

DRAFTING DEFAULTS AND REMEDIES CLAUSES IN COMMERCIAL LEASES

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TABLE OF CONTENTS

I.	TERMINATION	1
A.	Terminate the Lease	1
B.	Terminate Tenant's Right to Possession	1
C.	Forfeit the Lease	2
II.	EVICITION (REPOSSESSION)	2
A.	Eviction by Self-help (Non-judicial Repossession)	2
1.	Common Law Self-Help Rule	2
2.	Legislative Modifications to the Common Law Self-Help Rule	3
3.	The Current Self-Help Rule	4
B.	Eviction by Forcible Detainer (Judicial Repossession)	4
1.	Judicial Eviction (Forcible Detainer) Procedure	4
2.	Practical Consequences of a Forcible Detainer	6
3.	The Election of Remedies Problem.	6
4.	The Judicial Bar Misconception	7
5.	Possession v. Title: The Jurisdictional Wars	7
III.	SUING FOR RENT AND/OR DAMAGES	8
A.	Rent (Suing to Enforce the Lease)	8
B.	Damages (Suing for Damages for Anticipatory Breach of Lease)	8
C.	Rent and Damages (Suing for Both)	8
IV.	MITIGATION OF DAMAGES.	8
A.	Origin of the Mitigation Doctrine	9
B.	Current Texas Law on the Mitigation Doctrine	9
C.	Analysis of Supreme Court - Legislature Conflict	9
D.	Conclusions	11
V.	APPENDIX	11
A.	Default by Landlord/Events.	11
B.	Default by Landlord/Tenant's Remedies.	11
C.	Default by Tenant/Events.	11
D.	Default by Tenant/Landlord's Remedies.	11
E.	Mitigation/Rent.	11
F.	Mitigation/Damages.	12
G.	Default/Waiver.	12

DRAFTING DEFAULTS AND REMEDIES CLAUSES IN COMMERCIAL LEASES

Almost all commercial leases have a default section defining "events of default" and providing what notice, if any, is to be given to the defaulting party. The default section of the lease is generally followed by a remedies section providing the landlord three remedies:

- Termination of the lease, repossession of the premises, and the right to sue for damages;
- Termination of the tenant's right to possession, repossession of the premises, and the right to sue for rent; and
- The right to perform the tenant's lease obligations and charge the tenant for the services.

There is a fourth remedy which is rarely mentioned in the remedies section of a lease and that is the right of the landlord to not only terminate the lease, but forfeit the lease. A lease is a conveyance of land for a designated period with a reversionary interest in the lessor. Remedies one, two, and four all involve the landlord's right to repossess or retake the premises or to exercise his reversionary interest; in other words, an eviction.

I. TERMINATION

Upon the default of the tenant, most leases give the landlord three termination remedies

- 1) terminate the lease and sue for damages;
- 2) terminate the tenant's right of possession and sue for rent; and,
- 3) forfeit the lease and terminate the tenant's obligation to pay either rent or damages.

A. Terminate the Lease

When the tenant has abandoned the leased premises and ceased paying rent, the landlord may treat the tenant's conduct as an anticipatory breach of the lease. In this situation, the landlord may terminate the lease and sue for damages.¹ Most leases define damages as the rent that accrues while landlord is attempting to re-let the premises. In addition, the leases generally provide that damages include rentals that may accrue in

the future and set forth a measure of damages as the difference in the rent contracted to be paid and the reasonable value of the lease for the remaining term discounted to its present value.² Another way of stating the measure of damages for rent that may accrue in the future is that it is the difference between the contract rent and the fair market rent for the remainder of the term discounted to its present value.

B. Terminate Tenant's Right to Possession

When the tenant has neither abandoned nor vacated the leased premises and has ceased paying rent, most leases give the landlord the remedy of terminating the tenant's right of possession without terminating the lease. Termination of possession is accomplished by either non-judicial repossession (lockout) or judicial repossession (forcible detainer); both are evictions. See, TEX. PROP. CODE ANN. § 24.002(a)(1). The law is not exactly clear whether the termination of the tenant's right to possession also terminates the lease. Where the tenant has abandoned the premises and ceased paying rent, most leases provide that the landlord may release the premises for and on behalf of the tenant without terminating the lease. Assuming the rent is at a deficiency, the landlord then sues the tenant for the rental deficiency *as it accrues*. This is a suit upon the lease and is a suit for rent as opposed to damages. It is clear that the lease is not terminated in this situation.³ However, where the tenant has not vacated the premises, has ceased paying rent, and it becomes necessary for the landlord to terminate the tenant's right to possession, it is anything but clear whether the lease is terminated. The predecessor to section 24.002 of the property code (article 3973) contemplated that the lease must be terminated (pursuant to a right granted in the lease) before the tenant's right to possession could be terminated by a forcible detainer. The same logic would apply to lockouts. However, in 1985, section 24.002(a)(1) was amended to substitute "termination of tenant's right of possession" for "expiration of the lease under which the person claimed". Does section 24.002(a)(1) now give the landlord a right to terminate the tenant's right of possession (absent language in the lease) without terminating the lease? Without discussing the legislative history of section 24.002(a)(1), one case indicates that it does, *Tempo Tamers, Inc. v. Crow-Houston Four, Ltd.*, 715 S.W.2d 658, 668 (Tex. App. -

¹ *Crabtree v. Southmark Commercial Management*, 704 S.W.2d 478 (Tex. App. - Houston [14th Dist.], writ ref'd, n.r.e.).

² *John Church Co. v. Martinez*, 204 S.W. 486 (Tex. Civ. App. - 1918); *White v. Watkins*, 385 S.W.2d 267 (Tex. Civ. App. - Waco 1964, no writ); *Employment Advisors, Inc. v. Sparks*, 364 S.W.2d 478 (Tex. Civ. App. - Waco 1963, writ ref'd n.r.e. at 368 S.W.2d 199); *Warncke v. Tarbutton*, 449 S.W.2d 363

(Tex. Civ. App. -San Antonio 1969, writ ref'd n.r.e.); *Thomas v. Morrison*, 537 S.W.2d 274 (Tex. Civ. App. - El Paso 1976, writ ref'd n.r.e.); *Speedee Mart Incorporated v. Stovall*, 664 S.W.2d 174 (Tex. App. - Amarillo 1983, no writ); *Crabtree v. Southmark Commercial Management*, 704 S.W.2d 478 (Tex. App. - Houston [14th Dist.], writ ref'd, n.r.e.).

³ Stovall, "Remedies of the Landlord When Tenant Fails to Pay Rent," 13 BAYLOR L. REV. 374 (1961).

Dallas 1986, writ ref'd, n.r.e.), and another indicates that it does not, *Caro v. Housing Authority of City of Austin*, 794 S.W.2d 901 (Tex. App. - Austin 1990, writ denied). This is a situation where drafting of the remedies section of a lease is paramount.⁴

C. Forfeit the Lease

When the tenant has abandoned the leased premises and ceased paying rent, the landlord may treat the tenant's conduct as an anticipatory breach of the lease. In this situation, the landlord may terminate the lease and declare it to be forfeited, releasing the tenant of all liability under the lease, including the obligation to pay rent or damages.⁵ If ever there was a time for the lawyer for the landlord to choose his language carefully, this is it.

II. EVICTION (REPOSSESSION)

Eviction by a landlord of a tenant from real property and repossession of personal property by a secured creditor involve the same concept; that is, repossession.⁶ There are two forms of eviction: actual and constructive. Of actual eviction, there are two forms: judicial and non-judicial (or self-help). Constructive eviction will not be discussed at this point other than to state that it is nothing more than a legal fiction to supply the landlord with the necessary intent to convert a set of circumstantial facts into an actual eviction.⁷

A. Eviction by Self-help (Non-judicial Repossession)

Although eviction by self-help may take place in many different ways, it is most often accomplished by a lock-out; that is, the landlord merely changes out the core of the lock to the tenant's premises so that the

landlord has access, but the tenant's keys no longer work.

1. Common Law Self-Help Rule

At common law, the holder of a security interest had the right to retake possession of the security by self-help if he had the contractual right to repossess and did so without breaching the peace. *Singer Mfg. Co. v. Rios*, 96 Tex. 174, 71 S.W. 275 (1903). The same common law rule applied to both personal and real property. In real property, the rule evolved as follows:

A landlord may re-enter and take possession of the leased premises upon the tenant's default without notice to, the consent of, or even over the protest of the tenant, provided he has the right to do so under the terms of the lease agreement and does so peaceably and without force or violence.⁸

Therefore, the two key elements are the self-help remedy in the lease and the eviction that is "peaceably and without force or violence."

a. Self-help Remedy in Lease

Most lease forms give the landlord the right to retake possession of the leased premises upon the tenant's default. The lease forms generally have language giving the landlord the right "to enter upon and take possession of the leased premises by picking or changing locks if necessary, and lock-out, expel or remove tenant. . . ." Again, to belabor the obvious, ***the landlord does not have a right to self-help (a lockout) until the tenant is in default.***⁹ If the landlord does not have the right to lock out the tenant, but does so anyway, then the lease is forfeited and the landlord may not sue for rent or damages beyond the date of the unlawful

⁴ See, for example, Gibson, "Lease Drafting and Surrender by Operation of Law", 41 TEX. L. REV. 428 (1961).

⁵ *Rohrt v. Kelley Manufacturing Company*, 162 Tex. 534, 349 S.W.2d 95 (Tex. 1961); *Crabtree v. Southmark Commercial Management*, 704 S.W.2d 478 (Tex. App. - Houston [14th Dist.], writ ref'd, n.r.e.).

⁶ Cf., *Singer Mfg. Co. v. Rios*, 96 Tex. 174, 71 S.W. 275 (1903).

⁷ Cf., *Metroplex Glass Center, Inc. v. Vantage Properties, Inc.*, 646 S.W.2d 263, 265 (Tex. Civ. App. - Dallas 1983, writ ref'd, n.r.e.).

⁸ *Design Center Venture and Century Development Corporation v. Overseas Multi-Projects Corporation*, 748 S.W.2d 469 (Tex. App. - Houston [1st Dist.] 1988, writ denied); *Salpas v. State*, 642 S.W.2d 71 (Tex. App. - El Paso 1982, no writ); *Embry v. Bel-Aire Corporation*, 508 S.W.2d 469 (Tex. Civ. App. - Austin 1974, writ ref'd, n.r.e.); *Gulf Oil Corporation v. Smithey*, 426 S.W.2d 262 (Tex. Civ. App. -

Dallas, 1968, writ dismiss'd). There is one recent case where the court said, "Texas does not recognize 'self-help repossession' of real estate." *Russell v. American Real Estate Corporation*, 89 S.W.3d 204 (Tex. App. Corpus Christi 2002, no pet.). However, the language was dicta in a foreclosure case not followed by any citations and is clearly wrong. Russell tried to claim a "forcible entry" after a foreclosure sale, but never alleged a forcible detainer.

⁹ *PRC Kentron, Inc. v. First City Center Associates, II*, 762 S.W.2d 279 (Tex. App. - Dallas, 1988, writ denied) is a good illustration of this problem. Although the tenant was not occupying the office space, it was furnished and the tenant was current on its rent at the time of the lockout. It appears that the court confused the covenant not to vacate with a covenant of continuous operations. It is this author's opinion that the holding that the tenant was in default is clearly erroneous. There is no abandonment if the tenant, although not occupying the premises, continues to pay rent. *Lucky v. Fidelity Union Life Ins. Co.*, 339 S.W.2d 956, 959 (Tex. Civ. App. - Dallas, 1960, no writ).

lockout; that is, there is no further obligation to pay rent.¹⁰ In addition, a tenant has a cause of action for damages for wrongful eviction.¹¹ The key question, obviously, is whether the taking of possession by the landlord can be accomplished "peaceably and without force of violence."

b. Peaceably and Without Force or Violence

The cases set forth below illustrate how the courts have interpreted "peaceably and without force or violence" over the years.

- *Singer Mfg. Co. v. Rios*, 96 Tex., 71 S.W. 275 (1903) [personal property, chattel mortgage, peaceable].
- *Henderson v. Beggs*, 207 S.W. 565 (Tex. Civ. App. - Ft. Worth 1918 no writ) [real property, commercial, peaceable].
- *Chrono v. Gonzales*, 215 S.W. 368 (Tex. Civ. App. - San Antonio, 1919, no writ) [real property, residential, non-peaceable].
- *Kuhn v. Palo Duro Corporation*, 151 S.W.2d 894 (Tex. Civ. App. - Texarkana 1941), reversed on other grounds, 161 S.W.2d 778 (1942) [real property, commercial and residential, non-peaceable].
- *Gulf Oil Corporation v. Smithey*, 426 S.W.2d 262 (Tex. Civ. App. - Dallas 1968, writ dism'd [real property, commercial, non-peaceable].
- *Harris v. Panhandle and S. F. Railway Company*, 163 S.W.2d 647 (Tex. Civ. App. - Austin 1974 writ refused n.r.e.) [real property, commercial, peaceable].
- *Houck v. Kroger Company*, 555 S.W.2d 803 (Tex. Civ. App. - Houston [14th Dist.] 1977, writ refused, n.r.e.) [real property, commercial, non-peaceable].
- *McVea v. Verkins*, 587 S.W.2d 526 (Tex. Civ. App. - Corpus Christi 1979, no writ) [real property, commercial, non-peaceable].

- *Salpas v. State*, 642 S.W.2d 71 (Tex. App. - El Paso 1982, no writ) [real property, commercial, peaceable].
- *Martinez v. Ball*, 721 S.W.2d 580 (Tex. App. - Corpus Christi 1986, no writ) [real property, commercial, peaceable, non-permanent].
- *Design Center Venture and Century Development Corporation v. Overseas Multi-Projects Corporation*, 748 S.W.2d 469 (Tex. App. - Houston [1st Dist.] , 1988, no writ) [real property, commercial, peaceable].
- *MBank of El Paso v. Sanchez*, 836 S.W.2d 151 (Tex. 1992) [personal property, chattel mortgage, non-peaceable].

2. Legislative Modifications to the Common Law Self-Help Rule

In 1973, the 63rd Legislature of the State of Texas enacted House Bill 1684 which contained a new article 5236c dealing with willful interruption of utilities and willful exclusion by residential landlords. Section 2 of article 5236c provided that it would be:

"unlawful for a landlord or his agent to willfully exclude a tenant from the tenant's premises in any manner except by judicial process."

Section 2 also provided for a procedure that allowed the landlord to change the locks, but required him to give the tenant a new key "regardless of whether the tenant paid any delinquent rentals." This provision barring lockouts except by judicial process applied only to residential landlords. This legislation was subsequently modified by the legislature in 1983 (when it was placed into the Property Code), 1987, 1989, and 1993. The original act and the subsequent amendments constitute one of the most embarrassing chapters in the history of the Texas Legislature and (to borrow from Yogi Berra) raise the art of legislative bungling to a new low. The legislative history of this confusion is available from the author. The current statute regulating a landlord's self-help is set forth below.

¹⁰ *Cox's Bakeries of North Dakota, Inc. v. Homart Development Corporation*, 515 S.W.2d 326 (Tex. Civ. App. - Dallas 1974, no writ).

¹¹ *Gill Savings Association v. Chair King, Inc.*, 783 S.W.2d 674 (Tex. App. - Houston [14th Dist.] 1989, affirmed per curiam, 797 S.W.2d 31 (1990). Under the Uniform

Commercial Code, if the repossession is unlawful (and, therefore, the subsequent sale), the secured creditor is deemed to have accepted the proceeds of the sale in satisfaction of the entire debt. *Tannebaum et. al. v. Economics Laboratory, Inc.*, 628 S.W.2d 769 (Tex. 1982).

3. The Current Self-Help Rule.

The Self-help Rule governing **commercial** lockouts, as modified by the 1993 amendments to the Property Code, may be stated as follows:

- a) The landlord must have a right to self-help, either contractually or from the Property Code.
- b) The tenant must be in default, which will trigger the self-help remedy. If the remedy comes solely from the Property Code, the event of default is limited to a failure to pay rent.
- c) Eviction by self-help must be peaceable.
- d) Notice and stand-by requirements of the lease must be observed.
- e) Notice and stand-by requirements of the Code must be observed in the absence of conflicting language in the lease.
- f) The landlord need not return the key to the premises until the tenant brings the rent current.

TEX. PROP. CODE ANN. §93.002. In **residential** tenancies, item number 6 is different; the landlord must return the key to the premises to the tenant whether or not the tenant brings the rent current. TEX. PROP. CODE ANN. §92.0081(c).

As to personal property, the same basic rule has been codified in the Uniform Commercial Code. TEX. BUS. & COM. CODE § 9.503. *MBank of El Paso v. Sanchez*, 836 S.W.2d 151 (Tex. 1992). Contrary to lockouts, in which there is no common law right absent a contractual right, the Uniform Commercial Code specifically grants a secured party the right to retake possession of the collateral without judicial process in § 9.503. TEX. BUS. & COM. CODE § 9.503. In other words, in the absence of a contractual right, the Code grants a secured party the remedy of repossession by self-help. After the 1987 amendments to the Property Code, commercial landlords were given a statutory remedy of self-help (lockout) absent a contractual provision, but the event of default is limited to a failure to pay rent. TEX. PROP. CODE ANN. § 93.002. Prior to 1987, the self-help remedy was never implied; it only arose out of the contract between the landlord and the tenant.

B. Eviction by Forcible Detainer (Judicial Repossession)

One of the landlord's remedies upon the tenant's default of the lease agreement is eviction by judicial procedure. The statute and rules for eviction by judicial procedure (forcible detainer) are set forth in chapter 24 of the Texas Property Code and rules 500 through 510

of the Texas Rules of Civil Procedure. Although a forcible entry and detainer is often referred to as an "F.E.D.", the vast majority of the cases heard in justice of the peace courts are forcible detainers. A forcible entry occurs when a person enters the real property of another without legal authority (i.e., no lease agreement and no permission of the landlord). TEX. PROP. CODE ANN. § 24.001. A forcible detainer occurs when a person who has entered legally wilfully holds over after the expiration of the lease under which the person claimed. TEX. PROP. CODE ANN. § 24.002. After the Supreme Court amended the rules of justice courts in 2013, the process is called eviction rather than forcible detainer. Judicial seizure of personal property (the enforcement of a statutory or contractual lien) is either in the form of a distress warrant or a writ of sequestration. TEX. PROP. CODE ANN. § 54.025; TEX. CIV. PRAC. & REM. CODE § 62.001.

1. Judicial Eviction (Forcible Detainer) Procedure

Forcible detainer actions under section 24.002 of the Texas Property Code are filed in the justice of the peace court pursuant to Rule 500.3 3(d) and 510 of the Texas Rules of Civil Procedure. It is a prerequisite that a demand for possession must be made in writing prior to the forcible detainer action taking place; there is an exception if there was also a forcible entry. TEX. PROP. CODE ANN. § 24.002(b). A forcible detainer is outlined by section 24.002 of the Property Code as follows:

- (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.

TEX. PROP. CODE ANN. § 24.002.¹²

¹² See, *Coinmach Corp. v. Aspenwood Apartment Corp.*, 417

S.W.3d 909 (Tex. 2013), for an in depth discussion of the difference between a tenant at will and a tenant by sufferance.

Rule 510.3(a) sets forth the required contents of the petition in the justice court which must be sworn by the plaintiff and contain the following:

- (1) a description, including the address, if any, of the premises that the plaintiff seeks possession of;
- (2) a description of the facts and the grounds for eviction;
- (3) a description of when and how notice to vacate was delivered;
- (4) the total amount of rent due and unpaid at the time of filing, if any; and
- (5) a statement that attorney fees are being sought, if applicable.

TEX. R. CIV. P. 510.3(a).

a. Jurisdiction.

A justice court in the precinct in which the real property is located has jurisdiction in forcible entry and forcible detainer suits. TEX. R. CIV. P. 510.3(b) and TEX. PROP. CODE ANN. § 24.004. The justice has *exclusive* jurisdiction of forcible detainer suits and a county or district court has no jurisdiction to enjoin the forcible detainer suit.¹³

b. Notice to Vacate for Default.

The notice to vacate provisions are set forth in section 24.005 and require the landlord to give the defaulting tenant:

"at least three days' written notice to vacate the premises before the landlord files a forcible detainer suit. . . ."

TEX. PROP. CODE ANN. § 24.005.

c. May Sue for Rent.

A suit for rent may be jointed with an action for forcible entry and detainer, wherever the suit for rent is within the jurisdiction of the justice court. TEX. R. CIV. P. 510.3(d).

d. Citation.

When the party aggrieved or his authorized agent shall file his written sworn complaint with such justice, the justice shall immediately issue citation directed to the defendant or defendants commanding him to appear

before such justice at a time and place named in such citation, such time being not more than 21 days nor less than 10 days from the date of service of the citation. TEX. R. CIV. P. 510.4.

e. Complainant May Have Possession.

At the time of filing the petition, the plaintiff may file a bond for immediate possession prior of the premises. Defendant must be served with notice of the bond application and has seven days to file an answer. If the defendant files an answer, no writ of immediate possession will issue. TEX. R. CIV. P. 510.5.

f. Requisites of Petition.

The new eviction rules specifically set forth the requirements of the petition in the justice court in order to entitle the plaintiff to the possession and authorize the action under sections 24.001 - 24.004 of the Texas Property Code. TEX. R. CIV. P. 510.3(a).¹⁴

g. Only Issue is Possession.

In cases of forcible entry or of forcible detainer under sections 24.001 - 24.008 of the Texas Property Code, the only issue shall be as to the right to actual possession; and the merits of the title shall not be adjudicated. TEX. R. CIV. P. 510.3(e).¹⁵ However, a recent case out of the Houston Court of Appeals has muddied the waters. *Volume Millwork, Inc. v. West Houston Airport Corporation*, 218 S.W.3d 722 (Tex. App. Houston [1st Dist.] 2006, pet. denied). In that case, the original owner, Pelican Importing, leased to the tenant, Volume Millwork. Before the end of the lease term, Pelican sold the property to the Lesikar Family Trust and assigned the lease. Lesikar assigned the lease to West Houston Airport Corporation in return for management of the property. West Houston brought a successful forcible detainer and the tenant appealed to the county court at law and lost again. The tenant then superceded the judgment and appealed to the court of appeals. The court of appeals held that it did not have jurisdiction to hear the appeal for two reasons: one, the tenant challenged the landlord's right to bring the forcible detainer for possession; and, two, the tenancy was under a commercial lease and the court did not have authority under TEX. PROP. CODE ANN. § 24.007. The second reason for lack of jurisdiction was valid, but the first reason, if carried to its logical conclusion would effectively do away with forcible detainers. The court either ignored or was unaware of rule 747a (now rule

adequacy of the landlord's description of the premises.

¹³ *McGlothlin v. Kliebert*, 672 S.W.2d 231, 232 (Tex. 1984); *TMC Medical, Ltd. v. The Lasaters French Quarter Partnership*, 880 S.W.2d 789, (Tex. App. - Tyler 1994, writ dismissed, w.o.j.).

¹⁴ See, *Mitchell v. Citifinancial Mortgage Company*, 192 S.W.3d 882 (Tex. App. Dallas 2006, no pet.), upholding the

¹⁵ *TMC Medical, Ltd. v. The Lasaters French Quarter Partnership*, 880 S.W.2d 789, (Tex. App. - Tyler 1994, writ dismissed, w.o.j.); *Marshall v. Housing Authority of the City of San Antonio*, 198 S.W.3d 782 (Tex. 2006).

500.4(b) of the Texas Rules of Civil Procedure which specifically authorizes agents to bring a forcible detainer suit on behalf of their principals in a justice court.

h. Representation by Agents.

"[T]he parties may be represented by their authorized agents in the justice court."

TEX. R. CIV P. 500.4(b). A servicing agent for a foreclosing lender may bring a forcible detainer action against the borrower after the substitute trustee's sale.¹⁶

i. Effect on Other Actions.

A forcible entry and detainer suit or a forcible detainer suit does not bar a suit for trespass, damages, waste, rent, or mesne profits. TEX. PROP. CODE ANN. § 24.008. For example, a judgment for forcible detainer does not bar an action for wrongful eviction.¹⁷

j. Writ of Possession.

A landlord who prevails in a forcible entry and detainer or a forcible detainer action is entitled to a judgment for possession of the premises. TEX. PROP. CODE ANN. § 24.0061. See also, TEX. R. CIV P. 510.8(d).

k. Appeal.

In the justice court, a motion for new trial is not allowed and the appeal is to the county court at law. Appeal is perfected by posting a bond within five days from the date of the judgment. Within five days following the filing of the bond, the appealing party gives notice to the opposition. TEX. R. CIV P. 510.9. However, a recent Supreme Court of Texas case held that the failure to file a supersedeas bond was not a bar to an appeal to the county court at law where a notice of appeal was also filed.¹⁸ Either party may appeal from a final judgment in such case to the county court of the county in which the judgment is rendered. TEX. R. CIV P. 510.9. It is important to remember that the justice court is not a court of record; therefore, the appeal to the county court at law is a trial de novo. TEX. PROP. CODE ANN. § 24.007. Prior to January 1, 2012, a final

judgment in a commercial case in the county court at law could not be appealed to the Court of Appeals. However, the section was amended to add a section (b) stating:

"Notwithstanding any other law, an appeal may be taken from a final judgment of a county court, statutory county court, statutory probate court, or district court in an eviction suit."

TEX. PROP. CODE ANN. § 24.007.

2. Practical Consequences of a Forcible Detainer

As can readily be seen from the new eviction rules, the earliest a writ of possession may issue is nineteen days after demand is made in writing for possession of the leased premises and the case is tried. In the normal and everyday course of events between landlords, tenants, their attorneys, and the justice of the peace, the nineteen days will almost invariably double. If an appeal is taken to the county court at law, the trial is de novo and the time delays compound. Depending upon the circumstances, sometimes a forcible detainer is the landlord's only option. For example, how does a landlord lockout a tenant bank? If there is likely to be a breach of the peace in the lockout process, the landlord should opt for judicial repossession.

3. The Election of Remedies Problem.

There is authority for the proposition that the landlord may not mix and match its self-help and judicial remedies. Once a landlord submits to the judicial process, it may not thereafter renege and drop the judicial proceedings and re-embrace the self-help remedies; to do so would be an abuse of process.¹⁹ If the landlord does not have the right to lock out the tenant, but does so anyway, then the lease is forfeited and the landlord may not sue for rent or damages beyond the date of the unlawful lockout; that is, there is no further obligation to pay rent.²⁰ Under the Uniform Commercial Code, if the repossession is unlawful (and, therefore, the subsequent sale), the secured creditor is deemed to have accepted the proceeds of the sale in satisfaction of the entire debt.²¹

¹⁶ *Murphy v. Countrywide Home Loans, Inc.*, 199 S.W.3d 441 (Tex. App. Houston [1st Dist.] 2006, no pet.).

¹⁷ *Johnson v. Highland Hills Drive Apartments*, 552 S.W.2d 493 (Tex. Civ. App. -Dallas, 1977, writ refused n.r.e. per curiam 568 S.W.2d 661). *TMC Medical, Ltd. v. The Lasaters French Quarter Partnership*, 880 S.W.2d 789, 791 (Tex. App. - Tyler 1994, writ dismissed, w.o.j.).

¹⁸ *Marshall v. Housing Authority of the City of San Antonio*, 198 S.W.3d 782 (Tex. 2006).

¹⁹ *Cf., Houck v. The Kroger Co.*, 555 S.W.2d 803 (Tex. App. - Houston, 1977, writ refused n.r.e.); *Bishop v. General Motors Acceptance Corporation*, 229 S.W.2d 848 (Tex. App. - Austin, 1950, no writ); *Burnett Trailers, Inc. et. al. v. Polson*, 387 S.W.2d 692, (Tex. Civ. App. - San Antonio, 1965, writ refused n.r.e.).

²⁰ *Cox's Bakeries of North Dakota, Inc. v. Homart Development Corporation*, 515 S.W.2d 326 (Tex. Civ. App. - Dallas 1974, no writ).

²¹ *Tannebaum v. Economics Laboratory, Inc.*, 628 S.W.2d

4. The Judicial Bar Misconception

One of the most common misconceptions among attorneys litigating forcible detainers and/or suits for wrongful evictions is that a judgment in the justice court awarding possession to the landlord is a bar to a subsequent suit by the tenant for damages for wrongful eviction. Nothing could be further from the truth. “A forcible entry and detainer suit or a forcible detainer suit does not bar a suit for trespass, damages, waste, rent, or mesne profits.” TEX. PROP. CODE ANN. § 24.008. Further, a judgment for forcible detainer does not bar an action for wrongful eviction.²² Suppose a landlord has a recalcitrant tenant and it has proven impractical or impossible to evict the tenant by self-help and not breach the peace. What if the alleged breach is somewhat fuzzy? What is the landlord's safest remedy? A declaratory judgment pursuant to chapter 37 of the Texas Civil Practice and Remedies Code. TEX. CIV. PRAC. & REM. CODE §§ 37.001 to 37.008.²³

5. Possession v. Title: The Jurisdictional Wars

Texas law states that in a forcible detainer action:

“the only issue shall be as to the right to actual possession; and the merits of the title shall not be adjudicated.”

District courts have exclusive jurisdiction over title questions involving real property. Yet, a lease is a conveyance of land for a designated period with a reversionary interest in the lessor. How do the courts sort out this incongruity? Poorly, it turns out.

TEX. CONST. ART V, § 8 (amended 1985) states that the:

“district court jurisdiction consists of exclusive, appellate, and original jurisdiction of all actions, proceedings, and remedies, except in cases where exclusive, appellate, or original jurisdiction may be conferred by this Constitution or other law on some other court, tribunal, or administrative body.”

The Government Code says that

“The district court has the jurisdiction

769 (Tex. 1982).

²² *Johnson v. Highland Hills Drive Apartments*, 552 S.W.2d 493 (Tex. Civ. App. - Dallas, 1977, writ refused n.r.e. per curiam 568 S.W.2d 661); *Anarkali Enterprises, Inc. v. Riverside Drive Enterprises*, 802 S.W.2d 25 (Tex. App. - Fort Worth 1990, no writ); *TMC Medical, Ltd. v. The Lasaters French Quarter Partnership*, 880 S.W.2d 789, (Tex. App. - Tyler 1994, writ dismissed, w.o.j.); *McGlothlin v. Kliebert*, 672 S.W.2d 231 (Tex. 1984). See also, TEX. PROP. CODE ANN. § 93.003.

provided by Article V, Section 8, of the Texas Constitution.” TEX. GOV. CODE. § 27.004. Jurisdiction of justice courts is limited by the Government Code. Justice courts have jurisdiction of cases of forcible entry and detainer, but do not have jurisdiction of “a suit for trial of title to land. . .”

TEX. GOV. CODE § 37.031. In a forcible detainer action:

“the only issue shall be as to the right to actual possession; and the merits of the title shall not be adjudicated.”

(Emphasis supplied) TEX. R. CIV. P. 510.3(e).

Originally, Texas courts tried to resolve the question by asking if the title of real property was “tangentially or collaterally related to possession”. That is, was the:

“question of title so integrally linked to the issue of possession that the right to possession cannot be determined without first determining title, then the justice courts and, on appeal, the county courts, lack jurisdiction over the matter.”²⁴

However, the test seems to have resolved to the following:

“If the adjudication of the claims asserted in county court could arguably have claim preclusive effect on a question of title to real property, we think even the earliest case law reserved such claims for the district court's jurisdiction.”²⁵

For a detailed analysis of the Possession v. Title issue and jurisdiction between the justice and county courts on the one hand and the district courts on the other, see Bliss, *Jurisdictional Wars: District and Justice Courts on “Possession” v. “Title”*, The Bernard O. Dow Leasing Institute (2011) University of Texas School of Law.

²³ But see, *Goldman v. Alkek*, 850 S.W.2d 568 (Tex. App. - Corpus Christi 1993, no writ). For an excellent example of a fuzzy breach, see *West Anderson Plaza v. Feyznia*, 876 S.W.2d 528, (Tex. App. - Austin, 1994, no writ).

²⁴ *Gibson v. Dynegy Midstream Services, L.P.*, 138 S.W.3d 518, 522 (Tex. App. Fort Worth 2004, no pet.).

²⁵ *Merit Management Partners I, L.P. v. Noelke*, 266 S.W.3d 637, 650 (Tex. App. Austin 2008, no pet.). See also, *Coughran v. Nunez*, 127 S.W.2d 885 (Tex. 1939)

III. SUING FOR RENT AND/OR DAMAGES

When a tenant defaults in the payment of rent, the landlord may sue for rent or damages or a combination of the two. It is important to keep in mind the difference.

A. Rent (Suing to Enforce the Lease)

Suits for rent are suits upon the contract; that is, a suit to enforce the contract. The landlord may sue for rent periodically as it falls due, or he may stand on the contract and sue for the full rent at the end of the term. A suit for rent is not a suit for damages for breach of contract but is a suit upon the contract.²⁶ The landlord may sue the tenant for rentals as they accrue or, if the right is given in the lease, release for and on behalf the tenant at a deficiency and sue for the deficiencies as they accrue. Any judgment the landlord takes should be "without prejudice to the rights of landlord to sue for future rentals as they accrue."

B. Damages (Suing for Damages for Anticipatory Breach of Lease)

Where the tenant vacates the leased premises and indicates an intent to pay no further rent, the landlord may consider the conduct to be a breach, treat the contract as terminated and hold the tenant for liable for damages for breach of contract. Where the landlord sues for damages, the effect on the lease is a cancellation and termination of tenant's rights and obligations accruing after the termination, but the damage provisions of the lease still control. The measure of damages is the difference in the rent contracted to be paid and the reasonable value of the lease for the remaining term discounted to its present value.²⁷

C. Rent and Damages (Suing for Both)

Speedee Mart Incorporated v. Stovall, 664 S.W.2d 174 (Tex. App. - Amarillo 1983, no writ) held that a landlord must make an election at the time of filing the petition as to whether he is suing for rent or damages.

The Amarillo Court of Appeals held that the landlord could not sue for rent that had accrued up to the time of trial and for damages for anticipatory breach for the period of time from trial to the end of the lease term. This holding of the Amarillo court is simply wrong. If the landlord, in his petition, sues for rent that has accrued to the time of trial and asks for damages for anticipatory breach of lease from the time of trial to the end of the term of the lease, the landlord is entitled to both remedies.²⁸ In *Crabtree v. Southmark Commercial Management*, 704 S.W.2d 478 (Tex. App. - Houston [14th Dist.] 1986, writ ref'd, n.r.e.), the landlord made the mistake of suing for damages for anticipatory breach, taking a judgment "as to the entire case", and then suing later for past due rentals that had accrued. 704 S.W.2d at 480. Had the landlord sued for rent that had accrued to the time of judgment and the judgment recited that it was "without prejudice to the rights of plaintiff (landlord) to sue for future rentals as they accrue", the landlord could have done so. In addition, had the landlord sued for rent that had accrued to the time of judgment and sued for damages for anticipatory breach of the lease from the time of judgment to the end of the lease term, the landlord could have done so.

IV. MITIGATION OF DAMAGES.

Any time the landlord sues for either rent or damages, the landlord must be keenly aware of the duty to mitigate damages.

Where a lease imposes no affirmative duty upon the landlord to make efforts to release the premises upon the tenant's abandonment, Texas courts have traditionally held that the landlord is under no obligation to release.²⁹ These holdings have been where the landlord has sued for rent that has accrued. However, on January 10, 1997, a unanimous Texas Supreme Court issued a landmark decision and held that "landlords must mitigate damages upon a tenant's abandonment and failure to pay rent." *Austin Hill Country Realty, Inc.*

²⁶ *Davidson v. Hirsh*, 101 S.W. 269 (Tex. Civ. App. - 1907, no writ); *Speedee Mart Incorporated v. Stovall*, 664 S.W.2d 174 (Tex. App. - Amarillo 1983, no writ); *Crabtree v. Southmark Commercial Management*, 704 S.W.2d 478 (Tex. App. - Houston [14th Dist.], writ ref'd, n.r.e.); *Stovall*, "Remedies of the Landlord When Tenant Fails to Pay Rent," 13 Baylor L. Rev. 374 (1961).

²⁷ *John Church Co. v. Martinez*, 204 S.W. 486 (Tex. Civ. App. - 1918); *White v. Watkins*, 385 S.W.2d 267 (Tex. Civ. App. - Waco 1964, no writ); *Employment Advisors, Inc. v. Sparks*, 364 S.W.2d 478 (Tex. Civ. App. - Waco 1963, writ ref'd n.r.e. at 368 S.W.2d 199); *Warncke v. Tarbutton*, 449 S.W.2d 363 (Tex. Civ. App. -San Antonio 1969, writ ref'd n.r.e.); *Thomas v. Morrison*, 537 S.W.2d 274 (Tex. Civ. App. - El Paso 1976, writ ref'd n.r.e.); *Speedee Mart Incorporated v. Stovall*, 664 S.W.2d 174 (Tex. App. - Amarillo 1983, no writ); *Crabtree v. Southmark*

Commercial Management, 704 S.W.2d 478 (Tex. App. - Houston [14th Dist.], writ ref'd, n.r.e.). See *Maida v. Kroger Company*, 230 F.Supp. 668 (E.D. Tex. 1964) for a different measure of damages.

²⁸ Cf., *Warncke v. Tarbutton*, 449 S.W.2d 363 (Tex. Civ. App. -San Antonio 1969, writ ref'd n.r.e.); *Thomas v. Morrison*, 537 S.W.2d 274 (Tex. Civ. App. - El Paso 1976, writ ref'd n.r.e.); *Crabtree v. Southmark Commercial Management*, 704 S.W.2d 478 (Tex. App. - Houston [14th Dist.] 1986, writ ref'd, n.r.e.).

²⁹ *Metroplex Glass Center, Inc. v. Vantage Properties, Inc.*, 646 S.W.2d 263, 265 (Tex. App. - Dallas 1983, writ ref'd, n.r.e.); *Racke v. Anheuser-Busch Brewing Assn.*, 42 S.W. 774 (Tex. Civ. App. 1897); *Thomas v. Morrison*, 537 S.W.2d 274 (Tex. Civ. App. - El Paso 1976, writ ref'd n.r.e.).

v. Palisades Plaza, Inc., 40 Tex. Sup. Ct. J. 228, at 232, 233 (January 10, 1997). Since the case was so important, the opinion had the following statement:

"To ensure the uniform application of this duty by the courts of this state, and to guide future landlords and tenants in conforming their conduct to the law, we now consider several practical considerations that will undoubtedly arise."

40 Tex. Sup. Ct. J. at 233. After discussing several of the "practical considerations" in order to answer questions lower courts might ask, more questions were raised than answered. On July 9, 1997, the Supreme Court overruled the motion for rehearing, but withdrew the January 10, 1997, opinion and substituted a new one. *Austin Hill Country Realty, Inc. v. Palisades Plaza, Inc.*, 948 S.W.2d 293 (Tex. 1997). The July 9, 1997, opinion added three sentences which were designed to address questions raised by a brief of amici curiae filed by three, large commercial retail developers. The new opinion raised even more questions than the original.

A. Origin of the Mitigation Doctrine

The concept of a duty to mitigate by making reasonable efforts to release the premises after the tenant's abandonment arose in early anticipatory breach situations.³⁰ Where a tenant abandoned the premises and the landlord sued for future "rentals", as opposed to rent as it accrues, the measure of damages was set forth as the difference between the contract rent over the term of the lease agreement and the fair market value of the rent over the lease term discounted to its present value. In some of the earlier cases, the question of fair market value was defined as the amount that the landlord would have received if he were able to release the premises after using reasonable and diligent efforts to do so. In other words, since the premises had obviously not been re-let, the trial court was forced to submit an issue to the jury and ask them a question as to what would happen in the future. The question asked of the jury was as follows: If the landlord makes reasonable efforts to re-let the premises, when would he do so and at what rent?

B. Current Texas Law on the Mitigation Doctrine

In *Austin Hill Country Realty, Inc. v. Palisades Plaza, Inc.*, 948 S.W.2d 293 (Tex.1997), in an opinion by Justice Rose Spector, the Supreme Court of Texas stated as follows:

We thus hold that, when exercising the option to maintain the lease in effect and sue for rent

as it becomes due following the tenants's breach and abandonment, the landlord had 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. . . A suit for anticipatory repudiation, an actual reentry or a contractual right of reentry subject to the above conditions will therefore give rise to the landlord's duty to mitigate damages upon the tenant's breach and abandonment.

948 S.W.2d at 300.

The January 10, 1997, opinion of the Supreme Court stated, "Because there is no statute addressing this issue, we look to the common law." 40 Tex. Sup. Ct. J. at 230. However, unbeknownst to the Supreme Court, other plans were afoot during the legislative session in the spring of 1997 where Senator Barrientos introduced Senate Bill 1678 which, among other things, added a section 91.006 to the Texas Property Code. Senate Bill 1678 passed both the senate and the house and was signed into law by Governor Bush to become effective September 1, 1997. Section 91.006 of the Property Code reads as follows:

Sec. 91.006. LANDLORD'S DUTY TO MITIGATE DAMAGES. (a) A landlord has a duty to mitigate damages if a tenant abandons the leased premises in violation of the lease. (b) A provision of a lease that purports to waive a right or to exempt a landlord from a liability or duty under this section is void.

TEX. PROP. CODE ANN. § 91.006. Section 16 of Senate Bill 1678 provided that section 91.006 of the Property Code only applied to leases entered into on or after the effective date of the Act (September 1, 1997). Chapter 91 of the Texas Property Code is equally applicable to commercial and residential tenancies. However, the preamble to Senate Bill 1678 states that it is "an Act relating to certain procedures concerning landlords and tenants of residential real property." (Emphasis added.)

C. Analysis of Supreme Court - Legislature Conflict

First, the Supreme Court and Texas Legislature have almost certainly done away with the remedy of summary judgment in landlord tenant cases. In the past, landlords filed suits for accrued rent as opposed to suing for damages in order to avoid fact questions.

Second, section 91.006 of the Property Code

³⁰ *Evons v. Winkler*, 388 S.W.2d 265, 269-270 (Tex. Civ. App. - Corpus Christi 1965, writ ref'd n.r.e.); *Rohrt v. Kelley*

Manufacturing Company, 162 Tex. 534, 349 S.W.2d 95 (1961); *White v. Watkins*, 385 S.W.2d 267, 270 (Tex. Civ. App. - Waco 1964, no writ).

applies to all landlords whether or not the lease in question has a recapture clause whereas the Supreme Court opinion does not. Of course, section 91.006 only applies to leases entered into on or after September 1, 1997. It could be argued that there is some doubt as to whether section 91.006 applies only to residential leases by reason of the preamble to Senate Bill 1678. See, *Design Center Venture v. Overseas Multi-Projects Corporation*, 748 S.W.2d 469 (Tex. App. - Houston [1st Dist.] 1988, writ denied).

Third, the Supreme Court opinion is retroactive and applies to all leases in existence. Therefore, every lease in Texas with a recapture clause (virtually every lease) has a duty to mitigate and the landlord's right (option) to reenter becomes a duty to reenter. Landlord's attorneys should form an intimate relationship with the doctrine of surrender by operation of law because they will be seeing a lot of it.

Fourth, the Supreme Court opinion and section 91.006 talk about the mitigation duty where a tenant abandons the premises in violation of the lease. What if abandonment is taken out of the default section of the lease? Does the landlord still have a duty to mitigate? Consider this scenario: tenant defaults in the payment of rent, but remains in the premises. Landlord terminates tenant's right to possession (either judicially or non-judicially) without terminating the lease and sues the tenant for rent. Technically, there has been no "abandonment"; is there a duty to mitigate?

Fifth, the best course of action for landlords appears to make an attempt to draft around "objectively reasonable efforts" so that the landlord stands a chance of obtaining a summary judgment. The author suggests the following:

- (a) The lease should say that the landlord has a duty to mitigate damages when the tenant is in default and has either abandoned the premises, vacated the premises or his right to possession has been terminated by the landlord. It should be noted that in a non-retail lease (i.e., there is no covenant of continuous operations) there is no abandonment if the tenant, although not occupying the premises, continues to pay rent.³¹
- (b) The remedies section of the lease should contain an agreement between the landlord and the tenant as to what actions of the landlord constitute "objectively reasonable

efforts". For example, landlord has taken "objectively reasonable efforts" if landlord has done the following within [an agreed number] days after tenant no longer occupies the premises:

- 1) Place a "For Lease" sign at the premises;
- 2) Place the leased premises on landlord's inventory of available space;
- 3) Make landlord's inventory available to area brokers;
- 4) Advertise the space for lease in a suitable trade journal or newspaper [name it] at least once per month; and
- 5) Show the space to prospective tenants who request to see it.

It should be noted in the suggested re-drafting of the remedies section of a lease, the five items that constitute "objectively reasonable efforts" necessarily imply that the landlord may refuse to lease to prospective tenants within his sole discretion. To hold otherwise would impose a duty on the landlord to be "commercially reasonable." A duty on the landlord to be "commercially reasonable" in determining whether to lease to a proffered substitute tenant is the next logical step in the escalation of landlord's "objectively reasonable efforts" to release following the original tenant's anticipatory breach.

It's not as if the concept of "commercially reasonable" is unknown. The Uniform Commercial Code is liberally sprinkled with obligations upon buyers, sellers, lessors and lessees to be "commercially reasonable." See, for example, sections 2A.518 and 2A.527 dealing with mitigation of damages by entering into a substitute leases that is made in "good faith" and in a "commercially reasonable manner." TEX. BUS. & COM. CODE §§ 2A.518 & 2A.527. One will note also that the measure of damages is the same as that for anticipatory breach of a real property lease.

There is little solace to be taken in the argument that the Uniform Commercial Code does not apply to real property. Although chapter one of the Uniform Commercial Code does not purport to deal with real property and section 9.104(10) excludes transfers of interest in real estate, it has been the writer's experience that appellate judges have a proclivity for borrowing the logic from the UCC and applying it to real property transactions.³² The doctrines of "commercial reasonableness" and "good faith" in the performance of

³¹ *Lucky v. Fidelity Union Life Ins. Co.*, 339 S.W.2d 956, 959 (Tex. Civ. App. - Dallas, 1960, no writ).

³² See, for example, *Aycock v. Vantage Management Company*, 554 S.W.2d 235 (Tex. Civ. App. - Dallas 1977, writ ref'd, n.r.e.), where Chief Justice Guittard wrote as

follows: "This principle . . . has been adopted with respect to sales of goods in the Uniform Commercial Code. . . Although this section is not by the terms of the Code applicable to a lease of real estate, we regard the principle as sound and see no reason why it should not apply here." 554 S.W.2d at 237.

personal property contracts may work their way into the current duties of landlords to mitigate damages upon tenant's default in real property leases. See, e.g., TEX. BUS. & COMM. CODE ANN. §§1.102(c) and 1.203.

D. Conclusions

One of the most common mistakes lawyers make is to assume that the rent payments required in the lease are similar to a promissory note; that is, upon default, the "rent" is accelerated and all of the "future rent" is now due without offset. It must be remembered that a lease is not a loan.³³ There is no lending transaction in a lease. The damages (incorrectly called "future rent") are discounted by two factors: one, the fair market rent, and, two, a discount on the time differential for receiving money before it is due.

The courts and legislature have given modern tenants some powerful weapons to use for the purpose of getting out of leases. Most landlord/tenant litigation revolves around the landlord trying to avoid fact questions and the tenant trying to create fact questions. In a brief of amici curiae filed with the Supreme Court in *Austin Hill Country Realty, Inc. v. Palisades Plaza, Inc.*, 948 S.W.2d 293 (Tex. 1997), landlords complained bitterly that their remedy of summary judgment would be destroyed. If one represents a tenant, however, the measure of damages for the affirmative defense of failure to mitigate damages almost guarantees a fact question and that the tenant will reach the jury. The tenant is in a position to make the landlord "an offer he can't refuse."³⁴

So, the question for landlords is how to avoid a fact question. The clauses set forth in the Appendix A are this writer's attempt to avoid a fact question when litigating whether a landlord has exercised his duty to mitigate damages upon the breach of the lease by the tenant.

V. APPENDIX

A. Default by Landlord/Events.

Defaults by Landlord are failing to comply with any provision of this lease within thirty days after written notice and failing to provide Essential Services to Tenant within ten days after written notice.

B. Default by Landlord/Tenant's Remedies.

Tenant's remedies for Landlord's default are to sue for damages and, if Landlord does not provide an Essential Service within thirty days after default, terminate this lease.

C. Default by Tenant/Events.

Defaults by Tenant are (a) failing to pay timely Rent, (b) abandoning or vacating a substantial portion of the Premises, and (c) failing to comply within ten days after written notice with any provision of this lease other than the defaults set forth in (a) and (b).

D. Default by Tenant/Landlord's Remedies.

Landlord's remedies for Tenant's default are to (a) Terminate Tenant's right of possession and enter upon and take possession of the Premises, after which Landlord may relet the Premises on behalf of Tenant and receive the rent directly by reason of the reletting, and Tenant agrees to reimburse Landlord for any expenditures made in order to relet, (b) Enter the Premises and perform Tenant's obligations, and (c) Terminate this Lease by written notice and sue for damages. Landlord may enter and take possession of the Premises by self-help, by picking or changing locks if necessary, and may lock out Tenant or any other person who may be occupying the Premises, until the default is cured, without being liable for damages.

E. Mitigation/Rent.

Landlord and Tenant have a duty to mitigate rent as set forth in this section. In the event Tenant is in arrears on rent installments and Landlord has terminated Tenant's possession, Landlord may sue Tenant for rent as it accrues and periodically take judgments without prejudice to sue for rentals that may accrue in the future. Landlord has a duty to mitigate rentals as follows:

Within 30 days of Landlord taking possession:

- (1) Place a "For Lease" sign at the premises;
- (2) place the leased premises on

³³ *Apparel Manufacturing Company, Inc., v. Vantage Properties, Inc.*, 597 S.W.2d 447 (Tex.Civ.App. – Dallas 1980, writ ref'd n.r.e).

³⁴ For a paper on how to calculate damages for anticipatory breach of a lease, see, Bliss, *Mitigation of Damages and*

Calculation of "Future Rentals": The Difference between Rent and Damages, University of Texas Leasing Institute 2007.

- landlord's inventory of available space;
- (3) make landlord's inventory available to area brokers on a monthly basis;
 - (4) advertise the space for lease in a suitable trade journal or newspaper in the county where the Premises are located at least once per month; and
 - (5) show the space to prospective tenants who request to see it.

Landlord is only under a duty to show the Premises as built and for the remainder of the term of the Lease. If Landlord has done these things, Landlord and Tenant agree that Landlord has made objectively reasonable efforts to mitigate the loss of rentals as a result of the default of the Tenant.

F. Mitigation/Damages.

Landlord and Tenant have a duty to mitigate damages as set forth in this section. In the event Tenant has anticipatorily breached the Lease and Landlord has terminated the Lease, Landlord may sue Tenant for damages for rentals that may accrue for the remainder of the term of the Lease. The measure of damages is the difference between the rent set forth in the Lease for the remainder of the term and the fair market value of the rent discounted to its present value. The fair market value of the rent for the remainder of the term and its discount value shall be determined by arbitration before three commercial brokers licensed by the Texas Real Estate Commission. One broker shall be selected by Landlord, one broker shall be selected by the Tenant and the third broker shall be selected by the other two brokers. Nothing in this section shall prevent the Landlord for suing for rent as it accrues under the previous Mitigation/Rent section and suing for damages for rental that will accrue through the end of the Lease term.

G. Default/Waiver.

It is not a waiver of default if the non-defaulting party fails to declare immediately a default or delays in taking any action. Pursuit of any remedies set forth in this Lease does not preclude pursuit of other remedies in this Lease or provided by applicable law.