

**COMMERCIAL LANDLORD'S REMEDIES
FOR TENANT'S BREACH**

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I. INTRODUCTION¹

Possession, the old saying goes, is nine tenths of the law. But this old saying only partly true when it comes to a landlord's remedies for a tenant's default under a commercial lease. Determining who is entitled to possession of the leased premises is only one among many legal issues that must be resolved when a tenant defaults; even so, the resolution of this one issue decisively affects virtually all of the others. Repossessing the premises – whether done rightly or wrongly – affects a landlord's monetary claims for rent and damages. Doing so wrongfully, however, almost always breeds unwanted offspring – the twins defense and counterclaim – whose births complicate, and increase the cost of, recovering possession, rent, and damages from a delinquent tenant.

A. SCOPE OF OUTLINE. This outline is intended to be a practical guide to the exercise of, and interplay between, a landlord's possessory and monetary remedies. Sections II - V cover a landlord's possessory remedies – judicial evictions, lock-outs, and dealing with personal property in the premises. Section VI covers a landlord's monetary remedies – recovering rent and damages – and points out the difference between the two. Section VII covers the distinctive defenses and counterclaims available to a tenant in response to a landlord's attempts to recover possession, rent, and damages.

B. DECIDING TO EVICT. A landlord should make the decision to pursue eviction only after carefully considering its business objectives, its legal options, and the risks and costs associated with the pursuit of each. Before beginning the lease enforcement process, a landlord should examine its dealings with its tenant to uncover, if possible, any areas of potential liability exposure. A landlord or its attorney ordinarily should review

thoroughly the correspondence with the tenant; the lease; any lease amendments; guaranties; UCC filings; subleases and assignments; landlord's loan documents; subordination, attornment, and non-disturbance agreements; and tenant estoppels. Usage controls common in retail leases (*e.g.*, co-tenancy clauses, *etc.*) may make it necessary to examine other tenants' leases to determine the effect of terminating one tenant's lease on the rights and remedies of other tenants in the shopping center.² The failure to conduct such a review is a source of many common missteps in the lease enforcement process, including perhaps the most common — failing to send proper notices to all of the parties entitled to receive them.³ An appropriate review of these materials and a probing interview of the property manager should put a landlord in a far better position to choose the

² Robert Harms Bliss, *The Exclusive Use Clause: The Agent Provocateur of Retail Leasing*, SOUTHERN METHODIST UNIVERSITY SCHOOL OF LAW – REAL ESTATE LAW: LEASES-IN-DEPTH (1999); William E. Blodgett, *Retail Lease Provisions*, STATE BAR OF TEXAS: 17TH ANNUAL ADVANCED REAL ESTATE LAW COURSE (1995); Timothy R. Brown, *Commercial Leases: Drafting and Modification – Shopping Center, Retail and Similar Leases*, UNIVERSITY OF HOUSTON LAW CENTER CONTINUING LEGAL EDUCATION: REAL ESTATE WORKOUTS, DOCUMENTS & CLOSINGS (2005); Bernard O. Dow, *Exclusive Use Clauses: Drafting and Enforcement Issues*, SOUTHERN METHODIST UNIVERSITY SCHOOL OF LAW – REAL ESTATE LAW: LEASES-IN-DEPTH (1994); M. Rosie Rees and Theani C. Louskos, *Retail Leasing: Special Concerns & Sample Co-Tenancy Provision from Major Tenant Form*, NEGOTIATING COMMERCIAL LEASES 993 – 1068 (Practicing Law Institute 2003); Thomas M. Whelan, *Selected Retail Leasing Issues – Usage Controls*, STATE BAR OF TEXAS: 16TH ANNUAL ADVANCED REAL ESTATE DRAFTING COURSE (2005).

³ See, *e.g.*, *Gill Savs. Ass'n v. Chair King, Inc.*, 783 S.W.2d 674, 676 (Tex. App. – Houston [14th Dist.] 1989) (noting that landlord failed to send notice of tenant's default to tenant's creditor as required by agreement subordinating landlord's lien to creditor's lien on tenant's inventory), *aff'd in part and modified in part per curiam*, 797 S.W.2d 31 (Tex. 1990), *on remand sub nom.*, *Resolution Trust Corp. v. Chair King, Inc.*, 827 S.W.2d 546 (Tex. App.—Houston [14th Dist.] 1992, no writ).

¹ Unless otherwise specified, the text of all cited Texas statutes and codes through the end of the 2003 legislative session are taken from Texas Statutes and Codes Annotated by LexisNexis® as annotated through March, 2005).

remedies, or combination of remedies, which will most effectively accomplish its legitimate business objectives.

C. NEGOTIATING WITH DELINQUENT TENANTS. Negotiation can be the least costly and most effective way for a landlord to resolve a dispute with a delinquent tenant. But missteps in negotiations with a delinquent tenant can seriously impair a landlord's remedies. One landlord, for example, negotiated a repayment plan with its tenant and, in the process, partially released the guarantor of the lease by accepting a note from the tenant for the past due rent.⁴ Another landlord's conduct during negotiations about the tenant's non-payment of rent contributed to a large judgment against the landlord for wrongful eviction and fraud.⁵

D. ANATOMY OF A LEASE ENFORCEMENT CATASTROPHE. *Gill Savs. Ass'n v. Chair King, Inc.* illustrates some pitfalls of an ill considered and poorly executed eviction.

The tenant claimed its landlord failed to repair defects in the premises, treated this failure as a breach of the lease, and notified the landlord it would withhold payment of rent. The landlord balked. The tenant then offered to place the rent into an escrow account, and the landlord agreed to the escrow arrangement. But for some unexplained reason, the escrow account was never established.⁶

Meanwhile, temptation in the form of Toys 'R' Us, then a national credit tenant, came calling. To the landlord's chagrin, the troublesome, delinquent tenant occupied the only space in the shopping center suitable to Toys 'R' Us. The landlord asked the president of its troublesome tenant to relocate to comparable space in the same shopping center so that the landlord could enter into a lease with Toys 'R' Us. While negotiations for comparable space

were ongoing, the tenant received a letter demanding payment of the delinquent rent. The tenant's president claimed a representative of the landlord told him not to worry about the demand letter. The tenant's president then rejected an offer from the landlord for substitute space, and the tenant's president left town for a week, believing negotiations with the landlord for substitute space would continue. In his absence, the landlord hired a moving company and evicted the tenant. The landlord, of course, claimed the tenant should have known it would be evicted because the landlord had told the tenant's president, before he left town, that "other alternatives would have to be considered" if the tenant rejected the landlord's offer.⁷

In a *non-jury* trial, the trial court found the landlord liable for \$144,309 in actual damages, \$355,277 in punitive damages,⁸ and \$54,862 in attorneys' fees.⁹ The trial court also ruled that the landlord's conduct during these negotiations estopped the landlord from asserting any right to recover rent.¹⁰ The court of appeals and the Texas Supreme Court both affirmed the trial court's liability findings, although the damage awards were ultimately remanded for a new trial.¹¹ In any case, the landlord's apparently cavalier attitude toward commitments it made or implied during settlement negotiations with a non-paying tenant turned this eviction into protracted litigation and a financial disaster.

II. LANDLORD'S POSSESSORY REMEDIES – Overview

⁷ *Id.* at 676.

⁸ *Id.* at 676.

⁹ 783 S.W.2d at 680.

¹⁰ 783 S.W.2d at 679.

¹¹ *Gill Savs. Ass'n*, 783 S.W.2d at 680 (affirming trial court's judgment on liability, modifying award of attorneys' fees, and remanding for new trial on damages), *aff'd in part and modified in part per curiam*, 797 S.W.2d at 32-33 (affirming judgment on liability, reinstating trial court's award of attorneys' fees, and remanding for new trial on damages).

⁴ *Glasscock v. Console Drive Joint Venture*, 675 S.W.2d 590, 592 (Tex. App.—San Antonio 1984, writ ref'd n.r.e.).

⁵ *Gill Savs. Ass'n*, 783 S.W.2d at 674-80.

⁶ *Gill Savs. Ass'n*, 783 S.W.2d at 676.

Sections III through V of this outline are intended to be a practical guide to judicial eviction, self-help repossession, and dealing with personal property in the premises. The need for such a guide is not immediately apparent. The Texas legislature intended forcible detainer proceedings to be “a summary, speedy, and inexpensive remedy for the determination of who is entitled to possession of the premises.”¹² They are supposed to be so simple that non-lawyers may represent business entities in some forcible detainer cases.¹³ Sometimes forcible detainer proceedings are as simple as they are supposed to be. But, more often, vigorously contested forcible detainer proceedings are anything but simple, fast, and cheap.¹⁴ And, unfortunately, determining the effect of a forcible detainer suit or resulting judgment on the parties’ other remedies can be surprisingly complex.

Much of this complexity results, ironically, from attempts to keep forcible detainer proceedings simple. Several statutes give Texas’ justice courts exclusive jurisdiction over forcible detainer actions.¹⁵ These statutes and the Texas Rules of Civil Procedure, however, limit the issues that can be raised in forcible detainer actions.¹⁶ Thus,

immediate possession of the premises is the only issue properly before a justice court in a forcible detainer action, unless the landlord joins an action for past-due rent within the justice court’s monetary jurisdiction with its suit for possession.¹⁷ This means a landlord may not assert claims in justice court for more than \$5,000 in past-due rent or claims for any amount of unaccrued rent or damages resulting from its tenant’s breach of the lease.¹⁸ Likewise, a tenant cannot assert any counterclaims in an eviction suit in justice court.¹⁹

Moreover, the issues the parties may raise in an appeal from justice court are similarly limited. The prevailing party may only recover damages relating to withholding or defending possession.²⁰ These

controversy is not more than \$5,000, exclusive of interest); see also TEX. R. CIV. P. 738 (stating that suit for rent within monetary jurisdiction of justice court may be joined with eviction suit).

¹⁷ TEX. R. CIV. P. 738 (stating that suit for rent may be joined with forcible detainer action); TEX. R. CIV. P. 746 (declaring that possession is only issue before justice court in forcible detainer action).

¹⁸ *Haginas v. Malbis Mem’l Found.*, 349 S.W.2d 957, 958 (Tex. Civ. App.—Houston 1961), *aff’d*, 354 S.W.2d 368, 371 (Tex. 1962) (stating that landlord may recover only rent, as such, in forcible detainer action in justice court but not damages for wrongful withholding of premises); *Dews v. Floyd*, 413 S.W.2d 800, 805 (Tex. Civ. App.—Tyler 1967, no writ) (stating that Rule 738 does not permit landlord to join in forcible detainer action in justice court damage claims for wrongful withholding of premises or for other benefits accruing under contract).

¹⁹ *Grayson v. Rodermund*, 135 S.W.2d 178, 179 (Tex. Civ. App.—Austin 1939, no writ) (holding that tenant could not assert counterclaim against landlord in forcible detainer action because possession is only issue to be tried); *John E. Morrison Co. v. Harrell*, 148 S.W. 1122, 1123 (Tex. Civ. App.—El Paso 1912, no writ) (stating that defendant in forcible detainer proceeding could not assert counterclaim for value of services in excess of justice court’s jurisdiction to offset plaintiff’s suit for rent); see TEX. R. CIV. P. 746 (stating that actual possession is only issue to be tried in forcible entry and detainer or forcible detainer action).

²⁰ TEX. R. CIV. P. 752 (stating that either party to an appeal may “plead, prove and recover his damages, if any, suffered for withholding or defending the premises

¹² *McGlothlin v. Kliebert*, 672 S.W.2d 231, 232 (Tex. 1984) (citing *Scott v. Hewitt*, 90 S.W.2d 816, 818 (Tex. 1936)).

¹³ TEX. PROP. CODE § 24.011; TEX. R. CIV. P. 747a; OP. TEX. ATT’Y GEN. NO. JM-451 (1986).

¹⁴ See, e.g., *Fandey v. Lee*, 880 S.W.2d 164, 168 (Tex. App.—El Paso 1994, writ denied) (noting that forcible detainer action, which court of appeals decided over four years after it was filed in justice court, and which generated an 1107 page transcript in county court, was “anything but summary, speedy, and inexpensive.”).

¹⁵ TEX. GOV’T CODE § 27.031(a)(2) (stating that justice court has original jurisdiction in cases of forcible entry and detainer); TEX. PROP. CODE § 24.004 (stating that “[a] justice court in the precinct in which the real property is located has jurisdiction in eviction suits. Eviction suits include forcible entry and detainer and forcible detainer suits.”).

¹⁶ TEX. GOV’T CODE § 27.031(a)(1) (stating that justice court has original jurisdiction of civil matters in which exclusive jurisdiction is not exclusively in the district or county court and in which the amount in

damages ordinarily include the reasonable rental value of the premises between the date of the judgment in justice court and of the disposition of the appeal, plus reasonable attorneys' fees and costs incurred in justice and county court.²¹ Any damages unrelated to withholding or defending possession must be brought in a second suit filed in a district or county court having jurisdiction over the amount in controversy.²² In this unique jurisdictional scheme, one court rarely has jurisdiction to resolve a dispute between a landlord and a tenant over both money and possession.

Any misstep in this jurisdictional minefield along the road to an eviction can be costly. Because suits tried in justice court have limited preclusive effect,²³ a judgment for possession in a forcible detainer action will not, as commonly believed, bar a tenant's claim for wrongful

eviction.²⁴ Thus, a landlord may succeed in recovering possession in justice court only to find itself ordered by another court to pay damages to its former tenant because the justice court wrongfully ordered the eviction. Furthermore, while pursuing a forcible detainer action is supposed to be cumulative of a landlord's other remedies,²⁵ doing so may inadvertently impair them.²⁶ And, in some circumstances, a judgment for immediate possession in justice court will not prevent a district court from restoring ultimate possession to a tenant after a justice court orders an eviction.²⁷ This outline tries to chart some of these mines in the forcible detainer minefield and to give directions to some of the paths around that minefield.

Those paths, however, are few and often stop short of the intended destination. One, the Texas lock-out statute, is the principal self-help alternative to judicial eviction.²⁸ While locking-out a tenant can prevent a tenant who is delinquent in paying rent from going into the premises, or sometimes can bring that tenant to the bargaining table, it is of little use in removing a tenant who does not want to leave the premises. This statutory self-help remedy, like the contractual self-help remedy for retaking possession in most leases, cannot be used if doing so would breach the

during the pendency of the appeal."); *Rushing v. Smith*, 630 S.W.2d 498, 499-500 (Tex. App.—Amarillo 1982, no writ) (holding that tenant was not entitled in appeal of forcible detainer suit to recover value of his labor or expenses incurred planting crops on leasehold before receiving notice to vacate).

²¹ *Hart v. Keller Props.*, 567 S.W.2d 888, 889 (Tex. Civ. App.—Dallas 1978, no writ); *Stewart v. Breese*, 367 S.W.2d 72, 74 (Tex. Civ. App.—Dallas 1963, writ dismissed); *Snyder v. Tousinau*, 177 S.W.2d 799, 800 (Tex. Civ. App.—Galveston 1944, no writ); see *Koelzer v. Pizzirani*, 718 S.W.2d 420, 422 (Tex. App.—Fort Worth 1986, no writ) (applying same damage measure in forcible entry and detainer case).

²² *Rushing*, 630 S.W.2d at 500 (citing *Holcombe v. Lorino*, 79 S.W.2d 307, 309 (Tex. 1935)).

²³ TEX. CIV. PRAC. & REM. CODE § 31.004(a) (stating that "[a] judgment or determination of fact or law in a proceeding in a lower trial court is not res judicata and is not a basis for estoppel by judgment in a proceeding in a district court, except that a judgment rendered in a lower trial court is binding on the parties thereto as to recovery or denial of recovery."); *McCloud v. Knapp*, 507 S.W.2d 644, 647 (Tex. Civ. App.—Dallas 1974, no writ) (holding that because exception in statutory predecessor to section 31.004 only bars relitigation of issues actually litigated in lower court, tenant's claims for damages for breach of oral lease agreement were not barred by adverse forcible detainer judgement in justice court).

²⁴ TEX. PROP. CODE § 24.008 (stating that "[a]n eviction suit does not bar a suit for trespass, damages, waste, rent, or mesne profits."); *Anarkali Enters., Inc. v. Riverside Drive Enters., Inc.*, 802 S.W.2d 25, 26 (Tex. App.—Fort Worth 1990, no writ).

²⁵ *McGlothlin*, 672 S.W.2d at 232 (stating that forcible detainer action is cumulative of other remedies).

²⁶ *Dews*, 413 S.W.2d at 804-05 (illustrating some jurisdictional and preclusion issues raised by joining action for rent in forcible detainer suit).

²⁷ *Cf. Buttery v. Bush*, 575 S.W.2d 144, 146 (Tex. Civ. App.—Tyler 1978, writ refused n.r.e.) (stating that judgment for immediate possession in justice court did not preclude declaratory judgment action in district court to determine who was entitled to ultimate possession of premises under lease renewal option).

²⁸ TEX. PROP. CODE § 93.002.

peace.²⁹ Thus, if a tenant says, "I'm not leaving," a landlord should stop a self-help eviction. Another path around the forcible detainer minefield is self-help repossession of a tenant's personal property. Article 9 of the Texas UCC and most leases authorize a landlord to take possession of a tenant's personal property in order to enforce a contractual landlord's lien.³⁰ But a tenant can cut-off its landlord's use of this remedy by merely saying, "Don't touch my stuff."³¹ In some circumstances, a midnight lock-out may constitute a breach of the peace.³² In spite of their of their limitations, these

self-help alternatives to judicial eviction are sometimes useful to a landlord who must evict a tenant or dispose of a tenant's personal property.

III. JUDICIAL EVICTIONS

A forcible detainer action,³³ as distinguished from a forcible entry and detainer action,³⁴ is the

changing a lock, or merely unlocking an apartment.") [hereinafter FRIEDMAN ON LEASES].

³³ Section 24.002 of the Texas Property Code gives this definition of a forcible detainer action:

(a) A person who refuses to surrender possession of real property on demand commits a forcible detainer if the person:

(1) is a tenant or a subtenant wilfully and without force holding over after the termination of the tenant's right of possession;

(2) is a tenant at will or by sufferance, including an occupant at the time of foreclosure of a lien superior to the tenant's lease; or

(3) is a tenant of a person who acquired possession by forcible entry.

(b) The demand for possession must be made in writing by a person entitled to possession of the property and must comply with the requirements for notice to vacate under Section 24.005.

³⁴ Section 24.001 of the Texas Property Code defines a forcible entry and detainer action as follows:

(a) A person commits a forcible entry and detainer if the person enters the real property of another without legal authority or by force and refuses to surrender possession on demand.

(b) For the purposes of this chapter, a forcible entry is:

(1) an entry without the consent of the person in actual possession of the property;

(2) an entry without the consent

²⁹ *Gulf Oil Corp. v. Smithey*, 426 S.W.2d 262, 265 (Tex. Civ. App.—Dallas 1965, writ dismissed); *Embry v. Bel-Aire Corp.*, 508 S.W.2d 469, 471 (Tex. Civ. App.—Austin 1974, writ refused n.r.e.) (stating that "one who is entitled to possession of land, but who is not in possession, may not forcibly take possession from another . . .").

³⁰ TEX. BUS. & COMM. CODE § 9.609 (stating that "[u]nless otherwise agreed a secured party has on default the right to take possession of the collateral."); see *Mbank El Paso v. Sanchez*, 836 S.W.2d 151, 152-54 (Tex. 1992) (holding that creditor has non-delegable duty not to breach peace and that creditor breached peace when its subcontractor repossessed collateral over objections of debtor); *Geise v. NCNB Texas*, 881 S.W.2d 776, 783 (Tex. App.—Dallas 1994, no writ) (stating that unreasonable damage to property constitutes breach of peace).

³¹ Cf. *Lighthouse Church of Cloverleaf v. Texas Bank*, 889 S.W.2d 595, 602-04 (Tex. App.—Houston [14th Dist.] 1994, writ denied) (stating that Texas does not recognize right to self-help repossession of mortgaged real estate and that self-help repossession of personal property is permitted only if it can be done without breach of peace).

³² *Gulf Oil Corp.*, 426 S.W.2d at 265 (holding, in case in which tenant had not been informed that [the landlord] had declared the lease terminated, "that entry into the building by picking the lock was not peaceable but by force and violence."); see also Milton R. Friedman & Patrick A. Randolph, Jr., 2 FRIEDMAN ON LEASES, *Landlord's Right to Retake Possession by Self-Help* § 18.6, at 18:54-61 & nn. 264-283 (5th Ed. 2004) (stating, at p. 18:57, that "some courts, growing in number, rule that virtually any nonviolent entry . . . without the consent of tenant is wrong by landlord[, and] . . . [t]his includes not only the 'dark-of-night lock changing' method of eviction, but picking a lock,

judicial remedy ordinarily available to a landlord who seeks to evict a commercial tenant or subtenant from the leased premises. "To recover in an action for forcible detainer, the landlord must show a right to possession of the premises at the time the action is brought."³⁵ Chapter 24 of the Texas Property Code, and Rules 738 through 755 of the Texas Rules of Civil Procedure, for the most part, establish the rules for making this showing in forcible detainer proceedings.

A. NOTICE TO VACATE. The first step in a successful eviction is giving the tenant proper notice to vacate, validating that old Greek maxim, "well begun is half done."³⁶ Proper notice to vacate is an essential element of a landlord's case-in-chief in a forcible detainer action.³⁷ To give proper notice, a landlord must send the person in possession of the premises notice to vacate in accordance with the requirements of the lease, section 24.005 of the Texas Property Code, and any other applicable laws.³⁸ A landlord's failure to comply with this combination of contractual and legal rules, which govern the timing, manner of delivery, and content of the required notices, may delay entry, or cause the denial, of the sought after judgment for possession.

of a tenant at will or by sufferance; or

(3) an entry without the consent of a person who acquired possession by forcible entry.

³⁵ *Struve v. Park Place Apts.*, 923 S.W.2d 50, 51-52 (Tex. App.—Tyler 1995, writ denied).

³⁶ Literally, "ἀρχή δέ ἡμισυ παντός," translates "(the) beginning (is) half of everything."

³⁷ TEX. PROP. CODE § 24.002(b).

³⁸ TEX. PROP. CODE § 24.005(a), (e); cf. *Barajas v. Housing Auth.*, 882 S.W.2d 853, 855 (Tex. App.—Corpus Christi 1994, no writ) (discussing whether additional notice was required by lease or Federal regulations); *Caro v. Housing Auth.*, 794 S.W.2d 901, 903-04 (Tex. App.—Austin 1990, writ denied) (discussing common law demand requirement and waiver thereof in forcible detainer actions).

1. MINIMUM TIME REQUIREMENTS FOR NOTICE TO VACATE. As a general rule, a landlord must give the person in possession of the premises under an oral or written lease at least **3 days** written notice to vacate the premises before filing a forcible detainer suit, unless (i) the parties have contracted for a shorter or longer notice period in a written lease or agreement; or (ii) the lease or other applicable law requires an opportunity to respond.³⁹ This means that the terms of many commercial leases will control the minimum notice period. Because a landlord must have the right to possession at least by the time a forcible detainer suit is filed,⁴⁰ and possibly at the time the notice to vacate is given, any grace or notice-and-opportunity-to-cure provisions in a lease must be examined, along with the default and remedies provisions, to determine precisely when the combination of the tenant's conduct, any act or notice by the landlord, and passage of time will ripen into the landlord's right to take possession. A landlord who files a forcible detainer suit on grounds that the tenant is holding over beyond the end of the rental term or renewal period also may be required to comply with the tenancy termination requirements of section 91.001 of the Texas Property Code.⁴¹

³⁹ TEX. PROP. CODE § 24.005(a), (b), and (e); see also *Barajas*, 882 S.W.2d at 855; *Caro*, 794 S.W.2d at 903-04; *Blackmon v. Elliott*, __ S.W.2d __, 1997 W.L. 57693, *2 (Tex. App.—Austin Feb.13, 1997) (unpublished) (stating that "[a] demand for possession need not include magic phrases like 'notice to vacate' or 'demand for possession' . . .").

⁴⁰ TEX. PROP. CODE § 24.002(a)(1) (stating that tenant commits forcible detainer if tenant refuses to surrender possession of real property on demand holds over after the termination of tenant's right of possession).

⁴¹ Section 91.001. Notice for Terminating Certain Tenancies.

(a) A monthly tenancy or a tenancy from month to month may be terminated by the tenant or the landlord giving notice of termination to the other.

(b) If a notice of termination is given under Subsection (a) and if the rent-paying

2. MANNER OF GIVING NOTICE TO VACATE.

In addition to any requirements in the lease directing the manner of giving notice, section 24.005 of the Texas Property Code requires the landlord to give the statutory notice to vacate in

period is at least one month, the tenancy terminates on whichever of the following days is the later:

(1) the day given in the notice for termination; or

(2) one month after the day on which the notice is given.

(c) If a notice of termination is given under Subsection (a) and if the rent-paying period is less than a month, the tenancy terminates on whichever of the following days is the later:

(1) the day given in the notice for termination; or

(2) the day following the expiration of the period beginning on the day on which notice is given and extending for a number of days equal to the number of days in the rent paying period.

(d) If a tenancy terminates on a day that does not correspond to the beginning or end of a rent-paying period, the tenant is liable for rent only up to the date of termination.

(e) Subsections (a), (b), (c), and (d) do not apply if:

(1) a landlord and a tenant have agreed in an instrument signed by both parties on a different period of notice to terminate the tenancy or that no notice is required; or

(2) there is a breach of contract recognized by law.

TEX. PROP. CODE § 91.001; *cf. Hoenig v. Texas Commerce Bank, N.A.*, 939 S.W.2d 656, 663-64 (Tex. App.—San Antonio 1996, no writ).

person or by mail at the premises in question.⁴² Notice in person may be by personal delivery to the tenant or to any person residing at the premises who is 16 years of age or older or by personal delivery to the premises and affixing the notice to the inside of the main entry door.⁴³ Notice by mail may be by regular mail or by registered or certified mail, return receipt requested, to the premises in question.⁴⁴ The statutory notice period is calculated from the day on which the notice is delivered.⁴⁵ When a lease establishes different notice requirements, the landlord should comply with the statute and the notice provisions in the lease.⁴⁶

3. CONTENT OF NOTICE TO VACATE. “A demand for possession need not include magic phrases like ‘notice to vacate’ or ‘demand for possession’”⁴⁷ But it should state clearly whether the landlord has terminated the lease or only the tenant’s right to possession. Failing to make this distinction clearly is just one among the many traps for the unwary involved in giving notice to vacate. Some of these traps are discussed below.

a. Proper Wording of Demands and Notices.

A landlord should ensure that it does not inadvertently terminate the lease by carelessly wording its demand letters. Most leases, and many cases, recognize a distinction between terminating the lease (which usually terminates the landlord’s right to unaccrued rent) and merely terminating the tenant’s right to possession (which, in principle, does not terminate the landlord’s right to unaccrued

⁴² TEX. PROP. CODE § 24.005(f).

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ TEX. PROP. CODE § 24.005(g).

⁴⁶ *See, e.g., Crown Const. Co. v. Huddleston*, 961 S.W.2d 552, 556-57 (Tex. App.—San Antonio 1997, no pet.) (stating “delivery in person” requirement in notice provision in lease mandated hand to hand delivery and was not satisfied by taping notice on door).

⁴⁷ *Blackmon*, __ S.W.2d __, 1997 W.L. 57693, at *2 (unpublished).

rent or damages).⁴⁸ This small distinction may make a large difference in whether a landlord can pursue successfully its monetary claims against a tenant and in the cost of doing so. Two cases illustrate the distinction.

(1) In *Cavalcade Oil Corp. v. Samuel*,⁴⁹ for example, the trial court ruled that a demand letter, which stated “the undersigned elects to and does declare a forfeiture of the agreement if said due and payable amounts are not paid within three days[,]” was ambiguous.⁵⁰ This ambiguity created a fact issue for submission to the jury on whether the landlord intended to terminate the lease, which would have caused the landlord to forfeit its right to recover unaccrued rent or damages for the tenant’s breach of the lease, or only intended to terminate the tenant’s right to possession, which would allow the landlord to preserve its right to recover unaccrued rent or damages.⁵¹ Although the jury found that the landlord did not forfeit the lease, and thus retained the right to recover rents for the remainder of the lease term, the landlord had to endure the expense and risks of a jury trial because of the unfortunate wording of its attorney’s demand letter.

(2) In *Rohrt v. Kelley Mfg. Co.*,⁵² the landlord was less fortunate, forfeiting its right to recover unaccrued rents or damages for the tenant’s breach

because it included an unfortunate reference to forfeiture in its demand letter.⁵³

b. Common Law Demand for Payment or Performance. Texas law is arguably still unsettled on the issue of whether a landlord must demand payment before demanding that a delinquent tenant vacate the premises. At common law, a landlord could not terminate a written lease for a tenant’s breach, or exercise any right of re-entry, unless the landlord first demanded performance.⁵⁴ Because this demand is a vestigial element of the common law action for ejectment, a demand for performance would seem to have no place in a statutory action for forcible detainer.⁵⁵

(1) Demand is Not Required. Several authorities seem to support this view. In *Santos v. City of Eagle Pass*,⁵⁶ the court of appeals refused to require the landlord to make the common law demand for performance as a condition to obtaining a judgment for possession in a forcible detainer action, holding that resort to common law rules is unnecessary, at least when a lease grants the landlord the rights to re-enter the premises, to repossess them, and to terminate the tenant’s right of possession.⁵⁷ In addition, Chapter 24 does not expressly require a landlord to demand payment

⁴⁸ Compare *Cavalcade Oil Corp.*, 746 S.W.2d at 843-44 (holding that reference to termination of lease in demand letter did not result in forfeiture of landlord’s right to recover unaccrued rent) with *Rohrt v. Kelley Mfg. Co.*, 349 S.W.2d 95, 96-98 (Tex. 1961) (holding that landlord could not recover unaccrued rent because landlord sent letter to tenant announcing landlord’s intention to “declare the lease forfeited” if the tenant did not pay past due rent).

⁴⁹ 746 S.W.2d 842 (Tex. App.—El Paso 1988, writ denied).

⁵⁰ 746 S.W.2d at 844.

⁵¹ *Id.*

⁵² 349 S.W.2d 95 (Tex. 1961).

⁵³ *Rohrt*, 349 S.W.2d at 96-98 (holding that landlord could not recover unaccrued rent because landlord sent letter to tenant announcing landlord’s intention to “declare the lease forfeited” if the tenant did not pay past due rent).

⁵⁴ *McVea v. Verkins*, 587 S.W.2d 526, 531 (Tex. Civ. App.—Corpus Christi 1979, no writ).

⁵⁵ Compare *McVea*, 587 S.W.2d at 531 (stating that at common law, landlord could not terminate written lease for tenant’s breach or exercise any right of re-entry unless landlord first demanded performance) with *Santos v. City of Eagle Pass*, 727 S.W.2d 126, 128-29 (Tex. App.—San Antonio 1987, no writ) (stating that “if legislature had intended to give a defaulting tenant the right to cure by performance, it could have done so easily.”).

⁵⁶ 727 S.W.2d 126 (Tex. App.—San Antonio 1987, no writ).

⁵⁷ 727 S.W.2d at 128-29.

before giving the statutory notice to vacate,⁵⁸ and section 24.005(e)⁵⁹ does not give a defaulting tenant the right to cure by performance after receiving a notice of default.⁶⁰ Even so, the statement in *Santos* that the legislature did not intend to require landlords to make the common law demand for payment or performance before sending the statutory notice to vacate is *dictum*.⁶¹

(2) Demand is Required. Other fairly recent cases discuss the demand for performance in forcible detainer cases as if Texas law may still require this demand before a landlord gives a tenant notice to vacate. These cases, however, avoided directly ruling on the issue, finding instead that the tenant had waived any right to this notice it may have had at common law.⁶² The absence of any clear authority means that a landlord may wish to demand performance, especially if its lease does not have a strong waiver-of-notice clause,⁶³ to

ensure that it has demanded possession “in the manner provided by law”⁶⁴

c. When is Notice Effective: Deposit or Receipt. The statutory notice period in forcible detainer actions “is calculated from the day on which the notice is delivered.”⁶⁵ The landlord should review the lease to determine when any required notices are effective, to whom such notices must be sent, and how they must be delivered.⁶⁶ If the lease imposes any notice requirements more onerous than the statute, the landlord should also comply with the additional requirements set forth in the lease.

d. Some Defective Notices Are Not the End of the World. Improper notice is not always the end of the world or the beginning of a flawed eviction. One court of appeals, in response to a tenant’s claim that a premature notice violated its due process rights, held that the county court did not err in abating the proceedings to allow the landlord to correct any defects in its notice of termination.⁶⁷ Also, a mere notice to quit the premises, followed by the tenant vacating the premises, ordinarily will not constitute a constructive eviction.⁶⁸ Constructive eviction

⁵⁸ TEX. PROP. CODE § 24.005.

⁵⁹ Section 24.005(e) of the Texas Property Code provides:

If the lease or applicable law requires the landlord to give a tenant an opportunity to respond to a notice of proposed eviction, a notice to vacate may not be given until the period provided for the tenant to respond to the eviction notice has expired.

⁶⁰ *Caro*, 794 S.W.2d at 903-04 (holding that tenant may, and did, waive any common law demand requirement, which otherwise would have been a precursor to filing forcible detainer action); *Santos*, 727 S.W.2d at 128-29.

⁶¹ *Santos*, 727 S.W.2d at 127-29.

⁶² *Caro*, 794 S.W.2d at 903-04 (holding that tenant may and did waive any common law demand requirement which would have otherwise been a precursor to filing forcible detainer action).

⁶³ *Gray v. Vogelsang*, 236 S.W.2d 122, 127 (Tex. Civ. App.—Galveston 1921, no writ) (holding that contractual right to reenter upon default, without more, is not an effective waiver of any common law notice or demand requirements); cf. *Shumway v. Horizon Credit Corp.*, 801 S.W.2d 890, 893-94 (Tex. 1991) (holding that waivers of common law rights by maker of note must be specific).

⁶⁴ *McVea*, 587 S.W.2d at 532.

⁶⁵ TEX. PROP. CODE § 24.005(g); cf. *Brown v. Swift-Eckrich, Inc.*, 787 S.W.2d 599, 600-01 (Tex. App.—El Paso 1990, writ denied) (illustrating, in a case involving the exercise of a lease option, types of issues that arise when lease requires that all notices “shall be made in writing” but does not specify whether notices are effective when sent or when received).

⁶⁶ See, e.g., *Crown Const. Co.*, 961 S.W.2d at 556-57 (stating “delivery in person” requirement in notice provision in lease mandated hand to hand delivery and was not satisfied by taping notice on door).

⁶⁷ *Hinajosa v. Housing Auth.*, 896 S.W.2d 833, 836 (Tex. App.—Corpus Christi 1995, writ dismissed w.o.j.).

⁶⁸ *Rust v. Eastex Oil Co., Inc.*, 511 S.W.2d 358, 361 (Tex. Civ. App.—Texarkana 1974, no writ) (stating that notice to quit, without more, does not constitute a constructive eviction because constructive eviction requires some substantial interference which is injurious to tenant’s beneficial use and enjoyment of the premises); *Edwards v. Blissard*, 440 S.W.2d 427, 432

requires an additional feature, such as harassing incidents occurring on the property that disturb the tenant's peaceful possession.⁶⁹

B. FILE IT YOURSELF OR HIRE AN ATTORNEY. The cost of counsel often dictates that a landlord attempt to represent itself before the justice court in a forcible detainer action. Every business entity (e.g., a corporation, limited partnership, or partnership) should be aware that it is permitted to represent itself in justice court only in forcible detainer cases in which the tenant fails to pay rent or is holding over. A non-attorney who represents the landlord in a forcible detainer case brought on other grounds (e.g., a non-monetary default) may be engaged in the unauthorized practice of law,⁷⁰ which is a misdemeanor in Texas.⁷¹

1. DO THE RULES PERMIT A LANDLORD TO REPRESENT ITSELF IN JUSTICE COURT?
Sometimes. As a general rule, a natural person may represent himself or herself in the justice court or any other court in the State of Texas,⁷² but a

(Tex. Civ. App.—Texarkana 1969, writ ref'd n.r.e.) (stating that notice to quit, without more, does not constitute a constructive eviction); *Stillman v. Youmans*, 266 S.W.2d 913, 916 (Tex. Civ. App.—Galveston 1954, no writ) (holding that landlord's public demand for rent in the tenant's retail premises, which caused tenant great embarrassment, did not constitute constructive eviction when tenant had already entered into a new lease for lower rent before landlord made demand and tenant abandoned premises).

⁶⁹ *Quitta v. Fossati*, 808 S.W.2d 636, 643 (Tex. App.—Corpus Christi 1991, writ denied); *Fabrique, Inc. v. Corman*, 796 S.W.2d 790, 792 (Tex. App.—Dallas 1990), writ denied per curiam, 806 S.W.2d 801 (Tex. 1991) (reserving expressly question of whether mere threat of litigation by landlord interferes sufficiently with tenant's possession to give rise to a cause of action for damages).

⁷⁰ OP. TEX. ATT'Y GEN. NO. JM-451 (1986).

⁷¹ TEX. PENAL CODE § 38.123.

⁷² But see Jonathan Swift, *GULLIVER'S TRAVELS* 248 (Oxford Univ. Press 1977):

If my Neighbour hath a mind to my Cow, he

business entity (e.g., a corporation, limited partnership, or partnership) must be represented by an attorney.⁷³ A limited exception to this general rule prohibiting a business entity from representing itself applies in contested eviction suits in justice court for (i) nonpayment of rent or (ii) holding over beyond the rental term.⁷⁴ In these two types of contested cases, "the parties may represent themselves or be represented by their authorized agents, who need not be attorneys."⁷⁵ A further exception to the general rule permits an authorized agent, who is not an attorney, to request and obtain a default judgment "[i]n any eviction suit in justice court"⁷⁶

a. Who is an Authorized Agent? The Texas Attorney General has opined that "an 'authorized agent' under section 24.009⁷⁷ may only be a natural person and may not be a corporation or other business entity."⁷⁸ This opinion raises some interesting questions in connection with some very common practices in the real estate industry. If, for example, a corporate landlord designates a corporate management company as the landlord's agent for collection of rents and enforcement of leases, may an employee (the natural person) of the management company represent the landlord as the landlord's authorized agent in the justice court? The technical answer may be no. Any business entity finding itself in a similar situation should make specific appointments of the natural persons who will represent it in the justice court to avoid the possible violation of this rule.

b. Contested Eviction for Non-Monetary Defaults. The right of a business entity to use a

hires a Lawyer to take my Cow from me. I must then hire another to defend my Right; it being against all the Rules of Law that a Man should be allowed to speak for himself.

⁷³ TEX. GOV'T CODE §§ 81.101, 81.102.

⁷⁴ TEX. PROP. CODE § 24.011; TEX. R. CIV. P. 747a; OP. TEX. ATT'Y GEN. NO. JM-451 (1986).

⁷⁵ TEX. PROP. CODE § 24.011.

⁷⁶ TEX. PROP. CODE § 24.011.

⁷⁷ Section 24.009 is now codified as section 24.011.

⁷⁸ OP. TEX. ATT'Y GEN. NO. JM-451 (1986).

non-attorney representative in a contested forcible detainer suit is restricted to the two instances recited in the statute — nonpayment of rent or holding over. Thus, a business entity that terminates a tenancy before the expiration of the lease term for a non-monetary default must retain an attorney to try the case in justice court.

2. DO THE RULES PERMIT A LANDLORD TO REPRESENT ITSELF IN AN APPEAL OF A FORCIBLE DETAINER CASE FROM JUSTICE COURT? *Of Course Not.* Although a natural person may represent himself or herself in county court or before an appellate court, a business entity must retain counsel to represent it in any appeal to county court or to another appellate court. Section 24.011 of the Texas Property Code does not permit non-attorney representation of a business entity in any appeal from the justice court.⁷⁹

C. FILING IN THE PROPER COURT. Once a landlord has given all of the required notices, it may file a forcible detainer action in justice court. A forcible detainer complaint must be filed in the “justice court in the precinct in which the real property is located”⁸⁰ The venue statute applicable in forcible detainer cases also provides that the complaint “shall be filed” in the precinct in which all or a part of the property is located.⁸¹ If a party to a forcible detainer suit requests a change of venue, the justice court must grant that party’s request, unless the requesting party’s affidavits fail to satisfy the requirements of Rule 528 of the Texas Rules of Civil Procedure.⁸²

⁷⁹ TEX. PROP. CODE § 24.011.

⁸⁰ TEX. PROP. CODE § 24.004 (granting jurisdiction in eviction suits to justice court in the precinct in which the real property is located); TEX. GOV'T CODE § 27.031(a)(2) (granting justice courts original jurisdiction in forcible entry and detainer cases); *Goggins v. Leo*, 849 S.W.2d 373, 375 (Tex. App.—Houston [14th Dist.] 1993, no writ) (stating sworn complaint, which was not contradicted at trial, established location of property within precinct for jurisdictional purposes).

⁸¹ TEX. CIV. PRAC. & REM. CODE § 15.084.

⁸² TEX. R. CIV. P. 528; *Crowder v. Franks*, 870 S.W.2d 568, 571-72 (Tex. App.—Houston [1st Dist.] 1993, no writ) (stating Rule 528 is exclusive rule

D. EFFECTING PROPER SERVICE. Pleading the defendant’s name and address in accordance with Rule 742a can save time in effecting service in a forcible detainer action, especially if the defendant attempts to avoid personal service.

1. RULE 742a. Rule 742a allows the constable to employ alternative service if the sworn complaint (i) lists all home *and* work addresses of the defendant which are known to the person filing the sworn complaint; and (ii) states that such person knows of no other home or work addresses of the defendant in the county where the premises are located.⁸³ “It shall not be necessary for the aggrieved party or his authorized agent to make request for or motion for alternative service pursuant to this rule.”⁸⁴

2. STRICT COMPLIANCE REQUIRED. Strict compliance with Rule 742a, however, is required. In *Winrock Houston Assocs. Ltd. P’ship v. Bergstrom*,⁸⁵ the court of appeals held that substituted service under Rule 742a was ineffective because the officer’s sworn request for substituted service did not state he attempted service at the tenant’s office address *and* the tenant’s home address.⁸⁶ A party should carefully review the citation and the sheriff’s or constable’s return to ensure that they are accurate and complete. Even though the court’s clerks prepare the citations, and a sheriff or constable completes the return, the party attempting to rely on them bears the burden of any mistakes, even when the party supplies the correct information.

E. PLEADING AND PROVING THE RIGHT TO POSSESSION: THE ELEMENTS OF A FORCIBLE DETAINER ACTION. A party must plead and prove the essential elements of a forcible detainer action

governing change of venue in civil cases in justice court).

⁸³ TEX. R. CIV. P. 742a.

⁸⁴ TEX. R. CIV. P. 742a.

⁸⁵ 879 S.W.2d 144 (Tex. App.—Houston [14th Dist.] 1994, no writ).

⁸⁶ *Id.* at 151.

to obtain a judgment for possession. The complaint shall (i) describe the lands, tenements or premises, the possession of which is claimed, with sufficient certainty to identify them; (ii) state the facts which entitle the complainant to possession and authorize the action under Sections 24.001-24.004, Texas Property Code; and (iii) be sworn to or verified.⁸⁷ If the case is contested, the party seeking the judgment for possession must offer competent proof, by live testimony, of each essential element of the claim. To ensure the availability of witnesses, the justice has the authority to issue subpoenas for witnesses, to enforce their attendance, and to punish them for contempt.⁸⁸

1. Sufficiency of Description of Land in Complaint. Although the better practice is to include a legal description of the property in the complaint, it is not required. Rule 741 only requires that “[t]he complaint shall describe the lands, tenements or premises, the possession of which is claimed, with sufficient certainty to identify the same”⁸⁹ In *Stewart v. Breese*,⁹⁰ the court of appeals found that a street address could satisfy Rule 741, holding that “Route 1, Box 496, Old Seagoville Road, Seagoville, Texas” described the property with “sufficient certainty” to support a judgment.⁹¹ Moreover, even if the initial complaint does not describe the property with sufficient certainty, the complainant may amend its pleadings to supply an adequate description because “[a]n insufficient description in the complaint in forcible entry and detainer is not such a defect as to deprive the court of jurisdiction.”⁹² Thus, a county court, as well as a justice court, should allow a complainant in a forcible detainer action to amend its pleadings rather than dismiss

the complaint because of an inadequate property description.⁹³

2. FACTS ENTITLING COMPLAINANT TO POSSESSION. A party who seeks a judgment for possession must also plead and prove the facts that entitle the complainant to possession and authorize the action under sections 24.001-24.004 of the Texas Property Code.⁹⁴

a. Landlord-Tenant Relationship. Texas courts have long held that “[a] forcible detainer action is dependent on proof of a landlord-tenant relationship.”⁹⁵ A landlord-tenant relationship may exist under an oral or written lease,⁹⁶ under a purchase contract,⁹⁷ under a contract for deed,⁹⁸ or under a deed of trust.⁹⁹ The existence of a landlord-tenant relationship, however, is not an essential element of a forcible entry and detainer action.¹⁰⁰

b. Compliance with Section 24.005. A party seeking possession in a forcible detainer action must plead and prove that it made demand for possession in compliance with the requirements of section 24.005 of the Texas Property Code.¹⁰¹ At trial, a landlord must put on live testimony to prove that it satisfied these notice requirements. If the demand for possession is served at the premises, the landlord should ensure that the person who

⁹³ *Paley*, 356 S.W.2d at 355-56.

⁹⁴ TEX. R. CIV. P. 741.

⁹⁵ *Haith v. Drake*, 596 S.W.2d 194, 196 (Tex. Civ. App.—Houston [1st Dist.] 1980, writ ref’d n.r.e.) (citing *Dent v. Pines*, 394 S.W.2d 266 (Tex. Civ. App. — Houston 1965, no writ)).

⁹⁶ *Haith*, 596 S.W.2d at 195-96.

⁹⁷ *Id.* at 197.

⁹⁸ *Martinez v. Daccarett*, 865 S.W.2d 161, 163-64 (Tex. App.—Corpus Christi 1993, no writ).

⁹⁹ *Home Savs. Ass’n v. Ramirez*, 600 S.W.2d 911, 913 (Tex. Civ. App.—Corpus Christi 1980, writ ref’d n.r.e.).

¹⁰⁰ *American Spiritualist Ass’n v. Ravkind*, 313 S.W.2d 121, 124 (Tex. Civ. App.—Dallas 1958, writ ref’d n.r.e.).

¹⁰¹ TEX. PROP. CODE § 24.002(b).

⁸⁷ TEX. R. CIV. P. 739, 741.

⁸⁸ TEX. R. CIV. P. 743.

⁸⁹ TEX. R. CIV. P. 741.

⁹⁰ 367 S.W.2d 72 (Tex. Civ. App.—Dallas 1963, writ dism’d).

⁹¹ *Id.* at 73.

⁹² *Family Inv. Co. of Houston, Inc. v. Paley*, 356 S.W.2d 353, 355 (Tex. Civ. App.—Houston 1962, writ dism’d) (citing *Granberry v. Storey*, 127 S.W. 1122 (Tex. Civ. App.—1910, no writ)).

served the notices is available to testify at trial. If the demand is served by certified mail, notice can be established by introducing a copy of the letter and the original green card.

(1) Holdover after Termination of Right to Possession. “A person who refuses to surrender possession of real property on demand commits a forcible detainer if the person . . . is a tenant or a subtenant wilfully and without force holding over after the termination of the tenant’s right of possession”¹⁰² In most cases, this section will govern the required pleading and proof in cases instituted by a commercial landlord against the tenant or subtenant when (i) the tenant defaults or (ii) the tenant holds over after the expiration of the lease term.¹⁰³

(2) Termination of Tenant’s Right to Possession After Default. In many commercial leases, and at common law, termination of the tenant’s right to possession upon the tenant’s default is not automatic but is instead merely one of several options available to a landlord. Section 24.002(a)(1) of the Texas Property Code appears to require that a commercial landlord plead and prove that it has taken all of the steps necessary under the lease to terminate the tenant’s right to possession. This means, as a general rule, that the landlord should, where possible, follow both statutory and common law by pleading and proving that (a) the default or other event which gave rise to the landlord’s right to terminate the tenant’s right to possession occurred; (b) the landlord gave any notices or made any demands required under the lease, under any applicable statute, or at common law; and (c) the landlord had the right to terminate the tenant’s right to possession and, in fact,

exercised that right.¹⁰⁴ Before the landlord institutes a forcible detainer action, however, it should evaluate the effect that terminating the tenant’s right of possession may have on the landlord’s other remedies, including the right to collect unaccrued rent or damages.¹⁰⁵

(3) Termination of Right to Possession After Expiration of the Lease Term. In the event that the tenant holds over beyond the expiration of the lease term, the landlord still must plead and prove that (a) the lease expired; (b) the landlord gave any notices and made any demands required under the lease or by law; and (c) the landlord fulfilled the lease termination requirements of section 91.001 of the Texas Property Code and then gave the statutory 3 or 10-day notice to vacate when required to do so. And, while a landlord has no duty to accept rent from a hold-over tenant, negotiating a rent check after giving a hold-over tenant a notice to vacate invalidates the notice.¹⁰⁶

(4) Forcible Detainer Actions after Foreclosures. Real property foreclosures give rise to two distinct types of forcible detainer cases. The first arises if the deed of trust creates a landlord-tenant relationship when the mortgagor remains on

¹⁰⁴ Compare *McVea*, 587 S.W.2d at 531-33 (holding that when landlord did not make formal demand for payment of rent and for possession of land upon tenant’s breach, reentry and taking possession of land for breach of covenant to pay rent and covenant limiting use of realty were improper because, *inter alia*, lease did not contain an express waiver of landlord’s common law duty to make demand for payment or possession) with *Santos*, 727 S.W.2d at 127-29 (stating common law notice and demand are not required in statutory forcible detainer cases).

¹⁰⁵ See *Speedee Mart, Inc. v. Stovall*, 664 S.W.2d 174, 177 (Tex. App.—Amarillo 1983, no writ); see also *Rohrt*, 349 S.W.2d at 96-99 (holding landlord’s inadvertent termination of lease, instead of tenant’s right of possession, barred landlord’s claim for unaccrued rent); *Snyder v. Tousinau*, 177 S.W.2d 799, 800 (Tex. Civ. App.—Galveston 1944, no writ) (stating that landlord forfeits contract for unaccrued rent by filing forcible detainer suit).

¹⁰⁶ *Struve*, 923 S.W.2d at 52.

¹⁰² TEX. PROP. CODE § 24.002(a)(1).

¹⁰³ *Caro*, 794 S.W.2d at 903-04 (explaining that a forcible detainer action is available when tenant fails to pay rent); *Young Women’s Christian Ass’n v. Hair*, 165 S.W.2d 238, 242 (Tex. Civ. App.—Austin 1942, writ ref’d w.o.m.) (holding that a forcible detainer action is available when tenant holds over).

the property after a foreclosure.¹⁰⁷ The second arises if a tenant of the foreclosed-on mortgagor remains in possession the premises after a foreclosure. Each one presents different problems in forcible detainer proceedings brought by a purchaser-at-foreclosure seeking to retake possession of the premises.

(a) Evicting Mortgagor After Foreclosure.

Because a justice court does not have jurisdiction to inquire into the merits of title,¹⁰⁸ evidence of the supposed invalidity of the foreclosure sale ordinarily is irrelevant to the material issues in a forcible detainer action.¹⁰⁹ In many cases, a certified copy of the substitute trustee's deed introduced at trial in justice court should be sufficient to sustain a forcible detainer action against a mortgagor after a foreclosure.¹¹⁰ A mortgagor, nevertheless, has the right to challenge the validity of the trustee's deed or to litigate title to the property in district court.¹¹¹ But a district court cannot enjoin a justice court's exclusive jurisdiction over a forcible detainer case, unless the justice court does not have jurisdiction or the defendant does not have an adequate remedy at law.¹¹²

(i) Void versus Voidable Foreclosures.

Many justices and county court judges, however, are reluctant to evict a mortgagor after a foreclosure while a suit challenging its validity is pending in district court. This reluctance may be justified when mortgagor's claims, if proven, would establish that the foreclosure is void.¹¹³ When a foreclosure is void, a justice court does not have jurisdiction to order an eviction because the justice court would have to adjudicate the merits of title to determine who is entitled to immediate possession.¹¹⁴ But such reluctance is not justified when a mortgagor's claims, if proven, would only make the foreclosure voidable. A voidable foreclosure only gives a foreclosed-on mortgagor an equitable claim to the foreclosed property; a justice court, therefore, can rely on record title, without adjudicating the merits of that title, to decide who is entitled to possession.¹¹⁵

a) *Haith v. Drake.* *Haith v. Drake*, a case involving a contract for deed, supports distinguishing between void and voidable foreclosures on the ground that a justice court retains jurisdiction to render and enforce a

¹⁰⁷ *Home Savs. Ass'n v.*, 600 S.W.2d at 913 (stating that parties to deed of trust may stipulate that, in event of foreclosure, mortgagor becomes tenant at will of mortgagee).

¹⁰⁸ TEX. GOV'T CODE § 27.031(b)(4); TEX. R. CIV. P. 746 (stating that "merits of the title shall not be adjudicated" in a forcible detainer action).

¹⁰⁹ See *Midgett v. Resolution Trust Corp.*, 1991 WL 42830 (Tex. App.—Houston [14th Dist.] 1991, n.w.h.) (unpublished); see also *Mitchell v. Armstrong Capital Corp.*, 911 S.W.2d 169, 171 (Tex. App.—Houston [1st Dist.] 1995, writ denied); *Home Savs. Ass'n*, 600 S.W.2d at 913.

¹¹⁰ *Rodriguez v. EMC Mtg. Corp.*, 2002 LEXIS 4760 (Tex. App. — San Antonio 2002, n.p.h.) (unpublished); *Midgett*, 1991 WL 42830.

¹¹¹ *Mitchell v. Armstrong Capital Corp.*, 911 S.W.2d 169, 171 (Tex. App.—Houston [1st Dist.] 1995, writ denied); *Home Savs. Ass'n*, 600 S.W.2d at 913.

¹¹² *McGlothlin*, 672 S.W.2d at 232.

¹¹³ *Slaughter v. Qualls*, 162 S.W.2d 671, 674 (Tex. 1942) (stating that "[t]he question whether the trustee's deed is void or voidable depends on its effect upon title at the time it was executed and delivered. If it was a mere nullity, passing no title and conferring no rights whatsoever, it was absolutely void, but if it passed title to the . . . purchaser, subject only to the right of [the mortgagor] to have it set aside on proof that the sale was improperly made, then it was merely voidable."). See generally *Savers Fed. Savs. & Loan Ass'n v. Reetz*, 888 F.2d 1497, 1503 (5th Cir. 1989) (citing cases explaining mortgagor's damages for wrongful foreclosure); *Diversified, Inc. v. Walker*, 702 S.W.2d 717, 721 (Tex. App.—Houston 1985, writ ref'd n.r.e.).

¹¹⁴ *Haith v. Drake*, 596 S.W.2d at 196; see also *Slaughter*, 162 S.W.2d at 674 (discussing distinction between void and voidable foreclosures).

¹¹⁵ See *supra* footnotes 107-114; see also *Rice v. Pinney*, 51 S.W.3d 705, 713 (Tex. App. — Dallas 2001, no pet.) (stating that "a justice court or county court at law is not deprived of jurisdiction merely by the existence of a title dispute, but is deprived of jurisdiction only if 'the right to immediate possession necessarily requires the resolution of a title dispute.'").

judgment for forcible detainer when a party defends its right to possession based on an equitable claim to title.¹¹⁶ In *Haith*, Dr. Drake asserted he was entitled to possession by reason of a contract for deed. That contract created a landlord-tenant relationship upon its breach, but it did not require *Haith* to convey legal title until Dr. Drake had paid the entire consideration. Since Dr. Drake failed to pay the entire consideration, the court of appeals reasoned, he only had an equitable, but not a legal, claim to title. As a result, the mere fact that it might be necessary for *Haith* to introduce evidence of title in order to prove the existence of a landlord-tenant relationship did not deprive the justice court of court of jurisdiction.¹¹⁷ The court of appeals thus concluded that the justice court had jurisdiction to order the eviction and that the district court did not abuse its discretion in refusing to enjoin it.¹¹⁸

b) Jurisdiction in Simultaneous Proceedings.

The results in *Haith* appear consistent with the Texas Supreme Court's ruling in *McGlothlin v. Kliebert*.¹¹⁹ In that case, the supreme court held that a district court could only enjoin a justice court's exclusive jurisdiction over a forcible detainer case if the justice court did not have jurisdiction or the defendant did not have an adequate remedy at law.¹²⁰ Neither of these grounds for an injunction exist when a foreclosure is merely voidable.

¹¹⁶ *Haith*, 596 S.W.2d at 196.

¹¹⁷ See *id.* at 196-97; cf. *Falcon v. Ensignia*, 976 S.W.2d 336, 338 (Tex. App.—Corpus Christi 1998, no pet.) (stating that occupant's claim to possession based on oral agreement did not raise *bona fide* issue of title because alleged oral agreement is unenforceable as a matter of law).

¹¹⁸ *Haith*, 596 S.W.2d at 197.

¹¹⁹ 672 S.W.2d 231, 232 (Tex. 1984); see also *Landry's Seafood Inn & Oyster Bar — Kemah, Inc. v. Wiggins*, 919 S.W.2d 924, 928 (Tex. App.—Houston [14th Dist.] 1996, no writ) (holding that district court did not clearly abuse its discretion in denying application for temporary injunction prohibiting justice court from issuing writ of possession because tenant contended that justice court failed to give effect to 30 day notice and cure period in lease).

¹²⁰ *McGlothlin*, 672 S.W.2d at 232.

1) JP Court Jurisdiction after Voidable Foreclosure. A justice court has jurisdiction over an eviction when a foreclosure is voidable because the justice does not have to enquire into the merits of title to determine who is entitled to possession. If, notwithstanding any claimed defect in the foreclosure, delivery of the trustee's deed passed title to the purchaser, then the deed is merely voidable, and the justice may grant possession to the grantee named in the trustee's deed without exceeding its jurisdiction.¹²¹ In addition, a mortgagor also has adequate remedies at law when a foreclosure is voidable. A district court can restore title and possession, or award damages, to the mortgagor if the trustee conducted a wrongful foreclosure at the request of the mortgagee.¹²²

2) District Court Jurisdiction after Void Foreclosure. If, however, the claimed defect in the foreclosure, if proven, would render the deed a nullity (*i.e.*, prevent it from passing title upon its delivery), then the justice court does not have jurisdiction over the eviction, and a district court may enjoin the justice court from ordering an eviction.¹²³ Justice and district courts, therefore, must look to Texas foreclosure law to determine whether the claimed defect, if proven, would void or make voidable a given foreclosure.

(b) Evicting Tenant of Mortgagor After Foreclosure. The second type of post foreclosure eviction arises when a tenant of the foreclosed-on mortgagor remains in possession the premises after a foreclosure.¹²⁴ The foreclosure of a deed of trust

¹²¹ *Slaughter*, 162 S.W.2d at 674.

¹²² *FDIC v. Blanton*, 918 F.2d 524, 531 (5th Cir. 1990) (stating that mortgagor may seek to invalidate defective foreclosure sale or recover damages); *Farrell v. Hunt*, 714 S.W.2d 298, 299 (Tex. 1986) (explaining that mortgagor's damages for wrongful foreclosure are measured by difference between fair market value of property and foreclosure price).

¹²³ *Slaughter*, 162 S.W.2d at 674.

¹²⁴ TEX. PROP. CODE § 24.002(a)(2) (stating that "[a] person who refuses to surrender possession of real property on demand commits a forcible detainer if the

lien extinguishes a lease executed after, or subordinated to, a deed of trust.¹²⁵ Even so, a purchaser-at-foreclosure, by accepting lease payments from the tenant of the foreclosed-on mortgagor, may ratify a lease that otherwise would have been extinguished by the foreclosure.¹²⁶ Evicting a mortgagor's tenant after a foreclosure by the mortgagee is fraught with its own perils. In *ICM Mortgage Corp. v. Jacob*,¹²⁷ the mortgagee foreclosed its deed of trust lien and then evicted the mortgagor's tenant.¹²⁸ After the jury rendered its verdict in favor of the tenant, the trial court entered judgment against the mortgagee for negligently obtaining a judgment for forcible detainer.¹²⁹ Although the court of appeals reversed the trial court's judgment, its holding appears to acknowledge the existence of cause of action for negligent eviction.¹³⁰

3. SUFFICIENCY OF AFFIDAVIT OR VERIFICATION. The complaint in a forcible detainer case must be "sworn to."¹³¹ If an agent makes an affidavit under a procedural statute like the forcible detainer statute, which does not require the agent to swear to his agency, the affidavit is sufficient if it reasonably appears from the affidavit that the affiant is an agent, and this is especially the rule if no attack is made on the authority of the agent.¹³²

person . . . is a tenant at will or by sufferance, including an occupant at the time of foreclosure of a lien superior to the tenant's lease[.]"

¹²⁵ *United Gen. Ins. Agency v. American Nat'l Ins. Co.*, 740 S.W.2d 885, 886 (Tex. App.—El Paso 1987, no writ).

¹²⁶ 740 S.W.2d at 886 (stating that if tenant offers rent, and purchaser-at-foreclosure accepts it, purchaser-at-foreclosure may impliedly agree to continue lease).

¹²⁷ 902 S.W.2d 527 (Tex. App.—El Paso 1994, writ denied).

¹²⁸ *Id.* at 529.

¹²⁹ *Id.* at 528.

¹³⁰ 902 S.W.2d at 534.

¹³¹ TEX. R. CIV. P. 739.

¹³² *Holloway v. Paul O. Simms Co.*, 32 S.W.2d 672, 673-74 (Tex. Civ. App.—Austin 1930, no writ).

F. SUIT FOR RENT MAY BE JOINED IN FORCIBLE DETAINER ACTION. Immediate possession of the premises is the only issue properly before the justice court in a forcible detainer action, unless an action for rent within the jurisdictional limits of the justice court is joined with the suit for possession.¹³³ Rule 738 permits the landlord to recover only rent, as such, in the justice court but not damages for wrongful withholding of the premises.¹³⁴ The justice court may take evidence and construe the lease to determine who has the right of immediate possession,¹³⁵

1. MONETARY JURISDICTION OF JUSTICE COURT LIMITED TO \$5,000. The subject matter jurisdiction of the justice court is limited to civil cases in which the amount in controversy is not more than \$5,000, exclusive of interest.¹³⁶ This rule, however, is easier to state than to apply in forcible detainer cases. One complication is determining the monetary claims to which it applies. In a forcible detainer suit in justice court, a landlord may only recover rent, as such, and its attorneys' fees,¹³⁷ but a landlord may not recover damages for breach of the lease.¹³⁸ The \$5,000 limit, therefore, applies to claims for rent as such. A landlord cannot assert claims for unaccrued rent or damages in a forcible detainer suit in justice court.

Another complication is determining when to measure a landlord's claim for rent and attorneys' fees against the \$5,000 limit. The rule seems to be

¹³³ TEX. R. CIV. P. 738 (declaring that a suit for rent may be joined with forcible detainer action); TEX. R. CIV. P. 746 (explaining that possession is only issue); *Rushing*, 630 S.W.2d at 499 (citing *Haginas*, 354 S.W.2d at 371); *Buttery*, 575 S.W.2d at 146.

¹³⁴ *Haginas*, 349 S.W.2d at 958, *aff'd*, 354 S.W.2d at 371.

¹³⁵ *McGlothlin*, 672 S.W.2d at 232 (citing *Gibson v. Moore*, 22 Tex. 611 (1858)).

¹³⁶ TEX. GOV'T CODE § 27.031(a)(1).

¹³⁷ *See id.*

¹³⁸ *Haginas*, 354 S.W.2d at 371.

that the justice court's jurisdiction over a landlord's claims for rent are measured at the time suit is filed in justice court. In *Williams v. LeGarage De La Paix, Inc.*,¹³⁹ the court of appeals held that the county court, in an appeal of a forcible detainer action, did not have jurisdiction over the landlord's suit for rent because the landlord filed suit in justice court after rent in excess of the county court's jurisdiction had already accrued.¹⁴⁰ In *Regal Props. v. Donovitz*,¹⁴¹ the court of appeals stated that if a landlord files suit before rent accrues in excess of the court's jurisdictional limits, the county court acquires jurisdiction, and the subsequent accrual of each month's rent, which constitutes a separate cause of action, does not destroy the county court's jurisdiction.¹⁴²

Because a judgment for rent in excess of the justice court's jurisdiction is void, a party should not attempt plead down its claims for rent to bring them within the jurisdictional limits of the justice court.¹⁴³ If a litigant alleges an amount of damages exceeding the trial court's jurisdictional limit, and the alleged damages are liquidated and non-severable, the party may not amend its pleadings to reduce its liquidated damage claim to an amount within the trial court's jurisdictional limits.¹⁴⁴ But a litigant may reduce its unliquidated claim for damages to an amount within the trial court's jurisdictional limit if that party pleads in

good faith.¹⁴⁵ In all but the smallest cases, the limited monetary jurisdiction in justice court will prevent a landlord from joining a suit for rent or request for attorneys' fees with a forcible detainer action.

2. ATTORNEYS' FEES AND COSTS OF SUIT.

A landlord may recover its attorneys' fees in a forcible detainer action if the lease permits recovery of attorneys' fees.¹⁴⁶ Even if the lease does not provide a contractual basis for recovering attorneys' fees, the Property Code provides a statutory basis for recovery.

a. **Upside.** If a landlord does not have a contractual right to recover attorneys' fees, it must send its tenant a written notice demanding possession and notifying the tenant that, if the tenant does not vacate the premises before the 11th day after the date of receipt of the notice, and if the landlord files suit, the landlord may recover attorneys' fees.¹⁴⁷ The demand must be sent by registered or certified mail, return receipt requested, at least 10 days before the date the suit is filed.¹⁴⁸

b. **Downside.** This right in the Property Code to recover attorneys' fees has two negative aspects. First, the statute requires the landlord to give at least 10 days, as opposed to 3 days, notice before filing suit; second, it allows the tenant, if the tenant prevails, to recover reasonable attorneys' fees from

¹³⁹ 562 S.W.2d 534 (Tex. Civ. App.—Houston [14th Dist.] 1978, writ ref'd n.r.e.).

¹⁴⁰ See *id.* at 536.

¹⁴¹ 479 S.W.2d 748 (Tex. Civ. App.—Dallas 1972, writ ref'd n.r.e.).

¹⁴² See *id.* at 750.

¹⁴³ *Dews*, 413 S.W.2d at 804; *Willett v. Herrin*, 161 S.W. 26, 28 (Tex. Civ. App.—Galveston 1913, no writ) (stating, as general rule, amount shown in statement of cause, rather than amount stated in prayer for relief, controls determination of amount in controversy).

¹⁴⁴ *Smith Detective Agency v. Stanley Smith Security, Inc.*, 938 S.W.2d 743, 747 (Tex. App. – Dallas 1996, writ denied); *Failing v. Equity Mgmt. Corp.*, 674 S.W.2d 906, 908-09 (Tex. App. – Houston [1st Dist.] 1984, no writ)

¹⁴⁵ *Smith Detective Agency*, 938 S.W.2d at 747; *Failing*, 674 S.W.2d at 908-09 (plaintiff in court of limited jurisdiction may amend claim by entirely abandoning any severable item to reduce claim to amount within jurisdiction of court, but plaintiff cannot amend to confer jurisdiction by waiving portion of severable claim or by arbitrarily reducing alleged value of property or services to reduce claim to amount within court's jurisdiction); see *Isbell v. Kenyon Warner Dredging Co.*, 261 S.W. 762, 763 (Tex. 1924) (trial court properly retained initial claim and dismissed other claim, which was added after suit was filed, that increased amount in controversy above trial court's jurisdictional limit).

¹⁴⁶ TEX. PROP. CODE § 24.006(b).

¹⁴⁷ TEX. PROP. CODE § 24.006(a).

¹⁴⁸ See *id.*

the landlord.¹⁴⁹ A prevailing tenant is not required to give notice in order to recover its attorneys' fees from the landlord.¹⁵⁰

3. PRACTICE COMMENTS. A commercial landlord should rarely join a suit for rent in the justice court. In many cases, the jurisdictional limits of the justice court will prevent it. Even if the claim for past due rent is within the justice court's monetary jurisdiction, pursuing a suit for past due rent in justice court may impair the landlord's right to recover unaccrued rent in another court.¹⁵¹ A landlord may wish to expressly reserve its other rights in its sworn complaint for possession with clause similar to this: "Landlord reserves the right to seek other and further relief in a court of competent jurisdiction for rents, damages, attorneys' fees, and other sums which have or will become due."¹⁵²

G. DEFENDANT MUST ANSWER. If the defendant fails to enter an appearance upon the docket in the justice court or file an answer before the case is called for trial, the allegations of the complaint may be taken as admitted and judgment by default entered accordingly.¹⁵³ But if the justice court enters a default judgment, "[t]he court shall notify a tenant in writing of a default judgment for possession by sending a copy of the judgment to

the premises by first class mail not later than 48 hours after entry of the judgment."¹⁵⁴

H. TENANT MAY RAISE DEFENSES. A person in possession of the premises may, in certain limited instances, raise defenses to a forcible detainer suit in the justice court.¹⁵⁵ But at least one case supports the position that the tenant may not file in the justice court counterclaims in response to a forcible detainer suit because possession is the only issue to be tried.¹⁵⁶

I. COMPLAINANT MAY HAVE POSSESSION; POSSESSION BOND. The landlord may advance by several days the issuance of a writ of possession by filing a possession bond.

1. FILING POSSESSION BOND. "The party aggrieved may, at the time of filing his complaint, or thereafter prior to final judgment in the justice court, execute and file a possession bond to be approved by the justice[,], . . . and conditioned that the plaintiff will pay defendant all such costs and damages as shall be adjudged against plaintiff."¹⁵⁷

2. SETTING AMOUNT OF POSSESSION BOND. The justice may fix the amount of the bond in such amount as the probable amount of costs of suit and damages which may result to defendant in the event that the suit has been improperly instituted.¹⁵⁸ At common law, "the proper measure of damages for wrongful eviction is the difference between the market rental value of the leasehold for the unexpired term of the lease and the stipulated rentals."¹⁵⁹ "Further, recovery may be had for

¹⁴⁹ TEX. PROP. CODE § 24.006(c).

¹⁵⁰ *Mastermark Homebuilders, Inc. v. Offenburger Constr., Inc.*, 857 S.W.2d 765, 767 (Tex. App.—Houston [14th Dist.] 1993, no writ). The prevailing party also is entitled to recover all costs of court. TEX. PROP. CODE ANN. § 24.006(d).

¹⁵¹ *Dews*, 413 S.W.2d at 804 (illustrating preclusion issues raised by filing action for rent in forcible detainer suit).

¹⁵² *Neller v. Kirschke*, 922 S.W.2d 182, 185-86 (Tex. App.—Houston [1st Dist.] 1995, writ denied) (holding that res judicata barred landlord, who had pleaded for attorneys' fees in justice court, from recovering them in second suit, even though attorneys' fees incurred in justice court exceeded justice court's \$5,000 maximum jurisdictional limits).

¹⁵³ See TEX. R. CIV. P. 743.

¹⁵⁴ TEX. PROP. CODE § 24.0061(c).

¹⁵⁵ *Grayson*, 135 S.W.2d at 179.

¹⁵⁶ *John E. Morrison Co.*, 148 S.W. at 1123 (stating defendant in forcible detainer proceeding could not counterclaim for value of services in excess of justice court's jurisdiction to offset plaintiff's suit for rent).

¹⁵⁷ TEX. R. CIV. P. 740.

¹⁵⁸ *Id.*

¹⁵⁹ *Design Ctr. Venture v. Overseas Multi-Projects Corp.*, 748 S.W.2d 469, 473 (Tex. App.—Houston [1st Dist.] 1988, writ denied) (citing *Briargrove Shopping Ctr. Joint Venture v. Vilar, Inc.*, 647 S.W.2d 329, 336

special damages incurred, such as expenses of removal and net profits, after deduction of the value of the rental differences.”¹⁶⁰ These measures of damages should not only guide the justice in setting the amount of the bond but should also guide the landlord in assessing its potential liabilities if the eviction is wrongful.

3. SERVICE AND CONTENTS OF BOND. The defendant shall be notified by the justice court that the plaintiff has filed a possession bond.¹⁶¹ This notice shall be served in the same manner as service of citation and shall inform the defendant of all of the following rules and procedures:

a. Counterbond: Defendant may Remain in Possession. “Defendant may remain in possession if defendant executes and files a counterbond prior to the expiration of six days from the date defendant is served with notice of the filing of plaintiff's bond. Said counterbond shall be approved by the justice and shall be in such amount as the justice may fix as the probable amount of costs of suit and damages which may result to plaintiff in the event possession has been improperly withheld by defendant[.]”¹⁶²

b. Defendant may Demand Trial Within Six Days. “Defendant is entitled to demand and he shall be granted a trial to be held prior to the expiration of six days from the date defendant is served with notice of the filing of plaintiff's possession bond[.]”¹⁶³

c. Writ of Possession May Issue Before Trial. “If defendant does not file a counterbond and if defendant does not demand that trial be held prior to the expiration of said six-day period, the constable of the precinct or the sheriff of the county where the property is situated, shall place the

plaintiff in possession of the property promptly after the expiration of six days from the date defendant is served with notice of the filing of plaintiff's possession bond[.]”¹⁶⁴

d. Writ of Possession may Issue after Trial. “If, in lieu of a counterbond, defendant demands trial within said six-day period, and if the justice of the peace rules after trial that plaintiff is entitled to possession of the property, the constable or sheriff shall place the plaintiff in possession of the property five days after such determination by the justice of the peace.”¹⁶⁵

J. TRIAL IN THE JUSTICE COURT. Although trial in justice court is often conducted informally, a landlord must be prepared to introduce testimony, based on the personal knowledge of each witness, to prove each element of its forcible detainer claim. A landlord should bring the original of the lease and any other exhibits (e.g., payment ledgers, demand letters, green cards) it intends to introduce at the trial;¹⁶⁶ show them to court and the opposition; lay the evidentiary foundation for admission;¹⁶⁷ and offer true and correct copies as exhibits at the trial.¹⁶⁸

1. TIME FROM SERVICE UNTIL TRIAL: 6 TO 10 DAYS. Trial in justice court shall be held not more than ten days nor less than six days from the

¹⁶⁴ TEX. R. CIV. P. 740(c).

¹⁶⁵ TEX. R. CIV. P. 740(d).

¹⁶⁶ TEX. R. CIV. EVID. 1002 (declaring that to prove the content of a writing, the original is required except as otherwise provided in the rules or by law).

¹⁶⁷ An excellent practical guide to laying foundations for the admission of evidence, especially for the non-litigator, is Schlueter, Onion, Barrow and Imwinkelried, TEXAS EVIDENTIARY FOUNDATIONS (The Michie Co. 1992). It provides detailed sample foundations for the admission of most types of documents that would be introduced in a forcible detainer case.

¹⁶⁸ See also TEX. R. CIV. EVID. 1003 (holding that a duplicate is admissible to the same extent as an original unless a question is raised as to its authenticity or it would otherwise be unfair to admit the duplicate).

(Tex. App.—Houston [1st Dist.] 1982, no writ).

¹⁶⁰ 748 S.W.2d at 473; see *Birge v. Toppers Menswear, Inc.*, 473 S.W.2d 79, 84-85 (Tex. Civ. App. – Dallas 1971, writ ref'd n.r.e.).

¹⁶¹ See TEX. R. CIV. P. 740.

¹⁶² TEX. R. CIV. P. 740(a).

¹⁶³ TEX. R. CIV. P. 740(b).

date of service of the citation on the defendant.¹⁶⁹ But “[f]or good cause shown, supported by affidavit of either party, the trial may be postponed not exceeding six days.”¹⁷⁰ Most justice courts take the position that trial cannot be postponed more than once or for more than six days, even if parties agree to do so.

2. RIGHT TO JURY TRIAL. Any party shall have the right of trial by jury, by making a request to the court on or before five days from the date the defendant is served with citation, and by paying a jury fee of five dollars.¹⁷¹ If neither party demands a jury, the justice shall try the case.¹⁷² If either party demands a jury, the jury shall be empaneled and sworn as in other cases; and after hearing the evidence, it shall return its verdict in favor of the plaintiff or the defendant as it shall find.¹⁷³ The justice of the peace shall not charge the jury in any cause tried in his court before a jury.¹⁷⁴

3. MOTION FOR DIRECTED VERDICT. Rule 565 of the Texas Rules of Civil Procedure gives a justice the right to instruct a verdict.¹⁷⁵ If a forcible detainer suit is tried before a jury, the landlord or his authorized representative should consider moving for a directed verdict immediately after the defendant completes the presentation of its evidence. If the justice grants the motion, the case is taken away from the jury and decided by the court.

4. JUDGMENT IN JUSTICE COURT. Rule 748 requires the justice to give judgment for possession, costs, and damages to the prevailing party.¹⁷⁶ It is better practice to present a judgment to the justice

for signature and entry rather than to rely on the justice's notations on the docket sheet.¹⁷⁷ A signed judgment is a prerequisite to issuance of a writ of possession¹⁷⁸ and to an appeal to county court.¹⁷⁹

K. WRIT OF POSSESSION. A landlord who prevails in an eviction suit is entitled to a judgment for possession of the premises and issuance of a writ of possession.¹⁸⁰ A writ of possession may not be issued before the sixth day after the date on which the judgment for possession is rendered unless a possession bond has been filed and approved under the Texas Rules of Civil Procedure and judgment for possession is thereafter granted by default.¹⁸¹ The constable must post a notice that the writ has been issued and that informs the tenant that it has 24 hours to vacate the premises before the writ is formally served.¹⁸² The writ is then executed if the tenant does not leave voluntarily or announces its intent not to do so. An officer, if necessary, may use reasonable force in executing the writ.¹⁸³

1. EXECUTION OF WRIT OF POSSESSION. The mandatory provisions in a writ of possession summarize what happens when a sheriff or constable executes it.¹⁸⁴

¹⁷⁷ *Id.* (stating, among other things, that no writ of possession shall issue until five days from the day **judgment** is signed); *Pullin v. Parrish*, 306 S.W.2d 241, 242 (Tex. Civ. App.—San Antonio 1957, writ ref'd) (stating record must affirmatively show, in appeal of case tried before jury, that notation on docket sheet is a judgment and not a verdict).

¹⁷⁸ TEX. R. CIV. P. 748.

¹⁷⁹ *Edgewood Housing Auth. v. Sanders*, 693 S.W.2d 2, 3 (Tex App.—Tyler 1985, writ ref'd n.r.e.).

¹⁸⁰ TEX. PROP. CODE § 24.0061(a); TEX. R. CIV. P. 748.

¹⁸¹ TEX. PROP. CODE § 24.0061(b); TEX. R. CIV. P. 748.

¹⁸² TEX. PROP. CODE § 24.0061(d)(1).

¹⁸³ TEX. PROP. CODE § 24.0061(g).

¹⁸⁴ TEX. PROP. CODE § 24.006(c). The writ orders the sheriff or constable to: (1) post a written warning of at least 8½ by 11 inches on the exterior of the front door of the rental unit notifying the tenant that the writ has been

¹⁶⁹ TEX. R. CIV. P. 739.

¹⁷⁰ TEX. R. CIV. P. 745.

¹⁷¹ TEX. R. CIV. P. 744.

¹⁷² TEX. R. CIV. P. 747.

¹⁷³ *Id.*

¹⁷⁴ TEX. R. CIV. P. 554.

¹⁷⁵ *Triple T Inns of Texas, Inc. v. Roberts*, 800 S.W.2d 681, 683 (Tex. App.—Amarillo 1990, writ denied).

¹⁷⁶ TEX. R. CIV. P. 748.

2. DISPOSITION OF A TENANT'S PROPERTY.

The constable's primary role is to keep the peace. Even though the officer may engage the services of a bonded or insured warehouseman to remove and store, subject to applicable law, part or all of the property at no cost to the landlord or the officer executing the writ,¹⁸⁵ the landlord ordinarily must arrange for the movers. But the officer may not require the landlord to store the tenant's property.¹⁸⁶ In some cases, a landlord may desire to utilize a forcible detainer action to avoid having to store a tenant's personal property.

3. CONVERSION. The seizure of a tenant's property under a writ of possession does not necessarily protect a landlord from liability for conversion. "Conversion is the wrongful exercise of dominion and control by a person over the property of another."¹⁸⁷ A writ of possession carried

issued and that the writ will be executed on or after a specific date and time stated in the warning not sooner than 24 hours after the warning is posted; and (2) when the writ is executed: (A) deliver possession of the premises to the landlord; (B) instruct the tenant and all persons claiming under the tenant to leave the premises immediately, and, if the persons fail to comply, physically remove them; (c) 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 (D) 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.

¹⁸⁵ TEX. PROP. CODE § 24.0061(d)(2); *see also* TEX. PROP. CODE § 24.0062 (governing warehouseman's liens).

¹⁸⁶ TEX. PROP. CODE § 24.0061(e).

¹⁸⁷ *Campos v. Investment Mgmt. Props., Inc.*, 917 S.W.2d 351, 354 (Tex. App.—San Antonio 1996, writ denied); *Johnson v. Lane*, 524 S.W.2d 361, 364 (Tex. Civ. App.—Dallas 1975, no writ) (stating that conversion is "any act or dominion wrongfully asserted over another's personal property in denial of the owner's rights or inconsistent with such rights . . ." and that to state claim for conversion, owner must demand

out in compliance with Section 24.0061 does not give rise to a claim for conversion because the assumption of control over the property is not wrongful.¹⁸⁸ This rule may not completely protect a landlord from liability if the eviction itself, and thus the writ of possession, is later found to be wrongful.¹⁸⁹

L. THE FIRST APPEAL: JUSTICE COURT TO COUNTY COURT.

In almost every seriously contested forcible detainer action, the loser in justice court appeals to county court. Trial in county court is *de novo*.¹⁹⁰ Although an appeal inevitably involves some delay and additional expense, "[t]he trial, as well as all hearings and motions, shall be entitled to precedence in the county court."¹⁹¹ A forcible detainer case may be called to trial in county court "at any time after the expiration of eight full days after the date clerk of the justice court files the transcript in the county court."¹⁹² A party seeking an early trial in county court should keep in contact with the clerk of the justice court to ensure that the transcript is prepared promptly and sent to the county court. Once the county court receives the transcript, any party that desires an early trial date should immediately request a preferential trial setting under Rule 751.

property's return and party asserting dominion or control must refuse to return it).

¹⁸⁸ *Campos*, 917 S.W.2d at 354.

¹⁸⁹ *Cf.* TEX. CIV. PRAC. & REM. CODE § 34.0062 (stating that judgment debtor is entitled to receive fair market value of property taken under writ of execution if judgment is overturned); TEX. CIV. PRAC. & REM. CODE § 7.03 (stating that officer executing writ, in good faith, is not liable for damages); *Richardson v. Parker*, 903 S.W.2d 801, 804-05 (Tex. App.—Dallas 1995, no writ) (stating that official acts in good faith if a reasonably prudent official, under the same or similar circumstances, would have acted in same manner).

¹⁹⁰ TEX. R. CIV. P. 751; *see Poole v. Goode*, 442 S.W.2d 810, 812 (Tex. Civ. App.—Houston [14th Dist.] 1969, writ ref'd n.r.e.).

¹⁹¹ TEX. R. CIV. P. 751.

¹⁹² TEX. R. CIV. P. 753.

1. EITHER PARTY MAY APPEAL FROM ADVERSE JUDGMENT. Either party may appeal a final judgment rendered by the justice court in a forcible detainer case to the county court in the county in which the judgment is rendered.¹⁹³ A party may even appeal an agreed judgment and receive a trial *de novo* in county court.¹⁹⁴ Although an agreed judgment entered in the justice court does not deprive the county court of jurisdiction to conduct a trial *de novo*, a party who enters into an agreed judgment may nevertheless waive the right, or be estopped, to challenge the justice court's judgment in county court.¹⁹⁵

2. FILING APPEAL BOND WITHIN 5 DAYS IS REQUIRED TO PERFECT APPEAL. Either party may perfect an appeal to county court by "filing with the justice within five days after the judgment is signed, a bond to be approved by said justice" ¹⁹⁶ The phrase "[f]iling with the justice" in Rule 749 means that documents may be filed with the clerk in justice court or by handing them to the justice.¹⁹⁷ If the last day to file a bond falls on a

weekend or legal holiday, then the bond must be filed on the next day that is neither a weekend nor a legal holiday.¹⁹⁸

Satisfying these requirements confers a significant benefit on the loser in justice court; perfecting an appeal to county court in a forcible detainer case vacates and annuls the judgment of the justice court.¹⁹⁹ Not satisfying them, on the other hand, is fatal; failing to file timely an appeal bond in accordance with Rule 749 deprives the county court at law of jurisdiction to review the judgment rendered by the justice court requires dismissal of the appeal.²⁰⁰

3. NO MOTION FOR NEW TRIAL PERMITTED IN FORCIBLE DETAINER CASES. Filing a motion for new trial in justice court does not extend the five day deadline to perfect an appeal to county court.²⁰¹ "In appeals in forcible entry and detainer cases, no motion for new trial shall be filed."²⁰²

4. PAYMENT OF COSTS OF APPEAL. If the appellant fails to pay the costs on appeal within 20 days after being given notification to do so by the

¹⁹³ TEX. R. CIV. P. 749.

¹⁹⁴ *Mullins v. Coussons*, 745 S.W.2d 50, 50-51 (Tex. App.—Houston [14th Dist.] 1987, no writ); *Hall v. McKee*, 179 S.W.2d 590 (Tex. Civ. App. – Fort Worth 1944, no writ).

¹⁹⁵ *Pair v. Buckholt*, 60 S.W.2d 463, 464 (Tex. Civ. App.—Amarillo 1933, no writ); see also *Litton Ind. Prods., Inc. v. Gammage*, 668 S.W.2d 319, 322 (Tex. 1984) (holding that tort defendant could not reserve the right to complain about a judgment after filing a motion urging the trial court to render judgment for actual damages by accompanying the motion with a brief in which it took back what it urged in its own motion).

¹⁹⁶ TEX. R. CIV. P. 749; *Ragsdale v. Ward*, 173 S.W.2d 765, 766 (Tex. Civ. App.—El Paso 1943, no writ) (holding that Rule 749 requires landlord, as well as tenant, to post bond in order to perfect appeal, even if party appeals only portion of judgment granting or denying recovery of rent); see also TEX. R. CIV. P. 749c (explaining appeal is perfected when appeal bond or pauper's affidavit is timely filed).

¹⁹⁷ *Pharis v. Culver*, 677 S.W.2d 168, 169 (Tex. App.—Houston [1st Dist.] 1984, no writ) (citing *Tisdale v. F. Hannes & Co.*, 278 S.W. 324 (Tex. Civ. App.—Austin 1925, no writ)).

¹⁹⁸ *Estate of Zamaro v. Rodriguez*, 517 S.W.2d 838, 839 (Tex. Civ. App.—Corpus Christi 1975, no writ).

¹⁹⁹ *Poole v. Goode*, 442 S.W.2d 810, 812 (Tex. Civ. App.—Houston [14th Dist.] 1969, writ ref'd n.r.e.); *Dyches v. Ellis*, 199 S.W.2d 694, 696 (Tex. Civ. App.—Austin 1947, no writ) (citing *Speed v. Sawyer*, 88 S.W.2d 556 (Tex. Civ. App.—Amarillo 1935, no writ)).

²⁰⁰ *RCJ Liquidating Co. v. Village, Ltd.*, 670 S.W.2d 643, 644 (Tex. 1984) (per curiam); *Wetsel v. Fort Worth Brake, Clutch & Equip., Inc.*, 780 S.W.2d 952, 954 (Tex. App.—Fort Worth 1989, no writ); *Stegall v. Cameron*, 601 S.W.2d 771, 772-73 (Tex. Civ. App.—Dallas 1980, writ dismissed) (holding that special rules for appeals in forcible detainer cases apply even if landlord joined suit for rent in justice court).

²⁰¹ TEX. R. CIV. P. 749; *RCJ Liquidating Co.*, 670 S.W.2d at 644 (holding that county court lost jurisdiction over appeal from justice court because appellant, who was waiting for justice of the peace to decide motion for new trial, waited more than five days after justice of the peace signed judgment to file its appeal bond); *Wetsel*, 780 S.W.2d at 953-54.

²⁰² TEX. R. CIV. P. 749.

county clerk, "the appeal shall be deemed not perfected" and the county court may dismiss the appeal.²⁰³ If, however, the county clerk does not send notice to the appellant in accordance with Rule 21a of the Texas Rules of Civil Procedure, the county court may not dismiss the appeal because of the appellant's failure to pay costs.²⁰⁴

5. EFFECT OF PERFECTION OF APPEAL TO COUNTY COURT. As a general rule, the perfection of an appeal to the county court, including an appeal in a forcible detainer case, vacates and annuls the judgment of the justice court.²⁰⁵

6. SENDING NOTICE OF FILING OF APPEAL BOND REQUIRED. Rule 749 requires the appealing party to give notice of the filing of its appeal bond to the adverse party.²⁰⁶ "Rule 749 does not provide that giving notice of the filing of an appeal bond is jurisdictional."²⁰⁷

7. FILING PAUPER'S AFFIDAVIT PERMITTED. Rule 749a allows an appellant to perfect an appeal by filing a pauper's affidavit in lieu of an appeal or cost bond. Like an appeal bond, however, a pauper's affidavit must be filed within five days after the day the judgment is signed.²⁰⁸ In an appeal of an eviction for nonpayment of rent, the county court is not authorized to enter a default judgment

against a tenant who does not timely make the required payments unto the registry of the court.²⁰⁹

8. AMOUNT OF APPEAL BOND. "The justice shall set the amount of the bond to include the items enumerated in Rule 752."²¹⁰ Rule 752 permits the appellant or the appellee "to plead, prove and recover his damages, if any, suffered for withholding or defending the premises during the pendency of the appeal[.]" including loss of rentals and reasonable attorneys' fees in the justice and county courts. Only the party prevailing in county court shall be entitled to recover damages and costs.²¹¹ Most justice courts set the bond for about two months rent, plus a small amount for attorneys' fees.

9. FORM OF BOND. The appeal bond must be payable to the adverse party, conditioned that the appellant will prosecute his appeal with effect, or pay all costs and damages which may be adjudged against him.²¹² Rule 750 provides a sample form of appeal bond.²¹³ Although the failure to file timely an appeal bond is a jurisdictional defect, certain defects in the form of an appeal bond timely filed may be cured by the party posting the bond.²¹⁴ A county court, sitting as an appellate court, has broad authority to amend an appeal bond to correct any defects in form.²¹⁵ The test which determines

²⁰³ TEX. R. CIV. P. 143a.

²⁰⁴ *DePue v. Henderson*, 801 S.W.2d 178, 179 (Tex. App.—Houston [14th Dist.] 1990, no writ).

²⁰⁵ *Poole*, 442 S.W.2d at 812; *Dyches*, 199 S.W.2d at 696.

²⁰⁶ TEX. R. CIV. P. 749.

²⁰⁷ *Mitchell v. Armstrong Capital Corp.*, 877 S.W.2d 480, 481-82 (Tex. App.—Houston [1st Dist.] 1994, no writ). *But see Simmons v. Brannum*, 182 S.W.2d 1020, 1021 (Tex. Civ. App.—Houston 1944, no writ) (failing to give notice of filing of appeal bond is jurisdictional defect).

²⁰⁸ TEX. R. CIV. P. 749a; *Walker v. Blue Water Garden Apts.*, 776 S.W.2d 578, 579-82 (Tex. 1989).

²⁰⁹ TEX. R. CIV. P. 749b; *Kennedy v. Highland Hills Apts.*, 905 S.W.2d 325, 327 (Tex. App.—Dallas 1995, no writ) (holding that 749b(3) is not determinative of the merits of the issue of the right of possession). *But see Ibarra v. Housing Auth.*, 791 S.W.2d 224 (Tex. App.—Corpus Christi 1990, writ denied) (applying Rule 749b in a way that was determinative of merits of issue of right of possession).

²¹⁰ TEX. R. CIV. P. 749.

²¹¹ TEX. R. CIV. P. 752; *see Carlson's Hill Country Beverage, L.C. v. Westinghouse Road Joint Venture*, 957 S.W.2d 951, 954-56 (Tex. App.—Austin 1997, no pet.).

²¹² TEX. R. CIV. P. 749.

²¹³ TEX. R. CIV. P. 750.

²¹⁴ *Paley*, 356 S.W.2d at 355.

²¹⁵ *Pharis*, 677 S.W.2d at 170 (stating county court's power to amend an appeal bond included power to amend a misdemeanor bond erroneously filed as an

whether jurisdiction has been conferred on the appellate court does not depend on the form or substance of the bond, certificate or affidavit, but on whether the instrument was filed in a *bona fide* attempt to invoke the appellate court's jurisdiction.²¹⁶

10. LIABILITY OF SURETIES. The prevailing party on the appeal "shall be entitled to recover against the sureties on the appeal bond" ²¹⁷ The liability of the sureties on an appeal bond is limited to the penal sum stipulated in the appeal bond, even though the liability of the principal on such a bond is not.²¹⁸ The prevailing party on appeal to the county court may recover from the principal and the sureties on the appeal bond any damages properly awarded by the county court, even if the justice court did not award any damages.²¹⁹

11. RULE 752: LANDLORD'S DAMAGES PENDING APPEAL IN COUNTY COURT. "On trial of the cause in the county court the appellant or appellee shall be permitted to plead, prove, and recover his damages, if any, suffered for withholding or defending possession of the premises during the pendency of the appeal."²²⁰ To recover damages under Rule 752, the landlord must plead for them and prevail in county court.²²¹

a. Landlord's Damages Pending Appeal: Jurisdictional Amounts. Under Rule 752, the

appeal bond in forcible detainer case); *see also Weeks v. Hobson*, 877 S.W.2d 478 (Tex. App.—Houston [1st Dist.] 1994, orig. proceeding) (stating justice court should have allowed appellant, who had filed an unsworn pauper's affidavit, opportunity to file properly sworn pauper's affidavit).

²¹⁶ *Pharis*, 677 S.W.2d at 170.

²¹⁷ TEX. R. CIV. P. 752.

²¹⁸ *Lucas v. Hayter*, 376 S.W.2d 790, 792 (Tex. Civ. App.—San Antonio 1964, writ dismissed).

²¹⁹ *Bobbitt v. Womble*, 708 S.W.2d 558, 560-61 (Tex. App.—Houston [1st Dist.] 1986, no writ).

²²⁰ TEX. R. CIV. P. 752.

²²¹ *Krull v. Somoza*, 879 S.W.2d 320, 322 (Tex. App.—Houston [14th Dist.] 1994, writ denied).

county court's jurisdiction over the landlord's damage claims is not restricted by the \$5,000 limitation on the justice court's subject matter jurisdiction because such damages are ancillary to the main cause of action.²²² Accordingly, once the county court at law obtains jurisdiction over the suit for possession, the subsequent enlargement of the damages does not oust the county court of jurisdiction even though the damages asserted, had they accrued when suit was first filed, would have exceeded the county court's jurisdiction. "No amount is stated as a limit that may be recovered."²²³ For jurisdictional purposes, it is important to distinguish between the damages the county court may award under Rule 752, which may exceed the \$5,000.00 jurisdictional limit of the justice court,²²⁴ and claims for rent under Rule 738, which may not.²²⁵

b. Measure of Landlord's Damages when Tenant Withholds Possession of Premises Pending Appeal. Damages recoverable under Rule 752 are, as a general rule, those damages that accrue between the time of judgment in the justice court and the time of judgment in the county court.²²⁶ Actions for damages, costs, and fees in a

²²² *Haginas*, 349 S.W.2d at 958, *aff'd*, 354 S.W.2d at 368 (Tex. 1962); *Williams v. LeGarage De La Paix, Inc.*, 562 S.W.2d 534, 536 (Tex. Civ. App.—Houston [14th Dist.] 1978, writ refused n.r.e.).

²²³ *Haginas*, 349 S.W.2d at 958.

²²⁴ *Carlson's Hill Country Beverage, L.C.*, 957 S.W.2d at 954-55 (stating that Rules 738 and 752: (i) restrict jurisdiction of justice court and county court to claims for up to \$5000 in rent accruing before judgment in justice court, and (ii) allow additional recovery in county court of damages in excess of \$5000 under Rule 752).

²²⁵ TEX. R. CIV. P. 738; *Haginas*, 354 S.W.2d at 371 (stating that Rule 738 limits amount of rent which may be recovered in justice court to the justice court's jurisdictional maximum); *Goggins v. Leo*, 849 S.W.2d 373, 375 (Tex. App.—Houston [14th Dist.] 1993, no writ) (stating appellate jurisdiction of county court is limited to jurisdictional limits of justice court in forcible detainer cases).

²²⁶ *Carlson's Hill Country Beverage, L.C.*, 957 S.W.2d at 954-55.

forcible detainer action are ancillary to the main action for possession.²²⁷ The usual measure of the landlord's damages when a tenant withholds possession of the premises pending appeal of the forcible detainer action is the reasonable rental value of the leased premises.²²⁸ Under Rule 752, the landlord who elects to pursue a forcible detainer action is entitled to recover the value of the use of the premises, not as measured by the rental contract, but at a reasonable or market rental value of the property which has been wilfully withheld from him.²²⁹ This means that a landlord, in order to recover damages under Rule 752, must put on evidence, through a qualified witness, to prove that the sum sought represents the reasonable rental value of the premises.²³⁰ A landlord also may recover property taxes accruing between the date of the judgment in justice court and the date of the judgment in county court.²³¹

c. Tenant's Dismissal of Appeal does not Affect Landlord's Right to Pursue Damage Claim.

A tenant's dismissal of an appeal does not affect a landlord's right to recover rent or damages.²³² In *Knight v. K & K Props., Inc.*,²³³ the landlord filed a

forcible detainer action against the tenant in the justice court. The justice court granted the landlord judgment for possession and costs, but not for rents.²³⁴ The tenant appealed the judgment for possession to the county court.²³⁵ Before the landlord amended its pleadings in the county court to assert a claim for rents, the tenant yielded possession of the leased premises and then moved for dismissal of its appeal.²³⁶ The county court denied the tenant's motion to dismiss and granted the landlord judgment against the tenant for past due rents and attorneys' fees. The court of appeals, reasoning that the tenant could not take away the landlord's claim by abandoning his own, affirmed the judgment of the county court.²³⁷

d. Attorneys' Fees. To determine who is entitled to recover attorneys' fees, the issue before the county court remains who was entitled to possession on the date possession was in dispute, which is not necessarily the date of trial.²³⁸ Attorneys' fees are included in the damages recoverable under Rule 752.²³⁹ But the decision to award attorneys' fees to the prevailing party is discretionary with the county court.²⁴⁰

12. RULE 752: TENANT'S DAMAGES PENDING APPEAL IN COUNTY COURT. Under Rule 752 of the Texas Rules of Civil Procedure, the tenant, as well as the landlord, may "plead, prove, and recover his damages, if any, suffered for withholding or defending the premises during the

²²⁷ *Fitch v. Wilkins Props.*, 635 S.W.2d 661, 664 (Tex. App.—Fort Worth 1982, no writ).

²²⁸ *Hart v. Keller Props.*, 567 S.W.2d 888, 889 (Tex. Civ. App.—Dallas 1978, no writ); *Stewart v. Breese*, 367 S.W.2d 72, 74 (Tex. Civ. App.—Dallas 1963, writ diss'd); *Snyder v. Tousinau*, 177 S.W.2d 799, 800 (Tex. Civ. App.—Galveston 1944, no writ); see *Koelzer v. Pizzirani*, 718 S.W.2d 420, 422 (Tex. App.—Fort Worth 1986, no writ) (applying same rule in forcible entry and detainer case).

²²⁹ *Snyder*, 177 S.W.2d at 800 (holding that proof of the amount of monthly rent stipulated in the lease, without more, is no proof of the landlord's damages).

²³⁰ See *Id.*

²³¹ *Carlson's Hill Country Beverage, L.C.*, 957 S.W.2d at 954-55 (stating that property taxes are in nature of lost rent and, therefore, recoverable under Rule 752 because they are related to maintaining possession of premises).

²³² *Knight v. K & K Props., Inc.* 589 S.W.2d 860 (Tex. Civ. App.—Fort Worth 1979, no writ).

²³³ 589 S.W.2d 860 (Tex. Civ. App.—Fort Worth 1979, no writ).

²³⁴ *Knight*, 589 S.W.2d at 860-61.

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ *Id.* at 862.

²³⁸ *Engle v. Bordeaux Apts.*, 934 S.W.2d 773 (Tex. App.—Houston [1st Dist.] 1997, no writ) (holding that, in determining whether landlord was entitled to attorneys' fees, jury charge should have asked who was entitled to possession on date possession was in dispute, not on date of trial).

²³⁹ TEX. R. CIV. P. 752; *RCJ Liquidating Co.*, 670 S.W.2d at 644.

²⁴⁰ *McGuire 1900 Co. v. Inventive Indus., Inc.*, 566 S.W.2d 95, 98 (Tex. Civ. App.—Beaumont 1978, writ diss'd).

pendency of the appeal.”²⁴¹ Only “damage claims *related to* maintaining possession of the premises may be joined with the detainer action and litigated in county court.”²⁴² Because forcible detainer is cumulative of the parties’ other remedies,²⁴³ however, the tenant may bring claims for such damages in another suit in a court of competent jurisdiction.²⁴⁴

13. APPEAL TO COUNTY COURT EXCLUSIVE METHOD OF REVIEW. In forcible entry and detainer suits and forcible detainer suits, the only method of obtaining relief in county court is by appeal.²⁴⁵ Review by certiorari is not available in forcible entry and detainer cases.²⁴⁶ A writ of

certiorari is available to review of a writ of reentry.²⁴⁷

14. BILL OF REVIEW. In *Winrock Houston Assocs. Ltd. P’ship v. Bergstrom*,²⁴⁸ the court of appeals affirmed the county court’s grant of tenant’s bill of review setting aside a default judgment because defective service rendered the judgment void.²⁴⁹

M. APPEALS FROM COUNTY COURT TO COURT OF APPEALS. Section 24.007 of the Texas Property Code permits only limited appeal rights from the judgment of the county court in a forcible detainer action.²⁵⁰

1. AWARD OF POSSESSION IS NOT REVIEWABLE. A final judgment of a county court in a forcible entry and detainer suit or a forcible detainer suit may not be appealed on the issue of possession unless the premises in question are being used for residential purposes only.²⁵¹ In

²⁴¹ TEX. R. CIV. P. 752.

²⁴² *Krull*, 879 S.W.2d at 322 (emphasis in original); see, e.g., *Carlson’s Hill Country Beverage, L.C.*, 957 S.W.2d at 954-55 (holding that, under Rule 752, landlord could recover taxes accruing between date of judgment in justice court and date of judgment in county court); *Hanks v. Lake Towne Apts.*, 812 S.W.2d 625, 626-27 (Tex. App.—Dallas 1991, writ denied) (holding that tenant could not recover in county court on appeal of forcible detainer action damages for unlawful retention of her security deposit or for wrongful eviction in another forcible detainer action because such damages were not closely related to defending possession of premises); *Rushing*, 630 S.W.2d at 500 (holding that tenant could not recover in county court on appeal of forcible detainer action damages based on value of tenant’s labor before tenant received notice to vacate because such damages did not relate to defending possession).

²⁴³ *McGlothlin*, 672 S.W.2d at 232.

²⁴⁴ TEX. PROP. CODE § 24.008.

²⁴⁵ TEX. R. CIV. P. 749.

²⁴⁶ TEX. CIV. PRAC. & REM. CODE § 51.002(d) (explaining that the section governing review of justice court judgments by writ of certiorari “does not apply to a case of forcible entry and detainer.”); *Chang v. Resolution Trust Corp.*, 814 S.W.2d 543, 544 (Tex. App.—Houston [1st Dist.] 1991, no writ); *Fox v. San Antonio Savs. Ass’n*, 751 S.W.2d 257 (Tex. App.—San Antonio 1988, no writ) (finding that section 51.002(d) of the Texas Civil Practice and Remedies Code expressly prohibits removal of forcible entry and detainer actions from justice court to county court or district court by writ of certiorari); *Crawford v. Sigler*, 470 S.W.2d 915, 917

(Tex. Civ. App.—Texarkana 1971, writ ref’d n.r.e.) (finding that section 51.002(d) of the Texas Civil Practice and Remedies Code expressly prohibits the removal of forcible entry and detainer actions from justice court to county court or district court by writ of certiorari).

²⁴⁷ *Big State Pawn & Bargain Ctr. No. 1 v. Garton*, 833 S.W.2d 669, 671 (Tex. App.—Eastland 1992, writ denied).

²⁴⁸ 879 S.W.2d 144 (Tex. App.—Houston [14th Dist.] 1994, no writ).

²⁴⁹ 879 S.W.2d at 149-52.

²⁵⁰ TEX. PROP. CODE § 24.007; *Chang*, 814 S.W.2d at 544-45 (stating final judgment of county court for in forcible detainer cases is not reviewable on issue of possession when premises are used for commercial purposes).

²⁵¹ TEX. PROP. CODE § 24.007; see *Rice v. Pinney*, 51 S.W.3d 705, 709-13 (Tex. App. — Dallas 2001, no pet.) (discussing jurisdictional issues in post foreclosure eviction cases); *A.V.A. Servs., Inc. v. Parts Inds. Corp.*, 949 S.W.2d 852, 853-54 (Tex. App.—Beaumont 1997, no pet.) (holding that court of appeals does not have jurisdiction to review existence of landlord-tenant relationship in appeal involving commercial lease but has jurisdiction to review forfeiture of appeal bond);

Academy Corp. v. Sunwest N.O.P., Inc.,²⁵² the court of appeals held it did not have jurisdiction to review the sufficiency of evidence of a landlord-tenant relationship because such proof involves the issue of who has the greater right of possession.²⁵³ One justice on the Beaumont Court of Appeals, however, has criticized *Academy Corp.*, arguing that a court of appeals may review proof of landlord-tenant relationship to determine whether the justice and county courts had jurisdiction.²⁵⁴

2. AWARD OF DAMAGES IS REVIEWABLE.

The courts of appeals have jurisdiction to review a county court's judgment on issues other than possession. A court of appeals may review a county court's judgment awarding damages, but it may review only that portion of the judgment concerning the damages awarded.²⁵⁵ A court of appeals also may review a county court's judgment denying a tenant's counterclaim for the landlord's breach of the lease, even though there is an apparent inconsistency between the nonappealable portion of the judgment in favor of the landlord on the issue of possession and the tenant's appealable claim against the landlord for breach of the lease.²⁵⁶

Falcon v. Ensignia, 976 S.W.2d 336, 338 (Tex. App. – Corpus Christi 1998, no pet.) (holding that court of appeals does not have jurisdiction to review award of possession by county court if premises are used for both residential and commercial purposes).

²⁵² 853 S.W.2d 833 (Tex. App.—Houston [14th Dist.] 1993, writ denied).

²⁵³ *Id.* at 834.

²⁵⁴ *A.V.A. Services, Inc.*, 949 S.W.2d at 854-58 (Burgess, J., concurring) (arguing that proof of landlord-tenant relationship may be reviewed when it is jurisdictional).

²⁵⁵ *A.V.A. Services, Inc.*, 949 S.W.2d at 853-54 (stating that court of appeals may review forfeiture of appeal bond but not sufficiency of evidence of landlord-tenant relationship); *Academy Corp.*, 853 S.W.2d at 834 (stating, in *dicta*, courts of appeals may review county court's award of attorneys' fees); *Woolley v. Burger*, 602 S.W.2d 116, 117 (Tex. Civ. App.—Amarillo 1980, no writ) (stating judgments of county court in forcible detainer cases cannot be appealed, except as to award of damages); *Paley*, 356 S.W.2d at 355.

²⁵⁶ *Anarkali Enters., Inc.*, 802 S.W.2d at 26.

Thus, if no damages are sought in a forcible detainer action involving a commercial tenancy, no appeal lies from a final judgment rendered and entered by the county court at law.²⁵⁷

3. JURISDICTIONAL ISSUES ARE REVIEWABLE. Section 24.007 of the Texas Property Code does not deprive the intermediate appellate courts of jurisdiction to review a county court's exercise of jurisdiction in a forcible detainer suit.²⁵⁸ Thus, a court of appeals may determine whether a suit is truly for forcible detainer (over which the justice and county courts have jurisdiction) or a suit to establish title to land (over which the justice courts and county courts have no jurisdiction).²⁵⁹

4. MANDAMUS AVAILABLE TO REVIEW CERTAIN JURISDICTIONAL ISSUES. In *Weeks v. Hobson*,²⁶⁰ the court of appeals ruled that the county court had jurisdiction to consider the appeal of the tenant, who had filed a defective pauper's affidavit in justice court, even though justice court had denied the tenant's request to cure its defective pauper's affidavit.²⁶¹

5. MANDAMUS CANNOT BE USED TO CIRCUMVENT SECTION 24.007. A party to a forcible detainer suit in a county court cannot use a writ of mandamus to accomplish an appeal

²⁵⁷ *Walzel v. Southern Realty Corp.*, 245 S.W.2d 758, 760 (Tex. Civ. App.—Galveston 1952, orig. proceeding [leave denied]).

²⁵⁸ *Gibson v. Dynegy Midstream Servs., L.P.*, 138 S.W.3d 518, 522 (Tex. App. – Fort Worth 2004) (stating that due to special jurisdictional limitations imposed on justice courts, county court and court of appeals have jurisdiction to determine whether questions of title and possession are so integrally linked that justice court lacks subject matter jurisdiction); *Edgewood Housing Auth. v. Sanders*, 693 S.W.2d 2, 3 (Tex. App.—Tyler 1985, writ ref'd n.r.e.); *Meyer v. Young*, 545 S.W.2d 37, 39 (Tex. Civ. App.—Austin 1976, no writ).

²⁵⁹ *Greer v. Coleman*, 1996 WL 682210 (Tex. App.—San Antonio (Nov. 27, 1996) (unpublished)).

²⁶⁰ 877 S.W.2d 478 (Tex. App.—Houston [1st Dist.] 1994, orig. proceeding [leave denied]).

²⁶¹ *Id.*

prohibited by section 24.007 of the Texas Property Code.²⁶²

6. SUPERSEDEAS BONDS ON APPEALS FROM COUNTY COURT TO COURT OF APPEALS. The losing party in the county court may post a supersedeas bond to stay enforcement of the portion of the judgment which awards the prevailing party money damages.²⁶³ The amount of the supersedeas bond, however, should not include attorneys' fees awarded in the event of an appeal.²⁶⁴

7. PROCEDURAL ISSUES. The usual procedural rules governing appeals from a county court to the courts of appeals apply to the appealable portion of an eviction case. As in other cases, filing a request for findings of fact after a summary judgment does not extend the appellate timetables.²⁶⁵ But filing a request for findings of fact and conclusions of law will extend the appellate timetables following a dismissal for want of prosecution and the imposition of sanctions.²⁶⁶

N. FORCIBLE DETAINER ACTION IS CUMULATIVE OF OTHER REMEDIES. A forcible detainer action is not exclusive, but cumulative, of any other remedy that a party may have in Texas courts.²⁶⁷ If all matters between the parties cannot be adjudicated in the justice court in which the forcible entry and detainer proceedings are pending due to the justice court's limited subject matter jurisdiction, then either party may maintain an action in a court of competent jurisdiction for

proper relief.²⁶⁸ And, as a general rule, either the landlord or the tenant may continue a suit for damages or other relief in district court.²⁶⁹ In determining whether a forcible detainer suit is advantageous in a particular case, the landlord must evaluate carefully the effect that filing such a suit may have on the landlord's other remedies and on the landlord's exposure to liability claims.

1. SECTION 24.008. "A forcible entry and detainer suit or a forcible detainer suit does not bar a suit for trespass, damages, waste, rent, or mesne profits."²⁷⁰

2. EFFECT OF FORCIBLE DETAINER ON LANDLORD'S RIGHT TO UNACCRUED RENT. In the absence of a lease provision permitting the landlord to reenter the premises after a tenant's default and to relet for the account of the tenant, a landlord who files a forcible detainer suit to evict a tenant may forfeit the right to any rents that would otherwise accrue after the date of the eviction.²⁷¹ In addition, a landlord may forfeit the right to recover unaccrued rent by instituting forcible detainer suit before it properly matures its right to reenter the

²⁶² *Mullins v. Coussons*, 745 S.W.2d 50, 51 (Tex. App.—Houston [14th Dist.] 1987, no writ) (citing *Cavazos v. Hancock*, 686 S.W.2d 284, 287 (Tex. App.—Amarillo 1985, no writ)).

²⁶³ *Hughes v. Habitat Apts.*, 828 S.W.2d 794, 795 (Tex. App.—Dallas 1992, writ denied).

²⁶⁴ *Id.* at 795.

²⁶⁵ *Chavez v. Housing Auth.*, 897 S.W.2d 523, 526 (Tex. App.—El Paso 1995, no writ) (citing *Linwood v. NCNB Texas*, 885 S.W.2d 102, 103 (Tex. 1994)).

²⁶⁶ *Awde v. Dabeit*, 938 S.W.2d 31 (Tex. 1997) (citing *IKB Industries (Nigeria) v. Pro-Line Corp.*, 938 S.W.2d 440 (Tex. 1997)).

²⁶⁷ *McGlothlin*, 672 S.W.2d at 233.

²⁶⁸ *Id.*; *Holcombe*, 79 S.W.2d at 309.

²⁶⁹ *McGlothlin*, 672 S.W.2d at 233.

²⁷⁰ TEX. PROP. CODE § 24.008.

²⁷¹ *Rohrt*, 349 S.W.2d at 99 (stating that, without contractual right of reentry, landlord, who reenters, elects to recover possession of leased premises and forfeits right to unaccrued rent); *Snyder v. Tousinau*, 177 S.W.2d 799, 800 (Tex. Civ. App.—Galveston 1944, no writ) (citing TEX. R. CIV. P. 752); *see also PRC Kentron v. First City Ctr. Assocs., II*, 762 S.W.2d 279, 289-90 (Tex. App.—Dallas 1989, writ denied) (explaining that landlord has no right to unpaid rent accruing after termination date); *Garcia v. Olivares*, 74 S.W.2d 1064 (Tex. Civ. App.—Beaumont 1934, writ dismissed w.o.j.) (finding that lease terminated when landlord requested tenant to vacate); *Wutke v. Yolton*, 71 S.W.2d 549, 551 (Tex. Civ. App.—Beaumont 1934, writ refused) (holding that landlord forfeited right to unaccrued rent when landlord reentered premises without notice or demand); *Walling v. Christie & Hobby, Inc.*, 54 S.W.2d 186 (Tex. Civ. App.—Galveston 1932, no writ) (ruling that lease did not grant landlord right to reenter without terminating lease).

premises.²⁷² But a provision in a lease that provides the landlord's reentry will not affect the obligations of the lessee for the unexpired term of the lease is enforceable.²⁷³

3. TENANT'S OTHER REMEDIES. If a landlord wrongfully dispossesses a tenant from the leased premises, whether by self-help or through judicial process, the landlord may be liable to the tenant for any damages proximately caused by the eviction under a number of legal theories.

a. Tenant's Damages for Wrongful Eviction. At common law, a tenant who has been wrongfully dispossessed of the premises may recover damages measured by the difference between the market rental value of the leasehold for the unexpired term of the lease and the stipulated rentals.²⁷⁴ Further, the tenant may recover special damages, such as the expenses of removal and net profits after deducting from the profit calculation the value of the rental differences.²⁷⁵

²⁷² Cf. *McVea*, 587 S.W.2d at 531-32 (finding that lessor who took possession of lessee's personal property without giving proper notice, making demand, and properly foreclosing on its lien on personal property had no right to personal property and was liable to lessee for conversion).

²⁷³ Cf. *Stucki v. Noble*, 963 S.W.2d 776, 781 (Tex. App.—San Antonio 1997, pet. denied) (holding that landlord had no duty to mitigate because *Austin Hill Country Realty, Inc.* allows parties to contract out of this duty); *Logan v. Green*, 53 S.W.2d 119 (Tex. Civ. App.—Amarillo 1932, no writ) (stating that landlord's reentry did not cause forfeiture of landlord's right to unaccrued rent because of acceleration clause in lease); but cf. *Stewart v. Basey*, 245 S.W.2d 484, 486-88 (Tex. 1952) (holding that acceleration clause in lease is an unenforceable penalty).

²⁷⁴ See *Design Ctr. Venture*, 748 S.W.2d at 473 (citing *Briargrove Shopping Center Joint Venture v. Vilar, Inc.*, 647 S.W.2d 329, 336 (Tex. App.—Houston [1st Dist.] 1982, no writ)).

²⁷⁵ *Design Ctr. Venture*, 748 S.W.2d at 473; see *Birge v. Toppers Menswear, Inc.*, 473 S.W.2d 79, 85 (Tex. Civ. App.—Dallas 1971, writ ref'd n.r.e.).

b. Statutory Damages. Section 93.002(g)(2) of the Texas Property Code allows a tenant to recover from a 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."²⁷⁶

c. Right to Regain Possession. A tenant has the right to regain possession of leased premises of which he has been wrongfully dispossessed in a forcible detainer action.²⁷⁷ The dispossessed tenant, as a general rule, is not entitled to an injunction from a district court to regain possession.²⁷⁸ In *Housing Auth. v. Massey*,²⁷⁹ however, the court of appeals upheld the county court's injunction prohibiting the landlord from executing a writ of possession nine months after the landlord obtained a judgment for possession in justice court.²⁸⁰ Moreover, if the landlord wrongfully dispossesses the tenant of the leased premises, a district court may extend the lease for a period commensurate with the wrongful disposition.²⁸¹

d. Attorneys' Fees. Attorneys' fees are not recoverable by the tenant in a constructive

²⁷⁶ TEX. PROP. CODE § 93.002(g); *French v. Moore*, 2004 Tex. App. LEXIS 7254 (Tex. App. – Houston [1st Dist.] 2004, n.p.h.) (sustaining trial court's \$5,000 damage award based on tenant's testimony that tenant was required to find another place to store "household contents," which tenant had stored at warehouse from which tenant was wrongfully evicted).

²⁷⁷ *Design Ctr. Venture*, 748 S.W.2d at 473.

²⁷⁸ *Id.*

²⁷⁹ 878 S.W.2d 624 (Tex. App. – Corpus Christi 1994, no writ).

²⁸⁰ *Id.* at 625-27.

²⁸¹ *Muller v. Leyendecker*, 697 S.W.2d 668, 674 (Tex. App.—San Antonio 1985, writ ref'd n.r.e.) (citing *Kothmann v. Boley*, 308 S.W.2d 1 (Tex. 1957)).

eviction action brought in district court because constructive eviction is a tort.²⁸²

e. DTPA. Disagreements over the interpretation of lease provisions, standing alone, are not actionable under the DTPA.²⁸³ Almost anything else is potentially actionable.²⁸⁴ A tenant may assert a cause of action under the DTPA against a mover who takes possession of the tenant's property pursuant to a writ of possession.²⁸⁵

O. CLAIM AND ISSUE PRECLUSION. Res judicata (claim preclusion) bars the relitigation of all issues which, with the use of diligence, might have been tried in a prior suit between the same parties.²⁸⁶ The party asserting res judicata must

prove that there is an identity of parties, issues, and subject matter.²⁸⁷ Collateral estoppel (issue preclusion) bars relitigation of any issue actually litigated and essential to the judgment in the prior suit, regardless of whether the second suit is based on the same cause of action.²⁸⁸ The party asserting collateral estoppel must establish that: (1) the parties were adversaries in the first action; (2) the facts the party seeks to establish by collateral estoppel were essential to the judgment in the first action; and (3) the facts sought to be litigated in the second suit were fully and fairly litigated in the first action.²⁸⁹

1. GENERAL RULE. "A judgment or determination of fact or law in a proceeding in a lower trial court is not res judicata and is not a basis for estoppel by judgment in a proceeding in a district court, except that a judgment rendered in a lower trial court is binding on the parties thereto as to recovery or denial of recovery."²⁹⁰ A "lower trial court" includes "a justice of the peace court, a county court, or a statutory county court."²⁹¹

a. Justice Court. Under Section 31.004 of the Texas Civil Practice and Remedies Code,

S.W.2d 533, 536 (Tex. 1975).

²⁸² *Bonniwell*, 663 S.W.2d at 818.

²⁸³ *Barr*, 837 S.W.2d at 628; *Bonniwell*, 663 S.W.2d at 818; *Wilhite v. Adams*, 640 S.W.2d 875, 876 (Tex. 1982).

²⁸⁴ *Eagle Props., Ltd. v. Scharbauer*, 807 S.W.2d 714, 721 (Tex. 1990); RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1982).

²⁸⁵ TEX. CIV. PRAC. & REM. CODE § 31.004(a); see *Reese v. Reese*, 672 S.W.2d 1, 2-3 (Tex. App.—Waco 1994, no writ) (stating that judgment in forcible detainer case is not res judicata to suit for trespass to try title); *McCloud*, 507 S.W.2d at 647 (holding that because exception in predecessor to section 31.004 only covers issues actually litigated in lower court, tenant's claims for damages for breach of oral lease agreement were not barred by adverse forcible detainer judgement in justice court).

²⁸⁶ TEX. CIV. PRAC. & REM. CODE § 31.004(c); see *Morrison v. Sports Cars & More, Inc.*, 1995 W.L. 634361 (Tex. App.—Dallas (Oct. 27, 1995), n.w.h.) (unpublished).

²⁸² *Huddleston v. Pace*, 790 S.W.2d 47, 51 (Tex. App.—San Antonio 1990, writ denied) (citing *Charalambous v. Jean LaFitte Corp.*, 652 S.W.2d 521, 526 (Tex. App.—El Paso 1983, writ ref'd n.r.e.)). But see *Huddleston*, 790 S.W.2d at 52-55 (Chappa, J., dissenting).

²⁸³ *Polley v. Odom*, 957 S.W.2d 932, 938 (Tex. App.—Waco), motion to vacate overruled, 963 S.W.2d 917 (Tex. App.—Waco 1997, no pet.); *West Anderson Plaza v. Feyznia*, 876 S.W.2d 528, 532-35 (Tex. App.—Austin 1994, no writ).

²⁸⁴ See, e.g., *Goldman v. Alkeh*, 850 S.W.2d 568 (Tex. App.—Corpus Christi 1993, no writ) (holding that landlord's demand for percentage rent, which landlord knew was not owed, breached express warranty of quiet enjoyment and violated DTPA); *Henry S. Miller Co. v. Bynum*, 797 S.W.2d 51 (Tex. App.—Houston [1st Dist.] 1990), *aff'd*, 836 S.W.2d 160 (Tex. 1992) (stating that landlord's representations that shopping center was "almost occupied" and would be operated as "first class center" were actionable under DTPA); *Corum Mgmt. v. Aguayo Enters.*, 755 S.W.2d 895, 900 (Tex. App.—San Antonio 1988, writ denied) (holding that tenant was entitled to damages, that landlord could not recover rent, and that landlord violated DTPA by misrepresenting that tenant could sell pizza from premises and then withdrawing permission after tenant opened restaurant).

²⁸⁵ *Nelson v. Schanzer*, 788 S.W.2d 81, 86-88 (Tex. App.—Houston [14th Dist.] 1990, writ denied).

²⁸⁶ *Barr v. Resolution Trust Corp.*, 837 S.W.2d 627, 628 (Tex. 1992); *Bonniwell v. Beech Aircraft Corp.*, 663 S.W.2d 816, 818 (Tex. 1984); *Russell v. Moeling*, 526

therefore, an unappealed judgment of the justice court should not have any preclusive effect, except as to the issue of immediate possession and monetary sums awarded.²⁹² If, however, a landlord's pleadings pray for rent or attorneys' fees in justice court, and the judgment does not award them, the judgment in justice court may bar recovery of rent or attorneys' fees in a second suit.²⁹³

b. County Court. No cases expressly answer the question whether a county court, sitting as an appellate court in a forcible detainer case, is a "lower trial court" for purposes of section 31.004 of the Texas Civil Practice and Remedies Code. Several older cases, however, have given preclusive effect to final county court judgments in forcible detainer cases.²⁹⁴ The more recent decisions, which rely on section 24.007 of the Texas Property Code, generally apply collateral estoppel and estoppel by judgment only to the issue of immediate possession.²⁹⁵

2. WRONGFUL EVICTION. A tenant deprived of possession by a non-appealable judgment of the

county court in an appeal of a forcible detainer action is not estopped from seeking recovery for wrongful termination of the lease in a subsequent suit.²⁹⁶ A judgment of possession in a forcible detainer suit is not intended to be a final determination of whether the eviction is wrongful or not; rather, it is a final determination only with respect to the right of immediate possession. The judgment for possession in a forcible detainer suit does not determine the ultimate rights of the parties with respect to any other issue in controversy regardless of whether the other issue results in a change of possession of the premises.²⁹⁷

3. TRESPASS TO TRY TITLE. A judgment in the justice court for possession is not res judicata in a trespass to try title suit between the same parties in district court.²⁹⁸ The district court in which a trespass to try title suit is pending, however, does not have jurisdiction enjoin a forcible detainer proceeding in justice court or on appeal in county court.²⁹⁹

4. DTPA AND OTHER CONSUMER PROTECTION STATUTES. A forcible detainer suit does not operate as res judicata in a subsequent DTPA suit between the same parties if the DTPA issues are not actually tried in the justice court.³⁰⁰

²⁹² TEX. CIV. PRAC. & REM. CODE § 31.004(a).

²⁹³ *Neller v. Kirschke*, 922 S.W.2d 182, 185-86 (Tex. App.—Houston [1st Dist.] 1995, writ denied) (holding that agreed judgment for possession entered in justice court was res judicata of landlord's claim for attorneys' fees in excess of \$5,000 but did not collaterally estop tenant from claiming that it had not breached lease).

²⁹⁴ *Glau-Moya Parapsychology Training Inst., Inc. v. Royal Life Ins. Co.*, 507 S.W.2d 824 (Tex. Civ. App.—San Antonio 1974, no writ); *Slay v. Fugitt*, 302 S.W.2d 698 (Tex. Civ. App.—Dallas 1957, writ ref'd n.r.e.); *Young Women's Christian Ass'n v. Hair*, 165 S.W.2d 238 (Tex. Civ. App.—Austin 1942, writ ref'd w.o.m.); *Rankin v. Hooks*, 81 S.W. 1005 (Tex. Civ. App.—Dallas 1904, no writ), *overruled in*, *Johnson v. Highland Hills Drive Apts.*, 552 S.W.2d 493, 494-95 (Tex. Civ. App.—Dallas 1977), *writ denied per curiam*, 568 S.W.2d 661 (Tex. 1978).

²⁹⁵ *Ethan's Glen Community Ass'n v. Kearney*, 667 S.W.2d 287, 289-90 (Tex. App.—Houston [1st Dist.] 1984, no writ); *Johnson*, 552 S.W.2d at 494-95 (criticizing *Glau-Moya* and overruling *Rankin* on this issue).

²⁹⁶ *Anarkali Enters., Inc.*, 802 S.W.2d at 27.

²⁹⁷ 802 S.W.2d at 17 (citing *Johnson*, 552 S.W.2d at 495-96).

²⁹⁸ *Reese v. Reese*, 672 S.W.2d 1, 2 (Tex. App.—Waco 1984, no writ); see *McClendon v. State Farm Mut. Auto. Ins. Co.*, 796 S.W.2d 229, 232 (Tex. App.—El Paso 1990, writ denied) (approving of *Reese* and applying it more generally).

²⁹⁹ *Gillam v. Baker*, 195 S.W.2d 824, 825 (Tex. Civ. App.—Galveston 1946, writ ref'd n.r.e.); *Young Women's Christian Ass'n v. Hair*, 165 S.W.2d 238 (Tex. Civ. App.—Austin 1942, writ ref'd w.o.m.); see also *McGlothlin*, 672 S.W.2d at 232-33 (stating that for district court to enjoin forcible detainer proceeding, applicant must show justice court is without jurisdiction and applicant has no adequate remedy at law).

³⁰⁰ *Wilson v. Williams*, 1991 WL 114409 (Tex. App.—Houston [14th Dist.] 1991, n.w.h.) (unpublished) (suggesting that tenant could not have brought DTPA action in justice court).

Nor will it bar claims under the Texas Fair Debt Collection Practices Act.³⁰¹

5. DECLARATORY JUDGMENT: RIGHT TO POSSESSION UNDER RENEWAL OPTION. In *Buttery v. Bush*,³⁰² the Tyler Court of Appeals held that the landlord's suit under the Uniform Declaratory Judgments Act for a judgment declaring the rights of the parties to a written lease and renewal option was not barred by a judgment against the landlord in a forcible detainer action initiated by the landlord. Because the forcible detainer action was strictly concerned with the immediate right to possession, the landlord was not precluded from bringing another suit for declaratory judgment on the validity of the renewal option.³⁰³

6. CLAIMS FOR DAMAGES ASSERTED IN COUNTY COURT. By filing a counterclaim in county court seeking damages for wrongful termination of the lease, a tenant submits the entire controversy between the parties to the jurisdiction of the county court.³⁰⁴ The county court's judgment, therefore, may bar relitigation of these issues in another suit.

7. CLAIMS FOR IMMEDIATE POSSESSION BARRED. A number of Texas cases have held that a justice court or a county court judgment in a forcible detainer suit is res judicata of the issue of immediate possession of the premises.³⁰⁵

8. LANDLORD'S SUIT FOR FRAUD. In *Hebisen v. Nassau Dev. Co.*,³⁰⁶ the landlord leased space to three attorneys. (Its first mistake!) After the attorneys failed to pay rent, the landlord successfully prosecuted a forcible detainer action against them. In addition, the landlord filed suit in district court for fraud, alleging that the attorneys represented that they would make certain rental payments including rental escalation payments but did not intend to do so at the time they made the promise set forth in the contract. This case may have application in cases in which the tenant vacates at the expiration of a free rent period.³⁰⁷

IV. SELF-HELP EVICTIONS: TEXAS' LOCK-OUT STATUTE AND REENTER AND RELET CLAUSES.

Chapter 93 of the Texas Property Code authorizes a landlord to lock-out a tenant as a self-help alternative to judicial eviction. Under section 93.002 of this chapter, "[a] commercial landlord may not intentionally prevent a tenant from entering the leased premises except by judicial process unless the exclusion results from . . . changing the door locks of a tenant who is delinquent in paying at least a part of the rent."³⁰⁸ Before changing the door locks, a landlord or its agent "must place a written notice on the tenant's front door stating the address and telephone number of the individual or company from which a new key may be obtained."³⁰⁹ But a landlord is only required to provide a new key during the tenant's regular business hours and then "only if the tenant pays the delinquent rent."³¹⁰ The terms of the lease, however, will supersede the requirements of section 93.002 "to the extent of any conflict."³¹¹ Even

³⁰¹ Cf. *Waterfield Mortg. Co. v. Rodriguez*, 929 S.W.2d 64, 646 (Tex. App.—San Antonio 1996, no writ) (affirming trial court judgment for actual and punitive damages against lender who refused payments tendered by borrower, foreclosed, and then evicted borrowers in forcible detainer proceeding).

³⁰² 575 S.W.2d 144, 146 (Tex. Civ. App.—Tyler 1978, writ ref'd n.r.e.).

³⁰³ *Id.*

³⁰⁴ *Anarkali Enters., Inc.*, 802 S.W.2d at 27.

³⁰⁵ See, e.g., *Buttery*, 575 S.W.2d at 146 (citing cases).

³⁰⁶ 754 S.W.2d 345 (Tex. App.—Houston [14th Dist.] 1988, writ denied).

³⁰⁸ But cf. *Hott v. Percy Christon, Inc.*, 663 S.W.2d 851, 855 (Tex. App.—Dallas 1993, writ. ref'd n.r.e) (stating that reliance on term of written contract, without more, does not support action for fraud.)

³⁰⁹ TEX. PROP. CODE § 93.002(c)(3).

³¹⁰ TEX. PROP. CODE § 93.002(f).

³¹¹ *Id.*

TEX. PROP. CODE § 93.002(h).

when self-help eviction appears to be available, a number of practical considerations limit its usefulness.

First, the statute only expressly authorizes a landlord to lock-out a tenant who is delinquent in paying rent. A landlord may lock-out a tenant for other defaults only if the lease permits the landlord to do so.³¹²

Second, a landlord cannot lock-out a tenant if doing so would breach the peace, effectively giving the tenant a veto over a self-help eviction.³¹³ Many commercial leases purport to authorize a landlord to re-enter the premises "by force if necessary, and without liability for any act or omission of the landlord or its agents in connection with such reentry." This familiar phrase does not mean what it says.

In *Gulf Oil Corp. v. Smithey*,³¹⁴ for example, the landlord entered the premises by picking the locks after the tenant failed to pay rent. Even though the lease expressly allowed the landlord to re-enter the premises in the event of a default by the tenant, and even though it excused the landlord from liability for damages for any act or omission of the landlord in connection with such re-entry, the court of civil appeals held the landlord's reentry was unlawful. The court of civil appeals stated:

The provisions in a lease giving the lessor the right to re-enter upon default of the tenant, . . . without notice to, or the consent of, the tenant . . . and even over his protests, are recognized as valid, provided such rights are exercised peaceably and without force or violence Here, the plaintiff was not present; it was not shown that he even knew the re-entry or repossession were to be attempted, or that he had any knowledge thereof until [the landlord's] agents had already forced their way into the building by picking the lock. Having locked the building, [the tenant] must be considered as being in possession thereof and of the equipment situated therein. He had not been informed that [the landlord] had declared the lease terminated, if in fact it had done so, or that his right of occupancy was being challenged. . . [W]e hold that entry into the building by picking the lock was not peaceable but by force and violence.³¹⁵

The real rule seems to be that if a person entitled to possession can make peaceable entry upon the land, that person may resort to peaceable means, *short of force*, as will render impracticable the further occupation of the land by the other person. What force means, in a particular case, however, is in the eye of the beholding fact finder.³¹⁶

³¹² TEX. PROP. CODE § 93.002(c) and (h); *see also Austin Hill Country Realty, Inc. v. Palisades Plaza, Inc.*, 948 S.W.2d 293, 300 (Tex. 1997) (stating that because requiring landlord to mitigate when landlord maintains lease and sues for rent as it becomes due would force landlord to reenter the premises and thereby risk terminating the lease or accepting the tenant's surrender, "when exercising the option to maintain the lease in effect and sue for rent as it becomes due following the tenant's breach and abandonment, the landlord has a duty to mitigate only if (1) the landlord actually reenters, or (2) the lease allows the landlord to reenter the premises without accepting surrender, forfeiting the lease, or being construed as evicting the tenant.").

³¹³ TEX. PROP. CODE § 93.002(c) and (h).

³¹⁴ 426 S.W.2d 262 (Tex. Civ. App.—Dallas 1965, writ diss'd).

³¹⁵ *Id.* at 265 (emphasis in original); *see also Embry v. Bel-Aire Corp.*, 508 S.W.2d 469 (Tex. Civ. App.—Austin 1974, writ ref'd n.r.e.) (stating that "one who is entitled to possession of land, but who is not in possession, may not forcibly take possession from another . . .").

³¹⁶ *See, e.g., Design Ctr. Venture*, 748 S.W.2d 469; *Martinez v. Ball*, 721 S.W.2d 580 (Tex. App.—Corpus Christi 1986, no writ); *McVea*, 587 S.W.2d 526; *Houck v. Kroger Co.*, 555 S.W.2d 803 (Tex. Civ. App.—Houston [14th Dist.] 1977, writ ref'd n.r.e.); *Salpas v. State*, 462 S.W.2d 71 (Tex. App.—El Paso 1982, no writ); *Harris v. Panhandle & S.F. Ry. Co.*, 163 S.W.2d 647 (Tex. Civ. App. — El Paso 1942, writ ref'd w.o.m.); *Kuhn v. Palo Duro Corp.*, 151 S.W.2d 894 (Tex. Civ. App. — Texarkana 1941), *rev'd on other grounds*, 161 S.W.2d 778 (Tex. 1942); *Chrono v. Gonzales*, 215 S.W.368 (Tex. Civ. App.—San Antonio

Third, if a landlord violates section 93.002, its tenant is entitled to bring suit for re-entry in justice court.³¹⁷ If the justice court reasonably believes an unlawful lockout likely has occurred, the justice, after an initial hearing, which may be conducted *ex parte*,³¹⁸ may issue a writ of re-entry, which is enforceable by contempt, entitling the tenant to immediate possession of the premises pending a further hearing on the tenant's sworn complaint for re-entry.³¹⁹ To recover possession after a justice court issues a writ of reentry for an unlawful lockout, the landlord must either establish that the lockout was lawful in a hearing on the tenant's sworn complaint for reentry or file a separate forcible detainer suit in justice court.³²⁰ Violating the lockout statute can result in the termination of the lease and the assessment of a penalty payable to the tenant of up to one month's rent.

Finally, once a landlord has initiated a judicial eviction, it may not be able to abandon its judicial remedy and attempt a non-judicial eviction.³²¹

V. DEALING WITH PERSONAL PROPERTY

A landlord has 3 basic options when a delinquent tenant either does not, or will not,

1919, no writ); *Henderson v. Beggs*, 207 S.W.565 (Tex. Civ. App.—Fort Worth 1918, no writ).

³¹⁷ TEX. PROP. CODE § 93.003(a)-(b).

³¹⁸ TEX. PROP. CODE § 93.003(b).

³¹⁹ TEX. PROP. CODE § 93.003(a)-(e) and (i).

³²⁰ *See id.*

³²¹ *Cf. Houck*, 555 S.W.2d at 806 (stating that when judicial eviction had been filed, injunction was proper to stop landlord from reentering premises by force); *Burnett Trailers, Inc. v. Polson*, 387 S.W.2d 692, 694-95 (Tex. Civ. App.—San Antonio 1965, writ ref'd n.r.e.) (stating that when landlord could have seized mobile home, but instead sought writ of sequestration and then dismissed that suit, landlord was required to return mobile home to tenant); *Bishop v. General Motors Acceptance Corp.*, 229 S.W.2d 848, 849-50 (Tex. Civ. App.—Austin 1950, no writ) (stating that one may not file suit for writ of sequestration for sole purpose of gaining possession of property and then dismiss suit; on the contrary, in such cases, any property must be returned, and dismissal acts as abandonment of claim).

remove personal property from the premises. One option is obtaining a writ of possession and having the tenant's property moved and stored. Another option is enforcing its statutory or contractual landlord's lien. The final option is treating any personal property left on the premises as abandoned and then disposing of that property in accordance with section 91.003 of the Texas Property Code. Before selecting any of these options, a prudent landlord should ensure that the manner of disposition does not wrongfully impair the ownership or lien rights of a third party.

A. LANDLORD'S STATUTORY LIEN. The Texas Property Code grants "[a] person who leases or rents all or part of a building for nonresidential use . . . a preference lien on the property of the tenant or subtenant in the building for rent that is due and for 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."³²² This type of statutory lien has two major drawbacks. It only secures a limited amount of rent, and the lien may be enforced only by judicial process.

1. MAXIMUM AMOUNT OF STATUTORY LIEN. Section 54.021 of the Texas Property Code effectively prevents a landlord from securing payment of more than one year's rent by dividing a multi-year lease into a series of one year contracts.³²³ "[W]hen the tenant has occupied the premises for any part of any of said series of years the landlord has a lien for the balance of such year."³²⁴

2. ATTACHMENT. As a general rule, the statutory landlord's lien automatically attaches to all nonexempt personal property of a tenant or

³²² TEX. PROP. CODE § 54.021.

³²³ *FDIC v. Sears, Roebuck & Co.*, 743 S.W.2d 772, 773 (Tex. App. — El Paso 1988, no writ) (citing *Allen v. Brunner*, 75 S.W. 821, 822 (Tex. Civ. App. 1903, no writ)).

³²⁴ *Allen*, 75 S.W. at 822.

subtenant located in the building.³²⁵ It does not, however, attach to the property of others held by a tenant on the premises.³²⁶ If a tenant holds over, the statutory lien attaches to any personal property that the tenant leaves or places on the property after the expiration of the lease term.³²⁷ And once the statutory lien attaches to a tenant's property, the lien continues for one month after the day the tenant vacates the premises.³²⁸ A landlord retains the right to file for a distress warrant against any personal property removed from the premises

during the one month period after the tenant vacates the premises.³²⁹

3. AUTOMATIC PERFECTION. A statutory landlord's lien is perfected automatically at the inception of the lease and on each anniversary of the lease for rents due or coming due during the upcoming year.³³⁰ Revised Article 9 of the Texas UCC does not apply to statutory landlord's liens, and, therefore, there is no need to file a UCC Financing Statement to perfect one.³³¹ But in order to get the full benefit of its statutory landlord's lien, a landlord must renew its lien by following the special filing procedures described in the statute.

4. RENEWAL TO PRESERVE LIEN PRIORITY. Section 54.022 of the Texas Property Code provides that "[t]he lien is not enforceable for rent that is more than six months past due unless the landlord files a lien statement with the county clerk of the county in which the building is located."³³² "[I]n order to preserve its priority against intervening creditors with respect to rentals which are more than six months past due, the landlord must file an appropriate affidavit with the county clerk . . ."³³³ By filing the appropriate affidavit at six month intervals, a landlord may perfect its lien for more than six months:

When six months' unpaid rent have been accumulated, the landlord may file. That protects for that period. At the expiration of another six months he files again, and is again protected. Such protection extends until extinguished by payment. The

³²⁵ TEX. PROP. CODE §§ 54.021, 54.023; *Granville v. Rauch*, 335 S.W.2d 799, 803-04 (Tex. Civ. App. – Austin 1960, no writ); see also *Forrest v. Durnell*, 26 S.W. 481, 483 (Tex. 1894) (stating that "[u]nder the statutes now is [sic] force a landlord has a lien on all the crops raised on the premises, unless this be surrendered by contract, and it matters not whether the premises be cultivated by the original lessee, his assignee, or a subtenant.").

³²⁶ TEX. PROP. CODE § 54.023; *Shwiff v. City of Dallas*, 327 S.W.2d 598, 601 (Tex. Civ. App. – Dallas 1959, writ ref'd n.r.e.); *West Dev. Co. v. Crown Bottling Co.*, 90 S.W.2d 887, 890 (Tex. Civ. App.—Waco 1936, writ dismiss'd); *Massachusetts Mut. Life Ins. Co. v. Stockyards Nat'l Bank*, 50 S.W.2d 425, 428 (Tex. Civ. App. – Fort Worth 1932, writ dismiss'd) (ruling that statutory lien did not attach to separate property of tenant's spouse); *Davis v. Washington*, 43 S.W. 585, 588 (Tex. Civ. App. – Austin 1898, writ ref'd) (rejecting common law rule and stating that "[i]f . . . strangers, who supply the tenant with the means to occupy the rented premises and carry on a business therein successfully and profitably, should be held to pledge the property so furnished to secure the landlord in the payment of rent, such a burden would be an impediment to the business and discourage its successful operation."); *Needham Piano & Organ Co. v. Hollingsworth*, 40 S.W. 750 (Tex. Civ. App.), *aff'd*, 40 S.W. 787 (Tex. 1897) (holding that goods on consignment in possession of tenant are not subject to statutory landlord's lien).

³²⁷ *Maberry v. First Nat'l Bank*, 351 S.W.2d 96, 100-01 (Tex. Civ. App.—Amarillo 1961, no writ); see *General Motors Acceptance Corp. v. Bettes*, 57 S.W.2d 263, 265 (Tex. Civ. App.—Austin 1933, writ ref'd).

³²⁸ TEX. PROP. CODE § 54.024.

³²⁹ *Gollehon v. Porter*, 161 S.W.2d 134, 136 (Tex. Civ. App.—Amarillo 1942, writ ref'd w.o.m.).

³³⁰ *Shwiff*, 327 S.W.2d at 602; see *Maberry*, 351 S.W.2d at 100-01.

³³¹ TEX. BUS. & COM. CODE § 9.109(d)(1).

³³² TEX. PROP. CODE § 54.022.

³³³ *Bank of N. Am. v. Kruger*, 551 S.W.2d 63, 66 (Tex. Civ. App.—Houston [1st Dist.] 1977, writ ref'd n.r.e.) (citing *Industrial State Bank v. Oldham*, 221 S.W.2d 912, 913 (Tex. 1949)).

practical result is a lien for "past due" rents "for more than six months."³³⁴

The effect of a landlord's failure to comply with section 54.022 of the Texas Property Code, however, is not clear. Some commentators have suggest that if the landlord does not file a lien affidavit, the lien is released as to rent more than six months past due. Although some cases contain ambiguous statements concerning the effect of the landlord's failure to file a lien affidavit, it appears that the failure to file a lien affidavit only affects the perfection of the statutory lien in a priority dispute between competing lien claimants.³³⁵ The failure to file a lien affidavit should not render the lien unenforceable against the tenant for any covered rent.

5. RESOLUTION OF LIEN PRIORITY DISPUTES. "It therefore appears that precode Texas law will be followed with respect to the priority of a landlord's lien, as against a security interest arising under Article 9 of the Code"³³⁶ If another security interest is perfected before the property is placed on the premises, the perfected security interest is prior to a statutory landlord's lien.³³⁷ If, on the other hand, the property is placed in the leased premises before the secured creditor perfects its lien, the statutory landlord's lien has a preference.³³⁸ A statutory landlord's lien also is superior to any unrecorded security interest, even if the security interest is older than the landlord's

lien.³³⁹ The statutory landlord's lien is superior to any other security interest perfected during the same year, but a security interest perfected prior to the current contract year has priority over a statutory landlord's lien.³⁴⁰ These are but some of the basic rules governing the resolution of lien priority disputes. A lien search and a careful analysis of any competing liens should be undertaken before the landlord attempts to exercise its statutory lien rights.

6. JUDICIAL ENFORCEMENT OPTIONS.

Judicial proceedings are the only way to enforce a statutory landlord's lien. Although distraint is the remedy specifically tailored to enforce a landlord's statutory lien,³⁴¹ a landlord, in appropriate circumstances, may be entitled to utilize the extraordinary remedies of sequestration³⁴² or injunction.³⁴³ In *Hunt v. Merchandise Mart, Inc.*,³⁴⁴ for example, the court of appeals upheld the trial court's issuance of an injunction prohibiting a tenant from removing its personal property from the leased premises because no rent was due at the time the trial court issued the injunction, and, as a consequence, the landlord's legal remedy, distraint, was then unavailable.³⁴⁵

7. WAIVER. A landlord has a statutory landlord's lien in its tenant's personal property on the leased premises unless the landlord waives its statutory lien. A landlord may waive its statutory lien rights by electing to rely exclusively on its contractual lien.³⁴⁶

³³⁴ *Industrial State Bank*, 221 S.W.2d at 914 (citing *In re Pfaeffle*, 5 F. Supp. 708, 709 (N.D. Tex. 1933)).

³³⁵ 221 S.W.2d at 914; *In re Toggery, Inc.*, 60 F.2d 311 (D.C. Tex. 1932), *aff'd sub. nom.*, *Kokernot-Nixon Props. v. Wright*, 68 F.2d 317 (5th Cir. 1933); *Lincoln Ten, Ltd. v. White*, 706 S.W.2d 125, 129 (Tex. App. — Houston [14th Dist.] 1986, no writ); *Bank of N. Am.*, 551 S.W.2d at 66; *Gunst v. Dallas Trust & Savs. Bank*, 8 S.W.2d 806, 808 (Tex. Civ. App.—Dallas 1928, no writ).

³³⁶ *Associates Fin. Servs. of Tex., Inc. v. Solomon*, 523 S.W.2d 722, 724 (Tex. Civ. App.—Waco 1975, no writ).

³³⁷ *Solomon*, 523 S.W.2d at 724.

³³⁸ *Solomon*, 523 S.W.2d at 724.

³³⁹ *Id.*

³⁴⁰ *Bank of N. Am.*, 551 S.W.2d at 65-66.

³⁴¹ TEX. R. CIV. P. 610-20.

³⁴² TEX. CIV. PRAC. & REM. CODE §§ 62.001 - 62.063; TEX. R. CIV. P. 696 - 716.

³⁴³ TEX. CIV. PRAC. & REM. CODE §§ 65.001 - 65.045; TEX. R. CIV. P. 680 - 693.

³⁴⁴ 391 S.W.2d 141 (Tex. Civ. App.—Dallas 1965, writ ref'd n.r.e.).

³⁴⁵ *Id.* at 144.

³⁴⁶ *Cf. United States v. Truss Tite, Inc.*, 285 F. Supp. 88 (S.D. Tex. 1968).

8. DISTRAINT. Even when it is available, distraint is merely an ancillary remedy to preserve the collateral pending disposition of the primary suit for past due rent or to foreclose the landlord's statutory lien.³⁴⁷ Distraint has significant limitations. Because a landlord may not be entitled to a distress warrant unless rent is due,³⁴⁸ distraint may not be available to a landlord when its tenant commits a non-monetary default, even abandonment. In addition, because distraint is only an ancillary remedy, it often requires instituting two separate lawsuits.

a. Primary Suit. The primary suit for rent or to foreclose the landlord's lien should be filed in a court with jurisdiction over the amount of past-due rent secured by the statutory landlord's lien.³⁴⁹ Unless the amount of past-due rent is less than the maximum \$5,000 jurisdictional limit of the justice court, the primary suit and the distraint proceeding must be brought in different courts.

b. Application for Distraint Warrant Filed with Justice of the Peace. Either at the commencement of the primary suit or at any time during its progress, the plaintiff, its agent, attorney, assign, or other legal representative may file an application for the issuance of a distress warrant with the justice of the peace.³⁵⁰ The application may be supported by affidavits of persons having personal knowledge of relevant facts, but shall state that (1) the amount sued for is due for rent; (ii) the writ is not sued out for the purpose of vexing or harassing the defendant; and (iii) the specific facts on which the plaintiff relies to show the grounds for

issuance of the writ exist.³⁵¹ Grounds for issuance of a writ exist "if the tenant (1) owes rent; (2) is about to abandon the building; or (3) is about to remove the tenant's property from the building."³⁵² The application must be filed in justice court, even if the primary suit is pending in district or county court.

c. Bond Required. A party applying for a distress warrant must post a bond in an amount approved by the justice, with sufficient sureties as provided by statute.³⁵³ The justice shall set the bond in an amount which shall adequately compensate the defendant for all costs and damages suffered by the defendant if the plaintiff wrongfully sues out the warrant.³⁵⁴ Either party, after notice to the opposite party, may move to increase or decrease the amount of the bond or to question the sufficiency of the sureties in the court having jurisdiction over the subject matter.³⁵⁵ In other words, even though the justice court initially sets the bond, the parties must challenge the amount or sufficiency of the bond in the court hearing the primary suit.

d. Issuance of Distress Warrant. No warrant shall issue before final judgment except on written order of the justice of the peace after a hearing, which may be *ex parte*.³⁵⁶ Before the warrant issues, the justice, in his order granting the warrant, shall (i) make specific findings of fact to support the statutory grounds found to exist; (ii) specify the maximum value of the property that may be seized; (iii) set the amount of the plaintiff's bond; and (iv) command that the property seized be kept safe pending further order of the court having jurisdiction.³⁵⁷ Rule 612 states the formal

³⁴⁷ *Jarrell v. U.S. Realty Corp.*, 270 S.W. 1079, 1081 (Tex. Civ. App.—Fort Worth 1925, no writ) (explaining that if no primary suit is properly filed, distress warrant is void).

³⁴⁸ *Hunt*, 391 S.W.2d at 144-45 (acknowledging, but disregarding, contrary ruling in *DuBose v. Battle*, 34 S.W. 148 (Tex. Civ. App. 1896, no writ)); *but see Allen v. Bruner*, 75 S.W.2d 821 (Tex. Civ. App. 1903, no writ) (citing *DuBose* and stating statutes authorize issuance of distress warrant whether rent is due or not).

³⁴⁹ *Jarrell*, 270 S.W.2d at 1081.

³⁵⁰ TEX. R. CIV. P. 610; TEX. PROP. CODE § 54.025.

³⁵¹ TEX. R. CIV. P. 610.

³⁵² TEX. PROP. CODE § 54.025; *see Hunt*, 391 S.W.2d at 144-45 (stating that distraint is not available unless rent is due when distraint warrant is sought).

³⁵³ TEX. R. CIV. P. 610-61.

³⁵⁴ TEX. R. CIV. P. 610-611.

³⁵⁵ TEX. R. CIV. P. 611.

³⁵⁶ TEX. R. CIV. P. 610-611.

³⁵⁷ TEX. R. CIV. P. 610.

requirements for, and Rule 613 prescribes the manner of service and contents of, a distress warrant.³⁵⁸

e. Tenant May Replevy. A tenant may reclaim personal property seized under a distress warrant by posting a replevy bond.³⁵⁹ Rule 614 requires the court having jurisdiction of the amount in controversy to approve any replevy bond.³⁶⁰ The bond must be in an amount equivalent to either (1) double the amount of the plaintiff's debt; or, at the defendant's option, (ii) the value of the property plus one year's interest.³⁶¹ If the court approves the bond, the opposing party, upon reasonable notice (which may be less than 3 days), has the right to seek judicial review of the amount of the bond, the sufficiency of the sureties, and the estimated value of the property.³⁶² The evidence at this hearing, if uncontroverted, may be submitted by affidavit; otherwise, the parties must submit admissible evidence.³⁶³ And the defendant, on reasonable notice, may move to substitute other property, of equal value to the property attached, for the property seized.³⁶⁴

f. Dissolution or Modification of Distress Warrant. A defendant whose property has been seized, or any intervening claimant who claims an interest in such property, may by sworn written motion move to vacate, dissolve, or modify the warrant and the order directing its issuance, for any grounds or cause, extrinsic or intrinsic.³⁶⁵ Unless the parties agree to an extension of time, the motion, after reasonable notice (which may be less than three days), shall be heard promptly, and the issue shall be determined no less than ten days after the motion is filed.³⁶⁶ At the hearing, the court may

consider affidavits, but must consider other admissible evidence tendered by any party.³⁶⁷ The party who obtained the warrant has the burden to prove the specific facts relied on in the order granting the warrant; however, the party seeking dissolution of the warrant must prove that the reasonable value of the property exceeds the amount necessary to secure the debt.³⁶⁸

g. Damages Resulting from Wrongful Issuance of Distress Warrant. If the court determines that grounds for issuing the distress warrant did not exist at the time it was issued, the party seeking the warrant may be liable for any actual damages suffered by the tenant or other claimants by reason of the seizure of the property.³⁶⁹ In addition to claims for conversion, a landlord may be subject to DTPA claims for wrongfully taking possession of the tenant's property.³⁷⁰

B. CONTRACTUAL LANDLORD'S LIENS. Revised Article 9 of the Texas UCC governs the creation of contractual landlord's liens, and depending on the circumstances, Article 9 or Revised Article will govern the enforcement of such liens.³⁷¹ Because of the drawbacks of statutory landlord's liens, a contractual lien is

³⁶⁷ *Id.*

³⁶⁸ *Id.*

³⁶⁹ See, e.g., *Liquid Carbonic Co. v. Allen Morrow Co.*, 15 S.W.2d 1089 (Tex. Civ. App.—Waco 1929), *rev'd on other grounds*, 27 S.W.2d 132 (Tex. Comm'n App. 1930, judgm't adopted) (ruling that, even though tenant was in default, landlord was liable for conversion and that third party claiming possession of property, otherwise subject to statutory landlord's lien, was entitled to possession of that property as against landlord).

³⁷⁰ Cf. *Myers v. Ginsburg*, 735 S.W.2d 600, 605 (Tex. App.—Dallas 1984, no writ).

³⁷¹ Extensive revisions to Article 9 of the Texas UCC became effective in Texas on July 1, 2001. Section 9.702 of Revised Article 9 sets forth the transition rules. See TEX. BUS. & COM. CODE § 9.702 (REVISED ARTICLE 9). See generally *Bank of N. Am.*, 551 S.W.2d at 65 (explaining that Article 9 governs contractual but not statutory landlords' liens).

³⁵⁸ TEX. R. CIV. P. 612-613.

³⁵⁹ TEX. R. CIV. P. 614.

³⁶⁰ *Id.*

³⁶¹ *Id.*

³⁶² *Id.*

³⁶³ *Id.*

³⁶⁴ *Id.*

³⁶⁵ TEX. R. CIV. P. 614a.

³⁶⁶ *Id.*

sometimes a better — but not foolproof — way for a landlord to obtain and enforce a security interest in a tenant's personal property and fixtures. The following discussion is not a comprehensive treatment of Article 9; instead, it touches on a few basic issues commonly encountered in creating and enforcing contractual landlord's liens and, in so doing, highlights some of the key changes implemented by Revised Article 9.

1. CREATION AND ATTACHMENT. A contractual lien may be created in a lease by language sufficient to create a security interest.³⁷² Once created, a contractual lien attaches to the tenant's personal property, fixtures, and removable trade fixtures described in the lease or security agreement.³⁷³ But to provide any practical security, a contractual landlord's lien must also be perfected.

2. PERFECTION. To perfect a contractual security interest in its tenant's personal property, a landlord must file a UCC Financing Statement with the filing office in the state where the tenant is located.³⁷⁴ If a landlord's contractual lien also covers fixtures or removable trade fixtures, the landlord must file an appropriate UCC Financing Statement with the Texas Secretary of State the county clerk's office in the county where the leased

premises are located.³⁷⁵ If a landlord fails to perfect its contractual landlord's lien, third parties may acquire rights in the property superior to the landlord's security interest.

3. SELF-HELP REPOSSESSION. The Texas UCC permits a secured creditor to use self-help to take possession of personal property secured by the creditor's lien, unless the security agreement expressly prohibits the creditor from doing so or taking the property will breach the peace.³⁷⁶ Even if a lease grants the landlord the right to repossess the property subject to its contractual lien, a landlord cannot hold the property indefinitely without sale, credit, or payment of any surplus by which the value of the seized property exceeds the amount of past due rent.³⁷⁷ If a landlord fails to sell the property within a commercially reasonable time after taking possession, it may be liable in conversion for "the entire value of the property."³⁷⁸

4. JUDICIAL REPOSSESSION AND ENFORCEMENT. In addition to self-help repossession, a landlord may, in appropriate cases, resort to judicial process to enforce its contractual lien. Although distraint is the remedy specifically tailored to enforce a landlord's statutory lien,³⁷⁹ at least one court has held that it is available to enforce a contractual lien as well.³⁸⁰ The

³⁷² REVISED ARTICLE 9 § 9.201(a) (stating that except as otherwise provided, security agreement is enforceable according to its terms) and § 9.109(11) (stating that REVISED ARTICLE 9 applies to the creation or transfer on an interest or lien in real property, including a lease or rents); *see also* REVISED ARTICLE 9 § 9.102.

³⁷³ REVISED ARTICLE 9 § 9.109 (stating that, with certain exceptions, description of real or personal property is sufficient, whether or not it is specific, if it reasonably identifies what is described); REVISED ARTICLE 9 § 9.110.

³⁷⁴ *See* REVISED ARTICLE 9 § 9.307(b) (setting forth rules for determining debtor's location). REVISED ARTICLE 9 allows a creditor to file a financing statement without the debtor's signature if the debtor authorizes the creditor to do so. *See* REVISED ARTICLE 9 § 9.509(a)(1). By signing a lease that includes a contractual lien, a tenant automatically authorizes its landlord to file a financing statement consistent with the security interests granted in the lease. *See* REVISED ARTICLE 9 § 9.509(b).

³⁷⁵ REVISED ARTICLE 9 § 9.501; *see Bank of N. Am.*, 551 S.W.2d at 66 (discussing perfection under former Article 9).

³⁷⁶ *See* REVISED ARTICLE 9 § 9.609; TEX. BUS. & COM. CODE § 9.503 (Vernon 1991); *but see McVea*, 587 S.W.2d at 531 (holding that the right to reenter premises upon default and grant of contractual lien did not grant landlord right to take possession of tenant's personal property, and holding landlord liable for conversion for seizing tenant's property).

³⁷⁷ REVISED ARTICLE 9 § 9.610 (stating that every aspect of disposition must be reasonable); *Myers*, 735 S.W.2d at 605.

³⁷⁸ *Myers*, 735 S.W.2d at 605.

³⁷⁹ *See* TEX. R. CIV. P. 610-620.

³⁸⁰ *See Keep'Em Eating Co. v. Hulings*, 165 S.W.2d 211, 213 (Tex. Civ. App.—Austin 1942, no writ) (stating, in *dicta*, that a distress warrant may be an

extraordinary remedies of sequestration³⁸¹ or injunction³⁸² are available in principle, but it is often difficult to obtain the evidence necessary to obtain these extraordinary writs until it is too late. Unless a landlord has waived all statutory and contractual liens, a landlord should be extremely cautious about seeking a writ of attachment, which is ordinarily not available to a secured creditor.³⁸³

Resort to judicial enforcement carries its own financial burdens and legal risks. Seeking extraordinary judicial remedies inevitably involves expedited proceedings and the legal fees that mount invariably and rapidly while conducting them. Then, if the court grants extraordinary relief, the landlord must post a bond before it takes effect.³⁸⁴ And once it takes effect, the landlord can be held liable for any harm caused, if the trial court, or even an appellate court, later determines that the extraordinary relief should not have been granted in the first place.³⁸⁵

5. FORECLOSURE. Once the landlord repossesses the property subject to the contractual lien, it may hold a commercially reasonable public or private sale or resort to other alternatives

appropriate means to enforce contractual landlord's lien). *But see* TEX. PROP. CODE § 54.025 (Revisor's Note) (declaring that Rules 610-620 of the Texas Rules of Civil Procedure "now control [perhaps exclusively] the procedural matters related to distress warrants.").

³⁸¹ TEX. CIV. PRAC. & REM. CODE § 62.001-.063; TEX. R. CIV. P. 696-716.

³⁸² TEX. CIV. PRAC. & REM. CODE § 65.001-.045; TEX. R. CIV. P. 680-693.

³⁸³ TEX. CIV. PRAC. & REM. CODE § 61.001-.062; TEX. R. CIV. P. 592-609; TEX. R. CIV. P. 592a, 592b (bond requirements for writ of attachment).

³⁸⁴ *See* TEX. R. CIV. P. 698 (bond requirements for writ of sequestration); TEX. R. CIV. P. 684 (bond requirements for temporary restraining order and temporary injunction).

³⁸⁵ *See, e.g., City of El Paso v. Del Norte Golf and Country Club, Inc.*, 614 S.W.2d 168 (Tex. Civ. App.—El Paso 1980, writ ref'd n.r.e.) (holding that landlord was liable for conversion of tenant's personal property because landlord, under an injunction it obtained against the tenant, denied tenant access to property).

available under the Texas UCC.³⁸⁶ Whether the sale is commercially reasonable ordinarily is a question of fact, and the burden of pleading commercial reasonableness initially falls on the secured creditor.³⁸⁷ The once ominous rule that the secured creditor's failure to give proper notice to a debtor precludes the secured party from recovering a deficiency, however, has given way under Revised Article 9 to the rule that the secured creditor's failure to give notice or otherwise conduct a commercially reasonable sale will reduce a deficiency by the amount that would have been received if the non-complying creditor had complied with Subchapter F governing the parties' rights after a default.³⁸⁸ Thus, if a landlord does not perform the foreclosure properly under the Revised UCC, the landlord's claim for rent still may be reduced, but it will no longer automatically be barred.

C. SECTION 93.002(e): ABANDONED PERSONAL PROPERTY. Section 93.002(e) of the Texas Property Code permits a landlord to dispose of a tenant's personal property without foreclosing on it. This section provides that "[a] landlord may remove and store any property of a tenant that remains on premises that are abandoned."³⁸⁹ In addition to exercising any other rights, a landlord "may dispose of the stored property if the tenant does not claim the property within 60 days after the date the property is stored."³⁹⁰

³⁸⁶ Compare REVISED ARTICLE 9 § 9.610(b) with TEX. BUS. & COM. CODE § 9.504 (Vernon 1991).

³⁸⁷ *Greathouse v. Charter Nat'l Bank - Southwest*, 851 S.W.2d 173, 175-76 (Tex. 1992).

³⁸⁸ Compare *Tanenbaum v. Economics Lab., Inc.*, 628 S.W.2d 769, 771-72 (Tex. 1982) (holding that failure to send proper notice of disposition to debtor barred recovery of deficiency); *Beach v. Resolution Trust Corp.*, 821 S.W.2d 241, 243 (Tex. App.—Houston [1st Dist.] 1991, no writ) with REVISED ARTICLE 9 § 9.626(a)(3) (limiting, but not barring, creditor's recovery if creditor fails to comply with subchapter).

³⁸⁹ TEX. PROP. CODE § 93.002(e).

³⁹⁰ *Id.*

1. NOTICE TO TENANT REQUIRED. Before disposing of a tenant's property, "[t]he landlord shall deliver by certified mail to the tenant at the tenant's last known address a notice stating that the landlord may dispose of the tenant's property if the tenant does not claim the property within 60 days after the date the property is stored."³⁹¹ If a landlord is uncertain who owns any property left on the premises, it would be prudent to have a lien search performed to determine if any of the property belongs to someone other than the tenant.

2. STATUTORY PRESUMPTION OF ABANDONMENT. Section 93.002(e) creates a statutory presumption of abandonment in certain circumstances. It provides that "[a] tenant is presumed to have abandoned the premises if goods, equipment, or other property, in an amount substantial enough to indicate a probable intent to abandon the premises, is being or has been removed from the premises and the removal is not within the normal course of the tenant's business."³⁹² This presumption should be helpful to a landlord who wishes to dispose of the junk a tenant leaves in the space after the tenant has absconded with the valuable personal property.

3. RELATIONSHIP TO ARTICLE 9. But relying on Section 93.002(e) may be risky when a tenant leaves behind its valuable personal property. Under the Texas UCC, a landlord's failure to promptly dispose of a tenant's property in a commercially reasonable manner may bar the landlord's damage claims or give rise to claims against the landlord for conversion. Section 93.002(e) does not say how a tenant's deemed abandonment of personal property affects rights under Article 9 of the Texas UCC.

VI. LANDLORD'S MONETARY REMEDIES

The law in Texas governing a landlord's monetary remedies remains in flux. Before 1997, when the Texas Supreme Court and the Texas Legislature each announced a different rule establishing a

landlord's duty to mitigate damages,³⁹³ the legal rules governing a landlord's rights to recover rent and damages after a tenant breached its lease were longstanding but confusing.³⁹⁴ The new rules are still confusing. In an attempt to explain the mitigation rules and to identify some of the new issues on which confusion now reigns, this section of the outline: (A) reviews a landlord's traditional remedies for a tenant's breach; (B) summarizes, and then notes the differences between, a landlord's remedies for anticipatory breach under the old rules and the new; and (C) discusses a landlord's contractual remedies and suggests lease terms that may ameliorate some of the confusion resulting from the new mitigation rules. Section VII on Tenant's Defenses discusses the relatively few Texas mitigation cases decided since 1997 and examines mitigation cases from other jurisdictions.

A. COMMON LAW REMEDIES FOR BREACH. At common law, a landlord's remedies for a tenant's breach of a lease covenant were quite limited. Texas law regarded most covenants in a real property lease independent covenants,³⁹⁵ including a tenant's covenant to pay rent,³⁹⁶ to advertise a

³⁹³ Compare TEX. PROP. CODE § 91.006 (legislating statutory duty to mitigate) with *Austin Hill Country Realty, Inc.*, 948 S.W.2d at 299-300 (announcing common law duty to mitigate).

³⁹⁴ Jerry D. Johnson, *Landlord Remedies in Texas: Confusion Reigns Where Certainty Should Prevail*, 33 S. TEX. L. REV. 417 (1992).

³⁹⁵ See generally *Davidow v. Inwood N. Prof'l Group - Phase I*, 747 S.W.2d 373, 375 (Tex. 1988) (citing 3 G. Thompson, THOMPSON ON REAL ESTATE §§ 1110, 1115 (1980) for proposition that, at common law, "[a]ll lease covenants were therefore considered independent . . ." and explaining significance of conveyancing as rationale for independent covenants); *Cantile v. Vanity Fair Props.*, 505 S.W.2d 654, 657 (Tex. Civ. App.—San Antonio 1973, writ ref'd n.r.e.) (discussing historical basis for treating covenants in leases as independent covenants).

³⁹⁶ *Buffalo Pipeline Co. v. Bell*, 694 S.W.2d 592, 598 (Tex. App.—Corpus Christi 1985, writ ref'd n.r.e.) (stating that landlord did not have common law right to terminate lease because tenant failed to pay rent); *Shepherd v. Sorrells*, 182 S.W.2d 1009, 1011-12 (Tex. Civ. App.—Eastland 1944, no writ) (stating that breach

³⁹¹ *Id.*

³⁹² TEX. PROP. CODE § 93.002(d).

business with a percentage rent clause,³⁹⁷ to improve the premises,³⁹⁸ to repair the leasehold,³⁹⁹ not to alter the leasehold,⁴⁰⁰ and to record (and presumably not to record) the lease.⁴⁰¹ Under the doctrine of independent covenants, a tenant's failure to perform a lease covenant generally did not excuse the landlord from its obligation to honor

the covenant of quiet enjoyment.⁴⁰² Thus, a landlord did not have the right, at common law, to reenter the premises, to terminate the lease, or to recover unaccrued rent or damages for non-payment of unaccrued rent when a tenant failed to pay rent, *unless* the lease provided the landlord with these remedies or the tenant committed an anticipatory breach of the lease.⁴⁰³ Even a tenant's use of the premises for an illegal purpose ordinarily did not allow a landlord to terminate the lease.⁴⁰⁴

of covenant to pay rent does not breed "forfeiture of possession" by tenant or right of possession by landlord); *Dillingham v. Williams*, 165 S.W.2d 524, 526 (Tex. Civ. App.—El Paso 1942, writ ref'd w.o.m.) (holding that landlord did not have common law right to terminate lease because tenant failed to pay rent).

³⁹⁷ *G. C. Murphy Co. v. Lack*, 404 S.W.2d 853, 957-60 (Tex. Civ. App.—Corpus Christi 1966, writ ref'd n.r.e.) (after noting that lease covenants should be construed to avoid forfeiture, court of civil appeals reversed summary judgment for forfeiture in favor of landlord because tenant's alleged breach of covenant to spend three percent of its gross sales on advertising could be construed to avoid forfeiture).

³⁹⁸ *Foster v. L.M.S. Dev. Co.*, 346 S.W.2d 387, 394 (Tex. Civ. App.—Dallas 1961, writ ref'd n.r.e.) (holding that landlord could not terminate ground lease covering part of land upon which Mercantile Building in downtown Dallas was located after tenant failed to complete improvements within time required by lease because covenant to improve premises ordinarily is treated as an independent covenant, unless the "intention to create a conditional estate is clearly and unequivocally revealed by the language of the instrument.").

³⁹⁹ *Reavis v. Taylor*, 162 S.W.2d 1030, 1032-33 (Tex. Civ. App.—Eastland 1942, writ ref'd w.o.m.) (holding that landlord could not terminate lease when tenant failed to repair fences because covenant to repair ordinarily is not a condition precedent to the landlord's obligations to tenant, and, as a result, tenant's breach does not authorize landlord to terminate lease, unless lease expressly grants this remedy to landlord).

⁴⁰⁰ *Parham v. Glass Lake Club, Inc.*, 533 S.W.2d 96, 98-99 (Tex. Civ. App.—Texarkana 1976, writ ref'd n.r.e.) (stating that landlord could not terminate lease because tenant violated covenant not to fence off lake on leasehold).

⁴⁰¹ *Parten v. Cannon*, 829 S.W.2d 327, 331 (Tex. App.—Waco 1992, no writ) (holding that lessee's failure to properly record oil and gas lease, which constituted breach of express covenant, did not give rise to forfeiture).

1. LANDLORD'S LEGAL REMEDIES FOR BREACH. Thus, in the absence of an anticipatory breach or an express contractual remedy, a landlord, at common law, could (i) treat the contract as binding (*i.e.*, continue to recognize the tenant's right to occupancy and sue for rent as it came due through the earlier of the termination or surrender of the lease or the date of trial), (ii) sue to cancel the lease and repossess the premises, or (iii) in the event the tenant failed to perform any covenant (other than the covenant to pay rent) sue for damages resulting from the tenant's breach.⁴⁰⁵

2. EXAMPLE: LANDLORD'S REMEDIES FOR TENANT'S FAILURE TO REPAIR. The obligation of a tenant to take care of the leased premises, even in

⁴⁰² 2 FRIEDMAN ON LEASES, *Default by Tenant*—General § 16.1, at n. 2 (stating that, at common law, "[n]either nonpayment of rent nor breach of covenant by tenant divested the estate so created or revested landlord with a right of possession. His remedy was to sue for rent or breach of covenant, but with no right to dispossess.").

⁴⁰³ See *supra* footnotes 392-402; see generally 2 FRIEDMAN ON LEASES, *Default by Tenant*—General § 16.1, at n. 2.

⁴⁰⁴ *Moore v. Kirgan*, 250 S.W.2d 759, 767 (Tex. Civ. App.—El Paso 1952, no writ); cf. *Salpas v. State*, 642 S.W.2d 71, 72-73 (Tex. App.—El Paso 1982, no writ) (holding, in appeal of criminal conviction for possession of drugs seized in leased mini-warehouse, that landlord peaceably entered warehouse after tenant failed to pay rent and, therefore, landlord could lawfully allow police to enter premises).

⁴⁰⁵ *Buffalo Pipeline Co.*, 694 S.W.2d at 598; *Walling v. Christie & Hobby, Inc.*, 54 S.W.2d 186, 188 (Tex. Civ. App.—Galveston 1932, no writ).

the absence of an express repair and surrender covenant, is implied in every lease.⁴⁰⁶ Even so, at common law, a landlord could not terminate the lease because its tenant failed to repair the leased premises, unless the lease gave the landlord the right to do so.⁴⁰⁷

a. **Implied Covenant Against Waste.** In the absence of express repair and surrender covenants, a tenant had, and still has, an implied obligation not to commit waste. This duty arises from the landlord-tenant relationship and, unless superseded by an express covenant, obligates the tenant “to make such repairs as are necessary to preserve the property in the condition in which it was when rented, reasonable wear and tear excepted[.]”⁴⁰⁸

(1) **Meaning of Waste.** Waste is an injury to the reversionary interest in land caused by the wrongful act of a tenant or other party rightfully in possession, and [it] is primarily distinguishable from trespass in that trespass is an injury to land caused by the act of one not rightfully in possession.”⁴⁰⁹ Waste includes injury resulting from failure to exercise reasonable care in preserving the property.⁴¹⁰ Because waste requires that the tenant commit a wrongful act or fail to exercise ordinary care, waste does not include deterioration resulting from ordinary wear and tear,

accident, or other causes that are not the fault of the tenant.

(2) **Limitations of Implied Covenant Not to Commit Waste.** This implied covenant is not a promise “to repair generally, but to so use the property as to avoid the necessity for repairs, as far as possible. . . . It has never been so construed as to make a tenant answerable for accidental damages, or to bind him to rebuild, if the buildings are burned down or otherwise destroyed by accident.”⁴¹¹ The tenant’s only obligation under this implied covenant is to use the premises so as not to commit voluntary waste.

b. **Tenant’s Express Repair and Surrender Covenants.** A tenant’s implied duty to prevent waste may be altered by express covenants. Texas courts construe the entire lease to determine the meaning of express covenants “to repair” and “deliver up in good order and condition,” and all covenants bearing upon the tenant’s obligation in this respect are construed together so as to give reasonable meaning to each of them.⁴¹² But a tenant’s obligation to repair “will not be extended or enlarged beyond the plain meaning of language used in the covenants.”⁴¹³ This rule is consistent with the more general proposition that a lease should be construed “most strongly” against the landlord.⁴¹⁴ Thus, a covenant “to repair” or “to keep in repair” is ordinarily construed much the same as a covenant to deliver up the premises in good order and condition.⁴¹⁵

⁴⁰⁶ *R. C. Bowen Estate v. Continental Trailways, Inc.*, 256 S.W.2d 71, 72-73 (Tex. 1953) (citing *Norman v. Stark Grain & Elevator Co.*, 237 S.W. 963, 965 (Tex. Civ. App.—Dallas 1922, writ ref’d); *Great Atlantic & Pacific Tea Co. v. Athens Lodge*, 207 S.W. 2d 217 (Tex. Civ. App.—Ft. Worth 1947, writ ref’d n.r.e.); *Texas Co. v. Gibson*, 88 S.W. 2d 757 (Tex. Civ. App.—Beaumont 1935), *rev’d on other grounds*, 116 S.W. 2d 686 (Tex. 1938)).

⁴⁰⁷ *Reavis v. Taylor*, 162 S.W.2d at 1032-33.

⁴⁰⁸ *R. C. Bowen Estate*, 256 S.W.2d at 72-73.

⁴⁰⁹ *R. C. Bowen Estate*, 256 S.W.2d at 72 (citing *Camden Trust Co. v. Handle*, 132 N.J. Eq. 97, 26 A.2d 865 (N.J. 1942)).

⁴¹⁰ *R. C. Bowen Estate*, 256 S.W.2d at 72-73 (citing *Graffell v. Honeysuckle*, 30 Wash. 2d 390, 191 P. 2d 858 (1948) and *Gade v. National Creamery Co.*, 324 Mass. 515, 87 N.E. 2d 180 (1949)).

⁴¹¹ *United States v. Bostwick*, 94 U.S. 53, 68 (1876).

⁴¹² *Howeth v. Anderson*, 25 Tex. 557 (1860); *see also King v. Richards-Cunningham Co.*, 46 Wyo. 355, 28 P.2d 492 (1934); *Ginsburg v. Jacobson*, 276 Mass. 108, 176 N.E. 918 (1931).

⁴¹³ *Fisher v. Temco Aircraft Corp.*, 324 S.W.2d at 575 (citing *Puget Invest. Co. v. Wenck*, 36 Wash.2d 817, 221 P.2d 459 (1950)).

⁴¹⁴ *See Walling*, 54 S.W.2d at 188; *Pickrell v. Buckler*, 296 S.W. 1062 (Tex. Civ. App.—El Paso), *writ dismissed*, 293 S.W. 667 (Tex. 1927).

⁴¹⁵ *See Fisher v. Temco Aircraft Corp.*, 324 S.W.2d at 575 (citing *Shaffer v. George*, 64 Colo. 47, 171 P. 881, 882 (1917)). *But See Tinsley v. Smith*, 101 N.Y.S. 382,

(1) **Good Repair Covenants.** Leases commonly require the tenant to “keep the premises in good repair and condition, reasonable wear and tear excepted” and to surrender the premises in this condition at the end of the term. These fairly common clauses ordinarily do not contemplate “that the lessees were to become insurers against those casualties which ordinary prudence and foresight could not have guarded.”⁴¹⁶ This means that a lease provision expressly obligating the tenant surrender the property in good condition does not require a tenant to replace stolen fixtures or damage that occurs without fault on the part of

the tenant.⁴¹⁷ But it also means that, absent a contrary provision, a tenant ordinarily is responsible for rebuilding damage caused by the tenant’s negligence. As a general rule, however, any qualification of the of the tenant’s covenant to keep the premises in good repair and condition, such as the ordinary wear and tear exception, also qualifies the tenant’s covenant to surrender the property in good repair at the end of the lease term, even if the qualification is not expressly repeated in the surrender covenant.⁴¹⁸ The converse is generally also true.⁴¹⁹

(2) **Nadler Exception.** In *Nadler v. American Motor Sales Corp.*,⁴²⁰ the fifth circuit recognized that Texas courts have generally determined that the exception for reasonable wear and tear in the surrender covenant “significantly qualifies the lessee’s repair obligations.”⁴²¹ Although the *Nadler* court did not follow the general rule, the court of appeals “emphasiz[ed] that our determination of the

115 A.D. 708, 712 (N.Y. App. Div. 1906) (citing *Payne v. Haine*, 16 Mees & Welsb. 541 for proposition that covenant to **keep** in good repair obligates tenant to **put** the premises in good repair if they were not so at the commencement of the term and citing *White v. Albany Railway* (17 Hun. 98) for proposition that covenant to **make** “necessary repairs” only requires the tenant to make those repairs that the tenant might find necessary for its use of the premises and does not require the tenant to put the premises in better condition than they were at the commencement of the term).

⁴¹⁶ *Miller Billups & Co. v. Morris*, 55 Tex. 412, 419-21 (1881) (holding that tenant’s covenant to “give [landlord] peaceable possession of the said shops, oxen, wagon, houses, mill and gin in as good condition as when delivered to them; that is to say, in good running order, ordinary wear and tear excepted” did not bind [tenant] to rebuild in case of casual destruction of the property by fire, or impose the burden of the loss on them, the jury having found that the fire was not occasioned by their negligence.”); *Howeth v. Anderson*, 25 Tex. 557 (1860) (stating that “[w]here he (the lessee) covenants to surrender the premises at the expiration of the lease, in the same condition they are in at the date of the lease, natural wear and tear excepted, **but without any covenant to repair or rebuild**, he is not bound, in case the buildings are destroyed by fire during the continuance of the term, to put up new buildings in the place of those destroyed[.]” and holding that tenant’s covenant to redeliver sawmill at the expiration of the term in as good order as when it was received, excepting usual wear and tear and unavoidable accidents, did not render tenant liable in damages for the accidental loss of the premises by fire) (emphasis added).

⁴¹⁷ Cf. *B & B Vending Co. v. Carpenter*, 472 S.W.2d 281, 283 (Tex. Civ. App. 1971) (finding that exception of “casualty” in surrender clause exculpated tenant from any liability for disappearance of air conditioner without proving fault on part of tenant).

⁴¹⁸ *Freight Terminals v. Ryder System*, 326 F. Supp. 881, 889 (S.D. Tex. 1971), *aff’d*, 461 F.2d 1046 (5th Cir. 1972); *Fisher v. Temco Aircraft Corp.*, 324 S.W.2d 571, 575 (Tex. Civ. App.—Texarkana 1959, no writ) (holding that surrender covenant excepting “natural deterioration and damage by fire, tornado or other casualty” . . . “could only have been intended to modify, limit, and restrict the obligation of the ‘keep in good repair’ clause”); see also *Parker Plaza West, Ltd. v. Boniuk Invs., Ltd.*, 153 S.W.3d 729 (Tex. App.—Dallas, 2005, no pet.) (concluding that landlord was required to reimburse tenant for roof repairs necessitated by ordinary wear and tear).

⁴¹⁹ *Nadler v. American Motor Sales Corp.*, 764 F.2d 409, 415 (5th Cir. 1985) (acknowledging the general rule but declining to follow it).

⁴²⁰ 764 F.2d 409 (5th Cir. 1985).

⁴²¹ *Nadler*, 764 F.2d at 415.

effect of the [reasonable wear and tear] exception applies only to the facts of this case.”⁴²²

(a) **Facts.** The facts in *Nadler* were not unique. In *Nadler*, the tenant leased a brand-new building, with a state-of-the-art HVAC system, for a 20-year term. The repair covenant obligated the tenant to “take good care of the premises,” but the repair covenant itself did not contain an exception for ordinary wear. The surrender covenant required the tenant to surrender the premises in the “same condition as when received [i.e., new] except for reasonable use and natural wear.” Toward the end of the lease term, the landlord claimed that the tenant was required to repair or replace the HVAC system on the premises. The tenant claimed that it had no obligation to repair or replace the HVAC system to the extent the deterioration was due to ordinary wear and tear.⁴²³

(b) **Reasoning.** To reconcile the conflict between the repair and surrender covenants, the court of appeals refused to “rest our analysis upon scrutiny of the covenants alone, for the words they employ arguably support a finding that the surrender covenant exception significantly qualifies the lessee's repair obligations.”⁴²⁴ Instead, the court of appeals looked to the facts and circumstances surrounding the execution of the lease to determine the parties' intent. The covenants, when considered in light of a lease for a new building, gave rise to the inference that the parties intended the tenant to maintain the premises “as a reasonable and prudent owner would.”⁴²⁵ The court of appeals held that such a lease obligates the tenant to repair or replace the HVAC system if it falls below “good order and condition,” even if reasonable use and natural wear causes its decline. Because of factual disputes in the summary judgment record, the court of appeals remanded the case for the trier of fact to determine

“whether the system remained “in good order and condition” at the end of the term.”⁴²⁶

(3) **Meaning of Good Order and Condition.** The phrase “good order and condition” contemplates an objective standard by which to determine the necessity of repairs. Under this standard, a tenant must repair or replace property that a reasonably prudent owner would repair or replace.⁴²⁷

c. **Asbestos Containing Material (ACM).** ACM is present in many commercial buildings constructed before the early 1980's. Poorly drawn repair and deliver up in good condition covenants could saddle a tenant with unanticipated liability for the cost of asbestos removal or abatement.

(1) **Case Law.** In *Arnot Realty Corp. v. New York Tel. Co.*,⁴²⁸ a New York court held that the tenant, which had the duty to make all necessary structural repairs to leased premises, was not required to abate an asbestos hazard on the premises at the end of the term. The court found that the asbestos hazard was not a condition in need of repair, and the court stated that the tenant would not be required to remedy any asbestos contamination due to ordinary wear and tear. The court, however, rested its holding, in part, on the presumption that the parties, who signed the lease in the early 1970's, did not intend the repair obligation to include removal of asbestos required under laws enacted after the date of the lease. That rationale may no longer be persuasive. In another case, *Mittleman Properties v. Bank of California*,⁴²⁹ the Oregon Supreme Court stated that the tenant's covenant to keep the premises in “good order and condition and to promptly make all necessary repairs” did not require the tenant to remove asbestos that was not a current health hazard or in a state of disrepair. Even this decision, however, leaves open the

⁴²² *Id.* at 416.

⁴²³ *Id.* at 415-16.

⁴²⁴ *Id.* at 415-16.

⁴²⁵ *Id.* at 415-16.

⁴²⁶ *Id.* at 416.

⁴²⁷ *Id.* at 416.

⁴²⁸ 245 A.D.2d 780, 665 N.Y.S.2d 478, 480-81 (N.Y. App. Div. 1997).

⁴²⁹ 131 Ore. App. 666, 886 P.2d 1061 (1994).

possibility that a tenant would be required to remove asbestos that became a health hazard or fell into disrepair during the lease term.

(2) **ACM Statutes and Regulations.** In addition to contractual obligations undertaken in the lease, Federal and state law imposes additional obligations for dealing with ACM. The parties cannot contract out of the obligation to comply with these laws. But a lease in a building containing ACM should specifically spell out which party is responsible for any ACM containment, abatement, or removal required by law during or at the end of the term, and it should specify the extent to which the tenant's contractual obligation (if any) "to comply with applicable laws" applies to any ACM already in the premises before the lease begins.

d. **Mold.** Mold appears to be the ACM of the first decade of this century, and it, too, will likely lead to litigation in which one party to a lease seeks to impose or evade liability for mold remediation based on words that neither party ever thought would apply to mold when they signed the lease.⁴³⁰ At present, there are no statutory rules setting acceptable airborne mold concentrations or remediation measures. Scientific data necessary to prescribe such standards does not yet exist.

e. **Remedies for Breach or Repair and Surrender Covenant.** The measure of damages for breach or the repair and surrender covenants depends on the terms of the lease and, in the case of the repair covenant, whether suit is brought during or after the lease term.

(1) **Suit before end of Term.** When a landlord sues its tenant for injury to the premises before the expiration of the lease term, and the repairs have not been actually made, the proper measure of

damages is not the cost of repair but the injury to the market value of the reversion.⁴³¹

(2) **Suit After End of Term.** A landlord is entitled to the reasonable cost of repairs as the proper measure of damages if the landlord waits to sue for breach of the repair covenant until after the term of the lease expires.⁴³²

(3) **Variations in Measure for Cost of Repair.** In determining the reasonable cost of repair under repair and surrender clauses that except ordinary wear and tear, the tenant may be entitled to deduct from the total repair costs an allowance for the condition of the property before the commencement of the term and for depreciation during the term due to ordinary wear and tear. In *Baroid Division, National Lead Co. v. Early*,⁴³³ the court of appeals found that the trial court's computation of the landlord's damages properly applied the rule "that where a lessee covenanted to return property at the end of the lease in as good condition as when received, ordinary wear and tear excepted, the proper measure of damages was the reasonable cost of repairs necessary to place the building in such good condition."⁴³⁴ The trial court considered the fact that about 16 feet of the building, or approximately 1/4th of its length, was set aside for office purposes and that the only damage in that portion of the building was occasioned by customary wear and tear. The trial court deducted 1/4th of the cost of repairing the entire floor from the landlord's damage claim. The trial court then

⁴³¹ See *Fagan v. Whitcomb*, 14 S.W. 1018 (Tex. Civ. App. 1889, no writ); *Glickman v. DeBerry*, 11 S.W.2d 367 (Tex. Civ. App.—Austin 1928, no writ).

⁴³² See *Siegler v. Robinson*, 600 S.W.2d 382, 386 (Tex. Civ. App.—Houston [1st Dist.] 1980, writ ref'd n.r.e.); *Dunlap v. Mars Plumbing Supply*, 504 S.W.2d 917, 918 (Tex. Civ. App.—San Antonio 1973, no writ); *Whitworth Estate v. Mangels of Texas, Inc.*, 363 S.W.2d 851 (Tex. Civ. App.—Waco 1962, no writ).

⁴³³ 390 S.W.2d 866 (Tex. Civ. App.—Eastland 1965, no writ).

⁴³⁴ *Id.* at 868 (citing *Whitworth Estate*, 363 S.W.2d at 851).

⁴³⁰ Cf. *Lexington Ins. Co. v. Unity/Waterford-Fair Oaks, Ltd.*, 2002 LEXIS 3594 (N.D. Tex. 2002) (analyzing whether mold damage was excluded from coverage under policy exclusion for pollution and contamination).

estimated that the floor, which had been in the building over a period of 11 or 12 years, had depreciated by approximately 30% before the lease term began. The Court then reduced the total repair cost, less the 25% allowance for ordinary wear and tear, by another 30% to account for depreciation that occurred before the lease began.

(4) **Breach of Surrender Covenant.** A landlord's claim for breach of the surrender covenant does not accrue until the lease ends.⁴³⁵

3. EQUITABLE REMEDIES. In addition to these common law legal remedies, a landlord could seek equitable relief as a means to enforce certain of its tenant's obligations. Obtaining equitable relief, however, is sometimes difficult and almost always expensive. Specific enforcement of a tenant's continuing obligations (e.g., a covenant to operate) is rarely available because courts are unwilling to order, and then monitor, continuous activity over an extended period of time.⁴³⁶ Moreover, to obtain injunctive relief prohibiting a tenant from breaching a lease covenant, a landlord must prove that (i) it has a probable right to prevail on the merits; (ii) it has suffered, or will suffer, immediate and irreparable harm; and (iii) it has no adequate

remedy at law.⁴³⁷ Given the difficulty of satisfying these requirements, equitable relief is often unavailable. and, even when it might be available in theory, it is sometimes ill suited to remedy the particular breach. In the case of a tenant's failure to pay rent, equitable relief generally is of no help at all.

B. FOUR (NOW THREE) COMMON LAW REMEDIES FOR ANTICIPATORY BREACH. Before the adoption of a duty to mitigate in 1997, Texas law traditionally granted a landlord certain remedies, in addition to those available for breach of a lease covenant at common law, if a tenant committed an anticipatory breach of the lease. Because the most common type of anticipatory breach requires the tenant to abandon the premises *and* quit paying rent, the common law remedies for anticipatory breach were not much help to a landlord if a tenant quit paying rent but kept possession of the premises.

1. ANTICIPATORY BREACH. Any combination of words or conduct by which the tenant "unconditionally repudiates liability for further performance" may constitute an anticipatory breach of a lease.⁴³⁸ Anticipatory breach usually falls into one of two categories. A tenant may commit an anticipatory breach by expressly repudiating its own obligations, thus forfeiting its rights under the lease.⁴³⁹ Or a tenant may commit an anticipatory breach by failing to pay rent *and* abandoning the leased premises.⁴⁴⁰

2. TRADITIONAL REMEDIES FOR ANTICIPATORY BREACH. In *Speedee Mart, Inc. v.*

⁴³⁵ *City Hotel Co. v. Aumont Hotel Co.*, 107 S.W.2d 1094, 1095 (Tex. Civ. App. — San Antonio 1937, no writ) (citations omitted) ("The courts have uniformly observed a distinction between a covenant upon the part of a lessee to keep leased premises in repair, and a covenant to deliver up the premises at the expiration of the term in as good condition of repair as they were at the beginning of the term. A covenant to keep in repair requires the tenant to keep the premises in repair at all times during the term, and if he permits them to get out of repair at any time, the lessor, upon that breach, may sue during the term as for injury to the reversion; whereas, on a covenant to leave the premises in as good condition as he found them, no action will lie against the lessee until the end of the term, for obvious reasons.").

⁴³⁶ *Canteen Corp. v. Republic of Texas Props., Inc.*, 773 S.W.2d 398, 400-01 (Tex. App.—Dallas 1989, no writ) (affirming, in suit brought to enforce continuous operation clause, portion of judgment that enjoined tenant from maintaining vending machine operation but reversing portion of judgment that ordered tenant to operate continuously restaurant as required by lease).

⁴³⁷ TEX. R. CIV. P. 680, 683.

⁴³⁸ *Miller v. Vinyard*, 765 S.W.2d 865, 869 (Tex. App.—Austin 1989, writ denied) (citing *Wukasch v. Hoover*, 247 S.W.2d 593, 597 (Tex. Civ. App.—Austin 1952), *aff'd*, 254 S.W.2d 507 (Tex. 1953)).

⁴³⁹ *Wukasch*, 247 S.W.2d at 597 (holding that letter sent to landlord after tenant abandoned leased premises, which stated tenant would no longer pay rent, constituted anticipatory breach).

⁴⁴⁰ *Early v. Isaacson*, 31 S.W.2d 515, 517 (Tex. Civ. App.—Amarillo 1930, writ *ref'd*).

Stovall,⁴⁴¹ the Amarillo Court of Appeals identified what it called the four “common law remedies” available to a landlord upon a tenant’s anticipatory breach:

- the landlord could decline to repossess, elect instead to keep the lease in full force and effect, and sue month-to-month for contractual rent as it came due;
- the landlord could treat the tenant’s conduct as an anticipatory breach, repossess the property for its own purposes, and recover the present value of future lease payments less the reasonable market value for the unexpired term;
- the landlord could treat the tenant’s conduct as an anticipatory breach, repossess the premises, relet to another tenant for the benefit of the original tenant, and recover from the original tenant the difference between the rent under the original lease and the rent under the new lease; and
- the landlord could declare the lease forfeited, thus relieving the tenant of the obligation to pay unaccrued rent.⁴⁴²

The court of appeals in *Speedee Mart* states that these 4 remedies “common law remedies [are] available unless the parties contract otherwise.”⁴⁴³ There is a legitimate question – probably academic given the number cites to *Speedee Mart* – about the extent to which these 4 remedies are truly common law remedies or remedies that depend, to one extent

or another, on the contractual default or a remedy provisions in a given lease.⁴⁴⁴

a. Changes to Landlord’s Four Traditional Remedies. The adoption of a duty to mitigate in 1997 has modified a landlord’s remedies for anticipatory breach.⁴⁴⁵ One remedy — electing not to repossess and suing on the lease — is no longer available in most instances; a landlord must satisfy its duty to mitigate in order to recover rent between the time the tenant abandons the premises in breach of the lease and the time the landlord relets the premises. A landlord’s remaining remedies, or at least the damage measures incorporated into each of them, should not have been affected significantly by the adoption of a duty to mitigate.⁴⁴⁶ Texas law

⁴⁴⁴ See *Austin Hill Country Realty, Inc.*, 948 S.W.2d at 300 (citing *Speedee Mart* for proposition that “Texas courts have regarded the landlord as having four causes of action against a tenant for breach of the lease and abandonment.”).

⁴⁴⁵ *Austin Hill Country Realty, Inc.*, 948 S.W.2d at 299-300; TEX. PROP. CODE § 91.006; see generally Note, *Better Late than Never: Texas Landlords Owe a Duty to Mitigate Damages When a Tenant Abandons Leased Property: Austin Hill Country Realty, Inc. v. Palisades Plaza, Inc.*, 28 TEX. TECH L. REV. 1281 (1997).

⁴⁴⁶ See generally *Marathon Oil Co. v. Edwards*, 96 S.W.2d 551, 552 (Tex. Civ. App.—Amarillo 1936, writ dismissed) (explaining that landlord had the right, after breach of contract and abandonment of premises by tenant, to sue for damages measured by “the difference between the contract price for the whole period and such sum as they may have received by way of rentals from third parties, **after use of due diligence to obtain tenants.**”) (emphasis added); *White v. Watkins*, 385 S.W.2d 267, 270 (Tex. Civ. App.—Waco 1964, no writ) (“Where the tenant abandons the premises, the lessor, as one remedy, may accept the breach by the tenant, retake possession and sue for his damages If he elects this remedy and has relet the premises for the entire unexpired term, the measure of lessor’s damages is generally the difference between the rental originally contracted for and that realized from reletting.” Or if the landlord chose not to relet, it could sue for damages measured by “the difference between the present value of the rentals contracted for in the lease and the reasonable cash market value of the lease for its unexpired term.”); *Stewart v. Kuskin & Rotberg, Inc.*,

⁴⁴¹ 664 S.W.2d 174 (Tex. App.—Amarillo 1983, no writ).

⁴⁴² *Speedee Mart*, 664 S.W.2d at 177; see also *Lakeside Leasing Corp. v. Kirkwood Atrium Office Park Phase 3*, 750 S.W.2d 847, 852 (Tex. App.—Houston [14th Dist.] 1988, no writ) (listing first three *Speedee Mart* remedies as among those “traditionally available” at Texas common law and citing *Speedee Mart* and other decisions).

⁴⁴³ *Speedee Mart*, 664 S.W.2d at 177.

long included the substantial equivalent of a duty to mitigate in the measures of damages a landlord could recover once a landlord elected to reenter and relet, or attempt to relet, the premises. What should have happened and what has happened appear to be two different things. For, as one commentator has said, the court “changed centuries-old law with very little understanding of the law they have changed.”⁴⁴⁷ These changes are also discussed in the section of the outline on tenant defenses.⁴⁴⁸

b. Option No. 1: Maintaining Lease Replaced by Duty to Mitigate. Under the Texas Supreme Court’s decision in *Austin Hill Country Realty, Inc.*⁴⁴⁹ and the mitigation statute, a landlord no longer has the option, which was available at common law after a tenant abandoned the premises,⁴⁵⁰ to maintain the lease in force (or, from

106 S.W.2d 1074, 1075 (Tex. Civ. App.—Texarkana 1937, no writ) (stating that landlord was not entitled to recover damages under contractual reenter and relet clause because landlord failed to show amount of rent paid by its tenant or months occupied by tenant, amounts received on reletting, the items and necessity for any repairs, and the diligence and efforts made to relet the premises).

⁴⁴⁷ Weatherbie, *Annual Survey of Texas Law — Real Property*, 51 SMU LAW REV. 1321, 1335 (1998); see *Cash Am. Int’l v. Hampton Place, Inc.*, 955 S.W.2d 459, 463 (Tex. App.—Fort Worth 1997, pet. denied) (stating that mitigation instruction required in *Austin Hill Country Realty, Inc.* “permits the jury to weigh evidence of the amount of money, if any, lost by the landlord’s failure to exercise reasonable care in maintaining and managing the property, which would reduce the cash market value of the lease and thus reduce the damages owed the landlord); see generally Bliss, *Mitigation of Landlord’s Damages: Deconstructing Austin Hill County Realty*, SMU REAL ESTATE LAW: LEASE IN DEPTH (1998), at pp. 10-11 (explaining why Bliss believes *Cash America* is erroneous).

⁴⁴⁸ See *supra* at pp. 63-82.

⁴⁴⁹ 948 S.W.2d 293 (Tex. 1997).

⁴⁵⁰ *Marathon Oil Co.*, 96 S.W.2d at 552 (explaining that, at common law, “[a landlord] had the right to decline to meddle with the property, to take possession, or to lease it to other parties and wait until the end of the term stated in the lease and then sue for rent, but they were not driven to that course. The law did not require

a tenant’s perspective, sit on its haunches), without any obligation to relet, and then sue “on the lease” for each installment of rent as it came due.⁴⁵¹ Under a lease to which the duty to mitigate applies, the landlord’s right to recover rent between the time the tenant abandons the premises in breach of its lease and the time landlord relets the premises is conditioned on the landlord’s ability to overcome the tenant’s mitigation defense by showing that the landlord used commercially reasonable efforts to relet the premises. What it takes to satisfy this duty is discussed more fully in Section VII on tenant defenses.

c. Option No. 2: Re-enter and Hold the Premises. Under the traditional rules, a landlord could elect to treat the tenant’s conduct as an anticipatory breach, accept the tenant’s repudiation of the lease, repossess the property for the landlord’s own purposes, without reletting or attempting to do so, and recover the present value of the difference between the unaccrued lease payments and the reasonable market rental value of the premises for the unexpired term.⁴⁵² This option did not require a landlord actually to exercise any diligence to relet the premises.⁴⁵³ The credit given to the tenant for the fair market rental value of the lease term, however, served as a reasonable estimate of the amount that the landlord would have received by reletting had the landlord actually exercised reasonable diligence to do so.⁴⁵⁴ In other

them to run the risk of damages to the property, and the insolvency of the tenants . . .”).

⁴⁵¹ See *Compare Austin Hill Country Realty, Inc.*, 948 S.W.2d at 299 (holding that landlord cannot maintain lease in force without reletting) with *Shepherd*, 182 S.W.2d at 1011-12 (stating that landlord had right to maintain lease in force and sue for each installment of unaccrued rent as it came due); *Walling*, 54 S.W.2d at 188 (stating that landlord had right to maintain lease in force and sue for each installment of unaccrued rent as it came due).

⁴⁵² *White*, 385 S.W.2d at 270.

⁴⁵³ *White*, 385 S.W.2d at 270.

⁴⁵⁴ *White*, 385 S.W.2d at 270 (stating that “the measure of damages is the difference between the present value of the rentals contracted for in the lease

words, this measure of damages already incorporated a mitigation credit.

Texas courts arguably have not left well enough alone. One court of appeals, according to one commentator,⁴⁵⁵ has arguably sanctioned giving a jury instruction in anticipatory breach cases that allows a tenant redundant credit against its unpaid rental obligation.⁴⁵⁶ Even the mitigation instruction is only intended to permit the jury to weigh evidence of the amount of money, if any, **lost by the landlord's failure to exercise reasonable care in maintaining and managing the property**, which would reduce the cash market value of the lease and thus reduce the damages owed the landlord, the instruction does not limit the jury's consideration of other factors.⁴⁵⁷ The option to reenter and hold the premises should have survived the adoption of the

duty to mitigate essentially unchanged, but it is not certain that it has done so.⁴⁵⁸

d. Option No. 3: Re-enter and Relet. Under the traditional rules, a landlord also could elect to treat its tenant's conduct as an anticipatory breach, accept repudiation of the lease, repossess the premises, relet to another tenant for the benefit of the original tenant, and recover from the original tenant the present value of the difference between the rent under the original lease and the rent received and to be received under the new lease.⁴⁵⁹ Before Texas formally adopted a duty to mitigate, some courts had held that this traditional option "amounts to an election by the landlord of assuming a duty to mitigate his damages."⁴⁶⁰

and the reasonable cash market value of the lease for its unexpired term.").

⁴⁵⁵ *Cash Am. Int'l.*, 955 S.W.2d at 462 (stating that supreme court reversed and remanded *Austin Hill Country Realty, Inc.* because trial court refused to give this instruction: "Consider the following elements of damages, if any, and none other: You are instructed that the Landlord can recover as damages the present value of the rentals that accrue under the lease, reduced by the reasonable cash market value of the lease for the unexpired term . . . Do not include in your answer any amount that you find . . . [landlord] could have avoided by the exercise of reasonable care."); see generally Bliss, *Mitigation of Landlord's Damages: Deconstructing Austin Hill County Realty*, SMU REAL ESTATE LAW: LEASE IN DEPTH (1998), at pp. 10-11 (explaining why he considers *Cash America* to be erroneous).

⁴⁵⁶ See *Cash Am. Int'l.*, 955 S.W.2d at 463 ("The mitigation instruction sanctioned by the Texas Supreme Court asks the jury to reduce damages by not only the reasonable cash market value for the unexpired term, but also by the amount of damages, if any, that could have been avoided had the landlord used "reasonable care" in reletting the premises. This additional instruction permits the jury to weigh evidence of the amount of money, if any, lost by the landlord's failure to exercise reasonable care in maintaining and managing the property, which would reduce the cash market value of the lease and thus reduce the damages owed the landlord.").

⁴⁵⁷ *Austin Hill Country Realty, Inc.*, 948 S.W.2d at 299-300; *Cash Am. Int'l.*, 955 S.W.2d at 463.

⁴⁵⁸ *Harrison Riverside Ltd. P'ship v. Eagle Affiliates, Inc.*, 770 A.2d 490 (N.J. Super. App. Div. 1998) (citing *Austin Hill Country Realty, Inc.* and other cases for proposition that duty to mitigate reduces landlord's recovery only to extent losses reasonably could have been avoided).

⁴⁵⁹ *White*, 385 S.W.2d at 270 (stating that "[w]here the tenant abandons the premises, the lessor, as one remedy, may accept the breach by the tenant, retake possession and sue for his damages If he elects this remedy and has relet the premises for the entire unexpired term, the measure of lessor's damages is generally the difference between the rental originally contracted for and that realized from reletting.").

⁴⁶⁰ *Millison v. Clarke*, 413 A.2d 198, 207 (Md. 1980) (citing *Williams v. Kaiser Aluminum & Chem. Sales, Inc.*, 396 F. Supp. 288, 292-93 (N.D. Tex. 1975) (applying Texas law)); see *C.R. Miller & Bro. v. Nigro*, 230 S.W. 511, 512 (Tex. Civ. App. – Amarillo 1921, no writ) (stating that, if landlord used "due precaution or diligence" in making new rental contract, and it was fairly and honestly made, "tenant has no grounds to complain"); *Robinson Seed & Plant Co. v. Hexter & Kramer*, 167 S.W. 749, 751 (Tex. Civ. App. – Dallas 1914, writ ref'd) (stating that landlord had duty to exercise ordinary diligence to relet after resuming control of premises, which is the correct rule; but landlord's refusal to accept two proposed tenants was not a breach of this duty since replacement tenants would accept premises only on condition that landlord extend the defaulting tenant's unexpired lease for a long period of time for the same rent).

The practical effect of the landlord's duty to mitigate on this remedy is twofold. First, the landlord, unlike before, must use objectively reasonable efforts to relet as a condition of its right to recover rent, as it accrues, before any actual reletting. Second, based on mitigation cases in other jurisdictions, the fact finder, to a greater degree than under prior Texas law, is permitted to examine the terms of the replacement tenant's lease to determine whether the amount of the credit resulting from an actual reletting is objectively reasonable.

e. Option No. 4: Declare a Forfeiture. A landlord may declare the lease forfeited, thus relieving the tenant of the obligation to pay unaccrued rent, and sue for any unpaid rent that accrued before the forfeiture.⁴⁶¹ If a landlord terminates the lease, it may recover any unpaid rent due before termination, but not any damages for rent that otherwise would have accrued after the termination date, unless the lease expressly permits such a recovery.⁴⁶² Under this option, the landlord's right to recover rent in the period between the tenant's abandonment and the landlord's termination of the lease is conditioned on the landlord satisfying its duty to mitigate, even though no reletting actually occurs.

f. How should the jury compute the mitigation credit in this example? The tenant abandons its lease with 3 years left in the term. Its lease purports to require the tenant to pay all costs of reletting. The landlord takes 1 year to relet. The landlord then relets to a replacement tenant for a 5-year term, creating a 2-year overlap between the defaulting tenant's lease and the replacement tenant's lease. The replacement tenant receives free rent for the first year of the term, agrees to pay rent that is \$2 per square foot less than the rent in the defaulting tenant's lease for the next year, and agrees to pay rent at \$4 per square foot above the defaulting tenant's rent over the final 3 years of its

lease. The higher rent commences the day after the defaulting tenant's lease would have expired by its terms. The landlord seeks to recover all of the broker's commissions and the tenant finish incurred for the replacement tenant, the rent during the year the premises were vacant, plus the difference between the rent due during the last 2 years of defaulting tenant's lease and the rent due during the first 2 years of the replacement tenant's lease.

g. Scope of Duty to Mitigate. What a landlord must do to satisfy its duty to mitigate, once that duty arises, and how mitigation credits should be applied, are discussed in Section VII on tenant's defenses.

C. LANDLORD'S CONTRACTUAL REMEDIES. An historical reason for the length of the contractual default and remedies sections of a commercial lease is the dearth of practical common law remedies for a tenant's breach and the limited circumstances under which the 4 *Speedee Mart* remedies were available. A practical reason for revising these sections in form leases is the even greater legal uncertainty about measuring a landlord's damages now that Texas has adopted a duty to mitigate. Carefully drafted default and remedies provisions can close some of the loopholes in a landlord's common law remedies, can define – within reason – the landlord's duty to mitigate, and can make the enforcement process less time consuming, more predictable, and less expensive. The parties' right to craft default and remedies provisions in a lease is broad, but it is not unlimited. Even though a lease may state that the landlord's remedies are both alternative and cumulative, a court may limit the landlord's ability to exercise cumulative remedies if they are "clearly inconsistent" or would "permit[] the lessor a measure of recovery far in excess of just compensation."⁴⁶³

⁴⁶¹ See *Rohrt v. Kelley Mfg. Co.*, 349 S.W.2d 95, 98 (Tex. 1961).

⁴⁶² See *Rohrt*, 349 S.W.2d at 98.

⁴⁶³ See *American Lease Plan v. Ben-Kro Corp.*, 508 S.W.2d 937, 943 (Tex. Civ. App.—Houston [1st Dist.] 1974, writ ref'd n.r.e.) (holding, in a case involving a personal property lease, that landlord could elect to treat tenant's failure to pay rent as continuing breach and sue on lease for monthly rental payments or treat it as an anticipatory breach and sue for damages but that landlord could not repossess leased property and sue for

1. **CONTRACTUAL DEFAULTS.** In most commercial leases, the default section greatly expands the acts and omissions that will entitle the landlord to terminate the lease or exercise a panoply of other contractual remedies.⁴⁶⁴ The default provisions in a lease should be examined to determine if the defined defaults trigger the remedies appropriate to the landlord's needs.

a. **Vacating, Deserting, and Abandoning.** These words, or some combination of the 3, describe an event of default under many retail leases. Texas cases recognize that "[t]he ordinary meanings of 'abandon' and 'vacate' are different . . .," and, accordingly, the cases hold that the proof to establish a tenant abandoned, as opposed to merely vacated, the premises is different.⁴⁶⁵

(1) ***Vacate.*** "[V]acate' . . . means to make vacant, and vacant, in turn means 'being **without content or occupant**.'"⁴⁶⁶ "Vacate 'does not require an intent to forsake.'"⁴⁶⁷ If either the tenant or a substantial amount of property remain in the premises, the premises are not "vacant," which, in turn, means the landlord should not exercise any remedy that is contingent on the tenant vacating the premises.

(2) ***Desert.*** Desert is not synonymous with the term vacate.⁴⁶⁸ The Fifth Circuit Court of Appeals,

unaccrued rents as they came due).

⁴⁶⁴ See **ADDENDUM 1**.

⁴⁶⁵ *PRC Kentron, Inc. v. First City Ctr. Assocs. II*, 762 S.W.2d 279, 282 (Tex. App. – Dallas 1988, writ denied).

⁴⁶⁶ 762 S.W.2d at 282 (emphasis added). Cf. *Phoenix Assur. Co. v. Shepherd*, 137 S.W.2d 996 (Tex. 1990) (stating, in an insurance coverage case, that "vacant" means deprived of contents or empty); *Germania v. Anderson*, 463 S.W.2d 24, 25 (Tex. Civ. App. – Waco 1971, no writ); *Knoff v. United States Fidelity*, 447 S.W.2d 497, 501 (Tex. Civ. App. – Houston [1st Dist.] 1969, no writ).

⁴⁶⁷ *PRC Kenton, Inc.*, 762 S.W.2d at 282.

⁴⁶⁸ *Scot Props. v. Wal-Mart Stores*, 138 F.3d 571, 573 (5th Cir. 1998).

relying on the distinction between vacate and desert articulated by Justice Hecht in *PRC Kentron, Inc.*, stated that "'vacate' sets up a lower standard than 'desert' . . . '[D]esert' contains an element of 'intent to forsake' which is more fully suggested by the term 'abandon.' . . . 'Vacate' does not contain that element."⁴⁶⁹

(3) ***Abandon.*** "'[A]bandon' includes an element of intent present only to a lesser extent in the meaning of 'vacate.' . . . [T]he principal meaning of abandon is 'to cease to assert or exercise any interest, right, or title especially with the intent of never reasserting it.'"⁴⁷⁰ "An essential element of abandonment is the intention to abandon, and such intention must be shown by clear and convincing evidence; while abandonment may be shown by circumstances, the circumstances must consist of some definite act showing an intent to abandon. Nonuse alone is insufficient to show abandonment, without being long, continuous, and unexplained."⁴⁷¹ A tenant who closes its business and moves out of the premises, but who continues to pay rent, has not "abandoned" the premises.⁴⁷²

b. **Relating Vacating, Deserting, Abandoning, Vacating, Mitigating, Assigning and Subletting.** When vacating, deserting, or abandoning is not a default under the lease, or the lease either contains no covenant by the tenant to operate or grants the tenant an express right to go dark, the landlord very likely does not have a right to reenter and relet dark space as long as the tenant continues to pay rent.

(1) ***Mitigation.*** Under *Austin Hill Country Realty, Inc. v. Palisades Plaza, Inc.*,⁴⁷³ a landlord does not have a duty to mitigate unless the landlord has the right to re-enter after the tenant's default,

⁴⁶⁹ 138 F.3d at 573-74.

⁴⁷⁰ 138 F.3d at 573-74.

⁴⁷¹ *City of Anson v. Arnett*, 250 S.W.2d 450, 454 (Tex. Civ. App. – Eastland 1962, writ ref'd n.r.e.).

⁴⁷² See *Lucky v. Fidelity Union Life Ins. Co.*, 339 S.W.2d 956, 958 (Tex. Civ. App. – Dallas 1960, no writ).

⁴⁷³ 948 S.W.2d 293 (Tex. 1997).

and even if the landlord has the right to re-enter, the duty to mitigate does not arise until the tenant abandons or vacates the premises in breach of the lease.⁴⁷⁴ Under section 91.006 of the Texas Property Code, a landlord's statutory duty to mitigate does not arise until its tenant abandons the premises in breach of the lease.⁴⁷⁵ Some commentators have questioned whether the duty to mitigate arises if vacating, deserting, or abandoning the premises is not an event of default.

(2) **Landlord's Problem.** If a tenant with the right to do so goes dark but continues paying rent, it has not abandoned in breach of its lease and is not in default; as a result, the landlord ordinarily does not have a right to reenter and relet, and the landlord cannot ground a right to relet on the duty to mitigate. This means that the tenant could be in a position to hold dark space hostage, unless the landlord expressly reserves the right to recapture and relet it.

(3) **Assignment & Subletting.** If a lease permits the tenant to go dark, and it does not give the landlord the right to recapture dark space, the assignment and subletting provisions of the lease will determine the extent to which the tenant has any right, or obligation, to relet dark space. Again, a lease that does not give the landlord the right to recapture dark space, or that does not affirmatively obligate the tenant to relet dark space, could allow the tenant to hold dark space hostage.

(4) **Abuse of Notice & Cure.** A tenant's breach of its covenant to operate is a non-monetary default. A lease often gives a tenant a specified period of time (30 days) after notice within which to begin, to pursue diligently, and to complete the cure of any non-monetary default. A covenant to operate is

susceptible of particular abuse. A tenant may go dark, remain dark until the 29th day of the 30 day notice and cure period, cure the default by opening for a day, and then go dark the next day, forcing landlord to give a new notice and opportunity to cure. A landlord may want to carve out this type of violation from the general non-monetary default provision or, perhaps, provide that landlord would not be obligated to give notice of such default and opportunity to cure if it occurs more than once or twice during the term of the lease.⁴⁷⁶

2. RELATIONSHIP BETWEEN EXPRESS DEFAULTS AND CONTRACTUAL REMEDIES. Defaults trigger a landlord's right to exercise certain remedies, including termination or forfeiture of the tenant's lease or right to possession. Covenants in a lease are construed to avoid forfeitures, and courts are reluctant to enforce termination of a lease for breach of a "mere covenant," unless the terms of the lease demonstrate clearly that the parties intended the tenant's performance of that covenant to be a condition to its continued rights under the lease.⁴⁷⁷

3. FORFEITURE OR TERMINATION. A landlord may terminate a lease, or tenant's right to possession, pursuant to an express forfeiture provision.⁴⁷⁸ Forfeiture is contractual penalty distinct from the equitable remedy of rescission:

A forfeiture is a penalty provided by *the terms of the agreement* for a breach of a covenant in the agreement. Rescission, on the other hand, is an equitable remedy that terminates a lease by force of law and is independent of any provision of the lease agreement. The practical effect is the same: the tenant's obligation to pay rent ends at the time of forfeiture or rescission. . . . A corollary

⁴⁷⁴ 948 S.W.2d at 299-300 (common law duty to mitigate applies to leases entered into before September 1, 1997, but parties may waive common law duty to mitigate).

⁴⁷⁵ TEX. PROP. CODE ANN. § 91.006(a)(statutory duty to mitigate applies to leases entered into on or after September 1, 1997, but any waiver of statutory duty is void).

⁴⁷⁶ See Dow, *supra*, at n. 2.

⁴⁷⁷ *Parten v. Cannon*, 829 S.W.2d 327, 330 (Tex. App.—Waco 1992, no writ) (citing *Rogers v. Ricane Enters., Inc.*, 772 S.W.2d 76, 79 (Tex. 1989)); *G.C. Murphy Co.*, 404 S.W.2d at 858.

⁴⁷⁸ *Rohrt*, 349 S.W.2d at 97-98.

of this rule is that the tenant's obligation to pay rent continues until such an event occurs.⁴⁷⁹

By successfully terminating a lease, the landlord relinquishes any right to recover unaccrued rents "as if the termination date were the date originally fixed for the expiration of the term . . . of the lease."⁴⁸⁰ By properly terminating the tenant's right to possession, as opposed to the lease, a landlord can remove the tenant from the premises and preserve its claims for damages.⁴⁸¹ It is often said, however, that the law "abhors a forfeiture."⁴⁸² Thus, "if there is any doubt as to the meaning of the language in the lease then the uncertainty would be resolved against the lessor to prevent a forfeiture."⁴⁸³ Courts will sometimes invoke principles of equity to relieve a tenant of a forfeiture, even though the terms of the lease seem to allow it.⁴⁸⁴

⁴⁷⁹ *Miller*, 765 S.W.2d at 867 (emphasis in original).

⁴⁸⁰ *Rohrt*, 349 S.W.2d at 97-98.

⁴⁸¹ *Cavalcade Oil Corp. v. Samuel*, 746 S.W.2d 842, 843-44 (Tex. App.—El Paso 1988, writ denied).

⁴⁸² *G.C. Murphy Co.*, 404 S.W.2d at 858.

⁴⁸³ See *id.* at 856 (reversing summary judgment enforcing forfeiture because term "advertising" in clause that required tenant to spend three percent of its gross sales on advertising could have been construed more broadly to avoid forfeiture).

⁴⁸⁴ See, e.g., *Inn of the Hills, Ltd. v. Schulgen & Kaiser*, 723 S.W.2d 299, 301 (Tex. App.—San Antonio 1987, writ ref'd n.r.e.) (citing *Jones v. Gibbs*, 130 S.W.2d 265 (Tex. 1939) and stating that "[i]n cases of mere neglect in fulfilling a condition precedent of the lease, which do not fall within accident or mistake, equity will relieve when the delay has been slight, the loss to the lessor small, and when not to grant relief would result in such hardship to the tenant as to make it unconscionable to enforce literally the condition precedent of the lease."). But see, e.g., *Reynolds-Penland Co. v. Hexter & Lobello*, 567 S.W.2d 237, 239-40 (Tex. App.—Dallas 1978, writ dism'd by agr.) (stating that equity will not intervene to prevent a forfeiture and that neglect is not grounds for waiving a condition precedent). See generally *Crown Const. Co. v. Huddleston*, 961 S.W.2d 552, 557-59 (Tex. App.—San Antonio 1997, no pet.) (noting that Dallas Court of Appeals has refused to apply disproportionate

4. RE-ENTRY AND RELETING. Commercial leases usually provide that the landlord may re-enter the premises and relet, or attempt to relet, for the account of, or as agent for, the tenant, *without terminating the lease*. A well drafted reentry and reletting clause, at a minimum, should prescribe how any actual or promised payments from a substitute tenant will be credited against unpaid rent and other sums due under the original lease.

a. Reletting for a Higher Rate or Different Term. The remedies section in a lease should prescribe how any rents from a reletting will be treated. If, for example, a landlord relets the premises over only a portion of the remaining term, but at a rental rate higher than that stipulated in the defaulting tenant's lease, should the excess rent paid by the substitute tenant in one time period be credited toward the tenant's liability for rents that accrued under the tenant's lease in another time period, and, if so, how? One court of appeals faced with this question did not require the landlord to credit the *excess* rents from reletting in one period against a deficiency in another period.⁴⁸⁵ But, in light of *Austin Hill Country Realty, Inc.* and the mitigation statute, the result may not be the same today.⁴⁸⁶

b. "Right, but not the Obligation, to Relet." Such familiar phrases negate the duty to mitigate in leases to which the statutory duty to mitigate does not apply — i.e. leases entered into before

forfeiture doctrine but that San Antonio Court of Appeals has recognized doctrine).

⁴⁸⁵ See *Maida v. Main Building of Houston*, 473 S.W.2d 648, 652-63 (Tex. Civ. App.—Houston [14th Dist.] 1971, no writ) (awarding landlord unpaid rents to date of trial, less the proceeds of reletting through the date of trial, plus renovation costs associated with reletting).

⁴⁸⁶ See *supra* note 445 (citing mitigation statute) and *infra* notes 546-577 (discussing credits of excess rents from reletting in one period against rental deficiency in another period or against other damages).

September 1, 1997.⁴⁸⁷ In *Austin Hill Country Realty, Inc.*, the supreme court stated that a commercial landlord may avoid the duty to mitigate by contracting otherwise.⁴⁸⁸ In *Stucki v. Noble*,⁴⁸⁹ the court of appeals held that the phrase “the landlord has no obligation ‘to relet or attempt to relet the premises’ in the event of the tenant’s default . . .” was sufficient to relieve the landlord of any duty to mitigate its damages under *Austin Hill Country, Inc.* But any attempt to waive the duty to mitigate in a lease entered into on or after September 1, 1997, is probably void.⁴⁹⁰ In new leases, this familiar phrase could mislead some poor landlord, who is too busy managing his property to keep up with the latest legal developments, into believing that it is still free of any duty to mitigate.

c. “By Force if Necessary.” Many commercial leases purport to authorize a landlord to re-enter the premises “by force if necessary, and without liability for any act or omission of the landlord or its agents in connection with such reentry.” Retaining this familiar phrase in lease forms may be hazardous. The phrase does not

mean what many landlords believe it does — a landlord cannot reenter or repossess the premises if doing so will breach the peace.⁴⁹¹ And, in all probability, a landlord who tries will be held liable for any damages caused in the attempt.

5. LIQUIDATED DAMAGE CLAUSES. Well drafted liquidated damage clauses can be of great practical benefit to a landlord, provided the clause does not constitute a penalty. As the Texas Supreme Court explained:

The right of competent parties to make their own bargains is not unlimited. The universal rule for measuring damages for the breach of contract is just compensation for the loss or damage actually sustained. By the operation of that rule a party generally should be awarded neither less nor more than that party’s actual damages. A party has no right to have a court enforce a stipulation in a contract that violates the principle underlying that rule.⁴⁹²

Any “stipulation in a contract,” not just a rental acceleration clause or a provision labeled “Liquidated Damages,” may violate the principle of just compensation. As a consequence, the default and remedies provisions in lease forms should be reviewed to assess the risk that one or more of the landlord’s stipulated remedies may allow the landlord to recover more than “just compensation for the loss or damage actually sustained.”

a. Test of Enforceability. In *Stewart v. Basey*,⁴⁹³ the Texas Supreme Court, noting that “[v]olumes have been written . . .” on the subject, announced this test to determine whether a liquidated damages clause is enforceable or void as a penalty:

(1) An agreement, made in advance of breach fixing the damages therefor, is not enforceable as

⁴⁸⁷ Act of June 20, 1997, 75th Leg. R.S., S.B. 1678, § 8 (codified at TEX. PROP. CODE § 91.006(b) (stating that any provision in lease signed after September 1, 1997, purporting to waive duty to mitigate is void)).

⁴⁸⁸ See 948 S.W.2d 299; *Stucki v. Noble*, 963 S.W.2d 776, 781 (Tex. App.—San Antonio 1998, pet. denied) (holding that tenant must prove landlord failed to mitigate and how much landlord’s damages were increased by such failure).

⁴⁸⁹ 963 S.W.2d 776, 781 (Tex. App.—San Antonio 1998, pet. denied).

⁴⁹⁰ Act of June 20, 1997, 75th Leg. R.S., S.B. 1678, § 8 (codified at TEX. PROP. CODE § 91.006(b) (stating that any provision in lease signed after September 1, 1997, purporting to waive duty to mitigate is void)); *Lunsford Consulting Group, Inc. v. Crescent Real Estate Funding VIII, L.P.*, 77 S.W.3d 473 (Tex. App.—Houston [1st Dist.] 2002, no pet.) (stating that “[w]e hold that a lease entered into before September 1, 1997, requires a landlord to mitigate damages, unless the parties agree otherwise, but a lease entered into after September 1, 1997, requires a landlord to mitigate damages, and any clause to the contrary is void.”).

⁴⁹¹ See *Gulf Oil Corp. v. Smithey*, 426 S.W.2d 262 (Tex. Civ. App.—Dallas 1965, writ dismissed).

⁴⁹² *Stewart v. Basey*, 245 S.W.2d 484, 486 (Tex. 1952).

⁴⁹³ 245 S.W.2d 484 (Tex. 1952).

a contract and does not affect the damages recoverable for breach, unless:

(a) the amount so fixed is a reasonable forecast of just compensation for the harm that is caused by the breach, and

(b) the harm caused by the breach is one that is incapable or very difficult of accurate estimation.⁴⁹⁴

In sum, a liquidated damage provision must be a “reasonable forecast of just compensation for the harm that is caused by the breach.”⁴⁹⁵ To meet this prong of the test, the amount stipulated must be a reasonable forecast of the damages resulting from each breach that triggers the remedy. Different breaches may require different remedies. Simply put, the punishment should fit the crime.

b. Different Breaches Require Different Liquidated Damage Clauses. Many leases contain, and many landlords think they want, the right to terminate the lease and to recover accelerated rents as liquidated damages in the event of *any* default. The cases, however, suggest a more discriminating approach. In *Stewart v. Basey*,⁴⁹⁶ the supreme court held that the landlord could not enforce the tenant’s purported obligation to pay liquidated damages equal to \$150.00 per month times the number of months remaining after termination of a lease with a monthly rental of \$325.00. The supreme court reasoned that the clause was a penalty because the payment *could be* triggered by the tenant’s breach of *any* covenant in the lease, and the tenant’s obligation to make the payment did *not* depend upon termination of lease.⁴⁹⁷ The right to liquidated damages should not be triggered by *any* breach, without regard to its importance or materiality or the foreseeable damages resulting from the

particular breach. It ordinarily would not be reasonable, for example, to forecast the same amount of damages for a tenant’s breach of a covenant to repair the premises and for breach of the covenant to pay rent.

c. Liquidated Damage Clauses for Anticipatory Breach. The problem with the measure of damages for anticipatory breach, from a landlord’s perspective, is that some of the variables (*e.g.*, the proper discount rate, the reasonable cash market value of the lease for the unexpired term, and now the reasonableness of the landlord’s efforts to relet) are usually disputed fact issues. The presence of disputed fact issues means that the tenant will almost always be able to defeat a landlord’s summary judgment on the amount of damages, which is every tenant’s first objective in this type of landlord-tenant litigation. Defeating summary judgment means a trial. A trial means legal fees, expert witness fees, and delay. And delay begets more legal fees. To minimize these delays and expenses, consider including a liquidated damage provision applicable if the tenant commits an anticipatory breach or the landlord terminates the lease for the tenant’s failure to pay rent. While this will not ensure victory at a summary judgment hearing, it may, at least, tilt the balance in the landlord’s favor during the settlement negotiations before that hearing.⁴⁹⁸

⁴⁹⁸ **LIQUIDATED DAMAGES: BREACH OF**

COVENANT TO PAY RENT. If, but only if, with 12 or more months remaining in the Term, (a) Tenant fails to pay Base Rent, and (b) Landlord terminates this Lease for such failure, Landlord, at its option, will be entitled to recover Liquidated Rental Damages for the period after any such termination equal to 12 times the monthly Base Rent (including Parking Fees and the amount billed to Tenant for Landlord’s estimate of Tenant’s Pro Rata Share Operating Costs for the last month before the termination) in lieu of any other contractual or legal measure of damages for Tenant’s breach of its obligation to pay Base Rent after the termination of the Lease (including reletting costs but excluding attorneys fees, expert fees, and court costs incurred by Landlord in any eviction or in collecting any sum owing under the Lease), and the parties agree this is a reasonable estimate of Landlord’s damages for such a breach given the uncertainty of future market rental rates and of the

⁴⁹⁴ 245 S.W.2d at 486 (citing RESTATEMENT OF CONTRACTS § 139).

⁴⁹⁵ *Stewart*, 245 S.W.2d at 486.

⁴⁹⁶ 245 S.W.2d at 486-87.

⁴⁹⁷ 245 S.W.2d at 486-87.

d. Common Defects in Rental Acceleration Clauses. At common law, a tenant did not have an obligation to pay unearned periodic rent that otherwise would accrue after the lease was terminated, unless the lease so provided.⁴⁹⁹ The typical acceleration clause attempts to contract around this common law limitation on a landlord's right to recover unaccrued rentals. Acceleration clauses in commercial leases commonly purport to allow the landlord, upon any default, to (a) accelerate unaccrued rents upon the tenant's default; (b) evict the tenant; and (c) relet.⁵⁰⁰ Such a clause is unenforceable because it could allow the landlord more than one recovery (accelerated rentals from the original tenant and rent from a substitute tenant) for only one loss in violation of

the principle of just compensation.⁵⁰¹ Such a clause also is probably void under the mitigation statute.⁵⁰²

6. DRAFTING CONSIDERATIONS. Careful drafting of the contractual default and remedies provisions, however, can increase the chances of enforcing a tenant's obligations.

a. *Injunctive Relief.* To ease the burden of obtaining injunctive relief to enforce continuous operations clauses, radius restrictions, and other such covenants,⁵⁰³ a well drafted lease should require the tenant to stipulate to certain evidentiary

duration of any vacancy. If this liquidated damage provision is unenforceable, Landlord's termination of this Lease will not preclude Landlord's recovery of damages for Tenant's failure to pay Base Rent after the termination, and Landlord will be entitled to recover any other contractual or legal measure of damages for such breach. This liquidated measure of damages will not affect or impair Landlord's rights or remedies for breaches of the Lease other than other hr ant

⁴⁹⁹ See *American Lease Plan v. Ben-Kro Corp.*, 508 S.W.2d 937, 942 (Tex. Civ. App.—Houston [1st Dist.] 1974, writ ref'd n.r.e.).

⁵⁰⁰ See, e.g., *Christie, Mitchell and Mitchell Co. v. Selz*, 313 S.W.2d 352, 354 (Tex. Civ. App.—Fort Worth 1958, writ dism'd).

⁵⁰¹ See, e.g., *Christie, Mitchell and Mitchell Co.*, 313 S.W.2d at 354 (holding, in suit by landlord against defaulting tenant for all rents scheduled for payment after date of surrender, that provision requiring tenant to pay unaccrued rents in event of surrender was unenforceable as "mere penalty" when landlord relet premises for almost twice original tenant's monthly rent); compare. *American Lease Plan*, 508 S.W.2d at 942 (stating, in a case involving personal property lease, that tenant was relieved of obligation to pay unaccrued rent, even though lease provided landlord had right to "sue for and recover all rents and other amounts then due or thereafter accruing under the lease[.]" when landlord took possession of leased equipment because landlord would have double recovery in form of unaccrued rents, proceeds from reletting, and property) with *Stonehenge Square Ltd. P'ship. v. Movie Merchs.*, 715 A.2d 1082 (Pa. 1998) (upholding Pennsylvania rule that allows landlord to recover under rental acceleration clause without reducing rents to present value and without attempting to mitigate its damages but that prevents landlord from occupying or reletting during term covered by accelerated rents).

⁵⁰² TEX. PROP. CODE § 91.006(b).

⁵⁰³ *Weil v. Ann Lewis Shops*, 281 S.W.2d 651, 654-55 (Tex. Civ. App.—San Antonio 1955, writ ref'd) (holding that percentage rent clause in lease did not imply obligation to operate business in premises during lease term in manner that would produce percentage rent in excess of minimum guaranteed rental); *Palm v. Mortgage Inv. Co.*, 229 S.W.2d 869, 873-74 (Tex. Civ. App.—El Paso 1950, writ ref'd n.r.e.) (refusing to imply covenant of continuous operations in commercial lease).

predicates.⁵⁰⁴ These stipulations should include admissions by the tenant that: (i) the tenant's breach of certain covenants will cause immediate and irreparable harm, (ii) the landlord will not have an adequate remedy at law for their breach, (iii) the tenant will not suffer damages if injunctive relief is granted, and (iv) setting bond in a minimal amount will be sufficient to cover any damages the tenant may suffer if the court wrongfully orders temporary injunctive relief.⁵⁰⁵

b. **Liquidated Damages.** Or, instead of relying exclusively on the availability of injunctive relief, consider using liquidated damage clauses tailored to compensate the landlord for the breach of different covenants. Liquidated damage clauses may provide a landlord with an effective remedy when termination of the tenant's lease is not feasible or when money damages (*e.g.*, reduced percentage rentals paid by other tenants in a shopping center when a solvent anchor tenant ceases operations) are difficult to estimate or prove. But, be aware that an enforceable liquidated damage clause may provide the landlord with an adequate remedy at law and, thus, undercut any entitlement to injunctive relief.

VII. TENANT'S DEFENSES

A. **LANDLORD'S BREACH.** At common law, a landlord's breach of any covenant, other than the covenant of quiet enjoyment, ordinarily did not excuse a tenant from its obligation to pay rent. As a general rule, "[w]here the rental contract exists by which the tenant is entitled to occupy the leased premises for a given term, and by which the

landlord is entitled to receive a fixed rent for the entire term, the tenant cannot resist the demand for rent unless he shows evidence of paramount title, or that for some reason, recognized by law as sufficient, he was entitled to and did quit possession."⁵⁰⁶ The law traditionally recognized few reasons as sufficient. The same doctrine of independent covenants that limited a landlord's common law remedies for a tenant's breach also circumscribed a tenant's right to suspend its performance by withholding rent or terminating the lease for its landlord's breach.

1. LANDLORD'S COVENANT TO REPAIR.

Under the traditional rule, a landlord was *not* required to make any repairs (including structural repairs) to the premises during the lease term unless the lease expressly obligated the landlord to do so. As the Texas Supreme Court put it 50 years ago:

The tendency of modern decisions is not to imply covenants which might and ought to have been expressed, if intended. A covenant is never implied that the lessor will make any repairs. The obligation to make repairs is a very important element of a lease contract. The parties were free to contract with respect to this obligation as they desired.⁵⁰⁷

This traditional rule partially gave way to the implied warranty of suitability in 1988.

a. **Traditional Rule: Landlord's Breach No Defense.** At common law, the traditional rule was that "[a]ny obligation of the landlord to repair or maintain the premises would be independent of the tenant's obligation to pay rents."⁵⁰⁸ Accordingly, a landlord's failure to repair the premises ordinarily was *not* a defense to a tenant's obligation to pay

⁵⁰⁴ Cf. *Riverside Props. v. Teachers Ins. & Annuity Ass'n*, 590 S.W.2d 736, 738 (Tex. Civ. App. – Houston [14th Dist.] 1979, no writ) (stating, in case enforcing contractual right of mortgagee to appointment of receiver, that "the express agreement of the mortgagor is an equity that should not ordinarily be ignored."); *Barclays Bank v. Superior Court*, 69 Cal. App.3d 593, 137 Cal. Rptr. 743, 748 (Cal. Ct. App. 1977))

⁵⁰⁵ TEX. R. CIV. P. 684; *Ex Parte Leshner*, 651 S.W.2d 734, 736 (Tex. 1983) (holding that "the provisions of [Rule] 684 are mandatory and an order of injunction issued without a bond is void on its face.").

⁵⁰⁶ *Miller v. Compton*, 185 S.W.2d 754, 758 (Tex. Civ. App.—Eastland 1945, no writ).

⁵⁰⁷ *Yarbrough v. Booher*, 141 Tex. 420; 174 S.W.2d 47, 49 (1943).

⁵⁰⁸ *Edwards v. Ward Assocs., Inc.*, 367 S.W.2d 390, 393 (Tex. Civ. App.—Dallas, 1963, writ ref'd n.r.e.).

rent, unless the landlord's failure rose to the level of a constructive eviction.⁵⁰⁹

b. **Implied Warranty of Suitability.** These common law rules have been modified somewhat by the Texas Supreme Court's recognition of an implied warranty of suitability in *Davidow v. Inwood N. Professional Group – Phase I*. In that case,⁵¹⁰ the Texas Supreme Court held that there is an implied warranty of suitability that the premises in a commercial lease are suitable for their intended commercial purpose. "This warranty means that at the inception of the lease there are no latent defects in the facilities that are vital to the use of the premises for their intended commercial purpose and that these essential facilities will remain in a suitable condition. If, however, the parties to a lease expressly agree that the tenant will repair certain defects, then the provisions of the lease will control."⁵¹¹

(1) **Covers All Essential Facilities Within the Premises.** The implied warranty of suitability covers all latent defects in "essential facilities" within the leased premises and "**only** those repairs the lessee willingly accepted as part of the bargain" are outside the scope of this implied warranty.⁵¹²

⁵⁰⁹ See *Ravkind v. Jones Apothecary, Inc.*, 439 S.W.2d 470 (Tex. Civ. App.—Houston [1st Dist.] 1969, writ ref'd n.r.e.); *Ammons v. Beaudry*, 337 S.W.2d 323, 324 (Tex. Civ. App.—Ft. Worth 1960, writ ref'd) (holding that tenant could recoup any damages resulting from landlord's breach of its covenant to repair the air conditioning units but that landlord's breach did not excuse tenant, who remained in premises, from paying rent).

⁵¹⁰ 747 S.W.2d 373 (Tex. 1988).

⁵¹¹ *Davidow*, 747 S.W.2d at 376.

⁵¹² *Gober v. Wright*, 838 S.W.2d 794, 798 (Tex. App. — Houston [1st Dist] 1992, writ denied); *Parts Indus. Corp. v. A.V.A Servs., Inc.*, 2003 LEXIS 2244, *19-20 (Tex. App. — Corpus Christi March 13, 2003, n.p.h) (unpublished opinion) (stating that, as a matter of law, landlord's implied warranty of suitability is limited only by those specific terms in a commercial lease whereby a tenant expressly agrees to repair certain defects and holding that lease provision, which did not, in specific terms, expressly obligate tenant to repair

Most court hold the implied warranty of suitability applies the physical conditions of the premises

(2) **May Not Cover Essential Facilities Outside Premises.** In *Coleman v. Rotana, Inc.*,⁵¹³ the Dallas Court of Appeals held that inadequate parking caused by other tenants' use of their premises in violation of their respective leases is not the type of defect encompassed by the implied warranty of suitability, concluding that "this warranty only covers latent defects in the nature of a physical or structural defect which the landlord has the duty to repair."⁵¹⁴ The court of appeals also concluded that "not only must the defect alleged be within the scope of the warranty, the 'facility' alleged to be defective must be within the leased premises."⁵¹⁵

(3) **May Cover Use.** In *Lee v Perez*, the court of appeals held the a landlord breached the implied warranty of suitability for a use prohibited by the deed restriction encumbering the leased premises.⁵¹⁶

c. **Tenant May Recover Damages and Terminate Lease as Remedy for Breach.** In addition to giving rise to a claim for damages,⁵¹⁷ a

defects in the roof, but which granted tenant the option either to terminate lease or to make repairs that landlord failed to make, did not require tenant to exercise either option or limit landlord's obligations under implied warranty of suitability).

⁵¹³ 778 S.W.2d 867 (Tex. App. — Dallas 1989).

⁵¹⁴ *Coleman*, 778 S.W.2d at 870.

⁵¹⁵ *Id.*

⁵¹⁶ 120 S.W.3d 463 (Tex App. — Houston [14th Dist. 2003, no pet.) (citing *Davidow*, 747 S.W.2d at 377).

⁵¹⁷ *Kerrville HRH, Inc. v. Kerrville*, 803 S.W.2d 377, 385 (Tex. App.—San Antonio 1990, writ denied) (upholding tenant's claim for lost profits, stating that tenant may recover profits lost as a proximate result of actionable wrong that interferes with its business); *Beam v. Voss*, 568 S.W.2d 413, 419 (Tex. Civ. App.—San Antonio 1978, no writ) (holding that damages are recoverable for landlord's interference with tenancy); *Harper Bldg. Sys. v. Upjohn Co.*, 564 S.W.2d 123, 127 (Tex. Civ. App.—Beaumont 1978, writ ref'd n.r.e.) (holding that damages are recoverable for breach of

landlord's breach of this implied warranty is a **complete defense** to a tenant's obligations under the lease.⁵¹⁸

2. NO RIGHT OF OFFSET. Even if a tenant has the right to recover damages for its landlord's failure to make required repairs or to perform other covenants under the lease, a tenant cannot reduce the amounts due its landlord under the lease by way of recoupment, offset, or abatement, unless the tenant first obtains a judgment or the lease expressly grants the tenant the right to do so.⁵¹⁹

3. LANDLORD'S DUTY TO PLACE TENANT IN POSSESSION. A landlord impliedly covenants in every lease to place the tenant in possession at the commencement of the lease term. This covenant is a dependent covenant, and, as a result, a landlord's failure to make leased premises ready for tenant's occupancy will excuse the tenant from its obligation to pay rent as promised in the lease.⁵²⁰

4. NO IMPLIED COVENANT TO RETAIN CHARACTER OF BUILDING. In *Cantile v. Vanity Fair Props.*,⁵²¹ the tenant alleged that its lease terminated as a matter of law because the landlord changed the first floor of the building (where the

premises were located) from a shopping center to an office building. The court of appeals, however, rejected the tenant's argument that there was an implied covenant in the lease that the landlord would keep the first floor as a shopping center.

B. WAIVER. Waiver is the intentional relinquishment of a known right.⁵²² "[U]pon a theory that the occurrence of a cause of forfeiture gives the lessor an election to declare the lease at an end or to overlook the breach and allow the lease to remain in force, it is generally held that the acceptance of rent, which accrues after a breach of a covenant or condition of the lease, with knowledge of such breach, constitutes a waiver of the right to forfeit the lease on account of such breach."⁵²³ This general rule is subject to numerous exceptions.⁵²⁴ "The receipt of rent is not a waiver of a continuing breach of covenant, such as the breach of a covenant as to the use of the premises, a covenant to insure the premises, or a covenant to repair."⁵²⁵ A no waiver clause may not preclude a tenant's waiver defense.⁵²⁶

⁵²² See *Sun Exploration & Prod. Co. v. Benton*, 729 S.W.2d 35, 37 (Tex. 1987).

⁵²³ *C. G. Murphy Co.*, 404 S.W.2d 853, 858 (Tex. Civ. App.—Corpus Christi 1966, writ ref'd n.r.e.) (stating that "upon a theory that the occurrence of a cause of forfeiture gives the lessor an election to declare the lease at an end or to overlook the breach and allow the lease to remain in force, it is generally held that the acceptance of rent which accrues after a breach of a covenant or condition of the lease, with knowledge of such breach, constitutes a waiver of the right to forfeit the lease on account of such breach.").

⁵²⁴ See FRIEDMAN ON LEASES, *Waiver by Landlord of Tenant Default* § 16.5.

⁵²⁵ *Tony v. McClelland*, 283 S.W. 679, 681 (Tex. 1926).

⁵²⁶ See *Winslow v. Dillard Dept. Stores*, 849 S.W.2d 862 (Tex. App.—Texarkana 1992, no writ) (stating that landlord's action may constitute waiver of nonwaiver clause); *Zwick v. Lodewijk Corp.*, 847 S.W.2d 316 (Tex. App. — Texarkana 1993, no writ); *Regent Int'l Hotels, Ltd. v. Las Colinas Hotels Corp.*, 704 S.W.2d 101, 104 (Tex. App. — Dallas 1985, no writ); *Wendlandt v. Sommers Drug Stores Co.*, 551 S.W.2d 48 (Tex. Civ. App.—Austin 1977, no writ) (holding that tenant did not

warranty); *Birge v. Toppers Menswear, Inc.*, 473 S.W.2d 79, 85 (Tex. Civ. App.—Dallas 1971, writ ref'd n.r.e.) (holding that tenant may recover damages for landlord's breach of lease).

⁵¹⁸ *B & H Aircraft Sales v. Engine Components*, 933 S.W.2d 653 (Tex. App.—San Antonio 1996, no writ); *Neuro-Developmental Assoc. of Houston v. Corporate Pines Realty Corp.*, 908 S.W.2d 26, 28 (Tex. App.—Houston [1st Dist.] 1995, writ denied).

⁵¹⁹ See *Myers v. Ginsburg*, 735 S.W.2d 600, 603 (Tex. App.—Dallas 1987, no writ). *But cf. Wilbur and Village Lane Limited v. Cinemark Corp.*, LEXIS 3716 (Tex. App.—Houston [14th Dist.] 2002, no pet.) (holding that tenant's obligation to pay pass through expenses was excused because management fee was not authorized in lease).

⁵²⁰ *Richker v. Georgandis*, 323 S.W.2d 90, 95 (Tex. Civ. App.—Houston 1959, writ ref'd n.r.e.).

⁴⁷⁴ 505 S.W.2d 654 (Tex. Civ. App.—San Antonio 1973, writ ref'd n.r.e.).

C. **EVICTIION.** “In every lease of land, in absence of a provision to the contrary, there is an implied covenant in favor of the lessee that he will have peaceful and quiet enjoyment of the premises for the term of the lease For there to be a breach of this covenant, there must be an eviction, actual or constructive, brought about by the acts of the landlord or those acting for him or with his permission.”⁵²⁷

1. **ACTUAL EVICTION.** An actual eviction occurs if a landlord or someone acting under a claim of paramount title or with the permission of the landlord physically removes the tenant or denies the tenant access to the premises.⁵²⁸ A landlord's actions must evidence the intent to permanently deprive the tenant of possession. A temporary interference is usually only a trespass.

2. **CONSTRUCTIVE EVICTION.** The elements of a constructive eviction claim are the same as the elements of a claim for breach of the warranty of quiet enjoyment.⁵²⁹ “In order to constitute an

eviction, it is not necessary that there be a manual or physical expulsion from the premises. If the landlord's conduct be such as to materially and permanently interfere with the beneficial use of the premises and the defendant leaves as a result thereof, then there is a constructive eviction.”⁵³⁰ In *Stillman v. Youmans*,⁵³¹ the court of appeals stated the essential elements of a constructive eviction:

(i) the landlord must have a present intention, which may be proven by circumstantial evidence, that the tenant shall no longer enjoy the premises;

(ii) the act or omission complained of must be material and permanent; and

(iii) the tenant must completely abandon the premises within a reasonable time after, and as a direct consequence of, the complained of act or omission.⁵³²

A constructive eviction, like an actual eviction, terminates the landlord's right to unaccrued rent, and it gives rise to a claim for wrongful eviction.⁵³³

breach covenant to pay rent timely in view of landlord's prior acceptance, without protest, of late rent payments); *but see Taherzadeh v. Clements*, 781 F.2d 1093 (5th Cir. 1986) (citing no waiver provision in the lease, court of appeals rejected tenant's claim that landlord, by previously accepting late rent payments, waived its right to place the tenant in default for failing to timely pay rent, holding that following no waiver clause precluded tenant's waiver defense as a matter of law: “One or more waivers of any covenant, term or condition of this lease by either party shall not be construed as a waiver of a subsequent breach of the same covenant, term or condition.”).

⁵²⁷ *Richker*, 323 S.W.2d at 95.

⁵²⁸ *Luetlich v. Putnum*, 287 S.W.2d 727 (Tex. Civ. App.—El Paso 1956, writ ref'd n.r.e.) (stating that third party's assertion against tenant of claim of title paramount to landlord's claim of title constituted an actual eviction, even though tenant was not physically evicted from premises).

⁵²⁹ *Lazell v. Stone*, 123 S.W.3d 6, 12 n.1 (Tex. App. — Houston [1st Dist.] 2003, pet. denied) (citing *Goldman v. Alkek*, 850 S.W.2d 568, 571-72 (Tex. App. — Corpus Christi, 1993 no writ)).

⁵³⁰ *Silberstein v. Laibovitz*, 200 S.W.2d 647, 649 (Tex. Civ. App.—Austin 1947, no writ) (citing *Nabors v. Johnson*, 51 S.W.2d 1081, 1082 (Tex. Civ. App. — Waco 1932, no writ)); *see also Abney Group v. Robson*, 1996 Tex. App. LEXIS 5754 (Tex. App. — Austin 1996, no pet.) (unpublished opinion) (finding that landlord, who changed locks on gate outside of premises but not locks on premises itself, did not cause “actual physical denial of a tenant's right of entry” as contemplated by section 93.002(c)(3)” of the Texas Property Code); *Michaux v. Koebig*, 555 S.W.2d 171, 176 (Tex. Civ. App. — Austin 1977, no writ) (emphasis added) (construing pre-code statute TEX. REV. CIV. STAT. art. 6236(c)).

⁵³¹ 266 S.W.2d 913 (Tex. Civ. App.—Galveston 1954, no writ).

⁵³² *See Stillman*, 266 S.W.2d at 916.

⁵³³ *Lazell*, 123 S.W.3d at 12 (stating that landlord's intention that tenant no longer enjoy premises could be “inferred from the combination of [landlord's] changing the locks on the Premises and informing [tenant] that she was no longer welcome on the Premises”).

D. SURRENDER BY OPERATION OF LAW.

Surrender is “the yielding up by the tenant of the leasehold estate to the landlord so that the leasehold estate comes to an end by the *mutual agreement* of the landlord and tenant For a surrender to occur, the landlord and tenant must have a meeting of the minds and must mutually agree that there be a surrender of the lease”⁵³⁴ Although a tenant usually must show that its landlord accepted the surrender with the intention to release the tenant from further liability under the lease,⁵³⁵ some Texas courts have applied this doctrine on equitable grounds:

[T]here is said to be a surrender by operation of law whenever the parties have so acted that it would be inequitable for either to assert the continued existence of the lease. Therefore, if, upon an abandonment of the premises by the tenant in possession and a default in the rental obligation, the landlord re-enters and relets for *his own benefit*, the tenant’s obligations will be considered terminated by operation of law.⁵³⁶

Texas courts have long placed the burden on the tenant to plead and prove express surrender or surrender in fact.⁵³⁷

⁵³⁴ *Arrington v. Loveless*, 486 S.W.2d 604, 606-07 (Tex. Civ. App.—Fort Worth 1972, no writ) (holding that landlord’s cooperation with tenant to locate substitute tenant did not effect surrender); *see also Evans Young Wyatt, Inc. v. Hood & Hall Co.*, 517 S.W.2d 313, 315 (Tex. Civ. App.—1974, writ ref’d n.r.e.) (stating that “[f]or the lease to have terminated as a matter of law upon surrender and acceptance of the premises there must have been an agreement to such effect by the parties.”).

⁵³⁵ *Arrington*, 486 S.W.2d at 606-07.

⁵³⁶ *Dean v. Lacey*, 437 S.W.2d 433, 438 (Tex. Civ. App.—Beaumont 1969, no writ) (emphasis in original and noting that landlord physically occupied premises “without taking [unnamed] precautions to avoid a termination of the lease as to all parties . . .”).

⁵³⁷ *See Harry Hines Med. Ctr., Ltd. v. Wilson*, 656 S.W.2d 598, 601 (Tex. App.—Dallas 1983, no writ); *Arrington*, 486 S.W.2d at 606-07 (stating burden of both

1. SURRENDER WHEN LANDLORD ACTS AS UNFAITHFUL AGENT. Many commercial leases contain a remedy provision that allows the landlord, after the tenant’s default, to re-enter and relet the premises “as agent of the tenant.”⁵³⁸ If a landlord re-enters the premises and purports to relet the premises as the “tenant’s agent,” but the landlord instead enters into a new lease for its own benefit, the courts have treated the landlord’s self-interested conduct as an acceptance of the original tenant’s surrender of the premises, which terminates the lease.⁵³⁹ Texas courts have found that a landlord acted for its own benefit, rather than its former tenant’s benefit, in a number of different ways.

a. *Terms of Lease with Substitute Tenant.* One court found that a landlord surrendered its lease by including a termination option in the lease with the substitute tenant. In *Flack v. Sarnosa Oil Corp.*,⁵⁴⁰ a divided court of civil appeals held that the landlord, by reletting premises under a new lease that allowed the landlord to terminate the new lease after 90 days notice in the event of either the sale or demolition of the premises, accepted the surrender of the premises because the 90 day cancellation clause was included for the landlord’s benefit rather than

pleading and of proving surrender by a preponderance of the evidence is on tenant who is attempting to avoid rent payments); *Crawford v. Haywood*, 392 S.W.2d 387 (Tex. Civ. App.—Corpus Christi 1965, no writ) (stating that tenant’s declaration of its intent to vacate and not to pay further rent does not terminate landlord’s rights under lease).

⁵³⁸ *See, e.g., Flack v. Sarnosa Oil Corp.*, 293 S.W.2d 658 (Tex. Civ. App.—San Antonio 1956, no writ).

⁵³⁹ *Flack*, 293 S.W.2d at 658 (explaining that “we must either presume that if [the landlord] was attempting to act as the agent of [the tenant] that it was an unfaithful agent, acting for its self interest, or that in executing the [new lease], it was acting as principal....If [the landlord] acted as principal in executing in the [new] lease, such action constitutes an acceptance of [the tenant’s] offer to surrender the leased premises and [the landlord] cannot recover for the full term of the lease.”)

⁵⁴⁰ 293 S.W.2d 658 (Tex. Civ. App.—San Antonio 1956, no writ).

for the benefit of the original tenant. The dissenting judge argued persuasively that, although the landlord's exercise of the termination option might have constituted an acceptance of surrender, the mere presence of the cancellation clause in the new lease, standing alone, should have been insufficient to cause a surrender.⁵⁴¹

b. Landlord's Use of Premises Was for Landlord's Benefit. Another court found that a landlord surrendered the lease by operating its tenant's business in the premises. In *Patterson v. McGee*,⁵⁴² a state agency prohibited using the property as a nursing home unless certain repairs were made. Shortly thereafter, the landlord demanded that the tenant vacate the premises, and the tenant complied. The landlord then held itself out as operator of the nursing home. The court of civil appeals found that this evidence supported the trial court's findings of a constructive eviction and a surrender by operation of law.

c. Landlord's Use of Premises to Expedite Reletting Was for Tenant's Benefit. Yet, another court found that a landlord did not surrender its lease by allowing nearby hospital personnel to occupy a portion of the premises while it attempted to relet them. The landlord did so in an attempt to expedite completion of the hospital so that a substitute tenant could be found to relet the tenant's office suite. After the hospital was completed, the landlord relet the premises. Based on these facts, the court of appeals concluded:

We have found no Texas case which finds surrender by operation of law where the landlord evidences an intent to relet or sell the premises after the tenant has left, even if such intent is communicated to the tenant. If a landlord re-enters and relets the abandoned premises *for his own benefit*, a tenant's obligations would cease. However, the evidence here shows that

[the landlord's] conduct in allowing occupation of the premises after [the tenant's] departure was done in an attempt to mitigate the damages from non-payment of rent. . . . The conduct of [the landlord], in continuing to demand rental payments after [the tenant's] departure, clearly indicates that it did not accept any offer of surrender. The burden was on [the tenant] to plead and prove that a surrender occurred.⁵⁴³

2. SURRENDER IS COMPLETE DEFENSE. Surrender is a defense to a suit to recover rent that otherwise would have accrued after the surrender occurred.⁵⁴⁴ But a tenant cannot recover any rent it prepaid before a surrender by operation of law.⁵⁴⁵

E. FAILURE TO MITIGATE.

1. TRADITIONAL RULE. Under the traditional common law rule in Texas, a landlord had no duty to mitigate its damages by procuring a substitute tenant after the original tenant abandoned the premises.⁵⁴⁶ Thus, a landlord was at liberty to

⁵⁴³ *Harry Hines Med. Ctr., Ltd.*, 656 S.W.2d at 601 (reversing trial court's judgment, which had excused tenant from its obligations under lease on ground that landlord had accepted surrender and constructively evicted tenant); see generally *Landlord's Permitting Third Party to Occupy Premises Rent-free as Acceptance of Tenant's Surrender of Premises*, 18 A.L.R.5th 437 (1994).

⁵⁴⁴ *Meineke Disc. Muffler Shops, Inc. v. Coldwell Banker Prop. Mgmt. Co.*, 635 S.W.2d 135 (Tex. Civ. App.—Houston [1st Dist.] 1982, writ ref'd n.r.e.).

⁵⁴⁵ *Dearborn Stove Co. v. Caples*, 236 S.W.2d 486 (Tex. 1951) (holding that tenant, who prepaid all rent when he executed his lease, and who vacated premises before end of lease term could not recover "unearned" rents because rent is not "apportionable.")

⁵⁴⁶ *RTC v. Cramer*, 6 F.3d 1102 (5th Cir. 1993) (stating that Texas intermediate appellate courts still adhered to rule that landlord had no common law duty to mitigate damages); *Williams v. Kaiser Aluminum & Chem. Sales, Inc.*, 396 F. Supp. 288, 292-93 (N.D. Tex. 1975) (citing *Evons v. Winkler*, 388 S.W.2d 265 (Tex. Civ. App.—Corpus Christi 1965, writ ref'd n.r.e.);

⁵⁴¹ *Flack*, 293 S.W.2d at 690 (Nowell, J., dissenting).

⁵⁴² 350 S.W.2d 241 (Tex. Civ. App.—Eastland 1961, no writ).

(i) treat its tenant's conduct as a breach and hold the tenant liable for damages or (ii) disregard the breach and sue on the lease for rent accruing after the breach as the rent came due.⁵⁴⁷ Many anticipatory breach cases recite the rule that a landlord has no duty to relet, but these same cases apply damage measures that incorporate a duty to mitigate once the landlord reentered the premises.⁵⁴⁸ As the district court explained in *Williams v. Kaiser Aluminum & Chem. Sales, Inc.*:

[E]ven without the contract provision [granting the landlord the right to re-enter and relet for the account of the tenant], the landlord would have had the right to relet the property and, not having agreed to surrender his rights under the lease contract, recover from the former [tenant] the amount of the agreed rent for the entire contractual period of the lease less the sum that he may realize from the reletting, after the use of reasonable diligence to obtain a [substitute] tenant.⁵⁴⁹

Brown v. RepublicBank First Nat'l Midland, 766 S.W.2d 203 (Tex. 1988) (five justices suggesting, in *dicta*, that Texas should abandon traditional rule that landlord does not have the duty to mitigate); *Marynick v. Bockelmann*, 733 S.W.2d 665 (Tex. App.—Dallas 1989), *rev'd sub nom. on other grounds*, *Bockelmann v. Marynick*, 788 S.W.2d 569 (Tex. 1990) (acknowledging supreme court's *dicta* in *Brown* but refusing to adopt rule requiring mitigation until supreme court expressly addressed issue); *Metroplex Glass Ctr., Inc. v. Vantage Props., Inc.*, 646 S.W.2d 263, 265 (Tex. App.—Dallas 1983, writ ref'd n.r.e.).

⁵⁴⁷ *Stubbs v. Stuart*, 469 S.W.2d 311, 312 (Tex. Civ. App.—Houston [14th Dist.] 1971, no writ) (citing *Wukasch*, 247 S.W.2d at 597).

⁵⁴⁸ See *Brown*, 766 S.W.2d at 204 (Kilgarlin, J., concurring) (stating that landlord has duty to mitigate when it exercises contractual as opposed to common law remedies); *Williams*, 396 F. Supp. at 288.

⁵⁴⁹ 396 F. Supp. 288, 292-93 (N.D. Tex. 1975); see also *Evons*, 388 S.W.2d at 269; *Stewart*, 106 S.W.2d at 1075 (stating that when landlord reenters after tenant abandons premises proper measure for damages is difference between the contract price for the lease term and such sums as the landlord may have received by way

Under the rule stated in *Williams*, a landlord's recoverable damages were measured by the discounted present value of the difference between the rent the original tenant agreed to pay and either (i) the amount the landlord received from actually mitigating its damages (*i.e.*, the rent the original tenant contracted to pay less any rent received from, or promised by, a substitute tenant) or (ii) the amount the landlord would have received had it mitigated its damages (*i.e.*, the rent the original tenant contracted to pay less the fair market value of the premises for the remainder of the lease term).⁵⁵⁰ Other Texas cases, while recognizing the general rule, imposed a duty to mitigate if the landlord reentered the premises and sued for damages resulting from an anticipatory breach.⁵⁵¹

2. NEW RULE: LANDLORD HAS DUTY TO MITIGATE. In 1997, the Texas Supreme Court and the Texas Legislature both recognized that a landlord now has a duty to mitigate its damages under Texas law. But the duty each recognized is not identical, and some of the differences are significant.

a. When Does Duty to Mitigate Arise?

Under *Austin Hill Country Realty, Inc.*, a landlord "must have" a duty to mitigate when suing for

of rentals from a third party, *after the use of reasonable diligence to obtain a tenant at the best rental possible under circumstances of the case*).

⁵⁵⁰ *In re Merry-Go-Round Enters.*, 241 B.R. 124, 135 (Bankr. D. Md., 1999) (stating, in a case applying Texas law, that Texas courts would limit future rent damages to the present value thereof under *Austin Hill Country Realty, Inc.*).

⁵⁵¹ *Employment Advisors, Inc. v. Sparks*, 364 S.W.2d 478, 480 (Tex. Civ. App. – Waco) (stating, in case in which landlord sued tenant for anticipatory repudiation of lease, that because landlord pursued a contractual remedy, landlord's damage recovery was "subject, of course, to the usual rules concerning mitigation."), *writ ref'd n.r.e. per curiam*, 368 S.W.2d 199, 200 (Tex. 1963) (declining, in *per curiam* opinion, to express opinion on appellate court's holding); see also *Evons*, 388 S.W.2d at 269.

anticipatory breach.⁵⁵² *Austin Hill Country Realty, Inc.* imposes the duty to mitigate when (i) a tenant abandons the premises in violation of the lease, and (ii) the landlord either actually reenters the premises **or** has the right to do so without terminating the lease.⁵⁵³ Under the mitigation statute, however, a landlord has the duty to mitigate its damages whenever the tenant abandons the premises in violation of the lease.⁵⁵⁴ Neither *Austin Hill Country Realty, Inc.* nor the mitigation statute appear to alter the rule that a landlord does not have duty to mitigate before its tenant's breach.⁵⁵⁵

In cases in which the lease does not give the landlord the right to reenter the premises when its tenant defaults, the statute creates a dilemma for a landlord that *Austin Hill Country Realty, Inc.* anticipates but avoids. Because a landlord does not have a common law right to reenter the premises without risking termination of the lease, *Austin Hill Country Realty, Inc.* expressly exempts a landlord from the duty to mitigate if the lease does not give the landlord the right to reenter.⁵⁵⁶ The mitigation statute does not recognize this exemption. Unless such an exemption is implied, or the courts modify the existing rules for eviction and surrender, the mitigation statute places a landlord, who does not have an express right to reenter and relet, in a potentially untenable position. If, on the one hand, the landlord does not reenter and relet, its right to recover damages from the tenant could be compromised because the landlord has failed to mitigate its damages. If, on the other hand, the landlord reenters and relets, the landlord risks breaching the covenant of quiet enjoyment and thus forfeiting its right to recover any damages.

⁵⁵² *Austin Hill Country Realty, Inc.*, 948 S.W.2d at 299-300.

⁵⁵³ *See id.* at 299.

⁵⁵⁴ TEX. PROP. CODE § 91.006 .

⁵⁵⁵ *Cf. Vasquez v. Carmel Shopping Ctr. Co.*, 777 S.W.2d 532, 536 (Tex. App.—Corpus Christi 1989, writ denied) (holding that lease did not require landlord to accept assignment of lease to prospective buyer of tenant's business or to mitigate damages before tenant's breach).

⁵⁵⁶ *Austin Hill Country, Inc.*, 948 S.W.2d at 299-300.

b. Can the Parties Waive the Duty to Mitigate? ***Before-September 1, 1997, Yes:*** In *Austin Hill Country Realty, Inc.*, the supreme court stated that the duty to mitigate applies to all commercial leases, unless the landlord and the tenant contract otherwise.⁵⁵⁷ *Austin Hill Country Realty, Inc.* applies to leases entered into before September 1, 1997. ***After September 1, 1997, No:*** The mitigation statute declares void any lease provision purporting to waive a right or exempt a landlord from a liability under the statute,⁵⁵⁸ but the statutory prohibition on such waivers only applies to leases entered into on or after September 1, 1997.⁵⁵⁹ Even though the mitigation statute appears in Chapter 91 of the Property Code, which applies to residential and commercial leases, the statute's preamble indicates that the legislature only intended it to apply to residential leases.⁵⁶⁰ At least one case indirectly may support limiting its application to residential leases.⁵⁶¹ But the only case yet to address the issue directly held that the mitigation statute applies to commercial leases.⁵⁶²

⁵⁵⁷ 948 S.W.2d 299; *Stucki*, 963 S.W.2d at 781 (holding that tenant must prove landlord failed to mitigate and how much landlord's damages were increased by such failure).

⁵⁵⁸ TEX. PROP. CODE § 91.006(b).

⁵⁵⁹ TEX. PROP. CODE § 91.006.

⁵⁶⁰ *See* Act of June 20, 1997, 75th Leg. R.S., S.B. 1678, § 8 (codified at TEX. PROP. CODE § 91.006) (stating, in preamble, that mitigation statute is "an Act relating to certain procedures concerning landlords and tenants of residential real property.").

⁵⁶¹ *Cf. Design Ctr. Venture v. Overseas Multi-Projects Corp.*, 748 S.W.2d 469, 462-73 (Tex. App.—Houston [1st Dist] 1988, no writ) (refusing to apply lock-out statute to commercial tenancy when legislative council re-codified residential lock-out statute in chapter of Property Code generally applicable to all tenancies, reasoning that legislative council was not authorized to change law in re-codification process).

⁵⁶² *Lunsford Consulting Group, Inc. v. Crescent Real Estate Funding VIII, L.P.*, 77 S.W.3d 473, 476 (Tex. App. —Houston [1st Dist.] 2002, no pet) (stating that "[w]e hold that a lease entered into before September 1, 1997, requires a landlord to mitigate damages, unless the parties agree otherwise, but a lease entered into after September 1, 1997, requires a landlord to mitigate

c. **Duty to Use Objectively Reasonable Efforts to Relet.** While the supreme court attempted to define the duty to mitigate, the legislature did not. In *Austin Hill Country Realty, Inc.*, the supreme court stated that a landlord has a duty to make “objectively reasonable” efforts to fill the premises.⁵⁶³ This duty, however, is not absolute — a landlord is not required to fill the premises with any willing tenant. The substitute tenant, according to the court, must be “suitable.”⁵⁶⁴ The supreme court’s explanation is only slightly more helpful than the legislature’s silence.

d. **Breach of Duty to Mitigate Gives Rise to Defense.** The supreme court also explained the effect of a landlord’s breach of its duty to mitigate more clearly than did the legislature. The supreme court stated in *Austin Hill Country Realty, Inc.* that a landlord’s breach of the duty to mitigate does not give rise to a cause of action against the landlord.⁵⁶⁵ Instead, a landlord’s failure to mitigate bars its recovery against a breaching tenant only to the extent that the landlord’s damages reasonably could have been avoided, and when a landlord does mitigate, any damages the landlord actually avoids by reletting will reduce its recovery.⁵⁶⁶

e. **Burden of Proof on Tenant.** Finally, the supreme court, but not the legislature, prescribed certain procedural rules for putting a landlord’s duty to mitigate in issue.⁵⁶⁷ If a tenant merely wishes to receive credits for any amounts generated by the landlord’s efforts to mitigate, the tenant may file only a general denial. If, on the

other hand, a tenant wishes to assert that its landlord breached its duty to mitigate, the tenant must plead failure to mitigate as an affirmative defense. And the tenant bears the burden of proving the landlord’s failure to mitigate and the amount of any credit to which the tenant is entitled.⁵⁶⁸

F. **LESSONS ON MITIGATION FROM OTHER JURISDICTIONS.** Because the duty to mitigate is new to this jurisdiction, Texas courts may look to cases from other jurisdictions for guidance in determining whether a commercial landlord has fulfilled its duty to mitigate or surrendered the premises in its efforts to satisfy that duty.

1. **SURRENDER AND MITIGATION.** Some jurisdictions have recognized the need to reexamine the traditional rules of surrender when they adopt the duty to mitigate. The traditional rules of surrender — like the rule that a landlord has no duty to mitigate — are rooted in the real property doctrine that a lease is a conveyance of an interest in real property.⁵⁶⁹ One rationale for requiring a commercial landlord to mitigate its damages is that a contemporary commercial lease is both a

damages, and any clause to the contrary is void.”).

⁵⁶³ *Austin Hill Country Realty, Inc.*, 948 S.W.2d at 299.

⁵⁶⁴ *See id.*; *Stucki*, 963 S.W.2d at 781(holding that tenant must prove landlord failed to mitigate and how much landlord’s damages were increased by such failure).

⁵⁶⁵ *See Austin Hill Country Realty, Inc.*, 948 S.W.2d at 299-300.

⁵⁶⁶ *See id.*

⁵⁶⁷ *See id.*

⁵⁶⁸ *See id. Compare Hygeia Dairy Co. v. Gonzalez*, 994 S.W.2d 220, 225-26 (Tex. App.—San Antonio 1999, no pet.) (stating, in negligence case, that requirement that tortfeasor must prove “not only the lack of diligence, but also the amount by which the damages were increased by such failure[.]” . . . “simply means that there must be some evidence in the record from which the jury can make a reasoned calculation about losses from failure to mitigate.”) *with Hygeia Dairy Co.*, 994 S.W.2d at 226-27 (Hardberger, J., dissenting) (citing *Austin Hill County* and stating that “[t]o be entitled to such an instruction [on mitigation], however, Hygeia was required to prove the amount by which Gonzalez’s damages were increased by his alleged failure to mitigate.”).

⁵⁶⁹ *Schneiker v. Gordon*, 732 P.2d 603, 606-07 (Colo. 1987); *see generally* Hicks, *The Contractual Nature of Real Property Leases*, 24 BAYLOR L. REV. 443, 446-51(1972) (documenting that law treated real property lease primarily as a contract until 16th century before law consistently began treating lease essentially as a conveyance).

conveyance and a contract.⁵⁷⁰ This rationale for mitigation also supports relaxing, if not entirely abandoning, the traditional rules of surrender.⁵⁷¹ Because a landlord must, in a physical sense, accept the tenant's surrender of the premises in order to relet them, it is inappropriate to adhere to the real property doctrine of acceptance of surrender in a jurisdiction that has adopted a duty to mitigate — i.e., a jurisdiction that treats a tenant's abandonment of the premises as a breach of contract rather than a conveyance.⁵⁷²

Under this contract law rationale, a tenant, by abandoning the premises, forfeits its estate in real property, but remains liable for damages arising from its breach of contract.⁵⁷³ One consequence of adopting the contract law rationale underlying this rule is that the traditional view that a landlord may reenter on the tenant's behalf to mitigate its damages or on its own behalf to effect a surrender makes little sense.⁵⁷⁴ Because the tenant forfeits its estate by abandoning the premises, maintaining the fiction that the landlord is acting as the tenant's agent (i.e., the agent for the owner of the premises) is

inconsistent with the rationale for requiring the landlord to mitigate its damages.⁵⁷⁵

2. REASONABLE EFFORTS TO RELET. Once the duty to mitigate arises under *Austin Hill Country Realty, Inc.*, a landlord must make “objectively reasonable” efforts to fill the premises.⁵⁷⁶ Other jurisdictions use similar tests, requiring a landlord to exercise “due diligence,” “reasonable diligence,” “ordinary diligence,” or the like.⁵⁷⁷ Regardless of these differences in phrasing, the essence of a landlord's duty to mitigate in these jurisdictions is to act as a reasonable person would under the same or similar circumstances.⁵⁷⁸

⁵⁷⁰ *Austin Hill Country Realty, Inc.*, 948 S.W.2d at 299-300; *Schneiker*, 732 P.2d at 606-12 (discussing, in detail, implications for doctrine of surrender of treating lease as both conveyance and contract).

⁵⁷¹ *United States Nat'l Bank of Oregon v. Homeland, Inc.*, 631 P.2d 761, 765 n. 5 (Or. 1981); *Schneiker*, 732 P.2d at 606-12 (holding that, even though reletting for longer term than abandoning tenant's lease would have constituted acceptance of surrender under traditional real property rules, landlord was entitled to recover damages under contract principles).

⁵⁷² *Homeland, Inc.*, 631 P.2d at 765 n. 5; *Schneiker*, 732 P.2d at 606-12.

⁵⁷³ *Homeland, Inc.*, 631 P.2d at 765.

⁵⁷⁴ *Wilson v. Ruhl*, 356 A.2d 544, 547 (Md. 1976) (summarizing traditional rule); *Homeland, Inc.*, 631 P.2d at 765 n. 5 (criticizing traditional rule); *Schneiker*, 732 P.2d at 606-12 (holding that, even though reletting for longer term than abandoning tenant's lease would have constituted acceptance of surrender under traditional real property rules, landlord was entitled to recover damages under contract principles).

⁵⁷⁵ *Homeland, Inc.*, 631 P.2d at 765 n. 5 (criticizing traditional rule); *Schneiker*, 732 P.2d at 606-12 (criticizing traditional rule). For illustrations of facts creating tension between duty to mitigate and traditional surrender rules, see generally *Richard v. Broussard*, 495 So. 2d 1291, 1295 & fn. 6 (La. 1986) (holding that in absence of provision permitting landlord, after a tenant's default, to reenter and occupy premises for its own purposes, landlord risks accepting surrender by reentering and using the property to operate its own business); *Kimber v. Towne Hills Dev. Co.*, 274 S.E.2d 620, 622 (Ga. Ct. App. 1980) (holding that merely entering premises to protect the property after tenant abandons them does not amount to landlord accepting surrender); *Hurwitz v. Kohm*, 594 S.W.2d 643 (Mo. Ct. App. 1980) (holding that landlord's demand that tenant return keys and remove equipment from premises was neutral on issue of whether landlord intended to relet for its own account or as agent for tenant).

⁵⁷⁶ *Austin Hill Country Realty, Inc.*, 948 S.W.2d at 299.

⁵⁷⁷ See Annotation, *Landlord's Duty, on Tenant's Failure to Occupy, or Abandonment of, Premises, to Mitigate Damages by Accepting or Procuring Another Tenant*, 75 A.L.R.5th 1 (2004).

⁵⁷⁸ See, e.g., 21 A.L.R.3d at 542; *Easterling v. Halter Marine, Inc.*, 470 So. 2d 221, 223 (La. Ct. App.), cert. denied, 472 So. 2d 920 (La. 1985) (stating that it is unreasonable to require landlord to relet for less than market rent and holding that landlord fulfilled duty to mitigate by offering to relet premises for market rent, which was more than rent in defaulting tenant's lease).

Determining whether the landlord has done so is normally, but not always, a question of fact.⁵⁷⁹

a. Duration of Duty to Mitigate. Once a landlord's duty to mitigate arises, it continues so long as the original lease continues.⁵⁸⁰

b. Failure to Relet Not Determinative. In cases in which the landlord does not relet the premises, most courts focus on the landlord's efforts, not the lack of results, in determining whether the landlord satisfied its obligation to mitigate.⁵⁸¹

c. Effect of Failing to Mitigate. A landlord's failure to take reasonable steps to mitigate its damages does not totally bar recovery; it only bars recovery of those damages that could

have been avoided by reasonable efforts.⁵⁸² This view is consistent with the new Texas rule.⁵⁸³

3. FACTORS CONSIDERED IN DETERMINING REASONABLENESS. To assess whether a landlord has diligently sought to relet the premises, courts in other jurisdictions routinely consider these factors:

a. Hiring a Broker. Courts view favorably promptly hiring a real estate broker to market the premises after the tenant abandons them.⁵⁸⁴ But hiring a broker is not always essential.⁵⁸⁵ Even so,

⁵⁸² See *S.N. Mart, Ltd. v. Maurices, Inc.*, 451 N.W.2d 259, 263 (Neb. 1990) (holding that landlord's failure to mitigate did not bar its claim for percentage rent); see also *Kamada v. RX Group, Ltd.*, 639 S.W.2d 146, 149 (Mo. Ct. App. 1982) (stating that abandoning tenant must show its landlord would have found a substitute tenant if it had taken some specific and reasonable action).

⁵⁸³ See *Austin Hill Country Realty, Inc.*, 948 S.W.2d at 299-300 (stating that landlord's failure to mitigate bars its recovery against breaching tenant only to extent that landlord's damages reasonably could have been avoided, and when landlord does mitigate, any damages landlord actually avoids by reletting will reduce its recovery).

⁵⁸⁴ See, e.g., *Wingate v. Gin*, 714 P.2d 459, 461-62 (Ariz. Ct. App. 1986) (holding that landlord made reasonable efforts to relet premises when landlord urged realtor to diligently seek substitute tenant); *Rokolor, Inc. v. Connecticut Eating Enters., Inc.*, 558 A.2d 265, 269 (Conn. App. Ct. 1989) (holding that landlord failed to use reasonable diligence to relet premises by hiring broker 4 months after tenant's default and by reducing rent even though value of property had increased); *Wilson v. Ruhl*, 356 A.2d 544, 547 (Md. 1976) (stating that statute imposing duty to use reasonable diligence to locate substitute tenant "surely . . . requires no more than that the landlord seek out a reputable real estate broker and list the property for rent with that broker.").

⁵⁸⁵ See, e.g., *Kamada v. RX Group, Ltd.*, 639 S.W.2d 146, 149 (Mo. Ct. App. 1982) (stating that there is no case law establishing that a landlord breaches its duty to mitigate unless it hires real estate agent and holding that landlord used reasonable diligence to relet premises in medical building by advertising space in medical magazine and by putting up large for rent sign in building, even though landlord did not consult or engage

⁵⁷⁹ See *American Nat'l Bank & Trust Co. v. Hoyne Industries, Inc.*, 738 F. Supp. 297 (N.D. Ill. 1990) (applying Illinois law) (stating that whether landlord made reasonable effort to mitigate damages under lease that was silent on mitigation was a question of fact); *Wilson v. Ruhl*, 356 A.2d 544, 547 (Md. 1976) (citing *Hirsch v. Merchants Nat'l Bank & Trust Co.*, 336 N.E. 2d 833 (Ind. App. 1975)); but see *Wingate v. Gin*, 714 P.2d 459, 461-62 (Ariz. Ct. App. 1986) (holding that trial court should have granted landlord's summary judgment under rule judging reasonableness of landlord's efforts to relet under totality of circumstances).

⁵⁸⁰ See *Millison v. Clarke*, 413 A.2d 198, 207 (Md. 1980).

⁵⁸¹ See *Shank-Jewella v. Diamond Gallery*, 535 So. 2d 1207, 1212-13 (La. Ct. App. 1988) (holding that landlord did not breach duty to mitigate by leasing other vacant space in shopping when evidence showed that abandoning tenant's premises were not suitable to tenants who leased other vacant space).

it is highly recommended. One court has even suggested that hiring a broker is all that is required to satisfy the duty to mitigate.⁵⁸⁶

b. Advertising in Publications. Courts also consider advertising in publications as evidence of a landlord's diligence.⁵⁸⁷

c. Placing For Rent Sign in Premises. This is one factor often cited in evaluating a landlord's diligence, but it is rarely controlling.⁵⁸⁸

real estate broker).

⁵⁸⁶ See *Wilson v. Ruhl*, 356 A.2d 544, 547 (Md. 1976) (stating that statute imposing duty to use reasonable diligence to locate substitute tenant "surely . . . requires no more than that the landlord seek out a reputable real estate broker and list the property for rent with that broker.").

⁵⁸⁷ See, e.g., *Kimber v. Towne Hills Dev. Co.*, 274 S.E.2d 620, 621-22 (Ga. Ct. App. 1980) (holding that landlord used reasonable efforts to mitigate damages by entering into and repairing premises within 1 month after tenant vacated them, advertising premises in newspaper, and reletting premises to substitute tenant within 6 weeks); *Kamada*, 639 S.W.2d at 148-49 (finding that landlord used reasonable diligence to relet premises in medical building by advertising space in medical magazine and by putting up large for rent sign in building, even though landlord did not consult or engage real estate broker).

⁵⁸⁸ Compare *Wingate v. Gin*, 714 P.2d 459, 461-62 (Ariz. Ct. App. 1986) (holding that landlord was entitled to summary judgment on issue of whether landlord made reasonable efforts to relet premises when tenant's evidence showed landlord did not put for rent sign in premises, but landlord's evidence showed landlord urged realtor to diligently seek substitute tenant, and agent contacted numerous prospects, advertised premises in local paper, included premises in all general mailings about vacancies in landlord's shopping center, showed premises to various prospects, sent brochures to all businesses listed in local yellow pages that were in same business as delinquent tenant, and asked fair market value for premises) with *Vawter v. McKissik*, 159 N.W.2d 538 (Iowa) (holding that only placing for rent sign in premises is not enough) and *Fanarjian v. Moskowitz*, 568 A.2d 94 (N.J. Super. 1989) (holding that evidence was insufficient to show landlord used reasonable diligence to relet when landlord did not supply electricity to premises, landlord only put up one

d. Materially Altering Premises. Because most courts do not require a landlord to substantially alter its obligations under the abandoning tenant's lease in order to mitigate its damages, a landlord should not have to substantially alter the abandoned premises to accommodate a different use.⁵⁸⁹ But a landlord may make cosmetic renovations — without acquiescing to its tenant's abandonment (*i.e.*, accepting surrender) — in an effort to secure another tenant and recover the costs of those renovations.⁵⁹⁰ The courts may draw a line limiting the amount of improvement a landlord can complete without acquiescing in its tenant's abandonment.⁵⁹¹

e. Repossessing Tenant's Personal Property. A landlord may reenter the premises, take possession of a defaulting tenant's personal property, and hold that property until the landlord negotiates a new lease with a substitute tenant.⁵⁹² Such conduct evidences a landlord's intent to hold its tenant liable for any rental deficiency and is thus consistent with the effort to mitigate damages.⁵⁹³

for lease sign, and landlord proved it submitted advertisements but did not prove that journals actually published those ads).

⁵⁸⁹ See *Foggia v. Dix*, 509 P.2d 412 (Or. 1973) (holding that duty to mitigate did not require landlord to rent premises designed for dental clinic for a different use or for less than their fair market value).

⁵⁹⁰ See *International Comm'n on English in the Liturgy v. Schwartz*, 573 A.2d 1303, 1306 (D.C. 1990).

⁵⁹¹ See *Schwartz*, 573 A.2d at 1306 n.2 (stating that such a line might be drawn beyond normal refurbishing to make premises attractive to substitute tenant but short of substantial improvements significantly increasing value of premises).

⁵⁹² See *Hurwitz v. Kohm*, 594 S.W.2d 643, 646-47 (Mo. Ct. App. 1980) (holding that principles of constructive eviction do not apply when landlord repossesses premises and tenant's equipment after tenant's default and stating that maintaining attachment of delinquent tenant's equipment while attempting to relet premises evidenced landlord's intent to hold tenant liable for any loss caused by tenant's default).

⁵⁹³ *Hurwitz*, 594 S.W.2d at 646-47.

f. Offering Premises for Sale or Rent. A landlord may satisfy its duty to mitigate by offering the premises for sale or rent, but it may breach its duty to mitigate by offering the premises for sale.⁵⁹⁴ Offering the property for sale may be justified, however, for a very long term lease.

g. Substitute Tenant's Financial Capacity. As a general rule, a landlord does not breach its duty to mitigate by refusing to relet to a party incapable of paying rent.⁵⁹⁵

h. Substitute Tenant Tendered by Original Tenant. A landlord's failure to contact a prospective substitute tenant tendered by the abandoning tenant may contribute to a finding that it did not use reasonable diligence to relet premises.⁵⁹⁶ Also, refusing to consent to an assignment for purely arbitrary reasons may

contribute to a finding that the landlord failed to use reasonable diligence to avoid its losses.⁵⁹⁷

i. Accepting Subtenants of Abandoning Tenant. A landlord may satisfy its duty to mitigate by entering into subleases with new and renewing subtenants of the abandoning tenant, and, a landlord who does so, may have no duty to replace the abandoning tenant with a new prime tenant.⁵⁹⁸

j. Renegotiating with Original Tenant. A landlord is not under a duty to renegotiate a lease with its former tenant to mitigate damages.⁵⁹⁹

k. Permitting Occupancy by Third Party. Allowing a third party to use premises vacated by a delinquent tenant may constitute surrender. But, at least one court has held that a landlord did not breach its duty to mitigate by allowing a charitable organization (council for retarded citizens) to use the premises rent free because the tenant failed to show the landlord refused rent or that the charitable organization's occupancy prevented the landlord from reletting the premises.⁶⁰⁰

4. TERMS OF SUBSTITUTE LEASE. The following cases present some of the frequently recurring issues raised when a landlord procures, or simply seeks to procure, a substitute tenant on terms that differ from those in the abandoning tenant's lease. Some of these cases also point to

⁵⁹⁴ *Wilson v. Ruhl*, 356 A.2d 544 (Md. 1976) (holding that landlord under statutory duty to mitigate could not recover rent during period she offered premises for sale, but could recover rent during later periods when she offered premises for sale or lease and then offered premises for lease until reletting premises to another tenant).

⁵⁹⁵ See *Zanfino v. Moretti*, 86 Pittsb. Leg. J. 605 (Pa. 1938); *Austin Hill Country Realty, Inc.*, 948 S.W.2d at 299 (stating that substitute tenant must be "suitable").

⁵⁹⁶ See *S.N. Mart, Ltd. v. Maurices, Inc.*, 451 N.W.2d 259, 262 (Neb. 1990) (holding that landlord failed to use reasonable diligence to relet when landlord did not contact prospective substitute tenant tendered by original tenant; landlord did not have representative in city; and landlord made no other effort to relet); *Cameron v. Calhoun-Smith Dist. Co.*, 442 S.W.2d 815, 816-17 (Tex. Civ. App.—Austin 1969, no writ) (holding that tenant did not show, as a matter of law, landlord breached express covenant to credit proceeds from landlord's reasonable efforts to relet against any rental deficiency, even though tenant testified landlord was uncooperative and refused to lease premises to any of 10 prospects tenant tendered to landlord).

⁵⁹⁷ See *Bert Bidwell Inv. Corp. v. LaSalle & Schiffer, P.C.*, 797 P.2d 811 (Colo. Ct. App. 1990) (holding that landlord failed to mitigate by unreasonably refusing to consent to assignment of lease solely because landlord personally disliked proposed assignee).

⁵⁹⁸ See *Vareka Invs., N.V. v. American Inv. Props., Inc.*, 724 F.2d 907, cert. denied, 105 S. Ct. 107 (1984).

⁵⁹⁹ See *Zanker Dev. Co. v. Cogito Systems, Inc.*, 215 Cal. App. 3rd 1377, 264 Cal. Rptr. 76, 80 (6th Dist. 1989) (quoting *Stanley Manly Boys' Clothes v. Hickey*, 259 S.W. 160, 162 (Tex. 1924) ("[w]e doubt if any man should be required to contract a second time with one who has without cause breached a prior contract with him . . .")).

⁶⁰⁰ See *Radio Distrib. Co. v. National Bank & Trust Co.*, 489 N.E.2d 642, 649 (Ind. Ct. App. 1986).

important instances in which the duty to mitigate may be incompatible with the traditional rules of surrender.

a. *Duration of Substitute Lease.* Under traditional surrender rules, a landlord risked accepting its tenant's surrender of the lease — and thus forfeiting any right to recover rent or damages — by reletting or attempting to relet for a longer term than the term remaining on the abandoning tenant's lease.⁶⁰¹ Most states adopting the duty to mitigate have rejected such a rule, believing it to be incompatible with a landlord's duty to mitigate.⁶⁰² As one court noted, reletting or attempting to relet for a longer or shorter term should not, of itself, bar the landlord's claim for damages as a matter of law, for to insist that the landlord relet only for the unexpired term of the lease might well inhibit its marketability, particularly when a short term remained on the original lease.⁶⁰³

b. *Higher Rent Rate.* Other jurisdictions are split on whether a landlord may relet, or seek to relet, the premises for more than the abandoning tenant's rent without breaching the duty to mitigate.

(1) One View — Seeking Fair Market Rent OK. Some jurisdictions hold that reletting, or attempting to relet, at a rental rate higher than that in an abandoning tenant's lease does not bar, as a matter of law, a landlord's claim for damages.⁶⁰⁴ In these jurisdictions, the duty to mitigate does not require a landlord to relet the premises for less than their then fair market rental value, even though any

increase in rent may theoretically limit the premises' marketability.⁶⁰⁵ And, even in jurisdictions recognizing a duty to mitigate, courts will give effect to lease provisions permitting a landlord to relet at the current commercial rate or at not less than the then current market rate.⁶⁰⁶

(2) Another View — Seeking Higher Rent Inconsistent with Reletting as Agent for Tenant. Other jurisdictions hold that a commercial landlord may breach its duty to mitigate by seeking to relet the premises for significantly more than the rent stipulated in the defaulting tenant's lease, at least when seeking higher rent inhibits or delays reletting.⁶⁰⁷ Most of these cases reason that the

⁶⁰⁵ See *Homeland, Inc.*, 631 P.2d at 765; see also *American Nat'l Bank & Trust Co. v. Hoyne Industries, Inc.*, 738 F. Supp. 297 (N.D. Ill. 1990) (applying Illinois law) (holding that landlord does not breach its duty to mitigate by offering to relet premises for more than delinquent tenant's rent so long as rental rate sought does not exceed then current market rate for premises); *Wingate v. Gin*, 714 P.2d 459, 461-62 (Ariz. Ct. App. 1986) (holding that landlord was entitled to summary judgment on issue of whether landlord made reasonable efforts to relet premises, even though landlord offered to relet premises for their fair market value); *International Comm'n on English in the Liturgy v. Schwartz*, 573 A.2d 1303, 1306 (D.C. 1990) (holding that landlord fulfilled duty to mitigate, even though landlord made cosmetic renovations and sought higher rent); *Easterling v. Halter Marine, Inc.*, 470 So. 2d 221, 223 (La. Ct. App. 1985), cert. denied, 472 So. 2d 920 (La. 1985) (holding that landlord fulfilled duty to mitigate by offering to relet premises for market rent, which was more than rent in defaulting tenant's lease).

⁶⁰⁶ See *Del E. Webb Realty & Mgmt. v. Wessbecker*, 628 P.2d 114, 115-16 (Colo. Ct. App. 1980) (holding that landlord did not breach duty to mitigate by offering to relet space at market rates of \$11 to \$12 per square foot instead of \$8 per square foot rate in delinquent tenant's lease).

⁶⁰⁷ See, e.g., *Consolidated Sun Ray, Inc. v. Oppenstein*, 335 F.2d 801, 811 (8th Cir. 1964) (stating that when landlord acts as agent for tenant, landlord cannot, in good faith, demand rental in excess of what tenant owed and that such demand raises inference that landlord has resumed possession in its own right and not as agent for tenant); *Williams v. Kaiser Aluminum &*

⁶⁰¹ *Millison v. Clarke*, 413 A.2d 198, 202-06 (Md. 1980); *Homeland, Inc.*, 631 P.2d at 766 n. 9.

⁶⁰² *Homeland, Inc.*, 631 P.2d at 766.

⁶⁰³ *Homeland, Inc.*, 631 P.2d at 766 (rejecting cases that hold reletting for a longer term interferes with tenant's estate in land and thus releases tenant from any liability on its lease).

⁶⁰⁴ See *Homeland, Inc.*, 631 P.2d at 765 (holding that landlord satisfied duty to mitigate by showing premises to interested persons, offering premises on same terms and conditions as other premises in building, and offering premises at rental terms competitive with other premises in city).

landlord, by attempting to relet for more than the rent in the abandoning tenant's lease, is acting on its own behalf and not as the faithful agent of the defaulting tenant.⁶⁰⁸

c. *Rent Rate Decrease.* A landlord does not necessarily breach its duty to mitigate by reletting the premises to a substitute tenant for less rent than the rent under the abandoning tenant's lease.⁶⁰⁹

d. *Free Rent and Other Concessions.* Some courts allow a landlord to recover unpaid rent from a delinquent tenant during a brief rent-free

period in a substitute tenant's lease.⁶¹⁰ Others do not.

5. CONTRACTUALLY DEFINING DUTY TO MITIGATE. Many states imposing a duty to mitigate on commercial landlords also allow commercial landlords and tenants to contractually define the landlord's duty.⁶¹¹ One response to *Austin Hill Country Realty, Inc.* is to define contractually the scope of any duty to mitigate in the lease. A mitigation clause should cover, among other things: (i) when the landlord's duty begins

Chem. Sales, Inc., 396 F. Supp. 288, 295 n.11 (N.D. Tex. 1975) (when there is a great disparity between market rate and rate in abandoning tenant's lease, reasonable diligence by landlord acting as tenant's agent includes efforts to lease premises at or near rate in abandoning tenant's lease); *MBC, Inc. v. Space Ctr. of Minnesota*, 532 N.E.2d 255, 562-63 (Ill. App. Ct. 1988) (holding, over dissent, that landlord failed to exercise reasonable diligence to mitigate its damages by offering to re-rent premises for higher rent than rent stipulated in delinquent tenant's lease); *Mar-Son, Inc. v. Terwalho Enters., Inc.*, 259 N.W.2d 289, 292 (N.D. 1977) (stating that, if seeking higher rent inhibits re-rental of premises, it is not done in good faith and that landlord did not make good faith attempt to mitigate damages by, among other things, offering to relet premises for 50% more than defaulting tenant's rent); see generally *Hurwitz v. Kohm*, 594 S.W.2d 643, 646 (Mo. Ct. App. 1980) (stating that when landlord reenters after tenant abandons premises, a rebuttable presumption arises that landlord repossessed for tenant's benefit).

⁶⁰⁸ See *supra* note 485 (citing case relying on unfaithful agent rationale).

⁶⁰⁹ *Middagh v. Stanal Sound, Ltd.*, 382 N.W.2d 303, 309 (Neb. 1986) (holding that landlord's efforts to relet were not unreasonable as a matter of law when landlord, after advertising and listing premises, relet premises to only party expressing an interest in leasing them for less than rent stipulated in original lease but more than rent for which premises had been listed); but see *Rokalor, Inc. v. Connecticut Eating Enters., Inc.*, 558 A.2d 265 (Conn. Ct. App. 1989) (holding that landlord failed to use reasonable diligence to relet premises by hiring broker 4 months after tenant's default and by reducing rent even though value of property had increased).

⁶¹⁰ See *Millison v. Clarke*, 413 A.2d 198, 207-08 (Md. 1980) (holding that if tenant shows landlord could have obtained rent, through exercise of reasonable diligence, during free-rent period given to substitute tenant (as part of substitute tenant's rent or otherwise), delinquent tenant would be entitled to credit for difference between its rent and amount of rent landlord should have obtained in rent free period through exercise of due diligence); *Radio Distributing v. National Bank & Trust Co.*, 489 N.E.2d 642, 649 (Ind. Ct. App. 1986) (holding that landlord did not breach duty to mitigate by allowing charitable organization to use premises rent-free to keep premises insured while landlord attempted to relet premises in the absence of evidence that landlord refused to accept rent or that charity's occupancy prevented landlord from reletting premises).

⁶¹¹ *Compare American Nat'l Bank & Trust Co. v. Hoyne Indus., Inc.*, 738 F. Supp. 297, 301-02 (N.D. Ill. 1990) (enforcing lease providing that landlord could offer to relet premises for more than defaulting tenant's rent without breaching duty to mitigate so long as rate did not exceed fair market rent because Illinois' law allows parties, dealing at arms length, to shape contract as they please by excluding or restricting remedies for economic losses) with *Stewart v. Basey*, 245 S.W.2d 484, 486 (Tex. 1952) (stating that agreement, made in advance of breach fixing damages therefor, is not enforceable as a contract and does not affect the damages recoverable for breach, unless the amount so fixed is a reasonable forecast of just compensation for the harm that is caused by the breach, and the harm caused by the breach is one that is incapable or very difficult of accurate estimation); see also *Pague v. Petroleum Prods., Inc.*, 461 P.2d 317, 320 (Wash. 1970) (holding that general liquidated damage clause providing that landlord may terminate lease and recover liquidated damages does not preclude landlord from bringing claim for rent).

(e.g., after the tenant formally relinquishes any claim to possession); (ii) whether the landlord has the option to let other available space before becoming obligated to relet the premises of the defaulting tenant; (iii) the creditworthiness of the substitute tenant; (iv) whether the landlord has an obligation to relet the premises on less favorable terms than comparable space in the landlord's property or in comparable properties; (v) the formulas for determining the application of proceeds to the costs of reletting, the rental deficiency, and other such accounting issues; (vi) whether the landlord must relet at less than the then fair market value, which may affect tenant mix; (vii) whether the landlord may relet for more than the rent stipulated in the abandoning tenant's lease; and (viii) whether the landlord must advance payment for any tenant improvements required by a substitute tenant, lease commissions, or other costs associated with reletting.

6. COMPUTING DAMAGES AND MITIGATION CREDITS. When a landlord exercising objectively reasonable efforts seeks to relet the premises to a substitute tenant, the abandoning tenant, as a general rule, is liable to the landlord for:

(i) All unpaid rent and other sums due under the lease before the commencement of the substitute tenant's lease;⁶¹² *plus*

(ii) the difference between the rent due under the abandoning tenant's lease and the rent received during the same period under the substitute tenant's lease, discounted to present value;⁶¹³ *plus*

⁶¹² See *Kulm v. Coast-to-Coast Stores*, 432 P.2d 1006 (Or. 1967) (stating that if, after making reasonable efforts, landlord is unable to relet the premises, landlord is entitled to receive entire amount of rent for period during which premises could not be rented); *Schneiker*, 732 P. 2d at 607 (holding that if landlord makes reasonable efforts to relet, but its efforts are unsuccessful, landlord is entitled to amount equal to full rent reserved in lease, plus any other consequential damages)

⁶¹³ See *Schneiker*, 732 P. 2d at 607 (holding that if landlord procures substitute tenant through its reasonable efforts to relet, landlord is entitled to recover difference

(iii) any reasonable costs of reletting or attempting to relet, even if the landlord's reasonable efforts do not succeed in procuring a substitute tenant.⁶¹⁴

Other legal and factual issues may complicate the application of this general rule, and other damage measures may need to be used to compensate landlord for its tenant's breach.

a. Apportionment of Rent. Courts in other jurisdictions are split on whether a landlord, who relets for more than the abandoning tenant's rent, must credit the *excess* rents from reletting in one period against a rental deficiency in another period or against the landlord's other damages. Some courts require such credits.⁶¹⁵ An older Texas case does not.⁶¹⁶

between the rent reserved in lease and proceeds from reletting, plus any other consequential damages).

⁶¹⁴ See *Richard v. Broussard*, 482 So. 2d 729 (La. Ct. App.), *aff'd*, 495 So. 2d 1291 (La. 1985) (holding that landlord could recover advertising costs incurred to procure substitute tenant even though landlord's reasonable efforts did not succeed); *Middagh v. Stanal Sound, Ltd.*, 382 N.W.2d 303, 309 (Neb. 1986) (holding that landlord is entitled to recover reasonable costs of reletting).

⁶¹⁵ See, e.g., *Dalamagas v. Fazzina*, 414 A. 2d 494, 495 (Conn Super. Ct. 1979) (reasoning that, if excess rents received in one period are not credited to deficiency in another, landlord will be in better position than it would have been in had breach not occurred, thus contravening principle that damages for breach of contract should put innocent party in same position as it would have been had contract been performed); *Wanderer v. Plainfield Carton Corp.*, 531 N.E.2d 630 (Ill. App. Ct. 1976) (holding that excess rent must be credited against other damages, including reletting costs).

⁶¹⁶ See *Maida v. Main Bldg. of Houston*, 473 S.W.2d 648, 652-63 (Tex. Civ. App.—Houston [14th Dist.] 1971, no writ) (awarding landlord unpaid rents to date of trial, less the proceeds of reletting through the date of trial, plus renovation costs associated with reletting).

b. Procedural Conditions to Payment of Additional Rent Are Excused. As a general rule, one party's total breach of contract relieves the other party of its obligation for further performance.⁶¹⁷ Even though the non-breaching party's obligations may cease, the contract survives for purposes of measuring damages.⁶¹⁸ Under these rules of contract law, the landlord may recover damages after its tenant abandons the premises and ceases to pay rent, and the tenant's breach also will excuse the landlord from complying with certain contractual prerequisites — such as presenting a bill — to the landlord's right to recover taxes, expenses, and other damages.⁶¹⁹

c. Difference Between Rent and Fair Market Value. This measure of damages should survive the adoption of the duty to mitigate. In *Harrison Riverside Limited Partnership v. Eagle Affiliates, Inc.*⁶²⁰ the tenant appealed a summary judgment awarding the landlord the difference between the fair market value of the premises during the period before the landlord relet the premises, even though there was a fact issue as to whether the landlord had made reasonable efforts to mitigate its damages.⁶²¹ This result may at first seem confusing, but it is probably correct.

The facts in *Harrison* were fairly straight forward. The landlord leased a 49,500 square foot warehouse to the tenant for a 5 year term beginning September 1, 1992, and ending August 31, 1997, at the rate of \$4.85 per square foot. The tenant vacated the premises and stopped paying rent in July, 1994. But the substitute tenant did not take possession and begin paying its rent of \$2.15 per square foot until August 1, 1996. That rent increased to \$3.00 per square foot on September 1,

1997, just after the scheduled term of the original tenant's lease expired.⁶²²

The tenant sought reversal of the trial court's partial summary judgment, arguing that: (1) the landlord failed to make reasonable efforts to mitigate its damages after May 1, 1995; (2) its failure to do so terminated the lease as of that date and completely excused the tenant's obligation to pay rent or damages for the remainder of the lease term; and (3) the landlord failed to prove the substitute tenant was paying market rent.⁶²³ The landlord countered that it was entitled to recover the difference between the rent in the original tenant's lease and the market value of the premises, even without proof of any reasonable mitigation efforts.⁶²⁴

The superior court rejected the tenant's first two contentions, reasoning that, even if the landlord did not act reasonably to mitigate its damages, the landlord was entitled to recover damages in a declining market measured by the difference between the abandoning tenant's rent and the market rent.⁶²⁵ The superior court thus affirmed the

⁶²² 770 A.2d at 491.

⁶²³ 770 A.2d at 491.

⁶²⁴ 770 A.2d at 492.

⁶²⁵ 770 A.2d at 492 (stating that “[e]ven if [landlord] did not act reasonably, it would nevertheless be entitled to recovery of the difference between the net square footage rate under the lease and the fair market value in a declining market.”). The superior court also cited these cases to support this holding: *Kuhn v. Spatial Design, Inc.*, 585 A.2d 967 (N.J. Super. App. Div. 1991) (adopting sections 2.706 and 2.708 of UCC on seller's damages for sales of goods to determine seller's damages for breach of contract to buy real estate); *Brill v. Guardian Life Ins. Co. of Am.*, 666 A.2d 146 (N.J. 1995); *Carisi v. Wax*, 192 536, 542, 471 A.2d 439 (N.J. Super. Dist. Ct. 1983) (stating that when commercial lease does not excuse duty to mitigate the “landlord's recovery against tenant for unpaid rent has been diminished by the sum which landlord would have received had he mitigated damages.”); *Austin Hill Country Realty, Inc.*, 948 S.W.2d at 299 (stating that “landlord's failure to use reasonable efforts to mitigate damages bars landlord's recovery against the breaching

⁶¹⁷ See *Rokolor, Inc. v. Connecticut Eating Enters., Inc.*, 558 A.2d 265, 269 (Conn. App. Ct. 1989).

⁶¹⁸ See *id.* at 270.

⁶¹⁹ See *id.* at 270.

⁶²⁰ 770 A.2d 490 (N.J. Super. App. Div. 1998).

⁶²¹ 770 A.2d at 492.

trial court's partial summary judgment and awarded the landlord the difference between the abandoning tenant's rent (\$4.85 psf) and the tenant's expert's opinion of the premises' fair market value (\$3.00 psf) during the period — before the landlord relet the premises — in which there was a fact issue as to the reasonableness of the landlord's mitigation efforts.⁶²⁶ Much as Texas' courts have for years, the superior court treated the difference between the abandoning tenant's rent and the fair market value of the premises as a proxy for actually undertaking reasonable efforts to mitigate.

d. Lost Volume Landlord. When a landlord has other vacant property that is equally suitable to a substitute tenant, the traditional measures of damages may not put the landlord in the same position as it would have been in had the original tenant performed its lease. In this circumstance, a landlord is in a position similar to that of a lost volume seller.⁶²⁷

Illustration. The landlord built a new warehouse with two identical spaces, leased one space to a tenant for 5 years at \$10,000 per year, and continued its efforts to find a second tenant for the vacant space. After the first year, the tenant vacated its space and stopped paying rent, triggering the landlord's duty to mitigate. Through its objectively reasonable efforts over the next year, the landlord procured another tenant for a three year term.

tenant only to the extent that damages reasonably could have been avoided.”); *Ingraham v. Trowbridge Builders*, 687 A.2d 785 (N.J. Super. App. Div.1997) (duty to mitigate relates to “[t]he amount of loss that . . . could reasonably have been avoided,” quoting RESTATEMENT (SECOND) OF CONTRACTS, § 350, comment b (1981).

⁶²⁶ 770 A.2d 492.

⁶²⁷ Cf. Hawkland, 3 UNIFORM COMMERCIAL CODE SERIES § 2.708, at pp. 470-497 (Callaghan 1994) (discussing seller's damages generally and damages for lost volume seller); UCC CASE DIG. ¶¶ 2.708 (Callaghan 1994 & Supp. 1997) (discussing seller's damages generally and damages for lost volume seller).

(1) Traditional Conveyance Rationale and Analysis. Because a lease was treated as a conveyance of a unique parcel of real property, the fact that the landlord had other property was simply irrelevant to the damages analysis. The landlord could recover rent (**Option 1**) or damages measured by the difference between the rent reserved in the lease and either the proceeds from reletting or the fair rental value of the premises (**Option 2** or **Option 3**). The following two examples assume the landlord made reasonable efforts to relet both spaces before and after the original tenant abandoned its space.

(a) Putting New Tenant in the Other Vacant Space. If the landlord put its new tenant in the other space, the landlord could recover: (**Option 1**) the unpaid rent (\$40,000) for years 2 through 5 as it came due; or (**Option 2**) damages measured by the discounted present value of the rent for years 2 through 5, less the premises' fair rental value. The other damage measure — (**Option 3**) the discounted present value of the rent for years 2 through 5, less the proceeds from reletting, plus any reasonable reletting costs — would be irrelevant because the landlord did not relet, and had no obligation to relet, the original tenant's space. Assuming that the landlord elected to take its recovery under Option 1, and that it leased the other space to the new tenant for \$10,000 per year, the landlord's revenue from the original tenant would be \$50,000 and the revenue from the new tenant would be \$30,000, for a total of \$80,000, which is the same position the landlord would have been in had the original tenant performed its lease, except for reletting costs.

(b) Putting Substitute Tenant in Original Tenant's Vacant Space. If the landlord put its new tenant in the original tenant's space, however, its recoverable damages would be dramatically reduced. The landlord could only recover: (1) the rent (\$10,000) for year 2 as it came due; and (2) the discounted present value of the rent for years 3 through 5, less the proceeds from reletting, plus any reasonable reletting costs; or (3) the discounted present value of the rent for years 2 through 5, less the proceeds from reletting, plus any reasonable reletting costs. Assuming that the landlord elected

to take its recovery under Option 1, and that it leased the original tenant's space to the new tenant for \$10,000 per year, the landlord's revenue from the original tenant would be \$20,000 and the revenue from the new tenant would be \$30,000, for a total of \$50,000. A duty to mitigate that would require the landlord to put the new tenant in the original tenant's space would not put the landlord in the same position it would have been in had the original tenant performed.

(2) Contract Rationale and Analysis. If, instead of a being treated as a conveyance, a lease is treated as contract for purposes of computing damages after a tenant abandons the premises, the measures of damages — including the interpretation of the landlord's duty to mitigate them — should take into account circumstances in which the tenant's abandonment leaves the landlord in the position of a lost volume seller. Otherwise, the traditional damage measures will not always make the landlord whole.

VIII. CONCLUSION

Recovering possession, rent, and damages from a delinquent tenant need not be mutually exclusive remedies. A lawful eviction will affect a landlord's measure of damages; it ordinarily will not prevent a landlord from recovering them. But an unlawful eviction will almost certainly cause a forfeiture of the landlord's right to recover damages, and worse, may give rise to wrongful eviction and other claims against the landlord. Understanding how to lawfully recover possession is the first step along the road to successful monetary recoveries. Understanding what is required to mitigate once a tenant abandons the premises is another.

ADDENDUM 1 – DEFAULT AND REMEDIES

24. **DEFAULT.** The occurrence of any one or more of the following events is a **Default**:

(a) Tenant fails to pay where and when due any **Base Rent** or other component of **Rent** and that failure continues for 5 days (**Monetary Default**).

(b) Tenant does not vacate the Premises immediately upon the expiration or termination of this Lease.

(c) Tenant or any Guarantor: (i) becomes insolvent; (ii) makes a transfer in fraud of creditors; (iii) makes an assignment for the benefit of creditors; or (iv) admits, in writing, its inability to pay its debts as they become due;

(d) Tenant or any Guarantor: (i) commits an act of bankruptcy; (ii) files a petition under the United States Bankruptcy Code or under any other similar Federal or state law; (iii) is adjudged bankrupt; or (iv) is named in a pleading or motion filed in any court proposing to reorganize or adjudicate as a bankrupt Tenant or any Guarantor, and that pleading or motion is not discharged or denied within **30** days after its filing.

(e) A receiver or trustee is appointed for all or substantially all of the assets of Tenant or any Guarantor (i) in any proceeding brought by Tenant or any Guarantor; or (ii) in any proceeding brought against Tenant or any Guarantor, and the receiver or trustee (A) is not discharged within **30** days after its appointment, or (B) Tenant or any Guarantor consents to, or acquiesces in, its appointment.

(f) The leasehold estate is taken in execution, by writ, or by other process in any action against Tenant.

(g) The liquidation, termination, dissolution, forfeiture of right to do business, or death of Tenant or any Guarantor.

(h) Tenant fails or refuses to deliver any instrument required under **Paragraph 22 (Estoppels)** or **Paragraph 23 (Subordination)** within **5** days after delivery of a written request.

(i) Tenant fails to comply with any other term of this Lease, and Tenant does not cure its failure within **10** days after Landlord delivers written notice to Tenant of its failure.

(j) Tenant fails to take possession of and occupy the Premises within **30** days after the Commencement Date, or Tenant fails to continuously use the Premises for their Permitted Use.

(k) Tenant abandons or vacates a substantial portion of the Premises without Landlord's prior written consent. Tenant will be conclusively presumed to have abandoned the Premises when Tenant, or any person acting on its behalf, has removed, is removing, or is preparing to remove (other than in the normal course of business) substantial amounts of goods, equipment, fixtures, or other property from the Premises, and this presumption will supersede Section 93.002 of the Texas Property Code to the extent of any conflict.

Tenant's failure to comply with any term of this Lease more than twice during any consecutive **12-month** period will be an independent **Default**. Landlord will not be required to give more than **1** informative notice of **Default** during and consecutive 12-month period during the Term, and this limit on Landlord's obligation to provide any notice will override any contrary term in this Lease otherwise requiring Landlord to give notice or opportunity to cure.

25. **REMEDIES.** Landlord's remedies are cumulative and not exclusive. If a **Default** occurs, Landlord — without prejudice to any other legal, equitable, or contractual right or remedy — will be entitled to exercise any one or

ADDENDUM 1 – DEFAULT AND REMEDIES

more of the following remedies, using lawful force if necessary or appropriate, without further notice or demand:

- (a) Terminate this Lease or any of Tenant's rights under this Lease, with or without reentering or repossessing the Premises.
- (b) Terminate Tenant's right to occupy all or any part of the Premises — without terminating this Lease — and with or without reentering or repossessing the Premises.
- (c) Recover unpaid Rent and any Damages;
- (d) Change or pick the locks, access codes, or other access control devices, and take any other self-help or judicial action to exclude Tenant and other occupants from the Premises.
- (e) Remove and store (at Tenant's sole cost) any property on the Premises.
- (f) Sue for eviction, specific enforcement, equitable relief, rent, damages, or any other available remedy.
- (g) Apply the Security Deposit in any manner permitted by this Lease, and increase the amount of the Security Deposit.
- (h) Cure Tenant's Default, and if Landlord does so, Tenant must reimburse Landlord within **30** days after Landlord delivers an invoice for any expenses Landlord incurred effecting compliance with Tenant's obligations, plus **15%** of the cost incurred as a reasonable administrative fee to compensate Landlord for the time, expense, and inconvenience involved in performing Tenant's obligations.
- (i) Withhold or suspend any payment that this Lease would otherwise require Landlord to make.
- (j) Charge interest on any amount not paid when due from the due date through the date of its payment at the **Default Rate**, which is the lesser of **18%** per annum or the highest rate permitted by Applicable Law.
- (k) If, but only if, with **12** or more months remaining in the Term, (a) Tenant fails to pay Base Rent, and (b) Landlord terminates this Lease or Tenant's right to possession for such failure, Landlord, at its option, will be entitled to recover **Liquidated Rental Damages** for the period after any such termination equal to **12** times the monthly Base Rent (including Parking Fees and the amount billed to Tenant for Landlord's estimate of Tenant's Pro Rata Share Operating Costs for the last month before the termination) in lieu of any other contractual or legal measure of damages for Tenant's breach of its obligation to pay Base Rent after the termination of the Lease (including reletting costs but excluding attorneys fees, expert fees, and court costs incurred by Landlord in any eviction or in collecting any sum owing under the Lease), and the parties agree this is a reasonable estimate of Landlord's damages for such a breach given the uncertainty of future market rental rates and of the duration of any vacancy. If this liquidated damage provision is unenforceable, Landlord's termination of this Lease will not preclude Landlord's recovery of damages for Tenant's failure to pay Base Rent after the termination, and Landlord will be entitled to recover any other contractual or legal measure of damages for such breach. This liquidated measure of damages will not affect or impair Landlord's rights or remedies for breaches of the Lease other than other than Tenant's failure to pay Base Rent.
- (l) Exercise all other remedies available to Landlord at law or in equity (including, without limitation, injunctive and other extraordinary remedies).

ADDENDUM 1 – DEFAULT AND REMEDIES

Damages include, without limitation, all actual, incidental, and consequential damages, court costs, interest, and attorneys' fees arising from Tenant's breach of the Lease (including, without limitation, the cost of (A) recovering possession, (B) removing and storing Tenant's and any other occupant's property, (c) reletting (including, without limitation, the costs of brokerage commissions and cleaning, decorating, repairing, or altering the Premises for a substitute tenant or tenants), (D) collecting any money owed by Tenant or a substitute tenant, (E) repairing any damage caused by any Tenant Party, (F) performing any obligation of Tenant under the Lease, (G) any other loss or cost incurred by Landlord as a result of, or arising from, Tenant's breach of the Lease or Landlord's exercise of its rights and remedies for such breach, (H) any contractual or liquidated types or measures of damages specified in this Lease; and (I) any other type or measure of damages recoverable for any particular breach under Applicable Law.

Rental Deficiency is a contractual measure of Damages for Tenant's non-payment of Rent measured by either the: (A) **Actual Rental Deficiency**, which is the difference (never less than zero) between (1) the Base Rent due for, and other **Rent** allocable under this Lease to, each month beginning with the first month with respect to which Landlord receives rent from reletting the Premises, and (2) the proceeds, if any, that Landlord actually collects from any substitute tenant for any part of the Premises in each corresponding month in which the Term and the term of the substitute tenant's lease overlap, **or** (B) **Market Rental Deficiency**, which is the present value — discounted at 6% simple annual interest — of the difference (never less than zero) between (1) the **Rent** otherwise due under the Lease during any period after Tenant's breach in which Landlord may elect to recover this damage measure, and (2) the **Fair Rental Value** of the Premises during that period, **plus** any costs incurred in connection with any actual or attempted reletting and any other **Damages**. In determining the **Market Rental Deficiency**, the **Fair Rental Value** will be the total rent that a comparable tenant would pay for comparable space in a building of substantially equivalent quality, size, condition, and location, considering rental rates and concessions then prevalent in the marketplace, the remaining lease term, the expected vacancy, any other relevant factors. An independent MAI appraiser selected by Landlord will determine the Premises' Fair Rental Value, and that determination will conclusively bind the parties in any computation of the Market Rental Deficiency.

Unless Landlord delivers signed, written notice thereof to Tenant, no act or omission by any Landlord Party will constitute Landlord's acceptance of surrender of the Premises, termination of Lease, or an actual or constructive eviction of Tenant (including, without limitation, Tenant's delivery of keys to any Landlord Party or Landlord's repossession, reentry, or reletting of the Premises).

NO LANDLORD PARTY WILL BE LIABLE FOR ANY FOR ANY CLAIM BY ANY TENANT PARTY ARISING FROM ANY ACT OR OMISSION OF ANY LANDLORD PARTY IN THE EXERCISE OF ANY RIGHT REMEDY FOR TENANT'S DEFAULT UNDER THIS LEASE, INCLUDING WITHOUT LIMITATION, CLAIMS ARISING FROM A LANDLORD PARTY'S OWN NEGLIGENCE.

TO THE FULLEST EXTENT PERMITTED BY LAW, TENANT, AFTER CONSULTATION WITH COUNSEL OF ITS OWN CHOOSING, WAIVES ALL NOTICES AND DEMANDS (INCLUDING, WITHOUT LIMITATION, NOTICE OF BREACH OR DEFAULT, NOTICE OF NON-PAYMENT OR NON-PERFORMANCE, DEMAND FOR PAYMENT OR PERFORMANCE, DEMAND FOR POSSESSION, NOTICE OF ANY CHANGE IN LOCKS OR ACCESS CONTROL DEVICES, REENTRY, OR REPOSSESSION, AND NOTICE TO VACATE), EXCEPT FOR THOSE NOTICES AND DEMANDS EXPRESSLY REQUIRED IN THIS LEASE.

26. **MITIGATION.** In lieu of any other obligation to mitigate damages arising from Tenant's failure to pay Rent or its abandonment of the Premises in breach of this Lease, Landlord — beginning not more than **30** days after Tenant physically vacates the Premises and continuing until the Premises have been relet — will market the Premises for lease through Landlord's leasing agents or outside real estate brokers and include the Rentable Area of the Premises in Landlord's regularly published advertising (if any) of available space in the Building, and Tenant will remain liable for all Rent and other Damages, except to the extent that Tenant pleads and proves that Landlord did not do these things and that Landlord's failure caused an avoidable and quantifiable increase in Landlord's damages for unpaid Rent.

(a) In addition, Landlord — without breaching any duty to mitigate — may, among other things, (i) relet other vacant space in the Building before reletting the Premises, and Tenant will not be entitled to have any proceeds from reletting such vacant space credited against any amounts due Landlord under this Lease; (ii) refuse to relet to any prospective tenant who does not meet

ADDENDUM 1 – DEFAULT AND REMEDIES

Landlord's then current leasing guidelines; or (iii) offer or agree to relet the Premises, or any part of the Premises, (A) for its then fair rental value (regardless of whether the rental rate is more or less than the rent stipulated in this Lease); (B) for a shorter or longer term than the term then remaining under this Lease; (c) on terms different from those in this Lease (including, without limitation, lease concessions comparable to those then being offered for comparable space in light of market conditions and the other terms of the substitute lease); and (D) with cosmetic improvements made to the Premises, but Landlord will not be obligated to make any improvements to the Premises for a substitute tenant, unless Tenant pays such costs to Landlord, in advance, of Landlord's agreement to make them. The terms of any substitute tenant's lease will not effect a surrender of this Lease.

(b) No rent collected from a substitute Tenant for any month in excess of the Rent due under the Lease for that month will be credited or offset against unpaid Rent for any other month or any other Damages. Tenant stipulates that the mitigation requirements expressed in **Paragraph 26** of this Lease are objectively reasonable. **TO THE FULLEST EXTENT PERMITTED BY LAW, LANDLORD AND TENANT STIPULATE AND AGREE THAT THE EXPRESS OBLIGATIONS SET FORTH IN THIS PARAGRAPH ARE OBJECTIVELY REASONABLE AND SATISFY LANDLORD'S OBLIGATION TO MITIGATE ITS DAMAGES AFTER TENANT FAILS TO PAY RENT OR VACATES OR ABANDONS THE PREMISES.**