] or based on affidavit testimony.[15] The plaintiff should request that the court reporter transcribe the proceedings during the default-judgment hearing with respect to the evidence proving damages.[16] The failure to have a record is fatal to a default judgment.[17]

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11. TEX. R. CIV. P. 243; Holt Atherton Indus., Inc. v. Heine, 835 S.W.2d 80, 83 (Tex. 1992); Atwood v. B&R Supply & Equip. Co., 52 S.W.3d 265, 268 (Tex. App.—Corpus Christi 2001, no pet.); Arenivar v. Providian Nat'l Bank, 23 S.W.3d 496, 498 (Tex. App.—Amarillo 2000, no pet.); *see also* Tex. Commerce Bank, N.A. v. New, 3 S.W.3d 515, 516 (Tex. 1999) (noting that the Texas Supreme Court has held 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"); *Long*, 813 S.W.2d at 624 (noting that "[t]he rules do not require separate notice of the hearing on unliquidated damages").

12. *Atwood*, 52 S.W.3d at 268 (following Texas Rule of Civil Procedure 243); *see also* Fogel v. White, 745 S.W.2d 444, 446 (Tex. App.—Houston [14th Dist.] 1988, orig. proceeding) (explaining that unliquidated damages are not subject to a writ of garnishment).

13. *See* TEX. R. CIV. P. 243 (providing that "if the cause of action is unliquidated" or not proved in writing, then the court must hear evidence on damages); *Holt Atherton Indus.*, 835 S.W.2d at 86 (holding that "[a]fter a default judgment is granted, the trial court must hear evidence of unliquidated damages"); Morgan v. Compugraphic Corp., 675 S.W.2d 729, 732 (Tex. 1984) (explaining that proof of the "causal nexus between the event sued upon and the plaintiff's injuries . . . is necessary to ascertain the amount of damages to which the plaintiff is entitled"); *Aavid*, 68 S.W.3d at 711-12 (defining how damages are assessed).

14. *See Long*, 813 S.W.2d at 624 (stating that the rules do not require separate notice of the hearing on liquidated damages).

15. *See Tex. Commerce Bank*, 3 S.W.3d at 517 (holding that the trial court did not err when it considered the affidavits in rendering its default judgment). It should also be noted that if the defendant demands and is entitled to a jury trial, Rule 243 requires that the default judgment "be noted, a writ of inquiry awarded, and the cause entered on the jury docket." TEX. R. CIV. P. 243.

16. MICHOL O'CONNOR ET AL., O'CONNOR'S TEXAS RULES CIVIL TRIALS 433 (2002).

17. Stubbs v. Stubbs, 685 S.W.2d 643, 646 (Tex. 1985); Smith v. Smith, 544 S.W.2d 121, 122-23 (Tex. 1976); Alvarado v. Reif, 783 S.W.2d 303, 304-05 (Tex. App.—Eastland 1989, no writ).

D. *Drafting the Default Judgment*

A proposed default judgment drafted by the plaintiff should identify the cause and the parties, state the relief granted, and recite all the jurisdictional prerequisites: (1) that the citation was duly served with process; (2) that the return of service was on file for ten days before the default judgment was rendered (not including the day of filing or the date of judgment); and (3) that the defendant failed to answer and appear.[18] In addition, a final default judgment must dispose of all issues and parties. There is no presumed disposition of all issues and parties in a default judgment case.[19]

E. *Trial Court Clerk's Duties in Providing Notice of Default Judgment*

Rule 239a of the Texas Rules of Civil Procedure provides that

> [a]t or immediately prior to the time an interlocutory or final default judgment is rendered, the party taking the same or its 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.[20]

In addition, "[i]mmediately 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."[21] Further, Rule 306a(3) of the Texas Rules of Civil Procedure requires the trial court clerk to "immediately give notice to the parties or their attorneys of record by first-class mail advising that the judgment or order was signed."[22]

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18. MICHOL O'CONNOR ET AL., O'CONNOR'S TEXAS RULES CIVIL TRIALS 445 (2002).

19. *See* Houston Health Clubs v. First Court of Appeals, 722 S.W.2d 692, 693 (Tex. 1986) (orig. proceeding) (per curiam) (stating that a final judgment is one that disposes of all parties and all issues in a lawsuit).

20. TEX. R. CIV. P. 239a; *see also* Xu v. Davis, 884 S.W.2d 916, 917 (Tex. App.—Waco 1994, orig. proceeding) (interpreting the rule and its effects on the appellate timetable).

21. TEX. R. CIV. P. 239a.

22. TEX. R. CIV. P. 306a(3). Note, however, that Rule 306a(3) also states that "[f]ailure to comply with the provisions of this rule shall not affect" the time periods governing the trial court's plenary power, except as provided in Rule 306a(4). *Id.* Rule 306a(4) states that

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The trial court clerk's action in mailing notice of the default judgment is not triggered, however, until the plaintiff files a certificate of last known mailing address for the defaulting defendant.[23] Thus, if the plaintiff provides an incorrect address for the defendant, or completely fails to provide the certificate of last known mailing address, there may be a delay in the defaulting defendant receiving notice of the signing of the default judgment.[24] If the record reflects the filing of a certificate of last known mailing address, then it is presumed that the trial court clerk mailed notice of the default judgment, and the defaulting defendant bears the burden of proving that the trial court clerk failed to mail the requisite notice.[25] It is important to note that "[f]ailure to comply with the provisions of this rule shall not affect the finality of the judgment."[26]

III. Date of Notice or Knowledge of a Default Judgment

There are three procedures available for directly attacking a default judgment: (1) motion for new trial[27] and appeal if necessary; (2) restricted appeal (formerly called petition for writ of error);[28]

> If within twenty days after the judgment or other appealable order is signed, a party adversely affected by it or his attorney has neither received the notice required by paragraph (3) of this rule nor acquired actual knowledge of the order, then with respect to that party all the periods mentioned in paragraph (1) [regarding the time periods governing the trial court's plenary power] shall begin on the date that such party or his attorney received such notice or acquired actual knowledge of the signing, whichever occurred first, but in no event shall such periods begin more than ninety days after the original judgment or other appealable order was signed.

Tex. R. Civ. P. 306a(4).

23. Tex. R. Civ. P. 239a.

24. *See* Tex. Sting, Ltd. v. R.B. Foods, Inc., 82 S.W.3d 644, 651-52 (Tex. App.—San Antonio 2002, pet. denied) (admitting that the clerk mailed notice to an address other than the address counsel had listed in the pleadings).

25. *See* Withrow v. Schou, 13 S.W.3d 37, 40 (Tex. App.—Houston [14th Dist.] 1999, pet. denied) (noting that the constitutional standard does not require actual notice, but merely notice that is reasonably calculated under the circumstances to achieve due process); Sanchez v. Tex. Indus. Inc., 485 S.W.2d 385, 387 (Tex. Civ. App.—Waco 1972, writ ref'd n.r.e.) (affirming the presumption of notice by the trial court clerk).

26. Tex. R. Civ. P. 239a; *see also* John v. State, 826 S.W.2d 138, 140 (Tex. 1992) (discussing failure to comply); Campbell v. Fincher, 72 S.W.3d 723, 724-25 (Tex. App.—Waco 2002, no pet.) (discussing Rule 239a).

27. Tex. R. Civ. P. 324(b), 329b.

28. Tex. R. App. P. 30.

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and (3) petition for bill of review.[29] The procedure to be utilized in attacking a default judgment depends on the date the defendant or its attorney received notice that a default judgment was taken, whether the defendant or its attorney took any action at the time, and the nature of the reason for default. Note, however, that a petition for writ of mandamus is not an appropriate means for attacking a final default judgment if the trial court had jurisdiction when it rendered the default judgment.[30]

A. *Notice of Default Judgment Within Twenty Days of Signing—Motion for New Trial*

A motion for new trial is required to preserve error for complaint on an ordinary appeal for failure to set aside a default judgment.[31] Under Rule 329b(a) of the Texas Rules of Civil Procedure, "[a] motion for new trial . . . shall be filed prior to or within thirty days after the judgment or other order complained of is signed."[32] If either the defaulting defendant or its attorney has knowledge or notice of the default judgment in the first twenty days after it is signed, the motion for new trial must be filed within the thirty days after the judgment was signed.[33]

The "mailbox rule" provided by Rule 5 of the Texas Rules of Civil Procedure allows the motion for new trial to be mailed by first class U.S. mail "on or before the last day for filing," as long as it is received by the trial court clerk within ten days of the filing deadline.[34] It is advisable to request a certificate of mailing from the post office and send a copy to the trial court for filing, to prove compliance with the "mailbox rule" filing deadline. The specific

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29. TEX. R. CIV. P. 329b(f); *see also* Caldwell v. Barnes, 975 S.W.2d 535, 537-38 (Tex. 1998) (noting the importance of availing oneself of all adequate legal remedies before filing a bill of review); State v. 1985 Chevrolet Pickup Truck, 778 S.W.2d 463, 464 (Tex. 1989) (defining bill of review).

30. *See* Thursby v. Stovall, 647 S.W.2d 953, 954 (Tex. 1983) (per curiam) (clarifying that a bill of review or appeal by petition for writ of error, now known as a restricted appeal, are the two methods to vacate a default judgment when the trial court has jurisdiction).

31. TEX. R. CIV. P. 324(b)(1).

32. TEX. R. CIV. P. 329b(a).

33. *See* TEX. R. CIV. P. 306a(4) (identifying that adversely affected parties must receive notice within twenty days after the judgment or periods will begin on the date notice is received); TEX. R. CIV. P. 329b (specifying that a motion for new trial must be filed prior to or within thirty days after the judgment is signed).

34. TEX. R. CIV. P. 5.

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requisite matters to be included in the motion for new trial are discussed in Part VII of this Article.

B. *Notice of Default Judgment Between Twenty and Ninety Days of Signing—Rule 306a(4)*

1. Rule 306a(4)—Motion for New Trial

Although the trial court clerk's failure to "immediately" mail the required written notice of the signing of the default judgment does not affect the finality of the default judgment,[35] such delay may provide the basis for a Rule 306a(4) motion[36] to, in essence, restart the time period for filing a motion for new trial. Rule 306a(4) of the Texas Rules of Civil Procedure provides as follows:

> If within twenty days after the judgment or other appealable order is signed, a party adversely affected by it or his attorney has neither received the notice required by paragraph (3) of this rule nor acquired actual knowledge of the order, then with respect to that party all the periods mentioned in paragraph (1) shall begin on the date that such party or its attorney received such notice or acquired actual knowledge of the signing, whichever occurred first, but in no event shall such periods begin more than ninety days after the original judgment or other appealable order was signed.[37]

In other words, if neither the defaulting defendant nor its attorney receives notice or acquires knowledge of the signing of the default judgment within twenty days of the signing, Rule 306a(4) extends the deadline for filing a motion for new trial to thirty days from the date such notice or knowledge is received or acquired.[38] However, to take advantage of Rule 306a, the date of notice or knowledge of the default judgment must not have occurred more than ninety days after the date the default judgment was signed.[39] Rule 306a

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35. TEX. R. CIV. P. 239a.

36. TEX. R. CIV. P. 306a(4).

37. *Id.*; TEX. R. APP. P. 4.2(a)(1) (noting the importance of Texas Rule of Civil Procedure 306a(4)); Shull v. United Parcel Serv., 4 S.W.3d 46, 52 (Tex. App.—San Antonio 1999, pet. denied) (applying Rule 306a(4)).

38. TEX. R. CIV. P. 306a(4).

39. *Id.*; Levit v. Adams, 850 S.W.2d 469, 470 (Tex. 1993) (per curiam) (holding that Rule 306a(4) does not apply if notice is received more than ninety days after the signing of the judgment); *see also* Grondona v. Sutton, 991 S.W.2d 90, 92 (Tex. App.—Austin 1998, pet. denied) (per curiam) (discussing a Rule 306a(4) motion filed by the defaulting defendant eighty-four days after the date of notice or knowledge of default judgment; the court of appeals held that a Rule 306a(4) motion may be filed more than thirty days after the

does not apply to extend the deadline for perfecting a restricted appeal.[40]

2. Rule 306a(5)—Proof of Lack of Notice or Knowledge

Rule 306a(5) of the Texas Rules of Civil Procedure requires the defaulting defendant attempting to invoke Rule 306a(4) "to prove in the trial court, on sworn motion and notice, the date on which the party or his attorney first either received a notice of the judgment or acquired actual knowledge of the signing and that this date was more than twenty days after the judgment was signed."[41] The purpose of the sworn motion is to establish "a prima-facie case of lack of timely notice" in order to invoke the trial court's jurisdiction to hold a hearing concerning the date of notice.[42] The trial court does not have jurisdiction to make this determination where the movant has failed to properly establish the applicability of the exception; thus, any order that so determines the date of notice would be void.[43]

3. Hearing on Rule 306a Motion

It is important to denominate the motion for new trial as a Rule 306a motion, as opposed to a traditional new trial motion, because application of Rule 306a will not be implied.[44] The movant must set a hearing on the motion and request that the trial court find, on the record or in an order, the date on which the defaulting defendant or its attorney first learned of the default judgment for purposes of triggering Rule 306a.[45]

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defaulting defendant receives notice or knowledge of the default judgment "as long as he files it within the court's plenary power counted from the date of notice").

40. *See* Maldonado v. Macaluso, 100 S.W.3d 345, 346 (Tex. App.—San Antonio 2002, no pet.) (per curiam) (recognizing that, while Texas Rule of Appellate Procedure 4.2(a)(2) permits the extension of deadlines if Rule 306a requirements are fulfilled, restricted appeals are clearly exempted by Rule 4.2(a)(2)).

41. Tex. R. Civ. P. 306a(5).

42. *Grondona*, 991 S.W.2d at 91-92 (citing Carrera v. Marsh, 847 S.W.2d 337, 342 (Tex. App.—El Paso 1993, orig. proceeding)).

43. *Id.* at 92; Graham v. Fashing, 928 S.W.2d 567, 569 (Tex. App.—El Paso 1996, orig. proceeding).

44. *See* Thompson v. Harco Nat'l Ins. Co., 997 S.W.2d 607, 610-11, 617-23 (Tex. App.—Dallas 1998, pet. denied) (emphasizing that "compliance with Rule 306a(5) is a prerequisite for invoking the trial court's jurisdiction to grant relief under Rule 306a(4)").

45. *See, e.g.*, John v. Marshall Health Servs., 58 S.W.3d 738, 741 (Tex. 2001) (per curiam) (holding that "Rule 306a simply imposes no deadline, and none can be added by

A trial court's refusal to conduct a hearing on a Rule 306a motion may be subject to mandamus, because such a hearing is necessary for purposes of making a finding as of the date of notice or knowledge of the default judgment.[46] It is important to note that one court of appeals has held that the defaulting defendant claiming a substitute date under Rule 306a has only thirty days from the date that notice of the default judgment was received to have a hearing *and* obtain the trial court finding regarding its applicability.[47]

C. *Notice of Default Judgment Within Six Months of Signing—Restricted Appeal*

Rule 30 of the Texas Rules of Appellate Procedure pertains to "Restricted Appeal to Court of Appeals in Civil Cases," and provides as follows:

> A party who did not participate—either in person or through counsel—in the hearing that resulted in the judgment complained of and who did not timely file a postjudgment motion or request for findings of fact and conclusions of law, or a notice of appeal within the time permitted by Rule 26.1(a), may file a notice of appeal within the time permitted by Rule 26.1(c). Restricted appeals replace writ of error appeals to the court of appeals. Statutes pertaining to writ of error appeals to the court of appeals apply equally to restricted appeals.[48]

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decision, other than the deadline of the expiration of the trial court's jurisdiction"); *Grondona*, 991 S.W.2d at 92 (determining that appellant's motion, filed eighty-four days after learning of the default judgment, invoked the court's jurisdiction to hold a hearing to determine the date of notice); *see also* Equinox Enters. v. Assoc. Media, Inc., 730 S.W.2d 872, 872 (Tex. App.—Dallas 1987, no writ) (stating the complete rule for signing the court order).

46. TEX. R. APP. P. 4.2(c); *see also In re* Ray, 967 S.W.2d 951, 953 (Tex. App.—Dallas 1998, orig. proceeding) (stating that "[f]ailure to hold a hearing *and make a finding* . . . constitutes an abuse of discretion"); Xu v. Davis, 884 S.W.2d 916, 918 (Tex. App.—Waco 1994, orig. proceeding) (finding that where the relator's motion is timely filed, the court's failure to hold a hearing is an abuse of discretion).

47. Montalvo v. Rio Nat'l Bank, 885 S.W.2d 235, 237 (Tex. App.—Corpus Christi 1994, no writ).

48. TEX. R. APP. P. 30; *see also* Quaestor Investors, Inc. v. State of Chiapas, 997 S.W.2d 226, 227 (Tex. 1999) (per curiam) (summarizing the elements of Rule 30); Norman Communications v. Tex. Eastman Co., 955 S.W.2d 269, 270 (Tex. 1997) (per curiam) (noting the elements for review by writ of error); Texaco, Inc. v. Central Power & Light Co., 925 S.W.2d 586, 588 (Tex. 1996) (applying the elements of writ of error, though not a default judgment case); Stubbs v. Stubbs, 685 S.W.2d 643, 644 (Tex. 1985) (applying the elements under Rule 30).

Rule 26.1(c) of the Texas Rules of Appellate Procedure states that "in a restricted appeal, the notice of appeal must be filed within six months after the judgment or order is signed,"[49] without regard to the date the appellant received notice or acquired actual knowledge of the judgment or order. Note that Rule 306a, discussed previously, does not apply to extend the deadline for perfecting a restricted appeal.[50]

In order to prevail on a restricted appeal, the appellant (defaulting defendant) must prove the following elements: (1) the notice of restricted appeal was timely filed within six months of the date the default judgment was signed;[51] (2) the appellant was a party in the lawsuit;[52] (3) the appellant "did not timely file a postjudgment motion or request for findings of fact and conclusions of law, or a notice of appeal";[53] (4) the appellant did not participate, either in person or through counsel, in the actual trial of the case;[54] and (5) the trial court's error is apparent from the face of the record.[55] These elements and the restricted appeal proceeding will be discussed in further detail in Part VII.

D. *Motion for New Trial on Default Judgment Following Citation by Publication*

Rule 329 of the Texas Rules of Civil Procedure pertains to cases in which a default "judgment has been rendered on service of process by publication," and provides that the trial court "may grant a

49. TEX. R. APP. P. 26.1(c); *see also* Primate Constr., Inc. v. Silver, 884 S.W.2d 151, 152 (Tex. 1994) (per curiam) (reiterating the six-month time period to file a notice of appeal).

50. Maldonado v. Macaluso, 100 S.W.3d 345, 346 (Tex. App.—San Antonio 2002, no pet.) (per curiam) (quoting Texas Rule of Appellate Procedure 4.2(a)).

51. TEX. R. APP. P. 26.1(c); *Quaestor Investors*, 997 S.W.2d at 227; *Norman Communications*, 955 S.W.2d at 270; *Primate Constr.*, 884 S.W.2d at 152; *see also* TEX. CIV. PRAC. & REM. CODE ANN. § 51.013 (Vernon 1999) (stating that "in a case in which a writ of error to the court of appeals is allowed, the writ of error may be taken at any time within six months after the date the final judgment is rendered").

52. *Norman Communications*, 955 S.W.2d at 270.

53. TEX. R. APP. P. 30; Lab. Corp. v. Mid-Town Surgical Ctr., Inc., 16 S.W.3d 527, 528 (Tex. App.—Dallas 2000, no pet.) (dismissing the restricted appeal because the appellant timely filed a motion to set aside default judgment).

54. TEX. R. APP. P. 30; *Norman Communications*, 955 S.W.2d at 270; Texaco, Inc. v. Central Power & Light Co., 925 S.W.2d 586, 588 (Tex. 1996).

55. *Norman Communications*, 955 S.W.2d at 270; Gen. Elec. Co. v. Falcon Ridge Apartments, Joint Venture, 811 S.W.2d 942, 943 (Tex. 1991).

new trial upon petition of the defendant showing good cause, supported by affidavit, filed within two years after such judgment was signed."[56] When the plaintiff moves for a default judgment against a non-answering or non-appearing defendant following service by publication, Rule 244 of the Texas Rules of Civil Procedure requires the trial court to appoint an attorney ad litem to defend the case.[57]

E. *Notice of Default Judgment Within Four Years of Signing—Petition for Bill of Review*

A defaulting defendant may attack a default judgment through a petition for bill of review after the time for filing a motion for new trial has expired and when a restricted appeal is not available.[58] The petition for bill of review is an independent proceeding filed by the defaulting defendant, under a new cause number, in the same trial court that rendered the default judgment.[59] The petition for bill of review must be filed after the trial court's plenary power expires but within a residual four-year statute of limitations period, running from the date the default judgment was signed.[60] However, several Texas courts of appeals have held that the limitations

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56. TEX. R. CIV. P. 329; *see also* Stock v. Stock, 702 S.W.2d 713, 714-15 (Tex. App.—San Antonio 1985, no writ) (discussing the two elements required to satisfy good cause).

57. TEX. R. CIV. P. 244; Cahill v. Lyda, 826 S.W.2d 932, 933 (Tex. 1992); Isaac v. Westheimer Colony Ass'n, 933 S.W.2d 588, 590-91 (Tex. App.—Houston [1st Dist.] 1996, writ denied). For further discussion regarding attacking a default judgment following service by publication, refer to MICHOL O'CONNOR ET AL., O'CONNOR'S TEXAS RULES CIVIL TRIALS 612-14 (2002).

58. *See* TEX. R. CIV. P. 329b(f) (providing that once the trial court's plenary power has expired, a judgment can only be set aside by bill of review); Caldwell v. Barnes, 975 S.W.2d 535, 537-38 (Tex. 1998) (commenting that a bill of review may be brought when the judgment "is no longer subject to challenge by a motion for new trial or appeal"); Collazo v. Flores, No. 04-02-00274-CV, 2003 WL 236404, at *1 (Tex. App.—San Antonio Feb. 5, 2003, no pet.) (mem. op.) (stating that a bill of review may be used when no other remedy is available).

59. *See* Wembley Inv. Co. v. Herrera, 11 S.W.3d 924, 926-27 (Tex. 1999) (per curiam) (defining a petition for bill of review as "an independent action"); *Collazo*, 2003 WL 236404, at *1 (explaining the jurisdictional requirement that a bill of review must be filed in the same court that rendered the judgment); Hernandez v. Koch Mach. Co., 16 S.W.3d 48, 57 (Tex. App.—Houston [1st Dist.] 2000, pet. denied) (defining bill of review).

60. TEX. CIV. PRAC. & REM. CODE ANN. § 16.051 (Vernon 1999) (stating that "[e]very action for which there is no express limitations period, except an action for the recovery of real property, must be brought not later than four years after the day the cause of action accrues"); *Caldwell*, 975 S.W.2d at 538 (stating that "[t]he residual four-year statute of limitations applies to bills of review").

period may be extended if the petitioner proves extrinsic fraud.[61] The grounds and guidelines for a petition for bill of review proceeding are discussed in Part VII of this Article.

IV. Interlocutory Default Judgments

To be final and appealable, a default judgment must dispose of all issues and all parties in the case.[62] Rule 240 of the Texas Rules of Civil Procedure allows the plaintiff to take an interlocutory default judgment "[w]here there are several defendants, some of whom have answered or have not been duly served and some of whom have been duly served and have made default."[63] In addition, a default judgment is interlocutory if: (1) it does not dispose of all claims and all parties;[64] (2) it only establishes liability but does not adjudicate damage; (3) the monetary amount of the judgment cannot be determined;[65] or (4) the Rule 621a[66] post-judgment discovery order does not resolve all the disputes between the parties.[67]

When an interlocutory default judgment is rendered against a defaulting defendant under such circumstances, the defaulting defendant cannot appeal the interlocutory default judgment until the trial court renders a final judgment in the case,[68] the trial court signs a severance order making the interlocutory default judgment

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61. Defee v. Defee, 966 S.W.2d 719, 722 (Tex. App.—San Antonio 1998, no pet.); Law v. Law, 792 S.W.2d 150, 153 (Tex. App.—Houston [1st Dist.] 1990, writ denied); Williams v. Adams, 696 S.W.2d 156, 160 (Tex. App.—Houston [14th Dist.] 1985, writ ref'd n.r.e.).

62. Houston Health Clubs v. First Court of Appeals, 722 S.W.2d 692, 693 (Tex. 1986) (orig. proceeding) (per curiam).

63. Tex. R. Civ. P. 240.

64. First Nat'l Bank v. Martinez de Villagomez, 54 S.W.3d 345, 348 (Tex. App.—Corpus Christi 2001, pet. denied).

65. *See* Olympia Marble & Granite v. Mayes, 17 S.W.3d 437, 440 (Tex. App.—Houston [1st Dist.] 2000, no pet.) (indicating that the default judgment was interlocutory because prejudgment interest could not be calculated due to the fact that the date of accrual was not ascertainable from the record).

66. Tex. R. Civ. P. 621a.

67. Fisher v. P.M. Clinton Int'l Investigations, 81 S.W.3d 484, 485-86 (Tex. App.—Houston [1st Dist.] 2002, no pet.) (citing Arndt v. Farris, 633 S.W.2d 497, 500 (Tex. 1982) and Parks v. Huffington, 616 S.W.2d 641, 645 (Tex. Civ. App.—Houston [14th Dist.] 1981, writ ref'd n.r.e.)).

68. Tex. R. Civ. P. 301; Webb v. Jorns, 488 S.W.2d 407, 409 (Tex. 1972).

final,[69] or the remaining non-defaulting defendant is non-suited or dismissed or is not served with process (discontinuance).[70]

Even if a default judgment states that it is interlocutory, one should immediately check the trial court's file to confirm that the interlocutory default judgment has not been made final by a hearing on damages or by an order of severance, nonsuit, or dismissal. In a multi-defendant case, if an order of severance pertaining to one particular defendant is entered, the deadlines for that defendant to attack the default judgment commence on the day the severance order was signed.[71] If the plaintiff dismisses or non-suits the other defendants or other claims, a default judgment becomes final when the order dismissing the remaining defendants is signed.[72]

The procedures for overturning a final default judgment apply to attacking an interlocutory default judgment, although the deadlines will not be as strict for the latter. Rule 329b(a) of the Texas Rules of Civil Procedure provides that a motion for new trial "shall be filed prior to or within thirty days after the judgment or other order complained of is signed."[73] Rule 329b(a) does not differentiate between final default judgments and interlocutory default judgments with respect to the deadline for filing a motion for new trial.[74] Upon receiving notice or acquiring knowledge of an interlocutory default judgment within thirty days of its signing, a motion for new trial should be filed within the thirty-day period following signing, if possible, although the filing of a motion for new trial

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69. TEX. R. CIV. P. 41; Martinez v. Humble Sand & Gravel, Inc., 875 S.W.2d 311, 312-13 (Tex. 1994); *see also* New Hampshire Ins. Co. v. Tobias, 80 S.W.3d 146, 148 (Tex. App.—Austin 2002, no pet.) (summarizing that the appeal as to the "original cause" was dismissed because the judgment appealed was interlocutory and the severance order placed all claims involving appellant into the severed cause); Castano v. Foremost County Mut. Ins. Co., 31 S.W.3d 387, 388 (Tex. App.—San Antonio 2000, no pet.) (reiterating that a severance order makes the default judgment final).

70. *See* Youngstown Sheet & Tube Co. v. Penn, 363 S.W.2d 230, 232 (Tex. 1962) (finding that a discontinuance has occurred where no evidence exists to indicate that the petitioner anticipated serving the defendant); Tom Benson Co. v. Ervine, 574 S.W.2d 221, 222 (Tex. Civ. App.—San Antonio 1978, writ ref'd n.r.e.) (determining that a motion for new trial is authorized where a defendant has been non-suited, and a motion to set aside an interlocutory judgment will not affect the ability to file a motion for new trial after final judgment).

71. TEX. R. CIV. P. 41; *see also* McRoberts v. Ryals, 863 S.W.2d 450, 452-53 (Tex. 1993) (showing that the severance order is effective upon signing).

72. Wembley Inv. Co. v. Herrera, 11 S.W.3d 924, 927-28 (Tex. 1999) (per curiam).

73. TEX. R. CIV. P. 329b(a).

74. *Id.*

from an interlocutory default judgment may be postponed until any time prior to expiration of the thirty-day period following the date on which the default judgment becomes final.[75]

There is no presumption of finality for purposes of appeal in a default judgment situation[76] because the presumption of finality of judgments discussed in *North East Independent School District v. Aldridge*[77] does not apply to default judgments based on failure to answer, as opposed to those based on failure to appear for a trial setting. Note, however, that there is a split of authority among Texas courts of appeals on whether the *Aldridge* presumption of finality applies to a post-answer default judgment.[78] The trial court retains plenary jurisdiction to vacate and set aside an interlocutory

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75. *See* Fruehauf Corp. v. Carrillo, 848 S.W.2d 83, 84 (Tex. 1993) (stating that trial courts may set aside interlocutory orders at any time before final judgment is entered); Kone v. Sec. Fin. Co., 159 Tex. 445, 451, 313 S.W.2d 281, 286 (1958) (explaining that the trial court has the power, even during subsequent court terms, to set aside interlocutory judgments); Stout-Jennings-Schmidt Co. v. Schmidt, 615 S.W.2d 267, 269 (Tex. Civ. App.—Dallas 1981, writ dism'd w.o.j.) (stating that discretionary authority to set aside an interlocutory judgment may be exercised at any time prior to the final judgment); Ratcliff v. Sherman, 592 S.W.2d 81, 83 (Tex. Civ. App.—Tyler 1979, no writ) (stating that the trial court may set aside an interlocutory default judgment on its own motion or that of the defaulting defendant prior to the entry of a final judgment); Stone v. Enstam, 541 S.W.2d 473, 478 (Tex. Civ. App.—Dallas 1976, no writ) (stating that a motion for new trial under Rule 329b was premature where the default judgment remained interlocutory).

76. Houston Health Clubs v. First Court of Appeals, 722 S.W.2d 692, 693 (Tex. 1986) (orig. proceeding) (per curiam); Teer v. Duddlesten, 664 S.W.2d 702, 704 (Tex. 1984); *In re* Thompson, 991 S.W.2d 527, 530 (Tex. App.—Beaumont 1999, orig. proceeding); Quebodeaux v. Lundy, 977 S.W.2d 465, 467 (Tex. App.—Tyler 1998, no pet.); *see also* MICHOL O'CONNOR ET AL., O'CONNOR'S TEXAS RULES CIVIL TRIALS 436 (2002) (explaining that "[t]here is no presumed disposition of issues in a default judgment case"). *But see* Markham v. Diversified Land & Exploration, 973 S.W.2d 437, 439 (Tex. App.—Austin 1998, pet. denied) (willing to presume that a default judgment is final where a foreign jurisdiction has found it final). A foreign judgment taken by default does not defeat its presumption of finality under the Uniform Enforcement of Foreign Judgments Act. TEX. CIV. PRAC. & REM. CODE ANN. § 35.003 (Vernon 1997).

77. 400 S.W.2d 893, 898 (Tex. 1966).

78. *Compare* Schnitzius v. Koons, 813 S.W.2d 213, 216 (Tex. App.—Dallas 1991, no writ) (holding that, where all the evidence necessary to show a failure to appear was before the court, a presumption of finality would apply to default judgments of forfeiture against sureties on appearance bonds), *and* Thomas v. Dubovy-Longo, 786 S.W.2d 506, 507 (Tex. App.—Dallas 1990, writ denied) (showing the presumption would apply in a post-answer default judgment, even where it fails to dispose of a counterclaim and a claim for prejudgment interest), *with* Strut Cam Dimensions, Inc. v. Sutton, 896 S.W.2d 799, 801 (Tex. App.—Corpus Christi 1994, writ denied) (showing that the presumption does *not* apply because a post-answer default is not a judgment upon a trial).

default judgment and grant a motion for a new trial.[79] If the defaulting defendant has a deadline problem with respect to filing a motion for new trial, the plaintiff's pleadings, and the defendant's answer if it is a post-answer default judgment, should be carefully scrutinized for any issues, claims, or parties not finally determined in the default judgment, as the default judgment may be interlocutory rather than final. This is significant because an interlocutory default judgment may allow the defaulting defendant additional time to attack.[80]

V. PREPARING TO DIRECTLY ATTACK THE DEFAULT JUDGMENT

A. *Order the Reporter's Record and a Copy of the Trial Court's File*

The Texas Supreme Court has held that if the default judgment prove-up hearing is not conducted on the record, then the defaulting defendant is entitled to a new trial.[81] If a default judgment prove-up hearing was held on the record, the defaulting defendant or its counsel should immediately contact the court reporter and order a transcript of the hearing in order to challenge any irregularities in the plaintiff's method of obtaining the default judgment. The transcript will also be needed to analyze the required evidence used to support the default judgment and the damages awarded therein.[82] The proving-up of damages, when necessary, typically occurs during the same hearing in which the default judgment on liability is granted. More often than not, however, the requisite

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79. *Houston Health Clubs*, 722 S.W.2d at 694; *Kone*, 313 S.W.2d at 286; Koch Graphics, Inc. v. Avantech, Inc., 803 S.W.2d 432, 433 (Tex. App.—Dallas 1991, no writ).

80. *See* Rosedale Partners v. 131st Judicial Dist. Court, 869 S.W.2d 643, 648 (Tex. App.—San Antonio 1994, orig. proceeding) (finding that a default judgment is interlocutory where there is no disposition as to the prejudgment interest and attorney's fees requested).

81. Smith v. Smith, 544 S.W.2d 121, 122-23 (Tex. 1976).

82. *See* TEX. R. CIV. P. 243 (requiring a court to hear evidence of unliquidated damages); Arenivar v. Providian Nat'l Bank, 23 S.W.3d 496, 498 (Tex. App.—Amarillo 2000, no pet.) (holding that a trial court must conduct a hearing of the evidence of unliquidated damages prior to rendering a judgment on those damages); *see also* Holt Atherton Indus., Inc. v. Heine, 835 S.W.2d 80, 86 (Tex. 1992) (discussing that evidence of unliquidated damages is often incomplete since the absence of the opposing party leaves the damages uncontested; nevertheless, the evidence must still be sufficient to supply a basis for the judgment).

evidentiary support for the default judgment and damages is not provided during the hearing, so analysis of the record offers a high chance of success in a motion for new trial. If there is not a reporter's record, the court reporter may be asked to provide an affidavit stating either that there was no default judgment prove-up hearing or that a hearing was held but testimony was not transcribed on the record.

If a point in a motion for new trial is that a requisite document was not filed, it is necessary to establish the absence of the document. A complete copy of the trial court's file, including plaintiff's petition, default judgment, and documentary evidence, should be immediately requested by the defaulting defendant, typically by means of a letter to the clerk of the trial court, in order to search the record for procedural or evidentiary omissions. A certified copy of the entire file should be obtained, as well as an affidavit from the certifying clerk attesting that the full file has been copied. The clerk should include a copy of the front and back of the file jacket because docket notations are often made on the jacket but not included inside on the docket sheet.

B. *File an Answer Before or After the Signing of the Default Judgment*

The trial court may render a default judgment on the pleadings against a defendant who has not filed an answer, because the defaulting defendant admits all allegations of facts in the plaintiff's petition except for the pleaded unliquidated damages.[83] A trial court may not, however, render a default judgment on the pleadings against a defendant who has filed an answer, as a post-answer default judgment does not constitute an abandonment of the defendant's answer, an admission of liability, or an implied confession of issues.[84]

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83. Jackson v. Biotectronics, Inc., 937 S.W.2d 38, 41 (Tex. App.—Houston [14th Dist.] 1996, no writ); Norton v. Martinez, 935 S.W.2d 898, 901 (Tex. App.—San Antonio 1996, no writ).

84. Stoner v. Thompson, 578 S.W.2d 679, 682 (Tex. 1979) (holding that a post-answer default is not an abandonment of the defendant's answer, nor does it imply confession of the issues (citing Frymire Eng'g Co. v. Grantham, 524 S.W.2d 680, 681 (Tex. 1975))). *In re* $475,001.16, 96 S.W.3d 625, 627 (Tex. App.—Houston [1st Dist.] 2002, no pet.) (supporting the proposition that an answer is not abandoned merely because a post-answer judgment is

An answer, even if defective, places the merits of the plaintiff's case at issue and precludes the rendering of a "no answer" default judgment.[85] The plaintiff requesting a post-answer default judgment must prove its case as to liability and damages and introduce evidence at the trial or dispositive hearing, because a post-answer default judgment cannot be entered on the pleadings.[86]

If the defendant discovers that the answer deadline has passed, and therefore a default judgment may be rendered, the defendant should immediately file an answer. If an answer is filed after the deadline, but prior to the trial court rendering or signing a default judgment, then the trial court cannot render a valid default judgment.[87] If an answer is mailed to the trial court clerk before the default judgment is rendered or signed, the answer is considered filed under the "mailbox rule" before the default judgment is rendered or signed, even though the answer may not be received by

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entered); Wallace v. Ramon, 82 S.W.3d 501, 503 (Tex. App.—San Antonio 2002, no pet.) (quoting the proposition from *Stoner*).

85. MICHOL O'CONNOR ET AL., O'CONNOR'S TEXAS RULES CIVIL TRIALS 430 (2002).

86. *See* Bradley Motors, Inc. v. Mackey, 878 S.W.2d 140, 141 (Tex. 1994) (per curiam) (supporting the proposition that a plaintiff must provide evidence and prove all aspects of its case); Otis Elevator Co. v. Parmelee, 850 S.W.2d 179, 181 (Tex. 1993) (holding that supporting evidence is necessary to prove damages); *In re* Brilliant, 86 S.W.3d 680, 693 (Tex. App.—El Paso 2002, no pet.) (citing the proposition that notice is required and that a default judgment cannot be entered on the pleadings); *Wallace*, 82 S.W.3d at 503 (citing the proposition that the plaintiff must provide evidence and prove the case); Stone Res., Inc. v. Barnett, 661 S.W.2d 148, 151 (Tex. App.—Houston [1st Dist.] 1983, no writ) (citing the proposition that the plaintiff must prove all of the elements of a cause of action).

87. *See* TEX. R. CIV. P. 239 (stating that a default can be taken if the defendant has not filed an answer at docket call); Davis v. Jeffries, 764 S.W.2d 559, 560 (Tex. 1989) (reversing the default judgment after the defendant filed an answer one day after the deadline but several hours before the default judgment was rendered); *In re* $475,001.16, 96 S.W.3d at 627 (finding the trial court committed reversible error by entering a no-answer default judgment after the attorney ad litem filed an answer on the defendant's behalf before the default judgment was rendered and before the attorney ad litem's motion to withdraw as counsel was granted); $429.30 in United States Currency v. State, 896 S.W.2d 363, 364-65 (Tex. App.—Houston [1st Dist.] 1995, no writ) (reversing a default judgment entered minutes after the defendant filed an answer); Dowell Schlumberger, Inc. v. Jackson, 730 S.W.2d 818, 819-20 (Tex. App.—El Paso 1987, writ ref'd n.r.e.) (reversing the default judgment upon finding that the defendant filed an answer during a default judgment prove-up hearing but before the trial court rendered the default judgment); Frank v. Corbett, 682 S.W.2d 587, 588 (Tex. App.—Waco 1984, no writ) (reversing the default judgment even though the answer was neither signed by the defendant nor filed by the trial court clerk in the trial court file).

the trial court clerk until after the default judgment was rendered or signed.[88]

Rule 85 of the Texas Rules of Civil Procedure provides that "[t]he original answer may consist of motions to transfer venue, pleas to the jurisdiction, in abatement, or any other dilatory pleas; of special exceptions, of general denial, and any defense by way of avoidance or estoppel."[89] The Texas Supreme Court and Texas appellate courts have liberally construed an answer sufficient to preclude a default judgment as encompassing the following documents: (1) a pauper's affidavit;[90] (2) an answer not signed by either the defendant or counsel;[91] (3) an answer for a corporation signed by a non-lawyer;[92] (4) a letter from the defendant corporation's vice president to the clerk of the trial court that includes the cause number and denies liability;[93] (5) a letter from a pro se defendant to the district clerk in which the defendant confirms receipt of citation;[94] (6) a letter to the trial court from the secretary or treasurer of a corporation that contains a counterclaim to the plaintiff's allegations;[95] (7) a letter from a corporation's registered agent to the district clerk;[96] (8) an unsigned letter filed by a corporation that contains the sender's address, denies liability, and con-

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88. *See* Thomas v. Gelber Group, 905 S.W.2d 786, 788-89 (Tex. App.—Houston [14th Dist.] 1995, no writ) (supporting the proposition that an answer is filed upon mailing and in custody of the post office); Milam v. Miller, 891 S.W.2d 1, 2 (Tex. App.—Amarillo 1994, writ ref'd) (quoting Rule 5 and supporting the proposition that mailing an answer can prevent a valid default judgment).

89. TEX. R. CIV. P. 85; *see also In re* Brilliant, 86 S.W.3d at 693 (citing the rule that a plea to the jurisdiction constitutes an appearance).

90. *See* Hughes v. Habitat Apartments, 860 S.W.2d 872, 873 (Tex. 1993) (indicating that a pauper's affidavit is a sufficient answer).

91. *See Frank*, 682 S.W.2d at 588 (indicating that the failure of counsel or the defendant to sign did not affect the validity of the answer).

92. *See* Custom-Crete v. K-Bar Servs., 82 S.W.3d 655, 657-58 (Tex. App.—San Antonio, 2002, no pet.) (indicating that an answer from a corporation can be from a non-lawyer); Handy Andy v. Ruiz, 900 S.W.2d 739, 741-42 (Tex. App.—Corpus Christi 1994, writ denied) (holding that a non-lawyer can answer for a corporation).

93. *Custom-Crete,* 82 S.W.3d at 657-58.

94. Smith v. Lippmann, 826 S.W.2d 137, 138 (Tex. 1992).

95. Santex Roofing & Sheet Metal, Inc. v. Venture Steel, Inc., 737 S.W.2d 55, 57 (Tex. App.—San Antonio 1987, no writ).

96. R.T.A. Int'l Inc. v. Cano, 915 S.W.2d 149, 151 (Tex. App.—Corpus Christi 1996, writ denied).

tains the trial court cause number;[97] (9) a plea in abatement;[98] (10) a motion to dismiss;[99] and (11) a joint pre-trial order.[100] However, neither a motion for new trial[101] nor a motion to transfer venue[102] is considered sufficient to constitute an answer, nor is a letter from a pro se defendant to the plaintiff's attorney that does not contain a case heading or certificate of service.[103]

Once a defendant makes an appearance or files an answer, the defendant is entitled to notice of all subsequent hearings and the trial setting as a matter of due process.[104] In addition, if the defendant files an answer after the trial court renders a default judgment on liability but before a hearing on damages, the defendant may request and be entitled to a jury trial on damages.[105] As soon as the default is discovered, the defendant should file an answer. Once the trial court signs an order vacating or setting aside the default judgment, an answer will have already been filed in the in-

97. *See* Home Sav. of Am. FSB v. Harris County Water Control & Improvement Dist. No. 70, 928 S.W.2d 217, 218 (Tex. App.—Houston [14th Dist.] 1996, no writ) (finding the letter defective as an answer, yet sufficient to prevent a default judgment).

98. *See* Hines v. Hash, 843 S.W.2d 464, 469 (Tex. 1992) (indicating that a plea of abatement can constitute an answer); *In re* Brilliant, 86 S.W.3d 680, 693 (Tex. App.—El Paso 2002, no pet.) (holding that pleas can constitute an answer); Alcala v. Williams, 908 S.W.2d 54, 56 (Tex. App.—San Antonio 1995, no writ) (stating that a plea of abatement is an answer (citing Schulz v. Schulz, 726 S.W.2d 256, 258 (Tex. App.—Austin 1987, no writ))).

99. *See* LBL Oil Co. v. Int'l Power Servs., Inc., 777 S.W.2d 390, 390-91 (Tex. 1989) (holding that a motion to dismiss is an answer).

100. *See* Okpala v. Coleman, 964 S.W.2d 698, 700 (Tex. App.—Houston [14th Dist.] 1998, no pet.) (holding that a joint pre-trial order is an answer).

101. First State Bldg. & Loan Ass'n v. B.L. Nelson & Assocs., 735 S.W.2d 287, 289 (Tex. App.—Dallas 1987, no writ); *see also* Gonzalez v. Regalado, 542 S.W.2d 689, 691 (Tex. App.—Waco 1976, writ ref'd n.r.e.) (holding that a motion for new trial is insufficient).

102. *See* Duplantis v. Noble Toyota, Inc., 720 S.W.2d 863, 866 (Tex. App.—Beaumont 1986, no writ) (holding that a motion to transfer venue is insufficient for an answer).

103. *See* Cotton v. Cotton, 57 S.W.3d 506, 511-12 (Tex. App.—Waco 2001, no pet.) (indicating that a pro se letter without a case heading or certificate of service is not an answer).

104. *See* Peralta v. Heights Med. Ctr., Inc., 485 U.S. 80, 84-86 (1988) (supporting the proposition that due process of law requires that a defendant be given notice); Bradford v. Bradford, 971 S.W.2d 595, 597 (Tex. App.—Dallas 1998, no pet.) (supporting the proposition that notice of a trial setting is required after an answer or appearance).

105. TEX. R. CIV. P. 241, 243. However, if the defaulting party then fails to appear at the jury trial, it waives its right to a jury trial on unliquidated damages. Bradley Motors, Inc. v. Mackey, 878 S.W.2d 140, 141 (Tex. 1994) (per curiam).

terim, and the order granting a new trial should include a recitation that the answer is considered timely filed.

C. *Consider Practicalities of Attacking the Default Judgment*

Prior to preparing an attack on a default judgment, by whatever means, the defaulting defendant should consider the costs in attorney's fees, filing fees, and other incidental expenses that will be incurred in vigorously attacking the default judgment. Perhaps the plaintiff would accept a settlement offer in an amount discounted from the default judgment damages in order to avoid the delay and expense in further litigating the case. Alternatively, opposing counsel may agree to an order vacating and setting aside the default judgment, without the necessity of a motion for new trial or the like, in exchange for reimbursement of the expenses of taking the default judgment.[106] It is a good idea to extend such an offer, although the failure to offer such reimbursement does not preclude a new trial motion from being granted.[107] In addition, once the defendant alleges that the granting of the new trial motion will not cause delay or prejudice to the plaintiff, the burden shifts to the plaintiff to prove such injury.[108]

To be prepared for such negotiations, the defaulting defendant and its counsel must realistically estimate how much it will cost to prepare a motion for new trial, obtain several affidavits, perhaps submit the client to a deposition, and prepare for and attend a hearing. It is important to remind the plaintiff and its counsel that even the active negligence of a defaulting defendant will not prevent a default judgment from being set aside and vacated,[109] as will

106. *See* Dir., State Employees Workers' Comp. Div. v. Evans, 889 S.W.2d 266, 270 n.3 (Tex. 1994) (noting that "[t]he willingness of a party to go to trial immediately and pay the expenses of the default judgment are important factors for the court to look to in determining whether it should grant a new trial").

107. *See* Angelo v. Champion Rest. Equip. Co., 713 S.W.2d 96, 98 (Tex. 1986) (holding that the failure to offer reimbursement does not bar a motion for new trial).

108. *Evans*, 889 S.W.2d at 270.

109. *See* Ivy v. Carrell, 407 S.W.2d 212, 213 (Tex. 1966) (concluding that negligence is not a barrier); State v. Sledge, 982 S.W.2d 911, 914-16 (Tex. App.—Houston [14th Dist.] 1998, no pet.) (stating that "a defendant is not required to show that he and/or his agent were free of negligence"), *rev'd on other grounds*, 36 S.W.3d 152 (Tex. App.—Houston [1st Dist.] 2000, pet. denied); Transoceanic Shipping Co. v. Gen. Universal Sys., Inc., 961 S.W.2d 418, 420 (Tex. App.—Houston [1st Dist.] 1997, no pet.) (noting that the defaulting party is "not required to show diligence or lack of negligence"); K-Mart Corp. v. Armstrong, 944 S.W.2d 59, 61 (Tex. App.—Amarillo 1997, writ denied) (finding that "[i]t is . . .

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be discussed in Part VII. While plaintiff's attorneys are increasingly worried about the professional liability aspects of urging a client to give up a judgment that the client already feels it deserves, it is worth making the effort.

D. *Address Conflicts of Interest in Representation: Insurer and Insured*

Often the defaulting defendant will be covered by an insurance policy, and the fault for failure to answer a lawsuit will lie with the representatives or employees of the insurance company, which in turn hires counsel to represent the defendant/insured. Such a situation illustrates the potential for a conflict of interest in representation. While potential conflicts always exist in these types of relationships, at the motion for new trial stage, the insurance company and the insured have the same interests, as both insurer and insured want the default judgment overturned. However, it is important for counsel to be aware of the inherent tension between an insurance company's protection of its right to deny coverage based on the insured's failure to give notice of service or failure to cooperate in setting aside the default judgment and the insured's ultimate interest in setting aside and vacating the default judgment.

Diplomacy will be necessary if counsel has been hired as defense counsel by an insurance company to represent an insured and to vacate and set aside a default judgment.[110] Insurance companies are acutely aware of their potential liability if their representatives or employees are responsible for a default judgment being taken against their insureds.[111] However, many insurance company adjusters and attorneys may not appreciate the need to protect the best interest of the insured and attack the default judgment by honestly and humbly explaining their mistake, if any, in failing to answer the lawsuit. Affidavits will probably be required from the

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settled law in this state that negligence alone will not preclude setting aside a default judgment"); Gen. Life & Accident Ins. Co. v. Higginbotham, 817 S.W.2d 830, 832 (Tex. App.—Fort Worth 1991, writ denied) (noting that mere negligence does not constitute intentional conduct or conscious indifference).

110. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 1.06 cmt. 12, *reprinted in* TEX. GOV'T CODE ANN. tit. 2, subtit. G app. A (Vernon 1998) (requiring an arrangement between the insurer, insured, and counsel to assure professional independence).

111. *See* Wembley Inv. Co. v. Herrera, 11 S.W.3d 924, 927-28 (Tex. 1999) (per curiam) (supporting the liability of the insurer).

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insurance company adjusters and attorneys involved in the case to explain the accident or mistake that subsequently resulted in a default judgment.

Defense counsel may also need to consider present and future conflicts with the defaulting defendant if counsel was responsible for the accident or mistake in failing to answer or appear. The legal malpractice insurance carrier should be notified immediately under these circumstances, as the insurer may choose to minimize its potential losses by becoming actively involved in attacking the default judgment, perhaps even hiring counsel to assist the defaulting defendant's counsel.

VI. Points and Issues for Directly Attacking Default Judgments

A. *Subject Matter Jurisdiction*

Before rendering a judgment, a trial court must make a judicial determination of subject matter jurisdiction and ripeness for default.[112] The determination of subject matter jurisdiction must be reflected by the trial court in the record, usually in the judgment itself or on the docket sheet.[113] A court will never presume subject matter jurisdiction, and the issue of lack of subject matter jurisdiction cannot be waived.[114] A failure on the part of the trial court to determine subject matter jurisdiction constitutes a favorable point in a motion for new trial, as a trial court's lack of subject matter jurisdiction is fundamental error.[115] Determination of whether subject matter jurisdiction exists is a question of law for the trial court, subject to *de novo* review if appealed. The appellate court may note and review the lack of subject matter jurisdiction at any time during the appellate process.[116] If the trial court does not

112. *See* Finlay v. Jones, 435 S.W.2d 136, 138 (Tex. 1968) (reviewing the factors a trial judge must consider before rendering a default judgment); Uvere v. Canales, 825 S.W.2d 741, 743 (Tex. App.—Dallas 1992, orig. proceeding) (identifying the requirements a trial court must consider before rendering a default judgment).

113. *See* Nueces County Hous. Assistance, Inc. v. M&M Res. Corp., 806 S.W.2d 948, 949 (Tex. App.—Corpus Christi 1991, writ denied) (discussing the requirements in the record regarding jurisdiction and ripeness).

114. McGuire v. McGuire, 18 S.W.3d 801, 804 (Tex. App.—El Paso 2000, no pet.).

115. Coleman v. Sitel Corp., 21 S.W.3d 411, 413 (Tex. App.—San Antonio 2000, no pet.).

116. *Id.*

have subject matter jurisdiction, any judgment signed by that trial court, including a default judgment, will be void as a matter of law.[117]

B. *Citation: Sufficiency of Issuance, Service, and Return*

In a direct attack on a default judgment, "[t]here are no presumptions in favor of valid issuance, service, and return of citation."[118] The record must demonstrate strict compliance with the rules governing issuance, service, and return of citation; otherwise, the purported service of process will be void, and a default judgment rendered thereafter will be similarly void.[119] For that reason, and the corresponding lack of personal jurisdiction over the defen-

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117. *See* Browning v. Placke, 698 S.W.2d 362, 363 (Tex. 1985) (per curiam) (discussing the difference between void judgments and voidable judgments and holding that "a judgment is void only when it is shown that the court had no jurisdiction of the parties or property, no jurisdiction of the subject matter, no jurisdiction to enter the particular judgment, or no capacity to act as a court").

118. Primate Constr., Inc. v. Silver, 884 S.W.2d 151, 152 (Tex. 1994) (per curiam); *see also* Uvalde Country Club v. Martin Linen Supply Co., 690 S.W.2d 884, 885 (Tex. 1985) (explaining the standards for service of process); Vespa v. Nat'l Health Ins. Co., 98 S.W.3d 749, 751 (Tex. App.—Fort Worth 2003, no pet.) (noting that the normal presumptions regarding service are not applied); All Commercial Floors, Inc. v. Barton & Rasor, 97 S.W.3d 723, 726 (Tex. App.—Fort Worth 2003, no pet.) (explaining that there are no presumptions regarding the citation process); Benefit Planners, L.L.P. v. RenCare, Ltd., 81 S.W.3d 855, 858 (Tex. App.—San Antonio 2002, pet. denied) (discussing presumptions of service of citations); Carmona v. Bunzl Distribution, 76 S.W.3d 566, 568 (Tex. App.—Corpus Christi 2002, no pet.) (analyzing the process for reviewing a restricted appeal); Atwood v. B&R Supply & Equip. Co., 52 S.W.3d 265, 267 (Tex. App.—Corpus Christi 2001, no pet.) (stating that there are no presumptions on citation process when attacking a default judgment); Dolly v. Aethos Communications Sys., Inc., 10 S.W.3d 384, 388 (Tex. App.—Dallas 2000, no pet.) (discussing presumptions in the citation process); Min v. Avila, 991 S.W.2d 495, 499 (Tex. App.—Houston [1st Dist.] 1999, no pet.) (reasoning that, since a bill of review was a direct attack, there would be no presumptions regarding citation); Webb v. Oberkampf Supply of Lubbock, Inc., 831 S.W.2d 61, 64 (Tex. App.—Amarillo 1992, no writ) (deciding that the trial court record must show compliance with the method of service in a direct attack on a default judgment).

119. *See Primate Constr.*, 884 S.W.2d at 152 (noting the requirement of strict compliance with the citation process); Wood v. Brown, 819 S.W.2d 799, 800 (Tex. 1991) (stating that a defendant who complains about service can attack a default judgment); *Vespa*, 98 S.W.3d at 751 (holding that "[t]o sustain a default judgment under direct attack, the plaintiff in the trial court must strictly comply with the rules relating to the issuance of citation, the manner and mode of service, and the return of process"); *All Commercial Floors*, 97 S.W.3d at 726 (explaining the effect of the Texas Rules of Civil Procedure on default judgments when the defendant claims service was not in compliance); *Benefit Planners*, 81 S.W.3d at 858 (discussing the penalty for failure to comply with procedural rules); Lozano v. Hayes Wheels Int'l, Inc., 933 S.W.2d 245, 247 (Tex. App.—Corpus Christi 1996, no writ)

dant,[120] appellate courts have concluded that defective service may be raised for the first time on appeal.[121]

1. Rule 99—Strict Compliance

The citation must strictly comply with Rule 99 of the Texas Rules of Civil Procedure.[122] Personal jurisdiction is dependent upon citation being issued and served as required by law.[123] With respect to service, the record must demonstrate strict compliance with the type of service used and applicable rules in order to uphold a default judgment.[124] "Moreover, failure to affirmatively show strict compliance with the Rules of Civil Procedure renders the attempted service of process invalid and of no effect."[125] Even if the defendant receives actual notice of the lawsuit, such notice is not a

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(analyzing the requirements for default judgments when service of citation was not followed).

120. TAC Americas, Inc. v. Boothe, 94 S.W.3d 315, 318 (Tex. App.—Austin 2002, no pet.) (citing Conseco Fin. Servicing Corp. v. Klein Indep. Sch. Dist., 78 S.W.3d 666, 675-76 (Tex. App.—Houston [14th Dist.] 2002, no pet.)).

> Generally, 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, in order to satisfy due process and allow the defendant the opportunity to appear and defend the action.

Id.; *see also Benefit Planners*, 81 S.W.3d at 858 (asserting that "[w]hen the attempted service of process is invalid, the trial court acquires no *in personam* jurisdiction over the defendant").

121. *All Commercial Floors, Inc.*, 97 S.W.3d at 725 (citing Wilson v. Dunn, 800 S.W.2d 833, 836-37 (Tex. 1990)); *Benefit Planners*, 81 S.W.3d at 858; *see also Carmona*, 76 S.W.3d at 568 (analyzing the process for reviewing a restricted appeal).

122. *See* TEX. R. CIV. P. 99 (governing issuance and form of citation).

123. *See* Wilson v. Dunn, 800 S.W.2d 833, 836 (Tex. 1990) (explaining the requirements for effective establishment of personal jurisdiction); Finlay v. Jones, 435 S.W.2d 136, 138 (Tex. 1968) (stating that the trial court should verify that the defendant was duly served prior to entering a default judgment); *Carmona*, 76 S.W.3d at 568 (reviewing the requirements to establish personal jurisdiction).

124. *See Wood*, 819 S.W.2d at 800 (stating that a default judgment will fail if the defendant was not properly served); *see also* Nat'l Multiple Sclerosis Soc'y v. Rice, 29 S.W.3d 174, 176 (Tex. App.—Eastland 2000, no pet.) (analyzing the elements required for a default judgment to stand); Olympia Marble & Granite v. Mayes, 17 S.W.3d 437, 444 (Tex. App.—Houston [1st Dist.] 2000, no pet.) (listing the requirements for proper service execution).

125. Uvalde Country Club v. Martin Linen Supply Co., 690 S.W.2d 884, 885 (Tex. 1985); *All Commercial Floors, Inc*, 97 S.W.3d at 726 (noting that non-compliance with the rules renders service invalid); Barker CATV Constr., Inc. v. Ampro, Inc., 989 S.W.2d 789, 792 (Tex. App.—Houston [1st Dist.] 1999, no pet.) (indicating that strict compliance must be shown or service is invalid).

substitute for the required service of process.[126] As such, a default judgment following improper service is void as a matter of law.[127]

Examples of ineffective or invalid service of process sufficient to hold that a citation was not issued in strict compliance with the rules include: (1) the defendant's name listed incorrectly in the citation;[128] and (2) the return failing to recite that the citation was delivered to the corporate defendant by serving its registered agent.[129]

2. Rule 107—Citation and Return on File for Ten Days

In addition, Rule 107 of the Texas Rules of Civil Procedure provides that "[n]o default judgment shall be granted in any cause until the citation . . . with proof of service . . . shall have been on file with the clerk of the court ten days, exclusive of the day of filing

126. *See Wilson*, 800 S.W.2d at 836 (holding that jurisdiction depends not on sufficiency of actual notice with service of process, but rather on "citation issued and served in a manner provided for by law"); Dolly v. Aethos Communications Sys., Inc., 10 S.W.3d 384, 388 (Tex. App.—Dallas 2000, no pet.) (explaining that a return of service indicating that the defendant was personally served, together with a typed note at the bottom of the return stating "Posted to Front Door" rendered the return inherently inconsistent).

127. *See* Ackerly v. Ackerly, 13 S.W.3d 454, 458 (Tex. App.—Corpus Christi 2000, no pet.) (holding that improper service renders a default judgment void); Transoceanic Shipping Co. v. Gen. Universal Sys., Inc., 961 S.W.2d 418, 420 (Tex. App.—Houston [1st Dist.] 1997, no pet.) (noting that notice sent to defendant's counsel was returned undelivered because the address was no longer correct, therefore error existed on the face of the record, and the defendant was entitled to a new trial); Medeles v. Nunez, 923 S.W.2d 659, 663 (Tex. App.—Houston [1st Dist.] 1996, writ denied) (explaining that mistakes in file number and names of the parties in the citation rendered service defective on its face); Stephenson v. Corp. Servs., Inc., 650 S.W.2d 181, 183 (Tex. App.—Tyler 1983, writ ref'd n.r.e.) (recognizing that a default judgment is void if it is not supported by proper service of process).

128. *See Uvalde Country Club*, 690 S.W.2d at 885 (finding the citation invalid because it named "Henry Bunting" as opposed to Henry Bunting, Jr.); Amato v. Hernandez, 981 S.W.2d 947, 949-50 (Tex. App.—Houston [1st Dist.] 1998, pet. denied) (acknowledging that the citation was defective because it listed an entity rather than the individual defendant); *Medeles*, 923 S.W.2d at 663 (noting that citation was invalid because it named "Maria Mendeles" instead of Medeles); Faggett v. Hargrove, 921 S.W.2d 274, 276 (Tex. App.—Houston [1st Dist.] 1995, no writ) (holding citation defective because it showed "In re" and not Drexell Faggett). *But see* Mantis v. Resz, 5 S.W.3d 388, 391 (Tex. App.—Fort Worth 1999, pet. denied) (holding that when the defendant's name is merely misspelled and not misidentified, the doctrine of *idem sonans* applies to hold the citation valid and jurisdiction proper), *overruled in part on other grounds by* Sheldon v. Emergency Med. Consultants I, P.A., 43 S.W.3d 701, 702 n.2 (Tex. App.—Fort Worth 2001, no pet.).

129. Benefit Planners, L.L.P. v. RenCare, Ltd., 81 S.W.3d 855, 861 (Tex. App.—San Antonio 2002, pet. denied).

and the day of judgment."[130] Rule 107 requires a return of citation to be signed by the officer or authorized person performing the service.[131] Furthermore, it requires the return to be verified if served by a private process server rather than an officer. "Verified" has been defined as "an acknowledgment of an instrument before a notary public."[132] Rule 107 further provides that "when [a] citation [is] served by registered or certified mail . . . the return by the officer or authorized person must also contain the return receipt with the addressee's signature."[133]

3. Rule 106(b)—Substituted Service

Close examination of many citations and returns of service will reveal an error, especially with regard to substituted service[134]

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130. TEX. R. CIV. P. 107; *see also* Carmona v. Bunzl Distribution, 76 S.W.3d 566, 568 (Tex. App.—Corpus Christi 2002, no pet.) (noting that the court has a duty to ensure that the defendant was properly served before rendering judgment); Union Pac. Corp. v. Legg, 49 S.W.3d 72, 78 (Tex. App.—Austin 2001, no pet.) (concluding that, since there was not a file mark on the return of citation or a certified mail receipt, it had not been on file for ten days); Onyx TV v. TV Strategy Group, LLC, 990 S.W.2d 427, 429-31 (Tex. App.—Texarkana 1999, no pet.) (determining that Rule 107 is not complied with by filing the Secretary of State certificate).

131. TEX. R. CIV. P. 107.

132. *Carmona*, 76 S.W.3d at 569; *see also* Dolly v. Aethos Communications Sys., Inc., 10 S.W.3d 384, 389 (Tex. App.—Dallas 2000, no pet.) (asserting that a blanket statement that citation was in compliance with the rules does not verify the specific facts and therefore does not comply with the rules); Bautista v. Bautista, 9 S.W.3d 250, 251 (Tex. App.—San Antonio 1999, no pet.) (stating that the return was not verified even though the process server signed a certificate of delivery certifying the delivery of citation); Seib v. Bekker, 964 S.W.2d 25, 28 (Tex. App.—Tyler 1997, no writ) (illustrating that unless a verification is shown on the affidavit, it does not comply with the rule; therefore, a default judgment cannot not be upheld).

133. TEX. R. CIV. P. 107; *see also* All Commercial Floors, Inc. v. Barton & Rasor, 97 S.W.3d 723, 727 (Tex. App.—Fort Worth 2003, no pet.) (noting that a return not signed by the addressee or registered agent is not valid service); Bronze & Beautiful, Inc. v. Mahone, 750 S.W.2d 28, 29 (Tex. App.—Texarkana 1988, no writ) (stating that service upon a corporation by certified mail is invalid absent the signature of an authorized representative); Pharmakinetics Labs., Inc. v. Katz, 717 S.W.2d 704, 706 (Tex. App.—San Antonio 1986, no writ) (holding that service was invalid where the return of citation was signed by someone other than corporation's authorized agent).

134. *See* Wilson v. Dunn, 800 S.W.2d 833, 836-37 (Tex. 1990) (recognizing the order for substituted service was improper because it lacked the required affidavit; therefore, the default judgment was overturned, even though the defendant admitted receiving service of process); Olympia Marble & Granite v. Mayes, 17 S.W.3d 437, 444-45 (Tex. App.—Houston [1st Dist.] 2000, no pet.) (acknowledging that the affidavit in support of substituted service did not establish the defendant's "usual place of business or abode" and was not reasonably calculated to give notice of suit); Rivers v. Viskozki, 967 S.W.2d 868, 870 (Tex.

under Rule 106(b) of the Texas Rules of Civil Procedure, which provides as follows:

> 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.[135]

Where jurisdiction is based on substituted service of process, the plaintiff must allege in the pleadings that the defendant has not designated or maintained an agent for service of process in the state in order to support a default judgment.[136]

Texas law prefers personal service over substituted service; thus, when the plaintiff uses substituted service, the plaintiff bears the burden of proving that the defendant was served in the manner required by the applicable statute.[137] When a trial court orders substituted service under Rule 106(b), the only authority for the substituted service is that order itself,[138] and any deviation from the trial court's order necessitates a reversal of the default judgment.[139] The Second District Court of Appeals at Fort Worth recently determined that substituted service is defective and invalid, and that the trial court lacks jurisdiction to grant the default judgment, where the trial court's order requires the citation, petition, and a copy of the order to be placed on the front door of the defendant's

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App.—Eastland 1998, no pet.) (announcing that for alternate service, the court must direct the manner of service that is likely to give the defendant notice of suit); Lozano v. Hayes Wheels Int'l, Inc., 933 S.W.2d 245, 248 (Tex. App.—Corpus Christi 1996, no writ) (determining that the failure to include recitation that the defendant had not maintained a registered agent for service could not support the default judgment).

135. TEX. R. CIV. P. 106(b).

136. *See* Interaction, Inc. v. State, 17 S.W.3d 775, 780 (Tex. App.—Austin 2000, pet. denied) (stating that the defendant's failure to maintain a current registered agent rendered substitute service via the Secretary of State sufficient); *Lozano*, 933 S.W.2d at 245 (holding that a default judgment cannot be upheld without alleging that the defendant has not maintained a registered agent).

137. Vespa v. Nat'l Health Ins. Co., 98 S.W.3d 479, 751-52 (Tex. App.—Fort Worth 2003, no pet.) (citing Stankiewicz v. Oca, 991 S.W.2d 308, 311 (Tex. App.—Fort Worth 1999, no pet.)); Dolly v. Aethos Communications Sys., Inc., 10 S.W.3d 384, 388 (Tex. App.—Dallas 2000, no pet.).

138. *Vespa*, 98 S.W.3d at 752 (citing *Dolly*, 10 S.W.3d at 388).

139. *Id.* (citing Becker v. Russell, 765 S.W.2d 899, 900 (Tex. App.—Austin 1989, no writ)).

house, but the return of service shows that the process server failed to place the order on the door as instructed.[140]

4. Service on Other Defendants

Rule 21 of the Texas Rules of Civil Procedure requires that "[e]very pleading, plea, motion or application to the court for an order . . . shall be served on all other parties . . . ."[141] If the plaintiff asks the court for a default judgment against one defendant that has already entered an appearance, without serving each other answering defendant with a copy of the request for the judgment or with a copy of the request for a hearing on default judgment damages, the plaintiff has violated Rule 21.

5. Long Arm Statute

If service of process is made under the long arm statute, the pleadings must allege facts that, if true, would make the defendant amenable to process by use of the long arm statute. In addition, there must be proof in the record that the defendant was, in fact, served in the manner required by the long arm statute.[142]

Section 17.045(a) of the Texas Civil Practice and Remedies Code governs service of process to nonresidents and provides as follows:

> If the secretary of state is served with duplicate copies of process for a nonresident, he shall require a statement of the name and address of the nonresident's home or home office and shall immediately mail a copy of the process to the nonresident.[143]

The period for filing an answer runs from the date the Secretary of State was served as the defendant's agent, not from the date the Secretary of State forwarded the process to the defendant, as the

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140. *Id.* (citing Wilson v. Dunn, 800 S.W.2d 833, 836 (Tex. 1990)).

141. TEX. R. CIV. P. 21.

142. *See* World Distrib., Inc. v. Knox, 968 S.W.2d 474, 477 (Tex. App.—El Paso 1998, no pet.) (noting that the plaintiff must allege facts that would support serving the defendant under the long arm statute); Boreham v. Hartsell, 826 S.W.2d 193, 195 (Tex. App.—Dallas 1992, no writ) (emphasizing that the petition must allege facts that, when taken to be true, would support service of a non-resident under the long arm statute). *But see* Onyx TV v. TV Strategy Group, LLC, 990 S.W.2d 427, 431 (Tex. App.—Texarkana 1999, no pet.) (stating that the Secretary of State's certificate of process under the long arm statute does not by itself satisfy the requirement of placing the citation on file with the trial court).

143. TEX. CIV. PRAC. & REM. CODE ANN. § 17.045(a) (Vernon 1997); *see also* Seeley v. KCI USA, Inc., 100 S.W.3d 276, 279 (Tex. App.—San Antonio 2002, no pet.) (stating that the court will not infer a home address if not provided).

Secretary of State is considered the agent of the defendant for service of process, and service of process on the Secretary of State constitutes constructive notice to the defendant.[144] The plaintiff must obtain a "Whitney Certificate" from the Secretary of State prior to the default judgment being signed in order to certify compliance with the long arm statute.[145]

6. Amendment of Return of Citation

Note, however, that when the defaulting defendant files a motion for new trial, Rule 118 of the Texas Rules of Civil Procedure allows the plaintiff to formally amend the return of citation or provide other evidence to establish proper service.[146] An amended return relates back to the date the original return was filed.[147] Return of citation can be amended after the trial court enters a judgment, after a motion for new trial is filed, and even after an appeal has been perfected.[148]

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144. *See* Bonewitz v. Bonewitz, 726 S.W.2d 227, 230 (Tex. App.—Austin 1987, writ ref'd n.r.e.) (recognizing that the non-resident defendant is served once the Secretary of State is served).

145. *See* Whitney v. L&L Realty Corp., 500 S.W.2d 94, 96 (Tex. 1973) (holding that a certificate from the Secretary of State will suffice as proof of service of process); *Seeley*, 100 S.W.3d at 279 (noting that the plaintiff has the burden to show strict compliance with the long-arm statute requirements before a default judgment can be entered).

146. TEX. R. CIV. P. 118; *see also* Primate Constr., Inc. v. Silver, 884 S.W.2d 151, 153 (Tex. 1994) (per curiam) (stating that the Texas Rules of Civil Procedure allow liberal amendments in order to indicate the true circumstances surrounding service); Higginbotham v. Gen. Life & Accident Ins. Co., 796 S.W.2d 695, 696-97 (Tex. 1990) (explaining that the trial judge has express authority to grant an order allowing an amendment of return of service); Union Pac. Corp. v. Legg, 49 S.W.3d 72, 77 (Tex. App.—Austin 2001, no pet.) (noting that before a default judgment is entered, rules provide for liberal amendment of proof of service); Barker CATV Constr., Inc. v. Ampro, Inc., 989 S.W.2d 789, 793-94 (Tex. App.—Houston [1st Dist.] 1999, no pet.) (concluding that language in Rule 118 stating that the trial court may "allow" amendments requires an order in the record authorizing amendment of service).

147. *See* Bavarian Autohaus, Inc. v. Holland, 570 S.W.2d 110, 113 (Tex. App.—Houston [1st Dist.] 1978, no writ).

148. See Dawson v. Briggs, 107 S.W.3d 739, 744-48 (Tex. App.—Fort Worth 2003, no pet.) (holding that the trial court retained the jurisdiction to amend the return of citation following the entry of a default judgment, even though the defendant had filed a notice of appeal of default judgment); Walker v. Brodhead, 828 S.W.2d 278, 281 (Tex. App.—Austin 1992, writ denied) (holding that the trial court is authorized to amend proof of service at any time). *But see* Zaragoza v. De La Paz Morales, 616 S.W.2d 295, 296 (Tex. Civ. App.—Eastland 1981, writ ref'd n.r.e.) (stating that the return of citation may not be amended after the appeal is perfected).

C. *Defendant's Answer and Due Process Requirements*

Once the defendant has filed an answer or otherwise entered an appearance,[149] the defendant is entitled to notice of all hearings and the trial setting as a matter of constitutional due process under the Fourteenth Amendment.[150] A post-answer default judgment will be valid only if the defendant received notice of the trial setting or the dispositive hearing at which the default judgment was rendered.[151] Note that the trial court may render a post-answer default judgment only if the defendant fails to appear at a dispositive hearing, as opposed to any other hearing.[152]

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149. *In re* Brilliant, 86 S.W.3d 680, 693 (Tex. App.—El Paso 2002, no pet.) (holding that a plea to the jurisdiction constitutes an appearance).

150. *See* Peralta v. Heights Med. Ctr., Inc., 485 U.S. 80, 86 (1988) (stating that due process requires proper notice of suit); LBL Oil Co. v. Int'l Power Servs., Inc., 777 S.W.2d 390, 390-91 (Tex. 1989) (noting that the defendant is entitled to notice of the trial settings after making an appearance); Lopez v. Lopez, 757 S.W.2d 721, 722 (Tex. 1988) (finding that due process was violated where the defendant had no actual notice of the trial setting); Smith v. Holmes, 53 S.W.3d 815, 817 (Tex. App.—Austin 2001, no pet.) (stating that the defendant was entitled to notice of the trial setting after making an appearance); Coastal Banc SSB v. Helle, 48 S.W.3d 796, 801 (Tex. App.—Corpus Christi 2001, pet. denied) (holding that the defendant is entitled to notice as a matter of due process after making an appearance); Platt v. Platt, 991 S.W.2d 481, 483 (Tex. App.—Tyler 1999, no pet.) (emphasizing that due process requires notice of the trial setting after a timely answer); Bradford v. Bradford, 971 S.W.2d 595, 597 (Tex. App.—Dallas 1998, no pet.) (noting that the defendant is entitled to notice of the trial setting after making an appearance); Transoceanic Shipping Co. v. Gen. Universal Sys., Inc., 961 S.W.2d 418, 420 (Tex. App.—Houston [1st Dist.] 1997, no writ) (holding that a notice of the trial setting that was sent to an incorrect mailing address was not sufficient); Matsushita Elec. Corp. v. McAllen Copy Data, Inc., 815 S.W.2d 850, 853 (Tex. App.—Corpus Christi 1991, writ denied) (indicating that due process requires notice of a default judgment); Vining v. Vining, 782 S.W.2d 261, 262 (Tex. App.—Houston [14th Dist.] 1989, no writ) (expressing that the defendant is entitled to notice of the trial setting after making an appearance).

151. *See* TEX. R. CIV. P. 21a, 245 (requiring notice of all pleadings and motions, except for service of citation, to be served on the opposing party); Burress v. Richardson, 97 S.W.3d 806, 807 (Tex. App.—Dallas 2003, no pet.) (noting that notice of the trial setting is mandatory and involves due process); *Transoceanic Shipping Co.*, 961 S.W.2d at 419-20 (agreeing that error was apparent on the face of record where the transcript indicated that the defendant did not receive trial setting notices); $429.30 In U.S. Currency v. State, 896 S.W.2d 363, 366 (Tex. App.—Houston [1st Dist.] 1995, no writ) (indicating that a post-answer default judgment is valid only if notice of the hearing is received); Wilson v. Indus. Leasing Corp., 689 S.W.2d 496, 497 (Tex. App.—Houston [1st Dist.] 1985, no writ) (explaining that notice of the hearing implicates due process rights); P. Bosco & Sons Contracting Corp. v. Conley, Lott, Nichols Mach. Co., 629 S.W.2d 142, 143-44 (Tex. App.—Dallas 1982, writ ref'd n.r.e.) (upholding that a party's right to be present at the trial setting is fundamental).

152. *See* Masterson v. Cox, 886 S.W.2d 436, 438 (Tex. App.—Houston [1st Dist.] 1994, no writ) (declaring that a pre-trial conference was a "disposition" hearing where evidence

Due process requires notice that is reasonably calculated under the circumstances to effectuate service.[153] If a defendant receives less than forty-five days notice of a trial setting under Rule 245 of the Texas Rules of Civil Procedure,[154] Texas courts have consistently held there is a violation of due process that renders the default judgment invalid.[155]

D. *Plaintiff's Petition and Amendment of Pleadings*

The plaintiff's petition will support a default judgment if the petition: (1) states a cause of action within the jurisdiction of the trial court; (2) gives fair notice to the defendant of the claim asserted; and (3) does not affirmatively disclose the invalidity of the claim on the face of the petition.[156] A default judgment must be based on the pleadings; therefore, a default judgment may not be rendered

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was heard, and that the defendant had no notice that such conference would be a disposition hearing).

153. Withrow v. Schou, 13 S.W.3d 37, 40 (Tex. App.—Houston [14th Dist.] 1999, pet. denied); *see also Platt,* 991 S.W.2d at 483 (holding that seven days notice is ineffective).

154. TEX. R. CIV. P. 245.

155. *See In re* Brilliant, 86 S.W.3d 680, 693 (Tex. App.—El Paso 2002, no pet.) (noting that "[a] trial court's failure to comply with the rules of notice . . . deprives a party of the constitutional right to be present at the hearing, to voice her objections in an appropriate manner, and results in a violation of fundamental due process"). "Thus, if the respondent does not have notice of the trial setting as required by Rule 245, the default judgment should be set aside because it is ineffectual." *Id.*; *see also* Custom-Crete, Inc. v. K-Bar Servs., Inc., 82 S.W.3d 655, 660 (Tex. App.—San Antonio 2002, no pet.) (holding that the trial court's non-compliance with the forty-five day notice requirement violated due process); Blanco v. Bolanos, 20 S.W.3d 809, 812 (Tex. App.—El Paso 2000, no pet.) (explaining that a post-answer default judgment is ineffectual unless the defendant has had at least a forty-five day notice); *Transoceanic Shipping Co.*, 961 S.W.2d at 419-20 (stating that error was facially apparent where the defendant did not receive notice of the trial date in compliance with Rule 245). *But see In re* Parker, 20 S.W.3d 812, 818-19 (Tex. App.—Texarkana 2000, no pet.) (noting that Rule 245 goes beyond due process; therefore, due process was satisfied where the party received fourteen days notice of the trial setting); Interaction, Inc. v. State, 17 S.W.3d 775, 780 (Tex. App.—Austin 2000, no pet.) (finding no due process violation where late notice was the result of a failure to update the current registered agent as required by Article 2.10 of the Texas Business Corporations Act).

156. Paramount Pipe & Supply Co. v. Muhr, 749 S.W.2d 491, 494 (Tex. 1988); Stoner v. Thompson, 578 S.W.2d 679, 684-85 (Tex. 1979); Jackson v. Biotectronics, Inc., 937 S.W.2d 38, 42 (Tex. App.—Houston [14th Dist.] 1996, no writ); Caruso v. Krieger, 698 S.W.2d 760, 762 (Tex. App.—Austin 1985, no writ); *see also* 32 WEST'S TEXAS DIGEST 2d § 101(1) (1997) (listing default judgment cases in which the pleadings did not support the judgment).

on causes of action not adequately pleaded, and may not award damages not specifically requested in plaintiff's live petition.[157]

If the plaintiff decides to file an amended petition pleading additional causes of action or damages, or both, thereby seeking a more onerous judgment, the defendant must be served with the amended petition by service of citation in order for a default judgment to be based on the amended petition.[158] However, there is some disagreement among Texas courts of appeals as to whether an amended petition that does not plead additional claims or request additional damages must be served on the defendant along with a citation.[159]

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157. *See* Capitol Brick, Inc. v. Fleming Mfg. Co., 722 S.W.2d 399, 401 (Tex. 1986) (requiring that damages awarded by a trial court in the default judgment be no greater than the amount of damages in the pleading); Simon v. BancTexas Quorum, 754 S.W.2d 283, 286 (Tex. App.—Dallas 1988, writ denied) (concluding that the trial court may not award damages in a default judgment in excess of the amount in the pleading). A pleading for damages within the limits of the court's jurisidiction is sufficient under Rule 47(b) of the Texas Rules of Civil Procedure to award damages in a default judgment. *See* Cont'l Sav. Ass'n v. Gutheinz, 718 S.W.2d 377, 383-84 (Tex. App.—Amarillo 1986, writ ref'd n.r.e.) (upholding an award of damages in a default judgment in excess of those specifically stated based on a statement that sought damages within the court's jurisdictional limits and where there was no special exception).

158. *See* Weaver v. Hartford Accident & Indem. Co., 570 S.W.2d 367, 370 (Tex. 1978) (requiring the service of an amended petition because the amount demanded increased approximately $190,000); Seeley v. KCI USA, Inc., 100 S.W.3d 276, 278 (Tex. App.—San Antonio 2002, no pet.) (finding that the defendant was not served with the amended petition in which it was added as a named defendant); Atwood v. B&R Supply & Equip. Co., 52 S.W.3d 265, 267 (Tex. App.—Corpus Christi 2001, no pet.) (explaining that the service of an amended petition is required when it seeks a greater judgment than the original petition); Palomin v. Zarsky Lumber Co., 26 S.W.3d 690, 693 (Tex. App.—Corpus Christi 2000, pet. denied) (holding that the service of an amended petition that only changed the defendant's first name did not seek a more onerous judgment; therefore, service of an amended petition was not required); Caprock Constr. Co. v. Guaranteed Floorcovering, Inc., 950 S.W.2d 203, 205 (Tex. App.—Dallas 1997, no pet.) (finding that the failure to serve the defendant with a pleading upon which the default judgment is based renders the default judgment void); Payne & Keller Co. v. Word, 732 S.W.2d 38, 42 (Tex. App.—Houston [14th Dist.] 1987, writ ref'd n.r.e.) (holding that the rule requiring service of an amended petition seeking a more onerous judgment also applies to supplemental petitions); *see also* TEX. R. CIV. P. 62, 63, 64, 65 (establishing rules for the amendment of pleadings). *But see In re* R.D.C., 912 S.W.2d 854, 855 (Tex. App.—Eastland 1995, no writ) (finding that the service of an amended petition is sufficient without a new citation).

159. *Compare Caprock Constr. Co.*, 950 S.W.2d at 295 (holding that an amended petition that added an additional plaintiff but no new claims or damages must be served with citation), *and* Harris v. Shoults, 877 S.W.2d 854, 855 (Tex. App.—Fort Worth 1994, no writ) (finding that a failure to answer is not deemed an admission where the amended petition was never served) *with Palomin*, 26 S.W.3d at 694 (holding that service of an amended petition correcting the first name of the party is not required), *and In re* R.D.C., 912

E. *Proof of Causal Nexus: Conduct, Event, and Damages*

The Texas Supreme Court has stated that the plaintiff must establish two causal nexuses to be entitled to recovery by means of a default judgment.[160] The first is a causal nexus between the defendant's conduct and the event sued upon, and the second is a causal nexus between the event sued upon and the plaintiff's injuries.[161] In a no-answer default judgment, the first causal nexus is established by the default, as the defendant admits only that it caused the event in question, but not necessarily the connection between the event and the pleaded damages.[162]

The second causal nexus is strictly referable to the damages portion of the plaintiff's cause of action. Proof of this causal nexus between occurrence and damages is necessary to determine the amount of the plaintiff's damages.[163] "The legal and factual sufficiency of the evidence to show this causal nexus is analyzed using the same test applicable to any challenge to the legal and factual sufficiency of the evidence."[164] Examples of causes of action cases requiring such proof of the second causal nexus include personal injury,[165] breach of warranty of title to real estate,[166] breach of war-

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S.W.2d at 855-56 (Tex. App.—Eastland 1995, no writ) (concluding that the service of an amended petition without citation is sufficient), *and* Halligan v. First Heights, F.S.A., 850 S.W.2d 801, 802-03 (Tex. App.—Houston [14th Dist.] 1993, no writ) (holding that additional service was unnecessary where a petition in intervention merely reflected a corporate name change and did not assert new claims).

160. Morgan v. Compugraphic Corp., 675 S.W.2d 729, 731-32 (Tex. 1984).

161. *Id.*

162. *Id.* at 732.

163. *Id.*; Kirkpatrick v. Mem'l Hosp., 862 S.W.2d 762, 772 (Tex. App.—Dallas 1993, writ denied); *see also* Jackson v. Gutierrez, 77 S.W.3d 898, 902 (Tex. App.—Houston [14th Dist.] 2002, no pet.) (affirming that the defendant's liability must be established in addition to proof of a causal nexus between the damages claimed and the event sued upon).

164. *Jackson*, 77 S.W.3d at 902.

165. *See* Transport Concepts, Inc. v. Reeves, 748 S.W.2d 302, 305 (Tex. App.—Dallas 1988, no writ) (clarifying that proof of a causal nexus between the event sued upon and the plaintiff's injuries establishes proof of damages).

166. *See* Gibraltar Sav. Ass'n v. Kilpatrick, 770 S.W.2d 14, 18 (Tex. App.—Texarkana 1989, writ denied) (declaring that a default judgment is an admission of the allegations in the plaintiff's petition including damages, unless the damages are unliquidated or not supported by a writing).

ranty and DTPA violations,[167] and cases involving awards of exemplary damages.[168]

If the defendant files an answer after the trial court signs an interlocutory default judgment as to liability only, without adjudicating damages, then the defendant is entitled to appear at the damages prove-up hearing (or limited jury trial on damages, called "writ of inquiry")[169] to cross-examine the witnesses and present evidence to mitigate unliquidated damages and negate the causal nexus.[170] However, the defaulting defendant may not offer evidence to contravene its liability[171] or to support its defenses to liability.[172]

F. *Default Judgment Rendered During Hearing Versus Signed Without Hearing*

The defaulting defendant or its counsel should compare the reporter's record from the default judgment prove-up hearing to the text of the default judgment signed by the trial court judge. A trial court judge will presumably favor a motion for new trial that points out that the default judgment signed differs from the default judg-

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167. *See* Capitol Brick, Inc. v. Fleming Mfg. Co., 722 S.W.2d 399, 402 (Tex. 1986) (holding that breach of warranty and DTPA violations were admitted where a default judgment was entered against the defendant).

168. *See* Herbert v. Greater Gulf Coast Enters., 915 S.W.2d 866, 872 (Tex. App.—Houston [1st Dist.] 1995, no writ) (illustrating that exemplary damages must be proved by showing the extent of the defendant's egregious conduct).

169. TEX. R. CIV. P. 243; Maywald Trailer Co. v. Perry, 238 S.W.2d 826, 828 (Tex. Civ. App.—Galveston 1951, writ ref'd n.r.e.).

170. *See* Northeast Wholesale Lumber, Inc. v. Leader Lumber, Inc., 785 S.W.2d 402, 407 (Tex. App.—Dallas 1989, no writ) (stating that the defendant has a right to object to evidence and to cross examine the plaintiff's witnesses at a hearing on unliquidated damages); Bass v. Duffey, 620 S.W.2d 847, 849-50 (Tex. App.—Houston [14th Dist.] 1981, no writ) (explaining that after a default judgment, a defendant may object, be present, and cross-examine the plaintiff's witness at a hearing on unliquidated damages).

171. *See* Fiduciary Mortgage Co. v. City Nat'l Bank, 762 S.W.2d 196, 200 (Tex. App.—Dallas 1988, writ denied) (noting that the defendant cannot attack allegations in a petition that were established as a matter of law once the defendant's answer was stricken as a sanction).

172. *See* Downer v. Aquamarine Operators, Inc., 701 S.W.2d 238, 243 (Tex. 1985) (holding that the affirmative defense of contributory negligence must be supported by the pleadings and that no such support exists where defendant's pleadings were struck as a discovery sanction).

ment rendered at the hearing or that fails to conform to the evidence presented on damages.[173]

G. *Notification of Other Defendants of Application for Default Judgment*

If some defendants have filed answers, then the answering defendants are entitled to notice of a plaintiff's application for entry of a default judgment.[174] Rule 21 of the Texas Rules of Civil Procedure requires a party to serve on all other parties any application to the trial court for an order, whether it is made in the form of a motion, plea, or other request, unless it is presented during a hearing or trial.[175]

H. *Timing of Special Appearances from Default Judgments*

A non-resident defendant's attempt to invoke the judicial powers of a Texas court to set aside a default judgment constitutes a general appearance.[176] As such, the defaulting non-resident defendant should file the special appearance first and set the matter for a hearing immediately in order to allow sufficient time for filing and a hearing on a motion for new trial afterwards. The defaulting defendant should be careful not to recite in the motion for new trial that it is ready, willing, and able to go to trial, but rather should simply indicate that the plaintiff's case will not be unduly delayed by the granting of the motion for new trial.[177] In addition, the defaulting non-resident defendant should state in the motion for new

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173. *See generally* Capitol Brick, Inc. v. Fleming Mfg. Co., 722 S.W.2d 399, 401 (Tex. 1986) (stressing that damages awarded in a default judgment cannot exceed damages pleaded).

174. TEX. R. CIV. P. 21.

175. *Id.*

176. Liberty Enters., Inc. v. Moore Transp. Co., 690 S.W.2d 570, 571-72 (Tex. 1985); Barrett v. Barrett, 715 S.W.2d 110, 113 (Tex. App.—Texarkana 1986, writ ref'd n.r.e.). *See generally* TEX. R. CIV. P. 120a (defining a special appearance and stating that every appearance not in strict compliance with the rule is a general appearance).

177. *See* Transportes Aeros de Coahuila, S.A. v. Falcon, 5 S.W.3d 712, 716-17 (Tex. App.—San Antonio 1999, pet. denied) (noting that a special appearance was not waived because the motion for new trial did not include a "ready" statement).

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trial that its objection to the trial court's jurisdiction is not being waived.[178]

I. *Default Judgments Against the State of Texas*

Sections 30.004(b) and 39.001 of the Texas Civil Practice and Remedies Code require that the Attorney General of Texas be given notice, by certified mail, return receipt requested, of intent to take a default judgment against the State of Texas, one of its agencies, officials, or employees, or a party in a civil case for which representation will be undertaken by the Attorney General, at least ten days before the default judgment is signed.[179] If the State requests a hearing and satisfies the requirements for overturning a default judgment before the ten-day period passes, the trial court abuses its discretion in granting a default judgment.[180] The plaintiff's failure to provide the Attorney General with the requisite notice will result in the default judgment being set aside, without costs awarded to the plaintiff.[181]

VII. Procedures for Directly Attacking Default Judgments from State Courts

A. *Motion for New Trial—The* Craddock *Standard and Elements*

1. The Basics of a Motion for New Trial

Rule 320 of the Texas Rules of Civil Procedure provides that "[n]ew trials may be granted and judgment set aside for good cause, on motion or on the court's own motion on such terms as the court shall direct."[182] The motion for new trial does not have to be verified if affidavits supplying all the facts set forth in the motion are attached and incorporated by reference therein. The motion for new trial must be in writing and signed by the party or

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178. *See* Martinez v. Valencia, 824 S.W.2d 719, 722 (Tex. App.—El Paso 1992, no writ) (noting that a motion for new trial did not invoke the court's jurisdiction where language stated that the movant was not waiving its objection to jurisdiction).

179. Tex. Civ. Prac. & Rem. Code Ann. §§ 30.004(b), 39.001 (Vernon 1997).

180. *See* Dir., State Employees Workers' Comp. Div. v. Evans, 889 S.W.2d 266, 267-68 (Tex. 1994) (holding that the trial court's refusal to grant a new trial and set aside the default judgment was an abuse of discretion).

181. Tex. Civ. Prac. & Rem. Code Ann. §§ 30.004(d), 39.002 (Vernon 1997).

182. Tex. R. Civ. P. 320.

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attorney.[183] "The filing of a motion for new trial in order to extend the appellate timetable is a matter of right, whether or not there is any sound or reasonable basis for the conclusion that a further motion is necessary."[184]

Rule 321 of the Texas Rules of Civil Procedure requires that

> [e]ach point relied upon in a motion for new trial . . . shall briefly refer to that part of the ruling of the court, charge given to the jury, or charge refused, admission or rejection of evidence, or other proceedings which are designated to be complained of, in such a way that the objection can be clearly identified and understood by the court.[185]

Conversely, "[g]rounds of objections couched in general terms . . . shall not be considered by the court."[186]

2. The *Craddock* Standard and Elements

Although Rule 320 of the Texas Rules of Civil Procedure states that new trials may be granted and judgment set aside "for good cause,"[187] the Texas Supreme Court and Texas courts of appeals have followed a much more liberal standard in reviewing rulings on motions for new trial following default judgments,[188] as "[t]he law prefers that cases be disposed on their merits wherever possible, rather than by default."[189]

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183. *Id.*

184. Old Republic Ins. Co. v. Scott, 846 S.W.2d 832, 833 (Tex. 1993).

185. TEX. R. CIV. P. 321; *see also* Marino v. Hartfield, 877 S.W.2d 508, 513 (Tex. App.—Beaumont 1994, writ denied) (applying the requirements for a motion for new trial).

186. TEX. R. CIV. P. 322; *see also* D/FW Commercial Roofing Co. v. Mehra, 854 S.W.2d 182, 189 (Tex. App.—Dallas 1993, no writ) (stating that "[t]he purpose of a motion for new trial is to provide an opportunity for the trial court to cure any errors by granting a new trial [and that] [t]herefore, the allegations in a motion for new trial must be sufficiently specific to enable the trial court to clearly understand what is being alleged as error").

187. TEX. R. CIV. P. 320.

188. *See* Custom-Crete, Inc. v. K-Bar Servs., Inc., 82 S.W.3d 655, 658 (Tex. App.—San Antonio, 2002, no pet.) (noting that the *Craddock* standards determine whether the trial court abused its discretion in denying a defendant's motion for new trial); Tex. Sting, Ltd. v. R.B. Foods, Inc., 82 S.W.3d 644, 650 (Tex. App.—San Antonio 2002, pet. denied) (noting a historical trend toward liberally granting motions for new trial in default judgment cases).

189. Gen. Elec. Capital Auto Fin. Leasing Servs. v. Stanfield, 71 S.W.3d 351, 356 (Tex. App.—Tyler 2001, no pet.).

In *Craddock v. Sunshine Bus Lines, Inc.*,[190] the Texas Supreme Court articulated a standard for vacating and setting aside default judgments that is used today.[191] *Craddock* describes the three elements that a defaulting defendant must satisfy to be entitled to an order setting aside the default judgment:

> A default judgment should be set aside and a new trial ordered in any case in which the failure of [the] defendant to answer before judgment was not intentional, or the result of conscious indifference on his part, but was due to a mistake or accident, provided the motion for a new trial sets up a meritorious defense and is filed at a time when the granting thereof will occasion no delay or otherwise work an injury to the plaintiff.[192]

Although the *Craddock* test applies to both no-answer and post-answer default judgments,[193] as a practical matter, the *Craddock*

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190. 134 Tex. 388, 133 S.W.2d 124 (1939).

191. Craddock v. Sunshine Bus Lines, Inc., 134 Tex. 388, 393, 133 S.W.2d 124, 126 (1939).

192. *Id.* (emphasis added); *see also* Dir., State Employees Workers' Comp. Div. v. Evans, 889 S.W.2d 266, 268 (Tex. 1994) (ruling that the trial court's refusal to grant a new trial and set aside the default judgment was an abuse of discretion); Old Republic Ins. Co. v. Scott, 873 S.W.2d 381, 382 (Tex. 1994) (articulating the three-part test used in determining whether a trial court's decision to overrule a motion for new trial was an abuse of discretion); *Custom-Crete*, 82 S.W.3d at 658 (noting that the *Craddock* standards determine whether the trial court abused its discretion in denying a defendant's motion for new trial); *Tex. Sting*, 82 S.W.3d at 650 (discussing the requirements of the *Craddock* test used in determining the trial court's abuse of discretion); Tanknology/NDE Corp. v. Bowyer, 80 S.W.3d 97, 100 (Tex. App.—Eastland 2002, pet. denied) (illustrating that satisfaction of the *Craddock* test established that the trial court abused its discretion); Freeman v. Pevehouse, 79 S.W.3d 637, 641 (Tex. App.—Waco 2002, no pet.) (stating that the defaulting defendant has the burden of proof in establishing the *Craddock* standards); Smith v. Holmes, 53 S.W.3d 815, 817 (Tex. App.—Austin 2001, no pet.) (summarizing that the trial court's failure to notify the defendant of the trial setting constituted a deprivation of the defendant's due process rights and satisfied the *Craddock* test). It is important and interesting to note that the *Craddock* standard has also been applied to state agency denials of rehearings after a default judgment or order. *See* Anderson v. R.R. Comm'n, 963 S.W.2d 217, 219 (Tex. App.—Austin 1998, pet. denied) (applying the *Craddock* test to a state agency proceeding at the request of both the defendant and the plaintiff).

193. LeBlanc v. LeBlanc, 778 S.W.2d 865, 865 (Tex. 1989); Cliff v. Huggins, 724 S.W.2d 778, 779 (Tex. 1987); Grissom v. Watson, 704 S.W.2d 325, 326 (Tex. 1986); Ivy v. Carrell, 407 S.W.2d 212, 213 (Tex. 1966); *Tex. Sting*, 82 S.W.3d at 650; *Freeman*, 79 S.W.3d at 640-41; Elite Towing, Inc. v. LSI Fin. Group, 985 S.W.2d 635, 642 (Tex. App.—Austin 1999, no pet.).

test is often construed more strictly in a post-answer default judgment context.[194]

3. Abuse of Discretion Standard of Review

An order granting a motion for new trial is not appealable with respect to a default judgment. A trial court's denial of a motion for new trial and its failure to grant a motion for new trial within the period of plenary jurisdiction are reviewed under an abuse of discretion standard.[195] A trial court abuses its discretion in failing to grant a motion for new trial following a default judgment when the defaulting defendant satisfies all three *Craddock* elements.[196]

4. Accident or Mistake Versus Intentional or Conscious Indifference

The first element of the *Craddock* test provides that the defaulting defendant must demonstrate that the failure to answer or appear was the result of an accident or mistake, as opposed to an intentional act or the result of conscious indifference.[197] The accident or mistake versus lack of intent or conscious indifference analysis is viewed as a single element of the *Craddock* test.[198]

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194. *See, e.g.*, Pickell v. Guar. Nat'l Life Ins. Co., 917 S.W.2d 439, 443 (Tex. App.—Houston [14th Dist.] 1996, writ dism'd by agr.) (holding that the party failed to meet the burden necessary to have its post-answer default judgment set aside).

195. *Evans*, 889 S.W.2d at 268; *Cliff*, 724 S.W.2d at 778; *In re* A.P.P., 74 S.W.3d 570, 573 (Tex. App.—Corpus Christi 2002, no pet.); Cont'l Cas. Co. v. Hartford Ins., 74 S.W.3d 432, 434 (Tex. App.—Houston [1st Dist.] 2002, no pet.); Gen. Elec. Capital Auto Fin. Leasing Servs., Inc. v. Stanfield, 71 S.W.3d 351, 356 (Tex. App.—Tyler 2001, pet. denied); Mahand v. Delaney, 60 S.W.3d 371, 374 (Tex. App.—Houston [1st Dist.] 2001, no pet.); *Smith*, 53 S.W.3d at 817; Coastal Banc SSB v. Helle, 48 S.W.3d 796, 800 (Tex. App.—Corpus Christi 2001, pet. denied); Mantis v. Resz, 5 S.W.3d 388, 391 (Tex. App.—Fort Worth 1999, pet. denied), *overruled in part on other grounds by* Sheldon v. Emergency Med. Consultants, I, P.A., 43 S.W.3d 701, 702 n.2 (Tex. App.—Fort Worth 2001, no pet.).

196. *Evans*, 889 S.W.2d at 268; Bank One, Tex., N.A. v. Moody, 830 S.W.2d 81, 85 (Tex. 1992); *Custom-Crete*, 82 S.W.3d at 658; *Tex. Sting*, 82 S.W.3d at 650.

197. *See* Estate of Pollack v. McMurrey, 858 S.W.2d 388, 391 (Tex. 1993) (analyzing the first element of the *Craddock* test—whether the party's failure to answer was intentional or the result of conscious indifference); *Bank One*, 830 S.W.2d at 82 (restating the first prong—the failure of the defendant to answer was not intentional or the result of conscious indifference, but was due to accident or mistake).

198. *See Bank One*, 830 S.W.2d at 85 (emphasizing the requirement that the failure to answer due to mistake or accident is part of the first element of the three-part *Craddock* test and should not be treated as a detached element).

"Texas courts have liberally interpreted the element of accident or mistake and have found an abuse of discretion when a trial court is too strict in its review of the defaulting defendant's conduct."[199] "The controlling fact under the first prong's analysis is the absence of a purposeful or bad faith failure to appear."[200] The defaulting defendant need only provide a "slight excuse" or "some excuse, but not necessarily a good excuse."[201] Moreover, the defendant's active negligence will not preclude the vacating and setting aside of a default judgment.[202]

A mistake of law may be sufficient to satisfy the first element.[203] Where the defaulting defendant relied on a third-party to forward

199. State v. Sledge, 982 S.W.2d 911, 915 (Tex. App.—Houston [14th Dist.] 1998), *rev'd on other grounds*, 36 S.W.3d 152 (Tex. App.—Houston [1st Dist.] 2000, pet. denied); *see also Tex. Sting*, 82 S.W.3d at 650 (noting that "[t]he courts have applied the first prong of the *Craddock* test liberally, considering each case on an ad hoc basis").

200. *Tex. Sting*, 82 S.W.3d at 650.

201. *Id.*; *In re* A.P.P., 74 S.W.3d at 574; *Sledge*, 982 S.W.2d at 914; K-Mart Corp. v. Armstrong, 944 S.W.2d 59, 61 (Tex. App.—Amarillo 1997, writ denied); Gotcher v. Barnett, 757 S.W.2d 398, 401 (Tex. App.—Houston [14th Dist.] 1988, no writ).

202. *See* Ivy v. Carrell, 407 S.W.2d 212, 213 (Tex. 1966) (holding that the court of appeals erroneously required the defendant to allege and prove that its failure to be present at trial was not due to its fault or negligence); Custom-Crete, Inc. v. K-Bar Servs., Inc., 82 S.W.3d 655, 660 (Tex. App.—San Antonio, 2002, no pet.) (stating that the application of a negligence standard is improper in a case for default judgment); *Sledge*, 982 S.W.2d at 914-16 (explaining that "[c]onscious indifference means more than mere negligence" and that "a defendant is not required to show that he and/or his agent were free of negligence"); Transoceanic Shipping Co. v. Gen. Universal Sys., Inc., 961 S.W.2d 418, 420 (Tex. App.—Houston [1st Dist.] 1997, no pet.) (stating that a writ of error appellant need not show absence of negligence in order for the complaint to be heard); *K-Mart*, 944 S.W.2d at 61 (emphasizing that it is established law that mere negligence will not preclude the setting aside of a default judgment); Gen. Life & Accident Ins. Co. v. Higginbotham, 817 S.W.2d 830, 832 (Tex. App.—Fort Worth 1991, writ denied) (holding that the appellants met the burden of proving that their failure to answer was the result of negligence or mistake and not intentional indifference to their duty to respond to service); Jackson v. Mares, 802 S.W.2d 48, 51 (Tex. App.—Corpus Christi 1990, writ denied) (holding that the appellant's lawyer was not required to show that he was free from negligence when he forgot to respond to citations); Ferguson & Co. v. Roll, 776 S.W.2d 692, 697 (Tex. App.—Dallas 1989, no writ) (emphasizing that the negligence standard is not the proper test under *Craddock*).

203. *See, e.g.*, *Bank One*, 830 S.W.2d at 85 (setting aside the default judgment when a bank president mistakenly believed it was a proper answer to a garnishment suit to freeze the bank accounts and tender the balance to the trial court); *In re* Parker, 20 S.W.3d 812, 819 (Tex. App.—Texarkana 2000, no pet.) (affirming the trial court's finding of proper notice when the defendant, who had only fourteen days notice of the trial setting, and believing it was entitled to forty-five days notice, sent a letter to the court coordinator requesting clarification and then failed to attend the trial); Costley v. State Farm Fire & Cas. Co., 894 S.W.2d 380, 384 (Tex. App.—Amarillo 1994, writ denied) (finding that no meritorious defense was set up when the defendant and counsel both believed substituted

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the lawsuit papers, answer the lawsuit, and notify the defendant regarding a trial setting, the defendant must prove that the third-party's failure was due to accident or mistake, and not the result of intentional conduct or conscious indifference.[204]

"If the factual assertions in the defaulting party's new trial affidavits are not controverted, the defaulting party satisfies its burden if it sets forth facts that, if true, negate intent or conscious indifference."[205] In determining whether the defaulting defendant's assertions are controverted, the trial court and reviewing court must examine all evidence in the record.[206] Conclusory allegations are insufficient, as the facts must explain the nature of the accident or mistake.[207] It is important to note that when the defaulting defendant does not receive notice of the trial setting or dispositive hearing, the first prong of the *Craddock* test is satisfied, and the remaining prongs need not be pleaded and proved in order for the defaulting defendant to be entitled to a new trial.[208]

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service on defendant was improper and thus did not answer); Joiner v. AMSAV Group, Inc., 760 S.W.2d 318, 321 (Tex. App.—Texarkana 1988, writ denied) (holding that a cross-claim defendant who was dismissed from the main action but failed to answer a cross claim was entitled to have the default judgment set aside); Tex. State Bd. of Pharmacy v. Martinez, 658 S.W.2d 277, 281 (Tex. App.—Corpus Christi 1983, writ ref'd n.r.e.) (holding that the Board was entitled to a new trial because the Board believed jurisdiction was only proper in Travis County and thus failed to answer a case brought in Hidalgo County); Cont'l Airlines, Inc. v. Carter, 499 S.W.2d 673, 675 (Tex. Civ. App.—El Paso 1973, no writ) (allowing a new trial for a New York-based insurance carrier that hired an attorney who erroneously believed that an answer to a Texas lawsuit was due in thirty days instead of twenty days).

204. Holt Atherton Indus., Inc. v. Heine, 835 S.W.2d 80, 83 (Tex. 1992); Mem'l Hosp. Sys. v. Fisher Ins. Agency, Inc., 835 S.W.2d 645, 652 (Tex. App.—Houston [14th Dist.] 1992, no writ); *Ferguson*, 776 S.W.2d at 697.

205. *Tex. Sting*, 82 S.W.3d at 650-51; *see also* Dir., State Employees Workers' Comp. Div. v. Evans, 889 S.W.2d 266, 269 (Tex. 1994) (restating how the defendant satisfies its burden); Tanknology/NDE Corp. v. Bowyer, 80 S.W.3d 97, 101 (Tex. App.—Eastland 2002, pet. denied) (agreeing that as long as factual assertions in the affidavit are not controverted, the burden is satisfied when the facts, if true, would negate intentional conduct); Freeman v. Pevehouse, 79 S.W.3d 637, 641 (Tex. App.—Waco 2002, no pet.) (holding that the defendant meets its burden if the factual assertions are not controverted by the plaintiff and if the facts as true invalidate conscious indifference).

206. *Tex. Sting*, 82 S.W.3d at 651; *Tanknology*, 80 S.W.3d at 101; *Freeman*, 79 S.W.3d at 641.

207. *Tanknology*, 80 S.W.3d at 101 (citing Holt Atherton Indus., Inc. v. Heine, 835 S.W.2d 80, 82-83 (Tex. 1992)); *Freeman*, 79 S.W.3d at 641 (citing Folsom Invs., Inc. v. Troutz, 632 S.W.2d 872, 875 (Tex. App.—Fort Worth 1982, writ ref'd n.r.e.)).

208. *Tex. Sting*, 82 S.W.3d at 650; *see also* Lopez v. Lopez, 757 S.W.2d 721, 723 (Tex. 1988) (showing that lack of actual or constructive notice satisfies the first element of *Crad-*

Excuses for the defaulting defendant's failure to answer or appear that have been found to be sufficient to satisfy the first element of the *Craddock* standard typically involve one or more of the following scenarios: (1) the defendant or its counsel did not have notice or knowledge of the lawsuit or setting;[209] (2) the defendant misplaced the lawsuit papers or inadvertently failed to timely forward lawsuit papers to the attorney or insurance company for answering;[210] (3) the defendant was mistaken as to substance and

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dock and the other elements need not be established); Smith v. Holmes, 53 S.W.3d 815, 817 (Tex. App.—Austin 2001, no pet.) (asserting that lack of notice meets the first prong of *Craddock* and that satisfying this prong alone entitles the defendant to a new trial); Mosser v. Plano Three Venture, 893 S.W.2d 8, 12 (Tex. App.—Dallas 1994, no writ) (concluding that a party that did not receive notice need not satisfy the remaining elements of *Craddock*); Green v. McAdams, 857 S.W.2d 816, 819 (Tex. App.—Houston [1st Dist.] 1993, no writ) (holding that a refusal to grant a new trial after the first prong has been established violates due process).

209. *See* Estate of Pollack v. McMurrey, 858 S.W.2d 388, 391 (Tex. 1993) (contending that without actual knowledge, failure to answer is not the result of conscious indifference); *see also* Burress v. Richardson, 97 S.W.3d 806, 807 (Tex. App.—Dallas 2003, no pet.) (holding that it was reversible error for the trial court to grant a default judgment after the notice of trial setting was returned to the trial court clerk with the notation "undeliverable as addressed"); Custom-Crete, Inc. v. K-Bar Servs., Inc., 82 S.W.3d 655, 658 (Tex. App.—San Antonio, 2002, no pet.) (discussing the notice requirement); *Tex. Sting*, 82 S.W.3d at 651-52 (finding that the first element of *Craddock* was met because notice was mailed to the incorrect address); *Smith*, 53 S.W.3d at 818 (finding that the "uncontested denial" of receiving notice of the trial setting overcame the presumption to the contrary and thus the first element of *Craddock* was satisfied); Huffine v. Tomball Hosp. Auth., 979 S.W.2d 795, 799 (Tex. App.—Houston [14th Dist.] 1998, no pet.) (asserting that the non-receipt of notice set forth in an affidavit was not controverted and the facts as true negated conscious indifference); Harold-Elliott Co. v. K.P./Miller Realty Growth Fund I, 853 S.W.2d 752, 756 (Tex. App.—Houston [1st Dist.] 1993, no writ) (setting aside the default judgment after finding that the failure to answer was due to the defendant's failure to update its registered agent's address with the Secretary of State); J. H. Walker Trucking v. Allen Lund Co., 832 S.W.2d 454, 455-56 (Tex. App.—Houston [1st Dist.] 1992, no writ) (granting a new trial upon finding that defense counsel moved offices and the trial court lacked notice of the new address to send notice of the trial setting); Dorsey v. Aguirre, 552 S.W.2d 576, 577-78 (Tex. Civ. App.—Waco 1977, writ ref'd n.r.e.) (finding that the *Craddock* elements were met when the defendant alleged that it did not recall being served).

210. *See* Strackbein v. Prewitt, 671 S.W.2d 37, 39 (Tex. 1984) (establishing that the misplacement of papers causing a failure to answer was sufficient to meet the first *Craddock* element); Ward v. Nava, 488 S.W.2d 736, 737-38 (Tex. 1972) (setting aside the default judgment upon finding that the defendant misplaced the citation at his residence prior to forwarding to his insurance company); *In re* A.P.P., 74 S.W.3d 570, 574 (Tex. App.—Corpus Christi 2002, no pet.) (stating that the test for deciding whether a new trial should be granted is conscious indifference); Moya v. Lozano, 921 S.W.2d 296, 298-99 (Tex. App.—Corpus Christi 1996, no writ) (holding that the mistaken belief that an insurance company would also be served and thus handle the suit did not demonstrate the appellant's conscious indifference); Southland Paint Co. v. Thousand Oaks Racket Club, 724 S.W.2d

effect of the lawsuit papers served;[211] (4) the defendant's insurance company erred and failed to timely and properly answer or appear;[212] or (5) problems relating to the actual date of service

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809, 811 (Tex. App.—San Antonio 1986, writ ref'd n.r.e.) (finding a meritorious defense when the delay in mailing was due to shortness of office staff); Harlen v. Pfeffer, 693 S.W.2d 543, 545 (Tex. App.—San Antonio 1985, no writ) (holding that a sufficient excuse was established where two defendants failed to answer because each thought the other had contacted an attorney to answer the lawsuit); Dallas Heating Co. v. Pardee, 561 S.W.2d 16, 19 (Tex. Civ. App.—Dallas 1977, writ ref'd n.r.e.) (refusing to find conscious indifference where lawsuit papers were inadvertently misplaced by a corporate officer who believed that the lawsuit papers had been forwarded to an attorney).

211. *See* Norton v. Martinez, 935 S.W.2d 898, 902 (Tex. App.—San Antonio 1996, no writ) (showing that the appellants did not intentionally fail to answer but instead were mistaken in thinking that the claim was covered); Miller v. Miller, 903 S.W.2d 45, 47 (Tex. App.—Tyler 1995, no writ) (concluding that the defendant's failure to answer a divorce petition was the result of confusion because the proceedings were filed in two counties and abated in one county); Martinez v. Valencia, 824 S.W.2d 719, 723 (Tex. App.—El Paso 1992, no writ) (concluding that the defendants were unable to read English and mistakenly believed that the lawsuit papers pertained to a pending settlement); Nat'l Rigging, Inc. v. City of San Antonio, 657 S.W.2d 171, 173 (Tex. App.—San Antonio 1983, writ ref'd n.r.e.) (finding mistake when two separate petitions were served on the president of two corporate defendants and the president, assuming that the petitions were merely duplicates of one another, forwarded only one petition to its insurance company).

212. *See Tanknology*, 80 S.W.3d at 101 (noting that error on the part of appellant's counsel was not intentional because the human resources and risk management director for the defendant faxed papers to the insurance company recovery agent who did not process the lawsuit petitions); *In re* A.P.P., 74 S.W.3d at 574 (holding that the first prong of *Craddock* was satisfied when notice of a petition to modify the parent-child relationship was inadvertently placed in another file pertaining to the same client); State v. Sledge, 982 S.W.2d 911, 915 (Tex. App.—Houston [14th Dist.] 1998) (finding unintentional mistake where the defense counsel mistakenly believed that the case was dismissed, together with the fact that no controverting evidence was offered to establish conscious indifference), *rev'd on other grounds*, 36 S.W.3d 152 (Tex. App.—Houston [1st Dist.] 2000, pet. denied); K-Mart Corp. v. Armstrong, 944 S.W.2d 59, 60 (Tex. App.—Amarillo 1997, writ denied) (asserting that the failure to answer was not intentional where the citation was lost in the mail when forwarded from the defendant's office in Michigan to the Texas claims office); Blandford v. Ayad, 875 S.W.2d 12, 14 (Tex. App.—Amarillo 1994, no writ) (holding that the failure to answer was not intentional where the defendant delivered lawsuit papers to its attorney's office, but the attorney claimed that the lawsuit papers were not received or were misplaced); Owens v. Neely, 866 S.W.2d 716, 718 (Tex. App.—Houston [14th Dist.] 1993, writ denied) (concluding that an answer mistakenly filed in a garnishment action, rather than the main action, satisfies the first *Craddock* requirement); Gen. Life & Accident Ins. Co. v. Higginbotham, 817 S.W.2d 830, 832 (Tex. App.—Fort Worth 1991, writ denied) (holding that the appellants met their burden by demonstrating that the failure to answer was caused by an unintentional mistake); Triad Contractors, Inc. v. Kelly, 809 S.W.2d 683, 684 (Tex. App.—Beaumont 1991, writ denied) (concluding that the first prong of *Craddock* was satisfied due to the mistake of losing the citation); State Farm Life Ins. Co. v. Mosharaf, 794 S.W.2d 578, 580-81 (Tex. App.—Houston [1st Dist.] 1990, writ denied) (determining that the appellant's failure to answer was caused by a mistake where

or setting.[213]

Although there are numerous situations in which Texas appellate courts have reversed default judgments and found that the defaulting defendant satisfied the first element of the *Craddock* test, there are various circumstances in which the failure to answer or appear was held to have been the result of intentional conduct or conscious indifference. The following are examples: (1) the defendant

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the petitions were inadvertently filed away in the appellant's office); Guardsman Life Ins. Co. v. Andrade, 745 S.W.2d 404, 405 (Tex. App.—Houston [1st Dist.] 1987, writ denied) (claiming that the failure to answer was the result of the defendant counsel's mistaken belief that the lawsuit papers pertained to another lawsuit pending against the same defendant on the same matter in another county); Evans v. Woodward, 669 S.W.2d 154, 155 (Tex. App.—Dallas 1984, no writ) (finding that the failure to answer was not caused by indifference but rather by confusion in the retained counsel's office); Cont'l Airlines, Inc. v. Carter, 499 S.W.2d 673, 674 (Tex. Civ. App.—El Paso 1973, no writ) (noting that the failure to answer was not intentional but due to the failure on the part of the defendant counsel's secretary to mark an answer date on the calendar); Reynolds v. Looney, 389 S.W.2d 100, 101-02 (Tex. Civ. App.—Eastland 1965, writ ref'd n.r.e.) (finding unintentional mistake where the answer would have been timely filed but for the lawsuit papers being misplaced).

213. *See* Dir., State Employees Workers' Comp. Div. v. Evans, 889 S.W.2d 266, 268 (Tex. 1994) (reversing the lower court's refusal of a new trial when the successor attorney took over the file after the prior attorney resigned and was unaware of the trial setting due to resettings in the calendar); Mahand v. Delaney, 60 S.W.3d 371, 374 (Tex. App.—Houston [1st Dist.] 2001, no pet.) (indicating a lack of reasonable notice when the plaintiff's counsel, ordered by the court coordinator to fax a notice of the new trial setting to the defendant, faxed notice of the new trial setting after 5:00 p.m. on the day before the trial setting); Europa Cruises Corp. v. AFEC Int'l, 809 S.W.2d 783, 785-86 (Tex. App.—Houston [14th Dist.] 1991, no writ) (recognizing a lack of intentional disregard where the general manager in charge of answering petitions resigned before filing an answer, and the successor did not commence employment until after the answer due date); Van Der Veken v. Joffrion, 740 S.W.2d 28, 31 (Tex. App.—Texarkana 1987, no writ) (finding no intentional disregard or conscious indifference when the withdrawing counsel's letter to an out-of-state defendant stated that the trial date was "tentative" and the defendant believed that the trial court would confirm the setting); Aero-Mayflower Transit Co. v. Spoljaric, 669 S.W.2d 158, 160 (Tex. App.—Fort Worth 1984, writ dism'd) (finding that the first *Craddock* requirement was met because the defendant's attorney was involved in another trial at the same time the default judgment was rendered); Beard v. McKinney, 456 S.W.2d 451, 455 (Tex. App.—Houston [1st Dist.] 1970, no writ) (reversing the trial court's denial of a motion for new trial when the defendant's counsel did not have notice of the trial setting); Leibowitz v. San Juan State Bank, 409 S.W.2d 586, 589-90 (Tex. Civ. App.—Corpus Christi 1966) (excusing the defaulting party where the citation served on the defendant listed the date of service in February, when service was actually in January); Black v. Johnson, 404 S.W.2d 382, 383 (Tex. Civ. App.—El Paso 1966, writ ref'd n.r.e.) (finding lack of intentional disregard when, in a post-answer default judgment, the attorney failed to inform the defendant of the trial setting).

refused to accept service or mailings pertaining to the lawsuit;[214] (2) the defendant failed to file an adequate affidavit or provide adequate testimonial evidence in support of the motion for new trial and to vacate and set aside default judgment;[215] (3) the defendant had a mistaken understanding of the effect of bankruptcy proceedings;[216] (4) the defendant conceded notice or knowledge of the lawsuit or setting and decided not to answer or appear;[217] (5) the defendant was provided with multiple notices of the pending lawsuit and deadline to answer but failed to answer;[218] and (6) the de-

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214. *See* Sharpe v. Kilcoyne, 962 S.W.2d 697, 700 (Tex. App.—Fort Worth 1998, no pet.) (affirming the default judgment where the defendant had constructive, if not actual, notice of trial setting because it had "refused" mailings properly addressed to its regarding the trial setting after its attorney withdrew from representation); Osborn v. Osborn, 961 S.W.2d 408, 412-13 (Tex. App.—Houston [1st Dist.] 1997) (refusing to find that the failure to attend the trial was due to an accident or mistake).

215. *See* Freeman v. Pevehouse, 79 S.W.3d 637, 646 (Tex. App.—Waco 2002, no pet.) (holding that conclusory statements in affidavits, with no further explanation, will not prove that the failure to answer was the result of a mistake or accident); BancTexas McKinney, N.A. v. Desalination Sys., Inc., 847 S.W.2d 301, 302 (Tex. App.—Dallas 1992, no writ) (holding that conclusory statements in the appellant's affidavit were not competent proof of mistake or accident); Liberty Mut. Fire Ins. Co. v. Ybarra, 751 S.W.2d 615, 617-18 (Tex. App.—El Paso 1988, no writ) (finding that conscious indifference was not disproved where the affidavit contained general statements without reference to specific dates); Nichols v. TMJ Co., 742 S.W.2d 828, 831 (Tex. App.—Dallas 1987, no writ) (holding that conclusory allegations are insufficient); Dupnik v. Aransas County Navigation Dist., 732 S.W.2d 780, 782 (Tex. App.—Corpus Christi 1987, no writ) (holding that the trial court did not abuse its discretion in finding that mistake was not established where no efforts were made to procure an attorney to file an answer); Royal Zenith Corp. v. Martinez, 695 S.W.2d 327, 337 (Tex. App.—Waco 1985) (refusing to grant a new trial where the appellant admitted to swearing to an untrue affidavit alleging mistake).

216. Novosad v. Cunningham, 38 S.W.3d 767, 771 (Tex. App.—Houston [14th Dist.] 2001, no pet.). *Contra* Martin v. Allman, 668 S.W.2d 795, 799 (Tex. App.—Dallas 1984, no writ) (finding cause for a new trial when the successor attorney believed that a bankruptcy stay was in effect and therefore eliminated the need to answer).

217. Hilal v. Gatpandan, 71 S.W.3d 403, 407-08 (Tex. App.—Corpus Christi 2001, no writ); Balogh v. Ramos, 978 S.W.2d 696, 699 (Tex. App.—Corpus Christi 1998, pet. denied); Prince v. Prince, 912 S.W.2d 367, 369-70 (Tex. App.—Houston [14th Dist.] 1998, no pet.); O'Connell v. O'Connell, 843 S.W.2d 212, 216 (Tex. App.—Texarkana 1992, no writ); Beck v. Palacios, 813 S.W.2d 643, 645-46 (Tex. App.—Houston [14th Dist.] 1991, no writ); Johnson v. Edmonds, 712 S.W.2d 651, 652 (Tex. App.—Fort Worth 1986, no writ); Loewer v. Flanagan Farms, 661 S.W.2d 751, 754 (Tex. App.—San Antonio 1983, no writ).

218. *See* Konkel v. Otwell, 65 S.W.3d 183, 185 (Tex. App.—Eastland 2001, no pet.) (affirming the trial court's denial of a motion for mistrial when the plaintiff's counsel notified the defendant's counsel that an answer was due, serving the notification by letter via certified mail, return receipt requested); Young v. Kirsch, 814 S.W.2d 77, 81 (Tex. App.—San Antonio 1991, no writ) (finding conscious indifference where the appellant did not answer after "constant phone calls from the appellee reminding the appellant to take some

fendant assumed that settlement negotiations would negate the necessity for answering to the suit.[219]

5. "Setting Up" a Meritorious Defense

To satisfy the second element of the *Craddock* test, the defaulting defendant must "set up" a meritorious defense to the underlying lawsuit.[220] Note, however, that the defaulting defendant is not required to actually prove the meritorious defense in order to have the default judgment vacated and set aside.[221] If the default judgment was rendered against a defendant after improper service of process,[222] or if the defendant answered and was not provided with notice of the dispositive hearing or trial at which the default judgment was rendered,[223] the defaulting defendant is not required to set up a meritorious defense, as a matter of due process.

The motion for new trial must allege facts that would constitute a defense to the cause of action asserted by the plaintiff, and must be

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action"); Sunrizon Homes, Inc. v. Fuller, 747 S.W.2d 530, 533 (Tex. App.—San Antonio 1988, writ denied) (deciding that an intentional failure to appear exists when the defendant's general manager was repeatedly contacted by the plaintiff's lawyer and stated that he was "too busy" to file an answer).

219. *See* Pickell v. Guar. Nat'l Life Ins. Co., 917 S.W.2d 439, 443 (Tex. App.—Houston [14th Dist.] 1996, no writ) (holding that the reasonableness of an agent's failure to appear in light of a mediated settlement did not preclude a default judgment); Pentes Design, Inc. v. Perez, 840 S.W.2d 75, 79 (Tex. App.—Corpus Christi 1992, writ denied) (discounting the appellants' claim that alleged the resolution of the claim on a semi-formal basis justified setting aside the default judgment).

220. Ivy v. Carrell, 407 S.W.2d 212, 214 (Tex. 1966).

221. Dir., State Employees Workers' Comp. Div. v. Evans, 889 S.W.2d 266, 270 (Tex. 1994); *In re* A.P.P., 74 S.W.3d 570, 574-75 (Tex. App.—Corpus Christi 2002, no pet.); K-Mart Corp. v. Armstrong, 944 S.W.2d 59, 63 (Tex. App.—Amarillo 1997, writ denied). *Contra* Cont'l Carbon Co. v. Sea-Land Serv., Inc., 27 S.W.3d 184, 191 (Tex. App.—Dallas 2000, pet. denied) (holding that the defendant's allegation, without a supporting sworn affidavit that it did not owe the debt, was insufficient to reverse a default judgment on a lawsuit based on a sworn account).

222. *See* Peralta v. Heights Med. Ctr., Inc., 485 U.S. 80, 80 (1988) (reversing the summary judgment on grounds that the appellant did not receive proper service of process); Shull v. United Parcel Serv., 4 S.W.3d 46, 51 (Tex. App.—San Antonio 1999, pet. denied) (finding no abuse of discretion by the court in weighing the credibility of conflicting affidavits regarding the appellee's notice of the hearing).

223. Lopez v. Lopez, 757 S.W.2d 721, 722 (Tex. 1988); Custom-Crete, Inc. v. K-Bar Serv., 82 S.W.3d 655, 660 (Tex. App.—San Antonio 2002, no pet.); Green v. McAdams, 857 S.W.2d 816, 819 (Tex. App.—Houston [1st Dist.] 1993, no writ); *see also* Trevino v. Gonzalez, 749 S.W.2d 221, 223 (Tex. App.—San Antonio 1988, writ denied) (upholding the denial of a new trial when the record did not affirmatively overcome the presumption of proper notice).

supported by affidavits or other evidence proving prima facie that the defendant has such a meritorious defense.[224] A meritorious defense is set up if the facts recited, if proved at trial, would cause a different result, although not necessarily a totally opposite result. Thus, insufficiency of the evidence to support the damages awarded in the default judgment is a proper method of attacking the default judgment.[225] In determining whether a meritorious defense has been set up, the trial court may not try the defensive issues[226] and may not consider controverting evidence, counter-affidavits, or conflicting testimony.[227]

Sometimes the defaulting defendant may not have personal knowledge of specific facts that set up the meritorious defense. In this situation, counsel for the defaulting defendant must identify someone who possesses the requisite personal knowledge of the facts supporting a meritorious defense in order to prepare an affidavit that recites sufficient facts to set up a meritorious defense to the plaintiff's case. The affidavit must state *how* personal knowledge has been acquired by the affiant, and facts, not conclusions, must be recited in the affidavit to establish prima facie evidence of the meritorious defense.[228] If possible, the affiant should be pre-

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224. Estate of Pollack v. McMurrey, 858 S.W.2d 388, 392 (Tex. 1993); Tanknology/NDE Corp. v. Bowyer, 80 S.W.3d 97, 102 (Tex. App.—Eastland 2002, pet. denied).

225. *Tanknology*, 80 S.W.3d at 100; *In re* A.P.P., 74 S.W.3d at 574-75; *K-Mart*, 944 S.W.2d at 63; Liepelt v. Oliveira, 818 S.W.2d 75, 77 (Tex. App.—Corpus Christi 1991, no writ); Ferguson & Co. v. Roll, 776 S.W.2d 692, 698 (Tex. App.—Dallas 1989, no writ). *Cf.* Wallace v. Ramon, 82 S.W.3d 501, 503 (Tex. App.—San Antonio 2002, no pet.) (reviewing only the evidence provided); Renteria v. Trevino, 79 S.W.3d 240, 242-43 (Tex. App.—Houston [14th Dist.] 2002, no pet.) (finding no evidence that would change the result).

226. *See* Ivy v. Carrell, 407 S.W.2d 212, 214 (Tex. 1966) (stating that it is improper to try the defensive issues).

227. *See Estate of Pollack*, 858 S.W.2d at 392 (recognizing that counter affidavits and conflicting testimony should not be considered); Guar. Bank v. Thompson, 632 S.W.2d 338, 340 (Tex. 1982) (stating that "a motion for new trial should not be denied on the consideration of counter-testimony"); *Tanknology*, 80 S.W.3d at 102 (asserting that "[i]t is irrelevant whether the facts alleged by appellant in support of a meritorious defense are controverted"); *In re* A.P.P., 74 S.W.3d at 575 (holding that "[t]he court should not deny the motion on the basis of any contradictory evidence that is offered by the opposing party"); Cont'l Cas. Co. v. Hartford Ins., 74 S.W.3d 432, 435 (Tex. App.—Houston [1st Dist.] 2002, no pet.) (stating that "[t]he second *Craddock* element is determined based on facts alleged in the movant's motion for new trial and supporting affidavits, regardless of whether those facts are controverted," and "[t]he motion for new trial should not be denied on the basis of any contradictory testimony that is offered by the opposing party").

228. *See* Konkel v. Otwell, 65 S.W.3d 183, 187 (Tex. App.—Eastland 2001, no pet.) (concluding that "[i]n the supporting affidavit, appellant's counsel merely states what he

sent at the hearing on the motion for new trial and available if the trial court has questions.

6. Negating Delay or Injury to Plaintiff's Case

To satisfy the third element of the *Craddock* test, the motion for new trial should state that the vacating and setting aside of the default judgment would not result in any unreasonable or undue delay or injury to the plaintiff.[229] Once the defaulting defendant alleges and tenders prima facie evidence that the granting of the new trial motion will not delay or injure the plaintiff, the burden shifts to the plaintiff to prove injury.[230]

The purpose of the undue delay element is to protect the plaintiff against the sort of injury that causes a disadvantage in presenting the merits of the case at a new trial, such as loss of witnesses or other valuable evidence.[231] However, the loss of the plaintiff's economic benefit from a default judgment and the possibility of the defendant's bankruptcy do not constitute the types of delay or injury that will preclude the granting of a motion for new trial following a default judgment.[232]

Typically, the defaulting defendant states that it is ready, willing, and able to proceed to trial and to reimburse the plaintiff for all

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believes appellant disputes," and, since "[t]he affidavit is devoid of facts propounding a meritorious defense," conjecture is insufficient); Hicks v. Flores, 900 S.W.2d 504, 506 (Tex. App.—Amarillo 1995, no writ) (holding that all the elements of a defense must be supported by prima facie evidence in order for a meritorious defense to be set up (citing Holt Atherton Indus., Inc. v. Heine, 835 S.W.2d 80, 82 (Tex. 1992))).

229. Craddock v. Sunshine Bus Lines, Inc., 134 Tex. 388, 392-93, 133 S.W.2d 124, 126 (1939).

230. *See* Dir., State Employees Workers' Comp. Div. v. Evans, 889 S.W.2d 266, 270 (Tex. 1994) (determining that the plaintiff failed to negate the State's showing of no injury or undue delay); *Estate of Pollack*, 858 S.W.2d at 393 (holding that the burden shifted to the plaintiff to prove injury after a new trial motion represented otherwise); *Tanknology*, 80 S.W.3d at 103 (stating that the plaintiff "did not negate appellant's showing of no undue delay or injury"); *In re* A.P.P., 74 S.W.3d at 576 (recognizing the shift in burden to the appellee); *K-Mart*, 944 S.W.2d at 63 (holding that the burden shifts once the defendant alleges that a new trial will not injure the plaintiff); *Ferguson*, 776 S.W.2d at 699 (reversing the trial court's refusal to grant a new trial after the appellant showed that it would not injure the plaintiff and the plaintiff failed to show that it would); *see also* Cliff v. Huggins, 724 S.W.2d 778, 779 (Tex 1987) (recognizing the shift in burden).

231. *Evans*, 889 S.W.2d at 270; *see also* Jackson v. Mares, 802 S.W.2d 48, 52 (Tex. App.—Corpus Christi 1990, writ denied) (discussing the purpose of the final element of *Craddock*).

232. *Jackson*, 802 S.W.2d at 52.

reasonable expenses incurred in taking the default judgment.[233] Note, however, that one court of appeals has held that a mere "broad statement" in the motion for new trial stating that "granting the motion for new trial will 'cause neither delay nor injury'" to the opposing party "does not satisfy the requirements of *Craddock*."[234] If the default judgment is from a failure to answer the petition, it is best to simply say that the defendant is ready to proceed with the case, as there will be much case development before the case is ready for trial.

The failure to offer reimbursement for the plaintiff's costs of taking the default should not necessarily preclude the granting of a motion for new trial,[235] but an offer should be made. Only attorney's fees and expenses of taking and retaining the default judgment should be reimbursed to the plaintiff, as opposed to all attorney's fees and expenses incurred from the inception of the case.

7. Preparing the Affidavits

Absent a verified motion, the defaulting defendant must attach affidavits to the motion for new trial to support the factual statements contained therein regarding the accident or mistake that led

233. *See Evans*, 889 S.W.2d at 270 n.3 (recognizing the factors that the court should consider in determining whether to grant a new trial); *Tanknology*, 80 S.W.3d at 103 (noting that appellant was "ready, willing, and able to go to trial"); *In re* A.P.P., 74 S.W.3d at 575 (discussing the factors considered in determining whether delay or injury will occur); Cont'l Cas. Co. v. Hartford Ins., 74 S.W.3d 432, 436 (Tex. App.—Houston [1st dist.] 2002, no pet.) (discussing the final *Craddock* element of undue delay and stating that "[t]he two key questions in determining whether the non-moving party will be delayed or injured are: (1) whether the defendant offers to reimburse the plaintiff for the cost of obtaining the default judgment and (2) whether the defendant is ready, willing, and able to go to trial"); O'Connell v. O'Connell, 843 S.W.2d 212, 220 (Tex. App.—Texarkana 1992, no writ) (holding that the appellant must show it is ready and must offer to reimburse the appellee for expenses (citing Stone Res., Inc. v. Barnett, 661 S.W.2d 148, 152 (Tex. App.—Houston [1st Dist.] 1983, no writ))); *see also* cases cited *supra* note 228 (discussing the requirements for setting up a meritorious defense).

234. Konkel v. Otwell, 65 S.W.3d 183, 187 (Tex. App.—Eastland 2001, no pet.).

235. Angelo v. Champion Rest. Equip. Co., 713 S.W.2d 96, 98 (Tex. 1986); Gen. Elec. Capital Auto Fin. Leasing Servs., Inc. v. Stanfield, 71 S.W.3d 351, 356 (Tex. App.—Tyler 2001, no pet.); *see also* G&C Packing Co. v. Commander, 932 S.W.2d 525, 529 (Tex. App.—Tyler 1995, writ denied) (stating that an offer by the defendant to pay the plaintiff's expenses is not mandatory).

to the default judgment and the excuse for such act or omission.[236] In most cases, affidavits should be obtained from all persons who had contact with or responsibility for receipt of the citation and plaintiff's petition (no-answer) or who were involved in the lack of notice of the dispositive hearing or trial setting (post-answer). In other words, an affiant must have personal knowledge of the circumstances such that it can state that the facts are true and correct. If the factual allegations in the affidavits are not controverted, the trial court must accept them as true.[237]

8. Responding to Plaintiff's Pre-Hearing Discovery

The plaintiff is entitled to pre-hearing discovery with regard to all persons signing affidavits attached to the motion for new trial.[238] Defense counsel should be mindful of attempts by plaintiff's counsel to engage in discovery pertinent only to the underlying lawsuit, rather than discovery limited to the matters pertinent to the default judgment. At the hearing, once the motion has been granted, the court should be reminded that costs that will be normally incurred in defense of a lawsuit should not be included in any award relating to overturning the default judgment.

9. Conducting the Hearing on the Motion for New Trial

Even after the defaulting defendant attaches affidavit evidence to the motion for new trial, a hearing before the trial court should be requested in order to recite the arguments, authorities, and evidence in support of overturning the default judgment. Note, however, that allowing a motion for new trial to be overruled by operation of law seventy-five days after the default judgment was

236. MICHOL O'CONNOR ET AL., O'CONNOR'S TEXAS RULES CIVIL TRIALS 611 (2002). Note, however, that the defaulting defendant need not provide affidavit support for the allegations in the motion for new trial regarding meritorious defense or no delay or injury. *Id.*

237. *See Evans*, 889 S.W.2d at 269 (stating that the affidavits should be taken as true "for the purpose of establishing lack of conscious indifference"); Old Republic Ins. Co. v. Scott, 873 S.W.2d 381, 382 (Tex. 1994) (holding that the appellant satisfied its burden and introduced affidavits); Litchfield v. Litchfield, 794 S.W.2d 105, 106 (Tex. App.—Houston [1st Dist.] 1990, no writ) (discussing movant's uncontroverted affidavits where the appellee did not file a response to the appellant's motion for new trial).

238. *See* Estate of Pollack v. McMurrey, 858 S.W.2d 388, 392 (Tex. 1993) (deciding that the "trial court should have taken steps to assure right to discovery").

signed[239] does not waive error in denial of a motion for new trial.[240] "Affidavits attached to the motion for new trial do not have to be [introduced] into evidence [at the hearing] in order to be considered by the trial court."[241]

If any of the facts set forth in the motion are controverted, the trial court ordinarily will conduct a hearing.[242] To determine whether the affidavits are controverted, the trial court must look at all the evidence, including the motion and affidavits, the response to the motion and affidavits, and the oral testimony and exhibits introduced at the hearing.[243] If the defaulting defendant intends to conduct an evidentiary hearing with the introduction of live testimony (from the affiants or others, if necessary, or as requested by the trial court) and exhibits, a court reporter will be required to record the hearing.

If the motion for new trial is granted, the defaulting defendant should have an order prepared for the signature of the trial court judge reciting that the motion for new trial has been granted, the default judgment has been vacated and set aside, and a new trial as to liability and damages has been ordered. The plaintiff cannot appeal or petition for a writ of mandamus from the granting of a motion for new trial[244] unless the trial court signed the order after its plenary jurisdiction ended[245] or the trial court had no jurisdiction to grant a motion for new trial as to a foreign judgment.[246]

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239. TEX. R. CIV. P. 329b(c); Clark & Co. v. Giles, 639 S.W.2d 449, 449-50 (Tex. 1982).

240. Cont'l Carbon Co. v. Sea-Land Serv., Inc., 27 S.W.3d 184, 187-88 (Tex. App.—Dallas 2000, pet. denied).

241. *Evans,* 889 S.W.2d at 268. The court stated that "[i]t is sufficient that the affidavits are attached to the motion for new trial are part of the record." *Id.*

242. Puri v. Mansukhani, 973 S.W.2d 701, 715 (Tex. App.—Houston [14th Dist.] 1998, no pet.).

243. *Evans*, 889 S.W.2d at 269.

244. Cummins v. Paisan Constr., 682 S.W.2d 235, 235-36 (Tex. 1984); Thursby v. Stovall, 647 S.W.2d 953, 954 (Tex. 1983) (orig. proceeding) (per curiam); Wolk v. Life Partners, Inc., 994 S.W.2d 934, 935 (Tex. App.—Waco 1999, no pet.).

245. *In re* Barber, 982 S.W.2d 364, 368 (Tex. 1998) (orig. proceeding); *In re* Steiger, 55 S.W.3d 168, 170-71 (Tex. App.—Corpus Christi 2001, orig. proceeding); *see also* Porter v. Vick, 888 S.W.2d 789, 789-90 (Tex. 1994) (orig. proceeding) (per curiam) (noting that the trial judge signed an order vacating the new trial after the plenary power had expired). Note also that a petition for writ of mandamus will be granted where the trial court attempts to vacate its order granting a motion for new trial after its plenary jurisdiction has expired seventy-five days after the default judgment was signed. *Porter*, 888 S.W.2d at 789.

246. *In re* Jackson Person & Assocs., Inc., 94 S.W.3d 815, 817 (Tex. App.—San Antonio 2002, orig. proceeding) (citing Corp. Leasing Int'l, Inc v. Bridewell, 896 S.W.2d

10. Applicability of *Craddock* to Default Summary Judgments

Several Texas courts of appeals have held that the *Craddock* standard should be applied to a summary judgment entered against a defendant who did not have notice of a summary judgment motion or hearing thereon.[247] However, the First District Court of Appeals at Houston has taken the position that *Craddock* does not apply in the default summary judgment context.[248]

In 2002, the Texas Supreme Court was presented with the issue of applicability of the *Craddock* standards to a default summary judgment in *Carpenter v. Cimarron Hydrocarbons Corp.*[249] The plaintiff, Cimarron, failed to timely respond to the summary judgment motions filed by each of the defendants in the underlying case.[250] The plaintiff filed a motion for leave to file a late response and a motion to continue the scheduled summary-judgment hearing.[251] The trial court denied the plaintiff's motions and granted the defendant's summary judgment motions.[252] The plaintiff then filed a motion for new trial, claiming: (1) the trial court abused its discretion in denying the plaintiff's motions for leave to file a late response and for a continuance of the hearing; and (2) the *Crad-*

419, 422 (Tex. App.—Waco 1995, orig. proceeding)); Trinity Capital Corp. v. Briones, 847 S.W.2d 324, 327 (Tex. App.—El Paso 1993, orig. proceeding).

247. Huffine v. Tomball Hosp. Auth., 979 S.W.2d 795, 799 (Tex. App.—Houston [14th Dist.] 1998, no pet.); Washington v. McMillan, 898 S.W.2d 392, 396 (Tex. App.—San Antonio 1995, no writ); Gonzales v. Surplus Ins. Servs., 863 S.W.2d 96, 102 (Tex. App.—Beaumont 1993, writ denied); Krchnak v. Fulton, 759 S.W.2d 524, 528-29 (Tex. App.—Amarillo 1988, writ denied); Costello v. Johnson, 680 S.W.2d 529, 531 (Tex. App.—Dallas 1984, writ ref'd n.r.e.); *see also* Mosser v. Plano Three Venture, 893 S.W.2d 8, 12 (Tex. App.—Dallas 1994, no writ) (holding that *Craddock* applies generally to default summary judgments but not to the facts of the instant case).

248. Enernational Corp. v. Exploitation Eng'rs, Inc., 705 S.W.2d 749, 751 (Tex. App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.); Rabe v. Guaranty Nat'l Ins. Co., 787 S.W.2d 575, 579 (Tex. App.—Houston [1st Dist.] 1990, writ denied); *see also* Bell v. State Dep't of Highways & Pub. Transp., 902 S.W.2d 197, 199 n.3 (Tex. App.—Houston [1st Dist.] 1995, no writ) (discussing default summary judgments but refusing to decide the issue); Crime Control, Inc. v. RMH-Oxford Joint Venture, 712 S.W.2d 550, 551-52 (Tex. App.—Houston [14th Dist.] 1986, no writ) (distinguishing between a summary judgment and a default judgment).

249. 98 S.W.3d 682 (Tex. 2002).

250. Carpenter v. Cimarron Hydrocarbons Corp., 98 S.W.3d 682, 683 (Tex. 2002).

251. *Id.*

252. *Id.*

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dock standards should be applied in the default summary judgment context.[253]

The court distinguished *Craddock* and *Ivy v. Carrell*[254] from the *Carpenter* case on the basis that, in the former cases, the defaulting party learned of the scheduled event "after judgment, when the only potential relief available was a motion for new trial or to otherwise set aside the judgment."[255] In *Carpenter*, the defaulting party "learned two days before the summary-judgment hearing, well before judgment was rendered, that a timely response to the motion for summary judgment had not been filed."[256] The court stated that Cimarron availed itself of the remedies afforded under the summary judgment rules to a party in this situation by filing a motion for leave to file a late response and a motion for a continuance of the summary-judgment hearing.[257] The court noted "[t]hat the trial court denied these remedies does not mean that they were not available; rather, the trial court's rulings on Cimarron's pre summary-judgment motions are, like most other trial court rulings, subject to review for an abuse of discretion."[258]

In *Carpenter*, the court determined that *Craddock* was not applicable[259] because the defaulting party was provided with other remedies, and because

> *Craddock* does not apply to a motion for new trial filed after [a summary] judgment has been granted on a motion to which the nonmovant failed to timely respond when the respondent had notice of the hearing and an opportunity to employ the means our civil procedure rules make available [i.e., continuance or leave to file a late response] to alter the deadlines Rule 166a imposes.[260]

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253. *Id.*

254. 407 S.W.2d 212 (Tex. 1966).

255. *Carpenter*, 98 S.W.3d at 685.

256. *Id.*

257. *See id.* (citing Rules 166a(c) and 251).

258. *Id.*

259. *Id.* at 686.

260. *Carpenter*, 98 S.W.3d at 686; *see also* West v. Maintenance Tool & Supply Co., 89 S.W.3d 96, 103 (Tex. App.—Corpus Christi 2002, no pet.) (citing *Carpenter* in holding that "[W]e have already determined that West had notice of the [summary judgment] hearing. Accordingly, we hold he had an opportunity before judgment to pursue other relief provided by the rules of civil procedure, and *Craddock* is therefore inapplicable to his motion for new trial.").

Based on the court's holding and analysis in *Carpenter*, it is important to differentiate the two possible situations involved in the default summary judgment context. First, when the defaulting party had an opportunity to file a motion for leave to file a late response to the summary-judgment motion or a motion for a continuance of the summary-judgment hearing, *Craddock* is not applicable and the abuse of discretion standard for reviewing denial of leave and continuance motions is applied. Second, when the defaulting party did not have any such opportunity prior to the default summary judgment being rendered and signed, the *Craddock* factors most likely apply.[261]

11. Termination of Parent-Child Relationship Proceedings

The Fourth District Court of Appeals at San Antonio recently revisited the issue of the applicability of the *Craddock* test in termination of parent-child relationship proceedings.[262] The court had previously held that the *Craddock* test applied in a termination case, "given the constitutional nature of the rights involved," when the defendant's attorney, but not the defendant, appears at the trial, and the defendant files a motion for new trial following judgment.[263]

In the In re *K.C.* case,[264] however, the court overruled the panel's decision in the prior case and held that the aggrieved defendant parent, who did not appear at the trial but who was represented by counsel at the termination proceedings, did not technically default. Thus, there was no basis for applying the *Craddock* standards.[265]

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261. In *Carpenter*, the Texas Supreme Court did not "decide . . . whether *Craddock* should apply when a nonmovant discovers its mistake after the summary judgment hearing or rendition of judgment." *Carpenter*, 98 S.W.3d at 686. Since this issue has not been settled by the Supreme Court, a motion for new trial from a default summary judgment should "probably rely[ ] on the [*Craddock*] factors." MICHOL O'CONNOR ET AL., O'CONNOR'S TEXAS RULES CIVIL TRIALS 609 (2003).

262. *In re* K.C., 88 S.W.3d 277, 278 (Tex. App.—San Antonio 2002, pet. denied) (citing *In re* R.H., 75 S.W.3d 126, 130 (Tex. App.—San Antonio 2002, no pet.)).

263. *In re* R.H., 75 S.W.3d at 130.

264. *In re* K.C., 88 S.W.3d at 278.

265. *Id.* at 279.

B. *Restricted Appeal*

1. Rules 30 and 26.1(c) of the Texas Rules of Appellate Procedure

Rule 30 of the Texas Rules of Appellate Procedure[266] provides the framework for proceeding with a restricted appeal, as follows:

> A party who did not participate—either in person or through counsel—in the hearing that resulted in the judgment complained of and who did not timely file a postjudgment motion or request for findings of facts and conclusions of law, or a notice of appeal within the time permitted by Rule 26.1(a), may file a notice of appeal within the time permitted by Rule 26.1(c).[267]

Rule 26.1(c) of the Texas Rules of Appellate Procedure provides that the notice of restricted appeal "must be filed within six months after the judgment or order is signed."[268] "Restricted appeals replace writ of error appeals to the court of appeals," and "[s]tatutes pertaining to writ of error appeals to the court of appeals apply equally to restricted appeals."[269]

2. The Notice of Restricted Appeal

Rule 25.1(d)(7) of the Texas Rules of Appellate Procedure provides the requisite contents of a notice of restricted appeal. The notice of appeal must:

> (A) state that the appellant is a party affected by the trial court's judgment but did not participate—either in person or through counsel—in the hearing that resulted in the judgment complained of; (B) state that the appellant did not timely file a postjudgment motion,

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266. TEX. R. APP. P. 30.

267. *Id.*

268. TEX. R. APP. P. 26.1(c); TEX. CIV. PRAC. & REM. CODE ANN. § 51.013 (Vernon 1999); *see also* Quaestor Investors, Inc. v. State of Chiapas, 997 S.W.2d 226, 227 (Tex. 1999) (per curiam) (discussing the elements necessary for a review by writ of error); Primate Constr., Inc. v. Silver, 884 S.W.2d 151, 152 (Tex. 1994) (per curiam) (reviewing a reversal by writ of error). Note, however, that Rule 306a does not apply to extend the deadline for filing a notice of restricted appeal. Maldonado v. Macaluso, 100 S.W.3d 345, 346 (Tex. App.—San Antonio 2002, no pet.) (per curiam) (citing Texas Rule of Appellate Procedure 4.2(a)).

269. TEX. R. APP. P. 30; *see also* Carmona v. Bunzl Distrib., 76 S.W.3d 566, 567-68 (Tex. App.—Corpus Christi 2002, no pet.) (reviewing the provisions of Texas Rule of Appellate Procedure 30); Campbell v. Fincher, 72 S.W.3d 723, 724 (Tex. App.—Waco 2002, no pet.) (acknowledging that writ of error practice was replaced with the restricted appeal when new appellate rules were adopted in 1997).

request for findings of fact and conclusions of law, or notice of appeal; and (C) be verified by the appellant if the appellant does not have counsel.[270]

3. Restricted Appeal Requisite Elements

To prevail on a restricted appeal, the defaulting appellant must prove the following five elements:[271] (1) the notice of restricted appeal was timely filed within six months of the date the default judgment was signed;[272] (2) the appellant was a party in the lawsuit;[273] (3) the appellant did not timely file a postjudgment motion, request for findings of fact and conclusions of law, or notice of appeal; (4) the appellant did not participate, either in person or through counsel, in the actual trial of the case;[274] and (5) the trial court erred with the error being apparent on the face of the record.[275] It is important to note that, unlike a motion for new trial or a petition

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270. TEX. R. APP. P. 25.1(d)(7).

271. *Quaestor Investors*, 997 S.W.2d at 227; Norman Communications v. Tex. Eastman Co., 955 S.W.2d 269, 270 (Tex. 1997) (per curiam); Vespa v. Nat'l Health Ins. Co., 98 S.W.3d 749, 751 (Tex. App.—Fort Worth 2003, no pet.); Conseco Fin. Serv. Corp. v. Klein Indep. Sch. Dist., 78 S.W.3d 666, 670 (Tex. App.—Houston [14th Dist.] 2002,); Seeley v. KCI USA, Inc., 100 S.W.3d 276, 277 (Tex. App.—San Antonio 2002, no pet.); *Carmona*, 76 S.W.3d at 567-68; *Campbell*, 72 S.W.3d at 724; Gen. Elec. Capital Auto Fin. Leasing Servs., Inc. v. Stanfield, 71 S.W.3d 351, 356 (Tex. App.—Tyler 2001, pet. denied); Aavid Thermal Techs. v. Irving Indep. Sch. Dist., 68 S.W.3d 707, 709 (Tex. App.—Dallas 2001, no pet.); Wright Bros. Energy, Inc. v. Krough, 67 S.W.3d 271, 273 (Tex. App.—Houston [1st Dist.] 2001, no pet.); Osteen v. Osteen, 38 S.W.3d 809, 811-13 (Tex. App.—Houston [14th Dist.] 2001, no pet.); Mabon Ltd. v. Afri-Carib Enters., Inc., 29 S.W.3d 291, 296 (Tex. App.—Houston [14th Dist.] 2000, no pet.); *In re* E.K.N., 24 S.W.3d 586, 590 (Tex. App.—Fort Worth 2000, no pet.); Dolly v. Aethos Communications Sys., Inc., 10 S.W.3d 384, 387-88 (Tex. App.—Dallas 2000, no pet.); Flores v. Brimex Ltd. P'ship, 5 S.W.3d 816, 819 (Tex. App.—San Antonio 1999, no pet.).

272. TEX. R. APP. P. 26.1(c); *Quaestor Investors*, 997 S.W.2d at 227; *Norman Communications*, 955 S.W.2d at 270; *Primate Constr.*, 884 S.W.2d at 152; *see also* TEX. CIV. PRAC. & REM. CODE ANN. § 51.013 (Vernon 1999) (stating that "[i]n a case in which a writ of error to the court of appeals is allowed, the writ of error may be taken at any time within six months after the date the final judgment is rendered").

273. *Norman Communications*, 955 S.W.2d at 270.

274. TEX. R. APP. P. 30; *Norman Communications*, 955 S.W.2d at 270; Texaco, Inc. v. Cent. Power & Light Co., 925 S.W.2d 586, 588 (Tex. 1996).

275. *Norman Communications*, 955 S.W.2d at 270; Gen. Elec. Co. v. Falcon Ridge Apartments, Joint Venture, 811 S.W.2d 942, 943 (Tex. 1991); Stubbs v. Stubbs, 685 S.W.2d 643, 644 (Tex. 1985); *see also* Hercules Concrete Pumping Serv., Inc. v. Bencon Mgmt. & Gen. Contracting Corp., 62 S.W.3d 308, 311 (Tex. App.—Houston [1st Dist.] 2001, pet. denied) (remanding the case back to the trial court due to an "error on the face of the record").

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for bill of review, the appellant in a restricted appeal does not need to provide either a meritorious defense or an excuse for the failure to answer or appear.[276]

4. Participation in the Actual Trial of the Case

The definition of "participation" is probably best described as a matter of degree,[277] and should be liberally construed in favor of the right to restricted appeal.[278] If the record demonstrates that the defaulting party participated in the decision-making event producing the final judgment adjudicating the party's rights, then a restricted appeal is not available.[279] In addition, if the aggrieved party filed a timely post-default judgment motion for new trial or the like, then a restricted appeal may not be used to attack the default judgment.[280] The law is not clear, however, as to whether a party that learned of the default judgment within the time limits for filing a motion for new trial, but elected not to do so, may pursue a restricted appeal. The rule simply says the defaulting party must not have participated in the hearing that resulted in the default judgment. There are no Texas cases that have prevented a defaulting party that failed to file a motion for new trial when it had the chance from waiting up to six months before filing a restricted appeal.

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276. *See* Pace Sports, Inc. v. Davis Bros. Publ'g Co., 514 S.W.2d 247, 247-48 (Tex. 1974) (per curiam) (stating that the requirements for a bill of review are not applicable to a writ of error); *see also Texaco*, 925 S.W.2d at 590 (restating the proposition held in Pace Sports, Inc. v. Davis Publ'g Co., 514 S.W.2d 247, 247 (Tex. 1974) (per curiam)).

277. *See Stubbs*, 685 S.W.2d at 645 (holding that signing a waiver of citation and filing an agreement incident to divorce was not participation in the actual trial).

278. *See* Attorney Gen. of Tex. v. Orr, 989 S.W.2d 464, 466-67 (Tex. App.—Austin 1999, no pet.) (explaining that the Texas Supreme Court has historically followed a policy of liberal construction when determining the right to an appeal on procedural grounds).

279. *See Texaco*, 925 S.W.2d at 589, 591 (holding that the party did not participate in the evidence presentation at trial and thus could appeal by writ of error); Withem v. Underwood, 922 S.W.2d 956, 957 (Tex. 1996) (per curiam) (noting that the defendant did not participate in a decision-making event by filing only an answer); *Stubbs*, 685 S.W.2d at 645 (determining that a wife's signing of a waiver of citation and divorce agreement was not sufficient to warrant "participation"); Lawyers Lloyds of Tex. v. Webb, 137 Tex. 107, 110-11, 152 S.W.2d 1096, 1097 (1941) (clarifying that a restricted appeal is denied to those who participate in the actual trial or hearing in open court that leads to a final judgment).

280. *See* Lab. Corp. of Am. v. Mid-Town Surgical Ctr., Inc., 16 S.W.3d 527, 528 (Tex. App.—Dallas 2000, no pet.) (dismissing an appeal for want of jurisdiction because the appellant timely filed a motion to set aside the default which was construed as a motion for new trial, such that appellant was not permitted to bring a restricted appeal).

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Texas appellate courts have held that the following acts or conduct do not constitute participation for purposes of determining the availability of a restricted appeal: (1) filing an answer;[281] (2) appearing through a plea to the jurisdiction;[282] (3) being physically present in the courtroom, provided that the party does not actually participate in the hearing;[283] (4) filing a motion for new trial or the like (although such filing contradicts the third element listed above);[284] and (5) filing suit and engaging in discovery, or allowing the plaintiff to amend pleadings, when the trial court sustained a plea to jurisdiction without a hearing.[285]

On the other hand, the following circumstances have been held by Texas appellate courts to constitute participation which precludes a restricted appeal: (1) appearing at a discovery sanction hearing that results in the striking of the party's pleading;[286] (2) confession of judgment by an attorney of record;[287] (3) waiver of citation, execution of property agreement and approval of divorce decree at prove-up;[288] and (4) representation by an attorney at a discovery sanctions hearing, even though the defendant is not personally present.[289] An appearance at a summary-judgment hearing

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281. Flores v. H.E. Butt Grocery Co., 802 S.W.2d 53, 56 (Tex. App.—Corpus Christi 1990, no writ).

282. Schulz v. Schulz, 726 S.W.2d 256, 258 (Tex. App.—Austin 1987, no writ).

283. Collins v. Collins, 464 S.W.2d 910, 912 (Tex. Civ. App.—San Antonio 1971, writ ref'd n.r.e.).

284. *See* Noriega v. Cueves, 879 S.W.2d 192, 193 (Tex. App.—Houston [14th Dist.] 1994, writ denied) (agreeing that merely filing a petition or a motion for new trial was not enough to preclude a restricted appeal); *see also* Bonewitz v. Bonewitz, 726 S.W.2d 227, 228 (Tex. App.—Austin 1987, writ ref'd n.r.e.) (disagreeing with the argument that filing numerous motions constitutes participation).

285. *See* Ramirez v. Lyford Consol. Indep. Sch. Dist., 900 S.W.2d 902, 906 (Tex. App.—Corpus Christi 1995, no writ) (concluding that the appellant did not participate in the actual trial even though it filed a petition and engaged in discovery).

286. Norman v. Dallas Cowboys Football Club, Inc., 665 S.W.2d 137, 140 (Tex. App.—Dallas 1983, no writ); *see also* Stewart v. Texco Newspapers, Inc., 734 S.W.2d 175, 177 (Tex. App.—Houston [1st Dist.] 1987, no writ) (dismissing the petitioner's writ of error due to its attorney's participation in the sanctions hearing which resulted in the judgment).

287. *See* Lewis v. Beaver, 588 S.W.2d 685, 686-87 (Tex. Civ. App.—Houston [14th Dist.] 1979, writ ref'd n.r.e.) (finding participation when the attorney for petitioner acted on appellants' behalf).

288. *See* Hammond v. Hammond, 688 S.W.2d 690, 692 (Tex. App.—Beaumont 1985, writ dism'd w.o.j.) (accepting the reasoning that signing a waiver and judgment constitutes participation).

289. *See* C&V Club v. Gonzalez, 953 S.W.2d 755, 758-59 (Tex. App.—Corpus Christi 1997, no writ) (finding that the hearing was dispositive of the party's rights).

may constitute participation; the courts of appeals are split on the issue.[290]

5. Error on the Face of the Record

The "face of the record," for purposes of restricted appeal, consists of all papers on file in the appeal[291] and includes the clerk's record and the reporter's record, if any.[292] The appellate court is limited to reviewing the record as it existed in the trial court at the time the default judgment was signed.[293] However, the court of appeals may consider evidence outside of the record (by affidavit, for example) to determine if it has jurisdiction over the restricted appeal.

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290. *Compare* Dillard v. Patel, 809 S.W.2d 509, 512 (Tex. App.—San Antonio 1991, writ denied) (concluding that the petitioner had sufficiently participated by its response to a motion for summary judgment), Thacker v. Thacker, 496 S.W.2d 201, 205 (Tex. Civ. App.—Amarillo 1973, writ dism'd w.o.j.) (dismissing the petitioner's writ of error due to participation because the petitioner chose not to attend the summary judgment hearing), *and* Brandt v. Vill. Homes, Inc., 466 S.W.2d 812, 814 (Tex. Civ. App.—Fort Worth 1971, writ ref'd n.r.e.) (finding that the defendant participated because defense counsel argued the case at the scheduled summary judgment hearing), *with* Davis v. Hughes Drilling Co., 667 S.W.2d 183, 184 (Tex. App.—Texarkana 1983, no writ) (finding no participation, even though the petitioner filed a summary judgment response, because there was no indication in the record that the petitioner had received notice of the hearing).

291. TAC Americas, Inc. v. Boothe, 94 S.W.3d 315, 318 (Tex. App.—Austin 2002, no pet.) (citing Norman Communications v. Tex. Eastman Co., 955 S.W.2d 269, 270 (Tex. 1997) (per curiam)); DSC Fin. Corp. v. Moffitt, 815 S.W.2d 551, 551 (Tex. 1991)); *see also* Conseco Fin. Serv. Corp. v. Klein Indep. Sch. Dist., 78 S.W.3d 666, 670 (Tex. App.—Houston [14th Dist.] 2002, no pet.) (reciting the proposition that all papers on file and in the reporter's record constitute the face of the record).

292. *Norman Communications*, 955 S.W.2d at 270; *DSC Fin.*, 815 S.W.2d at 551; Osteen v. Osteen, 38 S.W.3d 809, 813 (Tex. App.—Houston [14th Dist.] 2001, no pet.); Mabon Ltd. v. Afri-Carib Enters., Inc., 29 S.W.3d 291, 296 (Tex. App.—Houston [14th Dist.] 2000, no pet.); *In re* E.K.N., 24 S.W.3d 586, 590 (Tex. App.—Fort Worth 2000, orig. proceeding); Flores v. Brimex Ltd. P'ship, 5 S.W.3d 816, 819 (Tex. App.—San Antonio 1999, no pet.); Herbert v. Greater Gulf Coast Enter., 915 S.W.2d 866, 870 (Tex. App.—Houston [1st Dist.] 1995, no writ).

293. *See* Stankiewicz v. Oca, 991 S.W.2d 308, 312 (Tex. App.—Fort Worth 1999, no pet.) (refusing to look at extrinsic evidence or evidence not in the record); *see also* Transoceanic Shipping Co. v. Gen. Universal Sys., Inc., 961 S.W.2d 418, 420 (Tex. App.—Houston [1st Dist.] 1997, no writ) (finding evidence in the record to support the claim of error on the face of the record). *But see* Withrow v. Schou, 13 S.W.3d 37, 41 (Tex. App.—Houston [14th Dist.] 1999, pet. denied) (disagreeing with *Transoceanic Shipping Co.* to the extent it imposed duties on the clerk beyond those enumerated in Rule 245 of the Texas Rules of Civil Procedure). *See also* TEX. R. CIV. P. 245 (providing for notice to parties of trial setting).

If there was a trial or a dispositive hearing at which evidence was introduced, a reporter's record is necessary in a restricted appeal in order to attack the evidence supporting the default judgment.[294] If the evidentiary hearing on unliquidated damages was not "on the record," and there is no reporter's record or other evidence for the appellate court to review, then there is error on the face of the record.[295] If damages are liquidated, however, no reporter's record is necessary if the liquidated damages were proved by written documents present in the record.[296]

When the defaulting party requests preparation of the clerk's record for a restricted appeal, all documents contained in the trial court's file should be designated for inclusion because, in some instances, the error on the face of the record is the fact that something is missing (a return of citation, for example). The defaulting party should request that the trial court clerk certify or verify in an affidavit, or otherwise, that all documents from the trial court's file have been included in the clerk's record. This will allow the defaulting party to argue about what is missing and to avoid the presumption that the missing item supports the default judgment.

Typical errors on the face of the record in restricted appeals from default judgments include the following: (1) plaintiff's pleading failed to state a cause of action sufficient to support a default judgment;[297] (2) the citation or return of service, or both, are defective or inadequate, as there is no presumption of validity of service with

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294. *See* Stubbs v. Stubbs, 685 S.W.2d 643, 646 (Tex. 1985) (holding that the reporter's failure to provide the appellant with a statement of facts was error on the face of the record); Smith v. Smith, 544 S.W.2d 121, 122-23 (Tex. 1976) (holding that a new trial was necessary where the court reporter did not transcribe the original default proceedings); Alvarado v. Reif, 783 S.W.2d 303, 304-05 (Tex. App.—Eastland 1989, no writ) (holding that reversal was required when error on the face of the record was shown and there was no record of the unliquidated damages).

295. *See* Chase Bank of Tex., N.A. v. Harris County Water Control & Improvement Dist., 36 S.W.3d 654, 656 (Tex. App.—Houston [1st Dist.] 2000, no pet.) (holding that the lack of a reporter's record in the post-answer default judgment required the court to reverse).

296. TEX. R. CIV. P. 241.

297. *See* Clements v. Barnes, 834 S.W.2d 45, 46-47 (Tex. 1992) (per curiam) (holding that it was reversible error, in an action against a bankruptcy trustee, for the trial court to grant a default judgment after the plaintiff failed to plead sole basis for liability, namely that the trustee acted outside the scope of his authority); Stoner v. Thompson, 578 S.W.2d 679, 682 (Tex. 1979) (outlining the requirement for pleadings to support a default judgment); Martinez v. Martinez, 61 S.W.3d 589, 590-91 (Tex. App.—San Antonio 2001, no pet.) (finding error in the trial court's award of a judgment, including retroactive child

a default judgment and strict compliance with the rules for service of the citation must appear on the face of the record,[298] and "'[v]irtually any deviation [from strict compliance with the rules for citation, service, and return] will be sufficient to set aside the default judgment' in a restricted appeal";[299] (3) lack of jurisdic-

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support, based on a petition for divorce which did not include a pleading for arrearages for retroactive child support).

298. Vespa v. Nat'l Health Ins. Co., 98 S.W.3d 749, 751-52 (Tex. App.—Fort Worth 2003, no pet.); *see also* TAC Americas, Inc. v. Boothe, 94 S.W.3d 315, 318 (Tex. App.—Austin 2002, no pet.) (citing Union Pac. Corp. v. Legg, 49 S.W.3d 72, 79 (Tex. App.—Austin 2001, no pet.)) (stating that "proper citation and return of service are crucial to establishing personal jurisdiction," and that "[i]f the return of service does not strictly comply, then the service is invalid and *in personam* jurisdiction cannot be established"); Carmona v. Bunzl Distrib., 76 S.W.3d 566, 568 (Tex. App.—Corpus Christi 2002, no pet.) (holding that a failure to comply with the rules "will render the attempted service of process invalid and of no effect"); Wright Bros. Energy, Inc. v. Krough, 67 S.W.3d 271, 273 (Tex. App.—Houston [1st Dist.] 2001, no pet.) (stressing the strict compliance requirement); Dolly v. Aethos Comm. Sys., Inc., 10 S.W.3d 384, 388-89 (Tex. App.—Dallas 2000, no pet.) (concluding that the return of service was inherently inconsistent when it stated that the defendant was personally served but contained typed language "posted to [the] front door"); Fowler v. Quinlan Indep. Sch. Dist., 963 S.W.2d 941, 943 (Tex. App.—Texarkana 1998, no pet.) (noting that the address shown on the return was a post office box, but that the return did not indicate service was by mail); Hollister v. Palmer Indep. Sch. Dist., 958 S.W.2d 956, 958 (Tex. App.—Waco 1998, no pet.) (finding that the failure to attach the "green card" to a return reflecting service by certified mail did not strictly comply with service of citation); Laidlaw Waste Sys., Inc. v. Wallace, 944 S.W.2d 72, 73 (Tex. App.—Waco 1997, writ denied) (refusing to review the supplemental transcript which detailed service of process because the court's review was limited to the record as it existed at the time default judgment was rendered); Whiskeman v. Lama, 847 S.W.2d 327, 329 (Tex. App.—El Paso 1993, no writ) (holding that the default judgment was void when the record failed to affirmatively show that service was valid). In *TAC Americas*, the return indicated that the citation was served at a time before the process server actually received the citation. *TAC Ams.*, 94 S.W.3d at 320. Note that misnomer alone may not be error on the face of the record, if the defendant was in fact properly served with process and was not misled. *See* Dezso v. Harwood, 926 S.W.2d 371, 373 (Tex. App.—Austin 1996, writ denied) (finding that a business owner was properly served in a citation, which it received, but that named only its business and its daughter-in-law as defendants).

299. *TAC Ams.*, 94 S.W.3d at 319 (quoting Becker v. Russell, 765 S.W.2d 899, 901 (Tex. App.—Austin 1989, no writ)); *Carmona*, 76 S.W.3d at 567-68; *see also Wright Bros. Energy*, 67 S.W.3d 271 at 275 (ruling that "Krough did not show reasonable diligence in serving Wright's registered agent at the registered office, and [that] . . . the trial court erred in permitting substitute service on the Secretary of State"); Hercules Concrete Pumping Serv., Inc. v. Bencon Mgmt. & Gen. Contracting Corp., 62 S.W.3d 308, 311 (Tex. App.—Houston [1st Dist.] 2001, pet. denied) (holding that "[b]ecause of the incomplete name of the corporate entity served, we believe the return is insufficient"). *But see* Conseco Fin. Serv. Corp. v. Klein Indep. Sch. Dist., 78 S.W.3d 666, 670-76 (Tex. App.—Houston [14th Dist.] 2002, no pet.) (affirming a default judgment on a restricted appeal where the appellant contended that citation was defective for the following three reasons: (1) service of process was on the registered agent of the registered agent of the corporation; (2) the date

tion;[300] (4) venue errors;[301] (5) the amended pleading not served on the defendant asserts additional causes of action or requests additional relief not included in original petition served on defendant;[302] (6) lack of notice of dispositive hearing or trial setting;[303] and (7) insufficiency of the evidence to support the damages awarded in the default judgment.[304]

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of service on the return was unrecognizable; and (3) the citation did not name all of the taxing units that assessed and collected taxes on the delinquent property).

300. McKanna v. Edgar, 388 S.W.2d 927, 929 (Tex. 1965); *see also Wright Bros. Energy*, 67 S.W.3d at 273 (noting that "[j]urisdiction over a defendant must be established in the record by an affirmative showing of service of citation, independent of the recitals in the default judgment"); C.W. Bollinger Ins. Co. v. Fish, 699 S.W.2d 645, 647-48 (Tex. App.—Austin 1985, no writ) (expressing that the question before the court was whether the record affirmatively showed, on its face, strict compliance with a statute by which jurisdiction could be acquired).

301. *See* Jackson v. Biotectronics, Inc., 937 S.W.2d 38, 43 (Tex. App.—Houston [14th Dist.] 1996, no writ) (finding that the defendant was not entitled to have the default judgment set aside by writ of error on grounds that Harris County was not proper venue, since the record did not affirmatively demonstrate that venue was improper in Harris County).

302. *See* Primate Constr., Inc. v. Silver, 884 S.W.2d 151, 152 (Tex. 1994) (per curiam) (reversing and remanding when the sheriff's pre-printed return of service stated that the defendant was served with a copy of the original petition, but the defendant was not made a party to the suit until the plaintiff's second amended petition was filed); Seeley v. KCI USA, Inc., 100 S.W.3d 276, 277-78 (Tex. App.—San Antonio 2002, no pet.) (finding error on the face of the record when the defendant was not served with the amended petition in which it was added as a named defendant); Caprock Constr. Co. v. Guaranteed Floorcovering, Inc., 950 S.W.2d 203, 204-05 (Tex. App.—Dallas 1997, no pet.) (explaining that the defendant's failure to answer could not serve as a basis of liability where the defendant had not been served with the amended petition); Sanchez v. Tex. Indus., Inc., 485 S.W.2d 385, 387 (Tex. Civ. App.—Waco 1972, writ ref'd n.r.e.) (recognizing the general rule that if an amended pleading asserts a new cause of action, new service of process is required).

303. *See* Gen. Elec. v. Falcon Ridge Apts. Joint Venture, 811 S.W.2d 942, 942 (Tex. 1991) (holding that because lack of notice was not apparent from the face of the record, there was no reversible error); Havens v. Ayers, 886 S.W.2d 506, 509 (Tex. App.—Houston [1st Dist.] 1994, no writ) (indicating that the certificate of service on a motion for summary judgment that rendered a judgment final constituted error on the face of the record when it named the wrong attorney for the nonmovant, even though the proper attorney received the motion and responded); Wendell Hall, *Appellate Review of Default Judgments by Writ of Error*, 51 TEX. B.J. 192, 193 (1988) (noting that improper service is usually apparent from the face of the record).

304. *See* Jackson v. Gutierrez, 77 S.W.3d 898, 902-04 (Tex. App.—Houston [14th Dist.] 2002, no pet.) (discussing how a plaintiff may prove that medical expenses were reasonable and necessary, and concluding that no evidence, either direct or indirect, was provided to support such claims); Sutton v. Hisaw & Assocs. Gen. Contractors, Inc., 65 S.W.3d 281, 284 (Tex. App.—Dallas 2001, pet. denied) (stating that "[a] review of the entire case includes a review of legal and factual sufficiency claims"); Arenivar v. Providian Nat'l Bank, 23 S.W.3d 496, 498 (Tex. App.—Amarillo 2000, no pet.) (indicating that the sufficiency of the evidence to support the amount of unliquidated damages awarded in a

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The Tenth District Court of Appeals at Waco recently held that the failure of the trial court clerk to provide notice of the signing of the default judgment, as required by Rule 239a of the Texas Rules of Civil Procedure, did not constitute an error on the face of the record, as the appellant "[sought] to reverse a judgment which appear[ed] valid on the—face of the record because of something occurring after the judgment was rendered-the failure of the clerk to send notice of the judgment."[305] In addition, in an ad valorem property tax case, the Fifth District Court of Appeals at Dallas affirmed a default judgment attacked by restricted appeal "where the defendant properly receive[d] service but the citation contains only a brief general description of the property upon which taxes [were] due."[306]

C. *Petition for Bill of Review*

If the time to file a motion for new trial has expired when the existence of a default judgment is discovered, and if the circumstances will not permit a restricted appeal, either because the deadline has passed or due to the need to develop extrinsic evidence outside the record to prove error, then a defaulting party may directly attack a default judgment by filing a petition for bill of review.[307]

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default judgment may be challenged by restricted appeal); Herbert v. Greater Gulf Coast Enters., 915 S.W.2d 866, 870 (Tex. App.—Houston [1st Dist.] 1995, no writ) (pointing out that there must be sufficient and legal and factual evidence in order to support a judgment); Comstock Silversmiths v. Carey, 894 S.W.2d 56, 57 (Tex. App.—San Antonio 1995, no writ) (finding evidence sufficient to award $30,000, but finding the evidence factually insufficient to support a $90,000 award); Behar v. Patrick, 680 S.W.2d 36, 38 (Tex. App.—Amarillo 1984, no writ) (reviewing the defendant's claim that the evidence was not legally or factually sufficient to support recovery).

305. Campbell v. Fincher, 72 S.W.3d 723, 725 (Tex. App.—Waco 2002, no pet.).

306. Aavid Thermal Techs. of Tex. v. Irving Indep. Sch. Dist., 68 S.W.3d 707, 710 (Tex. App.—Dallas 2001, no pet.).

307. *See* TEX. R. CIV. P. 329b(f) (establishing that a trial court may set aside a judgment by using a bill of review for sufficient cause filed within the legal time frame); *see also* King Ranch, Inc. v. Chapman, No. 01-0430, 2003 WL 22025017, at *6 (Tex. Apr. 2, 2003) (defining the proper use of a bill of review); Wembley Inv. Co. v. Herrera, 11 S.W.3d 924, 926-27 (Tex. 1999) (per curiam) (providing that a bill of review is a separate action to set aside a judgment that cannot be appealed or challenged by a movement for new trial); Caldwell v. Barnes, 975 S.W.2d 535, 537 (Tex. 1998) (stating that "[a] bill of review is an equitable proceeding brought by a party seeking to set aside a prior judgment that is no longer subject to challenge by a motion for new trial or appeal"); State v. 1985 Chevrolet Pickup Truck, 778 S.W.2d 463, 464 (Tex. 1989) (defining a bill of review as "an independent

1. Equitable Remedy

A petition for bill of review is an independent suit in equity filed by the aggrieved party in the underlying suit in the same trial court that rendered the complained-of default judgment.[308] The requirement that one must file a bill of review in the same court that submitted the original judgment is jurisdictional.[309] A petition for bill of review can be brought either by a party to the original lawsuit or by a person who had a then-existing interest or right that was prejudiced by the judgment in the underlying lawsuit.[310] Although

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equitable action brought by a party to a former action seeking to set aside a judgment no longer appealable or subject to motion for new trial"); Transworld Fin. Servs. Corp. v. Briscoe, 722 S.W.2d 407, 408 (Tex. 1987) (defining a bill of review); Ponsart v. Citicorp Vendor Fin., Inc., 89 S.W.3d 285, 288 (Tex. App.—Texarkana 2002, no pet.) (stating that "[a] bill of review is an independent action to set aside a judgment that is no longer appealable or subject to a challenge by a motion for new trial"); Nguyen v. Intertex, Inc., 93 S.W.3d 288, 293 (Tex. App.—Houston [14th Dist.] 2002, no pet.) (describing a bill of review); Urso v. Lyon Fin. Servs., Inc., 93 S.W.3d 276, 279 (Tex. App.—Houston [14th Dist.] 2002, no pet.) (stating that a bill of review is the only way to set aside a default judgment ruling in a case over which the court had jurisdictional authority); Min v. Avila, 991 S.W.2d 495, 499 (Tex. App.—Houston [1st Dist.] 1999, no pet.) (detailing that "a bill of review is an independent, equitable proceeding by a party to a former action who seeks to set the judgment aside when it is no longer appealable or subject to a motion for new trial"); Winrock Houston Assocs. Ltd. P'ship v. Bergstrom, 879 S.W.2d 144, 149 (Tex. App.—Houston [14th Dist.] 1994, no writ) (providing that "[a] bill of review is an independent, equitable action to set aside a judgment that is no longer appealable or subject to a motion for new trial"). *But see* discussion *infra* Part VII.C.5 (discussing the fact that if a party fails to exhaust all available remedies, bill of review relief is not available).

308. Hernandez v. Koch Mach. Co., 16 S.W.3d 48, 57 (Tex. App.—Houston [1st Dist.] 2000, pet. denied); *see also* Collazo v. Flores, No. 04-02-00274-CV, 2003 WL 236404, at *1 (Tex. App.—San Antonio Feb. 5, 2003, no pet.) (mem. op.) (noting that "[a] bill of review is a direct attack on a judgment that is available as an equitable remedy when other remedies are unavailable to plaintiff through no fault of his own"); *Wembley Inv. Co.,* 11 S.W.3d at 926-27 (describing "a bill of review [as] an independent action to set aside a judgment that is no longer appealable or subject to challenge by a motion for new trial").

309. *See Collazo,* 2003 Tex. App. WL 236404, at *1 (concluding that County Court at Law No. 5 was without jurisdiction to decide a bill of review attacking a default judgment rendered by County Court at Law No. 7 (citing Solomon, Lambert, Roth & Assocs., Inc. v. Kidd, 904 S.W.2d 896, 900 (Tex. App.—Houston [1st Dist.] 1995, no writ))); *see also Urso,* 93 S.W.3d at 279 (explaining that a bill of review should be filed in the same court that rendered the original judgment).

310. *See* Lerma v. Bustillos, 720 S.W.2d 204, 205 (Tex. App.—San Antonio, 1986, no writ) (stating that in order to have standing to file a bill of review, an appellant "must be a party to the prior judgment or one who had a then existing interest or right which was prejudiced thereby"); Barrow v. Durham, 574 S.W.2d 857, 860 (Tex. Civ. App.—Corpus Christi 1978) (requiring that an appellant be a party to the prior judgment or be one who had a then-existing right which was seriously affected thereby, to have standing when filing a bill of review), *aff'd*, 600 S.W.2d 756 (Tex. 1980).

it is designed to prevent manifest injustice,[311] a petition for bill of review seeking relief from a final judgment will be scrutinized "with extreme jealousy, and the grounds on which interference will be allowed are narrow and restricted."[312]

All parties whose interests could be directly or materially affected by the setting aside of the prior judgment must be made parties to the bill of review proceeding.[313] However, "when the bill of review attacks the interests of but one party whose interests are *severable*, others named in the former litigation need not be joined."[314] The plaintiff in the prior case becomes the defendant/respondent in a petition for bill of review. The petition for bill of review must be verified,[315] but the failure to object to an unverified petition for bill of review waives the error.[316]

2. Four-Year Residual Statute of Limitations

Rule 329b(f) of the Texas Rules of Civil Procedure provides that "[o]n expiration of the time within which the trial court has plenary power, a judgment cannot be set aside by the trial court except by bill of review for sufficient cause, filed within the time allowed by law."[317] The petition for bill of review must be filed after the trial court's plenary power expires, but within the residual four-year

311. Hanks v. Rosser, 378 S.W.2d 31, 33 (Tex. 1964); Hesser v. Hesser, 842 S.W.2d 759, 765 (Tex. App.—Houston [1st Dist.] 1992, writ denied).

312. Montgomery v. Kennedy, 669 S.W.2d 309, 312 (Tex. 1984) (quoting Alexander v. Hagedorn, 148 Tex. 565, 568, 226 S.W.2d 996, 998 (1950)); Ponsart v. Citicorp Vendor Fin., Inc., 89 S.W.3d 285, 288 (Tex. App.—Texarkana 2002, no pet.); Lowe v. Farm Credit Bank of Tex., 2 S.W.3d 293, 296 (Tex. App.—San Antonio 1999, pet. denied).

313. *See* Morrison v. Rathmell, 650 S.W.2d 145, 149 (Tex. App.—Tyler 1983, writ dism'd) (finding that all parties to the judgment must be made parties to a bill of review).

314. *Id.* at 150.

315. Wright v. Wright, 710 S.W.2d 162, 166 (Tex. App.—San Antonio 1986, writ ref'd n.r.e.); *see also* Urso v. Lyon Fin. Servs., Inc., 93 S.W.3d 276, 280 (Tex. App.—Houston [14th Dist.] 2002, no pet.) (determining that an application for a turnover order was not considered a petition for bill of review because it was not verified and brought as an independent lawsuit).

316. *See* Billy B., Inc. v. Bd. of Trs., 717 S.W.2d 156, 158 (Tex. App.—Houston [1st Dist.] 1986, no writ) (holding that the failure to object to the appellant's lack of verification of the bill of review waives the issue).

317. TEX. R. CIV. P. 329b(f); *see also* State *ex rel.* Latty v. Owens, 907 S.W.2d 484, 486 (Tex. 1995) (per curiam) (providing that where the court's plenary power has expired, the only method available to challenge the court's order is by bill of review).

statute of limitations period from the date the default judgment was signed.[318]

However, because a bill of review is an equitable remedy,[319] laches may be raised as a defense to the petition for bill of review.[320] There are two elements of laches: "(1) unreasonable delay by one having legal or equitable rights in asserting them; and (2) a good faith change of position by another to his own detriment because of the delay."[321] Generally, laches will not operate to bar a lawsuit before the limitations period expires unless some extraordinary circumstance rendered it inequitable to permit the petition for bill of review.[322]

3. Elements and Grounds for Bill of Review Under *Alexander v. Hagedorn*

The grounds for a petition for bill of review were first set forth by the Texas Supreme Court in *Alexander v. Hagedorn*.[323] First, the defendant must present a prima facie meritorious defense to the action and show that it did not have an opportunity to present

318. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 16.051 (Vernon 1999) (stating that "[e]very action for which there is no express limitations period, except an action for the recovery of real property, must be brought not later than four years after the day the cause of action accrues"); Caldwell v. Barnes, 975 S.W.2d 535, 538 (Tex. 1998) (claiming that "the residual four-year statute of limitations applies to bills of review"); Vandehaar v. ALC Fin. Corp., 25 S.W.3d 406, 409 n.2 (Tex. App.—Beaumont 2000, pet. denied) (extending the four year statute of limitations to apply to bills of review); Gramercy Ins. Co. v. State, 834 S.W.2d 379, 381 (Tex. App.—San Antonio 1992, no writ) (providing that a bill of review must be filed within four years of the accrual of the cause of action). Note, however, the exception to the four year statute of limitations period for cases involving extrinsic fraud. *See* Defee v. Defee, 966 S.W.2d 719, 722 (Tex. App.—San Antonio 1998, no pet.) (enforcing the extrinsic fraud exception to the four year statute of limitations on bills of exception); Law v. Law, 792 S.W.2d 150, 153 (Tex. App.—Houston [1st Dist.] 1990, writ denied) (noting that the single exception to the four year limitation period is a showing by the challenger of extrinsic fraud).

319. Nguyen v. Intertex, Inc., 93 S.W.3d 288, 293 (Tex. App.—Houston [14th Dist.] 2002, no pet.)

320. *Caldwell*, 975 S.W.2d at 538; *see also Vandehaar,* 25 S.W.3d at 409 (applying laches as a bar to bills of review); Steward v. Steward, 734 S.W.2d 432, 434 n.2 (Tex. App.—Fort Worth 1987, no writ) (noting that laches is a defense to bills of review (citing Callaway v. Elliott, 440 S.W.2d 99, 103 (Tex. Civ. App.—Tyler 1969, writ dism'd w.o.j.))).

321. *Caldwell*, 975 S.W.2d at 538 (citing Rogers v. Ricane Enters., Inc., 772 S.W.2d 76, 80 (Tex. 1989)).

322. *Id.* at 538 (quoting Barfield v. Howard M. Smith Co., 426 S.W.2d 834, 840 (Tex. 1968)).

323. 148 Tex. 565, 226 S.W.2d 996 (1950).

such meritorious defense.[324] Second, the defendant must show justification for failure to make such a defense by alleging fraud, accident, wrongful act of the plaintiff, or official mistake.[325] Finally, according to *Alexander v. Hagedorn*,[326] the defendant must show that the judgment was not rendered as a result of its own fault or negligence.[327] The requirement that the bill-of-review petitioner negate its own negligence in allowing a default judgment to be taken is sometimes confused with the requirement that the petitioner prove it exercised due diligence in pursuing other available legal remedies before resorting to the equitable bill of review.[328] When a defaulting party pleads and proves a due process violation for lack of service of process or lack of notice, or otherwise establishes that the judgment is void, the defaulting party is not required

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324. Alexander v. Hagedorn, 148 Tex. 565, 568, 226 S.W.2d 996, 998 (1950); *see also* Beck v. Beck, 771 S.W.2d 141, 141-42 (Tex. 1989) (requiring that the petitioner present prima facie proof of a meritorious defense); Garcia v. Tenorio, 69 S.W.3d 309, 312 (Tex. App.—Fort Worth 2002, no pet.) (providing that the petitioner must present prima facie proof of a meritorious defense).

325. *Alexander*, 226 S.W.2d at 998; *see also* Wembley Inv. Co. v. Herrera, 11 S.W.3d 924, 927 (Tex. 1999) (per curiam) (noting that generally, a party is only entitled to bill of review relief if the party can show that it was prevented from "making a meritorious claim or defense by the fraud, accident, or wrongful act of the opposing party"); *Caldwell*, 975 S.W.2d at 537 (noting the same); Tex. Mach. & Equip. Co. v. Gordon Knox Oil & Exploration Co., 442 S.W.2d 315, 317-18 (Tex. 1969) (following *Alexander*)).

326. *Hanks v. Rosser*, 378 S.W.2d 31 (Tex. 1964), may have eliminated this requirement in bills of review following a default judgment. *See* discussion *infra* Part VII.C.4 (discussing *Hanks v. Rosser*).

327. *Alexander*, 226 S.W.2d at 998; *see also Wembley Inv. Co.*, 11 S.W.3d at 927 (applying the requirement that no fault lies with the party seeking bill of review); *Caldwell*, 975 S.W.2d at 538 (ruling that fault may not lie with the party seeking a bill of review); State v. 1985 Chevrolet Pickup Truck, 778 S.W.2d 463, 464 (Tex. 1989) (recognizing that the accident or mistake must be unmixed with the party's own negligence). The Texas courts of appeals have issued many opinions reciting all three elements. *See, e.g.*, Ponsart v. Citicorp Vendor Fin., Inc., 89 S.W.3d 285, 288 (Tex. App.—Texarkana 2002, no pet.); Nguyen v. Intertex, Inc., 93 S.W.3d 288, 293 (Tex. App.—Houston [14th Dist.] 2002, no pet.); Urso v. Lyon Fin. Servs., Inc., 93 S.W.3d 276, 279 (Tex. App.—Houston [14th Dist.] 2002, no pet.); Rundle v. Comm'n for Lawyer Discipline, 1 S.W.3d 209, 213 (Tex. App.—Amarillo 1999, no pet.); Gone v. Gone, 993 S.W.2d 845, 849 (Tex. App.—Houston [14th Dist.] 1999, pet. denied); W. Columbia Nat'l Bank v. Griffith, 902 S.W.2d 201, 205 (Tex. App.—Houston [1st Dist.] 1995, writ denied); Cortland Line Co. v. Israel, 874 S.W.2d 178, 183 (Tex. App.—Houston [14th Dist.] 1994, writ denied).

328. *See* Hanks v. Rosser, 378 S.W.2d 31, 34-35 (Tex. 1964) (discussing the bill of review requirements); McDaniel v. Hale, 893 S.W.2d 652, 658-59 (Tex. App.—Amarillo 1994, writ denied) (discussing the bill of review requirements under *Hanks*). *Cf.* discussion *infra* Part VI.C.5 and note 356 (discussing the requirement of exhausting all available remedies).

to prove due diligence,[329] nor the three elements listed above.[330] In cases based on official mistake on the part of the clerk of the trial court (as opposed to the opposing party or counsel),[331] a showing of fraud, accident, or wrongful act of the plaintiff does not need to be proved as a justification for either the failure to answer or the failure to appear.[332] In addition, a defendant establishes a meritorious defense by proving: (1) its "defense is not barred as a matter of law"; and (2) it "will be entitled to judgment on retrial if no evidence to the contrary is offered."[333]

4. Elements and Grounds for Bill of Review Under *Hanks v. Rosser*

In *Hanks v. Rosser*,[334] the Texas Supreme Court "proceeded to liberalize those general rules to deal with the particular fact situa-

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329. *See Urso*, 93 S.W.3d at 280 (requiring no proof of due diligence when there is improper service (citing Tex. Indus., Inc. v. Sanchez, 525 S.W.2d 870, 871 (Tex. 1975))).

330. *See* Peralta v. Heights Med. Ctr., Inc., 485 U.S. 80, 86 (1988) (applying the rule when there is no proper service of process); *Caldwell*, 975 S.W.2d at 537 (explaining that the lack of service of process relieved the requirement of a meritorious defense); Lopez v. Lopez, 757 S.W.2d 721, 723 (Tex. 1988) (extending the rule when there is no notice of the lawsuit); Tex. Indus., Inc. v. Sanchez, 525 S.W.2d 870, 871 (Tex. 1975) (applying the rule when there is no proper service of process); *Nguyen*, 93 S.W.3d at 293 (applying the same); Interaction, Inc. v. State, 17 S.W.3d 775, 778 (Tex. App.—Austin 2000, pet. denied) (explaining that the rule applies when there is no notice of the lawsuit); Edison v. Beta Fin. Corp., 994 S.W.2d 827, 828 (Tex. App.—Eastland 1999, pet. denied) (applying the rule when there is no proper service of process); Winrock Houston Assocs. Ltd. P'ship v. Bergstrom, 879 S.W.2d 144, 149 (Tex. App.—Houston [14th Dist.] 1994, no writ) (applying the same).

331. *See* Transworld Fin. Servs. Corp. v. Briscoe, 722 S.W.2d 407, 408 (Tex. 1987) (clarifying that a mistake of a party's attorney does not relieve the party from showing fraud); K.B. Video & Elecs., Inc. v. Naylor, 847 S.W.2d 401, 406 (Tex. App.—Amarillo 1993, writ denied) (holding that a party's "attorney is not an officer of the court for purposes of determining if an official mistake has been made").

332. *See Transworld Fin. Servs. Corp.*, 722 S.W.2d at 408 (recognizing that official mistake may relieve the petitioner of proving extrinsic fraud); Baker v. Goldsmith, 582 S.W.2d 404, 407 (Tex. 1979) (finding in a motion for new trial context that the defendant's letter was sufficient to constitute an answer and the clerk's misplacement thereof was an official mistake); Gracey v. West, 422 S.W.2d 913, 915 (Tex. 1968) (applying the rule to a failure of a clerk to provide the defaulting party with notice of judgment); *see also* Gutierrez v. Lone Star Nat'l Bank, 960 S.W.2d 211, 216 (Tex. App.—Corpus Christi 1997, pet. denied) (discussing the part that fault or negligence plays in proving a reason for failing to appear).

333. *Baker*, 582 S.W.2d at 409; Ortmann v. Ortmann, 999 S.W.2d 85, 88 (Tex. App.—Houston [14th Dist.] 1999, pet. denied).

334. 378 S.W.2d 31 (Tex. 1964).

tion at hand,"[335] as "*Hanks* was not the usual bill of review case."[336] In *Hanks*, "erroneous information given by the clerk" with respect to the signing of a default judgment caused Hanks to: (1) file an answer one day after the default judgment was signed; and (2) fail to file a motion for new trial.[337] On petition for bill of review, the supreme court held that "[s]ince there was reliance on the erroneous information given by the clerk, it was unnecessary for Hanks to show . . . some accident, fraud, or wrongful act of the opposing party."[338] The supreme court "recognized that the erroneous information provided by the district court clerk did not prevent Hanks from filing an answer," but "[r]ather, the clerk's erroneous information caused Hanks to miss his chance to file a motion for new trial."[339] The clerk's failure to send notice of a default judgment is treated the same as misinformation from the clerk.[340] The Fifth District Court of Appeals at Dallas has held that in bill of review cases involving a default judgment taken after misinformation by the court clerk, the burden on the bill-of-review petitioner is much less onerous than the burden on a bill of review from a trial on the merits.[341]

The Seventh District Court of Appeals at Amarillo has interpreted *Hanks* to mean that, under those circumstances, when determining whether the defaulting party was at fault for failing to answer the plaintiff's petition in the underlying case, thus resulting in a default judgment, the defaulting party's conduct "should be measured by the standard for negligence of the non-answering defendant in a motion for new trial situation rather than by the standard of negligence for a complainant in a typical bill of review proceeding."[342] Accordingly, the bill of review elements in a default judgment situation under *Hanks* are as follows:

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335. McDaniel v. Hale, 893 S.W.2d 652, 658 (Tex. App.—Amarillo 1994, writ denied).

336. *See id.* at 658-59 (discussing the bill of review requirements under *Hanks*); Parker v. Gant, 568 S.W.2d 163, 165 (Tex. Civ. App.—Dallas 1978, writ ref'd n.r.e.) (stating that "*Hanks* reduced substantially the burden upon the defendant in obtaining a bill of review").

337. Hanks v. Rosser, 378 S.W.2d 31, 34 (Tex. 1964).

338. *Id.*

339. *McDaniel*, 893 S.W.2d at 659.

340. Buddy "L", Inc. v. Gen. Trailer Co., 672 S.W.2d 541, 545 (Tex. App.—Dallas 1984, writ ref'd n.r.e.).

341. *Parker*, 568 S.W.2d at 165.

342. *McDaniel*, 893 S.W.2d at 659 (internal citations omitted).

(1) a failure to file a motion for new trial,
(2) which he was prevented from filing by the misinformation of an officer of the court acting within his official duties, and
(3) the three requirements that must be proved in order to have a new trial granted where there has been a default judgment, namely:
   (a) the failure to answer the petition was not intentional or the result of conscious indifference;
   (b) a meritorious defense to the cause of action alleged to support the judgment; and
   (c) no injury will result to the opposite party by granting the bill of review.[343]

The Seventh District Court of Appeals at Amarillo also noted in *McDaniel v. Hale* that *Hanks* does not require that a petitioner in a bill of review following a default judgment prove "an absence of negligence in failing to file a motion for new trial," as negligence is negated upon proving the *Craddock* test elements of accident or mistake and lack of intent or conscious indifference.[344] As stated by the *McDaniel* court, "[i]t is undoubtedly much easier to show that one's failure to answer a petition was not intentional or the result of conscious indifference than to show that such failure involved a complete absence of fault or negligence."[345] The standards and elements provided in *Hanks* have been applied by various Texas courts of appeals in bill of review proceedings following default judgments involving official mistake or misconduct.[346]

Subsequent to *Hanks*, the Texas Supreme Court decided *Petro-Chemical Transport, Inc. v. Carroll*,[347] a bill of review case arising out of a trial on the merits where the clerk failed to notify the de-

343. *Id.* (citing *Hanks*, 378 S.W.2d at 35).
344. *Id.*
345. *Id.* at 659 n.13.
346. *See Parker*, 568 S.W.2d at 661-62 (explaining how various courts of appeals have applied the *Hanks* standards "in a limited fact situation"); *see also* Remington Invs., Inc. v. Connell, 971 S.W.2d 140, 142 (Tex. App.—Waco 1998, no pet.) (holding that erroneous information of a court official constitutes official mistake); City of Laredo v. Threadgill, 686 S.W.2d 734, 735 (Tex. App.—San Antonio 1985, no writ) (holding that the *Hanks* standard applies); Buddy "L", Inc. v. Gen. Trailer Co., 672 S.W.2d 541, 545 (Tex. App.—Dallas 1984, writ ref'd n.r.e.) (concluding that the *Hanks* standard applies); *Parker*, 568 S.W.2d at 165 (applying *Hanks*). *But see* Thompson v. Henderson, 45 S.W.3d 283, 288 n.4 (Tex. App.—Dallas 2001, pet. denied) (disagreeing that "*Hanks* and its progeny apply here").
347. 514 S.W.2d 240 (Tex. 1974).

fendant that a judgment had been signed, and the defendant failed to file a motion for new trial or perfect an appeal.[348] The supreme court determined that the bill-of-review petitioner had to negate its own negligence,[349] a holding which was "not consistent with *Hanks*."[350] As noted by the Amarillo Court of Appeals:

> [T]he Supreme Court has enunciated different rules in the two situations. In the default judgment situation, a litigant who has been prevented from filing a motion for new trial or perfecting an appeal must meet the liberalized requirements of *Hanks v. Rosser*. In a situation where the parties have participated at trial and the losing party has been prevented from filing a motion for new trial or perfecting an appeal, the requirements set forth in *Petro-Chemical* control.[351]

The next significant case in default judgment jurisprudence was *Baker v. Goldsmith*.[352] *Baker* involved a default judgment signed after the defendant mailed a letter to the trial court judge wherein the defendant substantially denied the allegations in the plaintiff's petition.[353] Although the letter was received at the courthouse, the letter was not filed. A default judgment was rendered, but the defendants did not receive notice of the default judgment until after the time had passed for filing a motion for new trial. Although the *Baker* case appeared factually and procedurally similar to the *Hanks* case,[354] the supreme court did not recite the *Hanks* test, as "the question of whether the bill of review plaintiffs needed to show a complete absence of negligence in failing to answer the petition or merely that their failure to answer the petition was not intentional or the result of conscious indifference was not in issue,"[355] because the supreme court found that the original defendants were not at fault.

348. Petro-Chem. Transp., Inc. v. Carroll, 514 S.W.2d 240, 244 (Tex. 1974).

349. *Id.*

350. McDaniel v. Hale, 893 S.W.2d 652, 660 n.17 (Tex. App.—Amarillo 1994, writ denied).

351. *Id.* at 662 (noting that Petro-Chem. Transp., Inc. v. Carroll, 514 S.W.2d 240 (Tex. 1974) involved a trial on the merits).

352. 582 S.W.2d 404 (Tex. 1979).

353. Baker v. Goldsmith, 582 s.W.2d 404, 405-07 (Tex. 1979).

354. *McDaniel*, 893 S.W.2d at 660.

355. *Id.* at 661 (stating "we do not read *Baker* as displacing the requirements set forth in *Hanks*").

5. Failure to Pursue and Exhaust Other Available Remedies

If the defaulting party learned of the default judgment at a time when other available remedies, such as a motion for new trial, appeal, or restricted appeal, could have been pursued, but were not pursued, then relief by petition for bill of review is not available.[356] However, if the defaulting party needs to present additional evidence because error is not apparent from the face of the record, then a restricted appeal was not an available remedy, and such explanation must be provided in the petition for bill of review.[357]

6. Extrinsic Fraud by the Opposing Party or Counsel

Extrinsic fraud sufficient to constitute a justification for failing to present a meritorious defense involves a wrongful act that prevents the losing party "from knowing about [its] rights or defenses," or "from having a fair opportunity" to present and fully litigate such rights or defenses.[358] Falsely swearing to an affidavit in order to secure service by publication is an example of extrinsic fraud.[359]

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356. *See* Wembley Inv. Co. v. Herrera, 11 S.W.3d 924, 927 (Tex. 1999) (asserting that a party's failure to timely avail himself of a legal remedy precludes his bill of review relief); Caldwell v. Barnes, 975 S.W.2d 535, 537-38 (Tex. 1998) (concluding that a party is only required to pursue remedies under Texas Law); Gracey v. West, 422 S.W.2d 913, 916-18 (Tex. 1968) (applying the principal to failure to prosecute); French v. Brown, 424 S.W.2d 893, 895 (Tex. 1967) (holding that failure to appeal after a motion for new trial was denied precluded bill of review); Nguyen v. Intertex, Inc., 93 S.W.3d 288, 293 (Tex. App.—Houston [14th Dist.] 2002, no pet.) (stressing the requirement of pursuing adequate legal remedies); Ponsart v. Citicorp Vendor Fin., Inc., 89 S.W.3d 285, 289 (Tex. App.—Texarkana 2002, no pet.) (expressing that "bill of review relief is available only if a party has exercised due diligence in pursuing all adequate legal remedies against a former judgment"); Thompson v. Henderson, 45 S.W.3d 283, 288 (Tex. App.—Dallas 2001, pet. denied) (holding that "bill of review relief is available only if a party has exercised due diligence in pursuing all available legal remedies against a former judgment"); Rundle c. Comm'n for Lawyer Discipline, 1 S.W.3d 209, 216 (Tex. App.—Amarillo 1999, no pet.) (reiterating the principle); Lawrence v. Lawrence, 911 S.W.2d 443, 448 (Tex. App.—Texarkana 1995, writ denied) (holding that ignoring available legal remedies precludes bill of review relief); Hesser v. Hesser, 842 S.W.2d 759, 765 (Tex. App.—Houston [1st Dist.] 1992, writ denied) (finding that defendant was not entitled to relief after waiting longer than ninety-five days after the notice of judgment to file a writ of error).

357. *See* Stankiewicz v. Oca, 991 S.W.2d 308, 312 (Tex. App.—Fort Worth 1999, no pet.) (explaining that the court was unable to consider extrinsic evidence when the default judgment was entered).

358. Alexander v. Hagedorn, 148 Tex. 565, 574-75, 226 S.W.2d 996, 1001 (1950); *see also* Tice v. City of Pasadena, 767 S.W.2d 700, 702 (Tex. 1989) (providing a succinct definition of extrinsic fraud).

359. Burrows v. Miller, 797 S.W.2d 358, 360 n.1 (Tex. App.—Tyler 1990, no writ).

Intrinsic fraud, by contrast, "relates to the merits of the issues which were presented and presumably [were] or should have been settled in the former action . . . and considered by the trial court in rendering the judgment assailed."[360] Intrinsic fraud, according to *Alexander v. Hagedorn*, is not a sufficient justification for failing to present a meritorious defense.[361]

7. Avoiding Enforcement of the Prior Judgment

A bill of review proceeding affects neither "the finality nor enforceability of the judgment"[362] being challenged, so filing a supersedeas bond will not suspend execution on the earlier judgment.[363] If necessary, the defaulting party should apply for an injunction to postpone execution on the original judgment until the bill of review proceeding has been concluded and the original judgment has been vacated and set aside.

8. Trial on the Petition for Bill of Review

The filing of a petition for bill of review invokes the court's equitable powers.[364] Under the *Alexander v. Hagedorn* standard discussed above, the bill of review petition must set forth prima facie proof of a meritorious defense, at least proving that the defense is not barred as a matter of law, and that the petitioner would be entitled to judgment at trial if no contrary evidence was offered.[365] The petition must also "allege factually and with particularity that the prior judgment was rendered as the result of fraud, accident or wrongful act of the opposite party or official mistake unmixed with [the petitioner's] own negligence."[366] Although the respondent can

360. *Tice*, 767 S.W.2d at 702.

361. *Alexander*, 226 S.W.2d at 1001.

362. City of Houston v. Hill, 792 S.W.2d 176, 179 (Tex. App.—Houston [1st Dist.] 1990, writ dism'd by agr.).

363. *See* Kantor v. Herald Publ'g Co., 632 S.W.2d 656, 657-58 (Tex. App.—Tyler 1982, no writ) (holding that the court lacks the "authority to entertain a supersedeas bond which attempts to suspend execution on the original judgment").

364. *See* Baker v. Goldsmith, 582 S.W.2d 404, 408 (Tex. 1979) (discussing the requirements for a petition for a bill of review).

365. *See id.* at 408-09 (setting forth the elements of a prima facie showing of a meritorious defense).

366. *See id.* (explaining when a meritorious defense is made). Note, however, that *Hanks v. Rosser* later held that the petitioner is not required to show that it was not negligent in the case of official mistake. Hanks v. Rosser, 378 S.W.2d 31, 35 (Tex. 1964).

file controverting evidence, at this preliminary stage the trial judge resolves fact disputes in favor of the bill-of-review petitioner.[367] Once the trial judge has found that a prima facie showing of the three elements has been made, the bill-of-review plaintiff may have the remaining issues decided by a jury.

Upon meeting the prima facie standard of proof on defense, the bill-of-review petitioner must next prove the petition for bill of review elements by a preponderance of the evidence to the trier of fact, often referred to as the first phase of the bill of review trial.[368] If the petitioner succeeds in proving the bill of review elements, then the final portion of the bill of review proceeding involves the respondent (underlying case plaintiff) proving the merits of the underlying lawsuit, sometimes called the second phase of the bill of review trial.[369] The bill of review trial and the underlying case trial may be conducted as either a single trial or separate trials.[370] However, if the evidence on the bill of review elements phase of the trial involves the mention of insurance, separate trials will be required so the jury will not be informed of the existence of insurance, in accordance with Rule 411 of the Texas Rules of Evidence.[371]

At the end of a petition for bill of review proceeding, the trial court should render a new final judgment that either: (1) denies the bill of review relief requested; or (2) grants the petition for bill of review, vacates and sets aside the original judgment in its entirety, and substitutes a new and correct judgment on the entire controversy.[372] An order on a bill of review petition that only "sets aside a prior judgment but does not dispose of the [underlying]

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367. *Baker*, 582 S.W.2d at 409.

368. *See* State v. 1985 Chevrolet Pickup Truck, 778 S.W.2d 463, 464-65 (Tex. 1989) (stating what must be proved in the bill of review proceeding before proceeding to the merits of the case).

369. *See Baker*, 582 S.W.2d at 409 (describing the second phase of a bill of review proceeding).

370. *See* Warren v. Walter, 414 S.W.2d 423, 423-24 (Tex. 1967) (disapproving of the lower court's statement that there must be a single trial).

371. *See* TEX. R. EVID. 411 (declaring that "[e]vidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully").

372. *See 1985 Chevrolet Pickup Truck*, 778 S.W.2d at 465 (holding that if the original plaintiff proves its cause of action, the relief is granted); Crabtree v. Crabtree, 627 S.W.2d 486, 487 (Tex. App.—Corpus Christi 1981, no writ) (asserting that a bill of review judgment denies relief or sets aside the old judgment and substitutes a new judgment).

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case on the merits is interlocutory and not appealable."[373] A final judgment in the bill of review proceeding is appealable, as in any other case, under legal and factual sufficiency of the evidence standards of review[374] or under an abuse of discretion standard of review if no findings of fact and conclusions of laws are prepared and filed.[375]

If the respondent successfully defends a petition for bill of review, then the respondent is entitled to recover attorney's fees incurred in the defense of the bill of review proceeding if the respondent would have been entitled to an award of attorney's fees in the underlying case.[376] Texas courts of appeals are split on whether an erroneously granted petition for bill of review is subject to review by a petition for writ of mandamus.[377]

D. *Special Procedures for Attacking Default Judgments Taken in Justice Courts*

Everything is different in justice court. Not only are the jurisdictional limits lower, but the time in which the defaulting party can appeal a judgment from the justice court is also greatly reduced. Moreover, a specific set of rules governs appeals from justice court and small claims court judgments. Rules 523 through 591 of the Texas Rules of Civil Procedure govern practice in the justice courts. Rules 537, 538, 558, 559, 561, 565, and 566 through 591 are the relevant rules when seeking to overturn a default judgment.

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373. Jordan v. Jordan, 907 S.W.2d 471, 472 (Tex. 1995).

374. Rose v. State, 497 S.W.2d 444, 446 (Tex. 1973); Whetsone v. Urban Renewal Agency, 655 S.W.2d 357, 359 (Tex. App.—Amarillo 1983, writ ref'd n.r.e.).

375. Nguyen v. Intertex, Inc., 93 S.W.3d 288, 293 (Tex. App.—Houston [14th Dist.] 2002, no pet.); Ponsart v. Citicorp Vendor Fin., Inc., 89 S.W.3d 285, 288 (Tex. App.—Texarkana 2002, no pet.).

376. Meece v. Moerbe, 631 S.W.2d 729, 730 (Tex. 1982); Bakali v. Bakali, 830 S.W.2d 251, 257 (Tex. App.—Dallas 1992, no writ).

377. *Compare In re* Nat'l Unity Ins. Co., 963 S.W.2d 876, 877 (Tex. App.—San Antonio 1998, orig. proceeding) (holding that "[a]n erroneously granted bill of review is effectively a void order granting a new trial," which affords "no adequate remedy at law"), *and* Schnitzius v. Koons, 813 S.W.2d 213, 218 (Tex. App.—Dallas 1991, orig. proceeding) (granting a writ of mandamus), *with In re* Moreno, 4 S.W.3d 278, 280 (Tex. App.—Houston [14th Dist.] 1999, orig. proceeding) (holding the order voidable and appealable, and not subject to mandamus), *and* Tex. Mex. Ry. Co. v. Hunter, 726 S.W.2d 616, 617-18 (Tex. App.—Corpus Christi 1987, orig. proceeding) (holding that mandamus is unavailable because the order is appealable).

Timing is even more critical when dealing with the justice courts because the deadlines arrive sooner. The justice may only grant a new trial within ten days from the date judgment was rendered[378] and may only set aside a default judgment within ten days of the date the justice signed the judgment.[379] Motions for new trial and motions to set aside judgments are overruled by operation of law ten days after the court rendered judgment.[380] But more importantly, the appellant must file a motion for new trial or a motion to set aside a judgment within five days after the judgment was rendered, and it must give the other side a one-day notice.[381] Filing a motion for new trial does not, however, enlarge the time to file an appeal bond.[382] So, the appellant must also file an appeal bond, with two or more good and sufficient sureties, for double the amount of the judgment, within ten days from either the date the judgment is signed, or, if the motion for new trial is overruled by written order before the expiration of ten days, within ten days of the date the order overruling the motion is signed.[383] Within five days of filing the appeal bond, the appellant must give proper Rule 21a notice of the filing to all parties.[384] A justice court or small claims court judgment is appealed to the county court or district court for trial *de novo*.[385]

If the appellant did not receive notice of the underlying suit or trial date, it is unlikely it will receive notice of the default judgment within five days of its signing or rendition. In that case, its only appeal option is a writ of certiorari, which must be filed and granted within ninety days of the date the judgment is signed.[386] The rules governing certiorari appeals contain specific requirements of what the appellant must include in an application for writ of certiorari and the motion to set bond. The following is the basic procedure.

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378. TEX. R. CIV. P. 567.
379. TEX. R. CIV. P. 566.
380. TEX. R. CIV. P. 567; Searcy v. Sagullo, 915 S.W.2d 595, 596-97 (Tex. App.—Houston [14th Dist.] 1996, no writ).
381. TEX. R. CIV. P. 569.
382. *Searcy*, 915 S.W.2d at 596-97.
383. TEX. R. CIV. P. 571.
384. *Id.*
385. TEX. R. CIV. P. 574b.
386. TEX. R. CIV. P. 575-591.

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The appellant must first file an application for writ of certiorari in the county court or district court, depending on local rules.[387] The application must be supported by an affidavit showing sufficient cause for granting the writ.[388] The facts stated in the affidavit and application must show either that the justice of the peace did not have jurisdiction to enter judgment or that injustice was done to the applicant by the judgment, and such injustice was not caused by the applicant's own inexcusable neglect.[389] An application supported by affidavit asserting that the applicant was not served or improperly served states sufficient cause for issuance of the writ.[390]

Because no writ of certiorari may be granted after ninety days from the date the judgment was signed, the appellant must file the application before the ninety-day deadline. It is wise to walk the application through the clerk's office and then to the chambers of whatever court is assigned the case in order to ensure that the county court judge or district judge enters an order granting the writ within ninety days from the judgment's signing. The appellant must also file the order granting the writ with the clerk's office within ninety days.

The writ itself will not issue until the applicant files a bond with two or more sufficient sureties with the clerk and receives approval from the clerk of the bond.[391] The county or district court judge sets the amount of bond.[392] So, when the appellant files the application for certiorari, it is important to also file a motion to set bond for application for certiorari, with an accompanying order setting bond at twice the amount of the judgment. The appellant should ask the court to set the certiorari bond at twice the judgment, citing Texas Rule of Civil Procedure 571 as support, because an appeal bond in a regular appeal from the justice court is for twice the amount of judgment.

Once the court grants the application for writ of certiorari, the appellant must: (1) obtain an order granting the application and

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387. TEX. R. CIV. P. 575- 578.

388. TEX. R. CIV. P. 577.

389. TEX. R. CIV. P. 578.

390. Centro Jurici De Instituto Technologico y Estudios Superiores De Monterrey v. Intertravel, Inc., 2 S.W.3d 446, 450 (Tex. App.—San Antonio 1999, no pet.); Am. Bankers' Ins. Co. v. Flowers, 64 S.W.2d 806, 807 (Tex. Civ. App.—Beaumont 1933, no writ).

391. TEX. R. CIV. P. 580.

392. *Id.*

ordering the clerk of the court to issue the writ; (2) obtain an order setting bond; (3) obtain a bond in the court-designated amount, payable to the adverse party, with at least two good and sufficient sureties; and (4) file the following with the clerk of the court: the order granting the writ, the order setting bond, the bond itself, at least two copies of the application for writ of certiorari, and any filing fees.[393] The clerk shall issue the writ as soon as these documents are filed.[394] When the clerk issues the writ of certiorari, the clerk must also issue a citation for the adverse party and the justice of the peace.[395] The appellant must, therefore, pay fees for the issuance of two citations and provide the clerk with two applications to serve on the justice of the peace and the adverse party, or more if there is more than one adverse party.

When the justice of the peace is served with the writ, he must stay further proceedings on the judgment.[396] The writ must command the justice of the peace to immediately make and certify a copy of the docket entries, all the papers in the underlying case, and a certified copy of the bill of costs, and to mail those documents to the court that granted the writ.[397] Unlike a traditional appeal, the case is docketed in the county or district court with the original plaintiff as plaintiff and the original defendant as defendant.[398] The adverse party has thirty days from service of citation on the writ to move to dismiss the certiorari for want of sufficient cause appearing in the affidavit or want of sufficient bond.[399] Once those thirty days have passed, however, the adverse party loses the ability to dismiss the writ for lack of sufficient cause or lack of sufficient bond.[400] But if a motion to dismiss is timely filed, the court must take the allegations in the application for writ of certiorari as

393. TEX. R. CIV. P. 580-582. Check your local rules to determine the filing fees for these motions, bonds, and citation issuance. Also note that the "clerk of the court" does not mean the individual judge's court clerk. These documents must be filed with and served by the county clerk or district clerk, depending on where the case is filed.

394. TEX. R. CIV. P. 582.

395. TEX. R. CIV. P. 583, 584.

396. TEX. R. CIV. P. 583.

397. TEX. R. CIV. P. 576.

398. TEX. R. CIV. P. 585.

399. TEX. R. CIV. P. 586.

400. Scott v. Tate, 28 S.W.2d 848, 850 (Tex. Civ. App.—Eastland 1930, no writ).

true in determining whether sufficient cause exists to grant the writ.[401]

Because this is a rarely used procedure, it is important at each step to deal personally with the clerk's office and to follow-up with them to make sure that the appropriate documents are filed and sent to the appropriate judge's chambers, and that the writ and citation are properly issued and served. It is also important to make sure that the county or district judge signs the order granting the writ and the order setting bond within ninety days of the date the original judgment was signed. If the clerk does not approve the bond until after ninety days, but the appellant timely filed a sufficient bond and the order granting the writ, the writ will not be considered void.[402]

E. *Special Considerations in Attacking Foreign Default Judgments Domesticated in Texas*

The Full Faith and Credit Clause of the United States Constitution requires that full faith and credit be given in each state to the public acts, records, and judicial proceedings of every other state.[403] A foreign default judgment may be registered and, thus, domesticated in Texas. Texas recognizes two methods of enforcing a foreign judgment: (1) filing under the Uniform Enforcement of Foreign Judgments Act (UEFJA), which establishes a procedure for enforcing a foreign judgment by merely filing an authenticated copy of the judgment with the clerk of any court in Texas with competent jurisdiction;[404] and (2) filing a common-law action to enforce the foreign judgment.[405] The UEFJA provides that:

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401. Huebsch Mfg. Co. v. Coleman, 113 S.W.2d 639, 642 (Tex. Civ. App.—Amarillo 1938, no writ); Am. Bankers' Ins. Co. v. Flowers, 64 S.W.2d 806, 807 (Tex. Civ. App.—Beaumont 1933, no writ); Lanning v. Yarbrough, 35 S.W.2d 211, 213-14 (Tex. Civ. App.—Eastland 1931, no writ).

402. Wilbur v. Lane, 53 Tex. Civ. App. 249, 250, 115 S.W. 298, 298 (Tex. Civ. App. 1909, no writ).

403. U.S. CONST. art. IV, § 1; Bard v. Charles R. Myers Ins. Agency, Inc., 839 S.W.2d 791, 794 (Tex.1992).

404. TEX. CIV. PRAC. & REM. CODE ANN. § 35.003 (Vernon 1997); Tri-Steel Structures, Inc. v. Hackman, 883 S.W.2d 391, 393 (Tex. App.—Fort Worth 1994, writ denied); Medical Adm'rs, Inc. v. Koger Props., Inc., 668 S.W.2d 719, 721 (Tex. App.—Houston [1st Dist.] 1983, no writ).

405. Lawrence Sys., Inc. v. Superior Feeders, Inc., 880 S.W.2d 203, 206 (Tex. App.—Amarillo 1994, writ denied).

> (a) A copy of a foreign judgment authenticated in accordance with an act of congress or a statute of this state may be filed in the office of the clerk of any court of competent jurisdiction of this state.
> (b) The clerk shall treat the foreign judgment in the same manner as a judgment of the court in which the foreign judgment is filed.
> (c) A filed foreign judgment has the same effect and is subject to the same procedures, defenses, and proceedings for reopening, vacating, staying, enforcing, or satisfying a judgment as a judgment of the court in which it is filed.[406]

A properly-filed foreign judgment has the effect of initiating an enforcement proceeding and instantly rendering a valid Texas judgment.[407] The filing of a foreign judgment under the UEFJA comprises both the plaintiff's original petition and the final judgment.[408] Texas case law has compared the filing of a foreign judgment under Section 35.003 to the entry of a no-answer default judgment, because the judgment debtor does not have an opportunity to defend himself before the judgment is considered final.[409] Texas appellate timetables apply to a foreign judgment filed in Texas.[410]

Under this scheme, the foreign judgment instantly becomes a final Texas judgment on the date the judgment creditor files the foreign judgment in a Texas court.[411] That does not mean, however, that the judgment debtor has no recourse against the domesticated judgment. On the contrary, a party against whom a foreign default judgment is registered may use any Texas appellate remedies to set aside the default judgment, including filing a timely motion for new trial, filing a timely motion to vacate the judgment,[412] or filing a restricted appeal.[413] Moreover, if the party resisting enforcement of a foreign judgment can show that the court did not have jurisdiction over either the parties, the subject matter, or both, or that the

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406. TEX. CIV. PRAC. & REM. CODE ANN. § 35.003 (Vernon 1997).

407. Walnut Equip. Leasing Co. v. Wu, 920 S.W.2d 285, 286 (Tex. 1996).

408. *Id.*

409. Moncrief v. Harvey, 805 S.W.2d 20, 22-23 (Tex. App.—Dallas 1991, no writ).

410. *Id.* at 22-25; *Walnut Equip.*, 920 S.W.2d at 286.

411. *Walnut Equip.*, 920 S.W.2d at 286.

412. Cash Register Sales & Srvcs. of Houston, Inc. v. Copelco Capital, Inc., 62 S.W.3d 278, 281 (Tex. App.—Houston [1st Dist.] 2001, no pet.); Brown's Inc. v. Modern Welding Co., 54 S.W.3d 450, 453-54 (Tex. App.—Corpus Christi 2001, no pet.).

413. Mayfield v. Dean Witter Fin. Servs., Inc., 894 S.W.2d 502, 504 (Tex. App.—Austin 1995, writ denied).

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judgment is not final and subsisting, that judgment is not entitled to full faith and credit in Texas and must be set aside.[414]

A restricted appeal is the best method to overturn a default judgment if: (1) the defaulting party cannot file a motion for new trial or motion to vacate judgment because its facts would not support *Craddock* arguments or the court did not still have plenary power by the time it received notice of the default judgment; and (2) six months have not passed since the date the foreign judgment was filed in Texas. All appellate time limits begin to run from the date the foreign judgment is filed in Texas, rather than the date the judgment is abstracted. However, before filing the restricted appeal, or in addition to the defaulting party's motion for new trial or motion to vacate judgment, it is imperative to file the foreign state's record with the Texas court. By doing so, the foreign record becomes a part of the Texas record and will be useful on appeal. Moreover, information from the foreign record will be necessary to overturn the judgment if a motion is made for a new trial or to vacate the judgment.

An essential prerequisite to application of the UEFJA is compliance with its provisions.[415] Therefore, it is imperative to strictly comply with the statutory requirements set out in the UEFJA when domesticating a foreign judgment in Texas. If, on the other hand, the client is the judgment debtor, a failure of the judgment creditor to strictly comply with the Act's requirements provides good ammunition for getting that judgment vacated on appeal.

The filing of a foreign judgment is effective under the Uniform Act only if the filing party follows the statutory requirements of authentication, filing, and notice.[416] If a party does not strictly comply with the requirements of the UEFJA, the foreign judgment may not be enforced in Texas.[417] *Any* deviation from the Act's re-

414. Mitchim v. Mitchim, 518 S.W.2d 362, 365 (Tex. 1975).

415. Lawrence Sys. Inc. v. Superior Feeders, Inc., 880 S.W.2d 203, 208 (Tex. App.—Amarillo 1994, writ denied); Jack H. Brown & Co. v. Northwest Sign Co., 665 S.W.2d 219, 221-22 (Tex. App.—Dallas 1984, no writ).

416. *Lawrence Sys.*, 880 S.W.2d at 208; *Jack H. Brown & Co.*, 665 S.W.2d at 221-22.

417. *See* Carter v. Jimerson, 974 S.W.2d 415, 417-18 (Tex. App.—Dallas 1998, no pet.) (noting that the registration of judgment was ineffective where the record failed to show compliance with the requirements of the UEFJA); *Jack H. Brown & Co.*, 665 S.W.2d at 221-22 (holding that, although the statute provides that a foreign judgment has the same effect as a judgment of the court in which it was filed, it has that effect only when the judgment complies with the statutory requirements of authentication and of filing an affi-

quirements, no matter how minor, requires the judgment be set aside and not enforced in Texas.[418]

There are two ways to register a foreign judgment in Texas. The requirements are found in Sections 35.004 and 35.005 of the Texas Civil Practice and Remedies Code. The first option, governed by Section 35.004,[419] requires the foreign judgment creditor's attorney to file an affidavit with the clerk of the court showing the name and last-known post office address of both the judgment debtor and judgment creditor, as well as an authenticated copy of the judgment.[420] The court clerk must then promptly mail notice of the filing of the foreign judgment to the judgment debtor at the address given, and "note the mailing in the docket."[421]

By not strictly complying with these requirements, the judgment may be vacated on appeal. For example, the affidavit must include a statement that the address listed is the judgment debtor's "last known address." The judgment creditor cannot list just any address for the judgment debtor, but must instead provide the court with what the judgment creditor knows as the judgment debtor's "last known address." This requirement is intended to ensure that the judgment debtor has the opportunity to attack the judgment.[422] An affidavit that does not contain the judgment debtor's "last

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davit naming the parties and giving their last known addresses); Allen v. Tennant, 678 S.W.2d 743, 744 (Tex. App.—Houston [14th Dist.] 1984, no writ) (holding that the judgment will be set aside where there is no evidence in the record that a notice of the filing of the foreign judgment was mailed to the debtor).

418. *See In re* Chapman, 973 S.W.2d 346, 348 (Tex. App.—Amarillo 1998, no pet.) (holding that the failure to provide a sworn statement with a foreign judgment, as required under the Uniform Interstate Family Support Act, required reversal of the judgment).

419. Section 35.004 of the Texas Civil Practice and Remedies Code, the UEFJA, provides the following:

> (a) At the time a foreign judgment is filed, the judgment creditor or the judgment creditor's attorney shall file with the clerk of the court an affidavit showing the name and last known post office address of the judgment debtor and the judgment creditor.
> (b) The clerk shall promptly mail notice of the filing of the foreign judgment to the judgment debtor at the address given and shall note the mailing in the docket.
> (c) The notice must include the name and post office address of the judgment creditor and if the judgment creditor has an attorney in this state, the attorney's name and address.

TEX. CIV. PRAC. & REM. CODE ANN. § 35.004 (Vernon 1997).

420. *Id.* § 35.004(a).

421. *Id.* § 35.004(b).

422. *See* City of Laredo v. Threadgill, 686 S.W.2d 734, 735 (Tex. App.—San Antonio 1985, no writ) (construing Texas Rule of Civil Procedure 239a which requires that the non-

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known address" constitutes error on the face of the record, requiring the foreign judgment be set aside.[423]

Similarly, the judgment creditor must make sure that the clerk physically notes the mailing of the notice of filing of foreign judgment on the court's docket sheet. Failure to do so constitutes error on the face of the record.

The second option for filing a foreign judgment in Texas is found in Section 35.005 of the Texas Civil Practice and Remedies Code. Under that section, the judgment creditor may mail notice of the filing directly to the judgment debtor and file proof of mailing with the clerk.[424] A clerk's lack of mailing of the notice of filing (non-compliance with Section 35.004) does not affect the enforcement proceedings, if proof of mailing by the judgment creditor has been filed.[425] So, the judgment creditor can take a "belt and suspenders approach" by: (1) having the clerk mail the judgment debtor the notice of filing of foreign judgment under Section 35.004, and noting that mailing on the docket sheet; and (2) mailing it to the judgment debtor himself under Section 35.005, and filing a notice of that mailing with the court clerk.

Another possible way to overturn a foreign default judgment authenticated in Texas is to show that the underlying judgment does not state that the foreign court determined it had personal and subject matter jurisdiction over the judgment debtor. Under Texas law, a judgment is void if it does not state that the court has both subject matter jurisdiction over the matter[426] and personal jurisdiction over the defendant.[427] Before rendering a judgment, a trial court must make a judicial determination of subject matter jurisdiction and ripeness for default.[428] The determination of personal and subject matter jurisdiction must be reflected by the trial court in

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defaulting party certify the defaulting party's "last known address" so that the clerk may mail notice of the judgment to the defaulting party).

423. *See* Jack H. Brown & Co. v. Northwest Sign Co., 665 S.W.2d 218, 221-22 (Tex. App.—Dallas 1984, no writ) (stating that "[a] judgment debtor cannot be expected to respond and take such measures as may be available to him to avoid enforcement of a foreign judgment unless the statutory requirements have been met").

424. TEX. CIV. PRAC. & REM. CODE ANN. § 35.005(a) (Vernon 1997).

425. *Id.* § 35.005(b).

426. Browning v. Placke, 698 S.W.2d 362, 363 (Tex. 1985) (per curiam).

427. McKanna v. Edgar, 388 S.W.2d 927, 930 (Tex. 1965).

428. Finlay v. Jones, 435 S.W.2d 136, 138 (Tex. 1968); Uvere v. Canales, 825 S.W.2d 741, 743 (Tex. App.—Dallas 1992, orig. proceeding).

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the record, usually in the judgment itself or on the docket sheet.[429] Subject matter jurisdiction will never be presumed and may not be waived.[430] In a direct attack on a default judgment, the court's jurisdiction must affirmatively appear on the face of the record in order for the judgment to withstand an attack on the merits.[431] If the trial court did not have subject matter jurisdiction, a default judgment signed by that trial court would be void as a matter of law.[432]

It is, therefore, error for Texas to give a foreign judgment full faith and credit if there is no evidence *on the face of the record* that the foreign court had jurisdiction to enter judgment against the judgment debtor.[433] A recitation in the judgment that the foreign court is a court of general jurisdiction, however, is sufficient to assert subject matter jurisdiction over the defendant.[434]

VIII. Procedures for Attacking Default Judgments in the Federal Courts

The method of setting aside a default judgment in federal court varies from that used in a state court. Rule 55(b)(1) of the Federal Rules of Civil Procedure directs the clerk of a federal district court to enter a default judgment on a liquidated sum upon request of the plaintiff and an affidavit proving the amount due.[435] Unliqui-

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429. *See* Primate Constr., Inc. v. Silver, 884 S.W.2d 151, 152 (Tex. 1994) (per curiam) (noting that the record must contain an affirmative showing of service of citation, independent of the recitals in the default judgment); *McKanna*, 388 S.W.2d at 930 (holding that jurisdiction based on substituted service must appear on the face of the record); Nueces County Hous. Assistance, Inc. v. M&M Res. Corp., 806 S.W.2d 948, 952 (Tex. App.—Corpus Christi 1991, writ denied) (construing the face of the record as not including motions filed after the default judgment was rendered).

430. McGuire v. McGuire, 18 S.W.3d 801, 804 (Tex. App.—El Paso 2000, no pet.).

431. *McKanna*, 388 S.W.2d at 929-30.

432. *See* Rogers v. Clinton, 794 S.W.2d 9, 11 (Tex. 1990) (orig. proceeding) (noting that a trial court's lack of jurisdiction over the subject matter is fundamental error).

433. *See* Robbins *ex rel.* Estate of Robbins v. Reliance Ins. Co., 102 S.W.3d 739, 746 (Tex. App.—Corpus Christi 2001, no pet.) (refusing to give full faith and credit to a Pennsylvania order that failed to show on its face that the Pennsylvania court had the power to order the relief requested), *judgment withdrawn by agreement, but opinion not withdrawn*, 2003 WL 1847115 (Tex. App.—Corpus Christi Apr. 10, 2003).

434. *See* Subaru of Am., Inc. v. David McDavid Nissan, Inc., 84 S.W.3d 212, 220 (Tex. 2002) (finding that "[c]ourts of general jurisdiction presumably have subject matter jurisdiction unless a contrary showing is made").

435. Fed. R. Civ. P. 55(b)(1).

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dated sums require an application for default judgment,[436] and upon application by the plaintiff, if the defendant has made an appearance in the action, the defendant shall be served with written notice of the application for a default judgment at least three days prior to the hearing.[437] Rule 54(c) provides that a "judgment by default shall not be different in kind from or exceed in amount that [was] prayed for in the demand for judgment."[438]

Rule 55(c) of the Federal Rules of Civil Procedure provides that "[f]or good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b)."[439] Rule 60(b) provides that the trial court may set aside a default judgment for reasons of "mistake, inadvertence, surprise, or excusable neglect."[440] The motion to set aside default judgment shall be made "within a reasonable time" and not more than one year from the date the default judgment was entered.[441] A Rule 60(b) motion does not affect the finality of the judgment, nor does it toll the time for appeal from a default judgment.[442] Because an appeal will lie from the denial of a Rule 60(b) motion, the defaulting party may have to pursue concurrent appeals seeking to overturn the same default judgment.

There are three primary factors to consider in determining whether good cause exists: (1) whether the default was willful; (2) whether setting it aside would prejudice the adversary; and (3) whether a meritorious defense is presented.[443] Other factors that may be appropriate for consideration in a particular case include whether the public interest was implicated, whether there was a significant financial loss to the defendant, and whether the defendant acted expeditiously in correcting the default.[444] The fact that a party will be required to prove its case is not the sort of prejudice that will operate to defeat a motion to set aside a default judg-

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436. FED. R. CIV. P. 55(b)(2).

437. *Id.*

438. FED. R. CIV. P. 54(c).

439. FED. R. CIV. P. 55(c).

440. FED. R. CIV. P. 60(b).

441. *Id.*

442. *See* Silas v. Sears, Roebuck & Co., 586 F.2d 382, 386 (5th Cir. 1978) (citing Federal Rule of Civil Procedure 4(a)).

443. CJC Holdings, Inc. v. Wright & Lato, Inc., 979 F.2d 60, 64 (5th Cir. 1992).

444. *See In re* Dierschke, 975 F.2d 181, 184 (5th Cir. 1992) (noting that the law favors the resolution of legal claims on the merits).

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ment.[445] Whether to relieve a defendant from a default judgment under Rule 60(b) rests within the sound discretion of the district court judge; thus, the standard of review is abuse of discretion.[446]

IX. Conclusion

As noted throughout this Article, the proper procedure for directly attacking a default judgment depends primarily on the amount of time that has elapsed since the signing of the default judgment. The Texas Supreme Court and Texas courts of appeals have, for the most part, provided consistent authority delineating the requirements for attacking default judgments by motion for new trial, restricted appeal, or petition for bill of review. Although the standards for vacating default judgments have typically been applied liberally, defaulting parties must exercise caution in pleading and proving the requisite elements of the pertinent procedure. In addition, both the defaulting and non-defaulting parties must consider the important issues associated with default judgments, including citation and service of process, jurisdiction, evidence supporting the causes of action and damages, and notice and knowledge of the signing of the default judgment.

445. *See* Gen. Tel. Corp. v. Gen. Tel. Answering Serv., 277 F.2d 919, 921 (5th Cir. 1960) (stating that no harm will be done by requiring a plaintiff to prove its case).

446. *See* Williams v. Brown & Root, Inc., 828 F.2d 325, 328 (5th Cir. 1987) (stating that the denial of relief must be "so *unwarranted* as to constitute an abuse of discretion" (quoting Seven Elves, Inc. v. Eskenazi, 635 F.2d 394, 406 (5th Cir. Unit A. Jan. 1981))).

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