

LANDLORD'S RIGHTS AND OPTIONS WHEN THE DEAL GOES BAD

I. Straightforward Lease Violations – Kill the Wiggle Room

Whether a lease violation is “straightforward” usually depends on how succinctly your lease is drafted. Ambiguity is your enemy.¹ The mantra for you and/or your attorney to use when drafting a lease agreement is to “kill the wiggle room.” The more succinct and precise your lease agreement is, the more “straightforward” a violation of the lease will be to identify not only for property management personnel but also for a Judge.

A. Rent Payments and Other Charges – What, When, Where, and How Much.

The most straightforward and probably most common lease violation is the nonpayment of rent, and even this simple provision can be tricky. Every provision in a lease should be drafted with an eye towards the future of proving a violation before a Judge, and therefore, every provision (even the most mundane) should be drafted to remove any doubt in the Judge’s mind that an event of default has occurred.

Simple Rent. A simple lease involves a set monthly rent payments. The lease should provide the amount of the rent due and the date it is due, as well as the existence or non-existence of any grace-period. If a grace-period is going to be given relating to the due date of rent, then the grace-period should be stated very clearly in the lease agreement. For instance, “Late fees will not be assessed to any rent payment received ***within*** three ***Business Days*** of the ***Due Date***.” Note the bold and italicized words in the previous sentence. The importance of words, and more specifically “defined terms”

¹ *ASI Technologies, Inc. v. Johnson Equipment Co.*, 75 S.W.3d 545, 548 (Tex. App. – San Antonio 2002, writ denied) (“In Texas, a writing is generally construed most strictly against its author”) (quoting *Lumbermens Mut. Cas. Co. v. Carter*, 934 S.W.2d 912, 914 (Tex. App. – Beaumont, no writ).

within your lease agreement cannot be stressed enough. “Within” is important because it notes that the payment must be received “within” the time period. “Business Days” and “Due Date” have first letter capitalization because these terms should be defined in your lease. “Business Days” could be defined as Monday through Friday with the exception of federal holidays. “Due Date” should indicate exactly when the rent payment is due. Further, landlords may want to require that the rent payment is actually received in their office on the “Due Date” or within the “Grace Period” to avoid the tenant whose “check is in the mail.”

Complex Rent. More complex leases involve graduated rent payments, common maintenance payments, and rents based upon gross sales. Nevertheless, the rule remains the same, in order to have a straightforward lease violation you need to kill the wiggle room. In my opinion, the best way to be clear with graduated rent payments is to lay it out all on the table, or more specifically, lay out the graduated rental payments in a table. Almost every word processing program has the ability to insert a table into a document. A very simple graduated lease payment schedule may look like this:

DUE DATE	AMOUNT DUE
December 1, 2007	\$1,500.00
January 1, 2008	\$1,500.00
February 1, 2008	\$1,750.00
March 1, 2008	\$1,750.00
April 1, 2008	\$2,000.00

You may desire to list the graduated payments for a longer period without having to list each month's due date. For example instead of "December 1, 2007," you may desire to state "December 1, 2007 – January 31, 2007." The tricky part in this exercise is that if you are ending a rental payment period at the end of a month to insure you get the right date in the period (e.g. February 28 instead of February 29).

Miscellaneous and Complex Charges. Miscellaneous and Complex Charges included in lease provisions include: common area maintenance charges; additional rent assessed based upon gross sales; and the percentage of utility charge. For each charge in excess of rent, the lease should succinctly set forth how the additional charge is calculated, when the additional charge will be assessed and when it is payable, and any obligations the tenant has in assisting the landlord in calculating the amount due. For example, if you are drafting a provision for the collection of additional rent based upon gross sales the lease will need to define "gross sale" and how it is calculated. The lease should also set forth any records that the tenant must provide in order to assist the landlord in calculating the amount due, as well as the date upon which the materials are due to be delivered into the possession of the landlord. The more precisely these matters are stated in the lease agreement, the less likely there will be any question as to whether the failure to adhere to the provisions of the lease is an event of default.

B. Non-Monetary Defaults. Landlords often provide for various non-monetary defaults (i.e. an event of default that does not involve payment of rent or other charges) in their leases. Non-monetary defaults may include: violation of an ordinance and/or law; failure to maintain Regular Business Hours; disturbing other tenants; and/or default for convenience clause.

Define. Define every crucial term in your lease. If the tenant is supposed to maintain certain business hours, then it is absolutely necessary to define the business hours by day and time. It is without much doubt that every landlord desires to have tenants that abide by the laws of the land, and therefore, a landlord would also desire to have the ability to declare a tenant in default if the tenant violates a law. The tricky part for the landlord and/or landlord's counsel is to define what violation of law is an event of default under the lease. Considerations in defining a non-monetary default by a tenant for violation of a law can include: (1) the nature of the offense (i.e. crimes involving bodily harm, or sexual offenses); (2) the level of the offense (i.e. felony or misdemeanor); and (3) whether a simple arrest for the crime is sufficient for a non-monetary default, or will a conviction or guilty plea is required.

Waiver. Consistently turning a “blind-eye” to a non-monetary default, or any default for that matter, can endanger your right to claim the tenant has defaulted. The Texas Supreme Court has defined “waiver” as “an intentional relinquishment of a known right or intentional conduct inconsistent with claiming that right.”² No matter how succinct your lease agreement is, if you don't actually call the tenant on the carpet for violations of the lease agreement and the tenant can demonstrate that you knew about the breach but did nothing, a Judge may find that you have waived your right to claim a default at a later date for the same conduct. Of course, “non-waiver” clauses are helpful tools that should be built into the lease agreement to assist you in preventing a tenant from pleading and proving an affirmative defense of waiver.

² *Jernigan v. Langley*, 111 S.W.3d 153, 157 (Tex.2003) (citing *Sun Exploration & Prod. Co. v. Benton*, 728 S.W.2d 35, 37 (Tex.1987); *U.S. Fid. & Guar. Co. v. Bimco Iron & Metal Corp.*, 464 S.W.2d 353, 357 (Tex. 1971)).

Application. The application and/or enforcement of non-monetary default clauses need to be uniform. Patterns of ignoring certain monetary defaults of one protected class over another or patterns of enforcing certain non-monetary default provisions against a certain protected class of citizens can lead to discrimination suits, which can be long, expensive, and bad publicity. The best way to avoid any type of allegation is to establish a uniform application of non-monetary default provisions for all your tenants, if a default occurs and you know about it, send the notice.

II. Collecting Over Due Rent – Never Make a Threat You Can’t Back Up

Actually the title of this section should be “never make a threat, period.” The rent was due and your tenant didn’t pay, what to do? In most cases, less is more. Clearly, it is important to inform your tenant that the rent was due and remains unpaid, however, beyond insuring that the tenant knows that you did not receive the rent there isn’t much else you need to say. You may choose to inform the tenant that their failure to remit payment is a default under the lease, but remember that it is important to be succinct and to follow any notice requirements that you have in your lease.

Fair Debt Collection Practices. The Texas Fair Debt Collection Practice Act protects consumers (individuals whose obligations were incurred primarily for personal, family, or household purposes), and in this context, a residential tenant.³ The Texas Fair Debt Collection Practice Act protects consumers from various types of threats and/or coercion, including, but not limited to:

- a. using or threatening to use violence or other criminal means to cause harm to a person or property of a person;
- b. accusing falsely or threatening to accuse falsely a person of a fraud or any other crime;

³ Tex. Fin. Code § 392.001(1-2).

- c. representing or threatening to represent to any other person other than the consumer that a consumer is willfully refusing to pay an undisputed consumer debt when the debt is in dispute and the consumer has notified in writing the debt collector of the dispute;
- d. threatening to sell or assign to another the obligation of the consumer and falsely representing that the result of the sale or assignment would be that the consumer would lose a defense to the consumer debt or would be subject to illegal collection attempts;
- e. threatening that the debtor will be arrested for non-payment of a consumer debt without proper court proceedings;
- f. threatening to file a charge, complaint, or criminal action against a debtor when the debtor has not violated a criminal law.

These and other acts you can take to get yourself into trouble are set forth in the Texas Fair Debt Collection Practices Act.⁴ A very simplistic recitation of other potential violations include: (a) making the tenant's telephone ring at all hours and cursing at them for not paying their rent;⁵ and (b) attempting to collect fees and interest that are not provided for in the lease agreement.⁶ Hopefully you won't ever be faced with an employee who says "so what if I did" in response to your inquisition as to whether he or she engaged in any of the aforementioned conduct, but just in case you receive that response, or a similar response, the answer is that you are subject to both criminal and civil penalties.

A violation of the Texas Fair Debt Collection Practice Act is a misdemeanor, which is punishable by a fine of not less than \$100.00 and up to \$500.00 for **each offense**.⁷ Furthermore, the tenant has one (1) year to file these charges against you. In addition, the tenant is entitled to actual damages and attorneys' fees relating to their

⁴ Tex. Fin. Code § 392.301(a)(1-8).

⁵ Tex. Fin. Code § 392.302.

⁶ Tex. Fin. Code § 392.303(2).

⁷ Tex. Fin. Code § 392.402.

successful prosecution of their case.⁸ All of a sudden the fact that the Texas Legislature raised the jurisdictional limits of the Justice of the Peace Courts from \$5,000.00 to \$10,000.00 isn't such good news! Somewhat surprisingly, the civil penalties for violation of the federal fair debt collection practice act are capped at \$1,000.00 per violation, and reasonable attorneys' fees.⁹ While it is frustrating to lose money because a tenant has refused to remit payment for rent, following the rules will keep the money you do have in your pocket and out of your tenants' hands.

III. Tenant Abandonment of Leased Premises – A Photo is Worth a Thousand Words.

The Texas Property Code states that a tenant is presumed to have abandoned the premises if goods, equipment, or other property in an amount substantial enough to indicate a probable intent to abandon the premise, and is not within the tenant's normal course of business.¹⁰ There's just nothing like a bright-line standard like that to make enough wiggle room for a tenant to sue a landlord for illegal lockout and/or eviction. Clearly, the catch with "abandonment" is that there is no clear definition of the term in the Texas Property Code, which can be alleviated by "bright-line" contractual provisions setting forth business hours and other safeguards to insure that you don't have to rely on the Texas Property Code's definition of "abandonment." Attempting to draft abandonment clauses for residential tenancies are trickier as they may challenge public policy. After all, as long as the residential tenant is paying rent and (if required by the lease agreement) maintaining the apartment and/or house, it would be difficult to

⁸ Tex. Fin. Code § 392.403.

⁹ Title 15 U.S.C. § 1692(k).

¹⁰ Tex. Prop. Code § 93.002(d)

persuade a Justice of the Peace Judge that a tenant should be deemed to have abandoned their residence (people do take vacations).

If the lease agreement states that the tenant must be open during certain business hours, then it might be helpful to take a photo of the premise during the business hours in order to establish abandonment of the leased premises. Some of my clients have taken a picture with a witness holding that day's newspaper. The newspaper is to establish that the picture was taken on or after that day, and the witness in the photograph can also be used to testify regarding the abandonment of the leased premises. A picture also allows the Judge to be able to have as close to first-hand knowledge of the conditions at the premises that led the commercial landlord to the conclusion that the premise was abandoned. While establishing abandonment as a matter of law may require some foot work, it's a far cry from the work involved in dealing with the aftermath of abandoned property.

IV. Unclaimed Tenant Property – What Do You Do With This Stuff?

My clients always appreciate my thoughtful response of “it depends” to what they feel is a straight-forward question. In the case where my client is a landlord and their tenant has abandoned the premise before the lease term is up and personal property is left behind, the question comes up regarding what should be done with the personal property that was left behind. The answer is “it depends.” There are a few questions that will allow me to focus my answer to be more helpful. Is there any rent currently due? Was a forcible entry and detainer action filed against the tenant? My answer will vary depending on the answers to these questions.

Property Seizure Before Abandonment

The Texas Property Code provides that commercial and residential landlords have liens against personal property.¹¹ In a residential tenancy some of the tenant's property is exempt from your lien,¹² however, even if the tenant hasn't abandoned the premise, you can seize the property (if it can be done without causing a breach of the peace) and either have the tenant pay the past due rent or proceed to sell the property (if and only if such a sale is authorized by the written lease agreement). The sale of any property seized by a residential landlord must be sold according to the requirements set forth in the Texas Property Code.¹³ On the other hand, if a commercial landlord desires to seize property prior to abandonment by the tenant, a commercial landlord must file an application for a distress warrant, which requires the initiation of a lawsuit.¹⁴ The requirements for filing the distress warrant (which can lead to the judicial sale of the tenant's property) can be found in the Texas Rules of Civil Procedure.¹⁵ Eventually, both of these approaches will allow the residential and commercial landlord to recover past due rent from the sale of the tenant's non-exempt personal property.

Abandoned Property Within the Context of a FED Action

If a forcible entry and detainer suit has been filed but the tenant fails to appear or appears and loses, then the Court can order the property stored in a bonded or insured public warehouse.¹⁶ The issue with this provision of the Texas Property Code is that it is fairly impracticable. First of all, the warehouse will not be able to collect storage fees for the belongings until thirty (30) days after the personal property has been stored at the

¹¹ Tex. Prop. Code §§ 54.021; 54.041

¹² Tex. Prop. Code § 54.042

¹³ Tex. Prop. Code § 54.045(b-e)

¹⁴ Tex. Prop. Code § 54.025

¹⁵ Tex. R. Civ. P. 610

¹⁶ Tex. Prop. Code § 24.062

facility.¹⁷ This is due to the fact that the tenant has the right to reclaim their seized property within thirty (30) days of it being stored at the warehouse.¹⁸ The warehouseman's lien is effective only if the warehouseman actually moves the property and places it in storage, meaning that if the tenant shows up during the moving process but before the warehouseman has completed the move then the tenant can demand that the warehouseman release the belongings without payment of any fees to the warehouseman.¹⁹ After the property is placed in the storage facility, the tenant may redeem the property by paying the warehouseman's lien for moving and storage of the property,²⁰ with the exception of certain items that can be redeemed by the tenant within the first thirty (30) days after the items are stored by the warehouseman.²¹ Lastly, any property sold subject to a warehouseman's lien must be conducted in accordance with § 7.210 and subchapters D and F, Chapter 9 of the Texas Business and Commerce Code.²²

The best course of action is to be a vigilant landlord and to initiate pre-emptive action before the tenant actually abandon's the leased premises. After all seizing property that the tenant intends to take with them is more likely to get you paid than seizing property that the tenant did not deem important enough to take with them.

Truly Abandoned Property

What about personal property that is left behind when the tenant is long gone? First of all, it is important to note that (unless you've signed a subordination agreement) a landlord's lien, which is created by statute, is a priority lien interest.²³ However, and this

¹⁷ Tex. Prop. Code § 24.062(f)

¹⁸ Tex. Prop. Code § 24.062(e)

¹⁹ Tex. Prop. Code § 24.062(b)(2)

²⁰ Tex. Prop. Code § 24.062(b)(4-5)

²¹ Tex. Prop. Code § 24.062(f)

²² Tex. Prop. Code § 24.062(j)

²³ Tex. Bus. & Com. Code § 9.333.

relates back to my first question of whether there was any rent due, a lien must be supported by indebtedness.²⁴ Which is to say that if there isn't any rent or other fees due, then a landlord doesn't have a lien. As a landlord, you should address abandoned property in your lease agreement and assess charges against tenants who abandoned property in the leased premises even if the term of the lease has expired.

We have already discussed the requirements placed upon a residential landlord who is conducting the sale of property, however, we have not discussed the requirements the Texas Property Code places on commercial landlords who are attempting to sell a tenant's property. This is due to the fact that while the Texas Property Code authorizes the sale of a tenant's abandoned property, it does not dictate the manner in which the commercial landlord conducts the sale of the tenant's property. The Texas Property Code requires a commercial landlord to deliver a notice by certified mail to the tenant's last known address stating that after sixty (60) days any abandoned property may be disposed of.

For direction for the method and/or procedure to conduct the sale of a tenant's abandoned property, Article 9 of the Texas Business & Commerce Code provides guidance. As cited above, the Texas Business & Commerce Code recognizes liens created by statute, and a landlord's lien is just such a lien. The Texas Business & Commerce Code sets forth "commercially reasonable" standards for the disposal of collateral (in this case the abandoned property) secured by a lien.²⁵ The Texas Business & Commerce Code also mandates that any person obligated by the security instrument (in this case the lease) and all other lien holders be notified of the disposition of the

²⁴ *Satsky v. U.S.*, 993 F. Supp. 1027, 1029 (S.D. Tex. 1998, n.w.h.)

²⁵ Tex. Bus. & Com. Code § 9.610

collateral.²⁶ Commercial landlords who seize abandoned property that is subject to a lien for past due rent or other charges should follow the requirements of the Texas Business & Commerce Code to avoid any secondary litigation that could arise from the “commercially unreasonable disposition of collateral,” especially when the property that was seized is subject to other creditor’s liens.

Before and After the Sale.

Despite the fact that a landlord’s lien is almost always a senior lien to all other creditors (which is why lenders are always asking you to subordinate your lien to theirs), the simple fact that your lien is the most senior lien doesn’t mean you get to ignore junior lien holders and/or the defaulted tenant. Although it is rare that the value of the collateral seized will cover the past due rent and other charges owed by the tenant, in the event that the collateral does bring more at the auction block than that which is owed to the landlord, the landlord should know to whom he/she should distribute the proceeds of the sale of the collateral.

Generally stated, in order for a lien to be affective, it must attach and be perfected.²⁷ Most liens, other than possessory liens and liens that are created in collateral subject to a certificate of title, will be filed with either the County Clerk where the property is located or with the Texas Secretary of State. If you intend to conduct a sale of property seized from a tenant, it would be wise to determine how many other lien creditors may have a claim to the goods that you are proceeding to sell. If the collateral is sold for more than the debt owed by the tenant to the landlord, then the landlord is required by law to pay the surplus first to any subordinate lien holders, and then to the

²⁶ Tex. Bus. & Com. Code § 9.611

²⁷ Tex. Bus. & Com. Code §§ 9.203, 9.301

tenant.²⁸ Knowing what collateral is subject to a lien may be useful in planning the sale of the collateral in order to avoid the claims of subordinate lien creditors. A prudent landlord would sell all the collateral that is not subject to a subordinate lien so as to offset as much of the tenants debt as possible, and then sell collateral that is subject to subordinate liens.

The bottom line for a commercial landlord is to take the time to research the collateral to determine if there are any subordinate liens so that if the collateral sells for an amount in excess of the fees and rental payments the tenant owes, the commercial landlord will know who the surplus belongs to and can forward payment to that party's attention. Being aware of your fellow creditor's rights is key to fending off litigation when the commercial tenant departs unexpectedly.

V. Landlord's Right to Inspect Premise – After all it's Still Your Property, Right?

The Texas Property Code does not give either commercial or residential landlords a statutory right to enter a tenant's leased premise. Therefore, right to inspect the leased premise must be a right established in the lease agreement. The following is a non-exhaustive list of reasons you may want to list in your lease agreement for the tenant to be required to allow the landlord access:

- Responding to the tenant's request;
- Making repairs or replacements;
- Estimating repair and refurbishing costs;
- Performing pest control or doing preventive maintenance;
- Changing filters;
- Testing or replacing smoke detector batteries;
- Retrieving tools, equipment, or appliances;
- Preventing waste of utilities;
- Leaving notices;

²⁸ Tex. Bus. & Com. Code § 9.608

- Delivering, installing, reconnecting, or replacing appliances, furniture, equipment or security devices
- Removing or rekeying unauthorized security devices;
- Removing unauthorized window coverings;
- Stopping excessive noise;
- Removing health or safety hazards, or items prohibited by law or by the lease agreement;
- Removing perishable food stuffs in the event of an electricity outage;
- Removing unauthorized animals;
- Cutting off electricity as authorized by statute;
- Retrieving property owned or leased by former tenants;
- Inspection when immediate danger to person or property is reasonably suspected;
- Allowing authorized persons (as identified by the tenant in the lease agreement) access if the tenant dies or is incarcerated;
- Assisting and/or allowing a law enforcement officer to access the premise if the officer has a search and/or arrest warrant or is in “hot pursuit.”
- Showing premise to prospective tenant (after move-out or vacate notice has been given); and,
- Showing the leased premise to government inspectors, fire marshals, lenders, appraisers, contractors, prospective buyers, or insurance agents.

As previously stated, this list is not exhaustive. It is without much doubt that each landlord who has been in the business for any significant period of time could probably double the above-referenced list.

Sophisticated tenants will probably request that numerous contractual provisions providing the landlord an unfettered right of access be culled, and providing notice before some inspections will probably allay most tenants’ fears about their privacy being invaded by over-zealous landlords.

VI. Forcible Entry – Words that Don’t Mean What You May Think They Do.

Forcible entry is defined by the Texas Property Code as being “an entry without the consent of the person in actual possession of the property; an entry without the consent of a tenant at will or by sufferance; or an entry without the consent of a person

who acquired possession by forcible entry.”²⁹ Essentially, a “forcible entry” can be defined as the entry into a premise by a person without the legal right to do or with less legal authority than the individual currently occupying the premise. Without touching on the various criminal statutes that may be available to a landlord in this instance, a landlord may avail themselves of the Justice Courts to assist in the removal of the individual who committed a forcible entry and who refuses to leave (i.e. forcible entry and detainer). A landlord’s decision to avail himself/herself/itself of the remedies provided by the Justice Courts for forcible entry only makes practical sense if the landlord believes that the person currently occupying the premise is not “judgment proof.”

Seeking the eviction of a person who has acquired possession of a premise by forcible entry is not too dissimilar from evicting an actual tenant. The Texas Property Code provides that a person occupying a premise by way of forcible entry is entitled to three (3) days written notice before filing a forcible entry and detainer suit.³⁰ One of the differences between the notice given to a tenant and the notice given to a person committing forcible entry and detainer, is that the notice to a person committing forcible entry and detainer may demand immediate possession of the premise.³¹ Further, a tenant can also bring this action against a person who has committed a forcible entry against the tenant’s possession of the premise.

Although the definitions in the Texas Property Code are worded relatively poorly, a person who has acquired possession of a premise by way of forcible entry may be held liable for forcible detainer if they fail to surrender possession of the premise upon

²⁹ Tex. Prop. Code § 24.001

³⁰ Tex. Prop. Code § 24.005(c)

³¹ Tex. Prop. Code § 24.005(d)

demand.³² It is unclear whether a landlord can recover attorneys' fees related to an eviction predicated upon a forcible entry as the Texas Property Code seems to indicate that attorneys' fees are only available if certain notice is given to a *tenant* or when attorneys' fees are provided for in the lease agreement.³³ It is also unclear whether a landlord could obtain damages against a person who acquired possession of the premise by way of forcible entry, as the Texas Property Code provides for recovery of unpaid rent from a *tenant*.³⁴

It seems clear, however, that a forcible entry suit will normally occur between a tenant and another individual who is intruding upon the tenant's right to possession of the premise. Support for this conclusion is based upon the fact that the Texas Property Code will allow a landlord to substitute in for the tenant seeking to evict the person committing forcible entry if the tenant's lease expires.³⁵ Because the issue of damages is questionable, the only tangible benefit for a landlord to substitute in the place of a tenant is that the process to effectuate the eviction of the person committing forcible entry is already in motion, and therefore, the removal of the person committing forcible entry will likely occur at a faster pace. Thankfully, evicting a tenant is a much more certain and sound process.

VII. Evictions – Kicking the Tenant to the Curb.

With the exception of "convenience clauses," there are only two reasons landlords file forcible entry and detainer lawsuits against tenants. These reasons are: (a) breach of the lease, or (b) failure of a tenant to deliver possession of the premise upon expiration of

³² Tex. Prop. Code § 24.002

³³ Tex. Prop. Code § 24.006

³⁴ Tex. Prop. Code § 24.0051

³⁵ Tex. Prop. Code § 24.003

the lease term (i.e. “holding over”). A landlord must begin each eviction proceeding with a notice to vacate prior to filing an eviction suit, however, the length of time provided in the notice to vacate can be shortened if set forth in the lease agreement.³⁶

The Notice. The notice must be delivered to the premise, but can be delivered in a number of ways, including regular mail, certified mail, registered mail, or in person.³⁷ It should be noted that if the tenant is holding over, the landlord must comply with additional notice requirements.³⁸ If the notice is given in person it may be delivered to the tenant or any other person at the premises who is 16 years old or older, or by affixing the notice to the inside of the main entry door. Further, if conditions make it impossible or dangerous to affix the notice to the inside of the main entry door, then the notice may be affixed to the outside of the main entry door.³⁹ If your lease agreement does not provide for recovery of attorneys’ fees, then you should revise the three (3) day notice to vacate letter to an eleven (11) day notice to vacate that informs the tenant that the landlord will be entitled to recover attorneys’ fees if an eviction suit is filed.⁴⁰ Failing to provide a provision in the lease agreement for the recovery of attorneys’ fees coupled with a failure to provide an eleven (11) day notice to the tenant will result in the inability of the landlord to recover his attorneys’ fees for evicting the tenant. In any event, the prevailing party to a forcible entry and detainer action is always entitled to the costs of court.⁴¹

³⁶ Tex. Prop. Code § 24.005(a)

³⁷ Tex. Prop. Code § 24.005(f)

³⁸ Tex. Prop. Code § 91.001

³⁹ Tex. Prop. Code § 24.005(f)

⁴⁰ Tex. Prop. Code § 24.006(a)

⁴¹ Tex. Prop. Code § 24.006(f)

Obtaining Possession After the Win. A landlord who prevails in a forcible entry and detainer suit is entitled to a writ of possession.⁴² Generally, a writ of possession may not be issued before the sixth day after the date on which the judgment for possession is rendered, however, if the landlord files a bond for writ of immediate possession the writ can be issued and delivered the same day that the judgment is rendered.⁴³ The tenant has twenty-four (24) hours after the writ of possession is posted to deliver possession of the premise to the landlord; remove or allow the landlord's representatives to remove personal property not belonging to the landlord; and place the removed property outside the rental unit.⁴⁴

VIII. Landlord Lockouts/Illegal Evictions – Taking the High Road Can Save You Money.

Some tenants make the most patient landlords bristle with impatience to remove them from their property, but in this situation haste may not make waste, however, it may make a case. Both residential and commercial landlords may lock tenants out of the leased premise, however, the legal requirements to effectuate a legal lockout differ markedly. Commercial landlords have fewer requirements, and commercial lockouts tend to be more effective.

The Commercial Lockout. A commercial landlord may change the door locks on a premise when the commercial tenant is delinquent in at least part of the rent.⁴⁵ You may note that the statute does not provide for a lockout for non-monetary defaults of lease agreements, so unless your lease agreement provides for a lockout for non-monetary breaches of the lease agreement, don't attempt a lockout unless the tenant is

⁴² Tex. Prop. Code § 24.0061

⁴³ Tex. Prop. Code § 24.0061(b)

⁴⁴ Tex. Prop. Code § 24.0061(d)

⁴⁵ Tex. Prop. Code § 93.002(c)(3)

behind on the rent. In the event that a commercial landlord does perform a lockout, the commercial landlord must post a written notice on the tenant's front door stating the name address and telephone number of the individual or the company from which the new key may be obtained.⁴⁶ However, in contrast to the residential landlord, the new key is only required to be provided during the tenant's regular business hours **and** only if the tenant pays the delinquent rent.⁴⁷ The rights of the residential landlord differ remarkably.

The Residential Lockout. Residential landlords can also change the locks on the leased premise of a residential tenant,⁴⁸ but that's where the similarities end. Before the residential landlord can change the locks on the leased premise, he/she must warn the residential tenant that the locks are to be changed not less than five (5) calendar days if served by mail or three (3) calendar days if hand delivered.⁴⁹ This pre-emptive notice must state the earliest date that the landlord purposes to change the locks, the amount of rent the tenant must pay to prevent the landlord from changing the locks, the name and address of the individual or on-site management office at which the rent may be paid during the landlord's normal business hours.

After completing the pre-emptive notice, once the locks are changed the residential landlord must place a notice on the front door of the leased premises stating the an on-site location where the tenant can go twenty-four (24) hours a day to obtain the new key, or provide a telephone number that is answered twenty-four (24) hours a day to have a key delivered within two (2) hours after calling the number.⁵⁰ The notice must also inform the tenant that the landlord must provide the key at any hour regardless of

⁴⁶ Tex. Prop. Code § 93.002(f)

⁴⁷ *Id.*

⁴⁸ Tex. Prop. Code § 92.0081(b)(3)

⁴⁹ Tex. Prop. Code § 92.0081(d)(2)

⁵⁰ Tex. Prop. Code § 92.0081(c)(1)

whether the tenant pays any of the delinquent rent,⁵¹ and the amount of rent and other charges that the tenant is delinquent.⁵² Despite the fact that the residential landlord must provide a pre-emptive notice and then be available twenty-four (24) hours a day to give a delinquent residential tenant the new key to the leased premises, a residential landlord may not withhold the new key even if the residential tenant doesn't pay any portion of the past due rent.⁵³ As if the requirements of providing pre-emptive notice, twenty-four (24) access to the new keys, and the fact that a residential landlord cannot withhold delivery of the keys to the tenant even if they do not pay rent isn't enough to dissuade residential landlords from attempting to lockout their tenants; if the lockout is performed incorrectly, the tenant can recover possession of the premises and court costs for an unlawful lockout.⁵⁴ Commercial tenants are entitled to the same recovery as residential tenants.⁵⁵

The Unjust Eviction. If a landlord is unsuccessful in prosecuting a forcible entry and detainer action against a tenant, some tactical choices made when initiating the suit may come back to haunt the landlord. For instance, if a landlord has provided the eleven (11) day notice to a tenant that failure to surrender possession of the premise that the landlord may recover attorneys' fees in a forcible entry and detainer action or the lease agreement provides for the landlord's recovery of attorneys fees, then the tenant will be entitled to recover attorneys' fees from the landlord if the tenant has been wrongfully evicted.⁵⁶ Of course the prevailing party is also entitled to all costs of court as well.⁵⁷

⁵¹ Tex. Prop. Code § 92.0081(c)(2)

⁵² Tex. Prop. Code § 92.0081(c)(3)

⁵³ Tex. Prop. Code § 92.0081(f)

⁵⁴ Tex. Prop. Code § 92.009

⁵⁵ Tex. Prop. Code § 93.003

⁵⁶ Tex. Prop. Code § 24.006(c)

⁵⁷ Tex. Prop. Code § 24.006(d)

Beyond the recovery of attorneys' fees and court costs, it will not be a hard sell for a tenant's attorney to convince a Judge that a landlord's unlawful attempt to evict the tenant is a breach of the lease agreement. After all, isn't the tenant paying rent so that he/she/they can have quiet enjoyment of the leased premises? Tenants can be awarded damages against landlords for damages associated with the landlord's breach of the lease agreement,⁵⁸ and further, the judgment for damages creates a lien against the landlord's non-exempt property in the tenant's possession and a lien on rent due to the landlord from the tenant.⁵⁹ This provision of the Texas Property Code makes the tenant's job of collecting a judgment against a landlord fairly simple, if only the same could be said of the judgments that landlord's obtain against tenants.

IX. Enforcing Awards/Judgments – Is it Worth Pursuing?

At a very early stage of my career a partner at a firm I was working at said that there were three questions to ask every potential litigation client before filing suit: (1) is it real (meaning "is there a cause of action?"); (2) can we win (meaning, "is the lawsuit too speculative?"); and (3) is it worth it (a question always answered by the client). If you have a judgment (as implied by the title of this section), then we can safely assume that the answer to the first two questions are "yes." "Is it worth it" is the question that is always the most difficult to answer.

Judgments Against Individuals. Texas is a "debtor friendly" State. The Texas Property Code provides for a personal property exemption for families in the amount of \$60,000.00 and single adults in the amount of \$30,000.00.⁶⁰ These are some staggering figures, especially when you take into consideration that these figures are based upon

⁵⁸ Tex. Prop. Code § 91.004(a)

⁵⁹ Tex. Prop. Code § 91.004(b)

⁶⁰ Tex. Prop. Code § 42.001(a)

“fair market value” figures rather than being based upon the purchase price of the personal property. Simply put, the overwhelming majority of families or single adults are not going to have more than \$60,000.00/\$30,000.00 in personal property. The only positive news here is that these personal property exemptions do not trump landlord’s liens. Simply put, in a residential lease unless you seize the tenant’s personal property before they vacate the leased premises, it is highly unlikely that you will be able to collect your judgment by executing upon the personal property of a residential tenant. This is why the issuance of “writs of execution” against individuals is almost always unsuccessful.

The Texas Property Code also exempts wages and alimony, support, and maintenance payments from being garnished.⁶¹ However, this exemption does not apply to funds in a debtor’s bank account. The reasoning behind this is that once the funds reach the debtor’s bank account the nature of the funds change. The bank is indebted to the judgment debtor for the amount on deposit with the bank, and therefore, the deposits are not wages but a debt that the bank owes to the judgment debtor; these funds are subject to a writ of garnishment.⁶² While this option may sound tempting, there are some things to know before you attempt to execute a writ of garnishment on your former tenant’s bank accounts. The Texas Rules of Civil Procedure state that a garnishee (usually a bank or other financial institution) has the right to collect its attorneys’ fees expended in answering the writ of garnishment.⁶³ There isn’t a standard charge for what the garnishee’s attorneys’ fees are, but in my experience the fees can range from \$200.00

⁶¹ Tex. Prop. Code § 42.001(b)

⁶² See *Foreness v. Hexamer*, 971 S.W.2d 525, 527 (Tex. App. – Dallas, 1997 writ denied).

⁶³ Tex. R. Civ. P. 677; see also *Henry v. Insurance Co. of North America*, 879 S.W.2d 366, 369 (Tex. App. – Houston [14th Dist.], 1994 n.w.h.)

to \$2,500.00 and somehow magically vary with the amount of funds that are in the account. A fairly safe estimate for a garnishee's attorneys' fees is about \$1,000.00. This leads us back to the question of "is it worth it?" If there are sufficient funds available to cover the garnishee's attorneys' fees and satisfy a portion of the judgment, then the answer may be "yes." Note that a garnishor's attorneys' fees are not recoverable in a garnishment action.

Judgment creditors are also entitled to file an abstract of judgment, which essentially creates a lien against any real property owned by the debtor in which the abstract is filed.⁶⁴ The requirements of the abstract of judgment are set forth in the Texas Property Code.⁶⁵ Of course, the abstract of judgment cannot be levied against an individual's homestead.⁶⁶ Abstracts of judgment are useful if the judgment debtor owns real property in addition to his/her homestead. After filing an abstract of judgment, a judgment debtor can either passively or actively seek to collect on the abstract of judgment. Passively seeking to collect on an abstract of judgment means that you wait for the debtor to sell the real property, and, along with all the other lien creditors attached to the real property, take the proceeds of the sale of the property. Waiting can sometimes be hazardous. A senior lien creditor can foreclose its interest which would discharge your lien, or the debtor may just sit on the property and never sell it. If the judgment creditor desires to be more proactive, he/she can seek to foreclose the abstract of judgment by way of a judicial foreclosure. This involves filing a lawsuit and any foreclosure of an abstract of judgment does not discharge prior and/or senior liens, which

⁶⁴ Tex. Prop. Code § 52.001

⁶⁵ Tex. Prop. Code **Error! Main Document Only.**§ 52.002

⁶⁶ Tex. Prop. Code § 41.001

means that you will take the property subject to any other liens attached before yours and/or having priority over your abstract of judgment (e.g. tax liens).

One of the most under utilized collection tools (and especially so against commercial tenants) is the turnover order. The Texas Civil Practice & Remedies Code provides that a judgment creditor is entitled to aid from the Court to obtain satisfaction of his/her judgment against interests that cannot be levied upon by ordinary legal process, and is not exempt from attachment.⁶⁷ One of the biggest hammers in this statute is that it authorizes the Court to appoint a receiver over all of the judgment debtor's non-exempt assets so that the receiver can sell the assets to satisfy the judgment.⁶⁸ Other benefits include that the statute provides the Court with authority to enter injunctive relief against the judgment debtor,⁶⁹ the Court need not specifically identify the property that is subject to turnover in its order,⁷⁰ and the judgment creditor is entitled to an award of attorneys' fees against the judgment debtor for fees expended in filing and prosecuting the motion for turnover.⁷¹

While collecting judgments against debtors in Texas can be challenging, if you can master coupling the right collection tools to the debtor's assets collecting money judgments can be accomplished fairly efficiently and effectively. However, sometimes the defaulting tenant is "judgment-proof," which is a term commonly used by collection attorneys to describe a judgment debtor who has no non-exempt assets upon which to levy, attach, garnish, or turnover. The only thing you can do at that point is attempt to warn others of the defaulting tenant's bad behavior.

⁶⁷ Tex. Civ. Prac. & Rem. § 31.002

⁶⁸ Tex. Civ. Prac. & Rem. § 31.002(b)(3)

⁶⁹ Tex. Civ. Prac. & Rem. § 31.002(a)

⁷⁰ Tex. Civ. Prac. & Rem. § 31.002(h)

⁷¹ Tex. Civ. Prac. & Rem. § 31.002(e)

X. Fair Credit Reporting – Some Things are Better Left Unsaid.

Reporting a defaulted tenant to a credit reporting agency is not like to cause a defaulted tenant to run through your door with fistfuls of cash, but having the option to report a tenant to a credit agency may give some tenants cause to pause before defaulting on their lease agreement. Since this paper is directed towards commercial and residential landlords, I will not focus this portion of the paper on the requirements of credit reporting agencies but rather on the benefits and/or liability associated with making a report to a credit agency about a tenant who has defaulted under a lease agreement.

The requirements for reporting information to a credit reporting agency are set forth in Section 1681s-2 of Title 15 of the United States Code. The requirements are relatively simple. Don't lie, that is, do not provide information to a credit agency that you know is false.⁷² If you make a report that is inaccurate and the tenant disputes the veracity of the report, then you need to inform the credit reporting agency that the information is incorrect.⁷³ If the tenant disputes the accuracy of your report, then you need to inform the credit reporting agency that the tenant has disputed the accuracy of the report.⁷⁴ If you are going to provide information to credit reporting agencies, you must also have in place reasonable procedures to respond to notice of identity theft from the credit reporting agencies. You must also conduct an investigation each time the tenant disputes the information contained within your report and submit the results of the investigation to the credit reporting agency.⁷⁵ Failure to abide by these rules can subject you to civil penalties.

⁷² Title 15 U.S.C. § 1681s-2(a)(1)(A).

⁷³ Title 15 U.S.C. § 1681s-2(a)(1)(B).

⁷⁴ Title 15 U.S.C. § 1681s-2(a)(3)

⁷⁵ Title 15 U.S.C. §§ 1681s-2(a)(8)(E); 1681s-2(b)(1)

The penalty for willful noncompliance is actual damages of not less than \$100.00 and not more than \$1,000.00.⁷⁶ The penalty for willfully submitting inaccurate information is: actual damages or \$1,000.00, whichever is greater; punitive damages; and costs of court and reasonable attorneys' fees.⁷⁷ Surely none of us here would submit information under false pretenses, but what are the penalties if you're just careless?

The penalty for negligent noncompliance is: actual damages sustained by the consumer, and the costs of court and attorneys' fees.⁷⁸ My next comment is made not for the purposes of disparagement but rather for informational purposes only, there are a number of attorneys who make a living by suing creditors for violations of the Fair Debt Collection Practices Act and the Fair Credit Reporting Act. Whether reporting a tenant to a credit reporting agency is worth the effort and hassle, is a business decision that is up to each and every landlord to determine for himself, herself, or themselves.

XI. Questions?

It was a pleasure to have the opportunity to prepare this paper, I sincerely hope that the information provided herein will be useful to you in the future. It goes without saying that it is impossible to provide an in-depth analysis of every topic touched by this paper, as each and every sub-title could easily provide enough topical information to fill a paper four times this size. Nevertheless, it is my hope that this overview will assist you in obtaining a general sense of the topics covered herein. If you have any questions after the presentation, please do not hesitate to contact me.

⁷⁶ Title 15 U.S.C. § 1681n(a)(1)(A)

⁷⁷ Title 15 U.S.C. § 1681n(a)(1)(B)

⁷⁸ Title 15 U.S.C. § 1681o(a)