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Enforcement of Commercial Leases: Evictions and Dealing with a Tenant's Personal Property

Thomas M. Whelan

ENFORCEMENT OF COMMERCIAL LEASES: EVICTIONS AND DEALING WITH A TENANT'S PERSONAL PROPERTY

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INTRODUCTION

Possession, the old saying goes, is nine-tenths of the law. This article is intended to be a practical guide to the other one-tenth—the law of taking possession. Accordingly, it covers the effect of recovering possession on a landlord's claims for rent and damages, the procedures governing forcible detainer proceedings in Texas, and the self-help alternatives to this statutory form of judicial eviction.

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."[1] Sometimes they are. But, more often, vigorously contested forcible detainer proceedings are anything but simple, fast, and cheap.[2] And unfortunately, determining the effect of a forcible detainer judgment on the parties' other remedies can be surprisingly complex.

Much of this complexity results, ironically, from the legislature's attempt to keep forcible detainer proceedings simple. When the legislature gave Texas's justice courts exclusive jurisdiction over forcible detainer actions,[3] it also limited the issues that can be raised in them.[4]

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

2. *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.").

3. *See* TEX. GOV'T CODE ANN. § 27.031(a)(2) (Vernon Supp. 1997) (stating that justice court has original jurisdiction in cases of forcible entry and detainer); Act of June 20, 1997, 75th Leg. R.S., S.B. 1678, § 1 (to be codified at TEX. PROP. CODE ANN. § 24.004) (*available via* Internet at http://www.capitol.state.tx.us) (stating that "[a] justice court in the precinct in which the real property is located has jurisdiction in evic-

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Thus, immediate possession of the premises is the only issue properly before the justice court in a forcible detainer action, unless an action for past due rent within the jurisdictional limits of the justice court is joined with the suit for possession.[5] This means that a landlord may not assert in justice court claims for past due rent in excess of $5,000 or for any amount of unaccrued rent or damages.[6] Likewise, a tenant cannot assert any counterclaims in an eviction suit in justice court.[7]

Moreover, the issues that the parties may raise in an appeal from justice court are also limited. In an appeal the prevailing party may only recover damages relating to maintaining or obtaining possession.[8] These damages ordinarily are limited to the reasonable rental value of the premises between the date of the judgment in justice court and the disposition of the appeal, plus reasonable attorneys' fees and costs incurred in justice and county court.[9] Any damages unrelated to maintaining or defending possession must be brought in a second suit filed in a district or county court having jurisdiction over the

tion suits. Eviction suits include forcible entry and detainer and forcible detainer suits.").

4. *See* TEX. GOV'T CODE ANN. § 27.031(a)(1) (Vernon Supp. 1997) (stating that justice court has original jurisdiction of civil matters in which exclusive jurisdiction is not exclusively in district or county court and in which the amount in controversy is not more than $5,000, exclusive of interest); *see also* TEX. R. CIV. P. 738 (stating that suit for rent may be joined with action for forcible entry and detainer if suit for rent is within monetary jurisdiction of justice court).

5. *See* 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).

6. *See* 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 the 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 with forcible detainer action in justice court damage claims for wrongful withholding of premises or for other benefits accruing under contract).

7. *See* 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, which exceeded justice court's jurisdiction, for value of its services to offset plaintiff's suit for rent); *see also* TEX. R. CIV. P. 746 (stating that actual possession is only issue to be tried in forcible entry and detainer or forcible entry action).

8. *See* 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 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 to recover, in appeal of forcible detainer suit, damages for value of his labor or expenses incurred planting crops on leasehold before receiving notice to vacate).

9. *See, e.g.*, 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 dism'd); Snyder v. Tousinau, 177 S.W.2d 799, 800 (Tex. Civ. App.—Galveston 1944, no writ); 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).

amount in controversy.[10] 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. Even though pursuing a forcible detainer action is supposed to be cumulative of a landlord's other remedies,[11] doing so inadvertently may impair them,[12] despite the supposedly limited preclusive effect of suits tried in justice court.[13] Moreover, a judgment for possession in a forcible detainer action will not, as commonly believed, bar a tenant's claim for wrongful eviction.[14] 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.[15] And, in some circumstances, a judgment for possession in justice court will not prevent a district court from restoring possession to a tenant after a justice court orders an eviction.[16] This article tries to chart these and other 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.[17] And while locking-out a tenant can prevent a tenant who is delinquent in paying rent from going into the

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

11. *See* McGlothlin v. Kliebert, 672 S.W.2d 231, 233 (Tex. 1984) (stating that forcible detainer action is cumulative of other remedies); Act of June 20, 1997, 75th Leg. R.S., S.B. 1678, § 6 (to be codified at TEX. PROP. CODE ANN. § 24.008) ("An eviction [~~A forcible entry and detainer suit or a forcible detainer~~] suit does not bar a suit for trespass, damages, waste, rent, or mesne profits.").

12. *See* Dews v. Floyd, 413 S.W.2d 800, 804-05 (Tex. Civ. App.—Tyler 1967, no writ) (illustrating some jurisdictional and preclusion issues raised by joining action for rent in forcible detainer suit).

13. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 31.004(a) (Vernon 1997) ("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 tenant's claims for damages for breach of oral lease agreement were not barred by adverse forcible detainer judgment in justice court because those issues were not actually litigated).

14. *See* Anarkali Enters., Inc. v. Riverside Drive Enters., Inc., 802 S.W.2d 25, 26-27 (Tex. App.—Fort Worth 1990, no writ).

15. *See* Act of June 20, 1997, 75th Leg. R.S., S.B. 1678, § 6 (to be codified at TEX. PROP. CODE ANN. § 24.008 ("An eviction [~~A forcible entry and detainer suit or a forcible detainer~~] suit does not bar a suit for trespass, damages, waste, rent, or mesne profits.").

16. *Cf.* Buttery v. Bush, 575 S.W.2d 144, 146 (Tex. Civ. App.—Tyler 1978, writ ref'd 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).

17. *See* TEX. PROP. CODE ANN. § 93.002 (Vernon 1995).

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 peace.[18] Thus, if a tenant says, "I'm not leaving," the 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.[19] But a tenant can cut-off a landlord's use of this remedy by merely saying to a landlord, "Don't touch my stuff."[20] In spite 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.

I. Tactical Considerations and Enforcement Options

A. *Negotiating With Delinquent Tenants*

Negotiations 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. In *Glasscock v. Console Drive Joint Venture*,[21] the landlord negotiated a repayment plan with the tenant, but the landlord partially released the guarantor of the lease by accepting a note from the tenant for the past due rent.[22] In *Gill Savings Ass'n v. Chair King, Inc.*, the tenant successfully asserted wrongful eviction and fraud claims based on the landlord's conduct during negotiations about the tenant's non-payment of rent.[23]

18. *See* Gulf Oil Corp. v. Smithey, 426 S.W.2d 262, 265 (Tex. Civ. App.—Dallas 1968, writ dism'd); Embry v. Bel-Aire Corp., 508 S.W.2d 469, 471 (Tex. Civ. App.—Austin 1974, writ ref'd n.r.e.) ("One who is entitled to possession of land, but who is not in possession, may not *forcibly* take possession from another.").

19. *See* Tex. Bus. & Comm. Code Ann. § 9.503 (Vernon 1991) (stating that "Unless otherwise agreed a secured party has on default the right to take possession of the collateral.").

20. 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); *see generally* 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); Giese v. NCNB Texas Forney Banking Ctr., 881 S.W.2d 776, 783 (Tex. App.—Dallas 1994, no writ) (stating that unreasonable damage to property constitutes breach of peace).

21. 675 S.W.2d 590 (Tex. App.—San Antonio 1984, writ ref'd n.r.e.).

22. *See Glasscock*, 675 S.W.2d at 592.

23. *See* Gill Savs. Ass'n v. Chair King, Inc., 783 S.W.2d 674 (Tex. App.—Houston [14th Dist.] 1989), *aff'd in part and modified in part per curiam*, 797 S.W.2d 31 (Tex.

The facts in *Gill Savings Ass'n* are instructive. Claiming that the landlord failed to repair defects in the premises, the tenant notified the landlord that it regarded this failure as a breach of the lease and that, as a result, it would withhold payment of rent. The tenant offered to place the rent into an escrow account, and the landlord agreed to the escrow arrangement. But for some reason, the escrow account was never established.[24]

Meanwhile, temptation in the form of Toys 'R' Us, a national credit tenant, visited the landlord. Unfortunately, its 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 the 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 the substitute space, and he 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.[25]

In a non-jury trial, the trial court found the landlord liable for \$144,309 in actual damages, \$355,277 in punitive damages,[26] and \$54,862 in attorneys' fees.[27] The trial court also ruled that the landlord's conduct during these negotiations estopped the landlord from asserting any right to recover rent.[28] 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.[29] 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.

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).

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

25. *See id.*

26. *See id.*

27. *See id.* at 680.

28. *See id.* at 679.

29. *See id.* at 682 (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).

B. *Deciding to Evict*

A landlord should make the decision to pursue an eviction only after carefully considering its business objectives, its legal options, and the risks and costs associated with pursuing each of those options. Before beginning the lease enforcement process, a landlord should also review its dealings with its tenant to uncover, if possible, any areas of potential liability exposure. Ordinarily, the landlord or its attorney should examine any correspondence with the tenant, the lease, any lease amendments, guaranties, UCC filings, subleases and assignments, subordination, attornment, or non-disturbance agreements, and the landlord's loan agreements. 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.[30] An appropriate review of these materials and a probing interview of its property manager should put a landlord in a far better position to choose the remedies, or combination of remedies, which will most effectively accomplish its legitimate business objectives.

C. *Common Law Remedies for Breach*

At common law, a landlord's remedies for a tenant's breach were quite limited. Most covenants in a real property lease, including the promise to pay rent,[31] to advertise a business with a percentage rent clause,[32] to improve the premises,[33] to repair the leasehold,[34] not to

30. *See, e.g., Gill Savs. Ass'n*, 783 S.W.2d at 676 (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).

31. *See* 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 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).

32. *See* G.C. Murphy Co. v. Lack, 404 S.W.2d 853, 857-60 (Tex. Civ. App.—Corpus Christi 1966, writ ref'd n.r.e.) (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).

33. *See* 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.").

34. *See* 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 prece-

alter the leasehold,[35] and to record, and presumably not to record, the lease,[36] were regarded as independent covenants,[37] meaning that a tenant's failure to perform them generally did not excuse the landlord from honoring the covenant of quiet enjoyment. As a consequence, a landlord did not have the right at common law to reenter the premises, to terminate the lease, or to recover damages for unaccrued rentals 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.[38] Even a tenant's use of the premises for an illegal purpose ordinarily did not allow a landlord to terminate the lease.[39]

1. Landlord's Legal Remedies for Breach

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 any damages resulting from the tenant's breach.[40]

2. 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 obli-

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dent to 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).

35. *See* Parham v. Glass Club Lake, 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).

36. *See* Parten v. Cannon, 829 S.W.2d 327, 331 (Tex. App.—Waco 1992, writ denied) (holding that tenant's failure to properly record oil and gas lease, which constituted breach of express covenant, did not give rise to forfeiture).

37. *See* Davidow v. Inwood N. Professional 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 Properties, 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).

38. *See supra* footnotes 31-37.

39. *See* 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 that, in appeal of criminal conviction for possession of drugs seized in leased mini-warehouse, landlord peaceably entered warehouse after tenant failed to pay rent and, therefore, landlord could lawfully allow police to enter premises).

40. *See* Buffalo Pipeline Co. v. Bell, 694 S.W.2d 592, 598 (Tex. App.—Corpus Christi 1985, writ ref'd n.r.e.); Walling v. Christie & Hobby, Inc., 54 S.W.2d 186, 188 (Tex. Civ. App.—Galveston 1932, no writ).

gations. Unfortunately, obtaining equitable relief is sometimes difficult and almost always expensive. Specific enforcement of a tenant's obligations is rarely available because courts are unwilling to order, and then monitor, continuous activity over an extended period of time.[41] Moreover, to obtain injunctive relief, a party 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.[42] Given these limitations, equitable relief is often unavailable or impractical.

3. Drafting Considerations

Careful drafting, however, can increase the chances of obtaining injunctive relief to enforce continuous operations clauses, radius restrictions, and other such covenants.[43] The well-drafted lease should include evidentiary stipulations in which the tenant admits that breach of these covenants will cause immediate and irreparable harm; that the landlord will not have an adequate remedy at law; that the tenant will not suffer damages if injunctive relief is granted; and that setting bond in a minimal amount will be sufficient to cover any damages suffered by the tenant if the court wrongfully orders temporary injunctive relief.

Or, instead of relying exclusively on the availability of injunctive relief, consider using liquidated damage clauses specifically tailored to compensate the landlord for breach of important covenants. A liquidated damage clause 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.

D. *Four (Now Three) Common Law Remedies for Anticipatory Breach*

The decision to evict should be made with the understanding that retaking possession invariably *will* affect a landlord's common law or contractual monetary remedies.

41. *See* Canteen Corp. v. Republic of Tex. 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 continuously operate restaurant as required by lease).

42. *See* Tex. R. Civ. P. 680, 683.

43. *See* 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 premises continuously 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).

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.[44] 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.[45] Or a tenant may commit an anticipatory breach by failing to pay rent *and* abandoning the leased premises.[46]

2. Remedies for Anticipatory Breach

In *Speedee Mart, Inc. v. Stovall*,[47] the Amarillo Court of Appeals identified what it called the four "common law remedies" available to the landlord upon a tenant's anticipatory breach:

> (a) 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 comes due;
> (b) 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 of the lease for its unexpired term;
> (c) 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; or
> (d) the landlord could declare the lease forfeited, thus relieving the tenant of the obligation to pay future rent.[48]

The first option—suing on the lease—is no longer available in most cases in light of the Texas Supreme Court's recognition of a landlord's duty to mitigate its damages and the 1997 legislature's addition of a duty to mitigate to the Texas Property Code. Because Texas law already imposed the substantial equivalent of a duty to mitigate once a landlord elected to reenter the premises,[49] the supreme court's an-

44. *See* Miller v. Vineyard, 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)).
45. *See Wukasch*, 247 S.W.2d at 597 (holding that letter sent to landlord after tenant abandoned the leased premises, which stated tenant would no longer pay rent, constituted anticipatory breach).
46. *See* Early v. Isaacson, 31 S.W.2d 515, 517 (Tex. Civ. App.—Amarillo 1930, writ ref'd).
47. 664 S.W.2d 174 (Tex. App.—Amarillo 1983, no writ).
48. *See 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).
49. *See* Marathon Oil Co. v. Edwards, 96 S.W.2d 551, 552 (Tex. Civ. App.—Amarillo 1936, writ dism'd) (explaining that landlord had the right, after the breach

nouncement of a duty to mitigate should have little effect on a landlord's three other remedies.

a. *Option No. 1: Maintaining Lease Replaced by Duty to Mitigate*

Under the Texas Supreme Court's decision in *Austin Hill Country Realty, Inc. v. Palisades Plaza, Inc.*,[50] a landlord no longer has the option, which was available at common law after a tenant abandoned the premises,[51] to maintain the lease in force (or, from 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.[52] This decision imposes on a landlord a duty to mitigate its damages, whether or not it actually reenters the premises, if the lease allows the landlord to reenter the premises without terminating the lease or accepting surrender of the premises.[53]

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of the contract and abandonment of the 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 the 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). The *White* court stated,

> 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 damage is generally the difference between the rental originally contracted for and that realized from the reletting.

Id. (citation omitted). 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." *Id. See also* Stewart v. Kuskin & Rotberg, Inc., 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 the amount of rents paid by the tenant or the respective months occupied by him, the amounts it received on reletting, the items and necessity for any repairs, *and the diligence and efforts made to relet the premises*).

50. 948 S.W.2d 293 (Tex. 1997).

51. *See Marathon Oil Co.*, 96 S.W.2d at 551-52 (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 them to run the risk of damages to the property, and the insolvency of the tenants . . . .").

52. *Compare Austin Hill Country Realty, Inc.*, 948 S.W.2d at 299 (holding that landlord cannot maintain lease in force without reletting) *with* Shepherd v. Sorrells, 182 S.W.2d 1009, 1011-12 (Tex. Civ. App.—Eastland 1944, no writ) (stating that landlord had right to maintain lease in force and sue for each installment of future rent as it came due); Walling v. Christie & Hobby, Inc., 54 S.W.2d 186, 188 (Tex. Civ. App.—Galveston 1932, no writ) (stating that landlord had right to maintain lease in force and sue for each installment of future rent as it came due); Davidson v. Hirsch, 101 S.W. 269 (Tex. Civ. App. 1907, no writ) (stating that suit for rent is suit on contract not suit for damages for breach of contract).

53. *Compare Austin Hill Country Realty, Inc.*, 948 S.W.2d at 300 (stating that actual reentry or right of reentry in lease creates obligation to mitigate) *with Marathon Oil Co.*, 96 S.W.2d at 552 (explaining that landlord, although not obligated to do

But *Austin Hill Country Realty, Inc.* is only the first word on the subject of a landlord's duty to mitigate. Before the supreme court published its second opinion in *Austin Hill Country Realty, Inc.*, the legislature added a duty to mitigate to the Texas Property Code.[54] This statute applies to leases entered into on or after September 1, 1997;[55] it declares void any lease provision purporting to waive a right or exempt a landlord from a liability under the statute[56] and purports to obligate a landlord to mitigate its damages anytime a tenant abandons the premises in violation of the lease.[57] It does not, however, expressly adopt the exception to the duty to mitigate announced in *Austin Hill Country Realty, Inc.* for leases without a contractual right of reentry.[58] The *Austin Hill Country Realty, Inc.* decision and the mitigation statute are discussed in the section on a tenant's defenses.

b. *Option No. 2: Reenter and Hold the Premises*

A landlord may 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 future lease payments less the reasonable market value of the premises for the unexpired term.[59] Even though this option does not require a landlord to actually exercise any diligence to relet the premises,[60] the credit given to the tenant for the fair market value of the lease term serves as a reasonable estimate of the amount that the landlord would have received by reletting had the landlord exercised reasonable diligence.[61]

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so, "had the right . . . after the breach of the contract and abandonment of the premises by [tenant], to sue for compensation for the injury sustained . . . .").

54. *See* Act of June 20, 1997, 75th Leg. R.S., S.B. 1678, § 8 (to be codified at TEX. PROP. CODE ANN. § 91.006).

55. *See id.* § 16(a).

56. *See id.* § 8 (to be codified at TEX. PROP. CODE ANN. § 91.006(b)).

57. *See id.* § 8 (to be codified at TEX. PROP. CODE ANN. § 91.006(a)).

58. *Compare Austin Hill Country Realty, Inc.*, 948 S.W.2d at 299 *with* Act of June 20, 1997, 75th Leg. R.S., S.B. 1678, § 8 (to be codified at TEX. PROP. CODE ANN. § 91.006).

59. *See* White v. Watkins, 385 S.W.2d 267, 270 (Tex. Civ. App.—Waco 1964, no writ); *see also* Thomas v. Morrison, 537 S.W.2d 274, 278 (Tex. Civ. App.—El Paso 1976, writ ref'd n.r.e.); Warncke v. Tarbutton, 449 S.W.2d 363, 364-65 (Tex. Civ. App.—San Antonio 1969, writ ref'd n.r.e.); Employment Advisors, Inc. v. Sparks, 364 S.W.2d 478, 480 (Tex. Civ. App.—Waco), *writ ref'd n.r.e. per curiam*, 368 S.W.2d 199 (Tex. 1963); John Church Co. v. Martinez, 204 S.W. 486, 489 (Tex. Civ. App.—Dallas 1918, writ ref'd).

60. *See White*, 385 S.W.2d at 270.

61. *See id.* ("[T]he measure of damages is 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.").

c. *Option No. 3: Reenter and Relet*

A landlord may 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.[62] The measure of damages is the principal, but not the only, difference between the landlord's option to reenter and hold (Option No. 2) and its option to reenter and relet the premises (Option No. 3).

d. *Option No. 4: Declare a Forfeiture*

A landlord may declare the lease forfeited, thus relieving the tenant of the obligation to pay future rent, and sue for any unpaid rent that accrued before the forfeiture.[63] 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.[64]

E. *Landlord's Contractual Remedies*

Carefully negotiated and well-drafted default and remedies provisions not only can close many of the loopholes in a landlord's common law remedies but also can make the enforcement process less time consuming, more predictable, and less expensive. Although the parties' right to craft default and remedies provisions in a lease is broad, it is not unlimited.[65] Thus, even though a lease states 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.'"[66]

62. *See id.* ("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 damage is generally the difference between the rental originally contracted for and that realized from the reletting.").

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

64. *See id.*

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

66. *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 unaccrued rents as they came due).

1. Forfeiture or Termination

A landlord may terminate a lease pursuant to an express forfeiture provision.[67] Forfeiture is a contractual remedy distinct from the equitable remedy of recission:

> [A] forfeiture is a penalty provided *by the terms of the agreement* for the breach of a covenant in the agreement. Recission, on the other hand, is an equitable remedy that terminates the agreement by force of law and is independent of any provision of the agreement. The practical effect is the same: the tenant's obligation to pay rent ends at the time of forfeiture or rescission. A corollary of this rule is that the tenant's obligation to pay rent continues until such an event occurs.[68]

If a landlord successfully terminates the lease, the landlord relinquishes any right to recover future rents as if the termination date were "the day originally fixed . . . for the expiration of the term" of the lease[69] and the tenant loses its right to possession.

It is often said, however, that the law "abhors a forfeiture."[70] Thus, "if there is any doubt as to the meaning of the language in a lease[,] then the uncertainty would be resolved against the lessor to prevent a forfeiture."[71] Courts will sometimes invoke principles of equity to relieve a tenant of a forfeiture, even though the terms of the lease seem to allow one.[72]

2. Reentry and Reletting

Commercial leases usually provide that the landlord may reenter the premises and relet for the account of, or as agent for, the tenant, *without terminating the lease.* A well-drafted reentry and reletting clause should, at a minimum, specify how any actual or promised pay-

67. *See Rohrt*, 349 S.W.2d at 97-98.

68. Miller v. Vineyard, 765 S.W.2d 865, 867 (Tex. App.—Austin 1989, writ denied) (citation omitted).

69. *Rohrt*, 349 S.W.2d at 97-98.

70. G.C. Murphy Co. v. Lack, 404 S.W.2d 853, 858 (Tex. Civ. App.—Corpus Christi 1966, writ ref'd n.r.e.).

71. *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); *see also* Parten v. Cannon, 829 S.W.2d 327, 330 (Tex. App.—Waco 1992, writ denied) (citing Rogers v. Ricane Enters., Inc., 772 S.W.2d 76, 79 (Tex. 1989)).

72. *See* 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.) (quoting Jones v. Gibbs, 130 S.W.2d 265, 272 (Tex. 1939) which states that "[i]n cases of mere neglect in fulfilling a condition precedent of a 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* Reynolds-Penland Co. v. Hexter & Lobello, 567 S.W.2d 237, 239-40 (Tex. Civ. 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).

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ments from a substitute tenant will be credited against unpaid rent and other sums due under the original lease. 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 be credited to the tenant's liability and, if so, how? One court of appeals facing this question did not require the landlord to credit the *excess* rents from reletting in one period against a deficiency in another period.[73] But the result may not be the same after *Austin Hill Country Realty, Inc.*

a. *"But not the Obligation, to Relet"*

The time to retire this familiar phrase in most lease forms has come. It is void in any lease entered into after September 1, 1997.[74] And if left in new leases, its only effect will be to mislead some poor landlord, who has been too busy managing his property to keep up with the latest legal developments, into believing that he is free of any duty to mitigate.

b. *"By Force if Necessary"*

Many commercial leases purport to authorize a landlord to reenter 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.[75] And, in all probability, a landlord who tries will be held liable for any damages caused in the attempt.

3. Liquidated Damage Clauses

Well-drafted liquidated damage clauses can be of great practical benefit to a landlord, provided that they do 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 a contract is just compensation for the loss or damage actually sustained. By the operation of that rule a party generally should be

73. *See* Maida v. Main Bldg., 473 S.W.2d 648, 652-53 (Tex. Civ. App.—Houston [14th Dist.] 1971, no writ) (awarding landlord unpaid rents, less proceeds of reletting, through date of trial, plus renovation costs associated with reletting).

74. *See* Act of June 20, 1997, 75th Leg. R.S., S.B. 1678, §§ 8, 16 (to be codified at TEX. PROP. CODE ANN. § 91.006(b)); *see also* Austin Hill Country Realty, Inc. v. Palisades Plaza, Inc., 948 S.W.2d 293, 299-300 (Tex. 1997) (holding that commercial landlord has duty to mitigate).

75. *See* Gulf Oil Corp. v. Smithey, 426 S.W.2d 262, 265 (Tex. Civ. App.—Dallas 1968, writ dism'd); Embry v. Bel-Aire Corp., 508 S.W.2d 469 (Tex. Civ. App.—Austin 1974, writ ref'd n.r.e.) ("[O]ne who is entitled to possession of land, but who is not in possession, may not forcibly take possession from another."). *See also infra* note 368.

> awarded neither less nor more than his actual damages. A party has no right to have a court enforce a stipulation which violates the principle underlying that rule.[76]

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."[77]

a. *Test of Enforceability*

In *Stewart v. Basey*,[78] the Texas Supreme Court, noting that "[v]olumes have been written" on the subject, announced the following 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 a contract and does not affect the damages recoverable for the 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 that is caused by the breach is one that is incapable or very difficult of accurate estimation."[79]

In sum, a liquidated damage provision must be a "reasonable forecast of just compensation for the harm that is caused by the breach."[80] 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 will require different remedies. Simply put, the punishment must 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*, the supreme court held that the landlord could not enforce the tenant's purported obligation to pay liquidated damages equal to $150 per month times the number of months remaining after termination of a lease with a monthly rental of $325. The supreme court reasoned that the clause was a penalty because the payment *could be* triggered by the tenant's breach of *any*

76. Stewart v. Basey, 245 S.W.2d 484, 486 (Tex. 1952).
77. *Id.*
78. 245 S.W.2d 484 (Tex. 1952).
79. *Id.* at 486 (quoting RESTATEMENT OF CONTRACTS § 339).
80. *Id.*

covenant in the lease, and the tenant's obligation to make the payment did *not* depend upon termination of lease.[81] 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 breach of the covenant to pay rent as for breach of a covenant not to open another store within a specified radius of the premises.

c. *Liquidated Damage Clauses for Breach of Covenant to Pay Rent*

To avoid being construed a penalty, a liquidated damage clause for breach of the covenant to pay rent should use the damage measure traditionally recognized as reasonable compensation for a tenant's anticipatory breach of a commercial real property lease—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.[82] The problem with this common law measure of damages, from a landlord's perspective, is that some of the variables (*e.g.*, the discount rate and the reasonable cash market value of the lease for the unexpired term) 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 stipulating a discount factor based on a readily ascertainable interest rate (*e.g.*,Wall Street Journal Prime) and a formula or other method, such as arbitration, to determine the reasonable cash value of the lease for the remainder of the term. While this will not ensure victory at a summary judgment hearing, it may, at least, tilt the balance in the landlord's favor during any settlement negotiations before that hearing.

d. *Common Defects in 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.[83] 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

81. *See id.* at 486-87.
82. *See* White v. Watkins, 385 S.W.2d 267, 270 (Tex. Civ. App.—Waco 1964, no writ).
83. *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.).

any default, to (i) accelerate unaccrued rents upon the tenant's default; (ii) evict the tenant; and (iii) relet.[84] 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 a single loss. This would clearly violate the principle of just compensation.[85] Also, such a clause probably is void under the new mitigation statute.[86]

4. Where, Oh Where, Has My Big Tenant Gone?

Abandoning or vacating the premises is an event of default under most commercial leases. The cases recognize that "the 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.[87]

a. *Vacate*

"'[V]acate' . . . means simply 'to make vacant,' and 'vacant,' in turn, means 'being *without content or occupant.*'"[88] Vacate "does not require an intent to forsake."[89] 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.

b. *Abandon*

"'[A]bandon' includes an element of intent . . . completely absent from the meaning of 'vacate'. [T]he principal meaning of 'abandon' is to cease to assert or exercise an interest, right, or title to esp[ecially]

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

85. *See id.* (holding, in suit by landlord against defaulting tenant for all rents scheduled for payment after date of surrender, that provision requiring tenant to pay future rents in event of surrender was unenforceable as "mere penalty" when landlord relet premises for almost twice original tenant's monthly rent); *cf. American Lease Plan*, 508 S.W.2d at 941-43 (stating, in a case involving personal property lease, that tenant was relieved of obligation to pay future 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 possession of property).

86. *See* Act of June 20, 1997, 75th Leg. R.S., S.B. 1678, §§ 8, 16 (to be codified at Tex. Prop. Code Ann. § 91.006(b)).

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

88. *Id.* (emphasis added). *Cf.* Phoenix Assur. Co. v. Shepherd, 137 S.W.2d 996 (Tex. 1940) (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).

89. *PRC Kentron, Inc.*, 762 S.W.2d at 282.

with the intent of never again resuming or reasserting it . . . .'"[90] 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. Non-use alone is insufficient to show abandonment, without being long, continuous, and unexplained.[91] A tenant who closes its business and moves out of the premises, but who continues to pay rent, has not "abandoned" the premises.[92]

II. Judicial Eviction of a Commercial Tenant in Forcible Detainer Proceedings

A. *In General*

A forcible detainer action,[93] as distinguished from a forcible entry and detainer action,[94] is the 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 that the action is brought."[95] Chapter 24 of the Texas Property Code,

90. *Id.* (citations omitted).

91. *See* City of Anson v. Arnett, 250 S.W.2d 450, 454 (Tex. Civ. App.—Eastland 1952, writ ref'd n.r.e.).

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

93. 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.

Tex. Prop. Code Ann. § 24.002 (Vernon Supp. 1997).

94. 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 of a tenant at will or by sufferance; or
> (3) an entry without the consent of a person who acquired possession by forcible entry.

Tex. Prop. Code Ann. § 24.001 (Vernon Supp. 1997).

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

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.

B. *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."[96] Proper notice to vacate is an essential element of a landlord's case-in-chief in a forcible detainer action.[97] 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.[98] 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.

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 *three 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.[99] 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,[100] 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 combina-

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

97. TEX. PROP. CODE ANN. § 24.002 (Vernon Supp. 1997).

98. *Id.* § 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).

99. *See* TEX. PROP. CODE ANN. § 24.005(a), (b), (e) (Vernon Supp. 1997). *See also Barajas*, 882 S.W.2d at 855 (discussing whether additional notice was required by lease or Federal regulations); *Caro*, 794 S.W.2d at 903-04 (discussing common law demand requirement and waiver thereof in the context of forcible detainer actions); Blackmon v. Elliott, 1997 WL 57693, at *2 (Tex. App.—Austin 1997) (unpublished) ("A demand for possession need not include magic phrases like 'notice to vacate' or 'demand for possession' . . . .").

100. *See* TEX. PROP. CODE ANN. § 24.002(a) (Vernon Supp. 1997) (stating that tenant commits forcible detainer if tenant refuses to surrender possession of real property on demand and holds over after the termination of tenant's right of possession).

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tion of the tenant's conduct, any act or notice by the landlord, and the 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.[101]

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 a landlord to give the statutory notice to vacate in person or by mail at the premises in question.[102] Notice in person may be by personal delivery to the tenant or to any person residing at the premises who is sixteen years of age or older or by personal delivery to the premises and affixing the notice to the inside of the main entry door.[103] Notice by mail may be by regular mail or by registered or certified mail, re-

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101. 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 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 ANN. § 91.001 (Vernon 1995).

102. *See* Act of June 20, 1997, 75th Leg. R.S., S.B. 1678, § 2 (to be codified at TEX. PROP. CODE ANN. § 24.005(f)) ("The notice to vacate shall be given in person or by mail at the premises in question. Notice in person may be by personal delivery to the tenant or any person residing at the premises who is 16 years of age or older or personal delivery to the premises and affixing the notice to the inside of the main entry door. Notice by mail may be by regular mail, [~~or~~] by registered mail, or by certified mail, return receipt requested, to the premises in question. If the dwelling has no mailbox and has a keyless bolting device, alarm system, or dangerous animal that prevents the landlord from entering the premises to leave the notice to vacate on the inside of the main entry door, the landlord may securely affix the notice on the outside of the main entry door.").

103. *See id.*

turn receipt requested, to the premises in question.[104] The statutory notice period is calculated from the day on which the notice is delivered.[105] When a lease establishes different notice requirements, the landlord should comply with both the statute and the notice provisions in the lease.

3. Content of Notice to Vacate

"A demand for possession need not include magic phrases like 'notice to vacate' or 'demand for possession' . . . ."[106] But it should state clearly whether the landlord intends to terminate the lease or only the tenant's right to possession.

4. Traps for the Unwary

Especially in cases in which a landlord desires to preserve its claims for unaccrued rent or damages, it should avoid the many traps for the unwary involved in sending notice to vacate. Some of these traps are discussed below.

a. *Properly Wording Demands and Notices*

A landlord should ensure that it does not inadvertently terminate the lease by carelessly wording a demand letter. 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 rent or damages).[107] This small distinction usually makes a large difference in whether a landlord can successfully pursue its monetary claims against a tenant and the cost of doing so.

Two cases are illustrative. In *Cavalcade Oil Corp. v. Samuel*,[108] 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.[109] 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

104. *See id.*
105. *See* TEX. PROP. CODE ANN. § 24.005(g) (Vernon Supp. 1997).
106. Blackmon v. Elliott, 1997 WL 57693, at *2 (Tex. App.—Austin 1997) (unpublished).
107. *Compare* Cavalcade Oil Corp. v. Samuel, 746 S.W.2d 842, 843-44 (Tex. App.—El Paso 1988, writ denied) (holding that reference to termination of lease in demand letter did not result in forfeiture of landlord's right to recover future rent) *with* Rohrt v. Kelley Mfg. Co., 349 S.W.2d 95, 96-98 (Tex. 1961) (holding that landlord could not recover future rent because landlord sent letter to tenant announcing landlord's intention to "declare the lease forfeited" if tenant did not pay past due rent).
108. 746 S.W.2d 842 (Tex. App.—El Paso 1988, writ denied).
109. *See id.* at 844.

or damages for the tenant's breach of the lease, or only to terminate the tenant's right to possession, which would allow the landlord to preserve its right to recover unaccrued rent or damages.[110] 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 demand letter. In *Rohrt v. Kelly Manufacturing Co.*,[111] the landlord was less fortunate, forfeiting its right to recover unaccrued rents or damages for the tenant's breach because it mentioned forfeiture in its demand letter.[112]

b. *Don't Overlook Making Common Law Demand for Payment*

Texas law is arguably still unsettled on the issue of whether a landlord must demand performance before demanding that a delinquent tenant vacate the premises. At common law, a landlord could not terminate a written lease for the tenant's breach, or exercise any right of reentry, unless the landlord first demanded performance.[113] 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.[114]

Several authorities seem to support this view. In *Santos v. City of Eagle Pass*,[115] 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 reenter the premises, to repossess them, and to terminate the tenant's right of possession.[116] In addition, Chapter 24 does not expressly require a landlord to demand payment before giving the statutory notice to vacate,[117] and section 24.005(e)[118]

110. *See id.*
111. 349 S.W.2d 95 (Tex. 1961).
112. *See id.* at 96-98.
113. *See* McVea v. Verkins, 587 S.W.2d 526, 531 (Tex. Civ. App.—Corpus Christi 1979, no writ).
114. *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 reentry 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 common law demand for performance is unnecessary in forcible detainer action).
115. 727 S.W.2d 126 (Tex. App.—San Antonio 1987, no writ).
116. *See id.* at 128-29.
117. *See* TEX. PROP. CODE ANN. § 24.005(a)-(e), (g)-(h) (Vernon Supp. 1997); Act of June 20, 1997, 75th Leg. R.S., S.B. 1678, § 2 (to be codified at TEX. PROP. CODE ANN. § 24.005(f), (i)).
118. Section 24.005(e) 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.

does not give a defaulting tenant the right to cure by performance after receiving a notice of default.[119] Even so, the statement in *Santos* that the legislature did not intend to require landlords to make the common law demand for payment before sending the statutory notice to vacate is *dicta*.[120]

Other fairly recent cases discuss the demand for performance in forcible detainer actions as if Texas law may still require this demand before a landlord gives a tenant notice to vacate. These cases, however, have 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.[121] 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,[122] to ensure that it has demanded possession "in the manner provided by law[.]"[123] Demanding payment before demanding possession also allows a landlord to "include in the notice to vacate required by [section 24.005] a demand that the tenant pay the delinquent rent *or* vacate the premises by the date and time stated in the notice."[124]

c. *Determining When Notice is Effective: Deposit or Receipt*

The statutory notice period in forcible detainer actions "is calculated from the day on which the notice is delivered."[125] The lease may make notices effective at a different time. If the lease imposes any notice requirements more onerous than the statute, the landlord

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TEX. PROP. CODE ANN. § 24.005(e) (Vernon Supp. 1997).

119. *See* Caro v. Housing Auth., 794 S.W.2d 901, 903-04 (Tex. App.—Austin 1990, writ denied).

120. *See Santos*, 727 S.W.2d at 127-29.

121. *See 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).

122. *See* Gray v. Vogelsang, 236 S.W. 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).

123. McVea v. Verkins, 587 S.W.2d 526, 532 (Tex. Civ. App.—Corpus Christi 1979, no writ).

124. Act of June 20, 1997, 75th Leg. R.S., S.B. 1678, § 2 (to be codified at TEX. PROP. CODE ANN. § 24.005(i)) ("If before the notice to vacate is given as required by this section the landlord has given a written notice or reminder to the tenant that rent is due and unpaid, the landlord may include in the notice to vacate required by this section a demand that the tenant pay the delinquent rent or vacate the premises by the date and time stated in the notice.").

125. TEX. PROP. CODE ANN. § 24.005(g) (Vernon Supp. 1997); *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, the 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).

should also comply with the additional requirements set forth in the lease.

d. *Remembering That 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 the tenant's 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.[126] Also, a mere notice to quit the premises, followed by the tenant vacating the premises, ordinarily will not constitute a constructive eviction.[127] Constructive eviction requires an additional feature such as harassing incidents occurring on the property that disturb the tenant's peaceful possession.[128]

C. *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 a 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,[129] which is at least a misdemeanor in Texas.[130]

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126. *See* Hinojosa v. Housing Auth., 896 S.W.2d 833, 836 (Tex. App.—Corpus Christi 1995, writ dism'd w.o.j.).

127. *See* Rust v. Eastex Oil Co., 511 S.W.2d 358, 361 (Tex. Civ. App.—Texarkana 1974, no writ) (stating that notice to quit, without more, does not constitute constructive eviction because constructive eviction requires some substantial interference which is injurious to tenant's beneficial use and enjoyment of premises); Edwards v. Blissard, 440 S.W.2d 427, 432 (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 tenant's retail premises, which caused tenant great embarrassment, did not constitute constructive eviction when tenant had entered into a new lease for lower rent before landlord made demand and tenant abandoned premises).

128. *See* 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) (expressly reserving question of whether mere threat of litigation by landlord interferes sufficiently with tenant's possession to give rise to cause of action for damages).

129. *See* Op. Tex. Att'y Gen. No. JM-451 (1986).

130. *See* TEX. PENAL CODE § 38.123 (Vernon 1994).

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 justice court or any other court in the State of Texas,[131] but a business entity (*e.g.*, a corporation, limited partnership, or partnership) must be represented by an attorney.[132] A limited exception to this general rule prohibiting a business entity from representing itself applies in contested forcible detainer suits in justice court for (i) nonpayment of rent or (ii) holding over beyond the rental term.[133] In these two types of contested cases, "the parties may represent themselves or be represented by their authorized agents, who need not be attorneys."[134] 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."[135]

a. *Who is an Authorized Agent?*

The Texas Attorney General has opined that "an 'authorized agent' under section 24.009[136] may only be a natural person and may not be a corporation or other business entity."[137] This opinion raises some interesting questions about 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 each natural person who will represent it in justice court to avoid the possible violation of this rule.

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

> If my Neighbour hath a mind to my Cow, he 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.

132. *See* TEX. GOV'T CODE ANN. §§ 81.101, 81.102 (Vernon 1988).

133. *See* Act of June 20, 1997, 75th Leg. R.S., S.B. 1678, § 7 (to be codified at TEX. PROP. CODE ANN. § 24.011) ("In eviction [~~forcible detainer~~] suits in justice court for nonpayment of rent or holding over beyond a rental term, the parties may represent themselves or be represented by their authorized agents, who need not be attorneys. In any eviction [~~forcible detainer or forcible entry and detainer~~] suit in justice court, an authorized agent requesting or obtaining a default judgment need not be an attorney."); TEX. R. CIV. P. 747a; Op. Tex. Att'y Gen. No. JM-451 (1986).

134. Act of June 20, 1997, 75th Leg. R.S., S.B. 1678, § 7 (to be codified at TEX. PROP. CODE ANN. § 24.011).

135. *Id.*

136. Section 24.009 is now codified at TEX. PROP. CODE ANN. § 24.011.

137. Op. Tex. Att'y Gen. No. JM-451 (1986).

b. *Contested Eviction for Non-Monetary Default*

The right of a business entity to use a 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 justice court.[138]

D. *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.[139] 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.[140] 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.[141]

E. *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,

138. *See* Act of June 20, 1997, 75th Leg. R.S., S.B. 1678, § 7 (to be codified at TEX. PROP. CODE ANN. § 24.011).

139. *See id.* § 1 (to be codified at TEX. PROP. CODE ANN. § 24.004) ("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."); TEX. GOV'T CODE ANN. § 27.031(a)(2) (Vernon Supp. 1997) (granting justice courts original jurisdiction in forcible entry and detainer cases). *See also* Goggins v. Leo, 849 S.W.2d 373, 375-76 (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).

140. TEX. CIV. PRAC. & REM. CODE ANN. § 15.084 (Vernon 1986).

141. *See* 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 the exclusive rule governing change of venue in civil cases in justice court).

especially if the defendant attempts to avoid personal service.[142] 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.[143] "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."[144]

Strict compliance with Rule 742a, however, is required. In *Winrock Houston Associates, Ltd. v. Bergstrom,*[145] 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.[146] 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.

F. *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 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 of the Texas Property Code; *and* (iii) be sworn to or verified.[147] If the case is contested, the party seeking the judgment for possession must offer competent proof, by live testimony, of each essential element of its 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.[148]

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

142. *See* TEX. R. CIV. P. 742.
143. *See* TEX. R. CIV. P. 742a.
144. *Id.*
145. 879 S.W.2d 144 (Tex. App.—Houston [14th Dist.] 1994, no writ).
146. *Winrock Houston Assocs., Ltd.*, 879 S.W.2d at 151.
147. *See* TEX. R. CIV. P. 739, 741.
148. *See* TEX. R. CIV. P. 743.

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the same[.]"[149] In *Stewart v. Breese*,[150] the court of appeals found that a street address could satisfy Rule 741, holding that "Rt. 1, Box 496, Old Seagoville Road, Seagoville, Texas" described the property with "sufficient certainty" to support a judgment.[151] 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."[152] 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.[153]

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.[154]

a. *Landlord-Tenant Relationship*

Texas courts have long held that "[a] forcible detainer action is dependent on proof of a landlord-tenant relationship."[155] A landlord-tenant relationship may exist under an oral or written lease,[156] under a purchase contract,[157] under a contract for deed,[158] or under a deed of trust.[159] The existence of a landlord-tenant relationship, however, is not an essential element of a forcible entry and detainer action.[160]

149. TEX. R. CIV. P. 741.

150. 367 S.W.2d 72 (Tex. Civ. App.—Dallas 1963, writ dism'd).

151. *Id.* at 73.

152. Family Inv. Co., 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)).

153. *See Paley*, 356 S.W.2d at 355-56.

154. *See* TEX. R. CIV. P. 741.

155. *See* 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)).

156. *See id.* at 195-96.

157. *See id.* at 197.

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

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

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

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.[161] 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 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.

c. *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 . . . ."[162] In most cases, this section will govern the required pleading and proof in cases instituted by a commercial landlord against a tenant or subtenant when (i) the tenant defaults or (ii) the tenant holds over after the expiration of the lease term.[163]

(1) Termination of Tenant's Right to Possession After Default

In many commercial leases, termination of the right to possession upon the tenant's default is not automatic but is instead one of several options available to the 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 a landlord, when possible, should follow both statutory and common law by pleading and proving that (i) the default or other event which gave rise to the landlord's right to terminate the tenant's right to possession occurred; (ii) the landlord gave any notices or made any demands required under the lease, under any applicable statute, or at common law; and (iii) the landlord had the right to terminate the tenant's right to possession and, in fact, exercised that right.[164] Before the landlord institutes a forcible detainer action, how-

161. *See* TEX. PROP. CODE ANN. § 24.002(b) (Vernon Supp. 1997).

162. TEX. PROP. CODE ANN. § 24.002(a)(1) (Vernon Supp. 1997).

163. *See* Caro v. Housing Auth., 794 S.W.2d 901, 903-04 (Tex. App.—Austin 1990, writ denied) (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 forcible detainer action is available when tenant holds over).

164. *Compare* McVea v. Verkins, 587 S.W.2d 526, 531-33 (Tex. Civ. App.—Corpus Christi 1979, no writ) (holding that when landlord did not make formal demand for payment of rent and for possession of land for breach of covenant, reentry and taking possession of land for breach of covenant to pay rent and covenant limiting use of

ever, it should evaluate the effect that termination of the tenant's right of possession may have on the landlord's other remedies, including the right to recover damages.[165]

(2) *Termination of Right to Possession After Expiration of the Lease Term*

In the event that a tenant holds over beyond the expiration of the lease term, the landlord still must plead and prove that (i) the lease expired; (ii) the landlord gave any notices and made any demands required under the lease or by law; and (iii) the landlord fulfilled the lease termination requirements of section 91.001 of the Texas Property Code and then gave the statutory three or ten-day notice to vacate. And while a landlord has no duty to accept rent from a hold-over tenant, accepting a rent check after giving a hold-over tenant notice to vacate invalidates the notice.[166]

3. 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 the property after a foreclosure.[167] The second arises if a tenant of the foreclosed-on mortgagor remains in possession of the premises after a foreclosure. Each scenario presents different problems for a purchaser-at-foreclosure seeking to retake possession of the premises.

a. *Evicting a Mortgagor After Foreclosure*

Because a justice court does not have jurisdiction to inquire into the merits of title,[168] evidence of the supposed invalidity of the foreclosure sale ordinarily is irrelevant to the material issues in a forcible

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realty were improper because, *inter alia*, lease did not contain an express waiver of landlord's common law duty to make demand for payment) *with* Santos v. City of Eagle Pass, 727 S.W.2d 126, 127-29 (Tex. App.—San Antonio 1987, no writ) (stating common law notice and demand are not required in statutory forcible detainer cases).

165. *See* Speedee Mart, Inc. v. Stovall, 664 S.W.2d 174, 177 (Tex. App.—Amarillo 1983, no writ); *see also* Rohrt v. Kelley Mfg. Co., 349 S.W.2d 95, 96-99 (Tex. 1961) (holding that 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).

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

167. *See* Home Sav. Ass'n v. Ramirez, 600 S.W.2d 911, 913 (Tex. Civ. App.—Corpus Christi 1980, writ ref'd n.r.e.) (stating that parties to deed of trust may stipulate that, in event of foreclosure, mortgagor becomes tenant at will of mortgagee).

168. *See* TEX. GOV'T CODE ANN. § 27.031(b)(4) (Vernon 1988); TEX. R. CIV. P. 746 (stating that "merits of the title shall not be adjudicated" in forcible detainer action).

detainer action.[169] In many cases, a certified copy of the substitute trustee's deed introduced at trial in justice court should be sufficient evidence to sustain a forcible detainer action against a mortgagor after a foreclosure.[170]

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.[171] 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 is appropriate. If a foreclosure is void,[172] a justice court probably does not have jurisdiction to order an eviction because the justice court would have to determine the merits of title to determine who is entitled to possession.[173] But such a reluctance to order an eviction appears unwarranted when a foreclosure is merely voidable, because a voidable foreclosure only gives a mortgagor an equitable claim in the foreclosed property.

Haith v. Drake, a case involving a contract for deed, suggests that a justice court retains jurisdiction to render and enforce a judgment for forcible detainer when a party defends possession based on an equitable claim to title.[174] In *Haith*, Dr. Drake asserted he was entitled to possession under a contract for deed. That contract created a landlord-tenant relationship upon its breach, but it did not require Haith to convey legal title to Dr. Drake until Dr. Drake had paid the entire consideration. Since Dr. Drake had not paid the entire consideration, he had only an equitable, but not a legal, claim to title. As a result, Haith's introduction of evidence of title to prove the existence of a landlord-tenant relationship did not deprive the justice court of jurisdiction. The court of appeals thus concluded that the justice had jurisdiction to proceed with the eviction and that the district court did not abuse its discretion in refusing to enjoin the eviction ordered by the justice court because Dr. Drake did have a claim to legal title.[175]

The rule applied in *Haith* also appears consistent with the Texas Supreme Court's ruling in *McGlothlin v. Kliebert*.[176] In *McGlothlin*, the supreme court held that a district court could only enjoin a forci-

169. *See* Midgett v. Resolution Trust Corp., 1991 WL 42830, at *1 (Tex. App.—Houston [14th Dist.] 1991, no writ) (unpublished); *see also* Mitchell v. Armstrong Capital Corp., 911 S.W.2d 169, 171 (Tex. App.—Houston [1st Dist.] 1995, writ denied); *Home Sav. Ass'n*, 600 S.W.2d at 913.

170. *See Midgett*, 1991 WL 42830, at *1.

171. *See Mitchell*, 911 S.W.2d at 171; *Home Sav. Ass'n*, 600 S.W.2d at 913.

172. *See Slaughter*, 162 S.W.2d at 674.

173. *See* Haith v. Drake, 596 S.W.2d at 194, 197 (Tex. Civ. App.—Houston [1st Dist.] 1980, writ ref'd n.r.e.); *see also Slaughter*, 162 S.W.2d at 674.

174. *Haith*, 596 S.W.2d 196.

175. *See id.* at 197.

176. 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

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ble detainer case if the justice court did not have jurisdiction or the defendant did not have an adequate remedy at law.[177] Neither of these grounds for an injunction exists when a foreclosure is only voidable.[178] The mere fact that the justice court might have to examine evidence of the title (*i.e.*, the trustee's deed and deed of trust) to determine whether a voidable foreclosure created a landlord-tenant relationship does not require the justice court to exceed its jurisdiction by inquiring into the merits of title.[179] Moreover, at least when the mortgagee is the purchaser at foreclosure, the mortgagor has adequate remedies at law in district court. A district court can restore title and possession, or award damages, to the mortgagor if the foreclosure was wrongful.[180] A district court, therefore, ordinarily should not enjoin a post-foreclosure eviction unless the mortgagor shows that its legal remedies will not be adequate or that the foreclosure was void.

b. *Evicting Tenant of Mortgagor After Foreclosure*

The second type of post-foreclosure eviction cases arise when a tenant of the foreclosed-on mortgagor remains in possession of the premises after the foreclosure.[181] A foreclosure of a deed of trust extinguishes a lease executed after, or subordinated to, that deed of trust.[182] But a purchaser-at-foreclosure, by accepting rental payments after a foreclosure from a tenant of the mortgagor, may ratify a lease that otherwise would have been extinguished by the foreclosure.[183]

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possession because tenant contended that justice court failed to give effect to thirty-day notice and cure period in lease).

177. *See McGlothlin*, 672 S.W.2d at 232.

178. *See* Slaughter v. Qualls, 162 S.W.2d 671, 674 (Tex. 1942) ("The question whether the trustee's deed is void or voidable depends on its effect upon the 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 upon 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 measure of damages for wrongful foreclosure); Diversified, Inc. v. Walker, 702 S.W.2d 717, 721 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.).

179. *See Haith*, 596 S.W.2d at 197.

180. *See* Federal Deposit Ins. Corp. 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) (stating measure of damages).

181. TEX. PROP. CODE ANN. § 24.002(a)(2) (Vernon Supp. 1997) ("A person who refuses to surrender possession of real property on demand commits a forcible detainer if the 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[.]").

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

183. *See id.* (stating that if, after foreclosure tenant offers rent, and purchaser-at-foreclosure accepts it, purchaser-at-foreclosure may impliedly agree to continue lease).

Evicting a mortgagor's tenant after a foreclosure by the mortgagee is fraught with its own perils. In *ICM Mortgage Corp. v. Jacob*,[184] the mortgagee foreclosed its deed of trust lien and then evicted the mortgagor's tenant.[185] 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.[186] Although the court of appeals reversed the trial court's judgment, its holding appears to acknowledge the existence of a cause of action for negligent eviction.[187]

4. Sufficiency of Affidavit or Verification

The complaint in a forcible detainer case must be "sworn to."[188] If an agent makes an affidavit under a procedural statute such as 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.[189]

G. *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.[190] Although the justice court may take evidence and construe the lease to determine who has the right of immediate possession,[191] the justice court has no jurisdiction to decide competing title claims.[192] Rule 738 permits the landlord to recover only rent, as such, in the justice court, but not damages for wrongful withholding of the premises.[193]

184. 902 S.W.2d 527 (Tex. App.—El Paso 1994, writ denied).

185. *Id.* at 529.

186. *See id.* at 528.

187. *See id.* at 534.

188. TEX. R. CIV. P. 739.

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

190. *See* 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 the only issue); *see also* Rushing v. Smith, 630 S.W.2d 498, 499 (Tex. App.—Amarillo 1982, no writ) (citing Haginas v. Malbis Mem'l Found., 354 S.W.2d 368, 371 (Tex. 1962)); Buttery v. Bush, 575 S.W.2d 144, 146 (Tex. Civ. App.—Tyler 1978, writ ref'd n.r.e.).

191. *See* McGlothlin v. Kliebert, 672 S.W.2d 231, 232 (Tex. 1984) (citing Gibson v. Moore, 22 Tex. 611 (1858)).

192. TEX. GOV'T CODE ANN. § 27.031(b)(4) (Vernon 1988); TEX. R. CIV. P. 746 (stating that "merits of the title shall not be adjudicated" in forcible detainer action).

193. *See* Haginas v. Malbis Mem'l Found., 349 S.W.2d 957, 958 (Tex. Civ. App.—Houston 1961), *aff'd*, 354 S.W.2d 368 (Tex. 1962).

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.[194] This rule, however, is easier to state than to apply in forcible detainer cases. One complication is determining to which monetary claims this rule applies. In a forcible detainer suit in justice court, a landlord may only recover rent, as such, and its attorneys' fees,[195] but a landlord may *not* recover damages for breach of the lease.[196] The $5,000 limit, therefore, applies to claims for rent as such. A landlord cannot assert any 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 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.*,[197] 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.[198] In *Regal Properties v. Donovitz*,[199] 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 court's jurisdiction.[200]

Because a judgment for rent in excess of the justice court's jurisdiction is void,[201] a party should not attempt to plead down its claims for rent to bring them within the jurisdictional limits of the justice court.[202] 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.

194. *See* TEX. GOV'T CODE ANN. § 27.031(a)(1) (Vernon Supp. 1997).
195. *See id.*
196. *Haginas*, 354 S.W.2d at 371.
197. 562 S.W.2d 534 (Tex. Civ. App.—Houston [14th Dist.] 1978, writ ref'd n.r.e.).
198. *Id.* at 536.
199. 479 S.W.2d 748 (Tex. Civ. App.—Dallas 1972, writ ref'd n.r.e.).
200. *Id.* at 750.
201. Dews v. Floyd, 413 S.W.2d 800, 804-05 (Tex. Civ. App.—Tyler 1967, no writ).
202. *See 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).

2. Attorneys' Fees and Costs of Suit

A landlord may recover its attorney's fees in a forcible detainer action if the lease permits recovery of attorneys' fees.[203] 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 eleventh day after the date of receipt of the notice, and if the landlord files suit, the landlord may recover attorneys' fees.[204] The demand must be sent by registered or by certified mail, return receipt requested, at least ten days before the date the suit is filed.[205]

The statutory right to recover attorneys' fees has two negative aspects. First, the statute requires a landlord to give ten days, as opposed to three days, notice before filing suit; second, it allows a tenant, if it prevails, to recover reasonable attorneys' fees from the landlord.[206] Also, a prevailing tenant is not required to give notice in order to recover attorneys' fees from its landlord.[207]

3. Practice Comments

A commercial landlord should rarely join a suit for rent in 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 a landlord's right to recover damages or attorneys' fees in another court.[208] A landlord may wish to expressly reserve its other rights in its sworn complaint for possession with a 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."[209]

203. *See* TEX. PROP. CODE ANN. § 24.006(b) (Vernon Supp. 1997).

204. *See* Act of June 20, 1997, 75th Leg. R.S., S.B. 1678, § 3 (to be codified at TEX. PROP. CODE ANN. § 24.006(a)) ("Except as provided by Subsection (b), to be eligible to recover attorney's fees in an eviction [~~a forcible entry and detainer suit or a forcible detainer~~] suit, a landlord must give a tenant who is unlawfully retaining possession of the landlord's premises a written demand to vacate the premises. The demand must state 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 attorney's fees. The demand must be sent by registered mail or by certified mail, return receipt requested, at least 10 days before the date the suit is filed.").

205. *See id.*

206. *See* TEX. PROP. CODE ANN. § 24.006(c) (Vernon Supp. 1997).

207. *See* Mastermark Homebuilders, Inc. v. Offenburger Constr., Inc., 857 S.W.2d 765, 767 (Tex. App.—Houston [14th Dist.] 1993, no writ); TEX. PROP. CODE ANN. § 24.006(d) (Vernon Supp. 1997) (stating that prevailing party also is entitled to recover all costs of court).

208. *See* Dews v. Floyd, 413 S.W.2d 800, 804-05 (Tex. Civ. App.—Tyler 1967, no writ) (illustrating preclusion issues raised by filing action for rent in forcible detainer suit).

209. *See* 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

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H. *Defendant Must Answer*

If the defendant fails to enter an appearance upon the docket in 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.[210] 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 the entry of the judgment."[211]

I. *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.[212] 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.[213]

J. *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."[214]

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 that may result to defendant in the event that the suit has been improperly instituted.[215] At common law, "the proper measure of damages for wrongful evic-

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).

210. *See* TEX. R. CIV. P. 743.

211. Act of June 20, 1997, 75th Leg. R.S., S.B. 1678, § 4 (to be codified at TEX. PROP. CODE ANN. § 24:0061(c)).

212. *See* Grayson v. Rodermund, 135 S.W.2d 178, 179 (Tex. Civ. App.—Austin 1939, no writ).

213. *See* 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 counterclaim for value of services in excess of justice court's jurisdiction to offset plaintiff's suit for rent).

214. TEX. R. CIV. P. 740.

215. *Id.*

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tion is the difference between the market rental value of the leasehold for the unexpired term of the lease and the stipulated rentals."[216] "Further, recovery may be had for special damages incurred, such as expenses of removal and net profits, after deduction of the value of the rental differences."[217] 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 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.[218] Such 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[.][219]

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[.]"[220]

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[.][221]

216. 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 (Tex. App.—Houston [1st Dist.] 1982, no writ)).
217. *Id.* 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.).
218. TEX. R. CIV. P. 740.
219. TEX. R. CIV. P. 740(a).
220. TEX. R. CIV. P. 740(b).
221. TEX. R. CIV. P. 740(c).

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.[222]

K. *Trial in the Justice Court*

Although trial in the 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;[223] show them to the court and the opposition; lay the evidentiary foundation for admission;[224] and offer true and correct copies as exhibits at the trial.[225]

1. Time From Service Until Trial: Six to Ten Days

Trial in justice court shall be held not more than ten days nor less than six days from the date of service of the citation on the defendant.[226] But, "[f]or good cause shown, supported by affidavit of either party, the trial may be postponed not exceeding six days."[227] Most justice courts take the position that trial cannot be postponed more than once or for more than six days, even if the 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.[228] If neither party demands a jury, the justice shall try the case.[229] 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

222. TEX. R. CIV. P. 740(d).
223. *See* 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).
224. 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.
225. *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).
226. *See* TEX. R. CIV. P. 739.
227. TEX. R. CIV. P. 745.
228. *See* TEX. R. CIV. P. 744.
229. *See* TEX. R. CIV. P. 747.

favor of the plaintiff or the defendant as it shall find.[230] The justice of the peace shall not charge the jury in any cause tried before a jury.[231]

3. Motion for Directed Verdict

Rule 565 of the Texas Rules of Civil Procedure gives a justice the right to instruct a verdict.[232] 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.[233] 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.[234] A signed judgment is a prerequisite to issuance of a writ of possession[235] and to an appeal to county court.[236]

L. *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.[237] 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.[238] The constable must post a warning to notify the tenant that

230. *See id.*
231. *See* TEX. R. CIV. P. 554.
232. *See* Triple T Inns, Inc. v. Roberts, 800 S.W.2d 681, 683 (Tex. App.—Amarillo 1990, writ denied).
233. *See* TEX. R. CIV. P. 748.
234. *See id.* (stating, among other things, that no writ of possession shall issue until five days from the day the *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).
235. TEX. R. CIV. P. 748.
236. *See* Housing Auth. v. Sanders, 693 S.W.2d 2, 3 (Tex. App.—Tyler 1985, writ ref'd n.r.e.).
237. *See* Act of June 20, 1997, 75th Leg. R.S., S.B. 1678, § 4 (to be codified at TEX. PROP. CODE ANN. § 24.0061(a)) ("A landlord who prevails in <u>an eviction suit</u> [~~a forcible entry and detainer or a forcible detainer action~~] is entitled to a judgment for possession of the premises and a writ of possession. In this chapter, "premises" means the unit that is occupied or rented and any outside area or facility that the tenant is entitled to use under a written lease or oral rental agreement, or that is held out for the use of tenants generally."); TEX. R. CIV. P. 748.
238. Act of June 20, 1997, 75th Leg. R.S., S.B. 1678, § 4 (to be codified at TEX. PROP. CODE ANN. § 24.0061(b)) ("A writ of possession may not be issued before the

the writ has been issued and that the tenant vacate the premises before the writ is executed.[239] 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.[240]

1. Execution of Writ of Possession

The mandatory provisions in a writ of possession summarize what happens when a sheriff or constable executes it. The writ orders the sheriff or constable to:

> (1) post a written warning of at least 8-1/2 by 11 inches on the exterior of the front door of the rental unit notifying the tenant that the writ has been 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) [~~(2)~~] 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) [~~(3)~~] 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.[241]

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,[242] the landlord ordinarily must arrange for the movers. But the officer may

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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."); TEX. R. CIV. P. 748.

239. *See* Act of June 20, 1997, 75th Leg. R.S., S.B. 1678, § 4 (to be codified at TEX. PROP. CODE ANN. § 24.0061(d)(1)).

240. *See id.* § 4 (to be codified at TEX. PROP. CODE ANN. § 24.0061(h)) ("(h) A sheriff or constable [~~(g) An officer~~] may [~~, if necessary,~~] use reasonable force in executing a writ under this section.").

241. *Id.* § 4 (to be codified at TEX. PROP. CODE ANN. § 24.006(d)).

242. TEX. PROP. CODE ANN. § 24.0061(e) now provides:

> (e) The writ of possession shall authorize the officer, at the officer's discretion, to engage the services of a bonded or insured warehouseman to re-

not require the landlord to store the tenant's property.[243] 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."[244] A writ of possession carried 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.[245] 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.[246]

M. *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*.[247] 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."[248] 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 the transcript is filed in the county court."[249]

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, a party desiring an early trial date should im-

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move and store, subject to applicable law, part or all of the property at no cost to the landlord or the officer executing the writ.

Act of June 20, 1997, 75th Leg. R.S., S.B. 1678, § 4 (to be codified at TEX. PROP. CODE ANN. § 24.0061(e)); *see also* TEX. PROP. CODE ANN. § 24.0062 (Vernon Supp. 1997) (governing warehouseman's liens).

243. Act of June 20, 1997, 75th Leg. R.S., S.B. 1678, § 4 (to be codified at TEX. PROP. CODE ANN. § 24.0061(f)).

244. Campos v. Investment Management Props., Inc., 917 S.W.2d 351, 354 (Tex. App.—San Antonio 1996, writ denied).

245. *Id.*

246. *Cf.* TEX. CIV. PRAC. & REM. CODE ANN. § 33.0062 (Vernon 1997) (stating that judgment debtor is entitled to receive fair market value of property taken under writ of execution if judgment is overturned). *See generally* TEX. CIV. PRAC. & REM. CODE ANN. § 7.03 (Vernon 1986) (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 the same manner).

247. 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.).

248. TEX. R. CIV. P. 751.

249. TEX. R. CIV. P. 753.

mediately request a preferential trial setting under Rule 751. And it rarely hurts to speak with the county court's setting clerk about obtaining an early trial setting.

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.[250] A party may even appeal an agreed judgment and receive a trial *de novo* in county court.[251] 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.[252]

2. Filing Appeal Bond Within Five 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."[253] 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.[254] 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.[255]

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.[256] Failing to timely file an appeal bond in accordance with Rule

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250. *See* TEX. R. CIV. P. 749.

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

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

253. 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. 749(c) (explaining that appeal is perfected when appeal bond or pauper's affidavit is timely filed).

254. *See* 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)).

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

256. *See* 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.—

749 deprives the county court at law of jurisdiction to review the judgment rendered by the justice court, requiring dismissal of the appeal.[257]

3. No Motion for New Trial Permitted in Forcible Detainer Cases

"In appeals in forcible entry and detainer cases, no motion for new trial shall be filed."[258] Thus, filing a motion for new trial in justice court does not extend the five-day deadline to perfect an appeal to county court.[259]

4. Payment of Costs of Appeal

If the appellant fails to pay the costs of appeal within twenty days after being given notification to do so by the county clerk, "the appeal shall be deemed not perfected" and the county court may dismiss the appeal.[260] 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.[261]

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.[262]

Austin 1947, no writ) (citing Speed v. Sawyer, 88 S.W.2d 556 (Tex. Civ. App.—Amarillo 1935, no writ)).

257. *See* 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 dism'd) (holding that special rules for appeals in forcible detainer cases apply even if landlord joined suit for rent in justice court).

258. *See* TEX. R. CIV. P. 749; *RCJ Liquidating Co.*, 670 S.W.2d at 644; *Wetsel*, 780 S.W.2d at 953-54.

259. *See* 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 appeal bond); *Wetsel*, 780 S.W.2d at 952.

260. TEX. R. CIV. P. 143a.

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

262. *See* 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)).

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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.[263] "Rule 749 does not provide that giving notice of the filing of an appeal bond is jurisdictional."[264]

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.[265] 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 into the registry of the court.[266]

8. Amount of Appeal Bond

"The justice shall set the amount of the bond to include the items enumerated in Rule 752."[267] 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.[268] 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.[269] Rule 750 provides a sample form of an appeal bond.[270] Although the failure to file timely an appeal bond is a jurisdictional defect, certain defects in the

263. *See* TEX. R. CIV. P. 749.
264. 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) (stating that failure to give notice of filing of appeal bond is jurisdictional defect).
265. *See* TEX. R. CIV. P. 749a; Walker v. Blue Water Garden Apts., 776 S.W.2d 578, 579-82 (Tex. 1989).
266. *See* TEX. R. CIV. P. 749b; Kennedy v. Highland Hills Apts., 905 S.W.2d 325, 327 (Tex. App.—Dallas 1995, no writ) (holding that Rule 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).
267. TEX. R. CIV. P. 749.
268. *See* TEX. R. CIV. P. 752.
269. *See* TEX. R. CIV. P. 749.
270. *See* TEX. R. CIV. P. 750.

form of an appeal bond timely filed may be cured by the party posting the bond.[271] A county court, sitting as an appellate court, has broad authority to amend an appeal bond to correct any defects in form.[272] The test that determines 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.[273]

10. Liability of Sureties

The prevailing party on the appeal "shall be entitled to recover against the sureties on the appeal bond . . . ."[274] 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.[275] 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.[276]

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."[277] To recover damages under Rule 752, a landlord must plead for them and prevail in county court.[278]

a. *Landlord's Damages Pending Appeal: Jurisdictional Amounts*

Under Rule 752, the 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

271. *See* Family Inv. Co. v. Paley, 356 S.W.2d 353, 355 (Tex. Civ. App.—Houston 1962, writ dism'd).
272. *See* Pharis v. Culver, 677 S.W.2d 168, 170 (Tex. Civ. App.—Houston [1st Dist.] 1984, no writ) (stating county court's power to amend an appeal bond included power to amend a misdemeanor bond erroneously filed as an appeal bond in forcible detainer case); *see also* Weeks v. Hobson, 877 S.W.2d 478, 479 (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).
273. *Pharis*, 677 S.W.2d at 170.
274. Tex. R. Civ. P. 752.
275. *See* Lucas v. Hayter, 376 S.W.2d 790, 792 (Tex. Civ. App.—San Antonio 1964, writ dism'd).
276. *See* Bobbitt v. Womble, 708 S.W.2d 558, 560-61 (Tex. App.—Houston [1st Dist.] 1986, no writ).
277. Tex. R. Civ. P. 752.
278. *See* Krull v. Somoza, 879 S.W.2d 320 (Tex. App.—Houston [14th Dist.] 1994, writ denied).

to the main cause of action.[279] 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 been in excess of the county court's jurisdiction. "No amount is stated as a limit that may be recovered."[280] 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 jurisdictional limit of the justice court, and claims for rent under Rule 738, which may not.[281]

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. Actions for damages, costs, and fees in a forcible detainer action are ancillary to the main action for possession.[282] The 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.[283] 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.[284] This means that the 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.[285]

279. *See* Haginas v. Malbis Mem'l Found., 349 S.W.2d 957, 958 (Tex. Civ. App.—Houston 1961), *aff'd*, 354 S.W.2d 368, 372 (Tex. 1962); Williams v. LeGarage De La Paix, Inc., 562 S.W.2d 534, 536 (Tex. Civ. App.—Houston [14th Dist.] 1978, writ ref'd n.r.e.).

280. *Haginas*, 349 S.W.2d at 958.

281. *See* 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); *see also* Goggins v. Leo, 849 S.W.2d 373, 375 (Tex. App.—Houston [14th Dist.] 1993, no writ) (stating that appellate jurisdiction of county court is limited to jurisdictional limits of justice court as to claims for rent joined in forcible detainer cases).

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

283. *See* 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 dism'd); Snyder v. Tousinau, 177 S.W.2d 799, 800 (Tex. Civ. App.—Galveston 1944, no writ); *see also* 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).

284. *See 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).

285. *See id.* at 800.

c. *Tenant's Dismissal of Appeal Does Not Affect Landlord's Right to Pursue Damage Claim*

In *Knight v. K & K Properties, Inc.*,[286] 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.[287] The tenant appealed the judgment for possession to the county court.[288] 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.[289] 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.[290] Thus, a tenant's dismissal of an appeal does not affect a landlord's right to recover rent or damages.[291]

d. *Attorneys' Fees*

To determine which party is entitled to recover its 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.[292] Attorneys' fees are included in the damages recoverable under Rule 752.[293] But the decision to award attorneys' fees to the prevailing party is discretionary with the county court.[294]

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 pendency of the appeal."[295] But only "[d]amage claims *related to* maintaining or obtaining possession of the premises may be joined

286. 589 S.W.2d 860 (Tex. Civ. App.—Fort Worth 1979, no writ).
287. *See id.* at 860-61.
288. *See id.*
289. *See id.*
290. *See id.* at 862.
291. *See also* Engle v. Bordeaux Apts., 939 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).
292. *See id.* (holding that jury charge should have asked who was entitled to possession on the date possession was in dispute, not date of trial).
293. *See* TEX. R. CIV. P. 752; RCJ Liquidating Co. v. Village, Ltd., 670 S.W.2d 643, 644 (Tex. 1984) (per curiam).
294. *See* Lee McGuire 1900 Co. v. Inventive Indus., Inc., 566 S.W.2d 95, 98 (Tex. Civ. App.—Beaumont 1978, writ dism'd).
295. TEX. R. CIV. P. 752.

with the detainer action and litigated in the county court."[296] Because forcible detainer is cumulative of the parties' other remedies,[297] the tenant may bring claims for such damages in another suit in a court of competent jurisdiction.[298]

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 the county court is by appeal.[299] Review by certiorari is not available in eviction cases.[300] A writ of certiorari is available in cases involving review of a writ of reentry.[301]

14. Bill of Review

In *Winrock Houston Associates Ltd. v. Bergstrom*[302] 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.[303]

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296. *See* Krull v. Somoza, 879 S.W.2d 320, 322 (Tex. App.—Houston [14th Dist.] 1994, writ denied). *See, e.g.*, 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 the premises); Rushing v. Smith, 630 S.W.2d 498, 500 (Tex. App.—Amarillo 1982, no writ) (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).

297. *See* McGlothlin v. Kliebert, 672 S.W.2d 231, 232 (Tex. 1984).

298. *See* Act of June 20, 1997, 75th Leg. R.S., S.B. 1678, § 6 (to be codified at TEX. PROP. CODE ANN. § 24.008) ("An eviction [~~A forcible entry and detainer suit or a forcible detainer~~] suit does not bar a suit for trespass, damages, waste, rent, or mesne profits.").

299. *See* TEX. R. CIV. P. 749.

300. TEX. CIV. PRAC. & REM. CODE ANN. § 51.002(d) (Vernon 1986) (explaining that 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) (holding 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); Fox v. San Antonio Sav. Ass'n, 751 S.W.2d 257 (Tex. App.—San Antonio 1988, no writ); Crawford v. Siglar, 470 S.W.2d 915, 917 (Tex. Civ. App.—Texarkana 1971, writ ref'd n.r.e.).

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

302. 879 S.W.2d 144 (Tex. App.—Houston [14th Dist.] 1994, no writ).

303. *Id.* at 149-52 (reasoning that bill of review is available to review jurisdiction issues properly raised in an eviction case).

N. *Appeals from County Court to Court of Appeals*

Section 24.007 of the Texas Property Code permits only limited rights of appeal from the judgment of the county court in a forcible detainer action.[304]

1. Award of Possession is Not Reviewable

A final judgment of a county court in an eviction suit may not be appealed on the issue of possession, unless the premises in question are being used for residential purposes only.[305] In *Academy Corp. v. Sunwest N.O.P., Inc.*,[306] 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 greater right of possession.[307]

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 appeal concerning the damages awarded.[308] A court of appeals, however, 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 land-

304. *See* Act of June 20, 1997, 75th Leg. R.S., S.B. 1678, § 5 (to be codified at TEX. PROP. CODE ANN. § 24.007) ("A final judgment of a county court in an eviction [~~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. A judgment of a county court may not under any circumstances be stayed pending appeal unless, within 10 days of the signing of the judgment, the appellant files a supersedeas bond in an amount set by the county court. In setting the supersedeas bond the county court shall provide protection for the appellee to the same extent as in any other appeal, taking into consideration the value of rents likely to accrue during appeal, damages which may occur as a result of the stay during appeal, and other damages or amounts as the court may deem appropriate.").

305. *See id.*

306. 853 S.W.2d 833 (Tex. App.—Houston [14th Dist.] 1993, writ denied).

307. *See id.* at 833-34; *see also* Chang v. Resolution Trust Corp., 814 S.W.2d 543, 544-45 (Tex. App.—Houston [1st Dist.] 1991, no writ) (stating final judgment of county court in forcible detainer cases is not reviewable where premises are used for commercial purposes).

308. *See Academy Corp.*, 853 S.W.2d at 834 (stating, in *dicta*, that court 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 that judgment of county court in forcible detainer case cannot be appealed, except as to award of damages); Family Inv. Co. v. Paley, 356 S.W.2d 353, 355 (Tex. Civ. App.—Houston 1962, writ dism'd).

lord for breach of the lease.[309] 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.[310]

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.[311] 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).[312]

4. Mandamus is Available to Review Certain Jurisdictional Issues

In *Weeks v. Hobson*,[313] 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 the justice court had denied the tenant's request to cure its defective pauper's affidavit.[314] This issue, the court of appeals reasoned, did not require it to decide who was entitled to possession but only whether the county court had jurisdiction to decide the merits of the case.

Still a party to a forcible detainer suit in a county court cannot use a writ of mandamus to accomplish an appeal prohibited by section 24.007 of the Texas Property Code.[315]

5. 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 awarding money

309. *See* Anarkali Enters., Inc. v. Riverside Drive Enters., Inc., 802 S.W.2d 25, 26 (Tex. App.—Fort Worth 1990, no writ).

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

311. 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).

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

313. 877 S.W.2d 478 (Tex. App.—Houston [1st Dist.] 1994, orig. proceeding [leave denied]).

314. *Id.* at 479.

315. *See* 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)).

damages.[316] The amount of the supersedeas bond, however, should not include attorneys' fees awarded in the event of an appeal.[317]

6. Procedural Issues

The usual procedural rules governing appeals from a county court to the court of appeals apply in appeals of 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.[318] 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.[319]

O. *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.[320] 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.[321] And as a general rule, either the landlord or the tenant may continue a suit for damages or other relief in district court.[322] In determining whether a forcible detainer suit is advantageous in a particular case, a landlord must evaluate carefully the effect that filing such a suit may have on its other remedies and on its exposure to liability claims.

1. Section 24.008

"An eviction [~~A forcible entry and detainer suit or a forcible detainer~~] suit does not bar a suit for trespass, damages, waste, rent, or mesne profits."[323]

2. Effect of Forcible Detainer on Landlord's Right to Unaccrued Rent

In the absence of a provision in the lease permitting a landlord to reenter the premises after its tenant's default and relet for the account

316. *See* Hughes v. Habitat Apts., 828 S.W.2d 794, 795 (Tex. App.—Dallas 1992, writ denied).
317. *See id.*
318. *See* 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)).
319. *See* 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)).
320. *See* McGlothlin v. Kliebert, 672 S.W.2d 231, 233 (Tex. 1984).
321. *See id.*; Holcombe v. Lorino, 79 S.W.2d 307, 309 (Tex. 1935).
322. *See McGlothlin*, 672 S.W.2d at 233.
323. *See* Act of June 20, 1997, 75th Leg. R.S., S.B. 1678, § 6 (to be codified at TEX. PROP. CODE ANN. § 24.008).

of the tenant, a landlord who files a forcible detainer suit to evict a tenant, in effect, elects to recover possession of the leased premises and forfeits the right to any rents that would otherwise accrue after the date of the eviction.[324] A landlord also may forfeit the right to recover unaccrued rent by instituting a forcible detainer suit before it properly matures its right to reenter the premises.[325] And now, even a provision in a lease clearly providing that the landlord's reentry will not affect the tenant's obligations for the unexpired term of the lease probably is unenforceable, at least as to the landlord's right to recover unaccrued rent.[326]

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. *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.[327] Further, the tenant may re-

324. *See* Rohrt v. Kelley Mfg. Co., 349 S.W.2d 95, 99 (Tex. 1961); 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 dism'd 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 ref'd) (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).

325. *Cf.* McVea v. Verkins, 587 S.W.2d 526, 531-32 (Tex. Civ. App.—Corpus Christi 1979, no writ) (finding that landlord who took possession of tenant's personal property without giving proper notice, making demand, or foreclosing properly on its landlord's lien had no right to its tenant's personal property and was liable to its tenant for conversion).

326. *See Austin Hill Country Realty, Inc.*, 948 S.W.2d at 300; Act of June 20, 1997, 75th Leg. R.S., S.B. 1678, § 8 (to be codified at Tex. Prop. Code Ann. § 91.006). *Cf.* Logan v. Green, 53 S.W.2d 119, 122 (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 this lease); *but cf.* Stewart v. Basey, 245 S.W.2d 484, 486-88 (Tex. 1952) (holding that acceleration clause in this lease an unenforceable penalty).

327. *See* 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 Center Joint Venture v. Vilar, Inc., 647 S.W.2d 329, 336 (Tex. App.—Houston [1st Dist.] 1982, no writ)).

cover its special damages incurred, such as expenses of removal and net profits after deduction of the value of the rental differences.[328]

b. *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 entry and detainer action.[329] Moreover, if a landlord wrongfully dispossesses its tenant of the leased premises, a court may extend the lease for the period of time that the parties are adjudicating their rights in connection with the wrongful dispossession.[330] But a dispossessed tenant, as a general rule, is not entitled to a temporary injunction from a district court to regain possession.[331] In *Housing Authority v. Massey*,[332] 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.[333]

c. *Attorneys' Fees*

Attorneys' fees are not recoverable by the tenant in a constructive eviction action brought in district court because constructive eviction is a tort.[334]

d. *DTPA*

Disagreements over the interpretation of lease provisions, standing alone, are not actionable under the Deceptive Trade Practices Act ("DTPA").[335] But almost anything else is potentially actionable.[336] A tenant may assert a cause of action under the DTPA against a mover

328. *See id.*; Birge v. Toppers Menswear, Inc., 473 S.W.2d 79, 85 (Tex. Civ. App.—Dallas 1971, writ ref'd n.r.e.).
329. *See Design Ctr. Venture*, 748 S.W.2d at 473.
330. *See* 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)).
331. *See id.*
332. 878 S.W.2d 624 (Tex. App.—Corpus Christi 1994, no writ).
333. *Id.* at 625-27.
334. *See* 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).
335. *See* West Anderson Plaza v. Feyznia, 876 S.W.2d 528, 532-35 (Tex. App.—Austin 1994, no writ).
336. *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 fully occupied" and would be operated as "first class center" were actionable under DTPA); Corum Management v. Aguayo Enters., 755 S.W.2d 895 (holding that tenant was entitled to damages, that landlord could not recover rent,

who takes possession of the tenant's property pursuant to a writ of possession.[337]

P. *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.[338] The party asserting res judicata must prove that there is an identity of parties, issues, and subject matter.[339] 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.[340] The party asserting collateral estoppel must establish that: (i) the parties were adversaries in the first action; (ii) the facts the party seeks to establish by collateral estoppel were essential to the judgment in the first action; and (iii) the facts sought to be litigated in the second suit were fully and fairly litigated in the first action.[341] Both doctrines are important in the context of forcible detainer actions, especially in the event an appeal is taken or a claim for rent is asserted, because of the possible preclusive effect these doctrines may have on the claims (other than the claim to immediate possession of the premises) that the landlord and the tenant may have against each other.

1. General Rule

The Texas Civil Practice and Remedies Code states:

> A judgment or a 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.[342]

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and that landlord violated DTPA by misrepresenting that tenant could sell pizza from premises and then withdrawing permission after tenant opened restaurant).

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

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

339. *See Bonniwell*, 663 S.W.2d at 818.

340. *See 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).

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

342. TEX. CIV. PRAC. & REM. CODE ANN. § 31.004(a) (Vernon 1997). *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 v. Knapp, 507 S.W.2d 644, 647 (Tex. Civ. App.—Dallas 1974, no writ) (holding that because exception language 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).

A "lower trial court" includes "a justice of the peace court, a county court, or a statutory county court."[343]

a. *Justice Court*

Under section 31.004 of the Texas Civil Practice and Remedies Code, an unappealed justice court judgment should not have any preclusive effect, except as to immediate possession and monetary sums awarded.[344] If 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 seeking recovery of rent or attorneys' fees in a second suit.[345]

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.[346] 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.[347]

2. Wrongful Eviction

A tenant deprived of possession by a non-appealable county court judgment in an appeal of a forcible detainer action is not estopped from seeking recovery for wrongful termination of the lease in another suit.[348] 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

343. TEX. CIV. PRAC. & REM. CODE ANN. § 31.004(c) (Vernon 1997). *See* Morrison v. Sports Cars & More, Inc., 1995 WL 634361 (Tex. App.—Dallas (Oct. 27, 1995), no writ) (unpublished).

344. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 31.004(a) (Vernon 1997).

345. *See* 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).

346. *See* 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).

347. *See* 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).

348. *See* Anarkali Enters., Inc. v. Riverside Drive Enters., Inc., 802 S.W.2d 25, 27 (Tex. App.—Fort Worth 1990, no writ).

the right of immediate possession. The judgment of 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.[349]

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.[350] The district court in which a trespass to try title suit is pending, however, does not have jurisdiction to enjoin a forcible detainer proceeding in justice court or on appeal in county court.[351]

4. DTPA and Other Consumer Protection Statutes

A forcible detainer suit is not res judicata of a tenant's DTPA claims in a subsequent DTPA suit between the same parties.[352] Nor will it bar claims under the Texas Fair Debt Collection Practices Act.[353]

5. Declaratory Judgment: Right to Possession under Renewal Option

In *Buttery v. Bush*,[354] 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 also bringing suit for declaratory judgment on the validity of the renewal option.[355]

349. *See id.* at 26-27 (citing *Highland Hills Drive Apartments*, 552 S.W.2d at 495-96).

350. *See* Reese v. Reese, 672 S.W.2d 1, 2 (Tex. App.—Waco 1984, no writ); 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).

351. *See* 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 v. Kliebert, 672 S.W.2d 231, 232-33 (Tex. 1984) (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).

352. *See* Wilson v. Williams, 1991 WL 114409 (Tex. App.—Houston [14th Dist.] 1991, no writ) (unpublished) (suggesting that tenant could not have brought the DTPA action in the justice court).

353. *Cf.* Waterfield Mortgage Co. v. Rodriguez, 929 S.W.2d 64, 66 (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).

354. 575 S.W.2d 144, 146 (Tex. Civ. App.—Tyler 1978, writ ref'd n.r.e.).

355. *See id.*

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.[356] The county court's judgment, therefore, may bar relitigation of these issues in another suit at least to any recovery awarded or denied.

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 on the issue of immediate possession of the premises.[357]

8. Landlord's Suit for Fraud

In *Hebisen v. Nassau Developement Co.*,[358] the landlord leased space to three attorneys. (The 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 they would make certain rental payments, including rental escalation payments, but they 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 a tenant vacates at the expiration of a free rent period.[359]

III. 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."[360] 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 the

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

357. *See, e.g.*, Buttery v. Bush, 575 S.W.2d 144, 146 (Tex. Civ. App.—Tyler 1979, writ ref'd n.r.e.) (citing Rankin v. Hooks, 81 S.W. 1005 (Tex. Civ. App.—Dallas 1904, no writ); Young Womens Christian Ass'n v. Hair, 165 S.W.2d 238 (Tex. Civ. App.—Austin 1942, writ ref'd w.o.m.); Glau-Moya Parapsychological Training Inst. Inc. v. Royal Life Ins. Co., 507 S.W.2d 824 (Tex. Civ. App.—San Antonio 1974, no writ)).

358. 754 S.W.2d 345 (Tex. App.—Houston [14th Dist.] 1988, writ denied).

359. *But cf.* Hott v. Pearcy/Christon, Inc., 663 S.W.2d 851, 855 (Tex. App.—Dallas 1983, writ ref'd n.r.e.) (stating that reliance on term in written contract, without more, does not support action for fraud).

360. Tex. Prop. Code Ann. § 93.002(c)(3) (Vernon 1995).

new key may be obtained."[361] 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."[362]

The terms of the lease, however, will supersede the requirements of section 93.002 "to the extent of any conflict."[363] A lease that does not expressly grant the landlord the right to reenter the premises when the tenant is delinquent in paying rent arguably conflicts with this statutory lock-out remedy. At common law, a landlord did not, and still does not, have the right to terminate a lease or to reenter the leased premises because of a tenant's breach, unless the tenant commits an anticipatory breach or the lease expressly grants these remedies to the landlord.[364] Before relying on section 93.002, a prudent landlord should ensure that it has the right to lock-out its tenant under the lease. And even 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 lockout a tenant who is delinquent in paying rent, although it arguably does not prohibit a landlord from locking out a tenant for other defaults if the lease permits the landlord to do so.[365]

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.[366] In *Gulf Oil Corp. v. Smithey*,[367] 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 reenter 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 reentry, 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

361. *Id.* § 93.002(f).
362. *Id.*
363. *Id.* § 93.002(h).
364. *See* Shepherd v. Sorrells, 182 S.W.2d 1009, 1011-12 (Tex. Civ. App.—Eastland 1944, no writ).
365. *See* TEX. PROP. CODE ANN. § 93.002(c), (h) (Vernon 1995).
366. *See id.*
367. 426 S.W.2d 262 (Tex. Civ. App.—Dallas 1965, writ dism'd).

> 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 was by force and violence ....[368]

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.[369]

Third, if a landlord violates section 93.002, its tenant is entitled to bring suit for reentry in justice court.[370] If the justice court reasonably believes an unlawful lockout likely has occurred, the justice, after an initial hearing, which may be conducted *ex parte*,[371] may issue a writ of reentry, 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 reentry.[372] 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.[373] 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.[374]

And finally, once a landlord has initiated a judicial eviction, it probably cannot abandon its judicial remedy and attempt a non-judicial eviction.[375]

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368. *Id.* at 265 (citation omitted). *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).

369. *See, e.g.*, Design Ctr. Venture v. Overseas Multi-Projects Corp., 748 S.W.2d 469 (Tex. App.—Houston [1st Dist.] 1988, no writ); Martinez v. Ball, 721 S.W.2d 580 (Tex. App.—Corpus Christi 1986, no writ); Salpas v. State, 642 S.W.2d 71 (Tex. App.—El Paso 1982, no writ); McVea v. Verkins, 587 S.W.2d 526 (Tex. Civ. App.—Corpus Christi 1979, no writ); Houck v. Kroger Co., 555 S.W.2d 803 (Tex. Civ. App.—Houston [14th Dist.] 1977, writ ref'd n.r.e.); 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); Chrone v. Gonzales, 215 S.W. 368 (Tex. Civ. App.—San Antonio 1919, no writ); Henderson v. Beggs, 207 S.W. 565 (Tex. Civ. App.—Fort Worth 1918, no writ).

370. *See* TEX. PROP. CODE ANN. § 93.003(a)-(b) (Vernon Supp. 1997).

371. *See id.* § 93.003(b).

372. *See id.* § 93.003(a)-(e), (i).

373. *See id.*

374. *See id.* § 93.003(e); Cox's Bakeries of N. Dakota, Inc. v. Homart Dev. Corp., 515 S.W.2d 326, (Tex. Civ. App.—Dallas 1974, no writ) (stating that landlord forfeited any right to recover rent after date of unlawful lockout).

375. *Cf.* Houck v. Kroger Co., 555 S.W.2d 803, 806 (Tex. Civ. App.—Houston [14th Dist.] 1977, writ ref'd n.r.e.) (stating that when judicial eviction had been filed, injunction was proper to stop landlord from reentering premises by force); Burnett Trailers,

IV. Dealing with a Tenant's Personal Property

A landlord has three basic options when a delinquent tenant either will not remove its personal property from the premises or leaves its personal property on 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 lien rights. The final option is treating any personal property left on the premises as abandoned and 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 an innocent 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.[376]

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.[377] "[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."[378]

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).

376. Tex. Prop. Code Ann. § 54.021 (Vernon 1995).

377. 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)).

378. *Allen*, 75 S.W. at 822.

2. Attachment

As a general rule, the statutory landlord's lien automatically attaches to all nonexempt personal property of a tenant or subtenant located in the building.[379] It does not, however, attach to the property of others in a tenant's possession.[380]

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.[381] 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.[382] A landlord, therefore, 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.[383]

3. Automatic Perfection

The 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.[384] 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.[385] 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

379. *See* TEX. PROP. CODE ANN. §§ 54.021, 54.023 (Vernon 1995); Granville v. Rauch, 335 S.W.2d 799, 803-04 (Tex. Civ. App.—Austin 1960, no writ).

380. *See* Shwiff v. City of Dallas, 327 S.W.2d 598, 601 (Tex. Civ. App.—Dallas 1959, writ ref'd n.r.e.); Vernon Dev. Co. v. Crown Bottling Co., 90 S.W.2d 887, 890 (Tex. Civ. App.—Waco 1936, writ dism'd). *See, e.g.,* 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); Massachusetts Mut. Life Ins. Co. v. Stockyards Nat'l Bank, 50 S.W.2d 425, 428 (Tex. Civ. App.—Fort Worth 1932, writ dism'd) (ruling that statutory lien did not attach to separate property of tenant's spouse). Care should be taken to ensure that exempt property is not seized. *See* TEX. PROP. CODE ANN. § 54.023 (Vernon 1995).

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

382. *See* TEX. PROP. CODE ANN. § 54.024 (Vernon 1995).

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

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

385. TEX. BUS. & COM. CODE ANN. § 9.104(2) (Vernon 1991).

county in which the building is located."[386] "[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 . . . ."[387] By filing the appropriate affidavit at six month intervals, a landlord may perfect its lien for more than six months:

> "When six months' unpaid rents 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 practical result is a lien for 'past due' rents 'for more than six months.'"[388]

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 suggested 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.[389] It 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 . . . ."[390] 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.[391] If, on the other hand, the property is placed on the leased premises before the secured creditor perfects its lien, the statutory landlord's lien has a preference.[392] A statutory landlord's lien is also superior to any unrecorded security interest, even if the security interest is older than the landlord's lien.[393] The statutory landlord's lien also is superior to any

386. TEX. PROP. CODE ANN. § 54.022 (Vernon 1995).
387. 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)).
388. *Industrial State Bank*, 221 S.W.2d at 914 (citing *In re* Pfaeffle, 5 F. Supp. 708, 709 (N.D. Tex. 1933)).
389. *See id.*; *see also In re* Toggery, Inc., 60 F.2d 311 (D.C. Tex. 1932), *aff'd sub nom.*, Kokernot-Nixon Properties 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); *Kruger*, 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).
390. Associates Fin. Servs., Inc. v. Solomon, 523 S.W.2d 722, 724 (Tex. Civ. App.—Waco 1975, no writ).
391. *See id.*
392. *See id.*
393. *See id.*

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.[394] 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

A statutory landlord's lien can be enforced only through judicial proceedings. Although distraint is the remedy specifically tailored to enforce a landlord's statutory lien,[395] a landlord, in appropriate circumstances, may be entitled to utilize the extraordinary remedies of attachment,[396] sequestration,[397] or injunction.[398] In *Hunt v. Merchandise Mart, Inc.*,[399] 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.[400]

7. 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.[401] And distraint has significant limitations. Because a landlord may not be entitled to a distress warrant unless rent is due,[402] 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.

394. *See Kruger*, 551 S.W.2d at 65-66.

395. *See* TEX. R. CIV. P. 610-20.

396. *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 61.001-.063 (Vernon 1997); TEX. R. CIV. P. 592-609.

397. *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 62.001-.063 (Vernon 1997); TEX. R. CIV. P. 696-716.

398. *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 65.001-.045 (Vernon 1997); TEX. R. CIV. P. 680-693.

399. 391 S.W.2d 141 (Tex. Civ. App.—Dallas 1965, writ ref'd n.r.e.).

400. *Id.* at 144.

401. *See* Jarrell v. United States 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).

402. *See 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).

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.[403] 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.[404] The application may be supported by affidavits of persons having personal knowledge of relevant facts, but shall state that (i) 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.[405] 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."[406] 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.[407] 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.[408] 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.[409] 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.

403. *See Jarrell*, 270 S.W.2d at 1081.

404. *See* TEX. R. CIV. P. 610; TEX. PROP. CODE ANN. § 54.025 (Vernon 1995).

405. *See* TEX. R. CIV. P. 610.

406. *See* TEX. PROP. CODE ANN. § 54.025 (Vernon 1995). *But see Hunt*, 391 S.W.2d at 144-45 (stating that distraint is not available unless rent is due when distraint warrant is sought).

407. *See* TEX. R. CIV. P. 610-611.

408. *See id.*

409. *See* TEX. R. CIV. P. 611.

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*.[410] 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.[411] Rule 612 states the formal requirements for, and Rule 613 prescribes the manner of service and contents of, a distress warrant.[412]

e. *Tenant May Replevy*

A tenant may reclaim personal property seized under a distress warrant by posting a replevy bond.[413] Rule 614 requires the court having jurisdiction of the amount in controversy to approve any replevy bond.[414] The bond must be in an amount equivalent to either (i) 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.[415] If the court approves the bond, the opposing party, upon reasonable notice (which may be less than three 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.[416] The evidence at this hearing, if uncontroverted, may be submitted by affidavit; otherwise, the parties must submit admissible evidence.[417] And the defendant, on reasonable notice, may move to substitute other property, of equal value to the property attached, for the property seized.[418]

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.[419] 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

410. *See* TEX. R. CIV. P. 610-611.
411. *See* TEX. R. CIV. P. 610.
412. *See* TEX. R. CIV. P. 612-613.
413. *See* TEX. R. CIV. P. 614.
414. *See id.*
415. *See id.*
416. *See id.*
417. *See id.*
418. *See id.*
419. *See* TEX. R. CIV. P. 614a.

days after the motion is filed.[420] At the hearing, the court may consider affidavits, but must consider other admissible evidence tendered by any party.[421] 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.[422]

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.[423] In addition to claims for conversion, a landlord may be subject to DTPA claims for wrongfully taking possession of the tenant's property.[424]

8. Waiver

A landlord may waive its statutory lien rights by electing to rely exclusively on its contractual lien.[425]

B. *Contractual Landlord's Liens*

Article 9 of the Texas UCC governs the creation and enforcement of contractual landlord's liens.[426] Because of the drawbacks of statutory landlord's liens, a contractual lien is 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.

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420. *See id.*

421. *See id.*

422. *See id.*

423. *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).

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

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

426. Bank of N. Am. v. Kruger, 551 S.W.2d 63, 65 (Tex. Civ. App.—Houston [1st Dist.] 1977, writ ref'd n.r.e.) (explaining that Article 9 governs contractual but not statutory landlord's liens).

1. Creation and Attachment

A contractual lien may be created in a lease by language sufficient to create a security interest.[427] Once created, a contractual lien attaches to the tenant's personal property, fixtures, and removable trade fixtures described in the lease or security agreement.[428] 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 Texas Secretary of State.[429] If a landlord's contractual lien also covers fixtures or removable trade fixtures, the landlord must file an appropriate UCC Financing Statement in the county clerk's office in the county where the leased premises are located.[430] 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.[431] Even if a lease grants the landlord the right to repossess the property subject to its contractual lien, the 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.[432] 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."[433]

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

427. *See* TEX. BUS. & COM. CODE ANN. § 9.102 (Vernon 1991).
428. *See id.* § 9.110.
429. *See id.*
430. *See Kruger*, 551 S.W.2d at 66.
431. *See* TEX. BUS. & COM. CODE ANN. § 9.503 (Vernon 1991); *but see* McVea v. Verkins, 587 S.W.2d 526, 531 (Tex. Civ. App.—Corpus Christi 1979, no writ) (holding that express right to reenter premises upon default and grant of contractual lien did not give landlord right to take possession of tenant's personal property and finding landlord liable for conversion for seizing tenant's property).
432. *See* Myers v. Ginsburg, 735 S.W.2d 600, 605 (Tex. App.—Dallas 1984, no writ).
433. *Id.*

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landlord's statutory lien,[434] at least one court has held that it is available to enforce a contractual lien as well.[435] The extraordinary remedies of attachment,[436] sequestration,[437] or injunction[438] are available in principle, but it is often difficult to obtain the evidence necessary to obtain these extraordinary writs until it is too late.

Resort to judicial enforcement also 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 the extraordinary relief takes effect.[439] 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.[440]

5. Foreclosure

Once a landlord repossesses the property subject to its contractual lien, it may hold a commercially reasonable public or private sale or resort to other alternatives available under the Texas UCC.[441] 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.[442] More ominous is the rule that the secured creditor's failure to give proper notice to a debtor precludes the secured party from recovering a deficiency.[443] Thus, if a

434. TEX. R. CIV. P. 610-620.

435. *See* Keep 'Em Eating Co. v. Hulings, 165 S.W.2d 211, 213 (Tex. Civ. App.—Austin 1942, no writ) (stating, in *dicta*, that distress warrant may be appropriate means to enforce contractual landlord's lien). *But see* TEX. PROP. CODE ANN. § 54.025 (Vernon 1995) (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.").

436. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 61.001-.062 (Vernon 1997); TEX. R. CIV. P. 592-609.

437. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 62.001-.063 (Vernon 1997); TEX. R. CIV. P. 696-716.

438. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 65.001-.045 (Vernon 1997); TEX. R. CIV. P. 680-693.

439. *See* TEX. R. CIV. P. 592a, 592b (bond requirements for writ of attachment); 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).

440. *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 tenant, denied tenant access to property).

441. *See* TEX. BUS. & COM. CODE ANN. § 9.504 (Vernon 1991).

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

443. *See* Tanenbaum v. Economics Lab., Inc., 628 S.W.2d 769, 771-72 (Tex. 1982); Beach v. Resolution Trust Corp., 821 S.W.2d 241, 243 (Tex. App.—Houston [1st Dist.] 1991, no writ).

landlord does not perform the foreclosure properly, the landlord's claims for rent or damages may be reduced or even 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."[444] 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."[445]

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."[446] 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.[447]

This presumption should give some comfort to a landlord who wishes to dispose of the junk a tenant leaves in the space after the tenant has absconded with the valuable 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

444. TEX. PROP. CODE ANN. § 93.002(e) (Vernon 1995).
445. *Id.*
446. *Id.*
447. TEX. PROP. CODE ANN. § 93.002(d) (Vernon Supp. 1997).

93.002(e) does not say how a tenant's deemed abandonment of personal property affects its rights under Article 9 of the Texas UCC.

V. Tenant Defenses

A. *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.[448]

Although a tenant usually must show its landlord accepted the surrender of the premises with the intention to release the tenant from further liability under the lease,[449] some Texas courts also 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.[450]

Texas courts have long placed the burden on the tenant to plead and prove express surrender or surrender in fact.[451]

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 reenter and relet the premises "as agent of the tenant."[452] If a landlord reenters the premises and purports to relet the premises as the "tenant's agent," but the landlord

448. 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.) ("For 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.").

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

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

451. *See* Harry Hines Med. Ctr. 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 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, 389 (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).

452. *See, e.g.*, Flack v. Sarnosa Oil Corp., 293 S.W.2d 688 (Tex. Civ. App.—San Antonio 1956, no writ).

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.[453] 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 the landlord surrendered its lease by including a termination option in the lease with the substitute tenant. In *Flack v. Sarnosa Oil Corp.*,[454] a divided court of civil appeals held that, by reletting premises under new lease that allowed the landlord to terminate the new lease after ninety-days notice in the event of either the sale or demolition of the premises, the landlord accepted the original tenant's surrender of the premises because the ninety-day cancellation clause was included for the landlord's benefit rather than 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.[455]

b. *Landlord's Use of Premises for Landlord's Benefit*

Another court found that the landlord surrendered the lease by operating its tenant's business in the premises. In *Patterson v. McGee*,[456] a state agency ordered that the property could not be used as a nursing home unless certain repairs were made. The landlord then demanded that the tenant vacate the premises, and the tenant complied. The landlord 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 constructive eviction and surrender by operation of law.[457]

c. *Landlord's Use of Premises to Expedite Reletting for Tenant's Benefit*

Yet, another court found that the landlord did not surrender its lease by allowing nearby hospital personnel to occupy a portion of the

453. *See, e.g., id.* at 688 (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 [tenant's] offer to surrender the leased premises and [landlord] cannot recover for the full term of the lease.").
454. 293 S.W.2d 688 (Tex. Civ. App.—San Antonio 1956, no writ).
455. *See id.* at 690 (Norvell, J., dissenting).
456. 350 S.W.2d 241 (Tex. Civ. App.—Eastland 1961, no writ).
457. *See id.* at 244.

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 a 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 obligation 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 nonpayment 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.[458]

2. Surrender is Complete Defense

Surrender is a defense to a suit to recover rent that otherwise would have accrued after the surrender occurred.[459] But a tenant cannot recover any rent it prepaid before a surrender by operation of law.[460]

B. *Landlord's Breach*

A landlord's breach of any covenant, other than the covenant of quiet enjoyment, ordinarily was not a defense to a tenant's obligation to pay rent under traditional common law principles. 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 under paramount title, or that for some reason, recognized by law as sufficient, he was entitled to and did quit the possession.'[461]

The law traditionally recognized few reasons as sufficient because the same doctrine of independent covenants that limited a landlord's com-

458. Harry Hines Med. Ctr. v. Wilson, 656 S.W.2d 598, 601 (Tex. App.—Dallas 1983, no writ) (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) (citations omitted).

459. *See id.*

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

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

mon 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 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 its tenant's occupancy will excuse the tenant from its obligation to pay rent as promised in the lease.[462]

2. Landlord's Covenant to Repair

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."[463] Accordingly, a landlord's failure to repair the premises ordinarily was *not* a defense to a tenant's obligation to pay rent, unless the landlord's failure rose to the level of a constructive eviction.[464] These common law rules have been modified somewhat by the Texas Supreme Court's decision in *Davidow*.

3. No Right of Offset

Even if a tenant has the right to recover damages, it cannot reduce the amounts due the landlord under the lease by way of recoupment, offset, or abatement, unless the tenant first obtains judgment or the lease allows the tenant the right to offset.[465]

4. No Implied Covenant to Retain Character of Building

In *Cantile v. Vanity Fair Properties*,[466] 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.

462. *See* Richker v. Georgandis, 323 S.W.2d 90, 95 (Tex. Civ. App.—Houston 1959, writ ref'd n.r.e.).
463. Edwards v. Ward Assocs., Inc., 367 S.W.2d 390, 393 (Tex. Civ. App.—Dallas 1963, writ ref'd n.r.e.).
464. *See* Ravkind v. Jones Apothecary, Inc., 439 S.W.2d 470 (Tex. Civ. App.—Houston [1st Dist.] 1969, writ ref'd n.r.e.) (holding the tenant could, however, sue for damages); Ammons v. Beaudry, 337 S.W.2d 323, 324 (Tex. Civ. App.—Fort Worth 1960, writ ref'd) (holding that tenant could recoup any damages resulting from landlord's breach of its covenant to repair air conditioning units but that landlord's breach did not excuse tenant, who remained in premises, from paying rent).
465. *See* Myers v. Ginsburg, 735 S.W.2d 600, 603 (Tex. App.—Dallas 1987, no writ).
466. 505 S.W.2d 654 (Tex. Civ. App.—San Antonio 1973, writ ref'd n.r.e.).

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C. *Eviction*

> There is in every lease of land, in the absence of a provision to the contrary, 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 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.[467]

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. A landlord's actions must evidence the intent to permanently deprive the tenant of possession. A temporary interference is usually only a trespass.[468]

2. Constructive Eviction

Unlike an actual eviction, constructive eviction does not necessarily involve the physical denial of the tenant's access to the premises.

> 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.[469]

In *Stillman v. Youmans*,[470] the court of appeals stated the essential elements of a constructive eviction:

> (a) [t]here must be present the intention on the part of the landlord that the tenant shall no longer enjoy the premises, [and that] intention . . . can be presumed from the circumstances proven[,]
> (b) [t]he act or omission complained of must be material and permanent[,]
> (c) [t]he tenant must abandon the premises within a reasonable time after the [complained of] act or omission [, and]
> (d) [t]he abandonment must be a direct consequence of the act or omission and the abandonment must be complete.[471]

467. *Richker*, 323 S.W.2d at 95.

468. *See* Luettich 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 the premises).

469. 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)).

470. 266 S.W.2d 913 (Tex. Civ. App.—Galveston 1954, no writ).

471. *Id.* at 916.

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.

D. *Failure to Mitigate*

Under the traditional common rule, a landlord had no duty to mitigate its damages by procuring a substitute tenant after the original tenant abandoned the premises.[472] In the absence of a duty to mitigate, a landlord was at liberty either to (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.[473] Although many anticipatory breach cases recite the rule that a landlord has no duty to relet, these same cases apply damage measures that assume a duty to mitigate once a landlord reentered the premises.[474] As the district court explained in *Williams*:

> [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 [new] tenant.[475]

Under the rule applied in *Williams* and other cases like it, a landlord's recoverable damages are measured by (i) the amount the landlord received from actually mitigating its damages (the rent the original tenant contracted to pay less any rent received from, or prom-

472. *See* 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.)); 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 duty to mitigate); Marynick v. Bockelmann, 773 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 Properties, Inc., 646 S.W.2d 263, 265 (Tex. App.—Dallas 1983, writ ref'd n.r.e.).

473. *See* Stubbs v. Stuart, 469 S.W.2d 311, 312 (Tex. Civ. App.—Houston [14th Dist.] 1971, no writ) (citing Wukasch v. Hoover, 247 S.W.2d 593, 597 (Tex. Civ. App.—Austin 1952), *aff'd*, 254 S.W.2d 507 (Tex. 1953)).

474. *See* Brown v. RepublicBank First Nat'l Midland, 766 S.W.2d 203 (Tex. 1988) (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.

475. Evons v. Winkler, 388 S.W.2d 265, 269 (Tex. Civ. App.—Corpus Christi 1965, writ ref'd n.r.e.). *See also* Stewart v. Kuskin & Rotberg, Inc., 106 S.W.2d 1074, 1075 (Tex. Civ. App.—Texarkana 1937, no writ) (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 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*).

ised by, a substitute tenant) or (ii) the amount the landlord would have received had it mitigated its damages (the rent the original tenant contracted to pay less the fair market value of the premises for the remainder of the lease term). The imposition of a duty to mitigate should not substantially change either of these measures of damages.

1. New Rule: A Landlord Now Has a Duty to Mitigate

In 1997, the Texas Supreme Court and the Texas Legislature both recognized that a landlord 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.

The duty to mitigate is triggered in slightly different circumstances. Under *Austin Hill Country Realty, Inc.*, a landlord "must have" a duty to mitigate when suing for anticipatory breach.[476] The duty to mitigate also arises if a tenant abandons the premises in violation of the lease and the landlord either actually reenters the premises or has the right to do so without terminating the lease.[477] 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.[478]

The statute creates a dilemna 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.[479] The mitigation statute does not. Unless such an exemption is implied, the mitigation statute places a landlord who does not have an express right to reenter and relet in an untenable position. If, on the one hand, the landlord does not reenter and relet, its right to recover damages from the tenant will be compromised because the landlord would breach its duty to mitigate. If, on the other hand, the landlord reenters in an attempt to mitigate its damages, the landlord would breach the covenant of quiet enjoyment, forfeiting the right to recover any damages. One hopes the mitigation statute will be construed to avoid this absurd result.

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.[480] This duty, however, is not

476. *See* Austin Hill Country Realty, Inc. v. Palisades Plaza, Inc., 948 S.W.2d 293, 299-300 (Tex. 1997).
477. *See id.* at 299.
478. *See* Act of June 20, 1997, 75th Leg. R.S., S.B. 1678, § 8 (to be codified at TEX. PROP. CODE ANN. § 91.006).
479. *See id.*
480. *Austin Hill Country Realty, Inc.*, 948 S.W.2d at 299.

absolute–a landlord is not required to fill the premises with any willing tenant. The substitute tenant, according to the court, must be "suitable."[481] The supreme court's explanation is only slightly more helpful than the legislature's silence.

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.[482] 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.[483] An ambiguity in the no waiver section of the mitigation statute raises the prospect that the statute may give a tenant a cause of action and a defense. It states "A provision of a lease that purports to waive a right or to exempt a landlord from a liability or duty under this statute is void."[484] It may now take additional decisions to settle an issue the supreme court already decided in *Austin Hill Country Realty, Inc.* in a manner consistent with decades of contractual mitigation cases.

On one issue, the supreme court and the legislature pronounced apparently contradictory rules. In *Austin Hill Country Realty, Inc.*, the supreme court stated that the duty to mitigate applies in commercial leases, unless the landlord and tenant contract otherwise.[485] But the legislature declared that "[a]ny provision in a lease that purports to waive or exempt a landlord from a *liability or duty* under this statute is void."[486] The statutory no waiver rule, however, only applies to leases entered into on or after September 1, 1997.[487]

Finally, the court, but not the legislature, prescribed certain procedural rules for putting a landlord's duty to mitigate in issue.[488] 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 this as an affirmative defense. And the tenant bears the burden of proving the landlord

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481. *See id.*

482. *See id.*

483. *See id.*

484. *See* Act of June 20, 1997, 75th Leg. R.S., S.B. 1678, § 8 (to be codified at TEX. PROP. CODE ANN. § 91.006).

485. *See Austin Hill Country Realty, Inc.*, 948 S.W.2d at 299.

486. Act of June 20, 1997, 75th Leg. R.S., S.B. 1678, § 8 (to be codified at TEX. PROP. CODE ANN. § 91.006).

487. *See id.*

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

mitigated or failed to mitigate and the amount of any credit to which the tenant is entitled.[489]

2. Contractually Defined Mitigation Obligations

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 (*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 applying any rent received to the rental deficiency and other such issues; (vi) whether the landlord must relet when other comparable spaces are being offered for rent by the landlord; (vii) whether the landlord must relet at less than the then fair market value, which may affect tenant mix; 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.

E. *Waiver*

Waiver is the intentional relinquishment of a known right.[490] Although often treated as boilerplate, a well-drafted no waiver clause may eliminate some obstacles to recovery that landlords frequently encounter in the lease enforcement process.[491] In *Taherzadeh v. Clements*,[492] the court of appeals, citing a no waiver provision in the lease, rejected the tenant's claim that the landlord, by previously accepting late rental payments, waived its right to place the tenant in default for failing to timely pay rent. The no waiver provision read: "*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.*"[493] Under controlling Texas law, according to the court, such a clause precludes the defense of waiver *as a matter of law*.[494]

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489. *See id.*

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

491. *See, e.g.,* Crain v. Southern Warehouse Corp., 612 S.W.2d 383 (Tex. Civ. App.—Houston [14th Dist.] 1981, no writ) (stating that no waiver provision in lease, which provided "nor shall pursuit of any remedy herein provided constitute forfeiture or waiver of any rent due hereunder to the landlord hereunder . . . [,]" prevented notice to quit from causing forfeiture of lease).

492. 781 F.2d 1093 (5th Cir. 1986).

493. *Id.* at 1098 (emphasis added).

494. *See id. But see* Winslow v. Dillard Dept. Stores, 849 S.W.2d 862 (Tex. App.—Texarkana 1992, no writ) (stating that landlord's conduct may waive nonwaiver

Conclusion

Recovering possession and recovering 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 result in the forfeiture of the landlord's right to recover any damages and, worse, may give rise to claims by the tenant against the landlord. Appreciating the importance of lawfully recovering possession, and understanding the effect of doing so upon a landlord's monetary remedies, are the first steps along the long and sometimes winding road that leads to successful evictions and monetary recoveries.

clause); Wendlandt v. Sommers Drug Stores Co., 551 S.W.2d 48 (Tex. Civ. App.—Austin 1977, no writ) (holding that tenant did not breach covenant to pay rent timely in view of landlord's prior acceptance, without protest, of late rent payments); C.G. Murphy Co. v. Lack, 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.").

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