

Civil Procedure - ▶ Tricky Issues

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Resources

- ▶ Civil Deskbook
- ▶ Administrative Proceedings Deskbook
- ▶ TRCP 500-510
- ▶ Civil Practice & Remedies Code
- ▶ www.tjctc.org
 - ▶ www.tjctc.org/SRL - for information packets

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What Happens When?

- ▶ You issue a citation, and never get a return of service back?

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Citation Issued, but No Return?

- ▶ If the citation has been issued, but no return of service has been filed, the court cannot move forward. Anytime the court cannot move forward on a case, it can be set on a dismissal docket (often called DWOP docket for “dismissal for want of prosecution”)
- ▶ At this docket, the plaintiff must give a reason why the case shouldn’t be dismissed.

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Citation Issued, but No Return?

- ▶ There is no set amount of time that a court must wait for a return of service.
 - ▶ Many courts wait 3-6 months
 - ▶ This is usually only an issue in cases with private process servers

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What Happens When?

- ▶ You get a return of service back, and the defendant never answers?

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Default Judgment - TRCP 503.1

- ▶ Generally, the plaintiff doesn't "automatically" win if the defendant doesn't answer within 14 days
- ▶ Instead, the case is now eligible for a default judgment hearing
- ▶ The court **cannot** give a default judgment if the defendant has answered, **even if** they answer late!

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Default Judgment Hearing

- ▶ In most cases, a default hearing must be held, where the plaintiff must prove its damages.
- ▶ No hearing is needed if the case is:
 - ▶ a debt claim case where the plaintiff filed proof of damages as required by Rule 508.3, or
 - ▶ a small claims case 'based on a written instrument' with proof of the instrument filed with the court.
 - ▶ See the Civil Deskbook for more info.

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Default Judgment Hearing

- ▶ The court doesn't set the hearing automatically, it is only set if the plaintiff requests the hearing, orally or in writing
- ▶ The court should send notice of the hearing to BOTH the plaintiff and defendant so that the parties have at least 3 days notice of the hearing - TRCP 501.4
- ▶ If the plaintiff doesn't appear, dismiss the case
- ▶ If the defendant doesn't appear, the judge hears the plaintiff's proof

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So Back to the Question

- ▶ If the defendant doesn't answer, but the plaintiff hasn't requested a default hearing, the court can set the case on a dismissal or DWOP docket at which time the plaintiff might request a default hearing.

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What Happens When?

- ▶ The court renders a default judgment and then receives the defendant's answer in the mail?

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Two Rules to Consider

- ▶ Mailbox Rule - something is considered filed the day that it is mailed as long as it is received within 10 days of that date
- ▶ Court must not render a default judgment if the defendant has already filed an answer.
- ▶ So if the court renders a default judgment on Mar. 7th, and then receives a defendant's answer postmarked Mar. 5th, the court should vacate the default judgment since the defendant already had answered by the time the default was rendered.

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What Happens When?

The defendant lives out of state?

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Service on Out-of-State Defendant

- ▶ It is up to the plaintiff to ensure any defendant is served, including an out-of-state defendant. They may use a process server, or seek to have the constable or clerk serve by certified mail.
 - ▶ If the clerk serves by mail, may ONLY charge reasonable amount for certified or registered mail, cannot charge the same “service fee” as constables.
- ▶ Who the citation is served upon will vary based on whether the plaintiff is suing a person or a company.

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Personal Jurisdiction

- ▶ Courts have two types of jurisdiction - subject matter jurisdiction and personal jurisdiction.
- ▶ The court has personal jurisdiction over the defendant unless and until a **special appearance** is filed with your court. If the defendant files a special appearance, the court will have to evaluate whether or not the defendant has necessary contact with the state to maintain personal jurisdiction.

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Personal Jurisdiction

- ▶ The special appearance must be filed with or before an answer, or the issue is waived by the defendant.
- ▶ The court has jurisdiction over an out-of-state defendant if the defendant has at least “minimum contacts” with Texas

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What Happens When?

- ▶ The petition in a debt claim case doesn't have all of the required info, but the defendant doesn't answer?

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Debt Claim Case Rules

- ▶ Rule 508 gives very specific information that must be included in a debt claim petition.
 - ▶ Why?
- ▶ If this information isn't present, the court has no authority to refuse to accept the case or issue the citation.

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Debt Claim Case Rules

- ▶ If the defendant files an answer after being served, the court shouldn't be concerned about the incomplete petition.
 - ▶ The defendant can file a motion to clarify if desired under TRCP 502.7
- ▶ But if the defendant doesn't answer, TJCTC recommends NOT rendering a default judgment due to improper notice.

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What Happens When?

- ▶ The person sues for the jurisdictional limit, but the case is worth more than that?

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What Are They Asking For?

- ▶ Jurisdiction is originally determined by the plaintiff's "good faith" pleadings. If those pleadings indicate they seek more than the jurisdictional limit, the court would have to dismiss for no subject matter jurisdiction.
 - ▶ Attorney's fees count toward the limit, court costs do not - TRCP 500.3.

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Can a Party Reduce its Claim?

- ▶ What if, upon review, the defendant owes more than the jurisdictional maximum but the plaintiff is asking for less?
- ▶ How the court proceeds depends on if the damages are "liquidated" or "unliquidated."
- ▶ Liquidated damages are clearly determinable based on a written instrument, such as a contract or promissory note.
- ▶ Unliquidated damages are not certain, such as damages from a car accident.

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Can a Party Reduce its Claim?

- ▶ If the damages are **unliquidated** (not certain), the party **can** reduce what they are seeking to under the limit get into the justice court's jurisdiction.
- ▶ If the damages are **liquidated and nonseverable** (meaning part of one single claim), the party **cannot**.

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Examples (assuming a \$10K max, changed to \$20K 9/1/2020)

- ▶ Bill is in a car accident with John. He has 3 repair estimates: \$9800, \$10.2k, \$10.8k.
 - ▶ He can file suit in justice court for \$9800.
- ▶ Jan lends Christie \$12,000 and they have a promissory note showing 6% interest. Christie has made no payments.
 - ▶ Jan cannot file suit in justice court for \$10,000.

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Examples (assuming a \$10K max, changed to \$20K 9/1/2020)

- ▶ Jan lends Christie \$12,000 and they have a promissory note showing 6% interest. Christie has made payments totaling \$5,000.
 - ▶ Jan can file suit in justice court for \$7,000 plus interest.
- ▶ Amber executes 4 contracts with Randy. In each, she will pay him \$3,000 to paint a house. He paints all the houses, but Amber pays him nothing.
 - ▶ Randy can file a single suit in justice court on 1, 2, or 3 of the contracts (and could file separate suits on each contract if desired).

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What Happens When?

The plaintiff dies?

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Suggestion of Death

- ▶ The plaintiff's heirs or executor may appear and enter a "suggestion of death", and they are made plaintiff and proceed in the case.
 - ▶ TRCP 151

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What
Happens
When?
The defendant dies?

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When There Is No Judgment Yet

- ▶ If the defendant dies before judgment, the defendant's heirs/executor can enter a suggestion of death, or the plaintiff can petition for a "scire facias" for the defendant's heir/executor to appear and may proceed against the heir/executor.
 - ▶ TRCP 152

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When There Was a Judgment

- ▶ If the judgment was for money, no execution can issue, but the money judgment would be part of probate.
- ▶ If the judgment was for property other than money, process can continue on the judgment after an affidavit has been filed with the court of the death and appointment of a representative.
 - ▶ TRCP 625-626

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What Happens When?

The lawsuit is for a piece of property instead of money?

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Writs of Sequestration - TRCP 696

- ▶ When a party is suing for possession of personal property, they may file an application for a **writ of sequestration**.
- ▶ This writ is an order for a piece of property to be held in the custody of the court until the court decides who should own it.
- ▶ This prevents the property from being lost, stolen, sold, damaged, or destroyed.

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Writs of Sequestration - TRCP 698

- ▶ A writ of sequestration is filed **pre-judgment**, so the plaintiff must put up a bond to protect the defendant, in case the defendant is deprived of the property but the court later determines the defendant is entitled to possession.
 - ▶ The judge has discretion to determine the bond amount.

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Writs of Sequestration - TRCP 699, 700a

- ▶ The writ is served on the defendant in any of the ways that a citation may be served, or informally under Rule 501.4.
- ▶ The constable (or sheriff) then takes the property into custody.
 - ▶ Occasionally, this can be very difficult (portable buildings, animals, etc.)

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Writs of Sequestration - TRCP 701

- ▶ Once the property is seized, the defendant has 10 days to post a **replevy bond**. This is a bond that allows the defendant to keep the property in their custody. If anything happens to the property, the plaintiff would get paid damages from this bond.
 - ▶ The bond amount is determined by the judge.

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Writs of Sequestration - TRCP 708

- ▶ If the defendant doesn't post a replevy bond within 10 days, the plaintiff then may post the replevy bond, and hold the property until the trial.
 - ▶ They cannot simply then dismiss their suit and walk away with the property.
 - ▶ This replevy bond is necessary if the plaintiff wants to hold the property, otherwise the court may not allow the plaintiff to hold the property before the judgment.

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Judgment for Personal Property

- ▶ A judgment for personal property must also contain a determination of that property's value. The judgment orders the person to turn over that property to the judgment creditor, but if the property is lost, stolen, damaged, etc., then the creditor can recover the value of the property.
 - ▶ Done by the jury if there is a jury, otherwise by the judge.

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“Special Writ” - TRCP 505.2

- ▶ Rule 505.2 says that to enforce judgments for possession of property, the court may issue a “special writ” for the seizure and delivery of this property. What is a “special writ”?
 - ▶ Some courts use a form called “writ of possession” - confusing because of eviction cases.
 - ▶ Others just use a form called “special writ for seizure and delivery of property.”
 - ▶ Still others use a “writ of execution for specific articles.”
 - ▶ The title isn't important as long as the writ directs the constable to do what Rule 505.2 says.

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What Happens When?

- ▶ The court renders an “agreed judgment” and then 30 days later the plaintiff wants to change it. They say you can issue a nunc pro tunc judgment.

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Plenary Power - TRCP 507.1

- ▶ Once a judgment is signed, the court can make changes to it for up to 21 days after the date the judgment is signed
 - ▶ Changing the judgment should be a very rare occurrence
- ▶ This power over a judgment is called ‘plenary power’
- ▶ Once the 21 days expires, the court cannot make any changes to a judgment

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Clerical Errors in the Judgment

- ▶ An exception to this limit is when a “clerk error” in the judgment needs to be fixed. What the judge announces in court is the “real” judgment, and the paper judgment can be changed to make sure it reflects the “real” judgment.
 - ▶ For example, the date is entered as 11/6/2019 instead of 2018
 - ▶ Or the judge awarded \$6000, but the paper judgment says \$600

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Judgment Nunc pro Tunc

- ▶ A judgment that corrects a clerical error is called a **judgment nunc pro tunc**.
- ▶ A judgment nunc pro tunc can be issued whenever the error is discovered, even if the court’s plenary power has expired.
 - ▶ Because the “real” judgment is what is announced in court, we aren’t changing the “real” judgment by issuing a nunc pro tunc.

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Judgment Nunc pro Tunc



Judgments nunc pro tunc **cannot** be used to correct legal errors in a judgment.



For example, say the judge thinks that contracts must be in writing. So she rules against a plaintiff who was suing based on an oral contract. She comes to school and learns that oral contracts are valid. Can she change the judgment?

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Judgment Nunc pro Tunc

- ▶ The court can't fix "clerical errors" by the parties with judgments nunc pro tunc.
- ▶ It is critical that courts read agreed judgments and verify that they are correct and legal **BEFORE** signing them.

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What Happens When?

- ▶ You receive a “writ of procedendo.”

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Writ of Procedendo

- ▶ In appeals from other courts, a “writ of procedendo” is an order from the higher court to the original court to “proceed on the judgment.”
- ▶ However, this doesn’t exist in appeals from justice court to county court, because the appeal is de novo, so the original judgment no longer exists.

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Writ of Procedendo

- ▶ If the appeal is perfected, the case can not come back to the justice court.
- ▶ It is important to remember that if the person fails to pay the filing fees at the county court, the rules say the appeal was never perfected, so the justice court judgment still exists and can be enforced.

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What Happens When?
The Judgment Creditor Wants an Abstract of
Judgment

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Abstract of Judgment - Prop. Code 52.001-.003

- ▶ What is an abstract of judgment?
 - ▶ A document that records facts about a judgment, that is placed in county records.
- ▶ What does an abstract of judgment do?
 - ▶ Creates a lien on real property (second home, land, investment property)
 - ▶ This means that if defendant sells the property, the buyer would be notified of the judgment and the defendant would have to pay with the profits of the sale

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Abstract of Judgment

- ▶ When can a party get an abstract of judgment?
 - ▶ Can be requested by judgment creditor as soon as the judgment is final
 - ▶ The abstract must be issued when requested, though it may make sense for the party to wait until they know there is no appeal. Why?
- ▶ There is a \$5 abstract fee per abstract
 - ▶ The party can get multiple abstracts, since they will need to file one with the county clerk in each county where they want to create a lien on property of the judgment debtor.

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How is the Abstract Prepared?

- ▶ By the court clerk
- ▶ The clerk fills in what information is provided to them
- ▶ The clerk does not research additional information
- ▶ Attorneys can create and file their own abstracts with the county clerk, without the justice court being involved

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What Happens When?

The judgment creditor wants a turnover order and appointment of a receiver?

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What is the Turnover Statute?

- ▶ CPRC 31.002: A court may “aid” a judgment creditor by:
 - Ordering a judgment debtor to “turn over” non-exempt property to a Constable or Sheriff to satisfy a judgment; or
 - **Appoint a receiver** with authority to take possession of non-exempt property, sell it and pay the proceeds to the judgment creditor.

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What Needs to be Shown for a Turnover Order?

- ▶ 1. The judgment debtor has non-exempt property that may be used to satisfy the judgment
- ▶ 2. The court that the application was filed in is a court of jurisdiction, which means either:
 - ▶ The court that issued the judgment, or
 - ▶ A court where a foreign judgment has been domesticated.

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What Happens Next?

- ▶ Up to the court whether to hold a hearing or notify the judgment debtor of the application.
 - ▶ Why might you notify them?
 - ▶ Why might you not notify them?
- ▶ Court can order the defendant to turnover any non-exempt assets to the judgment creditor.
 - ▶ Can also appoint a receiver to pursue collection of the judgment

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What Happens Next?

- ▶ Up to the court what duties the receiver has
 - ▶ Some proposed orders are VERY broad!
- ▶ Cannot order receiver fees up front
 - ▶ Could conditionally grant the fees, with a requirement to show they “earned” them afterward

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What Happens When?

The judgment debtor wants to pay part of the judgment?

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Partial Payments on Civil Judgments

- ▶ A judgment creditor has no obligation to accept partial payments on a judgment (unless, of course, they contracted to do so in a settlement agreement). If the judgment debtor offers partial payment, the judgment creditor can refuse, and interest will continue to accrue on the entire amount. The judgment debtor can only stop the accrual of interest by making what is called a 'valid tender' which must be unconditional and in the full amount of the obligation.

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Partial Payments on Civil Judgments

- ▶ If the judgment creditor does accept a partial payment, the 'declining principal' formula described by the Texas Supreme Court in *Brainard vs. Trinity Universal Ins. Co.*, 216 S.W.3d 809 (Tex. 2006) must be applied, meaning that the payment would first go to all interest that had accrued thus far, with any remainder going to the principal balance.
 - ▶ Going forward, interest would only accrue on the remaining principal.

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What Happens When?

The judgment creditor won't sign a release of judgment when the judgment debtor pays the judgment?

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Unclaimed Judgment - CPRC 31.008

- ▶ There is a process available for judgment debtors who either cannot locate the judgment creditor, or situations where the judgment creditor refuses to give a release of judgment.
 - ▶ Maybe they sued for \$10,000 and got \$2,000 and won't sign off unless they are paid \$10,000.

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Unclaimed Judgment - CPRC 31.008

- ▶ The debtor must first attempt to notify the judgment creditor by sending a letter by registered or certified mail to all last known addresses.
- ▶ If the judgment creditor does not respond by the 15th day after letter was sent, the debtor may file an affidavit with the court describing when and how the notice was sent.

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Unclaimed Judgment - CPRC 31.008

- ▶ They may then pay into the registry of the court that rendered the judgment the amount owed. Funds deposited with court must be held in the clerk's trust fund account.
- ▶ Payment **must** be in full.
- ▶ Debtor must prepare a recordable **release of judgment** to be executed by the judge or clerk.
 - ▶ A release of judgment is a document, usually issued by the judgment creditor upon payment, that says the judgment debtor is "released" from the judgment debt.

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What Happens When?

A judgment goes dormant?

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How Long is the Judgment Good For?

- ▶ A judgment is good for 10 years after it is issued.
- ▶ When a writ of execution is issued, it resets the clock, and the judgment is good for 10 years from that date.
 - ▶ This can happen over and over again!
 - ▶ Only writs of execution reset the clock, not garnishments, abstracts, or anything else!

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How Long Can Judgments Be Enforced?



If the 10 year clock gets down to 0 without a writ of execution being issued, the judgment cannot be enforced, and is called a “dormant judgment.”



A dormant judgment can be revived within 2 years of going dormant. The process to revive the dormant judgment is called a *scire facias*.



If the judgment remains dormant for 2 years, it is now dead and may not be revived.

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Scire Facias

- ▶ Scire facias, sometimes called scary faces, is an order by the court for the judgment debtor to come in and show good cause why the judgment should not be revived.

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Judgment Deadline Calculation

- ▶ A judgment is issued on October 29, 2015. If no writ of execution is issued, when would it go dormant? When would it die?
- ▶ Now the judgment creditor gets a writ of execution on September 1, 2019 and an abstract of judgment on January 15, 2020. Assuming nothing else happens, when would it go dormant? When would it die?

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