

**LEASE PROVISIONS AND ISSUES: PLANNING AHEAD
TO AVOID PROBLEMS**

I. Case Law and Legislative Updates.

Changes to Applications

Effective January 1, 2008, landlords must make available to applicants printed notice of the landlord's tenant selection criteria and the grounds for which the rental application may be denied, including the applicant's (1) criminal history, (2) previous rental history, (3) current income, (4) credit history, or (5) failure to provide accurate or complete information on the application form.¹ Further, the landlord must have the applicant sign an acknowledgement that the notice was made available, and if the acknowledgement is not signed, then the presumption is that the notice was not made available.² The Texas Property Code also sets forth the wording requirements for the notice.³ The notice must contain language that is substantially similar to the language set forth in the Texas Property Code. If the notice is included in the application itself then the notice must be underlined or in bold print.⁴ Failure to provide the notice makes it mandatory for landlords to return the application fee and any application deposit if the landlord rejects the applicant.⁵ This section of the Texas Property Code also requires the landlord to mail a refund of the application fee to the applicant at the address furnished by the applicant if the applicant requests the landlord to mail the refund.⁶

¹ Tex. Prop. Code § 92.3515(a)

² Tex. Prop. Code § 92.3515(b)

³ § 92.3515(c). (“Signing this acknowledgment indicates that you have had the opportunity to review the landlord's tenant selection criteria. The tenant selection criteria may include factors such as criminal history, current income, and rental history. If you do not meet the selection criteria, or if you provide inaccurate or incomplete information, your application may be rejected and your application fee will not be refunded.”)

⁴ § 92.3515(d)

⁵ § 92.3515(e)

⁶ § 92.3515(f)

Changes to the Right to Change Locks

Section 92.0081 of the Texas Property Code relating to the removal of property and exclusion of residential tenants has also undergone some important retooling. Specifically, subsection (d) was amended to provide that a landlord's right to change the locks on a tenant's individual unit (who is delinquent in paying rent) **only** if the lease agreement sets forth the landlord's right to change the locks because of the tenant's failure to pay rent.⁷ In short, if you want to be able to change the locks, you must include the right to change the locks of the tenant's premise in the lease agreement. Unfortunately, the revisions to this section of the Texas Property Code do not eliminate the futility of changing the locks to a tenant's leased premise. Further, the Texas Legislature has added additional requirements to the written notice that landlord's are required to provide before changing the locks to a tenant's leased premises. The notice must state, in underlined or bold print, that the tenant has the right to receive the key to the new lock at any time and regardless of whether the tenant pays the delinquent rent, and that a landlord who changes the locks or otherwise prevents a tenant from entering the tenant's leased premises may not change the locks or otherwise prevent a tenant from entering a common area of the residential rental property.⁸ Adding to the futility of changing locks, the Texas Legislature further denigrated a landlord's right to change the locks on a tenant who is delinquent in the payment of rent. Now a landlord may not change the locks while the tenant is in the leased premises, and the landlord must not change the locks on the leased premises more than once during a rental period.⁹ Beyond the futility of the act of changing locks, the statutory penalty for violating this section of

⁷ Tex. Prop. Code § 92.0081(d)(1)

⁸ Tex. Prop. Code § 92.0081(d)(3)(D – E-1)

⁹ Tex. Prop. Code § 92.0081(k)(1-2).

the Texas Property Code increased from \$500.00 to \$1,000.00 (the section still provides for the recovery of actual damages, court costs, and attorneys fees as well).¹⁰

Changes in Parking Rules for Multiunit Landlords

If a landlord of a multiunit complex is allowing a tenant to park in a specific space or common parking area, the landlord may require a tenant to provide only the make, model, color, year, license number, and state of registration of the vehicle to be parked.¹¹

If a landlord changes the vehicle towing or parking rules or policies during the term of the lease agreement, the landlord shall provide written notice of the change to the tenant before the tenant is required to comply with the rule or policy change.¹² Of course, the burden to establish that the tenant received notice of the policy change rests squarely on the landlord. The landlord may satisfy this burden by providing evidence that the (1) delivered the notice by certified mail, return receipt requested, addressed to the tenant at the tenant's dwelling; or (2) made a notation in the landlord's files of the time, place, and method of providing the notice and the name of the person who delivered the notice by hand delivery to the tenant or any occupant of the tenant's dwelling over the age of 16 years at the tenant's dwelling; facsimile to a facsimile number the tenant provided to the landlord for the purpose of receiving notices; or taping the notice to the inside of the main entry door of the tenant's dwelling.¹³

If a landlord changes the parking or towing policy during the term of the lease agreement, the change must apply to all of the landlord's tenants in the same multiunit complex and be based on necessity, safety or security of tenants, reasonable requirements

¹⁰ Tex. Prop. Code § 92.0081(h)

¹¹ Tex. Prop. Code § 92.0131(c-1)

¹² Tex. Prop. Code § 92.0131(d)

¹³ *Id.*

for construction on the premises, or respect for other tenants' parking rights; or be adopted based on the tenant's written consent; and may not be effective before the 14th day after the date notice of the change is delivered to the tenant, unless the change is the result of a construction or utility emergency.¹⁴

After adding additional notice requirements for landlords of multiunit properties to change their parking and/or towing policies, the Texas Legislature added civil liability to landlords who authorize the towing of a tenant's vehicle. If a landlord violates any part of Texas Property Code § 92.0131, then the landlord is liable for a civil penalty in the amount of \$100, plus any towing or storage costs that the tenant incurs as a result of the towing of the tenant's vehicle.¹⁵ Further, a non-prevailing party in a suit under this section is liable to the prevailing party for reasonable attorney's fees and court costs.¹⁶ If that wasn't enough, the Texas Legislature also made landlords liable for damage to a tenant's vehicle resulting from the negligence of a towing service that contracts with the landlord to remove vehicles that are parked in violation of the landlord's rules and policies if the towing company that caused the damage does not carry insurance that covers the damage.¹⁷

Changes in the Requirements for Late Fees

A landlord cannot charge a late fee without a notice that the late fee will be charged being included in the lease agreement.¹⁸ Further, the late fee must not be charged until the rent is more than two days late (the Texas Property Code states “after

¹⁴ Tex. Prop. Code § 92.0131(e)

¹⁵ Tex. Prop. Code § 92.0131(f)

¹⁶ *Id.*

¹⁷ Tex. Prop. Code § 92.0131(g)

¹⁸ Tex. Prop. Code § 92.019(A)(1)

the second day after the date the rent was original due”),¹⁹ and (this is the part that I cringe at the most) the fee must be a reasonable estimate of uncertain damages to the landlord that are incapable of precise calculation and result from late payment of rent.²⁰ Frankly, I am unaware of any formula to provide a “reasonable estimate” of “uncertain” damages that are “incapable of precise calculation” related to the late payment of rent. It would seem much more precise to say that the late fee must be “reasonable” and leave it at that.

The “late fee” can be broken into two types of fees, an initial fee and a daily fee. If you are going to charge an initial fee and a daily fee,²¹ be sure to delineate what the amount of each fee will be in your lease agreement. Do not compound the fees. If a landlord violates this section of the Texas Property Code, the landlord is liable to the tenant for: \$100.00; three times the amount of the late fee charged in violation of the section (another good reason not to compound your fees); and the tenant’s reasonable attorney’s fees.²² Unlike some statutory rights, a provision of the lease agreement purporting to waive liability or duty imposed by this section of the Texas Property Code is void.²³ Meaning that you can include a waiver in the lease agreement and it is unenforceable as a matter of law without any action having to be taken by the tenant to have the provision declared void.

Liability of the Landlord Relating to Bad Faith Failure to Refund an Application

The last amendment that will be discussed in this paper is Section 92.354, which has been altered slightly to specifically include “application fees” and “application

¹⁹ Tex. Prop. Code § 92.019(A)(3)

²⁰ Tex. Prop. Code § 92.019(A)(2)

²¹ Tex. Prop. Code § 92.019(B)

²² Tex. Prop. Code § 92.019(C)

²³ Tex. Prop. Code § 92.019(D)

deposits.”²⁴ The former code did not refer to “application fees” but only to application deposits. Consequently, now if a landlord wrongfully withholds an application fee or application deposit, the landlord will be liable for the sum of \$100.00, three times the amount “wrongfully retained” of the application deposit, and the applicant’s reasonable attorney’s fees in a suit to recover the deposit.²⁵ Further, your attorney can’t help you by inserting a waiver of the duties or the penalties associated with this provision either, as such a clause contained in an application notice is void as a matter of law.²⁶

This section of the paper should not be considered an exhaustive summary of the amendments that the Texas Legislature made during the 80th legislative session, however, it was intended to include the provisions most applicable to the largest number of landlords, commercial or residential.

II. Parties to the Lease.

In every lease agreement, a landlord wants to insure that they are contracting with who the tenant is purporting to be, and in a commercial setting, that the entity entering into the lease agreement actually has the authority to enter into the agreement. Taking steps to confirm the tenant’s identity will not only insure that the lease agreement is enforceable against that person, but will protect the landlord from being exposed to liability from the Fair Debt Collection Practice Act and the Fair Credit Reporting Act.

In a nightmare scenario the person signing the lease agreement has stolen someone else’s identity along with their checkbook. The thief fills out an application, presents a check, moves in, the check bounces, and the landlord proceeds to bring suit against the owner of the checkbook. In the meantime, the owner of the checkbook has

²⁴ Tex. Prop. Code § 92.354

²⁵ *Id.*

²⁶ Tex. Prop. Code § 92.355

filed a police report stating that the checkbook has been stolen. In proceeding against the owner of the checkbook, the landlord has violated the Texas Fair Debt Collection Practice Act.²⁷ If the lease agreement is considered void, then the landlord may be held liable for another violation of the Federal Fair Debt Collection Practices Act.²⁸ Generally, it is good business practice to attempt to confirm as much information about the tenant as you can by requesting to see and photocopy government issued identification cards and/or other photographic identification.

For the commercial landlord, the concerns are quite different. Determining who has the legal authority to bind a corporation, limited partnership, limited liability company, or trust can be difficult without the right tools. First of all, with the exception of limited liability partnerships and limited partnerships, most corporate entities have to be in good standing with the State of Texas in order to have the authority to transact business in the State of Texas.²⁹ Consequently, a corporation or limited liability company that has not paid its franchise taxes does not have the authority to conduct business in the State of Texas, and it could be argued, did not have the legal capacity to execute a lease agreement. An easy way to check the status of a corporation or a limited liability company is to request a certificate of account status from the Texas Comptroller's Office, which can be done on-line.³⁰

Legal capacity is also an issue when a landlord is attempting to make sure that the person(s) with proper authority execute the lease agreement. Generally speaking, the person or entity to execute the lease agreement on behalf of a limited partnership is the

²⁷ Tex. Fin. Code § 392.303(3)(C)

²⁸ Title 15 U.S.C. § 1692f(1)

²⁹ Tex. Bus. Corp. Act § 2.02

³⁰ <http://ecpa.cpa.state.tx.us/coa/Index.html>

general partner. The person and/or entity to execute the lease agreement on behalf of a corporation is a director and/or officer. The person(s) and/or entity(ies) to execute a lease agreement on behalf of a limited liability company is the managing member or the members (depending on whether the limited liability company is member managed or has a managing member). Some of this information regarding corporations and sometimes limited liability companies can be obtained on-line via the Texas Comptroller's Office when obtaining a certificate of accounts status. However, it is worth the \$1.00 per search charge to obtain an account with the Texas Secretary of State for access to the SOSDirect database that provides you with access to all corporate records filed with the Texas Secretary of State (with some limitations related to the age of the filing).³¹

A search on the SOSDirect database will provide you with information regarding the identity of the general partner of a limited partnership (the Texas Comptroller's Office does not provide this information), it will tell you whether a limited liability company is member managed or has a managing member, the identity of the directors and sometimes officers of a corporation, as well as a history of all documents related to that entity. Even with all this information at your finger-tips, if you are truly concerned about the authority of the person executing the lease, nothing cures that anxiety like a notarized corporate resolution or similar document evidencing the consent of the owners of the entity to become your tenant. Drafting these documents should be left to, or at the very least reviewed by, your attorney.

III. Guarantees.

Guarantees are only limited by the imagination of those who draft them. Guarantees can be limited to a certain amount, a certain timeframe, or to certain debts.

³¹ <http://www.sos.state.tx.us/corp/sosda/index.shtml>

Guarantees can be executed by individuals, corporations, limited liability companies, and almost any other legal entity. Guarantees can also be unlimited, they can be drafted to apply to debts not covered by the initial lease agreement.

Drafting a guaranty is fairly simple, but there are some elements that each guaranty needs to have in it. First, it needs to accurately identify the party(ies) to be bound by the guaranty. Second, it needs to state that by executing the guaranty the guarantors are benefiting from the landlord leasing the leased premise to the tenant (this will assist you in defeating challenges that the guaranty fails for “lack of consideration”). Third, it needs to accurately identify the debt that is guaranteed by the guarantors, whether it is unlimited or limited and whether the guaranty terminates for any reason or that it is perpetual. Fourth, unless you want difficulty asserting your right to collect against the guarantors, the guaranty should state that it is a guaranty of payment and not a guaranty of collection. This will assist you in avoiding having to chase the tenant to death, dissolution, or bankruptcy before seeking to collect from the guarantors. Fifth, the guaranty should state that the guarantors and tenant are jointly and severally liable for the debt identified in the guaranty. This will allow you to target the guarantor who is ripe for collection rather than having to proceed against all the guarantors.

IV. Assignment and Subletting.

A landlord's right to allow or refuse the assignment of a lease to another tenant or the subletting of a portion or the entire lease to another tenant is strictly within the privity of the landlord. The terms of the assignment and sublet provisions of a lease agreement can be as varied and complex as the lease itself. Generally, it is wise to keep the

following issues in mind before allowing the assignment and/or sublet of a lease agreement.

Approval. Whether the lease agreement is assigned or a subletting is allowed, it is generally prudent to include provisions relating to the assignment and/or subletting that clearly provide that the landlord has the sole discretion to approve or reject any proposed assignee or sublessee. A landlord is free to set forth any legitimate standards and/or approval criteria for assignees. **Liability.** The lease agreement should state whether the assignment and/or subletting has any affect on the liability of the original tenant and any guarantors of the lease. Failure to state this clearly in the lease agreement only allows for “wobble room” for the tenant, and “wobble room” (as described below in Section VI) is your enemy. It is fairly standard practice for landlords to require tenants and guarantors to retain liability on the lease agreement while the assignee/subtenant is in possession of the leased premises.

Assignments and subletting should be considered brand-new leases with the assignees and sublessees, and the agreements between the landlord and the assignee and/or sublessee need to be as extensive as the underlying lease with the initial tenant. The assignees and/or sublessees need to understand their obligations under the lease, and the initial tenant and/or guarantors need to acknowledge their continuing liability on the lease (if any).

V. Options to Renew/Extend – Expand/Terminate.

Options to Renew/Extend/Expand/Terminate should be given careful consideration before being included in a lease agreement. Option contracts are just that, contracts. Providing a tenant an option to renew/extend/expand/terminate can be very

detrimental to the landlord, and landlords should consider inserting various conditions precedent to the tenant's right to exercise an option in a lease agreement.

For instance, a tenant's right to expand the leased premise by acquiring the space occupied by another tenant may be qualified by limiting the tenant's right to exercise this option if, and only if, the other tenant (a) breaches or otherwise terminates the lease the landlord has with the other tenant, and (b) the tenant demonstrates the financial capacity to pay the additional rent associated with taking over the other tenant's space. A landlord may desire to limit the option contract to a definite period of time after a notice is given. For instance, if the landlord gives the tenant notice that there is space available for the tenant to expand, the tenant has ten (10) days to communicate its intent to exercise its option to expand, and thirty (30) days to provide additional financial information demonstrating its ability to pay the additional rent associated with taking over the additional space. The tricky part of drafting options to renew/extend/expand/terminate is to insure that you are not committing to provide the tenant with an option that, when the time comes, the landlord cannot or is not advantageous for the landlord to perform.

Renewals and extensions are basically synonyms in the lease business. Whether you are drafting a renewal or an extension, the renewal or extension needs to have the basic elements of a lease agreement contained within its terms. In my practice, unless I am advised by the client to the contrary, the renewal or extension contains a clause adopting by reference the provisions of the former lease into the renewal or extension so that the laundry list of obligations contained in the lease agreement do not have to be restated. Further, it is customary for renewals and extensions to contain a clause

specifically stating that unless the underlying lease agreement controls unless specifically modified by the renewal or extension agreement.

Surprisingly, termination agreements can be as flexible as any other provision of the lease agreement. Nothing in the Texas Property Code prevents a landlord including a termination provision in the lease agreement based solely upon the discretion of the landlord. Further, notices of termination are also completely negotiable, and can be as short or as long as the landlord and tenant agree.³² However, if a termination provision does not provide for a shorter termination notice, then the tenant will be entitled to not less than one rent period of notice before the lease agreement can be terminated.³³ For instance, if the rent period is a month-to-month, then the tenant will be entitled to one month's notice before the termination notice is affective.

Whether drafting an option to renew/extend/expand/terminate, the key is to include all the rights and responsibilities of the parties in the agreement so that there is as little ambiguity as possible. Ambiguity in a contract will subject a contract to be construed by a Judge, and while most Judges are fair, drafting a contract with clarity is much easier and less expensive than convincing a Judge that he/she should construe the provisions of a poorly written contract one way or another.

VI. Lease Drafting Considerations – Strive for a Straightforward Lease.

Whether a lease violation is “straightforward” usually depends on how succinctly your lease is drafted. Ambiguity is your enemy.³⁴ The mantra for you and/or your attorney to use when drafting a lease agreement is to “kill the wiggle room.” The more

³² Tex. Prop. Code § 91.001(e)

³³ Tex. Prop. Code § 91.001(b)-(c)

³⁴ *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).

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” 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 be 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.”³⁵ 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.

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.

VII. Fair Housing Act.

³⁵ *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. Binco Iron & Metal Corp.*, 464 S.W.2d 353, 357 (Tex. 1971)).

The stated policy of the Fair Housing Act is to provide for fair housing throughout the United States within the boundaries of the United States Constitution.³⁶ Essentially this act was codified to prevent the discrimination against members of a suspect class or quasi-suspect class. For the purposes of this paper, the focus will be on the affect the Fair Housing Act has on landlords and their leasing business.

The Fair Housing Act prohibits a landlord from refusing to rent or negotiate with a person based upon their race, color, religion, sex, familial status, or national origin.³⁷ With the exception of familial status, most of these characteristics are fairly evident. Familial status affords protection to individuals (one or more) who have not reached the age of 18 and are domiciled with either (a) a parent or another person having legal custody of such individual(s), or (b) the designee of such parent or other person having such custody, with the written permission of such parent or other person.³⁸ This protection also applies to pregnant women and individuals who are in the process of securing legal custody of an individual who has not attained the age of 18.³⁹ Discriminatory practices will not be viewed on a case-by-case basis, but instead, patterns can lead to the imposition of penalties for violation of the Fair Housing Act.⁴⁰ Notwithstanding the foregoing, isolated acts of discrimination are insufficient to prove a pattern or practice under the Fair Housing Act.⁴¹

The Department of Housing and Urban Development is the Federal Agency involved in enforcing the Fair Housing Act, and the penalties for violation of the Fair

³⁶ Title 42 U.S.C. § 3601

³⁷ Title 42 U.S.C. § 3604(a)

³⁸ Title 42 U.S.C. § 3602(k)(1-2)

³⁹ *Id.*

⁴⁰ *U.S. v. Big D. Enterprises, Inc.*, 184 F.3d 924, 930 (8th Cir. 1999) *cert denied*, 529 U.S. 1018, 120 S. Ct. 1419, 146 L. Ed. 2d 311, (2000)

⁴¹ *U.S. v. Balistreri*, 981 F.2d 916, 929 (7th Cir. 1992) *cert denied*, 510 U.S. 812, 126 L. Ed. 2d 28, 114 S. Ct. 58 (1993)

Housing Act are not insignificant. The Secretary of Housing and Urban Development is charged with investigating and notifying landlords that a violation of the Fair Housing Act has been alleged.⁴² The Secretary of Housing and Urban Development may commence and continue a case before an administrative law judge, however, if the respondent elects to refer the matter to be determined as a part of the civil action then the United States Attorney General's office is tasked with prosecuting the case.⁴³

The penalties for violation of the Fair Housing Act are capped if the action is commenced by the Secretary of Housing and Urban Development and proceeds to a hearing before an administrative law judge. If an administrative law judge finds that a respondent is found to have violated the Fair Housing Act and has not committed a previous violation, the maximum monetary penalty is \$10,000.00.⁴⁴ If the respondent has previously violated the Fair Housing Act once before within the previous 5-years before the filing of the charge, the maximum monetary penalty is \$25,000.00.⁴⁵ Further, if the respondent has previously violated the Fair Housing Act and has committed two or more discriminatory acts within the previous 7-years before the filing of the charge, the maximum monetary penalty is \$50,000.00.⁴⁶

The Secretary of the Department of Housing and Urban Development must refer the prosecution of a violation of the Fair Housing Act to the U.S. Attorney General's Office if the respondent elects to proceed in a civil action before a U.S. District Judge.⁴⁷ The election to proceed before a U.S. District Court must be made by the respondent

⁴² Title 42 § 3612

⁴³ *Id.*

⁴⁴ Title 42 § 3612(g)(3)(A)

⁴⁵ Title 42 § 3612(g)(3)(B)

⁴⁶ Title 42 § 3612(g)(3)(C)

⁴⁷ Title 42 § 3612(a)

within 20-days of the respondent's receipt of service, or the election can be made by the Secretary of the Department of Housing and Urban Development within the same time period.⁴⁸ A person has one year to file a complaint with the Secretary of the Department of Housing and Urban Development for a violation of the Fair Housing Act.⁴⁹ During the Secretary of the Department of Urban Development's prosecution of its case, the 2-year statute of limitations for a private person to bring a civil complaint for violation of the Fair Housing Act⁵⁰ is tolled for the period of time that a complaint is being investigated and/or prosecuted by the Secretary of the Department of Housing and Urban Development.⁵¹

Both the U.S. Attorney General and a private person may assert a cause of action for violation of the Fair Housing Act.⁵² The penalties for violation of the Fair Housing Act are not capped if the action is commenced by the U.S. Attorney General or a private person. The penalty for violation of the Fair Housing Act include, but are not limited to, actual damages, punitive damages, and attorneys' fees.⁵³ Consequently, while opting to proceed before a U.S. District Court may provide both (a) a slower resolution to the case, and (b) more stringent application of the rules of evidence and procedure; the potential for damages in the U.S. District Court is limited only by the reasonableness of the U.S. District Court Judge or the jury.

VIII. Special Circumstances: Public and Subsidized Housing, Mobile Homes

⁴⁸ *Id.*

⁴⁹ Title 42 § 3610

⁵⁰ Title 42 §§ 3613(a)(1)(A)

⁵¹ Title 42 §§ 3613(a)(1)(B)

⁵² Title 42 §§ 3613 and 3613

⁵³ Title 42 §§ 3613(c)

Landlords who provide housing for low-income individuals provide a service that can be rewarding on a moral level as well as a financial level. This paper will focus on how the low income housing program assists tenants who qualify for section 8 assistance. Section 8 assistance is available to those tenants whose incomes do not exceed 30% of the area median income.⁵⁴ The Secretary of Housing and Urban Development establishes the area median income.⁵⁵

Landlords who provide low income apartments must maintain certain housing quality requirements set forth by the Secretary of Housing and Urban Development.⁵⁶ The leased premise is also subject to an annual inspection to insure the quality of the housing meets federal standards.⁵⁷ Further, rent is capped, generally, at 10% above the fair market rental for the area of in-kind properties, which is established by the Secretary of Housing and Urban Development.⁵⁸ The maximum monthly rent must include utilities, maintenance charges, and all management charges for the rental unit.⁵⁹ The rate level for monthly rent as well as the family's income are reviewed annually so that adjustments can be made to the amount of assistance provided by the federal government.⁶⁰ Landlords of low-income residents are also subject to certain restrictions for evicting low-income residents.⁶¹ Legitimate bases for eviction include repeated breaches of the lease agreement, domestic violence or dating violence, and drug related criminal activity (subject to certain limitations).

IX. Liquidated Damages and Frequently Contested Issues

⁵⁴ Title 42 U.S.C. § 1437n(c)

⁵⁵ *Id.*

⁵⁶ Title 42 U.S.C. § 1437d(f)

⁵⁷ Title 42 U.S.C. § 1437d(f)(3)

⁵⁸ Title 42 U.S.C. §1437f(c)(1)(A)

⁵⁹ Title 42 U.S.C. §1437f(c)

⁶⁰ Title 42 U.S.C. §1437f(c)(2)

⁶¹ Title 42 U.S.C. §1437f(d)(1)(B)(ii – v)

Liquidated damages can be hard to enforce, especially, if there is not a rational basis for the imposition of a liquidated damages clause. A liquidated-damages clause is valid if (1) the harm caused by the breach is incapable of being estimated or is difficult to estimate at the time of the agreement, and (2) the amount of the liquidated damages is a reasonable forecast of just compensation.⁶² It may be necessary to go to trial to have the jury establish the damages to be covered by the liquidated damages provision before the Judge will be able to make the legal conclusion whether liquidated damages are reasonable.⁶³ This two prong test is sometimes referred to as the “penalty analysis” or the “anticipated-harm test.” If the Judge finds that the liquidated damages clause is a penalty to punish the party breaching the contract versus an actual estimate of potential damages, then the liquidated damages provision will be held invalid as a penalty. There must also be evidence related to the difficulty of estimation and the reasonableness of the forecast of the damages related to the liquidated damages clause.⁶⁴ If evidence of either of these prongs is lacking then the liquidated damages clause will be held invalid.⁶⁵

Liquidated damage clauses, however, should not be abandoned simply because of their evidentiary requirements. To the contrary, liquidated damages clauses can be used to assist landlords in recouping some of the costs associated with efforts they must take to mitigate their damages. Liquidated damage clauses can be used to offset broker fees, advertising costs, costs associated with bringing a rental space up to code, and other costs that the landlord will incur in an effort to remarket and/or refurbish the property. When including a liquidated damages provision in a lease agreement, make sure that you have

⁶² *BMG Direct Mktg. v. Peake*, 178 S.W.3d 763, 766 (Tex. 2005)

⁶³ *See R. Conrad Moore & Assocs. v. Lerma*, 946 S.W.2d 90 (Tex. App. – El Paso 1997, writ denied)

⁶⁴ *See Baker v. International Record Syndicate, Inc.*, 812 S.W.2d 53 (Tex. App. – Dallas 1991, no writ)

⁶⁵ *See Arthur’s Garage, Inc. v. Racal-Chubb Sec. Sys.*, 997 S.W.2d 803 (Tex. App. – Dallas 1999, no writ)

an idea of what those costs are so that the provision can be reasonably related to the costs associated with remarketing the property. Furthermore, keep track of all costs associated with remarketing the property after a tenant has breached, in case the tenant attempts to attack the liquidated damage clause as a penalty clause.

X. Q&A

It was my intent that this paper provide some guidance to landlords in operating their businesses, although I also recognize that it is impossible for me to answer every possible question or provide guidance in every conceivable situation that landlords face on a day-to-day basis. Nevertheless, if you have any questions regarding the content of this paper or if you run into a unique situation and you would like some guidance, please do not hesitate to contact me. Michael H. Myers, MYERS WILSON P.C., 16660 Dallas Parkway, Suite 2500, Dallas, Texas 75248; telephone #: (972) 248-8080; facsimile #: (972) 248-8088; e-mail address: michael@myerswilson.com.