

LANDLORDS AND TENANTS GUIDE

SPECIAL REPORT

Nº 866

REVISED APRIL 2002

JUDON FAMBROUGH • ATTORNEY AT LAW

Landlords and Tenants Guide

Judon Fambrough
Attorney at Law



April 2002

© 2002, Real Estate Center. All rights reserved.



Landlords and Tenants Guide

Contents

iii	Foreword
1	Residential Landlord's Duty to Repair
8	Retaliation
10	Residential Landlord's Duty to Return Security Deposits
14	Rental Application Deposits
15	Residential Landlord's Duty to Install, Inspect and Repair Smoke Detectors
19	Residential Landlord's Liability for Utility Cutoffs and Interruptions
20	Miscellaneous Landlord-Tenant Topics <ul style="list-style-type: none">Advanced Notices for Terminating LeasesTerminating Leases for Criminal ConvictionTenant's LienMCE CurriculumSubletting and Finding Replacement TenantsTenants' InsuranceTenants' Right to Protest Property Taxes
23	General Provisions Relating to the Residential Landlord-Tenant Relationship <ul style="list-style-type: none">Landlord's AgentsBad Faith and HarassmentWaivers and VenueCash Rental PaymentsOccupancy Limits for AdultsLandlord's Duty to Mitigate DamagesNotices Sent to Tenant's Primary ResidencePolicy Changes by LandlordCare of Deceased Tenant's Personal Property and Security Deposit
27	Removal of Property and Lockouts
30	Residential Landlord's Duty to Install and Maintain Security Devices
37	Residential Landlord's Duty to Disclose Ownership and Management of Rental Unit
39	Public Nuisances at Multiunit Residential Property
41	Residential Landlord's Lien
43	Landlord's Right to Evict Tenants

Contents

49	Covenant for Quiet Enjoyment and Constructive Eviction
51	Residential Rental Locators
52	Telecommunications
54	Swimming Pool Enclosures
56	Pool Yard Enclosures
63	Ascertaining the Criminal History of Employees of Residential Dwelling Projects
66	Towing Vehicles from Parking Lots and Public Roadways
72	Federal and State Statutes Affecting Residential and Commercial Tenancies <ul style="list-style-type: none">Soldiers' and Sailors' Civil Relief Act of 1940Fair Housing Amendments of 1988Pesticide ApplicationWarning of Lead-based Paint or HazardsStatute of FraudsContract Addendum for Disclosure of Information on Lead-based Paint Hazards
77	Commercial Tenancies
85	Submetering Commercial Property
88	Landlord's Lien on Commercial Buildings
89	Self-Service Storage Facility Liens
92	Mediation <ul style="list-style-type: none">Agreement for Mediation
94	Glossary

This report is for information only; it is not a substitute for legal counsel.

Foreword

Income-producing property plays a major role in Texas real estate. Central to much of this property is the landlord-tenant relationship. Significant legislative changes have been made in recent years.

One basic rule of English common law was that a tenant's duty to pay rent was independent of the landlord's duty to repair without an agreement or statute to the contrary. The lease was regarded as a conveyance in land, subject to the doctrine of *caveat emptor* ("let the buyer beware"). The landlord was required to deliver only the right of possession. The tenant, in return, was required to pay rent as long as possession was retained, even if the building was destroyed or became uninhabitable.

Texas courts and legislators have attempted to soften the harshness of this rule. The first major relief came in 1978, when the Texas Supreme Court established an implied warranty of habitability on residential landlords (*Kamarath v. Bennett*, 568 S.W. 2d 658 [Tex. 1978]).

In 1979, Texas legislation effectively extinguished the implied warranty by enacting Subchapter B of Section 92 of the Texas Property Code. As stated in that subchapter, the law replaced existing common law (case law) and other statutory law, warranties and duties of residential landlords for maintenance and repair of rental units.

More changes were enacted in 1993. Most significant was the replacement of subchapter D with new provisions requiring the installation of certain security devices in residential units. The failure of the landlord to comply allows the tenant to unilaterally terminate the lease. Also, another new law permits employers in

multiunit complexes to inquire about and verify the criminal history of current and prospective employees.

In 1995, new laws were added concerning the licensing of residential rental locators, the abatement of nuisances at multiunit residential property, the installation of telecommunications equipment on rental property and required educational courses dealing with landlord-tenant issues. In 1997, the 75th Legislature required landlords to mitigate damages when a tenant moves out early. Also, the legislators raised the maximum amount for the repair-and-deduct statutes to \$500 or one month's rent, whichever is greater.

This report discusses the various subchapters of the Texas Property Code, the Texas Local Government Code, the Texas Health and Safety Code, the Texas Human Resources Code, the Texas Government Code, the Texas Civil Practices and Remedies Code and also Articles 6701g-2 and 6573(a) of the Texas Civil Statutes as amended, as each applies to residential and commercial tenancies.

Because of the number of recent amendments, many sections lack case law to construe and clarify meaning and application. This is particularly true of laws dealing with security devices, pool yard enclosures and towing vehicles. To make the statutes more understandable, the language has been changed to lay terms when possible.

Landlords and tenants alike should be aware of the current statutes. For landlords, the awareness is critical; knowledge helps avoid liability. Tenants, on the other hand, need to know the law so they can preserve, protect and claim their rights and remedies.

Residential Landlord's Duty to Repair or Close Leasehold: Subchapter B, Chapter 92, Texas Property Code

Subchapter B is significant to residential landlords and tenants. Under the former implied warranty of habitability, the landlord was obligated to make the premises habitable throughout the lease term. The duty arose automatically without the tenant taking any initiative. **However, under the present legislative standard, the tenant must inform the landlord of a problem before the repair obligation arises.**

Each section of Subchapter B is discussed in the order that it appears in the statutes, beginning with Section 92.051 and ending with Section 92.061. The focus is primarily on **what the landlord must repair, what the tenant must do to invoke the landlord's duty to repair and what the tenant's options are if the landlord fails to repair.**

The statutes addressing landlord retaliation, Sections 92.057 and 92.059, have been moved to Subchapter H, Sections 92.331 through 92.334, effective January 1, 1996.

Which leases are affected?

The subchapter affects **all residential leases executed, entered, renewed or extended on or after September 1, 1979** (Section 92.051). Obviously, amendments added after 1979 became effective as specified by the enabling legislation.

Which conditions must landlords repair?

Section 92.052 sets the basic premise for the subchapter. The landlord must make a diligent effort to repair any condition that materially affects the health or safety of an ordinary tenant if the tenant

- has specified the condition in a notice to the person who collects rent or to the place where the rent is normally paid and
- is current in rent payments when the notice is given.

The notice must be in writing only if the written lease so requires. As a practical matter, all notices should be in writing and either delivered in person or sent by certified mail, return receipt requested. Otherwise, proving that notice was served may be difficult. If delivered, some verification such as a witness or a written acknowledgment from the recipient is needed.

Which conditions need not be repaired by the landlord?

Unless the problem is caused by normal wear and tear, the landlord has no duty to repair conditions caused by:

- the tenant
- a lawful occupant of the apartment
- a member of the tenant's family
- a tenant's guest or invitee

Finally, the landlord is not required to furnish utilities from a utility company if the utility lines are not reasonably available. The landlord is not required to furnish security guards (Section 92.052[b]).

The phrase *normal wear and tear* is defined as "deterioration that results from the intended use of a dwelling . . . but the term does not include deterioration that results from negligence, carelessness, accident or abuse of the premises, equipment or chattels by the tenant, by a member of the tenant's household, a guest or invitee of the tenant (Texas Property Code, Section 92.001[4]).

Who has the burden of proof?

Normally, in a judicial proceeding, the tenant must prove that the landlord failed to repair or remedy a condition that materially affects the health or safety of an ordinary tenant (Section 92.053). However, the landlord must assume this burden if the tenant can show that

- reasonable time has elapsed since the initial notice to repair was given,
- a subsequent written notice was given to the landlord demanding an explanation for the delay and
- the landlord failed to make the repairs or give a written explanation for the delay within five days after the second demand notice was received.

The major problems are determining what constitutes an unreasonable delay and what constitutes a nondiligent effort to repair. Some guidelines are provided later in Section 92.056. Furthermore, if repairs are not made by the landlord, the tenant has three options, but only one involves judicial action. Consequently, shifting the burden of proof is important only to tenants who seek the judicial remedies discussed later.

How does casualty loss affect repair obligations?

The landlord has no duty to repair following a casualty loss such as that caused by fire, smoke, hail or explosions **until the landlord receives the proceeds for an insured casualty** (Section 92.054).

Until the repairs are actually completed, however, either the landlord or tenant may terminate the lease by giving to the other a written notice whenever the casualty loss

- rendered the unit totally unlivable and
- was not caused by the negligence or fault of the tenant, a member of the tenant's family, a guest or invitee of the tenant.

If the lease is so terminated, the tenant is entitled to a pro rata refund of rent from the date the tenant moves out and to a refund of any security deposit required by law.

If the unit is rendered **partially** unusable for residential purposes from a casualty loss not caused by the negligence or fault of the tenant, a member of the tenant's family, a guest or invitee of the tenant, the tenant is entitled to a proportionate rent reduction upon a judgment of a county or district court. Although this alternative entails a judicial proceeding, in practice it rarely occurs. However, the landlord and tenant may agree to nonjudicial, proportionate rent reduction measures in the lease.

When may the landlord close a unit?

Basically, the landlord has the right to close a unit by giving written notices announcing that the landlord is terminating the tenancy as soon as legally possible, and, after the tenant moves, the landlord will either demolish the unit or no longer use it for residential purposes. Notices must be sent by certified mail, return receipt requested, to the tenant, to the local health officer and to the local building inspector (Section 92.055).

After the tenant leaves, the landlord may not allow reoccupancy or reconnection of utilities by a separate meter within six months. Likewise, neither the local health officer or building inspector may allow reoccupancy or utility service by a separate meter to the rental unit until all known conditions that materially affect the physical health or safety of an ordinary tenant have been repaired or remedied.

If the landlord gives the tenant the closing notice before the tenant gives the landlord a repair notice, the landlord has no liability to the tenant. If the tenant's notice to repair precedes the landlord's closing notice, the tenant's monetary recoveries include:

- actual and reasonable expenses;
- pro rata refund of any unused, prepaid rent;
- return of the security deposit less any proper deductions;
- one month's rent plus \$500;
- actual damages; and
- court costs and attorneys' fees, excluding any attorneys' fees for personal injury.

The statutes interject two important qualifications to this provision. First, the first three recoveries

apply only if the tenant moves out before the end of the lease term. Second, the closing of one or more units is permitted without closing the entire apartment complex.

Sections 92.056 and 92.0561 were amended by the 75th Texas Legislature. Both sections apply to residential leases entered or renewed on or after January 1, 1998.

It is the author's opinion that by complying with the procedures outlined below, the tenant fulfills both the old and new statutory requirements for repairing and deducting from rent. **However, the most the tenant may deduct is one month's rent for unrenewed leases entered before January 1, 1998.**

At what point does the landlord become liable for not doing repairs after being notified by the tenant?

Section 94.156(b) lists several requirements for creating landlord liability for nonrepairs, based on how the tenant gave the notice to the landlord.

If the tenant notifies the landlord in person or in writing, the landlord becomes liable when all of the following are true.

- The notice is given to the person to whom the tenant normally gives rent payments to repair or remedy a condition.
- The condition materially affects the physical health or safety of an ordinary tenant.
- The tenant gives a second notice **in writing** to repair or remedy the condition after a **reasonable time** elapses.
- The landlord has had a reasonable time to repair or remedy the condition after receiving the second notice.
- The landlord does not make a diligent effort to repair or remedy the condition after receiving the second notice.
- The tenant was not delinquent in rent at the time the notice(s) were given (Section 94.156[a]&[b]).

If the tenant initially notifies the landlord by certified or registered mail, the landlord becomes liable when all of the following are true.

- The tenant notifies the landlord to repair or remedy a condition by certified mail, return receipt requested or by registered mail. The notice is sent to the person to whom the tenant normally gives rent payments.
- The condition materially affects the physical health or safety of an ordinary tenant.
- The landlord has had a reasonable time to repair or remedy the condition after receiving the notice (by certified or registered mail).
- The landlord has not made a diligent effort to repair or remedy the condition after receiving the notice (by certified or registered mail).

- The tenant was not delinquent in rent at the time the notice was given (Section 94.156[a]&[b]).

What is considered a *reasonable time* for making repairs?

According to Section 92.056(d), a rebuttable presumption exists that seven days is a reasonable time to make repairs. Factors rebutting the presumption include the:

- date the landlord **receives** notice,
- severity and nature of the condition and
- the reasonable availability of materials and labor, and also the availability of utilities from the utility company.

When is the notice *received* for purposes of calculating the seven days?

Notice is deemed received by the landlord when the landlord's agent or employee physically receives it or when the U.S. Postal Service attempts delivery (Section 92.056[c]).

If the six factors are met, are there exceptions when the landlord still does not have to make repairs?

The landlord still has no obligation to repair or remedy a condition when the:

- condition was caused by the tenant or guests (Section 92.052[b]) or
- the landlord is awaiting the proceeds from an insured casualty loss (Section 92.054).

What alternatives does the tenant have if the six conditions are met creating landlord liability and none of the exceptions apply?

A tenant to whom a landlord is liable may, according to Section 92.056(e):

- terminate lease,
- repair or remedy the condition according to Section 92.0561 and deduct the cost of the repair from the rent without the necessity of judicial action or
- obtain judicial remedies as specified in Section 92.0653.

What happens if the tenant elects to terminate the lease?

If the tenant elects to terminate the lease, the tenant is entitled to:

- a pro rata refund of rent from the date of termination or the date the tenant moves out date, whichever is later, and
- to deduct the tenant's security deposit from the tenant's rent without the necessity of a lawsuit

or obtaining a refund of the tenant's security according to law (Section 92.056[f]).

The tenant is not entitled to pursue any of the other remedies specified in Section 92.056(e) if the tenant elects to terminate the lease.

What is the repair-and-deduct option? What are its qualifications and limits?

The repair-and-deduct option allows the tenant to arrange and pay for repairs, then deduct the amount from rent payments.

The statute qualifies this restriction to some degree. First, if the tenant's rent is subsidized in whole or in part by a governmental agency, the deduction limitation means the fair market rent for the dwelling and not the amount of monthly rent that the tenant actually pays. The government agency subsidizing the rent makes the determination. Otherwise, fair market rent is a reasonable amount under the circumstances.

Second, the repair person or supplier cannot place a lien on the property for the materials or services contracted by the tenant under this remedy. The landlord is not personally liable for the repairs.

And finally, the statute places the following restrictions on the option.

- Unless there is an agreement to the contrary, the tenant, the tenant's immediate family, the tenant's employer or employee of a company in which the tenant owns an interest cannot make the repairs.
- The repairs must be made by a company, contractor or repair person listed in the *Yellow Pages* or business section of the telephone directory. Alternatively, they may appear in the classified section of a local or county newspaper or in the newspaper in an adjacent county at the time the tenant gives the landlord notice of having selected the repair-and-deduct option.
- No repairs may be made to the foundation or load-bearing structure of a building containing two or more dwelling units.
- All repairs must be made in compliance with building codes, including building permits when required. (It is unclear whether the cost of the permits is included as part of the repair costs.)
- After the repairs are made, the tenant must furnish the landlord a copy of the repair bill and the receipt for payment with the balance of the next month's rent.

When can the tenant begin to make repairs?

This depends on the situation.

- When the condition involves the backup or overflow or raw sewage or the flooding from broken pipes or natural drainage inside the dwelling, the tenant may remedy the situation

immediately after giving notice. There is no waiting period.

- When the condition involves the breach of an expressed or implied lease agreement to furnish potable water to the tenant's dwelling and the water service has ceased totally, the tenant must wait three days before making the repairs.
- When the condition involves an expressed or implied lease agreement to furnish heating or cooling equipment; the equipment is producing inadequate heat or cooled air; and the landlord has been notified in writing by the appropriate local housing, building or health officials or other official having jurisdiction that the lack of heat or cooling materially affects the health or safety of an ordinary tenant; then the tenant must wait three days before making repairs.
- After the landlord has received written notification from the appropriate local housing, building or health official or other official having jurisdiction that some other condition exists that materially affects the health or safety of an ordinary tenant, the tenant must wait seven days before making repairs (Sections 94.157[d]&[f]).

In some situations, a local housing, building or health official must verify certain conditions materially affect the health or safety of an ordinary tenant before repairs can begin.

This verification is not required when the condition involves raw sewage, flooding from broken pipes, natural drainage inside the dwelling, potable water or water service, or failure of the heating or air conditioning system. Otherwise, verification is needed before proceeding under the repair-and-deduct option.

How may the landlord delay the tenant's option to repair and deduct?

The tenant's option to repair and deduct may be delayed by the landlord's delivering the tenant a signed and sworn affidavit (Section 92.0562). The Affidavit for Delay, as it is called, must be delivered before the tenant contracts for the repairs. The affidavit may be executed by either the landlord or an authorized agent. It must be delivered to the tenant by one of three methods:

- in person,
- by certified mail, return receipt requested or
- left in a conspicuous place at the tenant's dwelling if notice of delivery in such a manner is authorized in the written lease.

The affidavit must be submitted in good faith and summarize the reasons for the delay. The affidavit must contain a sworn statement that diligent efforts have been and are being made to effect repairs. The dates, names, addresses and telephone numbers of

the contacted contractors, suppliers and repair persons must be included.

The affidavit will delay repairs only in two circumstances. If neither circumstance exists, the affidavit is ineffective. First, the inability to obtain necessary parts will delay the landlord's repair obligation 15 days. Second, the general shortage of labor or materials following a natural disaster such as a hurricane, tornado, flood, extended freeze or widespread wind-storm will delay the landlord's obligation 30 days. The landlord can file repeated affidavits as long as the total delay does not exceed six months.

An Affidavit for Delay is effective only when necessary parts are unavailable or there is a shortage of labor or materials following a natural disaster. However, no affidavit is required and no repairs are necessary when the landlord is waiting for insurance proceeds following a casualty loss mentioned in Section 92.054.

The law presumes that the landlord acted in good faith and with continued due diligence for the first affidavit. However, this presumption may be refuted or disproven by the tenant. After that, there is a presumption to the contrary. If the landlord files a false affidavit or does not act with due diligence, the landlord is liable for all the judicial remedies described later except that the civil penalties shall be one month's rent plus \$1,000.

If the landlord repairs the condition or delivers an affidavit for delay after the tenant has contacted the repair person but before the repair person begins work, the landlord is liable for the repair person's trip charge. If the landlord does not reimburse the tenant for the charge, the tenant may deduct the charge from rent as if it were a repair cost.

How does change of landlords affect remedies?

The tenant's choice of remedies may be affected by an intervening change of ownership. If the tenant has opted to terminate the lease, an intervening change of ownership after proper notices have been given to the former landlord does not necessitate new notices to be given to the new landlord. Likewise, the tenant's right to repair and deduct for sewage backup, inside flooding or cutoff of potable water is not affected, and new notices are not required. However, new notices must be given for any other repair-and-deduct situation if the:

- tenant has not contracted for the repairs,
- landlord acquires title without knowledge of the tenant's notices to the prior landlord and
- acquiring landlord has notified the tenant of the new landlord's name and address or an agent's name and address.

If the tenant has chosen the third option (judicial remedies), any judicial remedy shall be limited to recovery against the former landlord if an interven-

ing change of ownership occurs. By issuing new notices to the acquiring landlord, however, the new landlord becomes liable for the judicial remedies specified in Section 92.0563. If, however, the new landlord violates Section 92.0562, the new landlord is liable to the tenant for a civil penalty of one month's rent plus \$2,000, actual damages and attorneys' fees.

Exactly how a new landlord can violate Section 92.0562 is unclear. However, the new landlord's liability is twice that of the former landlord's for the same act.

What judicial remedies are available to tenants?

Section 92.0563 lists as many as five possible judicial remedies a tenant may pursue if the judicial option is chosen:

- A court order directing the landlord to take reasonable steps to repair the condition.
- A court order reducing the tenant's rent according to the reduced rental value resulting from the condition. The reduction is figured from the time the first repair notice was given until the condition is repaired.
- A judgment for one month's rent plus \$500.
- A judgment for the amount of the tenant's actual damages.
- Court costs and attorneys' fees excluding those relating to recoveries for personal injury.

The tenant's petition may be filed in the justice, county or district courts, depending on the amount of the tenant's claim. However, the justice courts may not order the landlord to make repairs. They can render the other remedies.

The right of the justice court, the county court or the district court to hear a certain case depends on the monetary amount of the claim or dispute.

Can tenants retaliate?

The tenant is prohibited from withholding rents, causing repairs to be performed or deducting repair costs from rent in violation of Subchapter B (Section 92.058). If the tenant breaches this rule, the landlord may recover actual damages. However, the penalties are more severe if the tenant undertakes any or all three of the same acts, in bad faith, after the landlord has informed the tenant in writing that the acts are in breach of the subchapter and stated the penalties for the breach.

Under these circumstances, the landlord may recover a civil penalty of one month's rent plus \$500 and reasonable attorneys' fees. However, the landlord must prove by clear and convincing evidence that the

- written notice was given to the tenant in person, by mail or delivered to the premises and
- the tenant acted in bad faith.

The tenant cannot take matters in hand but must follow precisely the procedures prescribed in Subchapter B. If the steps are not followed exactly, the tenant, not the landlord, will be liable.

Where does tenant send or deliver notices?

A managing agent, leasing agent or resident manager is the agent of the landlord for purposes of notice of repair for Section 92.060 or other communication required or permitted by the subchapter.

It is unclear whether Section 92.060 contradicts Section 92.052 discussed earlier. Section 92.052 requires the tenant to give notice of a condition to the person to whom or to the place rent is normally paid. Such a person or place may not be the managing agent, leasing agent or resident manager as specified in Section 92.060. If they are not the same person or place, the tenant should send two notices, one in compliance with each section.

The duties of a landlord and the remedies of a tenant under Section 92.061 are in lieu of existing case law or other statutory law, warranties and duties of landlords for maintenance, repair, security, habitability and nonretaliation and remedies of tenant for a violation of those warranties and duties. In other words, Subchapter B represents the tenant's sole legal means to prompt a residential landlord to make repairs and the sole legal means for a judicial recovery in the event of the landlord's noncompliance.

Are waivers permitted?

Discussion of a residential landlord's duty to repair is not complete without addressing waivers. Basically, the landlord is prohibited from waiving any duty to repair the premises except in four instances. Three are found in Subchapter A of Chapter 92 of the Texas Property Code, the other in Subchapter B.

Some general facts about the landlord's duty to repair will help explain the statutes. The law imposes two elements on the landlord. The first is to make the repairs; the second is to make repairs at the landlord's expense. The statutes place the two elements in separate categories.

The first category permits waivers when the **tenant** makes the repairs **at the landlord's expense**. This is somewhat akin to the repair-and-deduct option but without the limitations and restrictions of one month's rent. The second category permits waivers when the tenant makes the repairs **at the tenant's expense**. Obviously, the second category is nearly opposite of the first. Hence, the formalities for this type of waiver are quite extensive.

When may the tenant make repairs at the landlord's expense?

Two waivers apply (Sections 92.006[d] and 92.0561[g]). The landlord and tenant may agree for the tenant to repair, at the landlord's expense, any

condition that materially affects the physical health or safety of the ordinary tenant (Section 92.006[d]). Also, the landlord and tenant may mutually agree for the tenant to repair, at the landlord's expense, any condition of the dwelling regardless of whether it materially affects the health or safety of an ordinary tenant (Section 92.0561[g]).

Together, the two sections permit the landlord and tenant to agree for the **tenant** to repair or remedy any condition just as long as it is **at the landlord's expense**. The waivers are not required to be in writing. In fact, the statutes require no formalities except the existence of the agreement.

Because of the monetary restrictions (one month's rent) and the subject matter limitation (only those things that affect the physical health or safety of an ordinary tenant) the tenant may wish to pursue the second waiver (Section 92.0561[g]) to make needed repairs around the dwelling that do not fall within the coverage of Subchapter B.

When may tenants pay for repairs?

Two waivers apply in the second, more restrictive, category (Sections 92.006[e] and 92.006[f]). The landlord and tenant may agree for the tenant to repair, at the tenant's expense (Section 92.006[e]), any condition that materially affects the physical health or safety of an ordinary tenant if the following eight conditions are met in the lease:

- The residential lease must have been entered into or renewed after August 31, 1989.
- At the beginning of the lease term, the landlord must own only one rental dwelling.
- At the beginning of the lease term, the dwelling must be free from any condition that would materially affect the physical health or safety of an ordinary tenant.
- At the beginning of the lease term, the landlord must have no reason to believe any condition that materially affects the physical health or safety of an ordinary tenant is likely to occur or recur during the tenant's lease term or during a renewal or extension.
- The lease must be in writing.
- The agreement for the tenant's repairs must be either underlined or printed in boldface in the lease or in an attached, written addition (addendum).
- The agreement must be specific and clear (unambiguous).
- The agreement must be made knowingly, voluntarily and for consideration (money).

It is unclear **when** or **why** a tenant would agree to such an arrangement unless the consideration was rent reduction equal to the repair costs or a reimbursement equal to the cost of a third party making the repairs.

The landlord and tenant may agree (Section 92.006[f]) that the tenant has the duty to pay for repairs for

- damage from wastewater stoppages caused by foreign or improper objects in lines serving the rental unit exclusively;
- damage to doors, windows or screens; and
- damage from windows or doors left open.

How are Section 92.006(f) waivers implemented?

To implement this waiver, the following eight conditions must be met:

- The residential lease must have been executed or renewed before March 1, 1990.
- The condition occurred during the lease term or a renewal or extension.
- The condition was not caused by the landlord's negligence.
- The agreement does not relieve the landlord's duty to repair wastewater stoppage or backups caused by deterioration, breakage, roots, ground conditions, faulty construction or malfunctioning equipment.
- The lease must be in writing.
- The agreement for the tenant's repairs must be either underlined or printed in boldface in the lease or in an attached, written addition (addendum).
- The agreement must be specific and clear (unambiguous).
- The agreement must be made knowingly, voluntarily and for consideration (money).

The last four requirements for this waiver are identical to the prior one. Also, it is apparently impossible to agree to a Section 92.006(f) waiver (the last one) after February 28, 1990. Finally, this waiver requires the tenant to **pay** for repairs. It says nothing about the tenant **making** the repairs.

How may landlords be penalized for waiver violations?

If a landlord knowingly violates either of the last two waivers by contracting orally or in writing to waive the landlord's duty to repair, severe statutory remedies are mandated. The tenant may recover actual damages, a civil penalty of one month's rent, \$2,000 and reasonable attorneys' fees (Section 92.0563[b]). The tenant has the burden of pleading and proving the landlord breached the statute knowingly. If the lease is in writing and in compliance with Section 92.006, the tenant's proof must be clear and convincing.

Although the penalties are intended to keep a landlord from violating the waivers, it is difficult to

imagine how a waiver made in compliance with Section 92.006 can be violated knowingly. Two of the four requirements for either of the last two waivers are for them to be underlined or in boldface print and to be made knowingly, voluntarily and for consideration. However, to make sure the tenant is aware of any such waivers in the lease, the landlord should have the tenant initial and date the provision.

Significant changes were made to Subchapter B of the Texas Property Code in 1989. As with any new law, it will take time for the courts to construe and clarify their meaning. In the meantime, landlords and tenants must puzzle over what repairs materially affect the physical health or safety of an ordinary tenant.

Also, some concept of what constitutes an ordinary tenant must be formulated. Are babies and the physically handicapped "ordinary tenants?" Obviously, conditions that would affect their health and safety might not affect the health of others.

What lease provisions are important?

Tenants and landlords also should be aware of how the lease agreement can affect the landlord's duty to repair. Tenants may unwittingly give up (or even gain) certain rights when they sign the lease. Here is a list of the relevant lease provisions mentioned in Subchapter B.

- The landlord and tenant can agree that the tenant will make all the repairs at the landlord's expense. This may be placed in the lease or made orally (Sections 92.006[d] and 92.0561[g]).
- The landlord and tenant can agree that the tenant will make all repairs that materially affect the physical health and safety of an ordinary tenant at the tenant's expense. This waiver must meet the eight requirements previously outlined (Section 92.006[e]).
- The lease agreement may address whether the first notice to repair must be in writing (Section 92.052).
- The landlord and tenant may agree to a proportionate reduction in rent if a casualty loss renders the unit partially unusable (Section 92.054).

- The landlord and tenant may agree that the tenant, the tenant's immediate family, the tenant's employer or employee of a company in which the tenant owns an interest can make the repairs under the repair-and-deduct option (Section 92.0561).
- The landlord may waive any expressed or implied duty to furnish heating and cooling equipment (Section 92.0561).
- The tenant may agree (or refuse to allow) the landlord to give effective notices by leaving the notice in the tenant's dwelling in a conspicuous place. This affects whether a notice may be given by leaving an Affidavit of Delay at the tenant's dwelling (Section 92.0562). It may affect whether the landlord can give notice to the tenant concerning the withholding of rent, causing repairs to be performed or deducting repair costs from rent in breach of Subchapter B (Section 92.058).

It is imperative that both the landlord and tenant know and understand Subchapter B of the Texas Property Code. From the landlord's perspective, it is important to know what items must be repaired and when the tenant has taken the appropriate steps (notices) to prompt their repair.

From the tenant's perspective, knowledge of Subchapter B is important in taking advantage of the available remedies. Tenants who attempt self-help measures or improperly attempt to invoke Subchapter B remedies may be liable to the landlord, according to Section 92.058.

Most tenants may know that a notice must be given before the landlord's repair duty arises. However, few may realize that at least two, and possibly three, notices are necessary. Likewise, tenants may not know when the notices must be given nor **what they must say**.

Finally, tenants must know that the landlord has a duty to repair only conditions that materially affect the physical health and safety of an ordinary tenant. Even then, those conditions caused by the tenant, a member of the tenant's family, a tenant's guest or a lawful occupant of the dwelling are not covered. Third party verification by health officials may be required.

Retaliation: Subchapter H, Chapter 92, Texas Property Code

Subchapter H of the Texas Property Code was enacted by the 74th Texas Legislature, effective January 1, 1996. The new subchapter is composed primarily of former Sections 92.057 and 92.059 of the Property Code. It prohibits a landlord from retaliating when a tenant pursues a repair-and-deduct option. Subchapter H contains Sections 92.331 through 92.334.

Can landlords retaliate?

Landlords are prohibited from retaliating against a tenant who:

- (1) in good faith exercises or attempts to exercise against a landlord a right or remedy granted to the tenant by lease, municipal ordinance, or federal or state statute,
- (2) gives a landlord a notice to repair or exercise a remedy under this chapter or
- (3) complains to a governmental entity responsible for enforcing building or housing codes, a public utility, or a civic or nonprofit agency, and the tenant:
 - claims a building or housing code violation or utility problem and
 - believes in good faith that the complaint is valid and that the violation or problem occurred (Section 92.331[a]).

What type of retaliatory actions are prohibited?

Basically, for six months after the date the tenant undertakes an action described in Section 92.331(a), the landlord may not retaliate by:

- filing an eviction proceeding, except for the grounds stated in Section 92.332 (discussed later),
- depriving the tenant of the use of the premises, except for reasons authorized by law,
- decreasing services to the tenant, increasing the tenant's rent or terminating the tenant's lease or
- engaging, in bad faith, in a course of conduct that materially interferes with the tenant's rights under the tenant's lease (Section 92.331[b]).

What defenses do landlords have?

According to Section 92.332, a landlord is not liable if the actions were not taken for purposes of retaliation. However, liability remains whenever the

landlord violates a court order under Section 92.0563 by:

- increasing rent under an escalation clause in a written lease for utilities, taxes, or insurance or
- increasing rent or reducing services as part of a pattern of rent increases or services reduction for an entire multi-dwelling project.

What if an eviction or lease termination occurs within the six-month period?

No eviction or lease termination shall be deemed retaliatory if based on one of the following:

- the tenant is delinquent in rent when the landlord gives notice to vacate or files an eviction action,
- the tenant, a member of the tenant's family, or a guest or invitee of the tenant intentionally damages property on the premises or by word or conduct threatens the personal safety of the landlord, the landlord's employees or another tenant,
- the tenant materially breaches the lease, other than by holding over, by an action such as violating written lease provisions prohibiting serious misconduct or criminal acts, except as provided by this section,
- the tenant holds over after giving notice of termination or intent to vacate,
- the tenant holds over after the landlord gives notice of termination at the end of the rental term and the tenant does not take action under Section 92.331 until after the landlord gives notice of termination or
- the tenant holds over and the landlord's notice of termination is motivated by a good faith belief that the tenant, a member of the tenant's family, or a guest or invitee of the tenant might:
 1. adversely affect the quiet enjoyment by other tenants or neighbors,
 2. materially affect the health or safety of the landlord, other tenants or neighbors or
 3. damage the property of the landlord, other tenants or neighbors (Section 92.332[b]).

What are the tenant's remedies for a landlord's retaliation?

If the tenant can prove the landlord's actions were retaliatory, the tenant may recover:

- a civil penalty of one month's rent plus \$500,
- actual damages,
- court costs and
- reasonable attorney's fees in an action either to recover property damages, moving costs, actual expenses, civil penalties, or to get declaratory or injunctive relief, less any delinquent rents or other sums for which the tenant is liable to the landlord.

If the tenant's rent payment to the landlord is subsidized in whole or in part by a governmental entity, the civil penalty granted under this section shall reflect the fair market rent of the dwelling plus \$500 (Section 92.333).

What remedies do landlords have for bad faith claims filed against them?

If a tenant files or prosecutes a suit under this subchapter in bad faith, the landlord may recover possession of the dwelling unit and may recover from the tenant a civil penalty of one month's rent plus \$500, court costs and reasonable attorney's fees (Section 92.334[b]). If the tenant's rent payment to the landlord is subsidized in whole or in part by a governmental entity, the civil penalty granted under this section shall reflect the fair market rent of the dwelling plus \$500.

The term *bad faith* is not defined. An example of a tenant's bad-faith action is illustrated in Section 92.334(a). If a tenant files or prosecutes a suit for retaliatory action based on a violation of a building or housing code or a utility problem, and the government building or housing inspector or utility com-

pany representative visits the premises and states in writing that a violation of a building or housing code does not exist or that a utility problem does not exist, there is a rebuttable presumption that the tenant acted in bad faith.

Can tenants retaliate?

The tenant is prohibited from withholding rents, causing repairs to be performed or deducting repair costs from rent except in exact compliance with the repair-and-deduct procedures outlined in Subchapter B. If the tenant breaches this rule, the landlord may recover actual damages. However, the penalties are more severe if the tenant undertakes any or all three of the same acts, in bad faith, after the landlord has informed the tenant in writing that the acts are in breach of the subchapter and stated the penalties for the breach.

Under these circumstances, the landlord may recover a civil penalty of one month's rent plus \$500 and reasonable attorney's fees. However, the landlord must prove by clear and convincing evidence that the

- written notice was given to the tenant in person, sent by mail or delivered to the premises and
- the tenant acted in bad faith (Section 92.058).

The tenant cannot take matters in hand but must follow precisely the procedures prescribed in Subchapter B. If the steps are not followed exactly, the tenant, not the landlord, will be liable.

What defenses do tenants have?

The tenant can defend an eviction suit by the landlord by showing that it is retaliatory (Section 92.335). Likewise, the tenant can defend a suit for nonpayment of rent by showing that it is in compliance with the repair-and-deduct procedures outlined in Subchapter B.

Residential Landlord's Duty to Return Security Deposits: Subchapter C, Chapter 92, Texas Property Code

Subchapter C of the Texas Property Code governs security deposits (Section 92.001 through Section 92.109). The sections are addressed in numerical order. When possible, the statutes have been restated in common terms.

Which leases are covered?

The subchapter applies to all residential leases regardless of when they were executed [Section 92.101].

How is the term *security deposit* defined?

Effective September 1, 1995, a security deposit is defined as any advance of money, other than a rental application deposit or an advance payment of rent, intended primarily to secure performance of the residential lease that has been entered by both a landlord and tenant (Section 92.102). No language dictates the size of the deposit; the amount is strictly negotiable.

When should landlords return a deposit?

The landlord is required to return the tenant's security deposit on or before 30 days after the tenant surrenders the premises (Section 92.103). The tenant need not give advance notice of the surrender as a condition for the refund **except when the lease so provides**. Even then, the requirement must be underlined and placed in conspicuous bold print.

If the landlord is in bankruptcy when the refund is required, the tenant's right to the deposit takes priority over the claim of any creditor, including a trustee in bankruptcy.

Must the security deposit be mailed by the landlord or received by the tenant within 30 days after surrender of the premises?

According to Section 92.1071, a landlord must mail the security deposit (and an accounting if deductions are made). The letter must be placed in the U.S. mail and postmarked on or before the end of the 30-day period. It does not have to be received by the tenant within the 30 days.

What charges may be deducted from a security deposit?

Some charges may be deducted from the security deposit (Section 92.104). The landlord may deduct damages and charges for which the tenant is legally liable under the lease or as a result of its breach. However, no charges are allowed for normal wear

and tear. The phrase *normal wear and tear* is defined as "deterioration that results from the intended use of a dwelling . . . but term does not include deterioration that results from negligence, carelessness, accident or abuse of the premises, equipment or chattels by the tenant, by a member of the tenant's household or by a guest of the tenant" (Texas Property Code, Section 92.001[4]).

Although there is a statutory definition of normal wear and tear, there has been no case law to amplify its meaning. Consequently, the determination is on a case-by-case basis with no fact situations as precedents.

The landlord is required to give the tenant a written, itemized list of all the deductions except when

- the tenant owes rent at the time of the surrender and
- the amount of rent owed is not disputed.

How and when should the unit's condition be verified?

Deductions from the security deposit are one of the major areas of dispute between the landlord and tenant. The problems center on (1) whether the unit's condition justified a cleanup, (2) whether a defect was caused by the tenant or resulted from normal wear and tear and (3) the amount of any justified repairs on cleanup. Unless proper precautions are taken by the landlord and tenant, proving the unit's condition both at the move-in and time of surrender may be difficult.

Part of the problem lies with the different motivations of the parties at the critical times. When showing the unit, the landlord tends to accentuate the unit's positive aspects and downplay the negative. When the tenant moves out, the landlord tends to accentuate the negative aspects of the unit to justify deductions from the security deposit. Obviously, the tenant takes the opposite side each time.

Consequently, accumulation and preservation of objective evidence of the unit's condition at the crucial times are imperative. Both parties should be amiable to one or more of the following suggestions.

Perhaps the easiest way to document defects, flaws, needed repairs, dirty spots, unclean appliances and so forth is for the landlord and tenant to conduct a walk-through and list problems as they are discovered. After the walkthrough, the list should be dated and signed. Both the landlord and tenant may wish to reserve the right to document other problems

discovered within a certain period after move-in or move-out.

Another approach is to take photographs or videotapes of the unit's condition at move-in and move-out. This may be supplemental to the walk-through or in lieu of it if both parties cannot be present at either or both times.

The latter approach is preferable for several reasons. First, the severity of a problem can be documented better on film. Second, ownership or management may change after move-in. The new owners or managers may dispute the findings of a walk-through conducted when they were not personally present. Third, in major apartment complexes, it is physically impossible for the landlord to be present for each move-in and move-out when many tenants arrive and leave at the same time.

And finally, photographs taken both at the beginning and end of a lease term help differentiate damages and normal wear and tear. The tenant is liable for damages but not for normal wear and tear.

Another unanticipated problem could arise even with careful walk-throughs and accompanying photographs. Such problems include sudden damages occurring after move-in that are not caused by the tenant. These include damages such as a leaking roof or flooding.

Obviously, the tenant should call these problems to the landlord's attention. However, the landlord may do nothing and charge the damages to the tenant's security deposit. This could happen, especially if a change of ownership intervenes. Consequently, **pictorial documentation of damages occurring after move-in should be made and preserved.**

Even with a walk-through, photographs or both, the tenant should be aware of any lease provision permitting clean-up costs. The wording of the provision and the amounts allowed for a cleanup in the lease are important.

For instance, the tenant might leave the apartment immaculate. Even so, the lease still may allow the landlord to have the unit cleaned for a predetermined cost.

Who returns a deposit when ownership changes?

When an intervening change of apartment ownership occurs, the former owner who received the security deposit and the new owner are jointly liable for the return (Section 92.105). However, the former owner's liability terminates once the new owner delivers to the tenant a signed statement acknowledging the owner has received and is responsible for the tenant's security deposit. The notice must specify the exact amount of the deposit received.

The section applies to any change of ownership by sale, assignment, death, appointment of receiver, bankruptcy or otherwise except to a real estate mortgagee who acquires title by foreclosure.

Section 92.106 gives a directive without imposing a penalty. It simply requires the landlord to keep accurate records of all security deposits. There is no legal requirement that the escrow payment be held in a separate account or that it accrue interest.

Why is a forwarding address important?

The tenant is required to give the landlord a written statement of the tenant's forwarding address for purposes of refunding the security deposit. Until the written forwarding address is received, the landlord has no duty to

- return the tenant's security deposit or
- give the tenant a written description of damages and charges.

However, failure to give the forwarding address does not cause the tenant to forfeit the right of refund or the right to receive a description of damages and charges.

The tenant's written notice of a forwarding address is a condition for the refund of the security deposit (Section 92.107). However, it does not state **when** or **how** the notices must be given.

The tenant has at least two possible approaches to the problem. If the tenant has a permanent address, as students do while away at college, the forwarding (or home) address may be placed on the lease when it is signed.

If the forwarding address is not placed on the lease form, proof of the delivery may be a problem. The tenant may wish to pursue either or both of the following procedures.

First, personally deliver a written copy of the forwarding address and have the landlord or authorized agent acknowledge the receipt. Keep the acknowledgment (on a separate piece of paper) for proof of delivery and the date notice was given.

Second, send the forwarding address to the landlord or authorized agent by certified mail, return receipt requested. Keep a copy of the notice and the return receipt for proof of delivery.

In fact, either a personal delivery of the forwarding address or a certified letter sent to the landlord approximately 30 days before the lease terminates can satisfy several requirements. First, if the lease mandates an advance written notice as a condition for refund of the security deposit (as discussed earlier by Section 92.103), the advance notice can fulfill such a requirement.

Second, as just discussed, the letter can apprise the landlord of the tenant's forwarding address if it was not attached to the lease at signing.

Finally, most written leases require the tenant to give the landlord a 30-day advance written notice of move-out. This is required even though the lease is for a fixed term. Again, this requirement can be met with such a notice.

To make sure the check is not lost in the mail, the tenant may wish to amend the lease by requiring the landlord to forward both the security deposit and the itemized list of deductions by certified mail, return receipt requested. However, the tenant generally does not have sufficient leverage to negotiate such a change.

The last two sections of Subchapter C describe the tenant's and landlord's liability.

May a tenant withhold rent in lieu of the security deposit?

A tenant is prohibited from withholding any part of the last month's rent on grounds that the security deposit will cover the balance (Section 92.108). If the tenant so withholds, the law presumes the tenant acted in bad faith. The tenant is liable for three times the amount of rent wrongfully withheld plus the landlord's reasonable attorneys' fees.

May a landlord wrongfully withhold a security deposit?

The landlord is prohibited from wrongfully withholding a security deposit or failing to provide a written description and itemization of the deductions (Section 92.109). If the landlord wrongfully continues to do either or both for more than 30 days after the tenant surrenders the premises, the law presumes the landlord acted in bad faith.

The term *bad faith* is not defined by the statute. However, the case law does lend some clues. In the case of *Reed v. Ford*, 760 S.W. 2d 26, the court held that the term meant ". . . an honest disregard of tenant's rights; bad faith requires intent to deprive tenant of refund known to be lawfully due."

Knowledge of the law plays an important role. In the case of *Ackerman v. Little*, 679 S.W. 2d 70, the court held that the landlord was an "amateur lessor" having only one rental property. As such, the landlord was ignorant of the statute. This was a factor to consider in determining bad faith.

An appellate decision in 1994, *Leskinen v. Burford*, 892 S.W. 2d 135, exonerated a landlord from liability, citing the "amateur lessor" defense. The landlord returned the deposit 35 days after surrender of the premises.

The appellate court distinguished this case from a former one, *Wilson v. O'Connor*, 555 S.W. 2d 776, where the landlord was held liable. In *Wilson* the landlord never returned the deposit as opposed to being five days late in this instance.

To offset these cases, the tenant may wish to include a copy of Section 92.109 with the forwarding address.

The landlord who acts in bad faith by **withholding all or a portion of a security deposit** is liable to the tenant for

- \$100,

- three times the portion of the deposit wrongfully withheld and
- the tenant's reasonable attorneys' fees.

The landlord, not the tenant, has the burden of proving the retention of any portion of the deposit was reasonable.

May a landlord wrongfully fail to provide an itemized list of deductions?

The landlord who acts in bad faith by **not providing a written description and itemized list of damages and charges**

- forfeits the right to withhold any portion of the tenant's security deposit,
- forfeits the right to bring suit against the tenant for damages to the premises and
- is liable for the tenant's reasonable attorneys' fees.

This section's impact on tenants cannot be over-emphasized. Section 92.104 allows the landlord to deduct "damages **and charges** for which the tenant is legally liable under the lease" from the tenant's security deposit.

The tenant may unknowingly consent to a multitude of charges when signing the lease. The tenant should realize that both the provision permitting the charge and the amount of the charge are, in theory, negotiable. Leases often require tenants to pay charges for the following:

- cleanup (discussed earlier)
- late rent payments (both initial and daily)
- violating pet restrictions
- unpaid utilities
- unreimbursed service charges
- utilities for repairs or cleaning
- admitting company representatives to remove resident's telephone or TV cable services
- opening the apartment for resident or occupant who has lost or forgotten key
- duplicate keys
- unreturned keys
- insufficient light bulbs
- scratches, burns, stains or unapproved holes
- removing or rekeying unauthorized locks or latches
- reletting costs
- returned check charges (not to exceed \$100)

If the security deposit is insufficient to cover the charges and damages, the landlord may recover the balance along with attorneys' fees, filing fees and court costs in a judicial proceeding against the tenant.

The tenant should examine provisions pertaining to security deposits before signing the lease. In particular, does the lease require an advance notice as a condition for a refund (Section 92.103)? Exactly what damages and charges can be deducted from the deposit (Section 92.104)?

If the tenant finds a satisfactory replacement, what effect does this have on the landlord's retention of the security deposit or rent-prepayment fee?

Effective January 1, 1996, a landlord may not withhold a security deposit or a rent prepayment fee if the tenant secures a replacement satisfactory to the landlord and the replacement tenant occupies the dwelling on or before the commencement date of the lease (Section 92.1031[a]).

What happens if the landlord, not the tenant, finds a satisfactory replacement?

If the landlord secures a replacement tenant satisfactory to the landlord and the replacement tenant occupies the dwelling on or before the commencement date of the lease, the landlord may retain and deduct from the security deposit or rent prepayment either:

- a sum agreed to in the lease as a lease cancellation fee or
- actual expenses incurred by the landlord in securing the replacement, including a reasonable amount for the time the landlord expended in securing the replacement tenant (Section 92.1031[b]).

Rental Application Deposits: Subchapter H, Chapter 92, Texas Property Code

Subchapter H of the Texas Property Code was added effective January 1, 1996, (Section 92.351 through Section 92.354). The sections address a landlord-tenant problem relating to rental application deposits, primarily how they interact with security deposits and when the deposit must be refunded.

A list of definitions contained in Section 92.351 includes:

- *Application deposit* means a sum of money that is given to the landlord in connection with a rental application. It is refundable if the applicant is rejected as a tenant.
- *Applicant* or *rental applicant* means a person who applies to a landlord for a dwelling rental.
- *Co-applicant* means a person who applies to rent a dwelling with other applicants and who plans to live in the dwelling with other applicants.
- *Deposited* means money deposited in an account of the landlord or the landlord's agent in a bank or other financial institution.
- *Landlord* means a prospective landlord to whom a person applies to rent a dwelling.
- *Required date* means the required date for any acceptance of the applicant under Section 92.352.

When is an application deemed rejected?

An application is considered rejected when the landlord does not give notice of acceptance to the applicant on or before the seventh day after the:

- (1) date the applicant submits a completed rental application to the landlord on a form furnished by the landlord or
- (2) date the landlord accepts an application deposit (Section 92.352).

The landlord cannot reject one co-applicant without rejecting all co-applicants.

What if the seventh day falls on Saturday, Sunday or a state or federal holiday?

The required compliance date is extended to the end of the next day following the Saturday, Sunday or state or federal holiday on which the deadline falls (Section 92.353[c]).

To whom must the landlord communicate acceptance or rejection of the application?

Unless the applicant requests otherwise, a landlord is presumed to have given notice of acceptance or rejection depending on the mode of communication (Section 92.353). If by telephone, the message must be given to the applicant, co-applicant or a person living with the applicant either on or before the required date. If by mail, the notice must be by U.S. mail, addressed to the applicant and postmarked on or before the required date.

If the applicant requests acceptance or rejection by mail, the acceptance or refund must be mailed to the address furnished by the applicant.

The statute is explicit concerning the date an application is deemed rejected. However, the statute does not state the exact date the refund is due.

What is the landlord's liability for not refunding the application deposit?

A landlord who in bad faith fails to refund an application deposit (presumably within the seven-day period) is liable for \$100, three times the amount of the application deposit and the applicant's reasonable attorney's fees in a suit to recover the deposit (Section 92.354).

The term *bad faith* is not defined. Presumably the same definition used in the security deposit section applies (Section 92.109).

Residential Landlord's Duty to Install, Inspect and Repair Smoke Detectors: Subchapter F, Chapter 92, Texas Property Code

The residential landlord has responsibility and liability for the installation, inspection and repair of smoke detectors (Subchapter F, Section 92.251 through 92.2611). Because the subchapter is relatively new, many of the sections are tied to specific dates.

Which dwellings require smoke detectors?

A *dwelling unit* is defined in Section 92.251 as a "home, mobile home, duplex unit, apartment unit, condominium unit or a unit in a multifamily residential structure." The definition of a dwelling from Section 92.001(1) is incorporated by reference. There, the term is defined as "one or more rooms rented for use as a permanent residence under a single lease to one or more tenants."

The duties of the landlord to install, inspect or repair smoke detectors in a dwelling unit and the tenant's remedies for the landlord's breach of those duties are contained in Subchapter F (Section 92.252[a]). Case law and other statutory law are irrelevant in determining those duties and remedies. Local ordinances are relevant when they

- were adopted before September 1, 1981, and relate to the installation of smoke detectors in new or remodeled units before September 1, 1981;
- relate to fire safety as part of a building, fire or housing code including requirements concerning both the type and installation of smoke detectors;
- contain additional enforcement provisions not in contradiction of Section 92.252(b); or
- require operational smoke detectors each time they are regularly inspected by local officials.

Are battery-powered detectors allowed by law?

The validity of local ordinances requiring smoke detectors to be powered by alternating current is addressed in Section 92.252(b). A local ordinance may require the installation of a smoke detector powered by alternating electrical current when a battery-powered detector was installed before September 1, 1987, and

- the interior of the unit is repaired, remodeled or rebuilt at a projected cost of more than \$2,500 and the repair, remodeling or rebuilding requires a municipal building permit;

- an addition occurs to the unit at a projected cost of more than \$2,500;
- a smoke detector powered by alternating current actually was installed in the unit prior to September 1, 1987; or
- a smoke detector powered by alternating current was required by lawful city ordinance when the unit was initially constructed.

Exemptions to Subchapter F are described in Section 92.253. These include:

- dwelling units occupied by the owner, no parts of which are leased to a tenant;
- dwelling units in a building five or more stories high in which smoke detectors are required or are regulated by local ordinance; and
- nursing or convalescent homes licensed by the Texas Department of Health and certified to meet the Life Safety Code under federal law and regulations.

The fourth possible exemption applies to persons licensed by the State Board of Insurance to install fire alarms or fire detection devices under Article 5.43-2 of the Texas Insurance Code. Individuals so licensed shall comply with that article and not with this subchapter when installing smoke detectors.

What are the legal characteristics of smoke detectors?

Five legal characteristics of a smoke detector are dictated (Section 92.254). Smoke detectors must be

- designed to detect both the visible and invisible products of combustion;
- designed with an alarm audible in the bedrooms they serve;
- powered by battery, alternating current or other power source as required by local ordinance;
- tested and listed for use as a smoke detector by Underwriters Laboratories, Inc., Factory Mutual Research Corporation or United States Testing Company, Inc.; and
- in good working order.

The power system and installation procedure of a security device that is electrically operated rather than battery operated must comply with applicable local ordinances.

Subchapter D of the Texas Property Code deals exclusively with security devices. It is unclear why security devices are referenced here in Subchapter F,

which deals exclusively with smoke detectors, and not in Subchapter D.

Where must detectors be located in new buildings?

Smoke detector placement in newly constructed buildings is specified in Section 92.255. Before the first tenant takes possession, the landlord shall install at least one smoke detector outside, but in the vicinity of, each separate bedroom in the dwelling unit. There are three exceptions to this rule depending on the nature of the dwelling unit.

First, if the unit is designed to use a single room for dining, living and sleeping, the smoke detector must be located inside that room.

Second, if one corridor serves all the bedrooms, at least one smoke detector must be installed in that corridor in the immediate vicinity of the bedrooms.

Third, if at least one bedroom is located on a level above the living and cooking areas, the smoke detector for the bedrooms must be placed in the center of the ceiling directly above the top of the stairway.

The term *bedroom* in the section means a “room designated for sleeping purposes.”

Where and how smoke detectors must be installed in older buildings are specified in Section 92.256(a). The landlord shall install at least one smoke detector in accordance with Section 92.255 (the prior section) and Section 92.257 (the next section) on or before September 1, 1984, if the

- dwelling unit was occupied as a residence on or before September 1, 1981, or
- building permit for the unit was issued on or before September 1, 1981.

May tenants install smoke detectors?

The tenant’s right to install battery-operated smoke detectors is spelled out in Section 92.256(b). Prior to September 1, 1984, a tenant could install a battery-operated smoke detector at the tenant’s expense without the landlord’s consent. The installation must comply with Sections 92.255 and 92.257. When the lease terminates, the tenant may remove the detector but is liable for any unnecessary damages to the apartment caused by its removal.

Where must detectors be placed?

Mandatory installation procedures are prescribed in Section 92.257. First, any installation must comply with the manufacturer’s recommended procedures. Second, the detector may be placed either on the wall or the ceiling but in the general proximity of each other. If placed on the wall, the detector must be between six and 12 inches from the ceiling. If placed on the ceiling, it must be no closer than six inches to a wall. The detector may be placed in other areas if the local ordinance or a local or state fire marshal so allows.

The inspection and repair of smoke detectors are described in Section 92.258. The landlord shall determine that the smoke detector is in good working order

- at the beginning of a tenant’s possession, if the dwelling unit contains a smoke detector;
- at the time of installation, if the landlord installs the smoke detector after the tenant has taken possession; and
- within a reasonable time after the tenant makes a request for inspection or repair, considering the availability of material, labor and utilities.

The landlord fulfills the duty to inspect and repair by following the manufacturer’s recommended test procedures for each model. The landlord is not obligated to provide batteries for a battery-operated smoke detector after the tenant takes possession as long as the detector was in good working order when the tenant moved in.

The landlord has no duty to inspect or repair smoke detector damage or malfunction caused by the tenant, the tenant’s family, the tenant’s guests or an invitee of the tenant. Even so, the landlord still must inspect and repair the detector when the tenant pays, in advance, for the reasonable repair or replacement cost, including labor, materials, taxes and overhead.

The statute places a four-pronged obligation on landlords. First, regardless of when the building was constructed, all dwelling units must have smoke detectors installed in them by September 1, 1984 (Sections 92.255 and 92.256). Second, all the smoke detectors must have the five characteristics mentioned in Section 92.254. Third, the detectors must be strategically located throughout the unit in accordance with Sections 92.255 and 92.257.

The statutes impose no liability on the landlord for violating the four-pronged obligation. Liability arises only when the landlord either fails to have a smoke detector installed and tested when the tenant enters (Section 92.258) or fails to install, inspect or repair the smoke detectors after being requested to do so by the tenant (Section 92.259).

When must smoke detectors be tested?

Effective September 1, 1995, the landlord must insure that the smoke detector is in good working order at the beginning of the tenant’s possession by testing the unit in one of three ways:

- by using actual smoke,
- by operating the test button or
- by other tests recommended by the manufacturer for the model.

If one or more tests indicate the unit is operative, the law presumes the unit is in good working order until the tenant requests repair of the unit (Section 92.258.)

Because of the wording of the statute, the landlord is supposed to make sure the smoke detector is in working order when the tenant occupies the dwelling. However, there is no liability for failing to do so.

When is the landowner liable?

The landlord is liable for:

- not installing a smoke detector at the beginning of the tenant's occupancy as required by the subchapter or as required by a pertinent municipal ordinance as permitted by the subchapter or
- not installing, inspecting or repairing the detector within seven days after receiving a written request from the tenant (Section 92.259).

If there is a written lease, the lease may require the tenant to make the initial request for installation, inspection or repair in writing versus making the request orally.

What remedies do tenants have?

The tenant's remedies for the landlord's failing to install a smoke detector at the commencement of the lease or failing to inspect or repair a smoke detector within seven days when asked to do so by the tenant are prescribed in Section 92.260. The tenant is entitled to one or more of the following remedies:

- a court order directing the landlord to comply with the tenant's request if the tenant is in possession of the dwelling unit (associated attorney fees are recoverable after September 1, 1995),
- a judgment against the landlord for damages suffered by the tenant because of the landlord's violation (associated attorney fees are recoverable after September 1, 1995),
- a judgment against the landlord for a civil penalty of one month's rent plus \$100 if the landlord fails to install, inspect or repair a detector within seven days after receiving a written request,
- a judgment against the landlord for court costs (no attorney's fees recoverable after September 1, 1995),
- unilateral termination of the lease without a court proceeding if the landlord fails to install, inspect or repair a detector within seven days after receiving a written request.

What defenses does the landlord have?

Section 92.261 contains two defenses to a tenant's suit brought under Section 92.260. The tenant cannot prevail if the landlord proves that:

- on the date the tenant gave notice to install, inspect or repair the smoke detector, the tenant was delinquent in rent payments or

- on the date the tenant terminated the lease or filed suit, the tenant had not fully paid all costs requested by the landlord and authorized by Section 92.258.

The only costs the landlord may request under Section 92.258 are advance payments for reasonable repair or replacement costs, including labor, materials, taxes and overhead for a smoke detector that the tenant, the tenant's family or the tenant's guests damaged or caused to malfunction.

Before September 1, 1995, any recovery for the tenant for a defective smoke detector was conditioned on the tenant requesting the landlord to install, inspect and repair the smoke detectors. With the amendment to Section 92.259 effective September 1, 1995, liability may arise for not installing a smoke detector when the tenant takes possession.

Consequently, tenants should make a formal written request at the beginning of the lease term to have the landlord inspect or repair all smoke detectors. The request should be repeated periodically throughout the duration of the lease.

When is a tenant liable for disabling a smoke detector?

Effective September 1, 1995, Section 92.2611 is added to the Property Code. The new statute imposes liability on a tenant who:

- removes a battery from a smoke detector without immediately replacing it with a working one or
- knowingly disconnects or intentionally damages a smoke detector, causing it to malfunction.

Before the landlord can sue the tenant, what notices must be given?

The statute conditions the landlord's recovery on giving two separate notices.

First, the lease must contain the following notice in underlined or bold-faced print:

The tenant must not disconnect or intentionally damage a smoke detector or remove the battery without immediately replacing it with a working battery. The tenant may be subject to damages, civil penalties, and attorney's fees under Section 92.2611 of the Property Code for not complying with this notice. (Section 92.2611[d][1])

Second, the landlord must notify the tenant of the following in a separate document after the landlord has discovered that the tenant has disconnected or damaged a detector or removed and not replaced a battery:

The landlord intends to exercise the landlord's remedies under Section 92.2611 if the tenant does not reconnect, repair or replace the smoke detector or replace the removed battery within seven days after receipt of this notice.

What are the landlord's remedies?

Basically, the tenant is liable for all damages sustained by the landlord caused by the disabled detector. However, Section 92.2611(e) specifies the landlord may obtain or exercise one or more of the following remedies:

- a court order directing the tenant to comply with the landlord's notice,
- a judgment for a civil penalty of one month's rent plus \$100,
- a judgment for court costs and
- a judgment for reasonable attorney fees.

What defenses does the tenant have?

One of the more confusing aspects of the new statutes is the defense. Section 92.2611(c) provides that a tenant is not liable for landlord's damages if caused by the landlord's failure to repair the smoke detector within a reasonable time after being requested by the tenant. (Section 92.2611[d][2]).

What is a landlord supposed to do when notified by the tenant to repair or replace a smoke detector that the tenant has damaged? Does the landlord fix it (Section 92.2611[e]) or notify the tenant to fix it in seven days or be sued (Section 92.2611[d][2])?

What about damages sustained by a tenant's guests or invitees who suffer damages caused by a defective smoke detector?

The landlord is liable for damages suffered by the tenant's guests and invitees if caused by the landlord's failure to install, inspect or repair a smoke detector as required by the statute (Section 92.2611[f]). However, the tenant is liable if the damages were caused by the tenant's removal of a battery or by knowingly or intentionally disconnecting or damaging a detector.

Where must the tenant send required notices?

Section 92.262 designates the managing or leasing agent, whether residing or maintaining an office on-site or off-site, as the agent of the landlord for purposes of notices or other communications required or permitted by the statute.

The notice to the landlord to install, inspect and repair smoke detectors must be given and documented. Otherwise, if the tenant or the tenant's property is damaged because the smoke detector malfunctions, the landlord is absolved of liability. The tenant's exclusive remedies for defective smoke detectors are contained in Subchapter F. Once the smoke detectors are installed, recovery for a defective smoke detector depends on the tenant's giving notice.

The tenant should examine lease provisions pertaining to smoke detectors before signing the lease. In particular, does the lease require the initial request for installation, inspection or repair of a smoke detector to be in writing (Section 92.260)? If so, the written request should be presented when the lease is signed. However, all requests for installation, inspection or repair should be made in writing and documented regardless of the statute.

And finally, the landlord's duty to inspect and repair smoke detectors under Subchapter F may be waived (Section 92.006[a], Subchapter A). The waiver must be contained in a written agreement. The tenant should be certain this waiver is not found in the context of the lease.

The law also permits the landlord's duties and the tenant's remedies for installing, inspecting and repairing smoke detectors to be enlarged by a specific written agreement (Section 92.006). If possible, the tenant may wish to impose a greater duty on the landlord to inspect and repair.

Residential Landlord's Liability for Utility Cutoffs and Interruptions: Subchapter G and Section 92.008, Subchapter A, Chapter 92, Texas Property Code

Subchapter G, Section 92 of the Texas Property Code, effective August 28, 1989, addresses the tenant's remedies when the landlord agrees but fails to provide utilities. The subchapter consists solely of Section 92.301.

The discussion also includes Subchapter A, Section 92.008, entitled "Interruption of Utilities." Section 92.008 was expanded significantly effective January 1, 1996. It addresses when utilities may be interrupted by the landlord and the tenant's remedies when the landlord wrongfully interrupts the utility services.

What remedies do tenants have when landlords interrupt utility service?

For Section 92.301 to apply, the landlord must have an expressed or implied agreement in the lease to furnish and pay for the tenant's water, gas or electrical service. The landlord is then liable to the tenant if the utility company cuts off or threatens to cut off the service because the landlord has not paid the utility bill.

In either event, the tenant has two options:

- Pay the utility company the funds needed either to reconnect the utilities or to avert a cutoff, whichever the case may be. The tenant then can deduct the amount so paid from future rent without resorting to any judicial action.
- Terminate the lease. To do so, the tenant must give the landlord written notice of the decision and move out within 30 days from the date the tenant receives notice from the utility company of the pending cutoff or of the actual cutoff, whichever is sooner. The statute authorizes the tenant to deduct the amount of the security deposit from the last rental payment under such circumstances.

Subchapter C, Section 92.108, forbids a tenant's withholding any part of the last month's rent on grounds the security deposit will cover the balance. Such a withholding creates a potential claim of three times the rent wrongfully withheld plus the landlord's reasonable attorneys' fees. Section 92.301, previously described, contains an exception.

If the tenant terminates the lease, the statute still permits the tenant to pursue judicial remedies to recover

- the amount of the security deposit, if it was not withheld from the last rent payment;

- a pro rata refund of any advance rentals paid from the date of termination or the date the tenant moves out, whichever is later;
- actual damages, including but not limited to moving costs, utility connection fees, storage fees and lost wages from work;
- court costs and attorneys' fees, excluding any attorneys' fees for a cause of action for damages relating to a personal injury.

The tenant may either terminate the lease or have the utilities continued or reconnected after receiving notice from the utility company. However, either option ceases if the

- tenant has not yet terminated the lease or filed a suit and
- landlord provides the tenant with written evidence from the utility company that all delinquent sums have been paid in full.

Before the tenant may assert either remedy, the tenant must receive notice from the utility company of the cutoff or pending cutoff. However, if the landlord has agreed to provide the utilities, all communications from the utility company will be directed to the landlord, not to the tenant. Consequently, tenants need to contact the utility company so notices of a cutoff or pending cutoff will be sent to them as well as to the landlord. It is much less expensive and troublesome to avert a cutoff than to pay hook-up charges and deposit fees to have utilities reconnected if the tenant wishes to continue the lease.

This subchapter apparently was prompted by economic hard times. Landlords failed to pay the utilities yet continued to charge rent.

Three issues become apparent under the subchapter. First, is the remedy to pay and deduct the utility bill a one-time event or a continuing choice? For example, if the tenant chooses to pay the delinquent utility bill to avoid a cutoff, can the tenant thereafter pay each month's utility bill directly to the utility company and deduct it from rent? Or, must the tenant wait until the utility company again threatens a cutoff?

Second, can the amount of the utility bill exceed one month's rent? For example, suppose the delinquent utility bill is \$600, and the tenant's monthly rent is \$300. Can the tenant pay the utility bill and avoid rent for the next two months? This is not permitted under Subchapter B, which states that the repair bill cannot exceed one month's rent.

Third, the statute makes no reference to how the dwelling unit (or apartment building) is metered. Some units may not have separate meters. In such case, the necessary payment to avert or cure a cutoff could be prohibitive, especially where one meter serves an entire apartment complex.

When may landlords interrupt a tenant's utility service?

As a rule, Chapter 92, Subchapter A, Section 92.008, prohibits the landlord from interrupting the tenant's water, wastewater, gas, or electric service when the tenant pays the utility company directly. The three general exceptions are for bona fide repairs, for construction or for an emergency.

What are the specific exceptions?

Effective January 1, 1996, two exceptions for interrupting electrical service are specified in Section 92.008.

First, a landlord may interrupt or cause the interruption of the tenant's electrical service as an incident of the tenancy or by other agreement if the following three conditions can be met:

- (1) the electrical service furnished to the tenant is individually metered or submetered for the dwelling unit,
- (2) the electrical service connection with the utility company is in the name of the landlord or the landlord's agent and
- (3) the landlord complies with the rules adopted by the Public Utility Commission of Texas for discontinuance of submetered electrical service (Section 92.008[c]).

Second, a landlord may interrupt or cause the interruption of the tenant's electrical service as an incident of the tenancy or by other agreement for delinquent rent if the following six conditions can be met:

- (1) the electrical service furnished to the tenant is not individually metered or submetered for the dwelling unit,
- (2) the electrical service connection with the utility company is in the name of the landlord or the landlord's agent,

- (3) the tenant is at least seven days late in paying the rent,

- (4) the landlord has mailed or hand-delivered to the tenant at least five days before the interruption a written notice stating the earliest date of the proposed interruption, the amount of rent the tenant must pay to avert the interruption and the name and location of the individual or the on-site management office where the delinquent rent may be paid during the landlord's normal business hours,

- (5) the interruption does not begin before or after the landlord's normal business hours and

- (6) the interruption does not begin on or immediately preceding a day when the landlord or other designated individual is not available or the on-site management office is not open to accept rent and restore electrical service (Section 92.008[d]).

How soon must the electrical services be restored?

If the landlord interrupts electrical services under either of the two specific exceptions, the service must be restored within two hours after the tenant pays the delinquent electric bill or rent owed during the landlord's normal business hours (Section 92.008[e]).

What are the tenant's remedies for the landlord's violation of Section 92.008?

The tenant has two remedies. The tenant may:

- (1) either recover possession of the premises or terminate the lease, and
- (2) recover from the landlord an amount equal to the sum of the tenant's actual damages, one month's rent or \$500, whichever is greater, reasonable attorney's fees, and court costs, less any delinquent rents or other sums for which the tenant is liable to the landlord (Section 92.008[f]).

Can the tenant waive any rights under Section 92.008 in the lease?

According to Section 92.008(g), any lease provision that purports to waive a right or to exempt a party from liability or duty under this section is void.

Miscellaneous Landlord-Tenant Topics: Chapter 91, Texas Property Code

Chapter 91 contains four provisions that address miscellaneous landlord-tenant topics (Section 91.001 through Section 91.005). Section 91.002 was removed from the chapter in 1987 and renumbered 92.008, which deals with unlawful lockouts.

How much advanced notice must be given to terminate a lease?

The notice requirements for terminating a monthly tenancy or a tenancy from month to month are described in Section 91.001. The prescribed notice requirements do not apply if

- the landlord and tenant have agreed in an instrument signed by both parties to a different or no notice provision or
- there has been a breach of contract recognized by law.

The notice provisions for the termination of a monthly tenancy or a tenancy from month to month vary depending on the rent-paying period. If the rent-paying period is at least a month, the tenancy terminates the later of the following two dates:

- the day specified in the notice or
- one month after the day the notice is given.

It is unclear if the statutory language stating “the day on which the notice is given” refers to the day the notice is sent or received.

If the rent-paying period is less than a month, the tenancy again terminates on the later of the following two dates:

- the day specified in the notice or
- one day after the notice is given plus the number of days equal to the rent-paying period.

If the termination date does not correspond to the start or end of a rent-paying period, the tenant is liable for rent only up to the date of termination. In other words, the last rent payment is prorated.

Tenants should be aware of any provisions pertaining to notices to vacate in the lease agreement. First, regarding monthly tenancies, Section 91.001 provides that the parties may agree in the written lease to a different notice period than provided in the statute. In fact, the parties can agree that no notice to vacate is required. This may be too harsh to certain tenants.

Second, regarding longer term leases such as a year-to-year lease, the lease agreement may require the tenant to give a 30-day notice to vacate even though the lease is for a given term. Failure to give the notice before movement continues the lease

beyond the set term. Tenants may wish to modify such a provision.

Can the landlord terminate a lease if the tenant is convicted of a crime?

The landlord may terminate the lease under Section 91.003 if the tenant or occupant, or if an agent or employee of the tenant or occupant, uses the property in such a way that leads to a conviction for violating Chapter 43 of the Texas Penal Code. (Chapter 43 deals with public indecency.) However, the conviction alone is insufficient. Three other requirements are necessary to terminate the lease. These include

- the lease or renewal was executed after June 15, 1981,
- the convicted person has exhausted or has abandoned all avenues of direct appeal and
- the fee owner or intermediate lessor gives written notice within six months after the appeals are exhausted or abandoned.

If the conditions are met, the right of possession to the property reverts to the landlord ten days after the notice is given. A lease provision cannot override this statutory right of termination.

Because the term *intermediate lessor* is not defined, it is unclear who can give notice besides the fee owner. The term could include the manager or leasing agent. Likewise, the term could include a person who subleases the unit.

When may a tenant be granted a lien?

The tenant is granted a lien on the landlord's nonexempt property in the event the landlord breaches the lease agreement (Section 91.004). For the lien to arise, the tenant must not be in default of the lease at the time, and the landlord's nonexempt property must be in the tenant's possession. The lien cannot exceed the extent of the tenant's damages. (See Section 41.002 of the Texas Property Code for more information on exempt and nonexempt personal property.)

The treatment of the tenant's lien is quite small in comparison to an entire subchapter (Subchapter C of Section 54) dedicated to the residential landlord's lien. In particular, there are no provisions explaining how the residential landlord's nonexempt personal property may be seized and sold in lieu of the lien. The prudent tenant would follow the same guidelines that are imposed on landlords in Section 54.045 of the Texas Property Code.

Must the MCE curriculum include any landlord-tenant issues?

At least six hours of the required annual mandatory continuing education must be devoted to prescribed topics relating to real estate according to Section 7A of the Real Estate License Act (Article 6573a, Texas Civil Statutes) as amended effective January 1, 1996. Fourteen topics are enumerated, and three of them directly relate to landlords and tenants.

Is subletting permitted?

Subletting is prohibited (Section 91.005). During the lease term, the tenant may not rent the leasehold to another person without the landlord's prior consent.

What effect does finding a satisfactory replacement have on the landlord's retention of the security deposit or rent prepayment fee?

A landlord may not withhold a security deposit or a rent prepayment fee if the tenant secures a replacement satisfactory to the landlord (Section 92.1031[a]) effective September 1, 1995. The replacement tenant must occupy the dwelling on or before the commencement date of the lease.

What happens if the landlord, not the tenant, finds a satisfactory replacement?

If the landlord secures a replacement tenant satisfactory to the landlord and the replacement tenant occupies the dwelling on or before the commencement date of the lease, the landlord may retain and deduct from the security deposit or rent prepayment either:

- a sum agreed to in the lease as a lease cancellation fee or
- actual expenses incurred by the landlord in securing the replacement, including a reasonable amount for the time the landlord expended in securing the replacement tenant (Section 92.1031[b]).

Do tenants need insurance for casualty and theft losses of their personal property? Or, are they automatically covered by a policy maintained by the landlord?

Tenants need their own insurance. Only in rare circumstances can tenants claim coverage under the landlords' policies.

A condition for purchasing property insurance is having an insurable interest. An insurable interest arises when the person seeking the insurance would suffer a financial loss if the property were damaged or destroyed.

Generally, the landlord has no insurable interest in the tenant's property. Thus, the landlord's insurance policy on the structure will not cover the tenant's personal property. Because of the insurable-interest factor, each tenant needs an individual policy even though more than one tenant inhabits the same unit.

Tenants may secure protection by purchasing a **Tenants Homeowner Policy** from an insurance agent. The policy protects the tenant from casualty losses, provides liability coverage and even affords additional living expenses if a catastrophe forces the tenant to live elsewhere temporarily.

Tenants need to inventory and document the extent of their possessions for proof of loss in the event of a casualty.

Can tenants protest the appraised value of the rent property if the landlord does not?

Some lease agreements, primarily commercial, contractually bind the tenants to reimburse the owners for property taxes on the leased premises. If the Central Appraisal District increases the assessed value, the owner-landlord has little incentive to protest the increase under the circumstances.

Effective August 28, 1995, Sections 41.413 and 42.015 were added to the Texas Tax Code. The new provisions allow tenants of real or personal property to protest the appraised value—if the owner does not—when the tenant is contractually obligated to reimburse the owner for taxes. The tenant has the same rights as the owner throughout the appeal process.

General Provisions Relating to the Residential Landlord-Tenant Relationship: Subchapter A, Chapter 92, Texas Property Code

Subchapter A deals with various aspects of the residential landlord-tenant relationship (Section 92.001 through Section 92.009). However, because Sections 92.008 and 92.009 deal directly with lock-outs, they are discussed under the next general heading. Two new sections were added effective September 1, 1993. They deal with cash rental payments and occupancy rates.

How are terms defined?

Terms used extensively throughout Chapter 92 (Section 92.001) are defined in the Glossary.

Does Chapter 92 apply to commercial property?

Chapter 92 applies only to the relationship between landlords and tenants of residential rental property (Section 92.002). Commercial rental property is covered by Chapter 93.

Who are landlord's agents?

The landlord's agents for the service of process are specified in Section 92.003. The owner's management company is the sole agent if a written notice of the name and business street address of the company has been given to the tenant. If not, then the owner must receive the service of process if the owner's name and business street address have been furnished in writing to the tenant. If neither has happened, then the owner's management company, on-premise manager or the rent collector serving the dwelling is the owner's authorized agent for service of process.

The service of process should not be confused with the delivery of notice. The service of process is required by law for the commencement of a lawsuit. This differs from giving the required notices indicated throughout Chapter 92 as a prerequisite for exerting or exercising a right.

What are the consequences of acting in bad faith?

Neither the terms *bad faith* nor *harassment* are defined by the statute (Section 92.004). However, the statute provides that a party (either the landlord or tenant) who files or prosecutes a suit under Subchapter B (repair or closing of leasehold), D (security devices), E (disclosure of ownership and management) or F (smoke detectors) in bad faith or for purposes of harassment is liable to the defendant for one month's rent plus \$100 and attorneys' fees.

Even though Section 92.004 was added in 1979, there has been no appellate case involving bad faith or harassment.

Section 92.005 is also related to lawsuits. It permits the prevailing party in a suit brought under Subchapter B, D, E or F to recover court costs and reasonable attorneys' fees. It does not authorize the recovery of attorneys' fees under the same subchapters for damages to property, for personal injuries or for criminal acts.

May duties or remedies be waived?

Waivers or expansions of the landlord's duties and the tenant's remedies are addressed in Section 92.006. Three of the waivers regarding the landlord's duty to repair the premises (Sections 92.006[e], [f] and [g]) are explained at the end of the discussion of Subchapter B in this report.

Basically, the landlord's duty or the tenant's remedies under Subchapter C (security deposits), D, E or G (utility cutoffs) **may not be waived**. However, the landlord's duty to inspect and repair smoke detectors under Subchapter F **may be waived** only by written agreement. The landlord's duties and the tenant's remedies under Subchapters D, E and F **may be enlarged** only by specific written agreement.

Where is venue?

The venue for any action brought under Chapter 92 is in the county where the premises are located (Section 92.007).

Must a landlord accept a tenant's rent payment in cash?

According to Section 92.011, a landlord must accept a tenant's timely rent payment in cash unless a written lease requires the tenant to pay by check, money order or other traceable or negotiable instrument.

What records must the landlord keep of the cash rental payment?

A landlord who receives a cash rental payment must provide the tenant with a written receipt and enter the payment date and amount in a record book maintained by the landlord.

What if the landlord will not receive a cash rental payment or render a receipt and keep a ledger?

The tenant, a governmental entity or a civic association acting on the tenant's behalf may file to enjoin the landlord's violation. The party who prevails against the landlord may recover court costs and reasonable attorneys' fees. If the prevailing party is the tenant, the tenant may also recover the greater of one month's rent or \$500 for each violation.

How many adults may a landlord allow to occupy a dwelling?

According to Section 92.010, the maximum number of adults a landlord may allow to occupy a dwelling is three times the number of bedrooms in the dwelling.

What are the exceptions to the specified occupancy rate?

The maximum occupancy rate may be exceeded:

- when and to the extent that state or federal fair housing law allows a higher rate and
- when an adult is seeking temporary sanctuary from family violence as defined in Section 71.01 of the Texas Family Code. However, the excess occupancy rate for family violence cannot exceed one month.

Who may enforce the occupancy rate limits?

Generally, the enforcement lies with an individual who owns or leases living space within 3,000 feet of a dwelling in violation. A governmental entity or civic association acting on the individual's behalf may also enforce the limits, but the remedies differ.

What are the remedies for a violation?

The prevailing party for enforcement of the occupancy limits may enjoin the violation, recover court costs and reasonable attorneys' fees. A prevailing plaintiff may recover \$500 for each violation in addition to court costs and reasonable attorneys' fees.

It is difficult to determine the difference between a "prevailing party" and a "prevailing plaintiff." Also, it is unclear what each violation means.

If each violation refers to "each lawsuit," then 50 individuals living within 3,000 feet of a dwelling in violation may each recover \$500. If the term refers to per person per day of violation, how many violations occur when three too many adults occupy a dwelling for 30 days? Is this one violation, three violations or 90 (3 X 30) violations?

Exactly who is an *adult* and what is a *bedroom*?

According to the definitions in the section, an *adult* means an individual 18 years of age or older. A *bedroom* means an area of a dwelling intended as sleeping quarters. The term does not include a kitchen, dining room, bathroom, living room, utility, closet or storage area.

Does the landlord have a duty to mitigate rent if a tenant abandons the lease prematurely?

For all leases, both residential and commercial, entered on or after September 1, 1997, a landlord has a duty to mitigate damages if a tenant abandons the leased premises before the lease term ends. Any lease provision that waives or exempts the landlord from this duty is void (Section 91.006).

Where must notices be sent when the leased premises are not the tenant's primary residence?

If the tenant notifies the landlord in writing when the lease is signed or renewed that the leased premises is *not* the tenant's primary residence, and if the tenant requests that all notices be sent to the primary residence as indicated on the notice, the landlord must mail to that address notices of all:

- lease reductions,
- lease terminations,
- rental increases at end of lease term and
- notices to vacate.

The notices must be sent by regular mail and are considered given on the date of the postmark. However, notices need not be sent (mailed) if actually hand delivered (Sections 92.012[a],[c] and [e]).

What if there is more than one tenant and each wants a separate notice?

If there is more than one tenant on the lease, the landlord is required to send notices to the primary residence of **only one** tenant (Section 92.012[d]).

How can the tenant notify the landlord of a change in the address of the primary residence?

The only effective way to notify the landlord of a change in the tenant's primary residential address is by written notice. Oral notices are ineffective (Section 92.012[b]).

ATTENTION: THE 76TH TEXAS LEGISLATURE PASSED TWO AMENDMENTS, HB 2408 AND HB 2769, THAT ADDED SIMULTANEOUSLY SECTION 92.013. ACCORDING TO CHRIS GREISEL

WITH THE TEXAS LEGISLATIVE COUNCIL, BOTH STATUTES BECAME LAW. ONE WILL RECEIVE A NEW SECTION NUMBER DURING THE 77TH TEXAS LEGISLATIVE SESSION. UNTIL THEN, THIS PUBLICATION REFERENCES BOTH AS SECTION 92.013 OF THE TEXAS PROPERTY CODE.

The first amendment, HB 2408, deals with how landlords must give notice of policy and rule changes.

The second amendment, HB 2769, addresses how a deceased tenant's property and security deposit must be treated.

Must landlords give tenants prior written notice of policy changes during the lease term?

Effective September 1, 1999, landlords shall give tenants prior written notice of any changes in rules or policies occurring during the lease term that were not in the lease agreement. (Section 92.013[a]).

What types of tenant's property must be affected by the change in policy or rules?

The statute requires prior written notice only to the tenant's personal property located outside the dwelling. A change in the vehicle towing rules or policies is a good example. (Section 92.013[a]).

How must the written notice be given?

The notice may be given in person if the tenant or occupant is 16 years or older. If not, affixing the notice to the inside of the main entry door of the dwelling unit is sufficient. The notice may be sent by regular mail, by registered mail or by certified mail, return receipt requested. If the dwelling has no mailbox, and if no one inside is 16 years of age or older, and if the landlord cannot gain entry because the apartment has a keyless bolting device, an alarm system or a dangerous animal that prevents affixing notice inside the main entry door of the dwelling unit, the notice may be affixed outside the main entry door. (Section 92.013[b]).

What are the consequences of failing to give proper notice?

A landlord who fails to give proper notice is liable for all the tenant's expenses incurred as a result. (Section 92.013[c]).

What should the landlord do with a deceased tenant's personal property and security deposit?

Effective September 1, 1999, Section 92.013 was added to the Texas Property Code addressing the fate of a deceased tenant's personal property and security deposit. Sections 92.013(a) and (b) allows a tenant to

voluntarily submit to the landlord or the landlord may make a written request from the tenant to:

- provide the name, address and telephone number of the person to contact in the event of the tenant's death and
- sign a statement authorizing the designated person to:
 - (a) access the premises at a reasonable time in the landlord's or agent's presence,
 - (b) remove any of the tenant's property and
 - (c) receive the tenant's security deposit, less any lawful deductions.

What can the landlord do when the deceased tenant is the sole occupant of the unit?

Unless the landlord and tenant agree to a different procedure in a written lease or other agreement for removing, storing or disposing of the deceased's property, the landlord may:

- remove and store the sole tenant's property,
- give possession of the stored property to the person designated by the tenant or to any other person lawfully entitled to it and
- refund the security deposit to the person designated by the tenant or to any other person lawfully entitled to it less any lawful deductions plus the removal and storage costs (Section 92.013[c][1], [2] and [3]).

Can the landlord require the person removing the property to sign for it?

The person removing the property must sign an inventory of the property if required by the landlord (Section 92.013[c][4]).

How long must the landlord keep the deceased tenant's property?

The landlord may discard the removed property after the:

- landlord has mailed a written notice to the designated person by certified mail, return receipt requested,
- the person has failed to remove the property after 30 days from the postmark date and
- the landlord has not been contacted by anyone claiming the property prior to its being discarded.

What are the penalties for the tenant not designating a person when requested by the landlord?

If a tenant does not provide the name, address and telephone number to the landlord after being requested and furnished a copy of *this subchapter* the

landlord is absolved of all liability for removal, storage, disappearance, damage or disposal of the deceased tenant's property (Section 92.013[e]).

What are the penalties for the landlord's noncompliance with the proper disposal process when the tenant designates an individual?

A landlord who knowingly disregards the disposal process after being furnished a copy of *this subchapter* and the name, address and phone number of the designated person shall be liable to the deceased tenant's estate for actual damages plus reasonable attorney's fees (Section 92.013[f] and Section 92.005[a]).

It is unclear what is meant by the reference to *this subchapter* in the last two questions. It could mean Subchapter A of Chapter 92 of the Texas Property Code. This includes Section 92.001 through 92.013 containing 14 separate statutes. However, the probable intent was simply to Section 92.013.

Either way, the tenant must do two things before the landlord becomes liable for wrongfully discarding the deceased tenant's property. The landlord must be furnished a copy of "this subchapter," and the tenant must designate the name, address and telephone number of the person to contact upon death.

The new law does not address the status of the lease agreement. Does it remain in force or does the tenant's estate remain liable for the remainder of the lease term?

The landlord's right to remove and store the deceased tenant's property arises only when the tenant is the *sole occupant*. It is unclear if the same privilege exists when the tenant has a roommate. By the same token, the term "sole occupant" raises questions. Does this mean when only one tenant's name is on the lease agreement? What if a family rents the unit and only the husband signs the lease? Or, what if two tenants share an apartment and one is out of town for several months when the other dies? Does this qualify as a sole occupant?

Removal of Property and Lockouts: Section 92.0081 and 92.009, Subchapter A, Chapter 92, Texas Property Code

Perhaps the most controversial subject addressed by the 1987 and 1989 legislative sessions regarded the residential landlord's right to lock out tenants. Section 92.008(d), passed during the 1987 session, allows landlords to change locks for the nonpayment of rent. However, no remedies were provided for an unauthorized residential lockout until 1989.

Effective January 1, 1996, Section 92.008(d) is renumbered Section 92.0081. Sections 92.0081(a) through 92.0081(j) are effective January 1, 1996.

What property may the landlord remove from the tenant's dwelling for a bona fide repair or replacement?

A landlord may not remove a door, window or attic hatchway cover or a lock, latch, hinge, hinge pin, doorknob or other mechanism connected to a door, window or attic hatchway cover from premises leased to a tenant except for bona fide repairs or replacements.

A landlord may not remove furniture, fixtures or appliances furnished by the landlord and leased to a tenant unless the landlord removes the items for a bona fide repair or replacement (Section 92.0081[a]).

When may a landlord exclude a tenant?

A landlord may not intentionally prevent a tenant from entering the leased premises except by judicial process unless the exclusion results from

- bona fide repairs, construction or an emergency,
- removing the contents of the premises abandoned by a tenant or
- changing the door locks of a tenant who is delinquent in paying at least part of the rent (Section 92.0081[b]).

Texas case law defines abandonment as the "relinquishment of possession with the intent of terminating ownership but without vesting it in anyone." The relinquishment must be intentional, voluntary and absolute. Mere nonuse of the property alone may be insufficient to establish abandonment.

What notices must be given in advance of locking a tenant out for nonpayment of rent?

A landlord must (1) mail locally not later than the fifth calendar day before the date on which the door locks are changed, or (2) hand-deliver to the tenant or (3) post on the inside of the main entry door of the tenant's dwelling not later than the third calendar

day before the date on which the door locks are changed, a written notice stating:

- the earliest date that the landlord proposes to change the door locks,
- the amount of rent the tenant must pay to prevent changing of the door locks and
- the name and street address of the individual to whom, or the location of the on-site management office where, the delinquent rent may be paid during the landlord's normal business hours (Section 92.0081[d][2]).

What notices must be left if a tenant is locked out for nonpayment of rent?

If the landlord changes the door lock for the tenant's failure to pay rent, the landlord or agent must place a written notice on the tenant's front door stating:

- the on-site location where the tenant may go 24 hours a day to obtain the new key or a telephone number that is answered 24 hours a day where the tenant may call to have a key delivered within two hours after calling,
- the statement that the landlord must provide the new key to the tenant at any hour, regardless of whether or not the tenant pays any of the delinquent rent and
- the amount of rent and other charges for which the tenant is delinquent (Section 92.0081[c]).

A landlord may not change the locks on the door of a tenant's dwelling for nonpayment of rent on or immediately before a day when the landlord or other designated individual is not available or when any on-site management office is not open for the tenant to pay the delinquent rent.

Also, the landlord who locks out a tenant for nonpayment of rent must provide the tenant with a key to the changed lock whether or not the tenant pays the delinquent rent (Section 92.0081[f]).

What if the tenant is absent when the landlord arrives with the new key?

If a landlord arrives at the dwelling in a timely manner (within two hours) in response to a tenant's telephone call to the number given in the notice and the tenant is not present to receive the key to the changed lock, the landlord may leave a notice on the front door of the dwelling stating the time the landlord arrived with the key and the street address

where the tenant may go to obtain the key during the landlord's normal office hours (Section 92.0081[g]).

What are the tenant's judicial remedies if the landlord violates these provisions?

The tenant may:

- either recover possession of the premises or terminate the lease and
- recover from the landlord a civil penalty of one month's rent plus \$500, actual damages, court costs and reasonable attorney's fees in an action to recover property damages, actual expenses or civil penalties, less any delinquent rent or other sums for which the tenant is liable to the landlord (Section 92.0081[h]).

If the landlord requires the tenant to pay the delinquent rent as a condition for getting the new key, the tenant may recover an additional civil penalty of one month's rent to the one listed above [Section 92.0081[i)].

Can any of these landlord requirements be waived?

A provision of a lease that purports to waive a right or to exempt a party from a liability or duty under this section is void (Section 92.0081[j]).

How may tenant regain possession?

The tenant's means of judicially regaining possession of the premises is addressed in Section 92.009. If the tenant has been locked out in violation of Section 92.0081, the tenant may recover possession by filing a sworn complaint for reentry with the justice court in the precinct where the premises are located. The tenant also must state orally under oath to the justice the facts of the alleged unlawful lockout.

If the justice reasonably believes that an unlawful lockout has occurred, the justice may issue, *ex parte* (see Glossary), a writ of reentry. The writ of reentry must be served on either the landlord or the landlord's management company, on-premises manager or rent collector. The writ entitles the tenant to immediate, but temporary, possession of the premises until a final hearing on the tenant's sworn complaint can be heard.

The writ must notify the landlord of the right to a hearing on the tenant's sworn complaint for reentry. The hearing must be held no earlier than the first day and no later than the seventh day after the date the landlord requests it. However, if the landlord fails to request a hearing before the eighth day after the service of the writ, a judgment for court costs may be rendered against the landlord.

If a hearing on the tenant's sworn complaint for reentry is held, either party may appeal the court's final judgment in the same manner as an appeal in a

judgment in a forcible detainer suit. (See pages 53 and 54.) However, a writ of possession supersedes a writ of reentry. This means that even if the tenant has served the landlord with a writ of reentry, the landlord may prevail and evict the tenant by obtaining a writ of possession. The landlord's writ of possession is superior to the tenant's writ of reentry. (See page 51 for a discussion of a writ of possession.)

What are sanctions for ignoring writ of reentry?

The sanctions the justice may impose on the party disobeying the writ of reentry are discussed in Section 92.009(i). If the person on whom the writ is served fails to comply immediately or later disobeys the writ, the justice may hold the person in contempt of court under Section 21.002 of the Texas Government Code or have the person jailed without bond.

Before either sanction may be imposed, the tenant or the tenant's lawyer must file an affidavit with the court stating both the name of the person who disobeyed the writ and the acts or omissions constituting the disobedience. The justice, after receiving the affidavit, shall issue a show-cause order directing the landlord (or the person disobeying the writ) to appear and show cause why he or she should not be adjudged in contempt of court. After considering the evidence presented at the hearing, the justice may commit the person to jail without bail until the person is purged of the contempt as the justice may dictate.

However, if the person initially disobeys the writ but later complies after receiving the show-cause order, the justice may still find the person in contempt and assess punishment under Section 21.002(c) of the Texas Government Code.

The punishment for contempt of a justice court under Section 21.002(c) is a fine of not more than \$100 or confinement in the county or city jail for not more than three days, or both.

Does the tenant have other remedies?

The tenant's remedies for an unlawful lockout are not limited to seeking a writ of reentry and having the offender held in contempt and placed in jail. The tenant also may pursue the civil remedies specified in Section 92.008(e) as follows:

- either recover possession (under the writ of reentry) or terminate the lease and
- recover an amount equal to the tenant's actual damages, one month's rent or \$500—whichever is greater—reasonable attorneys' fees and court costs, less any delinquent rents or other sums for which the tenant is liable to the landlord.

The only reason a landlord would resort to a lockout is to locate an elusive tenant. The statutes effectively preclude this as a means to collect rent.

Does the landlord have other remedies?

The landlord, however, is allowed similar remedies if the tenant in bad faith files a sworn complaint for reentry that results in a writ of reentry being served (Section 92.009k). Here, the landlord may recover from the tenant, **in a separate action**, an amount equal to actual damages, one month's rent or \$500 whichever is greater reasonable attorneys' fees and court costs, less any sums for which the landlord is liable to the tenant.

By requiring the landlord to recover damages **in a separate action**, the legislature took away the convenience of a landlord's attempting to recover damages at the hearing on the right of reentry. Instead, the landlord must file a separate cause of action against the tenant.

How much are filing fees?

The filing fees for the various legal actions associated with residential lockouts are set by statute. The filing fee for a sworn complaint for reentry by the tenant is \$15 (Section 118.121, Texas Local Government Code). This is the same as the filing fee for a civil action in the justice court.

The fees for serving a writ of reentry and for serving a show-cause order are set annually by the

commissioners court (Section 118.131, Texas Local Government Code). If the commissioners court fails to set them for any one year, the fees for the services of the sheriff and constables become those in effect on August 31, 1981. They generally range around \$35.

The justice may **defer** payment of the filing fees and service costs. However, the court costs may be **waived** entirely if the tenant files an "Affidavit of Inability" (a type of pauper's affidavit) with the court according to Rules 145 and 523 of the Texas Rules of Civil Procedure.

One of the reasons that the justice may **defer** filing fees and service costs is that the tenant's wallet, checkbook or cash may be locked inside the rental unit. Only after a writ of reentry has been issued can the tenant access funds to pay the court costs.

Finally, the rights of a landlord or tenant in a forcible detainer or forcible entry and detainer action under Chapter 24 of the Texas Property Code are not affected by Section 92.009. In other words, a landlord will prevail in an eviction suit when faced with the tenants attempt to regain possession under a writ of re-entry.

Residential Landlord's Duty to Install and Maintain Security Devices: Subchapter D, Chapter 92, Texas Property Code

The 73rd Texas Legislature repealed the existing Subchapter D of the Texas Property Code and replaced it with new sections 92.151 through 92.170 **effective September 1, 1993**. The new subchapter phases in mandatory security devices by January 1, 1995.

The security devices are divided into two categories: (1) those that the landlord must install at the landlord's expense without the tenant's request [Section 92.153] and (2) those that the landlord must install at the tenant's request at the tenant's expense [Section 92.157]. The landlord's duty to maintain, repair and replace the devices varies with the two categories. Also, the tenant's remedies for a landlord's breach vary with the categories.

Sections 92.164 through 92.166 deal with the tenant's remedies for the landlord's failure to comply. The most unique remedy is the ability of the tenant to install or repair and deduct the costs from next month's rent (Section 92.166).

The definitions are essential to understanding the subchapter. The term *dwelling* (and the subchapter) applies to a room in a dormitory or rooming house (unless excluded by the next sentence); a mobile home; a single-family house, duplex or triplex; and a living unit in an apartment, condominium, cooperative or townhome project. The term (and the subchapter) does not apply to a room in a hotel, motel, inn or to similar transient housing or to residential housing owned or operated by a public or private college or university accredited by a recognized accrediting agency as defined under Section 61.003 of the Texas Education Code, to residential housing owned or operated by preparatory schools accredited by the Texas Education Agency, a regional accrediting agency or any accrediting agency recognized by the commissioner of education or a temporary residential tenancy created by a contract for sale in which the buyer occupies the property before closing or the seller occupies the property after closing for a specific term not to exceed 90 days (Section 92.152).

While it appears a quadruplex should be included, it is not referenced directly.

The term *security device* and 15 other terms used throughout the subchapter are defined in Section 92.151 (see Glossary). They include *doorknob lock*, *door viewer*, *exterior door*, *French door*, *keyed dead bolt*, *keyless bolting device*, *landlord*, *multiunit complex*, *possession of a dwelling*, *rekey*, *security device*, *sliding door handle latch*, *sliding door pin lock*, *sliding door security bar*, *tenant turnover date* and *window latch*.

The term *dead bolt lock* is no longer used or referenced in this subchapter after September 1, 1993.

What security devices must the landlord install without the tenant's request and at the landlord's expense?

Effective January 1, 1996, certain security devices must be installed by the landlord (Section 92.153). No longer are the installations dependent upon the commencement or completion date of the building. Still, however, the tenant must first be in possession of the dwelling.

All dwellings must be equipped with the following security devices on January 1, 1996:

- a window latch on each exterior window,
- a doorknob lock or keyed dead bolt on each exterior door,
- a sliding door lock on each exterior sliding glass door,
- a sliding door handle latch or a sliding door security bar on each exterior glass door of the dwelling and
- a keyless bolting device and a door viewer on each exterior door of the dwelling.

What about dwellings with French doors?

If the dwelling has French doors, one of the pair must meet the requirements listed earlier in Section 92.153(a) depending on the completion date. The other door must have either:

- a keyed dead bolt or keyless bolting device capable of insertion into the doorjamb above the door and a keyless bolting device capable of insertion into the floor or threshold, each with a bolt having a throw of one inch or more, or
- a bolt installed inside the door and operated from the edge of the door, capable of insertion into the doorjamb above the door, and another bolt installed inside the door and operated from the edge of the door capable of insertion into the floor or threshold. Each bolt must have a throw of three-fourths inch or more (Section 92.153[b]).

Are there any exceptions for the installation of a keyless bolting device?

A keyless bolting device need not be installed at the landlord's expense on an exterior door if:

- the dwelling is part of a multiunit complex in which the majority of dwelling units are leased to tenants who are more than 55 years of age or who have a physical or mental disability,
- the tenant or occupant in the dwelling is more than 55 years of age or has a physical or mental disability and
- the landlord is expressly required or permitted to periodically check on the well-being or health of the tenant as a part of a written lease or other written agreement (Section 92.153[e]).

Effective September 1, 1995, a keyless bolting device is not required to be installed at the landlord's expense if the tenant or occupant:

- is older than 55 or has a physical or mental disability,
- requests, in writing, that the landlord deactivate or not install the keyless bolting device and
- certifies in the request that the tenant or occupant is older than 55 or has a physical or mental disability.

The request must be a separate document and may not be included as part of a lease agreement. A landlord is not exempt as provided by this subsection if the landlord knows or has reason to know that the requirements of this subsection are not fulfilled (Section 92.153[f]).

Are there any exceptions for the installation of a keyed dead bolt or a doorknob lock?

A keyed dead bolt or a doorknob lock need not be installed at the landlord's expense on an exterior door if at the time the tenant agrees to lease the dwelling:

- at least one exterior door usable for normal entry into the dwelling has both a keyed dead bolt and a keyless bolting device installed in accordance with the height, strike plate and throw requirements of Section 92.154 and
- all other exterior doors have a keyless bolting device installed in accordance with the height, strike plate and throw requirements of Section 92.154 (Section 92.153[g]).

What remedies are available to a tenant when the landlord falsely claims one of the foregoing exceptions as the reason for not installing a keyless bolting device?

According to Section 92.153(i), a landlord who knowingly deactivates or does not install a keyless bolting device and falsely claims that one of the exceptions applies is subject to the tenant remedies set forth in Section 92.164(a)(4).

How long must the security devices remain operable?

All required security devices must remain operable throughout the time a tenant is in possession of the dwelling. However, a landlord may deactivate or remove the locking mechanism of a doorknob lock or remove any device not qualifying as a keyless bolting device if a keyed dead bolt has been installed on the same door (Section 92.153[h]).

According to Section 92.157(c), if a security device required by Section 92.153 to be installed on or after January 1, 1995, without the necessity of a tenant's request, has not been installed, the tenant may request the landlord to immediately install it. Thereafter, the landlord shall comply immediately with the request at the landlord's expense. It appears the requirement should be placed either in Section 92.164 that deals with the remedies for a breach of Section 92.153 or here in Section 92.153.

What are the height, strike plate and throw requirements for keyed dead bolts or keyless bolting devices?

According to Section 92.154, either a keyed dead bolt or a keyless bolting device must be at a **height** between 36 inches and 54 inches from the floor if installed before September 1, 1993, or between 36 inches and 48 inches if installed after September 1, 1993 (Section 92.154[a]).

Likewise, the **strike plates** must be:

- screwed into the portion of the doorjamb surface that faces the edge of the door when the door is closed or
- installed in a door with a metal doorjamb that serves as the strike plate.

The strike plate requirements apply only to the two types of "keyless dead bolts" as described in sections (A) and (B) of the Glossary definition.

Finally, a keyed dead bolt or a "keyless dead bolt" as described in section (A) of the Glossary definition must have a bolt with a **throw** of no less than one inch if installed on or after September 1, 1993.

The height, strike plate and throw requirements do not apply to a keyed deadbolt or a keyless bolting device installed in one door of a pair of French doors discussed earlier in Section 92.153(b).

What are the height requirements for a sliding door security device?

A sliding door pin lock or a sliding door security bar must be installed at a height not higher than 54 inches from the floor if installed before September 1, 1993, or not higher than 48 inches if installed on or after September 1, 1993 (Section 92.155).

When must the landlord rekey or change a security device operated by a key, card or combination?

A security device operated by a key, card or combination shall be rekeyed by the landlord at the landlord's expense not later than the seventh day after each tenant turnover date (Section 156[a]). Thereafter, a landlord shall perform an unlimited number of rekeyings or change a security device at the tenant's expense when requested by the tenant. However, the expense of rekeying security devices for purposes of the use or change of the landlord's master key must be paid by the landlord (Section 156[a] and [b]).

The rekeying provisions do not apply to locks on interior doors.

What security devices must the landlord install at the tenant's request and expense?

At the tenant's request and expense, the landlord shall install a keyed dead bolt on an exterior door if the door presently has:

- a doorknob lock but not a keyed dead bolt or
- a keyless bolting device but not a keyed dead bolt or doorknob lock and
- a sliding door pin lock or sliding door security bar if the door is an exterior sliding glass door that lacks these devices (Section 92.157[a]).

However, if the dwelling was constructed before September 1, 1993, and the tenant makes the request before January 1, 1995, the landlord must install on an exterior door at the tenant's expense:

- a keyless bolting device if the door lacks one and
- a door viewer if the door lacks one (Section 92.157[b]).

Who has the duty to repair or replace the security devices?

The landlord shall repair or replace a security device when requested or notified by the tenant that the device is inoperable or needs repair or replacement. The duty continues during the lease term and throughout any renewal period (Section 92.158).

This requirement is somewhat confusing in light of Section 92.153 (g) discussed earlier. Section 92.153 (g), dealing with the security devices that must be installed at the landlord's expense without the tenant's request, requires those devices to be kept operable throughout the time the tenant has possession. Section 92.158 (above) requires the landlord to repair or replace security devices only after being notified by the tenant. By implication, Section 92.158 applies to the security devices that the landlord must install at the tenant's request and expense.

How must the request or notification be given to the landlord?

The tenant's request or notice for repairs or replacement may be communicated orally unless a written lease stipulates that it must be in writing. However, the lease provisions must be underlined or in bold face print to be effective (Section 92.159).

Who chooses the type, brand and manner of security device installation?

The landlord may select the type, brand and manner of installation, including placement of a security device, unless otherwise provided by this subchapter (Section 92.160).

How soon must the landlord respond to a tenant's request or notice to rekey, change, install, repair or replace a security device?

A landlord must comply with the tenant's request within a reasonable time but never later than the seventh day after the tenant's request is received (Section 92.161[a]).

How soon must the landlord respond to a tenant's request under Sections 92.156(a) and 92.157(a)(b) after the required advance payment has been received?

The landlord again must comply within a reasonable time, but never later than seven days after both the request and the advance payment have been received (Section 92.161[b]).

However, there is an exception to the seven-day maximum response time. A reasonable time shall mean no later than 72 hours, if, at the time the landlord receives the request and advance payment, the tenant informs the landlord that:

- an unauthorized entry occurred or was attempted in the tenant's dwelling,
- an unauthorized entry occurred or was attempted within the multiunit complex where the tenant lives during the two months preceding the request date or
- a crime of personal violence occurred within the multiunit complex where the tenant lives during the two months preceding the request date (Section 92.161[c]).

Are there any exceptions to the "seven-day, reasonable-time" landlord response as directed under Sections 92.161(a) and 92.161(b)?

The landlord may be excused from the seven-day time limits if, despite the landlord's diligence:

- the landlord did not know of the tenant's request through no fault of the landlord,

- materials, labor or utilities were unavailable or
- a delay was caused by circumstances beyond the landlord's control, including the illness or death of the landlord or a member of the landlord's immediate family (Section 92.161[d]).

The response times specified in Section 92.161 apply only when the tenant must make a request or both a request and an advance payment. The response times do not apply when the landlord is required to install or rekey a security device without the tenant's request or payment (Section 92.161[e]).

Who has to pay for the repair or replacement of a security device?

A landlord may not require a tenant to pay for the repair or replacement of a security device that malfunctions because of "normal wear and tear" (Section 92.162). (See Glossary for definition.) However, a landlord can require a tenant to pay if the following two conditions are met:

- an underlined provision in a written lease authorizes it and
- the security device was misused or damaged by the tenant, a member of the tenant's family, an occupant or a guest.

A security device is presumed to have been misused or damaged by the tenant, a family member, an occupant or guest if it occurs during the tenancy's occupancy. The tenant has the burden of proving that the misuse or damage was caused by another (Section 92.162[b]).

If the tenant is liable, can the landlord require a tenant to pay in advance for the repair or replacement?

If the tenant is liable, the landlord can require advance payment for the costs of repair or replacement when:

- (1) the written lease authorizes the advance payment,
- (2) the landlord notifies the tenant within a reasonable time after the tenant requests the repair or replacement that an advance payment is required and
- (3) the tenant is more than 30 days delinquent in reimbursing the landlord for other authorized payments for repairing or replacing a security device or the tenant requested that the landlord repair the same device during the prior 30 days and the landlord had complied (Section 92.162[c]).

How much can the landlord charge for repairing, installing, changing or rekeying a security device when authorized?

The landlord may not charge more than a third-party contractor would charge for the material, labor, taxes and extra keys. However, if the landlord's employees performed the work, the charge may include reasonable overhead but no profit to the landlord. If a management company's employees perform the work, the charge may include reasonable overhead and profit but may not exceed the normal cost charged to the owner (Section 92.161[d]).

Who must ultimately bear the costs for the installations and repairs of security devices if the tenant is not liable and the owner does not manage the dwelling?

The owner of a dwelling must reimburse a management company, managing agent or on-site manager for costs expended in complying with this subchapter. A management company, managing agent or on-site manager may reimburse itself for the costs from the owner's funds in its possession or control (Section 92.161[e]).

Who owns the security devices after they are installed? Can the tenant ever remove them?

A security device that is installed, changed or rekeyed under this subchapter becomes a fixture of the dwelling and belongs to the owner. Except where a tenant repairs the device and deducts the costs from rent as prescribed (see p. 32), a tenant may not remove, change, rekey, replace or alter a security device or have it removed, changed, rekeyed, replaced or altered without permission of the landlord (Section 92.163).

What remedies do tenants have if a landlord fails to install or rekey the security devices that are mandatory—i.e., required without a tenant's request or payment?

According to Section 92.164, if a landlord does not comply with the installation of security devices required without the tenant having to request them (Section 92.153) or, if the landlord does not rekey a security device operated by a key, card or combination within seven days after a tenant's turnover date, the tenant may:

- (1) install or rekey the security device as required by this subchapter and deduct the reasonable cost of material, labor, taxes and extra keys from the tenant's next rent payment, in accordance with Section 92.166 discussed later,

- (2) serve a written request for compliance on the landlord, and, if the landlord does not comply on or before the third day after the date the notice is received, unilaterally terminate the lease without court proceedings,
- (3) file suit against the landlord without serving a request for compliance and obtain a judgment for:
 - a court order directing the landlord to comply if the tenant is in possession of the dwelling,
 - the tenant's actual damages,
 - court costs and
 - attorneys' fees except in suits for recovery of property damages, personal injuries or wrongful death and
- (4) serve a written request for compliance on the landlord and, if the landlord does not comply on or before the third day after the date the notice is received, file suit against the landlord and obtain a judgment for:
 - a court order directing the landlord to comply and bring all dwellings owned by the landlord into compliance if the tenant serving the written request is in possession of the dwelling,
 - the tenant's actual damages,
 - punitive damages if the tenant suffers actual damages,
 - a civil penalty of one month's rent plus \$500,
 - court costs and
 - attorneys' fees except in suits for recovery of property damages, personal injuries or wrongful death.

Can the landlord extend compliance time from three days to seven for either the second or fourth described remedy?

The landlord may increase the compliance period from three to seven days if the written lease provides, in underlined or boldface print, that:

- (1) the landlord at the landlord's expense is required to equip the dwelling, when the tenant takes possession, with all the security devices described in Section 92.153(a), depending on the completion date of the dwelling.
- (2) the landlord is not required to install a doorknob lock or keyed dead bolt at the landlord's expense if the exterior doors meet the requirements of Section 92.153(f),
- (3) the landlord is not required to install a keyless bolting device at the landlord's

expense on an exterior door if the landlord is expressly required or permitted to periodically check on the well-being or health of the tenant as provided by Section 92.153(e)(3) and

- (4) the tenant has the right to install or rekey a security device required by this subchapter and deduct the reasonable cost from the tenant's next rent payment, as provided by Section 92.166.

Even though the written lease complies with the noted requirements, it will not extend the compliance time from three to seven days if, at the time the tenant served the written request for compliance, the tenant informed the landlord that an unauthorized entry occurred or was attempted or a crime of personal violence occurred in the tenant's dwelling, or in another unit in the multiunit complex where the tenant lives during the two months preceding the date of the request.

However, the seven-day requirement for the landlord's compliance is still effective if, even in the face of the landlord's diligence:

- the landlord did not know of the tenant's request through no fault of the landlord,
- materials, labor or utilities were unavailable or
- a delay was caused by circumstances beyond the landlord's control, including the illness or death of the landlord or a member of the landlord's immediate family (Section 92.164[c]).

What remedies do tenants have if a landlord fails to rekey, change, add, repair or replace a security device after a tenant has requested and paid for it when required by law?

According to Section 92.165, if the landlord does not comply with a tenant's request under Sections 92.156(b), 92.157 or 92.158 within the three-day or seven-day time limits, the tenant may:

- (1) install, repair, change, replace or rekey the security devices as required by this subchapter and deduct the reasonable cost of material, labor, taxes and extra keys from the tenant's next rent payment in accordance with Section 92.166 discussed later,
- (2) unilaterally terminate the lease without court proceedings and
- (3) file suit against the landlord and obtain a judgment for:
 - a court order directing the landlord to comply if the tenant is in possession of the dwelling,
 - the tenant's actual damages,
 - punitive damages if the tenant suffers actual damages and the landlord's failure

to comply is intentional, malicious or grossly negligent,

- a civil penalty of one month's rent plus
- court costs and
- attorneys' fees except in suits for recovery of property damages, personal injuries or wrongful death.

Although Section 92.165 references the landlord's failure to rekey, change, **add**, repair or replace a security device, nowhere else in the subchapter is the word *add* used again. It may have been a legislative oversight.

Exactly how does the repair-and-deduct provision work?

If the landlord does not respond within a reasonable time to the tenant's request to install, repair, change, replace or rekey a required security device under Sections 92.156, 92.157, 92.158 or other applicable sections, the tenant may install, repair, change, replace or rekey the security device and deduct the cost from next month's rent (Section 92.166). The tenant must advise the landlord, when the reduced rent payment is tendered, the reason for the rent deduction.

In addition, unless otherwise provided in a written lease, a tenant shall provide one duplicate key to any key-operated security device installed or rekeyed by the tenant within a reasonable time after the landlord makes a written request.

What defenses, if any, does a landlord have when the tenant unilaterally terminates the lease or files a lawsuit under Section 92.165?

The landlord has a defense to either remedy if the tenant has not fully paid the costs requested by the landlord and authorized by this subchapter. It is unclear, though, whether the defense is a complete defense or one allowing an offset (Section 92.167[a]).

What defenses, if any, does either a management company or a managing agent (who is not the owner of a dwelling and has not purported to be the owner in the lease) have against liability for a lawsuit filed under either Section 92.164 or 92.165?

According to Section 92.167(b), it is a defense to liability if, (1) before the date the tenant took possession or (2) before the date the tenant requested the installation, repair, replacement, change or rekeying and (3) before any property damage or personal injury to the tenant occurred, the management company or managing agent:

- (1) did not have any funds of the owner in its possession or control with which to comply with the tenant's requests,
- (2) had made written request to the owner by certified mail, return receipt requested, to provide necessary funds to allow installation, repair, change, replacement or rekeying of security devices as required under this subchapter and
- (3) provided the tenant with a written notice no later than the third day after the date of receipt of the tenant's request:
 - stating that the management company or managing agent has no owner funds as described in number 1 above and also has complied with number 2 in making the written requests,
 - stating that the owner has not provided or will not provide the necessary funds and
 - explaining the remedies available to the tenant for the landlord's failure to comply.

What recourse does a tenant have after receiving the written notice from the management company?

According to Section 92.168, a tenant may unilaterally terminate the lease or exercise other remedies under Sections 92.164 and 92.165 after receiving written notice from a management company that the owner of the dwelling has not provided or will not provide funds to repair, install, change, replace or rekey a security device as required by this subchapter.

The section describes what a tenant may do after receiving the notice from a management company. Nothing is said about receiving the notice from a managing agent.

To whom may the tenant give required notices when a landlord is not available?

A managing agent or an agent to whom rent is regularly paid, whether residing or maintaining an office on-site or off-site, is the agent of the landlord for purposes of notice and other communications required or permitted by this subchapter (Section 92.169).

How does this subchapter interact with the common law duties the landlord may have? Also, how does it interact with municipal ordinances?

The duties of a landlord and the remedies of a tenant under this subchapter are in lieu of common law, other statutory law and local ordinances relating both to a residential landlord's duty to install, change, rekey, repair or replace security devices and

a tenant's remedies for the landlord's failure to install, change, rekey, repair or replace security devices. However, a municipal ordinance adopted before January 1, 1993, requiring the installation of security devices at the landlord's expense at a date earlier than the ones required by this subchapter shall control. This subchapter does not affect a duty of a landlord or a remedy of a tenant under Subchapter B regarding habitability (Section 92.170).

What if a landlord received a request or notification involving security devices before September 1, 1993, the effective date of this law?

The changes made by House Bill 1368 to Subchapter D became effective September 1, 1993. It

applies only to a tenant's request for installation, change, rekeying, repair or replacement of security devices at a dwelling on or after that date.

A tenant's request for installation, change, rekeying, repair or replacement of security devices at a dwelling made to a landlord before the effective date is covered by the law in effect when the request was made, and the former law is continued in effect for this purpose.

Residential Landlord's Duty to Disclose Ownership and Management of Rental Unit: Subchapter E, Chapter 92, Texas Property Code

Subchapter E, Section 92.201 through Section 92.208, deals with the landlord's duty to disclose the ownership and management of a dwelling unit. The following changes were made by the 74th Texas Legislature, effective January 1, 1996.

When must the disclosure be made and to whom?

The disclosure of ownership and management must be made at a certain time according to a specific procedure (Section 92.201). Generally, the disclosure must be made on or before the seventh day after the landlord receives a request from either a tenant or any government official or employee acting in an official capacity for the information.

How must the information be disclosed to a tenant?

The landlord must either give the information to the tenant in writing or post the information continuously and in a conspicuous place at one of the following:

- in the tenant's dwelling,
- in the office of the on-site manager or
- on the outside of the entry door to the office of the on-site manager.

To avoid the tenant's request later, the landlord may include the information in the tenant's lease or in the written rules given to the tenant at the beginning of the lease. Likewise, by continuously posting the information in the three conspicuous places mentioned in Section 92.201, the landlord need not comply with the tenant's request for the same information at a later date.

However, if the information subsequently changes, it may be corrected by any of the described methods required for the initial disclosure.

The landlord must disclose the name and street address (or post office address) of the title holder of record of the dwelling to the tenant or to the government official or employee.

Also, the landlord must disclose the name and street address of any off-site manager if the off-site manager is primarily responsible for managing the dwelling.

How must the same information be disclosed to a government official or employee?

The landlord must give the information in writing to the official or employee on or before the seventh

day after the date the landlord receives the request (Section 92.201[d]).

What is landlord's liability?

The landlord is liable for not providing the information within seven days after it is requested (Section 92.202). However, no liability arises until a second notice is given. The second notice must be in writing and state that the tenant or governmental body may exercise the remedies provided in Section 92.205 if the information is not provided in eight days.

The initial request for the information must be in writing if the written lease so requires. All requests by government officials or employees must be in writing.

The landlord is liable for not correcting information given to the tenant (but not to governmental officials or employees) concerning either the title owner of record (as evidenced by the county deed records) or the off-site manager (Section 92.203). However, liability arises only if the following conditions are met:

- The initial information has become inaccurate.
- The initial information was given to the tenant either by posting or inclusion in the lease or in supplemental rules provided when the lease began.
- The tenant makes written demands for the correct information to be provided within seven days or else the tenant will pursue the remedies provided by Section 92.205.

It is difficult to understand how a tenant is to know when the initial information changes or when to ask for an update if it is incorrect. Apparently, this section becomes relevant only after the tenant attempts to reach the owner or off-site manager and finds the initial information incorrect or obsolete.

The landlord is forbidden from willfully providing the tenant incorrect information about the unit's ownership and management (Section 92.204). Likewise, the landlord may not willfully fail to correct the information when the landlord knows or realizes it is incorrect. However, the term **willful** is not defined by the statute.

The purpose of this subchapter is twofold. First, it assists the tenant in finding the owner for purposes of filing a lawsuit. Second, it enables the tenant to contact the owner directly when there is a complaint against the manager.

What are the tenant's remedies?

Section 92.205(a) describes the tenant's remedies for the landlord's violation of Sections 92.202, 92.203 or 92.204. If the tenant can prevail under one of the prior three sections, the tenant may obtain one or more of the following remedies:

- a court order directing the landlord to make a disclosure required by this subchapter,
- a judgment against the landlord for an amount equal to the tenant's actual costs in discovering the information required to be disclosed by this subchapter,
- judgment against the landlord for one month's rent plus \$100 and
- a judgment against the landlord for court costs and attorneys' fees.

In addition to the judicial remedies listed above, the tenant may unilaterally terminate the lease without a court proceeding.

The tenant is provided the same remedies under Section 92.205 whether the landlord violated the subchapter by not disclosing or intentionally giving incorrect information.

What are the governmental remedies?

A governmental body whose official or employee has requested information from a landlord who is liable under Section 92.202 or 92.204 may obtain or exercise one or more of the following remedies:

- a court order directing the landlord to make a disclosure as required by this subchapter,
- a judgment against the landlord for an amount equal to the governmental body's actual costs in discovering the information required to be disclosed,
- a judgment against the landlord for \$500 and
- a judgment against the landlord for court costs and attorney's fees [Section 92.205(b)].

The landlord is liable to the tenant for violating Sections 92.202, 92.203 or 92.204. The landlord is liable to the government for violating Sections 92.202 or 92.204. The difference is 92.203. This section requires the landlord to correct any information given to a tenant. No correction is required for information given a government official or employee.

What is the landlord's defense?

The landlord is granted one defense to a tenant's suit under either Section 92.202 or Section 92.203 (Section 92.206). The tenant cannot prevail if the

landlord proves to the court that the tenant was delinquent in rent when a required notice was given. However, nonpayment of rent is not a defense when the landlord willfully provides or willfully fails to correct inaccurate information. Thus, the difference between the landlord's willful and unwillful violation of the subchapter lies with the landlord's defenses, not with the tenant's remedies.

Where should notices be given?

A managing or leasing agent, whether residing or maintaining an office on-site or off-site, is the landlord's agent for purposes of notice and other communications required or permitted by this subchapter and also for notices and communications from a governmental body relating to a violation of health, sanitation, safety or nuisance laws on the landlord's property, including notices of:

- demands for abatement of nuisances,
- repair of a substandard dwelling,
- remedy of dangerous conditions,
- reimbursement of costs incurred by the governmental body incurring the violation,
- fines and
- service of process (Section 92.207[a]).

If the landlord's name and business street address in this state have not been furnished in writing to the tenant or government official or employee, the person who collects the rent from a tenant is the landlord's authorized agent for purposes of receiving notices and other communications.

How does Subchapter E relate to other laws?

The landlord's duty and the tenant's remedies under this subchapter are exclusive. The subchapter takes precedence over prior court cases, other statutory laws and local ordinances on the subject (Section 92.208). However, the subchapter does not prohibit the adoption of a local ordinance that conforms to the subchapter and contains additional enforcement provisions.

According to the statutes, the lease agreement may impact two things concerning disclosure of ownership and management. First, must the initial request for the information be in writing (Section 92.202)? Second, according to Subchapter A, Section 92.006, the lease agreement may enlarge both the landlord's duties and the tenant's remedies pertaining to the required disclosures. It cannot lessen the duties and remedies, however.

Public Nuisances at Multiunit Residential Property: Section 125.046, Texas Civil Practices and Remedies Code

A new statute became effective August 28, 1995: Section 125.046 of the Civil Practices and Remedies Code. Unlike most statutes dealing with landlords and tenants, it is not found in the Property Code. The statute deals with a unique remedy, the appointment of a receiver, whenever a common nuisance is maintained or a public nuisance exists at a multiunit residential complex.

As with all aspects of the law, the definition of several terms is critical: *public nuisance*, *common nuisance* and *multiunit residential property*.

How is a public nuisance defined?

A *public nuisance* for purposes of the subchapter exists when one or more of the following acts occur regularly on the premises:

- gambling, gambling promotion or communication of gambling information, as prohibited by Chapter 47 of the Texas Penal Code,
- compelling prostitution, promotion or the aggravated promotion of prostitution as prohibited by Chapter 43 of the Texas Penal Code,
- commercial manufacture, commercial distribution or commercial exhibition of material that is obscene as defined by Section 43.21 of the Texas Penal Code,
- commercial exhibition of a live dance or other act in which a person engages in real or simulated sexual intercourse or deviate sexual intercourse as defined by Section 43.01 of the Texas Penal Code,
- engaging in organized criminal activity as a member of a combination or as a member of a criminal street gang as described by Section 71.02 of the Texas Penal Code, or
- manufacture, delivery or use of a controlled substance in violation of Chapter 481 of the Texas Health and Safety Code (Section 125.041[3][B][1]-[6]).

The statute contains the above definition of terms. In addition, it references Section 125.021 where the following items are also listed as a public nuisance:

- engaging in a voluntary fight between a man and a bull if the fight is for a thing of value or a championship, if a thing of value is wagered on the fight or if an admission fee for the fight is directly or indirectly charged, as prohibited by law and
- reckless discharge of a firearm as described by Section 42.015 of the Texas Penal Code.

How is the maintenance of a common nuisance defined?

The statute does not define the phrase. Instead, it references Section 125.001 that gives the following definition. It appears quite similar to that of a public nuisance.

"A person who knowingly maintains a place to which persons habitually go for the purpose of prostitution or gambling in violation of the Texas Penal Code, for the purpose of reckless discharge of a firearm as described in Section 42.015 of the Texas Penal Code, or for the delivery or use of a controlled substance in violation of Chapter 481 of the Texas Health and Safety Code, maintains a common nuisance."

How is *multiunit residential property* defined?

The statute defines *multiunit residential property* as real property with at least three dwelling units, including an apartment building or condominium. The term does not include:

- property where each dwelling unit is occupied by the owner or
- a single-family home or duplex (Section 125.041[3]).

What can the courts do to abate a nuisance at multiunit residential property?

If a court determines that a common or public nuisance exists at multiunit residential property, the court, on its own initiative or on the motion of any party, may order the appointment of a receiver to manage the property or render any other order allowed by law to abate the nuisance (Section 125.046[a]).

What duties does the court-appointed receiver have?

Generally, the court determines the management duties of the receiver, the receiver's fees, the method of payment and the payment periods.

Specifically, the statute provides that the receiver may:

- take control of the property,
- collect rents due on the property,
- make or have made any repairs necessary to bring the property into compliance with minimum standards in local ordinances,

- make payments necessary for the maintenance or restoration of utilities to the properties,
- purchase materials necessary to accomplish repairs,
- renew existing rental contracts and leases,
- enter into new rental contracts and leases,
- affirm, renew or enter into a new contract providing for insurance coverage on the property and
- exercise all other authority that an owner of the property would have except for the authority to sell the property (Section 125.046[c]-[e]).

The receiver may not spend more than \$10,000 for repairs or purchase of materials without prior court approval. (Section 125.046[f]).

How long does the receiver's appointment last?

The appointment cannot exceed one year. However, the receiver shall continue to manage the property while any appeal is pending (Section 125.046[b]).

Must the receiver file an accounting?

The receiver must file a full accounting with the court of all costs and expenses incurred for repairs including reasonable costs for labor and subdivision. Also, the receiver must account for all income received. The accounting must be filed at the completion of the receivership (Section 125.046[g]).

Residential Landlord's Lien: Subchapter C, Chapter 54, Texas Property Code

The groundwork for the Subchapter C (Sections 54.041 through 50.048) is set in Section 54.041. It provides that a landlord of a single- or multifamily residence has a lien for unpaid rent. The lien attaches to the tenant's nonexempt property that is in the residence or that has been placed in a storage room.

What is exempt from the lien?

Fifteen items are exempt from seizure and from the lien (Section 54.042). These include the tenant's:

- wearing apparel
- tools, apparatus and books of a trade or profession
- school books
- a family library
- family portraits and pictures
- one couch, two living room chairs and a dining table and chairs
- beds and bedding
- kitchen furniture and utensils
- food and foodstuffs
- medicine and medical supplies
- one automobile and one truck
- agricultural implements
- children's toys not commonly used by adults
- goods that the landlord or the landlord's agent knows are owned by a person other than the tenant or an occupant of the residence
- goods that the landlord or the landlord's agent knows are subject to a recorded chattel mortgage or financing agreement

The list is similar to the personal property listed in the Texas Property Code, Section 42.002, that is exempt from attachment, execution and seizure for satisfaction of debt.

Are contractual liens possible?

The landlord may create a contractual lien on other property of the tenant under certain conditions (Section 54.043). Such a contractual landlord's lien is enforceable if the provision

- is underlined or printed in conspicuous bold print in the lease agreement and
- does not waive or diminish a right, liability or exemption provided in this subchapter.

The language of the statute is confusing as to what is meant by *other property*. There are two

categories of personal property—exempt and nonexempt. Only the nonexempt may be seized for delinquent rent. Consequently, the creation of a contractual lien on *other property* appears impossible.

What are the requirements for seizing property?

The requirements and procedure for the landlord seizing nonexempt property for nonpayment of rent are given in Section 54.044. First, if the tenant has abandoned the premises, the landlord or the landlord's agent may remove the contents without authorization in the lease. However, the landlord must be certain that abandonment has occurred.

Texas case law defines *abandonment* as the relinquishment of possession with the intent of terminating ownership but without vesting it in anyone else. The relinquishment must be intentional, voluntary and absolute.

Generally, the critical issue in an abandonment case is establishing the owner's intent. This may be evidenced by acts, conduct and declarations. However, the mere nonuse of the property is insufficient, in and of itself, to establish abandonment.

Second, if abandonment has not occurred, the landlord or landlord's agent may seize the tenant's nonexempt property if the seizure is authorized in a written lease and the seizure can be accomplished without a breach of peace.

Third, unless a written lease so authorizes, the landlord is not entitled to collect a charge for packing, removing or storing the property seized under this section.

And finally, immediately after seizing the property, the landlord or the landlord's agent must leave a written notice that an entry into the tenant's apartment has occurred and an itemized list of the items removed. The written notice and itemized list must be left in a conspicuous place in the dwelling. The notice must state the:

- amount of the delinquent rent;
- name, address and telephone number of the person whom the tenant may contact regarding the rent owed; and
- property will be promptly returned on full payment of the delinquent rent.

Two important provisions are contained in this section. First, a seizure of nonexempt personal property cannot occur unless a written lease so authorizes. Experts in this field feel that Section 54.044 negates, in part, Section 54.041 mentioned earlier granting the landlord a lien for unpaid rent.

The Section 54.041 lien may arise, but it cannot be perfected by seizure and sale unless a written lease meeting the requirements of Section 54.044 exists. Seizure and sale of nonexempt personal property under an oral lease are not authorized by the statutes.

Second, the statute speaks of the tenant's paying the delinquent rent to redeem the property. There is no mention of late payments and penalties. It is unclear whether late payments and penalties are considered a part of the delinquent rent.

How may the landlord sell seized property?

The landlord must follow a prescribed procedure in selling the seized property to satisfy the landlord's lien for unpaid rent (Section 54.045). First, the seized property may not be sold or otherwise disposed of unless so authorized by a written lease.

Second, the landlord must send the tenant notice of the pending sale by **both** first class mail and certified mail, return receipt requested, to the tenant's last known address no later than 30 days before the sale. The notice must contain

- the date, time and place of the sale;
- an itemized account of the amount owed by the tenant to the landlord; and
- the name, address and telephone number of the person whom the tenant may contact regarding the sale, the amount owed and the right of the tenant to redeem the property.

Third, the tenant may redeem the property at any time before the sale by paying all the delinquent rent. The tenant must also pay all reasonable packing, moving, storage and sale costs if the written lease so provides.

Fourth, if the tenant does not redeem the property within 30 days after notice is sent, the property shall be sold to the highest bidder. Proceeds from the sale shall be distributed in the following manner:

- first, toward delinquent rents;
- second, for reasonable packing, moving, storage and sale costs if the written lease so provides; and
- the remainder shall be mailed to the tenant's last known address within 30 days after the sale.

If the tenant makes a written request for an accounting, the landlord shall provide one for all proceeds from the sale within 30 days of the request.

The statute further provides that a sale under Section 54.045 is subject to a recorded chattel mortgage or financing statement. This means that the lien created by the recorded chattel mortgage or financing statement continues to attach to the nonexempt personal property seized and sold by the landlord.

The tenant's remedies for the landlord's willful violation of the subchapter are described in Section 54.046. The term *willful* is not defined by the statute.

However, a willful act is generally viewed as one done intentionally, knowingly and purposely without justifiable excuse.

If a landlord or the landlord's agent willfully violates the subchapter, the tenant is entitled to

- actual damages;
- return of any property seized that has not been sold;
- return of the proceeds of any sale of seized property;
- one month's rent or \$500, whichever is greater, less any amount for which the tenant is liable; and
- reasonable attorneys' fees.

The tenant's remedies stated in Section 54.046 are not exclusive (Section 54.047). The stated remedies do not affect or diminish any other rights or obligations arising under the case law or other statutory law.

How can tenants regain seized property?

The tenant has the right to have goods returned (replevied) based on the giving of security under Section 54.048. This section applies when the landlord has seized nonexempt property, has not disposed of it and is judicially pursuing collection of the unpaid rent.

The tenant may replevy any of the property—before a judgment is rendered and before the property has been claimed or sold—by posting a bond in an amount approved by the court, payable to the landlord. The bond is on condition that, if the landlord prevails in the suit, the amount of the judgment and any costs assessed against the tenant shall first be satisfied, to the extent possible, out of the bond.

How must the sale be conducted?

The sale of the property must be conducted in accordance with the Texas Business and Commerce Code, Sections 7.210, 9.301-9.318 and 9.501-9.507. The property shall be sold to the highest bidder to satisfy the landlord's lien (Section 54.045). How the sale must be advertised, who must be notified, when and where the sale may occur and how the sale must be conducted are described in the Texas Business and Commerce Code, Sections 7.210 and 9.504. Both sections reiterate that the sale may either be public or private, in bulk or in parcels but always in a commercially reasonable manner.

The residential landlord's lien is one of the few self-help remedies provided in the statutes. However, it is not automatic. The statutes specify that unless the written lease so provides, the landlord cannot

- seize, nonexempt property;
- charge for packing, moving or storing the nonexempt property; or
- charge for the costs of conducting the sale.

Landlord's Right to Evict Tenants (Forcible Entry and Detainer): Chapter 24, Texas Property Code

Evictions—the legal means by which tenants may be removed from the premises when they no longer have a right of possession—play an important role in the landlord-tenant relationship. The three leading causes for eviction are (1) nonpayment of rent, (2) holding over after the lease term has expired and (3) the continued possession of a home after foreclosure.

Statutes addressing evictions are found in the Texas Property Code, Chapter 24, Sections 24.001 through 24.011. Sections 24.009 and 24.010 are blank. The chapter applies to eviction of both residential and commercial tenants.

The substantive rules for evicting a tenant are described in Chapter 24. However, anyone thinking about bringing an eviction action should consult rules 738 through 755 of the Texas Rules of Civil Procedure. These rules parallel and amplify the sections in Chapter 24.

Although the word *eviction* is a legal term, it is never used in Chapter 24 or in the Rules of Civil Procedure. In its place, the terms *forcible entry and detainer* and *forcible detainer* appear. Either action effectively removes a person from wrongful possession of real property. The difference lies in how the person being evicted gained possession. It does not have to be by force as the name implies.

The statutes do not speak of bringing either a forcible entry and detainer action or a forcible detainer action. Instead, the statutes describe how both a forcible entry and detainer and a forcible detainer occur.

When does forcible entry and detainer occur?

A forcible entry and detainer occurs when an unauthorized person enters the real property of another, without legal authority or by force, and refuses to surrender possession on demand (Section 24.001). As the name implies, a forcible entry and detainer has two parts. The first is an unauthorized entry, the second the failure to leave on demand.

The section describes three situations in which the first part of a forcible entry and detainer may occur. These include when an unauthorized person enters:

- without the consent of the person in actual possession of the property;
- the premises of a tenant who, at the time, is a tenant at will or a tenant by sufferance; or
- without the consent of the person who acquired possession by forcible entry.

Definitions of key terms are in the glossary.

When does a forcible detainer occur?

A forcible detainer occurs when a person refuses to surrender possession of real property on demand (Section 24.002). This is distinguishable from the forcible entry and detainer because, under a forcible detainer, the person's entry does not have to be unlawful. Thus, most eviction suits by landlords are forcible detainers—not forcible entry and detainers—because the tenant's initial entry usually is lawful.

Three situations in which forcible detainer may occur include when the tenant or subtenant:

- willfully and without force holds over after the right of possession terminates,
- is a tenant at will or a tenant at sufferance or occupies the premises when a lien superior to the tenant's lease is foreclosed or
- acquires possession by forcible entry.

However, these three situations describe only the settings of a forcible detainer. In addition, a demand must be made for the occupant to vacate the premises and the occupant must refuse. The necessary elements of the notice to vacate are discussed later in Section 24.005.

A landlord may continue a forcible entry action in the tenant's name without refileing the suit in the landlord's name (Section 24.003). This occurs if the tenant has such a suit pending when the tenant's lease term expires. It is immaterial that the tenant received possession from the landlord or became a tenant after obtaining possession of the property.

Where is the jurisdiction for an eviction suit?

Jurisdiction for either a forcible entry and detainer or a forcible detainer suit is in the precinct where the real property is located (Section 24.004).

What is the procedure for notice to vacate?

The first step in the eviction process requires the landlord to demand that the tenant vacate (leave) the premises. How the notice to vacate (demand to leave) must be delivered and the period the landlord must wait after the delivery of the notice before filing a forcible detainer are explained at length in Section 24.005.

The landlord must give the tenant at least a three-day notice before filing a forcible detainer suit when the tenant has defaulted on rent payments or holds over after the lease term expires (Section 24.005a).

The three-day notice does not apply if the written or oral lease specifies a different period.

If the suit involves a month-to-month lease when the rent-paying period is monthly or less than a month, then the landlord must comply with the termination requirements described in Section 91.001. Basically, this section requires that the length of the notice to vacate correspond with the length of the rent-paying period. If the rent is paid every two weeks, then the notice to vacate must be at least two weeks plus one day before an eviction suit can be filed. However, the notices required by Section 91.001 are inapplicable where:

- the parties have agreed in writing to a different period,
- the parties have agreed in writing that no notice to terminate is required or
- one of the parties has breached the contract in a manner recognized by law.

When the occupant is a tenant at will or a tenant at sufferance, a three-day notice is required unless a different period has been contracted in the written or oral lease (Section 24.005[b]).

The notice requirements differ when the tenant's building has been purchased at a tax foreclosure sale or at a trustee's foreclosure sale under a lien superior to the tenant's lease. The statute (Section 24.005[b]) requires the purchaser to give the residential tenant at least a 30-day written notice if the tenant has timely paid rent and is not otherwise in default under the lease after the sale.

Rent is "timely paid" if the tenant either pays the monthly rent

- before receiving notice of the scheduled foreclosure sale; or
- to the "foreclosing lienholder" or purchaser at the sale no later than five days after receiving a written request for rent from such person.

The statute apparently allows the "foreclosing lienholder" to demand rent from the tenant prior to the foreclosure sale. Otherwise, any monthly rent collected by the landlord **before** the sale belongs to the collecting landlord and not to the purchaser at the foreclosure sale. (See *Treetop Apartments General Partnership v. Oyster*, 800 S.W. 2d 628 [Tex. App. 1990]). A foreclosing lienholder may give written notice to a tenant indicating that a foreclosure notice has been given to the landlord or owner and specifying the scheduled date of the sale. When the tenant acquired possession by forcible entry, a three-day notice is required before filing a forcible detainer suit (Section 24.005[c]).

Although the possibility that a person would rent from someone lacking possessory rights to the property is remote, this section addresses such a situation.

If the occupant is the person who gained possession by forcible entry under Section 24.001, there is

no required waiting period (Section 24.005[d]). The forcible detainer may be filed immediately or at the end of any deadline specified in the oral or written notice to vacate.

The notice differs when the lease or applicable law requires the landlord to allow a tenant to respond to a notice of a proposed eviction (Section 24.005[e]). Here, notice to vacate cannot be given until the response period ends.

In practice, the only leases containing a preliminary notice to vacate are HUD subsidized leases. Generally, the response period is ten days. The landlords are required to give two separate notices ten days apart. The first is a proposed notice to vacate; the second is the actual notice to vacate.

How may a notice to vacate be delivered?

The notice to vacate may be given in person or by mail at the premises (Section 24.005[f]). If delivered in person, the notice must be given to the tenant or to any resident at the premises who is at least 16 years of age. Personal delivery also includes affixing the notice to the inside of the main entry door to the premises. Notice also may be sent by regular mail, registered mail or certified mail with return receipt requested.

What alternatives does the landlord have if there is no mailbox or entry is impossible, inconvenient or dangerous?

If the dwelling has no mailbox, or if the dwelling has a keyless bolting device, alarm system or dangerous animal that prevents entry, the landlord may affix the notice to vacate outside the main entry door (Section 24.005[f]).

Can the notice to vacate include a demand that all delinquent rent be paid to avoid eviction?

The notice to vacate may include a demand for delinquent rent in lieu of eviction if the landlord has given the tenant prior written notice or reminder that the rent is due and unpaid. The delinquent rent must be paid by the date and time stated in the notice to avoid eviction (Section 24.005[g]).

The notice period is calculated from the day on which the notice is delivered (Section 24.005). A "notice to vacate" shall be considered a "demand for possession" for purposes of Section 24.002 discussed earlier.

How may the landlord recover legal fees?

The landlord must follow specific steps to recover attorneys' fees (Section 24.006) when the written lease is silent on the matter. The landlord must give the tenant who is unlawfully retaining possession of the premises a ten-day written demand to vacate the premises. The demand must be sent by registered or

certified mail, return receipt requested, at least ten days before the suit is filed. The demand must state that attorneys' fees may be recovered if the tenant does not vacate the premises before the eleventh day after receipt of the notice. The ten-day notice is not necessary if the written lease provides for the recovery of attorneys' fees. Generally, landlords or their agents represent themselves in the justice court without the involvement of attorneys negating the ten-day notice.

How may the tenant recover legal fees?

The tenant may recover attorneys' fees for successfully defending either a forcible entry and detainer or forcible detainer suit under certain conditions (Section 24.006[c]). Generally, when the lease permits the landlord to recover attorneys' fees or whenever the landlord gives the ten-day demand to vacate (Section 24.006), then the tenants who successfully defend such a suit may recover reasonable attorneys' fees from the landlord. No notices are required.

Likewise, either prevailing party may recover all court costs. This recovery is separate and apart from recovering attorneys' fees.

When may the landlord receive a writ of possession?

The second step in the eviction process involves judicial action if the tenant fails to vacate the premises within the allotted time after the notice to vacate is given. The judicial process involves getting a judgment for possession and then, if the tenant does not leave, getting a writ of possession six days later.

Before a judgment for possession can be rendered, an officer of the court must serve the tenant with notice of the pending lawsuit. This is known as the *service of citation*. If the officer tries twice unsuccessfully to serve the tenant both at the dwelling and at work, Rule 742a of the Texas Rules of Civil Procedure allows service by posting the notice to the front door or main entry to the premises and mailing a copy to the tenant's address.

If the landlord is evicting a tenant for unpaid rent, Rule 738 of the Texas Rules of Civil Procedure permits the landlord to bring an action for the unpaid rent in the same suit for possession when the amount is within the jurisdictional limits of the court. The landlord can then get two judgments—one for possession, the other for unpaid rent. Normally, the justice court will provide the landlord with an available form for filing the petition.

Update. Effective September 1, 1999, Section 24.0051 was added. It provides that in a suit filed in justice court on a sworn account where the landlord seeks both unpaid rent and possession of the premises, a service on the tenant under Rule 742a is

sufficient to support a default judgment for both possession and unpaid rent (Section 24.0051[a]).

The new law also provides that the landlord may recover unpaid rent under this section whether or not the tenant vacated the premises after the date the sworn statement was filed but before the date the court renders judgment (Section 24.0051[b]).

Nothing is said about the tenant's defenses to an eviction suit in this subchapter. However, Subchapters B and G mention three defenses. These include:

- an unlawful retaliation by the landlord (Section 92.057),
- a lawful rent reduction by the tenant under Section 92.0561 (the repair-and-deduct provision) and
- a lawful rent reduction by the tenant under Section 92.301 (the rent deductions permitted for paying to reconnect or avoid a utility cutoff).

A *writ of possession* is a court order directing the executing officer to deliver possession to the prevailing landlord (Section 24.0061). The statute provides that a landlord who prevails in an eviction suit is entitled to both a judgment for possession of the premises and a writ of possession. The judgment for possession is the court's decision that the landlord has prevailed.

The term *premises* as used in the statute means the unit that is occupied or rented and any outside area or facility that the tenant is entitled to use under a written lease or oral agreement, or that is held out for the use of the tenants generally.

The writ of possession cannot be issued before the sixth day after the judgment for possession is rendered. The only exception occurs when a possession bond has been filed by the landlord and approved by the justice court, and the judgment for possession is granted by default (Section 24.0061[b]). The procedure for filing a possession bond is described in Rule 740 of the Texas Rules of Civil Procedure.

Must the court attempt to notify the tenant of the writ of possession if the tenant never made a court appearance, i.e., the writ was acquired by default?

If the writ is acquired by a default judgment, the court must send a written copy of the judgment to the premises by first class mail no later than 48 hours after the entry of the judgment (Section 24.0061[c]).

A writ of possession orders the officer executing the writ to post a written warning at least 8½ x 11 inches on the exterior of the front door notifying the tenant that the writ has been issued and that it will be executed on or after the date and time stated but not before 24 hours has elapsed from the time of posting.

What does the officer do when executing the writ of possession?

The officer executing the writ shall:

- deliver the possession of the premises to the landlord,
- instruct the tenant and all persons claiming under the tenant to leave the premises immediately; and, if they do not comply, they may be physically removed;
- instruct the tenant to remove or to allow the landlord, the landlord's representatives or other persons acting under the officer's supervision to remove all personal property from the rental unit other than personal property claimed to be owned by the landlord; and
- place, or have an authorized person place, the removed personal property outside the rental unit at a nearby location but not blocking a public sidewalk, passageway or street and not while it is raining, sleeting or snowing (Section 24.001[d][2]).

The writ authorizes the executing officer, at the officer's direction, to engage the services of a bonded or insured warehouseman to remove and store, subject to applicable law, part or all of the tenant's personal property at no cost to the landlord or the officer executing the writ.

The sheriff or constable may, if necessary, use reasonable force to execute the writ. The officer may not require the landlord to store the property. And finally, the writ shall contain notice to the officer under the Texas Civil Practices and Remedies Code, Section 7.003, that the officer is not liable for damages resulting from the execution of the writ if the officer does so in good faith and with reasonable diligence.

Section 24.0062 (formerly Section 24.009) was renumbered in 1985. Section 24.009 is now blank.

When does a warehouseman's lien arise?

A warehouseman's lien arises when the tenant's personal property is removed from the premises as a result of a writ of possession and thereafter stored in a bonded or insured public warehouse (Section 24.0062). The warehouseman thereby obtains a lien on the personal property to the extent of any reasonable moving and storage charges incurred by the warehouseman. However, the lien does not arise until all the tenant's personal property has been stored.

If the tenant's personal property is to be removed and stored under a writ of possession, the executing officer must give the tenant certain notices. The notices may be delivered either personally or, if the tenant is not present when the writ of possession is executed, sent by first class mail to the tenant's last known address. The delivery of notice by mail must

be sent no later than 72 hours after the execution of the writ.

What information must the notice contain?

The notice must contain the complete address and telephone number of the location where the property may be redeemed. Also, the notice must state all of the following:

- The tenant's property is to be removed and stored by a public warehouseman according to the Texas Property Code, Section 24.0062.
- The tenant may redeem any of the property, without paying the moving or storage charges, on demand, during the time the warehouseman is removing the property from the tenant's premises and before the warehouseman permanently leaves the tenant's premises. (This provision must be underlined or in boldfaced print.)

The tenant may redeem, within 30 days from the date of storage, any of the property described below (hereinafter referred to as "the 16 essential items") on demand by payment of the moving and storage charges reasonably attributable to the following items:

- wearing apparel
- tools, apparatus and books of a trade or profession
- school books
- a family library
- family portraits and pictures
- one couch, two living room chairs and a dining table and chairs
- beds and bedding
- kitchen furniture and utensils
- food and foodstuffs
- medicine and medical supplies
- one automobile and one truck
- agricultural implements
- children's toys not commonly used by adults
- goods that the warehouseman or the warehouseman's agent knows are owned by a person other than the tenant or an occupant of the residence
- goods that the warehouseman or the warehouseman's agent knows are subject to a recorded chattel mortgage or financing agreement
- cash

The statute says nothing about partial redemptions within each group. It is unclear if part of the property within a group may be redeemed without redeeming the entire group.

After 30 days of storage have transpired, the two groups become one. To redeem **any** of the property, the tenant must redeem **all** the property on demand and pay all moving and storage charges. Naturally, the redemption must occur **before** the property is sold to satisfy the lien as described below.

Finally, the tenant must be told that the warehouseman has a lien on the property to secure payment of the moving and storage charges. The property may be sold to satisfy the lien if the property is not redeemed within 30 days. If the property is sold to satisfy the lien, the sale must be conducted in accordance with the Texas Business and Commerce Code, Sections 7.210, 9.301-9.318 and 9.501-9.507. Basically, these sections permit the sale of the property at either a private or public sale, in bulk or in parcels but always in a commercially reasonable manner.

When may the tenant intervene?

Before the property is sold to satisfy the lien, the tenant may intervene judicially for two different causes (Section 24.0062[i]). Either or both suits must be brought in the justice court where the eviction judgment was rendered or in another court in the county of competent jurisdiction. However, if the justice court has issued a writ of possession, it has exclusive jurisdiction for the matters regardless of the amount in controversy. All proceedings under Section 24.0062(i) shall take precedence over other matters as the court's docket.

First, the tenant may file an action to recover "the 16 essential items" on the ground that the landlord failed to return the property after timely demand and payment was made by the tenant.

The statute says nothing about the tenant filing an action to recover any nonessential items for the same reason. Also, it is interesting that the statute designates the landlord as the defendant when the property is in the possession of the warehouseman.

Second, the tenant also may file a suit to recover all the property (both essential and nonessential) on the ground that the amount of the warehouseman's moving or storage charges were unreasonable. If the tenant successfully proves the moving or storage charges are unreasonable, the warehouseman is barred from recovering any of them (Section 24.0062[h]).

In addition, the prevailing party under Section 24.0062 is entitled to recover actual damages, reasonable attorneys' fees, court costs and, if appropriate, any property withheld in violation of the section or the value of the property that was sold in violation of the section.

Who has the right of appeal?

Chapter 24 does not address the procedure for appealing an eviction suit rendered by the justice

court to the county court. Instead the process is described in Rules 749 through 752 of the Texas Rules of Civil Procedure.

According to these rules, either party may appeal the final judgment without cause. The appeal must be to the county court of the county where the judgment was rendered. The appeal must be filed within five days after the judgment is signed; otherwise, a writ of possession will be issued on the sixth day. A bond must be posted, approved by the justice and payable to the adverse party. The amount of the bond shall be set by the justice depending on the items enumerated in Rule 752.

If the appellant is unable to pay the costs of appeal or file a bond, the action still may be appealed by filing a pauper's affidavit with the justice within five days after the judgment is signed. The procedure for filing a pauper's affidavit is found in Rule 749a of the Texas Rules of Civil Procedure.

Chapter 24 addresses the procedure for appealing an adverse judgment by the county court (Section 24.007). A final judgment of a county court may not be appealed on the issue of possession except when the premises are being used for residential purposes. The judgment may not be stayed pending the appeal unless the appellant files a supersede as bond in an amount set by the county court within ten days after the judgment is signed.

The amount of the bond shall be set to protect the appellee (landlord), considering

- the value of the rents likely to accrue during the appeal;
- damages that may occur as a result of the stay during appeal; and
- other damages or amounts as the court deems appropriate.

How does suit relate to other legal action?

According to Section 24.008, an eviction suit has little effect on other legal actions. Basically, either suit does not bar a suit for trespass, damages, waste, rent or *mesne profits* (profits derived from the land while possession was withheld improperly).

When is an attorney required?

A party to an eviction suit need not be an attorney (Section 24.011). Others, not just attorneys, generally may represent themselves in a justice court to bring either type of suit. Likewise, the authorized agent of a party, whether an attorney or not, may bring an eviction suit in a justice court for the nonpayment of rent or for a hold-over tenant. However, the only other instance when an authorized agent who is not a lawyer may bring either suit is when the agent requests or obtains a default judgment.

When can a judge or justice of the peace be disqualified?

According to Section 21.005 of the Texas Government Code, a judge or a justice of the peace may not sit in a case if either of the parties is related to the judge by affinity or consanguinity within the third degree.

Covenant for Quiet Enjoyment and Constructive Eviction: Chapter 24, Texas Property Code

Landlords may evict tenants judicially according to the forcible entry and detainer statutes contained in Chapter 24 of the Texas Property Code. Also, landlords may force tenants to leave nonjudicially, either by breaching the covenant for quiet enjoyment or by committing acts or omissions amounting to constructive eviction.

Unlike judicial eviction, little statutory law addresses these processes, only case law. Also, unlike judicial eviction, the decision to terminate the lease rests primarily with the tenant after the landlord acts inappropriately.

What is the covenant for quiet enjoyment?

The covenant for quiet enjoyment is a covenant (or promise) implied by law. It prohibits the landlord (lessee) from disturbing the tenant's quiet use and enjoyment of the property. The covenant covers not only the landlord's actions but also those of persons deriving title from the landlord, such as other tenants. It does not cover acts of strangers.

How is the covenant breached?

Landlords breach the covenant primarily by preventing the tenant from entering the property except by an appropriate judicial process or in compliance with statutory guidelines. For example, the covenant is not breached when the tenant is excluded for bona fide repairs, construction or emergencies if done in compliance with Section 92.002(b) of the Texas Property Code. Likewise, no breach results from exclusion by removing abandoned property (Section 92.002[b]), changing door locks (Section 92.002[c]) or interrupting utilities (Section 92.002[a]) if done in compliance with the statutory dictates. The landlord may breach the covenant, however, by leasing the property to a third party before the lease term ends.

Because of recent statutory intrusion into this area, little pertinent case law exists.

What remedies does a tenant have when landlords breach the covenant?

Unless the landlord's intrusion is severe, the tenant's remedies are limited to damages, attorneys' fees and a possible injunction to end the interference.

More precisely, if the landlord does not strictly comply with the statutory guidelines for entering the property, removing abandoned property, changing door locks or interrupting utilities (Sections 92.002[a], [b] and [c]), the tenant may recover actual damages, one month's rent and reasonable attorneys'

fees (Section 92.002[d][2]). The court may deduct from the recovery any delinquent rent and other sums for which the tenant is liable to the landlord.

In addition to the statutory remedies previously described, the tenant also may recover damages allowed by common law (better known as case law). These include all damages naturally and proximately resulting from the breach. Lost profits and diminished rental value are mentioned by Texas cases.

Tenants also may recover punitive damages in certain instances (*Clark v. Sumner*, 559 S.W. 2d 914).

Finally, injunctive relief is available when the landlord has violated a statutory prohibition described earlier. Likewise, it is also available when the disturbance causes irreparable injury or when damages will not adequately compensate the tenant (*Obets & Harris v. Speed*, 211 S.W. 316).

When the intrusion is severe enough to constitute constructive eviction, the tenant may vacate the premises and terminate the lease.

What is constructive eviction?

Constructive eviction is, in essence, a material, substantial and intentional interference with the tenant's use and enjoyment of the property. Two elements are required.

First, the landlord's conduct materially and permanently interferes with the tenant's beneficial use of the premises. Second, the tenant leaves the property because of the interference. Basically, the landlord's actions constructively force the tenant to vacate the premises.

What is the difference between the breach of covenant for quiet enjoyment and constructive eviction?

No ironclad distinction is made between the two. However, a breach of the covenant for quiet enjoyment generally applies to situations where the tenant is denied physical access to the property. Texas statutory law indicates several instances when the landlord's physical invasion is permissible. Constructive eviction, on the other hand, applies when the tenant is denied the beneficial use of the property. No statutory law in Texas addresses the issue.

What four things are required by Texas case law for constructive eviction?

Texas case law has narrowed constructive eviction to the following four-part test:

- the landlord intends for the tenant to no longer enjoy the premises (this may be presumed),
- material acts or omissions by the landlord, the landlord's agents or those acting with the landlord's permission substantially interfere with the tenant's use and enjoyment of the property for the purposes for which it was rented,
- the acts permanently deprive the tenant of the use and enjoyment of the premises and
- the tenant abandons the property within a reasonable time after the acts or omissions occur (*Stillman v. Youmans*, 266 S.W. 2d 913).

The tenant cannot continue to occupy the premises and allege constructive eviction. The tenant must be forced to leave involuntarily.

What are some examples of constructive eviction from Texas case law?

An early 1929 Texas case held that the landlord's failure to abate a nuisance constructively evicted the tenant (*Maple Terrace Apt. Co. v. Simpson*, 22 S.W. 2d 698). Other examples include the unauthorized

removal of fixtures; loud, abusive language and threats to close the tenant's business made by the landlord in the presence of the tenant's customers; the removal of the tenant's advertising sign from the front of the building; and excessive noises and vibrations caused by the landlord's elevator in the building.

What remedies does a tenant have when constructively evicted?

Aside from the remedy of abandoning the premises and terminating the lease, the tenant may recover damages caused by the landlord's wrongful eviction. For instance, the tenant may recover the difference between the agreed rent for the duration of the lease and comparable rent paid elsewhere. Likewise, lost profits, the reasonable cost of moving and the depreciation in value of the property caused by the move are recoverable (*Reavis v. Taylor*, 162 S.W. 2d 1030).

In addition, punitive damages are recoverable when the landlord acted knowingly or maliciously (*Van Sickle v. Clark*, 510 S.W. 2d 664).

Residential Rental Locators: Section 24, Article 6573(a), Texas Civil Statutes

Effective January 1, 1996, the Texas Real Estate License Act, Article 6573a of Texas Civil Statutes (this Act) is amended by adding Section 24. The law requires residential rental locators to have a real estate broker's or salesman's license issued by the Texas Real Estate Commission (TREC).

Who is a residential rental locator?

A *residential renter locator* is a person, other than the owner of the property or a person exempted by Section 3 of this act, who offers, for consideration, to locate a unit in an apartment complex for lease to a prospective tenant (Section 24[a]).

Among others, Section 3 exempts on-site managers of apartment complexes; an owner or the owner's employees in renting or leasing the owner's own real estate whether improved or unimproved; transactions involving the sale, lease or transfer of cemetery lots; or transactions involving the renting, leasing or management of hotels or motels.

Must residential rental locators have a real estate license?

A person may not engage in business as a residential rental locator in this state unless the person holds a license issued under this act to operate as a real estate broker or real estate salesman and complies with the continuing education requirements under Section 7A of this act.

Where must the real estate license be posted?

Each residential rental locator shall post in a conspicuous place accessible to clients and prospective clients the locator's license, a statement that the locator is licensed by the commission, and the

name, mailing address and telephone number of the commission as provided by Section 5(q) of this act.

What if a person does not obtain the required license for residential rental locators?

A person who violates this law may be charged with a Class B misdemeanor, according to Section 24(f).

Are residential rental locators subject to any rules regarding advertising?

The commission by rule shall adopt regulations and establish standards relating to permissible forms of advertising by a person licensed under this section.

What if the licensed residential rental locator violates any of the commission's rules on advertising or any other rules?

A violation of this section by a residential rental locator constitutes grounds for the suspension or revocation of the person's license and for the assessment of an administrative penalty under Section 19A of this act.

Can the commission waive any of the requirements for a license?

The commission by rule may provide for a waiver of some or all of the requirements for a license under this act, notwithstanding any other provision of this act, if the applicant was previously licensed in this state within the five-year period prior to the filing of the application.

Telecommunications: Subchapter C, Chapter 214, Texas Local Government Code

The Public Utility Regulator Act (PURA), effective September 1, 1995, establishes a comprehensive regulatory system to ensure that public utility rates, operations and services are just and reasonable to Texas consumers.

The legislative act initiating the law, HB 2128, is comprehensive, covering more than 50 sections and 70 pages. The bill enacts at the state level federal requirements implemented under the Federal Communications Act of 1934, the Omnibus Budget Reconciliation Act of 1993 and the most recent rules promulgated by the Federal Communications Commission (FCC).

How do the new telecommunications regulations affect landlords and tenants?

Only a fraction of the act deals with landlord-tenant issues. Most relevant are the bill's:

- definitions in Section 7 (PURA, Section 3.002),
- right-of-way access provisions in Section 27 (PURA, 3.255 [a] and [b]) and
- nondiscrimination provisions in Section 29 (PURA, Section 3.255).

The following synopsis of the law is based on a presentation by Houston attorney Michael A. Jacobs at the 17th Annual Advanced Real Estate Law course.

The definition of *telecommunications provider* (see p. 62) now includes a shared tenant provider and providers of other radio, telephone and specialized telecommunications services (Section 3.002). The act grants to this expanded group full access to existing public utility easements created by plat or easement instrument by municipalities and other political subdivisions (Section 3.255 [b]).

What are the nondiscrimination provisions?

The nondiscrimination provisions prohibit public and private property owners from denying telecommunications providers access to buildings (Section 3.2555). A landlord is specifically prohibited from interfering with or preventing a telecommunications utility from installing service facilities requested by a tenant on the landlord's property. The landlord cannot discriminate against one or more such telecommunications utilities for installation, terms, conditions or compensation of facilities provided to a tenant. Neither can a landlord demand or accept an unreasonable payment in any form from a tenant or the tenant's telecommunications provider for allowing utilities on or within the landlord's property. The landlord cannot discriminate in favor of or against a

tenant in any manner regarding telecommunications, including rental charges.

These nondiscrimination provisions are mandated by federal communications rules. However, the most recent bill tries to clarify that, within the parameters of the new federal requirements, a landlord in Texas may impose reasonable conditions on tenants and their telecommunications providers who seek to install new facilities on the landlord's property. (Subsection 3.2555 [d]).

What reasonable conditions may the landlord impose?

Acting within the nondiscrimination requirements stated in the act, the landlord (private property owner) may:

- protect the safety, security, appearance and condition of the property as well as the safety and convenience of other persons;
- limit the times when a telecommunications utility has access to the property to install facilities;
- require compensation for damage caused by the installation, operation or removal of telecommunications facilities;
- require the tenant or the utility to bear the cost of installation, operation or removal of the facilities;
- limit the number of telecommunications utilities having access to the property if the owner can demonstrate that space constraints demand it; and
- require reasonable, nondiscriminatory compensation from the telecommunications utility.

Who enters into the contract with the utility under the right-of-way access provisions?

A landlord is not required to enter into a contract directly with a telecommunications utility that requests access to tenant services (Subsection 3.2555 [i]). The implication is that a landlord might instead require a tenant to handle these direct contractual obligations with the telecommunications company, and the landlord instead would contract only with the tenant.

What key definitions do landlords and tenants need to know?

The definitions in the PURA are both lengthy and complex. The two definitions relevant to landlords

and tenants are *public utility* and *telecommunications provider*.

Public utility. *Public utility* or *utility* means “any person, corporation, river authority, cooperative corporation or any combination thereof, other than a municipal corporation, or their lessees, trustees and receivers, now or hereafter owning or operating for compensation in this state equipment or facilities for the conveyance, transmission or reception of communications over a telephone system as a dominant carrier (hereafter *telecommunications utility*)” (Section 3.002 [9]).

A person or corporation not otherwise a public utility within the meaning of the act is not considered such solely because they furnish or maintain a private system or manufacture, distribute, install or maintain communications equipment and accessories on customers’ premises. Unless provided in Sections 3.606 and 3.608, nothing in the act should be construed to apply to companies whose only form of business is:

- telecommunications managers,
- central office-based or customer-based PBX-type sharing/resale arrangements suppliers,
- telegraph services,
- television stations,
- radio stations,
- community antenna television services or
- radio-telephone services other than commercial mobile service providers under FCC rules and other laws.

One exception may be radio-telephone services provided by wire-line telephone companies under the “Domestic Public Land Mobile Radio Service and Rural Service” rules of the FCC.

Public utility also includes interexchange telecommunications carriers (including resellers), special-

ized common carriers, other resellers of communications, other communications carriers who convey, transmit or receive communications over a telephone system and providers of operator services as defined in Section 3.052 (a). Subscribers to customer-owned pay telephone service are not considered telecommunications utilities. Separated affiliate and electronic publishing joint ventures as defined by Subtitle L are telecommunications utilities, but the commission’s regulatory authority over them is limited.

Public utility does not include any person or corporation not otherwise a public utility that furnishes the described services or commodity only to itself, its employees or its tenants when such service or commodity is not resold to or used by others.

Telecommunications provider. *Telecommunications provider* means “a certified telecommunications utility, a shared tenant service provider, a nondominant carrier of telecommunications services, a provider of authorized radio-telephone service, a telecommunications entity that provides central office-based, PBX-type sharing or resale arrangements, an interexchange telecommunications carrier, a specialized common carrier, a reseller of communications, a provider of operator services, a provider of customer-owned pay telephone service and other persons or entities that the commission may from time to time find provide telecommunications services to customers in this state.”

The term does not include a provider of enhanced or information services, another user of telecommunications services who does not also provide telecommunications services, state agencies or state institutions of higher education or services provided by state agencies or state institutions of higher education.

Swimming Pool Enclosures: Subchapter C, Chapter 214, Texas Local Government Code

Effective September 1, 1993, local municipalities can pass and enforce ordinances regulating enclosures surrounding private swimming pools. (Texas Local Government Code, Subchapter C, Chapter 214, added by the 73rd Legislature.)

Chapter 214 is unique because the statute permits the municipality, by its ordinances, to make repairs to existing swimming pool enclosures when the landowner fails to comply. A notice and hearing must be provided first. A lien may be placed on the property to secure repayment unless it is a homestead.

Effective September 1, 1993, what type of ordinances may municipalities adopt concerning minimum standards for existing swimming pool fences?

A municipality may establish by ordinance minimum standards for swimming pool fences and enclosures. Also, a municipality may adopt other ordinances necessary to carry out this subchapter (Section 214.101[a]).

Basically, the ordinance may require the owner of a swimming pool to maintain any swimming pool enclosure or fence in such a manner that it does not pose a hazard to the public health, safety and welfare. Nothing is said about the installation of an enclosure fence, only its maintenance (Section 214.101[b]).

A municipality may require a property owner to repair, replace, secure or otherwise maintain a swimming pool enclosure or fence in compliance with the minimum standards set forth in the ordinance. Before the municipality may order compliance, a notice and hearing must be provided the owner. The municipality or an appropriate municipal official, agent or employee may determine when an enclosure or fence violates the ordinance (Section 214.101[c]).

To whom must the notice be sent of a pending hearing about the condition of the enclosure or fence?

As a general rule, the notice is sent to the property owner. The statute implies, but does not state, that the notice should go to the party in possession of the property if that party is not the owner.

If the enclosure or fence is on unoccupied property or on property occupied only by persons who do not have a right of possession, the notice must be sent to the owner. The notice must state the municipality's

pending action to repair, replace, secure or otherwise remedy an existing swimming pool's enclosure or fence (Section 214.101[d]).

What if the owner does not correct the violation after the hearing has been held?

If the owner does not bring the enclosure or fence into compliance, the municipality may repair, replace, secure or otherwise remedy an enclosure or fence that is damaged, deteriorated, substandard, dilapidated or otherwise in a state that poses a hazard to the public health, safety and welfare (Section 214.101[b]).

Who bears the costs if the municipality repairs the enclosure or fence?

Ultimately the property owner must bear the costs and expenses. If a municipality incurs any repair expenses, and if the property owner does not reimburse the city, the municipality may assess (or place) a lien on the property unless, of course, the property is a homestead protected by the Texas Constitution. The lien may be extinguished by the property owner or anyone having a legal interest in the property (Section 214.101[e]).

The lien arises and attaches to the property at the time the notice of the lien is recorded in the office of the county clerk in the county in which the property is situated. The notice of the lien must contain the name and address of the owner if readily available, a legal description of the real property where the swimming pool or the enclosure or fence is situated, the amount of expenses incurred by the municipality and the balance due. The lien is a privileged lien subordinate only to tax liens and all previously recorded bona fide mortgage liens attached to the real property to which the municipality's lien attaches.

The statute is designed to rectify the problem of substandard fences enclosing private swimming pools. However, the language sometimes refers to the property "in which the swimming pool or enclosure or fence is situated." It is unclear why the reference is not to the property "on which" the swimming pool's enclosure or fence is located.

In addition to the lien, can a municipality assess any penalties for violating the ordinance?

An ordinance adopted under this subchapter may provide for a penalty, not to exceed \$1,000, for a

violation of the ordinance. The ordinance may provide that each day of violation constitutes a separate offense (Section 214.101[f]).

Can a municipality enter private unoccupied property to check on possible violations?

A municipal official, agent or employee, acting under the authority granted by this subchapter or any ordinance adopted under this subchapter, may enter any unoccupied premises at a reasonable time to inspect, investigate or enforce the powers granted under this subchapter or any ordinance adopted pursuant to this subchapter (Section 214.101[g]).

Can a municipality enter private occupied property to check on possible violations? Is a prior notice required?

After giving a minimum of 24 hours notice to the occupant, a municipal official, agent or employee, acting under the authority granted by this subchapter or any ordinance adopted under this subchapter, may enter any occupied premises to inspect, investigate or enforce the powers granted or any ordinance adopted under this subchapter (Section 214.101[g]).

What type of liability does the municipality face when remedying an enclosure or fence that is in violation of the ordinance?

A municipality and its officials, agents or employees shall be immune from liability for any acts or omissions not knowingly committed in eliminating dangerous conditions posed by an enclosure or fence that is damaged, deteriorated, substandard, dilapidated or that poses a hazard to the public health, safety and welfare.

Also, the municipality and its officials, agents or employees are immune from liability for inadvertent acts or omissions associated with eliminating previous or subsequent dangerous conditions on the property (Section 214.101[g]).

Is the authority granted by the subchapter the only authority a municipality may have in this regard?

The authority granted by this subchapter is in addition to that granted by any other law.

Pool Yard Enclosures: Chapter 757 Texas Health and Safety Code

Effective January 1, 1994, the state of Texas regulates pool yard enclosures on multiunit rental complexes and also on property owners associations that own, control or maintain pools. (By definition, a pool includes a permanent hot tub or spa more than 18 inches deep.) The chapter dictates standards for existing pool yard enclosures and mandates the construction of enclosures in compliance with the law where they do not exist. The standards are designed to prevent swimming pool deaths and injuries.

The legislators are serious about compliance. Civil penalties not exceeding \$5,000 may be imposed for noncompliance after notice has been given.

Part of the problem facing the regulated pool-yard owners is interpreting the statutory language. It is quite specific and often difficult to understand. A few examples or sketches by the legislators would have been helpful.

Definitions are essential to understanding the requirements. Chapter 757 of the Health and Safety Code defines 16 terms applicable to pool yard fences and to the doors and windows opening to a pool yard. The definitions are reproduced at the end of this section, not in the Glossary. The following terms are defined: *doorknob lock, dwelling or rental dwelling, French doors, keyed dead bolt, keyless bolting device, multiunit rental complex, pool, pool yard, pool yard enclosure or enclosure, property owners association, self-closing and self-latching device, sliding door, handle latch, sliding door pin lock, sliding door security bar, tenant and window latch.*

What are the required dimensions and characteristics of a required pool yard enclosure according to the subchapter?

According to Section 757.003 of the Health and Safety Code, the required dimensions and characteristics are as follows:

- (1) The height of the pool yard enclosure must be at least 48 inches as measured from the ground on the side away from the pool.
- (2) Any openings under the pool yard enclosure may not allow a sphere four inches in diameter to pass underneath.
- (3) The openings within the enclosure may not allow a sphere four inches in diameter to pass through them if the pool yard enclosure is constructed with horizontal and vertical members and the distance between the tops of the horizontal members is at least 45 inches or more.
- (4) The openings within the enclosure may not allow a sphere 1 3/4 inches in diameter to pass through if the pool yard enclosure is constructed with horizontal and vertical members and the distance between the tops of the horizontal members is less than 45 inches.
- (5) Chain link fencing is prohibited for new pool yard enclosures constructed after January 1, 1994. The use of diagonal fencing members that are lower than 49 inches above the ground is prohibited for new pool yard enclosures constructed after January 1, 1994.
- (6) Decorative designs or cutouts on or in the pool yard enclosure may not contain any openings greater than 1 3/4 inches in any direction.
- (7) Indentations or protrusions in a solid pool yard enclosure without any openings may not be greater than normal construction tolerances and tooled masonry joints on the side away from the pool.
- (8) Permanent equipment or structures may not be constructed or placed so they are readily available for climbing over the pool yard enclosure.
- (9) The wall of a building may be part of the pool yard enclosure only if the doors and windows in the wall are in compliance with Sections 757.006 and 757.007 discussed later.

Are there any required minimum distances between the pool and the pool yard enclosure?

There are no minimum required distances between the pool and the pool yard enclosure fence other than for minimum walkways around the pool. However, the "distances for minimum walkways" are not specified (Section 757.003[k]).

Do the requirements of the chapter apply to secondary pool yard enclosures?

The dimensions and characteristics of pool yard enclosures specified in Chapter 757 do not apply to secondary pool yard enclosures, located either inside or outside the primary pool yard enclosure (Section 757.003[k]).

What characteristics must a gate in the enclosure have?

A gate in a fence or wall enclosing a pool yard must have both a self-closing and self-latching device and hardware enabling it to be locked, at the option of whoever controls the gate, by a padlock or a built-in lock operated by key, card or combination. Also, the gate must open outward away from the pool yard (Section 757.004[a]).

At what height must the required gate latch be installed?

The gate latch must be installed at 60 inches above the ground. It may be installed lower under two conditions:

- (1) the latch is installed on the pool yard side of the gate only and is at least three inches below the top of the gate and
- (2) the gate or enclosure has no opening greater than one-half inch in any direction within 18 inches from the latch, including the space between the gate and the post to which the gate latches.

A gate latch may be located 42 inches or higher above the ground if the gate cannot be opened from both sides except by key, card or combination (Section 757.004[c]). Also, the requirements specified in Sections 75.004[a] and [b] above do not apply if the pool yard enclosure was constructed or modified before January 1, 1994, in compliance with existing municipal ordinances as discussed later in Section 757.005.

What are the two exceptions to the requirements of Sections 757.003 and 757.004 when the pool yard enclosure was constructed or modified before January 1, 1994, and if there were no municipal ordinances containing standards for pool yard enclosures at the time of the construction or modification?

First, if the enclosure is constructed with chain link metal fencing, the openings in the enclosure may not allow a sphere 2 1/4 inches in diameter to pass through it (Section 757.005[a][1]).

Second, if the enclosure is constructed with horizontal and vertical members, and if the distance between the tops of the horizontal members is at least 36 inches, the openings in the enclosure may not allow a sphere 4 inches in diameter to pass through it (Section 757.005[a][2]).

What if the pool yard enclosure was constructed or modified before January 1, 1994, according to applicable municipal ordinances in effect at the time?

According to Section 757.005(b), if applicable municipal ordinances were in effect at the time, and if the construction or modification was in compliance with the ordinance, the prior statewide dimensions and characteristics of a pool yard enclosure specified in Sections 757.003, 757.004[a][3] and 757.004[b] do not apply.

What are the required statewide standards for a door, sliding glass door and French door opening directly onto a pool yard?

If the date of electrical service for initial construction of the building or pool is on or after January 1, 1994, a door, sliding glass door or French door may not open directly into a pool yard (Section 757.006[a]).

However, according to Section 757.006[b], a door, sliding glass door or French door may open directly into a pool yard if the electrical service for initial construction of the building or pool was before January 1, 1994. However, the **doors** must meet the requirements of Section 757.006(c), the **sliding glass door** must meet the requirements of 757.006(e) and the **French doors** must meet the requirements of 757.006(d).

What are the requirements of Section 757.006(c) for doors opening into the pool yard?

If a door of a building, other than a sliding glass door or screen door, opens into the pool yard, the door must have a:

- (1) latch that automatically engages when the door is closed,
- (2) spring-loaded door-hinge pin, automatic door closer or similar device to cause the door to close automatically and
- (3) keyless bolting device that is installed not less than 36 inches or more than 48 inches above the interior floor (Section 757.006[c]).

What are the requirements of Section 757.006(e) for sliding glass doors opening into the pool yard?

A sliding glass door that opens into a pool yard must have a:

- (1) sliding door handle latch or sliding door security bar that is installed not more than 48 inches above the interior floor and
- (2) sliding door pin lock that is installed not more than 48 inches above the interior floor (Section 757.006[e]).

What are the requirements of Section 757.006(d) for French doors opening into the pool yard?

French doors are unique. One of the French doors that opens into a pool yard must have a latch that automatically engages when the door is closed. The other door must have either:

- (1) a keyed dead bolt or keyless bolting device that inserts into the doorjamb above the door and a keyless bolting device that inserts into the floor or threshold or
- (2) a bolt with at least a 3/4-inch throw installed inside the door and operated from the edge of the door that can be inserted into the doorjamb above the door and another bolt with at least a 3/4-inch throw installed inside the door and operated from the edge of the door that can be inserted into the floor or threshold (Section 757.006[d]).

There is an exception to these requirements. A door, sliding glass door or French door that opens into a pool yard from an area of a building that is not used by residents and that has no access to an area outside the pool yard is not required to have a lock, latch, dead bolt or keyless bolting device (Section 757.006[f]).

Are there any height requirements for the locking devices attached to the doors, sliding glass doors and French doors opening into the pool yard?

A keyed dead bolt, keyless bolting device, sliding door pin lock or sliding door security bar installed before September 1, 1993, may be installed not more than 54 inches from the floor (Section 757.006[g]).

Are there any special requirements for the throw lengths for either keyed or keyless dead bolts on door locking devices attached to the door or French doors opening into the pool yard?

A keyed dead bolt or keyless dead bolt installed in a dwelling on or after September 1, 1993, must have a bolt with a throw of not less than one inch (Section 757.006[h]).

If a wall with windows is part of the pool yard enclosure, what are the restrictions on the windows?

A building wall constructed before January 1, 1994, may not be used as part of a pool yard enclosure unless (1) each window in the wall has a latch and (2) each window screen is affixed by a window screen latch, screws or similar means. This section does not require the installation of window screens.

A building wall constructed on or after January 1, 1994, may not be used as part of a pool yard enclosure unless each ground floor window in the wall is permanently closed and unable to be opened (Section 757.007).

What about doors, sliding glass doors, windows and window screens on dwellings located within an enclosed pool yard?

According to Section 757.008, each door, sliding glass door, window and window screen of each dwelling unit in the enclosed pool yard must comply with Sections 757.006 and 757.007 previously described.

Section 757.008 appears to exempt or except French doors on dwellings located in an enclosed pool yard.

Whose duty is it to inspect, maintain, repair and keep in good working order all the devices surrounding the pool yard enclosure without a tenant's request?

According to Section 757.009, an owner of a multiunit rental complex or a rental dwelling in a condominium, cooperative or town home project with a pool or a property owners association that owns, controls or maintains a pool shall exercise ordinary and reasonable care to inspect, maintain, repair and keep in good working order the pool yard enclosures, gates and self-closing and self-latching devices required by this chapter (Section 757.009[a]).

How often must the inspections take place?

The pool yard enclosures, gates and self-closing and self-latching devices on gates shall be inspected no less than once every 31 days (Section 757.009[c]).

Can the inspection schedule be waived or expanded?

The inspection, repair and maintenance required under this section may not be waived under any circumstances and may not be enlarged except by written agreement with a tenant or occupant or as otherwise allowed by this chapter (Section 757.009[d]).

What devices and other items must be inspected, maintained, repaired or kept in good working order only after a tenant's request?

Those responsible shall exercise ordinary and reasonable care to maintain, repair and keep in good working order the window latches, sliding door handle latches, sliding door pin locks and sliding door security bars required by this chapter after request or notice from the tenant that those devices are malfunctioning or in need of repair or replacements (Section 757.009[b]).

How must the request be communicated?

A request or notice under this subsection may be given orally unless a written lease or the rules governing the property owners association require the request or notice be in writing. The requirement in the lease or rules must be in capital letters and underlined or in ten-point boldfaced print (Section 757.009[b]).

How does this subchapter interact with conflicting municipal ordinances, conflicting lease provisions and conflicting rules promulgated by the Texas Board of Health?

A pool yard enclosure constructed or modified before January 1, 1994, in compliance with a municipal ordinance may not be required to construct the enclosure differently by a local governmental entity, common law or any other law (Section 757.010[a]).

However, a municipality may continue to require greater overall height requirements for pool yard enclosures if the requirements exist under the municipality's ordinances on January 1, 1994 (Section 757.010[c]).

A tenant or occupant in a multiunit rental complex and a member of a property owners association may, by express written agreement, require the owner of the complex or the association to exceed those standards. By the same token, an owner of a multiunit rental complex or a rental dwelling in a condominium, cooperative or town home project with a pool or a property owners association that owns, controls or maintains a pool may, at the person's option, exceed the standards of this chapter or those adopted by the Texas Board of Health (Section 757.010[b]).

Finally, the Texas Board of Health may adopt rules requiring standards for design and construction of pool yard enclosures that exceed the requirements of this chapter. An owner of a multiunit rental complex or a rental dwelling in a condominium, cooperative or town home project with a pool or a property owners association that owns, controls or maintains a pool shall comply with and shall be liable for failure to comply with those rules to the same extent as if they were part of this chapter (Section 757.011).

Who may enforce the provisions of this subchapter?

A tenant in a multiunit rental complex, a member of a property owners association, a governmental entity or any other person or the person's representative may maintain an action against the owner or property owners association for failure to comply with the requirements of this chapter (Section 757.012[a]).

Also, the attorney general, a local health department, a municipality or a county having jurisdiction

may enforce this chapter by any lawful means, including inspections, permits, fees, civil fines, criminal prosecutions, injunctions. After required notice, a governmental entity may construct or repair pool yard enclosures that do not exist or that do not comply with this chapter (Section 757.012[c]).

The ability of a governmental unit to construct or repair a pool yard enclosure not in compliance with this chapter appears more of an afterthought than a well planned rule. Nothing is mentioned about where the notices must be sent, what the waiting period is or how the governmental entity will be reimbursed. Perhaps a reference to the procedure described in Subchapter C, Chapter 214 of the Local Government Code discussed earlier dealing with municipal ordinances governing swimming pool enclosures would have been helpful.

What can a prevailing party recover for a violation of this subchapter?

A prevailing party under this subchapter may obtain:

- (1) a court order directing the owner or property owners association to comply with this chapter,
- (2) a judgment against the owner or property owners association for actual damages resulting from the failure to comply with the requirements of this chapter,
- (3) a judgment against the owner or property owners association for punitive damages resulting from the failure to comply with the requirements of this chapter if the actual damages to the person were caused by the owner's or property owners association's intentional, malicious or grossly negligent actions,
- (4) a judgment against the owner or property owners association for actual damages, and if appropriate, punitive damages, where the owner or association was in compliance with this chapter at the time of the pool-related damaging event but was consciously indifferent to access being repeatedly gained to the pool yard by unauthorized person or
- (5) a judgment against the owner or property owners association for a civil penalty of not more than \$5,000 if the owner or property owners association fails to comply with this chapter within a reasonable time after written notice is given by a tenant of the multiunit rental complex or a member of the property owners association (Sections 757.012[a] and [b]).

The word "or" was strategically inserted after the fourth alternative remedy listed above. This means that the plaintiff must choose which of the five remedies to pursue. Recovery is limited to only one.

Also, in addition to the fifth alternative, the court may award reasonable attorney fees and costs to the prevailing party.

May a tenant request certain repairs in a multiunit rental complex? How must the request be communicated?

According to Section 757.013, a tenant in a multiunit rental complex with a pool may orally request repair of a keyed dead bolt, keyless bolting device, sliding door latch, sliding door pin lock, sliding door security bar, window latch or window screen latch unless a written lease executed by the tenant requires that the request be in writing. Even then, the lease provision must be in capital letters and underlined or in 10-point boldfaced print. A request for repair may be given to the owner or the owner's managing agent.

This is a confusing section. It appears to add little and overlaps Section 757.009 noted earlier. Section 757.009 requires an owner of a multiunit rental complex to maintain, repair and keep in good working order window latches, sliding door pin locks and sliding door security bars when requested by a tenant. It is unclear why the same provision was repeated here.

Does this subchapter require the enclosure of water other than in pools?

The owner of a multiunit rental complex or a property owners association is not required to enclose a body of water or to construct barriers between the owner's or property owners association's property and a body of water such as an ocean, bay, lake, pond, bayou, river, creek, stream, spring, reservoir, stock tank, culvert, drainage ditch, detention pond or other flood or drainage facility (Section 757.014).

How does this subchapter interact with other laws and statutes?

The duties established by this chapter for an owner of a multiunit dwelling project, an owner of a dwelling in a condominium, cooperative or town

home project and a property owners association supersede those established by common law, the Property Code, the Health and Safety Code and all but Section 214.101 of the Local Government Code. The chapter does not supersede either Section 214.101 of the Local Government Code noted earlier nor any local ordinances relating to duties to inspect, install, repair or maintain:

- pool yard enclosures,
- pool yard enclosure gates and gate latches, including self-closing and self-latching devices,
- keyed dead bolts, keyless bolting devices, sliding door handle latches, sliding door security bars, self-latching and self-closing devices and sliding door pin locks on doors that open into a pool yard area and
- latches on windows that open into a pool yard area. (Section 757.015[a]).

However, this subchapter does not affect any duties of a rental dwelling owner, lessor, sublessor, management company or managing agent under Subchapter D, Chapter 92, Property Code dealing with installation and maintenance of security devices.

Are the remedies described in Section 757.012 exclusive?

The remedies contained in this chapter are not exclusive and are not intended to affect existing remedies allowed by law or other procedure (Section 757.016).

Section 757.015 stating that this chapter supersedes nearly all existing laws and Section 757.016 stating that the chapter is not intended to affect existing remedies appear to conflict. If a law is superseded, so are its remedies.

How shall the provisions of this subchapter be interpreted?

The provisions of this chapter shall be construed liberally to promote its underlying purpose—to prevent swimming pool deaths and injuries in this state (Section 757.017).

Definitions for Swimming Pool Enclosures

The following 16 terms are defined in Section 757.001 of the Health and Safety Code. The definitions are limited to Chapter 757. They are not to be confused with the definition of terms in the Glossary used in the Texas Property Code.

Doorknob lock—a lock in a doorknob that is operated from the exterior **with** a key, card or combination and from the interior **without** a key, card or combination.

Dwelling or rental dwelling—one or more rooms rented to one or more tenants for use as a permanent residence under a lease. The term does not include a room rented to overnight guests.

French door—double doors, sometimes called double-hinged patio doors, that provide access from a dwelling interior to the exterior. Each door is hinged and closable so that the edge of one door closes immediately adjacent to the edge of the other door with no intervening partition. *French door* means either one of the two doors.

Keyed dead bolt—a door lock that is not in the doorknob, that locks by a bolt in the doorjamb, that has a bolt with at least a 1-inch throw if installed after September 1, 1993. It is operated from the exterior by a key, card or combination and operated from the interior by a knob or lever without a key, card or combination. The term includes a doorknob lock that contains a bolt with at least a 1-inch throw.

Keyless bolting device—a door lock not in the doorknob that locks by one of the following three ways:

- (a) with a bolt with a 1-inch throw into a strike plate screwed into the portion of the doorjamb surface that faces the edge of the door when the door is closed or into a metal doorjamb that serves as the strike plate, operable only by knob or lever from the door's interior and not in any manner from the door's exterior, and that is commonly known as a keyless dead bolt;
- (b) by a drop bolt system operated by placing a central metal plate over a metal doorjamb restraint which protrudes from the doorjamb and is affixed to the doorjamb frame by means of three case-hardened screws at least 3 inches in length. One half of the central plate must overlap the interior surface of the door; the other half must overlap the doorjamb when the plate is placed over the doorjamb restraint. The drop bolt system must prevent the door from being opened

unless the central plate is lifted off of the doorjamb restraint by a person on the interior of the door; or

- (c) by a metal bar or metal tube that is placed across the entire interior of the door and secured in place at each end of the bar or tube by heavy-duty metal screw hooks. The screw hooks must be at least 3 inches long and they must be screwed into the door frame stud or wall stud on each side of the door. The bar or tube must be securable to both screw hooks and permanently attached to the door frame stud or wall stud. When secured to the screw hooks, the bar or tube must prevent the door from being opened unless the bar or tube is removed by a person on the interior of the door.

The term does not include a chain latch, flip latch, surface-mounted slide bolt, mortise door bolt, surface-mounted barrel bolt, surface-mounted swing bar door guard, spring-loaded nightlatch, foot bolt or other lock or latch.

Multiunit rental complex—two or more dwelling units in one or more buildings that are under common ownership, managed by the same owner, managing agent or management company, and located on the same lot or tract of land or adjacent lots or tracts of land. The term includes a condominium project. The term does not include a facility primarily renting rooms to overnight guests or a single-family home or adjacent single-family homes that are not part of a condominium project.

Pool—a permanent swimming pool, permanent wading or reflection pool, or permanent hot tub or spa more than 18 inches deep, located at ground level, above ground, below ground or indoors.

Pool yard—an area that contains a pool.

Pool yard enclosure or enclosure—a fence, wall or combination of fences, walls, gates, windows or doors that completely surrounds a pool.

Property owners association—an association of property owners for a residential subdivision, condominium, cooperative, town home project or other project involving residential dwellings.

Self-closing and self-latching device—a device that causes a gate to close and latch automatically without human or electrical power.

Sliding door handle latch—a latch or lock near the handle on a sliding glass door that is operated with

or without a key and designed to prevent the door from being opened.

Sliding door pin lock—a pin or rod inserted from the interior of a sliding glass door opposite the door's handle and designed to prevent the door from being opened or lifted.

Sliding door security bar—a bar or rod that can be placed at the bottom of or across the interior of the fixed panel of a sliding glass door. It is designed to

prevent the sliding panel of the door from being opened.

Tenant—a person who is obligated to pay rent or other consideration and who is authorized to occupy a dwelling, to the exclusion of others, under an oral or written lease or rental agreement.

Window latch—a device on a window or window screen that prevents opening and is operated without a key only from the interior.

Ascertaining the Criminal History of Employees of Residential Dwelling Projects: Chapter 765, Texas Health and Safety Code

Prompted by the rash of attacks on residential tenants by employees of residential dwelling projects, the 73rd Legislature amended Chapter 135 of the Texas Human Resources Code. The 75th Legislature shifted the provisions to Chapter 765 of the Texas Health and Safety Code. Effective September 1, 1993, applicants for employment in a residential dwelling project may be asked about their criminal history. If employment is offered, the employer may verify the applicant's criminal history through the Department of Public Safety.

Six terms are defined at the beginning of Chapter 765. The terms are used extensively throughout the section. The definitions reproduced at the end of this section include: *department*, *dwelling*, *employer*, *employee*, *occupant* and *residential dwelling project*.

Exactly to whom does the chapter apply?

The chapter applies to each applicant for employment in a residential dwelling project to whom employment is offered and who, in the course and scope of the employment, may be reasonably required to have access to a dwelling in the residential dwelling project. The chapter does not apply to a person employed by an occupant or tenant (Sections 765.002[a] and [b]).

When may an employer of a residential dwelling project legally inquire about an applicant's criminal record?

An employer may request an applicant to disclose the applicant's criminal history at any time before or after an offer of employment is made (Section 765.003[a]).

Can the employer verify the applicant's criminal record? Is the applicant's consent necessary for the verification?

After offering employment, the employer may verify through the Texas Department of Public Safety any criminal history that is maintained by the department relating to the applicant. The department is authorized to release information pursuant to Section 411.086 of the Texas Government Code. The employer may verify the information only with the authorization of the applicant and in compliance with this chapter (Section 765.003[a]).

What information may the Department of Public Safety require before releasing the information?

The department may require the employer to submit the applicant's complete name, date of birth, social security number, sex, race, current street address and current Texas driver's license number, if any (Section 765.003[b]).

However, the department may adopt rules relating to an employer's access to criminal history including requirements for submission of:

- the employer's complete name, current street address and federal employer identification number,
- an affidavit by an authorized representative of the employer that the individual whose criminal history is requested has been offered a position of employment by the employer in a residential dwelling project and that, in the course and scope of the employment, the individual may be reasonably required to have access to a dwelling in the residential dwelling project and
- the complete name, date of birth, social security number and current street address of the individual signing the affidavit (Section 765.003[c]).

The affidavit must include a statement, executed by the individual being offered the position of employment, authorizing the employer to obtain the applicant's criminal history (Section 765.003[d]).

Must the department release the applicant's entire criminal record?

The department is required to provide only the information that the employer is entitled to receive under Section 411.118 of the Texas Government Code (Section 765.003[e]).

What information can be released to an employer of a residential dwelling project according to Section 411.118 of the Texas Government Code?

The department may release the criminal history of an application that relates to:

- (1) an offense classified as:
 - an offense against the person or family,
 - an offense against property or
 - public indecency

- (2) a felony violation of a controlled substance, either for the possession or distribution, under Chapter 481 or Section 485.033 of the Texas Health and Safety Code or
- (3) an offense under Sections 49.04, 49.07 or 49.08 of the Texas Penal Code if the position requires a substantial amount of driving.

What offenses are involved with the three sections of the penal code?

The respective sections of the penal code involve the following:

- Section 49.04: Driving While Intoxicated
- Section 49.07: Intoxication Assault—seriously injuring another by accident or mistake while operating an aircraft, watercraft or motor vehicle in a public place.
- Section 49.08: Intoxication Manslaughter—causes the death of another by accident or mistake while operating an aircraft, watercraft or motor vehicle in a public place.

Are employers required to check the criminal history of an applicant?

This chapter does not require an employer to obtain the criminal history of an applicant (Section 765.003[f]).

May the employer share the applicant's criminal history?

Criminal history received by an employer under this chapter is privileged and for the exclusive use of the employer. The employer may disclose the information to an authorized officer, employee or agent of the employer only for the purpose of determining an individual's suitability for

employment. An employer, or any individual to whom the employer may have disclosed information, may not release or otherwise disclose the information received under this chapter to any person or governmental entity except on court order or with the written consent of the individual being investigated (Section 765.004).

Are there any penalties for violating the restrictions with whom the applicant's criminal history may be shared? What if false information is given to the department?

An individual who is an officer, employee or agent of an employer and who knowingly or intentionally violates Section 765.004 of this chapter or submits false information to the department commits a Class A misdemeanor (Section 765.005).

What are the consequences if the applicant submits a false criminal history to the employer?

An employer may terminate the employment of an individual who, at the time of the application for employment or after being employed by the employer, submits false information about the individual's criminal history (Section 765.006).

Can the employer ask the applicant or employee about other relevant information not prohibited by law?

This chapter does not prevent an employer from asking an applicant or an employee to provide other information if the requested information is not otherwise prohibited by law (Section 765.007).

Definitions Used in Ascertaining the Criminal History of Employees

The following six terms are defined in Section 135.001 of the Texas Human Resources Code. The definitions are limited to Chapter 135. They are not to be confused with the definitions in the Glossary used in the Texas Property Code.

Department—the Department of Public Safety.

Dwelling—one or more rooms rented for residential purposes to one or more tenants.

Employer—a person who hires employees to work at a residential dwelling project.

Employee—an individual who performs services for compensation at a residential dwelling project and who is employed by the owner of the project or the

representative of the owner in managing or leasing dwellings in the project. The term does not include an independent contractor.

Occupant—an individual who resides in a dwelling in a residential dwelling project but who is not a tenant or the owner or manager of the dwelling.

Residential dwelling project—a house, condominium, apartment building, duplex or similar facility that is used as a dwelling. A facility that provides lodging to guests for compensation including a hotel, motel, inn, bed and breakfast or similar facility. The term does not include a nursing home or other related institution regulated under Chapter 242 of the Health and Safety Code.

Towing Vehicles from Parking Lots and Public Roadways: Chapter 835, Article 6701g-2, Texas Civil Statutes

The problem with vehicles obstructing entries and exits to parking lots, blocking fire lanes and parking in designated handicapped zones prompted the 73rd Legislature to amend Chapter 835 of Article 6701g-2 of the Texas Civil Statutes. Effective January 1, 1994, the entity controlling a parking lot such as property owners associations, multiunit rental complexes and even churches are empowered to tow vehicles violating this subchapter.

However, with the power to tow, comes a host of prerequisites, notably posting required signs at the proper height and location and featuring the correct colors, material, letter height, wording, etc. The failure of the entities controlling the parking lot to adhere to all the prerequisites subjects them to both civil and criminal sanctions.

The prerequisites, though, are not easy to decipher from the text of the statute. The wording is quite technical. Diagrams by the legislators would have been helpful.

The following nine terms used extensively throughout the statute are defined at the end of this section: *dedicatory instrument, parking facility, parking facility owner, property owners association, public roadway, towing company, vehicle, vehicle storage facility* and *unauthorized vehicle*.

How may the owner or operator of a vehicle violate this statute?

According to Section 2(a), an owner or operator of a vehicle may not leave a vehicle unattended on a parking facility if the vehicle:

- is in or obstructs a vehicular traffic aisle, entry or exit of the parking facility,
- prevents a vehicle from exiting a parking space in the facility,
- is in or obstructs a fire lane marked according to Subsection (b) of this section or
- is in a disabled parking space that is designated for the exclusive use of vehicles transporting disabled persons and does not display the specially designed license plate for such vehicles or the removable windshield identification card issued under Article 6675a-5e.1 of the Vernon's Texas Civil Statutes.

How should fire lanes be marked in the parking facility?

If a government regulation on marking fire lanes applies to a parking facility, fire lanes must be marked as specified. If a government regulation does **not** apply, all fire lane curbs must be painted red and

conspicuously and legibly marked with the warning “**FIRE LANE-TOW AWAY ZONE**” in white letters at least 3 inches tall at intervals not exceeding 50 feet (Section 2[b]).

Does this statute apply to emergency vehicles?

This section does not apply to an emergency vehicle that is owned or operated by a governmental entity (Section 2[c]).

What conditions are necessary before parking facility owners may legally tow an unauthorized vehicle?

A parking facility owner, without the consent of the owner or operator of an unauthorized vehicle, may remove the vehicle and any property resting on or contained within it. It may be stored at a vehicle storage facility at the expense of the owner or operator, when any of the following events occur:

- (1) a sign or signs prohibiting unauthorized vehicles have been installed on the parking facility for at least 24 consecutive hours and remain installed at the time of towing,
- (2) the owner or operator of the unauthorized vehicle has received actual notice from the parking facility owner that the vehicle will be towed at the vehicle owner's or operator's expense if it is parked in an unauthorized space or not removed from an unauthorized space,
- (3) the parking facility owner has given notice to the owner or operator of the unauthorized vehicle as provided by Section 3(b) below, that the vehicle will be towed at the expense of the owner or operator if it is in an unauthorized space or is not removed from an unauthorized space or
- (4) the unauthorized vehicle, in violation of Section 2(a) of this act, is preventing another vehicle from exiting a parking space on the parking facility or is in or obstructing a fire lane, disabled parking space, aisle, entry or exit, including any portion of a paved driveway or abutting public roadway used for entering or exiting the facility (Section 3[a]).

Exactly how is the parking facility owner required to give notice in satisfaction of Section 3(a)(3) above?

A parking facility owner is considered to have given notice under Section 3(a)(3) when:

- (1) a conspicuous notice has been attached to the vehicle's front windshield or to another conspicuous location on the vehicle if the vehicle has no front windshield, stating that the vehicle is in a parking space in which the vehicle is not authorized to be parked, describing all the other unauthorized areas in the parking facility, stating that the vehicle will be towed at the expense of the owner or operator if it remains in an unauthorized area of the parking facility and stating a telephone number that is answered 24 hours a day to enable the owner or operator of a towed vehicle to locate the vehicle and
- (2) after the notice has been attached to the vehicle:
 - the vehicle is parked by the owner or operator of the vehicle in another location where parking is unauthorized for the vehicle according to the notice or
 - a notice was mailed to the vehicle owner by certified mail, return receipt requested, to the last address shown for the vehicle owner according to the vehicle registration records of the Texas Department of Transportation, or if the vehicle is registered in another state, the appropriate agency of that state (Section 3[b]).

If a notice is mailed to the vehicle owner, it must state that the vehicle is in a space for which the vehicle is not authorized to park, describe all other unauthorized areas in the parking facility, contain a warning that the unauthorized vehicle will be towed at the expense of the owner or operator if it is not removed from the parking facility before the 15th day after the postmark date of the notice. The notice also must state a telephone number that is answered 24 hours a day to enable the owner or operator of a towed vehicle to locate the vehicle (Section 3[c]).

May the parking facility owner remove an unauthorized vehicle in other ways?

A parking facility owner may not have an unauthorized vehicle removed from the facility except as provided by this act, as provided by a municipal ordinance that complies with Section 10 of this act or under the direction of a peace officer or the owner or operator of the vehicle (Section 3[d]).

What liability does the parking facility owner face when having an unauthorized vehicle removed?

A parking facility owner who has an unauthorized vehicle removed in compliance with these provisions shall not be liable for damages arising out of the removal or storage of such vehicle if the vehicle is:

- removed by a towing company insured against liability for property damage incurred in towing vehicles and
- stored by a vehicle storage facility insured against liability for property damage incurred in storing vehicles (Section 3[e]).

May the parking facility owner call a towing company that does not have liability for property damage? What facts must the towing company verify or determine before towing the vehicle?

Only a towing company that is insured against liability for property damage incurred in towing vehicles may remove and store a vehicle at a vehicle storage facility at the expense of the owner of the vehicle, and then, only if any one of the following events has occurred:

- (1) the towing company has received written verification from the parking facility owner that the parking facility owner has, in compliance with Section 3(a)(1) of this act, caused signs to be installed in accordance with Section 6 of this act,
- (2) the towing company has received written verification from the parking facility owner that the vehicle owner or operator received actual notice under Section 3(a)(2) of this act or that the facility owner gave notice complying with Section 3(a)(3) of this act notifying the owner or operator that the vehicle will be towed at the vehicle owner's or operator's expense if it is not removed or
- (3) the unauthorized vehicle in violation of Section 2(a) of this act is preventing another vehicle from exiting a parking space or is in or obstructing a fire lane, disabled parking space, aisle, entry or exit, including any portion of a paved driveway or abutting public roadway used for entering or exiting the facility (Section 4[a]).

Are there any other ways a towing company may remove an unauthorized vehicle?

A towing company may not remove an unauthorized vehicle except as provided by this act, as provided by a municipal ordinance that complies with Section 10 of this act or under the direction of a peace officer or the owner or operator of such vehicle (Section 4[b]).

If a parking facility owner posts an unauthorized parking sign as described in Sections 6(a), (b) and (c) anywhere in the facility, the owner of a vehicle that is towed from the facility must be able to locate the vehicle by calling the telephone number posted on the sign (Section 3[f]).

What must a vehicle storage facility do when it receives a towed vehicle?

Within two hours after receiving a vehicle towed under this act, the vehicle storage facility must report to the local police department or, if the parking facility is not located within a municipality with a police department, to the county sheriff where the parking facility is located. The following information must be reported:

- a general description of the vehicle,
- the state and number of the vehicle's license plate, if any,
- the vehicle identification number if known,
- the location from which the vehicle was towed and
- the name and location of the facility where the vehicle is being stored (Section 5 [a]).

How must the information be relayed to the police department or sheriff's department?

The vehicle storage facility shall deliver the report by telephone, facsimile or personal delivery (Section 5[b]).

The parking facility owner is relieved of liability for the towing if both the towing company and the vehicle storage facility are insured. The law permits the parking facility owner to call only an insured towing company. The law says nothing about insurance for the vehicle storage facility.

How must the signs prohibiting unauthorized parking be installed?

A sign prohibiting unauthorized vehicles on a parking facility must be:

- (1) conspicuously visible and facing the driver of a vehicle entering the facility,
- (2) located on the right-hand or left-hand side of each driveway or curb-cut entrance, including any entry point along an alley abutting the facility,
- (3) permanently mounted on a pole, post, permanent wall or permanent barrier,
- (4) installed on the parking facility and
- (5) installed so that the bottom edge of the sign is no lower than 5 feet and no higher than 8 feet above ground level (Section 6[a]).

What other characteristics and dimensions must the sign have?

Each sign prohibiting unauthorized vehicles must:

- (1) be made of weather-resistant material,
- (2) be at least 18 inches wide and 24 inches tall,
- (3) contain the international symbol for towing vehicles, which is generally rectangular with

a solid silhouette of a tow truck towing a vehicle,

- (4) contain a statement describing who may park in the parking facility and prohibiting all others, such as "Tenant Parking Only," "Patient Parking Only," "Parking for Customers and Permit Holders Only," or "No Parking by Anyone,"
- (5) bear the words "Unauthorized Vehicles Will Be Towed at Owner's or Operator's Expense,"
- (6) contain a statement of the days and hours of towing enforcement, such as "Towing Enforced at All Times" or "Towing Enforced 7 a.m. to 7 p.m., Monday through Friday" and
- (7) contain a current telephone number, including the area code, that is answered 24 hours a day to enable the owner or operator of a towed vehicle to locate the vehicle (Section 6[b]).

What about color, layout, lettering and other design elements? What about signs made after January 1, 1996?

Each sign required by this act shall comply with the following color, layout and lettering height requirements:

- (1) the top portion of the sign must contain the international towing symbol. The symbol must be bright red on a white background, at least 4 inches tall and placed at the top of the unauthorized parking sign or on a separate sign immediately above the unauthorized parking sign,
- (2) the portion of the sign immediately below the towing symbol must contain the words "Towing Enforced" or the information in Section 6(b)(4) in lettering at least 2 inches tall. Before January 1, 1996, the lettering on this portion of the sign must be white letters on a bright red background or bright red letters on a white background. After that date, the lettering on this portion must be white letters on a bright red background,
- (3) except as provided by 6(c)(4), the next portion of the sign must contain the remaining information required by Section 6(b), with bright red letters at least 1 inch tall on a white background and
- (4) the bottom portion of the sign must contain the 24-hour telephone number, in lettering at least 1 inch tall and may, if the facility owner chooses or if an applicable municipal ordinance requires, include the name and address of the storage facility where an unauthorized vehicle will be taken. Before

January 1, 1996, the lettering on this portion of the sign must be white letters on a bright red background or bright red letters on a white background. After that date, the lettering on this portion must be white letters on a bright red background (Section 6(c)).

It is practically impossible to decipher the requirements of Section 6(c). A diagram by the legislators would have been helpful.

Are there any exceptions to the installation of signs as described in Section 6(a)(2)?

A parking facility owner may designate one or more spaces as restricted parking spaces on a portion or portions of an otherwise unrestricted parking facility. Instead of installing unauthorized parking signs at each entrance to the parking facility as provided by section 6(a)(2), a sign that prohibits unauthorized vehicles from parking in designated spaces that otherwise complies with section 6(a), (b) and (c) may be placed:

- (1) at the right-hand or left-hand side of each entrance to a designated area or group of parking spaces located on the restricted portion of the parking facility or
- (2) at the end of an individual parking space so that the sign, with the top no higher than 7 feet above ground level, is in front of a vehicle parked in the space with the rear of the vehicle being at the entrance of the space (Section 6(d)).

May a parking facility owner impose individual parking restrictions in areas already covered by signs?

A parking facility owner who complies with the entry sign requirements of Sections 6(a), (b) or (c) may impose individual parking restrictions in an area of individual spaces by installing or painting a weather-resistant sign or notice on a curb, pole, post, permanent wall or permanent barrier so that the sign is in front of a vehicle parked in the space with the rear of the vehicle being at the entrance of the space. The top of the sign or notice must be no higher than 7 feet above ground level. A sign must indicate that the space is reserved for a particular unit number, person or type of person, such as "Reserved for Unit 101," "Reserved for Suite 202," "Reserved for John Doe," "Reserved for Tenant," "Reserved for Permit Holders" or "Reserved for Permit #123". The letters must be at least 2 inches tall and must contrast to the color of the curb, wall or barrier so they can be read day and night. The letters do not need to be illuminated or made of reflective material (Section 6(e)).

Where must the signs be placed in parking lots with no established entry?

If curbs, access barriers, landscaping or driveways do not establish definite vehicle entrances into the parking facility from a public roadway other than an alley, and if an entrance exceeds 35 feet in width, each of the unauthorized parking signs otherwise complying with sections 6(a), (b) and (c) must be located at intervals along the entrance so that no entrance is farther than 25 feet from a sign (Section 6(f)).

Is strict compliance required for the minimum heights of signs and letters?

Minor variations of required or minimum heights of signs and letters do not constitute a violation of this act (Section 6(g)).

Is this statute limited to the regulation of towing from privately owned parking lots?

The definition of a parking facility as regulated by this statute also includes both (1) the portion of the right-of-way of public roadway that is leased by a governmental entity to the parking facility owner and (2) the area between the facility's property line abutting a county or municipal public roadway and the center line of the roadway's drainageway or the curb of the roadway, whichever is farthest from the facility's property line (Section 7(a)).

Unless prohibited in the lease, a parking facility owner or towing company may remove an unauthorized vehicle parked in whole or in part in a leased area just described by Section 7(a)(1), if the owner or towing company:

- (1) gives notice by sign as provided by Section 3(a)(1) of this act and otherwise complies with this act or
- (2) gives notice to the vehicle owner or operator as provided by Sections 3(a)(2) or 3(a)(3) of this act and otherwise complies with this act (Section 7(b)).

Unless prohibited by an applicable municipal ordinance, a parking facility owner or towing company may remove an unauthorized vehicle parked in whole or in part in the area, just described in Section 7(a)(2), by giving notice as provided by Section 3(a)(2) or 3(a)(3) of this act and otherwise complying with this act (Section 7(c)).

Can a governmental entity with jurisdiction over a roadway remove or have towed unauthorized vehicles violating "no parking" signs?

A governmental authority with jurisdiction over a public roadway that has posted one or more signs prohibiting parking in the right-of-way may:

- (1) remove or contract with a towing company to remove an unauthorized vehicle parked in the right-of-way of the public roadway, on direction of a representative of the governmental authority or
- (2) grant written permission to an abutting parking facility owner to post “No parking in R.O.W.” signs along the common property line between the facility and the public roadway and to remove vehicles from the right-of-way of the public roadway in compliance with this act (Section 7[d]).

If the governmental entity opts to use the second alternative noted above in Section 7[a][2]), then the posted signs must state that vehicles parked in the right-of-way may be towed at the vehicle owner’s or operator’s expense. The signs must be placed facing the public roadway, on the parking facility owner’s property within 2 feet from the common boundary line, and at intervals so that no point in the boundary line is less than 25 feet from a sign posted. In all other respects, the signs must comply with Section 6 of this act (Section 7[e]).

If the appropriate signs have been posted, a parking facility owner or a towing company may remove an unauthorized vehicle from the right-of-way to the extent allowed in the written grant of permission to the facility owner from the government under section 7(d)(2).

Are there any other ways a parking facility owner or a towing company may remove a vehicle from a public roadway?

A parking facility owner or towing company may not remove a vehicle from a public roadway (highway) except as provided by this act, as provided by a municipal ordinance complying with Section 10 of this act or under the direction of a peace officer or the owner or operator of the vehicle (Section 7[g]).

Can there be any kickbacks or other monetary interests or connections between the parking facility owner and the towing company?

A parking facility owner may not accept anything of value, directly or indirectly, from a towing company in connection with the removal of a vehicle from a parking facility. A parking facility owner may not have a monetary interest, directly or indirectly, in a towing company that removes unauthorized vehicles for compensation from a parking facility in which the parking facility owner has an interest (Section 8).

A towing company may not give anything of value, directly or indirectly, to a parking facility owner in

connection with the removal of a vehicle from a parking facility. A towing company may not have a monetary (pecuniary) interest, directly or indirectly, in a parking facility from which the towing company removes unauthorized vehicles for compensation (Section 9).

Section 12, discussed later, appears to contain the penalty for a violation of either Sections 8 or 9.

How does this statute interact with a municipal ordinance covering the same subject?

A municipality may adopt an ordinance that is identical to this act or that imposes additional requirements exceeding the minimum standards of this act but may not adopt a conflicting ordinance (Section 10).

What type of recovery can the owner or operator receive from the towing company or parking facility owner who violates this statute?

Any towing company or parking facility owner who violates this act shall be liable to the owner or operator of the vehicle for damages arising from the removal or storage of such vehicle and/or any towing or storage fees assessed in connection with the removal or storage of the vehicle. Negligence on the part of the parking facility owner or towing company need not be proved to recover (Section 11[a]).

Does the recovery vary when the towing company or parking facility owner intentionally violates the statutes?

A towing company or parking facility owner who knowingly, intentionally or recklessly violates this act shall be liable to the owner or operator of the vehicle for \$300 plus treble the amount of fees assessed in the removal, towing or storage of the vehicle (Section 11).

In any suit brought under this act, the prevailing party shall recover reasonable attorneys’ fees from the nonprevailing party.

In addition to the civil recoveries by the owner or operator of the vehicle, can any criminal fines or penalties be imposed?

Any violation of this act is punishable by a fine of not less than \$200 and not more than \$500. Any violation of the provisions of this act may be enjoined pursuant to the provisions of the Deceptive Trade Practices-Consumer Protection Act (Section 12).

Definitions Associated with Towing Vehicles from Parking Lots

The following nine terms are defined in Chapter 835, Article 6701g-2 of the Texas Civil Statutes. The definitions are limited to Chapter 835. They are not to be confused with the definitions in the Glossary used in the Texas Property Code.

Dedicator instrument—each governing instrument covering the establishment, maintenance and operation of a residential subdivision, planned unit development, condominium or townhouse regime or any similar planned development. The term includes a declaration or similar instrument subjecting real property to restrictive covenants, bylaws or similar instruments governing the administration or operation of a property owners association, to properly adopted rules and regulations of the property owners association, or to all lawful amendments to the covenants, bylaws, instruments, rules or regulations.

Parking facility—any public or private property used, in whole or in part, for restricted and/or paid parking of vehicles. The term includes but is not limited to commercial parking lots, parking garages and parking areas serving or adjacent to businesses, churches, schools, homes, apartment complexes, property governed by a property owners association and government-owned property leased to a private person. The term also includes a restricted space or spaces on a portion or portions of an otherwise unrestricted parking facility.

Parking facility owner—includes:

- an operator or owner (including a lessee, employee or agent) of a parking facility,
- a property owners association having control over assigned or unassigned parking areas according to a dedicatory instrument and
- a property owner having exclusive-use rights to a parking space under a dedicatory instrument.

Property owners association—an incorporated or unincorporated association owned by or whose members consist primarily of the owners of the property covered by the dedicatory instrument and through which the owners, or the board of directors or similar governing body, manage or regulate the residential subdivision, planned unit development, condominium or townhouse regime or similar planned development.

Public roadway—any public street, alley, road, right-of-way or other public way, including paved and unpaved portions of the right-of-way, unless otherwise stated.

Towing company—a person operating a tow truck registered under Chapter 1135, Acts of the 70th Legislature, Regular Session, 1987 (Article 6687-9b, Vernon's Texas Civil Statutes). The term includes the owner, operator, employee or agent of a towing company but does not include cities, counties or other political subdivisions of the state.

Vehicle—every kind of device in, upon or by which any person or property is or may be transported or drawn on a public roadway, except devices moved by human power or used exclusively on stationary rails or tracks. The term includes an operable or inoperable automobile, truck, motorcycle, recreational vehicle or trailer.

Vehicle storage facility—a facility operated by a person licensed under the Vehicle Storage Facility Act (Article 6687-9a, Revised Statutes).

Unauthorized vehicle—any vehicle parked, stored or situated in or on a parking facility without the consent of the parking facility owner.

Federal and State Statutes Affecting Residential and Commercial Tenancies

A discussion of residential and commercial tenancies would not be complete without addressing the impact of federal and state statutes. All federal laws are superior to any Texas laws on the subject according to the Federal Supremacy Clause of the U.S. Constitution.

Military Personnel

Two federal statutes override Texas landlord-tenant law. The first is the Soldiers' and Sailors' Civil Relief Act of 1940, as amended. The second is the Fair Housing Act of 1988.

How are military personnel and their dependents affected?

The Soldiers' and Sailors' Civil Relief Act of 1940 was designed to lessen the financial hardship faced by military personnel and their families caused by active service. Its purpose is ". . . to suspend enforcement of civil liabilities, in certain cases, of persons in the military service of the United States in order to enable such persons to devote their entire energy to the defense needs of the Nation. . . ."

Two aspects of the act apply to residential tenancies. One deals with the tenant's (military personnel's) right to terminate existing leases; the other concerns the landlord's right to evict military personnel or their dependents.

Eligible military service persons who have executed leases for dwelling, professional, business, agricultural or similar purposes have an unqualified right to terminate the leases if the following conditions are met:

- The leases were executed by or on behalf of the person before entering the military.
- The premises were occupied by the military person or dependents.
- The person gives the landlord written notice of termination by first class mail or other means after entering the service. The notice terminates the lease 30 days after the next rental payment is due.

The act prohibits any person from knowingly seizing or detaining the tenant's (military personnel's) property in an effort to claim rent after the lease terminates (50 United States Code Annotated, Section 534).

Without the court's consent, the act also prohibits landlords from terminating residential leases with dependents of military service personnel. Originally, the prohibition applied to dependents paying \$150 or

less per month. Effective July 1, 1990, the amount was raised to \$1,200 or less per month. The court will not permit an eviction when it finds that the tenant's ability to pay the rent was materially affected by reason of the military service (50 United States Code Annotated, Section 530).

Anti-Discrimination

The Fair Housing Amendments Act of 1988 was enacted September 13, 1988, as Public Law 100-430. Section 3604 of the act specifically prohibits discrimination in the sale or rental of housing based on the person's race, color, religion, sex, handicap, familial status or national origin.

Basically the statute states that it shall be unlawful to:

- refuse to sell or rent after the making of a bona fide offer or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny a dwelling based on the personal factors listed above;
- discriminate against any person in the terms, conditions or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith based on the personal factors listed above;
- make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on the personal factors listed above; or
- misrepresent the availability of a dwelling for inspection, sale or rent because of the personal factors listed above.

Handicapped Persons

What are the rights of handicapped persons living in rental property?

Two federal statutes have affected rights of the handicapped in rental property. The first is the Fair Housing Amendments Act of 1988 dealing with residential leases previously discussed. The other is the Americans with Disabilities Act of 1990 (ADA) concerning commercial leases. An explanation of the ADA is beyond the scope of this report.

As previously noted, the Fair Housing Act prohibits discrimination in the sale or rental of residential property based on a person's handicapped status. Also, the act addresses the type of accesses new

residential buildings of four or more dwelling units must have for handicapped occupants. Buildings available for first occupancy after March 13, 1991, must comply with the access requirements (24 C.F.R. Section 100.201).

What features are required in new units to provide handicapped access?

For newly constructed units, the act requires the following features to be included in each individual unit:

- a door sufficiently wide to allow passage by handicapped persons in wheelchairs;
- accessible routes into and through each unit;
- accessible light switches;
- accessible electrical outlets, thermostats and other environmental controls;
- reinforcements in bathroom walls to allow later installation of grab bars; and
- usable kitchens and bathrooms that allow an individual in a wheelchair to maneuver.

What features may be added to existing structures at the tenant's expense?

The part of the act that immediately affects existing structures is known as the "retro-fitting provisions." A tenant must be given the right (at his or her expense) to modify both the unit and the common areas to permit access. The types of modifications, according to the legislative history of the act, include:

- adding bathroom wall reinforcement and grab bars,
- installing a flashing light to enable the hearing impaired to see when someone is ringing the doorbell,
- replacing doorknobs with lever handles for tenants with severe arthritis,
- installing fold-back hinges on doors for tenants in wheelchairs and
- building entry ramps for persons in wheelchairs (56 Fed. Reg. 9472 at 62).

Although no specific types of modifications to the common areas are mentioned, the modifications are permitted to a lobby's main entrance of apartment buildings, laundry rooms and public-use areas necessary for the full enjoyment of the premises.

Do landlords have any safeguards?

Landlords are provided some safeguards. For instance, landlords may require a reasonable escrow or other measures to insure that the unit is properly constructed and returned to its original condition (when reasonable) after the handicapped person

leaves. However, HUD has determined that it is unreasonable to expect a tenant to restore *common areas* to their original condition.

Pesticide Application

Who may apply pesticides in a residential unit?

The Texas Structural Pest Control Act governs who may apply pesticides to apartment buildings.

The act establishes two types of pesticide applicators: certified commercial applicators and certified noncommercial applicators. An apartment building owner may obtain pest control services from either a business with a structural pest control business license or require an employee who is a licensed certified noncommercial applicator to perform the services.

Although the amendment uses the word *may*, a broad reading of the bill suggests the correct wording to be *must*. An uncertified owner is prohibited from applying pesticides to an apartment building containing two or more dwelling units. Apparently, an uncertified owner may apply pesticides to a separate, single-family residential unit.

What notices are required?

The Texas Structural Pest Control Board is required to develop a "Pest Control Sign" to be posted in the area of an indoor treatment; the sign must contain the date of the planned treatment and other information required by the board. The board is charged with developing and approving a Pest Control Information Sheet that is to be distributed to the owner or manager of a complex and also to the tenants.

The use of the sign and the information sheet depends on the size of the apartment complex. If the complex contains less than five rental units, including single-family dwellings, the certified applicator must leave the information sheet in each unit at the time of each pest control treatment.

If the complex contains five or more units, the certified applicator must provide the owner or manager of the complex both the information sheet and the sign. The owner or manager, in turn, must notify the residents who live in the direct or adjacent area of the forthcoming treatment at least 48 hours before the application by either posting the sign in an area of common access or leaving the information sheet on the front door of each unit or in a conspicuous place inside each unit.

Similar, but less stringent, requirements are imposed for outdoor treatments. However, a pest control treatment is considered an indoor treatment even though part of the treatment is outdoors if the primary purpose is to treat the inside of a building.

May unlicensed individuals apply pesticides?

The act provides certain exemptions. Unlicensed individuals may, on their own premises or on premises in which they own a partnership or joint venture interest, use pesticides to prevent, control or eliminate pest infestation. Also, people who use pest control chemicals available in retail food stores for household application are exempt if the insecticide is used by the owner, employee or agent in space occupied by the building owner in a residential building; or used in a place that is vacant, unused and unoccupied.

Warning of Lead-Based Paint or Hazards

Must landlords warn tenants about lead-based paint?

In October 1992, Congress adopted the Residential Lead-Based Paint Hazard Reduction Act, Title X of the Housing and Community Development Act (P.L. 102-550, 102 Stat. 3672, codified at 42 U.S.C.A. Section 4851 et seq.)

The statute required the Environmental Protection Agency (EPA) to work with the U.S. Department of Housing and Urban Development (HUD) to promulgate regulations for disclosure of lead-based paint hazards in residential property being sold or leased. The regulations were published March 6, 1996, in the *Federal Register*. The new regulations will be codified as 24 CFR Part 35 and 40CFR Part 745. The effective dates for the required disclosures are September 6, 1996, for owners of more than four residential dwellings; December 6, 1996, for owners of one to four residential dwellings.

The responsibility and liability for making the disclosures rest jointly with the lessor, the lessor's agent and property manager. The regulations cover residential lease property constructed prior to 1978 that has not been found lead-free by a certified inspector. Leases for property constructed prior to 1978 are exempt when:

- the duration of the lease is 100 days or less with no renewal or extension option or
- an existing lease is renewed, extended or ratified; the disclosure was given at the beginning of the lease; and no new information has been found in the interim concerning the presence of lead-based paint or associated hazards.

Also exempted are housing for the elderly (for persons 62 years or older at initial occupancy) or persons with disabilities unless a child younger than six years resides or is expected to reside in the dwelling. Also exempt are zero-bedroom dwellings with a combined living and sleeping area. These include efficiencies, studio apartments, dormitories,

military barracks and individual rooms rented within residential dwellings.

An apartment or dwelling is deemed to have *lead-based paint* when the surface coatings contain lead equal to or in excess of 1.0 milligrams per square centimeter or 0.5 percent by weight. However, a *lead-based paint hazard* is a condition in which exposure to lead from lead-contaminated dust, soil or deteriorated paint on accessible surfaces, friction surfaces or impact surfaces would result in adverse human health effects.

Before the lease contract is entered, the regulations require a pamphlet, entitled *Protecting Your Family from Lead in Your Home* (or an equivalent pamphlet approved by the EPA), to be given to the prospective lessee.

Single copies of the pamphlet, in either English or Spanish, may be obtained from the National Lead Information Center (NLIC) at 1-800-424-5323. The pamphlet is also available on the EPA Internet site at http://www.epa.gov/doc/lead_pm. Multiple copies are available from the Government Printing Office (GPO). The public may order by calling the GPO Order Desk at 202-512-1800, faxing 202-512-2233, or writing to Superintendent of Documents, P.O. Box 371954, Pittsburgh, PA 15250-7954. Request the publication by title, *Protect Your Family from Lead in Your Home*, and/or GPO stock #055-000-00507-9. The price is \$26 per pack of 50 copies.

In addition to the pamphlet, the prospective lessee must be told of knowledge, tests, reports and records concerning the presence of lead-based paint or hazards in the apartment or dwelling being leased and in any common areas. The term *common areas* in this context means a portion of a building generally accessible to all residents/users including, but not limited to, hallways, stairways, laundry and recreational rooms, playgrounds, community centers and boundary fences.

When the lease contract is entered, the regulations require an **attachment** to the contract, certified and signed by the lessor, agent and lessee, stating that the required pre-contractual disclosures were both given and received. If the lessor's agent is involved in the transaction, the attachment must state that the agent:

- informed the lessor of the lessor's obligation under 42 USCA 4852d and
- is aware of his or her duty to ensure compliance with both the statute and the promulgated regulations.

The attachment must contain the following **lead warning statement**, either in English or Spanish:

"Housing built before 1978 may contain lead-based paint. Lead from paint, paint chips, and dust can pose health hazards if not managed properly. Lead exposure is especially harmful to young children and pregnant women. Before renting pre-1978 housing, lessors must disclose the presence

of lead-based paint and/or lead-based paint hazards in the dwelling. Lessees must also receive a federally approved pamphlet on lead poisoning prevention.”

EPA and HUD drafted a sample disclosure form for attachment to leasing contracts. Because it is not mandatory, the form is not a part of the regulations. A copy is provided at the end of this section.

The presentation of the pre-contractual disclosures to the lessee’s agent relieves the lessor and agent of any further duty to see that the information is forwarded, provided the necessary parties complete, sign and date the required attachment to the contract.

After the contract is entered, the lessor and lessor’s agent must retain a completed copy of the attachment for at least three years from the beginning of the lease term.

The lessor’s agents and property managers share the same responsibility and liability for compliance with the regulations as their principals. The agents and property managers may escape some liability by directly informing the principal of the duty to:

1. tender to the buyer or tenant the required pre-contractual disclosures and
2. attach the mandatory warning language, statements, certifications, dates and signatures to the lease contracts.

The regulations state that the agents must personally ensure the principal complies with the regulations. However, the liability for failing to disclose to a tenant the presence of lead-based paint or hazards known by the lessor but not disclosed to the agent is lifted once the prescribed notice is presented to the principal. Consequently, all agents and property managers should routinely give this written notice to the principal to have it signed and dated before entering into each leasing contract.

A suggested disclosure form for agents is included at the end of this section. The EPA/HUD form should be attached to it when given to the principal.

If the lessor, lessor’s agent or property manager is unsure of the construction date of the apartment or dwelling, the information may be obtained by checking the tax roll at the Central Appraisal District.

The penalties for noncompliance include among other things:

- The plaintiff’s recovery of triple damages,
- The plaintiff’s recovery of court costs, reasonable attorney fees and expert witness fees and
- Civil and criminal sanctions for each violation not to exceed \$10,000.

The failure to give the required disclosures does not affect the validity or enforceability of the lease contract.

Nothing in the statute or regulations obligates the lessor, lessor’s agent or property manager to conduct any evaluation, inspection or test for the presence of lead-based paint or hazards or to have any lead-based paint or hazards removed.

Statute of Frauds

According to Texas statutory law, when must a lease agreement be in writing to be enforceable?

A lease of real estate for a term longer than one year is not enforceable unless the agreement, or a memorandum of it, is in writing and signed by the person(s) charged with the promise or agreement or by someone lawfully authorized to sign for them (Section 26.01, Texas Business and Commerce Code).

A lease for one year (365 days) or less need not be in writing to be enforceable. A lease for 366 days or more must be in writing.

Because a lease agreement requires promises from both the landlord and tenant, both parties must sign the agreement.

Sample Disclosure Format for Target Housing Rentals and Leases
**ADDENDUM FOR LESSOR'S DISCLOSURE OF INFORMATION
ON LEAD-BASED PAINT AND LEAD-BASED PAINT HAZARDS
AS REQUIRED BY FEDERAL LAW**

CONCERNING THE PROPERTY AT _____
(Street Address and City)

A. LEAD WARNING STATEMENT: *"Housing built before 1978 may contain lead-based paint. Lead from paint, paint chips, and dust can pose health hazards if not managed properly. Lead exposure is especially harmful to young children and pregnant women. Before renting pre-1978 housing, lessors must disclose the presence of known lead-based paint and/or lead-based paint hazards in the dwelling. Tenants must also receive a federally approved pamphlet on lead poisoning prevention."*

B. LESSOR'S DISCLOSURE:

1. PRESENCE OF LEAD-BASED PAINT AND/OR LEAD-BASED PAINT HAZARDS (check one box only):

(a) Known lead-based paint and/or lead-based paint hazards are present in the Property (explain):

(b) Lessor has no knowledge of lead-based paint and/or lead-based paint hazards in the Property.

2. RECORDS AND REPORTS AVAILABLE TO THE LESSOR (check one box only):

(a) Lessor has provided the Lessee (Tenant) with all available records and reports pertaining to lead-based paint and/or lead-based paint hazards in the Property (list documents):

(b) Lessor has no reports or records pertaining to lead-based paint and/or lead-based paint hazards in the Property.

C. LESSEE'S ACKNOWLEDGMENT (check applicable boxes):

(a) Lessee has received copies of all information listed above.

(b) Lessee has received the pamphlet *Protect Your Family from Lead in Your Home*.

D. BROKER'S ACKNOWLEDGMENT: Brokers have informed Lessor of Lessor's obligations under 42 U.S.C. 4852d to: (a) provide Lessee with the federally approved pamphlet on lead poisoning prevention; (b) complete this addendum; (c) disclose any known lead-based paint and/or lead-based paint hazards in the Property; (d) deliver all records and reports to Lessee pertaining to lead-based paint and/or lead-based paint hazards in the Property; and (e) retain a completed copy of this addendum for at least 3 years following the beginning of the lease. Brokers are aware of their responsibility to ensure compliance.

E. CERTIFICATION OF ACCURACY: The following parties have reviewed the information above and certify, to the best of their knowledge, that the information they have provided is true and accurate.

Lessor _____ Date _____

Lessor _____ Date _____

Lessee _____ Date _____

Lessee _____ Date _____

Lessor's Broker _____ Date _____

Other Broker _____ Date _____

Commercial Tenancies: Chapter 93, Texas Property Code

Texas statutes contain two chapters devoted exclusively to commercial landlords and tenants, easily recognized by their respective numbers and titles. Chapter 93 of the Texas Property Code is entitled "Commercial Tenancies." Chapter 54 of the Texas Property Code is entitled "Building Landlord's Lien." Each chapter is discussed under its respective heading.

Chapter 93 is short and covers only Sections 93.001 through 93.011. The provisions closely parallel those in Sections 92.008(a) and 92.009, Subchapter A, Chapter 92, dealing with residential landlord's liability for lockouts. The only difference is that the locked-out commercial tenant must first pay the delinquent rent before a new key can be acquired.

What does Chapter 93, entitled "Commercial Tenancies," cover?

Chapter 93 applies exclusively to landlords and tenants of commercial rental property. The phrase *commercial rental property* means any rental property not covered by Chapter 92 of the Texas Property Code, which is devoted entirely to residential landlords and tenants (Section 93.001).

Can a commercial landlord interrupt a commercial tenant's utility services for nonpayment of rent?

If the tenant pays the utility company directly, the landlord may not interrupt or cause the interruption of the services except for bona fide repairs, construction or an emergency (Section 93.002[a]).

Can a commercial landlord remove a tenant's property or the building's doors, windows or other structural parts?

A landlord may not remove furniture, fixtures or appliances furnished by the landlord and leased to a tenant unless the items are removed for bona fide repair or replacement. The repair and replacement must be prompt.

A landlord may not remove a door, window or attic hatchway cover or a lock, latch, hinge, hinge pin, doorknob or other mechanism connected to a door, window or attic hatchway cover unless the items require bona fide repair or placement. Again, the repair or replacement must be prompt (Section 93.002[b]).

Can a commercial landlord prevent a tenant from entering the leased premises?

A commercial landlord may not intentionally prevent a tenant from entering the leased premises except by judicial process unless the exclusion results from:

- (1) bona fide repairs, construction or an emergency,
- (2) removing the contents of premises **abandoned** by a tenant or
- (3) changing the door locks of a tenant delinquent in paying at least part of the rent (Section 93.002[c]).

How can a commercial landlord determine when a tenant abandons the premises?

A tenant is presumed to have abandoned the premises if goods, equipment or other property, in an amount substantial enough to indicate a probable intent to abandon the premises, is being or has been removed from the premises, and the removal is not within the normal course of the tenant's business (Section 93.002[d]).

A landlord may remove and store any tenant's abandoned property that remains on the premises. In addition to the landlord's other rights, the landlord may dispose of the stored property if the tenant does not claim the property within 60 days after the date of storage. The landlord must deliver a notice, by certified mail, to the tenant at the tenant's last known address. The notice must state that the landlord may dispose of the tenant's property if the tenant does not claim it within 60 days after it is stored (Section 93.002[e]).

Can a commercial landlord lock out a tenant for nonpayment of rent? Must the landlord provide the tenant a new key?

If a landlord or a landlord's agent changes the door lock of a tenant who is delinquent in paying rent, the landlord or agent must place a written notice on the tenant's front door stating the name and the address or telephone number of the individual or company from which the new key may be obtained. The new key is required to be provided only during the tenant's regular business hours and only if the tenant pays the delinquent rent (Section 93.003[f]).

The requirement of the tenant paying the delinquent rent as a condition for getting a new key was added by the 73rd Legislature, effective September 1, 1993.

What recourse does a tenant have when a commercial landlord breaches a prohibition described in Section 92.003?

If a commercial landlord causes an unauthorized interruption of utilities, undertakes an unauthorized removal of property or commits an unauthorized removal of doorways, windows, and so forth, the tenant may:

- either recover possession of the premises or terminate the lease, and
- recover from the landlord an amount equal to the sum of the tenant's actual damages; one month's rent or \$500, whichever is greater; reasonable attorneys' fees and court costs, less any delinquent rents or other sums for which the tenant is liable to the landlord (Section 93.002[g]).

According to Section 93.002(h), if the lease terms contradict any provisions of Section 93.002 just discussed, the lease controls.

How can a commercial tenant regain possession of the premises after an unlawful lockout—i.e., when the landlord has not abided by the requirements of Section 93.002(f)?

The commercial tenant must resort to judicial assistance following an unlawful lockout. The tenant must file a sworn complaint for reentry in the justice court where the rental premises are located. The complaint must specify the facts of the alleged unlawful lockout. Also the tenant must state orally under oath the facts of the alleged unlawful lockout to the justice (judge) (Section 93.003[a] and [b]).

What can the justice of the peace do?

If the justice reasonably believes that an unlawful lockout occurred, the justice may issue a writ of reentry, *ex parte* (without the landlord first being heard), that entitles the tenant to immediate but temporary possession of the premises pending a full hearing. The writ of reentry must be served on either the landlord or the landlord's management company, on-premises manager or rent collector in the same manner as a writ of possession in a forcible detained action would be served. The sheriff or constable may use reasonable force in executing a writ of reentry (Sections 93.003[c] and [d]).

What rights does the landlord have after being served? What happens if the landlord does not request a hearing?

The landlord is entitled to a hearing on the tenant's sworn complaint for reentry. The writ of reentry must notify the landlord of the right to a

hearing. The hearing shall be held not earlier than the first day and not later than the seventh day after the date the landlord requests it.

If the landlord fails to request a hearing before the eighth day after the date the writ of reentry is served, a judgment for court costs may be rendered against the landlord (Sections 93.003[e] and [f]).

Can a judgment be appealed?

Either party may appeal from the court's judgment rendered at the hearing on the sworn complaint for reentry in the same manner as an appeal from a judgment in a forcible detainer suit. If a writ of possession is issued, it supersedes (controls over) a writ of reentry (Sections 93.003[g] and [h]).

What two criminal penalties may be imposed on a landlord or a landlord's agent who fails to comply with the court's writ of reentry?

First, it is grounds for contempt of court under Section 21.002 of the Texas Government Code for the landlord or the person on whom the writ is served to disobey the writ.

Second, if the writ is disobeyed, the tenant or the tenant's attorney may file an affidavit with the court in which the reentry action is pending. The affidavit must state the name of the person who has disobeyed the writ and describe the acts or omissions constituting the disobedience. On receipt of an affidavit, the justice shall issue a show cause order, directing the person to appear on a designated date and show cause why he or she should not be adjudged in contempt of court. If the justice finds, after considering the evidence at the hearing, that the person has directly disobeyed the writ, the justice may commit the person to jail without bail until the person purges himself or herself of the contempt in a manner and form decided by the justice. If the person disobeyed the writ before receiving the show cause order but complied after receiving the order, the justice may still find the person in contempt and assess punishment under Section 21.002(c) of the Texas Government Code (Section 93.003[i]).

If the tenant files against the landlord for punishment under Section 21.002(c) of the Texas Government Code, is the tenant precluded from pursuing the civil remedies described earlier in Section 93.002(g)?

A tenant may pursue the landlord simultaneously under Section 93.003(i) for criminal remedies and under Section 93.002(g) for civil remedies. No election of remedies is required (Section 93.003[j]).

What civil recourse does the landlord have against a tenant who files a sworn complaint for reentry in bad faith?

If a tenant files a sworn complaint for reentry in bad faith resulting in a writ of reentry being served on the landlord or landlord's agent, the landlord may, in a separate cause of action, recover from the tenant an amount equal to actual damages; one month's rent or \$500, whichever is greater; reasonable attorneys' fees and costs of court, less any sums for which the landlord is liable to the tenant (Section 93.003[k]).

How do the filing fees for the described legal actions compare with other fees?

The fee for filing a sworn complaint for reentry is the same as that for filing a civil action in the justice court. The fee for service of a writ of reentry is the same as that for service of a writ of possession. The fee for service of a show cause order is the same as that for service of a civil citation. However, the justice may defer payment of the tenant's filing fees and service costs. Court costs may be waived only if the tenant executes a pauper's affidavit (Section 93.003[l]).

Can the landlord still file a forcible detainer or forcible and detainer action while trying to defend a writ of reentry action by the tenant?

This section does not affect the rights of a landlord or tenant in a forcible detainer or forcible entry and detainer action (Section 93.003[m]).

How does the statute define the term *security deposit* for purposes of commercial leases?

A security deposit is any advance of money, other than a rental application deposit or an advance payment of rent, that is intended primarily to secure performance under a lease of commercial rental property (Section 93.004).

The statute requires the landlord to keep accurate records of the deposits (Section 93.008). The statute does not address the amount of the security deposit. It is strictly negotiable.

When must the commercial tenant's security deposit be refunded?

The landlord must refund the security deposit within 60 days after the tenant surrenders possession of the premises and provides the landlord a forwarding address.

The tenant's claim to the security deposit supercedes any creditor's claims against the landlord, including a trustee in bankruptcy (Section 93.005).

The tenant does not forfeit the right to a refund of the security deposit or the right to receive a description of damages and charges for failing to give a forwarding address. Apparently, the landlord's obligation continues until the forwarding address is given (Section 93.009).

What may the landlord deduct from the tenant's security deposit before refunding it?

The landlord may deduct from the security deposit damages and charges resulting from a breach of the lease for which the tenant is legally liable under the lease.

What documentation of the deductions from the security deposit must be given to the tenant?

If the landlord retains all or part of the security deposit, the landlord must refund any balance of the deposit and give the tenant a written description and itemized list of the deductions.

However, no written description and itemized list of deductions are required if the tenant owes rent at the time the premises are surrendered and the amount of the rent owed is uncontested (Section 93.006).

What items cannot be deducted from the tenant's security deposit?

The landlord may not deduct any part of the security deposit to cover normal wear and tear (Section 93.006[b]).

The term *normal wear and tear* is defined as deterioration that results from the intended use of the commercial premises, including breakage or malfunction due to age or deteriorated condition, but the term does not include deterioration that results from negligence, carelessness, accident or abuse of the premises, equipment or chattels by the tenant, by a guest or invitee of the tenant (Section 93.006[b]).

If a change in ownership occurs during the lease term, who is liable for the return of the security deposit, the former owner or the new owner?

If an owner's interest in the commercial property is terminated by sale, assignment, death, appointment of a receiver, bankruptcy or otherwise (**except by a mortgage foreclosure sale**) the new owner is liable for the return of security deposits from the date title to the property is acquired (Sections 93.007[a]&[c]).

This section does not relieve the former owner of liability for the return of the security deposit, it simply makes the former owner and the new owner jointly liable for its return.

How can the former owner avoid liability for the return of the security deposit after a change in ownership occurs?

The former owner remains liable for a security deposit until the new owner delivers to the tenant a signed statement acknowledging that the new owner has received the deposit and the statement specifies the exact dollar amount of the deposit.

There is nothing the former owner can do to avoid liability for the return of the security deposit. The burden is on the new owner to give signed statements to the tenants. Until the new owner acts accordingly, the former owner remains jointly liable with the new owner.

How is the amount of the security deposit determined when a change of ownership occurs?

The amount of the security deposit is the greater of the amount provided in the tenant's lease, or the amount provided in an estoppel certificate prepared by the former owner at the time the lease was executed or prepared by the new owner when the commercial property is transferred (Section 93.007[b]).

May the tenant withhold the last month's rent and let the security deposit cover the payment?

The security deposit is not collateral for the last month's rent. A tenant is prohibited from withholding all or part of the last month's rent on the grounds it will be taken out of the security deposit.

What if a tenant withholds the last month's rent in violation of this prohibition?

The tenant who violates this prohibition is presumed to have acted in bad faith. A tenant who in bad faith withholds the last month's rent is liable to the landlord for three times the amount of rent wrongfully withheld and the landlord's reasonable attorney's fees to recover the rent (Section 93.010).

What are the consequences for the landlord who in bad faith wrongfully withholds the tenant's security deposit?

The landlord who acts in bad faith by withholding all or a portion of a security deposit is liable to the tenant for:

- \$100,
- three times the amount of the deposit wrongfully withheld and
- the tenant's reasonable attorneys' fees in a suit to recover the deposit.

The landlord, not the tenant, has the burden of proving the retention of any portion of the deposit was reasonable (Section 93.011[a]).

What are the consequences for the landlord who in bad faith wrongfully fails to provide an itemized list of deductions? May a landlord wrongfully fail to provide an itemized list of deductions?

The landlord who acts in bad faith by not providing a written description and itemized list of damages and charges:

- forfeits the right to withhold any portion of the tenant's security deposit,
- forfeits the right to bring suit against the tenant for damages to the premises and
- is liable for the tenant's reasonable attorneys' fees in a suit to recover the deposit (Section 93.011[b]).

A landlord who fails to either return the security deposit or to provide a written description and itemized list of deductions on or before the 30th day after the date the tenant surrenders possession is presumed to have acted in bad faith (Section 93.011[d]). Evidently, the statute assumes the landlord has the tenant's forwarding address and there is no unpaid rent due.

Note. Section 93.011 dealing with the bad faith retention of security deposits has an apparent internal conflict that should cause commercial landlords concern.

Subsection (b) states, "A landlord who in bad faith does not provide a written description and itemized list of damages and charges in violation of *this chapter . . .*" faces the described liabilities. Presumably, "this chapter" refers to Section 93.005 discussed earlier that requires security deposits to be returned in **60 days** after the tenant surrenders possession of the premises.

Subsection (d), however, states, "A landlord who fails to return a security deposit or to provide a written description and itemized list of deductions on or before **the 30th day** after the date the tenant surrenders possession is presumed to have acted in bad faith."

Until this internal conflict is corrected, landlords would be advised to abide by the shorter 30-day deadline to be safe.

The term *bad faith* is not defined by the statute. However, case law lends some clues. In the case of *Reed v. Ford*, 760 S.W. 2d 26, the court held that the term meant " . . . an honest disregard of tenant's rights; bad faith requires intent to deprive tenant of refund known to be lawfully due."

Knowledge of the law plays an important role. In the case of *Ackerman v. Little*, 679 S.W. 2d 70, the court held that the landlord was an “amateur lessor” having only one rental property. As such, the landlord was ignorant of the statute. This was considered a factor in determining bad faith.

An appellate decision in 1994, *Leskinen v. Burford*, 892 S.W. 2d 135, exonerated a landlord from liability, citing the “amateur-lessor” defense. The landlord returned the deposit late — 35 days after surrender of the premises. (This case involved a residential lease requiring that the security deposit be returned within 30 days after surrender of the premises.)

The appellate court distinguished this case from a former one, *Wilson v. O’Connor*, 555 S.W. 2d 776, in which the landlord was held liable. In *Wilson*, the landlord never returned the deposit rather than being five days late.

One Section, Two Topics

The 77th Texas Legislator passed two statutes effective September 1, 2001, both of which added a Section 93.004 to the Texas Property Code.

House Bill 2803, discussed earlier, added Sections 93.004 through 93.011, which deal with security deposits. House Bill 2186 added a second Section 93.004, dealing with charges commercial landlords may assess against commercial tenants.

Until the 78th Legislature session meets to resolve the conflict, the Texas Property Code has two Sections 93.004, each dealing with a different topic. The following discusses H.B. 2186.

When may the landlord assess charges, other than for rent and physical damages against the property?

The landlord is prohibited from assessing charges against the tenant, except for rent and physical damage to the property except when the amount of the charge or method of computing the charge is stated in the lease, an exhibit or an attachment to the lease.

However, this prohibition does not affect the landlord’s right to assess charges or obtain a remedy permitted under another statute or the common law (Section 93.004).

Analyzing the Impact of the New Law

Section 93.004 of the Texas Property Code is rather brief considering the huge impact it has on commercial leases entered into, renewed or extended on or after September 1, 2001. Glenn Koury, a Dallas attorney with Vinson & Elkins, wrote an excellent review of the impact and the potential problems created by the statute in Vol. 40, No. 2 of the *Real Estate, Probate and Trust Law Reporter*, a publication of the State Bar of Texas, published January 2002.

Following are excerpts from the article (all excerpts copyright © 2001 by Glenn Koury and used with permission of the author).

Commercial leases, by their nature, contain myriad charges besides base rent. They require the tenant to make a variety of payments ranging from complex rental escalations to straightforward reimbursements of the landlord’s out-of-pocket expenses. In many cases, the standard for payment is described as “the reasonable cost,” “such amount as the landlord may determine,” “as allocated by landlord,” “landlord’s customary charge,” or “at tenant’s cost.” Whether these ways of determining charges are computation methods required by the statute is far from clear. Consider these charges and provisions typically found in commercial leases:

- Formulas for sharing operating (or common area) expenses in multitenant properties based on rentable areas that may not be known when the lease is entered into or that may change as the project expands.
- Estimated monthly payments of operating expenses, subject to a true-up at the end of the year.
- Amortization of certain capital expenditures (as part of operating expenses) using “a commercially reasonable interest rate over a reasonable period of time determined by the landlord.”
- Allocation of operating expenses among buildings in a multibuilding complex “in such manner as the landlord may (reasonably) determine.”
- The gross-up clause, which merely states the concept — but not the method — of adjusting variable expenses when the building is not fully (or 95%) occupied or when services are not being provided to all (or 95%) of the rentable area.
- Charges for utilities that are submetered to the premises.
- Charges for overtime HVAC.
- A requirement that a retail tenant join and pay unspecified dues to a merchants association.
- Amounts payable to the landlord to consider a request for its consent under the lease, e.g., consent to a proposed assignment or sublease or alterations to the premises.
- Charges incurred by the landlord when exercising self-help remedies or reletting the premises after a tenant’s default, e.g., remodeling the premises for a new tenant.
- Amounts payable to indemnify the landlord, including losses resulting from acts of third parties or even the landlord’s own negligence.

- Reimbursement of charges imposed on the landlord under its lender's loan documents because of the tenant's late payment or nonpayment of rent or because of the tenant's default under the lease.

The American Heritage Dictionary of the English Language defines a "method" as "a means or manner of procedure, especially a regular and systematic way of accomplishing something." It is unclear whether the statute — which requires the lease to state the "method by which the charge is to be computed" — actually requires something akin to a formula, or can be satisfied by describing a consistent process or procedure for calculating the charge in question.

Operating expense provisions may need to be tested at two different levels to determine compliance with the statute: first, as to the overall expense pot, and second, as to specific items included within the pot ("charges within a charge"). At the first level, if the tenant's proportionate share is known (or capable of being calculated), the basic operating expense provision should satisfy the statute because multiplying such share times "all" operating expenses is a "method." Nevertheless, since the method itself involves other calculations and discretionary decisions by the landlord to determine the makeup of the expense pot, the statute may also require compliance by secondary lease provisions dealing with how individual expense items are calculated or selected for inclusion in total expenses.

The statute may be less problematic for triple-net leases and so-called bondable leases, which, depending on the degree of "netness," shift all or practically all property obligations to the tenant. For example, if the tenant pays only base rent to the landlord but pays all property obligations, e.g., taxes, insurance and maintenance, directly to third parties, there may be no other "charges" in the lease that are payable to, or assessable by, the landlord. The landlord is in a passive role under this type of lease and does not "assess" any charges to the tenant. The landlord simply collects a net rental, and the tenant effectively assumes all burdens and obligations of operating the leased premises during the lease term.

Transactions Covered by the Statute

Although the types of transactions covered by the new statute are straightforward, they may take on a variety of forms, including:

- Leases entered into on or after September 1, 2001, and renewals or extensions of those leases.
- Amendments to pre-September 1, 2001 leases to (1) renew or extend the lease term, or (2) lease new space to the tenant, whether as a result of

the exercise of an expansion option, right of first refusal or other preferential right, or otherwise.

- Renewals or extensions of pre-September 1, 2001 leases that become effective without formal amendments, e.g., where the lease fixes the rent for the renewal term, and the renewal is implemented merely by the tenant's exercise of its renewal option.

Landlords should be mindful of the new statute when amending older leases, which may become subject to the new statute when amended. For purposes of the state, a lease "entered into" may mean not only the execution of a new lease document, but also any transaction involving a lease grant. For example, the lease of additional space, even if documented as an amendment to an existing lease, is a new lease as to such space because it involves a new lease grant. It is less clear whether the statute covers pre-September 1, 2001 leases that provide for a post-September 1, 2001 "staged" delivery of the original premises or a mandatory expansion as to "must-take" space. Arguably, in those cases, the lease grant as to all of the premises occurred upon lease execution, and only the rent commencement date as to the subsequently delivered space has been delayed under the terms of the original contract. Likewise, substituting new space for space leased under a pre-September 1, 2001 lease can be problematic. If the substitution is made under a specific substitution clause in the existing lease, the transaction could be viewed as a lease of space under a grant that had its inception in the original lease, which authorized the substitution and continues to apply to the substitute space. On the other hand, the transaction could be viewed as a new lease because it involves a new lease grant as to space not identified in the original lease.

Dealing with Charges in the Lease

Until the statute is clarified by the Legislature or interpreted by the courts, commercial landlords should proceed cautiously when assessing charges under provisions other than those of base rent. Clauses that are vague or that give the landlord too much discretion could easily run afoul of the new statute. Following are several ways for landlords to deal with the uncertainties created by the new statute.

Agree on "Compliance" with the Statute

As an overall approach, the parties should agree that the prescribed ways of determining additional charges in the lease are "computation methods" for purposes of the statute.

Additionally, since the statute does not expressly prohibit or void a waiver of rights or duties under the statute, the parties should consider including an express waiver in the lease. If challenged in court, these approaches may not be upheld, but at least they indicate that the parties have negotiated calculation methods they consider acceptable and reasonable.

Be More Specific, Even With Estimated Payments

Whenever possible, the lease should state the initial amount of estimated payments required by the tenant. The same goes for nonrecurring charges such as administrative fees and charges for overtime air-conditioning. Even though the stated payments may be adjusted or re-estimated periodically under provisions that are not true formulas, disclosing the estimated amount when the lease is entered into will minimize any claim of surprise by the tenant and reinforce the landlord's position that the amount of the charge has been stated in the lease.

Reexamine Sharing and Escalation Formulas

Landlords should review other lease provisions intended to be true formulas — such as those that define the tenant's "proportionate share" or adjust amounts based on increases in the Consumer Price Index (CPI) — to ensure that the formulas contain all elements necessary to make the desired calculation. Formulas must still be sufficiently clear to be enforceable under basic contract law. Although the statute does not make poorly drafted formulas any more unenforceable than under contract law, the new law gives tenants the opportunity to dispute charges calculated under a formula that does not adequately state the computation method.

Most leases define the tenant's "proportionate share" either as a stated percentage or a ratio between two numbers (the area of the premises and the total area of the building) that, in most cases, can be readily calculated. If the areas of the premises and the building (if under construction) are not known when the lease is entered into or are subject to remeasurement, the lease should state the method of measurement.

Sometimes, it may not be possible or practicable to state a precise measurement method or one that does not give some discretion to the landlord. For example, leases of space in telecommunication switch facilities (sometimes called telecom carrier hotels) often state the method of measurement as "BOMA, as modified for the Project pursuant to Landlord's

standard rentable area measurements for the Project." Retail leases in shopping centers that are still being developed use an expandable definition of "proportionate share" that adjusts with any change in the size of the shopping center, all without stating a measurement method. Arguably, these types of clauses in telecom and shopping center leases are still computation methods even though they do not express the precise underlying method of measuring the space in question.

Clauses that adjust charges based on changes in the CPI need essential elements to work properly. To be effective, a CPI escalation clause should: (1) identify its population group, i.e., whether it is the CPI for All Urban Consumers (CPI-U) or the CPI for Urban Wage Earners and Clerical Workers (CPI-W), (2) identify its coverage area, i.e., the U.S. City Average or a specific region or local area, (3) state whether it includes "All Items" or is a special index that excludes a particular product or product group, (4) state the reference base period (currently 1982-84 = 100), (5) identify a period over which changes in the CPI will be measured, i.e., a base index (the CPI against which a later CPI will be compared) and a comparison index (a subsequent CPI that will be compared to the base index to measure any change), (6) state the frequency of the adjustment, e.g., annually at the beginning of each lease year, (7) state whether any "cap" or "floor" applies to the calculation, and (8) state what happens if the CPI is no longer published or is substantially changed or the current reference base is changed.

Timing Issues — Waiver and Estoppel

Practically, the most difficult issue for commercial landlords is predicting when a tenant might claim that a charge does not comply with the statute. As noted above, the original, residential version of the bill dealt with charges assessed at the end of the lease term or after a tenant surrendered the premises. The final, commercial version of the statute applies to certain charges, regardless of when they are made. Tenants pay many of the charges discussed in this article, particularly escalations, on an ongoing basis throughout the lease term. With the passage of time, a tenant's right to dispute regular charges under the lease should diminish. A landlord will have a strong argument that a tenant — especially one with audit rights under the lease — is estopped from challenging, and has waived any right to challenge, the validity and method of computing charges the tenant has paid regularly under the provisions of the lease, no matter how vague, discretionary or non-formulaic they may

be. Still, a tenant may attempt to use the statute to dispute specific costs included in the operating expense pot or challenge other specific charges as they arise under the lease.

No magic language can eliminate the confusion created for landlords by the statute or ensure that long-standing methods of calculat-

ing charges under commercial leases will comply. With a little caution, however, landlords should be able to minimize any issues concerning their right to collect escalations, reimbursements and other charges under typical commercial lease provisions.

Submetering Commercial Property: Subchapter M, Chapter 13, Texas Water Code

The 77th Texas Legislature passed HB 2404 effective September 1, 2001. The new law adds Sections 13.502 and 13.506 to the Texas Water Code and applies to submetering of water use in condominiums, apartment houses with five or more dwelling units, manufactured home rental communities and multiple-use facilities (defined below) on which construction commences after January 1, 2003. Submeters are not required on structures constructed before that date.

The statute discusses the requirements placed on the managers and owners to qualify the buildings or manufactured home rental communities for submetering.

Section 13.501 contains definitions vital to the understanding of Section 13.502. They are:

Apartment house — one or more buildings containing **five or more** dwelling units that are occupied primarily for nontransient use, including a residential condominium whether rented or owner occupied and, having rental paid, if a dwelling unit is rented, at intervals of one month or longer.

Dwelling unit — one or more rooms in an apartment house or condominium, suitable for occupancy as a residence, and containing kitchen and bathroom **facilities** or a manufactured home in a manufactured home rental community.

Commission — the Texas Natural Resource Conservation Commission.

Customer — the individual, firm or corporation in whose name a master meter has been connected by the utility service provider.

Multiple-use facility — commercial or industrial parks, office complexes, marinas and other types of facilities specifically identified in commission rules with five or more units.

Manufactured home rental community — a property on which spaces are rented for the occupancy of manufactured homes for nontransient residential use and for which rental is paid at intervals of one month or longer.

Nonsubmetered master metered utility service — water utility service that is master metered for the apartment house but not submetered and wastewater utility service based on master metered water utility service.

Owner — the legal title holder of an apartment house, manufactured home rental community, or **multiple-use facility** and any individual, firm or corporation that purports to be the landlord of

tenants in the apartment house, manufactured home rental community or **multiple-use facility**.

Tenant — a person who is entitled to occupy a dwelling unit or **multiple-use facility** unit to the exclusion of others and who is obligated to pay for the occupancy under a written or oral rental agreement.

What structures or places qualify for submetering?

The statute applies to condominiums, apartment houses, manufactured home rental communities and multiple-use facilities (hereafter collectively referred to as commercial buildings) on which construction begins after January 1, 2003.

Who is responsible for complying with the submetering for water?

The manager of a condominium or the owner of the other named structures must measure water consumed by the occupants of each unit.

How is compliance achieved?

Either the manager or owner must install individual submeters in each dwelling or unit or have the retail public utility install individual meters for each dwelling or unit (Sections 13.502[a]&[b]).

Who must install individual meters?

The manager or owner should request a retail public utility to install individual meters owned by the utility. The retail public utility must comply with the request if the installation is feasible. If not, the manager or owner should install a plumbing system that is compatible with the installation of the submeters or the individual meters of the retail public utility (Section 13.502[d]).

If the apartment house will receive government assistance or government subsidized rent, the owner is responsible for installing a plumbing system compatible with the use of submeters.

Once submetering begins, can the manager or owner switch from submetering billing?

The manager or owner may not change from submetering to allocated billing unless:

- the executive director of the Texas Natural Resource Conservation approves of the change in writing after a demonstration of good cause, including meter reading or billing problems that could not feasibly be corrected or equipment failures, and

- the property owner meets rental agreement requirements established by the commission (Section 13.503[e]).

After January 1, 2003, can the manager or owner begin submetering once the submeters or meters have been installed?

Before the managers or owners may begin billing for submetering for allocated water services in the commercial buildings fitted with the required submeters or meters,

- the sink or lavatory faucets, faucet aerators and shower heads must meet the standards prescribed by Section 372.002 (see next question) of the Texas Health and Safety Code and
- each dwelling unit, rental unit or common area must have a water leak audit performed on it and have any leaks repaired (Section 13.506[a]).

The duty and obligation to conduct these two procedures do not apply to an owner of a manufactured home rental community who does not own the manufactured homes in the community.

Once billing for submetering or allocated water services commences, are there any subsequent requirements for it to continue?

No later than one year after the manager or owner commences billing for submetered or for allocated water services, they must:

- remove all toilets exceeding a maximum flow of 3.5 gallons of water per flush and
- replace them with 1.6-gallon toilets that meet standards prescribed by Section 372.002 of the Texas Health and Safety Code (Section 13.506[b]).

The duty to replace the toilets exceeding 1.6 gallons does not apply to an owner of a manufactured home rental community who does not own the manufactured homes

Section 372.002 reads as follows:

§ 372.002. Water-Saving Performance Standards.

(a) A person may not sell, offer for sale, distribute or import into this state a plumbing fixture for use in this state unless:

- (1) the plumbing fixture meets the water-saving performance standards provided by Subsection (b); and
- (2) the plumbing fixture is listed by the commission under Subsection (c).

(b) The water-saving performance standards for a plumbing fixture are those established by the American National Standards Institute or the following, whichever are more restrictive.

- (1) For a sink or lavatory faucet or a faucet aerator, maximum flow may not exceed 2.2 gallons of water per minute at a pressure of 60 pounds per square inch when tested according to testing procedures adopted by the commission.

- (2) For a shower head, maximum flow may not exceed 2.75 gallons of water per minute at a constant pressure over 80 pounds per square inch when tested according to testing procedures adopted by the commission.

- (3) For a urinal and the associated flush valve, if any, maximum flow may not exceed an average of one gallon of water per flushing when tested according to the hydraulic performance requirements adopted by the commission.

- (4) For a toilet, maximum flow may not exceed an average of 1.6 gallons of water per flushing when tested according to the hydraulic performance requirements adopted by the commission.

- (5) For a wall-mounted toilet that employs a flushometer or flush valve, maximum flow may not exceed an average of two gallons of water per flushing or the flow rate established by the American National Standards Institute for ultra-low flush toilets, whichever is lower; and

- (6) a drinking water fountain must be self-closing.

(c) The commission shall make and maintain a current list of plumbing fixtures that are certified to the commission by the manufacturer or importer to meet the water-saving performance standards established by Subsection (b).

To have a plumbing fixture included on the list, a manufacturer or importer must supply to the commission, in the form prescribed by the commission, the identification and the performance specifications of the plumbing fixture. The commission may test a listed fixture to determine the accuracy of the manufacturer's or importer's certification and shall remove from the list a fixture the commission finds to be inaccurately certified.

(d) The commission may assess against a manufacturer or an importer a reasonable fee for an inspection of a product to determine the accuracy of the manufacturer's or importer's certification in an amount determined by the commission to cover the expenses incurred in the administration of this chapter. A fee received by the commission under this subsection shall be deposited in the state treasury to the credit of the water resource management account and may be used only for the administration of this chapter.

(e) The commission shall, to the extent appropriate and practical, employ the standards designated American National Standards by the American National Standards Institute in

determining or evaluating performance standards or testing procedures under this chapter.

- (f) This section does not apply to:
- (1) a plumbing fixture that has been ordered by or is in the inventory of a building contractor or a wholesaler or retailer of plumbing fixtures on January 1, 1992;
 - (2) a fixture, such as a safety shower or aspirator faucet, that, because of the

fixture's specialized function, cannot meet the standards provided by this section;

- (3) a fixture originally installed before January 1, 1992, that is removed and reinstalled in the same building on or after that date; or
- (4) a fixture imported only for use at the importer's domicile.

Landlord's Lien on Commercial Buildings: Subchapter B, Chapter 54, Texas Property Code

The Texas Property Code allows commercial landlords to place a lien on a tenant's property within a building to secure rent payments (Subchapter B, Section 54). The subchapter discusses the requirements necessary for the lien to arise.

The requirements are somewhat similar to the residential landlord's lien found in Subchapter C, Section 54 of the Texas Property Code.

Subchapter B includes Sections 54.021 through 54.025.

How does the landlord's lien on commercial buildings work? What property and what period does it cover?

A person who leases or rents all or a part of a building for nonresidential use has a preference lien on the property of the tenant or subtenant in the building for rent that is due. The preference lien also covers rent that is to become due during the current 12-month period succeeding the date of the beginning of the rental agreement or an anniversary of that date (Section 54.021).

Does the lien arise automatically or is there a required timely filing for enforcement?

The lien is unenforceable for rent on a commercial building that is more than six months past due unless the landlord files a lien statement with the county clerk of the county where the building is located (Section 54.022[a]).

Must the lien statement be verified? What particular items must the lien statement contain?

The lien statement must be verified by the landlord or the landlord's agent or attorney. The lien statement must contain the following four items:

- an account, itemized by month, of the rent for which the lien is claimed,

- the name and address of the tenant or subtenant, if any,
- a description of the leased premises and
- the beginning and termination dates of the lease (Section 54.022[b]).

Once the rental lien statement is filed, the county clerk is required to index it alphabetically (Section 54.022[c]).

Does the preferential lien created by Section 54.021 cover exempt property such as that protected by the Texas Business Homestead laws?

The subchapter does not affect a statute exempting property from forced sale (Section 54.023).

How long does the lien last?

The lien exists while the tenant occupies the building and until one month after the day that the tenant abandons the building (Section 54.024).

How can a commercial landlord prevent a tenant from removing the tenant's property and avoid the landlord's building lien for unpaid rent?

The person to whom rent is payable under a building lease may apply to the justice of the peace in the precinct where the building is located for a distress warrant if the tenant is:

- (1) delinquent in rent payments,
- (2) about to abandon the building or
- (3) about to remove the tenant's property from the building (Section 54.025).

A *distress warrant* is a writ (or order) from the justice authorizing an officer to detain a tenant's property for nonpayment of rent.

Self-Service Storage Facility Liens: Chapter 59, Texas Property Code

Self-service storage facilities grow in number each year. The Texas Property Code governs the use of self-service storage facilities. Primarily the code focuses on landlords' remedies for nonpayment of rent (Sections 59.001 through 59.046).

The unique feature of the chapter is that property, not people, occupies the leased facilities.

What terms are defined by Section 59.001?

There are four key definitions.

- **Lessor** - an owner, lessor, sublessor or managing agent of a self-service storage facility.
- **Rental agreement** - a written or oral agreement that establishes or modifies the terms of use of a self-service storage facility.
- **Self-service storage facility** - real property that is rented to be used exclusively for storage of property and is cared for and controlled by the tenant.
- **Tenant** - a person entitled under a rental agreement to the exclusive use of storage space at a self-service storage facility.

What agreements are covered by the chapter?

The chapter applies to all self-service facility rental agreements entered, extended or renewed after September 1, 1981 (Section 59.002).

What statutes expressly do not apply to self-service storage facilities?

Subchapter B, Chapter 54 of the Texas Property Code deals with a landlord's lien on commercial buildings and does not apply to self-service storage facilities (Section 59.003).

Likewise, unless a lessor issues a warehouse receipt, bill of lading or other document of title relating to property stored at the facility, the following statutes do not apply:

- Chapter 7, Business & Commerce Code, as amended,
- Subchapter A, Chapter 14, Agriculture Code, as amended and
- Sections 14.201, 14.204 through 14.214, and 14.216, Agriculture Code.

Can the lessor or tenant vary any provisions of Chapter 59 by agreement or waiver?

According to Section 59.004, unless a particular statute expressly provides for a variance or waiver,

changes are not allowed. The section contains no such provisions.

What are the remedies for damages caused by a violation of Chapter 59?

The person's remedies for damages lie with the Texas Deceptive Trade Practices Act found in Chapter 17, Subchapter E of the Texas Business and Commerce Code (Section 59.005).

Although not stated, the damages referred to in the section are those experienced by a tenant when the lessor seizes and sells the stored property improperly.

When does a lien attach to property stored at a facility? What priority does the lien have with other liens on the stored property?

According to Section 59.006, a lien attaches on the date the tenant places the property at the self-service storage facility. The lien takes priority over all other liens.

If the property, subject to the self-service storage facility lien, is sold, does the purchaser take it subject to a pre-existing lien on the stored property?

No. A good-faith purchaser of items sold to satisfy a lien under this chapter takes the property free and clear of any other liens that may exist, regardless of whether or not the lessor complied with the procedures described in this chapter (Section 59.007).

Does the tenant, whose property is sold to satisfy the self-service storage facility lien, have a right to redeem the property?

Yes, but only **after** the seizure and **before** the sale. A tenant may redeem property seized under a judicial order or a contractual landlord's lien prior to its sale or other disposition by paying the lessor the amount of the lien and the lessor's reasonable expenses incurred under this chapter (Section 59.008).

The time between the seizure and sale varies between 26 to 31 days, depending on whether or not the sale is published or posted.

Can the tenant use the premises for residential purposes as well as storage?

No. A tenant may not use or allow the use of a self-service storage facility as a residence (Section 59.009).

Is any property placed at the facility exempt from the self-storage lien?

No. The lessor has a lien on **all** property in a self-service storage facility for the payment of charges that are due and unpaid by the tenant (Section 59.021).

How does the lessor enforce the self-service storage facility lien—i.e., what is the legal procedure for seizing and selling the property?

There are two methods of enforcing the lien. If the rental agreement contains a contractual landlord's lien, underlined or printed in conspicuous bold print, then the lessor can seize and sell the property by following the procedures outlined in subsequent sections of this chapter.

If the rental agreement lacks a contractual landlord's lien, then the only enforcement is judicial. The landlord must obtain a judgment from a court of competent jurisdiction against the tenant for the amount of the lien. The court must then order the sale of the property in satisfaction of the judgment (Section 59.041).

What steps are involved in seizing and selling the property under the contractual landlord's lien?

First, the lessor must deliver written notice (Section 59.043) of the claim to the tenant. If the tenant does not satisfy the claim within 15 days after delivery, the lessor must either publish or post notices (Section 59.044) of sale. If the notice of sale is published, the sale may occur 16 days later. If notice is posted, the sale may occur 11 days later (Section 59.042).

What must be included in the notice of claim to the tenant? How and where must the notice be delivered or sent?

The notice of claim must contain:

- (1) an itemized account of the claim;
- (2) the name, address and telephone number of the lessor or the lessor's agent;
- (3) a statement that the contents of the self-service storage facility have been seized under the contractual landlord's lien and
- (4) a statement that if the claim is not satisfied before the 15th day after the day on which the notice is delivered, the property may be sold at public auction (Section 59.043[a]).

The notice of claim must be delivered personally or sent by certified mail to the tenant's last known address as stated in the rental agreement or in a written notice from the tenant to the lessor furnished after the execution of the rental agreement.

Notice by mail is considered delivered when properly addressed with postage prepaid and deposited with the United States Postal Service (Section 59.043[b]).

What must be included in the notice of sale either published or posted by the lessor?

The notice of sale must contain:

- (1) a general description of the property,
- (2) a statement that the property is being sold to satisfy a landlord's lien,
- (3) the tenant's name,
- (4) the address of the self-service storage facility and
- (5) the time, place and terms of the sale (Section 59.044[a]).

If the lessor publishes the notice of sale, where and how often must the notice be published?

If a newspaper of general circulation in the county exists where the self-service storage facility is located, the notice of sale must be posted once in each of two consecutive weeks of the newspaper (Section 59.044[b]).

If the lessor posts (does not publish) the notice of sale, where must the posting occur?

If the county has no general circulation newspaper, the lessor may post copies of the notice of sale at the self-service storage facility and in at least five other conspicuous locations nearby (Section 59.044[b]).

The statute does not allow the lessor the option of either publishing or posting. It depends on the availability of a local county newspaper of general circulation.

Also, no Texas cases have decided what constitutes "five other conspicuous locations near the facility."

How must the sale be conducted under the contractual landlord's lien?

The lessor must conduct a public sale at the self-service storage facility or at a public place nearby. The sale must comply with the terms specified in the notice advertising the sale. The property must be sold to the highest bidder (Section 59.045).

If the lessor receives excess proceeds from the sale, must the tenant be notified?

Yes. If the proceeds of a sale are greater than the amount of the lien and the reasonable expenses of the sale, the lessor shall deliver written notice of the excess to the tenant's last known address as stated in the rental agreement or in a written notice from

the tenant to the lessor furnished after the execution of the rental agreement (Section 59.046).

Must the lessor automatically deliver the excess proceeds to the tenant or must the tenant first request them?

The lessor is required to retain the excess funds for two years after the date of the sale. If, during this time, the tenant requests the funds, the lessor must give them to the tenant. If not, the excess belongs to the lessor (Section 59.046).

Mediation

As emphasized repeatedly throughout this publication, litigation in the justice court is the primary means to resolve disputes involving a breach of the contract or a failure to fulfill a statutory mandate. Mediation represents a possible alternative to resolving a dispute in lieu of litigation.

Unlike arbitration, mediation has no neutral third party who declares a winner and a loser. Instead, the third-party mediator attempts to resolve the dispute by having the parties "talk it out." Even if the parties go to court, many times the judge will order the parties to mediate before hearing a dispute.

Because of the efficiency and popularity of the procedure, local dispute resolution centers exist in most cities and towns. If one does not exist, the

local Bar Association, the local Board of Realtors or even the Chamber of Commerce may recommend names of qualified mediators.

The service is not free but not expensive either. Generally, costs are shared.

To implement mediation as a possible resolution mechanism prior to litigation, the Texas Real Estate Commission drafted a mediation addendum for real estate sales contracts. One does not exist for residential lease forms.

However, the Real Estate Center adapted the commission's sales addendum to lease contracts. It is on the next page. Landlords and tenants may wish to attach the addendum to future contracts.

AGREEMENT FOR MEDIATION
ADDENDUM TO LEASE CONTRACT CONCERNING THE PROPERTY AT

(Name of Apartment, Street Address and City)

The parties to the Lease Contract who sign this addendum agree to negotiate in good faith in an effort to resolve any dispute related to the Contract or to the breach of a statute governing the landlord-tenant relationship.

If the dispute cannot be resolved by negotiation, the parties to the dispute shall submit the dispute to mediation before resorting to litigation.

This Agreement for Mediation will survive the contractual period.

- If the need for mediation arises, the parties to the dispute shall choose a mutually acceptable mediator and shall share the cost of mediation services equally.
- If the need for mediation arises, mediation services will be provided by a dispute resolution center, and each party to the dispute agrees to bear the cost of the mediation services based on the Center's fee schedule. The applicant shall pay the application fee unless otherwise agreed.

NOTE: Mediation is a voluntary dispute resolution process in which the parties to the dispute meet with an impartial person, called a mediator, who would help to resolve the dispute informally and confidentially. Mediators facilitate the resolution of disputes but cannot impose binding decisions. The parties to the dispute must agree before any settlement is binding.

Date: _____

Tenant

Landlord or Leasing Agent

Tenant

Landlord or Leasing Agent
(The Agent signing on behalf of the Landlord acknowledges he or she has the authority to bind the Landlord to this Mediation Agreement.)

Glossary

Adjudged—a judicial determination of fact and entry of judgment.

Affidavit—a written statement of fact confirmed by oath (sworn to) before an officer or person (notary) having authority to administer such oath.

Contempt of court—the failure to take an action ordered by the court for another's benefit. The court may punish the person found in contempt by fine or imprisonment.

Doorknob lock—a lock in a doorknob, with the lock operated from the exterior by a key and from the interior without a key, card or combination.

Door viewer—a permanently installed device in an exterior door that allows a person inside the dwelling to view a person outside the door. The device must be either (1) a clear glass pane or one-way mirror or (2) a peephole having a barrel with a one-way lens of glass or other substance providing an angle view of not less than 160 degrees.

Dwelling—one or more rooms rented to one or more tenants under a single lease for use as a permanent residence.

Ex parte—an action granted by the court without the opposing party receiving notice or having an opportunity to contest.

Exterior door—a door providing access from a dwelling interior to the exterior. The term includes a door between a living area and a garage but not a sliding glass door or a screen door.

Forcible detainer—an action brought by a landlord to retake possession from a tenant of the leased premises when they are being wrongfully detained (occupied). (This phrase is defined further by Section 24.002[a] of the Texas Property Code.)

Forcible entry—an entry without consent or an unauthorized entry onto the land of another. (See Section 24.001[b] of the Texas Property Code for more details.)

Forcible entry and detainer—an action arising when a third party's entry onto the premises is unlawful. It is brought by the person whose possession has been disturbed and who wishes to retake possession. (The phrase is defined further by Section 24.001[a] of the Texas Property Code.)

French doors—a set of two exterior doors in which each door is hinged and abuts the other door when closed. The term includes double-hinged patio doors.

Holdover tenancy—an estate (tenancy) that is created when the tenant retains possession of the premises after the lease has terminated. The landlord has the option of treating the tenancy as one at sufferance or as a renewal of the original lease.

Justice—justice of the peace in the context of this publication.

Justice court—the court of the justice of the peace (J. P. Court) in the context of this publication.

Keyed dead bolt—a door lock not in the doorknob that locks with a bolt into the doorjamb and is operated from the exterior by a key, card or combination and from the interior by a knob or lever without a key, card or combination. The term also means a doorknob lock that contains a bolt with at least a 1-inch throw.

Keyless bolting device—(A) a door lock not in the doorknob that locks with a bolt into a strike plate screwed into the doorjamb surface that faces the edge of the closed door or into a metal doorjamb that serves as the strike plate, operable only by knob or lever from the door's interior and not in any manner from the door's exterior (commonly referred to as a *keyless dead bolt*.)

The term *keyless bolting device* includes (B) a door lock not in the doorknob that locks by a drop bolt system. It is operated by placing a central metal plate over a metal doorjamb restraint that protrudes from and is affixed to the doorjamb frame by three case-hardened screws at least 3 inches long. One half of the central plate must overlap the interior surface of the door, and the other half must overlap the doorjamb when the plate is placed over the doorjamb restraint. The drop bolt system must prevent the door from being opened unless the central plate is lifted off of the doorjamb restraint by a person who is on the door's interior.

The term *keyless bolting device* also includes (C) a door lock not in a doorknob that locks by a metal bar or metal tube placed across the entire interior of the door and secured at each end of the bar or tube by heavy-duty metal screw hooks. The screw hooks must be at least 3 inches long and screwed into the door frame stud or wall stud on each side of the door. The bar or tube must be secured to both of the screw hooks and permanently attached in some way to the

door frame stud or wall stud. When secured to the screw hooks, the bar or tube must prevent the door from being opened unless the bar or tube is removed by a person on the interior of the door.

The term *keyless bolting device* does not include a chain latch, flip latch, surface-mounted slide bolt, mortise door bolt, surface-mounted barrel bolt, surface-mounted swing bar door guard, spring-loaded nightlatch, foot bolt or other lock or latch.

Landlord—the owner, lessor or sublessor of a dwelling but does not include a manager or agent of the landlord unless the manager or agent purports to be the owner, lessor or sublessor in an oral or written lease.

For purposes of Subchapter D entitled “Security Devices,” the term *landlord* means a dwelling owner, lessor, sublessor, management company or managing agent, including an on-site manager.

Lease—any written or oral agreement between a landlord and tenant that establishes or modifies the terms, conditions, rules or other provisions regarding the use and occupancy of a dwelling.

Multiunit complex—two or more dwellings in one or more buildings that are under common ownership; managed by the same owner, agent or management company; and located on the same lot or tract or adjacent lots or tracts of land.

Normal wear and tear—deterioration that results from the intended use of a dwelling, including, for the purposes of Subchapter B and D, breakage or malfunction resulting from age or deteriorated condition. However, the term does not include deterioration resulting from negligence, carelessness, accident or abuse of the premises, equipment, or movable personal property caused by the tenant, by a member of the tenant’s household, a guest or invitee of the tenant.

Possession of a dwelling—occupancy by a tenant under a lease, including occupancy until the time the tenant moves out or a writ of possession is issued by a court. The term does not include occupancy before the initial occupancy date authorized under a lease.

Premises—a tenant’s rental unit, any area or facility the lease authorizes the tenant to use and the appurtenances (improvements), grounds and facilities held out for the use of tenants generally.

Rekey—to change or alter a security device that is operated by a key, card or combination so that a different key, card or combination is necessary to operate the security device.

Security device—a doorknob lock, door viewer, keyed dead bolt, keyless bolting device, sliding door handle latch, sliding door pin lock, sliding door security bar or window latch in a dwelling.

Sliding door handle latch—a latch or lock located near the handle on a sliding glass door that is operated with or without a key and designed to prevent the door from being opened.

Sliding door pin lock—a lock on a sliding glass door that consists of a pin or nail inserted from the interior side of the door at the side opposite the door’s handle and that is designed to prevent the door from being opened or lifted.

Sliding door security bar—a bar or rod that can be placed at the bottom of or across the interior side of the fixed panel of a sliding glass door and that is designed to prevent the door from being opened.

Supersedes—to obliterate, annul, set aside, replace or make void.

Tenancy at sufferance—an estate (tenancy) that is created when the tenant lawfully comes into possession of the premises but continues to occupy the premises improperly after the lease expires.

Tenancy at will—an estate (tenancy) that gives the tenant the right to possess the premises until the estate (tenancy) is terminated by either party; the length of the estate (lease term) is indefinite.

Tenant—a person authorized by a lease to occupy a dwelling to the exclusion of others and, for the purposes of Subchapters D (security devices), E (disclosure of ownership and management) and F (smoke detectors), obligated under the lease to pay rent.

Tenant turnover date—the date a new tenant moves into a dwelling under a lease after all previous tenants have moved out. The term does not include dates of entry or occupation not authorized by the landlord.

Window latch—a device on a window that prevents the window from being opened; it is operated without a key only from the interior.

Writ of reentry—a judicial order directing the tenant to retake or recover possession of a rental unit.

Writ of possession—a judicial order directing the landlord to retake or recover possession of a rental unit.



MAYS BUSINESS SCHOOL

Texas A&M University
2115 TAMU
College Station, TX 77843-2115

<http://recenter.tamu.edu>
979-845-2031
800-244-2144 orders only

DIRECTOR

DR. R. MALCOLM RICHARDS

ADVISORY COMMITTEE

JERRY L. SCHAFFNER, CHAIRMAN Dallas	CELIA GOODE-HADDOCK, VICE CHAIRMAN College Station
JOSEPH A. ADAME Corpus Christi	CATHERINE MILLER Fort Worth
DAVID E. DALZELL Abilene	NICK NICHOLAS Dallas
TOM H. GANN Lufkin	DOUGLAS A. SCHWARTZ El Paso
JOE BOB McCARTT Amarillo	LARRY JOKL, EX-OFFICIO Brownsville